

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER H2021-05

May 14, 2021

DR. JOHN DUSHINSKI

Case File Number 008401

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Dr. Dushinski (the Custodian) under the *Health Information Act* (HIA) for a copy of a letter refusing to see her that she believed he had written in April of 2016.

The Custodian did not respond to the access request. The Applicant requested an inquiry.

During the inquiry, the Custodian informed the Applicant that he had never refused to see her, but saw her in June 2016.

The Adjudicator found that the Custodian had not responded to the Applicant in the timeframe required by the HIA. However, as she found that the Custodian had responded to the Applicant during the inquiry, there was nothing further that could be ordered.

Statutes Cited: **AB:** *Health Information Act*, R.S.A. 2000 c. H-5 ss. 12, 80

I. BACKGROUND

[para 1] On September 26, 2016, the Applicant requested access to a record from Dr. Dushinski (the Custodian). She stated:

On several occasions I have requested a copy of a referral refusal response from your office dating back to April 2016 in the form of emails to the Urology Department as well as stating verbally to your receptionist without any success.

The Applicant also attempted to obtain this record from the Rockyview General Hospital. That request is the subject of case file 003926, which is addressed in Order H2021-04.

[para 2] The Applicant did not receive a response to her request from the Custodian. On May 24, 2018, the Applicant requested that the Commissioner review the failure of both custodians to provide the requested record.

[para 3] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

[para 4] The Commissioner agreed to conduct an inquiry and delegated the authority to conduct it to me.

II. ISSUES

ISSUE A: Did the Custodian meet the duty under section 12 of the *Health Information Act* by responding to the access request within 30 days of receiving it?

[para 5] Section 12 of the *Health Information Act* (HIA) states, in part:

12(1) A custodian must make every reasonable effort to respond to a request under section 8(1) within 30 days after receiving the request or within any extended period under section 15.

[para 6] Section 12 of the HIA requires a custodian to respond to an access request within 30 days of receiving it.

[para 7] In her submissions, the Applicant provided a transcript of a telephone call she had with her family physician. In this call, the family physician indicated that he did not have a copy of a refusal letter, but had arranged for the Applicant to be seen by the Custodian. The family physician indicated that when his receptionist contacted the Custodian's office for a copy of the rejection letter the Applicant had requested, the assistant was told, "no, no" -- that the Custodian would see the Applicant. An appointment was then booked.

[para 8] The Custodian did not provide submissions initially. I wrote the Custodian and stated:

I have reviewed the history of the matter and the correspondence sent by this office regarding the inquiry and believe that the notices and issues that were set are not sufficiently clear and were misstated. I have therefore decided to clarify the issues for which you are the respondent.

[The Applicant] made two access requests under the *Health Information Act* (the HIA) for the same record. The record is a letter created by you, refusing a referral from her family physician, [...]. You sent this letter to Dr. [...]. [The Applicant] requested [a] copy of this letter under the HIA from Alberta Health Services. Case file #003926 was opened to address this request.

[The Applicant] also made a request to you for access for your copy of this record under HIA on September 26, 2016. However, she complains that you have not responded to her access request. Case file #008401 was opened to address [the Applicant's] complaint that you have not responded to her access request.

The issue for inquiry was stated as the following:

Did the Custodian responsible for conducting a search for responsive records meet its obligations as required by section 10(a) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Custodian conducted an adequate search for responsive records.

In my view, this issue, as stated, is premature as it refers to a search for responsive records, which does not appear to have been conducted. It is also unclear what is meant by “the Custodian responsible” in the issue.

[The Applicant's] complaint with regard to your handling of her access request, is that she has not received a response to the access request she made to you on September 26, 2016.

Section 7 of the HIA creates a right of access. A patient may request access to health information from a custodian. Under the HIA, as a member of a college, you are a custodian of health information.

Section 12 of the HIA requires a custodian to make reasonable efforts to respond to an access request within 30 days of receiving it. It states, in part:

12(1) A custodian must make every reasonable effort to respond to a request under section 8(1) within 30 days after receiving the request or within any extended period under section 15 [...]

[The Applicant's] complaint is that she has never received a response to her access request from you, in contravention of section 12.

When a custodian fails to respond to an access request, the Commissioner has the authority to direct the custodian to comply with its duty to respond by making an order.

If I were to decide the inquiry today, I would find that [the Applicant] made an access request on September 26, 2016 and that you did not respond to it. I would therefore direct you to comply with your duty under section 12, by responding to the access request. However, as the issues were not stated clearly, it may be that you did not realize you had a case to meet or what it was. As you may have relevant submissions that could change the outcome of the inquiry, I have decided that it is necessary to provide you with additional notice. Accordingly, the issue for inquiry is the following:

Did Dr. Dushinski meet his duty under section 12 of the HIA by responding to the Applicant's access request within 30 days of receiving it?

I ask that you provide any submissions you would like to make regarding this issue no later than **March 17, 2021** and copy [the Applicant] on your submission. You are not precluded from responding to the access request at this time, if you have not already done so.

[para 9] Dr. Dushinski provided the following response:

I have supplied my records to various people over the years regarding this situation. I am not sure how I can provide proof of a letter that does not exist. I did not refuse to see [the Applicant] in 2016. As a matter of fact, she was seen for a cystoscopy in June of that year.

I have previously supplied my office records. I do not see any way that I can prove to you that I do not have a letter that doesn't exist.

[para 10] As this letter did not address the question of whether the Custodian had complied with the terms of section 12 of the HIA, I wrote the Custodian again, stating:

I have reviewed your correspondence of March 4, 2021. Unfortunately, it does not address the question for the inquiry.

As I noted in my letter, the question is whether you responded to [the Applicant's] request for access under the *Health Information Act*. I understand from your correspondence that you do not have the requested record and that the requested record never existed, because you did not refuse to see her and saw her as a patient. However, the present issue is whether you responded to the access request under the HIA; that is, whether you informed [the Applicant] of that fact in a written response.

If you did respond to the access request, please submit a copy of the response to me and to the Applicant. A response to the access request would be a complete answer to the issue for inquiry.

If you have not yet responded to the Applicant's access request of September 26, 2016, I ask that you do so at your earliest convenience.

[para 11] On March 26, 2021, the Custodian wrote to the applicant and responded to the Applicant's access request. He stated:

This letter is in response to a request for a letter from my office regarding an appointment which was refused.

I did not refuse to see [the Applicant] in April of 2016. As a matter of fact, she had a cystoscopy in June of 2016 for hematuria.

I can therefore not provide a letter stating that a referral was refused because that was not the case.

[para 12] I find that the Custodian has now responded to the Applicant's access request, as he has now explained that he cannot produce the requested record because he never created such a record.

[para 13] I acknowledge that the Applicant believes that the Custodian refused the referral and that there was a letter indicating this refusal. Unfortunately, the Applicant has not explained the basis of her belief that the Custodian refused the referral. The transcript of the telephone conversation between the Applicant and the family physician does refer to a refusal, and it is clear from the transcript that the Applicant believed at that time that the referral had been refused and that a letter indicating this had been sent. However, the transcript does not explain the source of her information and simply does not establish that the Custodian (Dr. Dushinski) refused the referral or sent a letter indicating he was refusing it. It appears possible that someone in the Custodian's office, or the family

physician's office, miscommunicated or misunderstood information and communicated this error to the Applicant. This is supported by the transcript, where it indicates that when the family physician's receptionist contacted the Custodian's receptionist for a copy of the refusal the Applicant had requested, the family physician's receptionist was told "no, no", and the applicant was given an appointment.

[para 14] Regardless, the Custodian's evidence that he did not refuse to see the Applicant or write a letter to that effect is uncontradicted. The Applicant did not provide an explanation for the inquiry as to who informed her that the Custodian had refused the referral, or why she believes the source of her understanding is credible. The transcript she provided does not include the basis for her understanding that a refusal had been made.

[para 15] Now that the Custodian has taken the step of responding to the Applicant and explaining why he cannot provide the requested record, I am satisfied that he has responded to the access request in accordance with the HIA. As the Custodian has now responded to the access request, there is nothing further that can be ordered in this inquiry.

III. ORDER

[para 16] I make this Order under section 80 of the Act.

[para 17] I confirm that the Custodian has now met the duty to respond to an applicant who has made an access request, as required by section 12 of the HIA.

Teresa Cunningham
Adjudicator
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