Responses by Mike Johns (with input from USDA OGC and others) to questions posed for the SAIT Course, 2008:

Note: For some difinitive answers the appropriate agency official should submit these questions to USDA OGC and DOI Office of the Solicitor. The information provided here is not intended to be legal advice or to cover any specific situation or investigation.

1. What degree of confidentiality can we give witnesses during accident investigation interviews?

There is no specific authority that I can find for an SAIT to advise a witness that information will be kept confidential (other than some statutorily protected information such as proprietary commercial information - largely irrelevant). SAIT is a multi agency entity so one has to consider policies of each agency. Current policy guidance in DOI Manual 485, Chapter 7 "Incident/Accident Reporting/Serious Accident Investigation" (1999) provides for sharing information obtained in the investigation including the following excerpts:

> 4) Ensure that the OSHA Area Office nearest to the serious accident is offered the opportunity to participate in the investigation. It may choose to conduct a separate investigation of the accident. If so, all factual information and evidence will be made available to its investigators, as requested, and without formal processes.
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> Note: Upon completion of the bureau investigation and report, the same OSHA Office, at its request, will be provided with appropriate information, as identified in 29 CFR 1960.29(d).

The cited regulation provides:

> (c) Any information or evidence uncovered during accident investigations which would be of benefit in developing a new OSHA standard or in modifying or revoking an existing standard should be promptly transmitted to the Secretary.
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> (d) The investigative report of the accident shall include appropriate documentation on date, time, location, description of operations, description of accident, photographs, interviews of employees and witnesses, measurements, and other pertinent information. A copy of the investigative report required by this section shall be forwarded to the official in charge of the workplace, the appropriate safety and health committee, and the exclusive employee representative, if any. The investigative report shall be made available to the Secretary or his authorized representative on request.

The Forest Service appears to be moving away from the concept of a joint accident investigation with OSHA in fire cases because the OSHA investigation is "regulatory" in nature. See attached USFS Fire Operations Risk Management Information Briefing Paper, October 28, 2008.

The DOI Manual goes on to state the following which includes a reference to possible confidential statements but I could not find authority for a confidentiality agreement:

> H. If evidence of criminal activity other than negligence, dereliction of duties, disobedience of a directive, or possible third-party liability is discovered, the SAIT or TI should discontinue the investigation and notify the Federal Bureau of Investigation and local law enforcement authorities, Office of the Inspector General (OIG) and the bureau DASHO immediately. If the evidence is based on confidential witness statements, the SAIT or TI should not disclose the individual statements, but provide a list of all witnesses to the law enforcement authorities and/or OIG.

Regardless of a promise of confidentiality, OSHA, the OIG and DOJ can reach witness statements by subpoena or authorized investigative demand. Local prosecutors and private litigants can probably also reach these statements with a court order.

In sum, current policy does not appear to support any promise of confidentiality by a SAIT. Note that the Forest Service Accident Prevention Analysis alternative involves an "agreement" between the APA Team and the Agency Administrator that information will not be used in administrative actions against employees, and written witness statements are not obtained. Nonetheless, the information is ultimately obtainable via the same compulsory legal processes applicable to an SAIT, and the duty to report information about fraud, waste, abuse or gross mismanagement trumps any promise of confidentiality.

2. Can agencies compel a witness to provide verbal or written statements for the purposes of accident investigations? If so, how should this process be managed, and who outside of the SAIT, if anyone, should be involved?

Short answer: Agencies can compel their own employees to do so - the employing agency (rather than the SAIT) should do so - but compelled testimony has legal implications and need approval by agency counsel and/or DOJ before being compelled.

USDA OGC noted:

> A. USDA employees are required to cooperate with investigations related to official matters. Failure to cooperate may constitute a basis for disciplinary action up to and including removal. See the Employee Rights and Responsibilities in Administrative Investigative Interviews and DR 4070 attached.
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> B. The FS has also provided in some cases a Kalkines Warning to employees. However, the agency should work closely with the AUSA office prior to granting the warning. See the Curry v. USDA MSPB case attached.

DOI has a manual provision on this subject, DM 452, Chapter 3 "Witness Immunity Procedures" which requires approvals within the Department, the Solicitor's Office and DOJ (copy attached).

3. What actions should serious accident investigation teams take if an employee refuses to cooperate and/or withhold evidence during an accident investigation? Some agencies have policy stating that disciplinary action can be taken in these circumstances…if employee is informed of this potential, is it considered "compelling" them?

If an employee refuses to cooperate in an investigation, the employing agency can consider compelling cooperation (see above caveats). While the SAIT has delegated authority from the agency(s) to conduct interviews, it would be best to have the employing agency do any compelling. All agencies can take disciplinary action if an employee of that agency refuses to cooperate. If the refusal to cooperate is grounded in a claim against self incrimination, compelling the cooperation can result in "use immunity" - which means the compelled information cannot be used in a criminal investigation or prosecution. The information can still be used in an administrative proceeding/failure to cooperate after a grant of immunity can be grounds for discipline including removal. Because compulsion can result in use immunity it should be pre-approved by the employing agency, agency counsel and DOJ.

Informing an employee of the potential for discipline for non cooperation is problematic - unless recorded, the employee may claim that disciplinary action was threatened. Explanation of rights is a complex problem - a desire not to cooperate is no defense to discipline /assertion of a right not to incriminate one's self must be grounded in good faith and people may differ whether there is an objective good faith basis to assert the 5th . It is probably better to let them refuse, and go get the authority to compel them on the grounds there is no good faith basis for incrimination concern, or with use immunity authority.

The SAI process assumes there is no criminal investigation, so the appropriate warning is that used by the OIG in a civil investigation - with no immunity intended or granted:

> "Before I ask you any questions, or request a statement, you must understand your rights, which are:
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> You have a right to remain silent if your answers may tend to incriminate you.
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> Anything you say may be used as evidence both in an administrative proceeding or any future criminal proceeding involving you.
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> If you refuse to answer the questions posed to you on the ground that the answers may tend to incriminate you, you cannot be dismissed solely for remaining silent. However, your silence can be construed in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case."

Where there **is** an explicit threat of discipline for failure to cooperate, the situation can become complex and can vary among the Circuit Courts. For example, in *Sher v. Department of Veterans Affairs,* 488 F.3d 489 (1st Cir. 2007), an employee had been given a letter from the

U.S. Attorney declining prosecution for certain acts but not others. The employee was represented by counsel and declined to cooperate unless the declination letter was clarified. The agency terminated the employee without giving the employee a chance to clarify the scope of immunity. Two of the judges ruled that the employee was sufficiently immunized by the threat of termination (compulsion) so that he could be terminated regardless of the limited declination by the U.S. Attorney. In other words, the compulsion alone immunized the testimony regardless of any letter from the U.S. Attorney, so refusing to cooperate justified termination. The dissenting judge believed that the employee still had an objectively reasonable concern that his statements could still be used against him because the letter from the U.S. Attorney did not cover all the acts of the employee at issue. The dissenting judge also believed that the employee should have been given time to get clarification of the scope of immunity. The dissenting judge also explained that this complex area of the law is applied differently among the circuit courts, so the outcome of a refusal to **immediately** cooperate in an investigation can depend on the specific facts, as well as the specific location the employee is in the country:

> "Given the complexity of this area of the law, it is not surprising that the circuits are split as to whether a government employer is required to advise an employee of his rights and obligations before he can be disciplined for maintaining his silence. As I read the cases, three circuits-the Fifth, Eighth, and Eleventh-have arguably held that the government employer does not have a disclosure obligation. See *Hill v. Johnson*, 160 F.3d 469, 471-72 (8th Cir.1998) ("[T]he mere failure affirmatively to offer immunity is not an impermissible attempt to compel a waiver of immunity."); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir.1985) ("We fail ... to see how the city's failure to offer the plaintiffs use immunity could make any constitutional difference.... [A]ny grant of use immunity to the plaintiffs would have been duplicative."); *Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir.1982), cert. denied,459 U.S. 1206, 103 S.Ct. 1194, 75 L.Ed.2d 439 (1983) ("Failure to tender immunity was simply not the equivalent of an impermissible compelled waiver of immunity."). However, even among these circuits, the answer at least in the Fifth and Eleventh circuits is not wholly clear." (footnote omitted)

Bottom line - get agency counsel/DOJ approval before compelling cooperation.

4. We recommend in the course that most field notes and draft copies of reports (or portions of reports e.g., working documents) be disposed of. They are used during the deliberative process to identify findings and causes that often evolve throughout the process. Do you support this recommendation from a legal perspective?

Information obtained by or created by an agency is subject to statutory control. If the information is a "record" it cannot be destroyed except in accordance with schedules approved by the agency and the National Archives and Records Administration (NARA) (fiscal records have additional requirements). If the information is "non-record" material, it can be destroyed. Some "non-record" material, like an information copy, can be converted to a "record" if it is used in a way which would shed light on agency operations, decisions, etc. - such as by circulating it and getting comments or causing some action to be taken - in which case it should be retained. A copy of excerpts from FSH 6209.11 with underlining is attached for further explanation.

USDA DR 3080-001 "Records Management" explains:

> Nonrecord materials are not generally included on records schedules because 44 U.S.C. Chapter 33 does not cover their disposal. Officials should dispose of nonrecord materials as soon as they have served their purpose and are no longer needed. **The agency, service, or staff office Records Officer should be contacted for advice if there is any question whether particular documentary materials are record or nonrecord materials.**
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> The responsibility to determine what documentary materials in the Department constitute records, as defined by 44 U.S.C. 3301, rests with the Secretary of Agriculture. **Offices may ask for an initial determination from the Departmental Records Officer, in consultation with the Office of the General Counsel.**
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> **Nonrecord Materials**. Federally owned informational materials that do not meet the statutory definition of records (44 U.S.C. 3301) or that has been excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit. May include:
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> · Reading file copies of correspondence.
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> · Tickler, follow-up, or suspense copies of correspondence.
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> · Identical duplicate copies of all documents maintained in the same file.
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> · Extra copies of printed or processed materials, official copies of which have been retained for record purposes.
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> · Superseded manuals and other directives maintained outside the office that is

responsible for retaining them.

· Materials documenting such peripheral activities of agencies as employee welfare activities and charitable fund drives.

· Routing slips.

· **Working papers**.

· **Drafts of reports and correspondence**.

· Transmittal sheets.

· Blank forms.

· Transcribed stenographic materials.

· Processed or published materials that are received from other activities or offices and that require no action and are not required for any kind of documentation (the originating office or activity is required to maintain record copies).

· Catalogs, trade journals, and other publications or papers that are received from Government agencies, commercial firms, or private institutions and that require no action and are not part of a case upon which action is taken.

· Correspondence and other records of short term value that, after action has been completed, have neither evidentiary nor informational value, such as requests for publications and communications on hotel reservations.

· Reproduction materials, such as stencils, hectograph masters, and offset plates.

· Information copies of correspondence and other papers on which no documented administrative action is taken.

· Physical exhibits, artifacts, and material objects lacking documentary values.

Working drafts of an accident report kept within an SAIT would, therefore, probably not be a "record". The 2005 FS Accident Investigation Guide, page 69, directs that after an Accident Review Board, the chairperson must collect and destroy all copies of the draft accident report - consistent with the view that drafts are not "records".

Regarding "field notes", it may depend on what the notes are about - if the notes record factual information or contain calculations and/or analysis they are probably "records" within the meaning of the statute, and the Forest Service retention schedule for accident reports in FSH 6209.11, 41 includes retaining "investigator's notes" and "analysis":

Schedule for retention (WO and RO 5 years after case closes and SO 3 years):

6730 Accident Reporting and `Investigation (N1-95-88-2) 5 5 5 3 3

1 Accident Investigations (Case folders. Includes **investigator's notes**, accident brief, **analysis**, appendix material, description of the investigation, and related correspondence.) (Correspondence and operating guides for using national and Chief and Staff data base systems.) (N1-95-88-2) 5 5 5 3 3

http://www.fs.fed.us/im/directives/fsh/6209.11/6209.11,41-part_09.txt

On the other hand, if "field notes" are just "working papers" as described above they may not be "records" subject to the schedule. I would recommend keeping separate any factual or analytical notes from any notes involving personal thoughts, drafting the report, etc. Your own agency records officials are the final authority on the issue.

5. How can/does internal agency accident investigation reports end up in court? Can these reports/or portions of the reports be protected (e.g., Management Evaluation Report) from being used for legal purposes?

Accident reports are not currently privileged by any laws (unlike certain military investigations). Current rules of procedure in litigation would require the Government to disclose the report as a matter of course if relevant to the litigation. Whether the report actually gets submitted to the judge or jury as evidence depends on whether the probative value exceeds possible prejudice, whether a part of the report contains an admission against interest, etc.

The various manuals suggest that the Management Evaluation Report is less freely disclosed than the Factual Report. However, the 30 Mile and Cramer Management Evaluation Reports are posted on the Internet. The FS Accident Investigation Guide (2005) at page 70 indicates that portions of the Management Evaluation Report may be released under the FOIA. Whether the agency decides to assert privilege for part of the Management Evaluation Report is really up to the agency. Findings and decisions are not privileged, so if the report is written such that a decision to "concur" or "not concur" in a recommendation discloses the very recommendation itself, it may not be practical to avoid disclosure of the recommendation. Bottom line - if the SAI program wants to ensure the privileged nature of the Management Report (or some form of purely deliberative/self evaluative documentation), a formal position should be taken by the involved agencies and an appropriate structure devised to facilitate non-disclosure of deliberative/self-evaluative information.

6. Under what circumstances would a Serious Accident Investigation Team provide evidentiary materials (including witness statements) to a law enforcement investigation?

Absent compelled testimony as discussed above, which must be walled-off from a criminal investigation, there does not appear to be any substantive legal impediment to disclosing information to a criminal law enforcement investigation - but certain approval procedures must be followed. Reporting criminal activity to appropriate people within one's own agency is not a problem. Providing information outside one's own agency implicates the Privacy Act. The Privacy Act has an exception allowing disclosure for civil or criminal law enforcement. The request from a law enforcement agency must be in writing and be from at least a supervisor, and specify what is requested and for what law enforcement purpose. What qualifies as "civil law enforcement" is a legal question. A disciplinary action probably does not qualify - an action to revoke a license probably does. The Privacy Act is a complex statute so any disclosure should be done with the advice of agency counsel. In addition to the Privacy Act, agencies have regulations (called Touhy regulations) prohibiting disclosure of agency information without prior approval from the appropriate authorizing official. That official varies with each agency per its own regulations. Therefore, agency counsel should advise the SAIT before **any** disclosures are made, to ensure compliance with both the Privacy Act and the Touhy regulations. This includes responding to subpoenas, and time to move to quash a subpoena can be short - so immediate notice to agency counsel should be given if a subpoena is received.

7. Under what circumstances would a Serious Accident Investigation Team provide evidentiary materials (including witness statements) to an administrative investigation (e.g. disciplinary)?

Providing information to appropriate officials within one's own agency is not a disclosure prohibited by the Privacy Act or the Touhy regulations. Compliance with the Privacy Act and the Touhy regulations **is** implicated if information is disclosed outside one's own agency - including where multiple Departments are involved. Disclosures from one Department to another may constitute a "disclosure" within the meaning of the Privacy Act and the Touhy regulations.

Agency counsel would have to be presented with a specific set of facts. For example, a disciplinary investigation may not qualify as a "civil law enforcement" action, so that exception to the Privacy Act may not apply. There are Privacy Act "routine use" exceptions published in the Federal Register by each agency, and they are all different, but with a routine use exception the purpose of the disclosure (e.g. discipline) must be compatible with the purpose for which the information was obtained (safety or accident investigation) and if these purposes are not legally "compatible" the routine use exceptions cannot be applied. Thus, a legal opinion should be obtained before deciding whether to disclose any information. If more than one Department is involved, counsel for both Departments should be consulted.

8. What is the potential liability for Serious Accident Investigation Team members?

By statute, Federal employees enjoy absolute immunity for common law torts committed within the scope of their employment. The scope of employment depends on the law of the state in which the act or omission occurs (and thus it varies). Most states determine scope broadly, because by doing so, the deep pocket employer is subject to liability - providing a viable source of payment of any judgment. Violating typical rules of the employer or disobeying orders, typically will not take someone outside the scope. It is extremely unlikely that an SAIT member would be subject to liability for a common law tort committed in connection with investigating the accident. If the agency and DOJ/U.S. Attorney agree that your own alleged tort was committed within the scope of your employment, the United States of America can be automatically substituted in your place in the litigation. The scope issue could thereafter be challenged but at least the initial step gets you out of the case automatically.

Constitutional torts occur when a federal employee violates a clearly established Constitutional or statutory right. This is unlikely during an SAI because it is not a law enforcement function. However, searching premises without a warrant - even a tent for example - is the sort of thing which could generate a Constitutional tort claim against the employee. Employees have qualified immunity rather than absolute immunity, and can be held liable only if the contours of the right, given the specific factual situation, were sufficiently clear that a reasonable employee should have known they were violating the right. (We won the warrant-less tent search case on the grounds that the need for a warrant to look inside a tent which appeared to be abandoned on public land was not clearly established.) Even if an employee loses a Constitutional tort case, the Government can indemnify the employee and pay the judgment if it decides it is in the interests of the Government to do so. It is extremely unlikely that an SAIT member would be involved in a Constitutional tort and ultimately become liable.

Team members who are not regular Federal employees, such as subject matter experts retained for a single investigation, raise additional issues. Whether their acts or omissions will be covered by the Federal Tort Claims Act, thereby providing absolute immunity, depends on whether they are legally an employee or an independent contractor. The bottom line test is whether the government is supervising and controlling the details of the work. Usually that would be the case, but if the expert is just asked to provide a product and left to his own means on how to do it, the expert may be an independent contractor and subject to liability as any other non-employee. The wording and intent of any written agreement for the work can influence the issue - is it an independent contractor agreement in form and substance or an agreement to work for the Team/Government. Whether Federal Workers Compensation will cover the expert during the SAI is basically the same issue - independent contractor versus employee.