

October 28th 2021

Re: Endorsement of the Private Prison Information Act

Dear Senator:

The undersigned organizations committed to government openness and accountability, civil liberties, human rights, and civil rights, write to urge you to support legislation to apply the Freedom of Information Act (FOIA) to federally-funded private prison facilities. The Private Prison Information Act would strengthen accountability and oversight by requiring non-federal prison, correctional, and detention facilities holding federal prisoners or detainees under a contract with the federal government to make the same information available to the public as is required of federal prisons and correctional facilities by FOIA.

Private prison companies that receive federal funding provide the same service as government agencies, but, by asserting their status as private entities, claim that they are not subject to public records laws such as the FOIA. As a result, the public is largely in the dark with regard to the functioning of the many of this country's private prisons, and the industry operates with a lack of oversight and accountability mechanisms. This dynamic hinders the ability of the government and public to ensure private prison companies are living up to their contractual obligations and not wasting taxpayer dollars.

The Department of Justice Inspector General has found that federal prisons run by private companies are substantially less safe and secure than ones run by the Bureau of Prisons.^[1] The heightened risks raise concerns given the growing reliance on private facilities. The Justice Department's Bureau of Justice Statistics estimates that 16 percent of federal prisoners are held in private prison facilities,^[2] and an estimated sixty-five percent of all Immigration and Customs Enforcement (ICE) detainees are held in for-profit detention facilities.^[3]

We commend the Biden Administration for taking a key step in ending the use of private prisons by directing the Department of Justice to not renew its contracts with private prisons. However, because the order does not apply to privately run detention centers, including immigration detention, the public needs additional transparency measures,^[4] including oversight measures to address the massive COVID-19^[5] outbreaks and other forms of medical neglect that are all too common in private detention centers.^[6] Further, FOIA requirements should apply to facilities housing federal prisoners during the implementation of the EO, which could take years, and in the case that a future administration should reverse course.

Despite the fact they are holding people in federal custody under federal law, non-federal entities are not subject to the federal FOIA. Private contractors abuse this loophole by marking field reports for internal use only and shielding from public scrutiny information on security breaches, overcrowding, and unaccountable spending.^[7] Moreover, federal agencies that contract out for jail and prison beds often rely on FOIA Exemption 4 – the business trade secrets exemption – to avoid responding in full to FOIA requests pertaining to privately-run facilities.^[8] This loophole leads to a lack of information needed to understand the cost of detention in private facilities and allow the public to understand the fiscal and human impact of privatized detention and incarceration.

The private prison loophole in the FOIA must be closed. The Private Prison Information Act of 2021 ensure that the same transparency standards applicable to federal detention facilities also apply to privately run prisons.

The Private Prison Information Act would accomplish the following:

- Create a mechanism by which federal contracting agencies can ensure that non-federal entities provide the information and access to records necessary for the government to respond to FOIA requests relating to prisons, jails, or detention facilities holding federal prisoners or detainees;
- Place the obligation to respond to FOIA requests relating to non-federal prisons, jails, or detention facilities holding federal prisoners or detainees on the federal contracting agencies, using existing FOIA procedures; and
- Continue to allow the government to protect confidential, privileged, and sensitive information from public disclosure under existing exemptions and exclusions.

Thank you for your attention to this matter. If you have any questions, please contact Freddy Martinez, Policy Analyst at Open the Government, at fmartinez@openthegovernment.org, or 202-332-6736.

Sincerely,

American Civil Liberties Union (ACLU)
Blue Wave Postcard Movement
Campaign for Accountability
Citizens for Responsibility and Ethics in Washington (CREW)
Defending Rights & Dissent
Government Information Watch
Government Accountability Project
Human Rights Defense Center
Human Rights First
Indivisible Santa Fe
In the Public Interest
MuckRock
National Association of Criminal Defense Lawyers (NACDL)

National Immigrant Justice Center (NIJC)
National Council of Churches of Christ in the USA (NCC)
National Freedom of Information Coalition
National Security Archive
NETWORK Lobby for Catholic Social Justice
News Leaders Association
Open The Government
Project On Government Oversight
Reformed Church of Highland Park
The Rutherford Institute
Sentencing Project
Worth Rises

^[1] U.S. Department of Justice, Office of the Inspector General, Review of the Federal Bureau of Prisons' Monitory of Contract Prisons, August 2016: <http://bit.ly/2aXwJS5>. Public interest groups have also found that private prison companies increase recidivism. See In the Public Interest, How Private Prison Companies Increase Recidivism, June 2016: <https://bit.ly/2NR3F4f>.

^[2] U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2019, October 2020: <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>

- [3] U.S. Department of Homeland Security Advisory Council, Report of the Subcommittee on Privatized Immigration Detention Facilities, December 1, 2016: <http://bit.ly/2gK74OD>.
- [4] Knappenberger, Ryan. (Feb 1, 2021) Biden ban on new private prison contracts will not reach ICE detainees. Kold News. <https://www.kold.com/2021/02/01/biden-ban-new-private-prison-contracts-will-not-reach-ice-detainees/>
- [5] Castillo, Andrea. (Aug 6th, 2020). ICE deliberately limited testing at the Bakersfield immigration facility with COVID-19 outbreak. Los Angeles Times. <https://www.latimes.com/california/story/2020-08-06/amid-coronavirus-outbreak-at-bakersfield-immigration-facility-emails-show-ice-deliberately-limited-testing>
- [6] Bekiempes, Victoria. (Dec 22, 2020). More immigrant women say they were abused by ICE gynecologist. The Guardian. <https://www.theguardian.com/us-news/2020/dec/22/ice-gynecologist-hysterectomies-georgia>
- [7] See Department of Justice, Office of the Inspector General, Audit of the United States Marshals Service Contract No. DJJODT70002 with CoreCivic, Inc., to Operate the Leavenworth Detention Center Leavenworth, Kansas, April 2017: <http://bit.ly/2rrcPXa>.
- [8] ICE withholds information, for example, that would clarify the cost of detention in private facilities, claiming the “confidential or privileged information” would cause substantial competitive harm to private contractors if released to the public. See Banking on Detention, Detention Watch Network & Center for Constitutional Rights, 2016 update: <http://bit.ly/2rnMY2k>.