



AUSTRALIAN SENATE

STANDING COMMITTEE ON RURAL AND REGIONAL AFFAIRS AND TRANSPORT

REFERENCES COMMITTEE

26 September 2012

Mr Martin Dolan
Chief Commissioner
Australian Transport Safety Bureau
PO Box 967
Civic Square ACT 2608

Via email:

Dear Chief Commissioner Dolan,

REQUEST FOR DOCUMENTS

You would be aware that on 13 September 2012, the Senate referred the following matters to the Senate Rural and Regional Affairs and Transport References Committee for inquiry and report by 29 November 2012:

- (a) the findings of the Australian Transport Safety Bureau into the ditching of VH-NGA Westwind II, operated by Pel-Air Aviation Pty Ltd, in the ocean near Norfolk Island airport on 18 November 2009;
- (b) the nature of, and protocols involved in, communications between agencies and directly interested parties in an aviation accident investigation and the reporting process;
- (c) the mechanisms in place to ensure recommendations from aviation accident investigations are implemented in a timely manner; and
- (d) any related matters.

In order to assist the committee with its inquiry, the committee requests you to provide the following documents:

- internal minutes of all meetings with any reference to the accident of VH-NGA including up until the hearings of the committee;
- all emails regarding any aspect of the accident of VH-NGA including to the accident survivors up until the hearings of the committee from, to, and between the following personnel: All Commissioners, Managers, Supervisors and Investigators or any staff of Australian Transport Safety Bureau (ATSB) involved in the accident of VH-NGA;
- copies of all draft versions of the accident report, and three final accident report versions dated 30 August 2012 at 10.30am, 31 August 2012, 5.19pm, and 4 September 2012 as amended;
- any fatigue studies done on the flight crew by the ATSB of the accident flight of VH-NGA;
- copies of all the Directly Involved Parties comments on all draft versions of the accident report;

- all correspondence between ATSB and Airways New Zealand regarding the accident of VH-NGA;
- all correspondence between ATSB and Fiji Civil Aviation Authority regarding the accident of VH-NGA and copies of any audio recordings between Fiji Air Traffic Control (ATC) and the accident aircraft VH-NGA;
- copies of any audio recordings of Norfolk Island Unicom and Auckland ATC;
- all correspondence between ATSB and Bureau of Meteorology regarding the accident of VH-NGA;
- all correspondence between ATSB and Airservices Australia regarding the accident of VH-NGA;
- Pacific Air Services and Air Navigation Agreement in force covering the period of the accident; and
- the complete administrative files of the accident investigation including original versions by the investigator.

The committee requests that these documents be provided to the committee secretariat by COB Wednesday, 10 October 2012.

You should be aware that committees (such as the Senate Rural and Regional Affairs and Transport References Committee) possess the full range of inquiry powers, enabling them, if necessary, to order the production of documents. A person failing to comply with an order of a committee to this effect may be found to be in contempt of the Senate.

The committee also takes this opportunity to remind the Australian Transport Safety Bureau of the Senate Parliamentary Privilege Resolutions relating to the protection of witnesses. Specifically, Senate Parliamentary Privilege Resolution 6(10) states that:

A person shall not, by fraud, intimidation, force or threat of any kind, by offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

and in Privilege Resolution 6(11):

A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

The committee intends to hold a public hearing for this inquiry on Monday, 22 October 2012. In due course the committee secretariat will contact the ATSB to arrange a suitable appearance time.

If you have any queries regarding this letter, please contact the Committee Secretary, Mr Stephen Palethorpe on _____ or _____

Yours sincerely,

Senator the Hon Bill Heffernan
Chair



Australian Government
Australian Transport Safety Bureau

Chief Commissioner

Our reference:
Contact: Martin Dolan

3 October 2012

Senator the Hon Bill Heffernan
Chair, References Committee
Standing Committee on Rural and Regional Affairs and Transport
Australian Senate
PO Box 6100
PARLIAMENT HOUSE CANBERRA 2600

Dear Senator Heffernan

REQUEST FOR DOCUMENTS

Thank you for your letter of 26 September 2012, requesting that the ATSB provide a range of documents to the References Committee relating to the ATSB's investigation of the ditching of the Westwind II aircraft registered VH-NGA.

The ATSB understands the importance of providing all relevant materials to assist the committee's inquiry and is currently assembling all the documents that meet the terms of your request. At the same time, I draw to the Committee's attention to Part 6 of the *Transport Safety Investigation Act 2003* (the TSI Act) and the limitations it places on the ATSB with respect to providing the information.

Nothing I say in that regard is intended to derogate in any way from the information-gathering powers of the Senate. Section 63 of the TSI Act clearly states nothing in the Act affects the information gathering powers of the Parliament.

However, in order to enable the ATSB to operate in accordance with the restrictions of the TSI Act, I respectfully ask that the Committee use its powers to require the production of any ATSB documents rather than request them. At the same time the Committee may wish to consider reviewing the extent of information it requires and form a view as to whether some or all of the information provided to it should be granted confidentiality.

To explain, Division 2 of Part 6 of the TSI Act relates to the protection of 'restricted information'. For the purposes of the TSI Act, restricted information includes almost all information the ATSB acquires or generates in the course of an investigation. Examples include statements, information recorded by investigators, communications with people involved in an occurrence, and recorded information such as air traffic control tapes. It includes all information acquired through use of the ATSB's powers of compulsion.

The TSI Act makes it a criminal offence for a current or former ATSB Commissioner, staff member or consultant to record or disclose restricted information to any person or to a court. The penalty for a breach is imprisonment for two years. The main exception is where such activity occurs while performing functions under the TSI Act (principally through the publication of investigation reports).

These provisions are in place to ensure cooperation with and the free flow of information to ATSB investigations so as to improve safety. There is an expectation that the information the ATSB obtains or generates will not become publicly available other than in the form of an ATSB report and that the information will not be used for blame or liability purposes.

The TSI Act states that it is not a function of the ATSB to apportion blame, determine liability, or (in most cases) assist in court cases. The ATSB is granted powers of compulsion that are to be exercised in this context. The compulsion powers are particularly broad-ranging and include the removal of a person's right not to incriminate themselves. It is important that the information is not used or disclosed other than for the purpose for which it was obtained.

Despite its powers of compulsion, the ATSB is dependent on the cooperation of other parties involved in an action or occurrence. Allowing information obtained or generated through investigation to become publicly available other than in the form of an accident investigation report is viewed domestically and internationally as liable to harm cooperation. For this reason 'restricted information' is subject to secrecy provisions under freedom of information laws. Cooperation diminishes to the extent that parties believe the information they supply will enter the public domain in a way that is to their disadvantage.

As I indicated earlier, these restrictions on disclosure of information do not prevent the Commonwealth Parliament from gathering information for the purposes of its proceedings. Parliament has reserved the right to call upon the ATSB to assist in providing evidence to its inquiries, especially when the manner in which ATSB conducts its investigation is the focus of such inquiries for accountability purposes.

At the same time, the committee's request for the production of documents could potentially undermine the purpose of the restricted information provisions of the TSI Act. I am therefore seeking the Committee's cooperation in three areas:

- to consider the potential implications for cooperation in current and future ATSB investigations resulting from the disclosure of the requested material before determining how much of it should be disclosed to the committee for the purposes of its inquiry;
- to exercise its formal powers to require rather than request the ATSB provide the necessary information (thus releasing us to the extent necessary from our statutory duty to protect the information);
- to treat the restricted information thus obtained appropriately as confidential to the Committee for the purposes of its inquiry.

That said, the ATSB stands ready to provide all necessary information to the Committee and to account for our investigations and the manner in which we undertake them.

Yours sincerely

Martin Dolan