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HOW THE GOVERNMENT MAY AMPLIFY SURVEILLANCE IN A COVID-19 WORLD

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CLIENT ALERT:

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The war against COVID-19 is being fought on many fronts, not least the technological. Khairy Jamaluddin, newly minted MOSTI minister, announced on March 26 during an online forum "Adapting to the COVID-19 Challenge" that the Malaysian Government is commissioning a smartphone application with the function of tracking the movements of individuals.

We're a little late to the party. Many countries have already resorted to using various tools to track their citizens in an effort to map out the spread of the virus amongst its people, some more invasive than others.

In **China**, government-installed surveillance cameras are arranged to point at the apartment doors of citizens who are under a 14-day quarantine to ensure that they do not leave their houses. Drones are deployed to remind the public to wear their masks, and digital barcodes on mobile apps highlight the health status of their users.

The **Hong Kong** government is using electronic wristbands connected to a smartphone app to track the movements of its citizens. The wristbands function to ensure that wearers who tested positive for COVID-19 are abiding by the government's orders to stay at home. Users were even told to walk around the corners of their houses so that the technology can precisely track the coordinates of their living spaces.

The government of **South Korea** uses records such as credit card transactions, smartphone location data, and CCTV videos to create a system through which COVID carriers are tracked on a map that could inform the public whether they had been near a carrier of COVID-19. The movements of people before they were diagnosed with the virus were published by retracing their steps using GPS phone tracking, credit card records, surveillance videos as well as personal interviews with the patients.

Malaysians, and the rest of the world, should brace themselves for a near future where deeply intimate information may be made available to their governments.

In **Israel,** the government had launched an app that can warn users if they have been in close contact with someone infected with COVID-19. Shin Bet, Israel's security agency, uses the citizens' mobile phone location data to track where the users have visited so that they can enforce quarantine controls.

In the **USA**, Google parent company Alphabet created a new website that provides a quick questionnaire to see if users qualify for a COVID-19 test. The US government is also in talks with Facebook, Google and other tech companies on the possibility of using location and movement data from smartphones, possibly to track the spread of the virus.

In the **EU**, where government intrusion is usually treated with hostility, and where the supranational General Data Protection Regulations (GDPR) apply, major mobile carriers are sharing data with health authorities in Italy, Germany and Austria to help fight the spread of COVID-19 by monitoring whether the public is complying with curbs on movement. The data sharing complies with the GDPR through data anonymisation and aggregation.

In **Singapore**, the "TraceTogether" app was launched on March 20. Although not mandatory, citizens were encouraged to download the app as a supplementary tool for the government's contact tracing efforts. The app uses mobile phones' Bluetooth signal of proximate users.

The phone then records the encounters, including the duration of contact, and stores the information in an encrypted format for 21 days. Patients who tested positive for COVID-19 can allow the authorities to access their app data to identify those who had been in close contact with the patients. Logs can be decrypted and analysed by the authorities.

The unprecedented scale of the COVID-19 pandemic is leading to a sense that privacy is something of a luxury that can be dispensed with, as even countries typically suspicious of government intrusion such as Germany enthusiastically embrace novel ways to fight and curb the spread of the pandemic.

So, **can the Malaysian government legally track the movements of its citizens during the Movement Control Order period?**

Personal data protection has always been only lightly enforced in Malaysia. Under the Malaysian Personal Data Protection Act 2019, "personal data" refers to a person's name, address, phone number, and any other information that can identify the person, and "sensitive personal data" refers to a person's physical or mental health or condition, political opinions, religious beliefs or criminal records, amongst others. Processing any personal data generally requires the consent of the data subject (i.e. the person whom the personal data identifies).

However, the requirement of consent, and the requirement to abide by the other Principles of the PDPA, such as the Notice and Choice Principal, the Disclosure Principal and the Access Principal (requirement to allow data subjects access to their personal data, including the data subject right to withdraw their consent for the processing of their personal data) may be exempted in the following cases:

- when the processing of personal data is necessary for the exercise of any functions conferred on any person by or under any written law or for any other purposes as the Minister thinks fit;
- when personal data is processed for the purpose of preparing statistics or carrying out research, provided that such personal data is not processed for any other purpose and that the resulting statistics or the results of the research are not made available in a form which identifies the data subject (i.e., through anonymisation or tokenisation); and
- when the processing of personal data that is necessary for the purpose of or in connection with any order or judgement of a court.

In addition to the above, the **Malaysian Communications and Multimedia Act 1998 (CMA)** gives power to the Minister and/or the Communications and Multimedia Commissioner ("Commissioner"):

- to request licensees under the CMA (which includes telecommunications service providers) to provide assistance in enforcing the laws of Malaysia including for the preservation of national security;
- to determine that licensees under the CMA shall implement the capability to allow authorised interception of communications; and
- to direct licensees under the CMA to comply with ministerial rules for interworking with international organizations (e.g. the World Health Organization).

Further, the Malaysian Prevention and Control of Infectious Diseases Act 1988 (PCIDA) allows the Minister to make regulations in relation to the collection and transmission of epidemiological and health information and the compulsory reporting of infectious diseases, and such other matters as may appear to the Minister advisable for the prevention or mitigation of infectious diseases. The Malaysian National Security Council Act 2016 (NSCA) also gives power to the National Security Council to formulate policies and strategic measures on national security and other interests relating to national security, and to monitor their implementation.

Local laws sufficiently empower the Malaysian government to collect and use personal data to address the current pandemic, be it in the form of collecting data using the proposed smartphone app, or by way of recruiting the help of local telcos to aid in the provision of their customers' data. It is worth noting as well that the Government and its agencies are exempt from the application of the PDPA, although in practice Government agencies largely conform to the Notice and Choice principle.

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Consent is usually automatically obtained when an app is first downloaded and a user is onboarded and thus become bound to the privacy terms incorporated by reference. However, the issue of the retention of the data collected and the continued use of the app to collect the public's data once COVID-19 makes its much hoped for exit from the world should be addressed. For the sake of consumer confidence, the Government or the app developer should, prior to the launch of such an app:

- ensure that the data collected remains anonymous;
- the data collected is used only to track the spread of the COVID-19 virus;
- the data will be adequately secured using quality cloud service providers and data processors;
- the data collected will be deleted or destroyed at the conclusion of the pandemic period; and
- that the app should also cease to exist following COVID-19's tapering off.

In Singapore, to address privacy concerns, the authorities had ensured the public that data collected are stored on the users' phones in an encrypted format and information on potential close contacts is stored not by their phone numbers but by using "cryptographically generated temporary IDs". In South Korea, the government had stated that its information collection efforts will end when the COVID-19 outbreak is over and that all personal data will be deleted.

Many such apps harness the power of artificial intelligence as well, giving data users access to enormous amounts of information and enabling them to very precisely extrapolate the behaviour of users. This is probably the most disconcerting aspect of the use of such apps.

Data science expert Prof Dr Mahendhiran Sangaran Nair commented at the MOSTI forum that the launch of the mobile application in Malaysia should not concern Malaysians who are worried about privacy infringements, as long as the app was strictly regulated.

Still, Malaysians, and the rest of the world, should brace themselves for a near future where deeply intimate information may be made available to their governments.

"They already know what you're looking at on the internet," Edward Snowden, militant whistleblower and successor to Julian Assange was quoted as saying recently in Copenhagen. "They already know where your phone is moving. Now they know what your heart rate is, what your pulse is."

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