AMERICAN CIVIL LIBERTIES UNION
Illinois

AMERICAN CIVIL LIBERTIES UNION
OF ILLINOIS
150 N. MICHIGAN AVENUE
SUITE 600
CHICAGO, ILLINOIS 60601-7570
(312) 201-9740
FAX (312) 201-9760
WWW.ACLU-IL.ORG

Commissioners
Cook County Board

Re: Resolution to compel disclosure of personal health information, including COVID-19 test results

Dear Commissioners:

The ACLU of Illinois, which has more than 70,000 members, strongly opposes Resolution 20-2378, compelling the disclosure of personal health information ("PHI") about people in Cook County who test positive for COVID-19. Release of this confidential PHI is dangerous to the public health – it would create a false sense of security and actually increase risk of exposure to the virus – and it violates federal and state constitutional and legal privacy protections.

Protecting the Public Health Requires Abiding by Guidances Issued by the Illinois Department of Public Health and the Cook County Board of Health.

The Illinois Department of Public Health does not recommend disclosing the personal health information of those who test positive for COVID-19, including their names and addresses. According to the Department, sharing this information 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. Dep't of Pub. Health, *Guidance to Local Health Departments on Disclosure of Information Regarding Persons with Positive Tests for COVID-19 to Law Enforcement* 2, *available at* https://www.dph.illinois.gov/sites/default/files/20200401_Guidance_on_Disclosure_of_Private_Information.pdf.

Numerous other 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 Cty. 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").

Public health experts are unified in urging first responders to treat every member of the public with whom they come into contact as potentially infectious because any list of people who test positive for COVID-19 is incomplete. More specifically:

- Current research suggests that 50% of those infected with COVID-19 will not begin to show symptoms for the first five days, during which time people are **most** likely to spread the virus to others.
- IDPH, the Centers for Disease Control and Prevention (CDC), and other public health authorities report that many people are asymptomatic but still shedding the virus and thus pose a risk to others with whom the come into contact.
- Further, current tests for COVID-19 could return a false negative up to 30% of the time. In any case, less than 5% of the Illinois population has been tested for the virus and we are now in a period of community spread.
- As a result, providing information on addresses with positive tests would give our first responders a false sense of security when entering homes where no positive test is reported.

When specifically called to homes or apartments for emergency response, first responders should again follow public health guidances, including those of the CDC. The updated CDC 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), *available at* https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-for-ems.html. Following this guidance provides real-time information that is likely to be more accurate and up-to-date—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 given the lack of sufficient testing to identify all people with COVID-19. *See Nw. Cent. Dispatch Sys.* at 17.

In denying the attempt by the Northwest Central Dispatch System to compel disclosure of this very information, Judge Demacopoulos of the Circuit Court of Cook County, declared: "The harm feared by [the plaintiff dispatch system] . . . simply will not be avoided by the relief it seeks." Informed by a number of factors, the judge concluded that disclosure of the names and addresses of people with confirmed COVID-19 would not reasonably provide meaningful relief to first responders, and actually would endanger them. *See Nw. Cent. Dispatch Sys.* at 16–17. Those factors include: the large number of untested people, the infectiousness of asymptomatic carriers, and the futility of relying on an individual's placement on a list of confirmed cases when they may no longer be contagious. *Id*. Moreover, Judge Demacopoulos found that releasing this personal health information risked harming to the [defendant health department] and public interest," including the public's privacy rights and health privacy rights, especially, are "real, concrete, and avoidable." *Nw. Cent. Dispatch Sys.* At 18.

Disclosing Personal Health Information in Contravention of Public Health Interests Violates the U.S. and Illinois Constitutions and Illinois Law.

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. "[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). *See also*

Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 762 (Ill. 2013) ("[O]ur state constitutional privacy guarantee protects a person's *reasonable* expectation of privacy in his or her personal medical information.") Because public health authorities have explicitly declared that sharing this information with law enforcement or other first responders is not an effective way of limiting the spread of the virus, the release of this information is "unreasonable" and thus runs afoul of the Illinois Constitution. *See also People ex rel. Director of Public Health v. Calvo*, 89 Ill.2d 130, 137 (1982) (State's Attorney could not subpoena reports of individual cases of sexually transmitted disease from the Department of Public Health)

The federal courts have also identified protections for an individual's interest in the privacy of medical and other sensitive information arising from the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g., 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[.]"); *Coons v. Lew*, 762 F.3d 891, 900 (9th Cir. 2014) (recognizing a "fundamental privacy right in non-disclosure of personal medical information"); *Burns v. Warden, USP Beaumont*, 482 Fed.App'x 414, 417 (11th Cir. 2012) (recognizing a constitutional interest in avoiding disclosure of personal matters); *Gruenke v. Seip*, 225 F.3d 290, 302–03 (3d Cir. 2000) (recognizing right to protection against disclosure of medical information).

Infringing 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. A strong public interest in access to or dissemination of information about individuals with confirmed COVID-19 is lacking here, because numerous experts including the Illinois Department of Public Health *and* the Cook County Department of Health's own leadership have opined that releasing this information to law enforcement authorities actually has limited value in terms of promoting or protecting public health. *See also, e.g., Grimes v. County 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 that public interest justified disclosure of plaintiff's transgender status); *Fort Wayne Women's Health v. Bd. of Comm'rs, Allen Cty., 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 a "mismatch between the [challenged law's] goals and the requirement for and inspection of patient notification forms containing patient identifying signatures"); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 552–53 (9th Cir. 2004) (holding regulation which gave agency access to unredacted medical records violated informational privacy rights of patients where access to the unredacted records 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 homosexuality and conceded "he would have no reason to disclose" this sensitive information).

Releasing Personal Health Information Will Chill Many People from Seeking Testing and Exacerbates the Risk of Community Spread.

Protecting the confidentiality of medical information is essential to ensuring that people access needed medical care for appropriate diagnosis and treatment. Disclosing this confidential health information risks deterring people from getting tested, especially communities with fraught relationships with law enforcement, because many of these communities are at higher risk of serious complications or dying from COVID-19 – especially African-American and Latinx communities – any decision that deters testing in these communities will compromise rather than protect public health. As a leading public health law scholar has noted:

> 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 Gostin, *Public Health Law Power, Duty, Restraint* 319 (2016).

Our relatively recent experience during the HIV epidemic demonstrates that confidentiality protections "reduce fear of stigma and discrimination, build trust and open channels of communication between patients and health-care workers, lead to more ready access to testing services and enhance compliance with public health and clinical advice." UNAIDS, RIGHTS IN THE TIME OF COVID: LESSONS FROM HIV FOR AN EFFECTIVE, COMMUNITY-LED RESPONSE 9, *available at* https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf. *See also* Janlori Goldman, *Protecting Privacy to Improve Health Care*, 17 Health Aff. 47, 48 (1998), *available at* https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.17.6.47.

The Illinois Supreme Court has recognized the paramount value of safeguarding the right of privacy in personal medical information in a variety of circumstances. For example, 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 for protecting an individual's private medical information, reasoning:

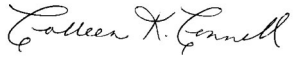
> Without an assurance of confidentiality, fear of social embarrassment resulting from disclosure of their identities and physical conditions might cause individuals with such a disease to shun treatment, while at the same time others to whom they may have transmitted the disease might remain unaware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

Id. at 132–33. *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.").

These public policy concerns further validate the critical need to protect the confidentiality of those who test positive for COVID-19.

In closing, upholding individual privacy is what will best protect the people in Cook County who need to access medical care, the broader public health, and first responders themselves during the current pandemic. For those compelling reasons, the ACLU of Illinois opposes the enactment of this resolution.

Sincerely,



Colleen K. Connell
Executive Director
ACLU of Illinois

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