

VOLUME 17 SAFETY MANAGEMENT SYSTEM**CHAPTER 1 GENERAL****Section 3 Voluntary Submission of Data****Source Basis:**

- **Title 14 CFR § 5.97, SMS Records.**
- **Title 14 CFR § 119.59, Conducting Tests and Inspections.**
- **Title 5 U.S.C. § 552, Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings.**
- **Title 44 U.S.C. § 3301, Definition of Records.**
- **Title 49 U.S.C. § 44735, Limitation on Disclosure of Safety Information.**

17-1-3-1 SAFETY MANAGEMENT SYSTEM (SMS) RECORDS, DATA, AND OTHER INFORMATION.**A. SMS Recordkeeping Requirements.**

1) The term “aviation organization” within this section is directed to the following organizations operating under Title 14 of the Code of Federal Regulations (14 CFR) that are developing and implementing an SMS:

- Existing and prospective air carrier certificate holders (CH) and Letter of Authorization (LOA) holders to whom 14 CFR part 5 is applicable (14 CFR parts 121 and 135, and § 91.147).
- Other aviation organizations seeking Federal Aviation Administration (FAA) acknowledgment of their SMS within the SMS Voluntary Program (SMSVP), as outlined in Volume 17, Chapter 3, Section 1.

2) Title 14 CFR § 5.97 requires aviation organizations to record outputs from their Safety Risk Management (SRM) processes, Safety Assurance (SA) processes, safety communications, and SMS training. Records of outputs for SRM processes must be maintained for as long as the controls remain relevant to the organization’s operation per 14 CFR § 5.97(a). Outputs of SA processes must be maintained for 5 years per 14 CFR § 5.97(b). Training records must be kept for as long as the individual is employed by the organization in accordance with 14 CFR § 5.97(c), and all SMS communication records under 14 CFR § 5.93 must be kept for 24 consecutive calendar months as required in 14 CFR § 5.97(d).

3) Additionally, SMS records also include reports, analyses, and directed studies, based in whole or in part on reports, data, or other information related to the development and implementation of an SMS. The definition of SMS records also applies to those records, reports, data, and information related to the development and implementation of an SMS under the provisions of the FAA SMSVP.

B. SMS Recordkeeping Systems.

1) Aviation organizations may choose to develop and implement a recordkeeping system for SMS records, data, reports, or information that is appropriate for the size, scope, and complexity of their operation. Organizations may utilize and adapt existing recordkeeping systems and do not need to develop standalone or separate recordkeeping systems for SMS records. However, in the case of electronic recordkeeping systems, inclusions of SMS-related manuals or documentation and SMS records may require FAA review and approval to amend operations specification (OpSpec) A025 authorizations.

2) Organizations may establish sophisticated electronic recordkeeping systems to house, maintain, and safeguard proprietary business records as well as SMS data, reports, and information, and may use this technology to provide the FAA remote electronic viewing access to inspect SMS records through a restricted/secure electronic process. FAA inspectors may utilize such access permissions to inspect, view, or verify SMS data, records, and information in the performance of their oversight activities. In accordance with 14 CFR § 5.7(d), any person required to develop and implement an SMS under this section must make available to the Administrator, upon request, all necessary information and data that demonstrates that the person has an SMS that meets the requirements set forth in this part. Under 14 CFR § 119.59(e), failure by any CH to make available to the Administrator any required record, document, or report is grounds for suspension of all or any part of the CH's certificate and OpSpecs.

NOTE: FAA inspectors may not sign any nondisclosure agreement (NDA) or similar agreement required by an organization as a condition for accessing or viewing an organization's SMS data, reports, and information. Signed NDAs or similar agreements impact the FAA's ability to obtain records from organizations to document the FAA's oversight activities.

C. SMS Data Sharing and Data Protection. The FAA has consistently promoted the open exchange of safety information between the FAA and the aviation industry with the goal of continuously improving aviation safety.

1) Title 49 of the United States Code (49 U.S.C.) § 44735 offers statutory protection from disclosure under the Freedom of Information Act (FOIA), pursuant to 5 U.S.C. § 552(b)(3)(B), for reports, data, or other information that is submitted to the FAA voluntarily and that is not required to be submitted to the Administrator under any other provision of law; or reports, data, and other information that is submitted for any purpose relating to the development and implementation of an SMS, including a system required by regulation.

2) Title 49 U.S.C. § 44735(b)(4) extends the limitation on disclosure to "reports, data, or other information produced or collected for purposes of developing and implementing a safety management system acceptable to the Administrator."

3) Title 49 U.S.C. § 44735(b)(5) also extends the limitation on disclosure to "reports, analyses, and directed studies, based in whole or in part on reports, data or other information" produced or collected for purposes of developing and implementing an SMS acceptable to the Administrator.

4) The Legal Interpretation to John S. Duncan (Jul. 11, 2018), and known in colloquial terms as the “Duncan Memo,” interpreted the terms “developing and implementing” as unambiguous, stating in part that “developing” an SMS means to create an SMS framework, while “implementing” an SMS means putting the SMS into effect and use. The Office of the Chief Counsel, Regulations Division (AGC-200) stated, “Based on the statutory authority delegated to the FAA through § 44735(b)(4), the FAA should protect from disclosure any SMS-related data produced or collected for purposes of—or as a result of—the ongoing development and implementation of SMS, as long as it is voluntarily submitted to the FAA and is not required to be submitted to the Administrator under any other provision of law.”

D. Submitted SMS Data, Records, or Information.

1) Access to SMS data provides significant insight and support to the FAA to ensure an organization properly identifies and controls its operational risks, while also providing a high level of supporting information when evaluating specific organization requests for acceptance or approval. Inspectors are asked to continuously inspect and test the organization’s programmatic processes and procedures while also ensuring regulatory compliance with 14 CFR part 5 requirements and the continued effectiveness of risk controls.

2) However, while it is highly desirable to routinely access and incorporate an organization’s SMS data into FAA oversight activities, FAA possession of an organization’s SMS data does not automatically exempt it from public disclosure. The FAA is obligated to ensure all appropriate legal requirements are met when determining whether specific SMS records can be protected from disclosure. Specifically, the FAA should not exempt SMS data from protection under 49 U.S.C. § 44735 unless the following criteria are met:

a) It is voluntarily provided to the FAA, and it is not required to be submitted to the FAA under any other provision of law; or

b) It consists of SMS information produced in the ongoing development and implementation of the organization’s SMS. This includes:

- SMS information requested by the FAA as part of routine surveillance, testing, and certifications.
- SMS information provided by a service provider to support requests of approval, acceptance, or authorization as part of doing business with the government.
- SMS information of service providers participating in the FAA’s SMSVP.
- Required summary reporting related to a service provider’s confidential reporting system.

3) The circumstances will vary and protection under 49 U.S.C. § 44735(a)(3) will depend on whether the information “is submitted for any purpose relating to the development and implementation of a safety management system, including a system required by regulation.”

a) Example 1. Title 49 U.S.C. § 44735(a)(3) likely does not apply: The FAA is investigating a 14 CFR part 121 air carrier for maintenance violations. The FAA requests the air

carrier to provide maintenance records. The air carrier does so and claims that the maintenance records are part of the SMS. The records are for the purpose of tracking maintenance on the aircraft and not for developing and implementing an SMS. Therefore, these records are not protected under 49 U.S.C. § 44735(a)(3). The Aviation Litigation Division (AGC-300) has noted that, in its view, maintenance records are not SMS records.

b) Example 2. Title 49 U.S.C. § 44735(a)(3) likely applies: The FAA is investigating a 14 CFR part 121 air carrier for 14 CFR part 5 SMS training documentation violations. The FAA requests the air carrier to provide its SMS training records. The records are likely for the purpose of developing and implementing an SMS. Therefore, these records are protected from disclosure under 49 U.S.C. § 44735(a)(3); however, they can still be used for enforcement purposes.

E. FAA Handling and Disposition of an Aviation Organization's SMS Records. The FAA may at any time inspect SMS records as part of its routine surveillance and regulatory oversight activities. FAA inspectors must exercise prudent care and good judgment when accessing, viewing, inspecting, or examining SMS records, regardless of location or method of access. When such documents are brought into FAA possession, they must be maintained in accordance with established document control procedures and recordkeeping requirements.

1) The FAA creates records that provide adequate and proper documentation and evidence of the FAA's activities.

a) Records include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the U.S. Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the U.S. Government, or because of the informational value of the data in them (44 U.S.C. § 3301). Refer to FAA Order 1350.14, Records Management.

b) The FAA receives a record when it takes into possession an organization's SMS records, data, reports, or information, regardless of whether it was made accessible under a request by the FAA, submitted to the FAA voluntarily, or required by regulation or statute.

c) The FAA may encourage organizations with a required SMS or participants in the FAA's SMSVP to appropriately label their SMS records readily accessible or voluntarily submitted to the FAA as exempt for public disclosure under 49 U.S.C. § 44735(b)(4). See subparagraph 4) below for FAA SMS records labeling guidelines.

2) FAA inspectors or personnel with access to an organization's SMS records must ensure the organization is notified when the organization's SMS records are brought into the possession of the FAA by any means, such as copying, printing, photographing, or screenshotting. Notification of the organization is accomplished by established customary means of communication between the organization and the FAA office.

3) The organization's SMS records, data, reports, or information brought into FAA possession must be processed in accordance with Department of Transportation (DOT)

Order 1351.28, Records Management, and FAA Order 1350.14, and retained in accordance with the responsible SA office's master records list. FAA offices and personnel may utilize the FAA Records Program Job Aid, which is designed to aid FAA personnel in determining whether an item in FAA possession is a record for recordkeeping purposes. The FAA Records Program Job Aid is not an appropriate tool for determining if a document is a record for FOIA purposes.

4) FAA offices must ensure all organization SMS records, data, and information brought into possession of the FAA are appropriately classified, labeled/marked, and processed. SMS records that meet the protection requirements should be labeled, "Protected under 49 U.S.C. § 44735," as part of the agency's recordkeeping agreements.

5) FAA offices with specific questions regarding the proper classification of SMS records, data, reports, or information should contact the Information, Data, and Technology Division (AGC-400) for legal guidance.

17-1-3-3 through 17-1-3-17 RESERVED.