



**COLORADO**  
Department of Revenue  
Enforcement Division - Marijuana  
455 Sherman Street, Suite 390  
Denver, CO 80203

October 25, 2016

*Sent via e-mail to:* [REDACTED]

Jerrico Perez, Esq.  
Vicente Sederberg LLC  
1244 Grant Street  
Denver, CO 80203

**RE: Response to Request for Statement of Position - Confidentiality of Executed Assurance of Voluntary Compliance and Related Documents and Testimony**

Dear Ms. Perez:

This letter is in response to your October 6, 2016, request for a Statement of Position pursuant to Rule M 104(A), 1 CCR 212-1 ("Request"). You have asked for a Statement of Position from the Marijuana Enforcement Division ("Division") as to the following three questions:

1. "Is an Assurance of Voluntary Compliance that is properly signed by a licensee a document that must be held confidential pursuant to the Confidentiality Provision when a local licensing authority requests the AVC for purposes of a renewal hearing?"
2. "Are the investigatory reports and accompanying documents associated with the signed Assurance of Voluntary Compliance documents that must be held confidential pursuant to the Confidentiality Provision when a local licensing authority requests them for purposes of a renewal hearing?"
3. "Are Division statements and testimony associated with the signed Assurance of Voluntary Compliance and any underlying investigation confidential pursuant to the Confidentiality Provision when a local licensing authority seeks such statements and/or testimony for purposes of a renewal hearing?"

In response to these questions, this Statement of Position first addresses generally the analysis that applies in determining whether a report or information is

confidential under the Medical Marijuana Code's confidentiality provision, section 12-43.3-202(1)(d), C.R.S. ("Confidentiality Provision"). It then addresses each of the questions that you have asked.

**A. General determination of whether a report or information is confidential under the Confidentiality Provision.**

The Medical Marijuana Code provides that certain reports and information obtained from a licensee are confidential, and, if confidential, may only be used for certain purposes. Specifically, the Confidentiality Provision states:

(1) The state licensing authority shall:

...

(d) Maintain the confidentiality of reports or other information obtained from a medical or retail licensee containing any individualized data, information, or records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans, or revealing any patient information, or any other records that are exempt from public inspection pursuant to state law. Such reports or other information may be used only for a purpose authorized by this article, article 43.4 of this title, or for any other state or local law enforcement purpose. Any information released related to patients may be used only for a purpose authorized by this article, article 43.4 of this title, or to verify that a person who presented a registry identification card to a state or local law enforcement official is lawfully in possession of such card.

§ 12-43.3-202(1)(d), C.R.S. This provision establishes the parameters for what reports or information are confidential, and then, if confidential, it identifies circumstances under which the reports or information may be used.

**1. Determining whether a report or information is confidential.**

Contrary to your assertion that the "starting point" for analyzing the Confidentiality Provision is that "information is confidential," (see Request at 6), the Confidentiality Provision only makes certain reports or information confidential.

To be confidential under the Confidentiality Provision, a report or information must meet three elements: First, the report or information must be "obtained from a medical or retail licensee." Second, the report or information must "contain[] . . . individualized data, information, or records." Third and finally, the report or information must be "related to the licensee or its operation."

From the Division's perspective, if a report or information does not satisfy any one of these three elements, the report or information is not confidential under the Confidentiality Provision.

**2. If a report or information is confidential, it still may be used and disclosed for certain purposes.**

The Confidentiality Provision does not impose an absolute bar on the use and/or disclosure of confidential information. Rather, the provision allows for the use of confidential information for purposes authorized by the Medical or Retail Marijuana Codes and/or for state or local law enforcement purposes:

Such reports or other information may be used only for a purpose authorized by this article [the Medical Marijuana Code], article 43.4 of this title [the Retail Marijuana Code], or for any other state or local law enforcement purpose.

§ 12-43.3-202(1)(d), C.R.S. Determining whether either of these permissible uses applies generally will depend upon the circumstances of the request—*i.e.*, who is requesting the document and for what purpose.

**B. Is an Assurance of Voluntary Compliance that is properly signed by a licensee a document that must be held confidential pursuant to the Confidentiality Provision when a local licensing authority requests the AVC for purposes of a renewal hearing?**

No. An Assurance of Voluntary Compliance ("AVC") is not a confidential document, and, therefore, it may be disclosed to a local licensing authority. Even if an AVC were considered confidential, or to contain confidential information, it could still be disclosed to a local licensing authority for purposes of a renewal hearing, as local licensing, including licensing renewal and related hearings, is a purpose authorized by the Medical Marijuana Code and/or a local law enforcement purpose.

**1. An AVC is not confidential.**

An AVC is generally not confidential because it is not "a report[] or other information obtained from a medical or retail licensee." See § 12-43.3-202(1)(d), C.R.S. The "obtained from" element does not apply to all reports or information *about* a licensee but, instead, only those reports or information the Division acquires *from* a licensee. See Black's Law Dictionary ("obtain, *vb.* 1. To bring into one's own possession; to procure, esp. through effort"). The AVC is not a report or information that the Division "obtains from" a licensee. Rather, the AVC is a disciplinary document used by the Division in its discretion to resolve, under certain circumstances, allegations that a licensee has violated the Medical

Marijuana Code and/or the rules promulgated thereunder.<sup>1</sup> See Rule M 1204, 1 CCR 212-1. The AVC, in other words, is a Division document that memorializes the Division's allegations and an agreement between the Division and a licensee to resolve those allegations without an administrative hearing.<sup>2</sup>

You contend in your request that Rule M 1201(C)(1), 1 CCR 212-1, broadens the Medical Marijuana Code's Confidentiality Provision to include all Division and State Licensing Authority generated records and information. (See Request at 2.) The Rule provides:

Employees shall maintain the confidentiality of State Licensing Authority and Division records and information. For confidentiality requirements of State Licensing Authority and Division employees who leave the employment of the State Licensing Authority, see rule M 1308 - Confidential Information and Former State Licensing Authority Employees.

Rule M 1201(C)(1), 1 CCR 212-1. The Division does not agree with your interpretation of Rule M 1201(C)(1).

Rule M 1201(C)(1) does not purport to modify or expand the Medical Marijuana Code's Confidentiality Provision. Nor does it state that all State Licensing Authority and/or Division records are subject to the Confidentiality Provision. Your interpretation of Rule M 1201(C)(1), that all such records are confidential and cannot be disclosed, would be a sweeping expansion of the Confidentiality Provision, and it would lead to the absurd result that no reports or information could be disclosed for any purpose (e.g., the Division could not disclose whether a business is licensed).

Rather, Rule M 1201(C)(1) simply requires that Division employees keep confidential reports or information that are in fact confidential under the

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<sup>1</sup> Your Request argues that an AVC is not discipline. (See Request at 5-6). Even if an AVC is not "discipline," an AVC does not satisfy the Confidentiality Provision's "obtained from" element and, therefore, is not confidential.

<sup>2</sup> You note that certain other Colorado codes make "letters of concern" confidential, which, you contend, suggests that an AVC is confidential. (See Request at 6-7 (discussing subsections 12-5.5-302(5) and 12-38-116.5(3)(c)(III), C.R.S.)) The Division does not find that argument persuasive. As an initial matter, an AVC is different in substance than a letter of concern, as an AVC is an action by the Division that asserts violations, may include a payment in response to the alleged violations, and requires an agreement by the licensee not to violate the Medical Marijuana Code or Rules. More to the point, and unlike the letters of concern provisions you cite, there is no specific confidentiality provision in the Medical Marijuana Code or the related rules that designates an AVC as confidential. Under the Medical Marijuana Code's Confidentiality Provision, a report or information is confidential only if it satisfies the three elements described above.

Confidentiality Provision. In other words, Rule M 1201(C)(1) does not establish what is confidential, it just requires employees to comply with the Confidentiality Provision. The Rule does not address when the Division (or the State Licensing Authority) may release information or records. Indeed, your proposed interpretation would create a conflict with the Confidentiality Provision itself, which provides that otherwise confidential reports or other information *may* be used for a purpose authorized by the Medical or Retail Marijuana Codes or for any other state or local law enforcement purpose. Such an interpretation would render the Rule void. *See Hanlen v. Gessler*, 333 P.3d 41, 49 (Colo. 2014) (voiding rule that conflicted with statute). Finally, not only is your interpretation of the Rule in conflict with Colorado public policy, *see* § 24-72-201, C.R.S., the Rule cannot modify or control the Division's obligations to disclose documents in response to a valid subpoena or Colorado Open Records Act ("CORA") request. *See* §§ 24-4-103(4)(b)(IV), -103(8)(a), C.R.S.; *Gessler v. Colo. Common Cause*, 327 P.3d 232, 235 (Colo. 2014) (explaining that an agency "does not have authority to promulgate rules that conflict with other provisions of law").

The Division recognizes that there may be circumstances in which *the content of* an AVC includes reports or information that were "obtained from" a licensee and are confidential under the Medical Marijuana Code or other statute. In that circumstance, the Division would not restrict the entire AVC from disclosure (*e.g.*, in response to a CORA request), but instead would redact any confidential information. However, as discussed in this Statement of Position, if the request for the AVC is from a local licensing authority for purposes of local licensing, including local licensing renewal, then such redactions based on the Confidentiality Provision would be unnecessary as local licensing is a purpose authorized by the Medical Marijuana Code.

**2. Licensing renewal by a local licensing authority is a purpose authorized by the Medical Marijuana Code.**

The Medical Marijuana Code expressly requires that a licensed medical marijuana business be licensed by the State Licensing Authority *and* the relevant local licensing authority. *See, e.g.*, § 12-43.3-310(2), C.R.S. The Medical Marijuana Code further provides that a licensed medical marijuana business must renew its local license prior to the expiration of the license. § 12-43.3-311, C.R.S. The Medical Marijuana Code provides that a local licensing authority may conduct a public hearing on a licensee's renewal application "if the licensee has had complaints filed against it, has a history of violations, or there are allegations against the licensee that would constitute good cause." § 12-43.3-311(1), C.R.S. And the local licensing authority may deny a renewal application for "good cause."<sup>3</sup> *Id.* Thus, local licensing is a purpose authorized by the Medical Marijuana

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<sup>3</sup> As an AVC addresses alleged violation of the Medical Marijuana Code and/or rules, it may be pertinent to a local licensing authority's determination of whether "good cause" exists to deny a renewal application under subsection 12-43.3-311(1), C.R.S. *See* § 12-43.3-104(1.3), C.R.S. (defining "good cause" as including a failure to comply with the Medical Marijuana Code and/or rules).

Code, and in particular as relevant to your question, a local licensing authority's consideration, investigation, and determination of a licensee's renewal application, including holding a renewal hearing, are purposes authorized by the Code.

This interpretation is also supported by the overall structure and purposes of the Medical Marijuana Code, which include the establishment of a dual state-local licensing scheme. Permitting information sharing with local licensing authorities is consistent with, and necessary for, the dual licensing structure mandated under the Code. Put differently, inhibiting information sharing with local licensing authorities would impede the execution of the statute, which would be contrary to Code's purposes and the General Assembly's intent. *See, e.g., State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000) ("In any event, the ultimate goal is to determine and give effect to the intent of the General Assembly; in doing so, a reviewing court must follow the statutory construction that best effectuates the intent of the General Assembly and the purposes of the legislative scheme.").

Accordingly, as local licensing renewal and renewal hearings are purposes authorized by the Code, an AVC may be disclosed to a local licensing authority for purposes of licensing renewal.

### **3. Local licensing is a law enforcement purpose.**

Because local licensing, including licensing renewal, is a purpose authorized by the Medical Marijuana Code, it is unnecessary to determine whether local licensing is also a law enforcement purpose within the meaning of the Confidentiality Provision. The Division notes, however, that contrary to your assertion (*see* Request at 4), the Confidentiality Provision's use exception for state or local law enforcement purposes, broadens, rather than narrows, the authorization to use confidential information.

The Confidentiality Provision does not restrict the law enforcement use provision to only "criminal" law enforcement. As the Colorado Supreme Court has explained, the phrase "law enforcement" does not necessarily mean "criminal" law enforcement; rather, the term may encompass civil and regulatory enforcement. *See Hung Ma v. People*, 121 P.3d 205, 210 (Colo. 2005) ("In the broadest sense, the phrase 'law enforcement' means not only the enforcement of criminal laws but also the enforcement of civil regulations. . . . The broad meaning of the phrase 'law enforcement' includes the enforcement of both criminal laws and civil regulations." ).<sup>4</sup> The language in the Confidentiality Provision and the purposes

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<sup>4</sup> Your request for position statement appears to misstate the analysis in *Land Owners United, LLC v. Waters*, 293 P.3d 86 (Colo. App. 2011), *writ granted* by 2012 Colo. LEXIS 56 (Colo. Aug. 13, 2012), *writ denied as improvidently granted* by 2012 Colo. LEXIS 701 (Colo. Sept. 6, 2012). (*See* Request at 4.) There, the Court of Appeals stated the "law enforcement" can include civil and regulatory enforcement. *See* 293 P.3d at 92 ("On the one hand, it could mean only criminal law enforcement records, . . . or on the other hand, it could also include records of civil law enforcement activity[.]"). The Court of Appeals adopted a narrower

behind the Medical Marijuana Code support a broader interpretation of the phrase “law enforcement” here.

Specifically, the Confidentiality Provision states that confidential reports or information “may be used only for a purpose authorized by [the Medical or Retail Marijuana Codes] or for *any other* state or local law enforcement purpose.” § 12-43.3-202(1)(d), C.R.S. (emphasis added). The use of the phrase “any other” indicates an intent by the General Assembly that “law enforcement purpose” have a broad meaning. “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). The use of the term “other” is a reference back to purposes authorized by the Medical Marijuana Code and Retail Marijuana Code, which includes not only criminal enforcement, *see, e.g.*, §§ 12-43.3-901 and 12-43.4-901, C.R.S., but also, and primarily, civil and regulatory enforcement. Thus, from the Division’s perspective, the use exception “for any other state or local law enforcement purpose” encompasses any civil, regulatory, or criminal enforcement undertaken by state or local governmental entities.<sup>5</sup> In addition to the text of the Confidentiality Provision, this broader interpretation furthers the purpose of the Medical Marijuana Code, which includes comprehensive regulation of the marijuana industry at the state *and* local level “for the protection of the economic and social welfare and the health, peace, and morals of the people of this state.” 12-43.3-102(1), C.R.S.

- C. Are the investigatory reports and accompanying documents associated with the signed Assurance of Voluntary Compliance documents that must be held confidential pursuant to the Confidentiality Provision when a local licensing authority requests them for purposes of a renewal hearing?

No. Although investigative reports and/or accompanying documents associated with an AVC would contain information obtained from a licensee, and which trigger the Confidentiality Provision, the two exceptions to the confidentiality requirement apply. That is, local licensing, including licensing renewal, is a purpose authorized by the Medical Marijuana Code and/or is a local law enforcement purpose. Accordingly, the Division may provide, subject to other considerations and legal restrictions apart from the Confidentiality Provision,

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reading of the phrase “law enforcement” in the former version of CORA based upon legislative history, prior case law, and public policy considerations related to the particular statute at issue. *See id.* at 93-95.

<sup>5</sup> If local licensing, including local licensing renewal, were somehow construed to not be purposes authorized by the Code, local licensing would be a local law enforcement purpose under the above analysis. Thus, confidential reports and information could still be shared with local licensing authorities for such purposes.



investigative reports and/or accompanying documents to a local licensing authority for purposes of local licensing, including licensing renewal.

1. **Licensing renewal by a local licensing authority is a purpose authorized by the Medical Marijuana Code.**

For the reasons given above, local licensing, including local licensing renewal, is a purpose authorized by the Medical Marijuana Code. Accordingly, investigative reports and/or accompanying documents associated with an AVC may be provided to a local licensing authority for those purposes.

2. **Local licensing is a law enforcement purpose.**

For the reasons given above, and in addition or in the alternative, local licensing, including local licensing renewal, is a local law enforcement purpose. Accordingly, investigative reports and/or accompanying documents associated with an AVC may be provided to a local licensing authority for those law enforcement purposes.

- D. **Are Division statements and testimony associated with the signed Assurance of Voluntary Compliance and any underlying investigation confidential pursuant to the Confidentiality Provision when a local licensing authority seeks such statements and/or testimony for purposes of a renewal hearing?**

No. Even if the Division statements or testimony would otherwise be confidential (*e.g.*, revealing confidential licensee information gathered during an investigation), local licensing, including licensing renewal, is a purpose authorized by the Medical Marijuana Code and/or a local law enforcement purpose. Accordingly, the Division may provide statements about an AVC and/or the underlying investigation to a local licensing authority, and may testify about an AVC and/or the underlying investigation at a local licensing renewal hearing.

1. **Licensing renewal by a local licensing authority is a purpose authorized by the Medical Marijuana Code.**

For the reasons given above, local licensing, including local licensing renewal, is a purpose authorized by the Medical Marijuana Code. Accordingly, even if Division statements or testimony are confidential, they may be provided to a local licensing authority for those purposes.

2. **Local licensing is a law enforcement purpose.**

For the reasons given above, and in addition or in the alternative, local licensing, including local licensing renewal, is a local law enforcement purpose.



Accordingly, even if Division statements or testimony are confidential, they may be provided to a local licensing authority for those law enforcement purposes.

Thank you for your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read 'James Burack', written in a cursive style.

James Burack  
Director  
Marijuana Enforcement Division

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October 6, 2016

Director Jim Burack  
Marijuana Enforcement Division  
1697 Cole Blvd., Suite 200  
Lakewood, CO 80401  
Sent via email: [Alan.Call@coag.gov](mailto:Alan.Call@coag.gov)

Director Burack:

This request for a statement of position is filed pursuant to the Colorado Administrative Procedure Act and Rule M 104. This request is filed on behalf of a client, who is currently licensed at both the state and local level. Given the nature of this request, my client's identify is not identified in this letter, but can be provided to you at your request.

After conferring with the Marijuana Enforcement Division (Division), your attorney reported to my co-counsel on September 9, 2016 that: "The Division's position is an executed AVC is a final agency action. Upon execution, the AVC and related documents will be open to public inspection."

In a legal pleading related to these issues, the State Licensing Authority (SLA) stated that the above statement was an "informal email" and not actually the Division's position. However, the SLA also stated in the same pleading that an executed AVC is "not" confidential.

Notwithstanding that the Division's attorney told my co-counsel the Division's position (and identified it as such) and that the SLA has stated in a pleading that an executed AVC is not confidential pursuant to section 12-43.3-202(1)(d), C.R.S., (the Confidentiality Provision), the SLA is stating that we must file a request for a position statement.

Accordingly, we seek the Division's response for the following questions:

1. **Is an Assurance of Voluntary Compliance that is properly signed by a licensee a document that must be held confidential pursuant to the Confidentiality Provision when a local licensing authority requests the AVC for purposes of a renewal hearing?**
2. **Are the investigatory reports and accompanying documents associated with the signed Assurance of Voluntary Compliance documents that must be held confidential pursuant to the Confidentiality Provision when a local licensing authority requests them for purposes of a renewal hearing?**
3. **Are Division statements and testimony associated with the signed Assurance of Voluntary Compliance and any underlying investigation confidential pursuant to the Confidentiality Provision when a local licensing authority seeks such statements and/or testimony for purposes of a renewal hearing?**

My position is that a signed AVC must be held confidential pursuant to the Confidentiality Provision and that all of the above questions must be answered in the affirmative. The following is my analysis, which is consistent to the analysis in this matter's associated lawsuit and something your legal counsel discussed with the Division prior to providing my co-counsel the Division's "position":

1. *The Starting Point for the Division is that that Documents and Information Are Confidential*

The Division and SLA are governed by strict and sweeping confidentiality requirement, which has been broadly interpreted in Rule M 1201(C). Specifically, the Confidentiality Provision states that the Division and the SLA must:

“Maintain the confidentiality of reports or other information obtained from a licensee containing any individualized data, information, or records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans, or revealing any customer information, or any other records that are exempt from public inspection pursuant to state law. Such reports or other information may be used only for a purpose authorized by this article or for any other state or local law enforcement purpose. Any customer information may be used only for a purpose authorized by this article.” C.R.S. § 12-43.4-202(1)(d).

While this language is broad, the SLA's Rule M 1201(C) has interpreted this provision to apply to Division- and SLA-generated records and information as well. Rule M 1201(C)(1), Duties of State Licensing Authority and Division Employees, says, “Employees shall maintain the confidentiality of State Licensing Authority and Division records and information. For confidentiality requirements of State Licensing Authority and Division employees who leave the employment of the State Licensing Authority, see rule M 1308 - Confidential Information and Former State Licensing Authority Employees.”

The statement of basis and purpose is the portion of the rule that clarifies from where an agency derives its authority to promulgate the rule, as well as the agency's rationale. *See Citizens for Free Enter. v. Dept. of Rev.*, 649 P.2d 1054 (Colo. 1982) (The statement of basis and purpose assures that the administratively perceived necessity for the rule will be explicated, and serves to provide a reference point against which the validity of the rule can be measured. It removes the review process from the realm of speculation and provides a context within which meaningful judicial review can occur.) Notably, the statement of basis and purpose for Rule M 1201(C) includes the Confidentiality Provision as one of its bases, showing the intent of the SLA to interpret the Confidentiality Provision in the rule.

Further, the rule clarifies that State Licensing Authority and Division employees are subject to further confidentiality requirements if they leave their employment, clarifying that Rule M 1201(C) refers to SLA and Division records and information that are generated while one is employed.

An AVC fits within the Confidentiality Provision and the rule's confidentiality requirement. First, an AVC is a report that contains information obtained from a licensee containing any individualized data, information, or records related to the licensee or its operation. Therefore, it is subject to the Confidentiality Provision. Second, an AVC is also a report generated by Division records. However, the two concepts (information obtained from a licensee or a Division record) are interrelated. In the context of an AVC, any Division records were likely only generated by obtaining information from a licensee during an inspection or other interactions between the Division and the licensee. Further, as the Division would not have authority to be investigating a licensed premises but for the Division's role as regulator, it would be an abuse of power and inherently unfair if a Division employee used his/her authority to enter an otherwise private area and then say the observations derived from that investigation were not considered to be information or data obtained from a licensee. Regardless of from where the information was derived, though, an AVC is subject to the Confidentiality Provision.

## *2. Disclosure of AVC Not Authorized In This Instance.*

There is no catchall exception to authorize disclosure of an AVC without violating the Confidentiality Provision. For example, there is no exception for "final agency actions." Nor is there an exception to authorize confidential information to a local licensing authority for a renewal hearing. In fact, the Confidentiality Provision specifies that information can only be used "for a purpose authorized by [the Medical Marijuana Code] or any other state and local law enforcement purpose."

The Medical Marijuana Code and its associated rules authorized disclosure of confidential information for public hearings. *See* § 12-43.3-601, C.R.S. (SLA has power to discipline a licensee after a public hearing) and Rule M 1304(F)(4)(a) ("Reports and other information that would otherwise be confidential pursuant to Subsection 12-43.3-202(1)(d), C.R.S., may be introduced as exhibits at hearing. Such exhibits shall not be sealed from public

inspection unless confidential pursuant to a provision of law other than Subsection 12-43.3-202(1)(d), C.R.S.”<sup>1</sup>. As discussed below, this provision does not apply to AVCs as an AVC is not a disciplinary action.

The Confidentiality Provision also allows disclosure of confidential documents for a state or local law enforcement purpose. A local licensing renewal hearing is not a law enforcement matter. While the Colorado Open Records Act (CORA) is not relevant here, the analysis related to whether something is a law enforcement matter provides guidance.

Prior to 2011, CORA contained an exception to disclosure of a public record if it was an “investigatory file compiled for any other law enforcement purpose.” C.R.S. § 24-72-204(2)(a)(I), C.R.S. The “other” reference meant any law enforcement investigation other than one conducted by any sheriff, prosecuting attorney, or police department, or any records of the intelligence information or security procedures of any sheriff, prosecuting attorney, or police department. While this exception still exists today, there was another important modification to CORA that warrants identifying the date this initial exception existed before the other modification.

In 2011, the scope of that CORA exception was clarified to exclude matters like local licensing renewal hearings. *See, Land Owners United, LLC v. Waters*, 293 P.3d 86 (Colo.App. 2011) (The CORA investigatory files exemption provided for in subsection 24-72-204(2)(a)(I) regarding law enforcement purpose must be construed narrowly to apply only to investigatory files compiled for criminal law enforcement purposes and not to investigatory files compiled in civil law enforcement proceedings.).

In 2012, CORA was amended to include an exception for civil law enforcement proceedings. *See* C.R.S. § 24-72-204(2)(a)(IX)(A) (allows an agency to deny inspection of “[a]ny records of ongoing civil or administrative investigations conducted by [an agency] in furtherance of their statutory authority to protect the public health, welfare, or safety...”)

In 2014, after CORA was amended, the General Assembly added the Confidentiality Provision to the Medical Marijuana Code. It is appropriate to conclude that the General Assembly was aware of the amendments to CORA as well as the associated case law. Consequently, one can confidently state that the reference to “law enforcement purpose” in the Confidentiality Provision was intended to be narrowly construed.

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<sup>1</sup> The Medical Marijuana Code also authorizes local licensing authorities to conduct public

### 3. *An Assurance of Voluntary Compliance is Not a Final Agency Action*<sup>2</sup>

Your attorney said the Division's position is that an executed AVC is a "final agency action." That term is not used anywhere in the Medical Marijuana Code, and the Confidentiality Provision does not make an exception for final agency actions.

Further, an AVC does not mark the consummation of the Division or SLA's decision-making process. The AVC does not make a decision on whether, as a matter of law, a licensee is subject to discipline for the actions alleged in the document. Although the AVC alleges violations, neither the SLA nor Division has established that the violation occurred and the Licensee does not admit to any wrongdoing. *See* Rule M 1204. In fact, at the point an AVC is signed by a Licensee, the Division has not even referred the matter to the SLA to initiate a formal administrative proceeding that is required to both charge that a violation occurred or make a determination of whether or the alleged violation occurred.

Additionally, Rule M 1204 allows the SLA to take further action on the acts alleged to have occurred in the AVC, making it merely tentative or interlocutory in nature. It is important to note that unlike a settlement agreement— which is often finalized after a charging document, *i.e.* an Order to Show Cause, has been filed – the AVC is not done in lieu of an administrative hearing. Therefore, the AVC is not conclusive of the issues presented, *i.e.*, whether violations occurred.

### 4. *An AVC is Not Discipline.*

An AVC is not discipline and is not connected to the public hearing provision in the Medical Marijuana Code. The AVC rule is not even included in the Discipline Series of the rules (1300 Series). Moreover, the statement of basis and purpose of the AVC rule does not reference any of the Medical Marijuana Code's provision in Part 6, which is entitled "Disciplinary Actions", so there can be no persuasive argument that the intent of the rule was to tie AVCs to discipline.

The AVC rule states that, "An [AVC] may not be considered an admission of a violation for any purpose." Rule M 1204(C). The AVC rule does not carry a penalty of a fine, and instead "may include a stipulation for the voluntary payment of the cost commensurate with the acts or practices and (sic) an amount necessary to restore money or property which may have been acquired by the alleged violator because of the acts or practices." Rule M 1204(B). These factors also weigh against an argument that an AVC is discipline.

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<sup>2</sup> An AVC is also not a "Final Agency Action" which is defined in Rule M 103 mean an Order of the State Licensing Authority issued in accordance with the Medical Code and the State Administrative Procedure Act. The State Licensing Authority will issue a Final Agency Order following review of the Initial Decision and any exceptions filed thereto or at the conclusion of the declaratory order process. A Final Agency Order is subject to judicial review.



None of the other Medical Marijuana Code rules suggest that an AVC is discipline. For example, the term “Final Agency Action” is used 20 times in the rules, but not in the AVC rule. Because the SLA is the only entity authorized to issue a Final Agency Order, absent her involvement in an administrative matter, no final order imposing discipline can exist.

The term “discipline” connotes that a final action occurred, and implies there is punishment imposed to correct a behavior. However, an executed AVC (that is, one signed by the Director of the Division and the Licensee) is not a final action; the AVC rule gives the SLA the discretion to “approve or review an [AVC].” Rule M 1204(D). Even then, there is no punishment as no violations are admitted to and there is not a fine, suspension, revocation, or other limitation on a licensee’s license as a result of signing an AVC.

Regardless of an AVC’s classification (discipline or not), its disclosure is not supported by law. The backdrop against all of this discussion is the starting point for the Medical Marijuana Code: information is confidential, and absent a specific purpose authorizing disclosure of information, it must remain confidential. *See* C.R.S. §§ 12-43.3-202(1)(d) and 12-43.3-201(5); see also Rule M 1201(C).

Assuming for the sake of argument an AVC is a final agency action, section 12-43.4-202(1)(d), C.R.S., only authorizes disclosure of confidential information for a law enforcement purpose or for a purpose authorized by the Medical Marijuana Code. There is no mention of disclosing a document because it is a final agency action in either the Medical Marijuana Code or the rules promulgated pursuant to it.

Essentially, the AVC is a mid-level, non-disciplinary administrative process that does not rise to the level of a final action.

##### *5. Analogous Regulatory Programs Treat AVC-Like Documents As Confidential*

The Division should not conclude that an AVC and its underlying investigatory report are not subject to the Confidentiality Provision. Other regulatory statutes explicitly state analogous documents are confidential while others create specific exceptions for such documents.

An AVC may include allegations, but it is not a formal disciplinary action as the SLA does not charge any violations and the Licensee makes no admissions of wrongdoing. Other regulatory statutes explicitly state that comparable documents issued to a licensee are confidential. For example, section 12-5.5-302(5), C.R.S., of the code that regulates hearing aid providers, addresses the confidentiality of a letter of concern issued to a hearing aid provider licensee stating: “When a complaint or investigation discloses an instance of conduct that does not warrant formal action by the director and, in the opinion of the director, should be dismissed, but the director has noticed indications of possible errant conduct by the licensee that could lead to serious consequences if not corrected, the director may send the licensee a confidential letter of concern.”

Similarly, section 12-38-116.5(3)(c)(III), C.R.S., of the code that regulates nurses, states when an “instance of conduct occurred that does not warrant formal action by the board and that

should be dismissed, but that indications of possible conduct by the nurse were noted that could lead to serious consequences if not corrected. In such a case, a confidential letter of concern shall be sent to the nurse against whom the complaint was made.”

Importantly, neither of the above-listed codes includes a similar broad Confidentiality Provision like the Medical Marijuana Code. But both codes require that letters of concern, which are similar to AVCs, remain confidential. It is reasonable to conclude that the Medical Marijuana Code does not authorize the disclosure of AVCs given that there is no exception to disclose them and other statutes mandate that similar documents remain confidential.

*6. The Documents Related to the AVC and Related Testimony Must Be Held Confidential*

All of the above analysis applies to the investigatory documents and related statements underlying the AVC as there is no exception in the Confidentiality Provision to disclose them.

In addition, other regulatory statutes that do not contain provisions similar to the Confidentiality Provision clarify that final agency actions are disclosable to the public but their underlying documents are not. The purpose of highlighting these statutes is to compare them to Confidentiality Provision to show how disclosing such documents and/or statements would violate the Confidentiality Provision:

C.R.S. §12-61-113(5) (Licensed Real Estate Brokers), C.R.S. §12-61-905.5(5) (Licensed Mortgage Loan Originator); §12-61-1010(4) (Licensed Community Association Manager and Management Company); and §12-61-704(2) (Real Estate Appraiser) all carve out a specific confidentiality exception for final agency orders stating: “Complaints of record in the office of the commission and commission investigations, including commission investigative files, are closed to public inspection. Stipulations and final agency orders are public records subject to sections 24-72-203 and 24-72-204, C.R.S.”

The Medical Marijuana Code does not make any comparable exceptions to the confidentiality requirement. Further, unlike the real estate codes listed above, the Medical Marijuana Code carries the risk of a criminal penalty for disclosure pursuant to C.R.S. § 12-43.3-201(5).

*7. Conclusion*

I believe your counsel provided us with your position on this matter. Further, I believe the SLA has provided her position on this matter. Nonetheless, I am submitting this question for your analysis at your request with the understanding that you may provide a different response.

Neither the Division nor the SLA has authority to disclose the above-discussed information to a local licensing authority for purposes of a renewal hearing. To do so would violate the Medical Marijuana Code.

Thank you for your prompt response to this issue. Your counsel has inferred that you will respond to this substantively and you will expedite such a response.

Sincerely,

/s/ Jerrico Perez

Jerrico Perez, Esq.

VICENTE SEDERBERG