



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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January 30, 2007

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The Honorable H. Russell Potts, Jr.
Member, Senate of Virginia
14 North Braddock Street
Winchester, Virginia 22601

Dear Senator Potts,

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire concerning records and inspection requirements for companion animal facilities. Specifically, you ask whether the Secretary of Agriculture and Forestry may: (1) allow private organizations to keep and maintain companion animal records; (2) allow private organizations to perform inspections of companion animal facilities to ensure that they comply with relevant statutes and regulations; (3) waive mandated inspections of companion animal facilities; or (4) permit the operation of noncompliant gas chambers for euthanization of companion animals in such chambers.

Response

It is my opinion that private reporting services are not authorized to administer the records required to be maintained by companion animal facilities. It further is my opinion that private organizations are not authorized to conduct official inspections of companion animal facilities. The State Veterinarian generally has the discretion to determine the time for and frequency of inspections of such facilities. It further is my opinion that the State Veterinarian cannot ignore the known operation of noncompliant facilities or the use of noncompliant procedures to euthanize companion animals. Finally, it is my opinion that the Board of Agriculture and Consumer Services or its designee has the discretion, but is not required, to assess civil fines for such noncompliant facilities or procedures; and the Commissioner of Agriculture and Consumer Services may enjoin or shut down the operations of noncompliant facilities.

Applicable Law and Discussion

I. Privatization of Record Reporting

Chapter 27.4 of Title 3.1, §§ 3.1-796.66 through 3.1-796.129, contains Virginia's "Comprehensive Animal Laws." Section 3.1-796.96 governs the establishment and operation of particular companion animal¹ facilities, specifically county or city pounds. Recordkeeping and reporting

¹Section 3.1-796.66 defines a "companion animal" to include "any domestic or feral dog [or] domestic or feral cat." For purposes of this opinion, it is not necessary to include a list of all the named companion animals.

requirements for those pounds are set forth in § 3.1-796.96(A)(4)-(6). These provisions require pounds to “maintain a written record of the information on each companion animal submitted to the pound” by an animal shelter, a releasing agency, or an individual.² The records must be kept “for a period of 30 days from the date the information is received by the pound.”³ The records must be made available to any person inquiring about a lost companion animal.⁴

Releasing agencies other than pounds or animal shelters also are required to “keep accurate records of each companion animal received for two years from the date of disposition of the companion animal.”⁵ These records must “be made available upon request to the Department [of Agriculture and Consumer Services], animal control officers, and law-enforcement officers at mutually agreeable times.”⁶ In addition to being available for request on demand, releasing agencies must make annual reports⁷ summarizing the records to the State Veterinarian.⁸ Releasing agencies subject to this reporting requirement include any “humane society, animal welfare organization, society for the prevention of cruelty to animals, or other similar entity or home-based rescue, that releases companion animals for adoption.”⁹

The relevant statutes require that the pounds “shall maintain” and the releasing agencies “shall keep” record.¹⁰ The use of the word “shall” in a statute indicates that the General Assembly intends its terms to be mandatory, rather than permissive or directive.¹¹ Therefore, pounds and releasing agencies expressly are required to maintain their own animal records pursuant to §§ 3.1-796.96(A)(4)-(A)(6) and 3.1-796.96:5(A)(2).

In addition, § 3.1-796.105(B) requires

[a]n animal control officer, law-enforcement officer, humane investigator or custodian of any pound or animal shelter, upon taking custody of any animal in the course of his official duties, or any representative of a humane society, upon obtaining custody of any animal on behalf of the society, shall immediately make a record of the matter.... Records required by this subsection shall be maintained for at least five years, and shall be available for public inspection upon request. A summary of such records shall be submitted annually to the State Veterinarian in a format prescribed by him.

²VA. CODE ANN. § 3.1-796.96(A)(4)-(A)(6) (Supp. 2006).

³*Id.*

⁴*See id.*

⁵*See* § 3.1-796.96:5(A)(2) (Supp. 2006).

⁶*See id.*

⁷*See id.* (“A releasing agency other than a pound or animal shelter shall submit a summary of such records to the State Veterinarian annually in a format prescribed by him[.]”).

⁸The “State Veterinarian” “means the veterinarian employed by the Commissioner of Agriculture and Consumer Services.” Section 3.1-796.66 (Supp. 2006).

⁹*See id.*

¹⁰*See* §§ 3.1-796.96(A)(4)-(A)(6), 3.1-796.96:5(A)(2).

¹¹*See* *Andrews v. Shepherd*, 201 Va. 412, 414-415, 111 S.E.2d 279, 281-82 (1959) (discussing intention of legislature in using words “shall” and “may”); *see also* *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that word “shall” in statute generally is used in imperative or mandatory sense).

Thus, § 3.1-796.105(B) requires public officials and custodians of shelters to make and maintain records of the animals of which they gain custody. Again, because § 3.1-796.105(B) uses the phrase “shall immediately make a record of the matter” it is mandatory that the named officials make the required records. (Emphasis added.) Furthermore, there is no statutory authority expressly allowing public officials and custodians of shelters to privatize such statutory obligations.

II. Privatization of Inspections

“The State Veterinarian and each State Veterinarian’s representative shall have the power to conduct inspections of animal shelters, and inspect any business premises where animals are housed or kept ... at any reasonable time, for the purposes of determining if a violation” has occurred.¹² Section 3.1-796.107(A) provides that “[u]pon receiving a complaint of a suspected violation ... any animal control officer, law-enforcement officer, or State Veterinarian’s representative^[13] may, for the purpose of investigating the allegations of the complaint, enter upon, during business hours, any business premises, including any place where animals or animal records are housed or kept.” (Emphasis added.) Therefore, only the State Veterinarian, animal control officers, law enforcement officers, and State Veterinarian’s representatives expressly are authorized to conduct inspections.

III. Failure to Conduct Inspections

The General Assembly has granted to the State Veterinarian the discretion to determine the time for and frequency of inspections of established public pounds and private animal shelters.¹⁴ The State Veterinarian or his designee must, however, inspect all private animal shelters before those shelters may begin to confine or dispose of animals.¹⁵

Section 3.1-796.107(A) states that “[u]pon receiving a complaint of a suspected violation ... any animal control officer, law-enforcement officer, or State Veterinarian’s representative may,^[16] for the purpose of investigating the allegations of the complaint, enter upon, during business hours, any business premises, including any place where animals or animal records are housed or kept.” (Emphasis added.) Therefore, §§ 3.1-796.67:2(A) and 3.1-796.107(A) authorize the State Veterinarian or his representative to inspect companion animal facilities at reasonable times, but do not require regular or specific inspections.

Section 3.1-796.96 governs the establishment and operation of particular companion animal facilities, specifically county or city pounds. This section does not require regular or specific inspection of such facilities. However, § 3.1-796.96:2 governs the establishment and operation of certain other companion animal facilities, specifically private animal shelters. Section 3.1-796.96:2(C) provides that “[t]he State Veterinarian or his designee shall inspect an animal shelter prior to the animal shelter confining or disposing of animals pursuant to this section.” (Emphasis added.) By including the term “shall” with the phrase “inspect an animal shelter” in § 3.1-796.96:2(C), which governs private animal

¹²Section 3.1-796.67:2(A) (Supp. 2006) (emphasis added).

¹³Section 3.1-796.66 defines “State Veterinarian’s representative” to mean “an employee of the Department of Agriculture and Consumer Services who is under the direction of the State Veterinarian.”

¹⁴See § 3.1-796.67:2(A); see also discussion *supra* Part II.

¹⁵See § 3.1-796.96:2(C).

¹⁶See *supra* note 11.

shelters, the statute requires an initial inspection of any facility operated by a private organization. However, § 3.1-796.96, which governs public animal shelters run by local governments, leaves the determination of when to perform an inspection to the discretion of the State Veterinarian unless he receives a complaint about a particular facility.

IV. Compliance with Statutes and Regulations

Finally, the Department of Agriculture and Consumer Services, the Board of Agriculture and Consumer Services, and in particular the State Veterinarian, cannot ignore the known operation of noncompliant facilities or noncompliant procedures used to euthanize companion animals.¹⁷ The Commissioner of Agriculture and Consumer Services¹⁸ has the discretion, but is not required, to enjoin the operation of noncompliant facilities.¹⁹

Section 3.1-796.96(A) requires that the local governing body “shall maintain or cause to be maintained a pound.” (Emphasis added.) Section 3.1-796.96(K) then adds that “[t]he governing body shall require that the pound be operated in accordance with regulations issued by the Board [of Agriculture and Consumer Services].” (Emphasis added.) The Attorney General previously has concluded that “shall” as used in the preceding statutes created a “mandatory duty” in the “establishment and maintenance of the pound,” as well as making the “manner of euthanasia to be used to destroy animals in the pound” mandatory.²⁰ Additionally, the Board’s regulation concerning euthanasia, 2 VAC 5-110-80, provides that “[e]uthanasia shall be performed in compliance with methods approved or prescribed by the State Veterinarian.” (Emphasis added.) Therefore, if the operation of a gas chamber or the procedures used in operating such chamber to euthanize companion animals do not comply with the methods approved by the State Veterinarian, including the requirements in Directive 79-1 of the Division of Animal and Food Industry Services²¹ (“Directive 79-1”), the facility would violate § 3.1-96.96(K) and 2 VAC 5-110-80.²²

Directive 79-1 allows, but with significant warnings, the use of carbon monoxide gas chambers to euthanize companion animals.²³ Although Directive 79-1 provides minimum requirements for the maintenance and operation of such chambers, it does not include mandatory certification or inspection requirements.

¹⁷ See §§ 3.1-796.96(K)-(L), 3.1-796.6:2(J)-(K).

¹⁸ See § 3.1-8 (1994).

¹⁹ See §§ 3.1-796.96(L), 3.1-796.96:2(K).

²⁰ See 1978-1979 Op. Va. Att’y Gen. 93, 93 (interpreting § 29-213.9, predecessor to § 3.1-796.96).

²¹ The State Veterinarian has developed methods approved for animal euthanasia. See DEP’T OF AGRIC. & CONSUMER SERVS., DIV. OF ANIMAL INDUS. SERVS., DIRECTIVE NO. 79-1, METHODS PRESCRIBED OR APPROVED FOR ANIMAL EUTHANASIA & COMPETENCY CERTIFICATION REQUIREMENTS (Nov. 1, 2004), available at <http://www.vdaes.virginia.gov/animals/pdf/euthansiadirective.pdf> [hereinafter “DIRECTIVE 79-1”].

²² In § 3.1-796.67, the General Assembly has authorized the Board of Agriculture and Consumer Services to promulgate rules and regulations or guidelines governing the care and transport of animals. The Board adopted regulations, including 2 VAC 5-110-80.

²³ See DIRECTIVE 79-1, *supra* note 21, Appdx. C, at *10 (providing that “the potential personnel and safety hazards that accompany the use of carbon monoxide for the euthanasia of animals should be strongly considered before using this method of euthanasia. However, if this method is to be used, the following conditions must, at a minimum, be met”).

The Honorable H. Russell Potts, Jr.
January 30, 2007
Page 5

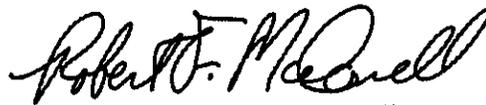
If violations are found after an inspection, § 3.1-796.96(K) provides that “the locality *may* be assessed a civil penalty by the Board [of Agriculture and Consumer Services] or its designee in an amount that does not exceed \$1,000 per violation. Each day of the violation shall constitute a separate offense.” (Emphasis added.) Also, § 3.1-796.96(L) provides that “[i]f ... any laws governing pounds are violated, the Commissioner [of Agriculture and Consumer Services] *may*²⁴ bring an action to enjoin the violation or threatened violation.” (Emphasis added.) By allowing for civil penalties in the form of fines, the General Assembly has given the Board or its designee discretion to assess fines for the continued operation of a facility for minor violations. The fines simply accrue for each day that the facility is operated in a noncompliant manner. The Board may also determine the amount of the fines up to \$1,000 per violation.²⁵ In addition to the civil penalties, the General Assembly has given the Commissioner discretion to obtain injunctive restriction of a noncompliant facility.²⁶

Conclusion

Accordingly, it is my opinion that private reporting services are not authorized to administer the records required to be maintained by companion animal facilities. It further is my opinion that private organizations are not authorized to conduct official inspections of companion animal facilities. The State Veterinarian generally has the discretion to determine the time for and frequency of inspections of such facilities. It further is my opinion that the State Veterinarian cannot ignore the known operation of noncompliant facilities or the use of noncompliant procedures to euthanize companion animals. Finally, it is my opinion that the Board of Agriculture and Consumer Services or its designee has the discretion, but is not required, to assess civil fines for such noncompliant facilities or procedures; and the Commissioner of Agriculture and Consumer Services may enjoin or shut down the operations of noncompliant facilities.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

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²⁴ See *supra* note 11.

²⁵ See § 3.1-796.96(K).

²⁶ See § 3.1-796.96(L).