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# PRIVATE PRISONS AND THE NEED FOR GREATER TRANSPARENCY: PRIVATE PRISON INFORMATION ACT

## ABSTRACT

*Private prisons are not subject to the same regulations as government prisons. Particularly, private prisons are exempt from the requirements set forth in the Freedom of Information Act and its state equivalents, which provide that the public has an enforceable right to request certain records from government agencies. Numerous efforts made by members of Congress to enact the Private Prison Information Act, a bill that would subject private prisons to disclosure laws found in the Freedom of Information Act, have been unsuccessful. Such efforts to strip the veil of secrecy that shades private prisons from public scrutiny are especially important because in recent years a great deal of corruption allegations and reports of unacceptable private prison conditions have come to light. As a result, in the summer of 2016, Deputy Attorney General Sally Yates instructed the Bureau of Prisons to begin winding down its operations with private prisons, ultimately seeking to end all federal outsourcing of correctional services. Immediately after the announcement of this phase-out, shares of private prison corporations plummeted and the industry fell into disarray. This Note explains that with the 2016 election of President Donald Trump, and the new administration's rescinding of the phase-out order, private prison corporations are allotted time to face the explicit need for transparency. This Note suggests that through the enactment of the Private Prison Information Act, and the subsequent allowance of greater transparency within the industry, private prisons can embrace the demand for public oversight. Such oversight would create a method through which the industry can improve its practices by becoming more accountable and efficient corporations. By doing so, the industry can strengthen its core, improve public relations, and ensure that it will continue to thrive beyond the Trump administration.*

## INTRODUCTION

The United States is very good at putting people behind bars. So good, in fact, that at any given point it has more people in prison than China, whose population is five times greater than that of the United States.<sup>1</sup> The prison population increased so rapidly during the 1980s<sup>2</sup> that the government could

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1. Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RES. (Mar. 10, 2008), <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>.

2. See Pamela Engel, *Watch How Quickly the War on Drugs Changed America's Prison Population*, BUS. INSIDER (Apr. 23, 2014, 1:19 PM), [www.businessinsider.com/how-the-war-on-drugs-changed-americas-prison-population-2014-4](http://www.businessinsider.com/how-the-war-on-drugs-changed-americas-prison-population-2014-4).

not keep up with the growing demand for more correctional facilities.<sup>3</sup> In 1983, as a result of supply and demand, the first modern day for-profit private prison corporation, Corrections Corporation of America (CCA), was formed.<sup>4</sup> Since its creation, both private<sup>5</sup> and government entities<sup>6</sup> have conducted investigations into the questionable conditions found in these private institutions. The years that followed proved to be a troubling time for the private prison industry.

On June 23, 2016, Mother Jones, an independent news organization, published an investigatory report that revealed troubling conditions in a facility run by CCA.<sup>7</sup> On August 8, 2016, the Office of the Inspector General, U.S. Department of Justice (DOJ), confirmed the revelation of unsettling conditions which inmates and staff have been subject to in private prisons.<sup>8</sup> A mere 10 days later, the DOJ, under the Obama administration, announced that the federal government would begin a phase-out process to end federal outsourcing to private prisons.<sup>9</sup> Specifically, Deputy Attorney General Sally Yates instructed the Bureau of Prisons (BOP) to either decline to renew expiring contracts or “substantially reduce [the contract’s] scope.”<sup>10</sup> The ultimate goal, explained Deputy Attorney General Yates, was to completely end federal use of privately operated prisons.<sup>11</sup> Because the DOJ cannot instruct state and local governments on whether they may engage correctional services offered by private prisons, this phase-out would have only affected a portion of the private prison industry: fourteen private prison facilities with a capacity of 27,000 beds.<sup>12</sup> While the phase-out was reversed by the Trump

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3. See BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 16 (2001).

4. See Madison Pauly, *A Brief History of America’s Private Prison Industry*, MOTHER JONES (July/Aug. 2016), <http://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline>; see also BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 1 (highlighting that prison overcrowding has been the “major catalyst for privatizing correctional facilities”).

5. See generally Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (June 23, 2016), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer> (journalist secures employment with one of CCA’s facilities and reports from within).

6. See generally Pauly, *supra* note 4 (listing investigations by The Justice Department and the FBI).

7. See generally Bauer, *supra* note 5.

8. See generally U.S. DEP’T OF JUSTICE, REVIEW OF THE FED. BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS (Aug. 2016) [hereinafter MONITORING OF CONTRACT PRISONS].

9. See Memorandum from Deputy Attorney General Sally Q. Yates to the Acting Director, Federal Bureau of Prisons (Aug. 18, 2016) [hereinafter Memorandum for the Acting Director].

10. *Id.*

11. See *id.*

12. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 4 (the BOP only outsources to 14 private prisons which have a maximum bed capacity of 27,000); see also MONITORING OF CONTRACT PRISONS, *supra* note 8, at 5.

administration,<sup>13</sup> it remains powerful foreshadowing of what is to come should private prisons head down the same questionable path. Now, the private prison industry has what is left of the Trump administration to undergo a transformation and face any allegations brought forth in well-publicized investigatory reports, or risk a similar phase-out by the next administration or by state governments.

This Note argues that the private prison industry should embrace the Private Prison Information Act (PPIA), which, if passed, would subject the industry to the Freedom of Information Act (FOIA). This Note suggests that by increasing transparency of private prison operations through disclosure and independent oversight, both governmental confidence and the public's opinion of private prisons can be rehabilitated. Transparency can also help the industry tackle negative press and prevent another phase-out initiative. After all, openness and transparency are the key ingredients to building requisite trust for the proper functioning of free market economies.<sup>14</sup> Should the industry continue to resist the obvious need for transparency, the negative perception of the private prisons will continue to grow, forcing other industry clients to follow in the footsteps of the Obama administration's DOJ.

Part I of this Note explores how the modern private prison industry was formed, introduces the three main private prison corporations—CCA,<sup>15</sup> The GEO Group, and the Management & Training Corporation—and explains what encouraged the DOJ to begin the phase-out. Part II discusses how federal entities such as the DOJ and U.S. Immigration and Customs Enforcement apply FOIA, and explains its lack of control over private prisons. Part III presents the history and intention behind the PPIA, elaborates on the opposition the Act has faced, and advocates for the PPIA's adoption. Part IV explores the benefits of enacting the PPIA, in that the Act would facilitate greater transparency, allow for independent oversight, improve public relations, and prevent the next administration, or state governments, from following in the footsteps of the Obama administration DOJ's phase-out order.

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13. See Eric Lichtblau, *Justice Department Keeps For-Profit Prisons, Scrapping an Obama Plan*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/politics/justice-department-private-prisons.html> (Trump administration "directed federal prison officials to keep using the private prisons," explicitly withdrawing from the phase-out initiative established by the Obama administration).

14. See Angel Gurriá, *Openness and Transparency - Pillars for Democracy, Trust and Progress*, L'ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES, [www.oecd.org/fr/etatsunis/opennessandtransparency-pillarsfordemocracytrustandprogress.htm](http://www.oecd.org/fr/etatsunis/opennessandtransparency-pillarsfordemocracytrustandprogress.htm) (last visited Sept. 23, 2017).

15. In October 2016, Corrections Corporation of America rebranded as CoreCivic. Because the sources found herein refer to CoreCivic by its former name, and because the corporation is still transitioning from Corrections Corporation of America to CoreCivic, this Note refers to the corporation as Corrections Corporation of America (CCA).

## I. MODERN DAY PRIVATE PRISON INDUSTRY: HISTORY AND MAIN ACTORS

Privately managed correctional services are not new in the United States. In fact, private sector involvement in correctional services can be traced back as far as 1607, when the first English colonists arrived in Virginia.<sup>16</sup> Then, convicted felons were transported by private entities to America to be sold into servitude as a condition of pardon.<sup>17</sup> The 1850s saw the first correctional facility constructed and operated by a private actor in the United States.<sup>18</sup> Even at that time, private prison entities asserted their ability to manage correctional facilities better than the government, and to produce both superior rehabilitative results as well as financial advantages.<sup>19</sup>

The prison population skyrocketed in the 1980s,<sup>20</sup> a time when the war on drugs became more aggressive and many states began to mandate that prisoners serve at least 85% of their terms.<sup>21</sup> Since the late 1980s, the DOJ's BOP inmate population increased by 400%.<sup>22</sup> By 2011, federal prisons were 39% over capacity, a number the BOP has predicted will continue to increase.<sup>23</sup> State prisons were similarly overwhelmed with the growing prison population. At the end of 2013, Illinois was 151% of capacity, North Dakota was 150% of capacity, and Nebraska, Ohio, Delaware, Colorado, Iowa, and Hawaii were all at least 110% of capacity.<sup>24</sup> Both federal and state governments were not able to keep up with the steep rise in the prison population and the subsequent overcrowding.

The Supreme Court addressed prison overcrowding in *Brown v. Plata* by ruling that prison overcrowding violates prisoners' Eighth Amendment protection against cruel and unusual punishment because, after all, even "prisoners retain the essence of human dignity inherent in all persons."<sup>25</sup> Prison overcrowding has been deemed by the DOJ's Bureau of Justice Assistance to be "one of the most burdensome problems plaguing our criminal justice system and a major catalyst for privatizing correctional facilities."<sup>26</sup> As a result of the government's inability to keep up with the

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16. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 9.

17. See *id.* at 9.

18. See *id.* at 10.

19. See *id.* at 10, 16 (modern day representatives of private prisons also claim that they are more cost efficient than prisons run by the government).

20. See THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 1 (2015).

21. See Bauer, *supra* note 5.

22. BUREAU OF PRISONS, GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 1 (Sept. 2012).

23. See *id.* at 2 (the BOP is 39% over its rated capacity—the number of prisoners the BOP can safely house).

24. See Reid Wilson, *Prisons in These 17 States Are Over Capacity*, WASH. POST (Sept. 20, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/20/prisons-in-these-17-states-are-filled-over-capacity/>.

25. See *Brown v. Plata*, 563 U.S. 493, 510 (2011).

26. BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 1.

demand and the costs related to an overpopulated prison system, it turned to outsourcing correctional services to private, corporate entities.<sup>27</sup>

Outsourcing promised two things—to alleviate the pressure caused by a lack of physical infrastructure necessary to house the growing prison population, and to save the government money.<sup>28</sup> For example, in its 2015 10-K form, The GEO Group wrote that its “continuum of care” results in “a higher quality of care for offenders, reduces recidivism, [and] lowers overall costs for [] clients.”<sup>29</sup> Private prisons may be able to raise infrastructure faster than the government since private actors are not constrained by lengthy bureaucratic procedures, but it is debatable whether private prisons save taxpayers money. Some studies confirm that private prisons are more cost effective than government prisons, while others suggest that private prisons actually cost more than their government counterparts.<sup>30</sup> More so, researchers indicate that the costs of private versus public prisons are not easily comparable because of many intervening factors, including “security level and health conditions of inmates, physical characteristics of facilities, indirect costs, and the large number of parties typically involved in maintaining and paying for either type of prison.”<sup>31</sup> For example, private prison contracts may provide that the prison will only accept inmates with no chronic illnesses or that the corresponding state will bear the cost of HIV treatment.<sup>32</sup> One study reports that “most contracts allow private [correctional] facilities to house lower risk and healthier—less costly—inmates than similar public facilities.”<sup>33</sup> Lastly, when calculating how much outsourcing correctional services truly costs taxpayers, two expenses are not typically accounted for: the cost of government monitoring, and the potential cost of increased litigation.<sup>34</sup> Today, regardless of whether the government saves money by outsourcing, the private prison industry is still alive and well.<sup>35</sup>

Since the formation of the modern prison industry, until its recent decline, the number of inmates housed in private facilities has enjoyed a steady growth.<sup>36</sup> In 2014, of the 1.6 million inmates incarcerated in the

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27. See Bauer, *supra* note 5.

28. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 15.

29. The GEO Group, Inc., Annual Report (Form 10-K) 8 (Feb. 26, 2016) [hereinafter GEO Group Form 10-K].

30. See Christopher Hartney & Caroline Glesmann, *Prison Bed Profiteers: How Corporations Are Reshaping Criminal Justice in the U.S.*, NAT'L COUNCIL ON CRIME & DELINQ. 8 (May 2012), <http://www.justiceacademy.org/iShare/Library-NCCD/prison-bed-profiteers.pdf>.

31. *Id.* at 8 (internal citations omitted).

32. See Bauer, *supra* note 5.

33. Hartney & Glesmann, *supra* note 30, at 8–9.

34. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 16.

35. See Lichtblau, *supra* note 13; see generally Hartney & Glesmann, *supra* note 30.

36. Abigail Geiger, *U.S. Private Prison Population Has Declined in Recent Years*, PEW RES. CTR. (Apr. 11, 2017), [www.pewresearch.org/fact-tank/2017/04/11/u-s-private-prison-population-has-declined-in-recent-years/](http://www.pewresearch.org/fact-tank/2017/04/11/u-s-private-prison-population-has-declined-in-recent-years/).

United States, 131,000 were housed in private prison facilities,<sup>37</sup> which amounts to about 8% of the country's total prison population. In August 2016, the Obama-era DOJ announced that it would not be renewing contracts with private prisons, ultimately seeking to completely phase-out correctional outsourcing.<sup>38</sup>

Is this the beginning of the end for the private prison industry? It does not have to be. With the new administration, the industry has at least four years to rehabilitate confidences shared by the public and the government. Any other phase-out will have a dramatic impact on the private prison industry, especially the three main private prison corporations: CCA, The GEO Group, and the Management and Training Corporation (MTC).<sup>39</sup>

#### A. CORRECTIONS CORPORATION OF AMERICA, THE GEO GROUP AND THE MANAGEMENT AND TRAINING CORPORATION.

CCA is the largest private prison corporation in the United States. It was founded in 1983 and received its first federal contract later that year.<sup>40</sup> CCA describes itself “[a]s a full-service corrections management provider, [that] specialize[s] in the design, construction, expansion and management of prisons, jails and detention facilities, along with residential reentry services, as well as inmate transportation services.”<sup>41</sup> The corporation prides itself on being the first company to design, build, and operate a private prison, and the first to manage a maximum security facility for the federal government.<sup>42</sup> CCA is publicly traded on the New York Stock Exchange (NYSE), under the trade name CXW. As of December 31, 2015, CCA had a capacity of about 88,500 beds.<sup>43</sup> CCA's 10-K lists that at the end of 2015 it owned and operated sixty-six correctional and detention facilities,<sup>44</sup> up from fifty-two facilities in

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37. See E. ANN CARSON, PRISONERS IN 2014 1 (2015).

38. See Memorandum for the Acting Director, *supra* note 9.

39. See Corrections Corporation of America, Annual Report (Form 10-K) 34 (Feb. 25, 2016) [hereinafter CCA 2015 Form 10-K] (“[w]e depend on a limited number of governmental customers for a significant portion of our revenues,” the loss of such customers “could seriously harm our financial condition and results of operations.”); see also GEO Group Form 10-K, *supra* note 29, at 33 (“[w]e depend on a limited number of governmental customers for a significant portion of our revenues. The loss of, or a significant decrease in revenues from, these customers could seriously harm our financial condition and results of operations.”); see also Chloe Nordquist, *Justice Department Considering No Contract Renewals for Private Prisons, Including Taft Prison*, 23ABC NEWS BAKERSFIELD (Aug. 18, 2016), <http://www.turnto23.com/news/local-news/justice-department-considering-no-contract-renewals-for-private-prisons-includes-taft-prison> (“MTC is disappointed to learn that the Department of Justice (DOJ) is planning to end the use of contract prisons within the Bureau of Prisons (BOP) system”).

40. See *The CCA Story: Our Company History*, CCA, [www.cca.com/our-history](http://www.cca.com/our-history) (last visited Aug. 15, 2017).

41. *Who We Are*, CCA, [www.cca.com/who-we-are](http://www.cca.com/who-we-are) (last visited Aug. 14, 2017).

42. See Corrections Corporation of America, Annual Report (Form 10-K) 16 (Feb. 25, 2015) [hereinafter CCA 2014 Form 10-K].

43. CCA 2015 Form 10-K, *supra* note 39, at 5.

44. See *id.*

2014,<sup>45</sup> and managed another eleven governmental facilities in the District of Columbia and twenty other states.<sup>46</sup> As of December 23, 2016, the company's website listed that it "currently partners with all three federal corrections agencies (The Federal Bureau of Prisons, the U.S. Marshals Service and Immigration and Customs Enforcement), many states and local municipalities."<sup>47</sup> The BOP accounted for 11% of CCA's total revenue for the fiscal year ending on December 31, 2015,<sup>48</sup> a revenue that CCA will not see if the next administration renews the phase-out initiative.

The GEO Group is CCA's main competitor. The entity was formed in 1984, at which time it was called Wackenhut Corrections Corporation, and it received its first contract in 1987.<sup>49</sup> Unlike CCA, The GEO Group's business is global; it has facilities in other English-speaking countries including Australia, South Africa, and the United Kingdom.<sup>50</sup> In 1994, the company went public with its initial offering on NASDAQ; its current NYSE symbol is GEO.<sup>51</sup> The GEO Group presently operates seventy-three facilities in the United States, with a maximum bed capacity of 78,213.<sup>52</sup> The corporation has grown exponentially in the last few decades, with annual consolidated revenue rising from \$40 million in 1991 to \$1.8 billion in 2015.<sup>53</sup>

Created in 1987, MTC is the third major private correctional service provider.<sup>54</sup> MTC appears to be more on the rehabilitative end of the spectrum. Unlike CCA and The GEO Group, which do not as actively promote rehabilitative services, MTC's website asserts that it has awarded tens of thousands of certificates in rehabilitative and educational capacities.<sup>55</sup> MTC currently holds about 27,000 inmates across its twenty-four facilities.<sup>56</sup> Out of the three private prisons discussed, MTC is the only company that is not publicly traded, which results in an even greater lack of transparency because of the absence of mandated reporting that publicly traded corporations are subject to.

45. See CCA 2014 Form 10-K, *supra* note 42, at 5.

46. See CCA 2015 Form 10-K, *supra* note 39, at 5.

47. *Who We Are*, CCA, *supra* note 41.

48. CCA 2015 Form 10-K, *supra* note 39, at 34.

49. *The GEO Group History Timeline*, THE GEO GROUP, INC., [www.geogroup.com/history\\_timeline](http://www.geogroup.com/history_timeline) (last visited Aug. 15, 2017).

50. GEO Group Form 10-K, *supra* note 29, at 3.

51. *The GEO Group History Timeline*, *supra* note 49.

52. *Our Locations*, THE GEO GROUP, INC., [www.geogroup.com/locations](http://www.geogroup.com/locations) (last visited Aug. 14, 2017).

53. GEO Group Form 10-K, *supra* note 29, at 9.

54. *MTC Corrections Position Statement*, MGMT. & TRAINING CORP., [http://www.mtctrains.com/wp-content/uploads/2017/06/MTC\\_Corrections\\_Position\\_Statement.pdf](http://www.mtctrains.com/wp-content/uploads/2017/06/MTC_Corrections_Position_Statement.pdf) (last visited Dec. 23, 2016).

55. See MGMT. & TRAINING CORP., *SOCIAL IMPACT ANNUAL REPORT* (2016), [http://www.mtctrains.com/wp-content/uploads/2017/08/MTC\\_Social\\_Impact\\_Report-Rev4-Fix.pdf](http://www.mtctrains.com/wp-content/uploads/2017/08/MTC_Social_Impact_Report-Rev4-Fix.pdf).

56. See MGMT. & TRAINING CORP., *CORPORATE OFFICE REPORT 2* (2016), [www.mtctrains.com/wp-content/uploads/2017/05/PREA\\_REPORT\\_2016.pdf](http://www.mtctrains.com/wp-content/uploads/2017/05/PREA_REPORT_2016.pdf) [hereinafter MTC CORPORATE OFFICE REPORT].



Clients of all three private prisons are local and federal correctional and detention authorities that typically pay a per diem, per body rate.<sup>57</sup> CCA reports that in 2015, 51% of its total revenue came from federal correction and detention authorities, and 42% came from its state customers.<sup>58</sup> The GEO Group provides that in 2015, 45% of its total consolidated revenue came from various agencies of the U.S. Federal Government.<sup>59</sup> MTC has contracts with county, state, and federal governments for which it operates twenty-four facilities in the United States,<sup>60</sup> thus a significant portion of its revenue is also derived from a limited set of clients.

### B. WHERE THE INDUSTRY WENT WRONG

Private prisons, also known as contract prisons, are operated by for-profit entities, and as such it is no surprise that, for example, CCA's primary business strategy is to increase occupancy and revenue.<sup>61</sup> Reports have shown that private prisons gain profit by cutting costs and implementing "moderate reductions in staffing patterns, fringe benefits, and other labor-related costs."<sup>62</sup> Another technique used to curb costs is employing non-union labor, which allows for the lowest benefits packages, thus saving the industry money on staffing costs.<sup>63</sup> This strategy of cutting costs, while simultaneously needing to provide adequate correctional facilities proved to be extremely problematic.<sup>64</sup> After all, history has already taught us that when prison facilities are operated by for-profit private actors they may become "plagued by problems associated with the quest for higher earnings," producing "abominable" and "inhumane living conditions."<sup>65</sup> Judging by the Obama administration DOJ's phase-out initiative and reports produced by independent actors like Mother Jones, it is clear that the quest for higher earnings is plaguing the modern private prison industry too.

Recently, news outlets have been clogged with bad press about the conditions that private prison inmates and staff are subject to. Investigatory reports from both media and government agencies have produced troubling results, such as inadequate staffing and uninhabitable, inhumane living conditions. The DOJ reports that private prisons have more frequent incidents per capita of "contraband finds, assaults, uses of force, lockdowns, guilty

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57. See GEO Group Form 10-K, *supra* note 29, at 102; see also CCA 2015 Form 10-K, *supra* note 39, at 6; see also Bauer, *supra* note 5 (reporting that CCA's Winn facility receives \$34 per day per inmate); Det. Watch Network v. U.S. Immigr. & Customs Enf't, 215 F. Supp. 3d 256, 259 (S.D.N.Y. 2016) (explaining how private prisons bill their client, the government).

58. CCA 2015 Form 10-K, *supra* note 39, at 10.

59. GEO Group Form 10-K, *supra* note 29, at 23.

60. MTC CORPORATE OFFICE REPORT, *supra* note 56, at 1.

61. See CCA 2015 Form 10-K, *supra* note 39, at 21.

62. BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at ix.

63. See *id.* at 16.

64. See generally *id.*; MONITORING OF CONTRACT PRISONS, *supra* note 8; Bauer, *supra* note 5.

65. BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 17.

findings on inmate discipline charges, and selected categories of grievances” than do prisons operated by the government.<sup>66</sup> An FBI report found that employees of a CCA facility in Idaho falsified records and caused the facility to be understaffed.<sup>67</sup> Understaffing causes prisons to go into lockdown, a tool that is generally intended for actual disturbances.<sup>68</sup> Inadequate staffing also generates “mismanagement and lax oversight,” which leads to barbaric treatment of prisoners.<sup>69</sup> Inmate healthcare is compromised because of the lack of healthcare professionals in these facilities and corporate reluctance to send prisoners to the hospital, even in emergencies.<sup>70</sup> Inmates may also face an absence of mandated vocational programs.<sup>71</sup> Such shortfalls cause private prison facilities to compromise the safety of all, inmates and staff alike.<sup>72</sup> More so, these conditions have caused both inmates<sup>73</sup> and staff<sup>74</sup> to

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66. MONITORING OF CONTRACT PRISONS, *supra* note 8, at 44.

67. See Press Release, U.S. Attorney’s Office, Dist. of Idaho, FBI Concludes Lengthy Investigation of Corrections Corporation of America (May 22, 2015), <https://www.fbi.gov/contact-us/field-offices/saltlakecity/news/press-releases/fbi-concludes-lengthy-investigation-of-corrections-corporation-of-america>.

68. See Bauer, *supra* note 5.

69. See Margaret Newkirk & William Selway, *Gangs Ruled Prison as For-Profit Model Put Blood on Floor*, BLOOMBERG (July 12, 2013), [www.bloomberg.com/news/articles/2013-07-12/gangs-ruled-prison-as-for-profit-model-put-blood-on-floor](http://www.bloomberg.com/news/articles/2013-07-12/gangs-ruled-prison-as-for-profit-model-put-blood-on-floor) (reporting that a Mississippi for-profit detention center has “turned it into a cauldron of violence, where female employees had sex with inmates, pitted them against each other, gave them weapons and joined their gangs”); see also Emily Le Coz, *Private Prison In Mississippi Allegedly Put Inmates In ‘Barbaric’ Conditions*, HUFFINGTON POST, [www.huffingtonpost.com/2013/05/31/private-prison-mississippi-barbaric-conditions-\\_n\\_3362596.html](http://www.huffingtonpost.com/2013/05/31/private-prison-mississippi-barbaric-conditions-_n_3362596.html) (last updated July 31, 2013) (reporting that in an MTC facility, prisoners don’t have functional toilets and must defecate on Styrofoam trays or into trash bags, and the facility is so infested with rats that prisoners use them as currency and keep them as pets).

70. See Seth Freed Wessler, *Federal Officials Ignored Years of Internal Warnings About Deaths at Private Prisons*, THE NATION (June 15, 2016), <https://www.thenation.com/article/federal-officials-ignored-years-of-internal-warnings-about-deaths-at-private-prisons/> (reporting that at least 38 prisoners have died because of poor medical care, gravely ill prisoners were left untreated or cared for by “low-level medical workers,” went months without seeing a doctor, and were not transferred to hospitals when required emergency treatment); see generally Bauer, *supra* note 5 (reporting that a prisoner who was told that he had fluid in his lungs did not receive proper care; describing the limited options prisoners at CCA’s Winn facility have when it comes to seeing a medical professional on site).

71. See Bauer, *supra* note 5 (reporting that vocational activities at this facility are non-existent).

72. See *id.* at 30 (“CCA’s Winn facility reported twice as many ‘immediate’ uses of force as the eight other Louisiana prisons combined.”); see also GREGORY GEISLER, CORR. INST. INSPECTION COMM. REP. ON THE INSPECTION AND EVALUATION OF THE LAKE ERIE CORR. INST. 4 (Jan. 2013) (after CCA purchased the facility, inmate-on-inmate assault increased by 188% and inmate-on-staff assaults went up more than 300% in a matter of two years); see also MONITORING OF CONTRACT PRISONS, *supra* note 8, at 14 (“[c]ontract prisons had higher rates of assaults and use of force”).

73. See Pauly, *supra* note 4 (prisoners in Mississippi, for example, threw riots complaining “about poor food, inadequate medical care, and disrespectful guards”); see also MONITORING OF CONTRACT PRISONS, *supra* note 8, at 2.

74. See Alice Miranda Ollstein, *This Is How Bad the Health Care Is in Private Prisons*, THINK PROGRESS (Apr. 8, 2015, 12:00 PM), <https://thinkprogress.org/this-is-how-bad-the-health-care-is-in-private-prisons-6657e5ae0293#8k6ji9xvc> (reporting that hundreds of nurses who work for a for-profit prison healthcare company threatened to go on strike if “company refuses to put enough

experience such frustration that it caused rioting and even death.<sup>75</sup> Investigative reports and media allegations have chipped away at the BOP's confidence in the industry, and prompted a phase-out of correctional outsourcing. This phase-out is an impediment to the industry's goals, its relationship with other clients, and is a threat to investor security.

Despite the industry's eagerness to clear its name, it continues to deny access to the information that is necessary to achieve its goal. Although government-run prisons are subject to FOIA, because of their non-governmental corporate status, private prisons are not. By attempting to pass the Private Prison Freedom of Information Act, Congress has tried time and again to extend FOIA to include private prison facilities.<sup>76</sup> Private prisons have fought tirelessly against its enactment, presumably, because they do not want to expose themselves to public scrutiny.<sup>77</sup> If FOIA is handled correctly, and the veil of administrative secrecy is stripped away, the private prison industry can work on healing client relationships, and restoring the confidence once held by the public and by the government.

## II. THE FREEDOM OF INFORMATION ACT AND ITS EFFECT ON THE PRISON SYSTEM

FOIA was enacted in 1966, after a decade of debate between agency officials, legislators, and public representatives.<sup>78</sup> FOIA intended "to overhaul the public-disclosure section of the Administrative Procedure Act,"<sup>79</sup> which "was plagued with vague phrases" that became more of "a withholding statute than a disclosure statute."<sup>80</sup> FOIA provides that any person has an enforceable right to obtain federal agency records.<sup>81</sup> In *NLRB v. Robbins Tire & Rubber Co.*, Justice Powell opined that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."<sup>82</sup> Congress enacted FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of

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nurses on duty and give them enough resources to adequately care for the thousands" of incarcerated men).

75. See generally Stephanie Gallman, *Guard Killed, Several Others Injured in Riot at Mississippi Prison, Officials Say*, CNN, [www.cnn.com/2012/05/20/us/mississippi-prison-disturbance/](http://www.cnn.com/2012/05/20/us/mississippi-prison-disturbance/) (last updated May 20, 2012) (CCA prison guard was killed while on duty during a riot; cause of death was deemed to be blunt trauma to the head).

76. See Pauly, *supra* note 4.

77. See *id.*; see also Christie Thompson, *Everything You Ever Wanted to Know About Private Prisons...*, THE MARSHALL PROJECT (Dec. 18, 2014, 12:26 PM), <https://www.themarshallproject.org/2014/12/18/everything-you-ever-wanted-to-know-about-private-prisons#.vQ4rW9rZq>.

78. See generally DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 1, 4, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/introduction.pdf>.

79. *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011).

80. *EPA v. Mink*, 410 U.S. 73, 79 (1973).

81. See GUIDE TO THE FREEDOM OF INFORMATION ACT, *supra* note 78, at 1.

82. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

public scrutiny.”<sup>83</sup> FOIA provides “a means for citizens to know what their Government is up to.”<sup>84</sup> It does not apply to state or local governments, but almost every state has a local version of open record laws.<sup>85</sup> Pursuant to FOIA and its state counterparts, “any person” can request records about prisons owned and operated by the government, so long as those records are properly requested, reasonably described, and do not fall within any of the nine listed exemptions.<sup>86</sup>

The nine exemptions explain what information is not subject to disclosure under FOIA. These exemptions include, but are not limited to: classified information that pertains to national security, trade secrets, privileged information, information that would invade another individual’s privacy, information compiled for law enforcement purposes such as information that would interfere with enforcement proceedings, information regarding the supervision of financial institutions, and the geological information of wells.<sup>87</sup> The Supreme Court has recognized that, because of the underlying reason for creating FOIA, exemptions must be “narrowly construed.”<sup>88</sup> Should an agency deny a request for information, they must justify the reason for doing so using one of the nine exemptions.<sup>89</sup>

U.S. Immigration and Customs Enforcement (ICE), an agency that outsources its prison duties to private prisons, provides that “the FOIA Office [of ICE] ensures openness and transparency to better serve those seeking more information about ICE and its operations.”<sup>90</sup> The BOP’s website, another federal entity that outsources its correctional responsibilities, specifies that FOIA requests made to the agency follow three routes: the simple, the complex, or the expedited track.<sup>91</sup> The simple and the complex tracks vary in the type of information being asked and the way the request is handled. Requests falling under the complex route take longer to process than those falling under the simple track; for example, policy statements or general information about the BOP fall into the simple track, while contract information and information on investigations conducted by the BOP’s

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83. *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep’t of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)).

84. *NARA v. Favish*, 541 U.S. 157, 171 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

85. See generally NAT’L ASS’N OF COUNTIES, COUNTY AUTHORITY: A STATE BY STATE REPORT (Dec. 2010).

86. See generally 5 U.S.C. § 552 (2012).

87. *Id.* § 552(b)(1)–(9).

88. *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citations omitted).

89. See generally Nicole B. Cdsarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 266 (1994–1995).

90. *Freedom of Information Act (FOIA) Office*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/management-administration/foia> (last visited Aug. 15, 2017).

91. See *Freedom of Information Act FAQs*, FED. BUREAU OF PRISONS, <https://www.bop.gov/foia/#tabs-3> (last visited Aug. 15, 2017).

Office of Internal Affairs follow the complex track.<sup>92</sup> The expedited track allows for information to be processed faster—should the request fall into a specifically listed situation, such as when “the subject of the request is of widespread and exceptional media interest and the information sought involves possible questions about the government’s integrity which affect public confidence.”<sup>93</sup>

CCA, The GEO Group, and MTC do not have descriptions on their websites about how FOIA requests are handled, or any requests for information, at all. Despite being funded by public taxpayer money, and despite performing a task that has historically been handled by the government, FOIA does not apply to private prisons.<sup>94</sup> The argument is that private prisons are private corporations, and thus are untouchable by FOIA requests.<sup>95</sup> By refusing to disclose or allow for any transparency, and instead enforcing secrecy, the industry tarnishes its own image, exacerbates public and government relations, and ultimately leads itself down a path where neither the industry nor its investors ever want to be—another phase-out.

If private prisons followed a FOIA information request structure similar to the one followed by the BOP, it is likely that any requests made when the DOJ announced its phase-out plans would have fallen under the expedited track. Under the expedited track, private prisons would have quickly disclosed information necessary to either counter the allegations, or embrace the steps the industry needs to take to provide better services. Either one of these outcomes would have ensured that the industry was working towards regaining public and governmental acceptance. This, however, is not what happened. Today, the private prison industry continues to lurk in the shadows as it hides behind its corporate veil, leaving all to wonder whether the allegations of corruption, fraud, and unacceptable living conditions brought forth by government and independent investigations are true.

### III. PRIVATE PRISON INFORMATION ACT

Prisons that are managed by the government are subject to FOIA, while their private counterparts are not.<sup>96</sup> Upon request, government-run prisons must disclose information such as prisoner demographics, violent incidents,

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92. *See id.*

93. *Id.*

94. *See generally* Matt Stroud, *Updated: Private Prisons Are Exempted From Federal Disclosure Laws; Advocates Say That Should Change*, FORBES (Feb. 7, 2013, 2:33 PM), <http://www.forbes.com/sites/mattstroud/2013/02/07/private-prisons-are-exempted-from-federal-disclosure-laws-advocates-say-that-should-change/#31bbd4634d0d>.

95. *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL’Y REV. 455, 475 (2011).

96. *See* Alex Park, *Will Private Prisons Finally Be Subject to the Freedom of Information Act?*, MOTHER JONES (Dec. 16, 2014, 11:45 AM), <http://www.motherjones.com/mojo/2014/12/will-private-prisons-ever-be-subject-open-records-laws>.

and prison budgets.<sup>97</sup> This grants the public, along with prisoner advocacy groups, the ability to oversee prison operations and hold the appropriate agency accountable. This is also in accordance with the purpose of FOIA: to allow for an informed citizenry that has the means to hold those that govern accountable.<sup>98</sup> Advocates and opponents of the industry alike agree on the importance of private prison accountability.<sup>99</sup>

In an attempt to expose the inner workings of private prisons, representatives in Congress repeatedly tried to enact the PPIA,<sup>100</sup> an act aimed at expanding FOIA to include private prisons. The first attempt was made in 2005 by Representative Ted Strickland when he introduced the Act to the House of Representatives; at the time it was first introduced, the bill had twenty-five cosponsors.<sup>101</sup> The next attempt was made on May 20, 2015 by Representative Sheila Jackson Lee to the 114<sup>th</sup> Congress, House of Representatives.<sup>102</sup> The driving force behind the 2015 bill was Alex Friedmann and Christopher Petrella of Prison Legal News (PLN).<sup>103</sup> This 2015 bill had twenty-eight cosponsors.<sup>104</sup> The summary of the bill explains that it:

[s]ubjects records relating to the operation of and prisoners in a prison or other correctional or detention facility that is owned or operated by a nongovernmental entity, state, or local government and that incarcerates or detains federal prisoners pursuant to a contract or agreement with a federal agency to the Freedom of Information Act in the same manner as records maintained by a federal agency operating a federal prison or detention facility.<sup>105</sup>

The latest action this bill encountered was on June 16, 2015, when it was referred to the Subcommittee on Crime, Terrorism, Homeland Security and

97. *See id.*

98. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (Justice Powell opined that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”).

99. *See* Cdsarez, *supra* note 89, at 249–50.

100. *See* Pauly, *supra* note 4.

101. *See* Cosponsors, H.R.1806–Private Prison Information Act of 2005, CONGRESS, <https://www.congress.gov/bill/109th-congress/house-bill/1806/cosponsors> (last visited Oct. 7, 2017).

102. *See* Private Prison Information Act of 2015, H.R. 2470, 114th Cong. (2015).

103. *See* E-mail from Alex Friedmann, Managing Editor, PLN and Associate Director, Human Rights Defense Center to author (Nov. 15, 2016, 12:05 EST) (on file with author) [hereinafter E-mail from Alex Friedmann]. In response to the author’s inquiry about the PPIA, Alex Friedmann advised that he and Christopher Petrella wrote most of the bill and were the driving force behind the last two introductions in the House. *Id.*

104. *See* Cosponsors, H.R.2470–Private Prison Information Act of 2015, CONGRESS, <https://www.congress.gov/bill/114th-congress/house-bill/2470/cosponsors> (last visited Sept. 23, 2017).

105. Summary, H.R.2470–Private Prison Information Act of 2015, CONGRESS, <https://www.congress.gov/bill/114th-congress/house-bill/2470> (last visited Sept. 23, 2017).

Investigations.<sup>106</sup> This bill died in that committee, as did the five PPIAs that the House saw before it.<sup>107</sup> The latest version, which was introduced in 2017, has been standing idle in the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations since May 1, 2017.<sup>108</sup>

The Senate encountered the bill as well. In fact, it was first introduced over ten years ago, in 2006, by Senator Joseph I. Lieberman.<sup>109</sup> The Senate last saw the Act when it was reintroduced by Senator Benjamin L. Cardin on September 28, 2016,<sup>110</sup> less than two months after the DOJ initiated the phase-out. That bill's goal is "[t]o require 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 that Federal prisons and correctional facilities are required to make available."<sup>111</sup> As of the summer of 2017, the bill has not progressed beyond the initial introduction.<sup>112</sup> The bill was reintroduced to the 115<sup>th</sup> Congress, but also stalled after the introduction.<sup>113</sup> In sum, each bill sought to make private prisons accountable to the public by expanding FOIA to include private correctional facilities, but none of the bills enjoyed much traction.

The PPIA has been vigorously opposed by private prison corporations,<sup>114</sup> and even by government entities.<sup>115</sup> CCA's "federal lobbying disclosure statements have specifically referenced lobbying related" to the bill.<sup>116</sup> In fact, CCA alone spent millions of dollars in the last decade lobbying against

106. See Actions, H.R.2470—Private Prison Information Act of 2015, CONGRESS, <https://www.congress.gov/bill/114th-congress/house-bill/2470/all-actions> (last visited Sept. 22, 2017).

107. See Actions, H.R.5838—Private Prison Information Act of 2014, CONGRESS, <https://www.congress.gov/bill/113th-congress/house-bill/5838/all-actions> (last visited Sept. 22, 2017); Actions, H.R.74—Private Prison Information Act of 2011, CONGRESS, <https://www.congress.gov/bill/112th-congress/house-bill/74/all-actions> (last visited Sept. 22, 2017); Actions, H.R.2450—Prison Information Act of 2009, CONGRESS, <https://www.congress.gov/bill/111th-congress/house-bill/2450/all-actions> (last visited Sept. 22, 2017); Actions, H.R.1889—Private Prison Information Act of 2007, CONGRESS, <https://www.congress.gov/bill/110th-congress/house-bill/1889/all-actions>; Actions, H.R.1806—Private Prison Information Act of 2005, CONGRESS, <https://www.congress.gov/bill/109th-congress/house-bill/1806/all-actions> (last visited Sept. 22, 2017).

108. See Actions, H.R.1980—Private Prison Information Act of 2017, CONGRESS, <https://www.congress.gov/bill/115th-congress/house-bill/1980/all-actions> (last visited Sept. 22, 2017).

109. See Private Prison Information Act of 2006, S. 4031, 109th Cong. (2006).

110. See Private Prison Information Act of 2015, S. 3422, 114th Cong. (2016).

111. *Id.*

112. See Actions, S.3422—Private Prison Information Act of 2016, CONGRESS, <https://www.congress.gov/bill/114th-congress/senate-bill/3422/all-actions> (last visited Sept. 23, 2017).

113. See Actions, S.1728—Private Prison Information Act of 2017, CONGRESS, <https://www.congress.gov/bill/115th-congress/senate-bill/1728/all-actions> (last visited Sept. 23, 2017).

114. See Pauly, *supra* note 4; see also Thompson, *supra* note 77.

115. See *Det. Watch Network v. U.S. Immigr. & Customs Enf't*, 215 F. Supp. 3d 256 (S.D.N.Y. 2016).

116. *Private Prison Information Act Reintroduced in Congress with PLN's Help*, PRISON LEGAL NEWS (Mar. 4, 2015), <https://www.prisonlegalnews.org/news/2015/mar/4/private-prison-information-act-reintroduced-congress-plns-help/> [hereinafter PRISON LEGAL NEWS].

the passage of the PPIA.<sup>117</sup> News outlets have also reported that a number of congressional members have purchased CCA's and The GEO Group's stock.<sup>118</sup> This may explain why Congress has yet to pass the bill, especially when assuming that subjecting private prisons to FOIA would result in the outpouring of information that would be directly harmful to the industry, and indirectly harmful to the members of Congress.

### A. PRIVATE PRISONS AND STATE OPEN RECORD LAWS

In the face of such legislative opposition, state courts took action to ensure that private prisons operating for state governments comply with the state open record statutes. Particularly, in *Times Publishing Company v. Corrections Corporation of America*, a Florida court concluded that because the private prison in question is “performing an essentially governmental function,” it is subject to Florida Public Records Act,<sup>119</sup> which is Florida's version of FOIA. In *Friedmann v. CCA*, Tennessee explicitly applied public record statutes to private prisons stating that the court “is at a loss as to how operating a prison could be considered anything less than a governmental function.”<sup>120</sup>

A Vermont court argued that permitting CCA to use its private actor status as a shield from open record requests “would enable any public agency to outsource its governmental duties to a private entity and thereby entirely avoid, intentionally or unintentionally, the fundamental interests in transparency and accountability that the Act is designed to protect and that has become a normalized quality and function of government.”<sup>121</sup> Upon being deemed “the functional equivalent of a governmental agency for public records purposes and thus subject to the Public Records Act,” CCA “fully cooperated with the request” and handed over the requested documents.<sup>122</sup> PLN, which was the propulsion behind many of these state suits,<sup>123</sup> also

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117. See Thompson, *supra* note 77.

118. See Emma Baccellieri, *Spotlight on Private Prisons*, CTR. FOR RESPONSIVE POL. (Aug. 23, 2016), <https://www.opensecrets.org/news/2016/08/spotlight-on-private-prisons-lobbying-and-others/> (“Sen. Susan Collins (R-Maine) and Rep. Bruce Westerman (R-Ark.) both own shares of CCA, while Reps. Buddy Carter (R-Ga.) and Kenny Marchant (R-Texas) hold GEO Group shares.”).

119. See *Times Pub. Co. v. Corr. Corp. of Am.*, No. 91-429 CA 01, 1991 WL 384136, at \*2 (Fla. Cir. Ct. Dec. 6, 1991).

120. *Friedmann v. Corr. Corp. of Am.*, 2009 Tenn. App. LEXIS 539, \*21 (Tenn. Ct. App. Aug. 5, 2009).

121. *Prison Legal News v. Corr. Corp. of Am.*, 2014 Vt. Super. LEXIS 36, \*9–10 (Vt. Super. Ct. Jan. 10, 2014).

122. *Prison Legal News v. Corr. Corp. of Am.*, 2015 Vt. Super. LEXIS 91, \*1 (Vt. Super. Ct. Sept. 1, 2015) (CCA initially withheld some documents that it believed were contractually protected because they were “subject to confidentiality agreements with third parties who declined to waive their rights.” The court reviewed the documents, made appropriate redaction, and released them to the requesting party).

123. See E-mail from Alex Friedmann, *supra* note 103.



succeeded in Texas courts when litigating against CCA for access to information.<sup>124</sup>

These courts have established a common pattern and set a strong precedent among state courts. After the trilogy of successful cases in Tennessee, Vermont, and Texas, PLN filed record requests in California and New Mexico; CCA produced the records without the need for litigation.<sup>125</sup>

## B. WHY PRIVATE PRISONS SHOULD BE SUBJECT TO FOIA

Private prisons should be subject to FOIA for a number of reasons: they are funded primarily by taxpayer dollars, they perform an inherently governmental function, and the government should not be permitted to contract away its FOIA obligation.

It is no secret that government contracts funded by taxpayer dollars contribute to the vast majority of the industry's revenue.<sup>126</sup> For example, in 2015, taxpayers in Oklahoma paid CCA a hefty \$2.3 million a month to run its state prisons.<sup>127</sup> In 2015, taxpayers shed \$1,339,474,186 in federal taxes to fund The GEO Group, CCA, and MTC.<sup>128</sup> A joint letter submitted to Representative Jackson Lee, expressing support for the PPIA, noted that “[i]f private prison companies like CCA and [The] GEO [Group] would like to continue to enjoy taxpayer-funded federal contracts, then they should adhere to disclosure laws equivalent to those governing their public counterparts—including FOIA.”<sup>129</sup> To function, private prison corporations must rely in large part on taxpayer funds, and thus should be held to the same standards as government prisons—requiring private prisons to answer to the very people who fund them.

In accordance with the reasoning set forth in *Times Publishing Company*, private prisons should also be subject to FIOA because they “perform the

124. See Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1731 (2014).

125. See E-mail from Alex Friedmann, *supra* note 103 (Alex Friedmann articulated that he is not sure whether case law can be directly attributed to the precedent courts set, but still notes that after these cases, CCA provided requested documents without the need for litigation.)

126. See AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 5 (2011), [https://www.aclu.org/files/assets/bankingonbondage\\_20111102.pdf](https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf).

127. Justin Glawe, *America's Biggest Private Prison Company Let Inmates Kill Each Other, Lawsuit Claims*, THE DAILY BEAST (Oct. 24, 2016, 1:03 AM), [www.thedailybeast.com/articles/2016/10/24/america-s-biggest-private-prison-company-let-inmates-kill-each-other-lawsuit-claims.html](http://www.thedailybeast.com/articles/2016/10/24/america-s-biggest-private-prison-company-let-inmates-kill-each-other-lawsuit-claims.html).

128. See *Spending Map*, USA SPENDING, <https://www.usaspending.gov/Pages/AdvancedSearch.aspx> (last visited Oct. 3, 2017) (used the advanced search option; search criteria included the year 2015 only, all spending options checked, and the appropriate DUNS Number entered; search result showed a total of 145 transactions amounting to \$534,738,964 with CCA, DUNS Number 159734151; a total of 167 transactions amounting to \$333,921,138 with The GEO Group, DUNS Number 039203740; a total of 182 transactions amounting to \$470,814,084 with MTC, DUNS Number 039203740).

129. Letter from Human Rights Defense Center to U.S. Rep. Sheila Jackson Lee (Dec. 18, 2012), [https://www.aclu.org/files/assets/private\\_prison\\_infor\\_act\\_sign\\_on\\_letter\\_final\\_jan2013.pdf](https://www.aclu.org/files/assets/private_prison_infor_act_sign_on_letter_final_jan2013.pdf) [hereinafter Letter from Human Rights Defense Center].

inherently governmental function of incarceration.”<sup>130</sup> Private prisons operate facilities that hold federal and state prisoners, ultimately curtailing their right to the many freedoms enjoyed by others. Indeed, prisons “house a uniquely powerless population.”<sup>131</sup> The sensitive function performed by private prisons mandates the need for transparency and effective oversight, which is made possible by the PPIA. As such, effective oversight involves public disclosure, government action, and litigation.<sup>132</sup>

By outsourcing correctional services to private entities, the government should not be allowed to waive its obligations under FOIA. When the government chooses to delegate its function to a private entity, it “frustrates the purpose of the FOIA.”<sup>133</sup> “The fact that [a] governmental agency does not control the information in a technical sense” does not make the argument for greater transparency any less probative.<sup>134</sup> Following the reasoning presented by the court in *Prison Legal News v. Corrections Corporation of America*, a public entity should not be permitted to outsource its duty, thereby avoiding “the fundamental interests in transparency and accountability.”<sup>135</sup> The point is that “the government should not be able to contract away the public’s right to know.”<sup>136</sup> Since these reasons alone are not likely to gain the attention of the industry, this Note will suggest reasons that may be more persuasive.

#### IV. SAVING THE PRIVATE PRISON INDUSTRY: INCREASED TRANSPARENCY

Capitalism dictates that business entities be held accountable by their customers and consumers. Consumers have the power to change how they interact with specific producers or service providers—should they become unhappy with their products or performance. For example, if an investor is not content with the way her stockbroker is handling her money, she is free to take it elsewhere. The stockbroker likely does not want to lose business, and so she will strive to better accommodate her clients by adjusting her methods. This is free market capitalism; it encourages producers to alter their means of production to better accommodate their consumers so that their customers will not take their business elsewhere.

CCA believes that federal, state, and local governments choose “an outsourced correctional service provider based primarily on availability of beds, price, and the quality of services provided.”<sup>137</sup> Although this may

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130. PRISON LEGAL NEWS, *supra* note 116.

131. David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010).

132. *See id.* at 1453–54, 1461–62.

133. Cdsarez, *supra* note 89, at 293.

134. Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21, 62 (1999).

135. *Prison Legal News v. Corr. Corp. of Am.*, 2014 Vt. Super. LEXIS 36, at \*9–10 (Vt. Super. Ct. Jan. 10, 2014).

136. PRISON LEGAL NEWS, *supra* note 116.

137. CCA 2015 Form 10-K, *supra* note 39, at 21.

partially be so, when selecting which private prison entity to outsource to, the government is unlike the broker's client because it does not have many options. Although the government may be influenced by its own perception of private prisons, what holds more power in swaying the government in selection and use of private prisons is public perception and the media. That is where the PPIA comes in. With the correct public relations strategy, the PPIA can strengthen the industry by rehabilitating confidences of the industry's customers, and by providing the means to inquire into and oversee private prison operations.

CCA and The GEO Group both acknowledge how important it is for the public and the government to perceive the industry with a positive attitude.<sup>138</sup> Both corporations also recognize the vital role governmental clients play in the industry's wellbeing.<sup>139</sup> Specifically, The GEO Group explains that its "revenue base is derived from [their] long-term customer relationships."<sup>140</sup> In a strikingly similar choice of words, in their Form 10-Ks, both CCA and The GEO Group concede that the industry has not achieved complete acceptance from either the government nor the public, and that negative publicity about privately managed facilities makes it more difficult to maintain existing contracts and attain new ones.<sup>141</sup> In yet another strikingly similar choice of words, the two giants acknowledged that they depend on a limited number of governmental customers for a significant portion of their revenue, and that losing business with any one of their customers can cause serious harm to the company's wellbeing.<sup>142</sup> The GEO Group believes that "public resistance to the use of public-private partnerships for correctional, detention and community based facilities could result in [their] inability to obtain new contracts or the loss of existing contracts, which could have a material adverse effect on [the] business, financial condition and results of operations."<sup>143</sup>

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138. See generally *id.*; GEO Group Form 10-K, *supra* note 29.

139. See generally CCA 2015 Form 10-K, *supra* note 39; GEO Group Form 10-K, *supra* note 29.

140. GEO Group Form 10-K, *supra* note 29, at 9.

141. See CCA 2015 Form 10-K, *supra* note 39, at 29–31 ("The operation of correctional and detention facilities by private entities has not achieved complete acceptance by either governments or the public. . . . Further, negative publicity about an escape, riot or other disturbance or perceived poor operational performance, contract compliance, or other conditions at a privately managed facility may result in adverse publicity to us and the private corrections industry in general."); see also GEO Group Form 10-K, *supra* note 29, at 35 (the industry "has not achieved complete acceptance by either government agencies or the public. . . . In addition, negative publicity about conditions, an escape, riot or other disturbance at a facility operated under a public-private partnership may result in adverse publicity to us and public-private partnerships in general.").

142. See CCA 2015 Form 10-K, *supra* note 39, at 34 ("[w]e depend on a limited number of governmental customers for a significant portion of our revenues," the loss of such customers "could seriously harm our financial condition and results of operations"); see also GEO Group Form 10-K, *supra* note 29, at 33 ("[w]e depend on a limited number of governmental customers for a significant portion of our revenues. The loss of, or a significant decrease in revenues from, these customers could seriously harm our financial condition and results of operations.").

143. GEO Group Form 10-K, *supra* note 29, at 35.

Shortly before the Obama administration DOJ announced its phase-out initiative, CCA reported that “[t]he loss of, or a significant decrease in, business from the BOP, ICE, USMS [U.S. Marshals Service], or various state agencies could seriously harm [their] financial condition and results of operations.”<sup>144</sup> CCA is not wrong. Should the next administration’s DOJ follow in the footsteps of President Obama’s initiative and withdraw its use of private correctional facilities, CCA stands to lose roughly 11%, or \$190 million, of its yearly revenue.<sup>145</sup> Since The GEO Group’s business with the DOJ amounts to 15.6% of its total consolidated revenue, they stand to lose much more.<sup>146</sup> This revenue would no longer be there if the industry fails to correct its ways. As public pressure continues to mount, should other federal, state, or local governments implement what President Obama began when his administration directed the BOP to begin the phase-out, the private prison industry will continue to head toward its own demise.

Regardless of the new administration’s federal action or inaction, the phase-out process may very well be implemented by state governments because state outsourcing is independent from that of the DOJ. State governments have not yet indicated that they too intend to limit and eventually end outsourcing correctional services. Private prisons can prolong the temporary status quo if they improve public and government perception, which private prison corporations have acknowledged produces a direct effect on revenues.

## A. THE PPIA AS A SOLUTION

Improving public and government perception can be done by enacting the PPIA, an Act which would allow private prisons to negate bad press through increased transparency, and facilitate independent oversight that can help move the industry back toward providing quality correctional services.

### 1. Transparency

Those who oppose the PPIA fail to acknowledge that building trust “has always been the mark of a good business.”<sup>147</sup> In fact, effective transparency is one of the tenets of corporate communication.<sup>148</sup> Howard Schultz, the CEO of Starbucks, once said “the currency of leadership is transparency.”<sup>149</sup> When

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144. CCA 2015 Form 10-K, *supra* note 39, at 34.

145. *Id.*

146. GEO Group Form 10-K, *supra* note 29, at 34.

147. Himanshu Sareen, *An Economy of Trust: How Transparency is Changing the Tech Industry*, WIRED, <https://www.wired.com/insights/2015/03/economy-trust-transparency-changing-tech-industry/> (last visited Oct. 3, 2017).

148. See Nick Morgan, *Is Corporate Transparency Always a Good Thing?*, HARV. BUS. REV. (Oct. 17, 2008), available at <https://hbr.org/2008/10/is-corporate-transparency-alwa>.

149. *The Openness Revolution*, THE ECONOMIST (Dec. 11, 2014, 2:14 PM), [www.economist.com/news/business/21636070-multinationals-are-forced-reveal-more-about-themselves-where-should-limits](http://www.economist.com/news/business/21636070-multinationals-are-forced-reveal-more-about-themselves-where-should-limits).

it comes to public trust, missteps “can mean the difference between success and failure.”<sup>150</sup> Transparency in the private prison world is equally important, especially when the industry has faced a decline in confidence from both the public and from its clients.

The Tylenol murders of 1982 are a great depiction of this concept. The murders occurred in Chicago, where over the course of a few days seven people died without apparent cause; the only link between the victims was that they all had taken Extra-Strength Tylenol.<sup>151</sup> As the investigation progressed, the ingested Tylenol was found to have been laced with a deadly chemical.<sup>152</sup> Upon this revelation, Tylenol was pulled off store shelves.<sup>153</sup> Before the murders, Tylenol controlled over 35% of the over-the-counter pain medication market. However, a few weeks after the deaths, Tylenol’s market share fell below 8%.<sup>154</sup>

The DOJ’s phase-out process is analogous to Tylenol being pulled from store shelves, because both situations threatened the existence of the corporation and called for the entities to respond promptly and authoritatively. Johnson & Johnson, Tylenol’s manufacturer, took “an active role with the media in issuing mass warning communications and immediately called for a massive recall of the more than [thirty-one] million bottles of Tylenol in circulation.”<sup>155</sup> It “reacted to the crisis swiftly and decisively, launching a massive public relations campaign urging the public not to use Tylenol.”<sup>156</sup> The company then pledged to the public that it would work harder to protect consumers in the future.<sup>157</sup> Johnson & Johnson kept its pledge by working with the Federal Department of Agriculture to create tamper-proof packaging; the packaging later became an industry standard.<sup>158</sup> As a result of Johnson & Johnson’s honest and open response, within a year the company’s market share was back to where it had been before the 1982 murders.<sup>159</sup> Even critics who had “prematurely announced the death of the brand Tylenol were now praising the company’s handling of the matter.”<sup>160</sup> Johnson & Johnson’s public relations campaign should serve as an example to the private prison industry: handling a company crisis transparently and

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150. Sareen, *supra* note 147.

151. See Dan Fletcher, *A Brief History of the Tylenol Poisonings*, TIME (Feb. 9, 2009), <http://content.time.com/time/nation/article/0,8599,1878063,00.html>.

152. *See id.*

153. *See id.*

154. See Howard Markel, *How the Tylenol Murders of 1982 Changed the Way We Consume Medication*, PBS NEWSHOUR (Sept. 29, 2014, 11:39 AM), [www.pbs.org/newshour/updates/tylenol-murders-1982/](http://www.pbs.org/newshour/updates/tylenol-murders-1982/).

155. *Id.*

156. *The Tylenol Murders*, HISTORY, [www.history.com/this-day-in-history/the-tylenol-murders](http://www.history.com/this-day-in-history/the-tylenol-murders) (last visited Aug. 15, 2017).

157. Markel, *supra* note 154.

158. *See id.*

159. *See id.*

160. *Id.*

proactively, and ensuring healthy public relations, facilitates an opportunity for the company to hold an open line of communication with its customers and gain customers' loyalty in return.

Because of the way Tylenol handled its brand's crisis, Tylenol is still a functioning and profitable business. On the other hand, companies that "were less forthcoming, or even deceptive, in their dealings with the public," are not.<sup>161</sup> Enron, for example, a company that before its collapse "marketed electricity and natural gas, delivered energy and other physical commodities, and provided financial and risk management services to customers around the world,"<sup>162</sup> was rated the sixth largest company in the world.<sup>163</sup> Upon reports of fraud, it was revealed that Enron's reported earnings had been falsified.<sup>164</sup> Enron's earnings reports falsely claimed revenue to be hundreds of millions of dollars more than the company actually made.<sup>165</sup> In addition to its financial collapse, the fraud led to the indictment and convictions of sixteen former executives, including Enron's chief executives.<sup>166</sup> Most notably and for this Note's purpose, Enron has since been labeled the poster child for corporate indecency and dishonesty.<sup>167</sup> The company drowned in its own mess, and endured what is a true nightmare for any corporation.

If the PPIA became law, it would extend FOIA to private prisons and subsequently grant the public a right to demand greater transparency. Journalists, advocates, and other interested parties would be able to request information and avoid being guided solely by ongoing accusations of inadequate management. If the facts reflect a different reality than that which investigative reports have shown in the recent years, then the industry's name will be cleared of any wrongdoing or abuse. However, since the industry has been reluctant to provide access to information, many believe that private prisons have a lot to hide. If this is not the case, then the transparency, inherent in the PPIA, would put the information needed to rebuild the people's trust in the industry directly into the people's hands.

These two things, transparency and trust, support sustainable growth not only because they reduce the need to make assumptions, but also because "the fact that more people are more closely scrutinizing board behavior

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161. Morgan, *supra* note 148.

162. *Enron Fast Facts*, CNN, [www.cnn.com/2013/07/02/us/enron-fast-facts/](http://www.cnn.com/2013/07/02/us/enron-fast-facts/) (last updated Apr. 17, 2017, 3:39 PM).

163. *See id.*

164. *See id.*

165. *See id.*

166. *See* Alexei Barrionuevo, *Two Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES (May 26, 2006), <http://www.nytimes.com/2006/05/26/business/businessspecial3/26enron.html>.

167. *See* Ken Silverstein, *Enron, Ethics and Today's Corporate Values*, FORBES (May 14, 2013, 7:12 AM), <https://www.forbes.com/sites/kensilverstein/2013/05/14/enron-ethics-and-todays-corporate-values/#51b90b3e5ab8> ("'Honesty' and 'decency' have typically been applied in interpersonal communications. But such characteristics can get lost during business dealings. Enron is the poster child for such distorted behavior.").

encourages directors to be more responsible.”<sup>168</sup> Should transparency reveal that the reality is as harsh as investigative reports have said it to be, embracing the PPIA would demand that the industry engage effective, independent oversight. That oversight could help to deliver on the industry’s promise to provide meaningful correctional services, while not only saving the government money, but also turning a profit.

## 2. Independent Oversight

A corporation’s duty is to safeguard the interests of all shareholders so that long term sustainability can be ensured.<sup>169</sup> The financial crisis of 2008 exposed weaknesses at all levels of corporate governance, and tarnished corporate reputations.<sup>170</sup> Negative impacts caused by the financial crisis have been felt by all, from the average household to shareholders and corporate executives. Thus, today, stakeholders are focused on the importance of effective corporate oversight, and are demanding that oversight be improved so that shareholders can be provided with greater protection and be assured that their investments are safe.<sup>171</sup> Considering the investigatory reports and the DOJ’s phase-out announcement, it would not be surprising to find shareholders in the private prison industry reacting similarly. It is in the investors’ best interest to ensure that the industry thrives beyond the Trump administration. To do so, the industry needs to win back government and public acceptance, which can be accomplished through the PPIA, an Act that would allow public interest groups to engage in independent industry oversight.

Justice Louis Brandeis once said that “sunlight is said to be the best of disinfectants.”<sup>172</sup> “Prison transparency allows for many opportunities for improvement to occur,” but “awareness without action is meaningless in the context of the prison.”<sup>173</sup> Prison oversight is “in the best interests of everyone,” including correctional leadership.<sup>174</sup> The media, watchdog organizations, interested citizenry, and other advocacy organizations have traditionally acted as independent overseers in this area by utilizing public

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168. *Id.*; see also *Corporate Transparency: Why Honesty is the Best Policy*, THE GUARDIAN (Aug. 4, 2014, 7:39 AM), <https://www.theguardian.com/sustainable-business/corporate-transparency-honesty-best-policy>.

169. See Sean Lyons, *Corporate Oversight and Stakeholder Lines of Defense Stakeholders Demand a Critical Review of Corporate Oversight*, EXECUTIVEACTION SERIES 1 (Oct. 2011).

170. See *id.* at 1; see also Nathaniel Parish Flannery, *Recent Scandals Highlight the Importance of Effective Board Oversight*, FORBES (July 7, 2011, 1:56 PM), [www.forbes.com/sites/nathanielparishflannery/2011/07/07/recent-scandals-highlight-the-importance-of-effective-board-oversight/#7e641e4353c5](http://www.forbes.com/sites/nathanielparishflannery/2011/07/07/recent-scandals-highlight-the-importance-of-effective-board-oversight/#7e641e4353c5) (“A number of recent cases of corporate fraud and misconduct suggest that companies may not be doing enough to promote effective board oversight.”).

171. See Lyons, *supra* note 169, at 1.

172. Stan Stojkovic, *Overview of Correctional Oversight: Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1478 (2010) (internal citation omitted).

173. *Id.* at 1479.

174. *Id.* at 1476.

record laws to gain access to operational information related to the industry.<sup>175</sup> It is no question that disclosure of information can be used as a “powerful tool for advocacy” and that “the lack of useful data reduces the accountability of prison companies.”<sup>176</sup> Public scrutiny is often a prerequisite for changing harmful practices.<sup>177</sup> “The presence of the civilian overseer keeps professional administrators at the top of their game,”<sup>178</sup> serving the benefit of all, including the corporation and its shareholders.

Currently, however, these advocates do not have access to information about the “shadow world” within which private prisons operate.<sup>179</sup> This lack of access prevents the public and advocacy groups from engaging in oversight and inhibits the means through which the industry can regain the government’s and the public’s confidence. Without rehabilitating said confidence, the industry impedes its chances of thriving beyond the Trump administration. Given the opportunity, there are many independent advocacy groups that would relish the chance to help private prisons ensure that they are meeting expectations. By requiring transparency, the PPIA provides a route to ensuring that private prisons are effectively monitored.<sup>180</sup>

### 3. Corporate Interest and Duty

Private prisons’ duties are not limited to keeping inmates in humane conditions nor to providing meaningful correctional services. By virtue of their corporate status, they also have a fiduciary duty to their investors, a duty that requires industry actors to act in the investors’ best interest.<sup>181</sup> There is no dispute that courts will enforce this duty, should it be breached.<sup>182</sup> Investigative reports that alleged cost-cutting, which subsequently resulted in gross violations of prisoners’ rights, combined with the industry’s sheltered response, fashion a poisonous concoction that can be viewed as a violation of the corporation’s fiduciary duty to its shareholders. It is a violation because the industry’s questionable actions and the subsequent sheltered response clearly does not and will not uphold the duties the industry owes to its shareholders in pursuing its primary business strategy of increasing occupancy and revenue. Through the PPIA, the industry can work to negate

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175. See Tartaglia, *supra* note 124, at 1691.

176. Hartney & Glesmann, *supra* note 30, at 25; see also Stojkovic, *supra* note 172, at 1480 (“transparency allows outside people to see correctional operations and to comment on their appropriateness”); John Brickman, *The Role of Civilian Organizations with Prison Access and Citizen Members – The New York Experience*, 30 PACE L. REV. 1562, 1571 (2010) (“[w]atching something affects its course”).

177. Geraghty & Velez, *supra* note 95, at 455.

178. Brickman, *supra* note 176, at 1569.

179. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 354–55 (1987) (Brennan, J., dissenting).

180. See Tartaglia, *supra* note 124, at 1691–92.

181. See Robert A. Kutcher, *Breach of Fiduciary Duties*, AMERICAN BAR ASSOCIATION 3–4, [apps.americanbar.org/abastore/products/books/abstracts/5310344\\_chap1\\_abs.pdf](https://apps.americanbar.org/abastore/products/books/abstracts/5310344_chap1_abs.pdf).

182. See *id.* at 4.



the obviously destructive effects caused by bad press, and engage in proactive public relations by allowing for greater disclosure, and effective and independent oversight.

Effective public relations strategies are crucial to the success of any industry. Both CCA and The GEO Group admit that neither their governmental clients nor the public has accepted the industry.<sup>183</sup> The GEO Group voices concerns that public resistance of private correctional facilities negatively affects its ability to renew old contracts or acquire new ones.<sup>184</sup> Nevertheless, private prisons refuse to provide access to information and choose to litigate against such disclosure, single-handedly causing the public to perceive the industry as being exceptionally secretive<sup>185</sup> and “legally immune to open-records requests.”<sup>186</sup>

Unlike their government counterparts, private prisons are not required to report on the inmates they house, nor do they make information easily accessible to monitors.<sup>187</sup> In fact, private prisons may not even be “aware of the documentation and reporting requirements intrinsic to the operation of public agencies.”<sup>188</sup> Thus, “oversight and monitoring has [] proven to be difficult and tends to be lax and ineffective.”<sup>189</sup> Several states have found poor contract performance to be caused by lack of transparency, which has created obstacles in the way of effective enforcement and oversight of contract satisfaction.<sup>190</sup> The result is a powerful industry that “flourish[es] in the shadows,”<sup>191</sup> and an industry that attempts to meet its interests by minimizing disclosure of information that may paint it in a negative light,<sup>192</sup> or any light at all for that matter. Such secrecy feeds into the popular belief that prisons are an inherently bad place. This does not have to be so. Private prisons have the capacity to deliver on their promise to provide adequate correctional services, and to save the government money. This, however, cannot be achieved without allowing for greater disclosure, increased transparency, and independent oversight.

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183. See CCA 2015 Form 10-K, *supra* note 39, at 29–31; see also GEO Group Form 10-K, *supra* note 29, at 35.

184. See CCA 2015 Form 10-K, *supra* note 39, at 29–31; see also GEO Group Form 10-K, *supra* note 29, at 35.

185. See Bauer, *supra* note 5; see also Letter from Human Rights Defense Center, *supra* note 130 (writing that the Human Rights Defense Center is “deeply troubled by the secrecy with which the private corrections industry presently operates”).

186. Park, *supra* note 96.

187. See Hartney & Glesmann, *supra* note 30, at 15.

188. *Id.*

189. *Id.*

190. See Tartaglia, *supra* note 124, at 1702.

191. Tom Barry, *The Shadow Prison Industry and Its Government Enablers*, CTR. FOR INT’L POL’Y (Apr. 30, 2010), <https://www.ciponline.org/research/html/shadow-prison-industry-government-enablers>; see also Hartney & Glesmann, *supra* note 30, at 15.

192. See Hartney & Glesmann, *supra* note 30, at 15–16.

Finally, if private prisons are not persuaded by the arguments above, they should be persuaded by the fact that their own secrecy has prevented growth in every aspect in which a business usually hopes to develop. When the DOJ announced its intent to begin phasing-out of outsourcing correctional duties, shares of CCA plummeted 35% and shares of The GEO Group fell 40%.<sup>193</sup> That same day, *Market Watch* reported that “the selloff may be an overreaction,” correctly noting that this decision only affected a portion of privately run facilities because the DOJ’s decision had no effect on states’ policies.<sup>194</sup> Nevertheless, should the industry continue to lurk in the shadows, public advocacy groups will not cease their tireless efforts to pressure the federal, state, and local governments to follow the DOJ’s precedent and end their relationship with the industry.

#### 4. Current Oversight of Private Prisons is Inadequate

An argument against the need for transparency and public accountability is that because the government employs private prisons, the government “can exercise power over the kind and level of services to be provided and at what cost,”<sup>195</sup> which arguably works to ensure adequate performance. However, this argument is flawed. “A trove of 20,000 pages of previously unreleased monitoring reports, internal investigations, and other documents obtained through an open-records suit show that the BOP had been warned of substandard care by its own monitors for years but failed to act.”<sup>196</sup> This finding alone debunks the idea that government oversight is enough to compel the private prison industry to conduct its business in a contractually adequate manner.

The state outsourcing experience is not all that different from that of federally outsourced facilities: scores of states have found contract deficiencies.<sup>197</sup> For example, in 2010 the Idaho Department of Corrections (IDOC) officials believed that a CCA Idaho Correctional Center (ICC) was taking all the steps necessary to comply with its contract, only to learn that ICC had been falsifying staffing numbers, and, in effect, defrauding taxpayers.<sup>198</sup> The facility even had its own IDOC contract monitor who failed to notice, or chose not to address, the falsified staffing reports.<sup>199</sup> In response,

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193. See Wallace Witkowski, *Privately-Run Prison Stocks Gutted as Justice Department Plans to Phase Out Use*, MARKET WATCH (Aug. 18, 2016, 6:14 PM), <http://www.marketwatch.com/story/private-prison-stocks-gutted-as-justice-department-plans-to-phase-out-use-2016-08-18>.

194. See *id.*

195. DOUGLAS McDONALD & CARL PATTEN, GOVERNMENTS’ MANAGEMENT OF PRIVATE PRISONS xxv (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/203968.pdf>.

196. Wessler, *supra* note 70.

197. See Tartaglia, *supra* note 124, at 1702.

198. See Associated Press, *Staffing Issues Known for Years at Idaho’s Private Prison*, BOISE STATE PUB. RADIO (Oct. 23, 2013), <http://boisestatepublicradio.org/post/staffing-issues-known-years-idahos-private-prison#stream/0>.

199. See *id.*

an IDOC Quality Assurance Manager stated that “[n]ever in a million years did we think they were lying to us.”<sup>200</sup> CCA’s contract with ICC was automatically terminated and Idaho sought bids from other private providers to take over the facility.<sup>201</sup> Ultimately, most of the state’s Democratic representatives urged Idaho to remove ICC from private hands and put it back under state management.<sup>202</sup> Interestingly, the letter containing these views was delivered by Republicans, not Democrats.<sup>203</sup> ICC, which was the biggest prison in the state, reverted to being a government-run prison, which resulted in CCA losing an annual \$29 million dollar contract.<sup>204</sup> This loss of revenue is due to the inadequate performance of IDOC monitoring procedures that failed to notice evidence of fraud. If advocacy groups had access to facility information, they would either have been able to notify IDOC of the deficiencies earlier, or would have pressured CCA to act accordingly.

Private prison contracts are often regulated through standards created by organizations like the American Correctional Association (ACA) or National Commission on Correctional Healthcare (NCCHC).<sup>205</sup> In fact, all private prison facilities must be accredited in order to continue their operations.<sup>206</sup> Public prisons, on the other hand, are not required to achieve accreditation from either ACA nor NCCHC, but may seek to do so voluntarily.<sup>207</sup> Accreditation, however, offers quite a deceptive perception of quality. For one, the process does not require actual, extensive observation of the facilities or even contact with prisoners.<sup>208</sup> Since audits are scheduled in advance,<sup>209</sup> corporations like CCA or The GEO Group are given ample time to cover up all the things they do not want auditors to see, and to present accreditors with a false reality.

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200. *Id.*

201. See Tartaglia, *supra* note 124, at 1702.

202. See Rebecca Boone, *Dems to Idaho Prisons Board: Let State Run ICC*, MAGIC VALLEY (Oct. 15, 2013), [http://www.magicvalley.com/news/local/dems-to-idaho-prisons-board-let-state-run-icc/article\\_cdf9be4e-35d4-11e3-ba41-001a4bcf887a.html](http://www.magicvalley.com/news/local/dems-to-idaho-prisons-board-let-state-run-icc/article_cdf9be4e-35d4-11e3-ba41-001a4bcf887a.html).

203. Idaho Governor C.L. “Butch” Otter’s spokesman, Mark Warbis, delivered the letter. “Warbis said there was no ‘hidden message’ to Otter’s decision to deliver the Democrats’ message to the board.” *Id.* This is interesting because it depicts that the Republicans, who would typically be for private prisons and for less disclosure, were actually acting in concert with the Democrats, thus cleverly depicting their support for removing the prison from the private industry.

204. See Associated Press, *Board: Idaho Can Start Taking Over Private Prison*, IDAHO NEWS (Jan. 10, 2014), <http://www.kboi2.com/news/local/board-idaho-can-start-taking-over-private-prison>.

205. Tartaglia, *supra* note 124, at 1700.

206. See David W. Miller, *The Drain of Public Prison Systems and the Role of Privatization: An Analysis of State Correctional Systems*, PROQUEST SOC. SCI. DISCOVERY GUIDE 6 (2010), [http://www.antoniascasella.eu/nume/miller\\_2010.pdf](http://www.antoniascasella.eu/nume/miller_2010.pdf).

207. *See id.*

208. *See id.* at 7.

209. *See id.*

Accreditors' primary source of income are the fees paid to them by those they investigate.<sup>210</sup> As such, it would not be in the auditors' interest to judge private prisons too harshly because that would result in unsatisfied clients. On July 9, 2010, CCA announced that five of its facilities had been reaccredited by the ACA, but what it failed to mention was that it cost CCA a hefty \$22,500 to attain what CCA termed its "stamp of approval."<sup>211</sup> If the auditor acted in a way that would displease their client it is unlikely that the client would engage with the auditor again. In the circumstance of the CCA's engagement with ACA, ACA would lose \$22,500 in revenue next time CCA needs an accreditation. This is precisely why the Sarbanes-Oxley Act of 2002 (SOX) was enacted—as a response to major corporate and financial scandals such as Enron.<sup>212</sup> The SOX encourages engagement of independent auditors to ensure unbiased, uninfluenced audits.<sup>213</sup>

The way the accreditation process is structured presents not only a clear conflict of interest, but a lack of effectiveness; thus, it fails to prevent the industry from cutting too many corners. Additionally, current governmental oversight is inadequate, and private prisons are left to do as they wish, as opposed to doing what they are contractually obligated to do.

## CONCLUSION

Private prisons perform a "hugely important and difficult undertaking: ensuring the humane treatment of prisoners, carrying out the rule of law, and preserving safety in the facilities."<sup>214</sup> Private prison corporations recognize that the industry is hurt by negative press, and by the fact that neither the government nor the public has accepted it.<sup>215</sup> Private prison entities also place great importance on their clients because the nature of the business does not leave the industry with many clients to appeal to.<sup>216</sup> The industry was shaken to its core when the Obama administration's DOJ found that private prisons do not provide a meaningful, nor acceptable, correctional service, and subsequently announced that it would cease contract renewal and ultimately

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210. *See id.*

211. *See* Press Release, Private Corrections Institute, CCA Pays Over \$22,000 to American Correctional Association to Claim "Stamp of Approval" at Five Private Prisons (July 9, 2010), available at <http://ww1.prweb.com/prfiles/2010/07/09/3673404/PCIPressreleasereCCAaccreditation2.pdf>.

212. *See* Gretchen Morgenson, *Sarbanes-Oxley, Bemoaned as a Burden, Is an Investor's Ally*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/business/sarbanes-oxley-investors.html>.

213. *See* Audit Committees and Auditor Independence, U.S. SEC. AND EXCHANGE COMMISSION, <https://www.sec.gov/info/accountants/audit042707.htm> (last visited Sept. 22, 2017) ("[A]n auditor's independence is impaired if the auditor is not . . . capable of exercising objective and impartial judgment on all issues encompassed within the audit engagement.").

214. Hartney & Glesmann, *supra* note 30, at 26.

215. *See* CCA 2015 Form 10-K, *supra* note 39, at 29–31; *see also* GEO Group Form 10-K, *supra* note 29, at 35.

216. *See generally* CCA 2015 Form 10-K, *supra* note 39; GEO Group Form 10-K, *supra* note 29.

seek to end prison outsourcing. Should the industry continue to lurk in the shadows, both the federal government's and the public's perceptions of private prisons will continue to deteriorate. In turn, this will make the industry's clients question whether they too should end outsourcing to private prisons.

While the industry is currently enjoying the policies set forth by the Trump administration, it is important to keep in mind that this administration is not permanent, and that this grace period should not be wasted on ill intentions, but rather should be used to improve industry standards, implement methods that allow for greater transparency, and restore the government's and the public's trust. Should this grace period be spent in vain, there is no telling how the next administration, or state and local governments, will address the prolonged issues currently faced by the private prison industry. There is, however, Sally Yates' initiative to begin phasing-out and ultimately ending outsourcing of correctional services to private entities that most definitely will be used as an example.

Enacting the PPIA will lead to increased transparency, which can help the industry combat bad press and improve public relations. The PPIA will facilitate access to information that is necessary for effective, independent oversight. Through such independent oversight, the industry can provide the means with which to win back the federal government's and the public's acceptance. By regaining this acceptance, the industry can strengthen its presence, prevent another phase-out, and ensure continuity of its existence.

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\* B.A., *magna cum laude*, CUNY – Brooklyn College, 2015; J.D. Candidate, Brooklyn Law School, 2018. This work is dedicated to my husband, Michael Vilher, who has worked so hard to make it possible for me to be a full-time student, allowing me the privilege of pushing my academic boundaries farther than I could ever push them before. I would also like to thank the entire staff of the Brooklyn Journal of Corporate, Financial & Commercial Law, particularly Drita Dokic and Kieran Meagher, for their time and effort in preparing this Note for publication.