



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 6, 1990

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 123

Dr. Wilbur Jay, D.V.M.
Acting Livestock Commissioner
Animal Health Department
712 Kansas Avenue, Suite B
Topeka, Kansas 66603-3808

Re: Livestock and Domestic Animals -- Animal Dealers --
Inspections and Investigations; Authority of
Livestock Commissioner

Synopsis: The Kansas animal dealers act inspection scheme
pertains to the operation of a closely regulated
industry and meets the Fourth Amendment
constitutional tests of reasonableness as set forth
by the United States Supreme Court. There is no
constitutional or statutory provision giving rise
to a "right" of the owner to be present during an
agency inspection of premises falling within the
ambit of the act. The inspection must cover every
condition required to be in compliance with the act
and its accompanying regulations. Cited herein:
K.S.A. 1989 Supp. 41-2601; 47-1701; 47-1702;
47-1703; 47-1704; 47-1706; 47-1707; 47-1707a;
47-1709; 47-1719; 47-1720; K.S.A. 77-624; K.A.R.
9-13-1; 9-13-2; 9-13-3; U.S. Const. Fourth Amend.

* * *

Dear Dr. Jay:

As acting livestock commissioner for the Kansas animal health
department you ask our opinion regarding the "legality" of
inspecting premises required to be licensed or registered
pursuant to the Kansas animal dealers act, K.S.A. 47-1701 et

seq. and amendments thereto. You specifically ask whether such premises may be inspected when the owner is not present and, if such inspection is permissible, the extent of the inspection.

The Kansas animal dealers act requires the licensing of animal dealers' premises (K.S.A. 1989 Supp. 47-1702), pet shops (K.S.A. 1989 Supp. 47-1703), pounds or animal shelters (K.S.A. 1989 Supp. 47-1704), research facilities (K.S.A. 1989 Supp. 47-1720) and the registration of hobby kennels (K.S.A. 1989 Supp. 47-1719).

Upon application for an original license the livestock commissioner or his authorized representative is required to make an inspection of the premises for which a license is sought. K.S.A. 1989 Supp. 47-1709(a). Once a license has been issued, the commissioner is required to inspect the premises once a year if the premises is also licensed under federal law; otherwise inspections are required twice a year. K.S.A. 1989 Supp. 47-1709(b). The commissioner is further directed to inspect premises of persons required to be licensed or registered upon a determination of reasonable grounds to believe that such person is violating the Kansas animal dealers act or rules and regulations adopted thereunder. The commissioner is also required to inspect licensed and registered premises when there are grounds for suspension or revocation of such person's license or certification of registration. K.S.A. 1989 Supp. 47-1709(c).

The purpose of routine inspections of licensed and registered facilities under subsections (a) and (b) of K.S.A. 1989 Supp. 17-4709 is to determine compliance with the statutory provisions of the Kansas animal dealers act and regulations adopted for the administration of the act. Specifically, inspections are to determine whether material misstatements in an original or renewal application have been made [K.S.A. 1989 Supp. 17-1706(a)(1)], whether there has been any willful disregard of any provision of the act or rule or regulation adopted thereunder [K.S.A. 1989 Supp. 47-1706(a)(2)], whether the licensee or registrant is allowing an unlicensed or unregistered person to use the license or registration certificate or whether such license or registration certificate has been transferred to an unlicensed or unregistered person [K.S.A. 1989 Supp. 47-1706(a)(3)], whether substantial misrepresentation has occurred [K.S.A. 1989 Supp. 17-4706(a)(5)] whether the housing facility or primary enclosure is inadequate [K.S.A. 1989 Supp. 47-1706(a)(8)], and whether the feeding, watering, sanitizing and housing practices are consistent with the act and its

rules and regulations [K.S.A. 1989 Supp. 47-1706(a)(9)]. Regulations further specify facility requirements (K.A.R. 9-13-1), animal health and husbandry standards (K.A.R. 9-13-2) and record keeping requirements (K.A.R. 9-13-3).

The statutory scheme clearly contemplates detailed and specific inspections of a licensee's entire operation. The act neither provides for nor requires an administrative search warrant to be obtained prior to conducting such inspections. Therefore, before reaching the specific question posed, a more fundamental issue must be addressed: whether K.S.A. 1989 Supp. 47-1909 which authorizes warrantless inspections violates the Fourth Amendment of the United States Constitution.

We first evaluate the statutory inspection scheme for licensed facilities as set forth in K.S.A. 1989 Supp. 17-4709(a) and (b) in light of the Fourth Amendment which prohibits unreasonable searches and seizures. Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), provides guidance regarding this issue:

"Our prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property. However, unlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. (Citations omitted)."

In reviewing prior cases the Donovan court noted that searches of commercial property were found to be unreasonable if not authorized by law or were unnecessary for the furtherance of governmental interests; if the occurrence of

such inspections was so random, infrequent or unpredictable that the owner for all practical purposes had no real expectation that his property would from time to time be inspected by governmental officials; or if there was no reasonable legislative or administrative standards for conducting an inspection which was authorized by law. The court also noted that the assurance of regularity provided by a warrant may be unnecessary under certain legislative schemes as when an industry has long been subject to close supervision and inspection or when the legislation provides a sufficiently comprehensive and predictable inspection scheme.

"These decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."
Donovan at U.S. 601.

A later case, New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed. 2d 601 (1987) addressed with greater particularity this concept of an attenuated expectation of privacy in commercial property employed in closely regulated industries. The threshold question under Burger is whether the statutory inspection falls within the established exception to the warrant requirement for administrative inspections of closely regulated businesses.

The statutory and regulatory provisions of the Kansas animal dealers act are extensive, requiring licensing or registration, payment of a license or registration fee, compliance with specific conditions of housing and caring for animals, and record keeping. Further, a person engaged in such a business is subject to criminal penalties, as well as loss of license and civil administrative fines for failure to comply with these provisions. For these reasons in our opinion the operation of commercial facilities dealing in animals is a closely regulated industry in Kansas and therefore a search or inspection, if reasonable, falls within the warrant requirement exception as expounded in Burger.

In determining whether warrantless administrative inspections of closely regulated industries were reasonable and therefore constitutionally permissible the Donovan and Burger

courts assessed three criteria: (1) whether there was a substantial governmental interest, (2) whether a warrantless inspection is necessary to further the regulatory scheme, and (3) whether there was certainty and regularity of the statutory inspection program. We will apply the same analysis in evaluating warrantless inspections of licensed premises covered by the Kansas animal dealers act.

(1) Substantial governmental interest: In Kerr v. Kimmell, No. 89-4056-S, slip op. (D.Kan. June 13, 1990), certain constitutional challenges were made to the Kansas animal dealers act. In it's memorandum and order, the court found that "a legitimate local public interest is served by the stated purposes of the act, i.e., quality control and humane treatment of animals." Slip op. at p. 6. This finding by the federal district judge is consistent with the legislative history of the animal dealers act. Minutes, House Committee on Federal and State Affairs, Feb. 5, 1987 and attachments.

(2) Whether a warrantless inspection is necessary to further the regulatory scheme: As explained in U.S. v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) and cited in Burger at U.S. 701:

"If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible."

Effective enforcement of the Kansas animal dealers act is premised on inspections to assure compliance with the act's provisions. Absent inspections, the deterrent value of the act's requirements for humane care and treatment of the animals would be minimal. Further, as pointed out in Burger, surprise is crucial if the regulatory scheme aimed at remedying the social problem is to function at all. Lastly, we note that Kansas law makes no provision for a search warrant under any administrative regulatory scheme. Obviously, in the absence of enabling legislation, a requirement for an administrative search warrant would totally frustrate effective enforcement of the Kansas animal dealers act.

(3) Certainty and regularity of inspection program: As in Donovan the act applies to a specific industry with a notorious history and is specifically tailored to address concerns relating to quality control and humane treatment of animals. The regulatory scheme as promulgated in the act and accompanying rules and regulations are pervasive, covering all aspects of the care and treatment of animals by persons required to be licensed. The regulations define with specificity precisely the conditions of confinement of the animals, health and husbandry standards, as well as particular records which must be kept by persons subject to the act. Persons subject to the act cannot help but be aware that they will be subject to inspection, as well as the defined scope of the inspection as provided by law.

As mentioned, the animal dealers act requires inspection of all licensed animal dealers' premises, pet shops, pounds, animal shelters and research facilities and specifically defines the frequency of inspection. Hobby kennels must be inspected if the commissioner determines there are reasonable grounds to believe violations of the animal dealers act exist. Standards for which compliance is expected are specifically set forth in the animal dealers act or in the Kansas Administrative Regulations. The act, therefore, establishes a predictable and guided state regulatory presence.

Should entry to inspect be refused, the act authorizes the commissioner to initiate an administrative action during which any special privacy concerns may be raised. K.S.A. 1989 Supp. 47-1706; K.S.A. 1989 Supp. 47-1707; K.S.A. 1989 Supp. 47-1707a. This proceeding provides an adequate forum to show that a specific inspection is outside the state regulatory authority or to seek an administrative order accommodating any unusual privacy interest that may exist. Further, the commission may petition the district court to enforce any rule, regulation or order under the civil enforcement provision of the Kansas act for judicial review and civil enforcement of agency actions. K.S.A. 77-624.

Under the analysis provided by Donovan, it is our opinion that the Kansas animal dealers act's inspection scheme for licensed facilities provides a constitutionally adequate substitute for a warrant, and therefore routine inspections made pursuant to the act do not violate the Fourth Amendment of the Constitution.

We now turn to inspections required by section (c) of K.S.A. 1989 Supp. 17-4709. These are inspections of unlicensed premises or unregistered hobby kennels when reasonable grounds

exist to believe violations of the act are occurring (e.g. credible information that a facility is unlicensed/unregistered and/or conditions there violate the act or regulations) and inspections of licensed or registered facilities where grounds exist for suspension or revocation of the license or registration (e.g. credible information that conditions there violate the act or regulations). This statutory inspection scheme contemplates non-routine, unannounced, warrantless searches of a claimed commercial facility. The question presented is whether this regulatory inspection scheme also comports with warrantless search criteria as set forth by the United States Supreme Court.

While Donovan dealt with a routine inspection of a rock quarry as authorized by the federal mine safety and health act of 1977, and therefore did not reach this issue, Burger specifically addressed a non-routine unannounced warrantless inspection of an unlicensed automobile junk yard. Both inspection schemes were upheld as not violative of the Fourth Amendment. As the Court declined to distinguish routine from non-routine administrative searches, we do likewise. The Court in both cases concluded that since the statutory inspection scheme was a closely regulated business and met the three criteria of reasonableness, the inspection was constitutionally permissible. We conclude therefore that the Kansas animal dealers act inspection scheme under K.S.A. 1989 Supp. 47-1709(c) pertains to the operation of a closely regulated industry and meets the criteria of reasonableness as set forth in Donovan and Burger.

We note in passing that while the Kansas Supreme Court has not addressed the issue at hand, nine years prior to Donovan the court gave indications of a compatible position in State v. Dailey, 209 Kan. 707 (1972). The issue involved a warrantless search of a private club and the seizure of gambling equipment pursuant to the licensing and registration of clubs act, K.S.A. 41-2601. In reaching the conclusion that the search was lawful, the court stated that, "the power to inspect is a necessary incident of the power to regulate, if inspection were to be deemed anything less than search, the regulatory provisions of the act would be emasculated." Dailey at 714-715.

We now turn to the specific question you posed, that is, whether the statutorily required inspections are permissible when the owner is not present. The primary issue, as noted, regards the constitutionality of warrantless administrative inspection of premises subject to the animal dealers act. Having determined that such searches do not offend the

Constitution, the issue becomes whether the owner has a right to be present during the inspection.

This leads us to a discussion of the nature of administrative inspections in general. Atchison, T. & S.F. Rly. Co. v. Commission on Civil Rights, 215 Kan. 911 (1974) distinguishes between agency "investigation" and agency "hearing" or "adjudication" functions:

"The term 'hearing' is appropriate to quasi-judicial proceedings while 'investigation' is appropriately used with regard to nonjudicial functions of an administrative agency and the seeking of information for future use rather than proceedings in which action is taken against someone." Atchison at p. 918.

An administrative investigation is not required to take any particular form, Atchison, supra, and an agency may investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Yellow Freight System, Inc. v. Kansas Commission on Civil Rights, 214 Kan. 120 (1974) (citations omitted). There is no constitutional right in anyone to be present at an investigation simply because his conduct is subject to inquiry and he may in the future be prosecuted as a result of information developed during the investigation. State, ex rel., American Oil Co., 202 Kan. 185 (1968). When an agency is conducting nonadjudicative, fact-finding investigations, rights such as appraisal, confrontation and cross-examination generally do not obtain. Atchison, supra, citing Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960).

We conclude that while the owner's presence may be preferable in some circumstances, there is no constitutional or statutory provision giving rise to a "right" to be present during an agency inspection of premises falling within the ambit of the Kansas animal dealers act.

You also ask for guidance regarding the extent of an inspection pursuant to the Kansas animal dealers act. Since the act and accompanying regulations require inspection of all phases of an operation subject to the act, the inspection must cover every condition required to be in compliance with the act and regulations. It is our understanding that many of the animal dealers in Kansas keep required records in their home which serves as an office. Because the United States Supreme Court clearly distinguishes between searches of private homes

and searches of commercial property, we caution against any forced entry or warrantless search an individual's home, albeit that home may also be serving as an office. Since appropriate record keeping is a requirement of a regulation authorized pursuant to the animal dealers act, inspectors do need to review such records. The owner of the premises may, of course, consent to providing such records to an inspector for review. If such consent is not forthcoming, the commissioner may file an administrative action claiming a violation of the act and seek an administrative subpoena.

In conclusion, the Kansas animal dealers act inspection scheme pertains to the operation of a closely regulated industry and meets the Fourth Amendment constitutional tests of reasonableness as set forth by the United States Supreme Court. There is no constitutional or statutory provision giving rise to a "right" of the owner to be present during an agency inspection of premises falling within the ambit of the act. The inspection must cover every condition required to be in compliance with the act and its accompanying regulations.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Camille Nohe
Assistant Attorney General