

RECORDING AN OPPORTUNITY TO BE HEARD [OTBH]

Purpose

The purpose of this bulletin is to provide guidance on the recording of OTBHs, the obligation to produce recordings and the making of transcripts.

Recordings

Although there is no legal obligation to electronically record oral evidence given at an OTBH, many delegated decision-makers (DDMs) do make audio recordings. The rationale for doing so may vary; however, one key advantage is that once the evidence is captured, the DDM can refer to it later. An electronic recording also eases the burden of taking notes, allowing the DDM to concentrate on the flow of evidence, the witnesses and the overall proceedings. For these reasons, it is recommended that OTBH proceedings be recorded electronically.

The type or format of recording is up to the DDM. Reliability should be the prime consideration. A brief sound check before recording is recommended to ensure that voices will be adequately recorded. It is worth investing in a good quality, reliable microphone and decent recording equipment. Ambient noises from fans, air conditioning and traffic should be considered when positioning the microphone and witnesses.

The DDM should ensure that someone in the room is monitoring the recorder so that proceedings can be paused when the tape or disk space runs out and is being replaced.

During the introductory phase of the OTBH, the DDM should advise the participants of the methods that will be used to record the proceedings. If a person objects to being recorded, the DDM should explain the reason for the recording: to ensure that the evidence is reflected accurately in the determination and to assist with the writing of the determination. A party who threatens not to participate in the OTBH on the grounds that they object to being recorded is free not to participate; however, the DDM need not accede to their request not to record simply on the basis of the party's objection.

The primary considerations are fairness and the ability of the party to present their case. If the party is not hampered in giving their evidence by the recording of it, then there ought to be some other good reason for not recording before granting their request. The DDM controls procedure at the OTBH and recording is an aspect of procedure.

Similarly, a witness (who is not a party) who refuses to provide evidence while being electronically recorded can not be forced to give evidence. The DDM will need to decide whether to proceed with the recording and not hear from the witness or stop the electronic recording and hear the evidence. The main considerations here will be fairness to the party who is subject to the determination (not the witness), and the need to uncover the truth.

If a party wishes to record the proceedings, the DDM can choose to allow it or not. One important factor to consider is the possibility that more than one record of the proceedings will be created: tapes can be skilfully edited, and lower quality recording equipment or inadequately positioned microphones can fail to pick up all voices. Unless a very good reason is provided by a party, it is recommended that parties not be permitted to make their own electronic recordings. If a party is permitted to do so, the DDM and the Ministry can request a copy, however the party is under no obligation to provide one.

In addition to an electronic record, a DDM may choose to record significant points on paper, or have an assistant take notes. Rather than attempting to record the entire proceedings, note taking should concentrate on points that strike the DDM as significant and which do not already appear in the written submissions of the party or Ministry. If using an assistant, the DDM can instruct that person on what to record. The DDM might say something like, "the record will show that witness X said ..." to prompt the note-taker to record the evidence. That provides the witness with an opportunity to correct the record in the event the DDM misinterpreted what was intended to be conveyed by the witness. By making written notes of significant points during the hearing, the DDM's task of sorting through the evidence, finding facts, and writing the determination after the hearing should be simplified.

Although there may not be a legal obligation to provide a copy of the electronic recording to a party, it is recommended that DDMs do so if requested, provided there are no third party privacy concerns. Where these concerns exist, the party should be directed to make an FOI request. The party requesting the recording should pay the reasonable costs of producing it. DDMs are probably under no obligation to provide copies of any notes they made during the OTBH or copies of notes made by their assistant; however, they may choose to do so at their own discretion bearing in mind third party interests. These notes, or portions of them, may or may not be releasable under the provisions of the *Freedom of Information and Privacy Act*.

Transcripts

A transcript is a word-for-word printed reproduction of the record of proceedings. Official transcripts of hearings can be produced by professional outfits from electronic recordings, or by attending the OTBH in person. Courts rely on professionally-made transcripts because the transcribers are independent of the parties and will attest to the accuracy of the transcript. However, these methods tend to be very expensive and, as DDMs have no obligation to make or provide transcripts to anyone, it is recommended that they do not have recordings professionally transcribed.

If a party wishes to have a transcript made from a recording, they are free to have one made at their own expense, provided the DDM gives them a copy of the recording. The DDM and the Ministry can request a copy, however the party is under no obligation to provide one.

If the DDM does make a transcript and a party requests a copy, many of the same considerations apply as with electronic recordings noted above. If the DDM's staff made the transcript, as opposed to using professional stenographers, the DDM should make a party aware of that fact if the party requests and is provided a copy of the transcript.
