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Opinion No. 09-72

Prohibition Against Regulatory Inspectors Notifying Law Enforcement of Criminal Activity

QUESTION

Does proposed Senate Amendment 2 to HB 386 / SB 258[1], which would prohibit the Commissioner of Agriculture from notifying appropriate law enforcement authorities if certain criminal violations are discovered during the inspection of a commercial breeding facility, violate any constitutional standards?

OPINION

The proposed amendment would not violate any constitutional standards since it would not take away any constitutionally protected right that a criminal defendant commercial breeding operator or employee possesses or restrict a district attorney's discretion in choosing to pursue an indictment. The amendment would not cause the Commissioner of Agriculture to violate any other statute by withholding information from law enforcement authorities. Nor would the amendment infringe upon any free speech rights by barring the Commissioner from reporting suspected criminal violations to law enforcement. The language of the proposed amendment does, however, conflict with those provisions of HB 386 / SB 258 requiring the district attorneys general, who are law enforcement officers, to represent the Commissioner in civil actions to enforce HB 386 / SB 258. In those civil enforcement actions where the facts uncovered by a Commissioner's inspection would also support a criminal prosecution of the violator, it would be impossible for the district attorney not to learn of those facts in the course of carrying out his duty to represent the Commissioner.

ANALYSIS

Proposed HB 386 / SB 258 would establish a new regulatory and inspection program for large volume dog and cat breeders in this state. You have asked whether Senate Amendment 2 violates any provision of the state or federal constitutions. Senate Amendment 2 removes a provision requiring the Commissioner of Agriculture to "notify the applicable local law enforcement agency, if an inspection reveals, or there is credible evidence to believe, a violation

[1] Senate Amendment 1 to HB 386 / SB 258 replaces the text of the originally filed bill. Senate Amendment 2 modifies the bill as amended by Senate Amendment 1. This opinion shall refer to the citations and section numbers as set out in the Senate Amendment 1 version of this bill.

of title 39, chapter 14, part 2, exists on the premises." HB 386 / SB 258 (SA1) § 44-17-709(a). The amendment replaces this section with the following language:

> Since the purpose of this act is to encourage compliance through inspection of facilities and civil remedies, the commissioner shall not notify the applicable law enforcement agencies if an inspection reveals a violation of title 39, chapter 14, part 2, exists on the premises.

HB 386 / SB 258 (SA2) § 44-17-709.

Senate Amendment 2 would bar the Commissioner from reporting any criminal violations[2] under Tennessee Code Annotated Title 39, Chapter 14, Part 2, dealing with the treatment of animals. This amendment would not negatively impact the 4th Amendment rights of commercial breeders under the United States Constitution against an unreasonable search since it does not extend the scope of the regulatory inspection authorized in Senate Amendment 1. *See New York v. Burger*, 482 U.S. 691, 702 (1987) (warrantless inspections of closely regulated industries permitted if specific criteria are met).

The legislature cannot bar, on separation of powers grounds, a district attorney from prosecuting an owner or employee of a commercial breeding operation for violations of animal abuse statutes or asking a grand jury to subpoena a civil regulatory inspector. *See State v. Superior Oil, Inc.*, 875 S.W.2d 658 (Tenn. 1994).[3]

Tennessee does not have a civil or criminal statute specifically banning "misprision," the act of refusing to prevent the commission of a crime or report a criminal offense. Tennessee's official misconduct statute only applies to public officials who have an affirmative duty to act and refuse to do so or who misuse their official authority for private gain. Tenn. Code Ann. § 39-16-402. Therefore, the Commissioner would not be violating any other state law by refusing to notify other law enforcement in accordance with this amendment.

Public employees, acting in their official capacities, have limited First Amendment free speech rights under the United States Constitution. Under a recent United States Supreme Court decision, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *See Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006). In this instance, the Commissioner, acting on information obtained in an official capacity, such as through a statutorily authorized facility inspection, would not have an automatic free speech right to communicate that information as the officeholder chooses if the legislature has restricted the use of that information.

Senate Amendment 2 would, however, be ambiguous when compared with the provision in HB 386 / SB 258 (SA1) § 47-17-706(d), which states "The commissioner is authorized to apply

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[2] By its terms, the amendment would not bar the Commissioner from reporting any suspected violations to civil enforcement authorities.

[3] Senate Amendment 2 does not provide for any remedy to the affected commercial breeding operator or employee if this provision is violated. The Amendment also does not provide for any penalty should the Commissioner nevertheless disclose criminal violations to a law enforcement authority.

to courts of competent jurisdiction for writs of injunction for the enforcement of this part. It is the duty of the several district attorneys general to represent the commissioner when called upon to do so." In this context, the statute requires the Commissioner to seek representation by the local district attorney general if a civil injunction is required to enforce a license revocation upon grounds that include violations of Tennessee Code Annotated Title 39, Chapter 14, Part 2. However, Senate Amendment 2 would prohibit the Commissioner from disclosing any criminal animal abuse violations to "applicable law enforcement agencies," which would include the district attorneys general. To obtain an injunction, the Commissioner would have to provide evidence from the inspection to the district attorney general that could also constitute evidence of criminal activity. If a district attorney general has evidence, he may use his unfettered discretion in deciding whether to pursue criminal charges. *Superior Oil*, 875 S.W.2d at 661 ("the General Assembly . . . cannot enact laws which impede the inherent discretion and responsibilities of the office of district attorney general without violating Article VI, § 5 of the Tennessee Constitution").

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