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Portable Medical Records and Vermont's Health Information Exchange

by Stephen Whitaker

Vermont health care consumers, insurers and taxpayers are laying out huge sums of money to develop a Health Information Exchange (HIE). It consists of so much more than our many unique medical records. For example: software interfaces for resolving common views of patient records and data exchange protocols between disparate systems in use across Vermont and New England. The multi-million dollar questions, remain unanswered by VITL or the Vermont Health IT Plan include:

- Who owns what? - of the intellectual property
- What choice is preserved to choose another HIE platform?

Beginning in 2005, the responsibility to carry out the work was assigned by the Vermont legislature to a state agency, to be completed in cooperation with a newly formed Vermont non-profit corporation called Vermont Information Technology Leaders. VITL's governance and management are now defined in statute, with requirements for public posting of minutes of VITL board of directors meetings, annual reports to the Legislature and oversight of VITL activities and spending by the Green Mountain Care Board.

The Intellectual Property issues were recognized from the outset, even at the time of the incorporation of VITL. Yet they mysteriously remain unresolved and unmentioned ten years later.

In Act 71 of 2005, this language was included:

If at any time VITL no longer demonstrates the ability to deliver the work described in 18 V.S.A. 9417, the state shall have the right to assume ownership of all licenses, intellectual property and work product of VITL developed for the state pursuant to section 9417 or otherwise.

The activities of VITL in building the Vermont Health Information Exchange are required by statute to be completed in a manner consistent with the Vermont Health IT Plan and its required annual updates. The Health IT Plan was, unfortunately, last prepared by the Department of Vermont Health Access (DVHA) in 2010.

After the missing updates came to the attention of legislators, an outsourced contract was awarded this past February 2015 by DVHA to Mosaica Partners to write the long overdue Health IT Plan. The contract amount was for about \$94k, falling just under the threshold amount of \$100k, which would have triggered greater oversight of IT systems planning and procurement. An amendment in the 2015 Appropriations Bill raised that trigger amount on July 1st to \$500k, the contract was almost immediately amended to \$256k Why? DVHA records responses are due this week.

VITL has, since 2008, prepared annual reports to the Legislature in accordance with statute. Interestingly, none of these required annual reports from VITL make any mention whatsoever of the specifically required data ownership or intellectual property analysis. The only reference in DVHA's 2010 Vermont Health IT Plan is the quoting of the statute, yet not a word analyzing the issues or fulfilling the requirement.

In 2005, Vermont entrepreneur Richard Tarrant sold his Burlington based company, IDX to GE Healthcare for \$1.3B. IDX had been a leading developer in electronic medical records technology for many years. Also in 2005, Aetna, the Hartford CT based insurer, purchased a company called Medicity for \$500M.

In VITL's first required annual report in 2008 they refer to VITL's prime contractor being GE Healthcare. The value of being in the proverbial 'cat-bird seat' with regard to electronic medical records had become well recognized in Vermont by that time.

The first VITL reference to Medicity is [a March 2011 press release](#) and then the 2012 annual report wherein Medicity, rather than GE Healthcare is referred to as VITL's primary contractor.

VITL now claims to not be subject to Vermont's Access To Public Records Act (APRA). A recent records request for VITL staff salaries, Intellectual Property analysis, and a copy of the Medicity contract was denied by a VITL executive and is on appeal.

A requirement in the 2014 session law required a review by the Attorney General's office of the Intellectual Property issues around VITL . VITL brazenly provided only a redacted copy of the Medicity contract. The Deputy AG offered a short 3 page set of findings with regard to Vermont's IP interests. In short: there aren't any! It appears that VITL had signed a contract granting all IP to Medicity. This is prior to the Health IT Plan having ever addressed this issue as required by statute.

If Vermont were to choose, in the future, another vendor to manage our HIE and electronic medical records, we could be left with nothing at all to show for our many million dollar investment in VITL. We could be starting from scratch, potentially with costs running into the tens of millions of dollars or more.

A 2015 VITL presentation to Senate Finance Committee reflects a \$4.5M annual grant from DVHA. VITL has already begun efforts to persuade the legislature to extend the sunset on a tax on health care insurance claims in order to continue to support their voracious appetite for dollars. Exceptionally detailed and informative color graphic diagrams of the intellectual property elements referred to as 'interfaces' and 'integration engines' are included in the presentation.

There was also in 2015 surprise and consternation over an expensive VITL advertisement that was broadcast during the Super Bowl. Another presentation to the legislative committee defended the decision.

This potentially catastrophic IT quandry falls close on the heels of the Vermont HealthConnect failure of both planning and execution, which wasted possibly \$200M+, as well as the oft mentioned Ten Years of missing Telecommunications Plans, which are similarly linked to pending contracts for FairPoint's incentive regulation plan. The IRP is required by statute to be found consistent with the Ten Year Telecommunications Plan, even as a duly adopted Plan has not been completed since 2004.

Still subject to check:

VITL entered into a contract, expiring in 2016, to use Medicity, an Aetna subsidiary, as the platform for the Vermont Health Information Exchange. In that agreement, VITL appears to have intended to sign over all of the intellectual property rights to the software 'interfaces' defined and developed by VITL.

<http://legislature.vermont.gov/assets/Legislative-Reports/A144-Sec-21-AGO-Memo.pdf>

Vermont would, if this is not resolved in the legislature or the courts, be contributing our IP to Medicity/Aetna's proprietary software development project, to which Vermont could be a perpetually dependent licensee of Medicity. Our own medical records and all of the excruciating effort to define these interfaces, simply given away, to be licensed back to us at a potentially ever escalating cost.

If Aetna is going to be constrained in making so many millions on the health care claims, why not make up the loss or revenue by creating a monopoly on the information access required to pay all claims?

We need an affordable and secure HIE to manage, share and protect the privacy of our medical records and conduct statistical analysis required for regulatory oversight. We also need 'Portability', i.e. to be free to take our records and display/ translation software tools to another vendor in the future, should that becomes necessary.

NYNEX made efforts in the early 1990s to 'own' the newly authorized Vermont Enhanced 911 database, such that it would be cost prohibitive for the State to move to a competing E-911 vendor as that would have required recreating the entire address/number matching database from scratch, or licensing the database from Nynex, but only if they chose to make such licensing available.

Early efforts to assert intellectual property ownership and a licensing model over Vermont's first in the nation statewide Geographic Information System were also attempted and defeated in the 1990s, but only after a combination of difficult Legislative and state court actions.

Did VITL knowingly attempt to sign away Vermont's IP rights to Medicity on behalf of Vermonters? Was there any consideration, stock or financial encouragement offered or paid to VITL executives or board members? Are those contracts potentially void due to conflicts with state laws?

What consideration, if any, does Vermont receive from Medicity for the value of the development of software interfaces defined by VITL, which are almost certainly subsequently licensed by Medicity to other states, health care providers and insurers?

If the IP which VITL offered to release to Medicity is found by the courts to belong to Vermont, how might Vermont then be justly compensated? Possibly from a share the revenues generated by Medicity's licensing the software to others? This could potentially be very valuable, and equitable.

How would the software interfaces otherwise be segregated or disentangled, and returned to Vermont for use in a next generation system or a possibly a public domain multi state HIE consortium?

A model worth considering would be for Vermont, Maine and New Hampshire to collaborate, each taking on a proportional share of the software development effort, constructing a modular set of medical records management, HIE integration engines and interfaces as an open source model. Schools and private programmers could contribute to the effort with the vital, not VITL, interests of Vermonters as a priority, with data security tested and hardened by the best minds available.

Important questions require detailed answers.

Stephen Whitaker
2015.12.06

Sources:

2005

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/acts/ACT071.htm>

Sec. 263. FISCAL YEAR 2005 DESIGNATED BALANCE (WATERFALL)

(3) Third, \$700,000 to the department of banking, insurance, securities, and health care administration to carry out the purposes of Sec. 277 of this act, adding 18 V.S.A. 9417, of which \$500,000 is for dollar-for-dollar matching funds to leverage resources necessary to fund the pilot program authorized under subsection 9417(e) of Title 18 and to contract for the development of the health information technology plan and other duties in 18 V.S.A. 9417.

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/acts/ACT093.htm>

Sec. 74. Sec. 263(e)(3) of No. 71 of the Acts of 2005 is amended to read:

(3) Third, \$700,000 general funds of which \$266,000 shall revert to the general fund in fiscal year 2006 and \$266,000 global commitment funds appropriated in fiscal year 2006 to the department of banking, insurance, securities, and health care administration to carry out the purposes of Sec. 277 of this act, adding 18 V.S.A. 9417, of which \$500,000 is for dollar-for-dollar matching funds to leverage resources necessary to fund the pilot program authorized under subsection 9417(e) of Title 18 and to contract for the development of the health information technology plan and other duties in 18 V.S.A. 9417. Availability of the \$500,000 funds is contingent on the secretary of administration's approval of a plan submitted by the Vermont information technology leaders (VITL) to coordinate VITL's activities with the Vermont blueprint for health chronic care initiative and other health care-related statewide information technology projects. Availability of the \$500,000 matching funds shall also be contingent on: a) the delivery by VITL of a sustainable business plan to the secretary of administration and the general assembly within 90 days of the passage of the fiscal year 2006 Budget Adjustment Act; b) a commitment by VITL to use best efforts to secure a non state match for the funds; and c) upon VITL's agreement to add to its board, as soon as legally possible, one member of the Vermont Academy of Family Physicians. If at any time VITL no longer demonstrates the ability to deliver the work described in 18 V.S.A. 9417, the state shall have the right to assume ownership of all licenses, intellectual property and work product of VITL developed for the state pursuant to section 9417 or otherwise.

2006

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/acts/ACT215.htm>

Sec. 87. Banking, insurance, securities, and health care administration - health care

administration

Personal services	4,541,080
Operating expenses	<u>379,818</u>
Total	4,920,898
Source of funds	
General fund	711,000
Special funds	2,423,717
Global Commitment funds	1,716,181
Interdepartmental transfer	<u>70,000</u>
Total	4,920,898

(a) Of the above appropriation, \$700,000, consisting of \$395,000 in general funds, \$105,000 in Global Commitment funds, and \$200,000 in special funds, is for a continuation of the project conducted by the Vermont information technology leaders (VITL), as referred to in Sec. 263(e)(3) of No. 71 of the Acts of 2005, as amended by Sec. 74 of No. 93 of the Acts of 2006. Availability of the \$700,000 funds is contingent on the secretary of administration's approval of a plan submitted by VITL to coordinate VITL's activities with the Vermont blueprint for health chronic care initiative and other health care related statewide information technology projects. Availability of the \$700,000 shall also be contingent on: the delivery by VITL of a sustainable business plan to the secretary of administration and the general assembly; and a commitment by VITL to use best efforts to secure a nonstate match for the funds. If at any time VITL no longer demonstrates the ability to deliver the work described in 18 V.S.A. 9417, the state shall have the right to assume ownership of all licenses, intellectual property, and work product of VITL developed for the state pursuant to section 9417 or otherwise. The \$700,000 in this section shall not be available until the funding in Sec. 263(e)(3) of No. 71 of the Acts of 2005, as amended by Sec. 74 of No. 93 of the Acts of 2006, has been fully expended.

(b) Of the above appropriation \$400,000 is for purposes of Sec. 57 of H.861 of 2006. In the event that H.861 of 2006 is not enacted into law, \$400,000 shall be reduced from the above appropriation. This reduction shall consist of \$316,000 in general funds and \$84,000 in Global Commitment funds.

2007

Act 70

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/acts/ACT070.htm>

22 VSA Sec. 902 (b)(8)

(8) address issues related to data ownership, governance, and confidentiality and security of patient information.

(c)(1) The commissioner shall contract with the Vermont information technology leaders (VITL), a broad based health information technology advisory group that includes providers, payers, employers, patients, health care purchasers, information technology vendors, and other business leaders, to develop the health information technology plan, including applicable standards, protocols, and pilot programs. In carrying out their responsibilities under this section, members of VITL shall be subject to conflict of interest policies established by the commissioner to ensure that deliberations and decisions are fair and equitable.

(2) VITL shall be designated in the plan to operate the exclusive statewide health information exchange network for this state, notwithstanding the provisions of subsection (g) of this section requiring the recommendation of the commissioner and the approval of the general assembly before the plan can take effect. Nothing in this section shall impede local community providers from the exchange of electronic medical data.

(d) The following persons shall be members of VITL:

<http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/acts/ACT065.htm>

Sec. 9a. Information and innovation Vermont information technology leaders (VITL)

Personal services	726,664
Source of funds	
General fund	395,000
Special funds	226,664
Global commitment fund	<u>105,000</u>

Total	726,664
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(a) Of the above appropriation, \$726,664, consisting of \$395,000 in general funds, \$105,000 in Global Commitment funds, and \$226,664 in special funds, is for a continuation of the project conducted by the Vermont information technology leaders (VITL), as referred to in Sec. 263(e)(3) of No. 71 of the Acts of 2005, as amended by Sec. 74 of No. 93 of the Acts of 2006. Availability of the \$726,664 funds is contingent on the secretary of administration's approval of an annual plan submitted by VITL to coordinate VITL's activities with the Vermont blueprint for health chronic care initiative and other health care related statewide information technology projects. Availability of the \$726,664 shall also be contingent on the delivery by VITL of an update on a sustainable business plan to the secretary of administration and the general assembly; and a commitment by VITL to use best efforts to secure a nonstate match for the funds. If at any time VITL no longer demonstrates the ability to deliver the work described in 18 V.S.A.

9417, the state shall have the right to assume ownership of all licenses, intellectual property, and work product of VITL developed for the state pursuant to section 9417 or otherwise. The \$726,664 in this section shall not be available until the funding in Sec. 87(a) of No. 215 of the Acts of 2006 and in Sec. 263(e)(3) of No. 71 of the Acts of 2005, as amended by Sec. 74 of No. 93 of the Acts of 2006, has been fully expended.

Sec. 9b. 22 V.S.A. 901(4) is amended to read:

(4) to review all information technology requests for proposal ~~with a value of over \$10,000.00 in accordance with agency of administration policies;~~

2008

2009

Blueprint for Health

(2)(A) The director shall convene an expansion design and evaluation committee,
incl VITL

<http://legislature.vermont.gov/assets/Documents/2010/Docs/ACTS/ACT128/ACT128%20As%20Enacted.pdf>

pg 35 "established"

(2) Collaboration with Vermont information technology leaders established in section 9352 of this title to assist health care professionals and providers to create a statewide infrastructure of health information technology in order to expand the use of electronic medical records through a health information exchange and a centralized clinical registry on the Internet.

Big Bill

<http://legislature.vermont.gov/assets/Documents/2010/Docs/ACTS/ACT156/ACT156%20As%20Enacted.pdf>

Sec I25 page 153

Sec. I.25 18 V.S.A. 9351(b) and (c) are amended to read

<http://legislature.vermont.gov/assets/Documents/2010/Docs/ACTS/ACT061/ACT061%20As%20Enacted.pdf>

HIT Plan requirement added

"(8) address issues related to data ownership, governance, and confidentiality and security of patient information"

VITL Governance added

9352. VERMONT INFORMATION TECHNOLOGY LEADERS

(a) Governance. The general assembly and the governor shall each appoint one representative to the Vermont Information Technology Leaders, Inc. (VITL) board of directors.

(b) Conflict of interest. In carrying out their responsibilities under this section, directors of VITL shall be subject to conflict of interest policies established by the secretary of administration to ensure that deliberations and decisions are fair and equitable.

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VT LEG 247660.1

(c) Health information exchange operation. VITL shall be designated in the health information technology plan pursuant to section 9351 of this title to operate the exclusive statewide health information exchange network for this state. Nothing in this chapter shall impede local community providers from the exchange of electronic medical data.

Sec. 9. 32 V.S.A. 10301 is amended to read:

10301. HEALTH IT-FUND

changes and purposes

<http://legislature.vermont.gov/bill/status/2010/H.441> Veto override

H.138 -

not passed IMMUNITY

An act relating to the Vermont Information Technology Leaders, Inc. (VITL)

Location House Committee on Health Care Sponsor(s) Rep. Steven Maier Legal Staff

Erik FitzPatrick

Bill/Resolution Text As Introduced

2009 Special Session

Act 1

<http://legislature.vermont.gov/assets/Documents/2010.1/Docs/ACTS/ACT001/ACT001%20As%20Enacted.pdf>

Sec. E.102.1 HEALTH INFORMATION TECHNOLOGY FOR PAYMENT REFORM
WORK GROUP

2010

<http://legislature.vermont.gov/assets/Documents/2010/Docs/ACTS/ACT128/ACT128%20As%20Enacted.pdf>

2011

housekeeping name change in big bill

<http://legislature.vermont.gov/assets/Documents/2012/Docs/ACTS/ACT063/ACT063%20As%20Enacted.pdf>

<http://legislature.vermont.gov/assets/Documents/2012/Docs/ACTS/ACT051/ACT051%20As%20Enacted.pdf>

Sec. 4. ELECTRONIC PRIOR AUTHORIZATION

The commissioner of Vermont health access and the Vermont information technology leaders (VITL), in collaboration with health insurers, prescribers, representatives of the independent pharmacy community, and other interested parties, shall evaluate the use of electronic means for requesting and granting prior authorization for prescription drugs. No later than January 15, 2012, the commissioner and VITL shall report their findings to the senate committee on health and welfare and the house committee on health care and make recommendations for processes to develop standards for electronic prior authorizations.

2012

<http://legislature.vermont.gov/assets/Documents/2012/Docs/ACTS/ACT171/ACT171%20As%20Enacted.pdf>
page 143 meeting interim

2013

<http://legislature.vermont.gov/assets/Documents/2014/Docs/ACTS/ACT079/ACT079%20As%20Enacted.pdf>

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VT LEG #291977 v.1 "the State's exchange"

(11) require each hospital to create or maintain connectivity to the States health information exchange network in accordance with the criteria established by the Vermont Information Technology Leaders, Inc., pursuant to subsection 9352(i) of this title, provided that the Board shall not require a hospital to create a level of connectivity that the States exchange is unable to support.

<http://legislature.vermont.gov/assets/Documents/2014/Docs/ACTS/ACT144/ACT144%20As%20Enacted.pdf>

2014

Sec. 21. HEALTH INFORMATION TECHNOLOGY AND INTELLECTUAL PROPERTY; REPORT

On or before October 1, 2014, the Office of the Attorney General, in consultation with the Vermont Information Technology Leaders, shall report to the House Committees on Health Care, on Commerce and Economic Development, and on Ways and Means and the Senate Committees on Health and Welfare, on Economic Development, Housing and General Affairs, and on Finance regarding the need for intellectual property protection with respect to Vermonts Health Information Exchange and other health information technology initiatives, including the potential for receiving patent, copyright, or trademark protection for health information technology functions, the estimated costs of obtaining intellectual property protection, and projected revenues to the State from protecting intellectual property assets or licensing protected interests to third parties.

<http://legislature.vermont.gov/assets/Legislative-Reports/A144-Sec-21-AGO-Memo.pdf>

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