

**HIT Policy Committee
Privacy & Security Tiger Team
Transcript
July 15, 2013**

Presentation

Operator

Ms. Robertson, all lines are bridged.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thank you. Good afternoon everybody, 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 call is a public call and there is public comment built into the agenda and it's also being recorded, so please make sure you identify yourself when speaking. I'll now take the roll call. Deven McGraw?

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

Here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks Deven. Paul Egerman?

Paul Egerman – Businessman/Software Entrepreneur

Here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks Paul. Dixie Baker?

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

I'm here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks Dixie. Judy Faulkner?

Judy Faulkner, MS – Founder and Chief Executive Officer – EPIC Systems

Here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks Judy. Leslie Francis?

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks Leslie. Gayle Harrell? John Houston?

John Houston, JD – University of Pittsburgh Medical Center; National Committee on Vital & Health Statistics

Here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks John. David McCallie?

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

Here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks David. Wes Rishel? Micky Tripathi?

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

Here. Wes here.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Ah, great. Thanks Wes. Micky Tripathi?

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

Here, I'll have to drop off at 3.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Okay, thanks Micky. And Kitt Winter? And any ONC staff members on the line, if you could please identify yourself.

Kathryn Marchesini, JD – Policy Analyst – Office of the National Coordinator

Kathryn Marchesini.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thanks Kathryn. Okay, I'll turn it over to Deven.

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

Okay, great. Thank you very much MacKenzie. So what we are going to do on our call today is to finalize our recommendations on query so that we're ready to make a presentation to the Health IT Policy Committee at our August meeting. We're essentially following up on the discussion that we had last Wednesday where we talked about what we learned in the hearing and determined whether or not we would suggest additional policies for non-targeted queries, queries where you're searching for a patient's information using information about the patient in order to find the record. So what we did in preparing the slides for you here today, was to almost really do the slide deck that we think we would like to present to the Health IT Policy Committee, and are offering it up to all of you here today for any additional comments, feedback, further discussion if we need to.

And where we're starting with is just to sort of remind the Committee about really where we started with respect to defining different query scenarios, all involving queries among disparate organizations and not internal queries. And we sort of outlined the three scenarios that really began our entire discussion of this issue. We're also reminding the Policy Committee of the way that we established what we thought were the existing obligations for query response between sort of data holders and requesters. We saw these slides on our – we went over these slides again on the Tiger Team call last week, so I'm not showing you anything new at this point, just sort of walking you through what I think might be the most effective presentation of our conclusions to the Health IT Policy Committee for your feedback. So, again, reminding them of these obligations which exist for any query response scenario.

And then what we do here is provide a summary of what our previous recommendations were on query, and these have been reworded a little bit so that there not posed just in terms of questions, but with sort of summary conclusions, but the backup recommendations. Again, these are all the recommendations that the Policy Committee has previously seen and endorsed on query response generally. Keeping in mind that we initially came to those conclusions using the scenar – the targeted query scenarios 1 and 2, but they apply to non-targeted queries as well.

So, we talk about the need to establish identity, talk about the need to establish authorization, to be able to receive a record or to access a record. We talk about the automation of responses and the ability to do that and when automation triggers our previous recommendations on meaningful choice and when it does not. We also talk about achieving accuracy in patient matching by reiterating our previous recommendations. We talk about the need for data holders to respond to queries consistent with their professional and legal obligations, but at a minimum there has to be at least some response, you can't just be silent. We talk about the need to log the query and the response and to be able to provide these logs to patients upon request. We had recommendations regarding sensitive data and ideally a technical capability to be able to communicate any applicable consent or authorization needs or requirements and to be able to maintain records of those transactions. And I'm glad Micky's on the call because I know the IE Workgroup just presented some recommendations on this topic as well to the July Policy Committee meeting.

So then after all of that back up, we get to what we concluded were our new recommendations, which is essentially a reiteration or re-affirmation of the recommendation that we made previously which is that even in a non-targeted query scenario that we didn't see a need for any additional policy, given all of the other recommendations that we had already teed up for query generally, that those would apply to non-targeted query. And based on what we heard from the hearing, we didn't see a need for additional policies for the non-targeted form, which essentially turns all of our recommendations into a set of recommendations on queries generally, regardless of whether they are targeted or non-targeted.

And then what we – and then we have some slides that essentially remind – are designed to educate the Policy Committee a bit about what we learned in the virtual hearing by telling them who gave us presentations and thanking them again. We probably cannot thank these people too often for the – for taking the time to educate us on what they were doing. And then we have the summary of the sort of key themes that arose from the testimony, and this time rather than sort of single out any one or more testifiers, the themes are – reflect the testimony we received generally, but don't identify any particular testifier. And the reason why I did this frankly was to make sure that I wasn't leaving somebody out in singling out any one particular testifier. We were also not putting ourselves in a position of sort of highlighting certain – or favoring certain models over the others and I didn't necessarily want to suggest that through these key themes. And so, these are essentially the same ones that you all saw last week, but stripped out with the naming of certain entities who presented us with testimony. Instead it's one network or some networks or nearly all networks, phrased in that way. But beyond that, the substance of these is unchanged from what you had seen before, but I'm also happy to entertain some discussion on them if they're not right or if we need to add some observations to this.

And then ultimately what we tried to do in the very last slide in the deck, which I'm on slide 16 if folks have frozen computer screens or are looking at a version offline. I just added a few of the additional points that came up in our conversation that we wanted to highlight for the Policy Committee or at least mention, but we don't have specific recommendations on these points. The number one bullet point being that the virtual hearing really highlighted the sort of state of the trust framework upon which current health information exchange occurs, which is really, I think, making the point that each of these networks took a tremendous amount of time to build in policies, to establish agreements, to get participants to sign on and that is sort of the existing state, at least as we were – as we learned from the hearing, based on the eight entities that testified to us. And it al – this slide also articulates the concern that we discussed a bit that we think it's both possible and we hear anecdotally in some circumstances that financial considerations may prevent data sharing with other providers, but that ultimately the data should go where the patient goes.

So I'm going to pause, and – because the rest of the slide deck is really background slides that we can refer to if we need to, for more information. But this was sort of our conception of the deck that we would present to the Policy Committee that we wanted to get your feedback on, on this our last full Tiger Team all before the Policy Committee meets in August. Paul, is there anything I left out or something that you want to add before we open this up to more discussion.

Paul Egerman – Businessman/Software Entrepreneur

No, I think you did a really good job Deven in taking everybody through the slides very quickly. And I think there shouldn't be any new information here, at least that was not our intention, compared to our last call. And I hope people see from what was presented is we learned some things at the last call and adjusted, so, that's why we chose not to try to call out individual HIEs by name, because there is some controversy as to whether or not we were being accurate and whether or not that was fair to the others that weren't called out. And we also tried to capture some of the things of the prior Tiger Team's conversation or discussion, like the issues about this interesting concern about – that Judy raised, that based on some financial considerations that there's experience with reluctance to exchange information.

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

So Paul, do you want to take the questions in order? I have some comments on 16, but I suspect you'd probably like a more logical sequence than –

Paul Egerman – Businessman/Software Entrepreneur

Whatever you would like, that's okay. Why don't we start with whatever your questions are Wes.

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

Okay. So, I think – as I understand it, the second bullet is sort of the response to the question the first bullet answers, or asks, in the sense that we talked – the state of trust that we found is described in the second bullet. I don't know that that's clear to everyone, it might be. In any event, I think that it should be clear that this is particularly pertinent to query because the situation with trust agreements for Direct is more – better organized if only because it's a simpler problem and it's worth mentioning – it's worth just making sure people don't think we're describing DirectTrust.org in this.

Paul Egerman – Businessman/Software Entrepreneur

Okay, so what you're really – if I'm hearing you right Wes, what you're really saying, you just want to be clear that when we talk about the multiple trust agreements, we're talking about non-targeted query situations.

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

Well, all query, I mean, right?

Paul Egerman – Businessman/Software Entrepreneur

Yeah.

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

I mean, as they currently – the second bullet currently the trust frameworks for query are – currently the trust for query is built upon numerous trust frameworks with data holders, some across state lines.

Paul Egerman – Businessman/Software Entrepreneur

So what the real issue is, is we should clarify this perhaps in the title of the slide. These points refer to consideration about query, it's not about information exchange –

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

Yeah. Yeah.

Paul Egerman – Businessman/Software Entrepreneur

– it's about these kinds of query situations.

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

Right.

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

And then I think the third bullet is clear to everyone who was there, but it might need – it could use some help in terms of setting the context for people who weren't. For example, I think whose financial concerns, is it the concern of the HIE, is it the conc – what I understand our discussion is concern that record holders may withhold data for business reasons – our concern is that record holders may withhold data for business reasons, ultimately data should go where the patient goes, I think would help people key into the specific problem we talked about.

Paul Egerman – Businessman/Software Entrepreneur

That's an excellent suggestion Wes, that's a better way to express it.

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

Yes.

Paul Egerman – Businessman/Software Entrepreneur

So that's great.

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

Thanks.

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

I have a comment this is Dixie.

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

Hi Dixie.

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

Hi. My comment is about slide 6.

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

Oh, okay.

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

The one about automation of responses. And I think you've done a – by the way, I think you've done a really good job of summarizing some very complex discussions here. And the – I think we need the statement here about, this really addresses the topic we were just discussing about making – denying information based on business reasons, whatever they may be. I think that statement should be associated with this question, and at our last meeting Deven, you did a really nice job of summarizing, we think you're going to make the right decisions. But at any rate, after the first one it says if the data holder maintains ability to make decisions on when to disclose they can choose to automate their responses. I think somewhere associated with this we should make the statement that we trust that they will make those decisions based on sound judgment rather than just business – arbitrary decisions.

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

Right, right.

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

Okay and the second sentence, I looked back at slides 25 and 26 and I think I know what you're talking about. I think what you're saying is they don't have control of data – the intermediary doesn't have control of the data, is that what you're saying by "if the ability to make these decisions is not present?"

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

Yeah. Well it's – so remember that this is, when we went to the discussion of automation, and it really actually did not come up in a context of sort of whether we – there are iss – whether we have a situation where sometimes record holders might make a decision to withhold data for business reasons. I'm not denying that that may be – that you could, in fact, if you're making a decision based on financial reasons, you could surely automate that decision as well. But really, the discussion here was about whether it was possible for you to sort of to allow your EHR to make the – or an intermediary of some caliber, to be able to make the decision for you. And ultimately where we came down on this was that if you're decision making capacity with respect to your records, you're retaining the ability to make judgment calls about when you release data and when you don't, your decision to automate those responses doesn't trigger – doesn't mean you've given up the control that would otherwise trigger meaningful choice.

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

So in that second sentence, I mean my bottom line is I don't understand what the second sentence means. But what you're saying is, if they don't have this automated capability, is that what you're saying?

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

No. Saying if you're essentially giving up your decision making capability and just allowing somebody to sort of automatically respond to you with – respond for you versus making judgment calls about when data will be released and when it won't, which is your sort of duty as a data steward, that's – you can't let the machine take over or you can't let – take over.

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

Oh, I see. I see, okay, and that's where the meaningful choice.

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

Yeah.

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

Okay. I think we need to clarify that. I don't think – I mean if I've even been in these discussions and I didn't understand what that meant, chances are the Committee won't either. That's a really good point; I just don't think we articulated it here.

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

Yeah, I – this is Wes. I wonder if we are really saying you can't – are we really saying you maintain responsibility for the decision, whether or not you choose to automate the decision.

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

No, no, no. Okay, so let's not – we're trying actually – we've already made the recommendation. That's what's on slides 25 and 26.

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

Um hmm.

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

What we're trying to do in slide 6 is to trigger recollection of it, right, it's not a separate or new recommendation that we're asking the Policy Committee to adopt, and all I'm trying to do is avoid having our presentation to the Policy Committee be loaded with fifteen slides detailing our query recommendations that they've already seen.

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

That's –

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

That's a good idea, but even looking at those slides I don't think the sentence communicates what's on the slides.

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

Okay. Well we can try to do a better job of capturing what's on those slides, I mean –

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

Just –

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

Well –

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

I'm sorry.

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

Go ahead Dixie.

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

That second sentence in particular. I did look at those slides and I still didn't understand what that sentence meant.

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

Okay.

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

So I'm wondering about slide 6, about the word "if" in the first sentence. Are we meaning to imply that the data holder –

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

We're not meaning –

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

– when you include automated decisions, are we meaning to imply that the data holder may not maintain the ability to make decisions?

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

Okay, we're not meaning to imply anything Wes; we're just trying to summarize what's on slides 25 and 26. So it sounds to me like we maybe just ought to use slides 25 and 26.

Paul Egerman – Businessman/Software Entrepreneur

Because this – this is Paul. This is – it is a topic that we had a robust discussion about before and we came to a conclusion. I think we even presented it to the Policy Committee and got it approved.

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

We did.

Paul Egerman – Businessman/Software Entrepreneur

And it really relates to, in this case actually a targeted query where an organization just may have a policy, because they know, for example, maybe a large healthcare provider organization and they're aware of most of the emergency departments in the area and they just normally will respond to queries from emergency – these emergency departments.

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

Yeah, so that's a policy they've put in place –

Paul Egerman – Businessman/Software Entrepreneur

That's a policy they put in place and they could, indeed, automate it, right.

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

Right.

Paul Egerman – Businessman/Software Entrepreneur

So it doesn't require anybody in the HIM department to do anything. And what we're also saying is because that's – the healthcare provider is retaining control of their decisions or making their decisions –

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

Yeah.

Paul Egerman – Businessman/Software Entrepreneur

– it does not by itself trigger meaningful choice requirement on the part of the –

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

Yeah, I think we're all agreeing on the underlying thought –

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

We just haven't captured it on slide.

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

My – yeah, that's my difficulty with this slide. And I also I guess I need a refresher course. Meaningful choice is about the choice the patient makes, right.

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

Well, right. But when is the right to have meaningful choice triggered? One of the questions that came up when we considered the ability to sort of automate decisions, and we looked back. And in fact, the meaningful choice slides, and I think maybe the trigger, although I'm not 100% sure, is in the backup slides. Either way, I think given how much time we spent in getting the language exactly right on slides 25 and 26, and how much the attempt to summarize it is just causing more confusion than helping the articulation, that we maybe just ought to build those slides back in versus trying to summarize them in ways that might be misleading.

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

Well I think meaningful choice applies in both cases, whether they have discretion or not.

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

No, it's doesn't Dixie –

Paul Egerman – Businessman/Software Entrepreneur

It doesn't, we've already –

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

– that is not what we decided.

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

Okay, okay. So I do think that the language on slide 26 is clearer.

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

Okay.

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

Like that second bullet that says “if data holders do not have discretion over record release policies, our previous recommendations requiring meaningful choice for the patient apply.” I think that's better than the summary.

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

Okay. That makes sense. And Wes, the trigger for meaningful choice, the language that we agreed to and that was approved by the Policy Committee several years ago, is on slide 37, in the backup slides.

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

Okay thanks. I'll do that on my own, no need to wait for me.

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

Okay. Okay, anybody else have comments, questions, concerns? This is very helpful.

Paul Egerman – Businessman/Software Entrepreneur

It is very helpful because –

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

I'd rather get them now than on August 9.

Paul Egerman – Businessman/Software Entrepreneur

And I think as everybody knows, when you write it, you know what it means, it seems clear to you. But the fact that Wes and Dixie are raising issues on things, obviously we didn't write it as clearly as we had understood or we thought, so I appreciate this feedback.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

This is Leslie, somebody who has been out of the loop a bit –

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

Yup.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

– and as of course members of the Policy Committee will also have been, and I just want to pose a question about the recommendations, which is, we were – this is not a critical question, it's totally informative, we were asked to have this hearing because the Policy Committee was concerned about the prior recommendations. And this in effect says we're pretty much reaffirming the prior recommendations. And what I want to be sure about is whether members of the Policy Committee will feel that we've responded to anything that was said in the hearing that might have given pause. When I read these slides, I wasn't – if I were a member of the Policy Committee, I'm not sure I would see this as responding to why they sent us back to do the hearing.

Paul Egerman – Businessman/Software Entrepreneur

Well – I mean Leslie, that's – those are good comments, but the basic discussion we had – I mean, we held the hearing and the discussion we had after the hearing was we didn't see a reason to change our recommendations. Now the Policy Committee, whether or not they accept that, I can't predict, Deven and I will do our best to be persuasive, but we didn't hear anything that caused us to change our recommendations.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Maybe that should be stated explicitly.

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

Hmm.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

I mean, it's implicit.

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

Well so here's how we articulate it Leslie, I'm just getting to the slide –

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

I just want to be – I want to be – I was just sort of pressing to make sure, given that people weren't asking other questions. Maybe whether there was anything that you all wrestled with as potentially really troublesome and then said, no, we don't need to change our minds. Or whether there just really wasn't even anything to wrestle with.

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

I – this is Dixie. I agree with Leslie and in flipping through the slides, I think Deven if you'd look at slide 9 that has the new recommendations –

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

Yup.

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

– it may be that if we left the first 3 bullets there, up through we held a hearing –

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

Yeah.

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

– then go and summarize the hearing and then you have another slide that says new recommendations and all you have is that last bullet that says “based on this testimony we affirm our recommendation and no additional policies,” and then it might flow more logically.

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

Yeah, I mean we could certainly do it that way because it really was, Leslie, the testimony was in many ways, I mean I’m speaking for myself, but I had the sense that the others on the Tiger Team, based on our last call, were in general agreement that we – it was very affirming how careful people were being about this and how much work that they had done to sort of craft a set of policies and circumstances that worked for their particular communities. So for example, a couple of the HIEs allowed payer access, but others did not. A few had opt in, one very strong opt in or no data moved, a number of opt in to access, but where the data was held in a business associate relationship and then others were more opt out with variations on technical models. On sensitive data, most of them didn’t take it and expected their data holders not to send it into the network, and that’s the reason for the sort of summary slides. But I think, so Dixie, I’ll tell you that what I was thinking of was not hiding the ball, right.

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

Um hmm.

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

We were going to say, we don’t think that we need additional policies and here are summaries of the testimony so that you understand why we came to that conclusion.

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

Maybe we’ll just repeat it, I think we lose the thought because –

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

Okay.

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

– this sounds like a nice summary statement, and then we launch into the hearing.

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

Okay.

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

I think we need to tie it up with that summary that you just articulated.

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

Okay.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

What was your sense about the network that allowed payers?

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

They’ve allowed payers from the very beginning Leslie and they built their – it’s very clear in all of their materials and they have a very low, single digit, opt out rate and they think it’s just because the people in their community are not surprised by payer access to data, they expect it.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

And everybody was comfortable with that?

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

I think everybody was comfortable with not telling her that we could make a better decision for her community than she could.

Paul Egerman – Businessman/Software Entrepreneur

And also Leslie, the issue of payer access was sort of not an issue that we were considering –

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Right.

Paul Egerman – Businessman/Software Entrepreneur

– because we were really looking at query for treatment purposes. And so the payer side is an interesting issue, and there's a number of nuances about that entire issue that one could discuss, but that was sort of like not on our radar screen, our real issue was query for treatment purposes and non-targeted query for treatment purposes, and is there any need to provide limits on the requests. And so the fact that we came across some payer things and some of the other issues are interesting issues, and if you wanted to, we could tee those up as to those are issues that perhaps could be discussed further.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah, I mean I don't want to look like we're approving that, let's put it that way.

Paul Egerman – Businessman/Software Entrepreneur

So maybe we add that to our list of query issues for further discussion, which is payer access –

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah.

Paul Egerman – Businessman/Software Entrepreneur

– if that's a matter that concerns you, because we didn't really explore that because it wasn't on our agenda to explore it. In other words, we're not trying to approve everything the HIEs do or don't do, we're just very focused on one question.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah, because I have the same question about public health and government and other things like that.

Paul Egerman – Businessman/Software Entrepreneur

That's right, and the same thing, we did not look at that at all.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah, I think we should be clear that we did not look at that.

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

Okay.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

I also want to be sure that everybody's – so basically what we're saying is, currently everything is happening in a highly trustworthy, trust-imposing framework but – and we don't expect there to be any outliers. But I want to be sure we're comfortable that this set of recommendations is enough to keep an outlier out.

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

Here's the reason why Leslie, I don't believe we need additional recommendations. And that is that we're still operating in an environment where the data holders make the decisions about how data gets disclosed from their records.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Right.

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

And they're on the hook for that. And given that yes, they will inevitably be incented to or feel strongly incented to sign up in different arrangements that enable exchange, that facilitate their exchange of records, at the end of the day, that doesn't change the legal dynamic that puts them on the hook.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah, fair enough.

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

And in each and every one of these sort of arrangements that people get into, they're on the hook for evaluating whether that kind of record access is something that they are legally and ethically comfortable with, and then they sign up when they're okay with it and they don't when they're not.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah I guess what I want to do is avoid creating a world in which because you're on the hook, you decide and patients, because they're worried that there aren't enough protective safeguards built in, patients opt out or choose not to opt in, thereby losing a very important advantage. And providers decide despite the incentive, I mean we want providers to be incentivized to share, we say that explicitly. But I just want to make sure we're not creating a situation in which the risk of a rogue actor is enough so that people might start to be getting cold feet. I mean, I'm really playing devil's advocate here.

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

I think everyone agrees with the concern and it's important that we make it clear that we need to – we need to explore areas other than query for treatment. I think it would be kind of disrespectful of the other testifiers who may or may not have had something to say about payers to –

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah.

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

– draw a conclusion from one –

Paul Egerman – Businessman/Software Entrepreneur

Yes.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Oh no, I don't want to draw any conclusions about –

Paul Egerman – Businessman/Software Entrepreneur

And I think – this is Paul – I think your comment Wes and your comments Leslie, those are good comments, so that we should expand that slide that says issues for further consideration and be clear that there are other issues as it relates to payers that probably need to be discussed. And Leslie's point is a good one, you don't want to have a situation where payer access to the information becomes a reason for somebody to not participate, because that would be troubling. So that's a legitimate thing to look at – comments.

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

So, this is Wes again. Gayle's comment led me to think about something that I usually see in presentations like this that now I review it, I don't see it here. Typic – this is a situation where they asked us to do something and we're coming back and reporting on what we did. Normally I expect a slide pretty close to the front to say, here's what you charged us to do, or if we don't have a written statement of that, here's how we interpreted what you charged us to do and gives that verbatim. And then it's – that kind of a context slide I think is always important and here it makes clear the dynamic of we considered further recommendations and upon due consideration, decided not to make any.

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

So in other words, moving slide 9 further up to the front?

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

Well, let me look at slide 9 here –

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Slide 9 is just the further recommendations –

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

Well but it's –

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

No, I'm looking for a slide that says, here's the task we set off on, okay, you asked us – the Policy Committee asked us – asked upon review of our presentation on this date, the Policy Committee asked us to determine whether we felt more recommendations were necessary for directed query and then – and that's probably just a slide by itself. But then at some point it's just – I just think it's really important to say up front, to orient your people to yeah, we heard the question right, don't think we went off –

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

Okay.

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

– like a rogue committee.

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

All right, that makes sense. That makes sense.

Leslie Francis, JD, PhD – University of Utah College of Law – National Committee on Vital and Health Statistics

Yeah, this is Leslie, I think that would help me, that's partly what I was reacting to.

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

Okay, all right. That's helpful, it's very helpful. Any other thoughts? All right, well what I'm going to propose that we do is that Paul and I do a little bit of work with these slides reflecting the comments that you all made. And we'll just send them out by email and give you some time to give us feedback on them, but we'll – assuming that we get it right, or get it close to right, we can do that through email, we won't meet as a Tiger Team on this issue again before the Policy Committee meeting in August. Okay, that's what we'll do.

Reminding folks, before we open for comment, that we do have that sub-group call scheduled for the 29th. Now this is the group of people who volunteered to assist us in giving some additional thought to Meaningful Use Stage 3 and what we might do, other than the mere attestation that is required today under Meaningful Use, to try to strengthen accountability for the requirement to do the security risk assessment. And today, MacKenzie circulated some new language for your consideration that we will deal with on our call on the 29th. Anybody from the Tiger Team is welcome to participate in that call if you would like. We need the members of the subgroup on, but if you're not able to make that call and you didn't sign up to be in the subgroup, you're not obligated to do so. It will also be a public call, as are all of our substantive calls, so we'll be taking public comment on it as well. Does anybody have any questions about that? Okay. Then I think, MacKenzie, we're ready for public comment and many thanks to the Tiger Team for your hard work on this query issue and stay tuned for the – keep your eye open in your email for the revisions.

Paul Egerman – Businessman/Software Entrepreneur

And also I would just add to what you just said Deven, and thank you so much for helping us clarify the slides.

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

Yeah.

Paul Egerman – Businessman/Software Entrepreneur

Deven and I do not want to go in front of the Policy Committee and spend half an hour trying to understand what everybody else is talking to you. So this has been –

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

Very helpful.

Paul Egerman – Businessman/Software Entrepreneur

– very helpful.

Public Comment

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Okay, operator, can you please open the line for public comment?

Caitlin Collins – Project Coordinator – Altarum Institute

Yes. 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.

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

Great. Thank you everybody.

Paul Egerman – Businessman/Software Entrepreneur

Thank you.

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

Thank you.

John Houston, JD – University of Pittsburgh Medical Center; National Committee on Vital & Health Statistics

Thank you. Bye.

MacKenzie Robertson – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thank you everybody.

Public Comment Received During the Meeting

1. Thompson Boyd: I agree with Leslie and with Paul: user types such as Payers and Public Health Entities need to be acknowledged. Please do not forget, in some HIEs, payers may contribute to the sustainability equation (business model) of a HIE.