August 12, 2005

Jean Marie Leisher
Office of the Attorney General
302 West Washington Street
Fifth Floor
Indianapolis, IN 46204

Re: Informal Inquiry Response to the Office of the Attorney General (OAG); Advice Regarding Disclosure of Transcript under the Access to Public Records Act

Dear Ms. Leisher:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you asked for guidance in the treatment of requests of the Attorney General or a state agency for copies of a transcript over which the Office of the Attorney General or the state agency has control or ownership, where the transcript is provided by an outside transcription service or court reporter not employed by the state.

You state: "Oftentimes, our office purchases or is loaned a copy of a transcript. Typically these transcripts are provided by a private transcription service group at a cost (usually rather substantial) per copy. Health Professions Bureau and the Indiana Professional Licensing Agency frequently use transcripts for their board meetings and hearings. It is our understanding that these documents cannot be copied without consent from the transcription service or by purchasing additional copies."

I requested additional information including any contracts or other evidence that the court reporter or service was asserting a copyright in the transcribed notes or recordings. I received a copy of a state contract entered into between the Health Professions Bureau and Accelerated Reporting Agency.

The Access to Public Records Act ("APRA") requires a public agency to allow any person to inspect and copy the public records of any public agency during the agency's regular

business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). The burden is on the public agency to show that it is authorized to withhold a public record. IC 5-14-3-1. "Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency...regardless of form or characteristics. IC 5-14-3-2(m). To begin this analysis, I would question whether every transcript over which the OAG exercises temporary dominion is "filed with, retained, maintained, or received" by the OAG. Hence, I believe there is justification for the OAG to deny a request to inspect and copy a transcript that has been "checked out" of the Clerk's office to prepare an appellate brief, *where no copy is made and maintained by the OAG.*

However, there are many occasions when the OAG <u>will</u> maintain a copy of a transcript in connection with its representation of professional boards, or for purposes of preparing a brief on judicial review, as just two examples. There is no exemption that explicitly applies to these records; no category of excepted records in section 4 applies to transcripts filed with an agency or maintained by an agency, whether created by the agency itself or by an outside reporting service. Also, no exception in section 4 would exempt copyrighted material where the rights under copyright are owned by a third party. Section 4(a)(3) excepts records that are declared confidential by federal law. Yet, the federal copyright law only grants certain exclusive rights to authors of material; it cannot be said to make copyrighted materials "confidential." 17 U.S.C. §106.

Nevertheless, there is authority in federal jurisdictions for the notion that a state agency is subject to liability under the federal copyright laws, making it questionable whether a state agency that is subject to a state public access law may be limited to allowing only inspection of a copyrighted record rather than copying. I need not belabor this opinion with those citations, although I am preparing an informal opinion for another agency where I will recite these authorities. The authorities are not necessary for this opinion, because I have found authority that states that a transcription of testimony lacks the requisite originality of authorship needed to gain common law copyright protection. *Lipman v. Massachusetts, 475 F.2d. 565 (1st Cir. 1973).* Copyright protection applies to "original works of authorship." 17 U.S.C.§102. A transcript is only a verbatim record of another's statements. Since transcription is by definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product. *Lipman at 568.*

I also reviewed the contract between the Health Professions Bureau and Accelerated Reporting Agency. In paragraph X, the contractor agrees that all material developed or produced by the contractor in furtherance of the contract is the property of the State. The contractor shall take such action as is necessary under law to preserve such property rights in and of the State while such property is within the control and/or custody of the contractor. By the contract, the contractor specifically waives and/or releases to the State any cognizable property right of the contractor to copyright, license, patent or otherwise use such material. Also, in paragraph XXV., the materials developed are considered to be a "work for hire." I believe these to be standard contract clauses, applicable to any number of other contracts.

The language in the contract deeming the material developed under the contract to be a "work for hire" would bestow in the <u>State</u>, not the reporter, the right to exclusive rights under

copyright, *if* the material were an "original work of authorship." Because it is not, the contract language is of no consequence to my analysis.

Unless the OAG or a state agency can assert a legal exemption to disclosure of a transcript, it must allow a person to inspect and copy the transcript, for the statutory copying fee.

Please let me know if you have any questions or comments.

Sincerely,

Karen Davis
Public Access Counselor

cc: