

## If You Build it They Will Come<sup>1</sup>

Joy Pritts

The United States was caught flat footed by the arrival of the coronavirus and the ensuing pandemic. For the most part, we were unable to effectively deploy traditional models for containing an epidemic: identifying the affected patient, manually tracing their contacts, and isolating or quarantining those who are likely to spread the disease. As a result, we have seen widespread interest in the potential utility of apps for contact tracing and exposure notification as a tool in the fight against COVID-19.

It is almost guaranteed that as we collect data for COVID-19 through these apps, attempts by law enforcement to access the data will not be far behind. Contact and proximity data could be used to augment the vast amounts of cell phone geolocation data that law enforcement and surveillance agencies already have access to. This additional information could allow law enforcement to, among other things, draw negative conclusions about a person based solely on who they appear to associate with. Data showing that person was in the same area of a gang could result in their being suspected of being a gang

To date, uptake of these apps, whose success depends on a significant rate of adoption, is low. Many people have expressed reluctance to use the apps due to significant concerns over privacy and government access. The majority of people are concerned that tracking measures used to contain the COVID-19 pandemic could lead to greater government surveillance.<sup>1</sup> Even more are worried that tracking measures will continue after the pandemic has ended.<sup>2</sup>

People have a right to be concerned. China initiated a number of technological tools to contain the coronavirus outbreak, including security cameras, location tracking apps and advanced facial recognition software. Now that the virus is largely contained, efforts are underway to make the health monitoring apps “part of daily life” to further China’s surveillance of its citizens for political reasons.<sup>3</sup>

We shouldn’t think that the United States is beyond this type of mission creep. In 2001, the Patriot Act was passed in the wake of 9/11 giving broad search and surveillance power to federal law enforcement and intelligence agencies to combat terrorism. The powers under the Act are now regularly used to surveil the activities of every day American citizens in a manner which many believe to be a violation of civil rights

The tech companies developing these apps recognize that proximity and contact data is potentially vulnerable to abuse, and have built protective features into the technology, such as assigning users a random identification number and storing the data collected on a person’s phone instead of in a centralized data base. But several governmental agencies have pushed back on this approach, citing a need for more identifiable information in order to successfully trace people that an infected person has come into contact with. As a result, it is possible that apps collecting more personal information may gain some traction.

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<sup>1</sup> Edvardas Mikalauskas, *Cybernews*, “Coronavirus Survey: Among Americans, support for privacy trumps fear of Pandemic,” April 24, 2020. Available at: <https://cybernews.com/privacy/report-among-americans-support-for-privacy-rights-trumps-fear-of-pandemic/>. Lucy Simko et al, *ArXiv*, “Covid-19 Contact Tracing and Privacy: Studying Opinion and Preferences,” (May 8, 2020) Available at <https://arxiv.org/pdf/2005.06056.pdf>:

<sup>2</sup> *Cybernews* and *ArXiv*, n. 2.

<sup>3</sup> Aidan Powers- Riggs, CSIS, COVID-19 is Proving a Boon for Digital Authoritarianism, (August 17, 2020), Available at: <https://www.csis.org/blogs/new-perspectives-asia/covid-19-proving-boon-digital-authoritarianism>

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In addition, people generally don't understand the nuances of how the privacy-protective apps work and may have the perception that they actually collect and share much more personal data than they do.

To address these issues, Congress should pass a federal law protecting COVID-19 information.<sup>4</sup> There have been a number of legislative efforts specifically geared to protecting COVID-19, with varying components. Many of them would require minimizing data collection and retention. While many of the draft bills circulating in Congress limit data use, most of them permit the disclosure of COVID-19 related data "as required by law," a phrase which has generally been interpreted as permitting disclosure pursuant to a subpoena. In other words, many Congressional efforts leave the door open for data collected for public health purposes to be accessed and used by law enforcement agencies.

We should close this loophole. Prohibiting the use of COVID-19 data for purposes other than public is an essential step. One method of accomplishing this goal would be to expressly prohibit the use of data collected for public health purposes for purposes unrelated to public health. As an additional protection, Congress could adopt the model used for ensuring confidentiality of substance abuse treatment-related data during the 1970s. Recognizing that people were not seeking treatment for drug abuse due to concerns about being identified and prosecuted, Congress enacted legislation that, among other things, [generally prohibits](#) the use of records related to such treatment records in criminal, civil, or other administrative contexts. Congress could take a similar approach here, and expressly prohibit law enforcement (and others) from using any information collected for the purpose of limiting the spread of COVID-19 in criminal, civil or other administrative contexts.

If we, as a country, are truly interested in encouraging wide-spread adoption of contact tracing and exposure notification apps, we should be sure that if we build such an ecosystem it is used solely for public health purposes. We should expressly foreclose the possibility of it being used for government surveillance.

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<sup>4</sup> Although there have recently been several efforts to pass a general federal privacy bill, it seems unlikely that any of those bills will pass in time to be of assistance in fighting COVID-19.