

Helsinki Information Law Moot Court 2021 Problem

Newtonland, a Member State of the European Union, announced its first confirmed case of Coronavirus Disease 2019 (also known as “**COVID-19**”) on 17th February 2020. After a brief but intense discussion covered by the *Newtonian Gazette*, the Newtonland government announced that it would take “radical and pro-active steps to prevent deaths from this terrible virus.” Part of this involved the passing of the Coronavirus Emergency Response Act 2020, a legislative package which, *inter alia*, authorised the creation of a contact tracing app.

The Newtonian government contracted a leading technology company, CoombesBrain, to develop an app that would allow them to track and trace cases of COVID-19. The government further instructed the National Medical Service (“**NMS**”) to work with CoombesBrain on the development of the system and ensure the smoothest possible procedure. On 6th July 2020, CoombesBrain published the following press release:

“We at CoombesBrain are proud to announce the launch of our COVID-19 tracing app. When a person downloads our app, our system will keep an anonymous record of everyone with whom they have come into contact. If one of those people report that they have been diagnosed with a confirmed case of COVID-19, the app will do two things. First, it will let you know that you may have been exposed to the virus, so you know when you must self-quarantine. Secondly, as part of our partnership with the NMS, the app will automatically dispatch a coronavirus test kit to your registered address. This means that, if you get an alert, all you need to do is stay at home and wait!

Our app will help to ensure that nobody has to worry about accidentally exposing other people. However, we also recognise that it is important not to panic; the last thing people want is a false positive, particularly if it leads to unnecessary quarantine and tests. There is still a lot that we don’t know about how this virus transmits and we do not yet have a complete understanding of the risk factors for infection.

Our app is therefore powered by our cutting-edge, proprietary *Whiffin AI* system. *Whiffin* will not only look for connections between confirmed cases, it will automatically use them to improve its understanding of how the virus transmits using the latest machine learning technologies. Our system therefore has the unique ability to improve its infection risk algorithm, adapting to ensure that we only send out notifications and test kits if our computers are sure that you have been exposed.”

To increase the accuracy of reports and protect our users, the tracing app uses the governmental Newtonland SecureID System. This system, which is regularly used for secure identification in Newtonland, creates a unique ID that is sent to CoombesBrain without providing any personal details (e.g. names, addresses or social security numbers). The system then sends the unique ID to the NMS, along with the identity of the person to whom it relates.

The front page of the app contains a link to CoombesBrain’s privacy policy. The privacy policy states, *inter alia*:

“Privacy policy

- This tracing app will keep a record of:
 - Your unique ID
 - Your exact location
 - The unique IDs and location of any other users with whom you have had contact

- Whether or not you have reported a coronavirus infection
- The purpose of the processing is to deliver the app and to develop the Whiffin AI system.
- When registering for an account, the National Medical Service will link your unique ID with your entry in the national registry. At no point does CoombesBrain have access to the national registry, nor does it keep track of the real identities of its users.
- The information will be stored for a maximum of two years. Our agreement with the Newtonian government also allows them to demand the deletion of all user data at any point (e.g. if the partnership between CoombesBrain and the government comes to an end). If this happens, we will notify you through the app and your data will be deleted after 14 days of such notification. However, if you would like to help future research, you can opt in to allow us to retain the information in a fully anonymous form for future analysis of how viruses spread.
- If you report a positive coronavirus infection, we will alert any other users that are deemed “at risk” from your tracing history. Whether users are deemed “at risk” will depend on the current modelling by our *Whiffen AI* system. The *Whiffen AI* system enhances the processed data with publicly available demographic and social economic data.
- If a user is deemed to be at risk, we will send their unique ID to the NMS, which will then dispatch a testing kit to your home address. The only information that will be sent to the NMS is whether a user is considered at risk; we do not send any tracing data to the NMS, nor will we share data with any other party than the NMS.
- The processing is justified under the contract with the Government and the Coronavirus Emergency Response Act 2020, s. 34.”

The privacy policy does not disclose the details of the contract between the Government and CoombesBrain, but includes a link to the NMS Coronavirus Testing website. On that website, the NMS state that, when they receive information about a potential infection from CoombesBrain, the relevant individual’s medical record will be updated with the information and a test will be automatically dispatched.

Jim McEbon, a citizen of Newtonland, was previously employed by the NMS as a data entry clerk. One of his roles as a clerk was to take information from hand-written medical records and enter them into the national computer system. However, Jim left the job in 2018 due to what he perceived to be an institutional disregard for the privacy and security of users. When he left the job, Jim attempted to have a story published on the topic with the *Newtonian Gazette*, but as Jim had no proof other than “his memories of conversations with his managers”, the editor elected not to run the story. After seeing CoombesBrain’s press release, Jim registered a complaint with the Newtonian Data Protection Authority, claiming that the tracing app was in violation of the General Data Protection Regulation (“**GDPR**”) and should immediately cease operations.

The Newtonian Data Protection Authority invites submissions on the following questions:

1. Does the Coronavirus Emergency Response Act 2020, s. 34 validly justify the various processing acts associated with the CoombesBrain tracing app? In particular: What is the legal basis for processing of this information?
2. Is the Newtonian Government’s partnership with CoombesBrain permitted under the applicable GDPR rules?
3. Does the use of the *Whiffen AI* system violate any rights provided under the GDPR?

Mooters are instructed to submit answers to those questions both from the perspective of Jim McEbon as the applicant; and for CoombesBrain, the NMS and the Newtonian Government as the respondents. For the purpose of this Moot Court, CoombesBrain, the NMS and the Newtonian Government will make a single set of submissions together.

Submissions are due on 15.11.2020 and should not exceed 5000 words per party.

Appendix:

National Medical Service Health Registry Act 1998

Section 2

(1) The National Medical Service is hereby empowered to keep a record of the health and medical conditions relating to each resident. These records shall be kept up to date with information from the national registry. The National Medical Service must establish and maintain technical and organisational measures necessary to protect the privacy and data protection rights of individuals. Including that these records are kept in a secure form, that all processing is proportionate to the needs of public health and that there is no unnecessary, unwarranted or unjustified risks to the personal data or privacy rights of individuals.

(2) The National Medical Service is further empowered to transfer paper records into the electronic database.

Coronavirus Emergency Response Act 2020

Section 34

The Newtonian government shall facilitate the creation of a coronavirus tracing app. This section hereby authorises the processing of personal data necessary for such an app to function, provided that such processing is proportionate to the needs of public health, subject to appropriate technical and organisational data protection measures, and does not create unnecessary, unwarranted or unjustified risks to the personal data or privacy rights of individuals.