



Meeting Notes

Health Information Technology Advisory Committee

Information Blocking Task Force

Workgroup 2: Exceptions

March 15 2019, 2:30 p.m. – 4:30 p.m. ET

Virtual

The March 15, 2019, meeting of the Information Blocking Task Force Workgroup 2: Exceptions of the Health IT Advisory Committee (HITAC) was called to order at 2:30 p.m. ET by Lauren Richie, Designated Federal Officer, Office of the National Coordinator for Health IT (ONC).

Lauren Richie conducted roll call.

Roll Call

MEMBERS IN ATTENDANCE

Andrew Truscott, Co-Chair, Accenture
Anil Jain, Member, IBM Watson Health
Steven Lane, Member, Sutter Health
Arien Malec, Member, Change Healthcare

MEMBERS NOT IN ATTENDANCE

Michael Adcock, Co-Chair, Individual
Valerie Grey, Member, New York eHealth Collaborative

ONC STAFF

Penelope Hughes, ONC Backup/Support
Mark Knee, Staff Lead
Lauren Richie, Branch Chief, Coordination, Designated Federal Officer
Lauren Wu, ONC SME

Lauren Richie called the meeting to order and turned the meeting over to Andy Truscott, co-chair.

Revisit outstanding issues

Request for information on potential additional information blocking exception for complying with the Common Agreement for Trusted Exchange

Arien Malec commented that he expected that ONC would align the Trusted Exchange Framework and Common Agreement (TEFCA) and information blocking exceptions so that doing the right thing would be the easiest way to comply with information blocking provisions.



- **Steven Lane** commented that it isn't immediately obvious that one would preclude the other. Someone in compliance with TEFCA might have a behavior that is also information blocking. He asked for a better understanding of this.
- **Arien Malec** noted there will be cases where there is problematic behavior, but it provides presumptions that when making data freely available via APIs, it would be presumed that something is being done right.
- **Andy Truscott** commented that without knowing where TEFCA would be it is hard to tell, but there is a presumption that if in alignment with TEFCA, one would not be information blocking.

Request for information on new exceptions

Arien Malec raised the notion of complying with contracts and business associate agreement (BAA) terms. Complying with BAAs is not a defined exception category. BAAs only have the data uses granted by the covered entity. Typically, the Health Insurance Portability and Accountability Act (HIPAA) has a minimum necessary standard. It could have been deliberately not included. BAA terms would be void or would need to be updated.

- **Mark Knee** noted that there is preamble language that addresses broadly that contractual obligations are not an excuse for information blocking.
- **Steven Lane** asked for more information from Arien, as it is his understanding that BAA terms are flexible.
- **Arien Malec** commented that there may be a need for legal clarification. From his understanding of how HIPAA and BAAs work. Covered entities have data use rights to PHI that are permitted purposes. Business associates only have the rights delegated to them by the BAA.
- **Anil Jain** questioned what Arien was hoping to see around BAAs.
- **Arien Malec** noted that he would like preemption or a clear statement of terms for data use. As currently written, it is ambiguous.
- **Andy Truscott** noted that the intention is that 21st Century Cures (Cures) would preempt.
- **Anil Jain** did not think that the intent with Cures was to put BAAs aside. This is an opportunity for entities to have 24 months to re-examine BAAs and ensure there isn't information blocking included. Cures isn't a means to get rid of BAAs; there still needs to be a discussion between the covered entity and the business associate.
- **Arien Malec** expressed concern that some organizations will fall into a poorly defined middle ground.
- **Andy Truscott** commented, in summary, there is room for ONC to provide guidance around BAA terms. ONC should issue guidance on the way BAAs, HIPAA, and Cures interact.

Andy Truscott questioned what extent might national security considerations require or warrant an exception? He noted that the Department of Defense (DoD) person on HITAC should be involved in conversations to provide DoDs insight.

171.206 EXCEPTION – LICENSING OF INTEROPERABILITY ELEMENTS ON REASONABLE AND NON-DISCRIMINATORY TERMS

(2) Reasonable royalty



Arien Malec questioned the use of royalty. As he wouldn't think of the fee associated with the service as a royalty.

- **Andy Truscott** agreed with Arien.
- The group asked Mark Knee to provide more insight into the use of royalty.
- **Arien Malec** shared that the term “interoperability element” is broad. This is related to his confusion between 171.204 and 171.206.

There was extensive discussion about the term royalty. The workgroup agreed to share the two varying viewpoints on this matter.

Arien Malec mentioned that there are alternatives to get at the policy goal. He committed to writing up his concerns in the shared document over the weekend.

Andy Truscott noted there is a high-level of contextualization.

- Anil Jain commented that this is a need to avoid unintended consequences.

Andy Truscott acknowledged the benefit of HITAC to provide insight.

(5) Non-disclosure agreement

Andy Truscott questioned the use of a trade secret instead of intellectual property.

- Mark Knee confirmed that the use of the trade secret was intentional.
- Anil Jain commented that if it is a trade secret, don't need to disclose.

Andy Truscott noted the amount of work that has gone the rule.

- Steven Lane also commented on the amount of work that went into the rule and noted his appreciation for the thoughtfulness.

Public Comment

There was no public comment.

Next Steps and Adjourn

Lauren Richie adjourned the meeting at 4:21 p.m. ET