



TESTIMONY OF:

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Presented Before

**New York City Council Committees on Health and Hospitals
Oversight Hearing on NYC's COVID-19 Testing and Contact Tracing Program**

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My name is Elizabeth Daniel Vasquez. I am the Special Forensic Science Council at Brooklyn Defender Services (BDS), and lead the Science & Surveillance Project, as well as the Forensic Science Practice. I have practiced as a criminal defense lawyer and as a civil rights attorney in New York, Washington, DC, and in federal courts across the country. BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for approximately 30,000 people in Brooklyn every year.

We thank the Committee on Hospitals and the Committee on Health for the opportunity to provide testimony regarding New York City's COVID-19 Testing and Contact Tracing Program. We fervently believe in the mission of the Contact Tracing Program and in the evidence-backed work being done throughout the City to combat the deadly coronavirus pandemic. With that commitment to public health in mind, as public defenders, we participate in today's hearing to draw attention to the critical surveillance threat posed by current iterations of this essential public health initiative.

The City’s decisions thus far regarding the contract tracing program Test & Trace Corps risk exposing New Yorkers’ most intimate details—their daily whereabouts, friends and family, private health information—to criminal, family, and immigration enforcement authorities, as well as other private actors. **To be clear, contact tracing is a vital and urgent public health mandate and BDS recognizes the critical importance of widespread participation to make it successful; however, absent stronger privacy protections, we cannot and will not advise the people we serve to turn over their personal information.** The risk of exposing people’s whereabouts and associations to law enforcement spying, whether by ICE or NYPD or another agency, is too great to ignore. That is why we support bipartisan legislation (S.8450-C/A.10500-C) passed by the State legislature to protect contact tracing confidentiality and urge Governor Cuomo to sign it into law immediately.

Background

Our clients’ communities have been among the hardest hit by the COVID-19 pandemic.¹ As the Centers for Disease Control and Prevention (CDC) reported in July: “Long-standing systemic health and social inequities have put many people from racial and ethnic minority groups at increased risk of getting sick and dying from COVID-19.”² The CDC’s report identified five factors contributing to that increased risk: discrimination; health access and utilization; occupation; education, income and wealth gaps; and housing. Remediation of this enhanced risk dovetails neatly with many of the demands made by New Yorkers in the wake of George Floyd’s murder earlier this summer: an investment in social programs that better serve our public safety and health needs and a divestment from law enforcement as the answer to social problems.

A twin storm of over-exposure—to infectious disease and to state surveillance—presently batters our clients’ communities. Just as the coronavirus has disproportionately impacted Black and brown communities in our City, mass surveillance and policing disparately encumber those same communities as well.³ Whether it be through daily scrutiny by highly saturated camera (Argus cameras) and microphone (ShotSpotter) placement, repeated in-person encounters with police officers or case workers, or high-tech mass data aggregation and social media surveillance (the Domain Awareness System), the people we serve are persistently subjected to consistent deprivations of privacy. The people we serve are rightly distrustful of government agencies seeking still more detailed information through programs that are already constitutionally suspect

¹ Mays, Jeffrey, et al, “Virus is Twice as Deadly for Black and Latino People than Whites in N.Y.C.,” NYTimes (Apr. 8, 2020) <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html>; Opperl, Jr., Richard, et al. “The Fullest Look Yet at the Racial Inequity of the Coronavirus,” NYTimes (July 5, 2020) <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

² CDC, “Health Equity Considerations and Racial and Ethnic Minority Groups,” (July 24, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>

³ Feuer, Alan, “Black New Yorkers are Twice as Likely to be Stopped by the Police, Data Shows,” NYTimes (Sept. 23, 2020) <https://www.nytimes.com/2020/09/23/nyregion/nypd-arrests-race.html>; see also Benjamin, Ruha, *Race After Technology: Abolitionist Tools for the New Jim Code* (Polity Books, 2019); Browne, Simone, *Dark Matters: On the Surveillance of Blackness* (Duke UP, 2017); Eubanks, Virginia, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (Picador, 2018); Gellman, Barton, et al., “The Disparate Impact of Surveillance,” The Century Foundation (Dec. 21, 2017) <https://tcf.org/content/report/disparate-impact-surveillance/>.

and threaten to violate the Constitution’s guarantee that people are ‘secure in their persons, houses, papers, and effects against’ expansive government surveillance.^[REDACTED]

As the people we serve make the personal decision whether or not to share their health, location, and relationship data with a government entity via Test & Trace Corps, they should be made aware of where their data will go, how it will be stored, and how any potential data breaches will be addressed to ensure they can properly make an informed choice.

How contact tracing actually works

In contact tracing efforts, people initially receive a call from a contact tracer, who is using Twilio⁴ to make contact with them. Over the Twilio platform, the conversation between the individual and contact tracers may be recorded. The conversation may also be listened in on by tracing supervisors. The currently provided reason for the recording and eavesdropping has been “quality assurance,” but NYC Health + Hospitals (H+H) has failed to disclose any further detail surrounding this justification or data security measures in place for this initial call.

After providing (1) personal health information, (2) location information, and (3) information about their close personal contacts in this initial conversation, people are contacted again multiple times to check in on their self-quarantine efforts and any hurdles to self-quarantining. These follow-up calls also take place over Twilio.

Phone outreach efforts are tracked in Salesforce.⁵ If people do not respond to phone outreach (either initially or in follow-up), contact tracers may be sent to visit New Yorkers’ residence of record. Details have not been provided regarding how contact tracers identify themselves in the field. In-person efforts are also tracked in Salesforce.

Not only is personal health data from contact tracing being collected on Twilio and entered into Salesforce by contact tracers, but that data is then also sent to the Department of Health and Mental Hygiene’s (DOHMH) Maven disease surveillance and case management system. The City is using Axway⁶ to transfer data between the two systems: Salesforce and Maven.

If a person opts-in to Test & Trace’s “Take Care Initiative,” their data is also shared with community-based organizations who have contracted to assist people in quarantine.

Privacy threats are inherent in the Test & Trace Program

While many people believe that private health information is protected by a suite of federal legislation, particularly including HIPAA, the reality is that federal and state health privacy

⁴ Twilio is a business cloud-communications technology company, which offers text and voice communications. <https://www.twilio.com/company>.

⁵ Salesforce is a cloud-based software company that specializes in providing a case management and task management interface through its eponymous primary enterprise offering “Salesforce.” <https://www.salesforce.org/> The company holds multiple contracts across private industry and government, including contracts with U.S. Customs and Border Patrol (CBP). See Press Release, “U.S. Customs and Border Protection Agency Selects Salesforce as Digital Modernization Platform” (Mar. 6, 2018), <https://www.salesforce.com/company/news-press/press-releases/2018/03/180306/>.

⁶ Axway Software is a publicly held technology company that provides software tools for managed file transfer.

statutes contain robust law enforcement exceptions. On behalf of the Test & Trace Corps, H+H has publicly committed to assert confidentiality and resist attempts to access tracing data, including fighting any legal requests for contact tracing information such as subpoenas from immigration or law enforcement.

However, neither Test & Trace nor the City's legal ability to protect contact tracing data from local or federal law enforcement access is established. In fact, in seeming acknowledgement of this limitation, their public-facing website says only that their "database will not be linked to any law enforcement databases."⁷ And the public has not been given information about what legal protections are actually in place for their data or the very real limitations on the extent of the present protections.

In addition to privacy threats, a lack of transparency also raises data security concerns

In addition to concerns surrounding law enforcement access to contact tracing data, Test & Trace's reliance on private companies presents a new set of challenges. For the people we serve who choose to share personal information about their location, contacts, and insurance status with contact tracers, there is often a significant risk to them if this information were to be leaked or hacked.

The City's Department of Information Technology and Telecommunications (DoITT) has contracted with a number of companies, including Salesforce and Twilio, as described above, but those contracts have not been made public and the public has not been informed of what provisions, if any, have been made in the event of a data breach.

It is also unclear whether Health + Hospitals or DOHMH have ever utilized Salesforce before. Instead of using the Maven system already in use, it appears that a new system was contracted for and developed specifically for COVID-19 contact tracing. In combination with the remote nature of contact tracers' data entry work right now, the large number of different data storage and transfer systems in use means that there is a heightened risk for software malfunctions, hacking, and accidental leaks of contact tracing data.

Additionally, there is no assurance that access permissions afforded to the staff of Test & Trace, Health + Hospitals, DOHMH, or DoITT are consistently monitored and updated.

Altogether these security lapses undermine trust and may negatively impact participation in contact tracing efforts by the City.

Security and privacy concerns are particularly heightened for New York City's public school children and families

Concerns regarding the security and privacy of the personal information people share with contact tracers also implicates plans for a safe reopening of New York City public schools. In announcing the Department of Education's (DOE) reopening plan, Mayor de Blasio stated that "rigorous test and trace protocols will keep our students and staff safe as we start off this new

⁷ <https://www.nychealthandhospitals.org/test-and-trace/>

school year.”⁸ Much of the DOE’s plan to determine when to close a classroom or school will depend on whether COVID-19 cases arising in schools are found to be linked; thus, the DOE has partnered with DOHMH and the Test & Trace Corps to investigate all positive cases found among DOE students and staff. When a student or school staff member tests positive for COVID-19, “NYC Test & Trace Corps contact tracing will interview the person and school administration to establish if there were any other additional close contacts.”⁹

However, we are concerned that despite the fact that contact tracing of students and staff is a cornerstone of the City’s plan for school reopening, the DOE and DOHMH have provided only minimal information regarding how the personal information collected from students and their families will be safeguarded. Furthermore, if families do not trust the contact tracing process and feel comfortable sharing information with contact tracers, it will be more difficult to trace cases within schools, and the DOE will likely struggle to enact its protocol regarding school and classroom closures.

We are also concerned that the DOE’s plan for the mandatory testing of students for coronavirus infections does not make clear how the privacy and security of students and their families will be appropriately safeguarded. In response to concerns about the availability of testing for students, teachers and school staff, the United Federation of Teachers (UFT) and the DOE came to an agreement that now mandates testing for randomly selected students and staff.¹⁰ The agreement states that once in-person learning has commenced, the DOE will begin mandatory testing at school buildings. Between 10 and 20% of the individuals in a school building will be tested in a given month, and these individuals will be randomly selected. If a student declines to submit to testing and there are not a sufficient number of students in the school who agree to testing, that student will no longer be permitted to attend in-person learning unless they submit to a test. Thus, families who fear that their children’s privacy will not be properly safeguarded, or fear that submitting to testing will lead to overly invasive contact tracing, will either have to allow their children to be tested in spite of these concerns, or switch their children into a remote-only option – an option which has proved unworkable for many students, particularly those students with disabilities or who lack access to technology at home.

The lack of transparency and threat to privacy is also particularly heightened for incarcerated people

In the City’s jails, we are concerned for detained people and their potential for exposure to COVID-19. Although Correctional Health Services has reported that they conduct contact

⁸ “Mayor de Blasio and Chancellor Carranza Announce Test and Trace Protocols for NYC Public Schools,” available at <https://www1.nyc.gov/office-of-the-mayor/news/558-20/mayor-de-blasio-chancellor-carranza-test-trace-protocols-nyc-public-schools>.

⁹ In its plan for reopening, the DOE outlined the scenarios under which a series of linked or unlinked cases of COVID-19 would lead to school closures. For example, if multiple positive cases are linked to each other within a classroom, the classroom will be closed for 14 days. If at least two cases within a school in separate classes are linked together through contact tracing, the school building will close for 14 days. New York City Department of Education’s School Reopening Plan Submission to the New York State Department of Education, at 31, 33-34.

¹⁰ DOE and UFT, “School Testing Policy Agreement,” available at <https://www.uft.org/sites/default/files/attachments/coronavirus-school-testing-policy.pdf>.

investigations with the Department of Corrections whenever they learn of a positive test result in their facilities, it is unclear whether the identity of the COVID-positive individual is kept private and confidential, and it is also unclear whether this contact investigation is coordinated with Test & Trace efforts. The lack of clear and transparent cooperation between Correctional Health Services, Department of Correction, and Test & Trace efforts to contain the spread of COVID-19 is cause for concern, especially as people in custody and jail staff move in and out of the city's jails on a daily basis.

Recommendations

Call on the Governor to Sign S.8450-C (Rivera) / A.10500-C (Gottfried)

Recognizing the dual importance of contact tracing and privacy, in July the New York State Senate and Assembly passed legislation related to the confidentiality contact tracing information. The bill (S.8450-C/A.10500-C) establishes safeguards for New Yorkers, including:

- Prohibiting law enforcement or immigration authorities from participating in contact tracing;
- Prohibiting contact tracers from providing information to law enforcement or immigration authorities;
- Requiring the NYS and NYC health commissioners to create regulations on safeguards for data storage.

We know that a successful contact tracing program will not work without a real commitment to protecting the privacy of all New Yorkers and ensuring ICE and law enforcement are not granted access to private health information. A resolution from the New York City Council in support of this legislation would send a strong message that the Governor must sign S.8450-C (Rivera) / A.10500-C (Gottfried) and establish confidentiality in contact tracing.

Increase Transparency around Data Security and Privacy

For New Yorkers who are already being monitored by the NYPD, ACS, or ICE, Test & Trace might feel like another impingement upon their privacy. For New Yorkers with valid concerns about data security and privacy, one means of mitigating distrust would be to provide transparency regarding the flow of individual data within Test & Trace's IT systems. Providing true transparency surrounding data privacy and security measures, including disclosing relevant contract provisions and governance and compliance procedures, would similarly be a step towards building trust. The Council's willingness to hold public hearings is appreciated in this regard true transparency requires a commitment from each of the relevant City agencies.

Conclusion

Brooklyn Defender Services is grateful to the Committees on Health and Hospitals for hosting this hearing and grappling with this critical issue. Thank you for your time and consideration of our comments. We look forward to further discussing these and other issues that impact the people we serve. If you have any questions, please feel free to reach out to Elizabeth Daniel Vasquez, our Special Forensic Science Counsel, at evasquez@bds.org.