



REVIEW REPORT 026-2020, 136-2020

Dr. Wagner (Provincial Oral Surgery)

January 13, 2021

Summary:

Dr. Wagner received an access to information request from the Applicant regarding their complete dental records. At issue were Dr. Wagner's late response and search efforts. The Commissioner found Dr. Wagner did not respond to the Applicant within the legislated timeframe, and did not conduct an adequate search for records in relation to one item outlined by the Applicant. The Commissioner recommended that Dr. Wagner has established policies and procedures to ensure they prioritize, process and manage access to information requests within the legislated timeframe, including if they grant their lawyer authority to respond to access to information requests. The Commissioner further recommended that Dr. Wagner conduct a search in relation to the one item outlined by the Applicant.

I BACKGROUND

[1] On December 18, 2019, according to confirmation by Canada Post, Dr. Wagner received the following access to information request from the Applicant dated December 17, 2019:

Finally, I would like to formally request a copy of my complete dental records from your office. I would like these records as soon as possible. Please let me know if you require anything else from me to initiate that process.

[2] On January 25, 2020, the Applicant contacted my office because they had not heard from Dr. Wagner regarding their access to information request. On February 11, 2020, my office discussed the matter with Dr. Wagner by telephone to ask if and when they would be responding to the Applicant's access to information request. Dr. Wagner stated the

Applicant would need to make their access to information request through their lawyer, Kevin Mellor. Dr. Wagner added they believed Kevin Mellor had already responded to the Applicant's access to information request.

[3] On February 14, 2020, my office contacted Kevin Mellor to discuss the Applicant's access to information request, who stated the Applicant would be provided the records upon payment of the required fee.

[4] On February 18, 2020, the Applicant confirmed with my office they had not yet received any contact or records from Dr. Wagner or Kevin Mellor, and that they would contact Kevin Mellor and pay the required fee.

[5] On March 16, 2020, my office followed up with the Applicant, who stated they informed Kevin Mellor they would pay the required fee when the records were ready to be picked up. On March 31, 2020, my office informed Kevin Mellor of this and asked them to confirm a pick up date. Kevin Mellor responded they would need to consult with Dr. Wagner on this.

[6] Hearing no response, my office again contacted Kevin Mellor on April 3, 2020, and stated a response was required by April 17, 2020. Between April 22, 2020 and May 11, 2020, my office requested two times, by email, updates from Kevin Mellor regarding the records, but none was provided.

[7] Since there had been no response, on May 14, 2020, the Applicant stated they would be satisfied moving their matter along to a review. On May 19, 2020, my office notified both the Applicant and Dr. Wagner that, due to the length of time it had taken Dr. Wagner to respond, my office would be undertaking a review of Dr. Wagner's lack of response.

[8] On May 21, 2020, the Applicant stated they received records from Dr. Wagner, but that some records appeared to be missing. On May 27, 2020, the Applicant followed up with Dr. Wagner regarding the missing records.

[9] On June 1, 2020, the Applicant stated to my office they also wished to undertake a review of Dr. Wagner's search efforts. On June 3, 2020, my office notified the Applicant and Dr. Wagner that the scope of the review was expanded to include Dr. Wagner's search efforts.

[10] On July 22, 2020, Dr. Wagner provided additional records to the Applicant.

II RECORDS AT ISSUE

[11] Because this matter deals with Dr. Wagner's time to respond to the access to information request and their search efforts, there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Does HIPA apply to this request for access?

[12] *The Health Information Protection Act* (HIPA) applies when three elements are present: 1) there is personal health information; 2) there is a trustee; and 3) the personal health information is in the custody or control of the trustee.

Is there personal health information involved?

[13] Upon review of the records, this matter involves the Applicant's dental records and information regarding their dental health and services received. This is "personal health information" pursuant to subsection 2(m)(i)(ii) and (iv) of HIPA, which provide as follows:

2 In this Act:

...

(m) "personal health information" means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;

(ii) information with respect to any health service provided to the individual;

...
(iv) information that is collected:

(A) in the course of providing health services to the individual; or

(B) incidentally to the provision of health services to the individual; or

[14] I am satisfied that personal health information is involved.

Is there a trustee involved?

Does the trustee have custody and control of the personal health information?

[15] Upon review of Corporate Registry information from Information Services Corporation, I note Dr. Wagner is listed as the sole owner and director of Provincial Oral Surgery. According to the College of Dental Surgeons of Saskatchewan, Dr. Wagner is a licensed dentist in accordance with *The Dental Disciplines Act*. Upon review of Order in Council 280/2019, Schedule M, I note that the Minister of Health has responsibility for *The Dental Disciplines Act*. As such, Dr. Wagner is a trustee pursuant to subsection 2(t)(xii)(A) of HIPA, which provides as follows:

2 In this Act:

...
(t) “**trustee**” means any of the following that have custody or control of personal health information:

...
(xii) a person, other than an employee of a trustee, who is:

(A) a health professional licensed or registered pursuant to an Act for which the minister is responsible; or

[16] To have *custody* means a trustee has physical possession of records with a measure of control over them. *Control* means having authority to manage the records, including storing, restricting and regulating their use. In this matter, Dr. Wagner appears to have custody or control of the Applicant’s dental records. I am satisfied that, for the purposes of HIPA, Dr. Wagner is a trustee, and that the personal health information in question is in their custody or control.

2. Did Dr. Wagner meet the legislated timeline to respond to the access to information request?

[17] Section 32 of HIPA provides an individual with a right of access to their personal health information that is in the custody or control of a trustee. Section 32 of HIPA provides as follows:

32 Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

[18] Subsection 36(1) of HIPA guides how a trustee is to respond to a written access to information request. Subsection 36(1) of HIPA provides as follows:

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

(a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;

(b) by informing the applicant that the information does not exist or cannot be found;

(c) by refusing the written request for access, in whole or in part, and informing the applicant:

(i) of the refusal and the reasons for the refusal; and

(ii) of the applicant's right to request a review of the refusal pursuant to Part VI;

(d) by transferring the written request for access to another trustee if the personal health information is in the custody or control of the other trustee.

[19] Subsection 36(1) of HIPA requires a trustee to respond to an access to information request within 30 days.

[20] In terms of calculating the due date, *The Legislation Act* establishes general rules that govern the interpretation of all statutory instruments in the province. Section 2-

28 of *The Legislation Act* provides guidance on the computation of time and can be applied to the 30-day calculation as follows:

- The first day the access request is received is excluded in the calculation of time;
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday; and
- As HIPA expresses the time in number of days, this is interpreted as 30 calendar days, not business days.

[21] The Applicant made their access to information request to Dr. Wagner on December 17, 2019, which Dr. Wagner appears to have received the next day on December 18, 2019. The 30th day to respond pursuant to subsection 36(1) of HIPA would have been January 18, 2020. I note the Applicant first received records on May 21, 2020, which is 154 days, or well beyond the 30-day legislated timeline to respond. Based on this, I find that Dr. Wagner did not meet the 30-day legislated timeline to respond to the access to information request.

[22] I wish to add that in response to why they did not respond to the Applicant's access to information request within the legislated timeline, Dr. Wagner stated the following:

I did respond to [the Applicant's] request. The delay was mainly due to miscommunication with my lawyer with whom I have severed dealings with in this case. I was also preoccupied with covering emergency care for southern Saskatchewan during the pandemic and this directed all my efforts and focus. This may not be satisfactory to you, but I did my best under the circumstances.

[23] It is understandable the recent pandemic may have caused some delays. Dr. Wagner cannot, however, rely on this as an excuse to delay a response pursuant to subsection 36(1) of HIPA, particularly when lockdown occurred March 20, 2020 in Saskatchewan. Given that the original access to information request was received by Dr. Wagner on December 18, 2019, this left them 92 days to respond to the Applicant. If at any time Dr. Wagner was unsure of the status of the Applicant's access to information request, or if they felt Kevin Mellor had already addressed it, it was incumbent on Dr. Wagner, as the trustee, to follow

up and ensure a response was provided to the Applicant as required pursuant to subsection 36(1) of HIPA.

[24] In this case, Dr. Wagner appears to have treated the Applicant's access to information request as part of a separate legal matter with the Applicant, which was not the correct way to respond. What resulted was back and forth communication between Dr. Wagner and Kevin Mellor, which contributed to the delay in responding to the access to information request. I acknowledge that on occasion a trustee will require legal advice on managing an access to information request, but in most cases a patient is just asking for their medical information. As such, I recommend Dr. Wagner has established policies and procedures for processing access to information requests to ensure they prioritize, process and manage them within the legislated timeframe. Such policies and procedures should include advising patients to contact Dr. Wagner's lawyer if Dr. Wagner has granted their lawyer full authority to act upon an access to information request.

3. Did Dr. Wagner conduct a reasonable search for records?

[25] Sections 12 and 32 of HIPA provide individuals with the right to request access to personal health information in the custody or control of a trustee. These sections provide as follows:

12 In accordance with Part V, an individual has the right to request access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

...

32 Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

[26] When a trustee receives an access to information request, the trustee should conduct an adequate search for records responsive to the request. In a review with my office, trustees must demonstrate they have conducted a reasonable search to locate records. My office's *IPC Guide to The Health Information Protection Act (Guide to HIPA)* at Appendix J, page 193 (December 2016), suggests a trustee build a search strategy by considering some of the following:

- Understand the type of information the applicant seeks and what information is available;
- For what time period the individual seeks the information;
- What types of records might be involved (e.g. paper, digital, photographic, etc.);
- Where the records are located (e.g. in a storage facility, within the unit, managed by off-site information management service provider, etc.);
- How the records are organized (e.g. alphabetically, by year, by function, by subject, etc.); and
- The record retention period.

[27] The preceding list is not exhaustive; there are other search strategies to consider. When a trustee receives an access to information request, they should demonstrate they have taken into consideration which records the Applicant has requested, and the search efforts required to respond to each part of an access to information request, whether they find responsive records exist or not.

[28] As discussed earlier in this Report, Dr. Wagner should have responded to the Applicant by January 18, 2020, but did not do so. Dr. Wagner's obligation was to search for and provide records in their possession or control up to the date they received the access to information request, December 18, 2019. When Dr. Wagner did respond on May 21, 2020, the Applicant questioned their response, which led to my office providing Dr. Wagner with notification on June 3, 2020, advising them that search efforts would be included in the scope of this review. Even after Dr. Wagner provided additional records to the Applicant on July 22, 2020, the Applicant still had concerns regarding the thoroughness of Dr. Wagner's search efforts, and stated in an email to Dr. Wagner on July 30, 2020, as follows:

I am still not satisfied that I have received all of my dental records. Please note the following:

1. While I see a record/note of [name of individual] talking to my dentist's office, I do not see any records/notes of phone calls between you [Dr. Wagner] and my dentist about my dental treatment. In your March 9, 2019 letter to me... I do not, however, see any record of this conversation in the documents you have released to me thus far.

In addition, I am aware of at least one other phone conversation you had with my dentist about my dental treatment, yet I do not see a record of that anywhere either.

2. June 7, 2012 X-RAY: You provided a hard-copy of this X-RAY image in the latest package. You previously provided electronic copies of the other X-RAYs I had done in your office. Is an electronic copy of the June 7, 2012 X-RAY not available?

3. I would like copies of any other records/documents from your office that I am entitled to under HIPA and have not yet received.

[29] With respect the Applicant's second item, which I have quoted in the preceding paragraph, I note this is not a search issue. Dr. Wagner did provide a hard copy of the x-ray in question to the Applicant, which is required by subsection 36(1)(a) of HIPA. As such, I will not consider this item further.

[30] With respect to the Applicant's third item, which I have quoted at paragraph [28] of this Report, I stated in Review Report 159-2019 at paragraph [16] that, "is it the applicant who sets the parameters of the access request, so that the trustee is able to conduct an adequate search for records". There is some onus on an applicant, then, to describe the types of records they believe may additionally exist, and explain their basis for believing so. As the Applicant's third item does not set such parameters, I will not consider this item further.

[31] However, the Applicant's first item, as quoted at paragraph [28] of this Report, is specific in that it requests "record/notes" regarding "phone calls between you and my dentist about my dental treatment". This appears to capture the Applicant's belief that further records in relation to the first item at paragraph [28] exist, for which Dr. Wagner has not accounted in their August 12, 2020 response. This response, in part, is as follows:

We reviewed [Applicant's] chart initially, then I had [name], my receptionist review again and add all materials that were missed. [Receptionist] reviewed the chart and applied it in full to [Applicant]...

If you need access to [Applicant's] chart please feel free to go through the appropriate legal channels to do so. Maybe a legal team can find more information in his chart, but I believe the complete chart is already with [Applicant].

[32] Dr. Wagner's receptionist added the following in a separate email dated August 26, 2020:

[I]n regards to the information that was provided to [Applicant], I can assure you that everything that is in [their] chart was sent to [them]. I printed everything that was in [their] correspondence and notes, including clinic notes, then cross-checked to make sure I had everything...

[33] It appears Dr. Wagner conducted a local search for records, and attempted to retrieve the x-ray in question from storage as stated by Kevin Mellor to my office on May 14, 2020. Regardless, the Applicant still questions the existence of “records/notes of phone calls” between their dentist and Dr. Wagner, as I have quoted from the first item at paragraph [28] of this Report. Dr. Wagner’s description of their search efforts lacks sufficient detail regarding the existence of any such records, such as what their record-keeping practices are (e.g. if records regarding the phone calls in question were kept). As such, I find Dr. Wagner did not conduct a reasonable search for records.

[34] I recommend Dr. Wagner conduct a further search for records in relation to what I have quoted from the first item at paragraph [28] of this Report and, within 30 days of receiving this Report, notify my office and the Applicant of the results of that search and issue a new section 36 letter to the Applicant, taking into consideration any factors at subsection 36(1) of HIPA that may apply.

IV FINDINGS

[35] I find that Dr. Wagner did not meet the 30-day legislated timeline to respond to the access to information request.

[36] I find that Dr. Wagner did not conduct a reasonable search for records.

V RECOMMENDATIONS

[37] I recommend Dr. Wagner has established policies and procedures for processing access to information requests to ensure they prioritize, process and manage them within the legislated timeframe. Such policies and procedures should include advising patients to

contact Dr. Wagner's lawyer if Dr. Wagner has granted their lawyer full authority to act upon an access to information request.

[38] I recommend Dr. Wagner conduct a further search for records in relation to what I have quoted from the first item at paragraph [28] of this Report and, within 30 days of receiving this Report, notify my office and the Applicant of the results of that search and issue a new section 36 letter to the Applicant, taking into consideration any factors at subsection 36(1) of HIPA that may apply.

Dated at Regina, in the Province of Saskatchewan, this 13th day of January, 2021.

Ronald J. Kruzeniski, Q.C.
Office of the Saskatchewan Information and
Privacy Commissioner