

ARIZONA LEGISLATIVE COUNCIL

MEMO

April 7, 2009

TO: Representative Sam Crump
FROM: Patricia A. Probst, Council Attorney
RE: Redflex Traffic Systems, Inc.; Private Investigator Licensing (R-49-57)

QUESTION

Is Redflex Traffic Systems, Inc. (Redflex) required to be a licensed private investigator to conduct speed camera operations under its contract with the state of Arizona?

ANSWER

Based on the definition of "private investigator" prescribed in Arizona Revised Statutes (A.R.S.) § 32-2401, one could argue that Redflex and its employees are engaged in activities that amount to private investigating and thus should be properly licensed or registered. However, at least one court and one state agency in other jurisdictions with similar state statutes have ruled that photo enforcement agencies are not required to obtain private investigator licenses.

DISCUSSION¹

Arizona

A.R.S. title 32, chapter 24, article 2 requires an entity that conducts the business of private investigations to obtain a license from the department of public safety. An applicant for a license must meet certain qualifications, including not having been convicted of any felony or certain misdemeanors, not having been convicted of acting as a private investigator without a license and having had at least three years of full-time investigative experience that consists of actual work performed as an investigator for a private entity. A.R.S. § 32-2422. The applicant

¹ Copies of any of the documents cited in this memorandum are available on request.

must also provide the department of public safety with certain required information, including a verified statement of the applicant's experience and qualifications and fingerprints for the purpose of obtaining state and federal criminal records checks. A.R.S. § 32-2423.

In addition, A.R.S. title 32, chapter 24, article 3 requires an employee of a licensed agency who acts as a private investigator to obtain a registration certificate from the department of public safety. An applicant for an employee registration must meet certain qualifications similar to those required of agency license applicants and must provide the department with similar verified information. A.R.S. §§ 32-2441 and 32-2442.

Any person who knowingly does not obtain the statutorily required license or registration is guilty of a class 1 misdemeanor. A.R.S. § 32-2411.

In interpreting statutes, the primary task is to determine the intent of the legislature. See *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529 (1994). The best indication of legislative intent is the statutory language itself. *Id.* The language of the statute that describes the activities of a "private investigator" is fairly clear. "Private investigator" is defined, in part, as any person other than an insurance adjuster or on-duty peace officer who engages in business or accepts employment to:

(a) Furnish, agree to make or make any investigation for the purpose of obtaining information with reference to:

(i) Crime or wrongs done or threatened against the United States or any state or territory of the United States.

.....

[or]

(b) Secure evidence to be used . . . in the trial of civil or criminal cases and the preparation therefor.

.....

A.R.S. § 32-2401, paragraph 16.

Additionally, the power to enact licensing laws is based on the legislature's police power, which is the power to enact laws deemed necessary for the protection of the property, peace, life, health and safety of the citizens of the state. See *State Board of Technical Registration v. McDaniel*, 84 Ariz. 223, 228 (1958); see also *State v. Beadle*, 84 Ariz. 217, 221-22 (1958) (stating that the purpose a statute that is enacted under the state's police power is to protect the public health, safety or welfare). Because the legislature provided that a person who acts as a private investigator without a license or a person who violates any provision of the private investigator statutes is guilty of a class 1 misdemeanor (see A.R.S. §§ 32-2411 and 32-2458, respectively), the legislature apparently considered these statutes necessary to protect the public's health, safety or welfare. Ariz. Atty. Op. No. 187-020. Moreover, a statute whose primary purpose is the protection of the public is entitled to a liberal construction for the accomplishment of its beneficent objectives. *State v. Sanner Contracting Co.*, 109 Ariz., 522, 524 (1973).

Applying liberal construction of the definition of private investigator under the statute, the activities conducted by a photo enforcement company such as Redflex arguably fit within that definition. Mainly, Redflex gathers data and processes it for the purpose of identifying violators of the state's traffic regulations. See A.R.S. § 28-601 (defining photo enforcement system, in part, as "a radar unit or sensor linked to a camera or other recording device that produces one or more photographs, microphotographs, videotapes or digital or other recorded images of a vehicle's license plate for the purpose of identifying violators"); see also, e.g., *Williams v. Reflex Traffic Systems, Inc.*, 2008 WL 782540 (E. D. Tenn. 2008) (stating that under the city of Knoxville photo enforcement program Redflex is required to retain data, select, process and assemble the data for review, issue and mail citations and print and mail notices).

In addition, A.R.S. § 32-2409 provides an extensive list of exceptions to the requirement of obtaining a license. It does not appear that Redflex would fall within any of these exemptions. Arguably, if the legislature wanted to exempt photo enforcement agencies from licensure, it could have done so by adding such agencies to the list of exemptions. See Atty. Gen. Op. No. I79-115 (April 25, 1979) (stating that unless there is some relevant exemption or exception to the statute, a person who falls within the scope of the statute must be licensed); but see Atty. Gen. Op. No. I91-011 (Feb. 13, 1991), citing *Kennard v. Rosenberg*, 127 Cal.App.2d 340; 273 P.2d 839 (1954) and *Dahl v. Turner*, 80 N.M. 564; 458 P.2d 816 (1969) (concluding that engineers who are called on to investigate the origin of fires and then testify at trial as expert witnesses are not required to be licensed even though engineers are not specifically exempt under the statute).

Moreover, if a private investigator license is required under the law, a contract to conduct private investigation activities without the requisite license could be unenforceable, and a later receipt of a private investigator's license may not cure the prior misconduct of operating as a private investigator without a license. See *Landi v. Arkules*, 172 Ariz. 126, 134-35 (App. 1992). In *Landi*, the defendant entered into a contract with the plaintiff to locate potential heirs to an estate. Although the defendant had applied for a private investigator license before entering into a contract with the plaintiff, the defendant had not yet obtained a license. The plaintiff filed a complaint to rescind the heir locator agreement and have it declared void and unenforceable. The court determined that the defendant conducted research to obtain information about the identity of a person and that information was potential evidence to be used before a court to prove a client's right to an estate. The court found that the defendant's activities fell squarely within the scope of the private investigator licensing statute. *Id.* at 133. Hence, the court concluded that: 1) the defendant had not substantially complied with the statute despite having applied for a license, 2) the regulation of private investigators is "so infused with important public policy considerations that a contract to perform investigations is, in the absence of a license, unenforceable," 3) "the public's protection precludes enforcement of an unlicensed investigator's . . . contract" and 4) "[t]he courts will not participate in a party's circumvention of the legislative goal by enforcing a . . . contract to provide regulated services without a license." *Id.* at 134-35.

Some have argued that Redflex acts as an "agent" of the department of public safety, and because officers or employees of this state, while engaged in the official performance of their

duties, are exempt from having to obtain a private investigator license, Redflex should be exempt as well. See A.R.S. § 32-2409, paragraph 1. Under A.R.S. § 41-1722, the department of public safety is authorized to enter into a contract with a private vendor to establish a state photo enforcement system related to traffic and speed. Furthermore, under A.R.S. § 28-1593, subsection B, a peace officer, or duly authorized agent or someone paid to act on behalf of a traffic enforcement agency may issue traffic complaints. Based on the wording of the statute a "duly authorized agent" or "someone paid to act on behalf" of the department of public safety may issue traffic complaints. Although, some argue that Redflex acts as the department's agent, pursuant to the statute, Redflex may be something less than an agent (i.e., someone paid to act on behalf of the department). Indeed the contract between Redflex and the state of Arizona specifically defines the relationship of the parties and states that the vendor under the contract is an independent contractor and that neither party to the contract is an employee or agent of the other party to the contract. See Contract No. L8-022-001 – Statewide Traffic Photo/Speed & Intersection Enforcement Systems, Mobile and Fixed, Arizona Department of Public Safety § 2.4 (July 16, 2008).

The issue of whether state private investigator licensing laws apply to photo enforcement agencies has been or is being litigating in a couple of other states. Moreover at least one state court and one state agency have determined that Redflex is not required to obtain a private investigator license under the statutory framework of that state. Although some of this litigation is filed in lower courts and not courts of record, we discuss the litigation here for illustrative purposes only, acknowledging that Arizona courts would not be bound by these decisions.

Louisiana

On August 10, 2008, the Louisiana State Board of Private Investigator Examiners ruled that the Board had jurisdiction over the activities of Redflex under its agreement with the Lafayette City-Parish Consolidated Government. Shortly thereafter, Redflex filed suit in state court petitioning the court for judicial review of the Board's decision. Under the Louisiana statute, which is very similar to our statute, a private investigator is "any person who holds out to the general public and engages in the business of furnishing . . . information or who agrees to make or makes an investigation for the purpose of obtaining information with reference to . . . crimes or wrongs committed . . . [or] securing evidence to be used before any court" La. Rev. Stat. Ann. § 37-3503.

On December 18, 2008, Judge Timothy Kelley reversed the Board's action by concluding that "Redflex and its employees are not conducting activities of a private investigator or private detective as defined in [the Louisiana statute] under Redflex's agreement with the Lafayette City-Parish Consolidated Government, and, accordingly, the P. I. Board is without jurisdiction to license and/or regulate Redflex and/or its employees while they are acting in accordance with the terms and provisions of the agreement . . ." *Redflex Traffic Systems, Inc. v. Louisiana State Board of Private Investigator Examiners*, No. 560856 (19th Jud. Dist. Ct. Dec. 18, 2008) (declaratory judgment). To date, Judge Kelley's ruling stands since the Board has decided not to appeal the ruling. See Minutes of Louisiana State Board of Private Investigator Examiners

(Feb. 10, 2009) (after coming back from executive session motion not to appeal ruling carries), available at <http://www.lsbpie.com/pdf/feb10minutes.pdf>.

Texas

There is a myriad of litigation in Texas – somewhat confusing and largely still pending. These lawsuits also argue that the Texas law governing private investigators applies to the vendors that operate various photo enforcement systems. Specifically, they claim that definition of private investigator requires a vendor to obtain a license as a private investigator. Under the Texas statute, which again is very similar to our statute, "a person acts as an investigations company . . . if the person engages in the business of obtaining or furnishing . . . information related to . . . [a] crime or wrongs done or threatened against a state or the United States . . . or . . . engages in the business of securing . . . evidence for use before a court . . ." Tex. Occupations Code Ann. § 1702.104.

In contrast, the Private Security Bureau of the Texas Department of Public Safety, which is the Texas agency statutorily authorized to regulate private investigator licensing, does not agree with interpretation posited by the plaintiffs in the lawsuits and issued an opinion that maintains that contractors that assist government bodies with the administration of photo enforcement systems are not required to be licensed as private investigators. The opinion states that the photo enforcement contractors' activities are mainly ministerial and are performed at the direction of government employees who are exempt from licensing requirements. See Texas Department of Public Safety - Private Security Bureau, *Municipal Red-Light Camera Systems and the Private Security Act*, available at <http://www.txdps.state.tx.us/psb/RedlightCamera.htm>.²

In *Amanda Ward v. ACS State and Local Solutions, Inc.*, No. 07-09501 (192nd Dist. Ct. – Dallas), the plaintiff sued ACS, a vendor that contracted with the city of Dallas to run the city's system, because of collection attempts made by ACS for a red light violation. Ward received her notice of violation from the city, and ACS, on behalf of the city, contacted Ward notifying her that she would be reported to a national credit agency if she did not pay the fine. Ward filed suit in state court alleging various state law causes of action and seeking \$3 million in damages. On November 19, 2008, the court issued a partial summary judgment in favor of Ward, ordering that ACS should have been licensed as a private investigator under Texas law. However, on March 23, 2009, the court issued another ruling dismissing the plaintiff's claims with prejudice.³

² The opinion also includes the following caveat, however: "This determination is based on our understanding of the most common contractual arrangements and may not be applicable to all such contracts between governmental entities and private vendors."

³ We have attempted to no avail to obtain a copy of this order from the Texas court. We base the description of the order, however, on a recent pleading filed by ACS State Local Solutions in a case pending before the United States District Court for the Northern District of Texas. (See below for a discussion of this case.) The plaintiffs are represented by the same lawyer in both suits. In its Reply Brief in Support of Defendant's Motion to Dismiss, ACS urges the federal court to grant similar relief (i.e., dismiss with prejudice) as the relief allegedly granted by the Texas state court in the *Amanda Ward* case.

On November 24, 2008, a group of plaintiffs filed a class action lawsuit against Redflex in the United States District Court for the Eastern District of Texas. The lawsuit alleged that Redflex was negligent in failing to obtain a private investigator's license as purportedly required by the Texas Occupations Code. The plaintiffs sought to recoup from Redflex the fines they paid after receiving citations for running red lights. On March 24, 2009, United States District Court Judge Michael Schneider dismissed the plaintiffs' claims with prejudice concluding that the plaintiffs lacked standing to assert any claims against Redflex. *See Bell, et al. v. Redflex Traffic Systems, Inc. (Bell I)*, Case No. 4:08-CV-444 (E.D. Tex. Mar. 26, 2009) (docket No. 20). The court stated, "Plaintiffs' sole cause of action relates to Defendant Redflex's failure to obtain a private investigator's license. The Court finds that Plaintiffs do not have standing to complain of Defendant Redflex's failure to obtain this license." *Id.*

Although the court in *Bell I* granted Redflex's motion to dismiss and acknowledged that the parties "spent considerable time and effort addressing whether the licensing requirement applies to red light manufacturers such as Redflex," the court did not rule on this issue. Instead, the court assumed without deciding that Redflex falls within the definition of an investigations company for purposes of the court's order. *Id.* at ft. nts. 3 & 7. Interestingly, in a recent press release issued by Redflex in response to the order, Karen Finley, president and CEO of Redflex seems to imply that the court in *Bell I* specifically concluded that Redflex is not required to be licensed as a private investigation agency by stating: "This is a dual victory. The [court's] ruling, together with the Texas Department of Public Safety's [determination], reinforces our belief that our operations are fully consistent with Texas law . . . Equally significant is that this ruling should dissuade other suits of this nature." Shoba Vaitheeswaran, *Texas Federal Court Dismisses Class Action Lawsuit Against Redflex Traffic Systems* (Mar. 27, 2009) available at <http://www.redflex.com>.

In another lawsuit filed in the United States District Court for the Northern District of Texas the plaintiffs allege that the defendant, American Traffic Solutions, Inc. (ATS), also failed to obtain the appropriate license as a private investigator in Texas. The plaintiffs received notices of red light violations and seek actual damages in the amount of the tickets each plaintiff received, attorney fees and \$3 million in punitive damages. *Bell, et al. v. American Traffic Solutions, Inc. (Bell II)*, Case No. 3-08CV2093-G (N.D. Tex.). The outcome of this lawsuit is pending. Most recently, on March 30, 2009, ATS filed a Notice of Supplemental Authority in Support of Defendant's Motion to Dismiss, seeking to apprise the court of Judge Schneider's recent decision (favorable to the defendant) in the *Bell I* case and pointing out that *Bell I* is a case practically identical to the instant suit. *See Notice of Supplemental Authority*, docket No. 14 at 1.

In another action, also pending in the United States District Court for the Northern District of Texas, a group of plaintiffs filed suit against the same defendant in the *Amanda Ward* case, ACS State and Local Solutions, Inc. Similar to the other Texas cases, the plaintiffs assert that the defendant should be permanently enjoined from operating its photo enforcement without a private investigator license. *Verrando, et al. v. ACS State & Local Solutions, Inc.* No. 3:08-CV-2241-G (N.D. Tex). Like *Bell II*, the outcome of this lawsuit is pending. Most recently, on March 26, 2009, ACS filed a Reply Brief in Support of Defendant's Motion to

Dismiss arguing that the plaintiffs lack standing to pursue their claims based on the Texas private investigator licensing law. The Brief also cites *Bell I* for the proposition that the plaintiffs have not shown injury to a legally protected interest that would confer standing over their claim based on the private investigator statutes. See *Reply Brief*, docket No. 14 at 3. In addition, the Brief informs the court that the Texas state court in the *Amanda Ward* matter ruled on the defendant's motion for summary judgment by dismissing the plaintiff's claims with prejudice and request this court to grant similar relief in this case. *Id.* at 2.

CONCLUSION

Although not controlling in Arizona, the issue of whether a photo enforcement agency must obtain a private investigator license has been reviewed or litigated in a few jurisdictions in other states, resulting in conflicting conclusions. The Texas Department of Public Safety maintains that entities that assist a municipality with the administration of a photographic traffic signal enforcement system are not required to obtain licenses as private investigators. Similarly, a state court in Louisiana has ruled that Redflex is not required to obtain a private investigator license and the Louisiana agency that oversees private investigator licensing is not authorized to regulate Redflex and its employees. Somewhat in contrast, at least one federal district court in Texas assumed, without deciding, that the Texas private investigator licensing statute applies to Redflex, but refused to grant any relief to the plaintiffs based on that statute. The issue is still pending in a few other courts in Texas.

Because the issue has not been litigated in Arizona, the answer to whether or not Redflex must obtain a private investigator license is unclear. However, based solely on the wording of the Arizona private investigator licensing statute and applying a liberal construction to that statute as an act under the state's police powers, the work Redflex is required to perform, mainly gathering information about alleged traffic violations that can be used in court, arguably is the type of activity that requires a private investigator license under the law. Additionally, because the state contract with Redflex specifically states that Redflex is an independent contractor, the exemption for state officers or employees stipulated in the statute probably does not apply. If the legislature would like to specifically exempt photo enforcement agencies from private investigator licensing, it could do so by enacting legislation that adds such agencies to the list of exemptions prescribed in A.R.S. § 32-2409.

ARIZONA LEGISLATIVE COUNCIL

MEMO

April 8, 2009

TO: Representative Sam Crump

FROM: Patricia A. Probst, Council Attorney

RE: Redflex Traffic Systems, Inc.; Private Investigator Licensing (R-49-57)
SUPPLEMENT

In our memorandum dated April 7, 2009, we referred to an Order for Summary Judgment in *Amanda Ward v. ACS State and Local Solutions, Inc.*, No.07-09501 (192nd Dist. Ct. – Dallas). We requested a copy of the Order from the Texas state district court, but had not yet received it. This morning, however, we received a copy of the final Order signed by Judge Craig Smith. A copy of it is attached for your review. Although the judge dismissed the plaintiff's claim of negligence with prejudice, he reiterated that ACS is required to obtain a license under the Texas private investigator licensing statutes.

Please let us know if you have any questions or would like copies of any of the other documents cited in our previous memorandum.

Enclosure

CAUSE NO. DC 07-09501-K

AMANDA WARD

Plaintiff,

vs.

ACS STATE AND LOCAL SOLUTIONS,
INC., D/B/A LDC COLLECTIONS SYSTEMS,

Defendant.

§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

192ND JUDICIAL DISTRICT

ORDER GRANTING DEFENDANT ACS STATE AND LOCAL SOLUTIONS, INC., D/B/A LDC COLLECTION SYSTEMS' SECOND AMENDED MOTION FOR TRADITIONAL AND NO-EVIDENCE SUMMARY JUDGMENT

The Court VACATES the Order dated March 23, 2009. The Court replaces the Order filed March 23, 2009 with this Order.

Came on to be heard the Second Amended Motion for Summary Judgment filed by ACS State and Local Solutions, Inc., d/b/a LDC Collection Systems ("ACS") and the Court being fully advised and having heard the arguments of counsel and having carefully reviewed: (1) the Motion and the discovery material referenced or set forth in the motion, and (2) the pleadings, admissions, and affidavits on file, is of the opinion that summary judgment should be granted to ACS.

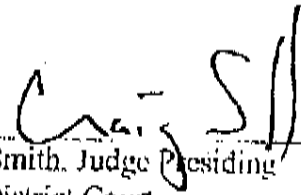
The Court finds, based on the summary judgment record, that ACS is required to obtain a license under §§1702.101-104 of the Texas Occupations Code. The Court further finds that Amanda Ward's negligence claim on Chapter 1702 of the Occupations Code fails as a matter of law, as Amanda Ward has not shown evidence that supports a finding of proximate cause or a finding of damages. Therefore, this Court finds that Amanda Ward has failed to demonstrate that

her damages were proximately caused by the actions of Defendant, the Court **DISMISSES** Amanda Ward's claim of negligence based on Chapter 1702 of the Texas Occupations Code **WITH PREJUDICE.**

For the reasons set forth in the briefs of ACS, the Court **DISMISSES** Amanda Ward's remaining claims **WITH PREJUDICE.**

It is hereby **ORDERED** that Plaintiff Amanda Ward take nothing by her claims.

Signed this the 8 day of April, 2009.



Craig Smith, Judge Presiding
192nd District Court