

PRISON LEGAL NEWS

Dedicated to Protecting Human Rights

www.prisonlegalnews.org

Please Reply to Tennessee Office:

afriedmann@prisonlegalnews.org

Direct Dial: 615-495-6568

5341 Mt. View Rd. #130

Antioch, TN 37013

July 1, 2008

SENT VIA FAX / EMAIL

Rep. Robert C. Scott, Chairman
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
B370 Rayburn House Office Building
Washington, DC 20515

Rep. Louie Gohmert, Ranking Member
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
B370 Rayburn House Office Building
Washington, DC 20515

RE: Follow-up Statement to June 26, 2008 Hearing on H.R. 1889

Dear Chairman Scott and Rep. Gohmert:

I want to again extend my thanks for providing me an opportunity to address the Subcommittee in reference to H.R. 1889. I also want to apologize, as it was my impression that my testimony did not meet the needs of the Subcommittee. If the objective of the hearing was to identify a “smoking gun” in terms of a FOIA request submitted to a federal agency concerning a private prison contractor, where the federal agency was unable to produce the requested records, then I failed to do so. Such a smoking gun is, however, attached to this correspondence.

The examples cited in my written statement provided to the Subcommittee prior to the June 26 hearing dealt primarily with the failure or refusal of private prison companies to comply with state public records statutes. These were offered as examples of how private prison contractors are reluctant to release information to the public – and in some cases to contracting government agencies. This has led to egregious results on the state level. One recent example involved the GEO Group-operated Coke County Juvenile Justice Center in Bronte, Texas. The State of Texas withdrew its juvenile offenders from the center and canceled its contract with GEO after abusive conditions were revealed – conditions that were not disclosed to state officials by GEO or by the state’s contract monitors (three of whom were previously employed by GEO). It is incidents like this that demonstrate why greater public oversight of private prison companies is needed, and why H.R. 1889 is necessary to safeguard against similar problems on the federal level.

The examples provided in my statement and testimony, relative to state public records statutes, are comparable to the difficulty in obtaining records from private prison firms on the federal level. E.g., on the second page of Exhibit 4 attached to my written statement, an example was cited where a FOIA request was submitted to the Bureau of Prisons for an incident report at a CCA-run prison. The Bureau of Prisons requested permission from CCA to release the report and CCA refused, claiming the report was a “business secret.” Also, a FOIA request filed with CCA directly was completely ignored by the company. Nevertheless, I did not cite an example where – to my personal knowledge – a FOIA request submitted to a federal agency related to a private prison contractor was denied due to lack of records. I now can.

Attached is a letter from Immigrations and Customs Enforcement (ICE), dated June 27, 2008, the day after the hearing on H.R. 1889. The letter from ICE was in response to a FOIA request submitted by Mr. Frank Smith, a field organizer for the Private Corrections Institute, of which I serve as vice president. Mr. Smith had requested specific information about a privately-operated detention facility run by Cornell Corrections – including the number of employee positions at the facility, the annual employee turnover rate, and the number of employee terminations and resignations and the reasons therefor. All of these records would be available from government-operated detention facilities. As stated by the ICE FOIA Officer in the attached letter, despite a “comprehensive search of files,” ICE was “unable to locate or identify any responsive records.” ICE could not produce four categories of records pursuant to our FOIA request, although the agency indicated that other requested records would be made available.

This is important because the requested records that ICE was unable to produce – the number of staff positions and the employee turnover rate – are significant indicators as to the stability of a correctional facility. Indeed, in several cases following a riot or other major disturbance at private prisons, staffing issues were cited as a contributing factor. Further, ICE’s inability to produce *any* documents related to the termination or resignation of Cornell staff members at the facility precludes ICE – and thereby the public – from knowing whether such terminations or resignations were related to disciplinary violations or criminal charges that affect public safety. As mentioned in my written statement, federal agencies are required to produce records related to criminal wrongdoing by their employees as a matter of public record. However, private prison companies are under no such obligation under current law, and the contracting federal agencies may, as in this case with ICE, be completely unaware of criminal acts or other misconduct by private prison contract employees. H.R. 1889 would correct this disparity.

While it is unfortunate that the attached letter from ICE was sent the day after the hearing on H.R. 1889, it at least arrived in time to be attached to this follow-up statement and included in the record. If the Subcommittee was seeking a specific example of a FOIA request related to a private prison company that the contracting federal agency was unable to answer because it did not have the requested records, then that example is attached and constitutes a specific reason as to why H.R. 1889 is necessary to ensure public oversight and accountability.

I would like to address, briefly, several other points raised during the June 26 hearing:

* *If H.R. 1889 extends FOIA requests to private prison firms, whether FOIA would or should be extended to other federal contractors.* If Congress limits the applicability of FOIA requests to private prison contracts exclusive of other federal contracts, then the applicability of FOIA to those contracts would be limited as specified by statute. As mentioned at the hearing, private prison contracts are unique and deserving of special consideration because they involve the imprisonment of citizens (i.e., deprivation of liberty), as well as civil rights issues and in-custody deaths at privately-operated facilities. Few other federal contracts raise comparable issues.

* *Whether the goal that is hoped to be accomplished by H.R. 1889 could be better achieved by making public access to records part of the contracts entered into between federal agencies and private prison contractors.* This proposed alternative to H.R. 1889 was raised by Mr. Michael Flynn, representing the Reason Foundation. While it would be beneficial to have such provisions included in federal contracts with private prison firms, to my knowledge they are not currently included in any such contracts. Nor could existing federal contracts be easily amended to include new public disclosure or FOIA compliance provisions; such provisions would have to be added to future contracts or when existing contracts are renewed.

Further, H.R. 1889 includes an enforcement provision whereby members of the public who are denied access to records can file court actions to seek review of such denials. There would be no private enforcement provisions in contracts between federal agencies and private prison firms, as the contract would apply only to the parties. Members of the public or the media who are denied access to records from private prison companies would have no private right of action to ensure compliance; rather, they would have to rely on the contracting federal agency to take action to enforce contractual obligations related to public records. This would delegate the public's right to know to the contracting agency, would result in increased costs to the agency, and would not safeguard the public's ability to obtain records from federally-contracted private prisons.

* *Applicability of FOIA exemptions.* Mr. Flynn noted during his testimony that if private prison companies were required to comply with FOIA requests, competitors could use FOIA to "learn trade secrets," "poach staff" or "obtain a company's propriety software code." This is hyperbole with little foundation. The FOIA statute already includes exemptions to ensure that sensitive or privacy-related records are not disclosed. In the attached letter from ICE, numerous exemptions are cited regarding records requested through FOIA that are not subject to disclosure. Private prison companies would be protected by these same exemptions if they were required to respond to FOIA requests to the same extent as federal agencies, as contemplated by H.R. 1889. Federal agencies maintain sensitive and privacy-related information, too, but have managed to comply with FOIA for decades without seeking complete exclusion from the FOIA statute.

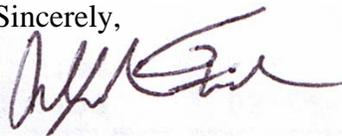
* *Motivation and agendas.* Mr. Flynn observed that “the leading proponents of this legislation are organizations that oppose contracting out the operation of correctional facilities.” While it is correct that many organizations that support H.R. 1889 oppose prison privatization (including the Private Corrections Institute), they also have an interest in ensuring transparency and public accountability in our corrections system. Further, organizations that oppose prison privatization, or advocate for closer oversight and monitoring of the private prison industry, often adopt such positions due to knowledge about past problems at privately-operated prisons and the reluctance of private prison companies to release information to the public, as described in my statement and summarized in my testimony before the Subcommittee.

As a former CCA prisoner myself, I was witness to numerous abuses by private prison staff that were not known to the public or to the contracting agency, and it was through such personal and empirical experience that I am cognizant of the shortcomings of prison privatization – especially without effectual government oversight and public accountability. Present oversight is deficient when, as indicated in the attached letter, ICE does not know how many staff are employed at a contract facility that houses ICE detainees, or the contractor’s employee turnover rate, or how many contract employees have been terminated and under what circumstances. Likewise, public oversight is insufficient when abuses such as those at the GEO-run Coke County juvenile facility in Texas continue to occur. Thus the need for H.R. 1889, to ensure public accountability through public access to records through FOIA, to the same extent as for federal agencies.

Mr. Flynn failed to mention that most of the leading *opponents* to H.R. 1889 are private prison companies, their lobbyists, and organizations that have received funding from the private prison industry – including the Reason Foundation, which Mr. Flynn represents. Mr. Flynn did not see fit to mention that the Reason Foundation is a major proponent of prison privatization and has received funding from private prison companies, including CCA.

Your continued time and attention concerning this matter is greatly appreciated. Please advise if I can provide any additional information to the Subcommittee relative to H.R. 1889.

Sincerely,



Alex Friedmann
Associate Editor, PLN
Vice President, PCI

Enclosure



**U.S. Immigration
and Customs
Enforcement**

June 27, 2008

Mr. Frank Smith
Private Corrections Institute, Inc.
1114 Brandt Drive
Tallahassee, FL 32308

Re: FOIA Case Number 08-FOIA-0624

Dear Mr. Smith:

This is an interim response to your Freedom of Information Act (FOIA) request to Immigration and Customs Enforcement (ICE), dated December 6, 2007, and received by this office on December 11, 2007. You have requested copies of records pertaining to the Regional Correction Center (RCC) in Albuquerque, New Mexico from January 1, 2006 through November 30, 2006; specifically:

1. All incident reports,
2. All quality assurance reports generated by either the operator or ICE,
3. All audits performed by any agency of the United States Government,
4. Any correspondence or reports regarding the withdrawal of ICE detainees from the RCC and the prospective placement of such detainees now or in the future,
5. The number of operator staff positions,
6. The operator employee annual turnover rate,
7. The number of operator employee terminations and reason for termination if available, and
8. The number of operator employee resignations and reason for resignation if available.

Your request has been processed under the FOIA, 5 U.S.C. § 552. A search of the Office of Detention and Removal Operations (DRO) and the Office of Professional Responsibility (OPR) for records responsive to your request was conducted. An estimate on the fees associated with processing items 1 and 4 of your request has been compiled, and is being provided in a separate letter (attached).

With regard to items 2 and 3 of your request, a search of DRO and OPR for responsive records produced a total of 117 pages. After review, I have determined that portions of these pages will be withheld pursuant to Exemptions 2, 5, 6 and 7(C) of the FOIA.

With regard to items 5, 6, 7 and 8 of your request, we conducted a comprehensive search of files within DRO for responsive records. We were unable to locate or identify any responsive records. Please be advised that the FOIA does not require federal agencies to create records in response to a FOIA request, but rather is limited to requiring agencies to provide access to reasonably described, nonexempt records.¹

Portions of 117 pages responsive to items 2 and 3 of your request have been withheld as described below.

¹ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975); Zemannsky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985).

FOIA Exemption 2(high) protects information applicable to internal administrative and personnel matters, such as operating rules, guidelines, and manual of procedures of examiners or adjudicators, to the extent that disclosure would risk circumvention of an agency regulation or statute, impede the effectiveness of an agency's activities, or reveal sensitive information that may put the security and safety of an agency activity or employee at risk. Whether there is any public interest in disclosure is legally irrelevant. Rather, the concern under high 2 is that a FOIA disclosure should not benefit those attempting to violate the law and avoid detection.

FOIA Exemption 2(low) protects information applicable to internal administrative personnel matters to the extent that the information is of a relatively trivial nature and there is no public interest in the document.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I have determined that portions of the responsive documents qualify for protection under the deliberative process privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The types of documents and/or information that we have withheld may consist of social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

While an adequate search for records was conducted, you have the right to appeal this determination that no records exist within the ICE Office of Detention and Removal Operations or the ICE Office of Professional Responsibility that would be responsive to items 5, 6, 7 and 8 of your request. In addition, you have a right to appeal the above withholding determination with regard to items 2 and 3 of your request. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland

Security, Washington, D.C. 20528, following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Please see the attached fee estimate with regard to items 1 and 4 of your request.

If you need to contact our office about this matter, please refer to case number **08-FOIA-0624**. This office can be reached at (202) 732-0300 or (866) 633-1182.

Sincerely,

A handwritten signature in black ink, appearing to read 'Catrina M. Pavlik-Keenan', written in a cursive style.

Catrina M. Pavlik-Keenan
FOIA Officer