STATE OF MICHIGAN

COURT OF CLAIMS

ERIC OSTERGREN, and JASON GILLMAN, JR.,

Plaintiffs,

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING SUMMARY DISPOSITION TO DEFENDANTS

v

Case No. 20-000053-MZ

GOVERNOR GRETCHEN WHITMER, and STATE OF MICHIGAN,

Hon. Cynthia Diane Stephens

Defendants.
_____/

Pending before the Court is plaintiff Jason Gillman Jr.'s motion for preliminary injunction, as well as the parties' competing motions for summary disposition. For the reasons that follow, the motion for preliminary injunction and plaintiffs' motion for summary disposition will be DENIED, and summary disposition will be GRANTED in favor of defendants.

I. BACKGROUND

A. EXECUTIVE ORDER NO. 2020-38

At the heart of this matter is Executive Order No. 2020-38 by the Governor in response to the COVID-19 pandemic. The order, which cited the authority of the Governor under the Emergency Management Act (EMA), MCL 30.401 *et seq.*, as well as the Emergency Powers of Governor Act (EPGA), MCL 10.31 *et seq.*, pertained to deadlines associated with response times

for requests made under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* The order provides, in pertinent part:

> To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders, it is crucial that all Michiganders limit in-person contact to the fullest extent possible. This includes practicing social distancing and restricting in-person work and interaction to only that which is strictly necessary. At the same time, and as memorialized by Michigan's Freedom of Information Act ("FOIA"), 1976 PA 442, as amended, MCL 15.231 et seq., it remains the public policy of this state—and a priority of my administration—that Michiganders have access to "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees," so that they "may fully participate in the democratic process." MCL 15.231(2). To balance this core priority with the steep and urgent demands posed by the COVID-19 pandemic, *it is reasonable and necessary to provide limited and temporary extensions of certain FOIA deadlines*, so that Michiganders may remain informed and involved in their government during this unprecedented crisis without unduly compromising the health and safety of this state and its residents. [Executive Order No. 2020-38 (emphasis added).]

The order applies to all "public bodies" as that term is defined in FOIA; pertinent to the instant case, "public body" refers to local public health departments. See MCL 15.232(h).

B. PLAINTIFFS' FOIA REQUEST

According to plaintiffs' allegations, plaintiff Jason Gillman, Jr. filed a FOIA request with the Kent County Health Department for three categories of records: (1) all communications and responsive records relating to a certain, petition filed by Kent County Health Officer Adam London; (2) a copy of the petition; and (3) an order issued in response to the petition by a Kent Circuit Judge. Plaintiff sent the request on or about April 18, 2020. Within one business day of receiving the request, the Kent County Health Department responded with an estimate regarding the time it would take to comply. The response stated that plaintiff Gillman's request had been uploaded and that "The court records are available through the court and communication will be

gathered but in accordance with the extended timelines" in EO 2020-38 because the request required on-site work.

C. PLAINTIFFS' COMPLAINT AND PERTINENT PROCEEDINGS

On or about April 7, 2020, plaintiffs filed a complaint challenging the validity of EO 2020-38 as it concerned FOIA requests. The complaint alleges that EO 2020-38 "ordered massive suspensions and alterations of" FOIA and that these alterations and suspensions ran contrary to this state's Constitution and FOIA. Plaintiffs further allege that neither the EMA nor the EPGA provide the Governor with authority to issue EO 2020-38.

Shortly after submitting his FOIA request plaintiff Gillman moved this Court for a preliminary injunction and show-cause order. The Court notes that at no time did plaintiff Gillman pursue a FOIA claim in Kent Circuit Court as the Act required him to do in the event he believed his rights had been violated with respect to a particular request. See MCL 15.240(1)(b). He asserts that MCL 15.235(2) requires a public body to either grant or deny a FOIA request within 5 business days of receiving the request—unless it requests a one-time, 10-day extension as permitted under MCL 15.235(2)(d). He contends that there is no exception contained within the statute for a pandemic. Plaintiff Gillman contends he has been harmed by Kent County's decision to rely on EO 2020-38 to delay its response to his request. His motion for preliminary injunction asked the Court to enjoin "the effectiveness of Executive Order No. 2020-38 . . . as to the *Freedom of Information Act* abridgement as outlined herein."

The Court held a hearing on the motion for preliminary injunction on May 8, 2020. With respect to the particular harm asserted by plaintiff Gillman, plaintiffs' counsel conceded that his client's access to Kent Circuit Court to challenge the timeliness of Kent County's response was in

no way hindered by the issuance of EO 2020-38. Plaintiffs' counsel argued that the ability to access Kent Circuit Court to redress the particular FOIA violation alleged by plaintiff Gillman was irrelevant, however, because the irreparable injury alleged by plaintiff Gillman was a general interference with his rights under FOIA.

II. ANALYSIS—MOTION FOR PRELIMINARY INJUNCTION

A trial court must consider four factors when determining whether it is appropriate to issue preliminary injunctive relief:

> (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. [*Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).]

Injunctive relief represents "an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted).

The extraordinary remedy of preliminary injunctive relief is not warranted in the matter at hand. Overlooking for now plaintiff Gillman's ability or inability to succeed on the merits, the Court concludes that plaintiff Gillman's request for preliminary injunctive relief is not ripe. The record before the Court reveals that Kent County granted plaintiff Gillman's request, stating that it would gather the records sought. On the surface at least, this response was permitted by MCL 15.234(8), which permits a public body to give a best-efforts estimate regarding the time it will take the public body to fulfill the request. There is thus no apparent, let alone irreparable, injury to plaintiff Gillman, because he cannot establish that there was a FOIA violation, let alone a FOIA

violation brought on by EO 2020-38. "The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim that rests on contingent future events is not ripe." *Shaw v City of Dearborn*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 341701), slip op at 8. Plaintiff Gillman's conjecture about whether the fulfillment of his request will be delayed such that it amounts to a denial of the request, see *King v Mich State Police Dep't*, 303 Mich App 162, 189; 841 NW2d 914 (2013) (explaining that a court will look past a public body's labeling of its FOIA response), does not amount to a live controversy. Plaintiffs' contention rests on speculation. and he has not presented a colorable claim of a FOIA violation based on EO 2020-38. Furthermore, any assertion by plaintiff Gillman that Kent County violated FOIA could have been, and should have been, pursued in Kent Circuit Court. Plaintiff Gillman failed to pursue vindication of his rights under the statute in Kent Circuit Court, as specified in MCL 15.240(1)(b). Nor was he prevented from doing so by anything in EO 2020-38 or otherwise. Preliminary injunctive relief is not warranted on the record before the Court.

Additionally, and for the reasons stated below, plaintiff Gillman's request for preliminary injunctive relief fails because he has no likelihood of success on the merits of his claim regarding EO 2020-38.

III. DEFENDANTS ARE ENTITLED TO SUMMARY DISPOSITION

The parties' have, also filed competing requests for summary disposition. Plaintiffs argue that neither the EMA nor the EPGA provided the authority for the Governor to issue EO 2020-38. With respect to the EPGA in particular, plaintiffs argue that the statute would be an unconstitutional delegation of legislative authority if it permitted the Governor to suspend or alter portions of FOIA.

The Court rejects plaintiffs' contentions because, at a minimum, the EPGA authorized and continues to authorize the issuance of EO 2020-38 and because the EPGA is not an unconstitutional delegation of legislative authority. Turning first to the issue of whether the EPGA authorized the issuance of EO 2020-38, the statute provides that:

> During times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled, either upon application of the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police or upon his or her own volition, the governor may proclaim a state of emergency and designate the area involved. [MCL 10.31(1).]

When the Governor proclaims a state of emergency based on great public crisis, public emergency, or upon the imperiling of public safety, she "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). The EPGA states that the Legislature's intent in passing the Act was:

> to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this act shall be broadly construed to effectuate this purpose. [MCL 10.32.]

Citing public health concerns, the benefits of social distancing, and the highly communicable nature of COVID-19, defendants' briefing argues that EO 2020-38 was, consistent with MCL 10.31(1), reasonable and necessary to protect public health and safety. Plaintiffs have not seriously challenged the existence of the Covid-19 pandemic, but instead argue that the EPGA does not, and cannot, as a matter of constitutional law, grant the Governor authority to "amend" FOIA. This assertion is unavailing. EO 2020-38 requires a response "within 10 business days" of actual receipt of a written request at the public body's physical address. The order modifies the FOIA time line with the insertion of "actual receipt". Presumptively this change reflects the effects

of the stay at home order which has closed the offices of many public body's, reduced staff in others and delayed ordinary mail service. Under FOIA, a public body already had the right to request a one-time, 10-business day extension under MCL 15.235(2)(d). While EO 2020-38 eased response times and compliance times under FOIA, it did not eliminate or fundamentally alter a public body's FOIA obligations. Thus, in light of the unchallenged public health concerns cited by defendants, the Court concludes that the order was within the scope of the Governor's authority granted by the EPGA because it was reasonable and necessary for the protection of life and/or to bring the spread of COVID-19 under control.

On the question of whether the EPGA occasions an unconstitutional delegation of legislative authority, the Court once again disagrees with plaintiffs. For the reasons articulated more fully in the simultaneously issued decision in *Mich House of Representatives v Governor*, (Docket No. 20-000079-MZ), the delegation of authority to the Governor under the EPGA withstands constitutional muster. The Court adopts its pertinent analysis from the *Mich House of Representatives* decision and incorporates it herein.

IV. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' motion for preliminary injunction is DENIED.

IT IS HEREBY FURTHER ORDERED that defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8) and (C)(10), and plaintiffs' competing motion for summary disposition is DENIED.

This order resolves the last pending claim and closes the case.

Dated: May 21, 2020

Cynthia Diane Stephens, Judge
Court of Claims