

# 일본항공사고 조사제도의 진실

## (The Unmasked Aviation Accident Investigation System in Japan)

Masao Sekiguchi  
(Komazawa University, Japan)

- I. Introduction
- II. The Genuine Character of “The Japanese Aviation Accident Investigation Board”
- III. Effect of Requested Written Opinions
- IV. Proposals for Improvement regarding the Two Secret Accords
- V. Proposals for Improvement regarding Privileges with Respect to Evidence Obtained by Investigators
- VI. Final Remarks

### Abstract

The Japanese Aviation Accident Investigation Board has two faces. While the surface of the Board is a one of the very accident investigation organ, its shadow face is a one of the very expert witness drawing up a requested written opinion for the sake of the criminal investigation of the Police under the two secret inter-ministerial accords.

This Paper proposes that some evidence obtained by investigation ought to be protected for disclosure and use by privilege derived from on of our most basic legal principles: “Nemo debet se-ipsem accusare-no one is required to incriminate oneself”.

---

\* Faculty of Law and Graduate Division, Komazawa University, Japan

## 1. Introduction

It is a great pleasure for me to participate in the World Conference on the Development of Air and Space Science and Technology on the 21<sup>st</sup> Century for commemorating the 50<sup>th</sup> Anniversary of Hankuk Aviation University in Korea.

Today, I would like to present my views on the need to amend the aviation accident investigation system in Japan, in the light of remarkable progress of human rights in the world.

The first part of this paper points out the unmasked character of the aviation accident investigation Board in Japan as “an expert witness drawing up a requested written opinion for the sake of the criminal investigation of the Police”.

Its second part examines the effect of a requested written opinion prepared by the Chairman of the Board for the Police.

Its third part proposes reforming jurisdictional conflicts between the Board and the Police.

The forth part proposes the improvement of privileges with respect to evidence obtained by investigators.

The last part of this paper makes final remarks.

## 2. The Genuine Character of “the Japanese Aviation Accident Investigation Board”

In 1974, the Japanese Aviation Accident Investigation Board (hereinafter it is called “the Board”) was, pursuant to the 1973 Act on Establishment of the Aviation Accident Investigation Board (hereinafter it is called “the Act”), established in the Ministry of Transport as an external agency with permanent character.

The Board is, pursuant to Article 1 of the Act, characterized as an organ

which “carries out accurately investigation of a cause or causes of aviation accidents for the purpose of preventing future accidents.

However, in the night before bringing the Act into existence, the National Police Agency and the Ministry of Transport exchanged secretly an umbrella accord named “the Memorandum” regarding coordination of investigative powers between both administrative organs.

In addition, as soon as the Act came into force, the National Police Agency and the newly established Board concluded an implementing accord named “Adjustment between the Criminal Investigation of the National Police Agency and the Aviation Accident Investigation of the Newly Established Aviation Accident Investigation Board”.

Relationship of the Board with the Police provided by the above two secret accords is summarized as follows:

1. The Police have priority over the Board in relation with investigations for persons concerned in an accident scene (Paragraph 5 of the Implementing Accord).
2. The Board may be permitted to have audiences for persons concerned who have been detained by the Police within the scope that will not be an obstacle to the work of the Police. In this case, an observer of the Police is permitted to sit in company with the Board under the pretext of a concern for detainee’s safety (Paragraph 5 of the Implementing Accord).
3. Regarding material evidence placed in or outside the accident scene that both of the Police and the Board are necessary for seizure, the Police is in principle to seize it (Paragraph 6 of the Implementing Accord).
4. Especially, regarding seizure of such material evidence as the flight recorder or the cockpit voice recorder of an accident aircraft which is needed to analyze quickly, the Police surprisingly and unbelievably takes priority to seize it over the Board (Paragraph 6 of the

Implementing Accord).

5. Moreover, the Police may request the Chairman of the Board to give an expert opinion for the flight recorder or the cockpit voice recorder that was already seized by it. Consequently, the Board accepts that the Chairman is to become a requested expert witness for the sake of the Police (Paragraph 6 of the Implementing Accord).
6. Regarding the maintenance records and the air traffic control records, the same procedure as the above is to be required (Paragraph 6 of the Implementing Accord).
7. On condition that the Board gives the Police a requested written opinion prepared by the Chairman, it is able to receive material evidence including the flight recorder and the cockpit voice recorder that is preferentially seized in the Police. As it turns out, the Board is able to analyze a probable cause or causes of an accident aircraft.  
Unless the Chairman promises to draw up a requested written opinion as soon as possible, and to deliver it to the Police as well, the Board cannot receive the flight recorder and the cockpit voice recorder from the Police. As the result, the Board will not analyze just enough for it to find out the provable cause or causes without the flight recorder and the cockpit voice recorder.
8. Because of borrowing material evidence in the form of a request, the Board will be later required to file to the Police an investigation report that is included probable causes analyzed through the recordings of the flight recorder and the cockpit voice recorder (Paragraph 6 of the Implementing Accord).
9. Surprisingly, looking at the practices of the past quarter century, the Chairman of the Board used to file a full accident investigation report as a requested written opinion to the Police, instead of filing a partial report relating to the flight recorder or the cockpit voice recorder.

As the results of the above mentioned procedures of the two secret inter-ministerial accords, the fundamental character of the Board that is provided by the Act, has been distorted. The Board has in fact been forced to become a requested expert witness of the Judicial Police for the sake of its criminal investigation. Therefore, the Board is now characterized as “an expert witness for the criminal investigations of the Police”. There is no state adopting the above procedures in the world.

### 3. Effect of Requested Written Opinions

There are two types of expert opinions in Japan. One is an expert opinion that is ordered by a court (Article 165 of the Criminal Procedure). This kind of expert opinion is called “a formal expert opinion”. The other is an expert opinion that is requested by investigative organ<sup>s</sup> including a prosecutor, an official of the public prosecutor’s office and a staff of the Judicial Police (Article 223 of the Criminal Procedure). This kind of expert opinion used to be called “a requested expert opinion”.

A document prescribing progresses and results of expert opinion that is written by an expert witness who is appointed by a court is called “a (formal) written opinion” (Paragraph 4 of Article 321 of the Criminal Procedure). On the other hand, a document prescribing progresses and results of expert opinion that is written by an expert witness who is requested by an investigative organ is called “a requested written opinion”. The latter is not prepared in a neutral position, but it is done for the sake of the said investigative organ.

However, a case of the Supreme Court (October 15, 1953, Supreme Court Case, 7 Collection of the Criminal Precedents at 1934) ruled that if a requested written opinion prescribes progresses and results of expert opinion, it may be treated in the same way as a formal written opinion. As a result, it

is recognized that a requested written opinion, irrespective of agreement or disagreement of the suspected aviation persons, has the same admissibility as a formal written opinion has.

Therefore, the aviation accident investigation report that is, in accordance with a request of the National Police Agency, filed by the Chairman of the Board has a good chance that its admissibility will be granted irrespective of agreement or disagreement of suspected aviation persons.

As a result, suppose an aviation person concerned testified against himself to an aviation accident investigator for the sake of the improvement of aviation safety, his statement that is recorded in an aviation accident investigation report would have a good chance that its admissibility would be granted by a court.

#### **4. Proposals for Improvement regarding the Two Secret Accords**

Jurisdictional conflicts are expected between the Board and the Police, since the aviation accident investigation power of the Board and the criminal investigation power of the Police may be exercised concurrently at the same time.

In consideration of potential jurisdictional conflicts, some urgent solutions should be sought as follows.

1. Regarding audiences of aviation persons concerned in or outside the accident scene, the Board should have priority over the Police.
2. Regarding material evidence placed in or outside the accident scene, the Board should in principle have priority over the Police.
3. Regarding cockpit voice recording, air traffic control recording or

witnesses' statements that are obtained in the course of investigation of an aviation accident by investigators, the Board should have priority over the Police.

4. The object of an accident investigation is not to apportion blame but to discover the cause or causes of an accident. If sources do not come forward with information, the accident investigator may be denied vital leads to the real cause of the accident.

Therefore, the aviation accident investigation power of the Board should be in principle to have priority over the criminal investigation power of the Police.

5. Exceptionally, in the event of such an aviation accident as is caused by means of explosives, drunk maneuvering, narcotics, reckless maneuvering, terrorism and so forth, the Board should immediately hand over its investigative priority to the Police.

## **5. Proposals for Improvement regarding Privileges with Respect to Evidence Obtained by Investigators.**

It is proposed that some evidence obtained by investigators ought to be protected for disclosure and use by a privilege derived from one of our most basic legal tenets: "the privilege against self-incrimination" provided expressly by Para.1 Article 38 of the Constitution of Japan. In order to keep vital leads of the Board to the real cause of an accident, such a privilege should be asserted for cockpit voice recording, air traffic control recording, statement of witnesses as well as voluntary report of voluntary reporters that are obtained by investigators.

First of all, cockpit voice recordings should be privileged and not be disclosed save as is hereinafter recommended.

1. The investigators and the Board should be forbidden to disclose cockpit

voice recordings with awareness.

2. The investigators and the Board should be forbidden to produce cockpit voice recording or testify it in the civil, criminal, or disciplinary proceedings.
3. The investigators and the Board should have free access to cockpit voice recordings.
4. The investigators and the Board should have free use of the recording that they consider necessary in the interests of aviation safety.
5. The investigators and the Board should be free to disclose to parties who may have a direct interest in the matter found in the course of investigation of the contents of the recording.
6. The investigators and the Board should not volunteer those portions of the recording which do not relate to a contributing cause of the accident under investigation.
7. The carrier who owns the cockpit voice recorder should be forbidden to disclose the contents of the recording or produce it, other than as authorized by law.
8. The cockpit voice recording or any transcript thereof should be produced in civil proceedings when, in the opinion of the judge, the public interest in the proper administration of justice outweighs the importance of any reasons advanced for maintaining confidentiality.
9. The cockpit voice recording or any transcript thereof should not be used against any members of the crew or the air traffic controllers in any criminal or disciplinary proceedings.

Secondly, air traffic control recordings should be privileged and not be disclosed save as is hereinafter recommended.

1. The investigators and the Board should have the right to make such use of air traffic control recordings as is necessary for the conduct of an orderly investigation. Furthermore, where they consider it necessary,

they should have the right to publish such portions of the recording as may be needed to explain their findings in their reports.

2. The investigators and the Board should not volunteer the contents of the air traffic control recordings, nor should they be produced other than as authorized or required by law.
3. Air traffic control recordings should be produced in civil proceedings when, in the opinion of the judge, the public interest in the proper administration of justice outweighs the importance of any reasons advanced for maintaining confidentiality.
4. Air traffic control recordings should not be used as evidence against any pilot or air traffic controller in any criminal or disciplinary proceedings.

Thirdly, witnesses' statements should be privileged and not be disclosed save as is hereinafter recommended.

1. Investigators should have the right to compel interviewees to answer questions put to them, and the Act should be amended to provide that such answers are not admissible in evidence against the interviewees in criminal or disciplinary proceedings.
2. The investigators should not reveal any information obtained from witnesses other than when authorized or required to do so by law, save for such publication as is necessary in the interest of promoting aviation safety.
3. The witness statement should be produced in civil proceedings when, in the opinion of the judge, the public interest in the proper administration of justice outweighs the importance of any reasons advanced for maintaining confidentiality.

## 6. Final Remarks

In conclusion, the Japanese Aviation Accident Investigation Board has two

faces. While the surface of the Board is one of the very accident investigation organs, its shadow face is a one of the very expert witness drawing up a requested written opinion for the sake of criminal investigation of the Police under the two secret inter-ministerial accords.

The air accident investigation system in Japan lacks careful considerations to a fact that the cockpit voice recorder or the air traffic control recorder was installed mandatory for commercial aircraft.

Nowadays, different considerations should be applied to criminal proceedings that may be taken against pilots or air traffic controllers. To permit for the use of the above-mentioned recordings in criminal proceedings against aviation persons concerned will be to run counter to one of our most basic principles: "Nemo debet se-ipsem accusare (no one is required to incriminate oneself)". Such a privilege also has been embodied expressly in Paragraph 1, Article 38 of the Constitution in Japan. This privilege is construed that it would not give immunity to the aviation person concerned from criminal process, but only provide that the mandatory recording should not be used against him or her in any such proceeding.

The object of an accident investigation is not to apportion blame but to discover a cause or causes of an accident. If source with information do not come forward, the accident investigator may be denied vital leads to real cause of the accident. Therefore, the aviation accident investigation power of the Board should be in principle to have priority over the criminal investigation power of the Police. However, in the event of such an aviation accident as is caused by means of explosive, drunk maneuvering, narcotics, reckless maneuvering, terrorism and so forth, the Board should immediately hand over its investigative priority to the Police.