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Opinion No. 12-84

Application of Private Investigators Licensing Act to Digital Forensics Providers

QUESTIONS

1. Under Tenn. Code Ann. § 62-26-202(6), which describes activities for which a private investigation license is required, are entities that provide digital forensics services required to obtain a private investigation license before providing these services?

2. Are the personnel responsible for reviewing the information gathered by digital forensics techniques, if not exempt from licensure under Tenn. Code Ann. §§ 62-26-223 and -231, required to obtain a private investigation license before performing the duties involved in digital forensics?

OPINIONS

1. Entities that provide digital forensics services for purposes that fall within the definition of "investigations company" codified at Tenn. Code Ann. § 62-26-202(6) generally are required to obtain a private investigation license. Many entities that meet this definition will nevertheless be exempted from licensure by Tenn. Code Ann. § 62-26-223. For example, digital forensics providers who serve as attorney or court consultants in litigation will be exempted from licensure by Tenn. Code Ann. § 62-26-223(b)(3)(A)(iii).

2. Personnel responsible for reviewing the information gathered by digital forensics techniques generally are required to obtain a private investigation license if they "furnish information with reference to" one of the purposes described in Tenn. Code Ann. § 62-26-202(6). Many of these personnel will also fall within one of the exemptions codified at Tenn. Code Ann § 62-26-223. For example, in litigation, these personnel are likely to be attorney or court consultants who are exempted from licensure by Tenn. Code Ann. § 62-26-223(b)(3)(A)(iii).

ANALYSIS

1. This opinion addresses how Tennessee regulates providers of digital forensics services. The requestor defines "digital forensics" as "the science of recovering digital information located in electronic devices." The requestor explains that "technology has made it possible for companies and individuals to 'image' the information on electronic equipment for the purpose of recovering encoded data." The requestor compares the procedure to "an autopsy on a biological organism, but on an electronic device." The requestor states that while the

purpose of this activity varies, in some cases it is "certainly related to litigation." The question posed is whether entities that provide digital forensics services are required to be licensed under the Private Investigators Licensing and Regulatory Act, Tenn. Code Ann. §§ 62-26-201 to -231.

Private investigators and investigations companies in Tennessee are governed by the Private Investigators Licensing and Regulatory Act, Tenn. Code Ann. §§ 62-26-201 to -231 ("the Act"). The Act states that "it is unlawful for any person to act as an investigations company or private investigator without first obtaining a license from the [private investigation and polygraph] commission." Tenn. Code Ann. § 62-26-204(a). Tenn. Code Ann. § 62-26-202(6) defines "investigations company" as follows:

> any person who engages in the business or accepts employment to obtain or furnish information with reference to:
>
> (A) Crime or wrongs done or threatened against the United States or any state or territory of the United States;
>
> (B) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputations or character of any person;
>
> (C) The location, disposition or recovery of lost or stolen property;
>
> (D) The cause or responsibility for fires, libels, losses, accidents, damages or injuries to persons or to property; or
>
> (E) The securing of evidence to be used before any court, board, commission, officer or investigating committee.

"Private investigator" is defined as "any person who performs one (1) or more services described in [Tenn. Code Ann. § 62-26-202(6)]." Tenn. Code Ann. § 62-26-202(10). "Person" is defined as "any individual, firm, association, company, partnership, corporation, nonprofit organization, institution or similar entity." Tenn. Code Ann. § 62-26-202(8).

Engaging in digital forensics, in and of itself, does not bring a person within the scope of the Act. There is no bright line rule requiring digital forensics providers to be licensed as investigations companies or private investigators. But in some circumstances one engaged in digital forensics will come under the Act. Whether a person will come within the purview of the Act will depend on the purposes for which the digital forensics provider is employed. For example, a digital forensics provider would not be required to obtain a private investigation license prior to "imaging" the information stored on a computer for the purpose of recovering encoded data for the owner of that computer. There will be situations, however, in which digital forensics providers are employed for purposes that fit within the statutory definition of "investigations company." For example, digital forensics could be used "to obtain or furnish information with reference to . . . [c]rime or wrongs done or threatened against the United States or any state or territory" thereof. Tenn. Code Ann. § 62-26-202(6)(A). As the requestor points out, digital forensics could also be used for purposes of litigation, in which case the provider

would likely be employed "to obtain or furnish information with reference to . . . [t]he securing of evidence to be used before [a] court." Tenn. Code Ann. § 62-26-202(6)(E). If a digital forensics provider is employed for one or more of the purposes described in Tenn. Code Ann. § 62-26-202(6), the provider will be required to obtain a private investigation license, unless an exemption applies.

Exemptions from the licensing requirements of the Act are codified at Tenn. Code Ann. § 62-26-223. These exemptions are numerous and include public accountants, governmental officers and employees performing official duties, persons in the business of obtaining and furnishing information regarding the financial rating or standing and credit of persons, attorneys and their employees and trial consultants, insurance companies and their personnel conducting investigations in connection with insurance business, private business employees conducting internal investigations for their employer, individuals conducting investigations in connection with the repossession of a vehicle, individuals conducting undercover investigations meeting certain criteria, persons duly licensed in another profession, and student interns working in a public defender's or district attorney's office. *See* Tenn. Code Ann. § 62-26-223. Many digital forensics providers will fall within one of these exemptions. For example, digital forensics providers retained in litigation will typically be exempted by Tenn. Code Ann. § 62-26-223(b)(3)(A)(iii), which provides an exemption from licensure for "[a] consultant when the person is retained by an attorney or appointed by a court to make tests, conduct experiments, draw conclusions, render opinions or make diagnoses, where those services require the use of training or experience in a technical, scientific or social science field." Digital forensics providers employed in litigation will typically be "retained by an attorney or appointed by a court to make tests, conduct experiments, draw conclusions, [and] render opinions" regarding encoded data recovered from electronic devices. Tenn. Code Ann. § 62-26-223(b)(3)(A)(iii). These services "require the use of training or experience in a technical [or] scientific . . . field." *Id.* As another example, it is likely that many digital forensics providers will be duly licensed in another profession and will thus be exempt from licensure for activities within the scope of that profession. *See* Tenn. Code Ann. § 62-26-223(b)(8).

2. The next question is whether the personnel responsible for reviewing the information gathered by digital forensics techniques are required to obtain private investigation licenses, assuming these personnel do not conduct internal undercover investigations, which are exempted from licensure by Tenn. Code Ann. §§ 62-26-223(b)(7) and -231.[1]

Personnel who merely review the information gathered by digital forensics techniques do not "obtain . . . information with reference to" any of the purposes described in Tenn. Code Ann.

[1] Tenn. Code Ann. § 62-26-223(b)(7) provides an exemption for "[a]n individual conducting undercover investigations meeting the criteria set forth in § 62-26-231." Tenn. Code Ann. § 62-26-231(a) provides as follows:

> An individual exempted by § 62-26-223(b)(7) from the licensing requirements for private investigators must be:
> (1) Employed by and under the control of a licensed private investigation company;
> (2) Employed by a private business entity, the internal affairs of which are the subject of investigation by the individual; and
> (3) Engaged only in investigating the internal affairs of the private business entity by which they are employed.

§ 62-26-202(6), because the information has already been obtained prior to their review. If the personnel who review the information gathered by digital forensics techniques also generate a report or otherwise explain their findings, then their duties would include "furnishing information with reference to" one of the purposes described in Tenn. Code Ann. § 62-26-202(6). In that event, they would be required to obtain a private investigation license, unless an exemption applies to their work. Many of these personnel will fall within one of the exemptions codified at Tenn. Code Ann. § 62-26-223. For example, in litigation, personnel who review the information gathered by digital forensics techniques are likely to be attorney or court consultants who are exempted from licensure by Tenn. Code Ann. § 62-26-223(b)(3)(A)(iii). Personnel who review the information gathered by digital forensics techniques might also be duly licensed in another profession and thus exempt from licensure for activities within the scope of that profession. *See* Tenn. Code Ann. § 62-26-223(b)(8).

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