



Protection of Safety Information





Overview

- **Safety vs. Legal Investigations**
- **Protecting Safety Information**
- **Promise of Confidentiality**
- **Freedom of Information Act (FOIA)**
- **Memorandum of Agreement (Safety Center and NCIS)**
- **Criteria to stop a safety investigation**



Legal vs Safety Investigations

**Legal investigations:
Determine accountability and culpability**

Legal (JAGMAN, etc) identifies fault (intentional or unintentional) of individuals.

– Bandaid fix, Does NOT solve root problems.

**Safety investigations:
Mishap prevention and enhance RM**

Safety identifies hazardous practices and conditions in the system in an effort to remove or mitigate hazards that can cause more mishaps.

- Safety solves systemic problems



Legal vs Safety Investigations

- **Good to Know:**

- Legal investigations and safety investigations are likely to occur for the same mishap.
- NCIS will investigate fatalities on a Naval / Marine Corps installation that are not disease or natural causes.
- The Office of the Judge Advocate General (OJAG) and Staff Judge Advocates (SJA) shall not be addressees on any SIREP messages or endorsements nor shall copies be provided to them.
- Safety Investigators may have access to all Legal investigations
- Legal investigations are may NOT have access to privileged safety information.



JAGMAN Investigations of Mishaps

- **Purpose: To determine accountability and culpability**
- **Information;**
 - JAG and Safety investigators are NEVER the same person(s)
 - JAGMAN shall be conducted independently and separately from the safety investigation
 - Safety Investigation reports shall not be included in JAGMAN investigations
 - JAGMAN investigators have access to ONLY factual information (non-privileged evidence) and witness names

- Information on this slide is a summary of Chapter 1, para 8.g; G1-14, para 42.; Chapter 6, Figure 6-1, para. 2; Chapter 6, Figure 6-2, para. 3; Chapter 6, para 6001.3; Chapter 6, para 6019.3; Chapter 6, para 6020.2; Appendix A, para. 1.b; and Appendix A, para. 1.g.



Protecting Safety Information

“Obtaining safety information is dependent upon protecting privileged information against use for other than safety purposes. Violations of this trust will destroy the credibility of the safety programs that have based their success on the ability to protect privileged information. “

MCO P5102.1B, Chapter 7, paragraph 7000



Protecting Safety Information

- **Concept of Privilege:** Military and federal courts grant protection under executive privilege to the *analysis, conclusions* and *recommendations* of;
 - Command Safety Investigators
 - Members of a Safety Investigation Board (SIB)
 - Safety Investigation Reports (SIREP) and Endorsements
- **Purpose:**
 - *Encourages safety Investigators and endorsers to provide open, forthright information, opinions, causes and recommendations.*
 - *Overcomes reluctance of witnesses to provide information to investigators.*

NOTE: The safety privilege was created by case law (court-made law). Machin vs. Zukert, 316 F.2d 336 (1963) established the safety privilege in federal court. U.S. vs. Weber, 465 U.S. 792 (1984) was a Supreme Court case that made the privilege applicable across the United States. Courts have occasionally restricted DoD's interpretation of the safety privilege; see Cooper vs. Dept of Navy, 558 F.2d 274 (1977); In RE Air Disaster at Ramstein Air Base, Germany, Western District of Texas, San Antonio Division (July 14, 1993).



Protecting Safety Information

- **Factual (*Non-Privileged*) Information:** May be releasable outside the safety community of interest through FOIA. (PII exceptions)
 - Part “A” of the SIREP (*applies to WESS and SIB reports*)
 - Physical evidence
 - Unedited Photographs / Photographs with scale devices
 - Witness Names
 - Witness written statements and “Advice to Witness” forms
 - Witnesses outlines or sketches
 - Log books, police reports, casualty reports, etc.
 - Hazard Reports (HAZREPS)

NOTE: *Non-privileged sources as defined by DODI 6055.07 and OPNAVINST 3750.6 (series)*



Protecting Safety Information

- **Privileged Information:**

- **All Evidence that is:**

- Staged or reconstructed photographs, films, and videotapes
- Investigator's drawings, maps, charts, etc.
- Simulated reenactments of possible or probable scenarios.

- **Safety Investigators**

- *Unit / Command safety investigators and members of an SIB*



Protecting Safety Information

- **Privileged Information:**

- **Investigator's Notes**

- *Investigator's deliberative analysis (drawing, opinions, calculations, deductions, etc.)*
- *Investigator's summaries of witness statements*

NOTE:

Summaries of witness statements should be the only written record.



Protecting Safety Information

Privileged Information

– Part B of the SIREP from a SIB

NOTE:

All stated findings, conclusions, and recommendations entered into WESS that are from a Unit/Command Safety investigation or from an SIB are considered “privileged”

SAFETY INVESTIGATION BOARD FINDINGS SECTION

THIS SECTION IS RESERVED FOR THE USE OF THE SAFETY INVESTIGATION BOARD (SIB), WHEN INVESTIGATING ON-DUTY CLASS A₁ OR OTHER MISHAPS AS DIRECTED. PART B IS USED TO LIST EVIDENCE, DETAILED FINDINGS, CAUSES DETERMINED BY A DELIBERATIVE PROCESS, AND RECOMMENDATIONS FOR SPECIFIC CORRECTIVE ACTION. ALL APPLICABLE SECTIONS OF THE PART A OF THE SIREP SHOULD BE COMPLETED BY THE SIB IN ADDITION TO THE PART B PRIVILEGED INFORMATION.

PART B PRIVILEGED INFORMATION

1. DOCUMENTARY EVIDENCE:
 - A. PRIVILEGED EVIDENCE
 - B. NON-PRIVILEGED EVIDENCE
 - C. EVIDENCE AVAILABLE TO ALL
2. CHRONOLOGICAL SEQUENCE OF EVENTS LEADING UP TO AND THROUGH THE INCIDENT:
3. OPINIONS OF THE SAFETY INVESTIGATION BOARD:
 - A. THE ADEQUACY AND USE OF APPROVED PROCEDURES:
 - B. THE QUALIFICATIONS OF THE PEOPLE INVOLVED:
 - C. THE STATE OF TRAINING OF THE PEOPLE INVOLVED AND OF THE CREW IN COMBATING THE MISHAP:
 - D. THE EFFECTIVENESS OF SUPERVISION:
 - E. THE EFFECTIVENESS OF THE QUALITY ASSURANCE PROGRAM, WHERE APPLICABLE:
 - F. THE EFFECTIVENESS OF THE DAMAGE CONTROL EFFORTS:
 - G. THE ROLE OF PREVENTIVE AND CORRECTIVE MAINTENANCE PLAYED IN THE MISHAP:
 - H. ANY EXISTING MATERIAL DEFICIENCIES OR SHORTCOMINGS, WHICH MAY HAVE CONTRIBUTED TO THE MISHAP:
 - I. ANY OTHER OPINION:
4. ANALYSIS OF FINDINGS: (SEE GLOSSARY G-7 FOR CAUSE CODES)
 - A. HUMAN FACTORS: (State each cause with less than 100



Protecting Safety Information

Privileged Information

– All Endorsements of SIREPs

FIGURE 5-4
SAFETY INVESTIGATION REPORT ENDORSEMENT
SAMPLE MESSAGE FORMAT

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BT
(Precedence - normally ROUTINE)
(DGT)
FM (Endorsing command)
TO (Subsequent endorsers based on appointing message and SIREP addressees)
COMNAVSAFECEN NORFOLK VA//30/40/054//
INFO CNO WASHINGTON DC// / /N45//
CMC WASHINGTON DC//SD// (If applicable)
FOUO //N05102//
MSGID/GENADMIN/MSG ORIG/SER NO./MONTH//
SUBJ/PRIVILEGED FIRST/SECOND ENDORSEMENT ON XXXX SAFETY
INVESTIGATION REPORT (SIREP) (REPORT SYMBOL OPNAV 5102-7A)//
REF/A/ (XXXXXXXXXX)//
REF/B/DOC/CNO/OPNAVINST 5102.1D/MCO P5102.1B
NARR/REF B IS OPNAVINST 5102.1D/MCO P5102.1B MISHAP AND SAFETY
INVESTIGATION REPORTING MANUAL.
////////////////////////////////////
THIS REPORT IS FOR OFFICIAL USE ONLY. THIS IS A PRIVILEGED,
LIMITED USE CONTROLLED DISTRIBUTION, SAFETY INVESTIGATION REPORT
ENDORSEMENT. UNAUTHORIZED DISCLOSURE OF THE INFORMATION IN THIS
ENDORSEMENT BY MILITARY PERSONNEL IS A CRIMINAL OFFENSE
PUNISHABLE UNDER ARTICLE 92, UNIFORM CODE OF MILITARY JUSTICE.
UNAUTHORIZED DISCLOSURE OF THE INFORMATION IN THIS REPORT BY
CIVILIAN PERSONNEL WILL SUBJECT THEM TO DISCIPLINARY ACTION
UNDER CIVILIAN PERSONNEL INSTRUCTION 752.
////////////////////////////////////
POC/NAME/RANK/COMMAND/LOC:/TEL:/EMAIL//
RMKS/1. GENERAL STATEMENT OF SIREP FINDING AND RECOMMENDATIONS
2. CONCUR OR NON-CONCUR AND WHY. RECOMMEND CHANGE TO ...
3. RECOMMENDATIONS COMPLETED AT THIS TIME.
4. ADDITIONAL COMMENTS AND RECOMMENDATIONS,
BT

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FIGURE C-1

• Privileged Information:

– Witness Statements under “Promise of Confidentiality”

NOTE:

May ONLY be granted by the Senior Member of an SIB

Unit / command level safety investigators (GSO / GSM) are NOT authorized to grant “Promise of Confidentiality”

See Appendix C of MCO P5102.1B

+ ADVICE TO WITNESS (PROMISE OF CONFIDENTIALITY)			
THIS IS PART OF A SAFETY INVESTIGATION REPORT LIMITED DISTRIBUTION AND SPECIAL HANDLING REQUIRED BY OPNAVINST 5102.1D/MCO P5102.1B			
THIS COVER SHEET AND STATEMENT ARE PRIVILEGED AND IS EXEMPT FROM DISCLOSURE			
DO NOT FILE THIS COVER SHEET IN A SYSTEM OF RECORDS SUBJECT TO THE PRIVACY ACT. FOR EXAMPLE, THIS STATEMENT MUST NOT BE RETRIEVABLE BY NAME, SOCIAL SECURITY NUMBER, DATE OF BIRTH, OR OTHER UNIQUE IDENTIFIER ASSOCIATED WITH AN INDIVIDUAL			
I understand that:			
a. I have been requested to voluntarily provide information to a Safety Investigation Board conducting an investigation of a Navy/Marine Corps mishap.			
b. I AM NOT being requested to provide statement under oath or affirmation.			
c. Disclosure of personal information by me is voluntary; my election or refusal to provide such information will have no direct effect on me.			
d. The purpose of the information provided by me is to determine the cause of the mishap and/or the injury and/or damage occurring in connection with that mishap.			
e. All information provided by me to the Safety Investigation Board will be used ONLY for safety purposes.			
f. The information provided by me shall NOT be used:			
(1) In any determination affecting my interests.			
(2) As evidence to obtain evidence in determining misconduct or line of duty status of killed or injured personnel.			
(3) As evidence to determine my responsibility or that of other personnel from the standpoint of discipline.			
(4) As evidence to assert affirmative claims on behalf of the government.			
(5) As evidence to determine the liability of the government for property damage caused by the mishap.			
(6) As evidence before administrative bodies, such as Officer/Enlisted Separation Boards, Judge Advocate General Manual investigations/inquiries, Naval Aviator/Naval Flight Officer Evaluation Boards (USN) or Field Flight Performance Boards (USMC).			
(7) In any other punitive or administrative action taken by the Department of Navy.			
(8) In any other investigation or report of the mishap about which I have been asked to provide information.			
All information provided by me to the Safety Investigation Board will be used ONLY for safety purposes.			
1. STATEMENT			
2. PRINTED NAME (First, Middle, Last)			3. SIGNATURE
4. DATE	5. RANK/RATE	6. SERVICE	7. TELEPHONE NUMBER
8. ADDRESS WHERE YOU MAY BE LOCATED			
9. PRINT BOARD MEMBER'S NAME:			10. SIGNATURE



Promise of Confidentiality

(Uses and Limitations)

- Can ***ONLY be granted by the Sr. Member of a SIB*** with the following limitations:
 - 1) Must be explicit and cannot be implied from the investigator's status or function
 - 2) Must be documented in all instances in which a witness provides information pursuant to a promise of confidentiality
 - 3) May be given only as needed to ensure forthright cooperation of the witness concerned and may not be given on a blanket basis to all witnesses
 - 4) Shall be limited to the information given to a safety investigator pursuant to a promise of confidentiality



Promise of Confidentiality

(Uses and Limitations)

- 5) Must inform the witness that the promise of confidentiality applies only to information given to the safety investigator and not to the same information if given to others**
- 6) May be given for aviation mishaps, friendly fire mishaps, mishaps involving complex systems and military-unique items, operations, or exercises**
- 7) May be authorized for other mishap categories or in individual cases by the Secretary of a Military Department when the Secretary concerned determines the authorization is in the interest of national security**



Unauthorized Uses of Privileged Information

NOTE: Unauthorized disclosure of Safety information by military personnel is a criminal offence punishable under article 92 of the UCMJ.

Unauthorized disclosure by civilian personnel will subject them to disciplinary action under CIVPERSINST 752.

- **Privileged information Shall NOT be used:**

- In making any determination affecting the interest of an individual
- As evidence to determine line-of-duty status
- As evidence for any punitive (disciplinary or administrative) action
- As evidence to determine liability of the government for property damage
- As evidence before administrative bodies
- Any other punitive or administrative action by the DON.
- For any other investigation or report of the mishap



Freedom of Information Act (FOIA)

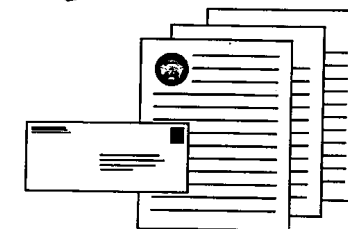
INFORMATION ACCESS

DoD 5400.7-R

Department of Defense

DOD Freedom of
Information Act
Program

September 1998



Directorate for
Freedom of Information
and Security Review



- **Public Right**
- **Protected Information is exempt**
- **Bottom Line:** *All Request for Safety Investigation information must be forwarded to the COMNAVSAECEN via Chain of Command*



Freedom of Information Act (FOIA)

Release of Report Information

- COMNAVSAFECEN may release reports under FOIA
- Releasable to Individuals only not businesses
- One government agency may not request info from another government agency under FOIA
- Members of Congress must go through Naval Safety Center JAG
- Non-DoD Federal agency requests go through Naval Safety Center JAG
- Subpoenas referred to SJA then onto Naval Safety Center JAG



Freedom of Information Act (FOIA)

Release of Report Information (*cont.*)

- Requests for access to Mishap reports from other staff, commands, and DoD organizations may be releasable.
 - *If sole purpose is for mishap prevention*

- If not solely for mishap prevention, the release excludes:
 - Findings, recommendations and analysis
 - Contents of witness statements given under promises of confidentiality
 - Medical records



Legal aspects of the Mishap site (*Who has priority?*)



Mishap Site Jurisdiction

OPNAVINST 5102.1D
MCO P5102.1B
7 January 2005

APPENDIX D

MEMORANDUM OF AGREEMENT BETWEEN
NAVAL SAFETY CENTER
AND
NAVAL CRIMINAL INVESTIGATIVE SERVICE

- **MOA (NSC – NCIS):**
 - Defines lanes.
 - Site preservation.
 - Raw / Physical evidence is shared.
 - NCIS keeps evidence if criminal activity is suspected.
 - Privileged witness statements cannot be shared.

1. Subject. The working relationship between the Naval Safety Center (NSC) and the Naval Criminal Investigative Service (NCIS).

2. Purpose. The parties recognize that both NSC and NCIS are tasked with investigating mishaps resulting in deaths, injuries and/or property damage that occur on naval installations, or involve naval aircraft or vessels. The purpose of this Agreement is to clarify the "ownership" of a mishap site and the evidence found therein; and to provide guidance for investigators from both agencies concerning the preservation of physical evidence at a mishap site and the spirit of cooperation and professionalism expected by the signatories hereto.

3. Understandings Agreements and Responsibilities.

a. The Naval Safety Center. NSC's sole purpose is to identify the cause(s) of a particular mishap in order to prevent similar accidents in the future. Any mishap that results from a criminal act is outside the purview of NSC and will not be investigated by NSC. If a suspicion of criminality is discovered in an on-going investigation, NSC shall stop investigating and deliver all non-privileged information to NCIS.

b. The Naval Criminal Investigative Service. The purpose of NCIS is to ascertain whether a criminal act contributed to a particular mishap and, if so, to identify the perpetrator and collect the evidence necessary to support disciplinary action or prosecution. If it becomes apparent that there was no criminality involved in a given mishap, NCIS shall stop investigating and deliver all information to NSC, which is not law-enforcement sensitive.

See Appendix D of MCO P5102.1B



Collecting Medical Evidence

- **Medical Records Request Letter**
 - Authorizes a Competent Medical authority to obtain crucial medical information
 - Medical Treatment Records
 - Pathological studies, etc.

See Appendix A of MCO P5102.1B

FIGURE A-1

RELEASE OF MEDICAL RECORD INFORMATION
SAMPLE LETTER

5102
DATE

MEMORANDUM

From: Commander, Naval Safety Center

Subj: NAVAL SAFETY CENTER SAFETY INVESTIGATION MEDICAL RECORDS REQUEST

Ref: (a) Health Insurance Portability and Accountability Act of 1996
 (b) 45 CFR § 164.512(b)(1)
 (c) Executive Order 12196
 (d) 29 CFR § 1960
 (e) DoDI 6055.7
 (f) OPNAVINST 3750.6R
 (g) OPNAVINST 5102.1D/MCO P5102.1B
 (h) OPNAVINST 5100.19D
 (i) OPNAVINST 5100.23F

1. This letter is to be presented when requesting official medical records, normally protected from release pursuant to reference (a), from any health care provider in the conduct of an official Naval mishap investigation.
2. Reference (b) authorizes release of protected health information to a "public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling injury or disability, including, but not limited to, the reporting of injury [and] public health investigations...."
3. References (c) through (i) authorize the undersigned and his designated representatives to collect such information and investigate injuries or disability of uniformed members and civilian employees of the United States Navy and Marine Corps, as well as such other persons who may be injured by a Navy or Marine Corps activity.
4. The holder of this letter is an authorized representative of the undersigned. All medical providers are requested to cooperate fully with the investigator and provide the requested information.
5. My point of contact is LT E. Taylor George, JAGC, USNR, Flag Staff Judge Advocate, COML (757) 444-3520 extension 7047, DSN 564.

R. E. BROOKS
Rear Admiral, U.S. Navy
Commander, Naval Safety Center



Criteria to stop a Safety Investigation

Evidence of Criminal Activity

- GSO / GSM or Sr. Member of SIB will:
 - Stop the Safety Investigation
 - GSO will notify Command and for guidance
 - SIB Senior Member will discontinue investigation upon formal guidance from Appointing Authority and Controlling Command
 - Provide legal investigators with all Factual information / evidence
 - For SIBs - Send all privileged information / evidence to NAVSAFECEN
 - For Unit Investigations – contact NAVSAFECEN and inform them that this is *Not* a mishap.



Current Challenges

- **Unauthorized access to privileged information**
 - Non-safety personnel with access to privileged reports & endorsements (*e.g. Non-safety personnel access to AMHS.*)
- **Safety investigations held in abeyance due to misunderstanding of processes and policies.** (*Mishaps and Crimes cannot co-exist*)
 - Severely degrades root cause analysis
 - Negative impact to trend analysis
 - Limited implementation of corrective action



Contact Information

For questions call:

Tactical Mishap Investigations Division
HQMC Safety Division Det, Naval Safety Center

(757) 444-3520

extensions 7137, 7139, 7161, 7170, 7173, 7198

Parachute Analyst: extension 7160