

**HIT Policy Committee
Privacy & Security Tiger Team
Transcript
November 5, 2013**

Presentation

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Thank you, good morning everyone this is Michelle Consolazio with the Office of the National Coordinator. This is a meeting of the Health IT Policy Committee's Privacy and Security Tiger Team. This is a public call and there will be time for public comment at the end of the call. As a reminder, please state your name as this meeting is being transcribed and recorded. I'll now take roll. Deven McGraw?

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

Here.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Paul Egerman?

Paul Egerman – Businessman/Software Entrepreneur

Here.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Dixie Baker?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I'm here.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Judy Faulkner?

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Here.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Leslie Francis?

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

Here.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Larry Garber?

Lawrence Garber, MD – Internist/Medical Director for Informatics – Reliant Medical Group

Here.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Gayle Harrell? John Houston? David McCallie? Wes Rishel? Micky Tripathi? David Holtzman? Kitt Winter?

David Holtzman, JD, CIPP/G – Senior Health Information Technology & Privacy Policy Specialist – US Department of Health & Human Services, Office for Civil Rights

Representing OCR here I am.

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

Here. This is Kitt.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

And are there – sorry, are there any ONC staff members on the line?

Joy Pritts, JD – Chief Privacy Officer – Office of the National Coordinator

Joy Pritts.

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

Kathryn. I think that was Joy.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

So, Joy Pritts and Kathryn?

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

Sorry about that and Kathryn, yeah, thanks, Michelle.

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Yes, thank you and with that I'll turn it over to you Deven and Paul. Thank you.

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

Great, thank you very much Michelle and thanks to everyone for making the time for the call today both members of the Tiger Team as well as members of the public. We know we're dealing with an issue of very high interest to the community and we greatly appreciate all of the feedback that you have given us both at the hearing that we held in September as well as on the Health IT Buzz Blog. I was actually just going through those comments myself yesterday. We received some very helpful feedback. So, thank you to all of you and also people who submitted testimony and those who give us public comment on these calls we greatly appreciate it.

So, at our last call that we had as a Tiger Team, which was really the first call where we had an opportunity to talk about what we learned from the hearing that we held on this issue and I want to give you all a roadmap of the slides that we have teed up for you today.

You know, we made the assumption that when we present a set of recommendations on this issue to the Health IT Policy Committee we assume that we want to do so in a very comprehensive way that both acknowledges what we heard from the hearing in summary fashion as well as the recommendations that we would make in response to both the goals that we set out for the hearing, what we heard at the hearing and also, you know, addressing the more immediate question of how HHS should go about implementing the changes that were part of the HITECH legislation to the HIPAA Accounting of Disclosure Right.

So, what we have teed up in slides is sort of an initial stab at laying out this sort of comprehensive approach to this issue, some hearing observations on the issue of importance of transparency and yet questions about feasibility and the value of the access report as an approach to transparency. The importance of a patient's right to have an investigation of concerns about inappropriate access to the record as well as their right to be able to access copies of data about them in an electronic health record.

But then we want to get I think to spending the meat of our discussion today on thinking through some straw recommendations that Paul and I have teed up in order to stimulate our discussion today. Do we want to, for example, spend some time re-enforcing the value of transparency of data uses generally and the patient's right to access data, and the right to an investigation.

Do we have suggestions for implementing the HITECH right to have information on disclosures for treatment, payment and healthcare operations through, and that should say EHR not HER it's a typo there, and then Paul and I have a set of questions for you to consider that flushes out this sort of less is more idea that seemed to be gathering some consensus on our last call.

So, I'm going to take you through some slides that really hit on all of these points but I really do hope that we'll be able to – rather than using our time on the call to necessarily do a lot of wordsmithing, on the hearing observations for example, because we can certainly spend time off line doing that, we want to get a sense if we're heading in the right direction with respect to those hearing observations, but would prefer not to spend time on the call wordsmithing them because what we want to spend the bulk of the call on is, you know, getting to the straw recommendations and in particular flushing out what we mean by a sort of less is more strategy to implementing the HITECH provisions.

And of course if we're wrong about growing consensus around less is more than we of course want to hear that too. So, I want to pause for a moment and give Paul a chance to add his remarks and then make sure everyone is clear on how we're going to conduct the meeting today. Paul?

Paul Egerman – Businessman/Software Entrepreneur

Yeah, I think Deven you did a good job about discussing what we're trying to get accomplished and the only thing I want to add is we have this meeting and we have one other meeting that's November 18th in roughly two weeks, a little less than two weeks and what we'd like to try to do is to sort of like wrap things up in those two meetings with a goal of being able to present a recommendation to the Policy Committee in early December.

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

Yeah, good point. Always good to know the timelines we're operating under. Does anybody have any questions about what we hope to accomplish today? All right, so here are – the first few slides are summaries of key points that we learned at the hearing and again, I think what we'd like to use a little bit of time on this call today is to get your reaction about whether we are conceptually headed in the right direction, whether there are bigger picture ideas that we need to get across or express as opposed to wordsmithing language which we can do off line and are happy to do if you want to send suggestions about how to word something.

So, you know, again a key hearing point being that transparency to individuals about uses and disclosures of health information is important for building trust in Health IT. We should ideally be doing transparency in a way that is understandable to these goals including those with disabilities and those for whom English is not their primary language.

And the patient representatives at the hearing testified that patients want the kind of transparency of record access proposed in the NPRM access report. Patient representatives also emphasized the importance of access to information about them in EHRs. This is the traditional HIPAA right to have access to and a copy of your data that and of course the Meaningful Use Stage 2 provisions that were referred to in the hearing.

However, we didn't get any testimony that supported that the proposed access report was doable at least with today's current technology and audit trail technologies were frequently mentioned as a tool for offering greater transparency but audit logs when they're deployed and, thank you Dixie for this language, are designed to track security relevance system events and not necessarily user activity. And the bottom line is that they don't easily produce reports designed to be understandable to individuals or patients really is what we're talking about here.

No one at the hearing offered a specific technical path forward to accomplishing the scope of what was proposed in the access report and questions were raised about potentially significant costs of building in the access report technical capability.

Lawrence Garber, MD – Internist/Medical Director for Informatics – Reliant Medical Group

Deven?

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

Yes?

Lawrence Garber, MD – Internist/Medical Director for Informatics – Reliant Medical Group

Deven, this is Larry Garber, just a quick question. Was there any discussion as you talked about the value of the transparency to patients, was there any talk about acting as a deterrent for inappropriate uses by, you know, clinicians or other users of the EHR if they were more aware of this transparency that they may be less likely to snoop around and do something inappropriate?

Paul Eggerman – Businessman/Software Entrepreneur

No, that was really not.

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

It didn't get mentioned by anyone testifying at the hearing interestingly enough.

Paul Eggerman – Businessman/Software Entrepreneur

And Deven also one comment on this slide.

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

Sure.

Paul Eggerman – Businessman/Software Entrepreneur

I think Dixie's wording about the audit logs is correct, is really – not just correct it's really very good, but another part of what came from the hearings was the audit logs by themselves were not adequate –

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

Right.

Paul Eggerman – Businessman/Software Entrepreneur

To provide the access report, that people have authorized accessibility, I'm trying to find the right word, to the data. Sometimes data is – in other words say sometimes data is pushed to people in various forms and so it doesn't come out in the security audit trail and this also says that no one at the hearing offered a specific path forward. There were also people at the hearing who said even if there was path forward this was not a good idea.

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

Right.

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

Deven, this is Leslie, I think in response to Larry nobody mentioned the deterrence effect but a number of people did voice the patient's side concern that a lot of what they're worried about is that kind of inappropriate access, the neighbor who works at the facility and so on.

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

Right.

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

And that's clearly part of what was going on in the whole discussion of what ought to be done about investigative capacity.

David Holtzman, JD, CIPP/G – Senior Health Information Technology & Privacy Policy Specialist – US Department of Health & Human Services, Office for Civil Rights

So this is David with OCR and I'd just like to bring up a point that under the current privacy and security rules there is an implicit if not an express requirement for covered entities to have in place some type of systematic audit program that would evaluate whether or not the access to the EHR system or the information systems in general is appropriate.

Of course there is a lot left to be worked out including, you know, just how broad in scope, you know, the audit requirement is, in other words it's not a full audit of each and every user each and every time, but the usual industry practices, as many of you know, is to take a sampling of those who have accessed the information system and measure and evaluate whether or not the access was appropriate. Thanks.

Paul Egerman – Businessman/Software Entrepreneur

Those are helpful comments, but the deterrence was really not part of our hearing, but these are good observations. We do have a few more slides to get through. So, I wonder if we could go onto the next slide, thanks.

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

Okay. So, then, you know, in terms of the third set of points from – key points from the hearing, you know, a number of testifiers said that it's not clear that patients want or would find value in the deluge of information that's likely to be produced by an access report and that today patients do rarely ask for them. Although it's not clear whether this is because the reports available today do not include much valuable information, patients are not aware of their right to ask for such a report or some other factor.

But generally, it seems unwise to impose a new access report mandate particularly given the potential costs and given how little we know of how much patients would request such reports. So, here it was an attempt to sort of acknowledge that, you know, there are points made about whether this is really what patients want and would find valuable, but we don't really have a whole lot of information on that because, you know, certainly current practice under current laws about sort of what is available to patients and what isn't is not necessarily indicative of what, you know, patients might desire in the future if it were made available to them, but, you know, based on what we know it's – in terms of sort of whether you impose a new potentially very expensive technical requirement in the face of such uncertainties, you know, is definitely a consideration.

And so then the last set of points are that all seem to agree that patients should have the right to a full investigation of complaints about inappropriate access and that such an episodic response could be more effective at addressing patient concerns versus building in expensive technology to produce a report that maybe less helpful and actually ferreting out inappropriate access because it would be buried in reams of material and would be expensive to build for the few occasions where it might be needed.

And then of course the last point that we have on the slide is that concerns were also raised about providing patients with the names of individual users who had accessed their health information and we, as a Tiger Team, had questions about whether the OECD principles, the Fair Credit Reporting Act or the Privacy Act of 1974 provide this type of access and we actually have backup slides with all of those provisions in them. And essentially there isn't a right to a report with an individual's name on it in any of these provisions.

So, I want to pause there and thank you for letting us get through all of those slides. The real purpose of these is to, you know, sort of summarize what we learned at the hearing but also with an eye towards setting the stage for what our ultimate recommendations would be and again what we want to hear from are sort of bigger picture issues that we want to make sure that we don't miss because we can continue to wordsmith these off line before our next call.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Deven, this is Dixie?

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

Yes.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

There is one more point that I considered extremely important that I think we need to capture here and that is for integrated delivery networks and OHCAs the distinction between disclosure and internal access is very difficult to establish by technology because a lot of individuals who access internal systems are actually employed by other organizations. I considered that a very important thing we learned from the hearing.

Paul Egerman – Businessman/Software Entrepreneur

Yeah, I think that's a very good point, it's hard to understand technically – it was hard for us to understand, as members of the Tiger Team, and so I suspect it's also an issue as the line is currently drawn very difficult for patients to understand as a distinction.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I think, Deven, as you – Kaiser's written testimony had one paragraph in there that really articulated that really well, you might want to just pull a sentence or so from there.

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

Oh, thank you, Dixie. Any other big picture issues missing? Okay, well now we're going to move to the straw recommendations discussion. I will revise these key hearing points and will also take wordsmithing suggestions by e-mail if folks have them and we welcome them actually.

Paul Eggerman – Businessman/Software Entrepreneur

Yeah and just to be – sorry to interrupt Deven, just to be clear, so what we just went through and with the changes this is hopefully going to be a part of what we're going to be presenting to the Policy Committee.

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

Yes, yeah.

Paul Eggerman – Businessman/Software Entrepreneur

As background for our recommendation.

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

Absolutely. Okay, so in terms of sort of what we have teed up for your discussion today I want to just quickly hit some of the high points on both of these slides and then we can jump into the meat of it. So, do we, for example, want to reinforce the importance about more high level transparency to patients generally about data uses and disclosures since at least one of our goals for the hearing was to look at ways to improve transparency and is there something to be said about the new model notice of privacy practices for example that we might want to say on this topic?

Similarly, do we want to take the opportunity to reinforce the right of an individual to an investigation of inappropriate access and we've noted here that already in the proposed accounting of disclosure rule, which is different from the proposed access report rule, there would be – that it does include a requirement to report to patients, if they ask for such a report, on disclosures that would be considered to be breaches but that might not hit the trigger for being reportable to patients.

And then in considering how we implement the HITECH requirements do we want to suggest a sort of step-wise way to do this and if we were to go in that direction would we, for example, say start with provider EHRs such as through standards and the certified EHR technology? Would we suggest beginning with the less is more philosophy such as by focusing on a much more narrow scope of disclosures such as disclosures only outside of an entity or outside of an OHCA and what kind of details about these disclosures would we suggest?

And I just trumped my next slide – and then would we, for example suggest piloting a technology to capture these more narrow disclosures through – before having this be policy more broadly and then even if we were to get agreement on all of those there is probably still some open questions regarding business associates and human versus machine generated disclosures that we would need to work through.

So, essentially we sort of have teed up, sorry I didn't mean to go that far back, teed up a number of sort of areas that we might want to hit in our recommendations that range from sort of reinforcing some rights that might already be there but perhaps we have some suggestions for improvement or maybe we just want to reinforce them to thinking through how are we going to – you know, if we have any suggestions to HHS on how to implement HITECH what do they look like and what for example does a less – would a less is more, at least as an initial step toward implementing HITECH, what would that look like and that's what we want to really get into a discussion of.

Paul, I want to make sure that I have articulated all that properly and not left anything out and then we can open it up for discussion.

Paul Egerman – Businessman/Software Entrepreneur

No, I think that's fine. Why don't we go ahead and first see if people agree with this roadmap and if they do we'll just start walking through it. I mean, are people okay with the sort of structure for our discussions? So, having heard like 10 seconds of silence I'll assume that means "yes" and so it's like speak now or forever hold your peace.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I don't know what the structure is? What do you mean? Just the –

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

Well, in terms of sort of those are sort of some key issues for us to talk about in terms of what the big framework of what recommendations would look like.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

This is Judy and one of the things I'm thinking of when you speak about less is more is comparing it to what we do in the paper world. So, for example, alerting patients about their rights, would we do that in the paper world or would we not? If we do it here, but not in the paper world then it's more not less. So, anyway that's going through my mind a comparison to the paper world.

Paul Egerman – Businessman/Software Entrepreneur

Okay that's a good basis for having a discussion, because there is also in the paper world, you know, there is some tracking of the medical record, you know, you do know who requested the medical record.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yeah.

Paul Egerman – Businessman/Software Entrepreneur

Although you know in a limited way, you know who requests it usually from the medical records department, usually you don't necessarily know what happens to it after it's requested, in other words it could move a bit, but there is some limited knowledge that is a good – that could be a good – something good to look at to help focus some of our discussion.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yeah, it helps us focus and in the paper world we don't have alerts to patients that they can ask for it, but on the other hand it is tracked, it is tracked in the computer world too it's just that there are so many more tracks.

Paul Egerman – Businessman/Software Entrepreneur

Well, yeah, and the tracking in the paper world is a little bit different also as I think about it, because one of the fundamental purposes is so that you can find the paper record if you need it, right, so it's more like a library, this group or person has checked it out, right, and now it's overdue and now I've got to go find why they haven't returned it.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

The reason I'm laughing Paul is that's one of the reasons for electronic medical records because they can't find it too often.

Paul Egerman – Businessman/Software Entrepreneur

I agree and it's also funny because one of the complaints about the electronic record is there is too much data and they can't find the information there.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yeah, right.

Paul Egerman – Businessman/Software Entrepreneur

So, we still have in some sense the same problem although how they found it in the paper record. But let's start walking through –

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

I would interject that I had a different understanding of less is more and I took what that meant on the slide to be about having the required accounting be simple enough so that it provides the relevant information to consumers in a usable way, right, in an understandable way and that was the idea of less.

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

Well, and Leslie, this is Deven, I think that's ultimately what the Tiger Team did mean, but I think they went further because of the technical difficulties in distinguishing between what's an access and disclosure and that if you include that entire volume it's almost impossible to come up with a report that's actually understandable and valuable, and isn't – you know, even if it's limited in terms of the fields –

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

Right.

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

That are in the report and so, you know, certainly in sort of – you know, based on my notes of the discussion I thought we were definitely headed towards what disclosures do we think we ought to focus on and then also what kind of information about those disclosures would be included in a report. So, it's sort of looking through, you know, trying to leverage what might be possible in the technology or could be more easily developed in the technology in order to create a report that patients could actually understand and that would still be valuable because it focuses on disclosures that might potentially be ones that patients would be most interest in finding out about.

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

Right, no, I understand.

Paul Egerman – Businessman/Software Entrepreneur

Deven, this – observation – I look at as sort of like a roadmap we've already gotten a couple of very interested questions about the saying less is more why don't we make that the first topic to discuss?

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

Okay.

Paul Egerman – Businessman/Software Entrepreneur

And so that – and maybe that helps guide the rest of the discussion. So, maybe that is our starting point. So, you know, let's look at this concept of less is more, again I think where that came from was from our discussions last time in which, you know, there was a view that, gee this access report, as described in the NPRM even if you could produce it, was just way too much information and the testimony would indicate things like, you know, it's possible that a nurse in an inpatient setting would look at data like 20 times, you know, and there might be a good reason that they look at that 20 times in a short period of time, but that's not useful information to a patient.

So, and we've got this discussion about what is the scope of a disclosure and the difference between access and disclosure is confusing, so the question is as well, is there a way to define what a disclosure is in a more narrow sense than the current definition that would get rid of the ambiguity about what's the difference between access and disclosure and also take a step forward to having something that perhaps is more useable.

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

I think –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

This is Dixie, Paul you just set up what I wanted to suggest perfectly, so thank you. I've been thinking a lot about this since our last discussion and thinking, especially about the access report because that really seemed to be, well it is, the part that imposes the most on healthcare systems and I was thinking that a lot of the people who gave testimony thought an audit would give them what they needed and as David has pointed out an audit, a system access is already required by HIPAA, I was wondering about – and here's what I'd like to propose, at least think about, proposing instead of an audit of – or an access report as described in the NPRM, require an audit of accesses to internal EHR systems as opposed to this fuzzy access disclosure.

Audit of accesses to internal EHR systems to the granularity of a single user accessing a single patient's EHR. And then the full accounting of disclosures as defined in the NPRM would be for disclosures to external to the enterprise and then we add the right to request an investigation of any suspected inappropriate accesses.

Paul Egerman – Businessman/Software Entrepreneur

Okay, so Dixie, you said two things there, you actually have an approach for the audit report and a report for the accounting of disclosure report and so let's sort of –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

The audit part was – the audit part was really the less is more responding to this less is more philosophy, yes.

Paul Egerman – Businessman/Software Entrepreneur

Okay, so I'm wondering if we can like tease that apart, you're also suggesting that – if I heard it right, maybe I didn't, that we redefine what a disclosure is, to be a disclosure more like the way we handled information exchange outside of the enterprise, outside of the OHCA to another enterprise is that what you're suggesting?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

They don't have a – basically from a technology perspective, if they have an account on the system its internal, if they don't its external.

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

Yeah, this is Leslie, I was going to suggest that one way to go about this was to think about what we thought were clear cases of disclosure and what Dixie just gave was going to be – one of my takeaways from the hearing was that everybody agreed that was clearly a disclosure that needed to be included in any accounting.

Paul Egerman – Businessman/Software Entrepreneur

Okay. So –

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

So, I'm not entirely clear, Dixie, what – are you suggesting that patients have a right to audit accesses, is that what you're – I'm trying to understand how that piece fits into less is more?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

What I would do is that – I would extend the HIPAA, the current audit requirement for HIPAA is audit of system accesses, so it wouldn't capture this or in certain systems it might, but I would make it clear that the covered entity would need to collect and maintain an audit of accesses to their internal EHR systems to the granularity of a single user accessing a single patient's EHR.

I think, the right to see that you've got to – you know, there would be names there or account names, you know, you would have to filter that through, you know, in terms of people's concerns about knowing the names of individuals, but at least the enterprise would have that audit to that level of granularity and they could use that for an investigation or they could show that to a patient without the individual names disclosed unless they, you know, force – unless they requested an investigation.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

This is Judy –

Paul Eggerman – Businessman/Software Entrepreneur

Yeah, so I understand what you're saying and you make an interesting distinction between internal and external and so if I'm hearing you right, I don't know if I am, you're sort of saying for anything that's external that's an automatic like, that's an accounting of disclosures and patients should be able to get that just as like a right, any patient who wants it, should want it, and the stuff that occurs internally that would be perhaps a little bit more of what I would call context sensitive and that would be based on other things, based on some reason to do an investigation.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Well, but I think that the audit – it would be an expansion of the audit requirement because I think the audit, the system audit should be able to capture the accesses to the granularity of a single user, you know Paul, as well as I do, that a lot of applications run as a single user to the database management system for example, right, so you would have to – the EHR system would have to be constructed to know the user who accessed the record so they would keep that record, but it wouldn't capture the purpose and the address, and all that other accounting of disclosure stuff, it would be more an audit of system use to the granularity of a single user.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

This is Judy and that's an interesting topic I'm trying to think of, from the development side, how that works.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I'll bet your system already does that Judy.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Well, the EHRs, I'm thinking not of just any one I'm thinking of different ones, they're going to be very different, one may not have cardiology, oncology lots of different ancillary systems radiology, lab, another may have it all together. So, you're going to get a very different definition of what are the users to the system depending on which system it is.

Paul Eggerman – Businessman/Software Entrepreneur

Yeah and Judy what you just said is consistent with the law and the testimony, and the written documentation, you know, especially from people at Intermountain Healthcare where you have these large IDNs that may have a large number of multiple systems internally, but I wonder does it help to parse – to separate out the internal from the external, perhaps that's a starting point.

I mean, one of the other things that Dixie is saying that, gee when information travels outside of the entity, if it goes from the OHCA to something else, you know, to say an HIE organization or to, you know, another healthcare organization that that's a disclosure and that that should be part of the accounting of disclosures and that that distinction of internal versus external is a useful one.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

So, what you're really getting at there, if I understand you Paul, is more of the interfaces that are going to go whether it's a standard interface through CCD documents or whether it is a hardwired interface. Now I know that we do about 2 billion a month of interface records being – so we're talking about big numbers here. A lot of it is going to go to billing, to an outside lab and stuff like that. So, I'm not saying it isn't possible I'm just saying it will take a lot of thought.

Paul Eggerman – Businessman/Software Entrepreneur

Well, it would, but it also could be handled in a way that is – if you have a concept of less is more, couldn't it be handled in a way that is like transparent, by that I mean let's say for example an organization does electronic prescribing and sends prescriptions to Surescripts –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Right.

Paul Egerman – Businessman/Software Entrepreneur

So as part of their accounting of disclosure it just says “your prescriptions are being sent to Surescripts in an electronic format.”

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Right, right and you –

Paul Egerman – Businessman/Software Entrepreneur

But they only have to say it once but it doesn’t have to say –

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

Yes.

Paul Egerman – Businessman/Software Entrepreneur

Every time it does it that you have to –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Okay.

Paul Egerman – Businessman/Software Entrepreneur

I just said it once.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yes.

Paul Egerman – Businessman/Software Entrepreneur

Perhaps that’s a valuable accounting of disclosures.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Once every –

Paul Egerman – Businessman/Software Entrepreneur

So, you get –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Once every day? How often would you repeat that? I can’t seem to –

Paul Egerman – Businessman/Software Entrepreneur

Well, that would be something that we would talk about.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yeah.

Paul Egerman – Businessman/Software Entrepreneur

It might be once.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I think that’s in the NPRM Paul, in the preliminary discussion, I think they even talked about how if you routinely sent records to a certain place you could – the accounting could summarize that. It might even be in the HIPAA. David is that in the HIPAA privacy rule, accounting of disclosures? It’s somewhere, I’ve read.

David Holtzman, JD, CIPP/G – Senior Health Information Technology & Privacy Policy Specialist – US Department of Health & Human Services, Office for Civil Rights

I’m so sorry, Dixie, repeat your question?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

It’s either in the current HIPAA or it’s in the upfront part of the NPRM where it says that if a covered entity routinely sends records to a particular place they can – the accounting of disclosure can include a summary that says we send the following records to this place every once a week or, you know, it can be a summary thing.

David Holtzman, JD, CIPP/G – Senior Health Information Technology & Privacy Policy Specialist – US Department of Health & Human Services, Office for Civil Rights

Give me a few minutes and I'll get back to you on that.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Okay.

Paul Egerman – Businessman/Software Entrepreneur

And whether or not it says that, that might be one vehicle – I mean, I'm trying – I'm listening to what you said for external, I'm listening to what Judy said, you know, where, you know, it's sort of burdensome to sort of say, well every time you do like an electronic prescription you have to record information about it, but maybe it's valuable to simply say, we use Surescripts and that is part of – you know, you give an accounting of disclosure statement that says this is how it works.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yes.

Paul Egerman – Businessman/Software Entrepreneur

And –

David Holtzman, JD, CIPP/G – Senior Health Information Technology & Privacy Policy Specialist – US Department of Health & Human Services, Office for Civil Rights

This is –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

You know what's a little Paul and that is if you think of what the healthcare organization is going to say, this is fine, they're going to say, well Surescripts is fine and the lab is fine, and the billing is fine, and the transcription is fine so that really doesn't help the patient look for things that are not fine.

Paul Egerman – Businessman/Software Entrepreneur

Yeah, but you're assuming that that's the purpose of the report for accounting of disclosure. Maybe accounting of disclosure report just tells the patient, well here's where your data is and here's what's happening to it. In other words that's transparency. It's not –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Right.

Paul Egerman – Businessman/Software Entrepreneur

There is a difference between transparency and necessarily investigating a problem and determining what is fine or not.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

But is the patient really that curious about who do you send it to or is the patient really – I mean what is the patient going to be looking there for? I think they're more going to be worried about is something going wrong with where my record is going in this area and is there an inappropriate disclosure and then they're going to be just saying I'm curious about where my record goes?

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

Well, I –

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

I think patients, this is Leslie, I think we heard that patients want to know what types of entities outside of the covered entity whether it's for treatment, payment, healthcare operations or something else get their PHI.

Lawrence Garber, MD – Internist/Medical Director for Informatics – Reliant Medical Group

This is Larry, there actually – also we need to remember there are a few other ways of releasing information outside the organization, you know, I know that up in Massachusetts there are some hospitals, you know, who actually have this thing called the magic button which basically allows them to have a view into another organization’s EHR.

I know with our EHR we have a bunch of community physicians who have, you know, through patient consent have access to look into our EHR so there is some viewing that takes place from outside organizations that essentially is release of information but you’re logging into my EHR.

Paul Egerman – Businessman/Software Entrepreneur

Yeah, so that’s a good point, because I actually visited one of those sites where an acute care institution had given sort of that kind of viewing rights to an extended care facility and they were actually talking about as a consequence they were able to significantly lower their Medicare re-admission rate and it seemed like a really wonderful thing. So, that would be included as part of this sort of like accounting of disclosures and transparency would simply say, you know, when you’re being transferred from, you know, Hospital A to Extended Care Facility B, Extended Care Facility B is going to have the right to review all of your information at Hospital A. You are basically – you’re simply telling people that.

Lawrence Garber, MD – Internist/Medical Director for Informatics – Reliant Medical Group

Right.

Paul Egerman – Businessman/Software Entrepreneur

And so it’s – some of that could be less, slightly less technology oriented, it’s more like almost a transparency report but it does start to perhaps, I thought this was what Dixie was getting at, but maybe not, you know, in terms of external or accounting for disclosures.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

I like that idea that it doesn’t – that both you and Larry I think you are saying, which is that it doesn’t have to be electronic it could be a privacy practices report that the hospital gives out that says here’s where your data could go and says all the groups that share to be able to do the work of the hospital.

Paul Egerman – Businessman/Software Entrepreneur

Right.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

And that the only thing –

Paul Egerman – Businessman/Software Entrepreneur

Right, although it would be, in my opinion, it would be better if it were able to somehow tailor it to the patient so instead of reading a 3-page report of where your stuff might go, if when you ask for it, it sort of says, well – it doesn’t include the extended care facility stuff if you never go to the extended care facility.

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

Right.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Which is what Dave McCallie was –

Paul Egerman – Businessman/Software Entrepreneur

That would be more useful and I don’t know to what extent that’s doable.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

I don’t know –

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

– difference from the –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

I don’t know if I agree with you because it might be useful to know where it could go –

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

Well, I just – keep in mind that we do – we will not be as helpful to HHS if we don't give them at least some guidance on how to implement what's in HITECH, which requires patients to be able to get a report of disclosures through an EHR that doesn't exempt treatment, payment or operations disclosures. So, I don't think, Judy, while I think we probably do want to think through how to improve transparency generally about where data goes there is a congressional requirement on the table that a patient –

Paul Egerman – Businessman/Software Entrepreneur

So, based on what you just said, Deven, the suggestion that I'm making, I thought was the direction Dixie was going, but you wouldn't just say in the transparency report, you wouldn't just say your data will go to your insurance company? You would say, your data is being sent to Blue Cross or you would specifically cite the insurance company it's being sent to.

Lawrence Garber, MD – Internist/Medical Director for Informatics – Reliant Medical Group

But how do you – but how do you report that? Okay, that your data is being sent to the states central repository where anybody in the state could be querying it.

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

Well –

Lawrence Garber, MD – Internist/Medical Director for Informatics – Reliant Medical Group

Does that satisfy the need?

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

I mean, I –

Paul Egerman – Businessman/Software Entrepreneur

Yeah, well, I think you report that – how you report that is based on how you send the data. If you send all of your data there then you just report that to every patient.

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

And then I think Larry that gets to the issue of what do we do about business associates, which I'd like to put aside for a minute. You know, one of the things that does occur to me is that there are some good ideas I think that we are generating about how you could do less is more particularly in terms of sort of focusing on an accounting of actual disclosures and that we might – it's either – it's probably not our job nor do we necessarily have time to flush out all of the details of what that might look like and so – and that's the reason why one of the straw suggestions that Paul and I have teed up for you all is whether – there's a sufficient – whether there is so much work that needs to be done in thinking through exactly what a focus on fewer disclosures would look like and whether you could do sort of group disclosures or, you know, like all disclosures to Surescripts for example as opposed to reporting them individually that there might – and there is a significant technological capability component to all of this.

We know that their might need to be a recommendation for piloting what's going to work within some broad parameters or suggestions that we might tee up, but that we probably are not going to be able to specify this with an excruciating level of detail.

Paul Egerman – Businessman/Software Entrepreneur

Yeah and the purpose of piloting might not just be around the technology, it also might be around what is really useful –

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

Yes.

Paul Egerman – Businessman/Software Entrepreneur

To patients too. I mean, it could just – I mean, we're talking about trying to do something on a national scale and we have really no data about, you know, what's going to work and not going to work. So, there needs to be some level of testing here.

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

I mean, what do folks think about aiming a set of recommendations around testing out less is more and taking the accounting of disclosure end of Dixie's suggestion, which we seem to be focusing on at the moment, you know, having a set of suggestions for what we think might work, directing ONC to pilot the technology, you know, prior to – you know, with an eye toward potentially making it doable through EHR certification so that, you know, there is at least one arm of the healthcare community that is deploying, you know, some greater transparency but with technology that's been tested to work, and that would be really, at least an initial phase, toward implementation of HITECH that more carefully I think matches what's technologically possible and tests it out in addition to trying to sort of make the policy advances that we're trying to make, if that makes any sense. I'm not sure it did, this was coming out of my mouth.

But, generally, what I'm suggesting is that there is such a strong technical component to this that it feels like any recommendations that we might make from a policy stand-point are going to have to be aimed at getting the technology right as well as understanding how to shape the policies within the realm of what's technologically doable and we are sort of pushing what the technology can do based on what we heard in the hearing, but we think it might be possible.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

That's why I suggested the audit thing and the internal accesses, because from a technological perspective that would be pretty easy to determine and, you know, whether the organization trusts this individual or this system enough to give them an account on their system and if so that's an internal – you know, then it's access it's not a disclosure.

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

But Dixie, then are you suggesting that that's the access report requirement? Is that still not an enormous volume of information for patients?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

No, no because it wouldn't – you know, accounting of disclosures gives the, you know, the address of the person, the purpose of the disclosure and that purpose of disclosure I think is the biggest difference because a system could collect an audit of accesses, it could say, Dixie Baker accessed Deven McGraw's record, you know, at 12:20 on Tuesday but it wouldn't say what I did or, you know, that the purpose of my access, but it would give sufficient information to know who accessed that record and it would be sufficient information to help them, the organization, do an investigation should they be called upon to do so.

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

Yeah, Dixie, as I understand you, this is Leslie, you're not proposing that as part of a report right now you're proposing that as something that ought separately to be done internally within an organization so that they are ready to investigate.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yeah, it would be, this is what they would be required to collect, but they wouldn't have to bind it up in a report or send it to anybody or anything unless they themselves suspected inappropriate access or a patient came in and said, you know, my neighbor I think is sneaking on my – then they would have a place to go to investigate it and it wouldn't have to be for a while – to address Judy's comment, they wouldn't have to, you know, have one for the entire enterprise they could go to different systems.

You know, they would just be required to collect the data at that level versus the EHRs, you know, somebody in, I don't know in the nursing staff on floor 3 accessed the EHR, it would be here is who accessed it and it was this person's EHR.

Paul Eggerman – Businessman/Software Entrepreneur

So, what you're doing though is – that's very helpful, is you're redefining what a disclosure is and what an access is?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Right.

Paul Egerman – Businessman/Software Entrepreneur

And an access is something that's internal. A disclosure is something is something that's external.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yeah and it would just refine the –

Paul Egerman – Businessman/Software Entrepreneur

And so that also redefines what an accounting of disclosure is, it's for external stuff and it defines possibly how you investigate concerns based on internal stuff.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

And – audit.

Paul Egerman – Businessman/Software Entrepreneur

And you're not yet –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

It redefines what's required to be in the audit. Right now HIPAA just says you have to audit system activity or something like that. This would say your audit has to record access to the EHR down to the individual user and the individual patient.

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

And there is something very interesting about that because if the original reason for moving through an access requirement was the concern about inappropriate accesses within an institution, some of which are potentially breaches, right, one of the later suggestions was to start to develop capability to include in an accounting breaches that don't rise to the level of those that are reportable to the patient.

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

Right but those would be still limited to external disclosures.

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

Would they?

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

Yes.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yes, yeah.

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

Okay.

Paul Egerman – Businessman/Software Entrepreneur

So, I still want to go back to Dixie's suggestion. She's suggesting that it's valuable to redefine disclosures as being times where the data is transferred outside of the OHCA, outside of the enterprise, and everything else is internal basically when it stays within the enterprise and that that is of value – and my question is do we agree that that's a valuable – it's actually a significant change, it's actually consistent with how we handle for example information exchange and some of our discussions about when you need meaningful choice though and so we're saying is this a valuable redefinition that helps us get through this less is more situation and helps clarify this whole situation.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Can I make one clarification there Paul? I think it's important that we define the audit, the internal as accesses by people with accounts on the system or, you know, processes, they have to have accounts on the system because you don't want to create a situation where, well, if you come over to my office tomorrow Paul I'll hand you this information and because you'll be inside my organization it won't be a disclosure. It's got to be something that the system can enforce.

Paul Egerman – Businessman/Software Entrepreneur

Okay, that's an important distinction but it's also, I have to tell you it's sort of like a fine point, you know – I think your broader point is the first one that we need to make sure we understand the internal versus the external and then you want to have some special treatment where if you have an employee who works say in the laboratory but doesn't really have – isn't really authorized to look at like radiology somehow walks over to radiology and does it anyway –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

–

Paul Egerman – Businessman/Software Entrepreneur

That's an interesting situation, but let's first focus on the internal versus external mixture. Do people understand that distinction or are comfortable with it?

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Well, we still have the challenge that for different systems they won't keep track of who is a legitimate user on radiology even though the radiology users are internal or who is a legitimate user in the lab.

Paul Egerman – Businessman/Software Entrepreneur

Oh, I agree.

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

Yeah, so that gets to actually a question that I had because Dixie you framed your recommendation in terms of an EHR. Did you mean for that recommendation to apply to a concept of an electronic health record versus, you know, the broader designated record set that would raise the issues I think that Judy just raised?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I was using it the way that long ago ONC, I think when they first came out with the first EHR standards they defined that, you know, an EHR is just about any technology that handles electronic health records of patients, you know, I wasn't thinking about a designated record set, no.

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

Right, but again, your suggestions about sort of improvements to really – one could almost refer to it as the HIPAA Security Rule provisions around audit are aimed at making investigations of potential inappropriate access more effective as opposed to trying to aim at a report that would necessarily go to patients.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Right, if you need –

Paul Egerman – Businessman/Software Entrepreneur

Well, no, but if I heard – well, I'm sorry, go ahead Dixie.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yeah, if you needed to you would be able to generate that but it wouldn't go you must generate a report every week and send it to – you know, you wouldn't have to generate – you know, you would just have the capability to generate it should a patient come in and say I want to see who accessed my record.

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

And so the patient would have a right to that report Dixie or that would be at the discretion of the organization?

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I think they have to have – now you're getting into the policy part, but I think that they need to have a right to see it, but I think a number of our – people who gave testimony had concerns about, you know, the safety of individuals. So, I think that they –

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

It wasn't the only thing, Dixie, it was also about, you know, the high volume of information.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Right and this would take care of the high volume of information for sure.

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

But the bottom line...

Paul Egerman – Businessman/Software Entrepreneur

Well –

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

For the patient is whether or not there were inappropriate accesses. I mean, so within the institution, bottom line is whether or not there were inappropriate accesses within the institution and you could say – I mean if we eventually got to that, you could say, your record was accessed by someone who was not part of your treatment team without mentioning who the person was. I mean, you can protect identities that way.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Again, this would not be a huge volume, this would not generate – in fact that was my primary purpose of thinking about it is that it wouldn't generate that much data.

Paul Egerman – Businessman/Software Entrepreneur

Well, and my comment is, I mean, I like what you're suggesting Dixie, because I kind of view it differently, I don't view this that you take all this internal stuff and make that into a report the patient sees. I view it more as you keep all this internal stuff and depending on the context and the situation with the patient it is useful to the organization. So whether you have for example a celebrity is the patient you might have some additional concerns and want to do additional monitoring on your staff.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Right.

Paul Egerman – Businessman/Software Entrepreneur

Because people are very interested or if you have – the patient is an employee or let's say the patient is an employee in the laboratory or it's, you know, the chief of radiology, you know, you might want to think that there is a circumstance where you're going to somehow give greater scrutiny to a particular department's activity and that might give you a vehicle to do that and also it might give you a vehicle if you have a patient complaint that is like an employee says, you know, I overheard, you know, this other employee say something and I'm troubled by that. Well now you have a vehicle to try to track that down.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Exactly right. In fact that's what most hospitals do now they have –

Paul Egerman – Businessman/Software Entrepreneur

But what I'm suggesting is context sensitive.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yes.

Paul Egerman – Businessman/Software Entrepreneur

In other words it's not necessarily something that the enterprise does for every patient, right? I mean, if I'm a patient at say BIDMC and I'm not employed there and I just say I'm curious to know the names of every single patient at your institution who ever looked at my record they don't have to provide that for me, you know, it's up to them and the context.

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

I think that ordinary people non-celebrities and non-employees might have a variety of reasons, some of them very good including things like stalking or nosy neighbors, for wanting to know whether people who are not members of the treatment team inappropriately accessed their records.

Paul Egerman – Businessman/Software Entrepreneur

Right.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Well the data would be there for them too.

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

Yeah, that's why I like your suggestion.

Paul Egerman – Businessman/Software Entrepreneur

Yeah, so it's sort of like recording the data and the enterprise uses it in a context where it might be necessary.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Right, right.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

What was that?

Paul Egerman – Businessman/Software Entrepreneur

For this kind of concept of an internal audit to make sure that the data is being handled. It's actually – I have to tell you it's a variation of what happens right now, right, these organizations do this, they watch carefully when they have celebrities, they take various measures to make sure their internal people are doing the right thing.

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

NCVHS several years ago heard testimony about the stalking issues that didn't have anything to do with celebrities.

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

Yeah, I definitely don't think we should highlight the celebrity as the example. I mean, I like to say sometimes that everyone is famous in a small town and usually the biggest employer in a small town is the medical facility. But, nevertheless, I think the general concept still holds that, you know, improving the ability of audit trails to be investigative tools for complaints about inappropriate access sounds like that is something that we would want to include.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yeah and that's a good example.

Paul Egerman – Businessman/Software Entrepreneur

And it's also – the small town is also a good example too of how the internal process has to be determined by the context in which it occurs because you could have a rural hospital that has a very small number of employees and basically every employee has access to every patient it's just the way it all works. And so in some sense it would be silly to burden that institution with a lot of fancy reporting when they just know that every employee has access to every patient.

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

Dixie, were you about to say something else? All right, we'll reach out to you to get some help on wordsmithing that particular aspect of it.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

This is Judy.

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

Right?

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Could someone walk me through how what Dixie said might work? I'm not sure where we are on it right now.

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

Well, I think it is a recommendation, I mean, I'm going to have to get some help from her to word it, that goes toward improving the way that the – improving security rule or making more specificity around security rule requirements for the EHR so that it records accesses by people with accounts on the system that use a patient's EHR and the purposes for this would not be for providing – for generating a report that would be provided to the patients upon request but to improve the ability of organizations using EHRs to be able to conduct investigations.

And maybe it's not just limited to EHRs. I mean, there are a number of covered entities that are covered by the security rule requirement in general and we should consider whether the recommendation is just for those using EHRs or whether it would be broader, but I think conceptually it's about making sure that audits are deployed in a way that facilitates investigation of inappropriate access but it doesn't –

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

Deven?

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

From what a report would look like is my understanding of where it was headed.

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

Deven, given the way you just put that this is an issue that came up yesterday in the NCVH discussion, which is that the actual accounting in the HITECH Act is not limited to disclosures from EHRs and we're going to need to think very carefully. I've been bracketing this problem.

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

It's disclosures through an EHR is the exact language in HITECH.

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

Well, if you actually bracket through I don't think that's – and we should talk about this off line, but –

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

Okay.

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

Yeah.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

So, is what the discussion about simply that the systems need to keep track of everybody who accessed the record are we back to that?

Paul Eggerman – Businessman/Software Entrepreneur

Yes we are.

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

But –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Really –

Paul Egerman – Businessman/Software Entrepreneur

Yes we are but a little bit of the breakthrough is we're defining it based on simply the people who are internal, basically people who have like user accounts on the system and we're not – and we're sort of saying, this whole business is about whether they're employed or not employed that doesn't work that confusing.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Right, so we're just simply saying its every access, right?

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

But not –

Paul Egerman – Businessman/Software Entrepreneur

No we're just saying anything that's internal is internal and the data is recorded for the purposes of helping you track stuff but it's not included in an accounting of disclosure report.

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

Right. It's a separate set of recommendations on what patients would have a right to a report of per HITECH and there is where we're trying to define disclosure more narrowly to mean actual disclosures.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Okay, so the first one is just keep track of every access, we get still back into different EHRs will be different but so one will keep track of all the, who knows radiology management stuff and another won't because it has interfaced that. So, still each one could keep track of whatever it keeps track of.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Right.

Paul Egerman – Businessman/Software Entrepreneur

That's right and that the internal stuff is not on an accounting of disclosure.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Okay, but it will be very different depending on what the EHR does and what it interfaces to.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Every organization should already be compliant with HIPAA as David pointed out early on and this just would expand what needs to be recorded in the audit trail.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yeah and then each one would have an audit trail so you would have to go to the radiology audit trail, the cardiology audit trail, the oncology audit trail.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Depending on how you implement it. If an organization decided to centralize their audits it could.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yes.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

But they wouldn't be –

Paul Egerman – Businessman/Software Entrepreneur

Well, yeah or you might have to go to those various audit trails Judy.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

It probably –

Paul Egerman – Businessman/Software Entrepreneur

In the context if there is some reason to go to it.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yeah.

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

Paul Egerman – Businessman/Software Entrepreneur

But there is not a right for a patient –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Okay.

Paul Egerman – Businessman/Software Entrepreneur

To automatically get a listing of all the internal stuff.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

So, all we're saying is that the EHRs have to keep whose access – which I think almost every EHR does, so that's –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

That's what I said I'm sure your system does this already.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

So that's not a change from what the EHRs currently do I think.

Paul Egerman – Businessman/Software Entrepreneur

We're sort of matching the policy to what the technology currently does.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Yeah and then so then – okay, I've got it.

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

So, then I think we're suggesting that for the accounting that there be pilots of technologies to give patients a report of accounting of disclosures with disclosures defined narrowly to be external to the organization or the OHCA, if they're in an OHCA, and that we would want to pilot a technology approach to doing this and, you know, so that's the track I thought we were on and then I think that raises obviously a bunch of questions that would be helpful to answer and that is, you know, are we aiming this at a pilot of EHRs for potentially down the road inclusion in certification criteria, which definitely puts within ONC's purview in terms of the technologies that they pilot or do we have a broader lens for this. And then Larry's question about, what about disclosures to business associates and what would be the responsibilities there is of course another angle to this.

Joy Pritts, JD – Chief Privacy Officer – Office of the National Coordinator

Deven –

Paul Egerman – Businessman/Software Entrepreneur

Yeah, but we've made an important –

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

Hang on I think Joy is breaking –

Joy Pritts, JD – Chief Privacy Officer – Office of the National Coordinator

Yeah, I hate to interrupt but Linda Sanches has been trying to get on the line because she had some comments she needed to make and her line is not live so I have sent an e-mail to Michelle, but if anybody – Linda does have something she would like to add to this conversation and I know our time is running out but I wanted you all to be aware of that.

Paul Egerman – Businessman/Software Entrepreneur

Okay, I'm sure that's a frustrating thing to not be able to get on the line, because I would also like to hear what she has to say. Should we wait a minute or what should we do here?

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

Yeah, let's give her, hopefully she's dialing in now.

Paul Egerman – Businessman/Software Entrepreneur

Because –

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

The operator can move her over so if you just bear with us.

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

Okay.

Paul Egerman – Businessman/Software Entrepreneur

Okay, because indeed, implicit I think in what is being suggested is that we're redefining what a disclosure is.

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

Or we're suggesting that they redefine it.

Paul Egerman – Businessman/Software Entrepreneur

Or we'll make a recommendation to redefine it – we're going to make a recommendation to redefine it.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

And we're clarifying it. I think this was the intent too. I think that –

Paul Egerman – Businessman/Software Entrepreneur

Well –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

– anticipate these OHCA issues. You don't think so?

Paul Egerman – Businessman/Software Entrepreneur

It's very hard to figure out the intent. I mean, I agree with you, but just – I had my own tendency to read this and assumed that what I think it should be doing is what the original intent was.

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

So did everybody else Paul.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

I just want to confirm that as we make these rules up it has power only over the EHRs and it doesn't have power over the cardiology system or the oncology system etcetera, is that correct?

Paul Egerman – Businessman/Software Entrepreneur

I don't think so Judy.

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

EHRs.

Paul Egerman – Businessman/Software Entrepreneur

Because you've got to look at it – I think you've got to look at the way the patient looks at it. I mean, you know, it's like in a system, if the data is in the cardiology system or the data is in the billing system or in an employer billing system –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Well, what do we do –

Paul Egerman – Businessman/Software Entrepreneur

So, it's hard to –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

What do we do with people who – hospitals who have a new EHR that they've bought for Meaningful Use but they have an old lab system that doesn't do this or they have an old billing system that doesn't do this aren't they all now going to be in trouble because the billing system people weren't following these rules because they didn't think it applied to them but now suddenly the hospitals have to follow these rules.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

They –

Paul Egerman – Businessman/Software Entrepreneur

Well –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

That's right and the HIPAA requirement, I looked it up, currently says, audit controls implement hardware, software and/or procedural mechanisms that record and examine activity in the information systems that contain or use electronic protected health information. And what we're suggesting is just a refinement of that requirement. So, if they don't currently comply with HIPAA they've got a problem regardless of what we say.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Okay, so what you're saying is that everybody should have done this anyway no matter what product they had.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Right, but maybe it needs to be –

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

–

Paul Egerman – Businessman/Software Entrepreneur

And I think we're also establishing the requirement that's within the scope of what most of the technology currently does.

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

Did I hear Linda's voice? No?

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

Yes, you did.

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

Okay.

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

Hi and I'm sorry to break in at this point some of these issues might be long gone, but I just wanted to point out that disclosures are currently defined to really include any sharing of information outside of a covered entity. So disclosures to a business associate would be a disclosure, sharing information with another member of your OHCA would be a disclosure.

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

Yeah.

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

And so that definition is important in a variety of ways throughout the rule not just within this section. So, perhaps in formulating this we could think more about – it sounds like you want to narrow the types of disclosures that are subject to the accounting.

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

Yes.

Paul Egerman – Businessman/Software Entrepreneur

So, if I heard that right rather than say we're redefining a disclosure we're defining types of disclosures?

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

Right.

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

For this particular purpose.

Paul Egerman – Businessman/Software Entrepreneur

For this particular purpose, okay.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

Now wasn't there a carve-out for personal health records that held patient information but they weren't attached to an EHR however the EHR could send them data. I thought there was a carve out for that which I never understood, but –

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

No Judy.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

I read it.

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

Where?

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

In some of the original stuff that came out it was a long time ago, because I remember fighting it and saying it makes no sense and we were not able to successfully fight it.

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

Yeah, I'm not sure what you're talking about.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

I can try to get that for you and show you.

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

Okay, that would be great.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

At that time it was the Google Health and the HealthVault that were saying that they did not – they were allowed to disclose information for advertising and other purposes.

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

That sounds like it's a completely different issue Judy.

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

Yeah that's –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

But it still goes back to the whole thing of if the healthcare organization does send data to there then is that covered or not covered?

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

Well, we're talking about a HIPAA right, so first we're talking about sort of what covered entities would be covered if – I think at least with respect to accounting of disclosures we're focusing on disclosures through an EHR and then, you know, I think it's within our purview to think through then what happens – what are we doing about disclosures to business associates and disclosures that they might have, but I think there should be a natural limitation on our exploration of this issue to the HIPAA and HITECH world.

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

And I think those guys were not business associates so therefore they are not under HIPAA, but it is interesting because it still does go with – it maybe the EHR sending them information.

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

Well, right and the –

Judy Faulkner, MS – Founder & Chief Executive Officer – EPIC Systems Corporation

I will follow up on that and get it to you.

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

Okay. All right well –

Paul Egerman – Businessman/Software Entrepreneur

So, this is a valuable discussion. We got a concept of internal and external. We've got a concept of saying that the external is going to be defined by the type of disclosure and the type of disclosure – I mean, the accounting of disclosure report will be defined by the type of disclosure that goes external to the OHCA.

And if we have consensus on that then I think what we probably have to start thinking about is, well what more do we want to say about the accounting of disclosure report in the context of less is more and how do we handle the business associates, is that right Deven?

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

I think so, yes.

Paul Egerman – Businessman/Software Entrepreneur

So, we've got about, I don't know not quite 10 minutes left, do we want to start to dive in and think about what should be on this accounting of disclosures report in terms of the level of detail?

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

That's – I mean, that's one option. I mean, because that was one of the questions. I mean, one option I think we have – I think we could go in multiple ways here one is that we could suggest categories of information that would be in the report but that ultimately they probably have to figure it out through the pilot testing in terms of what's going to make the most sense.

Like for example purpose disclosure I think is already part of what you would be required to include in an accounting but given that we're suggesting that people would be able to get a report of disclosures, you know, for treatment, payment and operations, which is what HITECH asks us to do, purpose isn't typically entered in general workflow disclosures and how much additional work would it be to include that and would we want to include it?

You know, if you look at, for example, what the Privacy Act of 1974 requires, which agencies do have to keep a record of disclosures and that record needs to include the date and the nature, and the purpose of the disclosure that's, you know, disclosures external to that agency, but nevertheless they do require a purpose, but it's probably a lower volume of disclosures for which purpose would be relatively easy to enter.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

So, that's already in HIPAA too, you know, for the privacy, accounting of disclosures except for TPO it already has that list there.

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

Well it does but is that list the right list when you're talking about a potentially larger volume and one where you ideally would be automatically recording that as opposed to having to separately note it with each and every disclosure because there could be a lot.

Paul Egerman – Businessman/Software Entrepreneur

Well, another way to look at this is to think of something that's in your e-mail that says when you do these disclosures these questions who, what, when and why.

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

Right.

Paul Egerman – Businessman/Software Entrepreneur

And so do we want to make comments on each of those? I mean, in some sense we've already made some comment about who, you know, and do we want to talk about, you know, what, when and why also.

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

Yeah.

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

I think – I got it, remember a while ago when I mentioned I had read somewhere that allowed for summary, somebody sent me an e-mail and they said that was in the NPRM, I think we should, you know, either have somebody look that up or –

Paul Egerman – Businessman/Software Entrepreneur

And that's a good observation. We should look it up, but we also I think have the freedom to make a suggestion as to what it should be. I mean, I think I'm trying to suggest, well, gee maybe it's okay to simply say it once. You know, we send the data to Surescripts –

Dixie B. Baker, MS, PhD – Senior Partner – Martin, Blanck & Associates

Yeah, I think so too.

Paul Egerman – Businessman/Software Entrepreneur

And they send it every time we – you, you know, do a – order a prescription or do a refill, you know, and –

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

Paul?

Paul Egerman – Businessman/Software Entrepreneur

Yes?

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

This is Linda Sanches, both the current privacy rule and the proposed accounting of disclosures each, generally speaking, do provide that an entity if they're doing repeated disclosures could name the date or the period of time in which it happened and a description of what it was and then not have to report each and every one of them.

Paul Egerman – Businessman/Software Entrepreneur

Oh, good.

Linda Sanches, MPH – Senior Advisor for Health Information Privacy – Office of Civil Rights

So there would be multiple disclosures that are captured once.

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

Okay so it sounds like we might want to suggest that as an approach that would be possibly explored in the pilot.

Paul Egerman – Businessman/Software Entrepreneur

Well, that's right. I mean, it's still a mystery to know what is sort of useful to patients but we're starting to get a much, probably by a couple of orders of magnitude, a much smaller report in terms of the amount of detail and then again I don't know what's necessarily useful but that seems interesting.

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

Well, taking a look at the time and knowing that we want to leave some time for public comment it sounds like we have – you and I Paul have some work to do to summarize the discussion and refine these straw recommendations so we can discuss them further on our next call.

Paul Egerman – Businessman/Software Entrepreneur

Yeah.

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

And in the meantime of course we can take some wordsmithing of some of the hearing observations too and we have some to add in there as well.

Paul Egerman – Businessman/Software Entrepreneur

Yeah and I just – I think we made great progress with a very difficult issue. This was significant progress.

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

Deven, this is Leslie, I also wanted to alert you that NCVH is meeting next week.

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

Okay.

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

If we have anything to add in we will make sure to be in touch with you and if you have any additional information about what you're thinking please let us know so we can incorporate it into our discussions which will be happening next Wednesday.

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

Next Wednesday, okay.

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

Yeah.

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

Thanks Leslie we appreciate that, we may be able to at least draw up our summary of what we think happened today in advance of that meeting for you, just as an FYI not as anything final, because we'll need for the Tiger Team to discuss it.

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

Right of course and we had a conference call yesterday and people have looked at the slides which were on the website.

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

Yes.

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

And so some of what I was thinking about today was influenced by the discussion yesterday, but I think there was general agreement that we liked the direction things were going in.

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

Good, good to hear. Okay, I think we're ready for public comment Paul?

Paul Egerman – Businessman/Software Entrepreneur

Yes.

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

Okay, Michelle?

Public Comment

Michelle Consolazio – Federal Advisory Committee Act Program Lead – Office of the National Coordinator

Operator can you please open the lines?

Ashley Griffin – Management Assistant – 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 have one comment. Kel, please go ahead?

Kel Callahan – Vice President & Chief Operating Officer – HIPAAT, Inc.

Thank you this is Kel Callahan from HIPAAT, I appreciate the opportunity to speak to the Tiger Team, just a quick note and then a comment if you don't mind. We took the time to I guess be the last comment on the blog, I would ask that perhaps some people take a look at that.

I'm concerned that this Tiger Team is not aware or may not be aware to the extent that a lot of these auditing questions were noodled, if you will, by the previous administration HITSP and a lot of the auditing questions and so forth were, you know, described and worked on by a lot of different stakeholders and I would encourage people to take a look at HITSP T15 it provides back in 2008/2009 a lot of the ability to record the varied concerns and accounting of disclosures that this Tiger Team is considering not the least of which is the ability to record a purpose of use which can be defined a number of different ways I give you that.

Something to keep in mind too as you're considering pilots is that HITSP's task was to reach out at that time and look for standards that were mature enough to adopt and formally recommend and so that work has already been done and completed to the satisfaction of others I don't know if it's to the satisfaction of this Tiger Team. And I would also submit to you that there are over 60 vendors right now adopting that particular standard that it points to. And so, as it relates to pilots you may have a focus of a pilot as to what the reports may look like but from an interoperability for the auditing tool to be viewed as mature enough it's been in existence since 2005 and every year is exercised at the HIMSS conference. So, I just leave you with that.

And some of the technology is already available as it relates to the inappropriateness of access within an organization or outside of an organization in the form of consent and management, and there are some open source tools already in the marketplace to facilitate some of these functionalities. Anyway, thank you.

Paul Egerman – Businessman/Software Entrepreneur

Thank you Kel that's very useful.

Ashley Griffin – Management Assistant – Altarum Institute

We have no further public comments.

Paul Egerman – Businessman/Software Entrepreneur

Perfect, well, I think this was an excellent discussion today. I want to thank everybody for their participation, this is not an easy topic but I think we're making great progress. Our next meeting we'll hopefully try to wrap this up is at 2:00 o'clock on Monday, November 18th. Thank you very much.

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

Thanks, everybody.

Public Comment Received During the Meeting

1. Does this TT not view the HITSP T15 Audit trail methodology as relevant? KP, GE and others participated in its development...
2. Even if everyone agrees that the "full investigations of complaints" is a good route to go, there ought to be some clearer definition of the data that systems should track so that individuals could have some expectation of meaningful results of a request for investigation. An "investigation" is not likely to be fruitful if the systems involved are not tracking the information necessary to make results consistent and meaningful.
3. *Reason* for Access to the Application: Required for Accounting of Disclosures; not required in the Access Report.
4. Patients concern about inappropriate access can be broader than concerns of a neighbor or ex-spouse deliberately looking at their record. By regularly examining an access report a patient may recognize that there has been a patient mismatch and their record is being looked at regularly by providers they have nothing to do with because a mismatch has occurred at some time. There are probably a million other scenarios and the Tiger Team sometimes seems to think too narrowly and gets hung up on particular example and think it represent the whole scope of a discussion.

5. ASTM E2147 outlines the data elements in the Access (Audit) Report and in the Accounting of Disclosures Report. This document should be used as a reference as policy is developed.
6. Does the investigation stop as soon as a patient's information leaves the EHR and becomes a "disclosure". Once it has been found that the information has been inappropriately handled, the patient probably wants to see the full path it followed from then on which is why applying the rules to Designated Record Set makes sense.