

**HIT Policy Committee  
Privacy & Security Tiger Team  
Transcript  
March 12, 2013**

**Presentation**

**MacKenzie Robertson – Office of the National Coordinator**

Thank you. Good morning everyone. This is MacKenzie Robertson in the Office of the National Coordinator for Health IT. This is a meeting of the HIT Policy Committee's Privacy & Security Tiger Team. This is a public call and there is time for public comment built into the agenda. The call is also being recorded and transcribed, so please make sure you identify yourself for the transcript. I'll now go through roll call. Deven McGraw?

**Deven McGraw, JD, MPH – Center for Democracy & Technology – Director**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Deven. Paul Egerman?

**Paul Egerman – Businessman/Software Entrepreneur**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Paul. Dixie Baker?

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I'm here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Dixie. Neil Calman? Judy Faulkner?

**Judy Faulkner – EPIC Systems – Founder and Chief Executive Officer**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Judy. Leslie Francis? Gayle Harrell? John Houston?

**John Houston, JD – University of Pittsburgh Medical Center**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks John. David McCallie?

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks David. Wes Rishel?

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Wes. Micky Tripathi?

**Micky Tripathi, PhD – Massachusetts eHealth Collaborative – President and Chief Executive Officer**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Micky. Kitt Winter?

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

Here.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Kitt. And are there any ONC staff members on the line?

**Kathryn Marchesini, JD – Office of the National Coordinator**

Kathryn Marchesini.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Kathryn.

**Joy Pritts, JD – Office of the National Coordinator**

Joy Pritts.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks Joy.

**David Holtzman, JD, CIPP/G – Office for Civil Rights**

David Holtzman for OCR.

**MacKenzie Robertson – Office of the National Coordinator**

Thanks David. And with that, I'll turn it back to Paul.

**Paul Egerman – Businessman/Software Entrepreneur**

Great. Thank you very much MacKenzie and good morning, welcome to our Tiger Team conference call. The Tiger Team is part of the HIT Policy Committee and we make recommendations to the Policy Committee on various policy issues. And this morning we are going to continue our discussions of this topic called Query/Response Scenarios for Health Information Exchange. So query/response is where basically one computer asks another computer a question and hopefully gets a response. So we are going to continue that. We have a schedule, as you see on our agenda; we have two meetings before the end of March, to try to wrap this topic up. The two meetings include today's meeting.

We've gone through three questions in our previous meetings, and we're not going to repeat those questions. But we did send out to the Tiger Team members, a PowerPoint presentation in which we tried to summarize what we've done so far in those three questions. And we want to make sure that the members of the Tiger Team are aware that we are asking you to review that PowerPoint presentation and make sure that it accurately reflects what your recollection is of our discussions and to wordsmith any way that you want. But what we want to do in this call is to proceed beyond the three questions that we've already responded to. To again quickly remind everybody of our goals, the first bullet is we're not trying to change the existing rules that are involved with query/response. And in saying that, I also want to make sure we acknowledge that this happens all the time already, it goes with computers and not with computers or physicians call each other and exchange information. We're not trying to change the rules by which that happens. Our goal is to reduce potential or real perceived barriers to that process, instead through computers. And as you see at the very bottom of that first, of that screen, we have three different scenarios that we've mapped out to achieve our goals.

So the very first scenario is a targeted query for direct treatment, it says in parentheses, HIPAA controls. The second scenario is a targeted query for direct treatment, but data covered by a more stringent privacy law or rule, so that could be a state law that provides some additional requirements. And the third scenario is non-targeted. The difference between targeted and non-targeted is targeted is when you know who you're asking the question to and the non-targeted is you don't quite know. So again to briefly review what scenario one is, we have this concept of HIPAA controls and we have these various assumptions. Patient "Z," I guess that's a de-identified patient, patient "Z" is being seen by provider "A," also de-identified provider. Provider "A" somehow has knowledge that patient "Z" has been seen by provider "B." So then, provider "A" queries provider "B" for records, to assist in the process of treatment. So that again is the scenario that we are working on.

Now we've gone through some questions on this already. There's a summary here on existing obligations, which I'm not going to go through, and if Deven wants to, she can go through that.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

No, keep going Paul.

**Paul Egerman – Businessman/Software Entrepreneur**

As I say, we've gone through some questions. There's a question about identity, and again, we've asked you to go through the detail, what's written here, to make sure you think we worded it correctly, but we're not going to do that today. There was a second question about basically what constitutes reasonable reliance of a treatment obligation or treatment relationship, and also who has the legal authority to ask questions. And again, we have words, if you want to, we talked about that in the previous meetings and if you want to respond to that, please send us, Deven and me and email with your responses. And then there was a third question, which was like does it matter if the data holder makes a decision to disclose that is automated. And we answered that yes. Again, if you would like to wordsmith our answers to that, please be sure to let us know.

So where we are going to take up the discussion this morning is after those three questions. And we had questions four, five and six; however, as we talked about these first three questions, there was a new question that was raised, so we called it 3b, this is a question you've not seen before. And I think perhaps the best thing would be for me to pause and see Deven if you would like to take us through, start us on question 3b and if you have any comments.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Okay. Thank you Paul. Again, just reminders to folks, we sent the language out on the previous questions that we had discussed before. If you want to suggest some changes from a wordsmithing perspective, it would be great for us to get them, we're trying to proceed and get as far as we possibly can today, with the additional questions and hence this additional question, quite frankly, that came up in Paul and I's discussions in preparation for these meetings. And that is, again, to what extent does automation, and that meaning sort of the automated response by the machine, to the query, does that at all trigger previous recommendations that we've made on when meaningful choice should be provided to patients. And we included some back-up slides as a reminder about what we had said previously on the triggers for when patients should have some meaningful choice about whether their data is made accessible through such an arrangement. And so we just worked out a straw response here for your consideration, that we thought was arguably consistent with what we've said previously, but that's for us to discuss on this call. And again, we're actually hoping today to get through this question and questions four, five and six, if we can, just as a reminder in terms of our timing.

So what we've sort of teed up for you is again, our previous recommendations were about the data holder, who is the person or entity that the patient customarily trusts, if that data holder still has the ability to make decisions on when to disclose a patient's information, then they of course can choose to automate those decisions. But when they don't have the capability to make decisions any more about whether or not to disclose a patient's record to a requester, then arguably our previous recommendations requiring meaningful choice for the patient will apply. And again, we do have in backup slides, and we can go to them if we need to, the language from our initial recommendations on this, which were endorsed by the Policy Committee. They begin on slides 17 and 18, if we end up needing to go there. What do folks think about this?

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Could you please elaborate on what conditions the data holders would no longer have the capability?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well, so I think one could foresee a circumstance where the data is made automatically available without the opportunity for the data holder to make a decision about that sort of automated capability. And I think it's really for us to discuss about what sort of constitutes the scope of what's a decision. Is it sufficient, for example, that the data holder can frankly agree to automate in sort of a universal fashion, or does that decision have to be capable of being exercised on a per patient basis, in order not to trigger our consent recommendations. I frankly think that's for us to determine, from a policy standpoint.

**Paul Egerman – Businessman/Software Entrepreneur**

And this is Paul again. Basically our previous recommendation on meaningful consent was based on the idea that patients should not be surprised and that if their provider, and I think we meant the provider entity, doesn't have control of the ability to make decisions about whether or not information is disclosed, then that's a situation that requires meaningful consent on the part of the patient, before the record is released. And so, the question becomes, well what about this query/response situation. If there's – you have a system where there's an automated query and there's an automatic response, does that mean that the record holder has control or do they not have control, do our previous recommendations requiring meaningful choice apply.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Yeah, that's what I'm saying, I'm wondering, are we setting up a situation where by definition automated means they don't have control?

**Paul Egerman – Businessman/Software Entrepreneur**

Well, that's the question. I mean, and so, I think that is the question Judy, so the question is though, what do you think?

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

So, are you – this is David – are you and Deven meaning by that decision that you could conceivably have an automated decision-making process, an algorithmic decision-making process. Would that count as a decision or does this imply it has to be a human?

**Paul Egerman – Businessman/Software Entrepreneur**

Your question is the ones that we're asking you to answer.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, so ...

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Okay, okay.

**Paul Egerman – Businessman/Software Entrepreneur**

In other words, is it – if it's fully automated, do you need meaningful choice? If it's semi-automated, what does that mean and do you need meaningful choice.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, can we actually go to slide 18? I'll just ask the folks from Altarum, because when I was flipping through the slides earlier, I ended up locking myself out of Adobe.

**Paul Egerman – Businessman/Software Entrepreneur**

Let me try that for you.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

I don't want to be bounced out again.

**Paul Egerman – Businessman/Software Entrepreneur**

Is this it? Is this it?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

No, the next one.

**Paul Egerman – Businessman/Software Entrepreneur**

Okay.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Me, too.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

This is exactly what we said last time in our recommendations, and these are the examples we provided and that the Policy Committee also endorsed as part of its recommendations to, at the time it was Dr. Blumenthal as the head of ONC in terms of when meaningful choice would apply. And it really was about the ability to control decisions about disclosures or exchanges of identifiable health information. And, the three models were sort of...a model where you actually had an intermed – all of our examples were intermediary-based, we didn't necessarily apply this particular set of recommendations to a scenario where there's not necessarily an intermediary in the middle, and you're sort of talking about a more directed transaction. Nor did we necessarily think about this in the type of query scenario that we're contemplating today.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

I don't think that back when we had that discussion we focused at all on the direct treatment relationship, you know, exemption if you would or say ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Oh no, that's not true David. We actually assumed, in fact, that any such exchanges that would be taking place would be those for meaningful use Stage 1, which is largely treatment and public health. So we presumed exchanges for treatment of the patient, which is direct treatment relationship.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

So then did we, I don't want to go and read it at that old discussion, but, how are our, on our current set of questions, we've discussed that direct treatment is sufficient consent, how could meaningful choice be required on top of that.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well, essentially what we said was, is that we have laws that of course permit a provider to release information for treatment purposes. But we said that there were exchange arrangements being created that were not necessarily, that were different from what patients were accustomed to, that the patient shouldn't be surprised to find what happens to their data, and that the data holders play a very strong role in sort of deciding when and to whom and how much gets disclosed in a non-computer environment, or even in a computer environment without sort of a lot of infrastructure that allows for automation. That in those circumstances, the patient has customarily relied on the doctor to make those decisions and that when that decision-making ability is missing, and we identified three arrangements where it could...where it would be missing, that the patient ought to have some meaningful choice about whether or not their data is accessible in that way.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Well I think that the second of the three – this is Wes – the second of the three bullets gives some evolution in our language, is very close to what we're talking about now and I think therefore we're either modifying or clarifying this slide in our discussion.

**Paul Egerman – Businessman/Software Entrepreneur**

So, this is Paul, so I Wes, you're sort of saying, well, the HIO is sort of operating even in the federated model, is sort of like acting like there's some other decision-making concept in the flow and so if you have any kind of automation of the query/response, even if it's just a computer.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I would say that the language about the HIO is not necessarily what we're talking about now, but we're talking about an arrangement that enables one provider to automatically retrieve data from another provider, unless there are specifically pre-identified circumstances that prevent that, that disallow that. Now we – at the time we were writing this, we had the notion that that transaction was necessarily enabled by this separate organizational entity, the HIO. We haven't talked much about our model on that regard this time, but it seems like there is something that enables some amount of interoperability, we indirectly have HISPs, which are sort of minimal HIOs. So, I really think that this is the heart of what we're talking about now.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

This is Dixie. I kind of disagree with that Wes. I think the difference, in my mind, is that what we see in the second bullet on 18, the decision is made of whether to release it or not, is made by the HIO and the individual provider who's a participant in that HIO may not be aware that that decision is made. And I think that if you wanted to kind of have a similar kind of a, but not exact kind of an arrangement on the previous slide, slide 9, I think that even though the data might be held in an HIO, the provider would still retain the control and the say over when the data ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So yeah, well, we're really, I think, having this discussion about whether automated, whether release untouched by human hands.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Right, but who ...?

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... constitutes control.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Who programs it? Does it ...?

**Judy Faulkner – EPIC Systems – Founder and Chief Executive Officer**

(Indiscernible)

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Is it programmed by the provider or programmed by ...?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, let Dixie finish – right, who programs the decision, right?

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Right.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Is the provider making a decision for a class of patients or a group of patients ...?

**Paul Egerman – Businessman/Software Entrepreneur**

Or a group of providers.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Or a group of providers, or is it a sort of more broad decision where your participation in a sort of network that permits queries, means that you sort of tacitly agree to release under all circumstances. Reliant of course, on the rules of the road, right, as is typically presented in at least the networks that I've seen, where you only get to ask if you have a direct treatment relationship with the patient and there's some accountability attached to falsification of this.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

This is Judy and I'd like to talk about the paper version right now, which is, as I understand it, the request typically goes to the HIM Department, not to the physician anyway.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well yeah, but that's not – the personnel within the institution I think is not the issue that we're focusing on here.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Yeah, I know. So what I'm saying is that, as long as – so what you're talking about, if I understand it correctly, is if we can program it so that the same algorithms that the HIM Department uses is what the system uses, then the question is, does – is that okay, is that the same?

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yeah, that's a good – yeah.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Well, I would ...

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

That was – this is David – that was my question about could this be an algorithm and does that mean, does that equate to decision-making if the algorithm just automates the decision process that exists today. So, I think that is a good question. But I think it matters the context in which the algorithm runs, whether this is the patient saying to the provider, go get my records, of course you need them to take care of me versus some maybe unattended, automatic, checking of records outside of a care context, but ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Okay, just ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well, keep in mind the scenario. The scenario is a care context; the scenario is direct treatment so it is treatment of the patient whose records are being sought.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Are we specifying whether the patient is aware of the records being sought or are we assuming, in this case, that they aren't aware?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

They may be or they may not be.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

But doesn't that make a difference?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well David, I would – why you think it does.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well I agree being aware may not make the difference.

**John Houston, JD – University of Pittsburgh Medical Center**

Can I actually, maybe – this is John Houston – maybe the other point is that adds at least notice of it versus the where.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Yeah, that's kind of where I was – in my mind's eye, sort of saying the patient assumes, because as a part of enrolling for the treatment in the first place, they've given the provider the ability to get the necessary data to take care of them. So they may not be aware that that occurs over a network, but they're not surprised that the doctors looking at their data.

**Paul Egerman – Businessman/Software Entrepreneur**

That's right – Paul.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

... sort of intermediate state of course you're getting my data, I don't know what that means; you're the doctor kind of thing. Where you're not really explicitly giving consent to go fetch over a network, but you assume the doctor's getting the data that he or she needs.

**Paul Egerman – Businessman/Software Entrepreneur**

So this is Paul. So to pick up on what you just said David, and also what Judy said. Think about first how it works in a manual situation where patient goes to say a surgeon for a scheduled appointment. And as the patient is there, the surgeon says, I really would like to look at the most recent lab results, and has that member of the office staff at the surgeon's office, contact the HIM Department or the patient's primary care provider and gets a fax of the most recent lab results.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**  
Right.

**Paul Egerman – Businessman/Software Entrepreneur**

And then brings them in and looks at it. Now that exists probably, that happens all the time and that exists because the surgeon and the primary care group work together a lot, and have relationships and it's a scheduled appointment and the patient may have even been referred. So that's sort of like a manual query/response situation. And if you were to replace that with automation where instead of the HIM Department having to fax the document, that somebody in the surgeon's office is able to inquiry into...do some sort of inquiry and get perhaps a series of lab results on a screen. The question is does that involve meaningful choice. And if I hear what Wes is saying ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I'm backing off Paul.

**Paul Egerman – Businessman/Software Entrepreneur**

... okay. So, if I hear what Dixie is saying, the answer is no. And so, it seems like the place we're coming down is, is the answer is no and the reason is to the extent that providers can determine how the computers respond to various inquiries, that's the way that the provider is exercising.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I'm – this is Wes – I'm not sure whether I'm going to ask a question that's germane or not, because it's about a specific product that's out there now. But, certainly some of the early experiences that have helped stimulate this discussion, have been based on the way care everywhere works and as I understand, if I understood Judy correctly in prior meetings, she has said that there's no discretion about releasing information to other members of care everywhere, except for specifically identified situations in the law, such as emancipated minors and so forth. Is that correct?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

And Judy, you should respond to this in part because I think this was a significant area of discussion in the Information Exchange Hearing, as I recall.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Well our customers have the discretion of how to set it up and they all set it up differently. In fact, I got an email yesterday at noon from a doctor who said, "I have a patient who moved to Chicago, she needs a bladder biopsy at Northwestern, which as you know is on EPIC." She wanted me to look at the records, but I couldn't unless she came to Madison and signed the release. So anyway, the interesting thing is that that's how Northwestern set it up. Everybody can set it up in different ways, different circumstances, different requirements, etcetera, to match what the HIM Department's policy is, because those are people there who have to follow policies as well, and that's what the HIM Department policies would do.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So, when in the past, you've said that – and I guess what you've said is that they cannot make a criterion who they are releasing it to, providing that they're releasing it to another CareAnywhere user...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Well, what we said is, it is the patient's choice. So wherever the patient goes, whether that is – let's assume that we have interoperability across the country with most of the vendors in it. What we're saying is, don't pick and choose your vendors, the patient should pick and choose what facility the patient goes to. And then just like that physician or organization can call up the original site so automation should be allowed to call up that site, too. That's the ... thing.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So just going with what – something we know has been working so far, and considering it is a model for broader interoperability in terms of the participating vendors, what we have now is that if the patient gives explicit at the time consent, or has previously given consent to good old hospital "A," and hospital "A" and hospital "B" are both members of your network in good standing, then hospital "B," and there are no state or other regulations that prevent the release of information, then hospital "B" must release hospital "A," and it must trust hospital "A" to...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

No, no.

**Paul Egerman – Businessman/Software Entrepreneur**

Hold it, hold it, let's not.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

No, that's not accurate.

**Paul Egerman – Businessman/Software Entrepreneur**

I'm just.

**Judy Faulkner – EPIC Systems – Founder and Chief Executive Officer**

And that was the example with the Northwestern situation, where Northwestern has rules where that she needed to sign stuff.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah let's ...

**Paul Egerman – Businessman/Software Entrepreneur**

And I'm also a little bit concerned that we're getting away from.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

We are ...

**Paul Egerman – Businessman/Software Entrepreneur**

... our question. Let's get back to what ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I don't mean to be dragging this to an individual product, if that's your concern.

**Paul Egerman – Businessman/Software Entrepreneur**

My concern is that we're wandering into a few other issues, for example the issue about whether or not disclosure is mandatory. I'd like to narrow the question to make it easier for us to respond.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I thought that was the question.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

But I ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

No it's not, it is not the question. We said from the very beginning on our slides that we are not trying to change the rules that govern that give discretion to providers about disclosure.

**Paul Egerman – Businessman/Software Entrepreneur**

Right. So the issue – yeah, the basic issue is, I think Judy phrased it in an interesting way. If you in effect program your computer system so it matches your HIM policies as to how you would release data manually, do you require meaningful choice? And so that does not say anything about whether or not disclosure is mandatory, because your HIM policies could be that you disclose or you don't disclose or you only disclose to certain people. But if your system has ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Okay, all right.

**Paul Egerman – Businessman/Software Entrepreneur**

... policy like that ....

**Paul Egerman – Businessman/Software Entrepreneur**

Does that mean that you – how does that ...?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

So I would actually argue that we may have gotten it close to right in the straw response and I'll add a little friendly wordsmithing to catch it up to where the conversation has been going ...

**Paul Egerman – Businessman/Software Entrepreneur**

Okay.

**Deven McGraw, JD, MPH – Center for Democracy & Technology – Director**

... which is that the data holder maintains the ability to make decisions on when to disclose the information and they can choose to automate their decision, such as through algorithms that match how their HIM Department customarily responds to record requests.

**Paul Egerman – Businessman/Software Entrepreneur**

Right.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yeah.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

... don't have the capability to make that decision, and maybe that scenario doesn't currently exist in any network. Certainly, the way that Judy has described CareAnywhere or Care Everywhere, I'm not sure which one is right, sorry Judy, and I got such a great presentation on it too. But the fact is that if that decision-making capability, your capability to make some decisions about automation if that wasn't there, then arguably that might trigger the requirements that we had laid out on choice. I mean, it's sort of based on what we've been talking about, it seems like we hit it.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

And I think you're absolutely right on that because there have to be some rules. Each organization is going to have different ways to, has the right to have different ways that they'll agree to release information, that's their right, and there's got to be the ability for the automated system to do it as that organization would do it.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yup.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Okay, so friendly response, friendly addition to the straw response, if the data holder maintains the ability to make decisions on when to disclose the patient's information, they can choose to automate their decisions and the concern about meaningful choice does not apply, however.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

That's fine.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

But, can I – this is David – I think we're coming at this from the wrong side and maybe it's a different question and coming up later in the deck, if so, we'll get to it. But, to me the question is what are the patient's wishes and how should the patient's wishes affect the way these remote systems respond. So for example, if the patient assumes or it's written into the consent for treatment that the physician will request information from appropriate sources and does so, that's an – it's an implicit consent and would expect to respond. That's kind of the easy case that we could automate with an algorithm. But what if the patient says, I don't want you to get data from hospital "B," I don't like the doctors there, they've got the wrong idea about who I am.

**Paul Egerman – Businessman/Software Entrepreneur**

Those are good questions David, but let me try to suggest this. Let's try to get through our sequence of questions and our process, and then let's try to look at our recommendation as a whole and see if we can reflect back on your issue, in terms of is this responding to what patients would reasonably expect to occur. Remember we had this criteria, patients should not be surprised, so let's try to get through our questions and then ...

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

... but meaningful ...

**Paul Egerman – Businessman/Software Entrepreneur**

... ask ourselves is this responsive to that issue or is this – and also is this responsive to something that providers are going to be comfortable with and then ask ourselves, does it work in the real world?

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And I guess, just my concern is not to forget that meaningful choice is a patient issue, not a remote system issue.

**Paul Egerman – Businessman/Software Entrepreneur**

I agree.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, no absolutely. And to be honest, we have some terrific language in our ultimate consent letter that really did talk about patient expectations, transparency about exchange arrangements and we should make sure that we don't lose those threads.

**Paul Egerman – Businessman/Software Entrepreneur**

And, I agree, and it is also important, one since we're trying to like chunk this up into isolated questions, but then when we get all done, we've got to look at it as a whole, not just wordsmith it, look at it as a whole and think through those issues. So, those are good comments, David.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

I think we have a sense of where everybody is on this issue, so are you okay Deven going on to question four?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah. Let's see how far we can get and, that's a good idea.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, because – we have for question four, is a little sort of like, I don't know what the right word is, it's like technical or pragmatic, but basically, what patient identifying information should be presented as part of the query? So, I don't know if you want to take us through this Deven, but ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah. So we sort of, the next bullet says ideally no more than is needed to accurately match, and that's really, I should have labeled that as a straw response, because we have not discussed this question really at all in previous meetings. And then we sort of sketched out some possible additional responses. Again, remember that what we're doing here is trying to reduce uncertainty and potential barriers as part of the query process, to enable providers to be able to respond consistent with their professional and legal obligation. So, starting with sort of basic demographics, there is a question about sort of who does the matching. I mean ultimately it is the data holder who's responsible for releasing the right record, because the failure, if they release the wrong one, they've potentially got a breach. And then there's a question of whether under some models, it's possible for the requester to actually search and match for the right patient, and this is even – and keep in mind, we're still talking about a targeted direct treatment scenario, where you actually know who the provider is that you're requesting. But in this case, there...is there a possibility that the requester might actually be able to search a patient index, for example, within that provider and say, oh, here, this is the patient whose record that I'm look for. And to what extent do those arrangements risk exposing more patient data because the requester could actually potentially see that other patients were on the list, as part of the process of narrowing down and finding the record of the particular patient that the provider is looking for.

So these were some thoughts that Paul and I worked up to start the discussion. Again, these are straw responses. It is the case that the data holder is the one responsible for releasing the right record. Given that, what would we want to say from a policy standpoint about the matching process, beyond what – keep in mind that we do also have a set of recommendations that we've made about improving accuracy in patient matching.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yeah, that's what I was going to suggest is that we go back and pull those forward, so that we're consistent at the very least.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah. No, absolutely.

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

And this is Kitt. I think maybe we should also be including what should be returned if too many patients were matched.

**Judy Faulkner – EPIC Systems – Founder and Chief Executive Officer**

Can I ...?

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

You are saying that the you're not supposed to be responding if the request for more demographic data is insufficient to match, what should then be returned in that notification. And should we be coming up with some kind of standardized matching algorithm.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

This is Judy and I would advise against coming up an algorithm because things change.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

What we have is a variety of different data elements and with recommendations to the customers to how to weigh them, which is typically the way it is done. That the way you do matching is you have a whole lot of different things and you weigh them, and it may be that they're weighed differently in different places. For example, in some places where you have a lot of names from different cultures, they may weigh things differently than they will do in other places.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Right.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

It may be that address is not as important as cell phone at some time in the future, so I think we tie ourselves to something that may get obsolete if we define it too much. And ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, well, and I'll just remind, Judy, I'm sorry to interrupt, but I just want to remind folks that we actually explicitly rejected the notion of sort of coming up with a common matching algorithm that everyone would use ...

**Paul Egerman – Businessman/Software Entrepreneur**

That's right.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

... and instead, went down the road of urging ONC to collect more data on sort of algorithms that create a sort of set of best practices over time, but to recognize that there are different algorithms that are useful in different contexts.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

So when it says start with the basics, I think that's fine, but can we remove saying full name, date of birth, address, unless the basics be whatever it's defined.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

For the algorithm.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

Yes, this is Paul. And that makes sense, because we also said that, when we talked about patient matching, it's like one size does not fit all, which is consistent with what Judy said. There's just – depending on the organization and the population, things can be very different.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

So, this is David. A couple of comments. I mean I think that this slide could be reduced to the tautology of sufficient information should be used to match the patient as accurately as possible, because – which is kind of a meaningless statement, I understand, because it doesn't really help anybody who's trying to make hard decisions. But I don't see how we're going to get to anything other than that, because I would say, just the fundamental wording of this slide is, instead of ideally no more than is needed to accurately match, you could argue that it ought to be no less than is needed for accurately match.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Yes.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Or no loss.

**Paul Egerman – Businessman/Software Entrepreneur**

You know it's hard to get just like exactly right, and challenging as well.

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

And this is Kitt, and I think that it's difficult because there are additional demographics like SSN and gender and telephone, cell numbers, email addresses that I think could be helpful in trying to get those matchings rather than the basic ones that are limited now.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Right, and if you ...

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And you can envision a model where the patient voluntarily offers powerful identifiers like a license or something, to facilitate the matching. You certainly wouldn't want to ignore that if they...if the patient says, please use this and makes it available.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Right.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

The other thing is that the matching process may occur...the demographic process may occur outside of or surrounding the targeted query. It won't necessarily be the responding system that is having to do the demographic match, if the network operates with some form of an MPI present, as many of the networks do. So, maybe this is specifically limited to the use case where the targeted responder is doing the match, but I don't think that's going to be the common case in the future.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well, and we have a non-targeted scenario that we'll have to go through.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Yeah.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

... for this, and it may be that the answers to these questions are not that different, based on the scenarios, but they may be. But for now – this is one of the reasons why we started with this simple scenario, because I think we think we can build on that.

**Judy Faulkner – EPIC Systems – Founder and Chief Executive Officer**

Just as a comment ... oh.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Yeah, I – this is David – I would agree that the same issues will come up regardless of who is doing the match, but it won't always be the targeted responder.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So we agree on start with available demographics, right.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So take away basic and put in available.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Yes, and this is Judy and what we do is we send over about ten different demographics and we look for the match. And then there's nothing more to really request, so we don't need that second bullet there.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Well, here's the thing that I think happens in the paper story that we're not considering here. Patient said they had their gallbladder removed at your hospital about three years ago. Along with demographics, it creates a fair amount of certainty that you have the right record, but it's transmitting personally identifiable health information, because we're always transmitting personal identifiable information, but is that something we want to consider in this inaccuracy, in this statement, in this request.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Again, I'm sort of – this is Deven – I'm leaning towards not being that specific in this recommendation and instead, picking up some of the recommendations that we made previously about improving accuracy in matching, as opposed to stating with certainty that data other than non-demographic data, should or could be used. Because that's probably sort of dependent on the algorithm and the scenario, and that we try not to be specific along those lines.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Right – this is David – I agree. I think that the state of the science of matching is changing rapidly and we'd be unwise to list the elements.

**Paul Egerman – Businessman/Software Entrepreneur**

So it seems like – this is Paul – we've got some agreement that we need to pick-up on our previous recommendations and make some very general statements to start with, you know, a list of available demographics. And we'll put together something, probably go through the same process we're trying to do for the first three questions, to put in front of you and let you wordsmith.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I'm sorry, did we want to list – are you saying we should list the demographic data on lists that should be used.

**Paul Egerman – Businessman/Software Entrepreneur**

No.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Oh, I thought you said that.

**Paul Egerman – Businessman/Software Entrepreneur**

No, no, just said we'll start, just trying to pick up on, I don't know if it was Judy said we should start with available, but we'll, rather than wordsmith it, I think we understand the concept of some, as Deven said, some general concepts and bring forward our previous recommendations.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, and we'll get that out for you guys to take a look at, too.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

This is Dixie, could I make a point here.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I think that from a policy perspective that second bullet is right, no more than accurately needed. And I would also point out that in the Standards Committee side of things, the – I think it's the Nationwide Health Information Network Power Team, but either that or Privacy & Security, has been assigned responsibility to come up with a standard for a patient record locator service for this next year. And I think that once you start specifying exactly what elements should be targeted, then you're getting into the realm of standards for a record locator service, rather than policy.

**Paul Egerman – Businessman/Software Entrepreneur**

I agree. Yeah, so we're not going to go into actual listing of data elements.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Right. And this is Judy, if I could comment on the third bullet. What we do is, you get either one or you get zero, we never send a list.

**Paul Egerman – Businessman/Software Entrepreneur**

That's true. And Judy, this is Paul. I understand that, but I think there are other structures where actually searches are allowed, where ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Well, I don't – here's why we did it that way, and that is because we don't think that the system should come back with names of other patients who have been to that organization, you shouldn't see them. You should only see the patient who there is a very reasonable match for.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

This is David. I would argue that's a judgment call that's not so obvious. That puts more value on the privacy of the patient than it does on the accuracy of the match. And I think from an ethical point of view, you could argue that that's not a clean separation ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well ...

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

... and you could argue that there's a – the matching process doesn't need to expose any clinical information, particularly if the MPI service is disconnected from the facility, it won't know which facility.

**Paul Egerman – Businessman/Software Entrepreneur**

This is Paul. It is a complicated issue because some people would argue that you are exposing information if you simply expose the fact that a patient ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well the reality is you are ...

**Paul Egerman – Businessman/Software Entrepreneur**

... an individual has been a patient ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, no, no, no, no. That is PHI.

**Paul Egerman – Businessman/Software Entrepreneur**

... is not ... exposing information if you expose an address...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

And so what Judy has said is sort of like a good privacy approach, give us – I think what I'm going to ask everyone to do is give Deven and me a chance to wordsmith this a little bit. I do want to take care of the case where – I know of situations where two healthcare organizations, an acute care organization gives an extended care organization access to the records of the patients that have been transferred from the acute care to the extended care, and just give them access to it. And it's very successful, but people have to do searches to do that, and we want to make sure that that kind of stuff is possible also, but ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well, so this may be one, and again, Paul and I will work on this, but we'll also maybe consult our liaison from the Office for Civil Rights, David Holtzman, as we build this. Because there may be scenarios where current breach notification laws already cover accountability with respect to exposing data on patients, even if no clinical data is exposed, that could still be PHI in some circumstances, and it's not a patient for which the two entities are both treating.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

But I do think we need to take into account the harm that can come from a false match and to bend over backwards to prevent revealing patients when you aren't 100 percent certain, which, by the way, you'll never be, introduces a kind of harm. That has to be balanced against the harm that a trusted professional, who's doing these queries in a controlled environment is going to see more patient names than he or she needs to see to get the match right. I mean, that's a sophisticated trade-off of risk that I think is not valid if you say you can only return one person.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I don't see this.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Well David, there's an easy back up for it because if you don't get a match, then you call, and so that's a safe way to do it.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

But, but ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

It isn't that you don't care for the person; it isn't that you don't get the information; it is that you call to confirm.

**John Houston, JD – University of Pittsburgh Medical Center**

Could I – this is John Houston – can I suggest the ... if the match is incorrect and you get the wrong John Smith versus the right John Smith, the likelihood of harm in my mind is quite small. Now if someone went searching for records for their next-door neighbor, I can understand why people would be up in arms, but we're talking about the same exact name and the likelihood that provider's going to say, that's the wrong John Smith, I'm going to get on with my life, because I'm trying to treat the right John Smith. So, it's a very small percentage of a very small percentage that potentially could cause harm.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

It's actually not a small percentage. I mean, that was – the Rand study looked at the numbers if you just limited to demographics, which some systems do, the error rate is quite significant.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

But I really think in this circumstance, the most that we can say, given that the science of matching is still evolving, is to rely on what we have said previously about this, after a day of hearings, and to be, to acknowledge the fact that there is law already in this area with respect to exposing data when you shouldn't be and that those are sort of the two aspects that work in concert to try to sort of balance the rights and obligations here.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Just to be clear, what we're saying is, if there's a high degree of ambiguity between multiple patients that is no match. Okay. And there are manual back-up procedures for, that are available to providers to call and whatever, in that case. It does argue that the response indicate there are multiple high probability candidates rather than it being identical to no match, but what I understand we're being asked to agree to is that the back-up system would be used in lieu of an automated browsing system if there are multiple high matches.

**Paul Egerman – Businessman/Software Entrepreneur**

In a sense that's what people want is they want a – they want to avoid exposing a lot of data.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

But I think even more, they want to avoid having a wrong data attached to their record.

**Paul Egerman – Businessman/Software Entrepreneur**

Sure.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And in the back up...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Well they have all ability to evaluate post – if they're given a record; they have lots of ability to evaluate whether the record is correct.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

That's even – that's fishing then, I mean, so they go back.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

No, it's already met the standards for this is a very high probability match. I suppose we can say, give me one more data element at a time or something, instead of all the data elements, to – but that's awfully complicated.

**Paul Egerman – Businessman/Software Entrepreneur**

Well again, the consensus I'm hearing is, is we want to submit a series of, a reasonable number of demographic data elements and we want to get either a single match or we want to have some sort of interaction.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yes.

**Paul Egerman – Businessman/Software Entrepreneur**

That ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Out-of-band interaction.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

But I don't...I think that is too constraining, too specific.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

... constraining to me, too.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

I mean, so the human interaction is highly more likely to be socially engineered to reveal unintended data than a computer that says you didn't give me sufficient information to narrow this down, and asks a specific question that is as non-revealing as it knows how to be. I mean with the human on the other end of the line, you can say, "is that the patient that had plastic surgery last week," and the clerk will say, "let me check, yeah that's her." I mean ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

... out of its HIM Department.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well again, who's to say who you get on the phone? I just think there are circumstances where that will be an appropriate way to resolve the issue, and there are circumstances when it won't be. And those MPI systems, in the hands of again, a trained user inside the firewalls, operating under constraints, and auditable lookups and the like, can, in fact, match the patient by requesting additional information, or giving you a choice of patients that you can then refine down.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, this is Deven. I think I'm reluctant to sort of prescribe a particular approach to this, and instead, try to lean towards the approach that we used in this issue previously, which is to acknowledge the responsibilities on the part of both sides to be able to achieve the highest level of matching accuracy possible. Using the data points that – but without exposing more data than is needed, but certainly not erring on the side of too few data to get the accurate match. I mean, it's almost as though you have to have policies in place...

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, I agree.

**Deven McGraw, JD, MPH – Center for Democracy & Technology – Director**

...to facilitate matching accuracy, which is what we said from the very beginning.

**Paul Egerman – Businessman/Software Entrepreneur**

This is Paul; it makes sense. Let's give Deven and me a chance to wordsmith something on this and we will run it by you to try to see if we can come up with a ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah, so just to be clear. What we're looking for would not be so constraining as to say there must be a once only dialogue in this identification process ...

**Paul Egerman – Businessman/Software Entrepreneur**

That's correct.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... that would be outside of the scope of this.

**Paul Egerman – Businessman/Software Entrepreneur**

That's correct.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So if some people wanted to implement ...

**Paul Egerman – Businessman/Software Entrepreneur**

Something else, they could.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... a can you tell me whether the patient ever lived at this address or something, then they wouldn't be barred from that interaction pattern by what we're going to say.

**Paul Egerman – Businessman/Software Entrepreneur**

That's right.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

And it shouldn't be prescriptive; I like Deven's approach.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Let's, yeah, we will definitely be running this by you, so we make sure we get it right.

**Paul Egerman – Businessman/Software Entrepreneur**

So we're going to move on now to question number five, because I'm looking at the clock and we have this question and question six we want to try to see if we can make some progress on. And question five says, data holder should respond to queries, it doesn't really have a question mark there, so I guess it seems like ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, the question is what's the response really ...?

**Paul Egerman – Businessman/Software Entrepreneur**

What is the response ...?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

... need more of an answer.

**Paul Egerman – Businessman/Software Entrepreneur**

So I understand this right, the question is, do you have to respond at all?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Right.

**Paul Egerman – Businessman/Software Entrepreneur**

Do you have to – I mean, can you be silent or can you just say, I've got – could it be like an acknowledgement, I got your message, that's all I'm going to tell you though? How should data holders ...?

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Keeping this in the realm of policy, as opposed to the technology that's required.

**Paul Egerman – Businessman/Software Entrepreneur**

That's correct.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... currently to implement ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yup.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Should the data holder as a matter of policy acknowledge at least that it received a query and understood it? And I think they should.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, that's – I mean, that's one of the reasons why that's down as a response, is that we know, again consistent with our goal of not trying to change the law and create mandatory disclosures, we're trying to create an environment where people are encouraged to disclose when they should. And certainly in this scenario, arguing that at least an acknowledgement that you got the query, even if you are making the decision not to respond, not to actually send information, including even whether the patient is or isn't in your, a patient in your organization or facility that at least you're getting a response. I got – that I heard you, I heard the knock at the door, I can't respond or I won't – after that, the response is sort of a policy matter for the data holder to ...

**John Houston, JD – University of Pittsburgh Medical Center**

Can I ask a question, scope-wise, are we saying whether this is a targeted query?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, no we're still in scenario one.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, targeted direct.

**John Houston, JD – University of Pittsburgh Medical Center**

Okay, so that the person making the request has some idea or some thought that that patient was seen at the other provider.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yes.

**John Houston, JD – University of Pittsburgh Medical Center**

Okay.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, good point John.

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

And this is Kitt. Is this how it should potentially be handled if the data holder does have a match, but the medical records are restricted in some way, or the patient has restricted their own medical records?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

That's scenario two.

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

Sorry.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I mean, this feels right as policy to me, but if I had to enunciate why, not as a matter of making sure the technology is working, but as a matter of policy, if I had to – I guess it fixes responsibility on the record data holder to have made a decision as opposed to say, we were never asked.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Right.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Okay, I guess that's good enough.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

This is Dixie. I would add that we should include something that indicates closure, so that the requester doesn't persist in query, query, query, they should ultimately come back with something like, we've searched and we can't produce any record.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

That's much more extensive information than this number five recommends.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

You know what, I think we ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I don't like the second bullet because I think it's too open-ended. If they don't send any records, how do you know whether they finished looking?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Why isn't it just ...?

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Maybe they never started looking for some ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Right, right ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I think the requester should get some indication of whether they're looking or not or whether they've closed the query.

**Paul Egerman – Businessman/Software Entrepreneur**

So what you're – so Dixie, what you're suggesting is it's not just acknowledgement, you want either to send the record or to say, as a statement, "Sorry Charlie, we're not giving you anything."

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Well – I'd close this. I would say both, I would both acknowledge receipt, "Yes, we received your request," and then they could either say we'll get back to you within two weeks or not or – I think there should be a closure, "We have searched and we have nothing," "We cannot respond to your request," or whatever.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So actually, from my point of view, what you're saying is, you think there should be a non-closure response, because I was assuming closure was implicit in the response. So you're saying there should be a response that says we have received your request and we are working on it, to be followed later by data or a response that says, we received your request and we will not reply.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

This is our reply, we rec – yeah. We've closed the case, we've closed the query.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

But you're implying then that there's a response that does not close the case.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, in other words, what I'm hearing from Dixie is there are three responses.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

One response is sort of like acknowledgement and here's the data. The second response is acknowledgement, give me a few minutes or a few days, but I need some time. And the third response is, acknowledgement and you're not going to get anything.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

Might say it more diplomatically than I did, but ...

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

This is David. I think that makes sense in some circumstances, but aren't we drifting into being overly prescriptive, we're turning what could be a synchronous system into an asynchronous system, and ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I'm trying to avoid denial of service attack on a request.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well, and I think denial of service.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

... requesting and requesting and requesting, and when they'll never receive a response. If you know you can't give them a record, fulfill their request, you should let them know that you can't.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well, but ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Well that's what we agree on, what we disagree on is whether you should have a response that says I'm working on it.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And by requiring ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

The first one is just an act, it's a simple "I got it," right? And the second one is either, produce the record or say; I cannot give you what you request ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

But, when ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

... whatever you ...

**Judy Faulkner – EPIC Systems – Founder and Chief Executive Officer**

But Dixie, when it's automated, there's no – the two things, we got it and we're working on it and then here it is, are going to come nanoseconds apart.

**Paul Eggerman – Businessman/Software Entrepreneur**

They should.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Right and that's why I – this is David – I think we're being too prescriptive.

**W**

Okay.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And from the point of view of a denial of service attack, if it's a true attack by requiring a response, you actually open yourself up for an attack, because ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

What do you mean by that David, I don't quite understand an attack?

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

I mean it's not – it's just, does that ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I just means they're going to drive somebody crazy with the request over and over and over again.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Or a bad – I mean, I'm thinking of a malicious attempt to block the response, to block the service. One of the few ways you can combat an attack like that is to just stop responding.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Oh, I don't really think it's literally, I didn't mean literally denial of service attack, but figuratively it's the same thing if you think, you keep on requesting the same ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Right, so let me suggest that instead we frame this in a similar way that the DURSA is framed, which is that yes you are required to respond. And your response can be with the records requested, all or part of the patient's record, again consistent with your, as the data holder, professional and legal obligations regarding when you disclose records. Or you can respond that you're not sending the records, right, but you have to respond.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yeah, that sounds perfect.

**Paul Egerman – Businessman/Software Entrepreneur**

Okay. Great.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

There's one thing that I still think is an interesting thing here. Suppose "A" and "B" are competitors and "A" doesn't like that the patient is going to "B," so whenever "B" queries "A," "A" always says no. Now, that's ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

You know, we ...

**Paul Egerman – Businessman/Software Entrepreneur**

Under this – this is Paul – under this policy that would be allowed.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

That is correct, yes.

**Paul Egerman – Businessman/Software Entrepreneur**

That would be allowed, but that's what you would say. Now if "B" were smart, if they always said no, they would explain the reason why, so they don't get driven nuts by ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Yeah, the reason why is, "We will not respond to you because..."

**Paul Egerman – Businessman/Software Entrepreneur**

We don't like you.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

We don't like you.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

But more typical, we're worried that our patients are going to switch to you and we're not going to share.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

That ...

**M**

Don't we ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

That exists today, absolutely. That exists in the paper-based world. I think we made a decision a long time ago that we didn't have the authority, or the capability to implement a requirement that providers disclose records, and that instead we were going to act on our best impulses and assume that in most cases, that they would and they should. Particularly in a direct treatment relationship context, and try to remove the obstacles that might prevent people from sharing, because they're not sure they got the right provider or they're not sure if – as a treatment relation – right, we can't fix the fact that sometime people are stingy with data.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

But I would – this is David – I totally agree with that, but I think that's not what this problem..., this bullet point number five is addressing, right? We're ...

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, this is a narrow question, but this does work in the situation that Judy describes.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

What I'm really saying, I think, is that when you have consistent with ethical and legal obligations, I do think the ethical obligation is share the data about the care of that patient, and people won't always do that, that's all, it's just a comment, nothing to change.

**Paul Egerman – Businessman/Software Entrepreneur**

And so what this does is say though that people have to respond in some way. They either have to respond – our answer says you either have to give the record or you have to say I received your request and you're not getting anything.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

So the question then would be should they explicitly state why they are not responding. I seriously doubt that a lot of competitors would explicitly state ...

**Deven McGraw, JD, MPH – Center for Democracy & Technology – Director**

No ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... that this because ...

**Paul Egerman – Businessman/Software Entrepreneur**

That could be a best practice to suggest that we want to require ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

I like the way it's worded because I think consistent with ethical and legal obligations words it nicely.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, I frankly think that's the best we're going to do, and just as a note, the DURSA doesn't require people to say why. Kitt can correct me if I'm wrong, but ....

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

No, that's true.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

... that's from my reading.

**Kitt Winter – Social Security Administration – eHealth Exchange Coordinating Committee Chair**

This is Kitt. I did have another question to add, is there any – and this might have been discussed previously, but, is there any requirement that the requester to indicate that the data holder would need to respond in a particular period of time. For example, if it's coming from an ER or you need an immediate response, but – or is scheduling an appointment within a week or two and needs it just for that period of time, is that included in this discussion somewhere?

**Paul Egerman – Businessman/Software Entrepreneur**

This is Paul. We haven't talked about that although the basic assumption is that we're doing, basically one computer talking to another, so one would expect the responses would be pretty fast.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

I mean, it should be faster than it takes you to like, you turn on a light and maybe you've got one of the new fancy light bulbs and it takes a second or so and then the light comes on ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Without being too prescriptive, we can certainly add the word timely – the data holder should timely respond to queries, consistent with professional, ethical and legal obligations.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yes.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And there are in the incentive rules some actual constraints on time, but that's a different...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Paul Eggerman – Businessman/Software Entrepreneur**

So I think we have an idea as to what to do with this, are we ready to move on to question number six?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, let's give it a try.

**Paul Eggerman – Businessman/Software Entrepreneur**

Now this is a very important and interesting question. So, is there – I guess, should we have a policy that says that there is a requirement to account for and log query and/or disclosure with the capability to share with patients upon request?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

And this is something that again has come up, and with the acknowledgment that there is a – there was a proposed rule that was released to create an access report, right, for patients to be able to get some accounting of disclosures from an electronic record. That's something that we think the Office for Civil Rights, we understand that they are interested in getting more input on. Here though, I think what we're talking about is whether there ought to be, in the scenario we're talking about, where there is query that is sent from machine to machine, which suggests a capability of the machine to acknowledge the query, and what's provided in response. And in that particular circumstance, should we ask for, as a policy matter, that there be, that this be logged in some way and that the patients could be able to get that. So that's really a fairly narrow scenario, much more narrow than what had been proposed in the access report, but it's consistent with the particular scenario that we're dealing with.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Well by law this is, if it's two different organizations, which I think is what we're talking about ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

We are ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

... that is disclosure so by law it does have to be logged.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

No, it's for TPO.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, well there again, I think ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

... excuse me, but HITECH said even for ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah but Dixie, that's what I was trying to ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

They've implemented a regulation for that because of the difficulty in doing it.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Exactly. Not in effect yet Dixie.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Right, it's not in effect yet, but that's what's ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

But that's why I want us to focus less on what was in that proposed rule and what's in HITECH and instead on what we would like to see happen in this particular scenario.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah. Let me suggest that the difficulties that have blocked the implementation of the law are primarily because it has to apply to the whole organization. If we were to produce policy and that recommended policy, that policy were adopted and a regulation were to come out that says this for an EHR and there was the incentives associated with meaningful use, I don't think any vendor in the world would have much difficulty doing this.

(Multiple speakers – indiscernible)

**Paul Egerman – Businessman/Software Entrepreneur**

To be clear Wes, when you say organization, I think I know what you mean Wes, but what this question relates to is not access of the medical data within an organization, if you have a ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

No, no, no. The difficulty I'm referring to is that the law in HIPAA talks about producing such a log for access by any one of a number of systems in the organization. It is ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

That is the draft regulation, that's ... HIPAA.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, and we're much more limited. This is just one EHR talking to another across an – some sort of organizational boundary or ... boundary, it goes, it's like, if Kaiser were to speak to University of Pittsburgh.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Okay so....

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

So this is David. I say the answer is yes.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I do, too.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah, all right.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yes.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

But not the query. I say the disclosure yes.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

But not – you don't think you could log the query and the institution that it came from?

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Well I think you could, I don't think it ...

**Paul Egerman – Businessman/Software Entrepreneur**

Wait, I don't understand the distinction you're making Dixie. Are you saying only if you disclose the data do you have to log it?

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

That's what I would say, yeah.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

No, I would say both.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

I'd agree with you. I would agree with you David.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah, I ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Well it would be, okay ...

(Multiple speakers, indiscernible)

**Paul Egerman – Businessman/Software Entrepreneur**

... that, let's think about the situation where you've got this problem with "A" and "B" that Judy described ...

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Oh yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

... where the one provider organization doesn't like the other and says no to all the queries. You want to log and disclose to the patient all of those that occur, even though there may not be very many, because hopefully there's a learning curve that prevents it.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

I agree, I agree.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Oh, there are all kinds of reasons. I mean bad behavior by a staff member ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yeah.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... in terms of looking up the child they lost in the divorce, I mean, it's – there are plenty of reasons why you'd want to see a log created.

**John Houston, JD – University of Pittsburgh Medical Center**

May I ask a question, which party logs what then? It sounds like it's ...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

The, the – oh, that's a good question. So I think we've been thinking about this in terms of a log that a query was received, so that would be on ...

**Paul Egerman – Businessman/Software Entrepreneur**

(Indiscernible)

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

... and what the response was on the part of the data holder ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yes.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

It's the disclosing party or the potentially disclosing party that we're talking about here.

**Paul Egerman – Businessman/Software Entrepreneur**

Right.

**John Houston, JD – University of Pittsburgh Medical Center**

Because I can see that if you disclose something, you're responsible for logging the fact that you disclosed it, if you're the disclosing organization. If you're the requesting organization, I can see why you'd be responsible for logging the fact that you made the request and you were denied.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

I can see why you might have legal reasons for wanting to do that, over an – there's nothing in our scenario that says you can't do it, or a policy that says you can't do it.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Right, right. This doesn't preclude logging the requests at the requester or a middleman, a broker, could log it both ways.

**John Houston, JD – University of Pittsburgh Medical Center**

I just think that it's – actually the operation I suspect is probably cleaner to log it the way I just described to do.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Oh, I don't know. If I was running a hospital and I would like to have that log of all of the queries, including the ones I turned down.

**John Houston, JD – University of Pittsburgh Medical Center**

And you may decide to do that, but I think it ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

We're talking about what should policy require.

**John Houston, JD – University of Pittsburgh Medical Center**

And I think policy should require is what, to Dixie's point, probably the minimum should be what is disclosed, but then when you start to get into where the actual query that's rejected, to me the organization requesting the data probably has a more compelling reason to want to have logged that.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Well is that – but that's, I think in discussing this, we've come to recognize that the organizations reason is not necessarily a reason to make it policy.

**John Houston, JD – University of Pittsburgh Medical Center**

But I would agree with Dixie that at the minimum it should be disclosures, and then the ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Okay, so I was asking a question is, are there cases where it's good for the patient to have a log of denied?

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

... requests ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... requests ...

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And I'd say yes.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Yeah, I think so, too.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah and where is it best for the patient for that log to be?

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Where their information is.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

The record holder.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

Well, I'm going to add to this something different. If you're an executive of the organization that is continually turning down another, it may be of value to you in how you run that organization to learn, well we turned down one or we turned down ten thousand. And I think the statistics on, and it may change their behavior, when they realize what an impact they're making by not helping in those areas. So I think it's very valuable to have on both sides.

**John Houston, JD – University of Pittsburgh Medical Center**

Valuable versus what we're going to require I think is two different things.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah, I agree. I think that it's valuable to say that you must disclose the log of failures to disclose, which is what we're saying here.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Refusals to disclose.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Refusals to disclose, well, any failure to disclose right?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Oh no, we're saying that you have – we want as policy maker for you to log both the query and your response, which would include when you say no.

**John Houston, JD – University of Pittsburgh Medical Center**

Yeah, exactly, right.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Right.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Right, not just in this circumstance.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

All responses.

**Judy Faulkner – Founder and Chief Executive Officer – EPIC Systems**

I think that's good.

**Paul Egerman – Businessman/Software Entrepreneur**

So we're saying – but we're saying something else. We're saying we want you to log the query and the response and we're also saying we want that log to be available for patients to somehow have access to.

**Judy Faulkner – EPIC Systems – Founder and Chief Executive Officer**

Right.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Upon request.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

That's right.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

And, yes, I agree.

**John Houston, JD – University of Pittsburgh Medical Center**

Who agrees – could we have a – I heard at least Dixie.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well, so what I heard was, consistency – what I thought I heard is, some – a majority at least of those of us who are on the call, agree that with respect to the entity who holds the patient’s record that’s being queried, that they should log any queries into the patient’s record, as well as what their response is, and provide it to the patient upon request.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

From outside the organization.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Outside...right, from outside the organization.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Yeah.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Now what was also raised, but where we don’t seem to have consensus, is whether in fact requesting entities should be logging their requests as a matter of policy, and making those available to the patient versus having that capability available for entities who want to deploy it for their own purposes.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

I think that’s a good question for slide six or something or point six.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

I mean it’s a different – it’s the other side of the question. I think that’s a good idea, actually.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, it might be a best practice, but I don’t think you’d have to require that as a policy.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well, the only reason why it might make sense from a patient advocate point of view is you might want to know, from the point of view of the requesting physician who’s currently treating you, which organizations are refusing to cooperate.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah.

**John Houston, JD – University of Pittsburgh Medical Center**

But that’s something you can do now. I mean all...I mean again, it’s a requirement versus a ...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Yeah, I mean, I think generally when we say it’s in “X’s” interest to do X; we don’t need a policy to support that. It’s when we say it’s in “Y’s” interest for “X” to do something; we need a policy to support it.

**John Houston, JD – University of Pittsburgh Medical Center**

Well it’s the patient’s best interest.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

Well, patient may be “Y.”

**Paul Egerman – Businessman/Software Entrepreneur**

So, I’m confused, where are we heading on this? So it seems like we have consensus on the record holder’s responsibilities.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Right, but we would like there to be a capability for the requester to log queries as well.

**Paul Egerman – Businessman/Software Entrepreneur**

Is it the capability, is it a best practice, is it something that they have to do?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

I would just call it a capability. What do folks think?

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Well aren't all of our recommendations best practice in some sense...I mean, we're not writing law or regulation here, so...

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Well, except that when we have a policy recommendation that the disclosing entity log, that could translate, that could be something that gets picked up as a matter of policy, such as from an implementation of the HITECH provision, for example. I mean, it's not for us to dictate, but it's a suggestion that we've laid on the table.

**David McCallie, Jr., MD – Cerner Corporation – Vice President, Medical Informatics**

Right.

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

The capability, if we...I don't think we should phrase it as capability because that's a standard type wording. We should just say whether it needs to be done or not, as a...

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

... whether it's required or not. I mean, anybody can do this kind of logging, there's no – it's not even a question of their having to make a lot of investment in doing it, so there's no ...

**Dixie Baker, MS, PhD – Martin, Blanck and Associates – Senior Partner**

Right.

**Wes Rishel – Gartner, Incorporated – Vice President & Distinguished Analyst**

They don't need any outside support to do it. The question we have is, do we think that they must do it in order to participate in this directed treatment query, targeted direct treatment query and I think, as Deven stated it, we want to make that a requirement as terms of obligations on the requesting organization. I'm not sure that there is enough benefit to anyone except the requesting organization that justifies being stated as a recommended policy.

**Paul Egerman – Businessman/Software Entrepreneur**

Okay, so – this is Paul. I'm going to interrupt because I'm also looking at the clock. We're supposed to wrap up in a few minutes. Is that right Deven?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, it is. I mean one thing we can do with this is to – I mean we have a brief – we have a half hour before the Policy Committee on our call on Thursday, we can get some input from them on this last question as well.

**Paul Egerman – Businessman/Software Entrepreneur**

I think that that's good. And I also think that we've made excellent progress. I think that we could write it up right now as not required and we can revisit this, but we made excellent progress. We actually got through our six questions. We're sort of like most of the way through question six, so I don't think we quite have a consensus on this issue of the requester's obligations to log, but we certainly got the first half of that.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yeah, we'll bring it back. We'll also bring back wordsmithing on the other questions we were able to resolve.

**Paul Egerman – Businessman/Software Entrepreneur**

That's right and so what I want to do is just very quickly explain what's going to happen. We have one more meeting, we're going to finish this question six at our next meeting, in our next meeting we're going to deal with scenario two, which is targeted direct treatment, but there's a sense of data, but there's some other law that applies. And we're also going to deal with scenario three which is non-targeted query for treatment purposes, so that's more likely some record locator service or DEAS or something that's in the middle. And so we'll be talking about those issues. We want to again ask you to review the material that we're going to be sending you with the PowerPoints to make sure that we've got this wordsmithed correctly and if not, we would like to ask for a blizzard of emails so we can try to get this all straightened out. And, unless you have any other comments Deven, we should ask to see if we have any public comments.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

Yup, sounds good Paul.

## **Public Comment**

**MacKenzie Robertson – Office of the National Coordinator**

Okay. Operator, can you please open the lines for public comment?

**Caitlin Collins – Project Coordinator, Altarum Institute**

If you are on the phone and would like to make a public comment please press \*1 at this time. If you are listening via your computer speakers you may dial 1-877-705-2976 and press \*1 to be placed in the comment queue. We do not have any comment at this time.

**Paul Egerman – Businessman/Software Entrepreneur**

Okay. And so I just want to thank everybody for a really excellent discussion this morning. These are not easy issues and I appreciate everybody's effort. And our next meeting is when Deven?

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

It's next week actually, it's like our summer schedule all over again from years ago.

**Paul Egerman – Businessman/Software Entrepreneur**

Next week.

**Deven McGraw, JD, MPH – Director – Center for Democracy & Technology**

We are meeting on the 18<sup>th</sup>.

**Paul Egerman – Businessman/Software Entrepreneur**

We'll look forward to speaking to everybody then. Thank you so much.