

August 16, 2004

Mr. Moses Giger  
D.O.C. #129717  
P.O. Box 41  
Michigan City, IN 46361-0041

*Re: Formal Complaint #04-FC-115; Allegation of Violation of Access  
to Public Records Act by St. Joseph County Jail*

Dear Mr. Moses:

This is in response to your allegation that the St. Joseph County Jail (Jail) has denied you the record of the physician's report of the x-ray of your left knee performed while you were incarcerated in the Jail in February, 2002. Mr. Peter J. Agostino has responded to your complaint on behalf of the St. Joseph County Jail. I have enclosed it for your reference.

#### BACKGROUND

You have previously requested and received other medical records, including x-ray reports of your hand, performed around the same time as you claim that your left knee was x-rayed. You do not state when you requested your medical records, but the documentation that you sent indicates that Memorial Home Care, Inc., the medical provider for the Jail, responded on June 29, 2004 that it had sent all the medical records that it had regarding the care rendered to you in the St. Joseph County Jail in 2002. In particular, Memorial Home Care, Inc. stated that it did not have a copy of an opinion of your left knee x-ray from any physician or radiologist. Also, Memorial Home Care, Inc. indicated that it did not have a record of what doctor may have performed the reading. The attending physician had passed away, preventing Memorial Home Care, Inc. from investigating further. In his response, Mr. Agostino indicated that the Jail is not the custodian of medical records, and that medical records are maintained solely by Memorial Home Care, Inc.

#### ANALYSIS

Any person is entitled to inspect and copy a public record anytime during the business hours of the public agency. I.C. 5-14-3-3(a). A "public record" means any

writing, paper, report, study, map, photograph, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. 5-14-3-2. A public agency is not required to create a record in response to a request, and it is not required to produce a record it does not have. If an agency does not have a responsive record, it should say so, but its failure to produce a record it does not have and is not required to maintain is not a denial under the APRA.

When you previously complained regarding the Jail's failure to timely produce your medical record, my predecessor Michael Hurst declined to find that the St. Joseph County Jail had violated the Access to Public Records Act. This was because the medical records were in the custody of the Jail's contracted medical provider, and the records were subject to release only with a properly executed release form. *Advisory Opinion of the Public Access Counselor, #04-FC-52*. Having executed a medical release form and received numerous medical records, you are now complaining that the report of the x-ray of your left knee was not provided. If the x-ray of your knee were in the possession of the Jail, or of Memorial Home Care, Inc. on behalf of the Jail, the Jail would be required to produce the x-ray report pursuant to your request for records. However, Memorial Home Care, Inc. and the Jail have indicated that no such x-ray exists in your medical record. It also appears from their response to you of June 29, 2004, that they have not been able to conduct any further investigation into the whereabouts of the x-ray due to the passing of the attending physician.

Given that Memorial Home Care has responded that it does not have the record you request, I find no violation of the Access to Public Records Act by either Memorial Home Care, Inc. or the Jail. There may be other state or federal laws imposing a duty on a medical provider to preserve and maintain a patient's medical record, but I may not issue an advisory opinion on that body of law, and I make no finding regarding whether the Jail or Memorial Home Care, Inc. breached any legal duty to you.

#### CONCLUSION

For the foregoing reasons, I find that the Jail, through Memorial Home Care, Inc. has not violated the Access to Public Records Act when it was unable to find and produce to you the report of your left knee x-ray.

Sincerely,

Karen Davis  
Public Access Counselor

Cc: Mr. Peter J. Agostino