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May 27, 2020

Honorable Laura Kelly
Governor of Kansas
State Capitol, Rm. 241-S
Topeka, Kansas 66612

Honorable Susan Wagle
President of the Senate
State Capitol, Rm. 333-E
Topeka, Kansas 66612

Honorable Ron Ryckman Jr.
Speaker of the House
State Capitol, Rm. 370-W
Topeka, Kansas 66612

Honorable Anthony Hensley
Senate Minority Leader
State Capitol, Rm. 318-E
Topeka, Kansas 66612

Honorable Tom Sawyer
House Minority Leader
State Capitol, Rm. 359-W
Topeka, Kansas 66612

Dear Governor Kelly and Legislative Leaders:

I write to recommend that during the special session of the legislature that convenes next week you work together to review and, if appropriate, address important public policy issues related to “contact tracing” and personal privacy.

As you know, there is considerable discussion about the importance of contact tracing for the weeks and months ahead as our economy reopens – a time when the legislature may not be in session to address issues as they arise. Many public health officials have explained contact tracing is key to enabling a safe reopening and economic recovery because it is the foundation for identifying new outbreaks of the virus and containing them before they can spread widely. *See, e.g., “We’ve got to know who they are’: Contact tracing vital as county reopens,” Topeka Capital-Journal, May 25, 2020 (available at <https://www.cjonline.com/news/20200525/weve-got-to-know-who-they-are-contact-tracing-vital-as-county-reopens>)(last accessed May 27, 2020).*

At the same time, the information-gathering activities inherent in contact tracing present significant and legitimate privacy concerns. *See “Contact tracing must balance privacy and public health,” STATNEWS, May 15, 2020 (available at <https://www.statnews.com/2020/05/15/contact-tracing-must-balance-privacy-and-public-health/>)(last accessed May 27, 2020).* The Centers for Disease Control advises that contact tracers must have “[a]n understanding of patient confidentiality, including the ability to conduct interviews without violating confidentiality (e.g., to those who might overhear their conversations)” and that “[t]o be successful, a community will need public awareness, and understanding and acceptance of contact tracing.” *See <https://www.cdc.gov/coronavirus/2019-ncov/php/principles-contact-tracing.html>.*

While contact tracing is a familiar tool to the public health community, the anticipated scope of expansion of the practice during the COVID-19 pandemic is certain to present challenging legal issues not addressed by current Kansas law. *See, e.g.,* <https://www.npr.org/sections/health-shots/2020/04/28/846736937/we-asked-all-50-states-about-their-contact-tracing-capacity-heres-what-we-learned> (last accessed May 27, 2020)(describing state plans to expand contact tracing). Already, concerns have been raised about whether and how cellphone location data may be used to track the movements of Kansans, *see* “Kansas’ Review of Cellphone GPS Data Raises Privacy Concerns,” *U.S. News & World Report*, April 2, 2020 (available at <https://www.usnews.com/news/best-states/kansas/articles/2020-04-02/kansas-review-of-cellphone-gps-data-raises-privacy-concerns>)(last accessed May 27, 2020). And major global data companies have announced they are developing technologies specifically to enable automated contact tracing through individuals’ cellphones. *See* “Coronavirus: First Google/Apple-based contact-tracing app launched,” *BBC*, May 26, 2020 (available at <https://www.bbc.com/news/technology-52807635>)(last accessed May 27, 2020). At least one lawsuit has been filed and resolved when the local government involved agreed to change its low-tech data-collection practices. *See Taylor v. Allen*, in the United States District Court for the District of Kansas, Case No. 2:20-cv-2238-HLT-ADM.

All of this is occurring without even a basic statutory architecture to guide development and deployment of the practice and management of the sensitive personal information collected. Competing bills to regulate contacting tracing have been introduced in Congress but have not been enacted. *See* “Senate and House Democrats Introduce COVID-19 Privacy Bill Targeting Contact Tracing Apps,” *Morningconsult.com*, May 14, 2020 (available at <https://morningconsult.com/2020/05/14/covid-19-data-privacy-legislation-democrats/>)(last accessed May 27, 2020). And under state law, while the basic public health activity of identifying persons who may be infected rests on a stated or implied statutory basis, *see e.g.,* K.S.A. 65-118 (a); K.S.A. 65-119; K.S.A. 65-128(b); K.S.A. 65-129b(a)(1)(A), the term “contact tracing” appears neither in Kansas statutes nor in any reported Kansas cases. The term is mentioned briefly in only one Attorney General Opinion with the principal point being that different values are presented and must be weighed as states strike the balance between epidemiological utility and personal privacy. *See* Attorney General Opinion 95-5 (January 6, 1995).

Similarly, current Kansas law does not answer important basic questions about contact tracing that are nearly certain to arise during the current pandemic response. A few of these questions include:

- Is participation voluntary or mandatory? If mandatory, what legal process is required for the government to obtain the information?
- What role will electronic data collection play, including data collected from third parties, or will it be allowed at all?
- What data may be collected?
- Who is authorized to collect, possess or access the collected data?
- For what purposes may collected data be used? With whom may it be shared? May it be sold? May it be shared for research or other purposes?
- If the collected data is held by a public agency, is it a public record governed by the Kansas Open Records Act? Is it subject to discovery in litigation unrelated to the contact tracing itself, including through nonparty business records subpoenas?

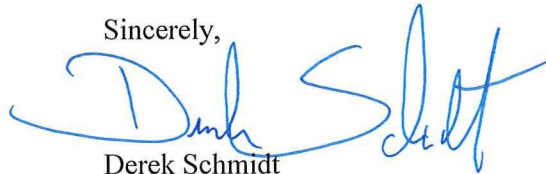
- How long may collected data be retained?
- What is the consequence for any person who improperly divulges collected data?

Much of this is unplowed legal ground, and I recognize that the relatively short time available will not allow development of a thoughtful, comprehensive contact-tracing statute. More thorough study in an interim committee or during the next regular legislative session no doubt will be advisable. But perhaps crafting a simple, basic framework to guide development of the practice at least through the remainder of this year is possible and advisable.

If you are willing to consider such legislation during the special session, I would be glad to prepare a preliminary draft that can become the starting point for discussion. I would hope, however, that expert input from the various agencies involved in contact tracing could be received as well as input from the public whose health and privacy are both at issue here.

Thank you for considering this recommendation. Please let me know if I may be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Derek Schmidt', with a stylized flourish extending to the right.

Derek Schmidt
Kansas Attorney General