

March 7, 2005

Mr. Mark E. Shere
6831 Mohawk Lane
Indianapolis, IN 46260

Re: Formal Complaint 05-FC-32; Alleged Violation of the Access to Public Records Act by the Indiana Office of Environmental Adjudication

Dear Mr. Shere:

This is in response to your formal complaint alleging that the Indiana Office of Environmental Adjudication (“OEA”) violated the Access to Public Records Act by failing to allow you to inspect a transcript.

BACKGROUND

You represented Hydrotech in a hearing before the Office of Environmental Adjudication. Presiding at the hearing was Chief Environmental Law Judge Mary L. Davidsen. The hearing involved a contested action against the Indiana Department of Environmental Management (“IDEM”). The hearing occurred over two days, October 25 and October 26, 2004. Immediately upon the conclusion of the hearing, the parties engaged in a discussion before Judge Davidsen regarding production of the transcript of the testimony at the hearing. The OEA had engaged a court reporter to take notes of the testimony during the hearing. The following exchange occurred:

JUDGE DAVIDSEN: Okay. Very good. Parties – and I assume the parties are requesting a transcript, or should – well, make arrangement with the court reporter on that; is that correct?

MR. SHERE: I take it that you find specific page references helpful.

JUDGE DAVIDSEN: Indeed, yeah.

MR. SHERE: And is – please educate me on –

JUDGE DAVIDSEN: Sure.

MR. SHERE: -- the point. Do – is there a transcript that is essentially generated and brought to the file here? Can I make use of yours?

JUDGE DAVIDSEN: Well, given the complexity of this, I will check the budget, and if I cannot afford to order it, I will let you know and ask the parties to consider. My – not to relegate you with my woes, but I am still operating under a budget created prior to me taking over those duties, and finding that there was no prior data and basically told, “We’ll let you know if you have a problem,” which I have just enough business experience and education to get – lose sleep over that.

But at any rate, I will let you know if it’s an issue. Otherwise, to me it would be available to be checked out. I appreciate the parties coordinating on that. So we will order it through our office at this point.

Record of proceedings, pages 491 and 492.

On November 29, having learned that the OEA did not have a budget for transcripts and that the transcript would be delayed due to illness of the court reporter, Judge Davidsen wrote a letter to both parties. In the letter, she stated that “Per Ind. Code 4-21.5-3-25(g), I would appreciate each of your clients contributing to the cost of this transcript. Thank you for reviewing this matter with your clients.” On December 17, 2004, the reporter delivered Day One of the transcript to the OEA. The OEA issued a “Notice of Receipt of Partial Transcript” stating that “[t]he court will submit notice to the parties on its receipt of the remaining portion of the transcript, and will release the transcript after payment arrangements are finalized.”

In late December 2004, the remainder of the transcript had been completed and delivered to the OEA. Judge Davidsen called for a status conference because she had not heard from counsel regarding the cost of the transcript. Claiming that you had not requested preparation of the transcript, you requested a copy of the transcript under the Access to Public Records Act, IC 5-14-3. Following the status conference, Judge Davidsen issued an order in which she stated that under IC 4-21.5-3-25(g), the OEA is authorized to charge the reasonable cost for preparing a transcript of an evidentiary hearing. She allocated the cost of \$1,811.12 to each party, for a total to Hydrotech of \$905.56. She further stated that neither party is required to include specific

citation to the record in its Proposed Findings of Fact, and that any public access request for the transcript will be processed as received in accordance with applicable law.

You submitted to OEA a written record request on January 18, 2005 in which you asked to inspect the transcript. In your request, you stated that you had not requested that the transcript be prepared. On January 19, 2005, Judge Davidsen denied your request to inspect the transcript, pending Hydrotech's payment for the preparation of the transcript, citing IC 4-21.5-3-25(g).

Your formal complaint to my office followed, on February 4, 2005. You contend that you did not request preparation of the transcript. You also claim that because the transcript is a public record of a public agency, you or your client may inspect the record as would any other member of the public so requesting.

I sent a copy of your complaint to Judge Davidsen. She responded by letter dated February 28, 2005, a copy of which is attached for your reference. Judge Davidsen contends that you did request the preparation of a transcript, citing the above record of proceedings. Because you and the IDEM counsel requested preparation of the transcript, IC 4-21.5-3-25(g) applies, and you must pay for the cost of preparing the transcript prior to inspecting it, Judge Davidsen contends.

ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, except as provided in section 4 of the APRA. IC 5-14-3-3(a). The OEA is a public agency for purposes of the APRA. IC 5-14-3-2. The issue presented in your complaint is whether the OEA may charge a fee to Hydrotech to cover the cost of preparing the transcript prior to allowing you (on behalf of Hydrotech) to inspect the transcript.

Except as otherwise provided in IC 5-14-3-8, a public agency may not charge any fee under the APRA to inspect a public record. IC 5-14-3-8(a). A state agency may charge a copying fee for its public records. The fee may not exceed the actual cost of copying or \$.10 per copy, whichever is greater. IC 5-14-3-8(c). A public agency may require that the payment for copying costs be made in advance. IC 5-14-3-8(e).

Ind. Code 4-21.5-3-25 governs the conduct of a hearing under the Administrative Orders and Procedures Act ("AOPA"). IC 4-21.5-3-25(g) states in relevant part:

The agency holding the hearing is not required, at its expense, to prepare a transcript, unless required to do so by law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption.

Notwithstanding IC 5-14-3-8, an agency may charge a person who requests that an agency provide a transcript (other than for judicial review under IC 4-21.5-5-13) the reasonable costs of preparing the transcript.

You do not contend that the OEA is required by law to prepare a transcript. Rather, you deny that you requested the transcript. The OEA declares that it is not required by law to prepare the transcript. Therefore, the question of whether you have the right to inspect the transcript turns on whether you requested the transcript.

The communication exchange between you and the administrative law judge following the hearing does not allow for easy interpretation. The subsequent orders and letters of the administrative law judge suggest that the OEA was soliciting the parties' contribution to the cost of transcript preparation. Using the precise language of the AOPA, you clearly did not "cause a reporter approved by the agency to prepare a transcript from the agency's record;" rather, the agency ordered the transcript from the reporter. The question of whether the agency ordered the transcript on your (and IDEM's) behalf is a factual issue that this office cannot determine on the record before it, nor may I find facts on what is essentially a disputed issue of fact relating to an oral contract.

Aside from this factual issue, if Hydrotech as a party did not request that the agency prepare a transcript of the testimony, then it is my opinion that IC 4-21.5-3-25(g) would not apply, and the provisions of the APRA do apply. Under the APRA, you would be entitled to inspect the transcript without any charge. IC 5-14-3-8(a). If you did request that the agency prepare the transcript, then there is no question that the copying fee provisions of IC 5-14-3-8 are preempted by IC 4-21.5-3-25(g), and the OEA may charge to you your share of the reasonable costs of preparing the transcript.

However, the issue is less clear where a party who requested that the transcript be prepared seeks the right to only inspect the transcript without paying the expense of transcript preparation. IC 4-21.5-3-25(g) states that *[n]otwithstanding IC 5-14-3-8* an agency may charge a person who requests that an agency provide a transcript the reasonable costs of preparing the transcript. This preemption language does not specify only the copying fee provisions of IC 5-14-3-8. Also, IC 4-21.5-3-25(g) states that an agency may charge a person who requests that an agency *provide* a transcript the reasonable costs of preparing the transcript. Again, the plain language of the AOPA is not limited to an agency providing a copy of the transcript, but would include providing the transcript for the purpose of inspecting it as well.

CONCLUSION

In my opinion, if you (or Hydrotech) requested that the OEA prepare the transcript of the proceeding, the OEA may require that you pay your portion of the reasonable cost of preparing the transcript prior to allowing you to inspect (or have a copy of) the transcript. If you did not request that the agency prepare the transcript, the OEA may not charge you a fee to inspect the transcript, under IC 5-14-3-8(a).

Sincerely,

Karen Davis
Public Access Counselor

cc: Judge Mary L. Davidsen