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RESEARCH MEMORANDUM

To: HLB
From: LM
Re: HIPAA Memo
Date: September 13, 2016

Research Query: Determine whether posting medical marijuana (MMJ) recommendations at a collective or cooperative cannabis garden violates federal HIPAA rules.

Summary Answer: It is unlikely that posting MMJ recommendations at a collective or cooperative cannabis garden violates federal HIPAA rules, since (1) the amount of protected health information contained in the recommendations is minimal and (2) since HIPAA does not prevent law enforcement officials from gaining access to such information in certain circumstances. Additionally, if a collective or cooperative cannabis garden obtains a patient's consent to post the recommendation, there is no violation.

Authority:

- HIPAA: The Health Insurance Portability and Accountability Act of 1996 (HIPAA), *Pub. L. No. 104-191, 110 Stat. 1936l,* includes a "Privacy Rule," codified at *45 C.F.R. §§ 160* and *164. See*, R. K. v. St. Mary's Med. Ctr., Inc., 229 W. Va. 712 (2012); Also, the CMIA: Confidentiality of Medical Information Act (CMIA), *Stats. 1981, c. 782, section 2*, codified at *Cal. Civ. Code §§56 – 56.37* (2012).

- U.S. Department of Health & Human Services, *Health Information Privacy (HIPAA information database)*, available at http://www.hhs.gov/hipaa (9/13/2016).

- California Department of Public Health, *Medical Marijuana Identification Card Program,* available at http://www.cdph.ca.gov/programs/mmp/pages/default.aspx.

- State of California Office of Health Information Integrity (a division of California Health & Human Services Agency), *Federal and State Health Laws*, available at http://www.chhs.ca.gov/OHII/Pages/StateandFederalHIPAALaws.aspx (9/13/2016).

- American Civil Liberties Union, *FAQ on Government Access to Medical Records*, available at www.aclu.org/faq-government-access-medical-records (9/13/2016).

- Privacy Rights Clearinghouse, *California Medical Privacy Fact Sheet C1: Medical Privacy Basics for Californians,* available at https://www.privacyrights.org/fs/fsC1/CA-medical-privacy-basics (Last updated 2012).

- Privacy Rights Clearinghouse, *California Medical Privacy Fact Sheet C2: How is Your Medical Information Used and Disclosed—With and Without Consent?,* available at https://www.privacyrights.org/fs/fsC2/CA-medical-uses-disclosures (Last updated 2012).

- Alex Topchishvili, *The Future of Medical Marijuana is HIPAA Compliant*, Potbotics, Aug. 28, 2015.

Detailed Answer: Two main questions form the basis of this inquiry. First, do MMJ recommendations contain information that is protected by HIPAA? Second, are collectives or cooperative cannabis garden sites considered "covered entities" under HIPAA?

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects the privacy of personal medical information. Specifically, the HIPAA "Privacy Rule" prevents the unauthorized disclosure of "protected health information" (PHI), which is individually identifiable health information that is transmitted or maintained electronically or via any other medium. This PHI typically contains unique identifiers such as a person's name, demographic information, known medical conditions, and may also contain billing or financial information as well as any information the patient has provided about family members.1

HIPAA applies to "covered entities" and "business associates" of covered entities. Covered entities include (1) health care providers such as doctors, clinics, nursing homes, pharmacies, dentists, chiropractors, and psychologists; (2) health plans, which include health insurance companies, HMOs, company-provided health plans, and government programs that pay for healthcare such as Medicare and military/veterans programs; and (3) healthcare clearinghouses.2 However, health care providers (mentioned above) are only considered a "covered entity" if they transmit or store patient information in electronic form in connection with a covered transaction.3 "Business associates" in the HIPAA context includes any entity that has a working relationship with a covered entity whereby the business associate provides a service (management, administrative, legal, or otherwise) for the covered entity and in doing so

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1 U.S. Department of Health & Human Services, *Summary of the HIPAA Privacy Rule*, available at http://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html.
2 45 C.F.R. §160.103. *See also* U.S. Department of Health & Human Services, *Covered Entities and Business Associates,* available at http://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html.
3 U.S. Department of Health & Human Services, *Covered Entities and Business Associates*, available at http://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html.

is exposed to patient medical information.4 A covered entity may also be a business associate of another covered entity.5

Under HIPAA, covered entities must notify clients of their privacy practices and how PHI will be used and disclosed. However, there are certain instances when PHI may be used or disclosed without authorization, including when the disclosure is required by law; when disclosure is needed to serve public health activities and purposes; during domestic violence or child abuse investigations; for purposes of health oversight activities (i.e., audits; civil, civil, or administrative investigations; licensing inspections or actions, etc.); judicial and administrative proceedings; and a range of law enforcement purposes, including investigating a crime.6

As a federal law, HIPAA establishes a floor rather than a ceiling, and therefore does not preempt more stringent state privacy regulations regarding personal medical information, unless it would be impossible to comply with both.7 California has enacted the Confidentiality of Medical Information Act (CMIA), which is more protective than HIPAA in certain circumstances. For example, the CMIA requires a separate signed authorization form in order to disclose information considered to be particularly "sensitive," such as records relating to treatment for sexually-transmitted diseases.8 Like HIPAA, there is a broad exception to this rule for law enforcement activities.9 This memo focuses specifically on HIPAA and not CMIA.

Having discussed the definitions of "protected health information" and "covered entity," it must be determined whether MMJ recommendations contain PHI and whether collective gardens are covered entities or business associates to which HIPAA would apply. If so, it must be determined (1) whether posting the recommendations constitutes a violation and (2) what measures can be taken to avoid violating HIPAA.

California MMJ recommendations do not contain a patient's full medical file. Typically, they contain only the patient's name and signature, as well as information about the recommending physician. For patients participating in California's optional Medical Marijuana Identification Program (MMIP), the county-issued card contains no personal information other than the patient's name and photograph, as well as a unique user ID number. Although MMJ recommendations lack the same level of PHI that other records do, since they contain the patient's name and relate to an assessment of health, and since this information is stored in

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4 *Id.*
5 45 C.F.R. §160.103.
6 45 C.F.R. §164.512.
7 American Civil Liberties Union, *FAQ on Government Access to Medical Records*. See also R. K. v. St. Mary's Med. Ctr., Inc., 229 W. Va. 712 (2012).
8 Privacy Rights Clearinghouse, *California Medical Privacy Fact Sheet C1: Medical Privacy Basics for Californians* (2002), https://www.privacyrights.org/fs/fsC1/CA-medical-privacy-basics.
9 Cal Civ. Code §56.10. *See also* Privacy Rights Clearinghouse, *California Medical Privacy Fact Sheet C2: How is Your Medical Information Used and Disclosed—With and Without Consent?* (2012), https://www.privacyrights.org/fs/fsC2/CA-medical-uses-disclosures.

verification databases and recorded on paper, a court would likely consider a recommendation to be PHI under HIPAA.10

The next question is whether collective gardens are covered entities or business associates of a covered entity as defined by HIPAA. As stated above, covered entities include health care providers, health plans, and healthcare clearinghouses. The only of these categories that a collective garden might reasonably fit into is "health care providers," and even that is a stretch, since the collective gardens are not providing health care services the way that doctors, clinics, or even pharmacies do.11 However, collective gardens could be classified as "business associates," since they perform functions that require the use and maintenance of PHI contained in the MMJ recommendations.12 Business associates may enter into contractual agreements with covered entities in which they promise to respect the confidentiality of PHI.13 While there is a lack of precedent indicating whether collective gardens would be considered covered entities or business associates of covered entities, an argument can be made that they are, in which case HIPAA would apply.

Since it is likely that a MMJ recommendation contains PHI and possible that a collective garden is either a covered entity or business associate, a HIPAA violation is possible. However, HIPAA protects against unauthorized disclosure, meaning that PHI can be shared with other entities with the patient's consent. If patients authorize for their MMJ recommendations to be displayed, there is likely no violation since there is no unauthorized disclosure. Additionally, there are circumstances (mainly law enforcement related) where PHI can be obtained by the government even without a patient's authorization. Collective gardens should notify patients of the government's power to obtain this information for law enforcement, administrative, and health oversight purposes.14 Such a notice can be vague and may be displayed on-site or delivered by hand or email to the patients whose PHI is being stored by the collective garden.15 Thus, if collective gardens choose to post MMJ recommendations, they should do so in a location that is not easily accessible to the public so as to limit any unintended disclosure of patient's personal information, but in a location that law enforcement could access if necessary.

END OF MEMO.

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10 46 C.F.R. §160.103

11 Under HIPAA, "the term 'provider of services' means a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or…a fund." 42 U.S.C. § 1395(u).

12 U.S. Department of Health & Human Services, *Business Associates,* available at http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html.

13 U.S. Department of Health & Human Services, *Business Associate Contracts: Sample Business Associate Agreement Provisions* (2013), http://www.hhs.gov/hipaa/for-professionals/covered-entities/sample-business-associate-agreement-provisions/index.html.

14 46 C.F.R. §164.512

15 American Civil Liberties Union, *FAQ on Government Access to Medical Records,* available at www.aclu.org/faq-government-access-medical-records.