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# Floodlights Instead of Flashlights

Sunshine Laws Out of Step with Government Contracting  
Leave Public and Lawmakers in the Dark



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## Executive Summary

**G**overnment contracting has been on the rise, but many open records laws fail to address transparency issues related to information held by private contractors, who receive significant amounts of money from the government and perform public functions. Paul Light, professor at New York University, found that in 2005, private companies received \$400 billion from the federal government through government contracts.<sup>1</sup> This enormous figure does not even include the billions of dollars spent by cities and states on contracts with private companies.

*Floodlights Instead of Flashlights* explores the real-world consequences of privatization on government transparency and the public's access to information. During Sunshine Week 2012, we acknowledge many advances in important government transparency measures, but there's still a lot of work to do. Our research shows that the increasing use of government contractors to perform public functions is limiting our ability to acquire important public information. This disturbing trend is occurring at all levels of government.

As the stories from across the country in this report show, corporations are circumventing open records laws claiming that documents and records related to government functions are "proprietary information" exempt from disclosure. Even basic information about a government contract and the accompanying procurement process can be difficult to obtain. Corporations may not diligently collect data and information related to public programs and services, leaving the public record incomplete. In all these situations, the public loses access to information about the public's own government.

### Background

**O**ur open records and sunshine laws exist because we believe that there is an overriding public interest in making government information widely available. A number of states enacted these laws in the wake of the Watergate scandal,<sup>2</sup> to ensure that the public could monitor government activities. By skirting open records laws, private corporations are essentially allowed to perform public functions behind a veil of secrecy that we would never tolerate from public servants. At a time when privatization has been under scrutiny for cost overruns, declines in service quality, degraded workforce standards, waste, and the growing political influence of government contractors, we must promote and protect transparency in government contracting.

This report examines various types of public information that we lose through privatization and presents numerous case studies to illustrate how this loss negatively impacts our communities. The report also highlights recent attempts to improve transparency, and provides recommendations to improve the public's access to information, better ensure that critical public information is not being lost, and bring government contractors out of the shadows.



**I**n 2011, a concerned citizen in New Mexico, asked her city government if she could review video recordings of city commission meetings. The city contracts with a private company to record the meetings and maintain the video recordings. The city refused to hand over the recordings, stating that the videos were not subject to open records laws because the city did not have these recordings in its possession. Even though the public meeting of elected city officials focused on government business, the fact that a private company held onto the official government recording of the meeting prevented citizens from reviewing what occurred. Without this information, the public's ability to provide oversight to government and contractor activities is lost, and public participation in the political decision-making process is frustrated.

## Findings: What do we lose?

**W**hen the government privatizes public programs, services, or assets, volumes of important information may be lost. In *The Public Interest's* review of government contracting found that we are already losing the ability to answer the following important questions:

- **How are public dollars being spent?**

From the basic to the most complex, financial information, such as underwriting for a government project, data about how a company derives rates charged to the residents, pricing information, or payment schemes can be denied, destroyed, or never made available.

- **Who is employed by contractors and why?**

Workforce data, such as executive and employee compensation information, information about hiring, promotions, and firing decisions, and other employee information, such as criminal backgrounds.

- **What recommendations and insights do contractors provide the government?**

Contractor work products, such as reports, policy recommendations, or any other document that the contractor produces to fulfill its contractual obligations.

- **Are companies performing public services doing a good job?**

Performance data, such as records that describe how a program or service is performing. For example, information about the type of care a child is receiving in a state's foster care system. Also, information contained in outside audits and reviews.

- **What terms are included in government contracts with private companies?  
Are negotiations taking place behind closed doors?**

Often, it can be difficult to obtain a contract between a governmental entity and a private corporation. Information about the procurement process, meetings between the government and the company, bid proposals and related documents are often shielded from the public as well.

Without information to help answer these important questions, watchdog organizations, journalists, advocacy groups, and interested residents lose the ability to understand government policies and actions, monitor public spending, inform their positions on various issues, advocate for what they believe in, and hold the government accountable. A well-functioning democracy relies on the public having honest answers to these key questions. Privatization should not make this information more difficult for the public to obtain.



## Recommendations

**A**s local, state, and federal government continue to contract out critical public functions, privatization will continue to pose barriers for open access to public information. Lawmakers, government agencies, media, and advocates must take actionable steps to ensure that information controlled by government contractors is made public.

### Lawmakers

**Strengthen existing open records laws:** The most straightforward way for localities and states to improve access to privatized public information is for legislative bodies to strengthen open records law. This can be done in several ways: 1) expand the reach of current open records laws, 2) decrease or tighten the exemptions allowed under the laws, and 3) enact new laws that specifically require certain types of information be made public.

**Repeal laws that directly reduce transparency:**

Laws that specifically exempt entire industries or areas of public information from open records laws are directly opposed to the public interest. They allow, and even encourage, corporations to hide public information. These laws should be repealed, and their corporate beneficiaries should be subject to the same open records requirements as other contractors.



### Government Agencies

**Require public contracts to contain transparency provisions:** Government contracts should include specific provisions explicitly describing what contractor information will be made public. By including these provisions in the contract, the government can make its commitment to openness and transparency a priority at the very beginning of the contracting process, before the contract is even signed.



**Improve government collection of contractor data:** Governmental entities should be vigilant about collecting data from contractors, to ensure a complete public record from the start. Governmental entities could include provisions in the contract that penalize the contractor if they fail to regularly submit certain information to the government or abide by open records laws.

**Increase online disclosure of contracting-related information:** Governmental entities should increase online disclosure of government expenditures, including providing access to all contracts. A complete list of contracts should be listed online with identifying information, including dates of contract, contracting agency, contracting amount, and what the contract was for. Copies of contracts should be included in an easily searchable format.

### Media and Advocates

**Regular reporting on the contracting process:** The media should regularly monitor and report on their government's contracting activities. This report could take the form of a weekly write-up that describes what large contracts are up for bid, and any important details that are known, such as what companies are bidding, and a description of the main issues at stake. The media can also highlight opportunities for stakeholder input, such as public hearing dates and important deadlines to encourage public participation in the contracting process.



**Be persistent:** Media and advocates can face numerous barriers to attaining information about government contracts and private contractors. This includes delays in releasing information, requiring specific information about the requested information that the requestor may not have access to, or even bringing costly lawsuits to prevent the release of public information. By continuing to request information, and using creative ways to overcome barriers, media and advocates can prevent public information from being hidden.



*“Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.*

— PRESIDENT JAMES MADISON

## Introduction

**Imagine that your city plans to raise your trash collection fees.** During a public hearing, city council members review a memo that contains financial information used to justify a 15% fee increase. As a concerned resident, you want to see that memo too, and better understand why your rates will increase. Since the memo is public information, it should be easy to obtain. What happens if your trash service is not provided by the city, but by a private company that contracts with the city? You request a copy of the memo, but the city denies the request. The city explains that the document contains financial information that the private company supplied, and therefore is not subject to open records laws.<sup>3</sup> Without this information, you are shut out. You are unable to participate in the public decision-making process and prevented from fully understanding the policies and decisions that affect your community.



We rely on open access to public information. It helps us understand our communities, our states, and our country.

Importantly, it helps us hold our governmental bodies accountable to the people they serve. Our local, state, and federal open records and sunshine laws give us the right to obtain public information. A number of states enacted these laws in the wake of the Watergate scandal,<sup>4</sup> to ensure that the public could monitor government activities. Because of open records laws, we can learn who works in our children’s school, how our state’s transportation department spends public funds, why the health and human services agency decides to adopt new public policies, what is discussed at public meetings, and much more. Watchdog organizations, journalists, advocacy groups, and interested residents regularly use public information to better understand government policies and actions, monitor public spending, inform their positions on various issues, advocate for what they believe in, and hold government accountable. Our open records and sunshine laws exist because we believe that there is an overriding public interest in making government information widely available.

But, what happens to this information when governments contract out public services, programs, and assets? Unfortunately, information that was once controlled by government agencies, and available to the public, is now in the hands of private corporations. Information about the public functions that these corporations provide is often shielded from the public’s view.

Government contracting has been on the rise, but many open records laws fail to address transparency issues related to information held by private contractors, who receive significant amounts of money from the government and perform public functions. Paul Light, professor at New York University, found that in 2005, private companies received \$400 billion from the federal government

through government contracts.<sup>5</sup> This enormous figure does not even include the billions of dollars spent by cities and states on contracts with private companies.

Restricted access to contractor information poses a threat to open government and the public interest. By skirting open records laws, private corporations are essentially allowed to perform public functions behind a veil of secrecy that we would never tolerate from public servants. At a time when privatization has been under scrutiny for cost overruns, declines in service quality, degraded workforce standards, waste, and the growing political influence of government contractors, we must promote and protect transparency in government contracting.

Corporations have sought to circumvent open records laws by claiming that documents and records related to government functions are “proprietary information” exempt from disclosure. Even basic information about a government contract and the accompanying procurement process is often difficult to obtain. Corporations may not diligently collect data and information related to public programs and services, leaving the public record incomplete. In all these situations, the public loses access to public information.

When the government privatizes public programs, services, or assets, volumes of important information may be lost. In The Public Interest’s review of government contracting found that we are already losing answers to the following important questions:

- **How are public dollars being spent?**

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- **Who is employed by contractors and why?**

Workforce data, such as executive and employee compensation information, information about hiring, promotions, and firing decisions, and other employee information, such as criminal backgrounds.

- **What recommendations and insights do contractors provide the government?**

Contractor work products, such as reports, policy recommendations, or any other document that the contractor produces to fulfill its contractual obligations.

- **Are companies performing public services doing a good job?**

Performance data, such as records that describe how a program or service is performing. For example, information about the type of care a child is receiving in a state’s foster care system. Also, information contained in outside audits and reviews.

- **What terms are included in government contracts with private companies? Are negotiations taking place behind closed doors?**

Often, it can be difficult to obtain a contract between a governmental entity and a private corporation. Information about the procurement process, meetings between the government and the company, bid proposals and related documents are often shielded from the public as well.

This report illustrates how privatization threatens our access to what was once public information. Part I provides an overview of specific types of information we lose, showing the real world effects that privatization has on government transparency through a series of case studies. Part II highlights recent attempts to improve transparency. Part III provides recommendations to improve the public’s access to information, better ensure that critical public information is not being lost, and bring government contractors out of the shadows.



## Part I: What We Lose

**W**hen the public loses access to public information, we lose the knowledge necessary to engage in the political and policy making process. This section will highlight the different types of information we often lose through privatization, and provide recent case studies that illustrate the negative consequences that follow when private companies shield public information.

### How are public dollars being spent?

Shareholder profits are at the heart of most corporations' decisions-making processes. Financial records show how a company is spending public funds. They give a more complete picture of the money trail; once funds leave the public coffers, financial documents show how the company uses them. Financial records can shed light on governmental decisions, such as fee increases or mismanagement



of public money. The public relies on this information to keep track of public resources, hold contractors accountable for mishandling of public funds, and ensure that companies' financial interests do not overcome the interests of the community and what is best for its residents. Yet financial information can also be some of the most difficult information for the public to obtain from contractors.

#### COMPANY

**Jenkinsville Water Company**

#### WHO REQUESTED INFORMATION

*The Independent Herald and several concerned residents.*

#### WHAT RECORDS ARE AT STAKE

**Financial records, including audited financial statements and budgets.**

#### SIGNIFICANCE

**The company failed to pay state employee payroll taxes, lost millions of gallons of water, and could not account for tens of thousands of dollars.**

**I**n South Carolina, the Jenkinsville Water Company failed to pay state employee payroll taxes, lost millions of gallons of water, and could not account for tens of thousands of dollars.<sup>6</sup>

*Concerned about mismanagement of funds, residents and journalists submitted open records requests to the Jenkinsville Water Company, seeking copies of financial records, including audited financial statements and budgets. But the company refused to comply.*

*A State Senator sought an opinion from the state's Attorney General regarding whether the company was bound by the state's open records laws. The Attorney General's office issued an opinion, stating that the water company was a public body and must disclose the records.<sup>7</sup> Even after this decision was issued, the company refused to hand over documents, leading to a lawsuit filed by The Independent Herald newspaper.<sup>8</sup> The outcome of the lawsuit has yet to be decided.*



**COMPANY**  
**David Evans and Associates**

**WHO REQUESTED INFORMATION**  
 A local citizen's group

**WHAT RECORDS ARE AT STAKE**  
 The company's latest audited financial statements.

**SIGNIFICANCE**  
 These records could help the public understand why the project has experienced cost overruns and delays.

**F**inancial documents were also at stake in a recent lawsuit over the release of contractor records in Washington State<sup>9</sup>. A private firm, David Evans and Associates, fell behind in developing plans for a comprehensive project to redevelop the Columbia River Crossing bridge.<sup>10</sup> Initial environmental planning was two years late and about \$35 million over budget.<sup>11</sup>

A local citizen's group requested information about the contractor, including the company's latest audited financial statements, in order to investigate how taxpayer dollars were being spent on the project. The company responded by filing a lawsuit to prevent the state from releasing the records, claiming that the information was private and would do "actual and substantial injury" to the business if released.<sup>12</sup> The citizen's group lacked the financial resources necessary to defend against the company's lawsuit, and abandoned its efforts. Financial information about the project and the company in charge remains secret. The public lost valuable clues that could help shed light on cost overruns that the state has incurred as a result of project delays.

## Who is employed by contractors and why?

**C**ontractors often refuse to release data about the employees who work on government projects. This can include full names of personnel, salary information, background checks, and much more. Without this data, the public loses its ability to understand who is providing key government services. The quality of our public services relies on the individuals who actually staff them, and sufficient workforce data is key in understanding who companies hire to work on public projects.

In many cases, the public may observe problems with privatized services long before the government does. Many contractors directly interact with the community, making the public's oversight incredibly valuable. For example, parents may know about driving issues with district bus drivers before school administrators. But, limited access to workforce data restricts the public's ability to learn more about contractor deficiencies, understand systemic problems and trends, and bring problems to the attention of the government.

One area where the unavailability of contractor workforce data has been particularly troublesome is in school districts. Parents and journalists have faced significant barriers in obtaining information about bus drivers in school districts in Georgia,<sup>13</sup> Wisconsin,<sup>14</sup> and Kansas.<sup>15</sup> In all these examples, the school districts privatized their bus service, and the bus drivers worked for a private company. The companies that contracted with the districts refused to release workforce information about their drivers, such as drivers' driving records, criminal backgrounds, or even simple identifying information, like full names. Without this information, the community loses its ability to obtain information about the drivers who interact with their children every day. Once a school service, such as student busing, is contracted out, much of the information that was once public becomes unavailable to parents and the public.



**COMPANY**

**Paramedics Plus**

**WHO REQUESTED INFORMATION**

*Tulsa World*

**WHAT RECORDS ARE AT STAKE**

Employee personnel information

**SIGNIFICANCE**

The newspaper sought personnel information to conduct background checks of contractor employees, after a technician that was employed by the company caused a fatal car accident and was charged with negligent homicide.



**I**n January 2012, a Tulsa technician who worked for a private contractor, Paramedics Plus, caused a fatal car accident and was charged with negligent homicide. The driver had a history of problems on the road. He had previously been convicted of criminal driving charges, including driving while intoxicated, changing lanes unsafely, speeding, and transporting an open container.

Concerned about the company's employee screening practices, the *Tulsa World* requested personnel information about drivers, such as full names, dates of birth, job applications, and disciplinary actions. The public authorities in Tulsa provided limited information, but Paramedics Plus refused to cooperate, arguing that its records are not subject to the state open records act. Due to the limited information received, journalists were unable to conduct criminal background

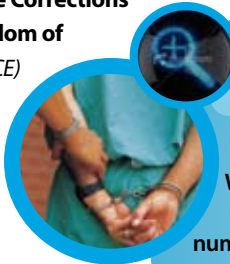
checks.<sup>44</sup> The inability of the newspaper to access and analyze these records greatly compromises the public's ability to ensure that emergency medical personnel are qualified to be performing this important public services. This is especially important amidst public safety concerns, as employees of the contractor have been entrusted with the responsibility of keeping Tulsa's residents safe in emergency situations.

**A**t the federal level, a non-profit advocacy organization, Private Corrections Institute, requested workforce information through the Freedom of

**Information Act (FOIA) from Immigrations and Customs Enforcement (ICE)**

to evaluate safety concerns at a correctional facility. The request asked for information about employees at one of the agency's facilities run by Cornell Corrections, including the number of employee positions at the facility, the annual employee turnover rate, the number of employee terminations and resignations, and reasons for those employee actions.

Following a "comprehensive search of files," ICE reported that it was "unable to locate or identify any responsive records."<sup>16</sup> The information requested was routine data that would have been collected and made publicly available had the facility been operated by the government. The workforce data sought, such as number of staff and employee turnover rate, is a significant factor in determining the stability of ICE facilities, as inadequate staffing levels often play a big role in correctional facility riots and other disturbances. But without the requested data, the organization was unable to examine the conditions and investigate safety concerns at this correctional facility.



**COMPANY**

**Cornell Corrections**

**WHO REQUESTED INFORMATION**

Private Corrections Institute

**WHAT RECORDS ARE AT STAKE**

Workforce information at an ICE privately-operated detention facility, including the number of employee positions at the facility, the annual employee turnover rate, the number of employee terminations and resignation.

**SIGNIFICANCE**

This information is important in determining the safety and stability of a correctional facility.

**What recommendations and insights do contractors provide the government?**

**W**hen we spend public funds on contracts with companies, the public has a right to see contract work product associated with the duty or services the company is providing. Unfortunately, contractor reports and other documents are not always made available to the public. Agencies and contractors may claim that this information is confidential, even though these documents and reports contain information about important government agency decisions or plans. As a result, the public is unable to get a full view of how public policy or other important decisions are made. When a company produces work product that guides an agency's decisions and development, and this information is withheld from the public, the public never has a complete picture of why and how these decisions are made. Additionally, without this information, the public is unable to determine whether the government is actually receiving the quality and quantity of work product in line with the amount of public funds spent on the contract, and whether the company is fulfilling its contractual obligations. When the government contracts with a private company, the public has a right to see the results.





**COMPANY**

**Boston Consulting Group**

**WHO REQUESTED INFORMATION**

*City Limits*

**WHAT RECORDS ARE AT STAKE**

Consultant reports and list of policy recommendations.

**SIGNIFICANCE**

The public needs these records to understand what the consulting firm is actually providing for the New York City's Housing Authority and if the agency is receiving the quality and quantity of work that it paid for.



**When New York City's Housing Authority (NYCHA) entered into a \$10 million contract** *Boston Consulting Group (BCG), journalists were unable to obtain reports and other documents produced by the contractor. The contract was shrouded in secrecy from the beginning. It was approved by the NYCHA board during a public hearing on March 2, 2011, but little information was disclosed about the contract during the hearing. The agency merely explained that the consulting firm would "provide comprehensive business transformation consulting services," and cited a similar contract in which BCG was engaged with Atlanta's housing authority.*<sup>17</sup>

*The \$10 million price tag for the contract, being taken on by a struggling agency with a budgetary deficit, raised concerns. It was unclear what services BCG would provide the agency. City Limits, a non-profit investigative journalism organization, requested information to shed light on the nature of the contract. Under the New York City Freedom of Information Law, City Limits requested information, including a list of policy recommendations that BCG had made to NYCHA, and various reports that the*

*consulting firm prepared for the agency. The request was denied, as NYCHA stated that it considers BCG's advice to be private.*<sup>18</sup> *NYCHA also refused to share information about how long BCG would be working with NYCHA, or when the contract would end. The New York agency contracted to pay at least \$10 million of public money to BCG. But New Yorkers can't see how this money is being spent, what recommendations are being provided by the private corporation, or how NYCHA's operations are being altered as a result of the consultant's advice. Residents are left with little idea what the agency is actually receiving in return for \$10 million.*

**The city of Peoria, Arizona hired a private consulting firm to evaluate the city's local police department** *and provide recommendations for improved operations. When the police chief announced his retirement from the department a short time after the contractor issued its report, The Arizona Republic requested a copy of the consultant's report. City officials announced that they were unable to provide a copy of the report to the newspaper, explaining that they had seen the report, but had not kept a copy of it. Supporting documentation, such as surveys of police department personnel, was destroyed by the contractor, even though this information formed the basis of the report.*<sup>19</sup> *Without the actual work product that the consultant produced for the city, the newspaper was unable to determine how the report may have affected the chief's retirement or other high-level changes in the department.*



**COMPANY**

**Berkshire Advisors Inc.**

**WHO REQUESTED INFORMATION**

*Arizona Republic*

**WHAT RECORDS ARE AT STAKE**

A consultant's report evaluating operations that the city's police department.

**SIGNIFICANCE**

Journalists were unable to determine how the private consulting firm's recommendations affected changes in the operation of the city's policy department.

## Are companies performing public services doing a good job?

**P**erformance data is critical in determining contractor performance and judging if companies are providing quality service. Regular access to and review of performance data can allow early detection of contractor deficiencies, and allow the government and the public to take action before problems become too severe. As the examples below show, the government and the public need this data to ensure that serious contractor problems do not go unchecked.



**COMPANY**

**Multiple private foster care contractors**

**WHO REQUESTED INFORMATION**

Nebraska Foster Care Review Board

**WHAT RECORDS ARE AT STAKE**

Important items in files of foster children, including case plans, documentation of court-ordered family visits, and information about family placements.

**SIGNIFICANCE**

These records are crucial for determining how a child is progressing in the foster care system and his/her mental and physical well-being.

**N**ebbraska is currently experiencing how the lack of contractor performance data makes it difficult to evaluate whether its child welfare system is adequately protecting the state's foster children. In 2009, the state contracted with several companies to provide foster care case management services. In 2010, the Foster Care Review Board released a report that found that critical items were missing from children's files, such as case plans for children, documentation of court-ordered family visits, and information about family placements.<sup>20</sup> In the reviews that were conducted, the agency found that nearly half of case files did not have therapy reports, 42% lacked health records, and more than one-third did not have placement reports, such as treatment plans.<sup>21</sup> This is significant because without these records, it is difficult, if not impossible, to determine how individual children are progressing. The missing file information represents key measures that could help determine whether children are making progress towards a permanent home. Without this data, it also becomes very difficult for the government and the public to evaluate whether the contractor is satisfactorily performing its case management duties, and ultimately making decisions that help children.



**COMPANY**

**Professional Probation Services, Inc.**

**WHO REQUESTED INFORMATION**

Southern Center for Human Rights

**WHAT RECORDS ARE AT STAKE**

Company's operating procedures, employee handbook, and information related to promotions and demotions of the company's probation officers

**SIGNIFICANCE**

The Southern Center for Human Rights needs this information to investigate complaints about company practices to charge exorbitant, and possibly illegal, fees to probationers

**I**n another recent example, a private probation company withheld information that would have allowed a watchdog organization to better evaluate whether the company was taking advantage of probationers. The Southern Center for Human Rights received serious complaints about financial schemes that a private probation company with numerous contracts with Georgia courts used to extract money from Georgia residents completing their probation term. The advocacy organization requested information regarding the company's operating procedures, the employee handbook provided to the company's probation officers, and information related to promotions and demotions of probation officers.<sup>22</sup> The company refused, citing a law in Georgia that considers all records and documents related to the supervision of probationers by private corporations to be confidential and not subject to the state's open records act.<sup>23</sup>

Georgia law allows private probation companies to circumvent the open records laws that government agencies and most other contractors are subject to, and completely shields their operations from public scrutiny. The organization has lost its ability to investigate whether the company is using its status as a government contractor to financially take advantage of Georgians. They are unable to provide informed oversight over the public probation system and hold the private provider accountable.



## What terms are included in government contracts with private companies?

**N**ot only does information that a contractor gathers or produces need to be subject to public disclosure, but information about the actual contract and contracting process should be made publicly available as well. When a government entity decides to privatize a public service or program, the public should have access to information related to potential contractors, the contracting process, and copies of the actual contract. Only when armed with this information, can the public really provide stakeholder input into whether the contract is right for the community.

From the beginning, the public should have access to any cost-benefit analysis or other information used to evaluate a privatization decision. These analyses often make assumptions and must rely on estimates that may be inaccurate. Making this information publicly available allows the public to understand and analyze the government’s rationale for the contract. Once the decision to privatize is made, the public should be made aware of the government’s intention to enter into a contract with a private company, and the public should be involved in the entire process. Documents related to the contracting process, meeting minutes, and information regarding potential contractors should be made publicly available. This allows the public to voice their priorities. If privatization might affect the way public services are operated or change the fee structure of public assets, the public has a right to voice their suggestions or concerns. But the community needs access to public records related to the contracting process to fully engage in the decision-making process.



**COMPANY**  
Chicago Parking Meters LLC

**WHAT RECORDS ARE AT STAKE**

Information about the pending contract, including contract terms and planning documents, such as cost-benefit analyses.

**SIGNIFICANCE**

The public needs access to information about pending contracts to adequately provide meaningful stakeholder input before the contract is finalized.



**T**he problems that have plagued the contract that privatized Chicago’s parking meters are in no small part related to the lack of transparency and public engagement that occurred in the contracting process. When Chicago privatized the operation of the city’s 36,000 parking meters in a 75-year \$1.15 billion contract, city aldermen received only two days to review information related to the contract and decide whether to approve the contract.<sup>24</sup> Some aldermen asked why the process was being rushed. They were told by the mayor’s office that delay might cost the city money. The public was unaware that the city was considering entering into the massive contract. The public had no access to cost-benefit analyses used to justify the deal, nor did they have access to documentation that would have allowed them to understand how the contract would be structured. In effect, the public had no information about the deal or any opportunity to provide stakeholder input, even though the contract would greatly affect parking across the city.

Consequently, the contract was rife with clauses that directly opposed the public interest.<sup>25</sup> For example, the contract contained terms that allowed the private operator to significantly increase parking meter rates. It also contained compensation and non-compete clauses. The compensation clause requires the city to compensate the private operator every time there is an occurrence that may decrease the company’s revenues. This means that the city must compensate the private operator every time the city closes of streets for parades, street maintenance, or even bad weather. The non-complete clause restricts the city’s ability to build parking garages or other parking structures that could potentially impact the contractor’s revenues. The public did not have an opportunity to provide valuable stakeholder input, and government officials did not have enough time to negotiate terms that would minimize the public’s risk in the contract.



**COMPANY**

**Corrections Corporation of America (CCA)**

**WHO REQUESTED INFORMATION**

**Authors Donna Selman and Paul Leighton**

**WHAT RECORDS ARE AT STAKE**

**Copies of contracts between the company and the Texas Department of Criminal Justice.**

**SIGNIFICANCE**

**Delays and unnecessary complications to open records requests can lead to important information being withheld from the public.**

**Copies of any government contract should be made public as well.** *Government contracts with private companies can sometimes be difficult to obtain because companies may claim that information contained in documents are “proprietary information,” and disclosing that information to the public would make them less competitive.*

*Authors Donna Selman and Paul Leighton ran into this problem as they sought copies of government contracts with private prison companies to inform a recent book.<sup>26</sup> They submitted requests for information to the Texas Department of Criminal Justice for copies of contracts between the state and Corrections Corporation of America (CCA). The agency informed them that they would need to submit specific contract identification numbers in order for the agency to release copies of the contracts. The authors found themselves in a difficult predicament – without copies of the contracts, the authors wouldn’t have the contract numbers. But, without the contract numbers, the state wouldn’t release the contracts.*

*After several months, the authors were finally able to obtain contract numbers, and resubmitted the open records requests. This time, the agency failed to respond to the request in a timely manner. Selman and Leighton called to check on their requests every week for months. After 18 months from the initial request, the authors received copies of the contracts, but the records had been redacted to eliminate information that the contractor considered*

*confidential.<sup>27</sup> The process to obtain these contracts was very difficult and time-consuming, illustrating some of the tactics that contractors and agencies may use to restrict access to contracts and other contractor information. By requiring the public to provide superfluous information before processing open records requests or attempting to prolong the waiting period, agencies and contractors erect obstacles that can discourage the public from requesting information and significantly restrict access to public records.*

## Part II: Attempts to Improve Access to Public Records

**The way that governmental entities handle open records requests are not always consistent.**

The varying ways that public agencies, contractors, and the courts interpret public records laws can lead to unpredictable outcomes. In general, many state and localities have adopted open records laws similar to the Freedom of Information Act (FOIA), but specifics vary in each jurisdiction. These laws are not always straightforward, and key terms, such as “agency” or “agency records,” may not be defined adequately, making the interpretation of these laws unpredictable.<sup>28</sup>

Some open records disputes get settled in the judicial system, but court decisions can be inconsistent. Courts tend to consider factors such as whether the private company performs a government function, the level of government funding, and the extent of government involvement or regulation.<sup>29</sup> However, the subjectivity inherent to these tests can lead to varied decision-making by courts.



Some governmental entities are taking action to prevent confusion regarding open records laws, passing legislation that clarifies the applicability of open records laws to government contractors. Some states have taken great strides in making contracting information public by posting it online. This section provides examples of legislative and administrative initiatives that help shine light on privatized public information.

### Require access to contractor information in contracts

**Connecticut has one of the few laws that require** large government contracts (over \$2.5 million) to contain provisions that specify that the government agency has access to contractor records, and that these records must be disclosed to the public through the state freedom of information act.<sup>30</sup> This approach not only clarifies government and public access to contractor records, but also provides an extra layer of enforcement, by including open records requirements in the actual contract between the government and the contractor. Minnesota also requires contracts between the government and a private company to contain terms that makes public any government data that the contractor “creates, collects, receives, stores, uses, maintains, or disseminates.”<sup>31</sup> Minnesota also requires provisions within the contract that require public access to privatized public records, protects the public’s right to this data, and ensures a complete government record. This approach makes expectations of transparency clear to the contractor before the contract even begins.

### Attempts to pass federal-level sweeping sector-specific legislation

**The private prison industry** has long been highly secretive. As Tom Barry, director of the Transborder Project, relayed during a January 2010 congressional briefing, “A near-total absence of committed oversight has allowed the prison industry to flourish in the shadows. Requests for the most basic information about the functioning of these prisons and detention centers routinely lead nowhere.”<sup>32</sup> Congresswoman Sheila Jackson Lee has tried to shine light on the

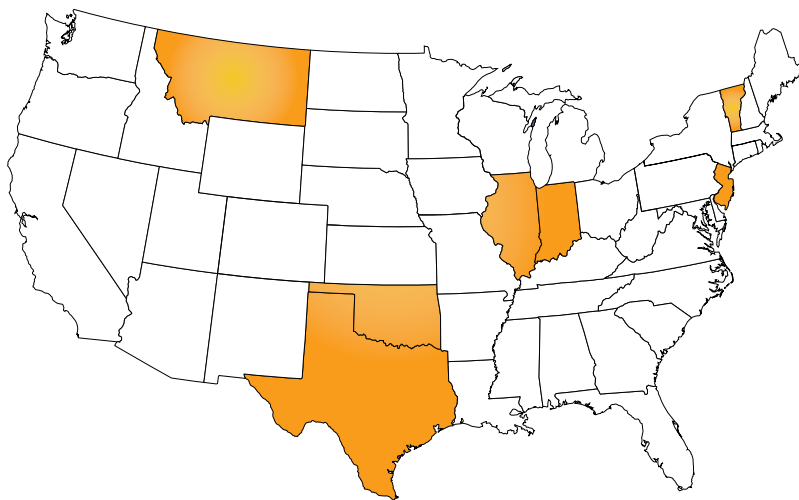
operations of private prison companies by introducing for the Private Prison Information Act (PIPA). The legislation would require non-federal prisons and other detention facilities housing federal inmates under a contract with the federal government to make the same information available to the public that federal prisons and detention centers are required to do.<sup>33</sup>

Private prison companies have spent large amount of money to lobby against this legislation. Between 2007 and 2009, CCA employed five sets of lobbyists assigned to several federal issues, including defeating PIPA.<sup>34</sup> In 2010, CCA spent \$3 million to kill the bill.<sup>35</sup> Although this bill has not yet been successful in becoming law, it represents an important way that the federal government can extend the reach of FOIA to encompass private contractors that receive funds from the federal government.



## Some states have made great strides in posting contracting data online

A few states have made great progress in making information about their contracting practices easily accessible to the public by posting this information in an easy-to-use format online. These websites allow the public to access information about contracts, and in some states, even access contracts in a searchable format. In 2009, the Center for



the Study of Responsive Law surveyed all 50 states to determine which states have the best online disclosure of government contracting information.<sup>36</sup> They specifically examined whether the state procurement website contained information related to contracts, such as the name of the recipient of the contract, the full amount of the contract, the parent company of the contract recipient, the period of the contract, and more. The report concludes that the best websites belonged to Illinois, Indiana, Montana, New Jersey, Oklahoma, Texas, and Vermont.

By taking the initiative to make contracting information publicly available in a user-friendly format, states are taking solid steps in making their contracting practices more transparent, and allowing residents to better understand how their government is spending public funds, without requiring public records requests. This helps residents keep their states accountable by giving them a more complete picture of how public monies are allocated.

## Part III: Letting the Sunshine In: Recommendations for Increased Access and Transparency

**S**ome governmental entities are making progress, but there is still work to be done to ensure the public's access to privatized public information. Below are several recommendations for lawmakers, government agencies, advocates, and the media that can help strengthen open records laws and bring greater transparency to government contracting activities.



### Lawmakers

#### Strengthen existing open records laws:

The most straightforward way for localities and states to improve access to privatized public information is for legislative bodies to strengthen open records law. Court decisions on open records issues can be unpredictable, and the best way to protect the rights of the public to contractor information is to make sure that local and state laws protect the public's right to privatized information from the very beginning, before disputes arise. Many open records laws can be improved upon in several ways:

#### 1) Expand the reach of current open records laws

Open records laws are most effective when they cover the broadest set of information. Many open records laws can be improved upon by explicitly expanding the universe of information to which the law applies. Many state open records laws do not explicitly allow access to the records of private companies that perform public functions,<sup>37</sup> creating murkiness and ambiguity in disputes over public access to privatized information. By amending open record laws to specifically provide public access to privatized information, legislative bodies can clarify for contractors, the public, and courts what information must be publicly provided.

#### 2) Decrease or tighten the exemptions allowed under the laws

Many contractors that try to evade open records laws claim that requested information should not be publicly disclosed because it falls under one of the law's exemptions. Many open records laws provide exemptions for "trade secrets" or "proprietary information," but these categories are broadly defined, or may not be defined at all. By tightening these exemptions and defining them more narrowly, the law can help clearly delineate between contractor information that truly merits an exemption, and information that should be made public.

#### 3) Enact new laws that specifically require certain types of information be made public.

Legislative bodies can enact new laws that increase open records and public access requirements for private contractors that work in particular industries or contract with specific agencies. This would be especially helpful in areas where privatized information has historically been difficult to obtain, or for an agency that contracts out a large amount of public work. For example, the proposed federal Private Prison Information Act makes explicit how information from companies that operate prison and detention facilities should be disclosed to the public. This law is crucial because it sheds light on an industry that has long been able to evade government and public transparency.



### Repeal laws that directly reduce transparency:

Laws, like the Georgia statute that exempts all records and documents related to the supervision of probationers by private corporations from the state's open records act,<sup>38</sup> should be repealed. Laws that specifically exempt entire industries or areas of public information from open records laws are directly opposed to the public interest. They overtly allow, and even encourage, corporations to hide public information. These types of laws have no redeeming value, and run counter to democracy's value of openness and transparency. These laws should be repealed, and their corporate beneficiaries should be subject to the same open records requirements as other contractors.

## Government Agencies

### Require public contracts to contain transparency provisions:

Similar to the requirements in Connecticut and Minnesota's open records laws, government contracts should all include specific provisions explicitly describing what contractor information will be made public. By including these provisions in the contract, the government can make its commitment to openness and transparency a priority at the very beginning of the contracting process, before the contract is even signed. Penalties for contractor non-compliance with open-record provisions can also be explicitly detailed in the contract. This minimizes the risk for confusion later in the contract term, when issues around disclosure of information may arise.

Such provisions must be explicit and unambiguous. When contract terms are vague, contractors can argue that certain information should not be subject to public disclosure. For example, a recent contract between Kentucky Department of Corrections and Aramark contained a provision requiring that the corporation make available to the agency "all records pertinent in the contract."<sup>39</sup> Aramark argued that certain documents requested by the agency were not "pertinent" to the contract. Contract terms that address the applicability of open records requirements to the specific contract should be carefully crafted.

### Improve government collection of contractor data:

Governmental entities should be vigilant about collecting data from contractors, to ensure a complete public record from the start. A governmental entity may not regularly collect information from contractors and, consequently, may not have the requested information in its possession. This makes the government and the public dependent on the contractor's willingness to hand over the information without resistance or delay. Governmental entities can include provisions in the contract that penalize contractors that fail to regularly submit certain information to the government or abide by open records laws. These types of penalties can be recorded in contractor databases, allowing the government to "pre-screen" contractors in future contracting opportunities and keep track of corporations that have poor track records in complying with transparency requirements.

When governmental entities collect information about prospective contractors, they should include past workforce and safety violations, employee job quality (including compensation schemes and whether the company provides health benefits), details about past performance, and any contract cancellations, to "pre-screen" companies. State and local governments that require prospective bidders to provide information about their company track record and policies, and use this information to identify qualified "responsible" bidders, report that contracts result in better outcomes – higher quality, more reliable services, reduced cost overruns and project delays, and reduced compliance and litigation costs.<sup>40</sup> By allowing public access to contractor information early in the contracting process, the government can create opportunities for the public to provide stakeholder input, ultimately improving the government's contracting process.

**Increase online disclosure of contracting-related information:**

Governmental entities should increase online disclosure of government expenditures, including providing access to all contracts. A complete list of contracts should be listed online with identifying information, including dates of contract, contracting agency, contracting amount, and what the contract was for. Copies of contracts should be included too, in an easily searchable format. In addition to information about the contract, documents related to the contracting process should be publicly disclosed online. Government entities should collect and assemble contractor databases that contain information about potential contractors and their track record. This could be similar to the federal FAPIIS database, which reports company information, including contract terminations, findings of defective or false pricing data, and contractor self-reporting of criminal, civil and administration actions.<sup>41</sup> These pre-screening tools are important ways for the government to ensure that they are choosing the most responsible contractors: contractors that have solid past performance, provide safe working environments, have few workplace or regulatory violations, and treat their workers well. Allowing the public to view this information provides the public an opportunity hold the government accountable in contracting decisions, and provide input into how the government should prioritize various factors in contracting decisions.

**Media and Advocates****Regular reporting on the contracting process:**

The media should regularly monitor and report on their government's contracting activities. This report could take the form of a weekly write-up that describes what large contracts are up for bid, and any important details that are known, such as what companies are bidding, and a description of the main issues at stake. Also, the report could highlight opportunities for stakeholder input, such as public hearing dates and important deadlines to encourage public participation in the contracting process. By regularly reporting on the local or state government's contracting activities, the media can set an expectation of greater transparency and openness of public information.

**Be persistent:**

Media and advocates can face numerous barriers to attaining information about government contracts and private contractors. As several of the case studies above illustrate, companies may use a variety of tactics to hide public information. This includes delaying the release of information, requiring specific information about the requested information that the requestor may not have access to, or even bringing costly lawsuits to prevent the release of public information. As authors Donna Selman and Paul Leighton show in the example above about requesting information about private-run prison facilities in Texas, persistence can pay off.<sup>42</sup> By continuing to request information, and using creative ways to overcome barriers, media and advocates can make sure that public information is made available. There are organizations in many states that actively work to promote open government and have expertise in their state's open records laws. These organizations may be able to provide resources or assistance in overcoming barriers. A list of state-based organizations can be found on the National Freedom of Information Coalition's website: <http://www.nfoic.org/members>.

## Conclusion

**J**ames Russell Wiggins, editor at the *Washington Post* in the 1950s, underscored the importance of open access to public information: “The more that government becomes secret,” he said, “the less it remains free.” One of the great ideas behind our democracy is that when the public has information about government operations, and can fully participate in the political process, our nation is better and stronger for it. When information is hidden because we allow private companies to decide the fate of important public records, we take a huge step backwards.

Corporations serve shareholders, and often have different priorities and goals than the government. Yet, contractors are providing public services, so it is critical that the public is able to access information about privatized public functions and hold these privatized government operators accountable. Public governance and participation is at the heart of our nation’s value system. When we have clear access to information, we can understand how government operates, why public policies are adopted, and how public funds and resources are being spent. This allows us to participate in our government, a fundamental and crucial element of a successful democracy.

We must take immediate and concrete steps to improve public access to privatized information, so we can prevent situations that deprive the public of knowledge. Currently, even the most basic information is being kept from the public. Recently, in New Mexico, a concerned citizen asked her city if she could review video recordings of past city commission meetings. The city contracts with a private company to record the meetings and maintain the video recordings. The city refused to hand over the recordings, stating that the videos were not subject to open records laws because the city did not have these recordings in its possession.<sup>43</sup> Even though the public meeting of elected city officials focused on government business, the fact that a private company held onto the official government recording of the meeting prevented citizens from reviewing what occurred. This example demonstrates how privatization can deprive us of public knowledge. Our ability to provide oversight to government and contractor activities is diminished, and public participation in the political decision-making process is frustrated. We must strengthen our open records laws, so our rights to public information and our democracy are not compromised through privatization. We must ensure that the public has access and control of public information. We must use floodlights instead of flashlights, so the public is not longer left in the dark.

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