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VIA EMAIL TO COUNSEL

Governor Anthony Evers
State Capitol
115 East
Madison, WI 53702

Secretary-Designee Andrea Palm
Wisconsin Department of Health Services
Office of the Secretary
1 W. Wilson Street, Room 650
Madison, WI 53703

Re: DHS's Plans to Publicize Names of Businesses Whose Employees Have
Tested Positive for COVID-19

Dear Governor Evers and Secretary Palm:

I represent the owner of several in-state businesses as well as Wisconsin Manufacturers & Commerce, whose 3,700 members employ Wisconsinites in every sector of the economy. It is our understanding that the Department of Health Services (DHS) is contemplating publishing the names of Wisconsin businesses with two or more employees who have tested positive for COVID-19, and, for each business, the number of positive cases. We also understand that, even if DHS chooses not to publish the names of all of these businesses on its own initiative and in a single list (which it has not definitively ruled out), the Department might release names in bursts, as it responds to open-records requests.¹ Because these disclosures would permit third parties to uncover the identity of individuals who have tested positive for COVID-19, they would violate several state and federal laws, all of which protect Wisconsinites' right to privacy in their health records. The disclosures would also likely inflict emotional distress on vulnerable workers and wreak reputational damage on both the patients and the employers. For these reasons and others, we urge you to

¹ See Molly Beck, *Wisconsin's health agency shelves plans to name businesses tied to coronavirus cases after pushback from industry lobbyists, GOP*, Milwaukee Journal Sentinel, Jul. 7, 2020, available at <https://www.jsonline.com/story/news/politics/2020/07/07/wisconsin-shelves-plan-name-businesses-tied-coronavirus-cases-covid-19/5383647002/> (quoting a DHS spokeswoman stating the agency had "no *immediate* plans to post the information [regarding businesses that have had employees test positive] on the website" and noting outstanding records requests from journalists) (emphasis added).

reconsider your contemplated course of action, which would be unlawful for at least three independent reasons.

First, Wisconsin law protects as confidential the information contained in health-care records, including the identity of patients' employers, and therefore DHS may not publicly release that information *even if* doing so would, in the Department's opinion, help to slow the spread of a virus.

a. State law provides that 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[]," the contents of which must remain confidential. Wis. Stat. §§ 146.81(4), .82. This rule extends to information reflected in reports of communicable diseases transmitted to DHS by local health officials: those reports, too, must be treated "as patient health care records" and therefore also must be kept under wraps. Wis. Stat. § 252.05(6).² And while DHS is permitted to release *some* medical information, it may do so only 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 (emphasis added), as naming the patient's employer would.³

The statutes governing DHS's collection and release of general public-health data confirm that a patient's employer's name is confidential health-care information. Under Chapter 153, DHS collects, analyzes, and distributes data relating to the quality of medical providers. Wis. Stat. § 153.05(1)(a). When DHS 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). Indeed, these statutes make clear that DHS may not release "patient-identifiable data," including a "[p]atient's employer's name," to any but a few enumerated entities.⁴ Wis. Stat. § 153.50(1)(b)(i), (4), (5).⁵

² The statute provides a cause of action against, and imposes penalties upon, persons who violate these confidentiality rules, "including the state or a[] political subdivision of the state." See Wis. Stat. § 146.84(1)–(2).

³ Also, to the extent that DHS would be re-disclosing information from a confidential medical record originally disclosed by a third party, in the absence of informed consent or a court order, permissible "redisclosure is limited to the purpose for which the patient health care record was initially received." Wis. Stat. § 146.82(5)(c).

⁴ Those entities include agents of DHS and of the entities responsible for collecting data for DHS; agencies required by state or federal law to obtain such data for "epidemiological investigation or to eliminate the need for duplicative databases"; and health-care providers. Wis. Stat. § 153.50(4)(a)1.–4. This information may be shared only for limited, specified purposes. *Id.*

⁵ Likewise, federal law protects the confidentiality of patient health care information, *see* 45 C.F.R. § 160.103; 45 C.F.R. § 164.502, and treats the name of a patient's employer as "individually identifiable health information," which information may not be disclosed. *See* 45 C.F.R. § 164.514(b)(1), (2).

b. Applying these well-settled legal principles here yields the straightforward conclusion that releasing the names of Wisconsin businesses with employees that have tested positive for COVID-19 would violate state law. Such information could come only from the confidential patient health-care records reported to DHS by local health officials, physicians, and laboratories.⁶ And that information, under Sections 252.05 and 146.82, must remain confidential. If DHS were to breach patient confidentiality, it would face penalties under Section 146.84.

Some might argue that the statute's exception for disclosing information that does not identify a patient applies here. *See* Wis. Stat. § 146.82(2)(a)20. Not so. Publicizing the name of a patient's employer would almost invariably allow *someone*—if only a coworker or friend, at first—to piece together whether a particular person has had the disease. Suppose a particular retail store in Sun Prairie with five cases of the virus were to make DHS's list. Even if DHS refused to name those five patients, it would not take long for one of their coworkers—a prying store clerk, for example, who noticed that several of her colleagues had been out on leave—to figure out (or, perhaps worse, *think* he has figured out) the identity of the mystery quintet. And from there, the fact (or rumor) could quite easily spread, perhaps even to the cashier's reporter-friend eager for the latest coronavirus-related scoop. As this example shows, removing or redacting an employee's name from whatever list or documents that DHS might release is obviously not enough. The employer's name alone “would permit the identification of the patient,” Wis. Stat. § 146.82(2)(a)(20), and therefore its disclosure would be illegal.⁷

Others might counter that, whatever DHS's statutes provide, the open-records law obliges DHS to release this information. That is also incorrect. Because the identity of a patient's employer is part of that patient's confidential health-care record, it is not subject to Wisconsin's open-records law in the first place. *See* Wis. Stat. §§ 19.36(1) (“Any record which is specifically exempted from disclosure by state or federal law . . . is exempt from disclosure under s. 19.35(1).”); 146.82 (patient health-care records are confidential); *see also* Wis. Stat. § 153.55 (health data obtained by DHS under chapter 153 “is not subject to inspection, copying, or receipt under s. 19.35(1).”); *Watton v. Hegerty*, 2008 WI 74, ¶¶ 9–10 (explaining that although

⁶ According to DHS's website, all data about confirmed COVID-19 cases comes from the Wisconsin Electronic Disease Surveillance System, which “is a secure, web-based system designed to facilitate reporting, investigation, and surveillance of communicable diseases in Wisconsin.” WEDSS, Wis. Dep't of Health Servs., <https://www.dhs.wisconsin.gov/glossary/wedss> (Oct. 29, 2014); *COVID-19: Data 101*, Wis. Dep't of Health Servs., <https://www.dhs.wisconsin.gov/covid-19/data-101.htm> (July 10, 2020).

⁷ A DHS rule purports to carve out an exception to the confidentiality rules for disclosing information “as may be needed for the purposes of investigation, control and prevention of communicable diseases.” Wis. Admin. Code § DHS 145.04(2)(d). Even if this rule on its face would allow the action that DHS is considering, the rule would be invalid as applied here, because it would conflict with a statute. *Seider v. O'Connell*, 2000 WI 76, ¶ 72 (“In those cases in which a conflict arises between a statute and an administrative rule, the statute prevails.”).

Wisconsin “recognizes a presumption of accessibility to public records . . . the presumption of access does not create an absolute right of access,” and that in addition to the mandatory statutory exemptions under Wis. Stat. § 19.36, access to records may also be denied “where there is a common law or public policy exception”) (citation omitted).

As a fallback argument, some might invoke DHS’s broadly worded enabling statute to argue that DHS has *implicit* power to publish the names of businesses whose workers have been diagnosed with COVID-19 as part of the Department’s effort to combat the virus. This argument also would fail. It overlooks that “agencies are creatures of the legislature” and “ha[ve] only those powers expressly conferred” by the statutes. *See Myers v. Wis. Dep’t of Nat. Res.*, 2019 WI 5, ¶ 21; *Wis. Legislature v. Palm*, 2020 WI 42, ¶¶ 51–52 (discussing the “explicit authority requirement”). DHS indicates that its published COVID-19 data is pulled from the Wisconsin Electronic Disease Surveillance System. Case data, *COVID-19: Data 101*, Wis. Dep’t of Health Servs. (“All data are laboratory-confirmed cases of COVID-19 that we extract from our live Wisconsin Electronic Disease Surveillance System (WEDSS) and freeze once a day.”).⁸ While Section 252.02 provides that DHS may “establish systems of disease surveillance,” such as the WEDSS, Wis. Stat. § 252.02(1), neither it nor any other statute empowers DHS to *publish* this data. On the contrary, the Legislature has provided that “the entity under contract under s. 153.05(2m)(a) shall prepare and publish a public health care emergency dashboard” relating to COVID-19. Wis. Stat. § 153.23.⁹ The law further provides that DHS and the entity must “enter into a data use agreement and mutually agree to the health care emergency preparedness program information the department will provide to the entity, the information the entity will include in the dashboard, any publication schedule, and any other terms considered necessary by the entity or the department.” *Id.* This legislative grant of authority to an entity other than DHS to publish data on a communicable disease indicates that DHS itself does not otherwise have the authority to publish this data. *See FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27 (“the express mention of one matter excludes other similar matters [that are] not mentioned”) (citation omitted). Anyway, even if DHS had implicit authority to publish *some* of this data itself, that power plainly would not encompass the authority to release patients’ employers’ names, since that is an act that other statutes *forbid*.

Second, publishing employer names would also likely violate the patient-employees’ “substantial privacy interest” under the Fourteenth Amendment “in the

⁸ <https://www.dhs.wisconsin.gov/covid-19/data-101.htm>.

⁹ The Wisconsin Hospital Association Information Center runs this dashboard. *See COVID-19 Situational Awareness Update*, Wisconsin Hospital Association, available at <https://www.wha.org/COVID19Update>; *State COVID-19 Relief Legislation Now Law, Includes Priorities to Protect Access to Care*, Wisconsin Hospital Association (April 16, 2020), <https://www.wha.org/MediaRoom/WHANewsletter/2020/04-16-2020/1>.

confidentiality of their medical information.” *Schaill by Kross v. Tippecanoe Cty. Sch. Corp.*, 864 F.2d 1309, 1322 n.19 (7th Cir. 1988).

a. In addition to the statutory protections provided to patient medical data, Wisconsinites have a “substantial privacy interest” under the Fourteenth Amendment “in the confidentiality of their medical information.” *Schaill*, 864 F.2d at 1322 n.19 (citing *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977)); *Denius v. Dunlap*, 209 F.3d 944, 955–56 (7th Cir. 2000). So “clearly established” is this interest that both the Seventh Circuit and the Wisconsin Court of Appeals have held that state officials are not entitled to qualified immunity for unjustifiably requiring disclosure or dissemination of medical information. *Denius*, 209 F.3d at 956–57 (medical records); *Hillman v. Columbia Cty.*, 164 Wis. 2d 376, 403 (Ct. App. 1991) (prisoner’s HIV diagnosis). Courts have held that disclosure of private medical information is unjustified when the government could achieve its goals “without the release of patient identifying information” and the information is released to those “who have no need” for it. *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 552–53 (9th Cir. 2004).

b. Because this data involves a patient’s medical information, the patient has a constitutionally protected privacy interest in that information remaining confidential. *See Schaill*, 864 F.2d at 1322 n.19. So DHS’s release of that information to those “who have no need” for it and for purposes that could be served “without the release of patient identifying information” would abridge a constitutional right. *See Tucson Woman’s Clinic*, 379 F.3d at 552–53. Disclosing this information online, viewable to every person on the planet with internet access, clearly releases the information to those “who have no need” for it.¹⁰ And DHS’s goals of curbing the spread of coronavirus could be achieved without releasing this patient-identifying information, such as by focusing resources on contact-tracing efforts that DHS and local officials are already undertaking.

Third, disclosing the names of businesses with coronavirus cases—which, in turn, would eventually uncover the identity of the patients themselves—could give rise to various tort-law claims. To begin, it could cause the patients themselves, who have already suffered, even more anxiety and emotional distress. *See Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis.2d 627, 632 (1994) (discussing the elements of an emotional distress claim). Making matters worse, if DHS claims that there is an “outbreak” of COVID-19 at any of the businesses, or even mistakenly implies as much, or suggests in its publication that the businesses themselves are somehow at fault for their employee virus cases,¹¹ DHS could be liable for defamation. *See In re*

¹⁰ The same would be true of any plans by DHS to release this information to media outlets.

¹¹ *See, e.g.*, the Oregon Health Authority’s June 24, 2020 COVID-19 Weekly report at 13-14, available at <https://assets.documentcloud.org/documents/6956596/COVID-19-Weekly-Report-2020-06->

July 15, 2020

EimerStahl^{LLP}

Storms v. Action Wisconsin, Inc., 2008 WI 56, ¶ 37 (quoting *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis.2d 524, 534 (1997)).

Basic principles of public policy also militate against disclosure. At a time when Wisconsin business owners are taking extraordinary and expensive steps to ensure the health and safety of their employees and customers, identifying the names of businesses with as few as *two* confirmed cases unfairly creates the impression that the establishments themselves are unsafe, when in fact those cases might have nothing to do with the business (perhaps the employee caught the virus from a family member over the weekend) and involved no exposure to the business, its customers, or its other employees (perhaps the employee was immediately tested and quarantined). In addition, publication of private health information might undermine trust in the medical system and thereby damage DHS's efforts to contain the virus. Patients may be less likely to cooperate with their physicians' requests for information if they suspect that their private health information will be publicly disclosed. The resulting dearth of reliable data would have the effect of both making treatment less effective on the individual level and making the public-health response more difficult to implement state-wide. In fact, publishing this information might even *work against* DHS's interest in protecting public health.

* * *

We sincerely share your concern for the health and safety of all Wisconsinites, and therefore we are very grateful for your attention to this matter. We respectfully request a reply to this letter at your earliest convenience, which reply would indicate whether you agree or disagree with our conclusions. We look forward to engaging in a constructive dialogue on these critical issues.

Sincerely,



Ryan J. Walsh
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24-FINAL.pdf; *see also* Washington Ozaukee Counties COVID-19 Cases Dashboard, *available at* <https://coronavirus-resources.esri.com/datasets/a422d25a1c184f77aec4c414e9f4bc1b>.