

SAFETY PRIVILEGE

Aviation Safety Action Program (ASAP)

We recommend you implement the Aviation Safety Action Program (ASAP) through an Air Force publication and website that clearly and precisely explain the anonymity, releasability, and permissible use of ASAP information. The current language does not adequately define the protections intended; it also suggests protection broader than is supported in law. In our opinion, implementing ASAP without clear and authoritative rules puts the success of the program at risk.

Moreover, AFI 33-360, *Publications and Forms Management*, paragraph 1.1.1 (2006) establishes official Air Force publications as “the only approved vehicles for issuing official Air Force policy and/or guidance.” We anticipate that implementing ASAP through the required publication coordination and review process will resolve the issues we identify below.

You explain that ASAP is a web-based self-reporting system, intended to be anonymous, that encourages voluntary reporting of safety issues and events. Specifically, aircrews are encouraged to report operational threats and aircrew errors that are not reported by other means and would otherwise remain unknown. You propose to sanitize ASAP inputs to remove identifying information before further dissemination. You intend that ASAP information not be used as a basis for disciplinary or adverse administrative action except in “cases of willful disregard of regulations and procedures.”

Other ASAP materials make slightly different assurances concerning the anonymity and confidentiality of reports, release of information to others within or outside the Air Force, use of ASAP information for discipline, and exclusion of certain events from the foregoing protections. The proposed ASAP site explains the program as “an anonymous, self-reporting system . . . designed to provide a non-punitive environment for the open reporting of safety concerns and information” The site encourages submitters to provide their names and contact information. Per another ASAP site, a submitter’s “identity will be protected if you leave your contact information at the end of the report” and “information here will be kept in safety channels not operational or command channels.” ASAP was also tested within a MAJCOM which described the program as “non punitive,” noting “individuals will not be disciplined or restricted for an error they personally report through the ASAP program.” It pledged members “will not be identified, disciplined or harmed career-wise in any way through . . . ASAP.” The command recognized, however, that reports would likely be releasable under FOIA. It also noted reports would be shielded from adverse action only if the alleged violation was inadvertent; there was no intentional disregard for safety; and the event did not involve criminal activity, controlled substance, alcohol, or intentional falsification.

Privileged safety information, including information given to safety investigators pursuant to a promise of confidentiality, is protected by regulation and case law from disclosure outside the safety community. This information may not be used as evidence for disciplinary or adverse administrative actions, to determine liability in claims for or against the United States, or in any other manner in any action by or against the United States. It is protected from release in

litigation, and is therefore exempt from release pursuant to FOIA. AFI91-204, *Safety Investigations and Reports* Ch. 3 (2008); DoDI 6055.07, *Accident Investigation, Reporting, and Record Keeping* E4 (2000); 5 U.S.C. § 552(b)(5). Use of the promise of confidentiality so as to confer the privilege is carefully limited by DoDI 6055.07 and AFI 91-204. Promises of confidentiality are limited to specific types of accidents. DoDI 6055.07 E4.4.2.2; AFI 91-204, paragraph 3.4.2. They must be explicit, documented, and given by authorized personnel only as needed to ensure forthright cooperation of individual witnesses; they may not be given on a blanket basis. DoDI 6055.07 E4.4.2.1.1; AFI 91-204, paragraph 3.4.4.

We next consider which of the protections afforded privileged safety information may be applied to ASAP information, beginning with **confidentiality, privilege and releasability under FOIA**. DoDI 6055.07 specifically limits how the Air Force may use promises of confidentiality for safety matters, and ASAP inputs do not fall within those limits. Therefore, absent permission from USD(AT&L), the Air Force may not promise confidentiality. And while we agree that making ASAP disclosures confidential would further goals similar to those behind the existing safety privilege, a blanket privilege for self-initiated safety reports in the absence of an accident would be a significant and untested extension of the safety privilege. ASAP inputs would not be privileged, then, because the Air Force may not currently promise confidentiality and because this broad privilege may not be accepted by the courts. The safety privilege is also the basis for the FOIA exemption generally applied to privileged safety information. *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792 (1984). Because this protection would not apply and no other FOIA exemption is broadly applicable to ASAP information, it would be subject to release under FOIA. (Though portions of ASAP inputs may be covered by other FOIA exemptions.)

There is no prohibition on making ASAP inputs **anonymous** to the extent technically possible. In other words, you may use a system that does not collect individual or computer information from those making inputs. If your personnel remove identifying information to preserve anonymity, however, the original inputs would remain agency records which must be retained pursuant to records management rules. And, as discussed above, those records would not generally be confidential, privileged, or protected from release under FOIA.

The Air Force has significant latitude in electing to **limit disciplinary and administrative actions** based on ASAP inputs. However, it is not within your organization's authority to establish that limit across the Air Force. We therefore recommend you propose an appropriate limit through a fully coordinated Air Force publication. The limit could be patterned after that for self-referral for substance abusers as set out in AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* Section 3C (2001). That AFI spells out what constitutes a voluntary disclosure and how the limited protection applies. And it avoids the problems of uncertainty raised by existing ASAP materials, which are not clear on who is protected (only the submitter, or others involved?), what incidents are excluded (e.g., who determines "willful disregard"? what "criminal activity" beyond violation of a regulation would be excluded? how are related false statements treated?), and how disclosures could be used (impeachment? launch of an inquiry to find independent evidence—such as review of tapes or asking others in the unit?). Any ambiguity in the description of protection for ASAP information could undermine the entire effort if the information is used in a manner inconsistent with a submitter's expectation.

If you elect to proceed with ASAP without specific protections set out in a regulation, we recommend the ASAP site, implementation memos and related materials include a caution that entries are not confidential and may be released within DoD or to the public. The materials could explain the technical features protecting anonymity, e.g., that the system will not record login or IP address information. If the site encourages submission of personal information, it likely requires a Privacy Act statement (coordinate with the Privacy Act office). Concerning use of the information, you could say, “The Air Force Safety Community encourages commanders to use their mature judgment in balancing the purpose and value of ASAP to prevent mishaps against the use of ASAP information for any other administrative or disciplinary purpose.”

OpJAGAF 2010/11 18 November 2010