

The Trouble With PI Licensing Statutes— An Example

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Introduction

I have written this article for the express purpose of informing those of you who search public records for a living about what is called **the private investigator licensing issue**, that is, whether PI licensing statutes apply to firms that restrict their business to searching in public records maintained by government agencies, for the purpose of abstracting or obtaining copies of public documents on behalf of clients. Firms that need to be aware of this issue include generalist public record search and retrieval firms as well as specialty retrieval firms such as criminal record search firms. (I will also discuss the applicability of these statutes to employment and tenant screening firms, which have a specialized role in verifying applicant information.)

I have been waiting years for the right time to write this article. I thought about writing an article a couple of years ago when one of the non-PI members of PRRN (many members are PI's) was thrown in jail for searching in a state court criminal index because a PI “turned him in” to the police for not having a private investigator license, but the case went away when the county district attorney thought better of taking the case to court, and the state later enacted an exemption to its PI statute. A while ago, I ran across another instance where this issue was raised. The situation is summarized next. **I have fictionalized the state where this case occurred in order to protect the innocent. I will call it “Anon,” abbreviated “AN.”** The comments and conclusions presented in this article about the Anon Attorney General's (AG's) office are mine alone; they do not necessarily represent views or opinions of the firm that was the subject of the AG office's inquiry.

Based on this situation, I review the PI licensing statutes of four states: Arizona, California, Anon and Texas. In addition to public record retrievers in those states, attorneys, government agencies at all levels, real estate abstract and title companies, and even news organizations will want to read what I have to say because you will see that **you may all be unlawfully singled out** by the Anon AG's office for imposition of what I think is unwarranted sanctions under the Anon private investigator licensing statute.

Background—The Situation in Anon

The Opening Shot

A generalist public record search firm with an office in Anon was “turned in” to the Anon PI Board for “possible unlicensed business activity as a private investigator.” Based on a short conversation with the local manager of the firm, an investigator for the Attorney General of Anon, who acts as Chair of the PI Board under Anon law, sent a letter stating:

“Based upon the description of the work performed by your business, it would seem that private investigator licensing would be required.”

The Search Firm Responds

The public record search firm's attorney responded in writing to this letter arguing that the firm does business “primarily as a public records document retrieval firm.” He stated:

“[The firm limits its business] to going to public offices on behalf of [its] principals² to retrieve specific public documents identified by the principal who has requested the retrieval.”

² One of the arguments that applies as well to the Fair Credit Reporting Act as to the PI licensing act is that a company acting in a principal-agent relationship with its client has the right to perform any activity that the client-principal could itself perform. In this instance, if it is accepted that anyone has a right to obtain public record information, then the agent of anyone has that same right.

The attorney pointed to and quoted from the Anon Open Records Act:

“...under Anon Revised Statutes..., every officer having custody of public records...shall furnish copies...to any person who request them...Also...[these records] ‘may be fully copied or an abstract or a memorandum may be prepared from those public books and records.’ My clients are engaged in the business of obtaining copies or abstracts of public records and books pursuant to [the statute]. They are not private investigators.”

The attorney concluded his letter with an appeal to the PI board to issue a determination that firms like his client’s are not subject to the PI licensing act.

The PI Board Answers

The Deputy Attorney General of Anon answered this letter, rather curtly, on behalf of the Attorney General, as follows:

“You are correct that material designated as public records are by law available to anyone upon request and they may be copied or an abstract prepared therefrom. And a person certainly does not need a license to request or obtain public records. However, the statutory right to obtain such records does not constitute a privilege to engage in the business for which a professional license is required.³

Anyone in the business of obtaining information relating to the identity, business, transactions, acts, affiliations, etc., of a person, or securing evidence is required to have a private investigator’s license, even if he [sic] gets all his information from public sources. As a matter of fact, most if not all the information obtained by private investigators in the course of an investigation comes from public sources.⁴”

³ This sentence is so offensive to the principles of open government that you wonder if the writer could possibly be a public servant. The establishment of a privileged class which is the only one to have access to public records is just the sort of thing that the Constitution of the United States was written to avert. I will discuss this sentence at length below.

⁴ The letter manages to belittle what private investigators actually do as well. I wonder what my PI readers think of this statement. As I have written elsewhere, some of the tools an investigator uses are the same, but the process of investigation is quite different from the mere information retrieval that a public record search firm does.

There this situation stands. The firm has asked for some clarification whether any formal opinions have been issued by the AG’s office, but apparently has not received any reply for more than a year.

Definitions of “Private Investigator”

Before returning to this specific case, I will now discuss characteristics of the PI licensing statutes of four states—Arizona, California, Anon and Texas—to give you a broad perspective on the issue.

Each state’s private investigator licensing statute contains a definition of private investigator. The content of each definition varies, but the basic elements are the same. They are:

- Business Activity and Remuneration—The activity must be a business run for the purpose of making money.
- General Characterization of Service—The business activity relates to obtaining information, sometimes, but not in every case, referred to as an “investigation.”
- Applicable Information Gathering about Persons—Among the types of information gathering that require licensing, certain categories of information about individuals are designated.

Following are quotations relevant to this article from these four statutes:

State	Business Activity and Remuneration	General Characterization of Service	Applicable Information Gathering about Persons ^{3,4}
AZ	for any consideration ¹ engages in business or accepts employment	agrees to make or makes any investigation ² for the purpose of obtaining information	The identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or

			character of any person or group of persons ⁵
CA	For any consideration whatsoever ¹ engages in the business or accepts employment	agrees to make, or makes, any investigation ² for the purpose of obtaining information	The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person
AN	for any consideration ¹ engages in business or accepts employment	agrees to make or makes any investigation ² for the purpose of obtaining information	The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation or character of any person
TX ⁶	engages in the business or accepts employment ¹	to obtain or furnish information ²	the identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person

Notes:

¹ Apparently Texas felt that being in business implied “for money,” so the reference to compensation was left out of its statute. I don’t know what the “whatsoever” is about in the California version.

² An important difference between Texas and the other states is its omission of the term “investigation” here. This omission makes the Texas statute potentially significantly broader in its application than the Arizona or Anon versions.

³ Each of these four statutes includes among other defining services (1) the location and recovery of lost or stolen property and (2) the securing of evidence to be used in court. Arizona also includes in its definition a special category of “the whereabouts of missing persons, owners of abandoned property or escheated property or heirs to estates.” California includes a provision that singles out investigation of employees “involving questions of integrity, honesty, breach of rules, or other standards of performance of job duties.”

⁴ Arizona appears to have shortened the list of nouns by comparison with the other three states, but I doubt that the omissions are significant. Rather, I think that the recitation of nouns in all three statutes as they apply to a person could today be easily summarized as “any and all personal and/or private information about any person.”

⁵ The addition of the phrase “or group of persons” to the Arizona statutes does not clarify the statute as far as I am concerned. In fact, it may do just the opposite. For example, is a partnership or a corporation considered to be a group of persons? If so, this statute would extend the definition of private investigator beyond persons who investigate individuals to those who just deal in corporate business matters.

⁶ Texas defines the term “investigations company” and then separately defines a “private investigator” as “any person who performs one or more services” included in the definition of investigations company.

Conclusion

Based on this comparison, I conclude, for the purposes of this article that

These four definitions of private investigator are essentially identical.

Exemptions From PI Licensing

If the definitions of private investigator are essentially identical, then you could reasonably assume that the interpretation of the definition would also be essentially the same in each state. Such is not the case. As a practical matter, any attempt to succinctly define “private investigator” appears to be futile. The

common experience of each of these states is that the board or committee that administers the law has tried to apply it inappropriately, and the legislature in each state has reacted by adding an ever-growing list of explicit exemptions to the licensing statute.

If the definitions are essentially identical, you might expect that the list of exemptions in each state would also show a high degree of similarity. Wrong again. The first clue that something is amiss is that the number of exemptions listed in each state’s statute today varies from nine (9) to 23: AZ—9; CA—13; AN—12; TX—23. (Of a total of 32 listed in Texas, nine (9) are related only to private security agency licensing, so the net exemptions from the PI licensing provisions in Texas is actually 23.)

Of all these exemptions, only three are unanimously accepted, one for attorneys and two for insurance-related activities.

Here is a summary of these exemptions. You will be astonished by the variations and missing ones. Each of the eleven categories to which I have assigned exemptions is discussed below the chart.

Type of Exemption	State
1. Attorney	
Attorney “related to a case for which the attorney has been retained”	AZ
Attorney “performing his or her duties as an attorney at law”	CA
Attorney “in performing his duties as such”	AN
Attorney “in performing his duties”	TX
2. Credit Related	
Person “engaged in the business of obtaining and furnishing financial ratings and personal information for others if...not employed or connected with any private investigator...”	AZ
Person “engaged exclusively in the business of obtaining and furnishing information as to the financial rating of persons”	CA AN
Person “engaged exclusively in the business of obtaining and furnishing information for purposes of credit worthiness”	TX
3. Debt collection agency	AZ AN TX
4. Government	
Government employee in performance of official duties	AZ CA TX
Law enforcement officer in performance of official duties	AZ AN
Probation or similar supervisor of persons	AN TX
Off-duty, unarmed law enforcement officer	CA
5. Real Estate Abstract/Title Company	
Landman	TX
6. News media and its employees	AZ
7. Not-for-profit organization (various forms)	CA AN TX
8. Private investigator employed by an employer regularly (exclusively) in connection with the affairs of that employer	CA AN TX
9. Public Record Retriever (see Section 5 below)	CA TX
10. Miscellaneous Categories	
Bank/Savings Association	CA AN
Cattle association employee performing inspections	TX
Communications common carrier	TX
Document for a deposition	TX
Engineer not performing investigations	TX
Expert witness in that capacity only	TX
Hospital	TX
Insurance adjusters not otherwise engaged as PI’s	AZ CA AN TX
Insurance company, agency or broker	AZ CA AN TX
Investigation related to sale by legal owner of personal property	AZ
Process server (separate licensing required)	AZ CA AN

Psychological testing	TX
Public service corporations (utilities)	AZ CA
Railroad	TX
Repossessor employed by an employer regularly in connection with the affairs of that employer	CA AN TX

The following sections, numbered according to the chart above, contain my observations of troubling aspects of the differences among the states in these exemptions, with special emphasis on how the Anon AG's office appears to interpret its licensing statute according to its quoted position in those instances where the Anon statute does not include an explicit exemption.

1. Attorney

Although the language differs slightly from state to state, it is unambiguous that all four states intend the attorney exemption as a limited one. Many attorneys, especially in small, remote counties supplement their incomes by performing work as local public record retrievers. Therefore, according to the logic of the Anon AG's office, all attorneys that perform such services in Anon (and there must be some) must register as PI's. Read section 5 below for more insight into your status as a public record retriever.

More recently, attorneys have come under attack by the staff of the Federal Trade Commission in unofficial opinion letters with respect to the Fair Credit Reporting Act. I read their opinions as considering an attorney firm a consumer reporting agency when it assists an employer in the backgrounding of an employee, such as in a sexual harassment matter. If this interpretation stands court tests, it would mean that in this instance the attorney firm is performing work other than as attorneys per se. Therefore, the attorney firm would no longer fall under the exemption from the PI statute, and the inexorable conclusion would be, I think, that such an attorney firm in any of these four states would also have to register as a PI as well.

2. Credit Related Firm

The language of this exemption appears to be about consumer credit bureaus. The Arizona version can be read to exemption public record retrieval firms although the circular wording makes interpretation difficult.

3. Debt Collection Agency

All states except California explicitly exclude debt collectors from PI licensing. California has no requirement to license debt collectors separately, nor does it appear that licensing is required as PI's under the licensing statute.

4. Government

All the states except Anon explicitly exempt all government employees. Item 8, however, exempting employees from licensing, can be applied to government agencies as well as private sector businesses. Therefore, it appears that all government employees are exempt in the performance of their duties in these states. Any spying the government does to you in these states must be controlled by other laws.

5. Real Estate Abstract/Title Company and 9. Public Record Retriever

California and Texas have added specific wording to clarify that these firms are exempt from PI licensing. The California exemption reads as follows:

“[Licensing does not apply to] a person engaged solely in the business of securing information about persons or property from public records.”

The Texas exemption, just enacted in 1997, reads in part as follows:

“{Licensing does not apply to] a person who does not perform any other act that requires a license under this Act, and who is engaged in obtaining information classified as public record under Chapter 552, Government Code [Open Records Act], regardless of whether for compensation...”

Each of these versions of the exemption has good features. The California version is broader in form regarding public records, not just limiting the definition to some other state statute that may not include a category of public record. The Texas version is commendable for its mention that compensation is not a determining issue.

However, both versions lack some clarity. The California version, for example, might be taken not to exclude telephone companies from licensing because in providing telephone number look-up services (1)

they are not “solely” in the business described by the exemption and/or (2) they use public information—telephone numbers obtained directly from individuals—rather than public record information obtained from a government agency.

Based on these two versions and their shortcomings, I suggest the following wording for any state that wants to craft its own exemption for public record retrievers, real estate abstractor/title companies, and telephone companies:

“[Licensing does not apply to] a person (individual or other entity) engaged, whether or not for compensation, in the business of securing information about persons or property from public records or from other public information, and not otherwise engaged in a business that requires a license under this Act.”

Whether this exemption is necessary at all for firms that only perform public record research is discussed below (“Do You Really Want a Statutory Exemption?”).

Let me issue a warning here to title companies. The Anon AG office’s opinion assuredly means that real estate title companies are no more entitled to exemption than public record retrieval firms.

6. News Organization

Arizona felt it necessary to explicitly exempt news organizations from its licensing statute. As discussed below (“Do You Really Want A Statutory Exemption?”), Arizona may not have been doing news organizations a favor.

In any event, news media should be concerned that, reading the wording of the letter above logically, the AG’s office believes it has the right under statute to limit news media access to public records by requiring PI licensing of reporters.

7. Charitable Organization

It is interesting that three of the four states considered it useful to exempt certain types of not-for-profit organizations from licensing. I am not sure why.

8. Employee of a Regular Business

It seems odd to me that Arizona left out an exemption for employees of a company that is not a private investigations firm. Does this mean that Motorola, the largest employer in the state, must obtain a PI license before investigating its own employees?

9. See 5 Above

10. Miscellaneous Exemptions

The **expert witness** exemption in Texas is an interesting and thoughtful one. The PI statute in all four states requires licensing of anyone who secures evidence for a court. It might be argued that an expert witness testifying in a case needed to be licensed because an expert usually provides evidence in the process of testifying.

There are a few other types of companies I have thought of that have not been mentioned in the list of exemptions of any of these states. Therefore, they may well be subject to PI licensing in Anon and possibly in other states.

(1) When the **telephone company** looks up the number of an individual for you, charging \$.75 or so these days, is it not for consideration providing you with information about the “whereabouts” of a person? Yet only Texas exempts this type of company. I expect US West to apply for its license in Anon at any moment.

(2) I am told that many grandmothers hire out for compensation to do **genealogical research** in public records for the purpose of helping people trace their lineage. In the performance of this work, they run across records that indicate the character of ancestors. In Anon, these grandmothers had better watch out or they will end up in the hoosegow.

Is an Exemption for Public Record Searching Necessary?

What does the term “exemption” mean, anyway?

What is an Exemption?

The dictionary definition of “exempt” is “to **free from an obligation**, a duty, or a liability to which others are subject.” Using this definition, you could reasonably say, as I have implied in this article up to this

point, that any person that falls within the definition of PI in the statute has an **obligation** to be licensed unless **freed** from that obligation by an enumerated exemption.

Actually, however, the word “exemption” only appears in the statute of one state. Although each of the four statutes begin with the words “[This section] does not apply to, the heading to this section of each statute is different, as follows:

State	Heading
AZ	Exemption
CA	No heading
AN	Applicability
TX	Exceptions

Therefore, the lawyers can make different arguments in each of these states regarding the relationship of what I am calling the exemptions to the definition of private investigator.

For the purposes of this article, however, I will continue to assume that all these statutes should be construed in the same way, that is, that the list enumerates “exemptions” as defined above. This leads to the next question: Why did each of these states list such a large number of exemptions? Does it mean that the principle behind the licensing statute is that the a general rule (the definition of PI) will apply without further interpretation unless an explicit exemption is enumerated? If this is so, we would have to interpret each of the statutes according to the following rule:

If a specific exemption to licensing a person cannot be found within the statute, then the person must be licensed.

Does this rule make sense? If it does, then many of the different types of companies in each of the four states need to be licensed, based on that state’s exemption list, even though I concluded above that the definition of private investigator is essentially the same in all the states.

How can this be? Maybe there is another principle at work here that modifies this rule.

What Trumps the PI Licensing Statute?

As a plain example that there must be more to the issue, consider the likely response of news organizations to the theory that they are required to be licensed under the PI licensing statutes in CA, AN and TX, which would be something like, “Have you heard of the First Amendment?” In other words, the position of the news media would be that their First Amendment right of freedom of the press overrides—attorneys like the card game expression “trumps”—the private investigator licensing statute of every state. (Arizona news organizations may in fact want to consider having their exemption deleted from the list of exemptions there. I will let you think through the reasoning behind this idea.)

Is the Anon AG’s office prepared to apply their opinion against news organizations? Does it think the licensing statute trumps the First Amendment? (Do not try the obviously fallacious argument that news organizations do not fall under the definition of PI because they do not investigate for “compensation.” What does a newspaper get from advertisers?)

Here is what the AG office’s letter stated:

“the statutory **right** to obtain such [public] records does not constitute a **privilege** to engage in the business for which a professional license is required.

With reference to a local public record retriever, what this says is that the PI licensing statute prevails over other laws, in this particular case the Anon Open Records Act. I would argue that the Anon AG’s office has the legal principle right, but has drawn the wrong conclusion.

The legal principle underlying the Anon AG office’s letter is this:

In determining the applicability of the PI licensing statute, you cannot only consider the enumerated exemptions in it, but must also consider the relationship of the statute to other relevant legislation and basic constitutional principles.

I’m sure there is some phrase, but I don’t know it, for the legal principle that determines the relative ranking of rights and privileges under the law. Certainly with reference to news media, the Constitution

outranks all other legislation. But, do licensing statutes outrank open records laws as the AG's office in Anon contends?

As a general rule, it seems to me that the closer any law is to the expression of a basic right of citizens, the higher it must rank on the scale of competing laws. I have confidence that any attorney worth his salt would have no problem winning the argument that the Open Records Act represents an essential expression of a basic constitutional principle of open government. And if that argument prevails, then most certainly

the Anon Open Records Law trumps the PI licensing statute.

(A hint to attorneys: If this statement were not true, the PI Board could effectively reduce the public's right to access its own records because of the power the board has over the PI's licensed by it. These PI's, dependent on the goodwill of the board, would be the only persons allowed to access the board's records for compensation, leaving the only truly independent public access available to non-professionals who might not be informed enough to understand or utilize board records effectively.)

Occasionally someone will argue what I call **the two-class principle of public record access**, that is, that someone who makes a buck searching public records has less stature under the principle of open records than someone who gets paid nothing. Such a principle would potentially deny the right of anyone who did not live within driving distance of a government agency to hire someone to get a public record on her behalf.

The Complete PI Licensing Rule

I can now condense my commentary into a general rule for determining whether a person is subject to PI licensing in any of these four states:

A person who performs work that is included in the statutory definition of "private investigator" must be licensed as a private investigator, unless (1) the licensing statute includes a specific exemption that applies to the work of that person, or (2) the work is sanctioned as a matter of constitutional right or more basic principle of law.

The heading to this section poses a question (What Trumps the PI Statute?") which I am now prepared to answer. Given the incorporation of item (2) into the rule above, both news organizations and public record retrievers should consider rejecting any offer for either of their categories to be included in the list of exemptions for the following reason. News organizations and public record retrievers do not merely wish to be exempted from the PI licensing statute; rather, the statute is not enforceable against such companies as a matter of public policy. As suggested at the start of this section, if a category is listed, there is a tacit assumption that a person in the category would otherwise be defined as a private investigator. If the exemption were then to be revoked, the argument could be made that since item (1) of the rule controlled the category previously, it is too late to invoke the exclusion under item (2) since no one objected to the category being placed in the exemption list to start with.

Public Records In Anon

Let's assume for a few paragraphs that this rule is not accurate, and look at some of the ramifications if the Anon AG's office version is correct.

The stakes are high if you flout the PI licensing statute in Anon. If the Anon AG's office interpretation is accepted, any person located in Anon who retrieves for remuneration records about individuals from any of the following government agencies is subject to fines up to \$10,000 per violation and to criminal prosecution for a misdemeanor for the first violation and for a gross misdemeanor for a second and subsequent violations.

Some public records are available only directly from government agencies, while others are also available from private vendors who compile public records from these agencies.

Government Sources

The most technologically advanced of the government sources of public records in Anon are the federal courts whose case records are not only public, but are more easily accessible than most state agency records. Two court administered systems, PACER and VCIS, provide immediate online or telephonic access to indexes of all civil, criminal and bankruptcy cases. Under the AG office's interpretation, it would be illegal for an unlicensed Anon firm to offer to answer the question, "Has Carl Ernst declared

bankruptcy in Anon?” Would it also be illegal for that firm to answer the same question, but for a bankruptcy in Arizona? An unlicensed out-of-state firm, on the other hand, could answer the question and obtain the relevant documents by mail without setting foot in the state.

How Come I Got the Anon Licensed PI List?

One of my staff recently surveyed the PI licensing boards in every state that has a licensing statute. He asked each state for a list of licensed PI's. Most states freely give out their PI lists, or charge a minimal fee for obtaining a computer file of licensees. None of these PI boards, including Anon, asked either (1) why he wished to have the list or (2) whether he was a licensed PI.

How could this be? Since the list includes personal information about the whereabouts of every PI in the State of Anon, only a PI should be allowed to have the list according to the opinion of the AG's office. Should the Anon PI board, which is chaired by the AG, have given him the list without finding out if he was a licensed PI?

Private Sources

There are many vendors who obtain and make available public records from government agencies in the state of Anon. In addition to the obvious examples of national public record database providers such as ChoicePoint and Lexis, there are many less well known local, regional and specialty private sources. For example, an online service available on the Internet provides, for a fee, access to Anon Secretary of State records (corporate and UCC), county assessor, treasurer and recording records, and other public record information. Anyone in the US can sign up for these services without restriction.

Uniform Commercial Code records from the office of the secretary of state in Anon, which are available online nationwide, provide an entertaining example of the difficulty in a retrieval firm's purposely trying to stay away from public records containing information about individuals. UCC records contain entries for individual debtor names as well as for business names. It is even possible to trip over individual names when you are searching only for business debtors because a business debtor may have a co-debtor who is an individual. In this case, the individual name will appear in the results of the search. Therefore, even if a public record retrieval firm were to state that it only searches on business names, it would still obtain results for individual names, making it subject, I assume, to the AG office's wrath.

In-State—No/Out-of-State—Yes

According to the AG's office, you should certainly not be allowed to access either of these sources of public records on behalf of anyone else without a PI license. On the other hand, your out-of-state competitors, and anyone else who makes a living in the US as a public record retrieval firm, can, without any license, look up the same information and obtain copies of the same public records without interference.

In effect, the AG office's opinion creates a situation where its own in-state businesses are held to a different standard of compliance compared to like out-of-state companies. This is an interesting position for a politician to take, is it not?

Are Online Public Record Vendors Private Investigators?

I mentioned above that public records are available from a number of private sources. This raises the following question: Should the online vendors who purchase public record data be licensed as private investigators? In California and Texas the specific exemptions quoted above certainly apply, but what about in Arizona and Anon? The position of the Anon AG's office is clear; any online vendor who obtains public records data on individuals from a Anon government agency is required to be licensed.

Taking this position to its logical conclusion, shouldn't the Anon AG's office sue the Secretary of State to stop it from selling UCC data to unlicensed online vendors like ChoicePoint? The position that Information America should take is, as I stated above, that the open records law trumps the PI licensing law.

Are Screening Firms Private Investigators?

Few would argue with the characterization of employment and tenant screening firms as consumer reporting agencies as defined in the Fair Credit Reporting Act (FCRA). At least part of their work involves assembling information into a consumer report on behalf of their clients. The definition of "consumer report" in the FCRA includes

“any information bearing on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living [of an individual].”

Some of these words look familiar because “reputation” and “character” are words used in the definition of “private investigator” in the statutes of all four states. Therefore, you might conclude that all screening firms in these states require licensing under the private investigator statute.

However, just because the FCRA lists all these categories of information that may appear in a consumer report does not mean that all consumer reports contain all of these categories of information. But, on the other hand, how can you produce a screening report without doing some background checking that would not come under the heading of checking “character?”

Tenant Screening Firms

A case can be made that all tenant screeners require licensing. Each of the four states provides an explicit exemption to the three national credit repositories (Equifax, Experian and Trans Union) in their role as exclusive furnishers of credit reports. According to the logic of this exemption, it is conceivable to conclude that any firm **other than** these national credit repositories that provides a credit report to its client and that is not otherwise exempt from licensing, must obtain a PI license because obtaining a credit report, which contains personal, private information about an individual, constitutes an investigation except in the hands of an exempted credit repository. Since tenant screening reports usually include a credit report; therefore, tenant screeners must be licensed according to this logic.

Employment Screening Firms

What about employment screening firms that do not use credit reports as part of their services? The argument has been made that employment screening firms are not subject to PI licensing as long as they only confirm factual information contained in the employment application, rather than performing “investigations.” (You will recall that three states, with the exception of Texas, include the term “investigation” in the definition of private investigator.) The problem is that “investigation” remains to my knowledge an undefined term since no court has interpreted it. I has written articles in the past about what makes private investigators distinguishable from retrievers, but it is much more difficult to distinguish between screeners and private investigators.

Crossing the Line

I remain open to arguments on both sides regarding whether employment screening firms are subject to licensing as private investigators, except that I think there is no doubt that employment screeners are acting as PI's in the following instance.

The Fair Credit Reporting Act uses the term “investigative consumer report” to describe a consumer report that includes (1) “information on the character, general reputation, personal characteristics, and mode of living,” which happen to be the latter part of the definition of a consumer report, and (2) is developed through “personal interviews with neighbors, friends, or associates of the consumer...or with others...who may have knowledge concerning any such items of information.”

My view is that when a screening firm crosses the line between preparation of a consumer report and preparation of an investigative consumer report, it has with certainty crossed the line between retrieval firm and private investigator. For example, a usual component of an employment screening project is to verify an applicant's previous employment. The screener calls the previous employer and asks, “Is it correct that [the subject] was employed by you as a [position] from [] to []?” It is argued that this question merely relates to checking facts rather than investigating character. (It can be argued that retrieval of this kind of information does not in some instances even constitute a consumer report, but this article is not the forum in which to discuss that issue. On the other side, it can be argued that this question is in fact checking the veracity of the applicant for employment, and is therefore an investigation of character.) In any event, if the screener making this call also asks, “Was [the subject] a good employee?”, the call has without argument crossed the line into “investigative consumer report” country because the screener is asking about the character and reputation of the subject. It's the kind of question a PI would ask.

Investigating Yourself

Here's an interesting question. Since the subject of an employment or tenant screening assignment gives written permission specifically to do the background investigation, does the PI licensing statute apply if

the results are shared with the subject? In addition, would the answer to this question differ (1) if the subject paid for the investigation, as is usually the case in tenant screening, versus (2) if someone else paid, as is usually the case in employment screening. Without too much reflection, I read these statutes as requiring licensing no matter who paid the bill, as long as compensation was received for the investigation. Does this mean that you can only use a PI to investigate yourself?

A Final Note to My Readers

Although I am certain of my position that the opinion regarding the licensing of public record retrieval firms by the Anon AG's office is incoherent as a matter of logic and offensive as a matter of public policy, I do not pretend that the answers to other issues I have discussed are entirely cut and dried. Any law is subject to interpretation until the courts have spoken (and frequently even after the courts have spoken). All I ask is that the people thinking and writing about these subjects consider them logically and fully. Therefore, if you disagree with any of my conclusions, I would appreciate hearing your reasoning. My email address is carl.ernst@ernst.cc.