ALAN WILSON
ATTORNEY GENERAL

February 27, 2019

Kelsey Gilmore-Futeral
South Carolina State Director
Humane Society of the US
839 Law Lane
Mount Pleasant, SC 29464

Dear Ms. Gilmore-Futeral:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter reads as follows:

> Please accept this correspondence as a formal request for an opinion from the Attorney General's office regarding an issue raised on House Bill 3086 that proposes to regulate commercial dog breeders. Based on the most recent House Ag Subcommittee hearing on this bill, the committee has two concerns and I believe the Attorney General may be able to provide an advisory opinion that would be responsive to one of the committee's concern.
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> The specific issue is a 4th Amendment right to privacy concern regarding Section 47-3-1050; specifically, the provision that: The investigator may enter any premises, including the residence of the commercial breeder, where animals maybe bred or maintained during daytime hours while conducting the investigation.
>
> I would greatly appreciate the Office Attorney General's opinion as to whether the language as written raises 4th Amendment privacy issues and, if so, what narrowing language would appease any privacy concerns.

Law/Analysis

It is this Office's opinion that a court may well find that the warrantless administrative search of commercial dog breeders' premises authorized in House Bill 3086, § 1 is constitutionally suspect pursuant to the Fourth Amendment of the United States Constitution. As the request letter explains, House Bill 3086, § 1, as currently drafted, would add Article 16

entitled "Commercial Dog Breeding Standards" to Chapter 3, Title 47 of the South Carolina Code of Laws. House Bill 3086 grants investigators authority to enter certain premises belonging to commercial dog breeders to investigate violations of the article in Section 47-3-1050 as follows:

> Any investigator may, upon receiving a complaint or upon their own suspicion, investigate any potential violation of the provisions of this article. The investigation may include the inspection of the books and records of the commercial dog breeder, the inspection of any companion animal owned by the commercial dog breeder, and the inspection of any place where animals are bred or maintained. The investigator may enter any premises, including the residence of the commercial breeder, where animals may be bred or maintained during daytime hours while conducting the investigation.

Id. Additionally, in Section 47-3-1060, the bill specifies that a person who violates the provisions of the article is guilty of a misdemeanor. Id.

The request letter asks whether these provisions could be interpreted to violate the Fourth Amendment which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[1] While this opinion will analyze why a court may find House Bill 3086 to be constitutionally suspect, it is important to state at the outset that this opinion begins with the understanding that "all statutes are presumed constitutional and, if possible, will be construed to render them valid." Op. S.C. Att'y Gen., 2010 WL 4391638, at *4 (October 18, 2010) (quoting State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009)). Further, "[w]hile this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute 'must continue to be followed until a court declares otherwise.'" Op. S.C. Att'y Gen., 2005 WL 1383357, at *9 (May 2, 2005).

[1] The Fourth Amendment is enforceable against the States through the Fourteenth Amendment. Ker v. State of California, 374 U.S. 23, 30, 83 S.Ct. 1623, 1628 (1963); see also S.C. Const. art. I, § 10 (similarly protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures").

In Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), the Supreme Court of the United States found that the San Francisco Housing Code violated the Fourth Amendment by authorizing housing inspectors to enter a private leasehold without a warrant. The Court explained its historical interpretation of the Fourth Amendment's purpose and the general framework for how it has been applied as follows:

> The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.'
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> ...
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> [O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.

387 U.S. at 528–29 (citations omitted); see also State v. Morris, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015) ("[W]arrantless search is per se unreasonable and violative of the Fourth Amendment unless the search falls within one of several well-recognized exceptions to the warrant requirement."). The Court concluded that administrative searches "are significant intrusions upon the interests protected by the Fourth Amendment" and suggested the following procedure to avoid a constitutional violation:

> [A]s a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry.

387 U.S. at 539–40.

While the Camara Court provided that there are exceptions to the warrant requirement for an administrative search, subsequent case law refined when such exceptions may apply. In New York v. Burger, 482 U.S. 691, 107 S. Ct. 2636 (1987), the Court found the "closely regulated" industry exception to the Fourth Amendment's warrant requirement is applicable to an administrative search of an automobile junk yard. The Court explained the reasoning behind the "closely regulated" industry exception as follows:

> The Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. See v. City of Seattle, 387 U.S. 541, 543, 546, 87 S.Ct. 1737, 1739, 1741, 18 L.Ed.2d 943 (1967). An owner or operator of a business thus has

> an expectation of privacy in commercial property, which society is prepared to consider to be reasonable, see Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes. See Marshall v. Barlow's, Inc., 436 U.S. 307, 312-313, 98 S.Ct. 1816, 1820-1821, 56 L.Ed.2d 305 (1978). An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. See Donovan v. Dewey, 452 U.S. 594, 598-599, 101 S.Ct. 2534, 2537-2538, 69 L.Ed.2d 262 (1981). This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. The Court observed in Marshall v. Barlow's, Inc.: "Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v. United States, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576 (1967), could exist for a proprietor over the stock of such an enterprise." 436 U.S., at 313, 98 S.Ct., at 1821.

482 U.S. at 699–700; see also Rush v. Obledo, 517 F. Supp. 905, 910 n.7 (N.D. Cal. 1981), *aff'd*, 756 F.2d 713 (9th Cir. 1985) (listing industries where warrantless administrative searches have been upheld due to history of pervasive government oversight). The closely regulated industry exception is just that, an exception to the general rule that a reasonable search under the Fourth Amendment requires a warrant. Marshall v. Barlow's, Inc., 436 U.S. 307, 314, 98 S. Ct. 1816, 1821 (1978). The Court noted that this exception turns on "the pervasiveness and regularity of the [] regulation" and on how an owner's expectation of privacy is impacted by the regulation. Burger, 482 U.S. at 701. The Court established three criteria to evaluate whether an industry is closely regulated and, as a result, whether a warrantless inspection of commercial premises may be reasonable.

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. ...
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> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." ...
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> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." Ibid. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See Marshall v. Barlow's, Inc., 436 U.S., at 323, 98 S.Ct., at 1826; see also id., at 332, 98 S.Ct., at

> 1830 (STEVENS, J., dissenting). To perform this first function, the statute must be "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 v. Dewey, 452 U.S., at 600, 101 S.Ct., at 2539. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope." United States v. Biswell, 406 U.S., at 315, 92 S.Ct., at 1596.

482 U.S. at 702-703.

In S.C. Dep't of Revenue v. Meenaxi, Inc., 417 S.C. 639, 790 S.E.2d 792 (Ct. App. 2016), the South Carolina Court of Appeals cited Burger in its decisions upholding a warrantless administrative search by a SLED agent of a convenience store which had a beer and wine permit. The Court held that the search fell within the "pervasively regulated industry" exception to the Fourth Amendment's warrant requirement. The Court explained its reasoning as follows:

> "Because liquor license holders have certainty regarding the statutory and regulatory licensing standards and regarding their obligation to permit inspection of the licensed premises for compliance with those standards, a statutory and regulatory scheme authorizing administrative inspections provides an adequate substitute for a warrant to search those premises." 48A C.J.S. Intoxicating Liquors § 740 (2014). "However, a liquor inspector's statutory and regulatory authority to conduct an administrative inspection is limited to a search of the licensed premises for violations of the liquor statutes and regulations." Id. "Thus, agents may conduct a valid administrative search of a liquor licensee's premises when they enter the premises without a warrant to investigate the possible violation of a regulation prohibiting gambling devices on any premises where liquor is sold because the search covers an administrative, rather than a criminal, violation." Id.

417 S.C. at 652, 790 S.E.2d at 798–99 (emphasis added).

While this exception has been applied by South Carolina state courts, its applicability to the commercial dog breeding industry statutory scheme in the current draft of House Bill 3086 is questionable. First, unlike the inspection at issue in Meenaxi, Section 47-3-1060 explicitly states that the inspections at issue in the bill are designed to uncover criminal violations. This Office has previously opined that criminal search warrants require a higher standard of probable cause than that of an administrative search warrant. Op. S.C. Att'y Gen., 1987 S.C. Op. Atty. Gen. 87 (April 13, 1987). Because the inspection itself is designed to discover criminal violations, the Fourth Amendment privacy considerations are accordingly greater. Id. Second, the argument that a dog breeding business is subject to close government scrutiny has been rejected by New

York state courts.[2] While not binding on South Carolina state courts, this analysis may persuade our courts to likewise reject the exception's applicability to the commercial dog breeding industry.

The request letter also asks this Office to suggest narrowing language which would more likely "appease any privacy concerns." This Office will refrain from wading into the legislative arena. Instead, we note that the General Assembly has previously crafted similar legislation which appears to mirror the practical suggestions of Camara for an inspector to request consent to search first and then obtain an administrative warrant if consent is refused. In the Childhood Lead Poisoning Prevention and Control Act, the General Assembly provided the following procedure to obtain right of entry to investigate lead poisoning:

> When the department is notified of a lead poisoning case, the department, upon presentation of the appropriate credentials to the householder, and with the consent of the householder or his agent, may enter a dwelling, dwelling unit, or childcare facility at reasonable times and in a reasonable manner for the purpose of conducting a lead-based hazard investigation and may remove samples of objects necessary for laboratory analysis. If the householder refuses admission to the premises, the department may obtain an administrative warrant from a court of competent jurisdiction to investigate the premises. This section also applies to secondary residences and any other premises routinely occupied by the child.

S.C. Code Ann. § 44-53-1390. It is this Office's opinion that a court would likely find a statutory scheme that similarly mirrors the Court's guidance complies with the Fourth Amendment.

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[2] See People v. Smith, 125 Misc.2d 782, 480 N.Y.S.2d 443 (Crim. Ct. 1984)

> The fact that the defendant conducted a dog-breeding business did not deprive her of her constitutional right to conduct this business free from unreasonable governmental intrusion. See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 1741, 18 L.Ed.2d 943; G.M. Leasing Corporation v. United States, 429 U.S. 338, 352, 97 S.Ct. 619, 628, 50 L.Ed.2d 530.
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> Therefore, even though the defendant used certain areas of her house for private business purposes, she was still entitled to Fourth Amendment protections and the premises were covered by the Payton ruling.
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> The People further claim that the type of business conducted by the defendant is one that is traditionally subject to close governmental regulation and this factor should severely limit her expectation of privacy. This theory is unsubstantiated by law.

125 Misc.2d at 786, 480 N.Y.S.2d at 447.

Conclusion

It is this Office's opinion that a court may well find that the warrantless administrative search of commercial dog breeders' premises authorized in House Bill 3086, § 1 is constitutionally suspect pursuant to the Fourth Amendment of the United States Constitution. As discussed more fully above, the authorization of warrantless inspections of a commercial dog breeder's premises, including his home, raises fundamental privacy concerns. Further, it is this Office's opinion that a court would likely find the "closely regulated" industry exception to be inapplicable to the commercial dog breeding industry. "While this Office may comment upon what we deem an apparent constitutional defect, we may not declare the Act void. Put another way, a duly enacted statute 'must continue to be followed until a court declares otherwise.'" Op. S.C. Att'y Gen., 2005 WL 1383357, at *9 (May 2, 2005).

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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