

**HIT Policy Committee  
Privacy & Security Tiger Team  
Transcript  
August 8, 2013**

**Presentation**

**Michelle Consolazio – Office of the National Coordinator**

Thank you, good afternoon everyone this is Michelle Consolazio with the Office of the National Coordinator. This is a meeting of the Health IT Privacy and Security Tiger Team. This is a public call and there will be time for public comment. As a reminder this meeting is being recorded and transcribed so please announce your name when speaking. I'll now go through the roll call. Deven McGraw?

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

Here.

**Michelle Consolazio – Office of the National Coordinator**

Paul Egerman?

**Paul Egerman – Businessman/Software Entrepreneur**

Here.

**Michelle Consolazio – Office of the National Coordinator**

David McCallie? Dixie Baker?

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

I'm here.

**Michelle Consolazio – Office of the National Coordinator**

Gayle Harrell?

**Gayle B. Harrell, MA – Florida State Representative – Florida State Legislature**

Here.

**Michelle Consolazio – Office of the National Coordinator**

John Houston? Judy Faulkner?

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

Here.

**Michelle Consolazio – 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 – Office of the National Coordinator**

Micky Tripathi? Wes Rishel? Kitt Winter? David Holtzman? Lisa Sanchez?

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

Here.

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

That's Linda Sanchez.

**Michelle Consolazio – Office of the National Coordinator**

Oh, I'm sorry, that was my fault, thank you Linda. And are there any ONC staff members on the line?

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

Kathryn Marchesini.

**Michelle Consolazio – Office of the National Coordinator**

Hey, Kathryn and I think that's everyone so I'll pass it over to you Paul.

**Paul Egerman – Businessman/Software Entrepreneur**

Great, thank you very much Michelle, and a terrific job of calling the roll. I want to thank everybody for being on our call this afternoon or this morning and we have a very interesting agenda. Before I get started I want to point out that this is a public call and there will be an opportunity for public comment at the end and encourage if there are members of the public listening in to make comments, we appreciate your interest in our effort.

We have a very interesting topic to discuss today which is planning about a virtual hearing on accounting of disclosures. Before we do that in terms of our basic agenda also we wanted to give you a brief summary of what it is that happened yesterday at the Policy Committee meeting for the members of the Tiger Team who were not present basically the recommendations that we made related to non-targeted query were approved. There was a request for some clarification and elaboration on the issue of – it was actually our previous April recommendation that said that patients needed to receive meaningful choice in terms of their being listed or included in an aggregator. So, there was some request simply that we put some more words around that.

And then the second issue that we had which was the attestation about the risk analysis, there was also a very good discussion on that topic and that was approved also. So, people I think should feel good that both of our topics, which again we explained were not like – they were not related they were independent topics were approved and before we start on the discussion of the virtual hearing let me just pause a minute because I know obviously Deven and also Gayle, and Judy were there and to make sure they feel like I described that accurately. If you want to add anything?

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

I think you got it Paul.

**Paul Egerman – Businessman/Software Entrepreneur**

Great.

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

It was good to be able to have both of those topics done. We've been on the query issue for quite some time so it's nice to be able to sort of put the bow on that and get the transmittal letter ready and submit it.

**Paul Egerman – Businessman/Software Entrepreneur**

Yes, we did tie a bow on that and I explained afterwards to Farzad why we had tied a bow on it that we had not tied a bowtie but that we had completed the task and people should feel good about it, that was not – it was an interesting and complicated issue and I think this Tiger Team has been very productive and I hope people feel good. Now we are also about to head into another fascinating and challenging issue which is a virtual hearing that we are going to hold on this issue of accounting of disclosures and to get started on that we need to give you both some background on the issue and so I want to let Deven do that because that way you don't have to hear me try my best to avoid butchering HIPAA. So, Deven is going to take us through the next piece of the agenda.

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

Thank you very much Paul I appreciate it. So, for those of you who are familiar with this accounting of disclosure issue we've been asked to have a virtual hearing on this topic by both ONC and the HHS office and actually I should say the Office for Civil Rights which is the office that has oversight over HIPAA. And they've been looking into this issue because there were some changes that were required to existing privacy rule provisions by HITECH and implementing them has become quite a challenge there is an interesting and challenging mix of both policy and technical issues to deal with.

They have asked us to have one of our virtual hearings on this topic and what we want to do with the Tiger Team today is to give all of you a bit of background on this issue from a legal stand-point so that those of you who haven't really been steeped in this issue will get up to speed on it and we're lucky to have Linda Sanches from the Office for Civil Rights on the line to help answer any questions about this.

And then we've already begun to sort of scope out both with OCR as well as MITRE who staffs us, and ONC what might be some potential topics to take on as well as some potential entities to invite to testify before us. It will be a public hearing as all of our hearings always are and we'll have an opportunity to really explore this issue I think from a lot of different dimensions.

So, my next step is to sort of launch into – well, the overall purpose of the hearing is really to explore realistic ways to provide patients with greater transparency about uses and disclosures of their digital identifiable health information and that exploration should also help facilitate implementation of the HITECH changes to the accounting rule, but we've also been encouraged again, to sort of take this on from a transparency angle and not necessarily just from the HITECH implementation angle, but having said that we do want to make sure we deal with the HITECH implementation issues.

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

Deven?

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

Yes?

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

This is Leslie and I'm speaking very much in my role as the Privacy Co-Chair at NCVHS, I wanted to let everybody know that NCVHS has also been asked by outside groups to have something in the way of a hearing with respect to accounting for disclosures. After I got the agenda yesterday I sent up a little trial balloon, this is very unofficial, but as you know we have some HIPAA responsibilities as well and a kind of public and possibly consumer focus, also a focus beyond the kinds of electronic health records that have been the focus of ONC and I have a kind of unofficial, this is very unofficial, I have run the trial balloon by the Chair of the Committee and others that we would love to partner in planning this virtual hearing whether the format takes is that we would plan one or more of the sessions or whether the format takes is that it would in effect be a two part virtual hearing I don't know.

But I just wanted to put that out on the table to indicate that, you know, in the past recently NCVHS has kind of hung back on the HIPAA side and let ONC take the lead but it's clear we have some shared interest and responsibilities and this might be a really nice opportunity to try to see if we can work together on something. So, I just wanted to put that out there and then where relevant I'll make some later comments along the way.

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

Okay, okay. I sort of feel like it might be something that we should discuss with our relevant sort of agency staff counterparts.

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

Yes, that has been, as I said, this came up at – actually I should also back up there wasn't time to fully discuss it but the request to NCVHS came up at our executive committee meeting on the phone on Monday and then when the agenda came around a lot more suggestion that we ought to put in – but it isn't fully clear which committee does exactly what and so it did seem to make sense to consider a – rather than having NCVHS do something and the Tiger Team do something see if we could work together a little bit on this.

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

That's why we have you on both committees' Leslie.

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

You got me. I've put it in "or" of that kind, but this is an "or."

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

Okay, well, let's have an offline conversation about how we'll manage that aspect of it.

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

Absolutely.

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

Because it does seem like, you know, it would be important not to do this twice and ideally also not to come up with conflicting recommendations if that is at all possible.

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

Right.

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

But given the sort of joint interest in moving this forward let's think about how best to do that.

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

Absolutely and I'm sorry to be bringing this up at the last minute, but as you probably know, one of the differences between NCVHS and ONC, and the Tiger Team is that we both have more limited staff and we also move more slowly.

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

Yeah.

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

But we need to learn some new tricks too.

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

Okay, all right, so more on that later, Leslie, thank you for raising that. So, does anybody else have any further questions before I launch into the regulatory background, there will be plenty of time to sort of ask questions about the substance and to opine on hearing scope and possible questions and testifiers once we sort of get through this background material. All right, so here we go.

Diving into the background material, I am going to present these slides, I'm fortunate, as I mentioned, to have, you know, both staff from the Office of the National Coordinator as well as the Office for Civil Rights on the line who can make sure that I'm articulating this properly and accurately and to help me field questions.

So, the HIPPA Privacy Rule has, for quite some time, required covered entities to make available, upon the request of an individual, an accounting of certain disclosures of an individual's PHI, which is the acronym for Protected Health Information, which is identifiable health information, during the 6 years prior to the request.

That accounting has to include the date, the name of the requestor, a brief description of the PHI disclosed and the purpose for that disclosure. These provisions apply to disclosures of both paper and electronic PHI and apply regardless of whether the information was in a designated record set and this becomes relevant when we talk about the proposed rule, but just so you know for now, a designated record set is another defined term under HIPAA and means a group of records maintained for or by the covered entity in order to make decisions about the individual such as medical bills and frankly medical records as well, and billing records either on the provider's side or on the health plan side.

Now this rule required this accounting of disclosures but there were a number of exemptions, disclosures that did not have to be included and the exemptions included disclosures to carry out treatment, payment or operations, disclosures to individuals who the PHI was about such as in a case where an individual requested a copy of his or her health information, disclosures done under an authorization from the patient, disclosures that were part of a limited dataset that were made under a data use agreement and disclosures that were made prior to the compliance date for the rule and this is actually just a handful of the disclosures that are exempted there are others.

So, that has been the rule in place for quite some time under HIPAA. In HITECH congress mandated the following with respect to these accounting of disclosure provisions, that the exemptions for disclosures to carry out treatment payment and operations would no longer apply if the disclosures were made through an electronic health record and individuals would receive a right to receive an accounting of disclosures made through that EHR for the 3 years prior to the request instead of the 6.

And with respect to disclosures from business associates covered entities must either provide an accounting of also the business associate disclosures or a list and contact information of all business associates that would then be provided to the individual who asked for the accounting and then that individual presumably could ask the business associates for separate accountings.

Now the HITECH also required the adoption of initial set of technical standards, implementation specifications and certification criteria to ensure that EHR technology could accommodate the new provisions around accounting of disclosures. So, before I move into talking about the RFI I just want to do a gut check with the staff on the phone that I've explained this correctly so far?

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

Yes.

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

Okay, doing well, good, all right. So, in 2010 as part of the process of implementing this HITECH Act HHS published an RFI, which is a Request for Information, seeking further information on people's interest in learning about disclosures of their protected health information, burdens on covered entities in providing information about those disclosures and technological capabilities and there were 9 questions that were asked requesting information on potential benefits, burdens, awareness of the right to an accounting, uses of an accounting, information, you know, that would be part of an accounting of disclosures, technological capabilities and timing. And your backup slides contain all of these questions and a brief summary of the collective responses that were made to this Request for Information.

So, upon receiving this information and deliberating on how to implement the rule the HHS, Office for Civil Rights released a Notice of Proposed Rulemaking, which is a proposed set of regulatory provisions to change the privacy rules accounting of disclosure requirement. And the proposed rule provides individuals with essentially two rights, one is the right to an accounting of disclosures and the other is a right to an access report.

So, to explain what both of these are, an accounting of disclosures is a right to, again, an accounting, disclosures made of an individual's PHI in both paper and electronic form by both covered entities and business associates but there is a specific list of disclosures that are required to be included in the accounting and those are disclosures for public health, disclosures for judicial and administrative proceedings, and this is not a mutually exclusive list but tries to hit on most of them, law enforcement disclosures, military and veteran's activity related disclosures, disclosures regarded related to situations to avert a serious threat to health or safety, disclosures to the state department regarding medical suitability, disclosures to government programs that provide public benefits and disclosures related to worker's compensation.

So, not the sort of routine TPO disclosures necessarily but an affirmative list of specific disclosures that would need to be accounted for and provided to an individual if they asked for it. But there was also another right that was proposed and that was the right to an access report that indicates who has accessed an individual's protected health information maintained in a designated record set, so this is the information that is used by a covered entity or a business associated on its behalf to make decisions with respect to the individual.

And the proposed rule also requires revisions to the notice of privacy practices that inform individuals about their right to this report. The report must include the following, the date and the time of access, the name of the person or the entity accessing the protected health information, a description of the information accessed and the user action, creation, modification, deletion are the actions.

So, where is this proposed rule today? Well, it has not been finalized, the Office for Civil Rights did not address accounting of disclosures in the recent final HIPAA Omnibus Rule that was issued in January 2013, which it was a separate proposed rule so I think many of us frankly were not expecting it to be wrapped up with the changes the other HITECH changes, but nevertheless, the Omnibus Rule does not contain any provisions related to accounting in it.

What has happened on the certification front, remember that HITECH had some sort of – does require the establishment of technical standards implementation specifications and certification criteria and essentially there is a certification criterion for accounting but it's optional, it was optional in the first round of certification and it remains optional in the 2014 edition of the criteria. And the intent was to leave complete EHR and EHR module developers with the flexibility to innovate in this area and develop new solutions to address the needs of their customers hence the certification is voluntary and – all right, so before we move onto an explanation of the goals I want to stop.

I want to first turn to the staff on the phone to make sure that I presented the material accurately and then we will open it up to questions about the background. Okay, so who has a question about, you know, the existing rule, the HITECH legislation or what was in the proposed rule?

**Paul Egerman – Businessman/Software Entrepreneur**

This is Paul I have a question about the access part of the proposed rule as it relates to business associates. Does it mean that a business associate has to somehow provide information about who the business – which business associate employees had access to the record?

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

I'm looking that up, yes, that's the answer but let me check.

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

Yeah.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah.

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

Okay, we'll give –

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

It would need to include the name of the entity or person who received the information if known.

**Paul Egerman – Businessman/Software Entrepreneur**

So, it's in effect treated the same – if I'm hearing that right it's treated the same way. So, if I do my own billing and accounts receivable system with my own employees I have to describe how they may have had access to the record, but if I like outsource that to a practice management company the practice management company still has to provide the same detail which employees had access to the record. Is that right?

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

Well, you would have to, under the proposal you would need to state that you disclosed it to that entity, but then the individual still has the right to find out who got it from the entities that work on your behalf.

**Paul Egerman – Businessman/Software Entrepreneur**

So, they would have to request that of the entity?

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

The covered entity would need to request it of the business associate or they could just give a list to the individual saying this is how you can reach them to find out what they did with the information.

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

This is Dixie; I want to make sure I understand this right. The TPO exemption still applies if it's not disclosed to an EHR right?

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

Well, that was the language in the statute but in the proposed rule OCR decided to use their existing HIPAA authority to expand that so it would not be related to an EHR it would be related to information that flows through a designated record set, which is a bigger set of information than an EHR, would include, you know, information that might be in billing records for instance or other quality improvement databases that might be separate from the EHR.

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

So –

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

So, this is Judy –

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

Hold on a minute, let me make sure Dixie's finished.

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

Yeah, I really want to – I appreciate that, Deven, so like an insurance company even if they disclosed even if its TPO if it's in part of a designated record set it would have to be part of the accounting.

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

It would be an access report.

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

Right it would be part of the access report. If they disclosed it, it would be part of the accounting of disclosures.

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

I meant to say disclosure; I meant a disclosure, so it would be included so they wouldn't have that TPO exemption even though they don't use an EHR.

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

Correct.

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

Okay, thank you, thank you.

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

So, I think that would – did I hear Judy next?

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

Yes. I'm going to pass.

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

Okay, okay. Do others have questions about the existing law, the HITECH or the proposed rule?

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

And we can get back to you to clarify anything.

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

Much appreciated, Linda, thank you. Okay, so let's begin to sort of talk about what this hearing would like even though we may end up working further with NCVHS on it we want to take the time while we have it with you all on the phone, Tiger Team members, to sort of hear from you about what we want to learn from this hearing.

So, we originally worked with staff to scope out a number of sort of key goals. Our goals are to really gain a greater understanding of what patients would like to know about uses and disclosures of their electronic protected health information. What are the capabilities of currently available affordable technology that could be leveraged to provide patients with greater transparency about access or disclosure of PHI?

How are record access transparency technologies currently being deployed by healthcare providers, health plans and their business associates and an example of a business associate would be an HIE?

Other issues that were raised as part of the initial proposed rule to implement the HITECH changes and for example the issue of whether individual names of who has either accessed a record or been the recipient of a disclosure, you know, should that be part of the report? That was definitely an issue upon which there were lots of comments made during the public comment period for the NPRM.

We'd like to understand more about the difficulty in making the distinction between uses and disclosures either from a substantive legal stand-point or probably more precisely in terms of the technical functionality of some of the systems that might be used to provide greater transparency about record access.

And we can and should get into a discussion about other things we want to learn from this hearing because that will help us to shape the questions. But let me first lay out some of the parameters here where we have this scheduled and you all have received save the dates so September 6<sup>th</sup> 11:30 to 5:30, we've chosen a pretty wide availability of time because I think we will want to hear from as many people as we can during that period and also provide a sufficient amount of time for questions.

We do intend to divide people into panels, probably based on functional groups but if others have different ideas we're open to suggestions. We'll come up with a question list that is, you know, based in part on the goals we want to achieve, some of the issues that came up in the comments to the proposed rule and feedback that we hear from you all today.

The person testifying will have the option to submit written testimony and a slide presentation prior to the hearing and we hope that people will in fact do this. This is how we have run our prior hearings. And our initial thoughts were to also invite the Privacy and Security Working Group to participate in the conduct of the hearing, listen to the testimony and be able to ask questions because, you know, so much of what is possible to do from a policy stand-point in this space is dependent on the technology.

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

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

And so I'll just say that the next slide deals, the next couple of slides deal with some initial suggestions.

**Paul Egerman – Businessman/Software Entrepreneur**

Just a second, Deven, first I had one quick comment on your previous slide, it's a virtual hearing it's not in person.

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

Yeah, I'm sorry if that wasn't clear, it is virtual, virtual, virtual you can be in your pajamas.

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

Right and Deven I would suggest that we invite members of the Privacy Confidentiality and Security Subcommittee of NCVHS.

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

Okay, again, I'm sort of looking to HHS staff to help us work that through.

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

Right.

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

You know, we certainly have budgeted a fair amount of time, which gives us some flexibility here, which helps.

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

Right.

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

Okay, thank you, Paul for that clarification. I'm hoping that helps folks who have religious holiday obligations, it's unfortunate, but hopefully we will still be able to get broad participation in this. So, the next couple of slides really has a potential list of testifiers it's not at all – it's a little bit uncomfortable to sort of be talking about people who haven't necessarily been officially asked to testify but this is a loose list that is based on some input from regulators, folks who submitted comment as part of the proposed rule, I personally have some thoughts about some entities that I have been working with on this issue that I think might be helpful, good testifiers that I will mention.

But, we just wanted to open it up for feedback and again you'll see we have them divided between providers, vendors, patients or patient advocacy groups for which we need much more input. We're hoping to get some individual patients to be able to present to us on this issue as well as some consumer patient advocacy organizations and then payers.

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

Deven, that is a place particularly where I think NCVHS on the consumer and public side would like to partner and help.

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

So, you guys have access to some consumers?

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

We certainly do. I mean, we have access to consumer groups; we have access to various groups with expertise in privacy.

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

Oh, yeah, as do I but that's – I'm glad that you mentioned that because our list may not be the same.

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

Our list may not be the same and I noticed that, you know, if I were going to pick a list that looks particularly anemic it is that subcategory.

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

Yes, it looked very anemic on the slides.

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

As well as the particular example is anemic but it is to say that having only one is anemic.

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

Absolutely, we have to have more than one. All right. So, I want to sort of open this up for discussion, again, discussion about the goals that we want to achieve from this and some of the potential testifiers and I'll hold off on mentioning some others that we might have because I've talked enough and I want to hear from you or does this list look so good, aside from the anemic list of patient testifiers?

All right, while you're thinking I will add for your consideration a couple of entities and one of them is Intermountain Healthcare because I have sat down with them to talk about this issue on a number of occasions and I know that they have thought it through from lots of different angles so I sort of offer that for consideration.

And then, you know, in terms of the vendors I'm curious Judy whether this is something that EPIC would want to weigh in on because my understanding is that the input that has been provided so far has been very helpful to HHS in some of its thinking and while you and I haven't talked about it previously I'm – you know, given the, you know, the space that you guys occupy and how important you would be to helping us think through a technical solution to this.

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

Yeah, I'd be happy to find someone to be one of the testifiers.

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

Okay.

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

Deven, I'm going, this is Leslie, I'm going back to goals.

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

Yes.

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

One of the things that isn't there and I don't have a particularly good way to formulate it, but I'll put it this way, there is nothing there about what are the public interests or concerns from the perspective of public health for example about accounting for disclosures and what appropriate policies ought to be. This is about individual patients, about technology and providers, and plans.

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

Oh, right, because I think it's heavily skewed, it's arguably more skewed to thinking through the access report proposal.

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

Right.

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

And the way of sort of providing patients with transparency about access and disclosures of their protected health information from relevant records but it doesn't sort of take on disclosures to public health that have to be included in the accounting is that what you are talking about?

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

Well that's one example, but the extent to which there are more general interests in how accounting for disclosure and access policies are framed, you know, I don't have an off the top of my head –

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

I don't know what questions I would ask to get at that goal.

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

Yeah, we're going to talk about that at NCVHS.

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

Okay.

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

But I just wanted to – I wanted to sort of put that question in at least.

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

Okay.

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

That there are some more general interests at stake in how we put together the policies here.

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

Okay.

**Gayle B. Harrell, MA – Florida State Representative – Florida State Legislature**

This is Gayle, I think we ought to hear from some smaller providers, maybe some medical societies or small hospitals and the challenges that they face in this kind of thing.

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

Yeah, absolutely. I mean, we have some small, yeah, these all look fairly big, you know, one of – we got these slides out yesterday and when we had a planning call this morning another provider organization was mentioned in North Texas that may in fact meet the, you know, that has provided some input on this issue previously and where we might benefit hearing from them in a public setting, but we would ideally hear from more than just one.

**Gayle B. Harrell, MA – Florida State Representative – Florida State Legislature**

I think if you approach some of the state and medical associations or medical societies they would have a perspective.

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

Yeah, you know, there were hundreds of comments filed on the proposed rule on this and I may under shooting that, but you can actually go through those comments on regulations.gov if you're looking to really steep yourself in the background of this and it's just fascinating to me that some of the breadth of some of the comments that were submitted including breadth both in terms of substantive scope but also breadth in terms of who commented.

There were a number, for example, of individual patients/consumers who submitted comments, but they were not necessarily submitted in a way where you could subsequently track the person down to ask them if they would be interested in presenting, which is unfortunate, but you can still read their comments on line, all of the comments are public.

**Gayle B. Harrell, MA – Florida State Representative – Florida State Legislature**

I would think that we definitely need to hear from consumers I mean that is a key group because those are the people, again, when we're talking about public trust they want to know who is accessing their information and there is a great deal of concern out there. I know that there are many consumer groups that are advocates in the area of privacy who would be very interested in speaking.

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

Deven, this is Dixie, I have two comments about what patients would want to know, one is that a lot of our discussions are around expectations, the surprise principle.

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

Right.

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

And I think that we should ask that question with respect to what would you as a consumer expect to be available to you and the second thing is context, you know, if you go into the hospital and have a procedure there are lots of individual names of people who have access to your record in the course of delivering whatever treatment you are in there for. How much information around the context does a patient need to have in order to really understand who accessed their record, in other words, a list of names may not be useful but the fact that these people were your, you know, surgical team or whatever might be more useful to them. So, those two things I think would be important.

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

Got, it, thank you. Other feedback.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, Deven, this is Paul, when we think about EHR and this concept of designated record set we tend to think about it as the electronic record but I think a patient's perspective is just all of their information or all of the record and a lot of organizations have what I might call like a hybrid, they have some things that are electronic but they also have paper documents and they may have paper documents that really exist in the form of scanned images that are somehow available perhaps as a supplement to the EHR and so one question I have is does our scope include those concepts?

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

Well, so the way that the accounting of disclosures historically, and in the actual accounting of disclosures right, even in the proposed rule, applies to disclosures for certain purposes and its paper or electronic. The access report would apply to electronic information that's in a designated record set. So, if it's digital and it's information upon which decisions get made then it would, under the proposed rule get included in the designated record set. I think it has to be taken on, in my view, as part of, you know, a sort of scope questions around sort of not only sort of what patients would like to know but also what are the capabilities for capturing that information and what would be the cost of doing so and providing that information to a patient and is it information that would be of value to them.

So, I mean, we can, as we're developing – I think we can as we're developing the questions to this get into detail about sort of specific aspects of records like images if we want to or we can remain more broad, you know, we always have the discretion, you know, to ask for questions to be addressed but then to have a bigger list of issues upon which we would want to get further information through the Q&A period. So, I'm taking notes on everything that's being said.

**Paul Egerman – Businessman/Software Entrepreneur**

Right.

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

So, that we ideally, you know, come up with a plan for this hearing that makes sure that we surface both the big picture issues and ideally, you know, the more incremental detailed ones.

**Paul Egerman – Businessman/Software Entrepreneur**

And so, perhaps one of the questions that we should be trying to answer is what constitutes an access that needs to be reported, in other words does an access include if, you know, you walk in and somebody registers you, checks you off an appointment list in effect, that yes you've walked in is that an access and you know, that might be a topic that would be useful, especially since our goal here is to create something that's usable to patients.

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

Right.

**Paul Egerman – Businessman/Software Entrepreneur**

You know, I mean, if you go to the laboratory and somebody produces a label that goes on a specimen tube is that an access that should be reported?

**Gayle B. Harrell, MA – Florida State Representative – Florida State Legislature**

Is there a record of that?

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

Well, I mean –

**Paul Egerman – Businessman/Software Entrepreneur**

Those are two different questions.

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

Right, well, but ultimately –

**Paul Egerman – Businessman/Software Entrepreneur**

They may or may not be, but the question is if it's an access then there should be a record of it and then if there isn't then we have to talk about it, but, my question is, what's really an access.

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

Well, and maybe not only what's an access but what's an access at, you know, given currently available technologies it could be captured in a way that then could be reported or made transparent to patients in some way.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, because in some sense it's really interesting, I think about Gayle's question about the small provider, in some sense some of these issues are very simple if you are a solo practitioner I can just see some solo physician shrugging his shoulders, well it's pretty simple it's me, it's my nurse and it's my administrative assistant those are the three people and they all have access to the record when I'm done, you know, and it's gets a lot harder when you get into larger organizations.

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

Well, right and when that smaller organization joins an HIE or some sort of exchange arrangement where the spectrum of potential access gets broader whether that is initially through an access system by one of those three staff persons that then subsequently goes elsewhere or whether that's sort of more of a direct access model.

**Paul Egerman – Businessman/Software Entrepreneur**

But then the question becomes who is responsible for reporting the access, right? Because if it's the HIE organization then the solo practitioner really doesn't have anything to do, if the solo practitioner has to report it by getting the information first from the HIE organization than that is different.

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

Well, it sounds like there is a question that we need to develop about sort of who is responsible for doing the reporting to the patient particularly when there is sort of – the access involves not just the covered entity but business associates.

**Paul Egerman – Businessman/Software Entrepreneur**

Well, yeah, I mean, because one of the things that happens for example is larger organizations can employ their own nurses or they can contract out to an organization that supplies nurses for them so that's a BAA arrangement, but in either case you have clinicians who are accessing the record and so the question is how do you do that in terms of an access report? Who is responsible?

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

Right, good question.

**Paul Egerman – Businessman/Software Entrepreneur**

So, I don't know does that fit in the goals or how do we do that?

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

Well, I mean, to me – let's see, maybe there is a goal about who should – who is responsible for providing a record or providing transparency to patients, covered entity, business associate, some combination of the two maybe that's another goal, because I'm not sure that – you know, other than just cramming it into the other issue's goal that it neatly fits into the other bucket. Good point. Other thoughts?

Just so you all know given that the hearing is scheduled for September 6<sup>th</sup> and we need to give testifiers sufficient time to prepare we're going to be taking your feedback post call and working with staff to begin getting invitations out and to begin creating question lists that we would then provide to these entities so that they can get started, because we don't have another call amongst ourselves until August 19<sup>th</sup> and we may in fact have another issue that we are going to need to take on in between this call today and when we actually have this hearing on September the 6<sup>th</sup>.

So, you know, one option, since you are really just learning about this today, and we know we need to, you know, sort of get to Leslie's point about and – interests in participating that, you know, we sort of continue to collect feedback from e-mail from folks because we really will need to get staff moving on getting invites out to folks. So, we're always under a bit of a time crunch with this work but we try to do the best we can to get as much input as possible in shaping the materials.

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

Deven, we – this is Leslie, we from NCVHS appreciate the time constraints and I'll work with you off line.

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

Okay, that's terrific, thank you, Leslie. All right, well so far the discussion has been a good one on sort of some of the goals and some of the issues that arise. Anybody else have any suggestions that they want to throw out for some potential testifiers, we may get some folks who chime in during our public comment period too. To the extent that the large community of people and organizations who are interested in this issue knew to call in on the Tiger Team call today we may get some good feedback on public comment, we may not, it is August after all.

All right, well I don't want to keep you all if nobody has any additional input to provide today, we can – we'll be continuing to work off line on this, including on NCVHS involvement, but also some of the substantive issues that you've raised we'll articulate the goals more clearly to include sort of who is responsible for making reports to consumers and if you have any other thoughts or suggestions about possible testifiers please chime in and, you know, if we're working with NCVHS on this then their input on testifiers will be really helpful too. Okay, well, I think – Paul, you think we can go to public comment?

**Paul Egerman – Businessman/Software Entrepreneur**

I think we should go to public comment.

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

All right, let's do it.

**Public Comment**

**Michelle Consolazio – Office of the National Coordinator**

Operator can you please open the lines?

**Rebecca Armendariz – Altarum Institute**

If you would like to make a public comment and you are listening via your computer speakers please dial 1-877-705-2976 and press \*1 or if you're listening via your telephone you may press \*1 at this time to be entered into the queue. We do have a public comment.

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

Okay.

**Karen S. Sealander, JD – Legislative Counsel – McDermott Wills & Emery, LLP**

Deven?

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

Yes.

**Karen S. Sealander, JD – Legislative Counsel – McDermott Wills & Emery, LLP**

Hey, it's Karen Sealander at McDermott Will and Emery for Intermountain Healthcare, I just dialed in as Paul was finishing speaking and as you spoke, so I apologize if this is redundant, but Intermountain Healthcare would be delighted to provide a witness for the hearing.

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

Okay, that's helpful Karen. Before you were able to join I noted that I had been involved in a number of conversations with Intermountain about the issue and thought that they would be good to testify.

**Karen S. Sealander, JD – Legislative Counsel – McDermott Wills & Emery, LLP**

Great, thank you, we appreciate that.

**Rebecca Armendariz – Altarum Institute**

We do have another public comment from Eunice Whitted.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

Hi, my name is Eunice and I'm with OCR, I'm on the HIT team and I just wanted to provide – I didn't know if I was able to interject while the Tiger Team was actually speaking.

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

Oh, no I don't think you have to do it as part of public comment, but since you are on the line go ahead.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

No, that's fine, I wanted to provide some clarity with regard to the access report and who was supposed to provide that access report, who's obligation it is, the covered entity or the business associate, now HITECH provides that for an accounting and accounting the disclosures can be provided by the covered entity or the covered entity can give the consumer, the requester, a list of business associates, however, in the proposed – in the NPRM with regard to access reporting this office proposed that the covered entities access report would include uses and disclosures by any business associate of electronic designated record set information maintained by the business associate rather than providing a listing of the BA's.

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

Okay.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

So, if that provides any clarification with regard to the last question.

**Paul Egerman – Businessman/Software Entrepreneur**

That's helpful, this is Paul, that's very helpful.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

Okay.

**Paul Egerman – Businessman/Software Entrepreneur**

Although I didn't understand the part where it says maintained by the business associate, it's possible the business associate has access to the data but actually doesn't maintain it.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

Okay, well this is – I'm getting this exactly from the NPRM.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, I understand.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

So, there may be a question with regard to the nuance between maintaining and accessing and I think that was a question that we were going back and forth with here with David Holtzman, who is not on the call, with regard to what constitutes a use and what's the definition, if you have – and how it applies to covered entities and business associates that distinction, if you have access to the information does that – or just maintain the information how would that effect your obligations under the rule. So, I think that might be a better question to ask with regard to the hearing.

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

Yes.

**Paul Egerman – Businessman/Software Entrepreneur**

Well, okay, so that is sort of one of the goals.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

Okay.

**Paul Egerman – Businessman/Software Entrepreneur**

But it would be to help define what really constitutes a use or –

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

Okay.

**Paul Egerman – Businessman/Software Entrepreneur**

I'm not sure if I'm using use and access correctly but that's sort of –

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

Well, that's actually –

**Paul Egerman – Businessman/Software Entrepreneur**

That would be more important to know than who is actually maintaining the data, because right now it's hard to know where the data is sometimes.

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

Hi, this is Linda Sanches, thank you Eunice for jumping it saved me having to go back and do some research.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

No problem.

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

Generally we are interested at OCR at how one would look at a term-like access and whether that would help simplify some of these issues around whether it's a use or a disclosure and what fits in what bucket and under the proposed rule I believe if it was maintained by the covered entity but the business associate got into the data that would be considered a disclosure by the covered entity to the business associate and would need to be accounted for that way.

But we are very interested in these discussions around, you know, access and is there some other way to frame these questions that will help meet our goals of, you know, improving transparency but, you know, in a way that's technologically appropriate.

**Paul Egerman – Businessman/Software Entrepreneur**

Okay, and would it be helpful if the question were something like, you know, what constitutes, not just an access or a use but a material access or a material use, in other words may be to suggest that there are some things that are like putting a label on a tube might not be material, but, you know, looking at a problem list probably is material or is that not a distinction you want us to try to make?

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

It's an interesting question, we are interested in ways to look at the issue where, you know, one of the thoughts we had is, is there a difference, and I don't know if there is, it's still a question, between sort of machine to machine standard, routine, constant, non-human mediated disclosures or users versus ones where there is a person that is involved in the user disclosure, that's how we had been wondering about if that was a useful way of limiting the conversation.

I hadn't thought about it where a person actually gets access to the data but isn't actually manipulating it she is just printing it off, but that is a question that we've gotten and I don't – I'd be curious to see how you all address that.

**Eunice Whitted, Esq. – Senior Regulatory Compliance Analyst - Office for Civil Rights**

Or I think another question that is related to that as well is if you are in a billing office or in a hospital and you put in a query for a number of individuals who were admitted that day but you are actually looking for Eunice Whitted but a whole list of individuals come up and their information comes up on that list is that actually an access of all of those people when you were actually just looking for one person.

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

Okay, this is very helpful to us sort of making sure we have the goals framed clearly and then beginning to flush out the questions, very helpful, thank you Eunice. Do we have any other callers on the public line that have queued up while we've been engaged in this dialogue?

**Rebecca Armendariz – Project Coordinator – Altarum Institute**

We have a public comment from Michael Ebert.

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

Okay, go ahead, Michael?

**Michael D. Ebert, CISA, CPA – Partner – KPMG, LLP**

Hi, yeah, real quick, I heard on part of the call that you would solicit EPIC but the technology and the elements to achieve accounting for disclosures at the NPRM level that is currently published may need a broader technology basis of representation, you know, we're looking at, you know, access from the clinical application systems to clinical treatment systems, to the administration systems like EPIC that are going to have impact as well as other technologies that are going to be required and that narrow band of EPIC may not properly represent the impact this is going to have from cost to the industry as well as a technology impact to the industry. So, there might be a broader representation of how the industry can even respond to this, the timeframe it will take to respond and the timeframe it will take to implement across the industry.

We are also looking primarily at large organizations but this is clearly going to impact everything down to the smaller physician practices as well and that's a different technology element as well. So, there are a lot of issues that time and energy is going to take for the industry and technology platform that's not mature enough to meet that at this point in time. So, you're going to need to broaden that a little bit would be my input.

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

Yeah, I don't know if you could see the slides Michael but there were other technology companies that were listed and so we do hope to have some broader input and we thank you very much for your comment.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah and if you have some specific names to suggest too that would be helpful.

**Michael D. Ebert, CISA, CPA – Partner – KPMG, LLP**

I do, you know, Cisco would be one, some of your identity management platforms like Oracle and Microsoft might be another one as well, because you're looking at a band of technology not just at the application layer that you need to account for that and then you've got to look at some of the clinical treatment environments and specialty applications everything from the GE platforms that do radiology and there is a lot of information captured in the diagnosis and treatment of patients at that level that will not pass through to the clinical administration environment, so you've got that information as I've read the NPRM would be applicable and would be a total change in the nature of the information and records that need to pass between clinical treatment environment to clinical administration environments for billing and collection.

**Paul Egerman – Businessman/Software Entrepreneur**

Very helpful comments, thank you.

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

Anybody else.

**Rebecca Armendariz – Project Coordinator – Altarum Institute**

We have no further comment at this time.

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

All right, well terrific that's – it's been a while since we've had such robust public comment I'm glad we had some.

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

Deven this is Judy and –

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

Yeah?

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

I'd be happy to add a few of the vendors who deal with the very small users that might be good to add to your list.

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

Yeah, yeah.

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

Shall I do that right now or off line?

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

Either way, whatever you're more comfortable with.

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

Well, you might want to add Highland which does the reading of patient identification and you could add one of the lab vendors such as Sunquest, some of the guys like Greenway or eClinicalWorks aimed at the smaller vendors, I think Greenway in particular sticks just with the smaller ones so that might be good.

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

Thank you, Judy.

**Paul Egerman – Businessman/Software Entrepreneur**

Yeah, I think that's helpful, I mean, I like the idea of including the lab vendors just like the previous speaker mentioned perhaps GE and a radiology vendor because those are what I call the sub-systems.

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

Sure.

**Paul Egerman – Businessman/Software Entrepreneur**

Who have a lot of information and there are a lot of employees in the workflow who have access to all of that data including diagnostic data, because they needed the context for whatever the order was. So those are very useful comments.

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

This is Dixie, the last public commenter kind of triggered this in my mind and especially since this hearing is supposed to be co-sponsored by both of the groups, I find that a lot of people have the misconception that an audit trail will give them the information they need for an accounting of disclosures and so I agree with the caller that it would be really nice for us to have someone who could explain to everybody who is listening in, you know, what it really – what the differences are and what it really takes from a technology perspective to gather the kinds of information that is needed for an accounting of disclosure across systems versus from a single system. And I can think about that and ask some people and perhaps suggest someone to do that, but I think that's an important context to have.

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

Okay, I mean, just for the record I didn't consider this to be necessarily a joint hearing but just one where we would invite you guys to participate but having said that that's great feedback and we'd love to hear more.

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

Okay.

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

Another area you might want to add too is a transcription vendor since they are really looking at a lot of the detail.

**Paul Egerman – Businessman/Software Entrepreneur**

That's right and the transcription vendors are interesting because in one sense it's easy to get the access because you know the transcriptionist is always identified but there are other people like the manager and the quality control people within the transcription group who also have access to the record but what makes the transcription people interesting is they're frequently in a different state and sometimes in a very different country and so there has always been some questions about the people in another country having access as to whether or not they still fall under HIPAA's umbrella and maybe they do but it seems like there is no enforcement capability if they violate something.

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

Right, probably the more relevant question. I understand we have another public comment on the line?

**Karen S. Sealander, JD – Legislative Counsel – McDermott Wills & Emery, LLP**

Deven, this is Karen Sealander again, for Intermountain and again I apologize for missing the beginning of the call, you know, there were hundreds of public comments filed on the proposed access report right, as you well know, will somebody from OCR sort of summarize those and raise the salient issues and remind folks of the, you know, statutory mandate?

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

We will go through, Karen, the same sort of statutory and regulatory background briefly before the hearing. Given the volume of comments that were provided during the proposed rule making and the ability for people to access those on line I don't plan to have – I'm not sure that it makes sense for OCR to take up time in the hearing where we can hear from people directly to summarizing public comment, especially since we are having a little bit of a – we're trying to look at these issues through somewhat of a broader lens in addition to considering, you know, what the consideration of those issues through that broader lens might mean for implementation of the HITECH changes to accounting of disclosures.

So, you know, we can, you know, discuss it with staff as we sort of move forward with the planning of it, but that certainly wasn't in our plans initially.

**Karen S. Sealander, JD – Legislative Counsel – McDermott Wills & Emery, LLP**

Yeah, I guess when I tuned it was just a little surprising to hear everybody talking about, you know, an access report because it seemed from the public comments that folks said that was just way too much information that really could not be automatically aggregated from multiple systems and that the report –

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

Karen, I'm going to stop you right there, because we're not going to argue the merits of this issue during this comment period we are trying to plan a hearing and we have – you know, there will be ample opportunity to surface all of those issues as we discuss them in the public forum.

**Karen S. Sealander, JD – Legislative Counsel – McDermott Wills & Emery, LLP**

So, the hearing won't be to look for alternatives to the access report which is what I thought OCR was doing?

**Michelle Consolazio – Office of the National Coordinator**

I think we – public comment is 3 minutes and I think we need to move on.

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

Yes, the slides, Karen, have the broader frame that we're trying to put on this hearing and the approach that we are taking. So, you know, given that we did discuss this earlier on the call I'm afraid that we're going to stop right here.

**W**

Thanks, Michelle.

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

I think – assuming we haven't had some more people join in the interim I think we're – even though we're not technically at the end of our time, I think we're ready to end.

**Paul Egerman – Businessman/Software Entrepreneur**

Yes, I agree and I just want to say first thank you to the members of the public who called in, appreciate your comments, thank you to the Tiger Team and because we had so many members of the public call in I think it's an indication that this will be a very interesting hearing, that there will be a lot of opinions and so that's – you know, that gives us a chance to be at our best to deal with an issue that might be controversial, so it should be fun.

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

Okay, thanks everybody.

**Paul Egerman – Businessman/Software Entrepreneur**

Thank you.

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

Thank you.

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

Bye.