NORTON ROSE FULBRIGHT

Contact tracing apps in the US

A new world for data privacy

As of June 5, 2020

The COVID-19 pandemic has seen governments across the world restricting civil liberties and movement to new levels. To aid the safe lifting of current public health restrictions, new technologies are being developed – contact tracing apps – and rolled out to automate labour intensive tasks critical to containing the spread of the virus. Our contact tracing survey summarises the principal regulatory and policy issues applicable to contact tracing across a range of key jurisdictions in real time.

Is technology being used by the government to monitor and control the spread of COVID-19 (e.g. contact tracing app, CCTV, cell phone location data, credit-card history)?

In the U.S., there has been some minimal, state-level efforts in this area, and two federal bills introduced in Congress. There also continues to be a major collaboration between Apple and Google.

The two federal bills focus on COVID-19 data privacy and create new rights for individuals related to COVID-19 health information. Some key similarities include requiring covered entities to: (1) obtain "affirmative express consent" before collecting and using COVID-19 related health information (subject to a few expectations); (2) disclose their data practices related to COVID-19 health information; and (3) create and implement reasonable data security and privacy safeguards. Some key differences include: (i) the definition of covered information, with one bill going beyond COVID-19 health information and including any physical or mental health status; and (ii) the coverage of employee-related data, with one bill essentially exempting COVID-19 related health information used to determine eligibility for entering the workplace facility (e.g., temperature checks).

Apple and Google released an API in mid-May that can be used in official publich health apps in the iOS and Google Play stores. The API uses detection of Bluetooth signals in order to track location of users over time. For example, if User A has been in close contact with User B, who later self-identifies as having COVID-19 within a pre-identifined time window, then User A will be alerted if the potential exposure.

What are considered to be the major privacy concerns in relation to the app in your jurisdiction (in relation to its use (a) by the government; and (b) by private sector organisations)?

The major privacy concerns that would normally be associated with this type of data collection appears, on paper, to have been mitigated through: (1) affirmative express consent (in the case of the federal bills) and (2) the use of a complex public key cryptography infrastructure develop by Apple and Google for the API. The devil of course, is always in the details, and so we will be able to better judge when apps using this API go live. At this point, notwithstanding a fair amount of noise in the media about privacy concerns, this approach could work well, if affirmative express consent is obtained (and the bills ultimately become law) and the crypto implementation by Apple and Google is sound.

Contacts

Chris Cwalina
Global Co-Head of Data Protection, Privacy and Cybersecurity
Washington DC
Tel +1 202 662 4691
chris.cwalina@nortonrosefulbright.com

Steven Roosa
Head of NRF Digital Analytics and Technology Assessment Platform, United States
New York
Tel +1 212 318 3222
steven.roosa@nortonrosefulbright.com

Marcus Evans
Head of Data Protection, Privacy and Cybersecurity, Europe
London
Tel +44 20 7444 3959
marcus.evans@nortonrosefulbright.com

Ffion Flockhart
Global Co-Head of Data Protection, Privacy and Cybersecurity
London
Tel +44 20 7444 2545
ffion.flockhart@nortonrosefulbright.com

Anna Gamvros
Head of Data Protection, Privacy and Cybersecurity, Asia
Hong Kong SAR
Tel +852 3405 2428
anna.gamvros@nortonrosefulbright.com

David Kessler
Head of Data and Information Risk, United States
New York
Tel +1 212 318 3382
david.kessler@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

Law around the world

nortonrosefulbright.com