

July 17, 2006

Elizabeth Ochs
2793 N. Meridian Road
Huntington, IN 46750

Re: Formal Complaint 06-FC-98; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Huntington County United Economic Development Corporation

Dear Ms. Ochs:

This is in response to your formal complaint alleging that the Huntington County United Economic Development Corporation (“HCUED”) violated the Open Door Law and the Access to Public Records Act by meeting in February 2006 without posting notice, and by refusing to give you a copy of a feasibility study. I find that the HCUED did not violate the Open Door Law or the Access to Public Records Act.

BACKGROUND

You have filed a formal complaint with the Office of the Public Access Counselor to challenge the HCUED’s denial of your request for a feasibility study. You allege that the feasibility study was requested by an “ad hoc committee” and paid for using taxpayer money. Carol Pugh, the Executive Director of HCUED had told you that she would attempt to retrieve a copy of the study, but she was unable to obtain it because it was maintained only by the ad hoc committee. The ad hoc committee called itself the Huntington County Ethanol Study Group, you state. Ms. Pugh told you that the study was commissioned by the Huntington County Ethanol Study Group; as such, it was not Ms. Pugh’s to give out. You also contend that you learned from Ms. Pugh for the first time that there were meetings in February in which there was a power point presentation of the feasibility study. You allege that no notice was posted of this meeting, and no minutes were maintained, in violation of the Open Door Law.

I sent a copy of your complaint to Ms. Pugh of HCUED. I received a response, a copy of which is enclosed for your reference. Ms. Pugh indicated that HCUED is a non-profit

corporation whose stated purpose is to foster cooperation, education and coordination of the public and private sectors, and to promote and encourage retention and expansion of existing business. She provided a list of the current members of the HCUED. The bio-fuels feasibility study was commissioned by a group of farmers and agribusiness people who have formed a committee to consider the feasibility of locating a bio-fuels facility in an industrial area of Huntington County. This group refers to itself as the Huntington County Ethanol Study Committee (Study Committee”), but is not an HCUED committee. Further, the Study Committee requested that the HCUED hold the funds it had gathered and that HCUED use those funds to pay for the feasibility study. This was done, and no HCUED funds were used for the feasibility study. In a telephone conversation with me, Ms. Pugh stated that the HCUED did not receive or maintain the feasibility study.

In addition, Ms. Pugh told me that the meeting to which she had referred in her conversation with you was of the Study Committee, not HCUED. Ms. Pugh attended the meeting and saw the slide presentation, but did not receive or retain any records regarding the feasibility study. You and Ms. Pugh shared with me the names of the individuals on the HCUED, its various committees, and the persons who serve on the Study Committee. It appears that the Study Committee is comprised of 13 members, four of which are on the HCUED’s AgriBusiness/New Ventures Committee, which has twelve members.

ANALYSIS

Access to Public Records Act

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act. Ind. Code 5-14-3-3(a). The HCUED is a non-profit corporation that is subject to audit by the state board of accounts. Therefore, it is a public agency. IC 5-14-3-2(1)(3)(B). “Public record” is any material that is “created, received, retained, maintained, or filed by or with a public agency.” IC 5-14-3-2(m).

Ms. Pugh has denied that the HCUED maintains the feasibility study, and she avers that the feasibility study was not paid for or commissioned by HCUED. Only the Study Committee, which is not affiliated with the HCUED, maintains the record. Ms. Pugh attempted to assist you by obtaining a copy of the feasibility study from the Study Committee, but was not successful.

In my opinion, the study is not a public record because it is not maintained by the HCUED. It was not commissioned by or paid for by the HCUED, according to Ms. Pugh. Therefore, the HCUED did not violate the Access to Public Records Act by not giving you a record it does not maintain. You do not allege that the Study Committee is an instrumentality of the HCUED. Indeed, the common board membership involves only four of the thirteen members of the Study Committee. There is no evidence, outside of some common board membership, that would suggest that the Study Committee is a mere instrumentality of the HCUED. *See Greater Hammond Community Services, Inc. v. Mutka*, 735 N.E. 2d 780 (Ind. 2000).

Open Door Law

Except as provided in section 6.1 of the Open Door Law, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. IC 5-14-1.5-3(a). A committee that is directly appointed by the governing body or its presiding officer, to which authority to take official action upon public business has been delegated, is a governing body under the Open Door Law. IC 5-14-1.5-2(b). You have alleged that the HCUED violated the Open Door Law by failing to post notice of a meeting or meetings in February which you believed must have been held by the HCUED.

The HCUED, a public agency, is required to hold meetings before the public and provide notice for them. IC 5-14-1.5-5(a). However, Ms. Pugh maintains that the HCUED did not hold a meeting in February 2006 for the purpose of receiving information about the feasibility study, nor has it ever held a meeting for such a purpose. Rather, Ms. Pugh attended a meeting of the Study Committee. Also, the Study Committee was not appointed by the HCUED. Taking Ms. Pugh's averments as true, I find that the HCUED did not violate the Open Door Law because it did not meet without posting notice as you allege. The Study Committee is not a committee of the HCUED and hence is not a governing body.

CONCLUSION

For the foregoing reasons, I find that the Huntington County United Economic Development Corporation did not violate the Access to Public Records Act or the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Carol Pugh