

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

February 2, 2023

Opinion No. 23-002

Application of Tenn. Code Ann. § 38-10-102 to Private Prison Contractor

Question

Is a private prison company that contracts with a state, county, or municipal law enforcement or correctional agency to operate a prison or jail in Tennessee subject to the reporting and public records requirements of Tenn. Code Ann. § 38-10-102?

Opinion

Yes, a private prison company that has contracted with a state, county, or municipal law enforcement or correctional agency to operate a prison or jail in Tennessee is subject to the reporting and public records requirements of Tenn. Code Ann. § 38-10-102.

ANALYSIS

“All state, county, and municipal law enforcement and correctional agencies” are required to submit to the Tennessee Bureau of Investigation reports of “their activities in connection with law enforcement and criminal justice, including uniform crime reports and reports of law enforcement-related deaths.” Tenn. Code Ann. § 38-10-102(a). Those same government entities are also required by statute to “maintain a record of deaths of individuals in custody” and that record “is open for public inspection.” *Id.* § 38-10-102(e).

The Tennessee Department of Correction is authorized, under the Private Prison Contracting Act of 1986, to contract with a private prison contractor to provide correctional services to prison inmates in the custody of the Department. *Id.* § 41-24-108(a) and § 41-24-102(5). The Tennessee Court of Appeals has held that a private entity operating a correctional facility pursuant to a contract with the State is performing a government function and, therefore, “is operating that facility as the functional equivalent of a state agency.” *Friedmann v. Corrections Corp. of America*, 310 S.W.3d 366, 375, 378 (Tenn. Ct. App. 2009); *see also State v. Gilliam*, No. E2009-01079-CCA-R3-CD, 2010 WL 2670822, at *2 (Tenn. Crim. App. July 6, 2010) (finding that “by operating a correctional facility, a function traditionally performed by the State, [private entity] and its employees were engaged in a governmental function”).

Counties may also contract with the Department to house state prisoners and may then, under the County Correctional Incentives Act of 1981, subcontract with private entities to provide the correctional services. Tenn. Code Ann. §§ 41-8-101-108; Tenn. Comp. R. & Regs. 0420-2-03-.01 and 0420-2-03-.09. Those facilities being operated by a private entity pursuant to contracts

with local governmental entities “likewise are being operated . . . as the functional equivalent of a governmental agency.” *Friedmann*, 310 S.W.3d at 379.

Thus, a private prison company that has contracted with the Department of Correction or a with local governmental entity to operate a correctional facility is operating that facility as the functional equivalent of a governmental correctional agency.

As the Tennessee Supreme Court has explained, “the functional equivalency approach . . . provides a superior means for applying public records laws to private entities which perform ‘contracted out’ governmental services” *Memphis Publ’g Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 78-79 (Tenn.2002).

[T]he public’s fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor. When a private entity’s relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.

Id.

Accordingly, when a private prison contractor is operating in a way that makes it the functional equivalent of a state or county correctional agency subject to the reporting and public record requirements of Tenn. Code Ann. § 38-10-102(a) and (e), the private prison contractor will be subject to the same statutory reporting and public record requirements to which the state or county correctional agency is subject.

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