

South Africa

RestoreDataRights: Mapping Declaration Principles to National Laws and Practices

As part of the RestoreDataRights project, Open Institute and DataReady are compiling a set of research briefs that explore how key provisions of the RestoreDataRights Declaration are translated into law and practice across four jurisdictions: Kenya, Ghana, South Africa and Nigeria. The purpose of this series of briefs is to establish an evidence-base of current data governance and use practices and to identify where advocacy opportunities may arise for civil society to improve the transparency, inclusiveness and accountability of governments' pandemic response.

This brief explores data governance and protection issues as they relate to the pandemic response in South Africa.

This analysis is based on independent qualitative research, complemented where relevant by a comparative legal analytical lens. This involved the collection of data from a diverse set of online resources including, among others, law reports, case law databases, news reports, publications by international organisations, government publications, government policy statements, and academic journal articles. The findings of this research are set out below, with a list of the sources explored at Appendix I. For certain analytical fields, no relevant online information was identified despite an extensive desk search of online information having been conducted. The desk search primarily relied on general and legal search engines, and derivative sources.

Executive Summary

Since the declaration of a state of disaster on 15 March 2020, the South African Government's approach to the co-ordination and management of the COVID-19 pandemic has been guided by the Disaster Management Act which provides wide regulatory powers to the National Executive and the Minister of Co-Operative Governance and Traditional Affairs (Minister).¹ Using these powers, the National Executive has sought to contain and slow down the spread of the virus by

¹ 57 of 2002.

implementing extensive public health interventions such as disease surveillance, education, social distancing, self-isolation, quarantine, curfew and lockdown.²

The dynamic measures adopted by the National Executive have significantly relied on extensive data collection, processing and analysis. Under the Regulations issued by the Minister, the National Department of Health (DoH) has developed a national database in order to guide appropriate responses in addressing, preventing or combatting the spread of COVID-19, including contact tracing and geospatial hotspot mapping.³ The Regulations proscribe that the information contained in this database is confidential and may only be disclosed by authorized persons where necessary. There is, however, limited transparency regarding the data governance practices adopted by the DoH in relation to the national database. It is, for example, unclear how the data is being hosted, shared and secured.

As an innovative oversight mechanism over the Government's surveillance and data-gathering efforts in connection with COVID-19, a “COVID-19 Designated Judge” has been appointed by the Minister of Justice and Correctional Services. The Judge must be provided with weekly reports about data-gathering, including the names and details of everyone whose location or movements were traced, and may make recommendations as they deem fit regarding the amendment or enforcement of the Regulation in order to safeguard the right to privacy while ensuring the ability of the Department of Health to engage in urgent and effective contact tracing to address, prevent and combat the spread of COVID-19. The Director-General of the DoH is also required, within six weeks after the end of the national state of disaster, to notify every person whose information has been obtained that information regarding their location or

² Ciara Staunton, Carmen Swanepoel, Melodie Labuschaigne, Between a rock and a hard place: COVID-19 and South Africa's response, *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, lsa052, <https://doi.org/10.1093/jlb/ljaa052>.

³ Regulation 8 of the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 GN R480 GG 43258, 29 April 2020 (the Regulations).

movements was collected. In addition, within six weeks after the end of the national state of disaster, the information in the COVID-19 Tracing Database must be de-identified, and the de-identified information may only be retained and used for research, study and teaching purposes.

Although the DoH initially relied on community health workers to conduct in-person widespread community symptom screening, the overlap between the symptoms of Covid-19 and tuberculosis necessitated the adoption of a more targeted approach in which testing efforts were focussed on areas identified as hot spots and on investigating clusters of infections.⁴ The DoH has also developed and implemented electronic systems to collect information from members of the public on a voluntary basis for inclusion in its COVID-19 Database.⁵ This includes an official Bluetooth contact-tracing that is built on the Apple–Google Exposure Notifications application programmable interface.⁶ The DoH may also receive information that is provided on a voluntary basis from private entities which operate electronic systems. The terms and conditions of these electronic systems must request the user’s express consent and contain information about data collection, storage, use, sharing and deletion practices. Persons who are tested for COVID-19 in both public and private sector laboratories are provided with their results through the CovidConnect platform which uses a combination of USSD channels, WhatsApp and SMS messaging to identify and inform persons who have been in contact with persons that have tested positive for COVID-19.⁷ Every employer is also required to take

⁴ David, N.; Mash, R. Community-based screening and testing for Coronavirus in Cape Town, South Africa: Short report. *Afr. J. Prim Health Care Fam. Med.* 2020, 12 and National Institute for Communicable Diseases, Covid-19 Weekly Epidemiology Brief Week 4 2021, available at <https://www.nicd.ac.za/wp-content/uploads/2021/02/COVID-19-Weekly-Epidemiology-Brief-week-4-2021.pdf>.

⁵ DoH. Covid-19 Online Resource and News Portal. Available at <https://sacoronavirus.co.za/2020/09/01/download-the-app-every-covid-alert-sa-app-download-means-more-lives-saved-in-sa/>.

⁶ Id.

⁷ Voigt “COVID-19: The trial and error of digital contact tracing in SA” Spotlight (28 July 2020).

measures to screen workers when they report for work to ascertain whether they have any COVID-19 symptoms, to notify the National Institute for Occupational Health and the Compensation Commissioner if a worker has been diagnosed with COVID-19, and to submit a COVID-19 risk assessment to the Department of Employment and Labour.

The DoH has also established an Electronic Vaccination Data System (EVDS) to support the vaccination roll out.⁸ Information that is submitted during registration by persons who express an interest in being vaccinated is being used to identify eligible vaccination beneficiaries, plan the supply of vaccines and ancillary items, allocate beneficiaries to their nearest available service point, and communicate with enrolled individuals about the vaccination program. As a form of technical regulation, anonymised data is reported to the DoH national database for monitoring purposes. In relation to data security, the administrators and vaccinators who access the EVDS have secure user login details that have a full audit trail on all the activities that they perform on their accounts in accordance with their assigned roles. All systems are built with open architecture for interoperability and alignment with local standards. The enhanced transparency of the EVDS's data governance mechanisms may enhance public trust in the vaccination roll strategy.

The regulations issued by the Minister further provide that any person who publishes any statement, through any medium, including social media, with the intention to deceive any other person about COVID-19, the COVID-19 infection status of any person, or any measure taken by the Government to address COVID-19, commits an offence.⁹ Any such person is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment. It is, however, unclear if any persons have in fact been prosecuted for such

⁸ DoH. ECDS Self Registration Portal User Manual. Available at https://vaccine.enroll.health.gov.za/assets/images/EVDS_Registration_User_Guide_v1.4_LIVE.pdf.

⁹ Regulation 14(2) of the Regulations.

misinformation. An Ipsos/World Economic Forum survey has also indicated that the proportion of South Africans who said they totally agreed that they would take a vaccine if it was available is decreasing.¹⁰ This may suggest that the criminalization of COVID-19 related misinformation has been ineffective in achieving its ends. Further research is, however, required to assess the effect of the regulation on misinformation.

It is clear that many of the regulations and directions issued by the Minister have limited the human rights of persons in South Africa. The rule of law, which is a founding value of the South African Constitution, applies in times of crisis as much as it does in more stable times, and any exercise of power is subject to the Constitution as the supreme law.¹¹ The rights in the Bill of Rights, including the right to privacy and freedom of expression, may only be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹²

The Protection of Personal Information Act also seeks to promote the protection of personal information processed by public and private bodies.¹³ Although the one year grace period for compliance with the Act's obligations concerning the processing of personal information and special personal information is still in effect, the newly appointed Information Regulator has encouraged responsible parties to proactively ensure that they process any Covid-19 related personal information of data subjects in accordance with its requirements.¹⁴ Many of the gaps in

¹⁰ Payne, "How to Battle Vaccine Misinformation in South Africa," Daily Maverick (5 January 2021); Ipsos, "Global Attitudes on a Covid-19 Vaccine" available at <https://www.ipsos.com/sites/default/files/ct/news/documents/2020-12/global-attitudes-on-a-covid-19-vaccine-december-2020-report.pdf>.

¹¹ *Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021).

¹² Section 36 of the Constitution.

¹³ 4 of 2013.

¹⁴ Information Regulator. *Guidance Note on the Processing of Personal Information in the Management and Containment of Covid-19 pandemic in terms of the Protection of Personal Information Act 4 of 2013*. Available at <https://www.justice.gov.za/inforeg/docs/InfoRegSA-GuidanceNote-PPI-Covid19-20200403.pdf>.

the South African data governance framework, including the uncertainty about the obligations of private entities, will be addressed when the Act becomes operative in June 2021.

When the relevant sections of the Act commence, personal information that is collected for the specified purposes of detecting, containing and preventing the spread of COVID-19 must not be retained by responsible parties for any longer than authorised to achieve these purposes unless such information is required for historical, statistical or research purposes. A responsible party may also further process personal information of a data subject notwithstanding the fact that such processing is not compatible with the original purpose for which it was collected if it is necessary to prevent a serious and imminent threat to public safety or public health, the life or health of a data subject or another individual. The Information Regulator has also stated that it is not necessary to obtain a data subject's consent to process their personal information in the context of COVID-19 when the processing complies with an obligation imposed by law on the responsible party, the processing protects a legitimate interest of the data subject, the processing is necessary for the proper performance of a public law duty by a public body or the processing is necessary for pursuing the legitimate interests of a third party to whom the information is supplied. This highlights the need to scrutinize the data collection and processing legal obligations that are imposed by the government on responsible parties.

Resources have also been redirected by the South African Government to fund a R500 billion package for the health response and relief of social and economic distress caused by the pandemic.¹⁵ In order to enhance transparency, the President issued a directive to organs of state to submit full information about COVID-19 related procurement to enable the Department of Justice and Constitutional Development and National Treasury to publish this information

¹⁵ Auditor-General *First Special Report on the financial management of government's Covid-19 initiatives* (September 2020).

online.¹⁶ The National Treasury has further instructed the organs of state to report on the COVID-19 spend using standard predefined format, the results of which are published in an interactive COVID-19 Procurement data dashboard.¹⁷ Despite these measures, the Auditor-General has concluded that there are still clear signs of overpricing, unfair processes, potential fraud as well as supply chain management legislation being contravened.¹⁸ This demonstrates that open digital access to procurement data is not a silver bullet in the fight against corruption. This strategy has, however, empowered civil society and the media to scrutinize COVID-19 related government expenditure and help enhance accountability and promote the rule of law.

Methodology

The analysis is based on independent qualitative research, complemented where relevant by a doctrinal analysis that benefits from a comparative law perspective. This involved the collection of data from a diverse set of online resources including, among others, law reports, case law databases, news reports, publications by international organisations, government publications, government policy statements, and academic journal articles. For certain analytical fields, however, no relevant online information was identified despite an extensive desktop search of online information having been conducted. The desktop search primarily relied on general and legal search engines, and derivative sources.

Key Findings

¹⁶ National Treasury. Media Statement. Available at http://www.treasury.gov.za/comm_media/press/2020/2020100201%20Covid-19%20Procurement%20Spend%20Dashboard.pdf.

¹⁷ See <http://ocpo.treasury.gov.za/COVID19/Pages/Reporting-Dashboard.aspx>.

¹⁸ Auditor-General above n 5.

- The measures adopted by the National Executive to mitigate the impact of the COVID-19 pandemic have relied extensively on data collection, processing and analysis.
- The Regulations issued by the Minister regarding the national database that is used by the DoH to guide appropriate responses in addressing, preventing and combating the spread of COVID-19 place various controls on the processing of Covid-19 related data. After the pandemic, data in the COVID-19 Tracing Database must be de-identified, and the de-identified information may only be retained and used for research, study and teaching purposes. There is, however, limited transparency regarding the data governance practices adopted by the DoH to meet these objectives.
- The appointment of a COVID-19 Designated Judge to oversee Government's surveillance and data-gathering efforts in connection with COVID-19 is an innovative privacy and transparency promoting mechanism that is able to also afford the government sufficient scope to effectively employ digital contact tracing tools.
- There has, however, been limited if any public consultation or parliamentary oversight regarding the governance policy adopted by the South African government regarding COVID-19 related data.
- It is unclear whether the criminalization of COVID-19 related disinformation has been effective. Prosecutors may find it difficult to prove that a person has the requisite intention to deceive other persons about COVID-19. There may also be challenges associated with identifying anonymous social media accounts and disinformation shared by persons beyond South Africa's territorial boundaries.

Appendix I: Reading List

Transparency

The Surveillance Reports are published online by the NICD

<https://www.nicd.ac.za/diseases-a-z-index/covid-19/surveillance-reports/>

For information about Statistics South Africa's gathering of mortality data, see

<http://www.statssa.gov.za/publications/Report%2000-80-05/Report%2000-80-052020.pdf>

The National Institute for Occupational Health (NIOH) publishes aggregated data regarding the admission and healthcare outcomes of health care workers at

<https://www.nioh.ac.za/covid-19-occupational-health-surveillance/>

The NIOH Report regarding COVID-19 Surveillance – Transmissions by Occupation is available at

https://www.nioh.ac.za/wp-content/uploads/2020/05/COVID-19_-and_occupation_FINAL_01.pdf

Information about the algorithm used by the NICD to map testing data is available at

<https://www.nicd.ac.za/wp-content/uploads/2021/02/COVID-19-Weekly-Epidemiology-Brief-week-4-2021.pdf>

After an extensive search of online information which involved the use of search engines and government sources, however, only limited information regarding the software or algorithms used to analyse data was found.

Information about the NICD's data collection practices for COVID-19 testing is available at <https://www.nicd.ac.za/wp-content/uploads/2021/02/COVID-19-Weekly-Epidemiology-Brief-week-4-2021.pdf>

For a sample form provided to persons under investigation for COVID-19 that is published by the NICD and the Department of Health, see <http://www.lancet.co.za/corona-virus-info-hub/>

For information about Category 1 notifiable medical conditions, see https://www.nicd.ac.za/wp-content/uploads/2017/06/NMC-list_2018.pdf

The NICD's standard operating procedures regarding the reporting of notifiable medical conditions is available at https://www.nicd.ac.za/wp-content/uploads/2017/06/SOP-Notifiable-Medical-Conditions_-_notification-procedures_v2Jan2018final-Copy.pdf

For an analysis of community-based screening and testing, see David, N.; Mash, R. Community-based screening and testing for Coronavirus in Cape Town, South Africa: Short report. *Afr. J. Prim Health Care Fam. Med.* 2020, 12.

For an analysis of COVID-19 and informed consent in South Africa, see DE VRIES, J et al. Research on COVID-19 in South Africa: Guiding principles for informed consent. *South African Medical Journal*, [S.l.], v. 110, n. 7, p. 635-639, jun. 2020. ISSN 2078-5135. Available at: <<http://www.samj.org.za/index.php/samj/article/view/12984/9386>>. Date accessed: 15 Feb. 2021 and Barit, Avi. The doctrine of informed consent in South African medical law. Diss. University of Pretoria, 2017.

The South African Auditor-General's Reports on the Financial Management of the COVID-19 Initiatives are available at

<https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/Covid-19%20Special%20report/Special%20report%20interactive%20final.pdf> and

[https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/Covid-19%20Special%20report/Second%20special%20report%20on%20financial%20management%20of%20government's%20Covid19%20initatives%20-%20FINAL%20PDF%20\(interactive\).pdf](https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/Covid-19%20Special%20report/Second%20special%20report%20on%20financial%20management%20of%20government's%20Covid19%20initatives%20-%20FINAL%20PDF%20(interactive).pdf)

The South African government's online news and resource portal is available at

<https://sacoronavirus.co.za/>

The guidance note issued by the Information Regulator of South Africa is available at

<https://www.justice.gov.za/inforeg/docs/InfoRegSA-GuidanceNote-PPI-Covid19-20200403.pdf>

Inclusion

The analysis of the functioning of the democratic process, including the role of the Executive, the Judiciary and Parliament during the COVID-19 national state of disaster, is based on the judgment by the Supreme Court of Appeal in *Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021).

Please note that some sections of the Protection of Personal Information Act 4 of 2013 are not yet operative.

Accountability

The data breach notification requirements in South Africa are analysed at

<https://www.dlapiperdataprotection.com/index.html?t=breach-notification&c=GH&c2=> and

<https://www.werksmans.com/legal-updates-and-opinions/data-breaches-in-south-africa-post-prietary-lessons-to-be-learned/> and

<https://www.linklaters.com/en/insights/data-protected/data-protected---south-africa>

Additional Resources

The national COVID-19 Database developed and maintained by the Department of Health is governed by Regulation 8 of the Regulations issued by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27 (2) of the Disaster Management Act, 2002.