



U.S. Department of Justice

Office of Legislative Affairs

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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 IGSA 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