PRIVATE PRISON INFORMATION ACT OF 2007 (PART II)

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 1889

JUNE 26, 2008

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PRIVATE PRISON INFORMATION ACT OF 2007 (PART II)

THURSDAY, JUNE 26, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:05 p.m., in Room 2237, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Gohmert, Coble, and Chabot.

Staff Present: Bobby Vassar, Subcommittee Chief Counsel; Kimani Little, Minority Counsel; Jesselyn McCurdy, Majority Counsel; Rachel King, Majority Counsel; and Ameer Gopalani, Majority Counsel.

Mr. SCOTT. The Subcommittee will now come to order.

I am pleased to welcome you today to the hearing before the Subcommittee on Crime, Terrorism and Homeland Security on H.R. 1889, the "Private Prison Information Act."

H.R. 1889 requires prisons and other correctional facilities holding Federal prisoners under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to release under the Freedom of Information Act, or FOIA.

On November 8, 2007, the Subcommittee held a hearing on the bill in conjunction with a hearing on the Prison Litigation Reform Act. Representative Tim Holden, the lead sponsor of the bill, was the only witness to testify before the Subcommittee on the panel regarding H.R. 1889. Neither majority staff nor minority staff was made aware of any opposition to the bill, so at the time of the November hearing H.R. 1889 did not appear to be controversial amongst Subcommittee Members, or anyone else for that matter.

Shortly after the hearing, the Corrections Corporation of America contacted Subcommittee staff to express its strong opposition to the legislation and question the necessity of the bill. However, organizations such as the advocacy group, Private Corrections Institute, PCI, and the American Civil Liberties Union supported the legislation, claiming it was difficult for them to obtain information from private prisons through the regular FOIA process of seeking the desired information through the request to the Federal Bureau of Prisons.

We decided to hold an additional hearing now to allow all parties to put their positions on the record and to give Members more information on the pros and cons regarding the bill.

Unfortunately, CCA has chosen not to testify today even though it has been the organization most vocally opposed to the legislation. They have submitted a written statement noting their opposition. And, without objection, I have made that part of the hearing record.

[The information referred to follows:]

Corrections Corporation of America

Written Statement for a Hearing on

H.R. 1889 – "The Private Prison Information Act"

Submitted to the
House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

Thursday, June 26, 2008

Media inquiries:

Steve Owen – CCA
615-263-3000

Corrections Corporation of America (CCA) welcomes the opportunity to present to the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security written views with regard to H.R. 1889 – "The Private Prison Information Act."

CCA is the nation's largest provider of outsourced corrections and detention management services to federal, state and local government agencies. Established in 1983, CCA specializes in the design, construction and management of prisons, jails and detention facilities and provides inmate transportation services. The company manages approximately 50 percent of all beds under contract with private operators and operates the fifth largest corrections system in the United States, following the federal government and three states. CCA employs approximately 17,000 correctional professionals who are responsible for the oversight and care of more than 75,000 offenders at all security levels in 65 correctional and detention facilities across the country. At the federal level, CCA contracts with the Federal Bureau of Prisons (BOP), the U.S. Marshals Service (USMS) and the Bureau of Immigration and Customs Enforcement (ICE) and currently houses a total of approximately 21,000 federal inmates and detainees for these three agencies.

CCA is committed to providing quality corrections management services and CCA's performance is backed by a high contract renewal rate, accountability and oversight by our government customers, and proven operations over our 25-year history as a company. CCA is required to deliver a high level of service and we welcome the multiple levels of oversight and accountability that help ensure that high level of service is achieved. A crucial part of this oversight and accountability structure is access to information and it is in this vein that we offer our views on H.R. 1889.

CCA strongly believes that H.R. 1889 is a solution in search of a problem. Public access to information at federally contracted, private correctional and detention facilities through the Freedom of Information Act (FOIA) process already exists, and it is a process that works well while appropriately protecting private and sensitive government information. In a recent example, the New York Times published a private prison contractor's internal incident documents involving the death of a detainee. Those documents were obtained by a member of the public via FOIA, even though they were stamped "proprietary and confidential" by the private prison contractor. In fact, recent media interest in detainee medical care highlights the availability of private detention facility reports, both from the private vendors, and from the federal government, which provides the medical care in most of the facilities profiled.

H.R. 1889 would circumvent the process in place with the governmental agencies and impose upon the private sector an unprecedented requirement to respond directly to requests for information from the general public. Within CCA's realm of federal agency partners, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) are the gatekeepers for law enforcement material, medical records, and other sensitive information that might be the subject of a FOIA request under the current law. And those departments are rightly, in CCA's opinion, the final arbiters of what information is ultimately released in response to a FOIA request.

It is important to note that the operations and performance of CCA and other providers of outsourced corrections and detention management services at the federal level are closely monitored by government staff with subject matter expertise, and often by on-site government officials. These on-site federal staff act as contract monitors and have unfettered access to all of the facilities at all times. Earlier this year, House Judiciary Committee staff toured the Northeast Ohio Correctional Facility in Youngstown, Ohio, a facility that CCA operates under contract with the BOP and USMS, and where the BOP maintains three full-time, on-site contract monitors. In addition to the Northeast Ohio Correctional Facility, BOP contracts with CCA to operate four other facilities where the BOP also maintains three full-time, on-site contract monitors at each site.

Direct oversight by the federal government allows the government to ensure that CCA is providing appropriate level of service and to learn in real time about serious incidents that may occur. Additionally, DHS and DOJ contractually require the private operators to provide documentation regarding all serious incidents at their facilities. Further, federal agencies conduct their own audits of contractor performance, and those audits are usually based on the same standards by which the government audits its own facilities.

In addition to regular and thorough audits by contracting federal agencies, private facilities are subject to external audits and inspections by accrediting organizations such as the American Correctional Association (ACA), the National Commission on Correctional Health Care (NCCHC) and other entities with licensing/permitting authority (health inspectors, fire inspectors, building and codes inspectors, etc). The ACA audit reviews hundreds of operations standards and for each of the past five years CCA's facilities accredited by ACA received audit scores of greater than 99%, including 100% scores on mandatory standards.

H.R. 1889 would require that private companies establish their own separate apparatus for receiving, evaluating and responding to requests for information. Further, these companies would be required to publicize these procedures and to prepare an annual report detailing the number and types of requests made for information, the number of days taken to process the requests and the ultimate determinations made with respect to these requests. The resulting additional administrative costs would ultimately be borne by these companies' customers – the U.S. taxpayers.

H.R. 1889 also does not explicitly extend the exception provided under FOIA to law enforcement information that could reasonably be expected to endanger the life or physical safety of any individual. That ambiguity could lead to greater security risks for inmates, employees and neighboring communities of a facility.

Further, H.R. 1889 does not explicitly extend the protections provided under FOIA to information or records (including personnel, medical and law enforcement files) that could be reasonably expected to constitute an unwarranted invasion of personal privacy.

Finally, CCA believes that H.R. 1889 unfairly and arbitrarily singles out one class of federal government contractors—private prison operators. One could reasonably extend the failed logic and intent of this legislation to include all federal government contractors—for-profit and non-profit. At the same time, H.R. 1889 does not extend to all contract facilities. It would therefore fail to apply to the hundreds of publicly-operated state and local facilities (which are often not accredited) that house federal prisoners and detainees under contract with the federal government.

For all of these reasons, CCA opposes H.R. 1889.

As noted above, CCA is committed to providing its professional management and operation of correction and detention facilities in an open and transparent manner. In that regard, we would extend an invitation to each member of the Committee to visit any of our facilities to see first hand the quality service provided by our 17,000 corrections professionals and unprecedented level of oversight that is employed by federal staff at these facilities.

Mr. SCOTT. So what started out to be an easy, straightforward bill has turned out to be more complicated and controversial than we first knew. And there seemed to be a general distrust of private prisons, and many believe that they purposely hide information from the public. In addition to PCI, the ACLU has put together a number of examples of how private prisons escape oversight by not being required to respond to FOIA requests.

On the other hand, CCA asserts that it complies with FOIA through the Bureau of Prisons or other Federal agencies, and the current system works. They also point out that to pass H.R. 1889 would have the effect of putting private prison contractors in a different position vis-a-vis other Federal contractors, which could significantly change the FOIA process in ways that may not have been intended by this bill.

With that, I will now recognize the Ranking Member of the Subcommittee, the gentleman from Texas, Judge Gohmert.

[The bill, H.R. 1889, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 1889

To require prisons and other correctional facilities holding Federal prisoners under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to do by law.

IN THE HOUSE OF REPRESENTATIVES

APRIL 17, 2007

Mr. HOLDEN (for himself, Mr. LOBIONDO, Mr. ELLSWORTH, Mr. MURTHA, Mr. BRADY of Pennsylvania, Ms. KILPATRICK, Mrs. MCCARTHY of New York, Ms. JACKSON-LEE of Texas, Mr. MILLER of Florida, and Mr. LAHOOD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To require prisons and other correctional facilities holding Federal prisoners under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to do by law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Prison Information Act of 2007".

SEC. 2. FREEDOM OF INFORMATION REQUIREMENT FOR CONTRACT PRISONS.

(a) IN GENERAL.—Each nongovernmental entity contracting with the Federal Government to incarcerate or detain Federal prisoners in a privately owned prison or other correctional facility shall have the same duty to release information about the operation of that prison or correctional facility as a Federal agency operating such a facility would have under the Freedom of Information Act (5 U.S.C. 552).

(b) REGULATIONS.—A Federal agency that contracts with a nongovernmental entity to incarcerate or detain Federal prisoners in a privately owned prison or other correctional facility shall promulgate regulations or guidance to ensure compliance by the nongovernmental entity with the terms of such contract.

(c) CIVIL ACTION.—Any party aggrieved by a violation of the duty established in subsection (a) may, in a civil action, obtain appropriate relief against the nongovernmental entity operating the facility or against any other proper party.

(d) DEFINITION.—In this section, the term ''privately owned prison or other correctional facility'' includes privately owned prisons or other correctional facilities that incarcerate or detain prisoners pursuant to a contract with—

(1) the Federal Bureau of Prisons;

(2) Immigration and Customs Enforcement; or

(3) any other Federal agency.

○

Mr. GOHMERT. Thank you, Chairman Scott.

And this is, as you said, our second hearing on this legislation. Our first hearing was held in November of last year. On that date, the Subcommittee also considered H.R. 4109, the Prison Abuse Remedies Act, a bill that made substantial changes to the Prison Litigation Reform Act. H.R. 4109 commanded most of the Subcommittee's attention that day, and I believe it overshadowed our consideration of H.R. 1889.

Since last November, I have had an opportunity to review the testimony of the sponsor of H.R. 1889, Mr. Holden. In his testimony, he describes the need to ensure that information regarding private prisons is readily available to the public. He proposed H.R. 1889 as the proper means to accomplish that goal.

Since November, I have also had the opportunity to hear from other advocates that support this legislation, as well as others who oppose it. After reviewing all the available information, I, too, have my serious concerns.

H.R. 1889 extends the Freedom of Information Act reporting obligations imposed on Federal agencies to private companies that contract with Federal agencies to house prisoners. These companies, obviously, are commonly called private prisons.

I support the Freedom of Information Act. It has done a great deal of good. I support the goal of providing information to the public. However, I think that the existing Freedom of Information Act framework does accomplish that goal. It is normally unnecessary and unwarranted to impose Freedom of Information Act obligations directly on private companies because of contracts with the Federal Government, and actually opens a gate that could, and I believe would, become a floodgate.

Congress passed the Freedom of Information Act to ensure open government. FOIA, as its initials cause it to be called, allows the public to gather information, upon request, from Federal Government agencies unless that information is properly withheld because of privacy, law enforcement, trade secret, national security or other concerns.

It was the intent of Congress to allow the public to peek behind the curtain of the Federal Government and to let people see how their tax dollars are being spent. Congress determined that FOIA was a reasonable burden for Federal agencies to bear. Foisting those same burdens on private entities certainly appears overburdensome.

Proponents of H.R. 1889 attempt to justify singling out private prisons to bear the burden of FOIA obligations by asserting that housing prisoners is a core and a unique governmental service. However, this limited test, providing a core and unique government service, could be used to impose FOIA on every class of Federal contractors, including those who take out the Government's trash and recycling.

This is a dangerous precedent, I believe, that we should not set without careful consideration of the likely consequences. Chief among those likely consequences is increased costs. If passed, the bill would cause every private prison with a Federal contract to hire lawyers to receive and reply to FOIA requests. These costs will be passed along to Federal agencies. That will occur even though

these same agencies already have offices that exist specifically for the purpose of processing FOIA requests.

Imposing FOIA on private entities will create a duplicative process that will waste taxpayer dollars. This certainly seems unwarranted, especially when one considers that it is yet to be demonstrated that information about private prisons cannot already be obtained through a FOIA request to the responsible Federal agencies.

There is not a single example, that I am aware of, of a FOIA request regarding a private prison that was properly made to the appropriate Federal agency which was refused. If someone has evidence to the contrary, we will welcome seeing that, as well.

We should not create legislative fixes to address problems that do not exist. Without clear evidence of the failure of the existing FOIA regime to properly work, it is difficult to support legislation that would take the huge step of imposing FOIA obligations on potentially all private entities.

So, at this point, I am in opposition to the Private Prison Information Act, and will yield back the balance of my time.

Mr. SCOTT. Thank you.

Our first witness on the panel will be Mike Flynn, the director of government affairs for Reason Foundation, the nonpartisan think-tank whose mission it is to advance a free society by developing, applying and promoting libertarian principals, including individual liberty, free markets and the rule of law.

He is a graduate of the University of Iowa, where he studied English and Economics. He has more than 15 years of experience in the development, implementation and analysis of public policy. He has provided his expertise to a number of nonprofit organizations.

He began his public policy career in the Illinois General Assembly, where he worked as an analyst, both in the Capitol and in the Assembly's Washington, D.C., office.

The next witness will be Alex Friedmann, vice president for Private Corrections Institution, Incorporated. He is the associate editor of Prison Legal News, a monthly publication that reports on corrections and criminal justice-related issues nationwide. Prison Legal News has been published since 1990 and has extensively covered the private prison industry.

He also serves in the voluntary, noncompensated capacity as vice president of the Private Corrections Institute, a nonprofit organization that opposes prison privatization.

He is presently a plaintiff in the lawsuit filed against CCA due to CCA's refusal to comply with Tennessee's public records law.

Our final witness will be Tom Jawetz, who is the immigration detention staff attorney for the National Prison Project of the ACLU Foundation.

He graduated from Yale Law School in 2003 and served as a law clerk for the Honorable Kimba Wood, United States District Court, Southern District of New York. He works on a wide range of issues dealing with the conditions in which immigrant detainees are housed, and has co-counseled several lawsuits involving issues ranging from overcrowding to poor medical care.

Prior to joining the ACLU, he worked in the Immigrant and Refugee Rights Project of the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

I welcome all of our witnesses to us today, and thank you for joining us today.

Your written statements will be entered into the record in their entirety, but I would ask you to summarize your testimony in 5 minutes or less. And there is a timing device where the light will be green and turn yellow with 1 minute left and red when your 5 minutes have expired.

We want to recognize the gentleman from North Carolina, Mr. Coble, who has joined us today.

We will start with Mr. Flynn.

TESTIMONY OF MICHAEL FLYNN, DIRECTOR OF GOVERNMENT AFFAIRS, REASON FOUNDATION

Mr. FLYNN. Chairman Scott, Ranking Member Gohmert, Members of the Subcommittee, thanks for this opportunity testify today. I am especially grateful for this opportunity because this issue touches on a lot of areas of Reason's work.

For 40 years, we have conducted research showing how the market and competition can improve the delivery of government services. We have also worked to reform the criminal justice system. We, for example, propose a number of initiatives that would reduce or even eliminate jail time for nonviolent drug offenders as a way to reduce our very high incarceration rate.

We also publish Reason Magazine, an award-winning magazine where we address public policy through journalism. And so we use the FOIA process quite a bit. Most recently, we used it to expose some prosecutorial misconduct in Mississippi. You would be hard-pressed to find bigger champion of the FOIA process than Reason Foundation.

That said, to extend the FOIA to private companies, whether it is private correctional companies or other Federal contractors, we believe is at best misguided and at worst it would create a host of unintended consequences.

First, we find that extending the FOIA process to private prisons is unnecessary. Currently, right now, when a Federal agency contracts with a private prison, they have employees who are on-site who monitor the contracts. There are a number of contracts and reports and audits that are submitted to the Federal agencies. All of those can be FOIA'ed. You can use the FOIA process to look at all that information.

Now, I know proponents of this legislation say there are some other aspects that we can't get to. We can't find out about training for prison staff or find out about wages or experience or turnover. But there is a very simple solution to that: Require it in the contract.

There is no prohibition on what the Federal agency can put in the contract with a private entity. They can stipulate certain training levels. They can stipulate certain compensation levels. They could actually make a contract that would require disclosure of more information than you would have under a FOIA. Only the

imagination of Federal officials keeps us from having this information.

Second, this would set a very dangerous precedent. I mean, governments have incredible sovereign powers to tax us, to regulate us, to prosecute us. Because of this, we have the FOIA process so that we can look at how the government is doing its work and make sure that they are acting in an honest and open and fair manner. Private companies do not have this power. So it is a very different place.

Now, there is no reason, if you extend this to private prison companies that you should, that it could not also be extended to any other Federal contractor and, by extension, their contractors and their suppliers. Thousands of individuals, small and large businesses, provide services to the government and products to the government at great efficiency for the taxpayers. All of that could be opened up to the FOIA process. Competitors could use it to find out trade secrets. You know, you could find out proprietary software code. You could use it as a tool to poach staff. It is an invasion of privacy that we think just isn't warranted in this.

And, finally, I think the real problem with this—and let's be honest that—and it should be pointed out that most of the organizations that support this are primarily against prison privatization, against contracting out for prison services. And if FOIA is in place, I think a lot of companies would probably remove themselves from that industry, from that market. And in doing so, we would lose out on a lot of innovation and a lot of flexibility.

Again, you know, we have a dysfunctional correctional system. We have among the world's highest incarceration rates. Our recidivism is very, very high. And the problem is, we are just managing the system, rather than trying to manage the outcomes.

With a Federal bureaucracy, it is very, very hard to get different outcomes. But with contracting, you can build different outcomes into the contract. You could make the payments contingent on, say, how many prisoners are in GED programs, how many prisoners are getting substance treatment. I mean, we can create contracts that get the outcomes we need. And you cannot do that without that. It is a very, very powerful tool that we can use. And, again, it is only the imagination of the Federal agencies that don't do this.

So I think, in looking at any public policy, I mean, this fails three critical tests. It is unnecessary, because we can get the information we need. It sets a very dangerous precedent, because there is no reason to think it wouldn't be extended across the board of Federal contractors. And it stifles innovation by removing a powerful tool, which is contracting to get better outcomes in our correctional system. Because, ultimately, we need to have a better correctional system, not just a place where we warehouse inmates.

Thank you. I would be happy to take any questions.

[The prepared statement of Mr. Flynn follows:]

PREPARED STATEMENT OF MICHAEL FLYNN

House Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security
United States Congress

"Private Prison Information Act of 2007"

Testimony of

Michael Flynn
Director of Government Affairs
Reason Foundation

June 26, 2008

Reason Foundation
3415 S. Sepulveda Blvd., Suite 400
Los Angeles, CA 90034
310-391-2245
www.reason.org
www.reason.com
www.reason.tv
Mike.Flynn@Reason.org

Chairman Scott, Ranking Member Gohmert and members of the Subcommittee, thank you for the opportunity to speak to you today. My name is Michael Flynn and I am Director of Government Affairs for the Reason Foundation. Reason is a non-profit, non-partisan think tank that, for four decades, has researched the consequences of government policy and worked to advance liberty and develop ways the market can be used to improve the quality of life for all Americans.

I'm especially grateful to provide testimony today, as the issue before you touches on several aspects of Reason's work. For decades, we have produced leading research showing how the market and competition can improve the delivery of government services. We have also long advocated reforms in the criminal justice system, such as reducing or eliminating jail-time for non-violent drug offenders, to reduce our nation's high rates of incarceration and recidivism. In addition, Reason Foundation publishes *Reason,* the magazine of "Free Minds and Free Markets."

The Freedom of Information Act (FOIA) process is a powerful tool we have used to expose government corruption and failure, including, most recently, prosecutorial misconduct in Mississippi. Expanding the reach of FOIA throughout the halls of government will find no greater champion than Reason Foundation.

That said, extending FOIA to private companies, including private correctional companies, is at best misguided and at worst a dangerous precedent that would undermine several important principles. It would also

stifle competition and, in this specific case, tie us forever to a correctional system that is failing both inmates and the public at large.

I. Extending FOIA to private companies is unnecessary

Currently, federal agencies contract with private companies to manage correctional facilities and immigration detention centers. The government agencies often have their own employees on-site to monitor the facilities and contracts. They also provide regular oversight and audits to determine whether the terms of the contracts are being met. The contractors are also required to file regular reports with the agency on their management and operations. All such documents are currently available from the federal agencies through the existing FOIA process. We know of no case where a legitimate FOIA request was turned down by a federal agency. In other words, most of the relevant information is already available by filing FOIA requests with the federal agency that administers the private contract.

Proponents argue that these documents don't detail the private company's staffing levels, compensation, or training requirements. If these issues are a concern, the answer is simple: The federal agency can – and should - make disclosure of this information a requirement in the contract. There is no prohibition on requiring the disclosure of this, or any other, information as part of the contract. Imagination is the only limit on what federal agencies can require companies partnering with the government to disclose.

Agencies can very specifically and precisely mandate certain staffing levels, rates of compensation, or even specific training courses that must be completed by workers as a condition of their contracts. Indeed, the onus must be on government officials who negotiate and administer such contracts to represent the public interest and require disclosure of information relevant to oversee the contract. They should not defer to the application of FOIA, which was neither intended nor designed for this purpose.

We already have the tools to obtain everything proponents say they want. And we can get it without an unprecedented extension of FOIA into private companies.

Indeed, through contracting, agencies can essentially require the disclosure of *more* information than would typically be obtainable from a government agency through FOIA.

II. Extending FOIA to private companies is a dangerous precedent

It is important to note that this proposal would have serious negative consequences. Extending FOIA to private companies and, by extension, private individuals is an unwarranted invasion of their privacy.

Governments have sovereign powers to tax, regulate and prosecute. Because of this, Congress wisely enacted FOIA to ensure the public could

"peek behind the curtain" to ensure government agencies and officials were acting openly, honestly and fairly. FOIA is a protection against the abuse of government power.

Private companies have no such powers.

There is no argument for private correctional companies to be subjected to FOIA, that wouldn't also apply to other government contractors and suppliers, and even down the line to their contractors and suppliers. Thousands of individuals, and small and large companies, provide important products and services to taxpayers and the government through competitive sourcing and managed competition.

Subjecting them to FOIA would open all aspects of their business to any prying eye. Competitors could use it to learn trade secrets. They could use information on compensation to try to poach staff. They could use it to obtain a company's proprietary software code. Curious individuals could even use FOIA requests to find out how much money their neighbor earns. That is not what the FOIA was designed or intended for.

The costs to private companies to comply with a potential avalanche of paperwork and FOIA requests about individual salaries or training courses would be passed along, ultimately to taxpayers.

The end result is that many companies would likely pull out of the contracting market altogether. Not only would this increase costs for taxpayers, it would shut federal agencies out of the innovations and

efficiencies that come from market-based competition. We would end up with inferior services at higher costs.

III. Extending FOIA will stifle innovation, eliminate flexibility

It bears noting that the leading proponents of this legislation are organizations that oppose contracting out the operation of correctional facilities. They want to dramatically alter the purpose of the FOIA in order to protect the status quo of mostly government-operated prisons.

Private prisons are delivering significant cost savings and equal or higher levels of quality when compared to government-run correctional facilities, according to a Reason Foundation study. Reason examined data from 18 quality comparison studies conducted since 1989 and found that private prisons outperformed, or were equal to, their government counterparts in 16 of 18 studies. In studies comparing costs, private prisons demonstrated significant savings in 22 of 28 studies.

But, this issue is larger than saving taxpayer money. The correctional system in this country is dysfunctional. Its costs are rising far faster than the rate of inflation. We have one of the highest rates of incarceration and recidivism in the world. We lock up non-violent offenders at alarming rates and provide few opportunities to enhance their skills or to further their educations in ways that would break a cycle of criminal behavior. We are simply housing people, rather than rehabilitating people for a productive life. We need to move away from operating the correctional system and start managing its outcomes.

Competitive contracting gives the government the means to do this. We can build positive performance requirements into the outsourced contract and make compensation contingent on meeting these goals. Today, we could craft contracts that stipulate that private prisons must meet requirements regarding the number of inmates taking GED courses, or getting substance abuse treatment, or taking part in job training programs. We could structure contract payments or even incentive bonuses on a whole range of goals that would benefit society. Private companies would compete and innovate to meet these goals.

Our current public correctional system does not and cannot do this. Government agencies are monopoly providers who can never be "fired" nor incentivized through performance payments based on outcomes. Private providers can be made far more accountable to the public through a rigorous contracting process than the current bureaucracies that run most prisons.

We have a choice. We can continue to fund our existing – and failing – correctional system or we can use the competitive contracting process to achieve correctional outcomes that are accountable, deliver a higher quality of service, and successfully rehabilitate prisoners while reducing the number of Americans behind bars. Again, imagination is the only thing that limits building these positive outcomes into a contract. Without this tool, we will forever have the existing status quo.

IV. Conclusion

The current proposal before you fails three critical policy tests:

1. **It is unnecessary**. Most of the relevant information is already available through the normal FOIA process. Any information that isn't already available could very easily be included in the terms of a contract.
2. **It has serious, negative consequences**. It exposes a private company's internal trade secrets and operations, not to mention individual salary information, to any curious outsider, imposing costs that will be passed along to the public, potentially reducing the government's contracting pool, and jeopardizing the right to privacy.
3. **It locks us into a system that is failing**. Contracting correctional management is a tool to improve our prison system. Eliminating competition and strengthening the public monopoly provider will prevent us from focusing on positive outcomes. It is neither in the interests of the general public nor incarcerated individuals.

Thank you again for the opportunity to provide testimony on this important issue. I'm happy to take any questions.

Mr. SCOTT. Thank you.

Mr. Friedmann?

We want to recognize the gentleman from Ohio has joined us, Mr. Chabot.

Mr. Friedmann?

TESTIMONY OF ALEX FRIEDMANN, VICE PRESIDENT, PRIVATE CORRECTIONS INSTITUTE

Mr. FRIEDMANN. Thank you, Chairman Scott, Ranking Member Gohmert, Members of the Subcommittee.

With respect to Mr. Flynn, regarding public access to information related to privately operated prisons that house Federal prisoners, he has painted somewhat of a rosy picture. Unfortunately, that picture is more a work of abstract art. I prefer the school of realism, and the testimony I am going to give relates more to how the real world works.

In December 2005, Prison Legal News, the publication that I worked for, filed suit against the GEO Group, the nation's second-largest private prison company, under Florida's public records law. Florida has a unique public records law in that it expressly applies to private companies that contract with the State. Regardless, GEO Group failed to respond to our records request, which led to our litigation. GEO is in the process of producing our requested records, but only after we filed suit and only after the Court granted multiple motions to compel.

I am going to discuss some examples related not only to FOIA but also to State public records laws. And the reason for that is that most public contracts with private companies relate to State and county prisoners, not Federal. FOIA, on the Federal level corresponds to the State public records laws on the State level. And these companies' failure to respond on the State level is comparable to their failures on the Federal level.

On April 3, 2007, on behalf of Prison Legal News, I submitted a records request to CCA under Tennessee's public records law. Tennessee Supreme Court had specifically ruled earlier that private companies that perform functionally equivalent government services were subject to the State's public records law. Regardless, CCA refused to answer our records request. A copy of CCA's refusal is attached to my written statement as Exhibit 1.

As a result, last month, I filed suit, personally, against CCA to ensure that the company complies with Tennessee's public records law, as interpreted by our Supreme Court in that State. That case is presently pending.

In 2007, the Private Corrections Institute, of which I serve as vice president, submitted a public records request to CCA under Florida's public records law. We were seeking a copy of the after-action report related to a September 2004 hostage-taking and shooting at the company's Bay County jail. CCA refused to produce a copy of the report, claiming attorney-client privilege. A copy of CCA's refusal letter is attached to my statement as Exhibit 2.

At that time, CCA's general counsel, Mr. Gustavus Puryear, was cited in a News Herald article as stating that report would never become a public record.

This past April, I sent public records requests to a number of government agencies that contract with CCA, requesting records related to the private prisons and jails that they contracted with. Of the 16 agencies that responded, only nine could provide the information I requested, which included the number of inmate-on-inmate assaults, inmate-on-staff assaults, and use-of-force incidents. Four jurisdictions stated they had no such records whatsoever.

This is one example of how contracting government agencies simply do not have all the data provided from private prison contractors that would be available from comparable publicly run facilities, because the private prison companies do not supply those records to the agencies they contract with. If the contracting government agencies do not get data from private prison companies, they cannot then turn that data over to the public through FOIA or public records requests.

Regarding FOIA, on May 8, 2008, Paul Wright, the editor of the publication that I work for, submitted a FOIA request to CCA's corporate office. That request is attached as Exhibit 3 to my written statement.

Our FOIA request encompassed data concerning CCA-operated facilities that house Federal prisoners. We asked for records related to inmate-on-inmate assaults and use-of-force reports, as well as other FOIA requests that CCA had received. All of this information would be available from federally operated prisons through FOIA.

To date, CCA has not responded to our FOIA request. Mr. Wright has left five messages; they will not call us back. FOIA allows 20 days to respond, which has long since passed. CCA has completely ignored our FOIA request.

The reality is that CCA and other private prison companies simply do not provide the public with records or information concerning their privately operated prisons. Their internal records are labeled proprietary and copyrighted or attorney-client privileged. Prisoners who are held in private prisons have greater access to internal documents than members of the public.

My written statement includes a description of how I tried to obtain a copy of the CCA policy concerning the company's mail policy in an Arizona prison. My request was denied. CCA stated that policy was proprietary and they could not provide it.

I would like to give a visual example of the difference between publicly operated prisons and private. Earlier, I mentioned a 2004 shooting and hostage situation. This is the public report regarding that incident from Bay County officials. This is the CCA report. And if you can't see it, it is because it is not here, because CCA refused to produce it, either to ourselves, Private Corrections Institute, the county, or the newspapers who requested it. That is the difference—public; private.

Thank you.

[The prepared statement of Mr. Friedmann follows:]

STATEMENT
OF
ALEX FRIEDMANN

ASSOCIATE EDITOR, PRISON LEGAL NEWS
AND
VICE PRESIDENT, PRIVATE CORRECTIONS INSTITUTE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY

REGARDING

H.R. 1889
(Private Prison Information Act of 2007)

PRESENTED ON

June 26, 2008

Statement of Alex Friedmann

Chairman Scott, Ranking Member Gohmert and Members of the Subcommittee:

Thank you for providing me this opportunity to testify concerning H.R. 1889, the Private Prison Information Act. I hope that my comments, this statement and the attached exhibits will prove helpful when considering this important and much-needed legislation.

I am the associate editor for *Prison Legal News* (*PLN*) – a non-profit monthly publication that reports on corrections and criminal justice-related issues. *PLN* has been publishing since 1990 and has extensively covered the private prison industry. I also serve in a voluntary capacity as vice president of the Private Corrections Institute (PCI) – a non-profit citizen watchdog agency that opposes prison privatization and maintains a clearinghouse of news reports and other documents related to private prison companies.

H.R. 1889 is fairly straightforward. This bill would require privately-operated prisons and other correctional facilities that hold federal prisoners under contract with a federal agency to comply with Freedom of Information Act (FOIA) requests to the same extent as the federal agency itself. Private prison firms would be required to do no more than what federal agencies already do.

The need for H.R. 1889 is three-fold. First, it is good public policy and safeguards the interests of taxpayers, since private prison contracts with federal agencies involve the use of taxpayer funds.

Second, H.R. 1889 is necessary because private prison companies have repeatedly demonstrated that absent a statutory requirement to do so, they will not provide the public and the media with

information that otherwise would be obtainable from government agencies under FOIA and state public records laws. Indeed, in some cases for-profit private prison companies have attempted to conceal information from contracting government agencies and, thus, from the public.

Third, H.R. 1889 is necessary as a matter of public safety. Transparency and accountability are critical for monitoring prison and jail operations, both public and private. Such transparency and accountability are already available in the public sector through FOIA, which provides oversight by means of public access to public records. Under current law there is no comparable means of ensuring transparency and public accountability for privately-operated prisons.

H.R. 1889 is Necessary as Good Public Policy

In 2002, in a case which extended Tennessee's public records statute to private contractors that provide functionally equivalent government services, the Tennessee Supreme Court said, "[T]he public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contactor."

Federal agencies that house prisoners or detainees, including the Bureau of Prisons (BOP), U.S. Marshals Service, and Immigration and Customs Enforcement (ICE), already are subject to the Freedom of Information Act. They are public agencies, incarcerate prisoners as a public function to ensure public safety, and are held publicly accountable through FOIA. Any citizen can obtain information about federal prisons or detention facilities by submitting FOIA requests – as can journalists and other members of the media who thereby inform and educate the public.

However, when the operation of correctional facilities is contracted to private-sector companies such as Corrections Corp. of America (CCA) or GEO Group (formerly Wackenhut Corrections), under current law the private contractors do not have to comply with FOIA requests and are not similarly accountable to the public. By contracting out the management of facilities that house federal prisoners, federal agencies are contracting away the public's right to obtain information about the operations of those facilities through FOIA requests. Thus, members of the public and the media are unable to obtain the same information from privately-run prisons that they can obtain from government-operated correctional facilities.

To the extent private prison companies claim H.R. 1889 is unnecessary because they already provide reports and records to government agencies pursuant to their contracts, that reasoning rings hollow. Private contractors are only obligated to provide reports and records as required by their contract, and nothing more. This excludes a wide range of documents that are available from federal agencies, which are required to comply with FOIA, but not available from CCA or other private prison companies. Contracts between private companies and the BOP, ICE and U.S. Marshals are not written with FOIA in mind; they are written with prison and jail security operations in mind. To my knowledge, no federal contract requires a private prison contractor to comply with FOIA to the same extent as the contracting government agency. Absent a law such as H.R. 1889, private prison contractors do not have to respond to FOIA requests.

As a result, records related to misconduct by private prison employees (e.g., crimes or disciplinary violations), employee-to-prisoner ratios, internal policies, the type of training that private prison employees receive, staff turnover rates, etc., are not obtainable from the contracting government agency if private prison companies are not required to disclose such information pursuant to their

contracts. A contract between a federal agency and a for-profit private prison company should not serve as the gatekeeper for, or inhibit access to, records that can be obtained by members of the taxpaying public who foot the bill for the government's private prison contracts.

I will provide an illustrative example. In April 2008, I sent public records requests to a number of public agencies that contract with CCA, requesting specific data including the number of inmate-on-inmate assaults, inmate-on-employee assaults and use of force incidents. I also requested data concerning CCA employees who had been charged with criminal offenses.

Despite contracting with CCA, several jurisdictions stated they could not provide the requested records or data. The Board of Commissioners for Citrus County, Florida provided the number of disciplinary reports but said, "All other information is not received or maintained by this office." The Tallahatchie County Sheriff's Office stated, "I do not have anything ref: to what you are asking for in my office. CCA takes care of their own business." The Hamilton County Dept. of Corrections replied, "No such records are maintained in this office for the dates you request."

In several cases it was suggested that I obtain the requested information from CCA; however, as noted below, CCA is not responsive to public records requests. Thus, in these examples, data that would be obtainable from government-run prisons was not obtainable from public agencies that contract with private prison companies, even though they presumably monitor their private prison contracts. This indicates that merely because CCA or other private prison firms provide some data to contracting government agencies, they clearly do not provide all the data that would be publicly available from government-operated correctional facilities.

As stated in "Watch Your Assets," Feb. 6, 2008 (a joint project by Texans for Public Justice and Grassroots Leadership), "In response to requests for records under the Texas Public Information Act, however, the [Texas Dept. of Criminal Justice] acknowledged that it does not collect basic statistics about private facilities, numbers that it routinely gathers for facilities that it operates itself. TDCJ officials say that its inspectors monitor some employment information during site visits but the agency could not provide staffing numbers for its private facilities. The requested data that the agency did not provide were records on the number of guards each facility employs, the guard-to-prisoner ratio, guard disciplinary data, and enrollment in drug-treatment programs."

H.R. 1889 is Necessary Because Private Prison Companies Fail to Comply with Existing Public Records Laws and FOIA Requests

On April 3, 2007, I submitted a public records request to CCA under Tennessee's public records statute. Five years previously, Tennessee's Supreme Court, in *Memphis Publishing Company vs. Cherokee Children and Family Services*, held that "private entities which perform 'contracted out' governmental services" that are functionally equivalent to those performed by public agencies are subject to Tennessee's public records law.

Despite the fact that CCA, which operates prisons and jails, unquestionably performs functionally equivalent public services, the company refused to comply with *PLN*'s records request. CCA's attorney argued that Tennessee's public records law did not apply to the company. Consequently, on May 19, 2008, *PLN* filed suit against CCA for failure to comply with the state's public records law as interpreted by the Tennessee Supreme Court's prior ruling. I am the plaintiff in that case, *Friedmann v. CCA*, Chancery Court of Davidson County, Tenn., Case No. 08-1105-I. This suit would not have been necessary but for CCA's denial of *PLN*'s public records request, in which

we requested documents that would have been obtainable from public agencies under Tennessee's public records act (e.g., complaints, verdicts and settlements in legal actions; reports, audits and investigations in which CCA was found to have violated its contractual obligations; and copies of the contracts entered into between CCA and Tennessee public agencies). A copy of CCA's letter denying *PLN*'s public records request is attached as Exhibit 1.

Previously, in December 2005, *PLN* sued the GEO Group – the nation's second largest private prison firm – for failing to fully respond to records requests under Florida's public records statute. Although GEO produced a limited number of the requested records, it ignored other requests and did not respond to a second records request. While that litigation is ongoing, GEO has agreed to produce the requested records – but only after *PLN* filed suit. Further, during the litigation GEO failed to comply with requests for discovery, requiring *PLN*'s attorney to file multiple motions to compel, which were granted by the court. The case is *PLN v. The Geo Group, Inc.*, 15th Judicial Circuit of Florida, Civil Division, Case No. 50 2005 CA 011195 AA.

Additionally, in 2004 and 2007 the Private Corrections Institute (PCI) submitted public records requests to CCA under Florida law, seeking an after-action report related to a hostage-taking and shooting at the CCA-operated Bay County Jail. CCA declined to produce the requested report, citing attorney-client privilege. Notably, the reports prepared by Bay County officials and by the Florida Department of Law Enforcement, concerning the exact same incident at the Bay County Jail, are public records that are made publicly available. A copy of the Oct. 19, 2007 letter from CCA's attorney denying PCI's public records request is attached as Exhibit 2.

The above examples relate to state public records laws, not to federal FOIA requests. However, to the extent that private prison firms have refused to comply with state public records statutes, there is no reason to believe they would voluntarily comply with FOIA requests.

To test this theory, on May 8, 2008, *PLN*'s editor, Paul Wright, sent a FOIA request to Mr. Cole Carter, CCA's Assistant General Counsel at the company's corporate office. Our FOIA request asked for the total number of FOIA requests filed with CCA since 2006, in addition to CCA's responses to the last 20 FOIA requests received. We also requested specific information related to CCA facilities that house federal prisoners – including the number of inmate-on-inmate assaults, inmate-on-staff-assaults, use of force incidents, etc. A copy of our FOIA request is attached as Exhibit 3. FOIA allows for 20 business days to respond to a records request; however, as of June 20 – thirty-one business days after our request was submitted – CCA had not replied. Mr. Wright has placed five phone calls to CCA to check on the status of our FOIA request and left messages each time. He has received no response from Mr. Carter or any other CCA official.

It is apparent that CCA is unwilling to voluntarily respond to FOIA requests, just as the company does not comply with requests submitted under state public records laws. Thus the need for H.R. 1889, to ensure that private prison companies are held accountable to the public through FOIA to the same extent as the federal agencies they contract with. Additional recent examples of private prison firms failing to provide information to the public and to journalists are included in Exhibit 4, which was compiled by the Private Corrections Institute and includes reports from the Public Broadcasting Service, *The New Yorker* and the *New York Times*, among others.

Ironically, prisoners held in privately-operated facilities have access to internal prison policies while members of the public do not. Consider that earlier this year, a prisoner at the CCA-run Saguaro facility in Arizona contacted *Prison Legal News* and informed us that CCA staff were not allowing prisoners to receive books ordered from *PLN*. I called the facility, left a message, and received a return call on April 7, 2008 from Traci Thompson, who identified herself as the Warden's secretary. I requested a copy of CCA's policy governing the receipt of reading material by prisoners; however, I was told I could not receive a copy of the policy because it was for "in-house" use only. See Exhibit 5, an affidavit I wrote at the time. While prisoners have access to internal CCA policies, as a member of the media I was denied access to those same policies. That would not happen at a government-run prison, where such policies are public documents.

Indeed, CCA has been very creative in keeping internal documents out of the public's hands. For example see Exhibit 6, an incident report from CCA's North Fork Correctional Facility in Sayre, Oklahoma involving the use of chemical agents and a "T-160 Flameless Expulsion grenade." This report is labeled "Proprietary Information – Not for Distribution – Copyrighted." No comparable report from a government agency would be designated "proprietary" or "copyrighted."

H.R. 1889 is Necessary as a Matter of Public Safety

As noted above, in April 2008 I sent public records requests to a number of public agencies that contract with CCA, in which I requested information about CCA employees who were charged with crimes. Many of the government agencies I contacted said they maintained no such records. The fact that many jurisdictions were unable to provide any data regarding CCA employees who had been arrested for criminal offenses is troubling. The Louisiana Dept. of Public Safety and

Corrections stated, "With regard to your request for information relative to CCA employees being charged with criminal offenses, this office has no information regarding that issue." According to news reports and other data, I am personally aware of at least 85 CCA employees who were charged with crimes over the past five years – yet in many cases the contracting public agencies were unable to provide information about arrests of private prison employees.

Certainly, prison staff who engage in criminal conduct – such as contraband smuggling – have an impact on public safety. Information related to federal prison employees who engage in criminal acts can be obtained through FOIA; however, private prison contractors are under no obligation to make public similar information about their own employees charged with crimes. As stated above, in many cases such information is not even known to contracting government agencies. If enacted, H.R. 1889 would require private prison companies to disclose criminal conduct by their employees to the same extent as federal agencies, by making them subject to FOIA requests.

Further, consider that in some cases private prison companies deliberately withhold information from government agencies. One documented example involves a May 16, 2007 incident at the CCA-operated Hardeman County prison in Tennessee, when CCA warden Glen Turner assaulted a prisoner. Despite a state monitor being present at the facility, the incident was not reported by CCA nor discovered by the monitor. The Tennessee Department of Correction (TDOC) was only informed two months later, in July, by the prisoner's attorney. The TDOC's Director of Internal Affairs stated in an e-mail that the incident involving Warden Turner "was never reported at the facility," and said it was only after the TDOC was notified by the prisoner's lawyer "that anyone at the facility began to acknowledge the excessive use of force by Warden Turner." A subsequent investigation verified that the incident did occur; Warden Turner resigned, was prosecuted and

pleaded guilty in September 2007. There is no question that CCA staff had tried to cover-up this abusive incident; information about Warden Turner's excessive use of force had to be obtained from state officials through a public records request, not from CCA.

Public safety concerns are also implicated when private prison companies do not provide accurate information about security-related incidents such as escapes and riots. On March 13, 2008, *TIME* magazine published an article concerning a former CCA employee-turned-whistleblower, Ronald T. Jones, who had been employed as a senior manager in the company's internal quality assurance division. Mr. Jones alleged that under the direction of CCA's vice president and general counsel, Gustavus A. Puryear, the company maintained two sets of quality assurance reports. The reports provided to contracting government agencies reportedly did not contain all of the information in CCA's in-house reports, which were labeled "attorney-client privileged" and not for distribution outside the company. A copy of the *TIME* article is attached as Exhibit 7. The quality assurance reports referred to by Mr. Jones include "zero tolerance" events such as riots, escapes, hostage situations, unnatural deaths and sexual assaults at CCA facilities.

One example of such an internal CCA quality assurance report, which is labeled "an attorney-client privileged communication ... not to be released to anyone without the expressed written approval of the Office of General Counsel," is attached as Exhibit 8. Such internal documents, which contain information about security-related events that impact public safety, are not made available to members of the public – nor, apparently, to contracting government agencies.

Although CCA has disputed Mr. Jones' allegations, the attempted cover-up at CCA's Hardeman County facility involving Warden Turner, the internal CCA quality assurance report designated

"attorney-client privileged" attached as Exhibit 8, internal CCA incident reports that are labeled "proprietary" and "copyrighted" as shown in Exhibit 6, and CCA's refusal to provide a copy of an internal policy as described in Exhibit 5, cast substantial doubt on the company's claim that it does not withhold information from contracting government agencies or the public.

Conclusion

Perhaps most obviously, if CCA and other private prison contractors allege that H.R. 1889 is not necessary because they already produce reports and information to federal agencies, or otherwise comply with FOIA requests, then what is the harm of this legislation and why are they lobbying against it? If they have nothing to hide they should have no objections. There is no downside to H.R. 1889; it would simply require private prison companies that contract with federal agencies to respond to FOIA requests to the same extent as the federal agencies themselves. Existing FOIA exemptions that safeguard personal information and privacy concerns would still apply.

In addition to my experience with *Prison Legal News* and the Private Corrections Institute, I am also a former prisoner. From 1992 to 1998 I was incarcerated at the CCA-operated South Central Correctional Facility in Tennessee; I therefore have personal knowledge and empirical experience in regard to how CCA operates. During my incarceration I was privy to internal CCA documents that contained information not for public disclosure, and was aware of misconduct by CCA staff that had an adverse impact on public safety. Absent any statutory requirement to publicly disclose such information, the public, the media and government agencies that contract with CCA would never know about many of the problems at the company's privately-operated prisons.

The bottom line is that if the private prison industry already provided members of the public with the same information that can be obtained from federal correctional facilities, H.R. 1889 would not be needed. However, because private prison companies have repeatedly demonstrated they are unwilling to respond to FOIA and public records requests, this legislation is necessary.

H.R. 1889 is good public policy that will increase accountability and transparency at privately-run facilities that house federal prisoners by making them subject to FOIA requests, and thereby will improve public safety and preserve the public's right to know how their tax dollars are spent.

NOTE: None of the CCA-related documents attached as exhibits to this statement were obtained from CCA; all were obtained through other sources, as CCA has denied my records requests.

EXHIBIT 1

WALKER, TIPPS & MALONE
ATTORNEYS AT LAW
2300 ONE NASHVILLE PLACE
150 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219
TELEPHONE (615) 313-6000
WWW.WALKERTIPPS.COM

ROBERT J. WALKER
J. MARK TIPPS
GAYLE MALONE, JR.
STEVEN E. ANDERSON
JOSEPH F. WELBORN, III
CLIBBY HALL BARROW
JOHN C. HAYWORTH
W. SCOTT SIMS
KATHRYN HAYS SASSER
SARA F. REYNOLDS
ERIN H. PALMER
CHARITY F. GOODNER
JOHN L. FARMINGER IV
CHARLES I. MALONE

DIRECT DIAL: (615) 313-6017
FAX: (615) 313-6001
E-MAIL: JWELBORN@WALKERTIPPS.COM

April 24, 2007

VIA FEDERAL EXPRESS
Alex Friedmann
Prison Legal News
5341 Mt. View Road #130
Antioch, TN 37013

Re: *Your April 3, 2007 letter*

Dear Mr. Friedmann:

Walker, Tipps & Malone represents Corrections Corporation of America ("CCA") with respect to your April 3, 2007 letter requesting production of certain documents pursuant to Tennessee's Public Records Act, Tenn. Code Ann. § 10-7-503. As set forth below, CCA denies your requests for several reasons.

First, CCA respectfully disagrees with your assumption that CCA is subject to Tennessee's Public Records Act. As the Tennessee Supreme Court held: "A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government." *See Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002). CCA is a privately-owned, for-profit corporation. CCA is not managed or operated by the State of Tennessee or any of its subdivisions, it was not formed by an act of the Tennessee legislature or a local general assembly, and it was not formed for the sole purpose of serving any Tennessee government functions. Rather, CCA has contracts with multiple federal, state, and municipal governments throughout the country. The only money CCA receives from political divisions of the State of Tennessee is as a *quid pro quo* for providing correctional facility management services, and this amount of money is a small percentage of CCA's overall income. Unlike a government agency, CCA does not claim the benefit of governmental immunity from suit in tort actions, CCA employees do not participate in public retirement plans, and CCA maintains its own insurance. CCA is simply not the functional equivalent of a Tennessee government agency. *See Cherokee Children*, 87 S.W.3d at 79; *Memphis Publishing Co. v. Shelby Cty. Health Care Corp.*, 799 S.W.2d 225, 229-231 (Tenn. Ct. App. 1990), *appl. perm. appeal denied* (Tenn. 1990).

Second, even if CCA were subject to the Public Records Act, many of the documents you request are not covered by the Public Records Act by operation of state law. *See* Tenn. Code Ann. § 10-7-503(a). Tennessee law protects from inspection under the Public Records Act

EXHIBIT B

attorney work product and documents protected by the attorney-client privilege. *See Arnold v. City of Chatanooga*, 19 S.W.3d 779, 786 (Tenn. Ct. App. 1999), *perm. app. denied* (Tenn. 2000); Tenn. Op. Atty. Gen. No. 06-104 (Tenn. A.G. 2006); Tenn. R. Civ. P. 26.02; Tenn. Code Ann. § 23-3-105. Similarly, Tennessee law protects from inspection under the Public Records Act documents sealed by a protective order of a court. *See Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996). Your request for documents protected by privilege and/or confidentiality is not appropriate under the Public Records Act.

Third, many of the documents you request are otherwise obtainable through either court clerk's offices or through the relevant governmental agency with whom CCA has contracted. In construing the Public Records Act, "the public's right of access to government records must be balanced with the burden that the disclosure of these records will place on the government." *See Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. 2005). To the extent you request documents that are otherwise available to you, CCA submits that it would be overly burdensome to require a private entity like CCA to gather and/or obtain such documents and make them available for inspection.[1]

You request six categories of documents. All requests are limited to documents pertaining to correctional facilities managed by CCA in the State of Tennessee pursuant to a contract between CCA and the State of Tennessee or a subsidiary county or municipal government. Further, you limit your requests to the time frame of January 1, 2002 through April 3, 2007. There are six (6) correctional facilities encompassed by your requests:

- Hardeman County Correctional Center, Whiteville, TN (contract with Hardeman County Correctional Facilities Corporation)
- Metro-Davidson County Detention Facility, Nashville, TN (contract with Davidson County Sheriff's Department)
- Shelby Training Center, Memphis, TN (contract with Juvenile Court of Memphis and Shelby County, Tennessee)
- Silverdale Detention Facilities, Chattanooga, TN (contract with Hamilton County, Tennessee)
- South Central Correctional Center, Clifton, TN (contract with Tennessee Department of Corrections)
- Whiteville Correctional Facility, Whiteville, TN (contract with Hardeman County Correctional Facilities Corporation)

Each category of documents is addressed separately as follows:

[1] Even if CCA were subject to the Public Records Act and some of the documents requested were not confidential or protected and not otherwise available, the Act requires only that documents be made available for inspection. *See* Tenn. Code Ann. § 10-7-503(a). For that reason, and because it would create an unreasonable burden, CCA would not be required to provide any documents in electronic format or via electronic mail.

(1) Complaints in Tennessee Lawsuits. Complaints filed in Tennessee courts are available in the court clerk's offices. Please refer to the list of relevant facilities above and contact the applicable federal or state courts where those facilities are located to obtain any records. It would be unreasonably burdensome to require CCA to gather and/or obtain such records when they are equally available to you from the court clerk's offices.

(2) Verdicts Forms and Settlement Agreements in Tennessee Lawsuits. As with complaints, any other pleadings or rulings filed with the respective court clerk's offices are as easily available to you as to CCA. Upon information and belief, all settlement agreements encompassed by your request contain confidentiality provisions and are, therefore, not open for inspection under the Public Records Act. Well-settled public policy protects the confidentiality of settlement negotiations and agreements in order to encourage settlement. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003). Further, some such confidential settlement agreements are sealed pursuant to court order and clearly not available for public inspection . *See Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996).

(3) Audits and Investigations by Tennessee Governments. You may refer to the above list of Tennessee government entities with whom CCA has contracted and request this information from them directly, to the extent any such information exists. It would be unreasonably burdensome to require CCA, who is not a government agency subject to the Public Records Act, to do this work for you.

(4) Tennessee Court Rulings. Once again, this information is as readily available to you as to CCA by contacting the respective court clerk's offices.

(5) Spreadsheets or Databases Regarding Tennessee Litigation. The only information CCA understands this request to encompass is protected by the attorney-client privilege and/or work product doctrine. Any CCA databases regarding Tennessee litigation contain case evaluations, settlement considerations, litigation strategies, and other protected and/or privileged information. Such information is not subject to the Public Records Act.

(6) Final Contracts and Renewals Between CCA and State of Tennessee. As with respect to any audits and investigations, you may obtain this information directly from the relevant Tennessee government entity with whom CCA has contracted.

My review and analysis of applicable law suggests that the facts and law support CCA's position that it is not subject to the Tennessee Public Records Act. I would be happy to discuss this matter further with you and invite you to share with me anything I may have overlooked in my analysis. Please direct all future correspondence and communications regarding this matter to me.

Very truly yours,

Joseph F. Welborn III

JFW/pkg

EXHIBIT 2

WILLIAMS ♦ SCHIFINO

WILLIAMS SCHIFINO MANGIONE & STEADY P.A.

ATTORNEYS AT LAW

John J. Agliano
Lina C. Angelici
Jacqueline M. Bell
Blake D. Bringgold
V. Stephen Cohen
Kelly Bopp Cone
James M. Craig
Daniel P. Dietrich
Joseph T. King
Ralph P. Mangione
Laurie L. Morris
Michelle A. Mueller
R. Marshall Rainey
John A. Schifino
William J. Schifino, Jr.
William J. Schifino, Sr.
Scott I. Steady
Robert M. Stoler
Mary B. Thomas
Kenneth G. Turkel
Shane B. Vogt
Robert V. Williams
Matthew L. Wilson

Of Counsel

Steven M. Samaha

October 19, 2007

Ken Kopczynski
Executive Director Private Corrections Institute, Inc
1114 Brandt Drive
Tallahassee, FL 32308

Dear Mr. Kopczynski:

Please be advised that the undersigned has the pleasure of serving as outside, private counsel for Corrections Corporation of America. In that regard, CCA has requested that I provide you with the following information in response to your September 20, 2007, public records request.

In that request, you sought "…all Risk Assesments and Monthly Key Indicators for CCA's Hernando County Jail for the last twelve month period."

Please be advised that the only documentation referenced in the request is a security risk review which was prepared by an outside contractor. I have been advised that the review addresses security systems and plans, and as a result, this documentation is exempt from those documents contemplated by Chapter 119.07, Florida Statutes. See Chapters 119.071(3) and 281.301, Florida Statutes.

As to the Monthly Key Indicators for the last twelve month period, please be advised that CCA is not in possession, custody or control of any such documentation.

Finally, your correspondence sought copies of an open "after action report" of the "September 7, 2004, hostage incident at the Bay County Jail."

I have been advised that this report was prepared by outside counsel in anticipation of litigation. Accordingly, it is exempt from those documents contemplated by Chapter 119.07, Florida Statutes. See Chapter 119.071(1)(d), Florida Statutes. Also, please be advised that potential parties to litigation regarding the incident are Amy and James Hunt.

Please feel free to contact my office should you have any questions or concerns regarding the request for documentation. I will make sure that any and all inquiries are promptly forwarded directly to CCA.

One Tampa City Center, Suite 3200 • Tampa, Florida 33602 • P.O. Box 380 (33601) • (813) 221-2626 • Fax (813) 221-7335

Very truly yours,

WILLIAMS, SCHIFINO, MANGIONE &
STEADY, P.A.

Robert M. Stoler

RMS/alk

EXHIBIT 3

PRISON LEGAL NEWS
Dedicated to Protecting Human Rights

P.O. Box 2420, West Brattleboro, VT 05303— 802-257-1342

www.prisonlegalnews.org pwright@prisonlegalnews.org

May 8, 2008 **SENT VIA CERTIFIED MAIL**

Corrections Corp. of America
Attn: Mr. Cole Carter
Assist. General Counsel, Operations
10 Burton Hills Blvd.
Nashville, TN 37215

RE: Freedom of Information Act Request Pursuant to 5 U.S.C. § 552

Dear Mr. Carter:

I am submitting the following request on behalf of *Prison Legal News* (*PLN*), pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for records and documents maintained by CCA, as set forth in the following specific requests:

1. The total number of FOIA requests received by CCA during calendar years 2006 and 2007, and to the date of this request for calendar year 2008.

2. Copies of the last twenty (20) FOIA requests received by CCA, and copies of the full responses or answers from CCA to said last twenty (20) FOIA requests.

3. The following requests apply only to the CCA facilities listed below which house federal prisoners; if any of these facilities do not house federal prisoners, please exclude those facilities from the following requests:

California City Corr. Center
Central Arizona Detention Facility
Eden Detention Center
Elizabeth Detention Center
Eloy Detention Center
Houston Processing Center
Laredo Processing Center
McRae Correctional Center
Northeast Ohio Corr. Center
San Diego Corr. Facility
T. Don Hutto Residential Center
Leavenworth Detention Center

A. The Safety and Control Report (or comparable document) for the time period of Oct. 5 to Oct. 12, 2006 for the above-listed facilities, including the aggregate number of year-to-date occurrences (from Jan. 1, 2006 to Oct. 12, 2006) for the following categories:

Safety – All Categories
Inmate on inmate assault with and without weapons
Inmate on employee assault with and without weapons
Discovery of weapons – manufactured and homemade
Use of force – with/without chemical and inflammatory agents
Discovery of alcohol and controlled substances
Inmate grievances
Inmate positive drug tests
Total disciplinary reports – Major and minor

B. The corresponding Data Worksheets with the source data used to compile the information included in the Safety and Control Report described in request no. 3A. Please note that data for all other CCA facilities except for those facilities referenced above can be redacted from the requested Safety and Control Report and corresponding Data Worksheets.

C. The Operations Indicators reports / spreadsheets (or comparable documents) for the above-listed facilities, for the time period covering the first two weeks in October 2006.

I request that all of the requested records be provided in electronic format. As *PLN* is a media publication and the requested records will be used for the benefit of the public through our non-commercial news reporting, I request a waiver of fees (5 U.S.C. § 552(a)(4)(A)(iii)). A federal court has already determined that *PLN* is entitled to a fee waiver under FOIA; see *PLN v. Lapin*, 436 F.Supp.2d 17 (D.D.C 2006). I further request an expedited review of this FOIA request as I am a journalist who is primarily engaged in disseminating information to the public, there is a compelling need for the timely production of the requested records in order to report on current events and news related to CCA, and because the requested records will contribute significantly to public understanding of government operations and activities.

Please note that above FOIA requests are severable, and in the event that CCA objects to any of these requests, I request responses to the remaining requests and the specific statutory exemption that you claim justifies your objection to produce any of the requested documents. Please provide a response to this request within twenty (20) working days, as provided by FOIA. Please contact me should you need any additional information. Thank you for your time and attention;

Sincerely,

/s/

Paul Wright, Editor *PLN*

EXHIBIT 4

Private Corrections Institute, Inc.

Support H.R. 1889, Private Prison Information Act

H.R. 1889 is a good government bill. This bill requires "prisons or other correctional facilities holding Federal prisoners under contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to do by law."

Very simple and fair. Why is this legislation needed?

Currently, private prison companies under contract with the federal government are not subject to Freedom of Information Act (FOIA) requests. For example:

- On May 9, 2008, the Public Broadcasting Service show NOW aired a program, "Prisons for Profit." Here's what one of the reporters, Maria Hinojosa, had to say about access to private prison records: "As a journalist, my job is to 'tell the untold story,' but visiting a prison – especially a private prison – is especially challenging. I couldn't find out how many drug offenders or other prisoners at Crowley [a CCA-operated prison] end up back behind bars because nobody is keeping track. And I couldn't find out if the numbers of assaults in this prison had gone up or down since the riot, because those records are not available to the public. These kind of statistics are treated as privileged information by private prison companies. If knowledge is power, a journalist, and by extension the public, is at a disadvantage when it comes to the corporate corrections industry."

- When PCI submitted a FOIA to Corrections Corporation of America for records at their San Diego Correctional Facility, the warden sent PCI a letter saying that CCA was not the proper authority for the information. The warden wrote that "We take no position on whether these records are subject to release at this time, but acknowledge that a large amount of contractor submitted information is subject to FOIA based on the statute and the Department's regulations." CCA produced no records.

- It was reported in the *San Diego Union-Tribune* on May 4, 2008 ("Immigration agency, contractors accused of mistreating detainees") that the ACLU could not determine if CCA had a financial interest in keeping detainees from having access to medical treatment because "the public cannot obtain government contract information from private companies."

- Two investigative journalists who put together a webpage on CCA and Immigration and Customs Enforcement (www.businessofdetention.com) had this to say: "We FOIA'd a list of CCA contracts with ICE and the US Marshals Service, and found them to be of minimal use when the financial amounts on the documents were redacted, as were the contracts shared with us by TRAC from a similar FOIA." Why can't members of the public learn how much of their taxpayer money is being spent on private prison contracts?

Don Hubbard, President | Alex Friedmann, Vice President | Stephen Raher, Secretary/Treasurer | Deb Phillips, Director | Ken Kopczynski, Executive Director

1114 Brandt Drive - Tallahassee, FL 32308
850-980-0887 - www.PrivateCI.org

- In "The Lost Children" (*The New Yorker*, March 3, 2008), author Margaret Talbot wrote that getting information about a CCA detention facility, "especially from the people who run it – is hard. Private prison companies are not subject to the same legal requirements as public prisons to provide incident reports on assaults, escapes, deaths, or rapes." Ms. Talbot then reports on one incident where Ms. Judy Greene, a criminal justice researcher, tried to obtain information about the for-profit's use of force authority. "In a Freedom of Information Act request, Greene asked for documents that might shed light on this question. Eventually, she recalls, she heard from the Bureau of Prisons that it was prepared to give her the information but had to get permission from CCA; a second letter informed her that CCA had said no, claiming that the information she sought about the use of force was a "business secret." Use of force authority for federal prisoners is a "business secret"?

- On March 13, 2008, *Time* magazine reported that Ronald Thomas Jones, a former high-ranking CCA quality assurance employee, had gone public with accusations that CCA maintains two sets of internal quality assurance reports. Mr. Jones described how damaging reports containing information from CCA prisons and jails were stamped "attorney client privilege" for in-house use only, to make it difficult, if not impossible, for the public to find out what is going on in CCA's prisons and jails.

- On May 5, 2008 the *New York Times* ("Few Details on Immigrants Who Died in U.S. Custody") reported that details related to deaths at ICE facilities were hard to come by. Reporter Nina Bernstein related how it took Congress to demand information about the deaths to get such information. The *Times* FOIA'd ICE to get a list of deaths but found that the "list had few details, and they are often unreliable." Ms. Bernstein's exposé focuses on the death at CCA's Elizabeth Detention Center in New Jersey of Boubacar Bah, a Guinean who had overstayed his visa. She writes that "Mr. Bah's relatives never saw the internal records labeled 'proprietary information – not for distribution' by Corrections Corporation of America." Mr. Bah died "in a sequestered system where questions about what had happened to him, or even his whereabouts were met with silence." Why? "Four days after the fall, tipped off by a detainee who called Mr. Bah's roommate in Brooklyn, relatives rushed to the detention center to ask Corrections Corporation employees where he was. 'They wouldn't give us any information,' said Lamine Dieng, an American citizen who teaches at Bronx Community College and is married to Mr. Bah's cousin ...."

- In another *New York Times* article the same day by Ms. Bernstein ("Family Struggled in Vain to Help Suffering Detainee"), she recounts another example of CCA ignoring requests for information from a detainee's relatives. The fours sons of Maya Nand, an illegal immigrant from Fiji, "kept calling the [CCA Eloy Detention facility] to plead for medical attention, they said, but could only through to an answering machine. They said they hired a lawyer to reach the warden, but nothing changed."

Plainly and simply, private prison corporations are hiding behind the veil of corporate secrecy to keep the public from finding out what is going on behind the walls of their facilities. It is obvious the current system of obtaining information about these privately-operated prisons and jails is not working.

If Steven Owen, CCA's Director of Marketing, is to be believed when he said "We're one of the most transparent industries out there" ("Who Holds the Keys?", *Boise Weekly*, September 12, 2007), then why is CCA lobbying to defeat this legislation? If they have nothing to hide why do they voice such strong opposition to H.R. 1889? This bill is needed to protect the interests of the public and to guarantee the public's right to know, in order to ensure public accountability over the for-profit private prison industry.

EXHIBIT 5

AFFIDAVIT

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, the undersigned, Alexander Friedmann, first being duly sworn, and under the penalty of perjury, affirm and state as follows:

1. I am employed as the Associate Editor of Prison Legal News.

2. On or about April 4, 2008, I called the CCA-operated Saguaro Correctional Center in Eloy, Arizona at 520-464-0500. I was transferred to the office of the warden's secretary, and left a message requesting that they contact me about questions related to the facility's mail policy.

3. On April 7, 2008 I received a call from Ms. Traci Thompson at the Saguaro Correctional Center, who identified herself as the warden's secretary. According to my Caller ID, the call originated from 520-464-0500.

4. I asked Ms. Thompson about the facility's policy in terms of prisoners being allowed to receive books from outside sources.

5. Ms. Thompson informed me that the facility's policy was that prisoners could not receive books sent from family members, friends or other outside sources, but must order books themselves and pay for them from their prison accounts.

6. Ms. Thompson informed me that prisoners could order books through a form available in the institutional library, and that she thought, but was not sure, that books could only be ordered from Barnes & Nobles.

7. I asked Ms. Thompson for a copy of the facility's policy concerning the receipt of books or reading material by prisoners. Ms. Thompson informed me that she was not allowed to provide a copy of the policy, as it was an in-house policy.

FURTHER, AFFIANT SAITH NOT.

Signed this 7th day of April, 2008.

ALEXANDER FRIEDMANN

EXHIBIT 6

PRIVILEGED AND CONFIDENTIAL 5-1G

PRELIMINARY INCIDENT/SITUATION NOTIFICATION REPORT

FACILITY	North Fork Correctional Facility		
DATE/TIME OF INCIDENT/SITUATION:	11-06-06, Approx. 1805 hours	**PRIORITY LEVEL:** ☐ I ☒ II	
TYPE OF INCIDENT: Use of force/ Use Of Inflammatory Agents			

FSC PERSONNEL NOTIFIED: (Notified By):

Vice President Operations:	☐ YES ☐ NO ☒ N/A	Date: ____ Time: ____ HRS	By:
Managing Director:	☒ YES ☐ NO ☐ N/A	Date: 11/7/06 Time: 1930HRS	By: I F.Figueroa
Regional Director, Health Services:	☐ YES ☐ NO ☒ N/A	Date: ____ Time: ____ HRS	By:

EMPLOYEE, CIVILIAN, INMATE/RESIDENT INJURIES:
☒ *YES* (if yes, complete section below) ☐ NO

NAME (Last, First, MI)	Title / ID Number	INJURIES
[redacted]s	[redacted]	Abrasions to RT.andLt.side of head. Abrasions to each side of face under eyes, abrasion to lt. shoulder, knees and Rt.forearm. Abrasions to back of head. Minor abrasions to Lt. index ,middle and ring fingers. Abrasions to Rt. pinkie finger and Rt. tricep. Abrasions to each side of ABD.
[redacted]	[redacted]	Small bruise middle of back,small bruise left inner upper arm. Denies any other pain or discomfort. No other injuries noted.

FACILITY DAMAGE: ☐ Light ☐ Medium ☐ Heavy ☐ Threat to Security

Brief description of the incident/situation: On 11-06-06 at approximately 1805 hours Inmates [redacted], [redacted] a white Wyoming custody inmate and Inmate [redacted], [redacted] also a white Wyoming custody inmate refused to participate with a search that involved all of Segregation. Inmates [redacted] and [redacted] are currently housed in cell # 12. Warden Figueroa was notified of the inmates actions and gave authorization for a Force Cell Move Team to be assembled and the use of inflammatory agents . Sort Commander J. Montalvo assembled a Force Cell Move Team and staged in the Segregation West Sallyport. The Team was directed to cell # 12 which housed Inmates [redacted] and [redacted]. Sort Commander [redacted] gave the inmates numerous orders to submit to hand restraints and said inmates failed to comply. At approximately 1813 hours Sort Commander Montalvo administered 2 one-second burst of OC/CS Inflammatory agent into the cell. Sort Commander Montalvo ordered the inmates again to submit to restraints and they failed to comply. Inmates [redacted] and [redacted] both had their faces covered with wet towells , therefore diminishing the affect of the inflammatory agent. At approximately 1818 hours Sort Commander Montalvo administered a T-160 Flameless Expulsion grenade into the cell ordering the inmates to submit to restraints and said inmates continued to disobey orders. At approximately 1825 hours Sort Commander Montalvo administered another T-160 Flameless Expulsion grenade into the cell and continued

PRIVILEGED AND CONFIDENTIAL 5-1G

PRELIMINARY INCIDENT/SITUATION NOTIFICATION REPORT

to order the inmates to submit to restraints and they still refused to comply. At approximately 1831 hours Sort Commander [redacted]o administered another one-second burst of OC/CS inflammatory agent into the cell and the inmates continued to disobey orders stating " Come on in and get us". At approximately 1835 hours Sort Commander Montalvo administered a two-second second burst of OC/CS into the cell and still did not gain compliance from either inmate. Sort Commander Montalvo administered another one -second burst at 1840 and at 1851 administered a two second burst into the cell , ordered the inmates to submit to restraints and they failed to comply. At approximately 1852 hours the Team entered the cell and began to attempt to secure the inmates both inmates were resistive and combative with the Team in the application of restraints. Inmates [redacted]s and [redacted]g charged the Team as they entered the cell, the inmates had also placed lotion on the floor at the cell entry. Sort Commander Montalvo also entered the cell and administered two seperate one second burst at Inmate [redacted] as he continued to resist the Team . Chie[redacted]o also entered the cell and administered approximately a two-second burst directed at Inmate [redacted]as he resisted and was combative with the Team. The restraints were applied and both inmates were removed from the cell and assisted to their feet and escorted to the showers for decontamination. Both inmates were then escorted to Medical where they received medical treatment and evalution. Both inmates were then escorted to Segregation and strip searched and secured in a cell all restraints were removed. This concluded the major use of force with no further incident.

CONTRACT MONITOR NOTIFIED (to include written notification if required):

☒ YES	DATE/TIME:11/7/06 1630	☐ NO	☐ N/A

MEDIA NOTIFIED:

☐ YES	DATE/TIME:	☒ NO	☒ N/A

ANY OTHER PERSON/AGENCY, OUTSIDE OF CCA, INVOLVED OR INFORMED OF INCIDENT/SITUATION? ☐ YES (If YES, complete section below) ☒ NO

NAME/TITLE	COMPANY / AGENCY	DATE / TIME

WARDEN OR DUTY OFFICER (name & title)	[redacted], Chief Of Unit Management
DATE:	11-07-06

*Attach additional pages as necessary.

EXHIBIT 7

Time Magazine article – Published March 13, 2008

Scrutiny for a Bush Judicial Nominee

By Adam Zagorin/Washington

As the top lawyer for America's biggest private prison company, Corrections Corporation of America (CCA), Gus Puryear IV, is known to sport well-pressed preppy pink shirts, and his brownish mop of hair stands out among most of President Bush's graying nominees to the federal bench. A favorite of G.O.P. hardliners, Puryear, 39, prepped Dick Cheney for the vice presidential debates — both in 2000 and 2004 — and served as a senior aide to two former senators and onetime presidential hopefuls, Bill Frist and Fred Thompson.

Political connections, though, may not be enough to get Puryear a lifetime post as a federal district judge in Tennessee. Puryear recently confronted tough questions about his conduct, experience and potential conflicts of interest from Democrats on the Senate Judiciary Committee, which must approve him before a full Senate vote. Now, a former CCA manager tells TIME that Puryear oversaw a reporting system in which accounts of major, sometimes violent prison disturbances and other significant events were often masked or minimized in accounts provided to government agencies with oversight over prison contracts. Ronald T. Jones, the former CCA manager, alleges that the company even began keeping two sets of books — one for internal use that described prison deficiencies in telling detail, and a second set that Jones describes as "doctored" for public consumption, to limit bad publicity, litigation or fines that could derail CCA's multimillion dollar contracts with federal, state or local agencies.

CCA owns or operates 65 prisons, housing some 70,000 inmates across the U.S. According to the company's website, it has a greater than 50% share of the booming private prison market. CCA is also a major contributor to Republican candidates and causes, and spends millions of dollars each year lobbying for government contracts. (Puryear enjoys a friendship with Cheney's son-in-law, Philip Perry, who lobbied for CCA in Washington before serving as general counsel for the Department of Homeland Security, which has millions of dollars in contracts with CCA, from 2005 to 2007.) The company has likewise given financial support to tax-exempt policy groups that support tough sentencing laws that help put more people behind bars. Like other prison companies, CCA has faced numerous lawsuits that stem from allegedly inadequate staff levels that can be a cause of high levels of violence in the prisons. Though hundreds of such lawsuits are often pending at any given time, many brought by inmates in its own facilities, CCA under Puryear has mounted an especially vigorous defense against them, refusing to settle all but the most damaging.

Jones knows CCA intimately. Until last summer, the longtime Republican was in charge of "quality assurance" records for CCA prisons across the U.S. He says that in 2005, after CCA found itself embarrassed on several occasions by the public release of internal records to government agencies, Puryear mandated that detailed, raw reports on prison shortcomings carry a blanket assertion of "attorney client privilege," thus forbidding their release without his written consent. From then on, Jones says, the audits delivered to agencies were filled with increasingly vague performance measures. "If the wrong party found out that a facility's operations scored

low in an audit, then CCA could be subject to litigation, fines or worse," explains Jones. "When Mr. Puryear felt there was highly sensitive or potentially damaging information to CCA, I would then be directed to remove that information from an audit report." Puryear would not comment on the allegations. Jones resigned from CCA last summer to pursue a legal career.

According to Jones, Puryear was most concerned about what CCA described as "zero tolerance" events, or ZT's — including unnatural deaths, major disturbances, escapes and sexual assaults. According to Jones, bonuses and job security at the company were tied to reporting low ZT numbers. Low numbers also pleased CCA's government clients, as well as the company's board, which received a regular tally, and Wall Street analysts concerned about potentially costly lawsuits that CCA might face.

In 2006, for example, Jones says CCA had to lock down a prison in Texas to control rioting by as many as 60 inmates. Despite clear internal guidelines defining the incident as a ZT, Jones says he was ordered not to label it that way. Instead it was logged as, "Altered facility schedule due to inmate action". And this was not unusual, says Jones: "Information was misrepresented in a very disturbing way concerning the company's most important performance indicators, which included escapes, suicides, violent outbreaks and sexual assaults."

Companies often try to show their best face to customers, and safeguard internal records with "attorney-client privilege." But according to Stephen Gillers, a leading expert on legal ethics at New York University, CCA's use of that privilege seems like "a wholesale, possibly overreaching claim," similiar to the blanket assertions of major tobacco companies that tried to keep damaging internal documents from public view. Those assertions of privilege have been rejected by federal judges as an attempt to improperly conceal their internal data on the dangers of smoking from customers, the courts and legal adversaries. CCA could also be in legal trouble if it minimized the tally of serious prison incidents and, by implication, its possible financial liability. As chief legal counsel, Puryear would have also had an obligation to ensure his board had all the information it needed, good or bad, to make decisions. If Puryear's reporting system had the effect of withholding information relevant to official prison oversight, that could bear on his suitability as a federal judge by suggesting his "disdain for the proper operation of an important function of government," notes Gillers.

Contacted by TIME, CCA says that Puryear, "has served the company well and honorably as general counsel and will be an outstanding judge." The company denies allegations that it keeps two sets of books, saying: "A final audit report is made available to our customers. Appropriate information gathered in the audits is separately provided to our legal department." The company adds that "CCA has produced all relevant, non-privileged documents in litigation," that its board is regularly apprised of the most serious prison incidents, and that "all appropriate" information is given to the financial community.

President Bush recently called Puryear and his 27 other judicial nominees facing Senate confirmation "highly qualified." Whether or not the Senate agrees on Puryear, Bush is likely to leave the White House with fewer judges approved than Bill Clinton or Ronald Reagan, both two-term chief executives.

EXHIBIT 8

CORRECTIONS CORPORATION OF AMERICA

Quality Assurance Weekly Report
October 16, 2006

ZERO TOLERANCE – 2004 to 2006 Totals

Zero Tolerance Events	2004	2005	2006 (As of 10/15/06)
Escapes	8	4	4
Disturbances/Disruptive Events	8	5	3
Unnatural Deaths	6	11	6
Sexual Assaults/Misconduct**	5	2	2
Hostage Situations	1	1	0
TOTALS	28	23	15

*Data compiled from Operations Department Priority Incident Database, from Administrative Duty Officer Reports, from Health Services Department mortality records, and from 5-1l Weekly Report of Facility Incidents forms.
**Data for sexual assaults in 2004 and 2005 only included inmate on inmate sexual assaults. Sexual assault data in 2006 includes substantiated employee on inmate, inmate on employee, and inmate on inmate sexual assaults.
*** Data In the 2006 table reflect only validated zero tolerance items.

SIGNIFICANT FACILITY EVENTS - ***The incidents in this section were reported from 10/09/06 through 10/15/06.***

WHITEVILLE CORRECTIONAL FACILITY – Attempted suicide requiring outside medical treatment
On 10/10/06, at approx. 1109 hours, an officer was cross counting in IA-pod when he got to cell 104 and saw inmate Rhea, Joseph #271369 lying on his right side on the top bunk facing the wall. The officer then observed 2 small spots of blood on the inmate's shirt. When he approached the bunk he pulled back the sheet and observed blood coming from the inmate's neck. The inmate was quickly treated by facility staff and then transported to a local hospital for treatment.

BAY CO. JAIL – Attempted suicide requiring outside medical treatment
On 10/11/06, at approx. 1513 hours, inmate Terry Locklear #06-12498 attempted to hang himself in the shower area of 5B by tying a sheet around his neck. Inmate Locklear was taken down by Inmates Jeremy Riley #06-5523, Inmate Passion Williams #06-1310 and Inmate Davulun Williams #06-11670 while staff was entering the unit. Inmate Locklear regained consciouness and was seen by medical then transported to Bay Medical Center with no significant injuries.

CENTRAL ARIZONA DETENTION CENTER – Attempted suicide requiring outside medical treatment
On 10/12/06, at approx. 0643 hours, an officer found inmate Medrano, Manuel #81076008 lying on his back on the floor with blood covering the inmate and floor. Senior Correctional Officer Rachel Madoneczky and Case Manager Christina Frappiea entered the cell after observing a laceration to the right side of the inmate's neck, and began basic first aide by applying pressure to the right side of the neck area of the inmate. The inmate was transported to a local hospital for treatment.

This document was prepared at the request of the Office of General Counsel. It is an attorney - client privileged communication. This document is not to be released to anyone without the expressed written approval of the Office of General Counsel

CORRECTIONS CORPORATION OF AMERICA

Quality Assurance Weekly Report
October 16, 2006

EDEN DETENTION CENTER - Altered facility schedule due to inmate action
On 10/10/06, at approx. 0500 hours, Dorm F was released to Food Service under controlled movement due to a scheduled Scabies screening in that unit. At approximately 0520, six inmates refused to return to Dorm F and comply with the screening. Approximately 50-60 inmates gathered in the compound and refused to return to Dorm F. After staff initiated confrontation avoidance, the inmates complied with orders to return to Dorm F. However, the initial six inmates continued to refuse and were placed in Special Housing. At approximately 0630, medical staff entered Dorm F to perform Scabies screenings. The inmates refused to be screened. After further attempts at confrontation avoidance proved unsuccessful, the Incident Management Team was initiated and the Disturbance Control Team was activated. The facility was placed under an altered building schedule with controlled movement and Dorm F was placed in lockdown status. On 10/11/06, at approximately 0330, the Food Service workers refused to report to work. The facility was placed under lockdown with no inmate movement, requiring the breakfast and noon meals to be provided in the form of sack lunches. At approximately 1320, medical staff entered Dorm F and the inmates complied with the scabies screening. At approximately 1410, the afternoon kitchen workers were released form their units and reported to Food Service. Upon the clearing of the 1530 count, the compound was opened with limited program activities. At approximately 1900, the Disturbance Control Team was deactivated. On 10/12/06,, at approximately 0500, the facility resumed normal operations.

RED ROCK CORRECTIONAL CENTER – Loss of ammunition
On 10/07/06, at approximately 0610 hours, Shift Supervisors were informed by Day Shift C/O's that there were only 8 rounds per perimeter vehicle - this is a loss of two 12 gauge double 00 buck rounds. Shift Supervisors went out to perimeter and verified that there were only 8 rounds per vehicle. Both vehicles were searched with no results. Upon assuming duties of Night Shift Perimeter, an officer accounted for 9 rounds per vehicle and reported no discrepancies. Staff attempted to contact Second Shift Supervisor and both perimeter drivers to find out if there were any discrepancies or changes in the number of rounds assigned to perimeter and were unable to make contact. There is an ongoing investigation of the incident; all areas have been searched, to include perimeter and vehicles. We have reasonable belief that one of two officers may have taken the rounds home by accident. The two missing rounds were later found in a perimeter truck in a box.

Incident from previous report:

SILVERDALE FACILITIES – Employee on inmate sexual misconduct (Potential Zero Tolerance event)
On 10/4/06, an investigation was initiated into allegations of sexual misconduct between a male correctional officer and a female inmate at the facility. The female inmate claims she performed oral sex and engaged in sexual intercourse with the officer in the laundry area on 10/01/06. The inmate also claims to have taken possession of a quantity of tobacco following the sex act and later sold it in the housing unit. **An investigation could not substantiate the female inmate's claim of sexual misconduct by the officer.**

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CORRECTIONS CORPORATION OF AMERICA

Quality Assurance Weekly Report
October 16, 2006

OPERATIONAL AUDITS

There were no audits scheduled last week. Audits are scheduled this week at the 1,600-bed Prairie Correctional Facility and the 1,676-bed South Central Correctional Center. Audits for the week of 10/23/06 are scheduled to take place at the 1,092-bed Metro-Davidson Detention Facility and the 2,016-bed Northeast Ohio Correctional Center.

INTERNAL/EXTERNAL AUDITS

FOOD SERVICE INCIDENT REPORTS: In October to date, there has been one food service incident report filed **(at Winn Correctional Center)** for menu non-compliance

From January – August 2006, there were 259 incident reports (41 in Jan., 36 in Feb., 42 in Mar., 46 in Apr., 56 in May, 15 in June, 12 in July, 11 in August, and 3 in September) filed at facilities system-wide.

INMATE CONCERN CENTER HOTLINE

In October to date, there have been 4 calls to the hotline regarding 3 facilities. The facility with the most calls was:

Correctional Treatment Facility with 2 calls. Calls concerned an attorney saying he could not see his client, and a caller alleging an inmate is not getting funds sent to him.

From January-August 2006, 199 calls (30 in January, 28 in Feb., 38 in Mar., 23 in Apr., 38 in May, 25 in June, 17 in July, 38 in August, and 43 in September) were made to the hotline in reference to alleged issues/concerns in over 54 facilities.

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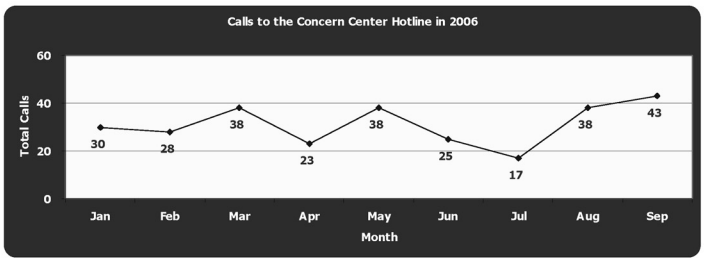
CORRECTIONS CORPORATION OF AMERICA

Quality Assurance Weekly Report
October 16, 2006



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Mr. SCOTT. Thank you.
Mr. Jawetz?

TESTIMONY OF TOM JAWETZ, IMMIGRATION DETENTION STAFF ATTORNEY, THE AMERICAN CIVIL LIBERTIES UNION NATIONAL PRISON PROJECT

Mr. JAWETZ. Good afternoon. I would like to thank Chairman Scott and Members of the Subcommittee for inviting me to speak about the critical need for oversight and accountability over the private prison industry and the importance of the Private Prison Information Act.

There are many different ways to measure the value of this bill. By increasing the public's access to information in the hands of for-profit prison companies, Congress would empower the public to monitor unacceptable risks to public safety and police fraud and abuse of government funds. The bill also would help to shine a light into the darkest recesses of our society, because, while our Nation's prisons too often lack the necessary transparency, private prisons are open to even less scrutiny.

My work puts me at the center of two important trends in incarceration: the incredible growth in the detention of people facing administrative immigration charges, and the Federal Government's increasing reliance on private prison companies to house those immigrants.

Since 2001, the number of people held in administrative immigration detention has tripled. Meanwhile, private prison companies have received lucrative contracts to house tens of thousands of immigrants in these facilities. For instance, the Corrections Corporation of America, or CCA, recorded nearly $1.5 billion in revenue last year, 13 percent of which came from contracts with ICE.

At the ACLU, we routinely hear about problems faced by immigration detainees, and we sift through these complaints to identify particularly egregious facilities. It is therefore striking that all three immigration detention lawsuits filed by my office over the last 18 months have involved CCA facilities.

Immigration detainees are held throughout the United States, but the privatization boom appears to be focused heavily on our southern border. Last month, I visited two privately run facilities in south Texas.

The Willacy County Detention Center, also known as "Ritmo," is run by Management and Training Corporation, a Utah-based company whose former director was tapped to set up the now-infamous Abu Ghraib prison in Iraq. Willacy houses over 3,000 immigration detainees, 2,000 of whom live in tents. Until recently, the tents had no windows, and detainees were completely deprived of natural light.

Walking through the compound during my tour, it was clear to see that tears and rips in the walls of the tents had been repaired with tape. So I was not surprised when I learned later that detainees routinely complain of water seeping into their living quarters when it rains. Yet records pertaining to how MTC maintains or repairs the tents are unavailable to the public.

Last year, a local news station obtained reports showing that dozen of detainees had complained they were being fed rotten food

crawling with maggots. Copies of MTC's logbooks recording those complaints were obtained directly from security guards who went to the media. Had the guards not come forward, those records might never have surfaced under our current FOIA law.

The South Texas Detention Complex is run by GEO Group. I also visited that one. It houses just over 1,900 detainees. Last month, actually just a day before my visit, a local news station uncovered evidence that GEO guards were sexually assaulting female detainees. GEO guards reportedly pressured the women by threatening to have them deported. At least one GEO guard and one ICE officer reported that they were fired after they complained internally about the assaults.

Now, while most ICE records pertaining to sexual abuse at the facility would be available under the FOIA Act, any records possessed by GEO Group, which told a reporter that it had no knowledge of sexual assault complaints, may never be released publicly.

The issue that has gained the most public attention when it comes to immigration detention is poor medical care and avoidable deaths. Back in June 2007, the New York Times revealed that over 60 people had died in immigration custody since 2004. I think this is a relevant point for Representative Gohmert.

The day after that story broke, the ACLU filed a FOIA request seeking records pertaining to detainee deaths, including any reports of investigations into such deaths. In January of 2008, ICE produced approximately 800 pages of documents, which included a list containing the names and locations of last detention for 66 deceased detainees. According to that list, 19 of those 66 detainees, their location of last detention was a facility run by a private prison company. And yet, only a single piece of paper produced to the ACLU by ICE appears to have been generated by one of the for-profit companies running these facilities. We got nothing from CCA. We got nothing from Corrections Corporation. We got one piece of paper from GEO.

It is inconceivable that not one of these 19 in-custody deaths resulted in an investigative report. So the question becomes whether ICE failed to produce records in its possession or whether private prison companies, as we know, routinely failed to turn over records to ICE.

Yesterday, the ACLU filed a lawsuit in Federal court against ICE to answer the first half of that question. But the second half of the question that goes to the heart of the Private Prison Information Act is that, without the ability to demand such records directly from private prison companies, how can the public ever be confident that it is receiving all of the information to which it is entitled?

In my written testimony, I detail one change to the bill that I believe is entirely consistent with the drafters' intent. Namely, the bill speaks exclusively to Federal, quote/unquote, "prisoners," but the more than 300,000 people detained in ICE custody each year pursuant to contracts with ICE are detainees, not prisoners. And that is throughout the U.S. Code. Unless the bill is amended, there is a risk that private facilities housing Federal immigration detainees pursuant to a contract with ICE will not be included and will not be required to comply with the bill.

On behalf of the ACLU, I would like to thank the Subcommittee and the Ranking Member. And I am happy to answer any questions.

[The prepared statement of Mr. Jawetz follows:]

PREPARED STATEMENT OF TOM JAWETZ

STATEMENT OF TOM JAWETZ

IMMIGRATION DETENTION STAFF ATTORNEY
ACLU NATIONAL PRISON PROJECT

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

REGARDING

PART II OF H.R. 1889, PRIVATE PRISON INFORMATION ACT OF 2007

PRESENTED ON

JUNE 26, 2008

Good afternoon. My name is Tom Jawetz and I am the immigration detention staff attorney for the National Prison Project (NPP) of the American Civil Liberties Union Foundation (ACLU). The ACLU is a non-partisan organization with hundreds of thousands of members and 53 affiliates nationwide. For more than 80 years, the ACLU has fought to defend the Constitution and our precious civil liberties against assault. One of our most important tools is the Freedom of Information Act, which allows members of the public to obtain vitally important information about government activity. But in a world where privatization of core governmental functions—including the management of our prisons and jails—is on the rise, more and more information is being shielded from public disclosure.

I would like to thank Chairman Scott and members of the subcommittee for inviting me here today to speak about the critical need for oversight and accountability over the private prison industry, and the importance of the Private Prison Information Act. The value of the proposed legislation can be measured by many different metrics; by increasing the public's access to information in the hands of for-profit prison companies, Congress would empower the public to monitor unacceptable risks to public safety and police fraud and abuse of government funds. Most importantly for purposes of my testimony, the bill also would—for the first time—shine a light into the darkest recesses of our society. Because while our nation's prisons already too often lack necessary transparency, particularly given the enormous powers that staff exercise, privately-run prisons are open to even less scrutiny, and yet are often the most worrisome.

My work as the Immigration Detention Staff Attorney for the NPP puts me at the center of two important trends in incarceration: the incredible growth in the use of detention for people facing administrative immigration charges, and the federal government's increasing reliance on private prison companies to house those immigrants. From Fiscal Year 2001 to the present, the average daily immigration detention population has increased more than 63%,[1] and the total number of people detained by Immigration and Customs Enforcement (ICE) in any given year has tripled.[2] At the same time, private prison companies like Corrections Corporation of America (CCA), GEO Group, and Cornell Corrections have received lucrative contracts to house tens of thousands of civil immigration detainees around the country. CCA recorded nearly $1.5 billion in revenue last year, 13% of which came from contracts with ICE, while GEO earned $1.2 billion in total revenue with ICE responsible for 11% of the company's operating revenue.[3]

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[1] *Compare Review of Department of Justice Immigration Detention Policies: Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 18 (2002) (statement of Joseph R. Greene, Acting Deputy Executive Associate Commissioner for Field Operations, Immigration and Naturalization Services) (average daily detention population in Fiscal Year 2001 was 19,533) *with* Dana Priest and Amy Goldstein, *System of Neglect*, WASHINGTON POST, May 11, 2008 (approximately 33,000 detainees held by ICE on any given day).

[2] *Id.* ("Since 2001, the number of detainees over the course of each year has more than tripled to 311,000, according to ICE and the Government Accountability Office.")

[3] Leslie Berestein, *Detention Dollars: Tougher Immigration Laws Turn the Ailing Private Prison Sector into a Revenue Maker*, SAN DIEGO UNION-TRIBUNE, May 4, 2008.

At the ACLU, we hear from detainees, immigration attorneys, and community advocates about the problems faced by immigration detainees. We sift through these complaints to identify facilities that are particularly egregious—problems that require an immediate response. It is, therefore, striking that of the three immigration detention lawsuits filed by my office over the past 18 months, all three have involved facilities run by CCA—the country's largest for-profit prison company, and by far the biggest player in the privatization of immigration detention. Two of the lawsuits have alleged that CCA's San Diego Correctional Facility was dangerously overcrowded for a period of years and that medical care at the facility was and is grossly inadequate. A third set of lawsuits alleged that conditions at the Hutto Family Detention Center—a former medium-security prison run by CCA—were terribly inappropriate for the population being held at the facility. The ACLU's original ten plaintiffs included children as young as three years old who were forced to wear prison uniforms and were confined to their cells for up to 12 hours each day because of numerous head counts. The children had little access to education or exercise and no pediatrician was available on-site.

Although immigration detainees are held at facilities all over the United States, the privatization boom appears to be focused heavily along our southern border. Last month I had the opportunity to visit two privately-run detention facilities in south Texas—the Willacy County Detention Center, also known as "Tent City" or "Ritmo," and the South Texas Detention Complex. Willacy is run by Management and Training Corporation (MTC), a Utah-based private prison company that gained some notoriety when its former director was tapped to set up the now-infamous Abu Ghraib prison in Iraq.[4] Willacy currently houses 2,000 immigration detainees in ten 200-person tents and another 1,000 detainees in a new, prison-like building. Until the tents were modified last Fall to add one small window per housing unit, the detainees were completely deprived of natural light. Walking through the compound, it is easy to see that tears in the walls of the tents have been repaired with tape, so it is unsurprising that detainees complain of water seeping into their living quarters when it rains. Yet records pertaining to how MTC maintains or repairs the tents are completely unavailable to the public. Last year, a local news station obtained records showing that dozens of detainees had complained that they were being fed rotten food that was crawling with maggots.[5] Copies of MTC's logbooks recording those complaints were obtained directly from security guards who went to the media with their story. Had the guards not come forward, those records never would have surfaced under our current laws, and the public might never have learned that our federal tax dollars were being spent on serving maggot-ridden food to civil detainees.

The South Texas Detention Complex in Pearsall, Texas is run by the GEO Group, and it houses just over 1,900 detainees. Last month, a local news station uncovered evidence that GEO guards

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[4] Kim Cobb, *Ex-Head of TDCJ Set Up Iraq Jail; 'Checkered' Career Raises Questions*, HOUSTON CHRONICLE, May 16, 2004.

[5] KGBT, *Detention Center Food Problems*, Aug. 2, 2007, *available at* http://www.detentionwatchnetwork.org/node/332.

were sexually assaulting female detainees at the facility.[6] According to the report, GEO guards pressured the women by threatening to have them deported if they did not agree to the guards' sexual advances. One GEO guard who reportedly impregnated a detainee was terminated as a result of his actions; the pregnant detainee was deported to Guatemala. At least one GEO guard and one ICE officer told the reporter that they were fired after they complained internally about the sexual assaults. All records in the possession of ICE pertaining to sexual abuse at the facility should be available to the public under our current FOIA law. But any records possessed by GEO Group—which told the reporter that it had no knowledge of sexual assault complaints at the facility—may never be revealed publicly.

Over the past 18 months, the issue that has gained the most public attention when it comes to immigration detention is poor medical care and avoidable deaths. Back in June 2007, the *New York Times* revealed that over 60 people had died in ICE custody since 2004.[7] The day after that story broke, the ACLU filed a Freedom of Information Act request with various government agencies including the Department of Homeland Security. The request sought records pertaining to detainee deaths, including any reports of investigations into such deaths. In January, ICE produced approximately 800 pages of documents, which included a list containing the names and locations of last detention for 66 deceased detainees. For at least 19 of those 66 detainees, the location of last detention was a facility run by a private prison company. And yet only a single piece of paper produced to the ACLU by ICE appears to have been generated by one of the for-profit companies that run these facilities. It is simply inconceivable that none of these 19 in-custody deaths generated so much as a single investigative report by CCA, GEO, or Cornell Corrections, but if that were the case would not that be of importance to the public? Assuming investigative reports do exist, the question becomes whether ICE failed to produce records in its possession or whether the private prison companies failed to turn over all of their relevant documents to ICE. That first question can be addressed through FOIA litigation against ICE, and is not relevant to the pending bill. But the second question goes to the heart of the Private Prison Information Act. Without the ability to demand such records directly from the private prison companies, how can the public ever be confident that it is receiving all of the information to which it is entitled?

There is one change to this bill that I would recommend, and I believe it is entirely consistent with the drafter's intent. As it is currently written, the bill applies to "nongovernmental entities contracting with the Federal Government to incarcerate or detain Federal prisoners in a privately owned prison or other correctional facility." Section 2(d) defines the term "privately owned prison or other correctional facility" to include facilities that "incarcerate or detain prisoners pursuant to a contract with . . . Immigration and Customs Enforcement." The problem with this language is that the more than 300,000 people detained by ICE each year are detainees, not

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[6] WOAI, *Claims of Sexual Assault at Immigration Facility*, May 6, 2008, *available at* http://www.woai.com/content/troubleshooters/story.aspx?content_id=2690837e-5c2a-4ea0-92dd-2e64a54996b2.

[7] Nina Bernstein, *New Scrutiny As Immigrants Die in Custody*, NEW YORK TIMES, June 26, 2007.

"prisoners."[8] Unless the bill is amended, there is a risk that privately owned facilities housing federal immigration detainees pursuant to a contract with ICE will not be required to comply with the terms of this bill. Sections 2(a), (b), and (d) should be amended to include the words "and detainees" after the word "prisoners."

On behalf of the ACLU, I would like to thank the Subcommittee for taking the time to explore this important issue, and I urge Congress to pass this bill with the aforementioned amendment. I look forward to the opportunity to answer your questions.

[8] *See* 28 U.S.C. 1915(h) (defining the term "prisoner" to refer to "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole probation, pretrial release, or diversionary program"). *Accord* 18 U.S.C. 3626(g); 28 U.S.C. 1915A(c); 42 U.S.C. 1997e(h).

Mr. SCOTT. Thank you.

We will now ask you to respond to questions under the 5-minute rule.

And I recognize myself for 5 minutes.

One of the things that we are trying to do is have some consistency. Either we are going to do the same for prisons that we do for all other contracts, or we will do the same for private prisons that we do for public prisons. I mean, either way, I guess we could be showing some consistency. And so let's try to determine which makes more sense.

The difference with prisons is that, with incarceration, we delegate to the private prisons authority that most contractors don't have: the right to shoot prisoners, when and when not to use fatal force, how to feed people. People who are sent to these facilities have no choice. Other contracts, you can deal with them or not deal with them as you please.

So, Mr. Flynn, why shouldn't we be able to get information on prisons that are private that we can get from prisons that are public?

Mr. FLYNN. Because we can get that information. That information, we can get it. As I said, there is no reason that the Bureau of Prisons cannot make disclosure of some of these items a contingent part of the contract. You don't need to extend the FOIA process into an entirely new area to get at this information.

I mean, we have heard a number of anecdotes about problems in certain prisons. We know about those problems, I mean, and these things do come up, and we do get information about them. The great thing about, with the contract, is that if there are problems in the facility you can terminate that contract.

You know, we make it sound like only private prisons have problems within the correctional system——

Mr. SCOTT. Well, let me ask Mr. Friedmann.

Most of your examples were with state prisons. Is that right?

Mr. FRIEDMANN. Correct, yes.

Mr. SCOTT. State prisons would not be affected by this legislation unless they also house Federal prisoners.

Mr. FRIEDMANN. That is correct. CCA and GEO Group, the private prison industry primarily houses State and county prisoners. CCA, for example, houses around 11,000 or 12,000 out of their total 70,000 to 75,000 prisoners. But our experience with these State public records laws and State prisoners is very representative of how we can expect CCA to behave with FOIA.

Mr. SCOTT. Well, why can't you submit your freedom-of-information requests to the Bureau of Prisons and let them get the information, rather than going to the private contractor?

Mr. FRIEDMANN. We have tried that with other government agencies, State and county, and that has failed.

We currently have a request into ICE to see if they can produce information from their private prison contractors that we specifically asked for and that we know that the private contractors already have. To date, ICE has not been able to produce that information. I am still waiting to get their final result, or I would have brought that with me.

Mr. SCOTT. Why would you be more likely to get the information from the private prison than through the Bureau of Prisons getting it from the private prisons? If they don't have it through the Bureau of Prisons, why would they have that information available to you?

Mr. FRIEDMANN. The Bureau of Prisons, ICE and other Federal agencies only have records that they get from their private contractors. If the private contractors do not give them those records, they do not have them, and I can't request them. We do know that private prison companies have these records——

Mr. SCOTT. Wait a minute. You can only request records that are on file at the Bureau of Prisons?

Mr. FRIEDMANN. Or that they can obtain.

Mr. SCOTT. Or that they can obtain. Okay, that is the part of the question we are trying to get at. If they can obtain them, why isn't that just as efficient a process as anybody, everywhere, off the street, sending in these requests to the prisons?

Mr. FRIEDMANN. Well, partly because that information is not available. Mr. Jawetz testified he has produced a number of records for ICE, and they produced the records but only one page from a private prison contractor, which is very unrealistic, that they only have one page.

Mr. SCOTT. Can a freedom-of-information request require the Bureau of Prisons to obtain whatever information they may have, even if it is not on file at the Bureau of Prisons?

Mr. FRIEDMANN. I take it that would be interpreted by the BOP or ICE as to whether they can do that through their contract, depending on how their contract is written.

But when those contracts are written, they are not written with FOIA in mind. BOP, ICE and other Federal agencies that house prisoners and detain them, their responsibility, first and foremost, is to detain those prisoners, whether in public or private prisons. They are not as much worried about FOIA. So when they draft their contracts, they are more concerned about security and operational-related issues.

Mr. SCOTT. And how would this bill change that?

Mr. FRIEDMANN. This bill would require private prison companies to comply with FOIA to the same extent as Federal agencies already do.

Mr. SCOTT. Mr. Gohmert?

Mr. GOHMERT. Thank you, Chairman.

I do appreciate everybody being here.

It never ceases that, whether it is a courtroom hearing or a legislative hearing, that credibility is always an issue.

Mr. Jawetz, you know, you made the statement in here that, most importantly, for purposes of your testimony, you said the bill also, quote, "would, for the first time, shine a light into the darkest recesses of our society," unquote.

Are you talking about the private prisons being the darkest recesses of our society?

Mr. JAWETZ. Yes, that they are among the most dark recesses.

And I think the point that I would like to make—and this does respond to Mr. Flynn's point. I don't think, in general, it is our experience at the National Prison Project that we want to suggest

that publicly run facilities smell like roses. I mean, a number of the cases that we file——

Mr. GOHMERT. Okay. Well, that is not my question. My question is regarding your statement.

We have had testimony regarding gangs, MS-13. We have had organized crime testimony. There are just all kinds of issues. And so it may not affect anybody else, but when you come in before this Committee and say that the private prisons, your words are, are the darkest recesses of our society, then it causes me credibility problems for you.

Why would you come in and say that?

You are trying to get information directly from these private prison entities. And frankly, Mr. Jawetz, I have had concerns since my days as an attorney and as a judge and chief justice about the use of private prisons, and this jury is still out on their propriety. I was thinking this was something that perhaps would be better addressed by oversight hearings from the Federal standpoint, from our standpoint, be open to those kind of things.

But, boy, what is being pushed here in this bill is going to create an additional burden for those private entities that is going to open the door, as I see it, to the same FOIA requests being laid on private entities, as I said in my opening statement, that could include, you know, who carries out the trash. But——

Mr. JAWETZ. Can I respond to your question, Representative Gohmert?

Mr. GOHMERT. Well, my only question I have asked so far is about your belief that the private prisons are the darkest recesses of our society. So if you have further comment on that question, yes.

Mr. JAWETZ. Sure. I think the purpose of my statement was to note that the public's ability to access information in the possession of private prison companies is incredibly limited. But, even more specifically, I can't walk up to a private prison on any given day and say that I want to walk around, look through their facilities, take a look through their records and try and get a sense of what it is that they are doing behind closed doors.

Mr. GOHMERT. Have you talked to your Member of Congress about going with him or her through a tour of a prison facility? I have taken grand juries on tours of both public and private facilities as a judge.

Yes, I wouldn't want public or private facilities to have Tom Jawetz or Louie Gohmert just come walking up out of the blue and say, "I want in to look around, and let me in." I think that would be a huge mistake. That would be counterintuitive to their mission. And I am surprised, once again, that you would expect that.

But, again, credibility is important to me. And when you come in and use "darkest," the superlative, not "darker" or "dark," but just "darkest," then it sounds to me like you are prone to exaggeration, which affects your credibility.

How many private prisons have you been in?

Mr. JAWETZ. I have been in three, at this point.

Mr. GOHMERT. And how did they come to let you in?

Mr. JAWETZ. The ACLU is a credible organization, and it is also an organization that is a credible threat. That really goes to the point of this litigation.

Mr. GOHMERT. So the ACLU has made requests to go on tours, and they were allowed?

Mr. JAWETZ. In some cases, we have made requests to go on tours and they have been allowed. We have gone into facilities—I mean, I don't know what sorts of tours you have had. Perhaps you have had all-access passes. But I can say that the experience of walking through a facility in a 2-hour period of time is quite different from the experience of living in that facility. And I can also say that the experience of walking through that facility blind, as compared to the ability to look at records from the facility, review serious injuries reports, or do things like that, is quite different.

Mr. GOHMERT. Well, there is a way to have an opportunity to live in a facility.

My time is running out, but I was going to ask——

Mr. SCOTT. The gentleman's time has expired. We will have a second round of questions.

Mr. GOHMERT. All right. Thank you.

Mr. SCOTT. Let me just ask a couple of quick questions.

I guess, Mr. Flynn, does present law allow FOIA requests to any private contractors now?

Mr. FLYNN. Not Federal law. There has been litigation at times, and you could find decisions to go both ways on this. In some very, very narrow specific situations, the courts have allowed a FOIA process to a private contractor. But that is in a specific situation. It is not a blanket thing like this would be in statute.

Mr. SCOTT. Do you agree with that, Mr. Friedmann?

Mr. FRIEDMANN. My research has been narrowly on private prison contracts with State and Federal Government. And I have found no cases where, in the Federal level, they provided access to private prison contract records.

Mr. SCOTT. Well, there are a lot of private contractors out there doing government functions. Is there any precedent for requiring a private contractor to respond to a FOIA request?

Mr. FRIEDMANN. I can speak only to the private prison contracts; I am sorry.

Mr. SCOTT. We are not aware of any.

Mr. Jawetz?

Mr. JAWETZ. I am not aware of any.

But I can certainly say that I think the job that we are asking private prison companies to do is really not comparable in any way to the job that we are asking private trash collectors to do. And the kind of authority that we are giving to private prison companies over depriving someone of liberty, of holding disciplinary hearings, of using force, is really quite different from the experience that most other private contractors have.

Mr. SCOTT. Including deadly force. That was the point I made in my opening statement.

Mr. Flynn, what additional cost would there be to a private contractor if they had to respond to FOIA requests directly, rather than FOIA requests to the Bureau of Prisons? If someone were to

send the request to the Bureau of Prisons, wouldn't it not be the same cost?

Mr. FLYNN. No, because the Bureau of Prisons absorbs that cost as part of their compliance with FOIA. The private company——

Mr. SCOTT. If the information is at the private prison, and that is where you are going to get the information, why would it be any more difficult to get that information from the private prison if you send the initial request to the Bureau of Prisons?

Mr. FLYNN. Because I think you can expect a—because there are—you could expect an avalanche of FOIA requests that go beyond just that particular information. And I think, you know, given the stridency that this issue raises and the emotions behind this issue, I think it would be used by several organizations as a tool against private prison companies, and they would be deluged with FOIA requests.

Mr. SCOTT. Mr. Friedmann, if we allowed the requests to go directly to FOIA, and then if there would be additional costs, who would absorb the additional costs?

Mr. FRIEDMANN. Most likely the private contractors. It would therefore reduce the costs that are currently being paid by the Federal agencies that have to handle those requests. Of course, contractors are responsible for handling whatever costs are associated with their contracts. So that would possibly result in a reduction of costs at the Federal agency level and an absorption of cost by the private prison contractors.

Mr. SCOTT. So the private contractor would have to absorb the additional cost in responding to FOIA requests?

Mr. FRIEDMANN. That is correct. To the extent they say they already do that, however, and if that is an accurate statement from the industry, presumably it would result in no additional cost, if they say they already do it.

Mr. SCOTT. Okay.

The gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I have received a copy of a letter here from Keith Nelson, Principal Deputy Assistant Attorney General. It looks like you have the same copy. It is addressed to Howard Coble, an outstanding Member on our Subcommittee. But I would ask that this letter of the Justice Department's reaction, at least their Office of Legislative Affairs, about the bill be made a part of the record.

Mr. SCOTT. Without objection.

[The information referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 26, 2008

The Honorable Howard Coble
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Congressman Coble:

Thank you for your letter of April 14, 2008, inquiring about the position of the Department of Justice (Department) concerning H.R. 1889, the "Private Prison Information Act of 2007". We are pleased to provide our comments on this bill.

H.R. 1889 would require each nongovernmental entity contracting with the Government to incarcerate prisoners in a private prison to release information concerning the operation of that prison as would a federal agency operating such a facility under the Freedom of Information Act (FOIA). Federal agencies that contract with private entities to incarcerate prisoners in private prisons must promulgate regulations or guidance to ensure that the private entity complies with the terms of the contract. Parties who claim a violation of this duty may obtain judicial relief against the operator of the facility or any other proper party.

Currently, FOIA requests for documents concerning Department inmates located in private facilities are sent to the Bureau of Prisons (BOP) for processing. Private facilities maintain their own documents as well. The government has access to any private prison's records and information regarding inmate care through the contract between the Department and the private facility. Under H.R. 1889, the Department's contracts with private facilities would need to contain language ensuring compliance with the legislation. The Department expects that the operational costs of compliance would fall primarily on the private prisons. However, these costs would raise the inmate per diem. Consequently, BOP and other agencies contracting for detention services, such as the Department of Homeland Security, would be required to pay that higher per diem, increasing costs for the Federal government.

Additionally, the legislation provides in subsection 2(c) that an aggrieved party "may, in a civil action, obtain appropriate relief against the nongovernmental entity operating the facility or against *any other proper party*." (emphasis added). It is likely that the Department would be determined to be a proper party due to the contract. For instance, if a private prison corporation released nonpublic information or records concerning an inmate in a private facility without the inmate's permission, the inmate could sue the private facility and/or the Department; or if a private prison incorrectly applied an exemption or exclusion under the FOIA, an individual could sue the Department in addition to the private prison. Further, this vaguely-worded language

could be construed to allow a variety of claims for "appropriate" relief against governmental entities, beyond those contemplated by FOIA itself.

Apart from the possibly significant financial and resource burdens that H.R. 1889 would impose, other provisions must also be clarified. First, it is not clear what is meant in subsection 2(a) by "information about the operation of that prison or correctional facility." The legislation should include a definition of that term. Second, although the legislation cites FOIA (5 U.S.C. § 552) as the reference for the obligation of a private prison, it should be clarified that nongovernmental entities contracting with the Government for incarceration or detention can avail themselves of the same exemptions and exclusions available under FOIA (5 U.S.C. §§ 552 (b) and (c)), and other laws and regulations such as 8 C.F.R. § 236.6, which restricts disclosure of information related to immigration detainees. Additionally, for detention purposes, the Department of Homeland Security's Immigration and Customs Enforcement utilizes both contracts with private entities and Inter-Governmental Service Agreements (IGSA) with State, local, and county governments. Therefore, the term "nongovernmental entity" should be clarified to indicate whether it includes IGSAs as well as contracts with private entities.

Section 2(a) of H.R. 1889 would require privately owned prisons to release information just as Federal agencies are under FOIA. In order to facilitate a consistent application of FOIA, and to ensure a proper treatment of information, the Department believes it would be best if private prisons forwarded requests to their contracting agency, to allow the agency's FOIA personnel to process the records under FOIA. Although subsection 2(b) requires the agency contracting with the prison to promulgate regulations and guidance, it would be preferable for the agency's trained FOIA personnel to make the actual disclosure determinations due to the complexity of processing FOIA requests.

Please do not hesitate to contact this office if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Robert C. Scott, Chairman
The Honorable Louie Gohmert, Ranking Member

Mr. GOHMERT. Thank you.

And then I haven't had a chance to read the whole letter, but, anyway, it sounds like they have some questions regarding, if this were to become law, things that would need to be rectified within it.

But I want to go back to the issue of these dark recesses in our society. And, Mr. Friedmann, you had mentioned that you have made numerous requests for information from private prisons, and your organization, you mentioned, had made numerous requests. Did I understand those to be State private facilities?

Mr. FRIEDMANN. The majority of them, yes. We have put in a FOIA request both to ICE and to CCA seeking records related to private prison companies that contract with the Federal Government. Most of the examples I cited were with State or county government agencies.

Mr. GOHMERT. All right. And before making those directly of the private entities, did you make the same requests regarding those facilities through the appropriate or the governing body controlling those facilities?

Mr. FRIEDMANN. No, partly because some of the information would have only been available from the private prison company. And it was our understanding that they stated that they complied already with FOIA. In fact, we called the company, and I spoke with their——

Mr. GOHMERT. Wait, wait, wait, I want to get this. You made requests, and they say they had already complied with FOIA, which seems to indicate that there were prior requests made. So had you made prior requests and then subsequent requests of the same facility?

Mr. FRIEDMANN. Allow me to clarify. We have submitted one FOIA request directly to Corrections Corporation of America and an additional separate FOIA request to ICE.

It was my understanding that the private prison industry has stated or claimed that it already complies with FOIA requests, which is why we submitted a request directly to the company's corporate office. After speaking with CCA's general counsel's office, they stated that we could submit that request to one of their assistant general counsels, which is what we did.

Mr. GOHMERT. With regard to all these other requests that were made from State and local entities, did you go through the governing body controlling those facilities first, or did you make them directly to the private facilities?

Mr. FRIEDMANN. All of the other requests that I cited were made to the contracting government agency or to CCA. It depends on the request. I am sorry to——

Mr. GOHMERT. So the contract or government facility, the one that made the contract with the private facility; is that correct?

Mr. FRIEDMANN. Correct, or the contractor themselves.

Mr. GOHMERT. And were you turned down in making that request of the government entity?

Mr. FRIEDMANN. The government entity we have been—I have been turned down by four agencies which indicated they could not provide the records because they did not have them.

Mr. GOHMERT. That they were in part of the private facility.

Mr. FRIEDMANN. Correct. They did not have the information I had requested.

Mr. GOHMERT. What caused you to select those facilities you did? I believe at one point didn't you mention, like, six facilities that you had made requests of?

Mr. FRIEDMANN. Right. Actually, we submitted a request to all of CCA's contracting government agencies, which number around 30. We received responses from around 16 of those agencies. And of those agencies, four had absolutely no records that they could provide. Six had some records.

Mr. GOHMERT. Well, my time is running out. What caused you to go after CCA particularly?

Mr. FRIEDMANN. Mainly because there was a news report in Time magazine which indicated—this was published in March of this year—that the company had a policy or practice of not disclosing information to government agencies.

Mr. GOHMERT. Well, Mr. Jawetz said he has been in three private prison facilities. Have you been in any private prison facilities yourself?

Mr. FRIEDMANN. Just one, which is the South Central Correctional Facility in Clifton, Tennessee.

Mr. GOHMERT. Okay. Was that a request made at the site that you go on a tour of the facility, or how was that occasion?

Mr. FRIEDMANN. Not exactly. Actually, I spent 6 years at that facility while I was incarcerated, from 1992 to 1998.

Mr. GOHMERT. Was that a CCA facility, or who owned it?

Mr. FRIEDMANN. It was. CCA operated under contract with the Tennessee Department of Correction.

Mr. GOHMERT. That seems to shed a little more light on motivation, anyway. Nonetheless, if there are issues that need to be resolved, I am for resolving them.

Thank you, Mr. Chairman.

Mr. SCOTT. Just another question. Mr. Friedmann, are their privacy concerns that may be generated with direct FOIA requests to private agencies?

Mr. FRIEDMANN. Absolutely. But those privacy concerns are addressed to the same extent that privacy concerns are addressed to Federal agencies. In other words, FOIA already encompasses exceptions and exclusions for information that would infringe on privacy, security and so forth, things that cannot be disclosed, things such as security operations at prisons, you know, the layout of how their locks work and so forth. Those things aren't subject to disclosure under FOIA already to Federal agencies.

So by extending FOIA to private prison companies, you would also extend the exceptions and the exclusions that FOIA already has. That would not create additional or new privacy concerns. Those are already addressed.

Mr. SCOTT. And you have indicated that you have made a FOIA request and could not get information. Can you be specific as to the information you have requested that you couldn't get?

Mr. FRIEDMANN. Certainly. The FOIA request that we submitted to CCA, based on their statement that we should submit it to their general counsel's office, requested specific information. We examined the number of FOIA requests that CCA itself has received

over the past 2½ years. We requested the last 20 FOIA requests that CCA has received and their responses to those requests. We have requested specific statistical information regarding CCA prisons that house Federal prisoners, and that included inmate-on-inmate assaults, inmate-on-staff assaults, use-of-force reports, disciplinary reports and other related statistics.

All of that information, had we submitted that request to any public facility, would be subject to FOIA. Our FOIA request to CCA has not yet been responded to.

Mr. SCOTT. Mr. Flynn, why shouldn't that information be available if it's a private prison as it is with a public prison?

Mr. FLYNN. Well, what Mr. Friedmann just explained is a fishing expedition.

Mr. SCOTT. Let's ignore the request for FOIA requests and get to the information about the assaults and that information.

Mr. FLYNN. I think that should be available, that should be available information. And that is up to the bureau who is making the contract to say that information must be disclosed.

But, again, this bill which Mr. Friedmann just discussed, and I do think it is important, is to have this avalanche of FOIA requests on a private company that is unrelated to any specific incident or any specific problem is what you want to avoid.

Mr. SCOTT. Any other questions?

Mr. GOHMERT. Just briefly.

Mr. SCOTT. Gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. Flynn, I hadn't had a chance, I hadn't made the chance to ask you questions, and I did have some of you. You know, I agree with your approach in general; basically, liking the idea that less government is usually better than more government.

But you had made the comment that we should be managing outcomes instead of process. And I agree with your concerns about the potentially unnecessary dangerous precedent. As I have already indicated, I am leaning against this type of legislation. But as I also indicated, I have my own concerns about contracting out certain governmental functions. So I am struggling somewhat with your idea of managing outcomes only, without regard to process.

You surely wouldn't want prisons that used significantly mind-altering drugs or beating a guy about the head or letting other inmates beat him until they are beat into submission and they come out this docile, mindless human being or remnant of a human being. I mean, I am sure you agree with that, right?

Mr. FLYNN. Absolutely, yes.

Mr. GOHMERT. So it is more than just managing outcomes. I mean, we would be concerned about the process, wouldn't you agree?

Mr. FLYNN. Absolutely. And what I mean by managing outcomes is, you know, right now, we have a correctional system that is very dysfunctional. And we have very, very high recidivism rates. You know, we put oftentimes nonviolent criminals in jail for a long time, and they get basically on-the-job training for criminal behavior. In our current system, we just house them. We should be moving in some direction toward rehabilitating them, making sure they get an education or job skills, so that when they leave the prison

system they have an alternative that just doesn't put them back in there.

Through contracting, by the use of private prisons, you can move in that direction, because you can make the contract contingent on these things. With the Federal bureaucracy and Federal employees, who cannot be fired essentially, you can never start to get those outcomes within the institution. You know, if there is a riot at a public facility, maybe somebody gets fired. If there is a riot at a private facility, you can pull the contract.

That is a tool that we should use and we should—you know, it is the competition that makes them run better. And if you incentivize and say "Okay, yeah, we are going to pay you X amount; and if you get X percent in substance treatment of your inmates, we will pay extra." And so that is what I mean by managing outcomes; not that you do it at the expense of the process. But right now we just pour money into the system and don't even look at what comes out on the other end.

Mr. GOHMERT. All right. Thank you.

Mr. SCOTT. Thank you.

And that is certainly an indictment of the prison system, that we can't use common sense and good practices, whereas we can contract to get those services; that maybe we ought to be looking at the public prisons to see if we can't get some better output.

Mr. GOHMERT. Is that our next hearing?

Mr. SCOTT. If you insist.

Any other questions?

Mr. Coble?

Mr. COBLE. Thank you, Mr. Chairman. I will be brief. I had two other meetings that I had to go to, and I am sorry I missed most of the testimony.

Mr. Flynn, would imposing FOIA obligations on private companies that have government contracts, could that lead to higher costs for the government?

Mr. FLYNN. Oh, absolutely.

Mr. COBLE. Proponents of the legislation have argued that private facilities operate under a shroud of secrecy and, thus, should be subject to FOIA.

Reason Foundation, your group, has conducted significant research into the operation of private correctional facilities. How did Reason come into access of this information?

Mr. FLYNN. Through public sources.

Mr. COBLE. Pardon?

Mr. FLYNN. Through FOIA requests and other means.

Mr. COBLE. Do you want to elaborate on that a little bit?

Mr. FLYNN. Yeah. I didn't do the actual requesting, so I don't know what they did. But we looked—and what we also did, which I think is even more interesting, is we looked at a bunch of studies, I think about 18 or 20 studies, going back to 1989, kind of a meta analysis, and found that in about 16 of those 18 cases, of those studies, the private prisons were at least as good as the public prison in terms of quality of service and usually better.

So, I mean, it is too much—I mean, this is a very specific bill about the whole private prison industry. But there has been a lot of misconception about how the private prison industry runs. And

they make it sound as if, you know, the public prisons are these wonderful daycare centers where everything is nice and light and the private prisons are some kind of, like, dark gulag. But the data does not show that at all.

Mr. COBLE. Thank you, sir.

Mr. Friedmann, the Freedom of Information Act was enacted to provide greater transparency into the operation of our Federal Government. I am not aware of any precedent whereby the statute has been extended beyond the government and to private entities. Are there such precedents?

Mr. FRIEDMANN. To my knowledge, and my research has mostly been in the private prison contracting area, no, which is what H.R. 1889 would do.

Mr. FLYNN. Just to clarify, there have been very, very limited, maybe, like, two or three, instances of private contractors being subject to FOIA as a result of litigation. But those were very particular and specific. But there is no statutory.

Mr. COBLE. Thank you, gentlemen.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

Gentleman from Texas?

Thank you.

I would like to thank all our witnesses for their testimony today.

Members may have additional written questions for our witnesses, which we will forward to you and ask that you answer as promptly as you can so that your responses may be made part of the record.

Without objection, the hearing record will remain open for 1 week for the submission of additional materials.

And, without objection, the Subcommittee now stands adjourned. Thank you very much.

[Whereupon, at 2:01 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman, for convening this hearing on the H.R. 1889, the "Private Prison Information Act of 2007." The way the United States treats its prisoners reflects greatly on the values of our nation. I have long been an outspoken advocate for the rights of detainees and feel today's hearing is incredibly important. I would like to thank our distinguished witnesses, the Alex Friedmann, Vice President, The President Corrections Institute, Inc.; Tom Jawetz, Immigration Detention Staff Attorney from The American Civil Liberties Union National Prison Project; and Mike Flynn, Director of Government Affairs, Reason Foundation. I look forward to their testimonies.

H.R. 1899 "THE PRIVATE PRISON INFORMATION ACT OF 2007"

This important piece of legislation, introduced by my distinguished colleague, Representative Tim Holden, addresses the release of information to the public regarding prisoners, an important step forward in the way of transparency. This legislation "requires prisons and other correctional facilities holding federal prisoners under a contract with the federal government to make the same information available to the public that federal prisons and correctional facilities are required to do by law." In effect, this "good government" legislation will require private prison vendors who contract with the Federal Government to make the same information available to the public as is required of public correctional facilities.

For years, private prison vendors have hid behind their "corporate veil" to keep damaging information from becoming public. H.R. 1889 would put an end to this practice once and for all.

Recently, *Time* magazine exposed Corrections Corporation of America's practice of keeping two sets of internal audit reports: one for public release and another, hiding possibly damaging information from public scrutiny under the guise of "attorney-client privilege."

Studies have shown private prison guards receive less pay and benefits, and experience higher rates of turnover than those in the public sector. As a result, employees, inmates, and surrounding communities near private correction facilities are exposed to great risks. At the very least, private contractors should reveal the same information about their hiring, training, and management practices which public facilities do.

While the for-profit private prison contractors, the Department of Justice and the Immigration and Customs Enforcement feel that private vendors currently supply information to the Federal Government, this is not the point. The public has a right to know what is going on inside these facilities, regardless of the limited amount of reporting required by the federal government.

As more and more stories are revealed of the horrific treatment of prisoners both within the federal prisons and contracted prisons emerge, it is imperative that we hold these facilities accountable. Concerns about internal problems within private prisons have been raised by a myriad of organizations and even Representatives from within this Congress. One such organization, the Private Corrections Institute, recently voiced its concerns stating, "there are more safety concerns and more escapes in private prisons where guards are not well trained, are poorly compensated, and where this is rapid turnover of personnel."

Mr. Chairman, because we are sending our federal prisoners to these private facilities, there must be some sort of mechanism with the capability of holding them

up to the same federal standards mandated to federal prisons and correctional facilities. It is our obligation to know under what conditions federal prisoners are living, whether they are living in a privately-owned facility or a government-owned facility. This bill is an important step toward guaranteeing that federal prisoners—whether they are housed in a government-owned facility or in a privately-owned facility contracted by the government—be treated the same.

Mr. Chairman, we must address the shortcomings of FOIA when it comes to private prisons. Modification is long overdue and I look forward to working with the committee to see these issues addressed. This bill is about accountability, fairness, public safety, and transparency. Thank you, Mr. Chairman. I yield back the balance of my time.

April 18, 2008

The Honorable Robert Scott
Chairman, Subcommittee on Crime, Terrorism and Homeland Security
House Judiciary Committee
1201 Longworth House Office Building
Washington, D.C. 20515

RE: H.R. 1889, the "Private Prison Information Act"

Dear Congressman Scott:

As Chairman of Corrections USA, a consortium of more than 80,000 corrections officers and employees throughout the country, I ask for your support and vote for H.R. 1889, the "Private Prison Information Act" which is scheduled to be considered by the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on Tuesday, May 6.

In November, the Subcommittee reviewed H.R. 1889 with no opposition. This legislation, introduced by Congressman Holden of Pennsylvania, assures that private prisons have the same disclosure responsibilities that public facilities have. This good government bill will bring greater transparency to the private prison facilities.

Corrections officers employed by federal, state and local governments are dedicated, hardworking professionals. We are proud of our profession and strive to make corrections safer and more effective. We have a duty to uphold public safety and a deep commitment to the communities in which we live.

Studies have shown private prison guards receive less pay and benefits, and experience higher rates of turnover than those in the public sector. As a result, employees, inmates and surrounding communities near private correction facilities are exposed to great risks. At the very least, private contractors should reveal the same information about their hiring, training, and management practices which public facilities do.

This legislation will increase public safety by making important information available to the public upon request and we urge you to support it.

Corrections USA
11400 Atwood Road
Auburn, CA 95603

Attached is the bill for your review. We would deeply appreciate your support of H.R. 1889 and look forward to working with you. If you need any more information, please don't hesitate to contact me.

With best wishes,

James Baiardi, Chairman
Corrections USA

Attachment: H.R. 1889

Corrections USA
11400 Atwood Road
Auburn, CA 95603

Corrections U.S.A.

The National Corrections Voice for Professionals by Professionals

11/7/07

James Baiardi
Chairman

Roy Pinto
Vice Chairman

Todd Dunn
Treasurer

Joe Baumann
Secretary

Nina Salarno-Ashford
Administrator

Dear Congressmen,

On behalf of the 80,000 State Correctional Officers from across the country, I urge you to support H.R. 1889, the Private Prison Information Act of 2007. This only makes everybody to really compare the total facts involved in all prison settings.

H.R. 1889 is a good bill that deals with **Public Safety** and will bring much needed accountability to America's private prisons. This bill levels the playing field between public and private facilities while increasing public safety with no additional cost to tax payers. Unlike public facilities, private prisons are not required to comply with the Freedom of Information Act (FOLA). This means that too often taxpayers and our elected leaders are left in the dark concerning matters of public safety, including the number of correctional officers that are hired by facilities, how much training they received, and the rate of staff turnover. Private prisons companies have argued that such information is proprietary but we believe that the public interest trumps corporate secrecy where public safety is concerned. The incarceration of a human being, the depriving a person of their liberty, is perhaps the most severe function of Government. Our elected leaders and the public have a right to know what is going on in the private facilities as they do at public prisons.

Please support H.R. 1889, The Private Prison Information Act of 2007.

Sincerely,

Roy Pinto

Roy Pinto, Vice Chairman

11400 Atwood Road
Auburn, CA 95603

TELEPHONE:
(530) 888-8756
(877) 702-1022

FACSIMILE:
(530) 885-4608

www.cusa.org

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION
2421 NORTH FRONT STREET
HARRISBURG, PA. 17110-1110
(717) 364-1700 PHONE
(717) 364-1705 FAX
1-866-GOPSCOA (PA)
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www.pscoa.org

Don McNany, President dmcnany@pscoa.org
Ed McConnell, Executive Vice President vp@pscoa.org
Roy Pinto, Vice President rpinto@pscoa.org
Percy Poindexter, Vice President ppoindexter@pscoa.org
Sam Brezler, Secretary/Treasurer Sbrezler@pscoa.org

11/7/07

Dear Congressmen,

On behalf of the 10,000 State Correctional Officers from across Pennsylvania, I urge you to support H.R. 1889, the Private Prison Information Act of 2007. This only makes everybody to really compare the total facts involved in all prison settings.

H.R. 1889 is a good bill that deals with Public Safety and will bring much needed accountability to America's private prisons. This bill levels the playing field between public and private facilities while increasing public safety with no additional cost to tax payers. Unlike public facilities, private prisons are not required to comply with the Freedom of Information Act (FOLA). This means that too often taxpayers and our elected leaders are left in the dark concerning matters of public safety, including the number of correctional officers that are hired by facilities, how much training they received, and the rate of staff turnover. Private prisons companies have argued that such information is proprietary but we believe that the public interest trumps corporate secrecy where public safety is concerned. The incarceration of a human being, the depriving a person of their liberty, is perhaps the most severe function of Government. Our elected leaders and the public have a right to know what is going on in the private facilities as they do at public prisons.

Please support H.R. 1889, The Private Prison Information Act of 2007.

Sincerely,

Roy Pinto

Roy Pinto, VP

Private Corrections Institute, Inc.

Support H.R. 1889, Private Prison Information Act

H.R. 1889 is a good government bill. This bill requires "prisons or other correctional facilities holding Federal prisoners under contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to do by law."

Very simple and fair. Why is this legislation needed?

Currently, private prison companies under contract with the federal government are not subject to Freedom of Information Act (FOIA) requests. For example:

- On May 9, 2008, the Public Broadcasting Service show NOW aired a program, "Prisons for Profit." Here's what one of the reporters, Maria Hinojosa, had to say about access to private prison records: "As a journalist, my job is to 'tell the untold story,' but visiting a prison – especially a private prison – is especially challenging. I couldn't find out how many drug offenders or other prisoners at Crowley [a CCA-operated prison] end up back behind bars because nobody is keeping track. And I couldn't find out if the numbers of assaults in this prison had gone up or down since the riot, because those records are not available to the public. These kind of statistics are treated as privileged information by private prison companies. If knowledge is power, a journalist, and by extension the public, is at a disadvantage when it comes to the corporate corrections industry."

- When PCI submitted a FOIA to Corrections Corporation of America for records at their San Diego Correctional Facility, the warden sent PCI a letter saying that CCA was not the proper authority for the information. The warden wrote that "We take no position on whether these records are subject to release at this time, but acknowledge that a large amount of contractor submitted information is subject to FOIA based on the statute and the Department's regulations." CCA produced no records.

- It was reported in the *San Diego Union-Tribune* on May 4, 2008 ("Immigration agency, contractors accused of mistreating detainees") that the ACLU could not determine if CCA had a financial interest in keeping detainees from having access to medical treatment because "the public cannot obtain government contract information from private companies."

- Two investigative journalists who put together a webpage on CCA and Immigration and Customs Enforcement (www.businessofdetention.com) had this to say: "We FOIA'd a list of CCA contracts with ICE and the US Marshals Service, and found them to be of minimal use when the financial amounts on the documents were redacted, as were the contracts shared with us by TRAC from a similar FOIA." Why can't members of the public learn how much of their taxpayer money is being spent on private prison contracts?

Doe Hubbard, President | Alex Friedmann, Vice President | Stephen Raher, Secretary/Treasurer | Dub Phillips, Director | Ken Kopczynski, Executive Director

1114 Brandt Drive - Tallahassee, FL 32308
850-980-0887 - www.PrivateCI.org

- In "The Lost Children" (*The New Yorker*, March 3, 2008), author Margaret Talbot wrote that getting information about a CCA detention facility, "especially from the people who run it – is hard. Private prison companies are not subject to the same legal requirements as public prisons to provide incident reports on assaults, escapes, deaths, or rapes." Ms. Talbot then reports on one incident where Ms. Judy Greene, a criminal justice researcher, tried to obtain information about the for-profit's use of force authority. "In a Freedom of Information Act request, Greene asked for documents that might shed light on this question. Eventually, she recalls, she heard from the Bureau of Prisons that it was prepared to give her the information but had to get permission from CCA; a second letter informed her that CCA had said no, claiming that the information she sought about the use of force was a "business secret." Use of force authority for federal prisoners is a "business secret"?

- On March 13, 2008, *Time* magazine reported that Ronald Thomas Jones, a former high-ranking CCA quality assurance employee, had gone public with accusations that CCA maintains two sets of internal quality assurance reports. Mr. Jones described how damaging reports containing information from CCA prisons and jails were stamped "attorney client privilege" for in-house use only, to make it difficult, if not impossible, for the public to find out what is going on in CCA's prisons and jails.

- On May 5, 2008 the *New York Times* ("Few Details on Immigrants Who Died in U.S. Custody") reported that details related to deaths at ICE facilities were hard to come by. Reporter Nina Bernstein related how it took Congress to demand information about the deaths to get such information. The *Times* FOIA'd ICE to get a list of deaths but found that the "list had few details, and they are often unreliable." Ms. Bernstein's exposé focuses on the death at CCA's Elizabeth Detention Center in New Jersey of Boubacar Bah, a Guinean who had overstayed his visa. She writes that "Mr. Bah's relatives never saw the internal records labeled 'propriety information – not for distribution' by Corrections Corporation of America." Mr. Bah died "in a sequestered system where questions about what had happened to him, or even his whereabouts were met with silence." Why? "Four days after the fall, tipped off by a detainee who called Mr. Bah's roommate in Brooklyn, relatives rushed to the detention center to ask Corrections Corporation employees where he was. 'They wouldn't give us any information,' said Lamine Dieng, an American citizen who teaches at Bronx Community College and is married to Mr. Bah's cousin ...."

- In another *New York Times* article the same day by Ms. Bernstein ("Family Struggled in Vain to Help Suffering Detainee"), she recounts another example of CCA ignoring requests for information from a detainee's relatives. The fours sons of Maya Nand, an illegal immigrant from Fiji, "kept calling the [CCA Eloy Detention facility] to plead for medical attention, they said, but could only through to an answering machine. They said they hired a lawyer to reach the warden, but nothing changed."

Plainly and simply, private prison corporations are hiding behind the veil of corporate secrecy to keep the public from finding out what is going on behind the walls of their facilities. It is obvious the current system of obtaining information about these privately-operated prisons and jails is not working.

If Steven Owen, CCA's Director of Marketing, is to be believed when he said "We're one of the most transparent industries out there" ("Who Holds the Keys?", *Boise Weekly*, September 12, 2007), then why is CCA lobbying to defeat this legislation? If they have nothing to hide why do they voice such strong opposition to H.R. 1889? This bill is needed to protect the interests of the public and to guarantee the public's right to know, in order to ensure public accountability over the for-profit private prison industry.

Time Magazine article – Published March 13, 2008

Scrutiny for a Bush Judicial Nominee

By Adam Zagorin/Washington

As the top lawyer for America's biggest private prison company, Corrections Corporation of America (CCA), Gus Puryear IV, is known to sport well-pressed preppy pink shirts, and his brownish mop of hair stands out among most of President Bush's graying nominees to the federal bench. A favorite of G.O.P. hardliners, Puryear, 39, prepped Dick Cheney for the vice presidential debates — both in 2000 and 2004 — and served as a senior aide to two former senators and onetime presidential hopefuls, Bill Frist and Fred Thompson.

Political connections, though, may not be enough to get Puryear a lifetime post as a federal district judge in Tennessee. Puryear recently confronted tough questions about his conduct, experience and potential conflicts of interest from Democrats on the Senate Judiciary Committee, which must approve him before a full Senate vote. Now, a former CCA manager tells TIME that Puryear oversaw a reporting system in which accounts of major, sometimes violent prison disturbances and other significant events were often masked or minimized in accounts provided to government agencies with oversight over prison contracts. Ronald T. Jones, the former CCA manager, alleges that the company even began keeping two sets of books — one for internal use that described prison deficiencies in telling detail, and a second set that Jones describes as "doctored" for public consumption, to limit bad publicity, litigation or fines that could derail CCA's multimillion dollar contracts with federal, state or local agencies.

CCA owns or operates 65 prisons, housing some 70,000 inmates across the U.S. According to the company's website, it has a greater than 50% share of the booming private prison market. CCA is also a major contributor to Republican candidates and causes, and spends millions of dollars each year lobbying for government contracts. (Puryear enjoys a friendship with Cheney's son-in-law, Philip Perry, who lobbied for CCA in Washington before serving as general counsel for the Department of Homeland Security, which has millions of dollars in contracts with CCA, from 2005 to 2007.) The company has likewise given financial support to tax-exempt policy groups that support tough sentencing laws that help put more people behind bars. Like other prison companies, CCA has faced numerous lawsuits that stem from allegedly inadequate staff levels that can be a cause of high levels of violence in the prisons. Though hundreds of such lawsuits are often pending at any given time, many brought by inmates in its own facilities, CCA under Puryear has mounted an especially vigorous defense against them, refusing to settle all but the most damaging.

Jones knows CCA intimately. Until last summer, the longtime Republican was in charge of "quality assurance" records for CCA prisons across the U.S. He says that in 2005, after CCA found itself embarrassed on several occasions by the public release of internal records to government agencies, Puryear mandated that detailed, raw reports on prison shortcomings carry a blanket assertion of "attorney client privilege," thus forbidding their release without his written consent. From then on, Jones says, the audits delivered to agencies were filled with increasingly vague performance measures. "If the wrong party found out that a facility's operations scored

low in an audit, then CCA could be subject to litigation, fines or worse," explains Jones. "When Mr. Puryear felt there was highly sensitive or potentially damaging information to CCA, I would then be directed to remove that information from an audit report." Puryear would not comment on the allegations. Jones resigned from CCA last summer to pursue a legal career.

According to Jones, Puryear was most concerned about what CCA described as "zero tolerance" events, or ZT's — including unnatural deaths, major disturbances, escapes and sexual assaults. According to Jones, bonuses and job security at the company were tied to reporting low ZT numbers. Low numbers also pleased CCA's government clients, as well as the company's board, which received a regular tally, and Wall Street analysts concerned about potentially costly lawsuits that CCA might face.

In 2006, for example, Jones says CCA had to lock down a prison in Texas to control rioting by as many as 60 inmates. Despite clear internal guidelines defining the incident as a ZT, Jones says he was ordered not to label it that way. Instead it was logged as, "Altered facility schedule due to inmate action". And this was not unusual, says Jones: "Information was misrepresented in a very disturbing way concerning the company's most important performance indicators, which included escapes, suicides, violent outbreaks and sexual assaults."

Companies often try to show their best face to customers, and safeguard internal records with "attorney-client privilege." But according to Stephen Gillers, a leading expert on legal ethics at New York University, CCA's use of that privilege seems like "a wholesale, possibly overreaching claim," similiar to the blanket assertions of major tobacco companies that tried to keep damaging internal documents from public view. Those assertions of privilege have been rejected by federal judges as an attempt to improperly conceal their internal data on the dangers of smoking from customers, the courts and legal adversaries. CCA could also be in legal trouble if it minimized the tally of serious prison incidents and, by implication, its possible financial liability. As chief legal counsel, Puryear would have also had an obligation to ensure his board had all the information it needed, good or bad, to make decisions. If Puryear's reporting system had the effect of withholding information relevant to official prison oversight, that could bear on his suitability as a federal judge by suggesting his "disdain for the proper operation of an important function of government," notes Gillers.

Contacted by TIME, CCA says that Puryear, "has served the company well and honorably as general counsel and will be an outstanding judge." The company denies allegations that it keeps two sets of books, saying: "A final audit report is made available to our customers. Appropriate information gathered in the audits is separately provided to our legal department." The company adds that "CCA has produced all relevant, non-privileged documents in litigation," that its board is regularly apprised of the most serious prison incidents, and that "all appropriate" information is given to the financial community.

President Bush recently called Puryear and his 27 other judicial nominees facing Senate confirmation "highly qualified." Whether or not the Senate agrees on Puryear, Bush is likely to leave the White House with fewer judges approved than Bill Clinton or Ronald Reagan, both two-term chief executives.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 1, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of Deputy Assistant Attorney General Ryan Bounds before the Subcommittee on Crime, Terrorism, and Homeland Security on November 8, 2007, at a hearing entitled "H.R. 1889, the Private Prison Information Act of 2007".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Lamar S. Smith
Ranking Member

"H.R. 1889, the Private Prison Information Act of 2007"

November 8, 2007

Questions for the Hearing Record
for
Ryan Bounds
Deputy Assistant Attorney General and Chief of Staff
Office of Legal Policy
United States Department of Justice

QUESTION FROM CONGRESSMAN COBLE:

1. **In testimony at a recent Congressional hearing on H.R. 1889, the Private Prison Information Act, questions were raised about whether companies that have federal contracts to operate correctional and detention facilities are subject to adequate transparency and accountability. Could you describe what kind of oversight the Justice Department exercises on these contracts and whether it has adequate access to information about the facilities and their operations?**

RESPONSE:

The Department of Justice ensures appropriate oversight of the contracts the Bureau of Prisons (BOP) awards for the operation of correctional institutions through adherence to and the use of provisions in the Federal Acquisition Regulation, detailed Statements of Work, and the use of contract monitors and contracting officers stationed at each contract facility.

Personnel from the BOP are on site at these contract facilities to conduct regular and ad-hoc reviews in order to monitor and ensure contract compliance. On-site BOP staff monitor the contractor's performance and document any noncompliance. Formal action can be taken against the contractor for unsatisfactory performance by reducing the contractor's invoice or withholding payment when the contractor fails to perform any of the required services. The BOP staff that are on site meet with a contractor's representative on a regular basis to provide a management-level review and assessment of the contractor's performance and to discuss and resolve problems. The contract may be terminated for default based on inadequate performance of services, even if payment was previously withheld for an inadequate performance.

In addition, teams of BOP subject matter experts in various disciplines conduct periodic reviews of each contract facility to ensure the contractor is performing in accordance with the contract. These reviews provide a mechanism for inspecting performance, testing adequacy of the internal quality controls, and for assessing risks for all program and administrative areas of contract performance. Contractors are required to submit a complete Quality Control Plan that addresses all areas of contract performance. The review guidelines are based on the contractor's Quality Control Plan, the Statement of Work, professional guidelines referenced by the Statement of Work, applicable BOP policy, and other appropriate measures within the contract's scope of work. The BOP reserves the right to develop and implement new inspection techniques and instructions at any time during contract performance without notice to the contractor.

Oversight of BOP contracts for private facilities is further accomplished through a Government Quality Assurance Program. The Quality Assurance Program is based on the premise that the contractor is responsible for the management and quality control actions necessary to meet the terms of the contract (it is not a substitute for the quality control by the contractor).

Contracts to operate correctional institutions are fixed-price contracts governed by the Federal Acquisition Regulation (FAR). Under the FAR, the Government has the right to inspect and test all services called for by the contract, to the extent possible, at all times during the term of the contract. Each phase of services rendered under the contract is subject to the BOP's inspection both during the contractor's operations and after completion of the tasks. When the contractor is advised of any unsatisfactory condition(s), the contractor will submit a written report to the contracting officer addressing any corrective or preventive actions taken. If any of the services do not conform to the contract requirements, the contractor may be required to perform the services again at no increase in contract amount. When the services cannot be corrected by new performance, the Government may require the contractor to either take necessary action to ensure future performance conforms to contract requirements or reduce the contract price to reflect the reduced value of the services performed. If the contractor fails to take the necessary corrective action, the Government can either perform the services and charge the contractor any costs that are incurred or terminate the contract for default.

STATEMENT FOR THE RECORD OF

ALAN CHVOTKIN
EXECUTIVE VICE PRESIDENT AND COUNSEL
PROFESSIONAL SERVICES COUNCIL

FOR THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

HOUSE JUDICIARY COMMITTEE

HEARING ON

H.R. 1889 – "THE PRIVATE PRISON INFORMATION ACT"

JULY 10, 2008

4401 Wilson Boulevard, Suite 1110, Arlington, VA 22203
(703) 875-8059, fax (703) 875-8922

Mr. Chairman, Ranking Member Gohmert, members of the Subcommittee, my name is Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council (PSC). PSC is the principal national trade association for companies providing services to virtually every agency of the Federal government. On behalf of our more than 330 member companies, thank you for the invitation to provide our views on H.R. 1889, "The Private Prison Information Act."

The United States Government spends more than $400 billion annually on contracting with the private sector for goods and services, and contractors should be held accountable for providing good service at a fair price. Taxpayer dollars provide for this partnership with the private sector and they have a right to know how the government is spending their money. However, the information made publicly available must be done in an appropriate manner that also protects a company's proprietary data.

H.R. 1889 in its current form is not the correct method for such disclosure. Furthermore, while it is currently limited to the private prison industry, if expanded to require all contractors to provide such data in this manner, it would have a chilling effect on the numbers of companies that offer services to the federal government. Less competition would cost the government more and deprive the government of needed services and technology, thereby doing the taxpayer a disservice.

With respect to the specific provisions of the bill, the Freedom of Information Act is not an independent disclosure statute – it requires agencies to release information they have unless an exemption to release can be found in the criteria established in the Act or another statute. However, section 2(a) does not clearly specify what information in the possession of the private contractor would have to be disclosed. As a general approach, PSC would prefer statutory direction that the federal agency requires any contractor to report to the federal agency on a fixed list of items rather than "the same information as the federal agency." Then the information would become a "federal record" and disclosure a federal agency matter under its FoIA process. It would also obviate the need for civil action under section 2(c) of the bill.

While PSC understands the intent behind section 2(b) of the bill, noncompliance with the terms of a contract are best handled through the contracting officers and the contractor, not by the promulgation of an additional layer of regulations or guidance.

With respect to section 2(c) of the bill, PSC opposes subjecting private contractors to civil action for work under a government contract for similar reasons outlined in the discussion of section 2(a).

Section 2(d) of the bill does not specify the scope of coverage of contracts. The language imposes a set of requirements on the private sector that they may not know about and may be precluded from complying with because of contractual provisions. It is another example of why the policy should be imposed on the appropriate federal agency and then flowed through to a contractor in contract clauses.

PSC would welcome the opportunity to provide the Subcommittee with any additional information you may require.

WASHINGTON
LEGISLATIVE OFFICE

June 25, 2008

The Honorable Robert C. Scott
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
House Judiciary Committee
Washington, D.C. 20515

The Honorable Louie Gohmert
Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security
House Judiciary Committee
Washington, D.C. 20515

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Re: The ACLU supports H.R. 1889, the Private Prison Information Act of 2007

Dear Chairman Scott and Ranking Member Gohmert,

On behalf of the American Civil Liberties Union, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nationwide, we write to support H.R.1889, the Private Prison Information Act of 2007 and urge the members of the Subcommittee to support its passage. This much needed legislation would require private entities operating prisons that detain and incarcerate federal prisoners to release information about the operation of the prisons in accordance with the Freedom of Information Act (FOIA) as any federal agency operating a facility is required to do.

Allowing the public to have access to FOIA information about private prisons is critical to the ongoing role the public plays in monitoring conditions of confinement and protecting people in federal facilities. Private facilities are responsible for some of the most vulnerable prisoners and detainees from various federal agencies across the country. Presently, FOIA laws do not directly apply to private prisons and immigration detention centers. This statutory omission makes it extremely difficult for the public to acquire the information necessary to help ensure that the constitutional rights of those held in these facilities are respected and that their living conditions are humane.

Recently, media and non-governmental organizations exposed some of the horribly inadequate living conditions faced by prisoners and immigration detainees held in private prisons. For example, at a San Diego immigration detention facility managed by the Corrections Corporation of America, Inc. (CCA), hundreds of detainees were forced to live for months and years in dangerously overcrowded conditions, many of them sleeping on plastic slabs placed on the floor by the toilet. Records pertaining to the

detainee population, CCA's staffing levels, and any CCA policies regarding sanitation, security or overcrowding at the facility were publicly unavailable because of current FOIA limitations. Unlike other federal prisons, these private prisons cannot be monitored by the American public for unacceptable conditions due to the FOIA omission.

We recommend only one minor change to the bill. As written, the bill applies to "nongovernmental entities contracting with the Federal Government to incarcerate or detain Federal prisoners in a privately owned prison or other correctional facility." Section 2(d) defin the term "privately owned prison or other correctional facility" to include facilities that "incarcerate or detain prisoners pursuant to a contract with . . . Immigration and Customs Enforcement." However, the more than 300,000 people detained by ICE each year are "detainees," not "prisoners."[1] Privately owned facilities housing federal immigration detainees pursuant to a contract with ICE might challenge the law's applicability if the bill remains unchanged. Sections 2(a), (b), and (d) should be amended to include the words "and detainees" after the word "prisoners."

Since its enactment over forty years ago, FOIA has created the transparency necessary t ensure that the public and the media can access basic government records. Open government is integral to holding the government accountable, and is vital especially when government denies person his or her freedom by incarceration. Currently, the Federal Bureau of Prisons houses mo than 27,000 prisoners in private facilities — not including the thousands of immigration detainees held in private federal prisons. With the increasing number of federal prisoners being held in private prisons, it is important that these facilities be held to the same standards and hav the same responsibilities as the federal government to promptly process requests for informatio and release information concerning prisoners and detainees under the FOIA laws.

We are pleased to support H.R. 1889 and urge you and other members of the Hous Judiciary Committee, Crime, Terrorism and Homeland Security Subcommittee to suppor this important legislation. If you have any questions about the ACLU's position on H.R. 188 please feel free to contact Michael Macleod-Ball at mmacleod@dcaclu.org or (202) 675-2309.

Sincerely,

Caroline Fredrickson
Director

Michael W. Macleod-Ball
Chief Legislative/Policy Counsel

cc: House Judiciary Committee
Crime, Terrorism and Homeland Security Subcommittee Members

[1] *See* 28 U.S.C. 1915(h) (defining the term "prisoner" to refer to "any person incarcerated or detained in any facil who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the ter and conditions of parole probation, pretrial release, or diversionary program"). *Accord* 18 U.S.C. 3626(g); U.S.C. 1915A(c); 42 U.S.C. 1997e(h).

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