

February 27, 2004

Mr. Dewey E. Lewis  
9649 State Road 56  
French Lick, Indiana 47432

*Re: Formal Complaints 04-FC-15, 04-FC-16;  
Alleged Violations of the Open Door Law by the Town of French Lick*

Dear Mr. Lewis:

This is in response to your formal complaints alleging that the Town of French Lick (Town) committed multiple violations of the Indiana Open Door Law (Open Door Law) in the approval of a salary ordinance and in the hiring of a police officer. The Town has submitted a response to your complaints, and that response is enclosed for your reference. I have consolidated these matters for resolution, and for the reasons set forth below, I cannot conclude that the Town violated the Open Door Law.

#### BACKGROUND

##### *Formal Complaint 04-FC-15*

In Formal Complaint 04-FC-15, you allege that the Town violated the Open Door Law by approving the 2004 salary ordinance in an open meeting on December 30, 2003, without discussion and without publishing the ordinance in the media prior to the meeting where it was adopted. You further allege that “council members are going into [the] meeting room 30 to 45 minutes prior to the open meetings, locking the doors, [and] discussing things,” and also that they are staying after the meetings to discuss things. Your complaint does not state any specific date that the alleged conduct occurred.<sup>1</sup>

The Town responds that the salary ordinance was passed in an open meeting as indicated by the minutes of the December 30, 2003, meeting, and that it is not required to “publish” a proposed salary ordinance prior to its adoption. The Town further notes that your complaint fails

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<sup>1</sup> In a prior informal inquiry, you asserted that you arrived for a January 19, 2004, meeting, at 6:15 p.m., and observed council member Barry Winger in the meeting room which was locked and not open to the public. You further asserted that council member Bill Ratliff entered the meeting room at 6:31 p.m., and council member Marlene Noble entered the meeting room at 6:33 p.m. You stated that the doors remained locked and the room was not open to the public until 6:57 p.m.

to allege any facts supporting your claim that the Town Council held an unnoticed private meeting in violation of the Open Door Law.

*Formal Complaint 04-FC-16*

In Formal Complaint 04-FC-16, you allege that the Town hired a new police officer without advertising for applicants for the position, and without holding a properly noticed meeting to interview the applicants either in executive or open session. As evidence to support the latter claim, you note the new officer was hired at the January 5, 2004, meeting, without discussion, and based solely on the recommendation of the police chief. I understand your claim to assert that this evidence suggests that the Town Council met secretly prior to the open meeting to discuss the police chief's recommendation. You further note that the officer was hired in violation of local ordinance because he was not yet 21 years old at the time he was hired.

The Town responds that it was not required to hold an executive session or any other meeting to interview applicants for employment, and that it did not interview or otherwise discuss the successful applicant in any meeting. The Town further asserts that it amended local ordinance to allow for the hiring of a police officer in the year that he or she would turn 21, and that the amendment is consistent with state law. In any event, the Town asserts that the age of the applicant/incumbent does not raise an Open Door Law issue.

ANALYSIS

As an initial matter, I offer a little clean up. Indiana Code 5-14-4-10, sets forth the powers and duties of the Public Access Counselor, and limits those powers and duties to activities related to interpreting and providing guidance on "public access laws." Ind. Code §5-14-4-10. "Public access laws" are defined as the Indiana Open Door Law (IC 5-14-1.5), the Access to Public Records Act (IC 5-14-3), and any other state statute or rule *governing access to public meetings or public records*. IC 5-14-4-3. Whether the Town was required to advertise for applicants for town police officer, or to otherwise post the open position or conduct a search for candidates is outside the scope of public access laws over which I have jurisdiction. So too is whether the Town was required by local ordinance or other law to hire only an applicant who was 21 years old at the time of hiring. These questions are for your private counsel or for other authorities<sup>2</sup> and I offer no opinion about them here.

Neither do I offer any opinion about whether the Town violated any laws relating to its powers and duties with regard to the consideration of town ordinances, and specifically whether the Town violated laws other than public access laws regarding the publication of ordinances. That is to say, a governing body may well meet the requirements of providing notice of its meetings where ordinances are ultimately adopted, while still running afoul of other laws requiring the governing body to take specific actions regarding the publication of those ordinances. The latter question is not a public access question, but rather a substantive issue of

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<sup>2</sup> Some authorities that may have jurisdiction over or resources to assist with labor and employment matters include the State Department of Labor, the State Office of Civil Rights, and the Equal Employment Opportunity Commission, to name a few.

town government, and I defer guidance on that question to your private counsel and a court of competent jurisdiction in any private right of action you may pursue on that point.

There remains, then, the question of whether the Town met on one or more occasions in private and without notice to discuss the salary ordinance, the hiring decision, or any other matter. I cannot find a violation based on the information presented, but I note that your complaints and the Town's response raise an evidentiary dispute that may be resolved in your favor in any private action you might bring pursuant to Indiana Code 5-14-3-9.

The intent and purpose of the Open Door Law is that "the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed." IC 5-14-1.5-1. Toward that end, except under very limited circumstances, all meetings of the governing body of a public agency must be open for the purpose of permitting members of the public to observe and record the meetings. IC 5-14-1.5-3(a). A public agency is therefore required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. IC 5-14-1.5-5(a). This notice must be posted outside the principal office or meeting location, and also provided to any news media that has, by January 1 of any calendar year, provided a written request to receive such notices. IC 5-14-1.5-5(b). The notice requirement applies also to those limited circumstances when a governing body is permitted to meet in executive session; that is, in private. IC 5-14-1.5-5(a).

The salary ordinance and the hiring decision at issue here were both approved in public meetings, and I do not read your complaints to challenge the notice or other public nature of those meetings under these or any other provisions of the Open Door Law. Moreover, no such violation is apparent on the face of your complaint and supporting documents. Rather, as I read your claims, you take issue with the fact that neither matter was discussed prior to being approved by the Town in the Town's final action at those public meetings, giving rise to the suggestion that the Town previously met in secret to discuss and decide those issues. In addition to the lack of discussion on both matters, you offer as further evidence your allegation that you have observed the Town Council members gathering together prior to and after public meetings.

On the latter point, the Open Door Law makes it quite clear that a gathering of a majority of the governing body to take official action on public business is a meeting, and cannot occur absent notice and providing the public with an opportunity to observe and record. A gathering of this sort by a majority of the Town Council would violate the Open Door Law. That said, I do not find that your allegation meets that threshold in this matter. Your formal complaints do not provide any facts to inform the inquiry. Moreover, even addressing the question using the facts you alleged in your earlier informal inquiry, I do not find a violation. First, the January 19, 2004, meeting referenced in that inquiry is not challenged in your formal complaints, and did not relate to the salary ordinance or hiring decision at issue here. Moreover, I am not inclined to make a finding that a meeting as defined by the Open Door Law occurred based solely on evidence that the members of the governing body gathered together as they arrived for a properly noticed meeting. Members of a governing body will necessarily arrive for a meeting within a reasonable time prior to the official start of the meeting. There is no legal or practical

requirement in the Open Door Law that each member be segregated from the others until the moment of the meeting. That said, the governing body cannot be permitted to defeat the Open Door Law by coming early and quickly and quietly discussing Town business before the public arrives. I decline to presume under these limited facts that the members of the Town Council took official action on public business as they gathered together immediately before a public meeting. Other facts may well warrant a different conclusion. Indeed, your suggestion that on at least one occasion the members of the Town Council gathered together in a meeting room closed to the public immediately before and as they arrived for a public meeting raises serious questions about their compliance with the law. While I do not find a violation on this allegation, additional evidence may permit you to prevail in any civil action you might bring against the Town.

Your additional point that the Town Council voted on matters before it without discussion does not itself give rise to a violation of the Open Door Law. There is no requirement in that law that the governing body conduct a discussion of matters before it, nor that it permit public comment on those matters. Neither is it dispositive that the governing body voted on an employment matter without holding an executive session to interview candidates for a position. While a governing body is *permitted* to hold an executive session for this purpose (*see* IC 5-14-1.5-6.1(b)(5)), it is not required to do so and may instead conduct interviews in open session or, subject to the requirements of other laws, not at all. In this case, the Town acknowledges that it did not engage in any competitive review for that position, but rather hired the only person who was recommended by the police chief in the open meeting. That person happened to be the then-current intern for the police department (and is alleged to be related to one of the council members). This is at least a plausible explanation for how and why the Town's vote occurred without interviews or discussion. Like your observations of the council members gathering together before and after the meeting, the lack of discussion on both the salary ordinance and the hiring decision may give rise to a suspicion about whether discussion was actually had at another time and place; however, that suspicion and evidence supporting and contesting it raise an evidentiary or factual dispute for the courts in any civil action you might file pursuant to Indiana Code 5-14-3-9.

#### CONCLUSION

For the reasons set forth above, I find that the Town did not violate the Open Door Law.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Mr. David M. Umpleby