

The National Transportation Safety Board: How Should They Conduct Witness Investigations—The Need for a Privilege

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INTRODUCTION

The primary function of the Board is to promote safety in transportation. The Board is responsible for the investigation, determination of facts, conditions, and circumstances and the cause or probable cause or causes of: all accidents The Board makes transportation safety recommendations to Federal, State, and local agencies and private organizations to reduce the likelihood of recurrences of transportation accidents.¹

A DANGEROUS HYPOTHETICAL:

After leaving New York on a transatlantic flight bound for the Middle East, a Boeing 767 suddenly plunges towards the Earth from an altitude of 35,000 feet. Within a matter of minutes, the passenger jetliner has disappeared from the radar screens for no apparent reason, claiming the lives of the 200 people onboard. The National Transportation Safety Board (“NTSB”) swings into immediate action. Their mission: to deter-

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1. 49 C.F.R. § 800.3(a) (1998).

mine the cause of the accident and to try and prevent future mishaps from occurring. The NTSB quickly arrives at the crash site to begin answering these two questions. Witness interviews are an integral and necessary part of that investigation. Within days of the crash NTSB investigators begin conducting interviews of the hundreds of people involved with the operations, maintenance, repair, and care of the aircraft. One of these witnesses, John Smith, is a mechanic responsible for the hydraulic systems on the 767. On the day of the accident, because he had been drinking on the job, John Smith had forgotten to perform the routine safety inspection of the hydraulic system in the 767 prior to takeoff. Because of this, the pressure was low and after thirty minutes of flight, the controls became non-responsive, ultimately resulting to the crash. The day before he is interviewed by the NTSB investigator, John reads an article in the New York Times about the 1996 crash of ValuJet Flight 592. The article details how the local prosecutor has charged the cargo loaders with manslaughter. It goes on to say that the primary evidence against the defendants is their own statements to NTSB investigators in which they state that they did not properly store and prepare the oxygen generators for flight. The next day John is asked to speak informally with the NTSB investigator.

One year later, the NTSB issues the final report concerning the Boeing 767 accident. Because of the lack of physical evidence and no other evidence to support any alternate theories as to the cause, the NTSB makes the determination that the crash must have been due to pilot error and no safety recommendations can be made.

OVERVIEW

The NTSB was created with the purpose of investigating accidents, determining the cause of those accidents, making safety recommendations and allowing the public access to the results of those investigations. One of the most important aspects of that investigation is the witness statements from all sources: the crew, the mechanics, passengers and even the bystanders. How should those statements be treated? Should they be protected from disclosure to the legal system? What will be the effect to accident investigations by the NTSB if witness statements are released? Does any other investigatory body do something different? Keep these questions in mind. By the conclusion it will be clear that the NTSB needs to make some changes.

THE NATIONAL TRANSPORTATION SAFETY BOARD ("NTSB")

The primary function of the NTSB is clear. It is the main federal authority which investigates and collects facts on all transportation acci-

dents in the United States. From this investigation, the NTSB is required to analyze and determine the probable cause of the accident. After the accident investigation is completed, the NTSB is charged with the responsibility of creating and publishing recommendations which will reduce the risk of future accidents from similar causes. This is done through cooperation with Federal, State and private organizations.

[I]t is the policy of the Board to make information available to the public to the greatest extent possible. Accordingly, all records of the Board . . . are declared to be available for public inspection and copying, as provided in this part. Records are to be made available to the public promptly and to the fullest extent [possible].²

HISTORY OF THE NTSB

Since the beginnings of air travel in the United States, Congress has in one form or another had a Federal Agency responsible for the investigation of aircraft accidents. While the NTSB today is responsible for all transportation safety, in the beginning the only focus was towards air travel safety regulation. This can be traced back to the Air Commerce Act of 1926.³ The Act required the Secretary of Air Commerce “[t]o investigate, record, and make public the causes of accidents in civil air navigation in the United States.”⁴

In 1934, with the rapid growth of the air industry, and trans-continental and trans-Atlantic flights, Congress authorized the Secretary of Air Commerce to hold hearings, conduct official investigations, subpoena witnesses and compel cooperation. The form of the Air Commerce Agency began to take real shape.⁵

The first true accident panel was initiated by the Secretary in 1937. The panel consisted of five members and they were in charge, under the ultimate supervision of the Secretary, of accident investigation. Three members were chosen from the Department of Commerce, while the remaining two were experts chosen for their expertise.⁶ In its most rudimentary form, this is the basic structure of the NTSB as we know it today.

This panel was formalized, in 1940, into the Civil Aeronautics Board (“CAB”), and by 1958 it came under the newly created Federal Aviation Administration (“FAA”).⁷ The purpose of the CAB was now clearly de-

2. 49 C.F.R. § 801.2 (1998).

3. Air Commerce Act of 1926, 44 Stat. 568 (1926).

4. *Id.* at 569.

5. Act of June 19, 1934, Pub. L. No. 73-418, 48 Stat. 1113 (1934) (amending the Air Commerce Act of 1926).

6. 14 C.F.R. § 91.20 (1938).

7. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

fined - prevent transportation accidents by finding the causes of previous accidents.⁸

By 1966, the CAB was transformed into the NTSB, as a division under the Department of Transportation. This did nothing to change to relationships between the NTSB and other federal agencies.⁹ Then, in 1974, the NTSB became its own separate agency, created by the Independent Safety Board Act of 1974.¹⁰ This was done to avoid any potential conflicts of interests between the NTSB and the FAA, which was clearly needed because the NTSB was increasingly investigating the FAA.¹¹ While the structure of the NTSB has been slightly modified over the years, for the most part it has essentially remained the same since the 1974 Act.

NTSB ACCIDENT/WITNESS INVESTIGATION

This portion of this essay will concentrate on the specifics of how the NTSB conducts an investigation, how witness statements are treated, the ultimate admissibility of NTSB witness statements taken by investigators into court and what affect this will have on aircraft investigations in light of the 1996 ValuJet crash and subsequent criminal prosecutions.

Like most administrative agencies of the federal government, the NTSB follows a strict outline for the investigation of aircraft (and other transportation) accidents. The Code of Federal Regulations at Title 49 provides, in general language, how an investigation is to proceed. By no means, however, does it contain any specifics.

As a result of this lack of guidance, the NTSB has adopted a specific manual for guidance. The Airline Pilots Association International ("ALPA"), in cooperation with the NTSB and the Canadian Transportation Board ("Canadian TSB"), has developed the Accident Investigation Handbook.¹² This serves as the primary source for specifics of how an aircraft investigation is conducted.¹³ While there are certain differences depending on the circumstances of the accident, the following is the basic structure of an investigation.

Immediately after a major accident, a member of the Board (one of

8. *Id.* (stating that the purpose of the CAB is "to make recommendations to the FAA Administrator that . . . would tend to prevent similar accidents in the future.").

9. Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931, 935 (1966).

10. Independent Safety Board Act of 1974, 49 U.S.C. § 1901 (1982).

11. *Id.*

12. AIRLINE PILOTS ASS'N INT'L, ACCIDENT INVESTIGATION HANDBOOK (1998) [hereinafter ALPA HANDBOOK].

13. *See Id.*; *see also* 49 C.F.R. § 831.4 (1998) (describing the authority of the NTSB and specifically stating that the NTSB is outside the requirements of the Administrative Procedure Act because there are no adverse parties, and the investigation is not used to determined the rights of any parties).

five appointees) travels to the scene. An investigator in charge (“IIC”) is then appointed by the member to head the investigation, and he has complete authority to conduct of the investigation.¹⁴ Following an organizational meeting, a determination is made as to what specific investigation groups will be needed and the Groups Chairmen are selected by the IIC. These Groups are responsible for a specific factor or issue in the accident, such as weather, maintenance or operations. Like the IIC, these Group Chairmen have almost complete authority to conduct their portion of the investigation as needed.¹⁵ During this organizational meeting, other interested parties can petition to be included and participate in the investigation. This is completely at the discretion of the IIC, and that party must bring some expertise to the investigations. As an example, usually the aircraft manufacturer will be included along with the FAA.¹⁶ These groups will then conduct the field investigation which involves photographic evidence, witness interviews, collecting of wreckage and a complete survey of the scene among other things.

After the field investigation is completed, the investigators return to their home office and put all of their observations and findings into document form. First, the Field Notes are created, which contains all of the witness statements notes of every witness investigation. This report then becomes part of the Factual Report which also contains the remaining factual observations and discoveries made by the investigators.¹⁷ After this has been reviewed and agreed to by the investigators, and the Group Chairmen give their assessment as to the cause of the accident. The IIC then reviews the Factual Report, and uses it to make his Final Report, which ultimately contains probable cause information and recommendations for the “Sunshine counsel” (a formal last review stage before release to the public). Once approved, this report becomes the Blue Cover Report which is then released to the public and makes safety recommendations.¹⁸ The purpose of the NTSB is to determine the cause of accidents, and make recommendations for prevention. The NTSB has no enforcement ability with its findings, it cannot mandate changes, impose fine or penalties, revoke or suspend any licensing of any kind nor even compel the FAA to act or promote air safety regulations as simple as installation of smoke detectors. Its only function is to recommend.¹⁹

14. See ALPA HANDBOOK, *supra* note 12, at 16.

15. Interview with Paul Weston, Operations Group Chairman, NTSB in Washington D.C. (Oct. 19, 1999) [hereinafter Weston Interview].

16. *Id.*

17. *Id.*

18. See ALPA HANDBOOK, *supra* note 12, at 24.

19. See Weston Interview, *supra* note 15; see also 49 C.F.R. § 800.3(a) (1998) (stating the primary purpose of the Board is to *promote* transportation safety).

How does the NTSB interview witnesses? Before examining this questions it is important to understand the context of the interview. As mentioned above, the NTSB is a purely information gathering and reporting agency. The NTSB has absolutely no criminal or civil enforcement power beyond issuing subpoenas, and the interviews are conducted and run by the Groups Chairmen or their designee. Like the guidelines from Congress, the ALPA Accident Investigation Handbook has no specific format that must be followed for taking witness statements.²⁰ As such, the investigator has almost complete discretion in running the interview, and it varies from investigator to investigator. Some conduct the interviews in a deposition format, with sworn statements and recorders.²¹ However most prefer to do it in a very casual "from the hip" manner.²² The investigator asks all of the questions, and can then open the questions to any other parties present at the interview. At any time, the NTSB investigator may stop the questioning or exclude any other party.²³ Interviewees have two rights during the interview. First, they may be accompanied by one individual, either legal counsel or a non-legal representative (such as a wife).²⁴ This representative may not interfere with the interview with the exception of telling the witness not to answer or asking to speak with them alone. Secondly, the witness may have any party excluded from the interview except the NTSB investigator.²⁵ Additionally, in situations where witnesses are uncooperative or not forthcoming, the Safety Board has authority to "issue a subpoena, enforceable in Federal District Court, to obtain testimony or other evidence."²⁶ In practice, the Group Chairmen have unlimited subpoena power to use at their discretion, which can be enforced in federal court through a contempt of court order. At no time is there any offer to keep witness statements confidential, nor is there any authority which allows confidentiality of those statements.²⁷ It is clear that the NTSB has wide authority to conduct witness investigations as it sees fit, with the power to compel testi-

20. See ALPA HANDBOOK, *supra* note 12; see also 49 C.F.R. § 831.9 (1998).

21. It important to note here, that the sworn deposition style is true to the definition. However, there is no Fifth Amendment privilege or *Miranda* style warnings required. This stems from the fact that there is no criminal investigatory purpose to a safety investigation, and the NTSB has no authority to act beyond making safety recommendations.

22. See Weston Interview, *supra* note 15.

23. *Id.*

24. 49 C.F.R. § 831.7 (1998).

25. See Weston Interview, *supra* note 15.

26. 49 C.F.R. § 831.9(a) (1998).

27. The ALPA Handbook contains the format for both the NTSB and the Canadian TSB, and notes the differences in the two organizations. See ALPA HANDBOOK, *supra* note 12. It states that witness statements taken by the Canadian TSB are considered privileged, and are not discoverable or admissible in a legal proceeding. *Id.* This approach is taken because it is believed that without such a privilege, witnesses would not be forthcoming.

mony, while offering only a minimal amount of protection to the witnesses themselves. Ultimately, does this reduce the integrity of the safety investigation? We will examine this next.

What is the admissibility of NTSB documents and witness statements in both civil and criminal court? We will examine these both in turn. After an aircraft accident there is a civil trial for damages. In most cases these suits are brought many months if not years after the accident has occurred. In an effort to obtain the best information available on the accident, litigants routinely move, under the Freedom of Information Act, to get the reports of the NTSB.²⁸

In realizing this, Congress enacted legislation to make this process easy on the public, noting that in many cases the NTSB is going to be the only source of critical information gathered shortly after the investigation.²⁹ However, Congress also realized the enormous strain this would put on the NTSB's ability to perform its function. As a result, a balance was struck. In civil trial, NTSB investigators are prohibited from testifying in court. The parties may contact the NTSB and depose the investigator in an adverse setting once.³⁰ That deposition is then available for use at trial. The investigator is allowed to refer to his notes and the factual report during the deposition. Any subpoena issued to an investigator is immediately quashed.³¹ Additionally, in most circumstance, the Factual Report (which contains the Field Notes) is admissible at trial under the public documents exception to the hearsay rule.³² While this process is somewhat laborious, civil litigants do have access to the Factual Report and the ability to have witness statements admitted at trial through the deposition of the investigator. Criminal trials, however, are treated much differently.

The set of rules which exist for the use of witness statements during a civil trial are virtually done away with in the context of a criminal trial. Investigators are permitted to testify in State or local grand jury hearings or criminal proceedings.³³ There is no restriction on availability, nor are

28. Freedom of Information Act requests to the NTSB, (visited Jan. 28, 2000) <<http://www.nts.gov/info/foia.htm>>.

29. See *In re Air Crash at Charlotte, North Carolina* on July 2, 1994, 982 F. Supp. 1071, 1075 (D.S.C. 1996).

30. 49 C.F.R. § 835.5(a) (1998).

31. 49 C.F.R. § 835.8 (1998).

32. See 49 C.F.R. § 835.4(a) (1998); see also FED. R. EVID. 803(8); 49 C.F.R. § 835.3(b) (1998) (allowing the investigator to testify as to his factual observations and what people said but restricting him from giving any opinion as to the causes of the accident); *Ritts v. American Overseas Airlines, Inc.*, 97 F. Supp. 457, 458 (S.D.N.Y. 1947) (stating that the factual findings and witness accounts were admissible but the opinions and conclusions were not).

33. 49 C.F.R. § 835.9 (1998) (noting that the testimony is restricted to factual findings as defined by § 835.3).

they limited to testifying only once. This is the expected result in the Florida State prosecution of the SabreTech mechanics responsible for the improper storage of the oxygen generators.

The 1996 crash of ValuJet flight 592 was a national tragedy. As always, the NTSB was the primary investigative body for determining the cause of the accident. Ultimately, it was determined that the crash was caused by the explosion of oxygen generators (air canisters which provide oxygen to face mask if a plane loses cabin pressure) stored in the cargo hold of the plane. When being shipped, these canisters must have a safety cap to keep them from exploding. SabreTech, the subcontractor responsible for cargo handling, had documented that the caps were installed on all of the canisters. This, however was not the fact. As the NTSB conducted its investigation, it began to interview everyone with relevant information towards the cause of the accident, issuing subpoenas where necessary.³⁴ Within a few days of the accident, Mauro Valenzuela was interviewed informally by the NTSB. Mr. Valenzuela was a mechanic who was responsible, in part, for making sure the safety caps were installed. In his maintenance reports he indicated that he had followed that procedure. However, during his interview, he stated that he had not installed the caps and had falsified the records.³⁵ From these statements to the NTSB stem the entire basis of the criminal charges for manslaughter against all three mechanics (including Danny Gonzalez and Eugene Florence) and SabreTech as a corporation. If convicted, there could be a potential ten to fifteen year prison sentence for each of the three men.

What effect will this have on future accidents and the role of the NTSB? The answer is clear. Those who work in the transportation industry, not just the airline industry, will be increasingly reluctant to be forthcoming and frank with NTSB investigators who are investigating accidents. There will be a chilling effect - workers will fear that what they say may put someone they know into jail, or even worse, themselves. Indeed, in some circumstances already, individuals being interviewed get "selective amnesia" and tend to forget certain key facts, or omit important details.³⁶ Regardless of whether there is a conviction, this amnesia will only increase as the awareness of the use of statements to investigators increases in court.

While it is important for the causes of accidents to be released to the public, should there be a line drawn to protect the integrity of the accident investigation itself, which leads to determining the cause. Can the recommendations be made without making available the witness state-

34. Ina Paiva Cordle, *Charges Imminent in ValuJet Crash*, MIAMI HERALD, July 13, 1999.

35. *Id.* When asked by the safety board investigator, "Did you install the cap?" Valenzuela said "No." Even though he had written on the records that he had. *Id.*

36. See Weston Interview, *supra* note 15.

ments taken by the investigators? The answer to this question is only heightened by the fact that there are no procedural protections of witnesses. Statements are never sworn, no warning is ever issued, and there exists no Fifth Amendment protections as it is not a criminal proceeding and legal representation is mostly restricted.³⁷ Does this help the NTSB conduct a full and complete investigation? No. Thus, there are two solutions to this problem: First, adopt all of the procedural guarantees mentioned above to protect the witnesses, and, second, put them on notice that what they say can be held against them in a court of law. Unfortunately, this would only serve to restrict witnesses even more. The best solution is to approach accident investigation statements in the way the United States military does, to keep all witness statements strictly confidential and forbid their use for any reason against them, whether in a civil, evaluation or criminal proceeding.

THE CONCEPT OF PRIVILEGED WITNESS STATEMENTS - THE MILITARY

Like the NTSB, the United States Armed Forces have developed a program for the investigation of aircraft accidents. For the purposes of this article, I will look at several branches of the military and how they conduct accident investigations. However, it is important to note that every branch of the military follows the same procedures.³⁸

The military, in many circumstances, acts as its own autonomous legal entity. This autonomy also exists in military accident investigations. It is important to understand this process to understand the concept of privilege. Thus, what happens when a military aircraft crashes?

Whenever an aviation mishap occurs, two boards are convened, each with its own mission. The first of these boards is the Aviation Mishap Board ("AMB").³⁹ The AMB consists of a senior member and at least four other members who represent different sections of the investigation. At the conclusion of its investigation, a Mishap Investigation Report ("MIR") is produced. The function of the AMB is clear: "[t]o preserve human and material resources."⁴⁰ The AMB determines the cause of the accident in an attempt to prevent future re-occurrences and puts those findings into the MIR, much like the purpose and structure of the NTSB and the Blue Cover report.

At the same time, a separate Judge Advocate General ("JAG")

37. U.S. CONST. amend. V.

38. DEPARTMENTS OF THE AIR FORCE, ARMY, NAVY AND TRANSPORTATION, PARTICIPATION IN A MILITARY OR CIVIL AIRCRAFT ACCIDENT SAFETY INVESTIGATION: SAFETY (1997).

39. *Id.*

40. Office of the Chief of Naval Operations Instruction, 3750.6Q, § 102 (Aug. 28, 1989) [hereinafter OPNAVINST].

Manual Investigation is initiated.⁴¹ The primary function of this investigation is to gather and preserve evidence for future legal proceedings, whether military, criminal or civil.⁴² Known as the JAG Manual Investigation, this investigation runs separately and simultaneously to the AMB investigation. The purpose of the JAG Manual Investigation is to “obtain and preserve all available evidence for use in claims, litigation, disciplinary action, and adverse administrative proceedings, and for all other purposes except for safety and accident prevention purposes.”⁴³ Most notably, witnesses are sworn before giving their statements, and they are also advised of their rights, which does not occur with the AMB investigation.

THE AVIATION MISHAP BOARD (“AMB”)

The AMB has a single concern; the prevention of future accidents. As a result, the AMB investigation is conducted differently from the JAG Manual Investigation. The most important difference between these two investigations concerns the methods used in interviewing witnesses and the uses made of statements by witnesses. With all AMB investigations, witness statements are solicited under a guarantee of confidentiality.⁴⁴ Every witness is promised complete confidentiality.⁴⁵ Individuals are never advised of their legal rights, nor do they ever give sworn statements to investigators.⁴⁶ Additionally, their statements can never be used against them in any fashion, regardless of the circumstances.⁴⁷ While the MIR will contain notes on these statements, it is important to realize that only the AMB has access to the complete report and the witness statements.

The rationale behind this “privilege” is clear, as stated by the Navy instruction manual, “[i]ndividuals may be reluctant to reveal information pertinent to a mishap because they believe certain uses of the information could be . . . detrimental to themselves.”⁴⁸ The purpose behind the privilege is to encourage witnesses to reveal complete and candid information pertaining to a mishap. Thus, every investigator is required to advise each witness that his or her interview is privileged, and that statements will never be used against him or her in any fashion.⁴⁹ This privilege,

41. See Navy JAG Instruction 5830.1; JAG Manual, ¶ 0205, at 2-7; U.S. Dept. of Army, Reg. 15-6.

42. *Id.*

43. U.S. Air Force, Reg. 110-14, P 1

44. See OPNAVINST, *supra* note 40, at § 606(c)(1).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See *id.* at § 606(d)(2). Note also, that this ultimate privilege creates a system whereby a

however, would be worthless if it were not recognized by the courts.

JUDICIAL REVIEW OF THE PRIVILEGE

This privilege was first recognized by the courts in *Machin v. Zuckert*.⁵⁰ In *Machin*, the sole survivor of a B-25 crash sought discovery of the Air Force equivalent to the Navy MIR. After being subpoenaed to compel discovery, the Secretary of the Air Force refused to turn over the MIR, stating that the information in the report had been obtained through the promise of confidentiality.⁵¹ The court found for the Secretary, holding “[w]e agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program . . . the reports should be considered privileged.”⁵² In this decision, the court recognized an executive privilege with AMB witness statements. This privilege protected the witness statements and the opinions of the investigators from discovery for trial. The ultimate protection, however, was short lived. Three years after the *Machin* privilege was established, Congress enacted the Freedom of Information Act (“FOIA”).⁵³

FOIA was enacted because Congress felt that the administrative agencies of the federal government were improperly withholding considerable amounts of information from the public which should have been disclosed and made generally available. Originally passed as an amendment to the Administrative Procedure Act, the 1974 amendment re-codified FOIA, making it applicable to all agencies of the government, including the military.⁵⁴

With FOIA now permanently in place, the doors for private litigants and civilian prosecutors to subpoena and use privileged witness statements from an MIR, which had been effectively closed by *Machin*, were now open again for review. Within one year of the FOIA amendments, the issue of investigation privilege was before the courts.

In *Brockway v. Department of the Air Force*, the court was faced with the identical request that had been denied in *Machin*.⁵⁵ However, there

witness would never refuse to speak with AMB investigators truthfully, even if he later lied to JAG investigators. Regardless of the situation, the statements are absolutely protected from use by anyone.

50. *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963).

51. *See id.* at 339.

52. *Id.*

53. FOIA was signed into law by President Johnson on July 4, 1966, and became effective exactly one year later. 5 U.S.C. § 552 (1994).

54. Gregory L. Waples, Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 895-99 (1974).

55. *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975).

was a change. Unlike *Machin*, the plaintiff in *Brockway* was the father of an officer killed in a plane crash, who requested that the court compel the Air Force turn over the entire MIR, as was required by the FOIA. The district court found this argument compelling, stating that the FOIA was clear and agency documents were to be made available to the public.⁵⁶ The appellate court reversed the district court because of a FOIA exemption.⁵⁷

FOIA has nine distinct exemptions to disclosing agency information to the public. If the requested information meets the criteria of one of the exemptions, it is then outside of FOIA.⁵⁸ Particularly, the court examined exemption five, which exempted "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁵⁹

The court had two questions to decide: was this MIR an inter-agency memorandum, and was it one which would not be available at law to a party? The court found that the nature of the MIR was that of a memorandum, since it was created exclusively by and for the AMB. This was within the memorandum meaning of FOIA. As to the second issue, the court looked back to the decision in *Machin* which had recognized the executive privilege for witness statements making them nondiscoverable, stating, "there is authority indicating that an executive privilege exists justifying 'by law' the nondiscovery of these witness statements."⁶⁰ From this privilege, the court found that the statements would not be available at law to a party. Thus, by using the privilege established by *Machin*, the military was able defend the witness statements from a FOIA request.

This issue was again revisited in *Cooper v. Department of the Navy*.⁶¹ In this case the family made a FOIA request for the MIR of a helicopter crash that killed their son. The court denied the FOIA request under exemption five. The court further went on to state that

[t]o permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one. Logic argues, then, that in such a circumstance as the Aircraft Accident Safety Investigation, where promises of confidentiality have been found helpful and perhaps essential to obtaining

56. See *id.* at 1187; see also 5 U.S.C. § 552 (1994).

57. See *Brockway*, 518 F.2d 1184.

58. See 5 U.S.C. § 552(a).

59. 5 U.S.C. § 522(b)(5).

60. *Brockway*, 518 F.2d at 1192.

61. *Cooper v. Department of the Navy*, 558 F.2d 274 (5th Cir. 1977).

information upon which to base corrective action, those promises should be respected⁶²

The plaintiff also argued that the factual observation of the safety investigators contained in the MIR were discoverable by FOIA. They stated that while the witness statements may have been given under a promise of confidentiality, the investigators were given no such promise. As a result, the plaintiffs requested a redacted version of the MIR. The court disagreed, and held that the MIR, in its entirety, was nondiscoverable and exempt from FOIA because its ultimate purpose was to aid the military in accident prevention.⁶³ This issue, however, would be visited again.

While the court did not permit the MIR to be disclosed, they did rule that the entire JAG Manual Investigation report was subject to disclosure under FOIA.⁶⁴ The main difference here was the fact that there was never a promise of confidentiality. Additionally, the purpose of the JAG Manual Investigation was the finding of facts in an adjudicated forum and not safety factors. Because of this it did not fall under the *Machin* privilege and was ultimately discoverable.⁶⁵

Five years later, this issue was before the Supreme Court in *United States v. Weber Aircraft Corp.*⁶⁶ Following the rationale of the court of appeals in *Cooper*, Justice Stevens wrote that “[t]he statements are unquestionably ‘intra-agency memorandums or letters’ within the meaning of the Exemption, and, since the *Machin* privilege normally protects them from civil discovery, they ‘would not be available by law to a party other than [the Air Force] in litigation with [the Air Force].’”⁶⁷ The court continued to follow *Cooper*, and allowed the JAG Manual Investigation report to be release in its entirety.

Additionally, *Weber* fell short of the *Cooper* decision. The court recognized the privilege and its exempt status under FOIA, but only to the extent that it covered the actual witness statements, and not the MIR in its entirety. While Justice Stevens did not specifically state that the redacted factual portions of the MIR were subject to release under FOIA, the court refused to broaden its ruling beyond witness statements which were given under the promise of confidentiality. Instead, the court relied on the logic that

[i]f aircraft mishap investigators were unable to give such assurances [of confidentiality], or if it were felt that such promises were hollow, testimony and input from witnesses and from manufacturers in many instances would be

62. *Id.* at 277.

63. *See id.* at 278-79.

64. *See id.*

65. *See id.* at 279.

66. *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).

67. *Id.* at 792.

less than factual and a determination of the exact cause factors of accidents would be jeopardized. This would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident.⁶⁸

The court ultimately recognized the *Machin* privilege as an executive privilege and left the exemption under FOIA, however, it left open the question of what else was protected from release.

Less than one year after the Supreme Court decided *Weber*, the courts were again faced with the problem of what was exempt and what was not. The Court of Appeals for the D.C. Circuit addressed this issue in the case of *Badhwar v. United States Dept. of the Air Force*.⁶⁹ Taken on appeal four times over two years during the course of the district court trial, the appellate court attempted to define and narrow the Supreme Court's ruling in *Weber*. Finally, in *Badhwar IV*, the court arrived at a median; "[w]e affirm the exemption from disclosure of witness statements of third parties and government employees, and of the findings, conclusions, and recommendations in each of the mishap reports."⁷⁰ The court held that only witness statements, opinions, recommendations, conclusions and determinations as to cause were exempt under FOIA because that information would not have been obtained without the promise of confidentiality. This did not apply to factual observations of the investigators, as they were trained to report every detail and did not have any reason to withhold that information or not be forthcoming.⁷¹ Also, those investigators are generally the first on the scene.

As a direct result of the *Badhwar* decision, each branch of the military changed their accident safety program to incorporate this ruling, and preserve the *Machin* privilege. As for the Navy, the original safety investigation manual OPNAVINST 3750.6P was replaced by OPNAVINST 3750.6Q.

This new safety investigation manual changed the format of the Mishap Aviation Report ("MIR"). Specifically, the MIR was divided into two sections: Part A would contain non-privileged information (set out by *Badhwar*) that could be released to the public, and Part B would contain privileged information held strictly by the AMB.⁷² Specifically, Part B would comprise photo coverage, flight surgeons reports, witness statements, aircrew statements and Mishap Board developed information and conclusions.

68. *Id.* at 797 n.11.

69. *Badhwar v. United States Dept. of the Air Force*, 829 F.2d 182 (D.C. Cir. 1987).

70. *Id.* at 186.

71. *See id.* at 184-85.

72. *See* OPNAVINST, *supra* note 40, at § 105(e).

In *Hill Tower, Inc. v. Department of Navy*, discovery was sought of both the MIR and the JAG Manual Investigation report.⁷³ The district court, relying on *Weber, Cooper*, and *Badhwar* ruled that Part A of the MIR and the entire JAG Manual Investigation report was discoverable, and fell outside the exemption in FOIA and the *Machin* privilege. Since this decision, there has been no change to the AMB, the MIR, or a new judicial approach to its discovery by a party.

In a practical sense, the *Machin* privilege and the confidentiality of the witness statements is the most protected and valuable tool at the AMB's disposal to investigate accidents.⁷⁴ Because of its importance to the military when there is a serious accident that raises the attention of the nation, an AMB investigation will sometimes not be performed. An example of this was the crash of the Air Force jet carrying Department of Commerce Secretary Ron Brown. In a public address, President Clinton stated that all information pertaining to the crash would be made available. Because the Air Force feared that the privilege would come under heavy attack if an accident investigation was conducted, only the JAG Manual Investigation was conducted.⁷⁵

While this seems to be over cautious, it nonetheless shows the military's deep belief in, and ultimate need for, the confidentiality of the witness statements. However, what would happen if someone's statement to safety investigators were ever used against them? In the strictest sense, the action, what ever it was, would be undone completely.⁷⁶

CONCLUSION

What lessons are to be learned? Does the NTSB need to adopt a privilege similar to that of the military, and indeed other nations around the world? Accident investigation is an important public necessity for the protection of travelers as well as bystanders. Transportation accidents cost billions of dollars per year, and claim countless numbers of lives. The International Civil Aviation Organization, a multinational organization, which proscribes rules for accident investigations to other countries, sums up the need for such a privilege in the NTSB

[I]nformation given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative or criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede

73. *Hill Tower, Inc. v. Department of Navy*, 718 F. Supp. 562 (N.D. Tex. 1988).

74. Telephone Interview with Commander Brian Woods, Aviation Safety School (Oct. 5, 1999).

75. *Id.*

76. *Id.*

the investigative process and seriously affect flight safety.⁷⁷

77. INTERNATIONAL CIVIL AVIATION ORGANIZATION, AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION - ANNEX 13 (8th ed. 1994).