

DEMOCRATS

MARK TAKANO, CALIFORNIA, CHAIRMAN  
 JULIA BROWNLEY, CALIFORNIA  
 CONOR LAMB, PENNSYLVANIA  
 MIKE LEVIN, CALIFORNIA  
 CHRIS PAPPAS, NEW HAMPSHIRE  
 ELAINE LURIA, VIRGINIA  
 FRANK J. MRVAN, INDIANA  
 GREGORIO KILILI CAMACHO SABLAN, NORTHERN MARIANA ISLANDS  
 LAUREN UNDERWOOD, ILLINOIS  
 COLIN Z. ALLRED, TEXAS  
 LOIS FRANKEL, FLORIDA  
 ANTHONY G. BROWN, MARYLAND  
 ELISSA SLOTKIN, MICHIGAN  
 DAVID J. TRONE, MARYLAND  
 MARCY KAPTUR, OHIO  
 RAUL RUIZ, CALIFORNIA  
 RUBEN GALLEG0, ARIZONA

MATT REEL  
 STAFF DIRECTOR

REPUBLICANS

MIKE BOST, ILLINOIS, RANKING MEMBER  
 AUMUA AMATA COLEMAN RADEWAGEN, AMERICAN SAMOA  
 JACK BERGMAN, MICHIGAN  
 JIM BANKS, INDIANA  
 CHIP ROY, TEXAS  
 GREGORY F. MURPHY, NORTH CAROLINA  
 TRACEY MANN, KANSAS  
 BARRY MOORE, ALABAMA  
 NANCY MACE, SOUTH CAROLINA  
 MADISON CAWTHORN, NORTH CAROLINA  
 TROY E. NEHLS, TEXAS  
 MATTHEW M. ROSENDALE, MONTANA  
 MARIANNETTE MILLER-MEEKS, IOWA  
 JAKE ELLZEY, TEXAS

MARIA TRIPPLAAR  
 REPUBLICAN STAFF DIRECTOR

# U.S. House of Representatives

## COMMITTEE ON VETERANS' AFFAIRS

ONE HUNDRED SEVENTEENTH CONGRESS

364 CANNON HOUSE OFFICE BUILDING

WASHINGTON, DC 20515

<http://veterans.house.gov>

January 21, 2022

The Honorable Donald Remy  
 Deputy Secretary  
 U.S. Department of Veterans Affairs  
 810 Vermont Avenue, NW  
 Washington, DC 20420

Dear Deputy Secretary Remy:

At this juncture in the Electronic Health Record Modernization (EHRM) program, given the decision to proceed with implementation of the Cerner electronic health record (EHR) system in Columbus, Ohio, Walla Walla, Washington and beyond, we believe VA must clarify how the determination and findings (D&F) document, which former Secretary Shulkin signed on June 1, 2017, is being interpreted and applied. As you know, the D&F was the foundational document used to approve the sole-source solicitation and resulting contract with Cerner and commence the EHRM program.

It is our understanding that interpretation of the D&F has been repeatedly used by the various VA offices involved in EHRM in their debates about the program's strategic direction. Specifically, some have warned that any action inconsistent with their particular interpretations of the D&F would expose VA to protest or other legal risk. It must be remembered that a protest was filed against the D&F, first at the agency level, then at the U.S. Court of Federal Claims, and later appealed to the U.S. Court of Appeals for the Federal Circuit. This protest was dismissed for lack of standing. It is unclear whether, or to what extent, the Office of General Counsel has institutionalized such interpretations. We are concerned that misinterpretation of the D&F and a stagnant acquisition strategy have precluded competition and prevented the introduction of the most capable external technology partners to address the EHRM program's evolving requirements.

First and foremost, any D&F applies at a point in time to establish the rationale and the extent of scope for a discrete procurement action. No D&F precludes other or future procurement actions, whether on the basis of full and open or restricted competition, or noncompetition.

A D&F is also no substitute for a program or project charter, internal policy, rulemaking, or a Congressional authorization. Additionally, at this point in the performance of VA's indefinite-delivery, indefinite-quantity contract with Cerner, it is hard to see what protest risk still exists.

Turning to the language of the D&F, in its “Determination” section it states the following:

*Under the contract, at a minimum, Cerner will provide the full scope of services, including integration, configuration, testing, deployment, hosting, organizational change management, training, and sustainment, and licenses necessary to deploy the DoD’s EHR system in a manner that meets VA needs. The contract will also address all EHR functions supporting clinical care including revenue cycle, in-patient, ambulatory, as well as home care, ancillaries, and specialties to include dental. The contract will also address non-clinical core functional requirements, which may include inventory management/supply chain capabilities.*

The document’s central premise is that VA will purchase and deploy “the DoD’s EHR system in a manner that meets VA’s needs.” The D&F leaves for subsequent interpretation whether this simply means the Cerner EHR system or the Cerner EHR system with identical or substantially similar composition as in the Department of Defense (DoD). While the D&F identifies functions including “revenue cycle, in-patient, ambulatory . . . home care, ancillaries, and specialties to include dental,” it is silent on other functions. Though the D&F states the “contract will also address non-clinical core functional requirements, which may include inventory management/supply chain capabilities” the use of “may” seems to render inventory management/supply chain capabilities optional, and no other such functional requirements are identified. From the outset of the EHRM program, Office of Electronic Health Record Modernization leadership touted their intention to purchase and implement more Cerner EHR modules and functionality than DoD had. This suggests VA originally interpreted the D&F to refer to the Cerner EHR system generally.

However VA has interpreted the D&F conceptually, EHRM program executives’ actions to date appear selectively inconsistent with its language. For example, the original scope of work called for Cerner to integrate the Henry Schein Dentrix software used by DoD, but VA has now directed Cerner to develop its own dental module. In contrast, Cerner’s revenue cycle software has been retained as it has struggled in the West Consolidated Patient Account Center. The D&F’s characterizations of the dental and revenue functionalities are equally subject to interpretation, but opposite decisions have been made. Turning to a third example, the “Determination” section is clear that Cerner’s services will include integration. As you know, the feasibility of bringing a third-party integrator into the EHRM program is presently a topic of intense study. Putting aside the advantages and disadvantages of this approach, if VA is relying on the D&F as prescriptive into the future, a third-party integrator would be impermissible. Only a selective interpretation would permit it. Finally, the D&F has reportedly been used to color the protracted internal debate to select between Cerner’s patient portal, dubbed MyVAHealth, and VA’s patient portal My HealthVet. The “Determination” section of the D&F does not mention a patient portal. Paragraph 7 of the “Findings” section does refer to a patient portal in the context of the benefits of a single common system across VA and DoD, in what seems to be a descriptive statement of needed capability. Relying on the D&F to direct a patient portal decision would be inappropriate, as the “Determination” and “Findings” sections do not carry equal weight, and the language within “Findings” does not identify a particular patient portal.

In conclusion, the D&F served its purpose by establishing the boundaries of permissible scope of work that Cerner may perform on a sole-source basis at the time of award. It is no substitute for a charter, policy, rulemaking, or Congressional authorization and under no circumstances should anyone look to it for the guidance or direction properly provided through those means. To do otherwise invites selective interpretation and inconsistency.

In the interest of clarifying this subject, please provide answers to the following questions no later than February 18, 2022:

- 1) Has the Office of General Counsel issued any opinions or other guidance as to the meaning, interpretation, or impact of the D&F? If so, please provide them.
- 2) Has VA interpreted or used the D&F to preclude any scope of work from being performed on any other contract?
- 3) Please provide a list of contracts awarded to companies other than Cerner and Booz Allen Hamilton to support the EHRM program and the scope of work for each.
- 4) Does VA believe the D&F allows or precludes a third-party integrator in the EHRM program?
- 5) Does VA believe the D&F requires VA to adopt the same dental module, patient portal, revenue cycle module, or any other EHR functionality mentioned in the D&F as DoD?
- 6) Aside from the D&F's legal significance as a justification for noncompetitive procedures, does VA interpret the D&F to have any other meaning?
- 7) Does VA have an acquisition strategy for the EHRM program extending beyond the Cerner contract? If so, please provide a copy and an explanatory briefing.

Thank you for your attention to this important matter. We look forward to working with you and Secretary McDonough in order to ensure VA is making decisions based on what is operationally feasible given current realities and in the best interests of veterans and taxpayers.

Sincerely,



Frank J. Mrvan  
Chairman  
Subcommittee on Technology Modernization



Matthew Rosendale, Sr.  
Ranking Member  
Subcommittee on Technology Modernization