



Reason

**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.