



Neutral Citation Number: [2016] EWHC 2280 (QB)

Case No: HQ16X01053

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/09/2016

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE SINGH

Between :

Chief Constable of Sussex Police **Claimant**

- and -

Secretary of State for Transport **First Defendant**

-and-

British Airline Pilots Association **Second Defendant**

Mr Martin Downs (instructed by East Sussex Legal Services) for the Claimant
Mr David Manknell (instructed by Government Legal Department) for the First Defendant
Mr Martin Chamberlain QC and Mr Nicholas Yeo (instructed by Reynolds Dawson) for the Second Defendant

Hearing dates: 14 and 15 July 2016

Judgment Approved by the court
for handing down

Mr Justice Singh :

Introduction

1. The Chief Constable of Sussex makes this application for disclosure of certain items to be ordered pursuant to Regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (SI 1996 No. 2798) (“the 1996 Regulations”). It is common ground that such an application does have to be made and that it can only be made in the High Court. An attempt was made at one time to seek a production order from the Crown Court under the Police and Criminal Evidence Act 1984 (“PACE”) but that was withdrawn once it had been pointed out that only the High Court can make an order of this kind in the present context. This Court was informed that this application appears to be the first of its kind to be made in England and Wales. The Chief Constable was represented before this Court by Mr Martin Downs.
2. The materials which are the subject of this application are in the possession of the Air Accidents Investigation Branch (“AAIB”), which is part of the Department for Transport.
3. The Secretary of State does not resist the application as such, since he considers it to be a matter for the Court to decide whether disclosure should be made, having carried out the balancing exercise between different public interests which is required by Regulation 18. However, Mr David Manknell appeared on behalf of the Secretary of State in order to assist the Court and also to point out the strong policy considerations which lie behind the legislative scheme in this area and which tend to militate against disclosure of the sort of materials which are in issue in this case. The Secretary of State submits that the disclosure of the material sought in this case would have a significant and adverse domestic and international impact on future safety investigations, something which the Court is required to weigh on one side of the balance. However, the Secretary of State recognises that there are other interests which must be weighed on the other side of the balance, in particular the public interest in the effective investigation and detection of crime by the police.
4. The British Airline Pilots Association (“BALPA”) also appeared in the public part of the hearing in this case and made submissions in opposition to the Chief Constable’s application for disclosure. In particular Mr Martin Chamberlain QC submits on behalf of BALPA that the Court cannot order disclosure in a case such as this unless the criteria for the making of a production order in the Police and Criminal Evidence Act 1984 (“PACE”) are satisfied. In the alternative, he submits that, in conducting the balancing exercise which has to be performed by this Court, a weighty factor militating against disclosure should be the fact that, as he submits, those criteria in PACE are not satisfied.

The facts

5. On 22 August 2015 a Hawker Hunter T7 G-BXFI aircraft, piloted by Andrew Hill, crashed while performing a stunt at the Royal Air Force Association air show at

Shoreham, West Sussex. The air show took place at Brighton City Airport (known as Shoreham Airport). The aircraft is an old one (approximately 60 years old). The aircraft struck the westbound carriageway of the A27. Eleven people were killed as a result. The pilot survived although he was injured.

6. A significant police investigation was initiated and is continuing. The police have taken approximately 330 statements so far.
7. An investigation into the crash was also launched by the AAIB. The AAIB has issued three Bulletins concerning the crash. The first revealed that the aircraft was not fitted with a flight recorder and no flight path information was recovered from the GPS. However, two image recording cameras were mounted within the cockpit.
8. At the hearing this Court was informed that the AAIB investigation has been completed and the final report is likely to be published in the autumn of this year.

Material legislation

9. The background to the relevant legislative scheme can be found in an international treaty: the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Treaty Series No. 8 (1953)) (Cmd 8742). Often referred to as the Chicago Convention, this treaty has been updated from time to time. Of particular importance in the present context is Annex 13 to that Convention, which has the title 'Aircraft Accident and Incident Investigation.' Annex 13 is now in its 10th edition (2010), although at the hearing before this Court we were also shown the 9th edition (2001).
10. Of particular relevance to this case is para. 5.12 of Annex 13. In the 9th edition, that stated as follows:

"Non-disclosure of records

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

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

- e) opinions expressed in the analysis of information, including flight recorder information.

5.12.1 These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed.

Note.- Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to the investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety.” [Emphasis added]

11. In the 10th edition para. 5.12 takes the following form:

“Non-disclosure of records

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

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

5.12.1 These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or

incident. Parts of the records not relevant to the analysis shall not be disclosed.

Note 1.- Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to the investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety.

Note 2. – Attachment E contains legal guidance for the protection of information from safety data collection and processing systems.

5.12.2 The names of the persons involved in the accident or incident shall not be disclosed to the public by the accident investigation authority.” [Emphasis added]

12. It will be apparent that there is no material difference between the 9th and 10th editions of Annex 13 for present purposes. Both make it clear that material such as that in issue in the present case (cockpit recordings and their transcripts) shall not be disclosed “for purposes other than accident or incident investigation” unless “the appropriate authority for the administration of justice” determines that “disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations.”
13. Part III of the Civil Aviation Act 1982 (“the 1982 Act”) provides for the regulation of civil aviation. Section 60 of the 1982 Act confers power to make an Order in Council for carrying out the Chicago Convention, and any Annex thereto, relating to international standards and recommended practice and generally for regulating air navigation.
14. Section 75 of the 1982 Act has the sidenote ‘Investigation of Accidents.’ Without prejudice to section 60, it confers power to make regulations to make provision for the investigation of any accident arising out of, or in the course of, air navigation and for carrying out any Annex to the Chicago Convention. Section 75(5) provides that any person who contravenes regulations made under that section shall be guilty of an offence.
15. The Secretary of State has made regulations under section 75 of the 1982 Act about air accident investigations: they are the 1996 Regulations.
16. The 1996 Regulations were originally made to implement the obligations of the United Kingdom under Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation

accidents and incidents (OJ 1994 L319, p.14); and the international obligations of the United Kingdom under Annex 13 to the Chicago Convention.

17. The 1994 Directive has now been repealed and replaced by Regulation (EU) No. 996/2010 of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation (OJ 2010 L295, p.35) (“the EU Regulation”), which came into force on 2 December 2010.
18. Under Article 288(2) of the Treaty on the Functioning of the European Union, EU Regulations are directly *applicable*, in other words they generally become part of the domestic law of Member States even without the need for national implementing measures. But that does not mean that every provision of every EU Regulation is sufficiently precise to have direct *effect*: see Case C-403/98 Monte Arcosu [2001] ECR I-103. It is therefore not unusual for EU Regulations to be given effect in national law by specific implementing legislation. It is also not unusual for a later EU measure to be given effect in domestic law by earlier legislation: this may well happen where a Member State takes the view that its own domestic law already complies with the requirements of EU law.
19. It is a fundamental feature of the Chicago Convention, the EU regime and the 1996 Regulations that investigations have a single object: the prevention of accidents and incidents. Their purpose is not to apportion blame or liability: Article 3.1 of Annex 13 to the Chicago Convention; Article 4(3) of the 1994 Directive; Article 5(5) of the EU Regulation; and Regulation 4 of the 1996 Regulations.
20. In accordance with the 1996 Regulations such investigations are overseen by the Chief Inspector of Air Accidents: Regulation 8(1). The body of inspectors is the AAIB: Regulation 8(2).
21. Regulation 9 of the 1996 Regulations set out the powers of investigating inspectors for the purpose of enabling the carrying out of an investigation into an accident or incident. These include provisions for access to the site and to the debris and access to the flight recorders and any other recordings. The inspector has the power to examine witnesses (regulation 9(1)(f)), for which purpose he has (under Regulation 9(2)) the powers to issue summonses and to require the persons summoned to answer any questions. Failure without reasonable excuse to comply with a summons is a breach of Regulation 17(2). Accordingly, the 1996 Regulations confer on the AAIB a power to interview under compulsion.
22. The Chief Inspector of the AAIB must cause the report of an investigation into an accident or incident to be made public in the shortest time possible (and, if possible, within 12 months): Regulation 13. The report of an investigation into an incident shall protect the anonymity of the persons involved in the incident; and where appropriate contain safety recommendations. A safety recommendation shall in no case create a presumption of blame or liability for an accident or incident: Regulation 11.
23. Of particular importance in the present case are two provisions: Article 14 of the EU Regulation and Regulation 18 of the 1996 Regulations.

Article 14 of the EU Regulation

24. Article 14 of the EU Regulation protects sensitive safety information from being made available or used other than as permitted under its provisions. It provides as follows:

“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;
 - (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 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.” [Emphasis added]

25. “Safety investigation” is defined in Article 1.14 as “a process conducted by a safety investigation authority for the purpose of accident and incident prevention which includes the gathering and analysis of information, the drawing of conclusions, including the determination of cause(s) and/or contributing factors and, when appropriate, the making of safety recommendations”.

Regulation 18 of the 1996 Regulations

26. Regulation 18 of the 1996 Regulations protects “relevant records”, which are defined in regulation 18(3) by reference to the paragraph 5.12(a)-(e) of Annex 13 of the Chicago Convention. These cover broadly similar (though not identical) categories as are protected under Article 14 of the EU Regulation. Regulation 18 provides as follows:

“Disclosure of relevant records

18. (1) Subject to paragraphs (2) and (4) to (6) below *no relevant record* shall be made available by the Secretary of State *to any person* for purposes other than accident or incident investigation.
- (2) Nothing in paragraph (1) above shall preclude the Secretary of State making a relevant record available to any person where -
- (a) In a case where that person is a party to or otherwise entitled to appear at judicial proceedings, *the relevant court* has ordered that the relevant record shall be made available to him for the purpose of those proceedings, or
- (b) In any other circumstances, the relevant court has ordered that the relevant record shall be made available to him for the purpose of those circumstances.
- (3) In this regulation –
‘judicial proceedings’ includes any proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath,
‘*relevant court*’ in the case of judicial proceedings or an application for disclosure made *in England and Wales* means *the High Court*, in the case of judicial proceedings or an application for disclosure made in Scotland means the Court of Session and in the case of judicial proceedings or an application for disclosure made in Northern Ireland means the High Court,

'relevant record' means any item in the possession, custody or power of the Secretary of State which is of a kind referred to in sub-paragraphs (a) to (e) or paragraph 5.12 of the Annex; and
'Secretary of State' includes any officer of his.

- (4) Subject to paragraph (6) below *no order shall be made under paragraph (2) above unless the relevant court is satisfied that the interests of justice in the judicial proceedings or circumstances in question outweigh any adverse domestic and international impact which disclosure may have on the investigation into the accident or incident to which the record relates or any future accident or incident investigation undertaken in the United Kingdom.*
- (5) A relevant record or part thereof shall not be treated as having been made available contrary to paragraph (1) above in any case where that record or part is included in the final report (or the appendices to the final report) of the accident or incident.

The provisions of this regulation shall be without prejudice to any rule of law which authorises or requires the withholding of any relevant record or part thereof on the ground that the disclosure of it would be injurious to the public interest.”

The Chief Constable's application for disclosure

27. On behalf of the Chief Constable it is accepted that the records sought and which are held by the AAIB are all given a protected status in law. Therefore, in principle, they are immune from disclosure unless an order is made by the High Court. Furthermore, it is common ground that the relevant test for this Court to apply in determining whether to order such disclosure is: whether the benefits of disclosure outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation.
28. The only decision which has been drawn to our attention which is directly concerned with the 1996 Regulations is the decision of the Outer House of the Court of Session in Scotland in Lord Advocate 2015 SLT 450 (Lord Jones). In that case it was ordered that disclosure should be made of the cockpit voice and flight data recording pursuant to Regulation 18. However, it was said that no precedent would be created by that decision. It was not anticipated that investigators would be routinely compelled to disclose cockpit voice recordings: see paras. 58-60 of the judgment.
29. So far as the researches of counsel could discover, there are only three cases in other jurisdictions which have considered applications for disclosure of material in the context of air accidents.

30. The first was an Australian case: Australia National Airlines Commission v Commonwealth of Australia [1975] HCA 33, (1975) 132 CLR 582. This concerned an application for disclosure in an action for damages following a ground collision between aeroplanes. The application was for inspection of the cockpit voice recording. The Minister opposed the application on the basis of a claim to privilege founded upon public interest. Mason J decided to listen to the tape himself and considered that it contained material which was relevant to the civil action. However his judgment makes no reference to the Chicago Convention or the principles derived from it.
31. The second case arose in New Zealand: New Zealand Airline Pilots Association v Attorney General [1997] 3 NZLR 269. This arose out of an air accident which resulted in the death of four passengers and a flight attendant but in which the flight crew survived. The accident was investigated by the Transport Accident Investigation Commission ("TAIC"). There was also a criminal investigation by the police. The police requested disclosure of the cockpit voice recording but the TAIC refused that request. The Court of Appeal of New Zealand observed that the provisions of Annex 13 to the Chicago Convention were not incorporated into the domestic law of New Zealand. The case therefore turned on that domestic law only, which gave protection only while the investigation by the TAIC was current and did not require consideration of the adverse impact on future investigations.
32. The third case arose in Canada: Société Air France v NAV Canada [2010] ONCA 598, a decision of the Ontario Court of Appeal in the context of an action for damages. The issue was whether to order disclosure of a cockpit voice recording for use in civil litigation. The Court noted that section 28(6) of the Transportation Accident Investigation and Safety Board Act 1989 allowed a court to order the production of such a recording if it concluded that the public interest in the proper administration of justice outweighed in importance the privilege which that section accorded to it. The Court concluded that the judge at first instance had been entitled to order disclosure. It noted that there had been no evidence before that judge to substantiate the assertion that disclosure would have a chilling effect: see para. 29 of the judgment.
33. In my view each of the three decisions from other jurisdictions to which our attention was helpfully drawn either turned on its own facts or was concerned with the domestic law of the state concerned. None of them sheds light on the principles which this Court should apply under Regulation 18 of the 1996 Regulations or the international and EU law regimes to which those Regulations give effect.
34. Since the present application was first issued on 23 March 2016, the Chief Constable has continued to reflect on the scope of the order sought. He has consequently narrowed his request to a considerable extent. That process of reflection and discussion with the Department for Transport continued up to and during the course of the hearing before this Court. Accordingly, the extent of the request made was further narrowed during the course of that hearing. I will therefore refer in this judgment only to those requests which are still in issue.

The procedure for such applications for disclosure

35. It would appear that the present application is the first of its kind ever to have been made in England and Wales. Accordingly, with the assistance of the parties, this Court had to devise the appropriate procedure for such an application.
36. The first part of the hearing was conducted in the normal way in open court, with members of the public and the media present. The parties' submissions were supplemented by submissions which the court heard from Mr Chamberlain QC, who appeared on behalf of BALPA and who supported the general submissions made on behalf of the Secretary of State but also, unlike the Secretary of State, actively resisted the application for disclosure in this case.
37. However, there came a point during the hearing at which it was no longer appropriate for the hearing to be conducted in open court or with anyone other than the two parties represented. This is because factual matters had to be gone into which it would not be appropriate to be aired in a public hearing, in particular because they might prejudice any criminal trial which may take place in the future.
38. There came a third stage of the hearing, at which it was not possible or appropriate for the representatives of the Chief Constable to be present at the hearing. In effect the court had to conduct a hearing similar to that which it would conduct when considering an application for public interest immunity.
39. In so far as necessary any confidential matters are set out in a Confidential Annex attached to this judgment. That Confidential Annex will be made available only to the parties, that is the Chief Constable and the Secretary of State.

The different categories of material sought

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

The first category: statements made by Andrew Hill

41. In my view it is almost inconceivable that statements made to the AAIB could properly be the subject of an order for disclosure when the appropriate balancing exercise is done by this Court. This is for two main reasons.
42. First, there would be a serious and obvious “chilling effect” which would tend to deter people from answering questions by the AAIB with the candour which is necessary when accidents of this sort have to be investigated by it. This would seriously hamper future accident investigations and the protection of public safety by the learning of lessons which may help to prevent similar accidents. As is clear from the text cited earlier from Annex 13 to the Chicago Convention, the EU Regulation and the 1996 Regulations, this would be contrary to one of the fundamental purposes of the regime in this area, which is carefully designed to encourage candour in the investigation of air accidents in order to learn lessons and prevent accidents in the future.
43. Secondly, it would be unfair to require such disclosure. This is because the powers of the AAIB, unlike the ordinary police, are such as to permit the compulsion of answers to questions: see Regulation 9 of the 1996 Regulations. Further, so far as I could discern from the hearing before this Court, there is no clear practice, to say the least, of giving a caution to the person interviewed. This is hardly surprising, since the purpose of such an interview is to obtain the fullest possible information in an accident investigation. This contrasts markedly with the purpose of a police interview, which is to elicit evidence which may be capable of being used at a subsequent criminal trial.
44. I would not accept Mr Chamberlain’s “strong” submission, that this Court can never order disclosure under Regulation 18 unless the specific criteria for the grant of production orders under PACE are satisfied. It seems to me that the legislative scheme in the present context sets out its own carefully crafted code, which governs the present kind of application. This is reinforced by the consideration that the domestic Regulations give effect to obligations which are imposed on the United Kingdom by international law and by EU law. The international and EU regimes which are applicable in this context are not likely to be concerned with the precise criteria which a given state may have for disclosure of evidence to the police in their own criminal procedure. However, I would accept Mr Chamberlain’s alternative submission that the sort of policy considerations, such as fairness and the protection of personal privacy, which underlie PACE are also factors to be weighed in the balance when this Court carries out its task under Regulation 18 of the 1996 Regulations.
45. Accordingly, on the facts of the present case, I would refuse the Chief Constable’s application for disclosure of the statements made by Mr Andrew Hill when interviewed by the AAIB. There is nothing to prevent the police from conducting such interviews for themselves, complying of course with their usual obligations, such as the administration of the caution. Indeed, as I understand it, Mr Hill has been interviewed by the police.

The second category of material: film footage

46. On behalf of BALPA a witness statement has been filed by Dr Hunter, which states, at para. 41:
- “Should cockpit and image recording be passed to the police, pilots may be inhibited in what they say and do during emergency situations. Should records of the flight which are made by the pilot of his own volition be passed to police the pilot may be disinclined to carry such equipment which may otherwise provide useful information to the accident investigation bodies.”
47. On behalf of the Secretary of State it is submitted by Mr Manknell that such material is of significant benefit to the AAIB in the investigation and prevention of accidents. He submits that, if it was indeed the case that such equipment would less likely to be used in the future because of the prospect of an order for disclosure by this court, it would have a detrimental impact on the AAIB’s ability to carry out its functions. Important though those interests are in the generality of cases, I do not find those submissions persuasive on the very particular facts of the present case.
48. It is important to stress that the film footage in this case is unlike the cockpit voice and flight data recording which normally has to be created as a matter of legal duty by those operating aircraft. There was no such duty in the present context. For that important reason this case is distinguishable from that of the Lord Advocate case, which was considered by Lord Jones.
49. Furthermore, in my judgment, what is significant in the present case is that the cameras concerned were installed not only on a voluntary basis but for leisure and private commercial reasons. Indeed, on the evidence before this Court, it would appear that the intention was to use the film footage obtained during the air show in this way as part of a broadcast. I am, therefore, not persuaded that pilots would be deterred in the future from installing such equipment on a voluntary basis, since they would do so for their own private, and potentially commercial, reasons.
50. In the circumstances of the present case, I am satisfied that the balance falls in favour of disclosure rather than against it. The film footage has significant potential value for the police investigation in this case, since it is a contemporaneous recording of what happened during the flight itself.

The third category of material: experiments, tests etc.

51. The scope of this third category of material became narrower during the course of the hearing before this Court. In the private part of the hearing it was confirmed that the Chief Constable would not pursue his application for disclosure of speed calculations. It was also confirmed that he would not pursue the report of the Health and Safety laboratory.
52. I endorse those concessions. These are matters which there is no reason why the police could not themselves investigate. I also bear in mind that all relevant reports,

including the speed calculation report, will be made public in annexes to the final version of the AAIB report, with only the names redacted.

53. What that therefore leaves for further consideration is two requests for disclosure. The first relates to reports of test flights which were done by a specialist pilot. The second relates to engineering reports on the mechanical state of the plane.
54. For the reasons which are set out in the Confidential Annex to this judgment, I would refuse those requests by the Chief Constable.

Conclusion

55. For the reasons I have given I would refuse the Chief Constable's application for disclosure in this case except in relation to the film footage from within the aircraft.
56. It was agreed between the parties that, if this court decided to order disclosure of any material, it should be subject to the following conditions:
 - (1) The material set out in the Schedule attached herewith ("the material") is to be disclosed to the Chief Constable of Sussex for the purposes of his criminal investigation into the circumstances surrounding the crash of the Hawker Hunter T7, G-BXFI piloted by Mr Andrew Hill;
 - (2) The Chief Constable of Sussex will retain overall responsibility for the material until its return to the AAIB;
 - (3) The material that is disclosed to the Chief Constable of Sussex shall not be further disclosed by him save that he may disclose the material to:
 - (i) Any experts instructed by the Police in the furtherance of their investigation
 - (ii) The Crown Prosecution Service for the purposes of advising him and pursuing a prosecution if that is the decision of the CPS and any Solicitor or Counsel engaged by them to act as their agents or representatives or any expert instructed by them
 - (iii) Mr Andrew Hill and any other Defendant prosecuted as a result of the investigation into the crash of the Hawker Hunter T7, G-BXFI and any Solicitor or Counsel engaged by them for the purposes of ensuring that he receives the required procedural safeguards by way of disclosure that are provided for in the case of an investigation and prosecution of a crime pursuant to the Criminal Procedures and Investigatory Powers Act 1996

- (4) The results of any analysis and any subsequent opinion as a result of the expert consideration referred to in 3(i) above shall be treated on the same confidential as the rest of the material.
- (5) The material in the Schedule shall be returned to the AAIB at the conclusion of any criminal proceedings.

Lord Thomas of Cwmgiedd CJ:

57. I agree.