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FORMAL OPINION

OF

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No. 15-02

January 15, 2015

This opinion, requested by Larry Wolk, Executive Director of the Colorado Department of Public Health and Environment ("CDPHE" or "Department"), addresses the permissible disclosures of the Department's Medical Marijuana Registry ("Registry") to law enforcement who seek verification of Registry patients' recommended amounts of marijuana plants or ounces provided by their physician on the Registry application.

QUESTION PRESENTED AND ANSWER

Question: May the Department's Medical Marijuana Registry verify a patient's recommended amount of marijuana plants and ounces to law enforcement, including the Department of Revenue ("DOR")? Does a registry identification card validate a patient or caregiver's claim to need amounts of marijuana in excess of two ounces or six plants?

Answer: No. Upon a lawful stop or arrest,[1] the Registry is only allowed to disclose to law enforcement whether the presenter is "lawfully in possession" of the Registry card. Possession of a Registry identification card does not validate claims for quantities of marijuana in excess of the presumptive amount of two ounces of usable form marijuana or six plants.[2] *See* COLO. CONST. art. XVIII, §14(3)(a) ("Amendment 20"). Authorization

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[1] The CDPHE is neither authorized nor trained to question the legality of the stop or arrest and should presume law enforcement is engaged in a lawful stop of a person who presents a Registry card.

[2] The Constitution defines the allowable plant limit to be "No more than six marijuana plants, with three or fewer being mature, flowering plants that are producing a usable form of marijuana." COLO. CONST. art. XVIII, § 14(4)(a)(II)

for amounts above that threshold is based upon "medical necessity," which is undefined by Amendment 20, the medical marijuana code, or case law. *See id.* Section (4)(b). Because CDPHE does not determine "medical necessity," it cannot advise law enforcement of the legality of any amounts of marijuana in excess of the presumptive two ounces and six plants. By the terms of Amendment 20, CDPHE's verification of "lawfully in possession" answers only whether the registry identification card itself is valid and accurate.[3]

ANALYSIS

I. The Controlling Law for Registry Disclosures.

The Colorado Constitution requires the Department to disclose Registry information to law enforcement in certain circumstances:

> No person shall be permitted to gain access to any information about patients in the state health agency's confidential registry, ... ,
>
> > except for authorized employees of the state health agency in the course of their official duties and authorized employees of state or local law enforcement agencies
> >
> > which have stopped or arrested a person
> >
> > who claims to be engaged in the medical use of marijuana and
> >
> > in possession of a registry identification card...
>
> Authorized employees of state or local law enforcement agencies shall be granted access to the information contained within the state health agency's confidential registry only for the purpose of verifying that an individual who has presented a registry identification card to a state or local law enforcement official is *lawfully in possession of such card.*

COLO. CONST. art. XVIII, § 14, at (3)(a) (emphasis added).

The Department's release of Registry information to law enforcement is also informed by statute:

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[3] Of note, Amendment 20 does not define either "medical necessity" or "lawfully in possession," and neither the General Assembly nor case law to date has provided any clarification.

> The state health agency shall maintain a registry of this information and make it available twenty-four hours per day and seven days a week to law enforcement for verification purposes. Upon inquiry by a law enforcement officer as to an individual's status as a patient or primary caregiver, the state health agency shall check the registry. If the individual is not registered as a patient or primary caregiver, the state health agency may provide that response to law enforcement. If the person is a registered patient or primary caregiver, the state health agency may not release information unless consistent with section 14 of article XVIII of the state constitution.

C.R.S. § 25-1.5-106(7)(d).

There are two components of disclosing Registry information: (1) what must happen first to authorize disclosure; and if authorized, (2) what information may be disclosed.

The Executive Director's question implicates the second component – that is, assuming that disclosure is authorized, what Registry information may be shared with law enforcement? According to Section 3(a), law enforcement is entitled to verify whether the individual is "lawfully in possession" of the Registry card.

II. Verification of a Registry identification card does not speak to any claim for marijuana amounts in excess of the default six plants or two ounces.

The Registry's limited role means that verifying "lawfully in possession" allows for a release of the information expressly listed in the Constitution at Section 14(3)(c)[4], as well as verifying that the person has complied with Section 3(b) in the application for a registry identification card. This verification ensures the person presenting the card is indeed the patient and not an imposter and, for example, that the card is authentic by describing security features embedded in the card. (See C.R.S. 18-18-406.3(2)).

Verification does not validate or invalidate claims for particular quantities of marijuana. There are different legal mechanisms in Section 14 for (1) someone on the Registry and

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[4] Specifically (at COLO. CONST. art. XVII, § 14(3)(c)):

> (I) The patient's name, address, date of birth, and social security number;
> (II) That the patient's name has been certified to the state health agency as a person who has a debilitating medical condition, whereby the patient may address such condition with the medical use of marijuana;
> (III) The date of issuance of the registry identification card and the date of expiration of such card, which shall be one year from the date of issuance; and
> (IV) The name and address of the patient's primary care-giver, if any is designated at the time of application.

possessing only up to six plants or two ounces, contrasted with (2) someone who is on the Registry but in possession of greater than six plants or two ounces of marijuana.

Amendment 20 declares it to be an "exception"[5] from the criminal law when a cardholder possesses the default amount of six plants or two ounces, and Amendment 20 describes usage within those limits "lawful" when in strict compliance with the limits of the constitution.[6] For the exception to apply, one must obtain a Registry card. COLO. CONST. art. XVIII, § 14, at (2)(b).

To this end, Amendment 20 provides the mechanism for law enforcement to verify registry identification cards, and it requires the presentation of a Registry identification card to law enforcement. As a result, any stop or arrest where the person claiming to be protected by Amendment 20 claims they have a registry card but cannot produce it is not in compliance with the Constitution. *See* C.R.S. § 25-1.5-106(9)(a). Thus, if a person is stopped or arrested and they present a registry identification card that is verified, the use of marijuana is deemed an "exception" from the state's criminal laws, Section (2)(b), and "lawful," Section 4(a).

In contrast, patients or caregivers who possess more than six plants or two ounces (per patient, for caregivers) are not protected by simply possessing a valid Registry card. *See* Section (4)(b). None of the provisions governing the confidential registry, the registry application process, nor the registry verification mechanism address claims of "medical necessity" needed to establish an affirmative defense for possession of "quantities of marijuana in excess" of the default amounts of six plants or two ounces. *Id.*

A Registry card simply does not authorize a patient to any more marijuana than the default amount of six marijuana plants or two ounces.[7] For this reason, when law enforcement encounters such a situation, it is within their discretion to treat the person

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[5] COLO. CONST. art. XVII, § 14, at (2)(b).

[6] *Id.* at (4)(a); *See People v. Watkins*, 282 P.3d 500, 503 (Colo. App. 2012). ("The Amendment provides that it shall be an exception from the state's criminal laws for any patient in lawful possession of a 'registry identification card' to use marijuana for medical purposes. While possession of marijuana remains a criminal offense in Colorado, a patient's medical use of marijuana within the limits set forth in the Amendment is deemed 'lawful' under subsection (4)(a) of the Amendment.") (internal citations omitted); *See also Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 976 (Colo. App. 2011).

[7] *See Beinor*, 262 P.3d at 975 ("Because subsection (4) also provides specific limits for the quantity of marijuana and the number of marijuana plants that may be possessed, we understand the purpose of this subsection as setting the limits beyond which prosecution is not exempted, and not the creation of a separate constitutional right.").

as they deem appropriate. It should be noted that an investigating officer need not refrain from a search or seizure just because the individual might ultimately prove an affirmative defense. *Mendez v. People*, 986 P.2d 275, 281 n.4 (Colo. 1999) ("[W]e reject the defendant's contention that the fact that the medicinal use of marijuana provides an affirmative defense to the charge of possession precludes a finding of probable cause under these circumstances. . . . [A]bsolute certainty is not required before probable cause can be established."). Because CDPHE cannot confirm lawfulness of possession of more than six plants or two ounces of marijuana, law enforcement officers have discretion to continue their investigation, or not, even when there is a valid Registry card.

What the Registry may share aligns with the Registry's role: if a person is in lawful possession of a Registry card, they are allowed to acquire, possess, produce, use or transport six plants or two ounces of medical marijuana – within this limit, it is an exception to the criminal law. The Registry exists to verify this limited exception and interrelated information, not to adjudicate claims for "medical necessity".

CONCLUSION

The Constitution's two-part disclosure standard controls when and what the Registry can disclose to law enforcement, including DOR. When the Registry is allowed to release information, it is limited to verifying whether that person is "lawfully in possession" of the Registry card. Because lawful possession of a registry identification card does not validate a claim to "excess" amounts of marijuana, verification of "lawfully in possession" does not include any specific plant or ounce amounts.

Therefore, upon lawful inquiry from law enforcement, the Registry should not release any recommended plant or ounce amounts. Investigation and observation revealing plant count or weights in excess of the default amounts would be within the law enforcement agencies' discretion to handle as they deem appropriate.

Issued this 15th day of January, 2015.

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