

WISCONSIN MANUFACTURERS AND
COMMERCE, MUSKEGO AREA
CHAMBER OF COMMERCE, and NEW
BERLIN CHAMBER OF COMMERCE
AND VISITORS BUREAU,

Case No. 20-cv-

Plaintiffs,

v.

TONY EVERS, in his official capacity
as Governor of the State of Wisconsin,
115 East, State Capitol,
Madison, Wisconsin 53703,

ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,
1 West Wilson Street,
Madison, Wisconsin 53703,

JOEL BRENNAN, in his official
capacity as Secretary of the Wisconsin
Department of Administration,
101 E. Wilson Street, 10th Floor,
Madison, Wisconsin 53703,

Defendants.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal

action.

Within 45 days of receiving this Summons, you must respond with a written answer, as the term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Waukesha County Clerk of Circuit Courts, 515 W Moreland Blvd, Waukesha, Wisconsin 53188**, and to Ryan J. Walsh, Plaintiffs' attorney, whose address is: **10 East Doty Street, Suite 800, Madison, Wisconsin 53703**.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Date: October 1, 2020

Respectfully submitted,

Electronically Signed
/s/ Ryan J. Walsh

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WISCONSIN MANUFACTURERS
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Case Type: Declaratory Judgment

MUSKEGO AREA CHAMBER OF
COMMERCE,
S73W16485 W Janesville Rd,
Muskego, Wisconsin 53150

Case Code: 30701

Case No. 20-cv-

NEW BERLIN CHAMBER OF
COMMERCE AND VISITORS
BUREAU,
13825 W National Ave,
New Berlin, Wisconsin 53151,

Plaintiffs,

v.

TONY EVERS, in his official
capacity as Governor of the State
of Wisconsin,
115 East, State Capitol,
Madison, Wisconsin 53703,

ANDREA PALM, in her official
capacity as Secretary-Designee of
the Wisconsin Department of
Health Services,
1 West Wilson Street,
Madison, Wisconsin 53703,

JOEL BRENNAN, in his official
capacity as Secretary of the
Wisconsin Department of
Administration,
101 E. Wilson Street, 10th Floor,
Madison, Wisconsin 53703,

Defendants.

COMPLAINT

Plaintiffs Wisconsin Manufacturers & Commerce (“WMC”), Muskego Area Chamber of Commerce (“MACC”), and New Berlin Chamber of Commerce and Visitors Bureau (“NBCC”) (collectively, “Plaintiffs”) by their undersigned attorneys, hereby allege as follows:

INTRODUCTION

1. This action challenges the legality of Defendants’ planned release of patient-identifiable data from the confidential patient health care records of thousands of Wisconsin citizens across the state. Defendants’ planned action will violate Wisconsin laws requiring any person, including government actors, to keep confidential the information contained in medical records and will wantonly damage the reputations of businesses and workers.

2. On September 30, 2020, Defendant Brennan informed Plaintiff WMC that Defendants Evers and Palm planned to release the names of over 1,000 businesses across the State of Wisconsin that have had at least two employees test positive for COVID-19, purportedly in response to public records requests. Defendants plan to release this information on October 2, 2020.

3. The information that Defendants plan to release is derived from diagnostic test results and the records of contact tracers investigating COVID-19. The information constitutes “[p]atient health care records” that must be kept confidential. Wis. Stat. §§ 146.81, 146.82. Moreover, Wisconsin law prohibits the

release to any but a few enumerated entities of “patient-identifiable data,” which includes a “[p]atient’s employer’s name. Wis. Stat. § 153.50(1)(b), (4), (5).

4. By releasing the names of the employers of patients that have tested positive for COVID-19, Defendants will release patient-identifiable data derived from confidential patient health care records. This will violate the privacy of thousands of Wisconsin citizens employed by the businesses that Plaintiffs represent, would contravene the substantial protection that Wisconsin statutes provide to the privacy of an individual’s medical information, further damage Wisconsin’s business community, and undermine the efforts of local health authorities to control the virus.

PARTIES

5. Plaintiff Wisconsin Manufacturers & Commerce is Wisconsin’s largest business trade association, representing more than 3,700 employers of every size and from every sector of the economy. WMC maintains its office at 501 E. Washington Avenue, in the City of Madison, Dane County, Wisconsin. The release confidential medical information of the employees of WMC’s members will violate those employees’ right to privacy and unfairly harm the reputation of WMC’s members.

6. Plaintiff Muskego Area Chamber of Commerce is a trade association representing employers in Waukesha County, Wisconsin. MACC maintains its offices at S73 W16485 Janesville Road, in the City of Muskego, Waukesha County, Wisconsin. The release confidential medical information of the employees of MACC’s members will violate those employees’ right to privacy and unfairly harm the reputation of MACC’s members.

7. Plaintiff New Berlin Chamber of Commerce and Visitors Bureau is a trade association representing employers in Waukesha County Wisconsin. NBCC maintains its offices at 13825 W. National Avenue in the City of New Berlin, Waukesha County, Wisconsin. The release confidential medical information of the employees of NBCC's members will violate those employees' right to privacy and unfairly harm the reputation of NBCC's members.

8. Defendant Tony Evers is Governor of the State of Wisconsin and is sued in his official capacity. Defendant Evers maintains his office at 115 East, Wisconsin State Capitol, in the City of Madison, Dane County, Wisconsin. Defendant Evers ordered the release patient-identifiable data from confidential medical records in violation of Wis. Stat. 146.82(2)(a)(20) and 146.82(5)(c).

9. Defendant Andrea Palm is the Secretary-Designee of the Wisconsin Department of Health Services and is sued in her official capacity. Defendant Palm maintains her office at 1 West Wilson Street, in the City of Madison, Dane County, Wisconsin. Defendant Palm plans to release patient-identifiable data from confidential medical records in violation of Wis. Stat. 146.82(2)(a)(20) and 146.82(5)(c).

10. Defendant Joel Brennan is the Secretary of the Wisconsin Department of Administration and is sued in his official capacity. Defendant Brennan maintains an office at 101 E. Wilson Street, 10th Floor, in the City of Madison, Dane County, Wisconsin. Defendant Brennan disclosed the plan to release patient-identifiable data

from confidential medical records in violation of Wis. Stat. 146.82(2)(a)(20) and 146.82(5)(c) to Plaintiff WMC.

JURISDICTION AND VENUE

11. This is an action for declaratory and injunctive relief under Wis. Stat. §§ 806.04 and 813.01.

12. Venue in this Court is proper pursuant to Wis. Stat § 801.50(2)–3.

STATEMENT OF FACTS

13. Wisconsin Statute Section 146.82 requires any person, including government actors, to keep confidential the information contained in medical records. Any record “related to the health of a patient prepared by or under the supervision of a health care provider” is a “[p]atient health care record[],” Wis. Stat. § 146.81, and therefore must be kept confidential. Wis. Stat. § 146.82.

14. Moreover, any person, including “the state or any political subdivision,” with information from a patient health care record is required to keep that information confidential. Wis. Stat. § 146.84.

15. Consistent with this strong policy of protecting the privacy of medical information, the statutes permit DHS to release health data to the public only if it does so in a way that prevents identification of patients or their employers. Thus, under Chapter 153, the Department of Health Services (“DHS”) collects, analyzes, and distributes data relating to the quality assurance of medical providers. Wis. Stat. § 153.05. When DHS gathers and releases health data for “public use” under Chapter

153, it must “*protect[] by all necessary means*” “[t]he identification of *patients, employers, or health care providers.*” Wis. Stat. § 153.45(1)(b) (emphases added).

16. Further, these statutes prohibit DHS from releasing to any but a few enumerated entities¹ “patient-identifiable data,” which data includes a “[p]atient’s employer’s name.” Wis. Stat. § 153.50(1)(b), (4), (5).

17. On September 30, 2020, Defendant Brennan informed Plaintiff WMC that Defendants Evers and Palm plan to release the names of all Wisconsin businesses with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close case contacts that were investigated by contact tracers.

18. For each business that meets the criteria dating back to at least May 2020, Defendant Brennan informed Plaintiff WMC that Defendants plan to release the businesses’ name and the number of known or suspected cases of COVID-19.

19. Defendant Brennan further stated there are more than 1,000 employers that meet the administration’s criteria.

20. Defendant Brennan informed Plaintiff WMC that the release is being made in response to public records requests.

21. Defendant Brennan stated that the information will be released on Friday, October 2, 2020.

¹ These entities include agents of DHS, of the entity responsible for collecting data for DHS, agencies of the state or federal government, and health-care providers. Wis. Stat. § 153.50(4)(a)1.–4. Furthermore, this information may be shared only for limited, specified purposes. *Id.*

22. The information that Defendants plan to release is information from confidential medical records and therefore cannot be disclosed. Information about whether an employee of a facility has tested positive for COVID-19 can come only from the individual's medical records. Thus, Defendants seek to release the results of medical diagnostic tests conducted on numerous individuals. That information is protected, confidential health care information that cannot be released without the informed consent of each individual. Wis. Stat. § 142.82

23. While Wisconsin Statute Section 146.82 provides that medical information may be released if “the circumstances of the release do not provide information that would permit the identification of the patient.” Wis. Stat. § 146.82(2)(a)20, releasing a patient's employer's name would permit identification of the patient. Indeed, such information is classified in other statutes as “patient-identifiable data.” Wis. Stat. § 153.50(1)(b)(1)(i); *see also* 45 C.F.R. § 164.514(b)(1)(2) (requiring removal of employer information to de-identify medical data); Wis. Stat. § 943.201(1)(b) (“Personal identifiable information” includes “[a]n individual's employer or place of employment.”).

24. Given the relatively small number of employees at any given facility, it would not be difficult for co-workers or community members to discern the identity of the employee or employees who have tested positive for COVID-19. Thus, releasing the information that Defendants plan to release would permit identification of the patient and is not permitted by Section 146.82(2)(a)20.

25. Nor is the release of the information permitted under Wisconsin's Open Records Law, Wis. Stat. §§ 19.31, et seq. Section 146.82 stands as a statutory exemption for patient health care records from the open records law.

26. Moreover, even if an exemption did not apply, the public-interest balancing test weighs against disclosure because the public interest in non-disclosure of private medical information heavily outweighs the public interest in disclosure.

27. In addition to violating the privacy interests of the employees of Plaintiffs' members, Defendants' planned disclosure will irreparably harm Plaintiffs' members by effectively blacklisting them and permanently harming their reputations. If any of Plaintiffs' members are listed in Defendants' release (as some most assuredly will be, given the breadth of Plaintiffs' memberships and of Defendants' planned release), such information will imply that the businesses are somehow at fault for COVID-19.

28. This is especially troublesome given Defendants' plan to release information dating as far back as May. Thus, it is quite likely that the public will suspect that businesses who were never exposed to COVID-19, or who may have been exposed only months ago, are actually coronavirus "hotspots," and avoid those businesses entirely.

CAUSES OF ACTION

COUNT I – FOR A DECLARATION THAT THE RELEASE OF THE NAMES OF WISCONSIN BUSINESSES WITH OVER 25 EMPLOYEES THAT HAVE HAD AT LEAST TWO EMPLOYEES TEST POSITIVE FOR COVID-19 OR THAT HAVE HAD CLOSE CASE CONTACTS THAT WERE INVESTIGATED

BY CONTACT TRACERS VIOLATES WISCONSIN LAW

29. Plaintiffs incorporate and reallege all of the previous allegations in the Complaint.

30. Plaintiffs seek a declaration that Defendants' plan to release the names of Wisconsin businesses with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close contacts that were investigated by contact tracers is unlawful.

31. The information that Defendants plan to release is derived from diagnostic test results and the records of contact tracers investigating COVID-19, and constitutes "[p]atient health care records" that must be kept confidential. Wis. Stat. §§ 146.81, 146.82.

32. Although Section 146.82 provides that medical information may be released if "the circumstances of the release do not provide information that would permit the identification of the patient," Wis. Stat. § 146.82(2)(a)20, releasing a patient's employer's name would permit identification of the patient. Thus, releasing the information that Defendants plan to release would permit identification of the patient and is not permitted by Section 146.82(2)(a)20.

33. Nor is Defendants' planned disclosure required under the Wisconsin Open Records Law, Wis. Stat. §§ 19.31, et seq. Wisconsin Statute Section 146.82 provides a statutory exemption for patient health care records from the open records law. Further, the public interest balancing test weighs against disclosure.

34. In addition to violating the privacy interests of the employees of Plaintiffs' members, Defendants' planned disclosure will irreparably harm Plaintiffs'

members by effectively blacklisting them and permanently harming their reputations.

35. Plaintiffs' planned disclosure thus violates Wisconsin statutes.

Prayer for Relief

WHEREFORE, Plaintiffs request the following relief:

- A. A declaration that Defendants' plan to release the names of Wisconsin businesses with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close contacts that were investigated by contact tracers is unlawful.
- B. An injunction prohibiting Defendants from releasing the names of Wisconsin businesses with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close contacts that were investigated by contact tracers is unlawful.
- C. Such other relief as the Court deems just and proper.

Date: October 1, 2020

Respectfully submitted,

Electronically Signed
/s/ Ryan J. Walsh

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