

Closing the Books

**How Government
Contractors Hide
Public Records**

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Government Contractors Circumvent Sunshine Laws

Government transparency strengthens democracy, promotes fiscal responsibility, checks corruption, and bolsters public confidence. Sunshine laws enshrine transparency into the fabric of government by guaranteeing citizens access to information regarding government expenditures and policies.

When government contractors assume control of public services, in many cases they are able to circumvent sunshine laws and shield important information from disclosure. Corporations may refuse to release records that would otherwise be available by claiming that transparency would hurt their bottom lines. Many times, contractors claim that the information is a “trade secret” or “proprietary” and legally protected from public review.

This brief provides case studies that illustrate how private contractors hide three key types of information:

1. The fees they charge the public,
2. How they spend public funds, and
3. Details on the quality of public services.

To protect the public’s right-to-information, decision makers should adopt strong sunshine laws that require government contractors to follow the same disclosure rules as government entities. As an additional protection, state and local governments should also include disclosure requirements in contracts.

Government Contractors Hide Their Fees

State contractors earn revenue by charging the government and the public for costs and fees to provide the service. Some contractors attempt to circumvent sunshine laws and hide these costs from public oversight, claiming that transparency would hurt their bottom lines and give competitors an unfair advantage. This opacity prevents the public from ensuring that contractors’ fees are not extortionate and follow the fee structure in the contract agreement.

When government agencies provide public services, the costs incurred by the taxpayer are public record. Not only must government bodies follow freedom of information rules, but the government’s main priority is providing quality services to the public — not earning profit margins — nullifying the incentive to keep costs hidden. In fact, governments have an incentive to disclose the costs of services as transparency allows the public, decision makers, and watchdog groups to identify areas to save money and improve service quality.

1 Connecticut: Maximus Inc. Refuses to Release Billing Rates for Managing Health Care Exchange Call Center



In February 2013, Access Health Connecticut — the state’s health care authority created under the Affordable Care Act — contracted with Maximus Inc. to operate the exchange’s call center.¹ The contract lasts three years and is worth \$15 million according to Maximus.²

During the health care rollout, Connecticut’s NPR station, *WNPR*, submitted a public records request for Maximus’ contract with the state to uncover how much the company was planning to charge Access Health Connecticut per call minute. In response *WNPR* received a heavily-redacted version of the contract with details of Maximus’ costs

Maximus claimed that releasing the contract’s pricing information could reveal proprietary trade secrets.⁴ The company’s lawyer explained that **“if... one of our competitors learned of how we priced... then they have an advantage that they have not earned.”**⁵ After *WNPR* filed a complaint with the Freedom of Information Commission, Access Health Connecticut released the unredacted version of the contract.⁶

[illegible]

	STARTUP	OPERATIONS			
	6/1/2013-9/1/2013	9/1/2013-3/31/2014	4/1/2014-8/31/2014	9/1/2014-8/31/2015	9/1/2015-8/31/2016
Start Up Cost	\$ 5,444,991.72				
Fixed Monthly		\$ 183,270.37	\$ 183,270.37	\$ 183,270.37	\$ 183,270.37
Months		7	5	12	12
Total Fixed		\$ 1,282,892.59	\$ 916,351.84	\$ 2,199,244.42	\$ 2,199,244.42
Price per Min		\$ 1.22	\$ 1.22	\$ 1.22	\$ 1.22
Est. Min		2,340,251	1,354,557	2,321,809	1,916,094
Total Variable Cost		\$ 2,851,622.20	\$ 1,650,543.09	\$ 2,829,151.07	\$ 2,334,782.76
Fixed Monthly Broker Costs*		\$ 23,856.32	\$ 11,828.16	\$ 11,828.16	\$ 11,828.16
Months		6*	5	12	12
<u>Total Fixed Broker Costs</u>		<u>\$ 141,937.22</u>	<u>\$ 59,140.79</u>	<u>\$ 141,937.90</u>	<u>\$ 141,937.90</u>
Total Annual Cost	\$ 5,444,991.72	4276452.01**	2626035.73**	5170333.40**	4675965.08**

Access Health Connecticut Releases Unredacted Contract after Freedom of Information Complaint⁹

2 Iowa: KKR & Co. Hides Fees Charged to the Public Employees' Retirement System



Public pension systems — government entities that manage retirements for public employees such as teachers and police officers — contract with financial firms to invest pensioners' funds. In exchange for a fee, these firms invest retirement accounts in mutual funds, buyouts, and other financial products. Today, public pensions constitute 28 percent of all outside investment received by private equity companies.¹⁰

In 2014, the Securities and Exchange Commission (SEC) expressed concern over the fees charged by buyout firms, prompting *The Wall Street Journal* to ask the Iowa Public Employees' Retirement System (IPERS) for information on the fees paid to private equity contractor KKR & Co. for a \$70 million investment.¹¹

In response, the IPERS conferred with KKR and released a heavily-redacted document that provided little information on KKR's fees. (See Figure 2.) **KKR's lawyer stated that disclosing the company's fees could cause "competitive harm."** KKR also threatened the pension system by claiming that releasing the information would "jeopardize [the pension fund's] access to attractive investment opportunities."¹²

By withholding the information, KKR prevented the public from investigating whether the company's fees were reasonable and whether the company's charges followed the fee structure in the agreement. A later investigation by the SEC concluded that KKR had overcharged its clients and neglected to inform them of certain fees. KKR has since issued refunds to its investors.¹³

Figure 2: KKR & Co. Redacts Information on the Fees Collected from the Iowa Public Employees' Retirement System¹⁴

Portfolio Company	Total KKR Fee	2006 Fund	Other KKR Funds / SMAs (a)	KKR Parallel Vehicles (b)	Non-Discretionary SMAs (c)	KKR Co- Investors (d)
		Gross Fee Appportioned Before Offsets	Gross Fee Appportioned Before Offsets	Gross Fee Appportioned Before Offsets	Gross Fee Appportioned Before Offsets	Gross Fee Appportioned
<u>Transaction Fee Data</u>						
Big Heart Pet Brands (aka Del Monte Foods Co) (1)	\$		\$		\$	
KDI						
ProSiebenGet.1 Media AG (2)						
<u>Management Fee Data</u>						
Academy Ltd.	\$		\$		\$	
Accelerated Oil Technologies I L.P.						
Alliance Boots plc						
Big Heart Pet Brands/aka Del Monte Foods Co)						
Bicoret, Inc.						
Capital Safety Group						
CapSugel						
First Data Corporation						
Go Daddy Group, Inc.						
Icono Holdings LLC						
MME Holdings Limited						
Northgate Information Solutions plc						
Samson Resources						
TAGC, Inc.						
U.S. Foods						
<u>Break-Down Fee Detail</u>						
N/A						
Total 2006 Fund Gross Fee Before Offsets		\$				

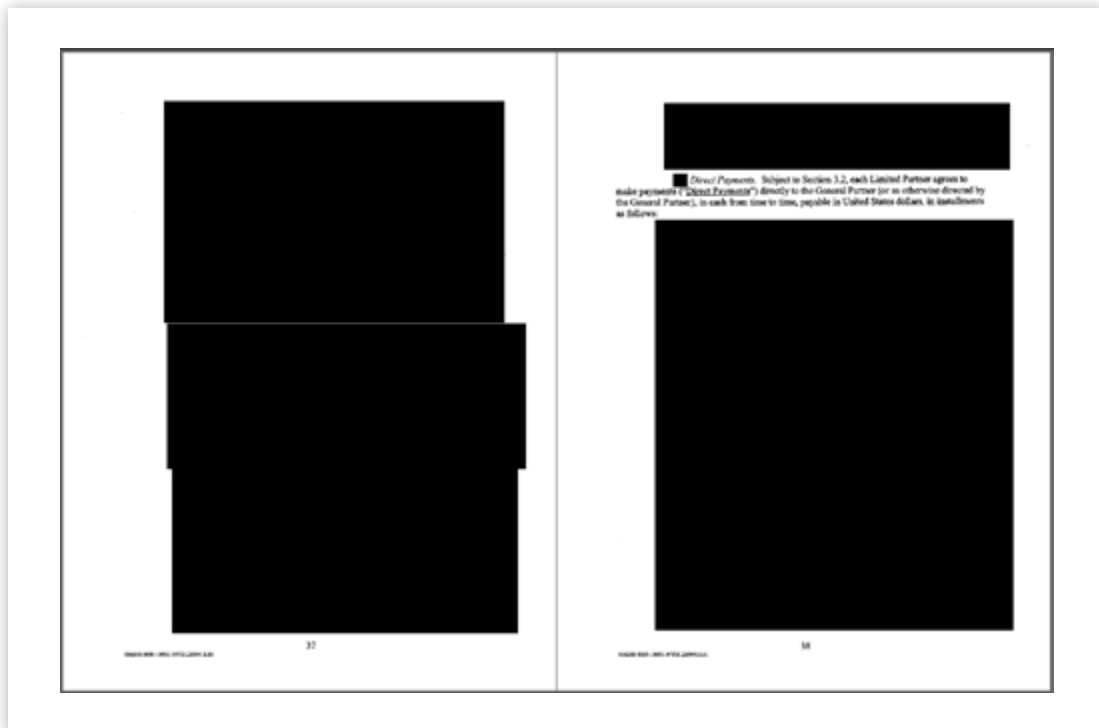
3 Louisiana: Carlyle Group Refuses to Disclose Charges to the Teachers Retirement System



In 2014, Carlyle Group and other buyout companies settled a lawsuit that alleged they colluded in lowering the value of the companies they purchased. To determine whether Carlyle's customers — including public pension systems in California, Illinois, Louisiana, Ohio, and Texas — would incur the costs of the settlement, *The New York Times* placed an open records request with the Teachers Retirement System of Louisiana (TRSL) for a copy of its partnership agreement with Carlyle.¹⁵

TRSL conferred with Carlyle and redacted most — if not all — of the content on 108 out of 141 pages before releasing the agreement. (See Figure 3.) **According to Carlyle, disclosing details in the agreement “would cause substantial competitive harm” to the company.**¹⁶

Figure 3: Carlyle Prohibits the Disclosure of Most Content in its Contract with the Teachers Retirement System of Louisiana¹⁷



According to an analysis by *The New York Times*, which was able to obtain an unredacted version of the agreement, Carlyle was hiding an array of information, including details on how it passes legal costs onto pensions, how it calculates pensions' investment returns, and dates of the fiscal year.¹⁸

4 New York: United Water Utility Withholds Details of Multimillion Dollar Bill



In May 2014, the New York Public Service Commission (PSC) canceled plans to build a water treatment plant for Rockland County, northwest of New York City. United Water, the private company that provides water for Rockland, had already begun the project and attempted to charge residents for already-incurred costs — \$56 million for planning and design and \$4 million for interest.¹⁹

However, United Water did not explain how it accrued the \$56 million in costs. The utility released the names of subcontracting companies, their hourly charge, and the number of hours billed, but withheld information on the services or good provided.²⁰ Without this information, the public and the PSC were unable to ensure that United Water was not overcharging residents.

United Water justified its opaque practices by claiming that transparency would harm revenues.

According to a company spokesperson, “release of specific financial or proprietary information could potentially harm the competitive position of the company, as well as its vendors.”²¹

In November 2014, the PSC ruled against United Water, blocking the utility from charging customers for the \$60 million in alleged design costs. The PSC explained that United Water had withheld important information needed for an audit that could approve the surcharge.²²

5 Pennsylvania: Swarthmore Group Hides the Turnpike Commission’s Loan Repayment Rates



In 2013, the Pennsylvania Turnpike Commission contracted with Swarthmore Group, an investment firm in Philadelphia, to secure financing for new connector ramps between the Pennsylvania Turnpike and I-95.²³ Under the guidance of Swarthmore Group, wealthy lenders — at the time of this report’s print — were investing in a newly-created company called the Delaware Valley Regional Center (DVRC), which planned to loan \$200 million to the Pennsylvania Turnpike Commission for the project.²⁴

At the behest of Swarthmore Group, the Turnpike Commission has not disclosed the costs of financing the project. By withholding these costs, Swarthmore Group has prevented the public and the news media from assessing whether the Turnpike Commission received favorable financing terms. For example, in response to an information request from *The Philadelphia Inquirer*, the Turnpike Commission released its loan agreement with DVRC, but withheld the repayment schedule. The Turnpike Commission explained that the

repayment schedule was “trade secret and confidential proprietary information.” Swarthmore justified its secrecy by explaining, **“we only hope to keep our financial innovation away from the cunning interest of our competitors.”**²⁵



Pennsylvania Turnpike Commission plans to build interchange between the Turnpike and I-95. Credit: Pennsylvania Turnpike Commission.

Government Contractors Hide How They Spend Public Funds

Contractors that receive taxpayer funds to manage government services may attempt to circumvent sunshine laws and prevent the public from overseeing how the funds are spent. While taxpayers might still have access to basic spending information that is held by the state — such as the total dollar value paid to the company — they lose access to public information that is held by the company. Without details on contractors’ expenditures — such as executives’ salaries and the services provided by subcontractors — the public cannot prevent irresponsible spending.

Whereas the public has access to details on how taxpayer funds are spent when the government manages the public service, once the funds enter corporate coffers, many companies claim that the spending decisions are proprietary and trade secrets.

1 Illinois: Bombardier Withholds Information on Manufacturing Chicago Railcars



In 2005, the Chicago Transit Authority (CTA) contracted with Bombardier to purchase new train cars with funds from the U.S. Department of Transportation (DOT) among other sources.²⁶ Federal requirements mandated that Bombardier follow the DOT’s Buy America rules, which require 60 percent of the railcar components be manufactured in the U.S.²⁷

In 2013, Jobs to Move America (JMA) — a national coalition that advocates for the creation of good American jobs in connection with the public purchase of buses and trains — requested Bombardier's Buy America compliance audit along with other related documents from the CTA.²⁸ The audit was requested as part of JMA and the Political Economy Research Institute at the University of Massachusetts Amherst's analysis of Buy America's economic impacts.²⁹



Bombardier builds new rail cars for the Chicago Transit Authority. Credit: CTA.³⁰

In response, the CTA released a copy of the Buy America audit with text redacted that Bombardier had requested be confidential.³¹ (See Figure 4.) Bombardier defended its secrecy by claiming that transparency could hurt business. In Bombardier's response to JMA's request, Bombardier's attorney claimed that **"the disclosure of Bombardier's trade secrets or confidential information can have an impact around the world where Bombardier does business."**³²

JMA has since appealed to the Illinois Attorney General to order CTA and Bombardier to release the government audit. As of February 2015, the appeal was pending.³³

Figure 4: Bombardier Redacts Information on Suppliers for Chicago Transit Authority Railcars³⁴

Buy America Post Delivery Audit Review On Rail Vehicle Procurement For CTA Rail Car A					Section 7(1)(g)
TOTAL CAR COST					(g)
VENDOR NAME	COMPONENT	CERT.	EDGIBLE COST	PERCENTAGE	NEW MFG.
Bombardier Transportation	Propulsion	YES	Section 7(1)(g)	Section 7(1)(g)	
WABCO	Switches	YES			
WABCO	Couplers	YES			
WABCO	Master Controller	YES			
Adams & Westlake	Current Collector	YES	Section 7(1)(g)	Section 7(1)(g)	YES
ITL	Auto Train Control System	YES	Section 7(1)(g)	(g)	
Merak	HVAC	YES			
Vapor	Door Operating Assy (Consists of	YES			
Vapor	Low Speed Detector Side & End	YES			
Vapor	Door Panels & Cab Door Panels	YES	Section 7(1)(g)	Section 7(1)(g)	
Axon Technologies	Communication & Signs	YES			
Axon Technologies	Vehicle Comm. System	YES	Technology List Deleted-Replaced by Tag Master (Foreign)		
Tag Master	Vehicle Comm. System	YES			
Axon Technologies	Train Ethernet Switch	YES	Technology List Deleted-Replaced by Bombardier Trans		
Bombardier Transportation	Monitoring Train Ethernet Switch	YES	Section 7(1)(g)	Section 7(1)(g)	YES
Luminate	Lighting System	YES			
North America Spec Glass	Windows & Windshield	YES	Section 7(1)(g)	Section 7(1)(g)	YES
General Cables	Wires & Cables	YES			
Bombardier Transportation	Truck Assy. Complete	YES			
PHW	ATC	YES			YES
Hall Ind	Misc Material/Hardware	YES			YES
Transtek	Truck Assembly	YES	Section 7(1)(g)		
Bombardier Transportation	Wheel & Axle Assy	YES			
ORX	Steel Castings	YES			
Eagle Bredon	Gearbox & Traction Motor	YES			
Bombardier Transportation	Door & Cables	YES			
WABCO		YES			
TOTAL					
Barry Controls	Replaced by General Metal Technik	YES	Section 7(1)(g)		
General Metal Technik	Misc. Electronic Components	YES			
Endomont	Track Brake Suspension	YES			
Tombier	Journal Bearings	YES			
Hanning & Khul	Track Brakes	YES			
Liebherr	Active Suspension	YES			
ORX	Replaced by PHW	YES	Section 7(1)(g)		
MMI	Wheel	YES			
Bombardier Transportation	Truck Frame	YES			
Liebherr	Misc. Material/Hardware	YES			
Mulling	Replaced by Kustom Seating USA Inc. Attached	YES	Section 7(1)(g)	Section 7(1)(g)	YES
Kustom Seating	Passenger Seats	YES			
Kustom Seating	Operator Seat	YES			
Teddon	Replaced by Rail Tech/Hillrom USA Inc. Attached	YES	Section 7(1)(g)	Section 7(1)(g)	YES
Rail Tech	Floor Panels	YES			

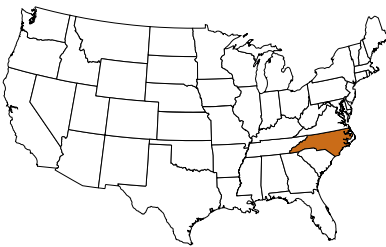
2 New York: National Heritage School Refuses to Explain How Charter School Spent State Funds



In 2012, the New York State Comptroller audited Brooklyn Excelsior Charter School operated by National Heritage Academies Inc. (NHA). The audit found that the school was failing to comply with its own by-laws, paying almost \$800,000 above market value to rent the building from NHA, and compensating a board member \$138,000, creating a conflict of interest.³⁵

Due to a lack of transparency, the auditors could not determine “the extent to which the \$10 million of annual public funding benefited students” according to the audit. NHA staff refused to provide details on how the school spent \$1.6 million, claiming that **“the expenditures were private and proprietary.”**³⁶ The auditors were able to determine that the unaccounted funds included \$610,000 spent on “academic and general support” and \$260,000 spent on “human resources,” but no further detail.³⁷ This opacity deprives state officials and parents of the tools needed to ensure that students receive a quality education and that the NHA spends funds on school programs, not corporate profit.

3 North Carolina: Roger Bacon Academy Refuses to Release Staff Salaries at Charter School



Roger Bacon Academy is a charter school management company that works in southeastern North Carolina.³⁸

In 2014, state officials

asked for the salary information of employees at the company's Charter Day School. Roger Bacon Academy initially withheld the records, claiming that the salaries were private information, but without details on staff salaries, the parents and decision makers could not evaluate the management of public funds. When the State Board of Education placed Charter Day School on probation, the school surrendered the information to the regulators.³⁹

The Department of Public Instruction released the salary document to the public despite Charter Day School's threat of litigation. In the salary document, Roger Bacon Academy included the line, “unauthorized release of this confidential information may result in incurring liability.” (See Figure 5.) The document also states that the salary information is **“confidential,” “proprietary,”** and a **“trade secret.”**⁴⁰

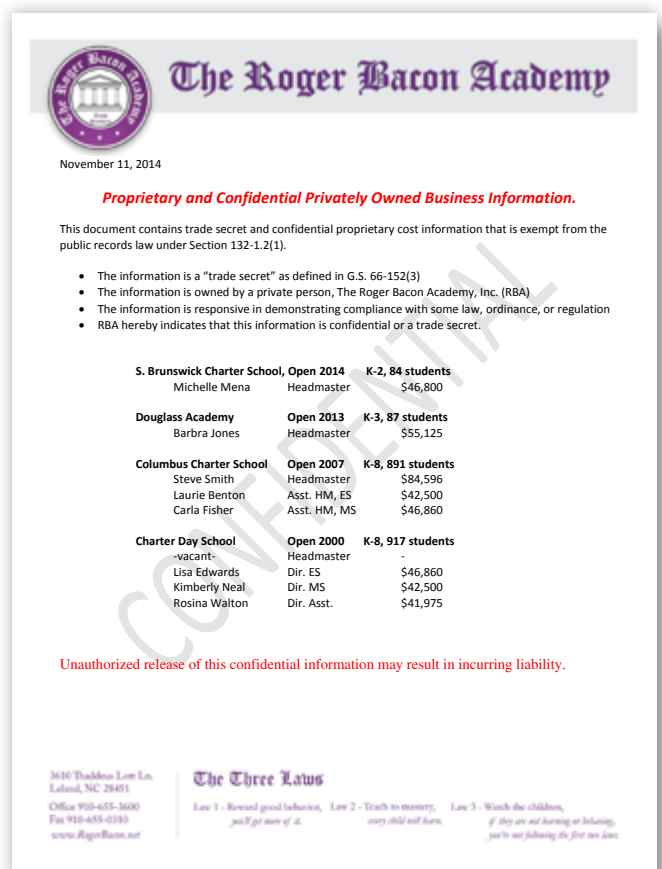


Figure 5: Roger Bacon Academy Marks Executives' Salary Information as a “Trade Secret”⁴¹

4 Ohio: White Hat Management Shields Charter School's Expenditures from Parent Oversight



White Hat Management is one of Ohio's largest charter school operators.⁴² When White Hat's schools began performing poorly, parents and board members asked the company to disclose how it spends public education funds. White Hat refused to open the schools' books, claiming that the funds were private, not public. However, by withholding the spending information, White Hat prevented parents and board members from providing guidance and oversight to improve the quality of the education.⁴³

The company likened the need for secrecy in its financial and education decisions to Coca-Cola's need for secrecy in its Coke formula. According to White Hat's attorney, "if I'm Coca-Cola, and you're a Coca-Cola distributor or a Coca-Cola purchaser, that doesn't entitle you to know the Coke formula or find any financial information you'd be interested in learning from the Coca-Cola company."⁴⁴

In 2011, a judge ordered White Hat to release the financial records for 10 charter schools in Ohio on grounds that the company was accountable to the school boards because it was a de facto public body. When White Hat appealed, a three-judge appellate court upheld the lower court's decision.⁴⁵ At the time of this report's print, the case was before the Ohio Supreme Court.⁴⁶

Government Contractors Hide Indicators of Service Quality

Private companies that receive government contracts may circumvent sunshine laws to prevent regulators and the public from assessing the quality and performance of public services. Without this transparency, the government and watchdog groups cannot ensure contracted services support the public's well-being.

Whereas the public has access to information on the performance of state-managed public services through open records laws, private companies that manage public services are able to withhold performance data. These companies claim that the performance records are trade secrets or proprietary, competitive information.

1 Florida: Corizon Correctional Healthcare Denies Public Information Request for Litigation History



In 2013, the Florida Department of Corrections (DOC) contracted with Corizon Correctional Healthcare to provide health care for inmates at 41 state correctional facilities.⁴⁷ Florida usually requires contractor companies to disclose the number, location, and outcomes of previous malpractice lawsuits. However, during the vetting process for Corizon, the Florida DOC did not ask the company for its litigation history.⁴⁸

When an investigative news agency — *Broward Bulldog* — requested the litigation history from Corizon, **the company refused to release the documents, claiming that the information was a "trade secret."**⁴⁹ By withholding the information, Corizon prevented *Broward Bulldog* from understanding the company's performance track record and assessing the quality of the company's health care services.

Once *Broward Bulldog* threatened to bring a lawsuit against Corizon for violating sunshine rules, the company released the records. By then, however, Corizon had already contracted with the state and was providing health care to inmates.⁵⁰

2 Florida: Trinity Industries Blocks the Release of Guardrail Safety Information

For the past several years, the Florida Department of Transportation (FDOT) has contracted with Trinity Industries, which manufactures industrial transportation products, to supply guardrails for state highways.



In 2005, Trinity changed the design of its guardrails, but failed to notify the Federal Highway Administration as required. Unfortunately, the new design jeopardized passenger safety. Instead of bending away from the car on impact, the rail now folded in half, allowing it to slice through the vehicle body.⁵¹ When the guardrail's design changes were exposed in 2012, transportation officials began linking the rails to fatal and injurious car accidents.⁵²

In February 2014, Safety Research and Strategies Incorporated (SRS), a consumer safety research firm, requested a set of documents and correspondences pertinent to the FDOT's contract with Trinity and the safety of the guardrails.⁵³ FDOT provided 13 files and explained that Trinity was reviewing more than 1,000 emails to redact confidential information before releasing them. According to the FDOT, **Trinity had obtained a protective order that prevented the FDOT from releasing "trade secret" records.** The protective order merely pertained to two specific documents, neither of which were requested by SRS.⁵⁴

Without information on the guardrails, SRS could not assess whether Trinity was negligent in injuries and deaths from car accidents on Florida highways. After waiting several months to receive the remaining documents, Safety Research and Strategies filed a lawsuit to compel the FDOT to release the information.⁵⁵

3 Texas: GEO Group and Physicians Network Association Withhold Documents on Inmate Health Care

In December 2008 and January 2009, poor health care services and substandard living conditions sparked inmate riots at Reeves County Detention Center (RCDC) in Texas.⁵⁶ The facility is managed by GEO Group, the second-largest private prison operator in the country, and the health care is managed by the Physicians Network Association, a for-profit company that provides medical services at correctional facilities.⁵⁷



To understand prisoners' grievances and uncover the low-quality health services that sparked the riots, the American Civil Liberties Union filed a public information request with Reeves County for documents on the provision of health care, prisoner complaints, and inmate deaths.⁵⁸ Reeves

County refused to disclose the information because **GEO Group and Physicians Network Association claimed the documents were "trade secrets."**⁵⁹ Once the Texas Attorney General ordered Reeves County to release the records pursuant to the Texas Public Information Act, the County filed a lawsuit to overturn the decision.⁶⁰

4 Vermont: Corrections Corporation of America Ignores Request for Lawsuit Payment Records



Vermont contracts with Corrections Corporation of America (CCA) — the largest prison-management company in America — to house 500 of the state's prisoners.⁶¹

In 2012, *Prison Legal News (PLN)*, a monthly magazine that covers criminal justice issues, requested records from CCA on the damages awarded to Vermont prisoners from lawsuits against the company.⁶² When CCA did not respond, *PLN* appealed, and when CCA ignored the appeal, *PLN* filed a lawsuit to obtain the information.⁶³

By withholding the records, CCA attempted to prevent *PLN* from investigating and reporting on CCA's malfeasance and associated costs.⁶⁵ Without details on the conditions in the prison, activists and decision makers would lack the tools to build support to improve prisoner care.

CCA explained its decision to withhold the records by claiming that transparency would hurt the company's bottom line. According to CCA's public affairs manager, **"CCA has proprietary information... and there is some of that business information we need to protect to maintain our competitive position and capabilities."**⁶⁶

At trial, the court ruled that CCA is the functional equivalent of a public agency and must abide by Vermont's sunshine rules. CCA has since released the records.⁶⁷



CCA houses Vermont Prisoners at Lee Adjustment Center in Beattyville, Kentucky.⁶⁴ Credit: Lexington Herald-Leader.

Decision Makers Should Require Government Contractors to Follow Sunshine Rules

As these examples demonstrate, when government contractors assume control of public services, they are able to shield important information from disclosure. State and local decision makers should adopt a three-step strategy to ensure the public maintains access to information on contracted services.

1. Decision makers should extend sunshine laws to explicitly require government contractors to follow the same disclosure rules as government entities.
2. Decision makers should strengthen weak sunshine laws that allow companies to withhold public records by exploiting exemptions and loopholes.
3. Decision makers should include strong disclosure requirements in contracts.

With these policies, decision makers can protect the public's right-to-information. Sunshine laws that require government bodies to disclose details on public services strengthen democracy and improve Americans' well-being. Government contractors should abide by the same transparency standards.

Endnotes

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- ⁶ See note 4.
- ⁷ Due to heavy redactions in the first contract released, In the Public Interest researchers could not verify that the two images are of the same contract page.
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- ¹⁰ Mark Maremont and Mike Spector, "Buyout Firms Push to Keep Information Under Wraps," *The Wall Street Journal*, 4 November 2014.
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- ²⁷ Linda Nguyen Perez, Jobs to Move America, personal communication, 6 February 2015.
- ²⁸ Linda Nguyen Perez, Jobs to Move America, "Declaration of Linda-Nguyen-Perez in Support of Appeal," 1 October 2014; Document received from Linda Nguyen Perez, Jobs to Move America, personal communication, 25 February 2015.
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