No. 2-20-0339

IN THE ILLINOIS APPELLATE COURT
SECOND DISTRICT

MCHENRY COUNTY SHERIFF,

Plaintiff-Appellee,

v.

MCHENRY COUNTY HEALTH DEPARTMENT,

Defendant-Appellant.

CITY OF MCHENRY, an Illinois municipal corporation; VILLAGE OF ALGONQUIN, an Illinois municipal corporation; CITY OF WOODSTOCK; an Illinois municipal corporation; and VILLAGE OF LAKE IN THE HILLS, an Illinois municipal corporation,

Plaintiffs-Appellees,

v.

MELISSA H. ADAMSON, in her official capacity as Public Health Administrator for the McHenry County Department of Health; and the MCHENRY COUNTY DEPARTMENT OF HEALTH,

Defendants-Appellants.

Appeal from the Circuit Court of the Twenty-Second Judicial Circuit
McHenry County, Illinois
Case Nos. 20 MR 373 and 20 MR 387
The Honorable Michael J. Chmiel, Judge Presiding

BRIEF OF *AMICI CURIAE* HEALTH & MEDICINE POLICY RESEARCH GROUP, ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, AND LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF ILLINOIS IN SUPPORT OF DEFENDANTS-APPELLANTS

Colleen Connell (No. 3126988)
Ameri R. Klafeta (No. 6286239)
Emily Werth (No. 6307304)
Roger Baldwin Foundation of ACLU, Inc.
150 North Michigan Avenue, Suite 600
Chicago, IL 60601
(312) 201-9740
aklafeta@aclu-il.org
Attorneys for Amici Curiae

POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

Health & Medicine Policy Research Group (HMPRG) is a non-profit organization dedicated to challenging health inequities and improving the health of all people in Illinois. Founded in 1981, HMPRG is a fierce advocate for health equity. The organization is a founding member of the Illinois Adverse Childhood Experiences (ACEs) Response Collaborative and initiated the country's first Trauma-Informed Hospital Workgroup to train more than sixteen health systems on ACEs, trauma, and resilience. HMPRG led the coalition that resulted in the establishment of the independent Board for Cook County Health and Hospitals. It has developed legislation on a wide range of issues, including the creation of Freestanding Birth Centers in Illinois, a task force to establish principles and funding mechanisms for Community Health Workers, and state funding mechanisms that support older adults remaining in their homes and communities rather than being placed prematurely in institutions. HMPRG has led efforts to diversify the healthcare workforce including by contributing to establishment of an Institute for Diversity in Medicine at Blue Cross Blue Shield. Elected officials and community-based organizations rely on HMPRG for policy, research, and advocacy leadership on the full spectrum of public health issues.

The Illinois Coalition for Immigrant and Refugee Rights (ICIRR) is a non-profit, nonpartisan statewide organization dedicated to promoting the rights of immigrants and refugees to full and equal participation in the civic, cultural, social, and political life of our diverse society. In partnership with member organizations, ICIRR educates and organizes immigrant and refugee communities to assert their rights; promotes citizenship and civic participation; monitors, analyzes, and advocates on immigrant-related issues;

and informs the public about the contributions of immigrants and refugees. ICIRR has advocated for policy changes to broaden access and remove barriers for immigrants needing health care, and to protect the privacy rights of immigrants and refugees who fear that disclosure of sensitive information will lead to stigmatization, discrimination, and potentially arrest, deportation, and long-term separation from their families.

League of United Latin American Citizens of Illinois (LULAC) is part of a non-profit nationwide advocacy organization with state and local councils that seek to advance the economic condition, educational attainment, political influence, housing, health, and civil rights of the Hispanic population of the United States. National LULAC's Latinos Living Healthy initiative seeks to address health disparities and to engage community partners to impact the healthcare related needs of Latinos in local communities. For example, LULAC has worked to build trust between vulnerable immigrant communities and the McHenry County Health Department in order to improve the health of the Latino community in the County. Throughout the current pandemic, LULAC has engaged in advocacy to improve the health and safety of immigrants and communities of color, including by advocating for more access to testing and treatment. LULAC continues to use its resources to improve health outcomes in its membership communities, many of which have been disproportionately impacted by COVID-19.

ARGUMENT

The state of Illinois remains in the throes of grappling with COVID-19, the disease caused by a novel coronavirus, which has become a global pandemic. Critical to our ability to prevent the rapid spread of COVID-19 is the need to ensure that people across Illinois who have symptoms of the disease or who may have been exposed to the

coronavirus promptly get tested and access crucially important medical care. But for this to happen, people must know their private medical information, including their COVID-19 positive status, will remain confidential. We learned this lesson during the HIV epidemic, where effective public health responses to infectious disease depended on ensuring the confidentiality of private medical information in order to prevent stigma and discrimination and to encourage people—particularly people from marginalized communities—to seek prompt testing and treatment.

The Circuit Court below issued a Temporary Restraining Order (TRO) that tramples on the right to privacy and these core public health principles by requiring the McHenry County Health Department (MCHD) to release the names and addresses of people who have tested positive for COVID-19 to law enforcement agencies. The Illinois Constitution, the United States Constitution, and Illinois statutes—such as the Department of Public Health Act and the Communicable Disease Report Act, both of which are applicable to county public health departments—protect such information from disclosure. The disclosure to law enforcement of the names and addresses of people who have tested positive for COVID-19 does not promote safety or health interests, and instead actually *undermines* public health and jeopardizes the health and safety of first responders. For the reasons set forth below, *amici curiae* urge this court to reverse the Circuit Court's denial of Defendants' motion to dissolve the TRO.

I. PROTECTING THE PRIVACY OF MEDICAL INFORMATION IS VITAL FOR PERSONAL HEALTH AND PUBLIC HEALTH.

A patient seeking medical care is in an extraordinarily vulnerable position. The individual tells their health care provider sensitive information and allows the provider to examine them in a manner they would not permit any other stranger. In exchange, the

patient receives assurance that the provider will keep their health information private. At the heart of the patient-provider relationship is thus a foundational understanding that personal health information is protected from disclosure.

The principle that medical information must be kept confidential is as old as the practice of medicine itself. It dates back to at least the time of Hippocrates, who implored physicians to keep confidential any information obtained in the course of treating a patient. *See* Mark A. Rothstein, *The Hippocratic Bargain and Health Information Technology*, 38 J.L. Med. & Ethics 7, 7–8 (2010). The principles of privacy and confidentiality remain core components of medical ethics codes today. *See, e.g.*, Am. Med. Ass'n, Code of Medical Ethics Opinion 3.1.1 ("Physicians must seek to protect patient privacy in all settings to the greatest extent"); Am. Med. Ass'n, Code of Medical Ethics Opinion 3.2.1 ("Patients . . . should feel free to fully disclose sensitive personal information to enable their physician to most effectively provide needed services. Physicians in turn have an ethical obligation to preserve the confidentiality of information gathered in association with the care of the patient.").

Protecting the confidentiality of medical information is essential to ensuring that people access medical care in order to be diagnosed and treated for illness. Maintaining the public's confidence that public health authorities will keep personal medical information reported to these agencies confidential is also key to the surveillance needed to advance public health goals, including containing communicable diseases, for communities more broadly. As a leading public health law scholar explained:

> People suffering from or at risk of a stigmatizing condition may not come forward for testing, counseling or treatment if they do not believe their confidences will be respected. They are also less likely to divulge sensitive information about risk factors . . . Failure to divulge health information for

> fear of disclosure can be detrimental to treatment and put others at risk of exposure to disease. Informational privacy, therefore, is valued . . . to protect patients' . . . health and the health of the wider community.

Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* 319 (3d ed. 2016); *see also* Janlori Goldman, *Protecting Privacy to Improve Health Care*, 17 Health Aff. 47, 48 (1998) (without confidentiality, patients will be reluctant to accurately disclose personal information or may avoid seeking care altogether for fear of embarrassment, stigma, and discrimination).

Our relatively recent experience during the HIV epidemic demonstrates that protecting confidentiality reduces the fear of stigma and discrimination, builds trust, leads to better access to testing, and enhances compliance with medical and public health advice. *See* UNAIDS, *Rights in the time of COVID: Lessons from HIV for an effective, community-led response* 9 ("Everyone . . . should be confident that their sensitive personal information—including name, diagnosis and medical history—is treated with the utmost care and confidentiality[.]"). "One important lesson we learned from the AIDS epidemic is that a solution to addressing the legitimate concerns of first responders is not to identify those living with the disease [because] it will not make anyone safer and may actually put first responders at greater risk." Harvard Law Sch. Ctr. for Health Law and Policy Innovation, *Applying Lessons Learned from the AIDS Epidemic to the Fight Against COVID-19* (Mar. 20, 2020) (CHLPI Letter; *see also* Craig Klugman, *Commentary: Preckwinkle was right to veto COVID-19 address-sharing policy*, Chi. Trib. (May 29, 2020) (discussing efforts to provide the names and addresses of people diagnosed with HIV to first responders that were rejected 35 years ago).

As discussed below, state and federal law reflect these important health principles and provide substantial protection for a person's privacy interest in their health information. There is simply no basis for invading those privacy interests here.

II. RELEASING THE IDENTITIES OF PEOPLE WHO TEST POSITIVE FOR COVID-19 TO LAW ENFORCEMENT ABRIDGES THE RIGHTS TO PRIVACY AFFORDED BY THE ILLINOIS CONSTITUTION AND ILLINOIS PUBLIC HEALTH LAWS.

In numerous ways and in varying contexts, courts have extended strong protection to confidential medical information. As the United States Supreme Court recognized in rejecting a practice of turning over drug test results to law enforcement, "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); *see also Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 459 (1997) (citing *Petrillo v. Syntex Labs.*, 148 Ill. App. 3d 581 (1986)) ("[W]e conclude that patients in Illinois have a privacy interest in confidential medical information, and that the *Petrillo* court properly recognized a strong public policy in preserving patients' fiduciary and confidential relationship with his or her physicians."); *Parkson v. Cent. DuPage Hosp.*, 105 Ill. App. 3d 850, 855 (1982) (refusing to compel disclosure of redacted medical records, reasoning that "[a]s the patients disclosed this information with an expectation of privacy, their rights to confidentiality should be protected"). In the circumstances of this case, both the Illinois Constitution's right to privacy and Illinois public health laws prohibit the dissemination of the personal health information Plaintiffs seek, and there are no countervailing factors to compel its disclosure.

A. Requiring Disclosure of the Names and Addresses of People who Tested Positive for COVID-19 Violates the Illinois Constitution's Right Against Unreasonable Invasions of Privacy.

The Illinois Constitution provides that "[t]he people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable . . . invasions of privacy[.]" Ill. Const. art. I, § 6.[1] "[T]he confidentiality of personal medical information is, without question, at the *core* of what society regards as a fundamental component of individual privacy" protected by this provision. *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997) (emphasis added); *see also Hope Clinic*, 2013 IL 112673 at ¶ 65 ("[O]ur state constitutional privacy guarantee protects a person's reasonable expectation of privacy in his or her personal medical information.").

The Illinois Constitution forbids "unreasonable invasions of privacy." *Kunkel*, 179 Ill. 2d at 538. In *Kunkel*, the Illinois Supreme Court held that forcing disclosure in discovery of highly personal medical information having no relevance to the issues in a lawsuit was a substantial and unjustified invasion of privacy. *Id.* at 538–40; *cf. Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶¶ 35, 59 (2016) (finding discovery request for forensic imaging of computers unreasonable and hence unconstitutional where it would unduly burden the significant interest in privacy without offering information of sufficient probative value); *People v. Nesbitt,* 405 Ill. App. 3d 823, 830–34 (2010) (holding that law enforcement's request for banking records without a subpoena, warrant, or consent was unreasonable intrusion on Illinois Constitution's privacy right).

[1] This right of privacy is distinct from that provided under the federal constitution. *See Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 62 (2013).

Requiring the MCHD to release the names and addresses of people with confirmed COVID-19 to law enforcement is a textbook example of an unreasonable encroachment of the right to privacy in personal medical information. An individual's interest in maintaining privacy over such information clearly outweighs the claimed governmental interest here—a desire to protect police from contracting COVID-19, which is an interest that will *not* be served by the mandated disclosure of the names and addresses of those who, at some point, tested positive for the disease.

The Illinois Department of Public Health (IDPH) has explicitly declared that sharing identifying information about people who have tested positive for COVID-19 with law enforcement or other first responders has "limited epidemiologic and infection control value" because of the large number of asymptomatic cases and cases unconfirmed by testing during the current pandemic. Ill. Dept. of Pub. Health, *Guidance to Local Health Departments on Disclosure of Information Regarding Persons with Positive Tests for COVID-19 to Law Enforcement* 2. Numerous public health experts agree with this assessment. *See, e.g.*, *Nw. Cent. Dispatch Sys. v. Cook Cnty. Dep't of Pub. Health*, No. 20 CH 03914, *14–15 (Cir. Ct. Cook Cnty. May 1, 2020) (attached as Exhibit A) (describing "thorough and informative" affidavit from Dr. Rachel Rubin, Co-Administrator of Cook County Department of Public Health); Letter from Chicago Mayor Lori Lightfoot to Illinois Attorney General Kwame Raoul (April 23, 2020) (attached as Exhibit B) (describing opinion of Chicago Department of Public Health Commissioner Dr. Allison Arwady that there is "no public health reason for disclosure of positive COVID-19 cases"). In fact, the MCHD itself took this position. *See* Aff. of Melissa H. Adamson, at ¶

14 (attached as Exhibit C) (describing MCHD Public Health Administrator's position that providing names and addresses is "not medically or epidemiologically appropriate").

The Circuit Court of Cook County relied on similar considerations to reject an emergency dispatch system's request for a temporary restraining order to obtain identifying information about people who, at one point, had tested positive for COVID-19. In discussing the balancing of the harms, the judge concluded that the harm claimed by the dispatch system would not be avoided by the disclosure, while the harms to the public's privacy rights are "real, concrete, and avoidable." *Nw. Cent. Dispatch Sys.* at 18. In fact, the judge concluded that disclosing such information could actually *endanger* first responders because of the large number of untested people, the number of non-symptomatic carriers, the infectiousness of people in the days before they become symptomatic and are tested, and the futility of relying on an individual's placement on a list when they may no longer be contagious. *See Nw. Cent. Dispatch Sys.* at 16–17.

The Illinois Supreme Court has protected the right of privacy in personal medical information in circumstances similar to those posed here. In *People ex rel. Director of Public Health v. Calvo*, 89 Ill. 2d 130, 137 (1982), the Court held that a State's Attorney could not subpoena reports of individual cases of sexually transmitted disease from the Department of Public Health. In so doing, the court recognized strong public policy justifications in safeguarding an individual's private medical information, reasoning:

> Without an assurance of confidentiality, fear of social embarrassment resulting from disclosure of their identities and physical conditions might cause individuals with such a disease to shun treatment, while at the same time others to whom they may have transmitted the disease might remain unaware that they are in need of treatment.

Id. at 132–33. The concerns the Illinois Supreme Court recognized in *Calvo* are just as strong and relevant today as our state fights the COVID-19 pandemic. Widespread screening will be critical to slowing the spread of the disease. *See* Office of Governor J.B. Pritzker, *Restore Illinois: A Public Health Approach to Safely Reopen Our State* 6–10 (May 5, 2020). It is therefore crucial to reduce all barriers to screening for individuals. But given the fears of stigma and discrimination surrounding any infectious disease, mandated disclosure of identifying information to law enforcement will likely deter some people from being screened in the first place—particularly communities that may have historic distrust of the police and/or the medical profession, including people of color and undocumented people. *Cf.* UNAIDS at 9. Concerns about harassment of those who are confirmed to have COVID-19 are justified. *See, e.g.*, *Local COVID-19 patient asks people to stop threatening her,* WICS NEWSCHANNEL 20 (March 16, 2020).

In the current circumstances, the critical importance of protecting the privacy of health information in order to promote both individual and community health vastly outweighs the minimal benefit—or even negative impact—from disclosing medical information to law enforcement. The TRO's mandate that MCHD provide the name and addresses of people with confirmed COVID-19 to law enforcement is thus unreasonable, and infringes the Illinois Constitution's right to informational privacy.[2]

[2] Defendants have conceded to sharing addresses where individuals confirmed to have COVID-19 live, while objecting to the further disclosure of names. *See* Exhibit C at ¶¶ 17–21; *but see id.* at ¶ 19 ("[W]e understood [IDPH guidance] was *not* a recommendation to share *any* protected information with law enforcement[.]") (emphasis added). However, sharing just addresses without names still involves the same serious concerns about undermining individual and public health and significant limitations on the usefulness of disclosing this information to law enforcement. *See, e.g.*, Exhibit B at 3 (discussing lack of public health justification for disclosing addresses in particular);

B. The Illinois Legislature Established Strong Protection for the Confidentiality of Private Medical Information Collected by Public Health Authorities.

Contrary to the Circuit Court's conclusion, Plaintiffs have no legally enforceable right to force broad disclosures of private medical information. *See Nw. Cent. Dispatch Sys.* at 6–12.[3] Rather, Illinois public health laws recognize that strong confidentiality protections are necessary to achieve the compelling goals that underlie public health reporting requirements. Ensuring that people are not chilled from seeking medical care and sharing information voluntarily with health care providers and public health practitioners is paramount in the context of the COVID-19 pandemic.

Illinois public health laws explicitly call on public health authorities to safeguard the confidentiality of private medical information that they collect as part of their public health mission. For example, the Department of Public Health Act provides that:

> [T]he identity of or facts that would tend to lead to the identity of the individual who is the subject of [a report to the Department of Public Health] . . . shall be strictly confidential, are not subject to inspection or dissemination, and shall be used only for public health purposes by the Department, local public health authorities, or the Centers for Disease Control and Prevention.

20 ILCS 2305/2(i)(C). *See also* Department of Public Health Act, 20 ILCS 2305/2(h) ("[L]ocal public health authorities shall protect the privacy and confidentiality of any medical or health information or records or data obtained[.]"); Communicable Disease

---

CHLPI Letter (same). As a result, the sharing of addresses, even in the absence of names, is itself an unreasonable violation of the Illinois Constitution's right to privacy.

[3] The Circuit Court of the Nineteenth Judicial Circuit reached this same conclusion as the Circuit Court of Cook County rejecting the Lake County Sheriff's temporary restraining order request in a lawsuit nearly identical to the present case. *Idleburg v. Pfister*, No. 20 MR 269, *7–13 (Cir. Ct. Lake Cnty. May 18, 2020) (attached as Exhibit D).

Report Act, 745 ILCS 45/1 ("The identity of an individual . . . identified in a report of . . . communicable disease . . . or an investigation conducted pursuant to [such report] shall be confidential and . . . shall not be disclosed publicly[.]").

State law explicitly limits to narrow circumstances any discretion afforded to public health authorities to disclose private medical information about individuals. Such disclosure is only permitted where it would actually promote public health. The Illinois law requiring communicable disease cases to be reported to the state Department of Public Health includes a very limited exception to the general obligation to maintain the confidentiality of identifying information about individuals when "necessary . . . for the protection of the health of others." 77 Ill. Adm. Code 690.200(d)(5).

Such circumstances are not present here where experts, including the Illinois Department of Public Health, maintain that releasing the identities of those with COVID-19 undermines public health practice. *See supra*, Part II.A. Moreover, updated federal guidance for first responders instructs dispatch operators to make inquiries to determine whether a specific caller has or may have COVID-19. Centers for Disease Control and Prevention, *Interim Guidance for Emergency Medical Services (EMS) Systems and 911 Public Safety Answering Points (PSAPs) for COVID-19 in the United States* (updated Mar. 10, 2020). Following this guidance provides real-time information that is likely to be more accurate—and thus more protective of first responders—than a list of individuals that likely includes people who are no longer infectious and that is woefully incomplete due to limitations in testing. *See Nw. Cent. Dispatch Sys.* at 17.

The only Illinois law that discusses any requirement of information sharing between public health authorities and law enforcement agencies—Section 2.1 of the

Illinois Department of Health Act—is simply not relevant to Plaintiffs' demands for the names and addresses of people who tested positive for COVID-19. Section 2.1 creates a mandatory reporting obligation for state and local law enforcement, and a reciprocal obligation on IDPH and local public health authorities. 20 ILCS 2305/2.1(a)-(b). The specific and limited purpose of this reporting obligation imposed on public health authorities is apparent on the face of subsection (b) of the law—to give law enforcement authorities information they may need for "the purpose of conducting a criminal investigation or a criminal prosecution." *See Nw. Cent. Dispatch Sys.* at 10.

Plaintiffs incorrectly relied on subsection (c) of Section 2.1 to argue they are entitled to receive identifying information about individuals with COVID-19. However, the accurate interpretation is that subsection (c) lays out the extent of permissible information-sharing in just the limited circumstances where disclosure is specifically mandated by Section 2.1—with public health departments for the purpose of investigating and preventing a public health emergency in accordance with subsection (a), or with law enforcement for the purpose of conducting a criminal investigation or prosecution in accordance with subsection (b). *See Nw. Cent. Dispatch Sys*. at 10.[4]

Plaintiffs have also suggested that the federal Health Insurance Portability and Accountability Act (HIPAA) regulation that permits disclosure of patient information without prior authorization if "necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public" requires disclosure. 45 C.F.R.

[4] Likewise, Plaintiffs' reliance on Section 690.1405 of the Control of Communicable Diseases Code was misplaced, as close similarities in language demonstrate this regulation should be understood as merely codifying Section 2.1 and thus limited to the same criminal investigation and prosecution purposes. *Nw. Cent. Dispatch Sys.* at 11.

164.512(j)(1)(i). Where there is a state law that is "more stringent" and provides greater privacy protection than HIPAA, however, the state law controls. *See* 45 C.F.R. 160.203(b); *see also Nat'l Abortion Fed'n v. Ashcroft*, No. 04 C 55, 2004 WL 292079, at *2–4 (N.D. Ill. Feb. 6, 2004). Furthermore, HIPAA requires any person making a disclosure pursuant to this provision to have a "good faith" belief that sharing the information would in fact serve this purpose, 45 C.F.R. 164.512(j)(1), and to limit the information disclosed to the "minimum necessary" to accomplish this purpose. 45 C.F.R. 164.502(b). In light of the position taken by the MCHD's own leadership that releasing identifying information to law enforcement about those with COVID-19 is not a good public health practice, this HIPAA exception is inapplicable to current circumstances—contrary to the Office of the Attorney General's April 3, 2020 Opinion referenced in the Circuit Court's decision denying Defendants' motion to dissolve the TRO.

III. RELEASING THE IDENTITIES OF PEOPLE WHO TESTED POSITIVE FOR COVID-19 TO LAW ENFORCEMENT ALSO INFRINGES ON RIGHTS PROTECTED UNDER THE UNITED STATES CONSTITUTION.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects individuals' interests in the privacy of medical and other sensitive information. *See Wolfe v. Schaefer*, 619 F.3d 782, 785 (7th Cir. 2010) ("[C]ourts of appeals, including this court, have interpreted [Supreme Court precedent] to recognize a constitutional right to the privacy of medical, sexual, financial, and perhaps other categories of highly personal information[.]"); *see also, e.g.*, *Coons v. Lew*, 762 F.3d 891, 900 (9th Cir. 2014) (recognizing a "fundamental privacy right in non-disclosure of personal medical information"); *Gruenke v. Seip*, 225 F.3d 290, 302–03 (3d Cir. 2000) (recognizing right to protection against disclosure of medical information).

An infringement on this constitutional privacy interest is permissible "only upon proof of a strong public interest in access to or dissemination of the information." *Wolfe*, 619 F.3d at 785. As discussed in Part II.A, *supra*, a "strong public interest in access to or dissemination" of information about individuals with confirmed COVID-19 is lacking here, because numerous experts—including IDPH *and* the MCDH's own leadership—believe that releasing this information to law enforcement authorities actually has limited value in terms of promoting or protecting public health. *See also, e.g.*, *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 552–53 (9th Cir. 2004) (holding regulation giving agency access to unredacted medical records violated patients' privacy rights where such access would not actually promote government's interest in health and safety); *Sterling v. Borough of Minersville*, 232 F.3d 190, 196–97 (3d Cir. 2000) (finding violation of constitutionally protected privacy interest where police officer threatened to reveal arrestee's sexual orientation and conceded "he would have no reason to disclose" this information); *Grimes v. Cnty. of Cook*, No. 19 C 1691, 2020 WL 1954149, at *2–4 (N.D. Ill. Apr. 23, 2020) (denying motion to dismiss claim for violation of right to medical privacy under Fourteenth Amendment's Due Process Clause where defendants did not argue public interest justified disclosure of plaintiff's transgender status); *Fort Wayne Women's Health v. Bd. of Comm'rs, Allen Cnty., Ind.*, 735 F. Supp. 2d 1045, 1061 (N.D. Ind. 2010) (finding plaintiff likely to succeed on merits of due process claim where there was "mismatch between the [challenged law's] goals and the requirement for and inspection of patient notification forms containing patient identifying signatures").

CONCLUSION

In the current COVID-19 pandemic, it is critical to uphold the right to privacy over personal medical information in order to protect McHenry County residents who need to access medical care and to guard the health of first responders and public health more broadly. The Circuit Court's TRO requiring the MCHD to disclose the personal health information of individuals confirmed to have COVID-19 to law enforcement is contrary to state and federal protections for medical privacy.

For the foregoing reasons, this court should reverse the decision of the Circuit Court below and dissolve the Temporary Restraining Order against the McHenry County Health Department in its entirety.

DATED: June 17, 2020

Respectfully Submitted,

/s/ Ameri Klafeta
Attorney for *Amici Curiae*

Colleen Connell (ARDC No. 3126988)
Ameri R. Klafeta (ARDC No. 6286239)
Emily Werth (ARDC No. 6307304)
Roger Baldwin Foundation of ACLU, Inc.
150 North Michigan Avenue, Suite 600
Chicago, IL 60601
Phone: 312-201-9740 ext. 345
Email: aklafeta@aclu-il.org

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 16 pages.

/s/ Ameri Klafeta
Attorney for *Amici Curiae*

Exhibit A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NORTHWEST CENTRAL DISPATCH SYSTEM, an Illinois intergovernmental cooperating association, on behalf of its municipal members, Plaintiff(s), v. COOK COUNTY DEPARTMENT OF PUBLIC HEALTH; DR. KIRAN JOSHI, in his official capacity as Co-Administration of the Cook County Department of Public Health, *ET AL.* Defendant(s).	No. 20 CH 03914 Calendar 04

MEMORANDUM OPINION & ORDER

This matter comes before the Court on Plaintiff Northwest Central Dispatch System's (NWCDS) Emergency Motion for Temporary Restraining Order (TRO) and/or Preliminary Injunction with Notice, filed on April 23, 2020. Having reviewed the motion and its exhibits, the verified complaint filed April 20, 2020, Defendants Response Brief filed on April 27, 2020, and heard argument via teleconference on April 27, 2020, and reviewed the supplemental briefing requested by the Court, and thereby being fully informed in the premises, for the following reasons, Plaintiff's motion is DENIED.

OVERVIEW

This case concerns pandemic protocols and requires the balancing of individual privacy rights with the needs of first responder preparedness. Both issues are of extreme importance and warrant careful analysis. Currently, the world is undergoing a pandemic resulting from the deadly COVID-19 virus. Confirmed cases in Illinois number over 50,000 with over 15,000 confirmed infected in Cook County alone. *See* COVID-19 Statistics, ILLINOIS DEPARTMENT OF PUBLIC HEALTH, https://www.dph.illinois.gov/covid19/covid19-statistics visited on 4/30/20.

These numbers climb daily. Notably, though testing is limited, with every increased round of testing the infection rate stays relatively stable at 20% of people testing positive. Response Brief, Ex. 1, Rubin Affidavit ¶17 relying upon Ex. G.

There is a global shortage of personal protective equipment, including glasses, gowns, gloves, and N-95 masks (collectively PPE). Motion for TRO, Ex. 3 Chief's Affidavit, ¶11; *see* Chaib, Fadela, Shortage of personal protective equipment endangering health workers worldwide, WORLD HEALTH ORGANIZATION, https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide visited on 4/30/20. Although the Court notes there is no evidence, or even allegations as to NWCDS' *itself* having a specific shortage.

Plaintiff NWCDS is an emergency dispatch center that provides 9-1-1 services to 11 communities with a combined population of nearly 500,000 and covering over 170 square miles. NORTHWEST CENTRAL DISPATCH SYSTEM, www.nwcds.org, visited on April 28, 2020. It is a suburban cooperative consisting of the fire and police departments of (a) Arlington Heights, (b) Buffalo Grove, (c) Elk Grove Village, (d) Hoffman Estates, (e) Inverness, (f) Mount Prospect, (g) Palatine, (h) Prospect Heights, (i) Rolling Meadows, (j) Schaumburg, and (k) Streamwood. The Defendants in this matter are the Cook County Department of Public Health, its Co-Administrators Doctors Rachel Rubin and Kiran Joshi, and Cook County President Toni Preckwinkle along with Cook County (collectively, Health Department).

On April 20, 2020, NWCDS filed a three-count complaint for (1) Declaratory Judgment; (2) Writ of Mandamus; and (3) Permanent Injunction. All three counts ask for the same relief, that the Health Department be required "to provide the names and address of all individuals that are or become infected with COVID-19 residing within each respective municipality to Plaintiff for release to each Municipal Member's law enforcement and EMS personnel as reasonably necessary." Before the complaint was filed, the parties had been negotiating, and the Cook County Board of Commissioners took a proposal into consideration on April 23, 2020, putting it into committee on that date. The emergency motion for TRO was filed later that day.

STANDARD OF REVIEW

An interlocutory injunction, such as a TRO or preliminary injunction, is an extraordinary remedy typically granted to preserve the status quo pending a full hearing on the merits. *See Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & W. Ry.*, 195 Ill. 2d 356, 365 (2001). Status

quo is defined as the last, actual, peaceable, uncontested status that preceded the pending controversy. *Puleo v. McGladrey & Pullen,* 315 Ill. App. 1041, 1044 (1st Dist. 2000). Injunction may also issue to prevent harm until the merits can be decided. *People v. Kerr-McGee Chem. Corp.,* 142 Ill. App. 3d 1104, 1107 (2d Dist. 1986). Injunction is "an extreme remedy which should be employed only in situations where an emergency exists, and serious harm would result if the injunction is not issued." *Norfolk & W. Ry.*, 195 Ill. 2d at 365.

To obtain a TRO, the Plaintiff needs to show (1) a fair question that the plaintiff possesses a clearly ascertainable right in need of protection; (2) a fair question that there is a likelihood that the plaintiff will succeed on the merits; (3) that the plaintiff will suffer irreparable harm if an injunction is not issued (including harm of a continuing nature); and (4) that the plaintiff has no adequate remedy at law (e.g., that money damages are not an adequate remedy). *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142 (1992); *Buzz Barton & Assoc. v. Giannone*, 108 Ill. 2d 373, 382 (1985) (fair question). But where a statute expressly authorizes injunctive relief, a plaintiff need only show the defendant's violation and their own standing to pursue the cause. This is because when a statute is violated there is a presumption of public harm. *County of DuPage v. Gavrilos,*359 Ill. App. 3d 629, 634 (2d Dist. 2005). The balance of the hardships must also support the relief requested. *Cross Wood Prods., Inc. v. Sutter,* 97 Ill. App. 3d 282, 284 (1st Dist. 1981).

An interlocutory injunction should not be granted if it would grant the ultimate relief sought in the complaint, because this denies the Defendant a full hearing on the merits. *Passon v. TCR, Inc.*, 242 Ill. App. 3d 259, 264-65 (2d Dist. 1993). The trial court should not decide contested issues of fact, nor the merits of the case. *Hartlein*, 151 Ill.2d at 156-57 (contested issues); *Lonergan v. Crucible Steel Co. of Am.*, 37 Ill. 2d 599, 611 (1967) (merits). Generally, injunctive relief is not granted against public officials unless their acts are outside their authority, arbitrary and capricious, or tainted with fraud, corruption, or gross injustice. *Bigelow Grp., Inc. v. Rickert,* 377 Ill. App. 3d 165, 171-72 (2d Dist. 2007). Should an injunction issue, it must be reasonable and go no further than is essential to safeguard the plaintiff's rights. *Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.*, 157 Ill. App. 3d 713, 717-18 (1st Dist. 1987). The decision to grant or deny interlocutory relief is entrusted to the sound discretion of the trial court. *Desnick v. Dep't of Prof. Reg.*, 171 Ill. 2d 510, 516 (1996).

DISCUSSION

NWCDS' goal is to protect the safety of first responders, and thus, the community at large. It seeks to provide first responders with as much information as possible, so that they can do their jobs as safely and efficiently as possible. This includes, according to NWCDS, the right to affirmatively know if you are about to be exposed to COVID-19. This knowledge would allow first responders to take extra precaution before responding to a dispatch call and immediately self-isolate afterwards. The Health Department's goal is to protect the rights of the public at large, including first responders, and act consistently with its statutory duties to protect the personal health information of the citizens of Cook County.

NWCDS argues that the Health Department has a statutory duty to provide it with the names and address of all individuals that are, have been, or become infected with COVID-19 (hereinafter Covid List). NWCDS claims that the Health Department is being arbitrary and capricious in denying it the Covid List, and that the Health Department lacks discretion in whether to provide this information. NWCDS claims that there are multiple first responders who attend each dispatch event, and that each responder must wear full PPE (including gloves, gowns, glasses, N-95 masks). Because there is a worldwide shortage of PPE, the NWCDS claims the Covid List will help it ration its PPE, ultimately protecting the first responders by ensuring they have proper equipment for the foreseeable future. Currently, the PPE is used for every encounter.

Defendant Health Department argues there is no statutory duty to share the Covid List, and that the statutes cited by NWCDS allow for disclosure, but do not require it. In other words, the Health Department's position is that whether to disclose any Covid List lies in the discretion of the Health Department alone. The Department also points out that NWCDS has provided no proof that the members of the cooperative have an *actual* shortage of PPE, claiming that relying upon the existence of a global shortage is insufficient evidence. Relying on the advice of public health officials, the Health Department claims that the relief NWCDS seeks will not further its goal of protecting first responders. This is because of asymptomatic COVID-19 carriers, lack of testing availability, and the geographic scope of the list. These factors make the allegedly useful Covid List largely useless. The list can never be comprehensive because of the nature of the virus as we know it, and if it is not comprehensive it cannot truly protect first responders.

It is uncontested that NWCDS' motion asks for the same ultimate relief as in its complaint. Normally, a TRO should not be granted if it would grant the ultimate relief sought in the complaint, because this denies the Defendant a full hearing on the merits. *Passon v. TCR, Inc.*, 242 Ill. App. 3d 259, 264-65 (2d Dist. 1993). Moreover, an injunction typically issues to preserve the status quo, defined as the last peaceable moment between the parties. *Puleo v. McGladrey & Pullen,* 315 Ill. App. 1041, 1044 (1st Dist. 2000). Here, the status quo is that NWCDS does not have the information it seeks. NWCDS asks this Court to do the opposite of what the law normally requires, emphasizing that the pandemic has created a true emergency, arguing it is proper to issue an injunction or TRO to prevent harm when extreme circumstances exist. *Kerr-McGee Chem. Corp.*, 142 Ill. App. 3d at 1107.

The Court understands and appreciates NWCDS' urgency – our first responders are going above and beyond in this time of crisis and deserve to be able to do their jobs as efficiently and safely as possible. It is truly astounding that not just Cook County, but the entire nation is experiencing this shortage of essential medical supplies. The Court understands this is no fault of the first responders, but a court order in this cause of action cannot bring those supplies into existence. And this Court must balance the rights of the public at large with the alleged rights of NWCDS, and the last thing this Court would want to do is give our first responders a false sense of security that could lead to tragedy. As such, the Court will analyze each of the elements for a TRO individually, addressing the parties' arguments in turn.

1. Clearly Ascertainable Right in Need of Protection

Whether NWCDS has a clearly ascertainable right in need of protection is a threshold issue which must be met for a TRO to issue. *Hartlein v. Ill. Power Co.*, 151 Ill.2d 142, 156-57 (1922). The failure of the complaint to establish a clearly ascertainable right in need of protection stops the analysis, and no other factors need be considered. *Id.* As with the likelihood of success factor, discussed below, NWCDS need only raise a fair question as to the existence of an ascertainable claim for relief. *See Ford Motor Credit Co. v. Cornfield,* 395 Ill. App. 3d 896, 903-04 (2d Dist. 2009), *appeal denied* 236 Ill.2d 503 (2010).

NWCDS claims it has a right to the names and addresses of all individuals that are or become infected with COVID-19 within its geographical area. NWCDS heavily relies upon a memorandum from the Illinois Attorney General's Office dated April 3, 2020 that offers guidance as to "Disclosing Addresses for Confirmed COVID-19 Cases to First Responders,"

claiming it is the Attorney General's opinion that disclosure is mandatory, thus supporting NWCDS' clearly ascertainable right. *See* Verified Complaint, Exhibit 1, Exhibit C. Putting aside that the Illinois Attorney General's Office, while a respected and learned legal authority, does not create or make binding interpretations of the law, NWCDS' interpretation of the Attorney General's guidance is wrong. The memorandum is clear that "disclosure is permitted, but not required." Verified Complaint, Exhibit 1, Exhibit C, p.1. The document repeats the phrase several times, disclosure is *permitted, but not required.* It also explicitly states that "state and local health public health departments retain discretion in deciding whether to make such disclosures." *Id.* at 1.

NWCDS also claims it has a clearly ascertainable right to the names and address of all individuals that are or become infected with COVID-19 under (A) the Health Insurance Portability and Accountability Act (HIPAA); (B) the Department of Public Health Act; or (C) the Control of Communicable Diseases Code. *See* 45 C.F.R. § 164.512(j)(1) (HIPAA); 20 ILCS 2305.2.1(c) (Department of Public Health Act); 77 ILAC Sec. 690.1405/2.1(c) (Communicable Diseases) (Lexis 2020). The Health Department's position is that, under any of the laws cited by NWCDS, there is no statutory duty to share information. Each of the statutes provide for limited disclosure consistent with the discretion of health officials. The Health Department is correct.

A. HIPAA

Federal regulations under HIPAA are the primary legal standard this Court must follow when it comes to private health information. *See* 45 C.F.R. § 160; § 164, Subparts A and E. The HIPAA Privacy Rule requires health care providers and organizations, as well as their business associates, to develop and follow procedures that ensure the confidentiality and security of protected health information when it is transferred, received, handled, or shared. In general, State laws that are contrary to HIPAA's Privacy Rule are preempted by the federal requirements, which means that the federal requirements supersede them and apply. But the Privacy Rule provides exceptions to the general rule of federal preemption for contrary State laws that (1) relate to the privacy of individually identifiable health information and provide *greater* privacy protections or privacy rights with respect to such information, (2) provide for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention, or (3) require certain health plan reporting, such as for management or financial audits. *See* U.S. Dep't of Health & Human Services (HHS), Summary of Privacy Rule at

https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html on 4/25/20.

NWCDS claims Section 164.512(j)(1)(i) of HIPAA mandates disclosure, it reads in full:

> (j) Standard: Uses and disclosures to avert a serious threat to health or safety.
> (1) *Permitted disclosures.* A covered entity *may*, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:
> (i)
> (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
> (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.

45 C.F.R. § 164.512(j)(1)(i) (Lexis 2020) (emphasis supplied).

NWCDS is correct that HIPAA regulations do permit disclosure of protected health information "to avert a serious threat to health or safety," when the disclosure is: (i) "necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public," and (ii) "to a person or persons reasonably able to prevent or lessen the threat." 45 C.F.R. § 164.512(j)(1)(i) (Lexis 2020). But any disclosure must be consistent with the law and ethics, and be restricted to the "minimum necessary to accomplish the purpose for which the disclosure is being made." *Id.* at § 502(b).

This limitation on the scope of disclosure underscores the profound privacy interest individuals have in their personal protected health information, an interest receiving substantial protection under both federal and state law. *See* 45 C.F.R. § 164.508; 20 ILCS 2305/2(h). And again, the plaint text of HIPAA is clear that disclosure is permitted. "a covered entity *may*" disclose covered health information. To permit is defined as "to give permission, to license. To grant leave or liberty; to allow to be done by giving consent or by not prohibiting." BALLANTINE'S LAW DICTIONARY, permit (Lexis 2020). Merely because something is permitted does not mean it is *required*, a permission is not an affirmative duty.

The Court also finds it important to note that, after somebody has been exposed to COVID-19, for example, in a hospital room, ambulance, or police car, HIPAA already allows those exposed individuals to be informed and warned. And this information is narrowly tailored, it does not expose identifiable information of the patient, but allows people to take precautions as

soon as possible after being exposed to the virus. This system is retrospective instead of prospective, and it is not perfect, but currently it is the best and most reliable system available. It is uncontested that there are asymptomatic COVID19 carriers. It is uncontested that there is a shortage of COVID19 tests in the State and Cook County. Given these facts, every member of the public potentially has the virus and is contagious.

A list of those who had or have the virus cannot be complete, so it makes no sense to ration PPE to those few known cases when every person potentially has the virus. Indeed, the one of NWCDS's stated goals is the rationing of PPE, however what is known about the virus means that rationing of PPE by not utilizing it if a person is not known to be infected would be unwise. Thus, under NWCDS's own pleadings the procurement of the list may place more first responders in danger than would otherwise be without plaintiffs having access to the Covid List. The best anyone can hope for is to be informed after the fact. Prepare for the worst and pray for the best. And HIPAA already provides for that, a covered health care provider may disclose protected health information as needed to notify a person that they have been exposed to a communicable disease if the covered entity is legally authorized to do so to prevent or control the spread of the disease. *See* 45 CFR 164.512(b)(1)(iv) (Lexis 2020).

B. Department of Public Health Act

NWCDS also states it is entitled to the information sought under the Department of Public Health Act, Section 2.1(c). Section 2.1(c) must be read in conjunction with Section 2(h) and the rest of Section 2.1 to give it its full effect. *See In re Detention of Lieberman,* 201 Ill. 2d 300, 308 (Ill. 2002) (statutes must be read as a whole). Section 2(h) of the Department of Public Health Act (Health Act) gives the governing standard for state and local health department requirements during an infectious disease outbreak. 20 ILCS 2305/2(h) (Lexis 2020). It states that to prevent the spread of a dangerously infectious disease, public health authorities, shall, in relevant part "have emergency access to medical or health information [ ] upon the condition that the [ ] public health authorities shall protect the privacy and confidentiality " of that information in accordance with federal and state law. *Id.* (emphasis supplied). Section 2(h) of the Health Act only entitles public health authorities, such as the Defendant Health Department to this information, although it does not limit the sharing of information authorized under Section 2.1 below. *Id.*

Section 2.1 of the Health Act regulates the sharing of health information regarding the investigation and prosecution of criminal conduct, such as an act of bioterrorism, which has "the potential to be the cause of or related to a public health emergency." 20 ILCS 2305/2.1 (Lexis 2020). This section must be read in conjunction with Section 2(h), which provides the governing standard for disclosure. *Compare* 20 ILCS 2305/2(h) (powers and disease outbreak requirements) *with* 20 ILCS 2305/2.1 (information sharing) (Lexis 2020). It reads in full:

> (b) Whenever the Department or a local board of health or local public health authority learns of a case of an illness, health condition, or unusual disease or symptom cluster, *reportable pursuant to rules adopted by the Department or by a local board of health or a local public health authority*, or a suspicious event that it reasonably believes has the potential to be the cause of or related to a public health emergency, as that term is defined in Section 4 of the Illinois Emergency Management Agency Act, it shall immediately notify the Illinois Emergency Management Agency, *the appropriate* State and local law enforcement authorities, other appropriate State agencies, and federal health and law enforcement authorities and, *after that notification*, it shall provide law enforcement authorities with such other information as law enforcement authorities may request *for the purpose of conducting a criminal investigation or a criminal prosecution of or arising out of that matter. No information containing the identity or tending to reveal the identity of any person may be redisclosed by law enforcement, except in a prosecution of that person for the commission of a crime.*
>
> (c) Sharing of information on reportable illnesses, health conditions, unusual disease or symptom clusters, or suspicious events between and among public health and law enforcement authorities *shall be restricted to the information necessary* for the treatment in response to, control of, investigation of, and prevention of a public health emergency, as that term is defined in Section 4 of the Illinois Emergency Management Agency Act, *or for criminal investigation or criminal prosecution of or arising out of that matter.*"
>
> 20 ILCS 2305/2.1(b); (c) (Lexis 2020) (emphasis supplied).

Section 2.1 imposes mutual mandatory reporting requirements between (i) state and local law enforcement and (ii) state and local public health authorities. *Id.* This section requires state and local law enforcement to alert the Illinois Emergency Management Agency and the Illinois Department of Public Health upon discovering a case of a specified set of diseases or a

suspicious event that may be connected to a public health emergency, and vice versa. 20 ILCS 2305/2.1(a); 2.1(b) (Lexis 2020). This statute again contains discretionary language. The Health Department reports *pursuant to its own rules*, which in this case means reporting to the I-NEDSS network, which it has already done. And NWCDS has already been informed there is COVID-19 in its geographical area, the statute does not mandate more than that absent a crime. The mandatory grounds for sharing more information with law enforcement authorities is explicitly limited to "the purpose of conducting a criminal investigation or a criminal prosecution arising out of that [public health emergency] matter." 20 ILCS 2305/2.1(b) (Lexis 2020). And the statute limits law enforcement from redisclosing information that tends "to reveal the identity of any person" except for prosecuting that person for a crime. *Id.* A list of names and address undoubtedly reveals a person's identity.

Section 2.1(c) states that the sharing of this information between public health and law enforcement authorities "shall be restricted to the information necessary for the treatment" and response to or prevention of a public health emergency. 20 ILCS 2305/2.1(c) (Lexis 2020). Again, tendering a list to NWCDS does not fit these criteria. Because the disclosure under the Health Act primarily revolves around the prevention of, reaction to, and prosecution of a bio-crime or attempted bio-crime, it seems clear that the Health Act does not contemplate the sharing of information with first-responders outside of that specific context.

Reading the text of the Health Act as a whole, as this Court must under the law, reveals that unless the information directly effects treatment, a criminal investigation, or criminal prosecution, NWCDS is not entitled to the health information sought. And NWCDS is not seeking this information in furtherance of an investigation or prosecution, it seeks this information so that it may ration its PPE for its first responders.

C. Control of Communicable Diseases Code

NWCDS also claims it is entitled to the information under the Control of Communicable Diseases Code. The Control of Communicable Diseases Code is part the administrative code and guidelines promulgated by the Illinois Department of Public Health. *See* 77 Ill. Adm. Code 689-99 (Lexis 2020). Section 690.1405 of the administrative code, titled "Information Sharing," states, in relevant part, that whenever a local health department learns of a reportable illness or suspicious event that may be the cause of a public health emergency, then it shall

immediately notify the Department of Illinois Emergency Management Agency, and the appropriate State and local law enforcement authorities. 77 Ill. Adm. Code 690.1405(a) (Lexis 2020). It goes on to state that the sharing of that medical information "shall be restricted to information necessary for the treatment, control of, investigation of, containment of, and prevention of a public health emergency [ ] or for criminal investigation or criminal prosecution of or arising out of that matter." 77 Ill. Adm. Code 690.1405(b) (Lexis 2020). It reads in full:

> a) Whenever a certified local health department learns of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event that may be the cause of a public health emergency as that term is defined in Section 4 of the Illinois Emergency Management Agency Act, it shall immediately notify the Department, the Illinois Emergency Management Agency, and *the appropriate* State and local law enforcement authorities.
>
> b) Sharing of medical information on persons with reportable illnesses or health conditions, unusual disease or symptom clusters, or suspicious events between the Department, certified local health departments and law enforcement authorities *shall be restricted* to information necessary for the treatment, control of, investigation of, containment of, and prevention of a public health emergency, as that term is defined in Section 4 of the Illinois Emergency Management Act, *or for criminal investigation or criminal prosecution of or arising out of that matter*.
> 77 Ill. Adm. Code 690.1405 (Lexis 2020) (emphasis supplied)

It is uncontested that this language mirrors the language of Section 2.1 of the Health Act above. Both parties arguing it supports their positions. This Court finds that the same limitations discussed above apply – mandatory disclosure to first responders is limited to the prosecution of a crime. And that is not the situation here.

NWCDS need only raise a fair question as to its clearly ascertainable right to relief, in this case, the Covid List. *See Ford Motor Credit Co. v. Cornfield,* 395 Ill. App. 3d 896, 903-04 (2d Dist. 2009), *appeal denied* 236 Ill.2d 503 (2010). But is has failed to meet its burden. Each of the statutes relied upon by NWCDS is either expressly discretionary in the sharing of information, or limits when the information can be shared to a different situation than is before the Court. Individuals have a profound privacy interest in their personal protected health information, an interest receiving substantial protection under both federal and state law. *See* 45 C.F.R. § 164.508; 20 ILCS 2305/2(h). A person's right to privacy is one of the most important

rights found in the Constitution of the United States, and the U.S. Supreme Court has many opinions detailing its importance. *See Griswold v. Connecticut,* 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347, 351 (1967); *Lawrence v. Texas,* 539 U.S. 558 (2003). The statutes and administrative regulation relied upon by NWCDS primarily seek to protect that privacy interest rather than share it, even under these unusual circumstances. Given the limited value of sharing the information NWCDS seeks, this Court will not abrogate that right. NWCDS does not have even a fair question as to a clearly ascertainable right to a Covid List, this factor favors the Health Department.

2. Likelihood of Success on the Merits

To establish a likelihood of success on the merits, NWCDS need not make out a case that in all events will warrant relief at the final hearing. *Tie Sys., Inc., Ill. V. Telcom Midwest, Inc.,* 203 Ill. App. 3d 142, 150-51 (1st Dist. 1990). NWCDS need only raise a "fair question," as to its likelihood of success on the merits. *Buzz Barton & Assocs., Inc. v. Giannone*, 108 Ill. 2d 373, 382 (1985). And if the subject of the injunction is property that may be destroyed, the applicant may not even need to show a likelihood of success. *Save the Prairie Soc. v. Greene Dev. Grp., Inc.,* 323 Ill. App. 3d 862, 870 (1st Dist. 2001).

There are technically three causes of action before the Court, (1) Declaratory Judgement; (2) Writ of Mandamus; and (3) Permanent Injunction. As already pointed out, these causes of action are duplicative, and each asks for the exact same relief. Thus, the Court will go forward with its analysis only as to the Writ of Mandamus, the only proper cause of action raised.

Mandamus is an extraordinary remedy to enforce, as a matter of right, "the performance of official duties by a public officer where no exercise of discretion on his part is involved." *Noyola v. Bd. of Educ.*, 179 Ill. 2d 121, 133 (Ill. 1997) quoting *Madden v. Cronson*, 114 Ill. 2d 504, 514 (Ill. 1986); *Pate v. Wiseman,* 2019 IL App (1st) 190449 ¶25-27 Mandamus is employed to compel a public official to perform a ministerial duty. *People ex re. Birkett v. Dockery,* 235 Ill. 2d 73, 76-77 (Ill. 2009). Where public officials have failed or refused to comply with requirements imposed by statute, the courts may compel them to do so by means of a writ of mandamus, provided the requirements for that writ have been satisfied. *Noyola,* 179 Ill. 2d at 13233.

The court is limited to deciding matters of law only. *Chicago Ass'n of Commerce & Indus. v. Regional Transpo. Auth.*, 86 Ill. 2d 179, 185 (Ill. 1981). Where the performance of an official duty or act involves the exercise of judgment or discretion, the officer's action is not subject to review or control by mandamus. *Id.* Mandamus may be used to compel the exercise of discretion that is vested in a public official, but it may not direct the way the public official's discretion is to be exercised. *Burnidge Bros. Almora Heights, Inc. v. Wiese,* 142 Ill.App.3d 486, 490 (2d Dist. 1986) (emphasis in original). But it also has been held that, if an administrative body abuses its discretion or exercises its authority arbitrarily or for some selfish and unworthy motives, mandamus may issue to correct the matter. *Etten v. Lane,* 138 Ill.App.3d 439, (5th Dist. 1985); *Tanner v. Bd. of Trustees of Univ. of Ill.*, 48 Ill.App.3d 680, (4th Dist. 1977).

A plaintiff seeking a writ of mandamus must plead and prove the following (1) a clear right to have the act performed; (2) every material fact necessary to demonstrate plaintiff's clear right to the writ; (3) a showing that the requested act is the duty of the defendant to perform; (4) a showing that the requested act is in the power and authority of the defendant; and (5) in the case of a private right – rather than a public right – the plaintiff must show a demand and the defendant's refusal to act. *People ex rel. Endicott v. Huddleston,* 34 Ill. App. 3d 799, 802 (Ill. 1st Dist. 1976). A writ is "never awarded in a doubtful case." *Molnar v. City of Aurora,* 38 Ill. App. 3d 580, 583 (Ill. 2d Dist. 1976).

NWCDS claims the Health Department's choice to refrain from sharing the information sought is arbitrary and capricious. Generally, an agency's decision is arbitrary and capricious if it relies upon factors that the statute does not intend, fails to consider an issue or important aspect of the problem before it, the agency offers an explanation for its decision that runs counter to the evidence, the decision is implausible, or when the agency fails to follow its own regulations. *Pollachek v. IDFPR,* 367 Ill. App. 3d 331, 341-42 (1st Dist. 2006); *Marion Hosp. Corp. v. Ill. Health Facilities Planning Bd.,* 324 Ill. App. 3d 451, 457-58 (1st Dist. 2001) (failure to follow regulations). As a matter of public policy, it is a high burden to show a governmental agency's decisions are arbitrary and capricious. *See* 735 ILCS 5/3-110 (Lexis 2020); *Abrahamson v. Ill. Dept. of Professional Regulation,* 153 Ill. 2d 76, 88 (1992).

While a mandamus can issue if an administrative body abuses its discretion or exercises its authority arbitrarily or for some selfish and unworthy motives, that is not the case here. *See Etten v. Lane,* 138 Ill.App.3d 439, (5th Dist. 1985); *Tanner v. Bd. of Trustees of Univ. of Ill.*, 48

Ill.App.3d 680, (4th Dist. 1977). Neither the Verified Complaint, nor NWCDS' Emergency Motion for TRO plead any overt facts showing the Health Department acted in an arbitrary or capricious manner. The Motion for TRO pleads that the Health Department will not release the information sought "because of concerns related to the confidentiality of personal health information," and because its release would "provide a 'false sense of security' because many individuals who are infected with COVID-19 are asymptomatic and have not been tested, or simply have not been tested despite being symptomatic." NWCDS Motion for TRO at 3-4. If anything, this shows a commonsense basis and legal basis for the Health Department's decision, it simply is not arbitrary or capricious. The Response Brief further articulates the legal and scientific bases for the Health Department's decision, supported by a thorough and informative affidavit from Doctor Rachel Rubin.

Dr. Rubin is the Co-Administrator of the Cook County Department of Public Health and graduated from Rush Medical College in the '80s. She has been working on the Department's COVID-19 response since January of 2020. Response Brief, Ex. 1, Rubin Affidavit ¶2-3. Ninety percent of her current duties relate to the Department's COVID-19 response. *Id.* She stated that the Department's duties require balancing the need to release appropriate information with individuals' strong and legitimate privacy expectations. *Id.* at ¶6. She avers that the Department is balancing the potential for stigma that individuals or groups may face because of their diagnosis, the potential for individual harassment, the potential that the information may be used to identify and target undocumented aliens, and "the fact that such an approach tends to discourage individuals from coming forward to receive testing and treatment." *Id.*

She also stated that she is "of the strong opinion that provided such information will not make first responders safe, and may actually put them at greater risk," and is aware the Illinois Department of Health (IDPH) shares this same concern. *Id.* at ¶11-12. She is correct that IDPH guidance states that providing first responders and law enforcement with the identity of positive COVID-19 cases has limited epidemiologic and infection control value and therefore IDPH does not recommend notification to law enforcement of individuals who have tested positive for COVID-19. Rather, IDPH recommends that first responders and law enforcement take appropriate protective precautions when responding to all calls." *Id.* at ¶13, relying upon IDPH guidance at Response Brief, Ex. 1, Ex. F. She stated that "the specific features of the COVID-19 pandemic make it such that information about individuals' diagnosis is not particularly helpful

and could give first responders a false sense of security when considering when to take particular precautions." *Id.* at ¶14. She says less than 2% of Illinois residents have been tested. *Id.* at ¶16. Given this background, it was reasonable for Cook County President Toni Preckwinkle to rely on Dr. Rubin's recommendation and refuse to give NWCDS the information unless directed by the Cook County Board as the Board of Public Health.

NWCDS argues that sharing the information sought is a statutory duty, and not a discretionary act. Thus, because the Health Department has not shared its information, it has acted arbitrarily and capriciously by failing to follow the law and its own regulations. *Pollachek v. IDFPR,* 367 Ill. App. 3d 331, 341-42 (1st Dist. 2006); *Marion Hosp. Corp. v. Ill. Health Facilities Planning Bd.,* 324 Ill. App. 3d 451, 457-58 (1st Dist. 2001) (failure to follow regulations). But as discussed above, none of the laws or regulations cited by NWCDS impose a mandatory duty to share the information sought. *See Supra,* Section 1. All of them are discretionary. A mandamus cannot be used to acquire new rights. *See Burnidge Bros. Almora Heights, Inc. v. Wiese,* 142 Ill.App.3d 486, 490 (2d Dist. 1986). And generally, a mandamus will not issue where the plaintiff seeks to change a *discretionary act* by the defendant. *See Chicago Ass'n of Commerce & Industry v. Regional Transportation Authority*, 86 Ill. 2d 179, 185 (Ill. 1981) (emphasis supplied). The Court is limited to deciding matters of law only, it may not substitute its discretion for that of the Health Department. *Id.*[1]

NWCDS cannot pled or prove the five elements necessary for the issuance of a mandamus because it does not have a *clear* right to have the act performed and cannot show the requested act is a *duty* of the Health Department. *People ex rel. Endicott v. Huddleston,* 34 Ill. App. 3d 799, 802 (Ill. 1st Dist. 1976). Even under the charitable "fair question" standard mandated by a TRO proceeding, NWCDS' argument fails. The laws relied upon by NWCDS are clearly discretionary, and the Health Department has used its discretionary powers to make an

[1] The Court notes that some local health departments have been court ordered to release information. *McHenry County Sheriff v. McHenry County Health Dep't.,* No. 20-MR-0373 (Cir. Ct. McHenry Cty. April 10, 2020). Others have exercised their discretion to share information. Some have done so because they issued a local *quarantine order,* as opposed to a mere shelter-in-place order. And first responders do have the authority to enforce a quarantine order. *Compare* 20 ILCS 2305/2(k) (quarantine statute, violation of which is a Class A misdemeanor) *with* Ill. Exec. Order No. 2020-10, (March 20, 2020) (Governor Pritzker's shelter-in-place order). Other health departments are sharing only addresses, and yet others go as far as sharing names, address, dates of birth, gender, and when the person was released from the hospital. This is further proof of the wisdom in letting local health departments exercise their discretion. Courts are not supposed to legislate, and should not be substituting their discretion for public health experts' judgment. *See* NWCDS Supplement Response Brief re Infection Percentage, Ex. 4.

informed and reasoned decision. NWCDS does not have a fair question of a likelihood of success on the merits, this factor favors the Health Department.

3. Irreparable Harm

The harm NWCDS seeks to enjoin must be expected with reasonable certainty, as opposed to a mere possibility. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill. 2d 356, 37172 (2001). NWCDS claims the irreparable harm is to the personal health and safety of first responders. NWCDS claims that "if all possible protective measures are not taken and the COVID19 pandemic is permitted to ravage first responders and the communities they serve, lives will be unnecessarily lost." Emergency Motion for TRO at 11. And although not explicitly articulated as part of the claimed "irreparable harm," the NWCDS' motion and oral argument contains a lot of discussion about its limited supplies of PPE and the need to efficiently use it.

The Health Department persuasively argues the Covid List will not help prevent the harm sought by NWCDS. The Health Department has advised, consistent with State and Federal Guidance, that all first responders treat everyone as if they are positive due to the nature of the virus. Response Brief, Ex. 1, Rubin Affidavit ¶13. As much as this Court respects first responders and wishes to help them, the relief requested simply will not accomplish NWCDS' goals. It will not prevent the alleged irreparable harm, and, in fact, if first responders stopped taking every precaution at every interaction with the public, could bring about the harm alleged.

As discussed above, there are asymptomatic people who can spread the virus, there are people who have the virus but haven't been tested, and, even if the NWCDS obtained the information it sought, what good does knowing about people who tested positively in January and wearing full PPE to that specific encounter do for them? People who tested positive for COVID-19 in January are likely no longer contagious, according to our current understanding of the virus. And regardless of who is on the Covid List, first responders are still at risk of catching the virus from any given person on the street. Moreover, even if NWCDS was granted complete relief, its information would *still* be incomplete for its geographical area because two of its member-municipalities, Palatine and Barrington, are also part of Lake County and beyond the scope of this case. Not to mention that nothing stops a citizen from another part of the state or

country from going through NWCDS' region and interacting with first responders. Either way, NWCDS first responders have incomplete information and are at risk.

The Court recognizes that the more information our first responders have, the better decisions they can make to efficiently and safely serve the community and protect themselves from potential harm. But even in the normal course of duty, the information first responders are entitled to is limited. For example, whether someone may be armed with a dangerous weapon is information highly probative to first responders. Dispatch operators are trained to ask questions about whether there are firearms in the house and pass that information on to the first responders.

Similarly, the Center for Disease Control has issued guidance for modified dispatch caller inquiries to determine whether someone has or may have COVID-19. *See* CDC, Coronavirus Disease 2019 (COVID-19) First Responder Guidance, https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-for-ems.html visited on 4/29/20. This way NWCDS can get names plus much more, like symptomatic patients, by merely following the CDC guidelines for dispatchers that would lead to a safer encounter. This real-time information would likely be more accurate and up to date than any list the NWCDS seeks, and would be easier to obtain. NWCDS' claimed irreparable harm cannot be stopped by the Covid List, this factor favors the Health Department.

4. Inadequate Remedy at Law

An adequate remedy at law is a remedy that is clear and complete and provides the same practical and efficient resolution as an injunction would provide. *Tamalunis v. City of Georgetown, Vermilion County, Ill.*, 185 Ill. App. 3d 173, 189-90 (4th Dist. 1989). An interlocutory injunction should not issue if there is a legal or equitable remedy that will make the plaintiff whole after trial. *Kanter & Eisenberg v. Madison Assocs.*, 116 Ill. 2d 506, 510-11 (Ill. 1987). Injunctive relief is not proper when money damages are an adequate remedy. *Lumbermen's Mut. Cas. Co., v. Sykes*, 384 Ill. App. 3d 207, 230-32 (1st Dist. 2008). There is also some precedent that the availability of specific performance or mandamus as relief preclude the issuance of injunction. *Kanter & Eisenberg*, 116 Ill. 2d at 515-16 (specific performance); *Lyle v. Chicago*, 357 Ill. 41, 44-45 (Ill. 1934). It is uncontested that the only available remedy to NWCDS is an equitable remedy. There is no remedy at law that is clear, complete, and provides the same practical and efficient resolution for NWCDS as being given the Covid List. This factor favors NWCDS.

5. Balancing of the Harms

Generally, a court need only address the balancing of the harms or equities if the first four factors for issuance of a TRO have been satisfied. *Lumbermen's Mut. Cas. Co. v. Sykes*, 384 Ill. App. 3d 207, 232-33 (1st Dist. 2008). Factors that can be considered include public interest and public policy. *Prairie Eye Ctr., Ltd. v. Butler*, 305 Ill. App. 3d 442, 448-49 (4th Dist.) *appeal denied*, 185 Ill.2d 665 (1999), *appeal post-remand*, 329 Ill. App. 3d 293 (4th Dist. 2002). If the balancing does not favor NWCDS then the injunction may be denied. *Clinton Landfill, Inc. v. Mahomet Valley Water Authority*, 406 Ill. App. 3d 374, 380-81 (4th Dist. 2010).

While the majority of the four factors for whether to issue a TRO favor the Health Department, the Court finds it important to make a full and complete record. The harm feared by NWCDS, while real, simply will not be avoided by the relief it seeks. Whereas the harm to the Health Department, and public interest is real, concrete, and avoidable.

The public's privacy rights, and the health privacy rights especially, are some of the strongest rights under the Constitution and laws of the United States and Illinois. Once that data is exposed, there is no taking it back, and it is unclear how NWCDS would be distributing, storing, and destroying the health information it seeks. As with PPE, a secure system for storing medical information on NWCDS servers cannot be instantaneously brought into existence. It is a matter of common sense that the more people who have access to this information, the more likely that the information will somehow be made public. Moreover, the Court is greatly concerned by the possibility for stigma or harassment, should that information be leaked. And recognizes the very real possibility that, if such a list exists in the County, that it may in fact discourage people from getting testing or admitting having symptoms. We have statistics now that the virus disproportionality effects lower income African American communities and undocumented aliens. Response Brief, Ex. 1, Rubin Affidavit ¶6-9. These are already at-risk communities with complicated relationships with many first responders, and being put on a list would only complicate it further.

The laws and regulations already allow for first responders to be informed if they have been directly exposed. And again, NWCDS can more easily get names and much more, like symptomatic patients, by merely following the CDC guidelines for dispatchers which would lead to a safer encounter. *See* CDC, Coronavirus Disease 2019 (COVID-19) First Responder

Guidance, https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-for-ems.html visited on 4/29/20. The Covid List could never be as useful or up-to-date as the information a dispatcher can get from the public while on a call.

The keeping and updating of the Covid List would also pose an undue burden on the Health Department. The information is changing daily, and if this TRO issued, then getting that changing information to NWCDS would also have to be done daily. And there is no mechanism or suggested protocol for when this burden would end, how to remove people who have recovered, people who have died, or people who had a false-positive test.

Another public policy concern is that this could create a piecemeal approach across county and municipal boarders leading to inconsistent treatment of private rights within Illinois. It could also expose the Health Department to a deluge of court cases against it, and burdens the public with their private information being shared. It could also expose the Health Department to inconsistent court mandates from various judges as to its own policies. The reason for the high burden to justify both an injunction and a mandamus is to try to help keep the law consistent in Illinois and support the discretion vested in Illinois agencies. It is a matter of comity, and should only be disturbed in clear and extraordinary circumstances. Unfortunately for NWCDS, its right to relief is not clear, especially when it has less intrusive means of getting more accurate and current information. In times of panic and emergency it is imperative that essential constitutional rights are not lightly thrown aside, the balancing of the harms favors the Health Department.

CONCLUSION

While the Court is sympathetic to its reasons, NWCDS has failed to meet its burden under the law for both procedural reasons and reasons on the merits. A TRO is an extraordinary remedy typically granted to preserve the status quo, defined as the last peaceable moment between the parties. *Puleo v. McGladrey & Pullen,* 315 Ill. App. 1041, 1044 (1st Dist. 2000). Here, the status quo is that NWCDS does not have the Covid List. NWCDS seeks to use a TRO to do the opposite of its purpose under the law.

A TRO can also be used in rare emergency circumstances where an emergency exists, and serious harm would result if the injunction is not issued. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & W. Ry.*, 195 Ill. 2d 356, 365 (2001). But the law is simply not on NWCDS' side, it does not have a clearly ascertainable right to people's protected health information, even

during a pandemic. The Health Department's expertise and discretion is controlling in this situation, both by statute and as a matter of policy. The harm NWCDS wants to avoid will not be fixed by the sharing of people's protected health information given what we know about COVID-19, especially the existence of contagious asymptomatic carriers. And because of the discretionary nature of both the health laws relied upon by NWCDS, and the mandamus cause of action, NWCDS does not have a likelihood of success on the merits. It simply does not have a basis to force the Health Department to share people's protected health information.

Lastly, the Court wants to make it clear that this order does not prohibit the Health Department from using its discretion in a different way. In the Health Department's supplemental brief, it indicated that it would comply if the Cook County Board enacts the proposed resolution requiring the release of information. A resolution the Board is currently considering as of April 23, 2020. The Court encourages the parties to keep talking. The more information our first responders have, the better they can do their jobs, and they are more essential than ever in this trying time.

IT IS ORDERED:

Plaintiff NWCDS' Emergency Motion for TRO is DENIED.

DATED: May 1, 2020

ENTERED:

Anna H. Demacopoulos

Judge Anna H. Demacopoulos, 2002

Judge Anna Helen
Demacopoulos

MAY 0 1 2020

Circuit Court - 2002

Exhibit B

CITY OF CHICAGO • OFFICE OF THE MAYOR

VIA EMAIL

April 23, 2020

Dear Attorney General Raoul,

I am aware of your Office's recent efforts to provide guidance to State's Attorneys, in its memo of April 3, 2020, concerning whether federal and state law "permit, but do not require, first responders responding to an emergency call for service at a particular address to be notified of the existence of a confirmed COVID-19 case at that address." Your guidance was premised upon the privacy protections flowing from the federal Health Insurance Portability and Accountability Act ("HIPAA"). Respectfully, HIPAA is not relevant to the question of whether individual patient data can be disclosed, and particularly during a pandemic. Your memo recognized that HIPAA applies only to "covered entities" (page 1, n.2), which would not include Chicago Department of Public Health (CDPH) functions in this context. It also recognized (page 3) that, HIPAA and related federal regulations "permit states to adopt 'more stringent' standards relating to 'the privacy of individually identifiable health information,' 45 C.F.R. § 160.203(b)." HIPAA thus provides no authority for the disclosure to first responders by CDPH or other public health bodies of names and addresses of those testing positive for COVID-19.

I do appreciate your Office's recognition that the Illinois Department of Public Health (IDPH) "does not recommend notification to law enforcement of individuals who have tested positive for COVID-19" (April 3 memo at page 2). We agree with the IDPH's conclusion but would go further. Our Corporation Counsel has advised me that state law does not permit this type of notification, at least under current facts and conditions. Further, we are concerned such notification would unfairly and unnecessarily stigmatize those who have the disease; dissuade people from seeking testing; and even expose first responders to greater risks. Also, no public body should be in effect encouraging the creation of a data base of people sick with COVID-19, which is precisely what your guidance would compel first responders to do.

COVID-19 cases are reported to local health authorities, such as the Chicago Department of Public Health (CDPH), under the Illinois Communicable Disease Report Act, 745 ILCS 45/1. That Illinois law, not federal law (HIPAA), applies to CDPH and other public health bodies in this context.[1] That state statute concerns mandatory reporting of diseases such as COVID-19 to

[1] Your memo recognized that HIPAA applies only to "covered entities" (page 1, n.2), which would not include CDPH's functions in this context. It also recognized (page 3) that, HIPAA and related federal regulations "permit states to adopt 'more stringent' standards relating to 'the privacy of individually identifiable health information,' 45 C.F.R. § 160.203(b)." HIPAA thus provides no authority for the disclosure by CDPH of names and addresses of those testing positive for COVID-19 to first responders.

governmental agencies and officers. It clearly provides that such reports "shall be confidential" and that the "identity of any individual . . . who is identified" in such a report "shall be confidential" and "shall not be disclosed publicly." We understand this to refer to patient names and addresses.

Regulations promulgated under this Illinois law also indicate that, at least with respect to information in I-NEDSS and other IDPH registries, notification is ***not permissible***. I-NEDSS, as you know, is "a secure, web-based electronic disease surveillance application utilized by health care providers, laboratories and State and local health department staff" for reporting, detection, and analytical purposes, 77 Ill. Admin. Code 690.10. CDPH obtains most of the information it has on positive COVID-19 cases through I-NEDSS. The Control of Communicable Diseases Code explicitly provides that "[a] person or institution to whom information" from such databases and registries "is furnished or to whom access to records has been given ***shall not divulge*** any part of the records so as to disclose the identity of the person to whom the information or record relates, *except as necessary* for the treatment of a case or carrier or *for the protection of the health of others*." *Id.* (emphasis added). 77 Ill. Admin. Code 690.200(d)(8)(D).

At the present time, there has been no showing that disclosure of the existence of a confirmed COVID-19 case at an address is necessary for the protection of the health of others. This is plain from IDPH's own guidance recommending against such disclosure, which your Office has acknowledged. IDPH's April 1 and 2 statements on potential disclosure to first responders of names and addresses of individuals testing positive for COVID-19 infection make clear that there is *no* identified public health benefit to, and many negative public health consequences from, such disclosure. For example, IDPH's April 1, 2020 Guidance states that "providing first responders and law enforcement with the identity of positive COVID-19 cases has limited epidemiologic and infection control value and therefore IDPH does not recommend notification to law enforcement of individuals who have tested positive for COVID-19. Rather, IDPH recommends that first responders and law enforcement take appropriate protective precautions when responding to all calls" in lieu of "relying on reports of COVID-19 positive individuals." IDPH added in its April 2, 2020 Guidance that there are "limits on the usefulness of current test result information."

We agree with IDPH's conclusion in its April 1st guidance that the "safety of first responders and law enforcement is of paramount importance." For that reason, this guidance instructed first responders to "assess the likelihood that the person may be experiencing symptoms of COVID-19 or may be under investigation for COVID-19."

IDPH's April 1st guidance further makes clear that, because COVID-19 is "widespread in Illinois," notification of the location of a confirmed COVID-19 case would in fact undermine public health. That is because, as IDPH explains in this guidance, "there are likely a larger number of asymptomatic and cases that have not been confirmed by a laboratory in each community," and provision of information only about individuals known to have been infected could "give first responders and law enforcement a false sense of security, as many people who are ill may not have

been tested yet." Further undermining any value to that information is the fact that, as this guidance also pointed out, "many who have tested positive are no longer contagious."

CDPH Commissioner, Dr. Allison Arwady, similarly found no public health reason for disclosure of positive COVID-19 cases. On April 18, 2020, she opined that "at this point in the outbreak, there is no role for flagging addresses in respiratory/COVID patients." Consistent with IDPH guidance, she explained that, "[g]iven widespread community transmission, it is crucial that first responders use ***universal precautions***, and assume that any individual or address is equally likely to have a person infected with COVID-19." (Emphasis in original.) She pointed out (as did IDPH) that such disclosure could be "detrimental to protecting first responders" because it may "cause first responders to relax their precautions around other locations." Dr. Arwady also opined that "[w]hen it comes to first responder safety," she is "much more concerned about the many people who are unaware they are infected and/or have not been tested and/or are needing transport because they are ill and need to be tested—so again, a universal approach to infection control and self-protection/PPE is safer for first responders." Therefore, in Chicago, given the wide spread of COVID-19 among the population, we have advised first responders to assume that any member of the public might be COVID-19 positive and to take all necessary precautions.

In addition to the lack of medical need for disclosure to protect the health of others, including emergency personnel, IDPH recognized that "protect[ing] the identity of individuals and prevent[ing] stigmatization of patients is also a priority." Given the lack of public health value to disclosure of names and addresses of persons testing positive for COVID-19, this important consideration should be paramount. But there is more. Singling out COVID-19 patients is inappropriate and could cause trauma and the possibility that people will not seek testing or treatment for fear of being labelled. This is particularly true given that the impact of the COVID-19 virus has fallen disproportionately on communities of color who for far too long have suffered under the yoke of racism. No one needs to be labelled at a time when we need to be uniting all our residents in this fight of a lifetime.

In sum, I strongly urge you to revise the April 3, guidance to take into consideration the many instances in state law which preclude the disclosure of individual patient identities acquired through I-NEDSS and other IDPH registries. As set forth herein, any such disclosure will obstruct public health efforts to further identify and control the virus's reach and scope. That, of course, would be deeply counterproductive to public health, and the health of first responders.

I urge you to take these facts and legal principles into consideration in your direction to the State's Attorneys. Happy to discuss further at your convenience.

Sincerely,

Lori E. Lightfoot
Mayor, City of Chicago

Exhibit C

EXHIBIT C

IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT,
McHENRY COUNTY, ILLINOIS

McHENRY COUNTY SHERIFF,	)	
	)	
Plaintiff,	)	Nos. 20 MR 373,
	)	20 MR 386,
v.	)	20 MR 387
	)	(consolidated)
McHENRY COUNTY HEALTH DEPARTMENT, et. al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF MELISSA H. ADAMSON

COUNTY OF McHENRY)
) ss.
STATE OF ILLINOIS)

I, Melissa H. Adamson, after being duly sworn under penalty of perjury, do depose and state as follows:

BIOGRAPHICAL BACKGROUND

1. I am the Public Health Administrator for the McHenry County Department of Health (the "Health Department"), and have served in this position since November of 2018.

2. Prior to this position, I received a Masters of Public Health Degree from the Emory University Rollins School of Public Health in 1999, and have worked in a variety of public health policy and administration positions for the last approximately 21 years. I worked as the Director of Community Health Policy and Planning/Assistant Administrator for the Peoria City/County Health Department for just over four years prior to my current role in McHenry County.

3. As part of my duties as Public Health Administrator, I manage the day-to-day operations of the Health Department, including, but not limited to overall, administration, leadership and management of the Health Department and its employees, subject to the approval and direction of the McHenry County Board of Health.

4. Throughout my career I have had substantial policy and practical experience with the Health Insurance Portability and Accountability Act of 1996 and its associated federal regulations (commonly referred to as "HIPAA").

FACTUAL INFORMATION

5. The role of the McHenry County Department of Health, and its Board, are to identify and investigate health problems and health hazards in the community, as well as to educate and empower people about health issues, and to mobilize community partnerships to identify and solve health problems. This is done largely through the development of policies and plans that support individual and community health efforts, including enforcement of the McHenry County Health Ordinance.

6. The McHenry County Board of Health is currently made up of ten persons, including two Medical Doctors, one Dentist, a Registered Nurse, one member of the County Board, and five members of the general public including one Firefighter-Paramedic.

7. The Health Department, in February 2019, assisted the McHenry County Sheriff and Corrections Facility staff, to address a mumps outbreak, providing them consultation and guidance on how to properly quarantine and isolate detainees

and inmates within the corrections facility. The Health Department also closely worked with their staff, and assisted with the vaccination of staff, detainees and inmates.

8. During the COVID-19 outbreak, the Health Department is working closely with the Illinois Department of Public Health ("IDPH"), to investigate instances of COVID-19 and its transmission throughout the community, and to help coordinate the medical, educational, and resource response to COVID and other infectious diseases.

9. Due to our close working relationship with IDPH and other State entities in responding to the outbreak of COVID-19, I am aware that testing throughout the state, and in McHenry County in particular, is extremely limited. Currently to qualify for public testing, through an IDPH lab for COVID-19, an individual must be symptomatic in the hospital, or from a congregate setting, or at risk for severe illness (i.e., has co-morbidity and/or greater than 65 years of age), and/or a first responder or healthcare worker with symptoms. Commercial lab and hospital-based lab testing is available and only provided to symptomatic patients presenting to primary care providers and hospitalized patients. Test results are provided, by law, to the local health department in the jurisdiction in which the patient resides for the public health investigation. Completed case investigations are submitted from the local health department to IDPH via the Illinois-National Electronic Disease Surveillance System (I-NEDSS) and are considered Protected Health Information ("PHI") and subject to HIPAA. The purpose of this information exchange is to allow the Health Department to reduce the further

spread of the communicable disease by investigating the individual cases and issuing “isolation orders” to prevent further exposure to others and quarantining contacts already exposed.

10. On or about 12:28 PM on Thursday, March 26, 2020, I received an email from the Assistant State’s Attorney, Norm Vinton, regarding disclosure of PHI in response to the recently released U.S. Health Department and Human Services (DHHS) guidelines. His email noted the McHenry County State’s Attorney’s Office (“SAO”) had gotten many inquiries from local law enforcement agencies. He stated the DHHS guidelines allowed disclosure of PHI on COVID-19 infected individuals. Before communicating with local agencies, the State’s Attorney’s office wanted to give us a heads up and opportunity discuss any questions or issues we may have.

11. On or about 2:54 PM on Thursday, March 26, 2020, I received a “Use of "Premise Alert" by Sheriff - COVID-19” memorandum from the SAO. The memo was a review by the SAO on the DHHS memorandum regarding the disclosure of PHI during the COVID-19 Pandemic. It was the State’s Attorney’s opinion that the Health Department may disclose PHI of COVID-19 cases to dispatch to provide information to first responders about the status of the premises they are responding to.

12. On or about the morning of March 28, 2020 I emailed Norm Vinton indicating we had concerns regarding the limitations of the PHI information being requested.

13. On or about March 30, 2020, my staff and I met, through a phone conference, with the Sheriff’s office, including McHenry County Sheriff Prim. That meeting

concerned the SAO's memo and the request of law enforcement to share the names and addresses of positive COVID-19 cases.

14. On or about March 30, 2020, I met with my staff, including the Health Department's Public Health Nursing Director, Susan Karras, R.N., and my Department's Medical Advisor, Doctor Laura Buthod, M.D. We carefully considered the guidance provided via a phone call with IDPH, as well as our medical and public health expertise, and determined a number of reasons exist why providing the information requested by the Sheriff and SAO is not medically or epidemiologically appropriate. Among those reasons are the limited nature of the testing; the widespread community spread; transmission of cases of COVID-19 that are not being tested, (reinforcing the CDC's guidance that all first responders should treat every person as though they are presumptively positive for COVID-19 and wear appropriate PPE); the delays between testing and reporting/confirmation of a positive test, which is currently about 3 days for the state lab, and 10 days for private sector labs, while the incubation period is believed to be 14 days; an individual's infectious period of 9 days or more, 2 days before symptoms and at least 7 days following symptom onset; the likelihood that everyone in a household would have been exposed at the address of an infected individual; the risk of stigma to individuals with COVID-19 that are named, and subsequent unwillingness of citizens to be tested or cooperate with our investigation of cases or potential exposures knowing the privacy of their PHI could be violated; and the potential that releasing individual names could create a false sense of security in Law Enforcement personnel that could lead to less than

the recommended use of PPE when dispatched to a call resulting in subsequent infection of those officers. We also agreed that we had concerns related to HIPAA's requirements that such information could only be disclosed under limited circumstances, and that our medical professionals' oaths and licensures require us to protect patient's health information.

15. On or about March 31, 2020, I and Susan Karras, RN, had a phone conversation with Norman Vinton from the State's Attorney's office. Despite our reservations, but due to the pressure from the Sheriff and State's Attorney's Office, we shared a preliminary list of addresses and persons who had tested positive for COVID-19.

16. On or about April 1, 2020, IDPH provided written guidance which we understood from this memo to be suggesting that sharing with first responders of address information of persons tested positive for COVID-19 would be permissible, but was not mandatory, and further that additional identifying information, including identity would serve limited epidemiologic or infection control value since many people may be asymptomatic and others may not have been tested yet. That guidance is attached as Exhibit 1.

17. As a result of this IDPH memo, we, on April 1, 2020, immediately informed the State's Attorney that we would no longer provide names of persons, but in the interests of compromise, would continue to provide addresses of such persons with dates where the household should no longer be infectious.

18. On or about April 1, 2020, the Illinois Attorney General also issued guidance on the propriety of releasing such information. We also understood that guidance to

say that such disclosures were permissible but not mandatory. That memo is attached as Exhibit 2.

19. On or about April 2, 2020, we received further written guidance from IDPH which we understood to clarify their prior guidance, we believed to understand to mean that disclosure of addresses was permissible. However, we understood that this was not a recommendation to share any protected health information with law enforcement or first responders. That guidance is attached as Exhibit 3.

20. On or about April 3, 2020, I spoke with several officers of the Board of Health individually, who affirmed their support for our Department's position.

21. On April 3, 2020, at about 3:16 PM I sent an email to State's Attorney Kenneally explaining my and my staff's position that this information should not be shared, and expressing our concerns with their guidance, although we agreed that the IDPH guidance allowed us to share addresses with first responders, but holding firm that we could not provide names of individuals infected. That email is attached as Exhibit 4.

22. On April 3, 2020, at or about 3:30 PM a conference call occurred with myself, Susan Karras, RN, Patrick Kenneally and Norman Vinton. On this call we reinforced earlier points. The State's Attorney was adamant that we should release this information.

23. At or about 3:30 PM on April 6, 2020, my staff and I had a conference call which included the State's Attorney, the Sheriff, and several other officials, including

several police chiefs. We reiterated our position as to why the individual names would not be shared.

1. Following our meeting on April 6, 2020, at or about 5:00 pm, I returned a call from one of the assistant states' attorneys informing me of a conflict of interest between the State's Attorney and the Health Department and that the Health Department would no longer be represented by their office on this matter. I was also informed that MCDH could retain its own counsel regarding this matter.

2. Later that evening, at or about 7:42 pm on April 6, 2020, I received the attached email, Exhibit 5, from Mr. Kenneally, indicating that his department would no longer represent us in this matter.

3. On or about April 10, 2020, I received further guidance from IDPH in the form of a "SIREN" email, hereto attached as Exhibit 6, again underscoring that release of addresses is the maximum information PHI release that is appropriate and it further recommends a process for the information's release which is not entirely consistent with the breadth of the TRO issued on April 10, 2020.

Melissa Hall Adamson

Melissa H. Adamson.

Exhibit D

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

JOHN IDLEBURG, Lake County Sheriff Plaintiff, v. MARK PFISTER, Executive Director, and LAKE COUNTY HEALTH DEPARTMENT AND COMMUNITY HEALTH CENTER, Defendants.	)	Case No. 20 MR 269

MEMORANDUM OPINION

This matter comes before the Court for ruling on Plaintiff Lake County Sheriff John Idleburg's (the "Sheriff") Emergency Verified Motion for Temporary Restraining Order filed on April 28, 2020. The Court has received and reviewed the Motion and its supporting exhibits, the underlying Verified Complaint for Declaratory Judgment, Writ of Mandamus, and Permanent Injunction, and the Response and opposing affidavits attached thereto filed by Defendants Mark Pfister, the Executive Director of the Lake County Health Department and Community Health Center ("Pfister"), and the Lake County Health Department and Community Health Center (the "Health Department" and, together with Pfister, the "Health Department Defendants"). The Court heard oral argument on May 13, 2020, and having taken the matter under advisement, now rules, as follows:

I. BACKGROUND

The Sheriff seeks a temporary restraining order compelling the disclosure from the Health Department Defendants of the names and addresses of Lake County residents who test positive for the COVID-19 virus. This case involves the competing interests of safeguarding federally and state-protected, confidential personal health information concerning Lake County residents and the need

for first responders to have access to useful and timely information concerning the persons they are duty-bound to interact with during the COVID-19 pandemic.

The Sheriff is the chief law enforcement officer in Lake County, with approximately 200 sworn deputies, as well as corrections officers, court security officers, and non-sworn civilian employees for a total of approximately 445 employees. Verified Complaint, ¶7. The Lake County Health Department is a local health department established pursuant to Illinois law with access to information concerning patients diagnosed with reportable health conditions, such as COVID-19.

The Sheriff has filed a three-count complaint against the Health Department Defendants. In all three counts, the Sheriff seeks identical relief: that the Health Department Defendants disclose to the Sheriff's designee the names and addresses of any and all individuals residing within Lake County who test positive for the COVID-19 virus within twenty-four hours of the Health Department learning of such information. Count I is styled as a declaratory judgment claim, but the prayer for relief does not ask the Court to declare the parties' right and duties under applicable law. Rather, it seeks an order from the Court compelling the Health Department Defendants to disclose the names and addresses of Lake County residents that test positive for the COVID-19 virus.

Count II seeks the very same relief pursuant to a writ of mandamus, asserting that the Sheriff has a clear legal right to receive the personal health information and that the Health Department Defendants have a clear mandatory duty to disclose the information sought concerning COVID-19 positive individuals.

Count III is captioned as a count for "Permanent Injunction" wherein the Sheriff asserts he has a clear and ascertainable right to receive the desired information, that he has no adequate remedy at law, and that he and his deputies and employees will suffer irreparable injury if the information is not provided by the Health Department Defendants.

II. THE APPLICABLE LEGAL FRAMEWORK

Preliminarily, the Court notes that because the same relief is sought in Count I and II (an order compelling the Health Department Defendants to disclose the name and addresses of residents testing positive for the COVID-19 virus) and, further, because it appears that the basis for the relief sought in Count I is the exact same legal basis that underpins Count II--that the Sheriff has a legal right to the information sought and the Health Department Defendants have a legal duty to provide the information sought—the Court treats both counts under the standards applicable to mandamus claims.

As to Count III (Permanent Injunction), an injunction is not itself a separate cause of action; rather, it is an equitable remedy that a court can provide when a party succeeds on the merits of its underlying cause of action but the available legal remedy (e.g., money damages) is inadequate. *Town of Cicero v. Metropolitan Water Reclamation Dist.*, 2012 IL App (1st) 112164, ¶46. Accordingly, the Sheriff cannot prevail on Count III unless he first prevails in some *other* viable underlying claim, namely, his mandamus claim. All of which is to say that the Sheriff cannot prevail on either Counts I or III unless he also prevails on Count II. The Sheriff's counsel acknowledged as much during oral argument. Therefore, in considering the Sheriff's motion for a temporary restraining order, the Court limits its analysis to the Sheriff's entitlement to a writ of mandamus.

A temporary restraining order is as an extraordinary remedy intended not to grant a plaintiff the ultimate relief it seeks in a complaint but merely to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue. *Delgado v. Board of Election Commissioners*, 224 Ill. 2d 481, 483 (2007). The status quo is defined as "the last actual, peaceable, uncontested status which [preceded] the pending controversy." *County of DuPage v. Gavrilos*, 359 Ill. App. 3d 629, 638 (2nd Dist. 2005). A temporary restraining order should generally be employed only in matters of great injury, and then only with the utmost care and caution. *Charles P. Young Co. v.*

Lenser, 137 Ill. App. 3d 1044, 1052-53 (1st Dist. 1985). A temporary restraining order is a summary proceeding where the court proceeds only the motion and written submissions of the parties. *Passion v. TCR*, Inc., 242 Ill. App. 3d 259, 263 (2nd Dist. 1993).

A temporary restraining order may issue when a plaintiff establishes that: 1) it has a clearly ascertainable right that needs protection, 2) it will suffer irreparable harm in the absence of an injunction, 3) it lacks an adequate remedy at law; and 4) it has a likelihood of success on the merits. *Makindu v. Illinois High Sch. Ass'n*, 2015 IL App (2d) 141201, ¶31; *Village of Westmont v. Lecnihan*, 301 Ill. App. 3d 1050, 1055 (2d Dist. 1998). If the moving party establishes that each of these elements is satisfied, the court must then proceed to balance the relative hardships to the parties and consider the public interest involved before granting a temporary restraining order. *Makindu*, at ¶31. At the temporary restraining order stage, the court is not to decide controverted facts or the ultimate merits of the case. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1089 (2nd Dist. 2007).

Typically, the issuance of an injunction is left to the sound discretion of the trial court when a plaintiff demonstrates that there is a "fair question" presented as to the existence of the right claimed and that the circumstances lead to a reasonable belief that, at trial, the moving party will be entitled to the relief sought. *Stenstrom Petroleum*, 375 Ill. App. 3d at 1089; *Village of Westmont v. Lenihan*, 301 Ill. App. 3d at 1055.

However, where a plaintiff seeks to compel a defendant to action through a mandatory injunction, as opposed to the more typical injunction which seeks to prohibit a defendant from taking certain actions, the law imposes an even higher burden upon the plaintiff. In such instances, courts have held that a plaintiff must show even greater and urgent necessity for the temporary relief sought and demonstrate a "probability of success" on the merits, rather than simply raising a "fair question" as to its entitlement to the relief sought. *See, e.g., Nat'l Bank of Austin v. River Forest State Bank*, 3 Ill. App. 3d 209, 210-11 (1st Dist. 1971).

At oral argument, the Sheriff's counsel cited to *Stanton v. City of Chicago*, 177 Ill App. 3d 519, 524-25 (1st Dist. 1988), and argued that because the Health Department Defendants have not filed an answer to the Verified Complaint, the Court may not consider the affidavits of Pfister and Board of Health President Timothy Sashko offered in opposition to the Plaintiff's Motion. This appears to be an accurate statement of the law. *See Bridgeview Bank v. Meyer*, 2016 IL App (1st) 160042, at ¶11.; *Kurle v. Evangelical Hosp. Ass'n.*, 89 Ill. App. 3d 45, 48 (2nd Dist. 1980). Accordingly, the Court does not consider those affidavits for purposes of its ruling.

The specific claim underlying Plaintiff's motion for temporary restraining order is a cause of action for a writ of mandamus. Mandamus is itself an extraordinary remedy to enforce, as a matter of right, "the performance of official duties by a public officer where no exercise of discretion on his part is involved." *Noyola v. Bd. Of Educ. of the City of Chicago*, 179 Ill. 2d 121, 133 (1997); *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 229 (1999). A writ of mandamus will not be granted unless a plaintiff fulfills its burden to plead and prove: 1) that the plaintiff has a clear, affirmative right to relief, 2) a clear duty of the defendant to act, and 3) clear authority in the defendant to comply with the writ. *Noyola*, 179 Ill. 2d at 133, *Lewis E.*, 186 Ill. 2d at 229; *Y-Not Project Ltd. v. Fox Waterway Agency*, 2016 IL App (2d) 150502, ¶27.

"The writ [of mandamus] will not lie when its effect is 'to substitute the court's judgment or discretion for that of the body which is commanded to act.'" *Lewis E.*, at 229 (*quoting Ickes v. Board of Supervisors*, 415 Ill. 557, 563 (1953)). Where the performance of an official's action involves the exercise of judgment or discretion, that act is generally not subject to review or redress by mandamus, even if the judgment or discretion is erroneously exercised. *Turner-El v. West*, 349 Ill. App. 3d 475, 480 (5th Dist. 2004). Mandamus will typically not lie to direct the manner in which a discretionary act is performed. *Clarke v. Community Unit School Dist. 303*, 2014 IL App (2d) 131016, ¶25. In fact, only if a

discretionary power is exercised with "manifest injustice" or if a "palpable abuse of discretion is clearly shown," might mandamus issue. *Kermeen v. City of Peoria*, 65 Ill. App. 3d 969, 972 (3rd Dist. 1978).

Against this legal backdrop, the Court considers the Sheriff's motion for a temporary restraining order against the Health Department Defendants.

III. ANALYSIS OF THE TRO PROOFS AS MEASURED AGAINST THE APPLICABLE LEGAL STANDARDS

The Sheriff seeks a temporary restraining order compelling the Health Department Defendants to act. Specifically, the Sheriff demands disclosure of the names and addresses of Lake County residents who test positive for the COVID-19 virus. There is no allegation or suggestion that this information has ever previously been provided by the Health Department Defendants to the Sheriff. Therefore, the last peaceable, pre-dispute status condition between the parties was that this information was *not* shared with the Sheriff. Accordingly, the Sheriff seeks to *alter*, not maintain, the status quo through the issuance of a *mandatory injunction* that gives the Sheriff the *full relief* he seeks in his complaint. Although not foreclosed, the specific relief sought here is rare under the controlling caselaw set forth above.

The Court now considers, in turn, each of the requirements the Sheriff must satisfy in order to demonstrate his entitlement to the temporary restraining order sought.

A. Does the Sheriff Have a Clearly Ascertainable Right to the Names and Addresses of COVID-19 Positive Lake County Residents?

The first issue the Court must consider is whether the Sheriff has demonstrated a clearly ascertainable right to the disclosure of the names and addresses of COVID-19 positive persons. The Sheriff asserts that his right to this information arises from three sources:

1) Section 164.512(j) of the federal regulations adopted to implement the provisions of the Health Insurance and Portability and Accountability Act ("HIPAA")(45 CFR 164.512(j)),

2) Section 2.1 of the Illinois Department of Public Health Act (20 ILCS 2305/2.1), and

3) Section 690.1405 of the Illinois Control of Communicable Diseases Code (77 ILAC 690.1405).

1. HIPAA

HIPAA is a federal law which provides a baseline of personal health information privacy protections. HIPAA does not preempt state laws that provide *additional* protections to ensure the privacy of an individual's health information; however, HIPAA establishes a floor level of protection which states may not undermine or erode by passing laws or regulations that provide less protection than is afforded under HIPAA. *Giangiulio v. Ingalls Memorial Hospital*, 365 Ill. App. 3d 823, 827 (1st Dist. 2015). Pursuant to HIPAA, the United States Department of Health and Human Services has adopted privacy rules to regulate protected health information and identify the circumstances when that information can be disclosed. *Id.* HIPAA contains an explicit preemption provision that generally supersedes contrary state law provisions. *Id.* (*citing* 42 U.S.C. 1320d–7(a)(1)).

HIPAA contains specific, limited exemptions that permit disclosure of personal health information only under certain conditions. The Sheriff attempts to rely upon one such exemption:

> A covered entity *may* use or disclose protected health information without the written authorization of the individual, …, or the opportunity for the individual to agree or object…, in the situations covered by this section, subject to the applicable requirements of this section…..
>
> ….
>
> (j) Standard: Uses and disclosures to avert a serious threat to health or safety.
> (1) Permitted disclosures. A covered entity *may*, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, *if the covered entity, in good faith, believes* the use or disclosure:
>
> (i)(A) Is *necessary* to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
> (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat;….

45 CFR 164.512(j)(emphasis added).

The parties appear to agree that the Health Department is a "covered entity" under HIPAA. Complaint, ¶¶17, 19; Health Department Defendants' Response, p.11. Moreover, the names and

addresses of patients is protected confidential health information. 45 CFR 164.514(b). Therefore, the federal regulation cited above permits disclosure of protected health information if the Health Department in "good faith believes" that such disclosure is "necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public" and the disclosure is made "to a person or persons reasonably able to prevent or lessen the threat."[1]

The starting point is to recognize that by its plain terms HIPAA is not a font of any health information disclosure obligation; rather, it is the source of a duty to protect personal health information. The limited exemptions to the otherwise mandatory protection of such information are permissive, not mandatory. The cited section the Sheriff attempts to rely upon uses explicitly permissible language: to wit, "[a] covered entity *may*...use or disclose protected health information." The permissive interpretation of the exemption is bolstered by the further limitation that disclosure is allowed only if the covered entity "in good faith believes" such disclosure is required to prevent or lessen a serious public health risk. No case or authority has been cited by the Sheriff in support of his interpretation of HIPAA as *requiring* a covered entity, such as the Health Department, to disclose personal health information. The Court has likewise found none. In fact, during oral argument, the Sheriff's counsel conceded that HIPAA does not mandate disclosure of the protected health information.

In short, in the Court's analysis, the HIPAA exemption initially relied upon by the Sheriff does not mandate or require any disclosure by the Health Department Defendants. It merely allows such disclosure and leaves to the Health Department's sound discretion whether it "in good faith believes" such disclosure is "necessary" under the circumstances to prevent a serious health threat.

---

[1] This same regulation also permits disclosure to law enforcement if such disclosure is necessary for law enforcement "to identify or apprehend" a criminal. 45 CFR 164.512(j)(1)(ii). However, the Sheriff does not cite to or rely upon this sub-section as a basis for disclosure.

Here, the Health Department has apparently concluded that the disclosure is not necessary from a public health perspective. At this stage and based on the limited record, the Court cannot conclude that decision was erroneous or made in bad faith. This regulation does not appear to give the Sheriff any clearly ascertainable right to the information sought.

2. The Illinois Department of Public Health Act

Next, the Sheriff cites to Section 2.1 of the Illinois Department of Public Health Act which provides, in pertinent part, as follows:

> (b) Whenever the Department or a local board of health or local public health authority learns of a case of an illness, health condition, or unusual disease or symptom cluster, reportable pursuant to rules adopted by the Department or by a local board of health or a local public health authority, or a suspicious event that it reasonably believes has the potential to be the cause of or related to a public health emergency, as that term is defined in Section 4 of the Illinois Emergency Management Agency Act, *it shall immediately notify* the Illinois Emergency Management Agency, the appropriate State and *local law enforcement authorities*, other appropriate State agencies, and federal health and law enforcement authorities and, after that notification, *it shall provide law enforcement authorities with such other information as law enforcement authorities may request for the purpose of conducting a criminal investigation or a criminal prosecution of or arising out of that matter.* No information containing the identity or tending to reveal the identity of any person may be redisclosed by law enforcement, except in a prosecution of that person for the commission of a crime.
>
> (c) *Sharing of information* on reportable illnesses, health conditions, unusual disease or symptom clusters, or suspicious events between and among public health and law enforcement authorities *shall be restricted to the information necessary for the treatment in response to, control of, investigation of, and prevention of a public health emergency,* as that term is defined in Section 4 of the Illinois Emergency Management Agency Act, *or for criminal investigation or criminal prosecution of or arising out of that matter.*
>
> 20 ILCS 2305/2.1 (emphasis added).

Under this Illinois statute, it does appear that a local board of health, such as the Health Department, has a mandatory duty to "notify" the local law enforcement authority of a reportable "illness, health condition, [] unusual disease or symptom cluster…or suspicious event." *See Heinrich v. White*, 2012 IL App (2d) 110564, ¶19 ("[w]hen the issue is whether the force of the statutory language is mandatory or permissive, then 'shall' does usually indicate the legislature intended to

impose a mandatory obligation"). But that does not end the inquiry, for the statute further provides that the precise information to be shared with local law enforcement shall be "restricted to the information necessary for the treatment in response to, control of, investigation of and prevention of a public health emergency." Nothing in this statute indicates that anything other than the *fact* that a reportable case, cluster, or event has occurred need be reported. Does this statute mandate that the local health department must disclose the specific information sought by the Sheriff concerning the identities of the person or persons with the illness or health condition? Only, it would appear, if such disclosure is deemed to be "necessary for the treatment in response to, control of, investigation of and prevention of a public health emergency."

The Heath Department Defendants argue that the disclosure of the names and address of COVID-19 positive individuals does not advance any public health interest or help control, contain, treat or prevent the COVID-19 pandemic. The Illinois Department of Public Health ("IDPH") recognizes that because testing is still limited, there are likely large numbers of untested and asymptomatic COVID-19 positive individuals and that first responders must assume for their own protection that every individual they encounter is COVID-19 positive. *See* April 2, 2020 IDPH Update to "Guidance to Local Health Departments on Disclosure of Information Regarding Persons with Positive Tests for COVID-19 to Law Enforcement" (https://www.dph.illinois.gov/covid19/community-guidance/LHD-disclosure).

And, in fact, the Sheriff does not argue that the disclosure of the information he seeks will help control, contain, or treat the pandemic. Instead, he contends that the information is primarily necessary to "protect the safety of" his deputies, employees, and their families. Emergency Motion, ¶11. While the Court acknowledges that these are indisputably important concerns that every employer should rightly be seeking to protect, they do not fall squarely within the limited purpose explicitly required for any disclosure under Section 2.1.

The Court notes that in certain circumstances under the statute at issue, the Sheriff *can* dictate what specific information he is entitled to receive from the Health Department. That is, when local law enforcement is "conducting a criminal investigation or a criminal prosecution" relating to a reportable event, the local board of health "*shall provide law enforcement authorities with such other information as law enforcement authorities may request* for that law enforcement purpose. 20 ILCS 2305/2.1(b)(emphasis added). Again, however, here the Sheriff is not seeking the name and address of COVID-19 positive residents as part of criminal investigation or prosecution, so it logically follows that he does not have the right to dictate the specific information to be disclosed under this statute.

3. The Illinois Control of Communicable Diseases Code

The Sheriff also attempts to rely upon Section 690.1405 of the Illinois Control of Communicable Diseases Code to demonstrate his clearly ascertainable right to the names and addresses of COVID-19 positive Lake County residents. As is readily apparent, this regulation mirrors the language of the Illinois Department of Health Act the Court analyzed in the preceding section of this opinion.

> a) Whenever a certified local health department learns of a case of a reportable illness or health condition, an unusual cluster, or a suspicious event that may be the cause of a public health emergency as that term is defined in Section 4 of the Illinois Emergency Management Agency Act, it shall immediately notify the Department, the Illinois Emergency Management Agency, and the appropriate State and local law enforcement authorities.
>
> b) Sharing of medical information on persons with reportable illnesses or health conditions, unusual disease or symptom clusters, or suspicious events between the Department, certified local health departments and law enforcement authorities shall be restricted to information necessary for the treatment, control of, investigation of, containment of, and prevention of a public health emergency, as that term is defined in Section 4 of the Illinois Emergency Management Act, or for criminal investigation or criminal prosecution of or arising out of that matter.
>
> 77 ILAC 690.1405

Given the fact that this regulation is nearly identical in all relevant respects to Section 2.1 of the Illinois Department of Public Health Act, the Court adopts its analysis and conclusions with respect to the interpretation and applicability of that statute as its analysis and conclusions with respect to this administrative regulation…with one notable exception.

The Court is not a public health expert. The Sheriff does not claim to be either. To the extent there is ambiguity in the meaning or applicability of the language in the regulation cited above, the Court must give some deference to the interpretation given to the regulation by the agency charged with enforcing and administering the regulation. *Johnson v. O'Connor*, 2018 IL App (1st) 171930, ¶16; *LaBelle v. State Employees Retirement System of Illinois*, 265 Ill. App. 3d 733, 735 (2nd Dist. 1994).

Here, the IDPH has not interpreted this specific section as requiring the disclosure of the identity of individuals who test positive for COVID-19 to local law enforcement authorities. In fact, the IDHC counsels against such disclosure.

> As discussed further below, providing first responders and law enforcement with the identity of positive COVID-19 cases has limited epidemiologic and infection control value and therefore IDPH does not recommend notification to law enforcement of individuals who have tested positive for COVID-19. Rather, IDPH recommends that first responders and law enforcement take appropriate protective precautions when responding to all calls.

See IDPH April 1, 2020 Guidance to Local Health Department on Disclosure of Information Regarding Persons with Positive Tests for COVID-19 to First Responders, (https://www.dph.illinois.gov/covid19/community-guidance/LHD-disclosure).

In sum, the provisions cited and relied upon by the Sheriff to demonstrate his clearly ascertainable right to the names and addresses of COVID-19 positive residents appear to either explicitly grant the Health Department Defendants discretion to disclose *any* protected health information or grant the Health Department Defendants discretion to decide what information

about a reportable case, cluster, or event is the minimum disclosure necessary to advance the public health.

The Court notes its conclusion is entirely consistent with the Illinois Attorney General's memorandum opinion dated April 3, 2020 which the Sheriff attached to his Complaint as Exhibit D. In that non-binding memorandum, the Illinois Attorney General, analyzing the very same statutes and regulations the Sheriff advances here, concludes that "[f]ederal law and state law *permit, but do not require* first responders responding to an emergency call for service at a particular address to be notified of the existence of a confirmed CIVID-19 case at that address." *See*, Attorney General Memorandum Opinion, at p. 7.

The Court concludes that the Sheriff has not presented a "fair question" that he has a clearly ascertainable right to the information sought under the statute and regulations cited.

B. Will the Sheriff and his Employees Suffer Irreparable Harm if the Names and Addresses of COVID-19 Positive Lake County Residents are Not Disclosed?

The Sheriff posits that his employees will suffer irreparable harm if the Health Department Defendants are not immediately ordered to disclose the names and address of COVID-19 positive residents because of the threat of "the exposure of Lake County Sheriff's deputies, correctional officers, court security officers, civilian employees, family members of employees, jail inmates, and the community at large to the spread and contraction of the COVID-19 virus." Emergency Motion, ¶20. However, the requirement of the showing of imminent injury is not satisfied by proof of a speculative possibility of injury. *Smith Oil Corp. v. Viking Chemical, Co.*, 127 Ill. App. 3d 423, 431 (2nd Dist. 1984)(*quoting Barco Manufacturing Co. v. Wright*, 10 Ill.2d 157, 166, (1956)).

Although the Court recognizes the risk of potential exposure to COVID-19 that our first responders face every day, the Sheriff offers no factual support for his conclusion that immediate and irreparable harm will befall his employees if the information is not provided or, stated

differently, that providing the information sought will prevent that risk of harm. For example, the Sheriff does not contend that there is any shortage of personal protective equipment available to his employees or that he and his staff are being forced to ration its use. Further, given the facts that COVID-19 testing is currently still quite limited and that many persons with the virus are asymptomatic and untested, the Health Department Defendants argue that the disclosure of this information would be of limited practical value or reliability and that the Sheriff and his deputies should take precautions and assume every law enforcement encounter involves a COVID-19 positive individual.

The Court further notes that with respect to recent arrestees transported to the Lake County Jail, it is the Court's understanding that the parties have agreed to a procedure whereby Jail medical care providers will be able to obtain from the Health Department confirmation of whether that arrestee has tested positive for the virus or not. Irreparable harm denotes transgressions of a continuing nature so that redress cannot be had at law. *Petrzilka v. Gorscak*, 119 Ill. App. 3d 120, 124 (2nd Dist. 1990).

The Court certainly does not mean to minimize the concerns that the Sheriff has raised and the risks to his deputies and employees, but the law requires a showing of immediate and irreparable harm if the relief sought is not granted. The evidence before the Court, at least on the limited temporary restraining order record, does not support a finding of irreparable injury or harm.

C. Does the Sheriff Have an Adequate Remedy at Law?

Closely related to, and sometimes conflated with, the irreparable injury inquiry and analysis, a plaintiff must also demonstrate that it has no adequate remedy at law in order to be entitled to temporary injunctive relief. The standard for the adequacy of the legal remedy is whether it is clear, complete, and as practical and efficient as the desired equitable remedy. *Bio–Medical Laboratories, Inc.*

v. Trainor, 68 Ill. 2d 540, 549 (1977); *Tamalunis v. City of Georgetown*, 185 Ill. App. 3d 173, 189 (4th Dist. 1989).

Here, the Court has no difficulty concluding that the Sheriff has no remedy that is nearly as practical or complete as injunctive relief would be. The Sheriff does not seek and likely cannot obtain money damages from his sister Lake County agency. Moreover, even if money damages were hypothetically recoverable, they would be a poor and insufficient substitute for a mandatory injunction requiring the timely disclosure of the names and addresses of COVID-19 positive residents. And, in fact, the Health Department Defendants apparently concede this point as they offer no counter argument or evidence.

The Sheriff satisfies the "no adequate remedy at law" requirement necessary to sustain a temporary restraining order.

D. Has the Sheriff Demonstrated a Likelihood of Success on the Merits?

As set forth in Section II of this opinion above, the only viable cause of action in the Complaint is mandamus. In order to prevail on a mandamus claim, the Sheriff must demonstrate: 1) that the plaintiff has a clear, affirmative right to relief, 2) a clear duty of the defendant to act, and 3) clear authority in the defendant to comply with the writ. *Noyola*, 179 Ill. 2d at 133.

Much of the Court's analysis of these mandamus standards is nearly identical to the Court's analysis in concluding that the Sheriff has not satisfied the first element of a temporary restraining order—a clearly ascertainable right to the relief sought. That is, in assessing the Sheriff's "likelihood of success on the merits" of his mandamus claim, the Court must necessarily consider the same statues and regulations at issue and determine whether they raise a "fair question" that the Sheriff has a clear entitlement to receive and the Health Department Defendants have a clear duty to provide the names and addresses of COVID-19 positive Lake County residents.

Because the Court has concluded that HIPAA, the Illinois Department of Public Health Act, and the Control of Communicable Diseases Code all at most permit, but do not require, the Health Department's disclosure of the specific personal health information of COVID-19 positive residents sought, the Health Department Defendants can be said to have discretion in deciding whether or not to release that information sought and under what circumstances.

Discretionary decisions almost never support a mandamus claim. *Lewis E.*, 186 Ill. 2d at 229; *Turner-El v. West*, 349 Ill. App. 3d at 480; *Clarke v. Community Unit School Dist. 303*, 2014 IL App (2d) 131016, ¶25. And, while mandamus can be used to "compel a public official to in fact exercise the discretion that he possesses" (*Howell v. Snyder*, 326 Ill. App. 3d 450, 452 (4th Dist. 2001)), here the Sheriff acknowledges that the Health Department Defendants have in fact exercised their discretion, made a decision, and informed the Sheriff of their decision not to turn over the information sought by the Sheriff. *See* Emergency Motion, ¶12. The Sheriff understandably disagrees with the *manner* in which the Health Department Defendants exercised their discretion. But the manner in which discretion is exercised is either never subject to attack in mandamus, *Lewis E.*, 186 Ill. 2d at 229 or, as some caselaw would suggest, subject to challenge only if it represents a gross injustice or palpable abuse of discretion. *See Kermeen v. City of Peoria*, 65 Ill. App. 3d at 972. While the Sheriff, and even the Court, might disagree with the decision of the Health Department Defendants, that is not itself a basis to judicially "undo" that decision…that exercise of discretion.

The Health Department Defendants have attempted to articulate a rational basis for their decision not to turn over the personal health information of COVID-19 positive residents. The Sheriff has not come forward with evidence or argument that this decision, even if potentially erroneous, is completely devoid of logic and disconnected from reason. Nor is there any suggestion that it was done for any improper or spiteful motive. Accordingly, in mandamus, the Court may not

simply substitute its judgment for the presumptively reasoned judgment of the Health Department Defendants.

The Court concludes that the Sheriff has not raised a "fair question" that he will prevail, much less demonstrated a "probability of success," *Nat'l Bank of Austin*, 3 Ill. App. 3d at 210-11, at the ultimate trial of his mandamus cause of action. This fourth element for a temporary restraining order has not been satisfied.

E. Do the Relative Hardships and Public Interest Support the Issuance of the Temporary Restraining Order?

Because the Court finds that three of the four requisite elements needed to sustain the issuance of a temporary restraining order have not been satisfied, the Court need not consider, and does not consider, whether the Sheriff has also demonstrated that a weighing of the relative hardships on the parties and a balancing of the public interests further support the granting of the temporary restraining order.

IV. CONCLUSION

The issue before the Court is limited and the record is undeveloped. The Sheriff bears a significant burden because the temporary relief sought here is extraordinary.

The law does not permit the Court to simply substitute its judgment for the judgment of the Health Department Defendants on the issue of whether the public health demands the disclose of the names and addresses of COVID-19 positive Lake County residents to the Sheriff. There are substantial and important countervailing interests in this case. On the one hand are the Sheriff's legitimate, important, and easily understood concerns for the health and safety of his employees and charges who, unlike most of us, do not have the relative luxury of sheltering in place but are duty bound to protect the public and answer the call 24/7. On the other hand are the extremely broad federal and state law protections afforded personal health information, the Health Department's

duty to safeguard that information, its duty to act in the public interest to prevent and contain the spread of COVID-19, and its discretion to decide whether the disclosure of the information sought by the Sheriff advances that public health interest. The Court appreciates and admires both parties for their important work and the challenges they currently face in these unprecedented times.

However, for the reasons set forth in this opinion, the Court concludes that the Sheriff has not sustained his burden to demonstrate his entitlement to a temporary restraining order. The Sheriff's motion for such relief is therefore denied

IT IS THEREFORE ORDERED AS FOLLOW:

1. Plaintiff Lake County Sheriff John Idleburg's Verified Motion for Temporary Restraining Order is DENIED;

2. The previously-set ruling date of May 20, 2020 at 1:30 p.m. in C-202 shall stand; at that time, the Court will enter a discovery schedule and a hearing date for the pending motion for preliminary injunction;

3. The clerk shall promptly email and mail a copy of this order to all counsel of record.

Dated at Waukegan, Illinois
this 18th day of May, 2020.

ENTERED:

The Honorable Daniel L. Jasica

No. 2-20-0339

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

MCHENRY COUNTY SHERIFF, *Plaintiff-Appellee,* v. MCHENRY COUNTY HEALTH DEPARTMENT, *Defendant-Appellant*.	)	Appeal from the Circuit Court of the Twenty-Second Judicial Circuit McHenry County Illinois Case Nos. 20 MR 373 and 20 MR 387 The Honorable Michael J. Chmiel, Judge Presiding
CITY OF MCHENRY, an Illinois municipal corporation; VILLAGE OF ALGONQUIN, an Illinois municipal corporation; CITY OF WOODSTOCK; an Illinois municipal corporation; and VILLAGE OF LAKE IN THE HILLS, an Illinois municipal corporation, *Plaintiffs-Appellees,* v. MELISSA H. ADAMSON, in her official capacity as Public Health Administrator for the McHenry County Department of Health; and the MCHENRY COUNTY DEPARTMENT OF HEALTH, *Defendants-Appellants*.	)	

NOTICE OF FILING and PROOF OF SERVICE

I certify that on the 17th day of June, 2020, there was electronically filed and served upon the Clerk of the above court the **BRIEF OF *AMICI CURIAE* HEALTH & MEDICINE POLICY RESEARCH GROUP, ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, AND LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF ILLINOIS IN**

SUPPORT OF DEFENDANTS-APPELLANTS, and that true and correct copies of the same were served upon the counsel for the parties by electronic mail at the email addresses listed as follows:

State's Attorney Patrick Kenneally
Assistant State's Attorney Jana Blake
PDKenneally@mchenrycountyil.gov
JEBlake@mchenrycountyil.gov
Counsel for McHenry County Sherriff

David W. McArdle
Kevin A. Chrzanowski
dmcardle@zrfmlaw.com
kchrzanowski@zrfmlaw.com
Counsel for City of McHenry, Village of Algonquin, City of Woodstock, and Village of Lake in the Hills

Robert Long
Douglas Dorando
rlong@dlplawyers.com
ddorando@dlplawyers.com
Counsel for McHenry County Health Department and Melissa Adamson

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statement set forth in this instrument are true and correct.

/s/ Ameri Klafeta
Attorney for Proposed *Amici Curiae*