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11/11/11

Ms. Joy Brand, President
Dog Federation of Wisconsin

VIA email attachment

Dear Joy,

My continued conversations and correspondence with Attorney Daniels, Dr. Bellay's public presentation to the Bernese Mountain Dog Club on November 6th 2011, recent news reports, and public records, have led me to conclude the following:

1. The Department takes the stance that anyone who breeds or sells dogs regardless of the number of dogs they sell is a "business".
2. As a "business" the Department may use its regulatory authority to conduct inspections and searches of any of the areas of a person's home used for conducting this "business".
3. If they request to search and are refused, they can obtain an Inspection Warrant.
4. An Inspection Warrant is not a search warrant and does not require probable cause. It is issued upon "citizen complaint" and refusal of access.
5. If someone is identified to the department as possibly needing a license, this identification is sufficient basis to serve as the "citizen complaint".
6. The Department of Agriculture solicits "citizen complaints" on their web page by asking people to provide the Department with the names of individuals they "think" may need a license. (I believe the web page was modified sometime last week to make this solicitation less prominent.)
7. After receipt of a "citizen complaint" the department will send an unsolicited license application to the individual. They may also include an Affidavit to complete, indicating that the person believes they are not subject to licensing.

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8. Failure to complete the application or submit the affidavit can be considered by the Department as a refusal to inspect and could result in the Department seeking an Inspection Warrant to enter someone's home and search for evidence to determine whether or not the individual needs to be licensed.
9. An Inspection warrant does not require probable cause. Even if an Inspection Warrant is not for the purpose of seeking criminal evidence, should criminal evidence be uncovered during the inspection, it could result in providing the probable cause basis to support an application for a Criminal Search Warrant.
10. Selling more than 25 dogs in a year without a license is a violation of a criminal law.
11. The initial license period is from June 1st 2011 through September 30th 2012, a fifteen month span, which may have the effect of capturing people in the 25 dog threshold who may otherwise not need a license if the period were only twelve months.
12. While it is not the intent of the Department to seize dogs during this inspection process, if the Department uncovers evidence of code violations they could report that to the local humane officer.
13. The declared purpose of the affidavit and potential inspection of records is to determine if the individual was required under the statute to obtain a dog breeder/seller license.
14. If the inspection warrant turned up evidence that an individual was operating a facility that required a license, that information could be used as a basis to make a referral to the local District Attorney or to the State Attorney General for the purpose of a criminal complaint.
15. The Department has had approximately 80% fewer applications than they estimated they would receive when they provided information to the legislature during the legislative process.
16. The program was designed to be self-funded.

It is my belief that some individuals in the Department and other vocal proponents of Act 90, from the beginning, attempted to manipulate the legislative process to use it to establish a method by which to gain access into the homes of individuals engaged in hobby breeding. Some of these individuals are associated with or linked with animal rights groups. PETA and the HSUS have actively and publically pursued an agenda to eliminate the breeding of pure bred dogs and have successfully lobbied for similar legislation in other jurisdictions. This agenda is evidenced by the swiftness by which the Department has begun to use the "complaint" process combined with the Department's solicitation of complaints as evidenced by the Agency's web page.

Staff at the Department of Agriculture, are unapologetic in the claim that they can use this process to enter private dwellings where dog breeding occurs and inspect under the mandates of this legislation. If a whelping female were kept by the owner's bedside, as is often the case with hobby breeders, this argument could lead to the preposterous conclusion that the Department of Agriculture could have access to the bedrooms of private citizens to inspect "business" activity. The obvious pun is unintended.

There are other concerns for small shelters and breed rescue groups. Some may be caught inadvertently exceeding the 25 dog threshold. There have already been at least two situations that have occurred as a result of the Departments interpretation of sale and the time frame in which those sales occur.

Sale is defined by the department to mean the transfer of a dog for consideration. Most people equate the term “sale” by its common usage, the sale of a puppy or dog for a purchase price in money. However, legal consideration can mean many other things, such as a puppy in lieu of a stud fee or to have a co-owner sign off on the registration of the puppy’s dam. A more obscure form of consideration could be the transfer of a dog to a sponsor for the purpose of exhibition. If the seller received some advertising as the result of that exhibition, that could possibly be consideration for the transfer of the dog.

Because the statutory language and definition of “dog dealer” does not refer to facility, only to conduct; “..... the sale, distribution, trade or **offers for sale**, distribution of 25 or more dogs in a year that the person has not bred or raised”, it could capture out of state puppy sales by Wisconsin co-owners, especially if the co-owner received consideration. sec. 173.41.(1)(e) and (2) Wis. Stats., The statute does not indicate on its face that the actual sale need to occur in Wisconsin but if the offer for sale occurred in this state, that could capture the behavior.

People who may identify themselves as “breeders” may find that they could be identified by the Department as dog dealers based on the characteristics of the transactions. For example, sales of puppies by co-owners may be included in the threshold number calculation. If both owners were Wisconsin residents and both received “consideration” for the transfer of puppies from a litter, those puppies could be counted twice, once for the breeder as puppies bred and raised and sold by the breeder and once for the co-owner as sales by a dog dealer. For situations where the dam is co-owned with someone out of state, if the Wisconsin resident received consideration for the sale of those puppies, they may be counted toward determining if a breeder needed a dealer license.

Small shelters and rescue groups face their own set of issues pertaining to the Department’s interpretation of sec. 171.41(b). The term “shelter” again is interpreted by the Department as :

“Sheltering is taking in dogs for care by a non-profit organization and any of its “home custody providers” who have an agreement with the non-profit organization to provide that continuing care for the dogs under the organization’s custody. What the Division has said to make a clarification to those who have asked, is if person merely acts as a transporter of dogs for shelter or rescue, that person would not be considered a dog seller or a shelter if themselves. (sic) However, if they take actual custody of any dog (meaning their names are on the papers that move with the dogs), that dog will be counted towards the 25 dog minimum for licensing

purposes (Emphasis added). *If a dog continues to reside in a shelter from year to year, it will be counted each year*". Attorney Daniels email 11.10.11.

I understand that the Department will consider the "facility" to be any location where records are kept even if no animals are kept at the location. Since records of many small shelters and rescue operations would typically be kept by a volunteer with the group, any location where that person maintained those records would be open to inspection. Some breed rescue and other groups operate in multi-state areas. I am not sure if the Department takes a stand that if an individual or group identified under sec. 173.41 (1)(b) "shelters" fewer than twenty-five dogs in Wisconsin, but shelter an aggregate of more than twenty-five dogs in all states of operation, is required to obtain a Wisconsin shelter license. I doubt that foster providers and small rescue groups are aware of these implications. I fear that once people become aware of these possible inspections, they will be reluctant to continue to provide this volunteer service.

Additionally, it appears the Department takes the stance that if an individual provides foster care for a licensed rescue or shelter, ***or one that should be licensed***, while the foster provider is not obligated to have an individual license, they are subject to inspection by the Department. Their rescue home would need to meet the Department's standards of care promulgated by the administrative rules for licensed facilities. As has been discussed in other forums, it would be virtually impossible for private homes to meet those standards.

In conclusion, if the Department receives a citizen complaint indicating the reporter "believes" or "thinks" someone is a dog breeder, dealer or shelter subject to the requirements for licensing under sec.173.41, that report or complaint will act as the catalyst to begin an inspection. There is no requirement that the reporter identify themselves or the basis of their claim. Initially, the Department will send an unsolicited application to the named person or group identified in the citizen complaint. The Department may request to inspect the person's records or location where any breeding, dealing or sheltering occurs. If the individual or group fails to provide the information or claims they do not meet the threshold outlined in the statute, they may be required to submit an affidavit (a statement under oath) they are in compliance. If they fail to do so or fail to permit the inspection of the home upon request, the Department can seek an Inspection Warrant. An Inspection Warrant does not require probable cause, only a complaint and refusal of entry by the subject of the complaint. Uniformed police officers will accompany any agent or investigator in the execution of this Warrant. The results of the inspection can be used as the basis for a criminal search warrant if the Department uncovers evidence that the person failed to have a license when necessary or is engaged in other criminal conduct, in this case, operating a dog breeding, dealing or shelter facility without a license.

While I believe that this process raises constitutional questions, unless there is a ruling by a court or other person with more authority than the persons I have spoken with on this issue, the Department can, and apparently will, operate as outlined, unfettered.

This application of the law could have a chilling effect on the legal hobby of dog breeding, exhibition and competition and private shelter and rescue operation in Wisconsin. Dog events such as conformation shows and tracking and field events could suffer. The revenue generated in communities that host these events will feel the economic impact. Small private rescues and shelters may discontinue their programs forcing the dogs and other pets they assist into already overcrowded government funded shelters.

Whether or not proponents of Act 90 considered these implications in promoting this legislation is not clear. However, an open records request for documents from the Department who are known to have co-ordinated with activists may shed light on this. If DFOW would like to pursue that avenue, we would be willing to assist with drafting that open records request.

If we can be of any further assistance to DFOW, please feel free to contact us at any time.

Sincerely,

Sheila Kessler
Animal Legal Resources, LLC