

In The Matter Of:

ORIGINAL

*Alex Friedmann v.
Corrections Corporation of America*

*Davidson County Chancery Court
Honorable Claudia Bonnyman
July 29, 2008*

*Vowell & Jennings, Inc.
214 Second Avenue North
Suite 207
Nashville, Tennessee 37201
615-256-1935*

VJ **V O W E L L**
AND
J E N N I N G S

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CHANCERY COURT OF DAVIDSON COUNTY, TENNESSE

ALEX FRIEDMANN,
Individually and as an
Associate Editor of
PRISON LEGAL NEWS,
Petitioner,
v.
CORRECTIONS CORPORATION
OF AMERICA,
Respondent.

NO. 01-1105-I

TRANSCRIPT OF PROCEEDINGS
Taken Before the Honorable Claudia Bonnyman
July 29, 2008

VOWELL & JENNINGS, INC.
Court Reporting Services
207 Washington Square Building
214 Second Avenue North
Nashville, Tennessee 37201
(615) 256-1935

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1 - APPEARANCES -
2
3 For the Petitioner:
4
5 ANDREW C. CLARKE
6 BOROD & KRAMER
7 80 Monroe Avenue, Suite G1
8 Memphis, Tennessee 38103
9 901-524-0200
10 aclarke@borodandkramer.com
11
12 For the Respondent:
13
14 JOSEPH F. WELBORN, III
15 AND
16 JASON CALLEN
17 WALKER, TIPPS & MALONE
18 150 Fourth Avenue, North
19 Nashville, Tennessee 37219
20 615.313.6000
21
22 COURT REPORTING FIRM:
23
24 JENNIFER HAYNIE
25 VOWELL & JENNINGS, INC.
214 2nd Avenue North
Suite 207
Nashville, Tennessee 37201
Telephone: 615.256.1935
E-Mail: jenniferhaynie@comcast.net

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1 (The above-styled matter came on to be heard
2 before the Honorable Claudia Bonnyman, at
3 1:00 on July 29, 2008, when the following
4 proceedings were had, to wit:)
5 THE COURT: Lawyers, this is the
6 continuation of a proceeding of several weeks
7 ago in which we discussed and made a decision
8 about or at least the Court ruled upon
9 burdens of proof and the parties and the
10 Court shared information about which cases
11 seem to be on point and what parts of the
12 case would really lead the Court to the
13 conclusion and the plaintiff filed four
14 exhibits.
15 MR. CLARKE: Yes, your Honor.
16 THE COURT: There is an affidavit
17 that has been filed, but has not been made an
18 exhibit to the hearing. You might want to do
19 that. I'm speaking as to the CCA --
20 MR. WELBORN: I would like to make
21 Mr. Groom's affidavit an exhibit to the
22 hearing.
23 THE COURT: And I'm assuming
24 that --
25 MR. WELBORN: As well as the, I

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1 think the annual, all the exhibits that we
2 filed with our notice of filing.
3 THE COURT: Okay. And you have a
4 copy of this?
5 MR. CLARKE: Yes, Your Honor. To
6 the extent it's going to be utilized or
7 dispositive of the Court's ruling, the
8 affidavit is hearsay, but I think we need to
9 get to the point of this, if it gets to that
10 point, I would like to, of course, take the
11 deposition of
12 Mr. Groom, who makes a lot of legal
13 conclusions in the affidavit. I think we
14 need to move this thing along. If the Court
15 thinks that there's a proof issue that needs
16 to done, we have made our alternative request
17 for discovery. I don't think it is
18 necessary, but for the record I will say that
19 the affidavit is hearsay.
20 The contracts that I produced are
21 public records. They are exempted from the
22 hearsay exception. They are contracts
23 received from the State, so to the extent
24 that is dispositive of the Court's ruling I
25 just note my objection.

1 THE COURT: Well, we know that no
 2 one factor can be dispositive of the Court's
 3 ruling, so if I'm going to go ahead and
 4 make -- I'm not going to, but I'm going to
 5 recognize CCA's motion to make its paper
 6 filed July 9th.

7 MR. CLARKE: And I do have a
 8 copy-of it. There's not a notice issue and
 9 everything. They served that on me.

10 THE COURT: And we'll mark that
 11 collective exhibit.

12 Are there any other exhibits that
 13 should be made, whether they're affidavits or
 14 contracts or anything else that you can think
 15 of?

16 MR. CLARKE: Not from the
 17 petitioner, Your Honor.

18 MR. WELBORN: No, Your Honor.

19 THE COURT: Because the parties
 20 indicated at the first hearing that witnesses
 21 would not be called, that fact proof was
 22 fairly limited, was very limited, I'm
 23 admitting the affidavit, which is hearsay,
 24 but it seems to the Court that the parties
 25 have been fairly informal as regards exactly

1 what the Court should look at in terms of
 2 fact evidence, and I think that the Court can
 3 go through those matters and determine which
 4 ones are actually fact and which ones are
 5 presented to make a point of law.

6 So we know that the burden of
 7 showing that CCA is the functional equivalent
 8 in the nation's government agency's own
 9 plaintiff. You've both filed supplemental
 10 briefs, which I did review. Is there -- I'm
 11 ready to hear the plaintiff if there's
 12 anything that you want to add or anything
 13 that you want to expand upon.

14 MR. CLARKE: No, Your Honor, other
 15 than what we previously argued. We have,
 16 after our initial petition and after we
 17 responded to CCA's briefs, we filed a
 18 supplemental memorandum that really went
 19 through a lot of the contracts. We would
 20 just point out very briefly without rearguing
 21 and rehashing everything over again, I think
 22 the big distinction for this Court to make
 23 and that both CCA and the petitioner have
 24 been kind of analyzing the question a little
 25 bit different, is whether or not the function

1 that CCA performs is governmental; not how
 2 they operate their own business. And I think
 3 based on that, while the Court has to look at
 4 all the factors, and I think we've briefed
 5 them fairly detailed to the Court is that
 6 there is no function that is more uniquely
 7 governmental than housing, incarcerating and
 8 having people to pay their debts to the State
 9 of Tennessee. It cannot be done without
 10 legislature, that is that being the Private
 11 Prison Contracting Act.

12 But this is all set up for us in
 13 our briefs, Your Honor. We don't have any
 14 additional proof. We do feel that there, if
 15 you want to look through all four factors,
 16 while no one is dispositive, I think the
 17 three factors that Cherokee are really a way
 18 to analyze the function, which is whether or
 19 not it is governmental or public.

20 I don't necessarily believe there
 21 are four factors. I believe there is one
 22 factor that the Court can consider in
 23 addition to whatever it wants to consider;
 24 three factors, a level of funding, the level
 25 of involvement, whether it was created by a

1 private act of the government. Those are
 2 ways to determine it.

3 We're not talking about, you know,
 4 the Humane Society. We're not talking about
 5 an entertainment group running an arena.
 6 We're not talking about something that was
 7 done ever without legislation that allowed it
 8 to. I think the fact that we have a Private
 9 Prison Contracting Act, in and of itself, to
 10 allow CCA to even operate a private prison
 11 is, in my opinion, incredibly important to
 12 the Court's consideration as to whether or
 13 not it's a governmental agency or acting as a
 14 functional equivalent of a governmental
 15 agency.

16 With that being said, we would
 17 just argue that if you asked a jail today if
 18 CCA wasn't operating a jail that we're asking
 19 for the records from, can we have these
 20 records, they would have to be produced.
 21 There is no question about it. Now, there
 22 are exceptions to the public records and I
 23 think that's what the Court really has to pay
 24 attention to because what Cherokee says, if
 25 we're not going to let a governmental entity

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1 contract out, either intentionally or
2 unintentionally, its obligation to produce
3 records.
4 Based on all the arguments that
5 we've made, based on all the briefs that
6 we've written, which we submitted for your
7 consideration; however, if the Court for some
8 reason, feels that we did not sustain our
9 burden of proof because we came up here and
10 we appreciate the Court's candor in talking
11 to us. We have been informal and we have
12 tried to put this in a ways for the Court to
13 be able to analyze it quickly. We would ask
14 for discovery.
15 We admit -- denied our
16 governmental, I mean, our public record's
17 request and we have made our alternate
18 request for discovery, because there is no
19 actual provisions in the public records' act
20 that address this, so rather than dismiss it
21 if the Court feels we haven't received our
22 burden, which we think we have,
23 unquestionably we would ask for the Court to
24 allow us to have certain discovery on the
25 Cherokee and Allen factors. Thank you.

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1 of a state agency.
2 Now I just wanted to address one
3 thing that was said just a moment ago. The
4 question was raised by
5 Mr. Clarke if you went to a jail and asked
6 for the jail records, you know, there
7 wouldn't be any question that those would be
8 turned over. I think that was the gist of
9 what he said. That are not asking for jail
10 records or inmate files. Inmate files in the
11 State of Tennessee are public records. We're
12 saying we're not the person to get those
13 from. The State of Tennessee has to produce
14 those if there's a way to request and get
15 those documents, but that's not what they're
16 requesting. They're asking for litigation
17 files of ours and our litigation department
18 has nothing to do -- it is completely
19 detached from the State of Tennessee.
20 They're not controlled by, not operated, not
21 funded by the State of Tennessee. That's
22 what they're asking for.
23 When I argued at the last hearing
24 they're trying to come at this from the
25 facility level. The facility level is not

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1 THE COURT: Mr. Welborn.
2 MR. WELBORN: Your Honor, Joe
3 Welborn here on behalf of CCA. I think our
4 argument is pretty set out in our briefs, our
5 initial briefs and supplemental briefs, so
6 I'm not going to go back through those. I
7 think the question is for the Court, and I
8 think
9 Mr. Friedmann goes away from this, is the
10 question whether CCA, the entity, is the
11 functional equivalent. That's the question.
12 And that's what the question for Cherokee,
13 and that's the question in the Allen versus
14 Day case and our position, Your Honor, is
15 unquestionably in this case, first of all,
16 they have not met their burden and they're
17 the ones who chose to have the hearing on the
18 15th, they presented no proof other than the
19 exhibits that were offered into evidence,
20 unauthenticated exhibits. They haven't met
21 the burden, but even beyond that, considering
22 the evidence that we put in the record, CCA
23 that does ten percent of its business with
24 state or local agencies in the State of
25 Tennessee, is not the functional equivalent

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1 the question. It's whether the entity is the
2 functional equivalent and they simply have
3 not met their burden, cannot meet their
4 burden, we submit, Your Honor, and for that
5 reason we respectfully submit that their
6 request be denied and their petition be
7 dismissed.
8 THE COURT: You have the last
9 word. You know, I think lawyers, you've
10 automatically separated the two major issues
11 in the case. One is whether CCA is the
12 functional equivalent of a governmental
13 agency and then the next step, if the CCA is
14 the functional equivalent of CCA is to
15 examine each and every request that's been
16 made for specific documents and the burden
17 then is on CCA to show why those documents
18 are not public record.
19 Are we agreed that's the way we're
20 going to do it?
21 MR. CLARKE: I believe that's the
22 way Allen v. Day says it, and I think that's
23 what public records says, we are dealing with
24 the functional equivalency question first.
25 THE COURT: Okay. All right.

1 Lawyers, I did, as I stated earlier read the
2 briefs in the case. I've done independent
3 research. I've looked very carefully at the
4 major cases, which are Cherokee and Allen and
5 we all agree on that and because the Court is
6 required to balance factors, not simply to
7 take one issue and use that one issue to
8 determine the outcome of this burden that the
9 plaintiff is carrying or must carry. I'm
10 going to into some detail about what the
11 factors are, what factors might be out there
12 that have not been addressed and try to
13 delineate for the Court of Appeals because
14 most of these cases do go before the Court of
15 Appeals as the second act, so the Court can
16 understand that analysis and the reasoning
17 that the Court is opining.

18 The plaintiff seeks to apply the
19 Public Records Act at 10-7-501 to his request
20 for records from Corrections Corporation of
21 American covering the time period from 2002
22 to 2007. The defendant has refused to
23 provide the documents because it takes the
24 position that it is not a government agency
25 and its records are not public records and

1 the plaintiff has sought this hearing
2 providing at TCA Section 10-7-503.
3 As the parties contentions, the
4 plaintiff contends that CCA is the functional
5 equivalent of a government agency and
6 consequently CCA is subject to the Open
7 Records Act. The defendant contends that CCA
8 is not managed or operated by the State of
9 Tennessee, that it was not formed for the
10 sole purpose of serving Tennessee
11 governmental functions. The defendant says
12 these indicia and others show that CCA is the
13 not functional equivalent of a Tennessee
14 government agency. The defendant contends
15 that as to the records some of the documents
16 sought by the plaintiff are attorney work
17 product and/or are otherwise protected by the
18 attorney/client privilege and are
19 confidential.

20 The issues to be decided include
21 whether CCA is subject to the Open Records
22 Act and if CCA is subject to the act whether
23 this entity can carry its burden to show that
24 the records sought by the plaintiff are not
25 public records. And in this regard, in

1 regard to this first issue in which the
2 plaintiff has the burden of proof the Court
3 must decide what are the most critical
4 services provided by CCA and are those
5 services the functional equivalent of the
6 services that are required of the government
7 to provide to the public.

8 The Court must also decide at the
9 end of the day whether pursuant to TCA
10 section 10-7-505, the plaintiff is entitled
11 to reasonable attorney's fees and cost based
12 upon the willful failure of CCA to provide
13 the public records.

14 Now as to the principles of law
15 that the parties have mostly agreed will
16 apply in this case, the Court will read those
17 into the record. Some of these statements
18 are from the party's briefs and they do
19 accurately express the law in the State of
20 Tennessee and others are from the research
21 that the Court has done independently of the
22 parties.

23 As to the principles of law, the
24 Tennessee legislature has bestowed upon the
25 Tennessee courts limited subject matter

1 jurisdiction to try claims arising under the
2 Public Records Act at Tennessee Code
3 Annotated 10-7-503 and 505.

4 The Constitution of the State of
5 Tennessee at Article I, Section 32 states,
6 prisons and prisoners, that the erection of
7 safe prisons, the inspection of prisons and
8 the humane treatment of prisoners shall be
9 provided for.

10 In an action under the Public
11 Records Act to obtain records, the plaintiff
12 has the initial burden of showing that CCA is
13 the functional equivalent of government
14 agencies and that CCA has the burden of proof
15 for justification of the non disclosure of
16 the records if it is the functional
17 equivalent of a government agency. And this
18 from Allen versus Day at 213 SW 3rd 244.

19 Among the nonexhaustive factors
20 relevant to this determination of whether CCA
21 or any private entity in a governmental
22 equipment include, one, the level of
23 government funding of the entity; two, the
24 extent of the government involvement with
25 regulation of or control over the entity;

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1 whether the entity, that is CCA in this case,
 2 was created by an act of the legislature or
 3 previously determined to be open to public
 4 access by law -- this is from Memphis
 5 Publishing Company versus Cherokee Children
 6 and Family Services.
 7 In the case before the Court all
 8 factors which are considered must be balanced
 9 by the Court. No single factor is
 10 dispositive and this balancing language is
 11 the from Allen versus Day. Records, we know
 12 that records in the hands of public parties
 13 are beyond the reach of the public records
 14 statute. This is from Cliff versus Campbell
 15 159 SW 3rd 565, Tennessee Court of Appeals
 16 2004. But private business and private
 17 businesses not open its records to public
 18 scrutiny merely by doing business with or
 19 performing services on behalf of a state or
 20 municipal government, but the entity must
 21 assume responsibility for providing public
 22 functions to such an extent that it becomes
 23 the functional equivalent of a government
 24 agency. This is from Cherokee 87 SW 3rd 79.
 25 The cornerstone of the analysis is

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1 whether and to what extent the entity
 2 actually performs a governmental or public
 3 function. We construe -- and this is
 4 Tennessee Supreme Court -- we construe the
 5 Tennessee Public Records Act deliberately in
 6 favor of the fullest possible public access
 7 to the public records. We filed the
 8 Connecticut Supreme Court and interpret
 9 records made overseas in connection with the
 10 transaction of public, of official business
 11 by any government agency to include those
 12 records in the hands of any private entity
 13 which operates as the functional equivalent
 14 of a government agency.
 15 In making this determination we
 16 look to the totality of the circumstance in
 17 each given case and no single fact would be
 18 dispositive. And the Supreme Court goes on
 19 to say that we intend by our holding to
 20 ensure that the government agency cannot
 21 intentionally or unintentionally avoid its
 22 disclosure obligations under the act by
 23 contractually delegating its responsibilities
 24 to a private entity. We know that the
 25 private entities may be subject to the Public

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1 Records Act if that the private entity's
 2 relationship with the government is so
 3 extensive that the entity serves as a
 4 functional equivalent of a government agency.
 5 We know that the Tennessee Code Annotated
 6 41-24-101 in sequence the Private Prison
 7 Contracting Act of 1986 was enacted for the
 8 purpose of allowing the State or regulating
 9 the State's contract with private industry
 10 which seeks to contract those services with
 11 the State of Tennessee or municipality.
 12 We know the TCA 41-24-115 also
 13 authorizes government to promulgate rules and
 14 regulations which will govern and regulate
 15 the private prison contracting found in the
 16 code. Until the Private Prison Contracting
 17 Act of 1986, neither the State nor a private
 18 prison contractor could contract to provide
 19 prison services. The State has the statutory
 20 duty to monitor, regulate, supervise, and
 21 oversee conduct and performance of CCA
 22 pursuant to TCA Section 41-24-115.
 23 If CCA is the functional
 24 equivalent of a government agency and unless
 25 it's clear that the disclosure of a record is

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1 excepted from disclosure under the Public
 2 Records Act, the Court must require
 3 disclosure even in the face of serious
 4 countervailing consideration. This is the
 5 language from Allen versus Day. The clear
 6 language of the act states that if the act is
 7 to be broadly construed, so as to give the
 8 fullest possible public access to public
 9 records, and this is language at TCA section
 10 10-7-505(D.) While the Public Records Act
 11 does not find what constitutes a public
 12 record. The Tennessee Supreme Court has held
 13 that the proper test is whether the record
 14 was made or received pursuant to law or
 15 ordinance or in connection with the
 16 transaction of the official business by any
 17 government agency. This is from Griffin
 18 versus City of Knoxville 821 SW 2nd 921,
 19 Tennessee Supreme Court 1991.
 20 Now, as to findings of the fact,
 21 the Court finds that the four contracts filed
 22 and presented by the plaintiff are not
 23 probative of the issue of whether CCA is the
 24 equivalent of a government agency and that
 25 because, and I'm very aware, that the party

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1 did not really plan to propose those
2 contracts, that not much analysis had gone
3 into the exact identity of the contract, and
4 respectfully the Court finds that, I believe
5 that's three of the contracts had expired.
6 Those are the ones that the Plaintiff had
7 that the plaintiff could propose. Maybe
8 three of the four had expired and one of them
9 I believe was with Hardeman County instead of
10 with the State and we do know that county
11 government is a child of the State, but it is
12 not directly on the point so that the Court
13 can analyze whether certain things in the
14 contract are going to provide or propose
15 different factors or help the Court analyze
16 the factors that Cherokee and Allen versus
17 Day have pointed up. So that's the first
18 finding that the Court makes.
19 CCA is a privately owned
20 corporation that was not created by an act of
21 the legislature. The plaintiff is a citizen
22 of Tennessee and pursuant to TCA section
23 10-7-503, the plaintiff made an open records
24 requested by letter dated April 24, 2007 to
25 an official of CCA.

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1 Act. The contracts with CCA must be approved
2 by the State Building Commission, the
3 Attorney General and Reporter, and the
4 Commissioner of the Tennessee Department of
5 Corrections. Proposals for contracts to
6 provide correctional services must be
7 reviewed by an oversight committee. Any
8 entity that proposes to provide, such as CCA,
9 that proposed to provide correctional
10 services must prove it's qualifications to
11 run a facility and comply with, correctional
12 standards.
13 TCA Section 41-24-101 establishes
14 performance criteria for contracts, and
15 actually requires the State to establish
16 certain performance criteria. The statutes
17 make provision for the governor to certify a
18 plan in which the State will resume control
19 of the prison when the contract with prison
20 contractors terminate. Certain powers and
21 duties are not delegable to prison
22 contractors. And those authorities and
23 responsibilities which stay with the
24 Commissioner and are not handed to or
25 contracted with a prison contractor are

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1 CCA does not have its Genesis in
2 the state legislature. It is a private
3 corporation. It is financed in large part by
4 public funds and most of its revenue for its
5 functions in Tennessee are public funds from
6 Tennessee taxpayers. It is not entitled of
7 government annuity and tort matters as a
8 matter of state Statute.
9 There's no proof, I believe I'm
10 right about this, there is no proof in the
11 record about the makeup of the board and how
12 the board is paid or if the board is paid,
13 but because this is a private corporation the
14 Court is understanding that the board or
15 private citizens in Tennessee and the board
16 is not made up of public officers.
17 CCA does maintain prisons and has
18 the custody of prisoners, all or both of
19 which are a government function. We know
20 that at TCA 41-24-110 and following the State
21 is authorized to enter into a contract with a
22 prison contractor who will provide correction
23 services as defined in the act.
24 And here I'm going to look at a
25 summary of the Private Prison Contracting

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1 developing and implementing procedures for
2 calculating inmate release and parole
3 eligibility dates; developing and
4 implementing procedures for calculating and
5 awarding sentence credit; approving inmates
6 for furlough and work release; approving type
7 of work inmates may perform and the wages and
8 sentence credit; granting, denying or
9 revoking sentence credit; placing inmates
10 under less restrictive custody or more
11 restrictive custody or changing any
12 disciplinary actions.
13 We know that the employees of the
14 prison contractors, pursuant to 41-24-113 are
15 not deemed state employees. There's certain
16 grandfather provisions regarding employees
17 who are currently within the prison system,
18 employed by the prison system, when prison
19 contractors take over prison maintenance and
20 prison management. We know that CCA
21 employees are authorized to use deadly
22 weapons and that they must -- "they", that is
23 the employees who use deadly weapons, must
24 meet the standards of national and state
25 prison associations for safety and other

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1 standards.
2 As for the analysis, that is the
3 application of the law to the facts and
4 balancing the factors that are present in
5 this case in attorney general opinion 0864
6 the attorney general stated that the Airport
7 Authority is a public agency for purposes of
8 the Records Act. The Attorney General also
9 applied the functional equivalent standards
10 in Memphis Publishing Company and Cherokee
11 Children and Family Services in analyzing the
12 Airport Authority and found, relied upon TCA
13 Section 42-3-115, which states that all land
14 and other property used or acquired by the
15 Airport Authority are declared to be inquired
16 and used for public and governmental purposes
17 and as a matter of public necessity, and as a
18 side as not nearly the force of the statute
19 the Attorney General also applied Memphis
20 Publishing to the facts in the Airport
21 Authority case, or in the Airport Authority
22 situation, and found that the Airport
23 Authority is the functional equivalent of a
24 government agency, but based primarily upon
25 the decision that the legislature has made.

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1 And in applying the law of the
2 facts the Court finds that CCA is the
3 functional equivalent of a government agency
4 based first and foremost on the fact that the
5 Tennessee Constitution makes the maintenance
6 of the prisons and the keeping of the
7 prisoners a government function and CCA, as a
8 threshold matter for the Court to decide, CCA
9 has been assigned those functions certainly
10 on a temporary basis, but it has been
11 assigned those functions. CCA does receive
12 its funding mostly from public funding and
13 here I'm talking about the functions that
14 take place in Tennessee are funded by
15 Tennessee taxpayers.
16 Government involvement is, it's
17 difficult to compare government involvement
18 in this matter with government involvement
19 with other agencies that have been found to
20 be the functional equivalent of a government
21 agency, because the facts in this prison case
22 are so different from the Airport Authority
23 facts or the facts which arose in Cherokee.
24 The Court has distinguished, earlier
25 distinguished Cherokee from the facts in this

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1 case because in Cherokee the Attorney General
2 state government was insisting upon viewing
3 Cherokee as a government agency, as the
4 functional equivalent of a government agency,
5 and here we have a private citizen litigating
6 the issue of whether CCA is a government -- a
7 functional equivalent of a government agency
8 and then we have CCA which is a private
9 agency objecting to the characterization of
10 its activities and its duties as anything
11 akin to the functional equivalent of a
12 governmental agency.
13 The Court balances the factors as
14 follows: The statutory scheme at 41-24-101
15 does require that the State of Tennessee
16 provide a liaison at the prisons to confer
17 with CCA and that person is an employee of
18 the prison system and that person's function
19 appears to be as much a monitor as other any
20 other characterization you can give that
21 person. Government involvement in the issue
22 of both the custody of the prisoners, how
23 long they're going to be there, calculating
24 and awarding all of the release and
25 sentencing decisions which strongly impact

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1 which services CCA will provide, indicate
2 that the State and CCA are so intertwined as
3 to require the Court to decide for purposes
4 of the Public Records Act, given the fact
5 that the Public Records Act says it must be
6 construed liberally and wherever possible to
7 make public record, make records which
8 probably are public, to make sure they are
9 made public and so for purposes of the Public
10 Records Act the Court finds that the fact
11 that prisons have always been in the State of
12 Tennessee a government function to be, as a
13 threshold issue, to be so far on the side of
14 the plaintiff that all of the factors, the
15 level of government functioning, the extent
16 of government involvement with, regulation
17 over or control over CCA, whether CCA was
18 created by an act of the legislature -- we
19 know it wasn't -- it has not been previously
20 determined to be open to public access by law
21 in the State of Tennessee, but the threshold
22 issue which is whether the services that are
23 provided by CCA to state government and to
24 the public are a public function is such a
25 strong threshold issue in this particular

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1 case, it's not talking about airplane flying,
2 it's not talking about any other things that
3 are government functions, but that are not so
4 essential to the safety of the public or the
5 citizens of Tennessee, I find that that
6 threshold question creates an environment in
7 which the factors must be balanced in favor
8 of finding that CCA is a functional
9 equivalent of an agency; therefore, because
10 CCA is the functional equivalent of a public
11 Tennessee agency for purposes of the Public
12 Records Act, its records are public records,
13 to the extent requested public records are in
14 the custody -- to the extent that the
15 requested public records are in the custody
16 or control of CCA, CCA is required to make
17 those records available for inspection during
18 normal business hours and may not avoid its
19 obligations under the Public Records Act by
20 directing the citizens to another
21 governmental agency that may also have copies
22 of the requested records.
23 CCA must make records immediately
24 available for inspection regardless of the
25 age, size, and nature of the records

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1 requested unless the records are confidential
2 or privileged. In all cases where any person
3 has the right to inspect such public records,
4 such person shall have the right to take
5 extracts or makes copies thereof and to make
6 photographs or photostats of the same, while
7 such records are in possession, custody and
8 control of CCA. The custodian of CCA's
9 records may enforce reasonable rules
10 governing the making of such copies,
11 photostats or photographs. If requested,
12 copies must be provided. The custodian may
13 require a charge or fee per copy that will
14 cover the cost of producing such copies.
15 And here the Court was persuaded
16 to use the language in Tennessee Opinion
17 Attorney General number 0864 because it
18 tracks the language of the statute, but makes
19 it a little more understandable, and having
20 ruled that CCA is the functional equivalent
21 of a governmental agency, we need now to
22 address the issue of which of these documents
23 that the plaintiff is seeking are
24 confidential or not, fall within the
25 exception, so I'll hear Mr. Welborn on that.

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1 MR. WELBORN: Your Honor, I'm
2 going to address the Court briefly and if I
3 can turn it over to Mr. Callen because he is
4 going to address the issues we raised. I
5 just need, I wanted to ask the Court some
6 questions about clarification on your ruling.
7 And I think, I think, I understand this. We
8 have in the State of Tennessee contracts with
9 federal government and other states where we
10 house inmates in the State of Tennessee from
11 other states. I assume your ruling is not
12 that we're the functional equivalent of a
13 Tennessee agency for those purposes, for
14 those contracts in those documents, but it's
15 the question I've got for the Court.
16 THE COURT: Okay. Now tell me
17 some more. Give me some example of what you
18 mean.
19 MR. WELBORN: For example, our
20 West Tennessee Detention Facility has nothing
21 to do with the State of Tennessee. It has a
22 contract with the federal government, the
23 Bureau of Prisons, it's either the Bureau of
24 Prisons or US Marshal's office and it also, I
25 think, there are inmates in that facility

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1 from other states and those are pursuant to
2 contracts with other states or the federal
3 government and that is not pursuant to any
4 statute in Tennessee.
5 THE COURT: That prison not -- the
6 land and the prisons are not owned by the
7 State of Tennessee.
8 MR. WELBORN: West Tennessee
9 Detention Facility is not.
10 Another example is our Whiteville
11 facility. Even though currently it has, I
12 believe, Tennessee inmates, through 2002
13 Wisconsin inmates were housed in that
14 facility pursuant to a contract with the
15 State of Wisconsin and it had nothing, again,
16 to do with the State of Tennessee's pursuant
17 contract. We even cited I think Your Honor,
18 in our reply a case that states that there's
19 no authorization in Tennessee, there's no
20 prohibition, there's no authorization in
21 Tennessee by statute to allow that to happen
22 and the Court there says it's okay, but it's
23 not pursuant to any State statute, so those
24 are two facilities.
25 I think in our Silverdale facility

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1 we have federal inmates at that facility as
2 well. I think we also have Tennessee
3 inmates. I take that back. I think there
4 are local inmates in that facility pursuant
5 to a contract with county government. And,
6 but there are some federal inmates there
7 pursuant to contract. It's either going to
8 be with the US Marshal's Office, Bureau of
9 Prisons or Office of Customs and Immigration
10 Enforcement.
11 So those contracts have nothing to
12 do with the State of Tennessee. They are
13 separate and apart. I just need some
14 clarification from the Court on if we're the
15 functional equivalent of a Tennessee agency,
16 is that with respect to the contracts in
17 Tennessee with either the State of Tennessee
18 or Tennessee local governments, which is my
19 assumption.
20 THE COURT: Well, let's hear what
21 the plaintiff has to say about the, we're
22 talking now about the west Tennessee facility
23 at -- would you tell me the name of that
24 again?
25 MR. WELBORN: West Tennessee

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1 municipality or entity is subject to the
2 Tennessee Public Records Act.
3 Federal stuff is different because
4 there is federal laws that allow them to
5 contract and allow them to be involved in
6 that and there is a federal Freedom of
7 Information Act, you know, the FOI Act. But
8 with respect to the Tennessee State stuff,
9 the state property, anything that's in the
10 State, pursuant to their operations of that
11 facility, pursuant to the contract with the
12 State, we don't care who they're housing
13 there or the function that it's serving, and
14 having that prison allow them to do it, the
15 State's got to allow the people that house
16 prisoners there from Wisconsin if they want
17 to. That's got to be something that comes
18 from the State, but if we made a distinction
19 between the federal and the state facilities,
20 we think we're entitled to everything within
21 the state facilities regardless of what
22 contract it is because they're not allowed to
23 be there except for the contract with the
24 State of Tennessee.
25 Then you get into a third and

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1 Detention Facility?
2 THE COURT: Detention facility.
3 MR. WELBORN: There's Shelby
4 Training Center and Shelby Training Center,
5 Your Honor, I think has some local or some
6 juveniles from the State of Tennessee, but it
7 also has federal inmates, and then Silverdale
8 Detention Facility in Chattanooga.
9 MR. CLARKE: Thank you, Your
10 Honor. With respect to the federal prisons,
11 that's clearly covered by the FOI. There's a
12 federal only records request that allows you
13 to get records and documents from federal
14 prisons, so I don't think even our request
15 asks for those.
16 The Whiteville, Shelby County
17 having to deal with prisoners, things like
18 that, those ones -- we think, you know, the
19 Court's ruling as of their functional
20 equivalent of a governmental entity, at this
21 point we're now in a different aspect of
22 where we are. Once they are, if they are,
23 we've been operating prisons and everything
24 they do when they're operating a prison for
25 the State the Tennessee, for a state or local

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1 fourth tier of equivalency, and I think we
2 are kind of falling back into an argument now
3 which I think the Court has made the
4 determination, I think wisely, in looking at
5 what are they doing. They're doing this,
6 this is their constitutional duty and
7 obligation and you have found that. Now
8 we're not going to be able to split the hairs
9 as we go down the road, but the federal stuff
10 is different, Your Honor. We would look at
11 that and also I would actually think our
12 records request is confined to the Tennessee
13 state stuff if you look at Exhibit A to our
14 petition. I don't think it covers the
15 federal prison and, again, at this point now,
16 now we survived our burden, with all due
17 respect to Mr. Welborn's argument here, I
18 don't know how to take it who houses what and
19 what contract according to what the issues
20 he's saying Wisconsin prisoners were here
21 pursuant -- for 2002. At this point, you
22 know, with raising of the burdens I don't
23 think he has sustained any type of burden
24 whatsoever. There's no proof whatsoever as
25 to the makeup of any prison.

1 THE COURT: All right. Now, Mr.
2 Welborn, I hear your question. You have a
3 stipulation about the federal owned and
4 operated --

5 MR. WELBORN: And we --

6 THE COURT: Just a minute. And
7 the operated entities, you don't have a
8 stipulation about anything else. And I don't
9 think I can help you with that question. I
10 don't think I have enough of a record here to
11 answer your question except to say that as
12 for the Public Records Act I found that CCA
13 is the functional equivalent of a state
14 agency and that is about the best I can do.

15 MR. WELBORN: I think that answers
16 my question that I have to produce when the
17 time comes, documents related to our state
18 activities. That's the only purpose of my
19 question. We own three of these facilities
20 that I'm talking about, so I think that
21 answers my question.

22 THE COURT: All right.

23 MR. WELBORN: What you just
24 stated, Your Honor. Mr. Callen is going to
25 address the exceptions to the Public Records

1 Act.

2 THE COURT: All right. And let's
3 get to the plaintiff's letter because I think
4 that's where we are.

5 MR. CALLEN: Okay. Yes, Your
6 Honor. And if I can just begin with that,
7 there are specifically two categories of
8 documents that are included within the
9 documents requested by Mr. Friedmann in his
10 letter that CCA contends they are exempt from
11 disclosure in the Public Records Act, even
12 with this Court's ruling today that CRA is
13 the functional equivalent of a state agency.
14 And these two categories include CCA's
15 litigation tracking database which is
16 protected by the attorney work product and
17 also includes privileged communications and
18 also a confidential settlement agreement
19 that's under seal by court order.

20 Mr. Friedmann's records request
21 includes request for, one, all spreadsheet
22 summaries where similar databases of all
23 litigation involving CCA in Tennessee that
24 resulted in payment of damages or fees from
25 2002 to the present, and that's payment or

1 damages of fees that were greater than \$500
2 and also all settlement agreements,
3 regardless of whether those agreements are
4 under seal, in suits filed in Tennessee from
5 2002 to the present in which CCA ultimately
6 paid over \$500 in damages or fees to the
7 plaintiff.

8 Now in this briefing Mr. Friedmann
9 does not dispute that records protected by
10 the attorney work product offering or
11 attorney/client privilege are not subject to
12 disclosure nor does he appear to take issue
13 with the general proposition that settlement
14 agreements under seal by court order are not
15 subject to disclosure.

16 Tennessee's Public Records Act
17 grants citizens the right to inspect state,
18 county and municipal records unless those
19 records are, quote, otherwise provided by
20 state law, close quote. That's from TCA
21 Section 10-7-503, and the key, Your Honor, in
22 that quote is the phrase, unless quote,
23 otherwise provided by state law.

24 Courts have interpreted this
25 phrase to mean that documents protected by

1 work product and the privilege are exempt
2 from the disclosure and in our opening brief
3 we cited to the Court a number of cases that
4 stand for that proposition.

5 Courts have also interpreted the
6 same phrase to mean that settlement
7 agreements under seal by court order are also
8 exempt from disclosure and, again, in our
9 opening brief we cited a number of cases that
10 have held that. Beginning first with CCA's
11 litigation tracking database, we believe as
12 outlined in our opening brief that that
13 database clearly qualifies for work product
14 protection. Tennessee's work product
15 doctrine is embodied in Tennessee Rule of
16 Civil Procedure 26.023 which protects any
17 documents prepared in anticipation of
18 litigation by or for the attorney.

19 We believe that that standard is
20 satisfied here and so attached to the opening
21 brief and now accepted by the Court today as
22 an exhibit. CCA's deputy counsel, Steve
23 Groom, testified in his affidavit that CCA's
24 litigation database was created and is
25 maintained by CCA in-house counsel in

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1 anticipation of litigation against the
2 company.
3 What that database contains is, it
4 contains lists of lawsuits filed against CCA;
5 it identifies the outcomes of that
6 litigation; contains attorney/client
7 privileged communications from CCA as the
8 client, as well as communication from outside
9 counsel; contains attorney analysis of cases,
10 exposure and loss for analysis, theory,
11 strategy and attorney thought process.
12 Now what that database has been
13 used for, it is used by CCA's attorney to
14 manage, defend, analyze the assess risk and
15 pending and future litigation. CCA's
16 attorneys specifically use the database to
17 assess risk in CCA's position and pending and
18 future litigation while identifying potential
19 settlement amount in light of that offered in
20 similar suits.
21 And not only this database
22 protected by the attorney work doctrine, but
23 it's also protected by the attorney/client
24 privilege. That database as I just described
25 to Your Honor contains privileged

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1 privileged or protected will enable the other
2 parties to assess the applicability of the
3 privileged protection, close quote.
4 That standard, Your Honor, we
5 submit is clearly satisfied here by CCA and
6 by the affidavit submitted by deputy general
7 counsel Steve Groom. In Mr. Groom's
8 affidavit CCA has identified each element
9 that is contained in the database who has
10 created the database and then what that
11 database is used for.
12 In short, CCA has done everything
13 short of producing a sample database itself
14 which, of course, under rule 26.025, it's not
15 required to do.
16 MR. CLARKE: May I respond to
17 that?
18 THE COURT: Well, wait.
19 MR. CALLEN: I was going to move
20 to discuss the settlement agreement unless
21 Your Honor has specific questions about the
22 litigation tracking database that you would
23 like me to address.
24 THE COURT: No, I'm just trying to
25 figure what is the role of Rule 26.

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1 communications, communications back and the
2 forth between CCA and its attorneys. For
3 example, the database contains the
4 confidential settlement amounts which
5 communicated to CCA's in-house attorney
6 through their employment and, therefore, is
7 covered by the attorney/client privilege.
8 Now Mr. Friedmann responds in his
9 briefing, the only response that I'm aware of
10 in his briefing, to this assertion of
11 protection for the database by work for work
12 product, attorney work doctrine,
13 attorney/client privilege is to argue that
14 CCA hasn't been specific enough in its
15 identification of this database.
16 Well, the standards that CCA must
17 satisfy in assertion of work product
18 protection and attorney/client privilege is
19 found in Tennessee Rules of Civil Procedure
20 26.025. That rule provides that the party
21 asserting privilege for work product
22 protection, quote, shall describe the nature
23 of the document, communications or things not
24 produced or disclosed in a manner that,
25 without revealing information thought

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1 MR. CALLEN: Well, the role of
2 Rule 26, Your Honor, is in this instance was
3 to define -- to provide first the definition
4 of the standard for work product protection
5 and then it was our stance that it also
6 defines what CCA is required to do in terms
7 of asserting that rule and, excuse me, in
8 terms of asserting that protection under the
9 work product doctrine, what type of showing
10 CCA required to make.
11 Mr. Friedmann, in his briefing,
12 suggested that CCA needed to submit a
13 privileged log or something along those
14 sorts. In our briefing as well as in Deputy
15 General Counsel Steve Groom's affidavit, CCA
16 went far beyond what was privileged. We
17 identified who created this database, each
18 element of what is contained in the database
19 and what that data is used for.
20 THE COURT: Well, I know that that
21 database is something that CCA counsel is
22 very concerned about. I understand that, but
23 I wanted to ask first about number one in the
24 letter which says, I am requesting the last
25 complaint or amended complaint each and every

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1 lawsuit claim and other legal action filed
 2 against on Corrections Corporation
 3 originating in the State of Tennessee.
 4 Now \$500 or more in damages, you
 5 may not be able to -- that's a lot of work
 6 for somebody to go through and find a number
 7 500, but what about the complaints or amended
 8 complaints?
 9 MR. CALLEN: Your Honor --
 10 THE COURT: Are those -- do you
 11 keep them stored or do you just keep the
 12 information about the lawsuit?
 13 MR. CALLEN: Your Honor, it's my
 14 understanding that the, almost the entirety
 15 of what Mr. Friedmann has requested is likely
 16 stored, but I can't guarantee that, but it's
 17 almost all stored either in offsite storage
 18 facilities or with CCA's counsel and we would
 19 have to go through and determine whether or
 20 not all these materials dating back to 2002
 21 in fact still exist and are still in CCA's
 22 possession. Some of those complaints may
 23 still be there, may likely to be still there,
 24 some of them may not. Obviously, as Your
 25 Honor indicated, by requesting all complaints

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1 from every case in which CCA ever paid more
 2 than \$500, that could potentially be a large
 3 spectrum of cases and I can't, standing here
 4 today, guarantee that every single one of
 5 those complaints have been saved throughout
 6 the five years period or six years, I guess,
 7 dating back to 2002 of what Mr. Friedmann is
 8 seeking.
 9 THE COURT: Well, it might be, I
 10 don't know if the plaintiff here, I'm going
 11 to ask the plaintiff, what you really want.
 12 I know you'd like to have a copy of the
 13 complaint. What you really want I'm
 14 understanding is probably to know what are
 15 the cases. Would that be right?
 16 MR. CLARKE: I mean, to get back,
 17 what we want, what my client wants and I
 18 submit to the Court with all due respect and
 19 I hope this doesn't come out wrong, what my
 20 client wants any public record for is
 21 immaterial and it's relevant. I could go in
 22 and talk about what I think my client wants
 23 to do, but you know what, I never asked him,
 24 because I really don't care. He runs a
 25 prison, legal organization. CCA is an

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1 organization that tries to settle cases in
 2 secrecy. I think he wants to know, I think
 3 that he's entitled to know the types of
 4 complaints that are filed. For him that
 5 reaches a certain threshold or benchmark.
 6 The problem I'm having right now is to
 7 show -- and now we're past my burden and with
 8 all due respect to my wonderful opposing
 9 counsel here 26.05 requires a privileged law
 10 and they have not produced it and according
 11 to Rutter D. Wells, they cannot come in here
 12 and say, I got this general claim of
 13 privilege. And I'm sitting here trying to be
 14 as respectful to the situation --
 15 THE COURT: Well, hold on one
 16 second. One reason I'm asking about the
 17 complaints and the amended complaints in each
 18 and every lawsuit is because none of that can
 19 possibly be privileged.
 20 MR. CLARKE: Right.
 21 THE COURT: The actual existence
 22 of those papers, and so let's get back to
 23 this side of the table and just say, you
 24 stated to me that you think you probably have
 25 those somewhere. To the extent that you have

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1 them you have to bring them forward and let
 2 the plaintiff inspect them.
 3 MR. CALLEN: That's correct. To
 4 the extent that we have those complaints,
 5 Your Honor, we do have to follow the Court's
 6 ruling that we do have to, of course, as you
 7 also held that we are able to set specific
 8 rules for copying costs and to the extent
 9 that Mr. Friedmann wants to copy any of those
 10 complaints. I wasn't and I didn't want to
 11 confuse the Court, I wasn't specifically
 12 addressing those complaints. I was
 13 specifically addressing the litigation
 14 database. It is likely to run through each
 15 one of the requests.
 16 THE COURT: I think that would be
 17 the most efficient way to move forward.
 18 MR. CALLEN: Beginning with the --
 19 we discussed the complaints, Your Honor,
 20 which is the first request. The second
 21 request was for verdict form releases, claim
 22 payment forms and settlement agreements.
 23 I'll specifically come back to and address
 24 settlement agreements, but verdict forms
 25 releases claim payment forms to the extent

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1 that those aren't drafts protected by
 2 attorney work product doctrine, I believe we
 3 would be required to produce those.
 4 All Tennessee state has a third
 5 request that Tennessee state, county and
 6 municipal government reports, audits,
 7 investigations or similar reports issued from
 8 2002 to the present, which found that CCA did
 9 not comply with its contractual obligations.
 10 You know, those documents as we pointed out
 11 in our initial response letter are available
 12 from other public agencies, but of course now
 13 the Court has found CCA to be the functional
 14 equivalent we would not contend that those
 15 documents are not subject to disclosure by
 16 CCA.
 17 All Tennessee court rulings
 18 issuing injunctive or declared to a judgment
 19 to get CCA from 2002 to the present, again, I
 20 would just say that those are available from
 21 court files. Of course, since we are again
 22 held to be the functional equivalent we will
 23 produce those to the extent that we have
 24 them. I cannot represent to the Court today
 25 that we have every single court ruling issued

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1 injunctive of declaratory relief dating back
 2 six years.
 3 The next request is for the all
 4 spreadsheets, summaries or similar databases
 5 of all litigations involving CCA in Tennessee
 6 that resulted in payment of damages or fees
 7 from 2002 to the present. That's what I have
 8 just been addressing. In respect to Mr.
 9 Clarke's point that we can't assert a general
 10 claim of privilege. I don't think that's at
 11 all what we're doing. We specifically
 12 described the database that we believe fits
 13 within in this request and would be
 14 responsive to this request, but that we
 15 contend is protected by the attorney work
 16 product and privilege for all the reasons
 17 outlined. It's not a specific general
 18 assertion privilege for work product
 19 protection that CCA has named. We
 20 specifically identified the document. We
 21 stated exactly the elements of each element
 22 of what's contained in that document, who
 23 creates it and what it's used for and we've
 24 done that through sworn testimony and
 25 submitted the affidavit of Mr. Groom.

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1 Next request is --
 2 THE COURT: Let's stay on five
 3 just for a moment. You apparently do have a
 4 spreadsheet or some sort of database showing
 5 all litigation against CCA including
 6 Tennessee, which resulted in the payment of
 7 money damages. Now, I'm assuming that you
 8 can make prints of screens. I'm assuming
 9 that you can make a print of a screen that
 10 summarizes the actual names of the cases.
 11 MR. CALLEN: It summarizes the
 12 names of the cases, to create a separate --
 13 are you asking, Your Honor, I just want to
 14 make sure I understand, are you asking can we
 15 create a separate document from what our
 16 litigation tracking database is using
 17 information that's contained in the database?
 18 THE COURT: You're telling me that
 19 some of this information is privileged and
 20 I'm saying it's certainly not all privileged,
 21 so I'm trying to get a handle on what the
 22 database looks like. Ultimately, I may have
 23 to look at it myself, but I'd rather not, but
 24 I'm trying to figure out what it looks like
 25 and whether there are spreadsheets, summaries

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1 and screens that can be printed that just
 2 show the name of the cases, the summaries,
 3 the litigation that concluded which maybe you
 4 have a column that shows what the money
 5 damages were. Maybe you have that or maybe
 6 you don't, but I'm trying to get a feel for
 7 what that looks like.
 8 MR. CALLEN: To address that, Your
 9 Honor, I will say that my contention isn't
 10 that all of the information in the database
 11 is privileged. There is privileged
 12 information, but more broadly the entire
 13 database is attorney work product that's
 14 created in anticipation of litigation. The
 15 only reason that database is created is for
 16 CCA attorneys to be able to manage their
 17 current litigation and that they've prepared
 18 in anticipation of future litigation so that
 19 CCA can assess its risk going forward.
 20 The database, I think to get to
 21 Your Honor's point, it's my understanding
 22 that it does contain a list of cases. It
 23 doesn't contain outcomes from the cases. If
 24 a verdict was entered, the amount of the
 25 verdict, if a settlement was entered into,

1 the amount of the settlement or if the case
2 was dismissed, it might indicate that as
3 well. Going even more beyond that as it's
4 created and as that information is put in,
5 also put into the database are attorney
6 thought processes, what their assessment of
7 their case, how this case might impact other
8 currently pending or future litigations that
9 CCA might enter into, so there's a wealth of
10 information that is entered into this
11 database that goes beyond I think what Your
12 Honor is getting at.

13 THE COURT: I think it goes beyond
14 what he is requesting too. He's requesting
15 spreadsheets and databases that show all
16 cases or claims involving prison property or
17 litigation concluding against CCA, so I don't
18 think he's looking for anything that you
19 described that you're concerned about.

20 MR. CALLEN: Your Honor, just to
21 circle back, that isn't all of our database.
22 Our database contains all of this
23 information. I think -- are you suggesting
24 that what he's looking for is something that
25 would require us to then delete out certain

1 information from that database?
2 THE COURT: Maybe you would need
3 to. I don't know what the prints of your
4 screens would look like, so I'm trying to get
5 a feel for that.

6 MR. CALLEN: My understanding is
7 that a print from the screen could include
8 the types of privileged information that I'm
9 talking about.

10 THE COURT: Do you know that?

11 MR. CALLEN: I think -- I believe
12 that it can, yes, your Honor. And as far as
13 just again to circle back, whether or not it
14 would even include the privileged and
15 confidential communication, once again, that
16 information is being created, the database
17 itself is being created by CCA's attorney and
18 is being created for the purposes of
19 litigation and anticipation of litigation and
20 impending litigation, so we would contend
21 that the whole database itself is protected
22 attorney work product.

23 THE COURT: Well, we get to, when
24 we get through the list I'll have the
25 plaintiff respond. Now we're looking at

1 number six.

2 MR. CALLEN: All contracts between
3 CCA and Tennessee related agencies and
4 entities from 2002 to the present, CCA is
5 contending today that those should not be
6 subject for disclosure or exempt from the
7 disclose act.

8 THE COURT: Okay. Just one
9 second. You're saying in number six they are
10 exempt or are not?

11 MR. CALLEN: No. Are not. Not
12 exempt.

13 THE COURT: Okay.

14 MR. CALLEN: Not exempt from the
15 act.

16 THE COURT: That's what I thought.
17 Okay.

18 Now, going back and looking at
19 number one, I'll ask the plaintiff to
20 respond.

21 MR. CALLEN: And Your Honor, I'm
22 sorry, before I sit down I just want to make
23 sure I didn't make any argument concerning
24 settlement agreements if you want to hear
25 from Mr. Clarke first just regarding the

1 litigation that's fine. I just wanted to
2 make sure if you wanted to hear from CCA's
3 position regarding why a settlement should be
4 exempt, a settlement agreement under seal by
5 court order should be exempt from disclosure
6 I'm happy to address that now.

7 THE COURT: Not right now. Thank
8 you.

9 MR. CLARKE: Thank you, Your
10 Honor. In going through the list just to
11 make sure I understand, we don't contend that
12 anything that is true attorney work product
13 or true attorney/client privilege is subject
14 to production under the Open Records Act. We
15 will cite to you Rudder v. Wells that says
16 they can't just say that it is this thing, I
17 don't have my rules, but I saw
18 Mr. Welborn with the rules, if I could borrow
19 this. Under Rule 26.05 I believe it is,
20 "when a party withholds information otherwise
21 discoverable under the rules by claiming it
22 is protected as trial preparation or any
23 other materials or any other privileges,
24 shall give a law."

25 So they can't come here, I submit

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1 to the Court, and show cause hearing and come
 2 up and say well, I think, you know, it's
 3 this, it's this. My guy says it was made in
 4 anticipation of litigation that applies to
 5 all documents. That's wrong. You have to
 6 have the date, the time, what it was for,
 7 description so we can evaluate the privilege.
 8 We don't have any of that here.
 9 Let me just kind of get to the
 10 meat of the coconut. With respect to the
 11 complaints and anything over \$500, we're
 12 trying to just get copies of complaints where
 13 there was a monetary payment. I don't think
 14 they've argued or I must have misunderstood
 15 if they did, Mr. Callen argued that we are
 16 not entitled to these things. We want to
 17 inspect everything first, Your Honor, and
 18 then make sure if we want to copy it we
 19 decide if we want to pay to copy it.
 20 Verdict forms, releases, claimant
 21 forms, these are not attorney/client --
 22 verdict forms, releases, you know, anything
 23 that deals with any kind of release is black
 24 letter law under the Public Records Act that
 25 you cannot make a settlement agreement

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1 confidential. Only the legislature can make
 2 an agreement settlement confidential. I've
 3 cited in my brief beyond argument that they
 4 can do this. Swift v. Campbell even says a
 5 settlement agreement made confidential by the
 6 Federal Rules of Civil Procedure is the not
 7 exempt from the Public Records Act.
 8 We have to look at state law,
 9 interpret state law. Nothing in federal law
 10 applies to exempt us from the Tennessee
 11 Public Records Act. Swift v. Campbell says,
 12 "we decline to hold the rules governing in
 13 proceedings in federal court for the
 14 Tennessee public records statute, so when you
 15 get into -- when you look at a settlement
 16 agreement, the extent this is the covered by
 17 it, they don't have the right as the
 18 functional equivalent of a governmental
 19 entity to enter into those agreements.
 20 I will cite to the Court pleading
 21 the case if I need to, but I don't think I
 22 have to. They are in my brief. I think with
 23 respect to paragraph one, paragraph two we
 24 get everything. With respect to paragraph
 25 three, this is the government audits, I think

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1 they said we're titled to get them with
 2 respect to court rulings and injunctions and
 3 declaratory judgments I think they said we're
 4 entitled to get them.
 5 With respect to these
 6 spreadsheets, let me point out to the Court,
 7 under the Public Records Act it expressly
 8 says you cannot refuse to produce something
 9 just because it contains confidential
 10 information. A perfect example is a law
 11 enforcement officer's personnel file. If I
 12 want to get it I make a request, I go down to
 13 Nashville, I go down to the City of Memphis,
 14 they give me the record, but they have to
 15 redact Social Security numbers, they have to
 16 redact -- the Court is looking for a cite, I
 17 believe it's 10-7-504. So when you have a
 18 document, you know, a personnel file is, when
 19 it comes up most of the time you have
 20 somebody's home address, telephone number,
 21 Social Security number. Now they can't, if
 22 the fact that the document contains
 23 confidential information, we wouldn't be able
 24 to obtain any of those records, but it's
 25 clearly a public record.

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1 If they contend that something in
 2 the litigation database spreadsheet is
 3 confidential they can scratch through it;
 4 however, I would submit this to the Court and
 5 while this is not my burden it is my belief
 6 and my understanding based on my information
 7 from my client, that CCA creates these
 8 databases like I'm holding here, Your Honor,
 9 and they submit them with bid proposals, and
 10 this contains absolutely no confidential
 11 information. Facility, matter, nature of
 12 action, date opened, incident date, outcome,
 13 date of occurrence. There is not one iota of
 14 confidential information in this litigation
 15 spreadsheet.
 16 Now, they may be talking about
 17 something different, something broader,
 18 something that encompasses more. I don't
 19 know. I don't have a privilege law. I have
 20 somebody saying we obtain things in
 21 anticipation of litigation. I'm going to say
 22 that my client has produced this to me as a
 23 contract bid proposal as an attachment to
 24 Dickson County, Dickson County, Tennessee,
 25 which we clearly would be privileged as

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1 waived. Now again, with respect to this the
 2 aspect of the hearing, I have not seen
 3 anything that can even allow the Court to
 4 properly evaluate the privilege. The only
 5 thing I will agree to is if there is, as the
 6 case law has said, it has determined
 7 attorney/client privilege stuff, is not
 8 subject to protection. You have to evaluate
 9 the particular information. Work product is
 10 not.
 11 I would say the biggest point that
 12 I think we're going to have an argument about
 13 is confidential settlement, make confidential
 14 settlements. If there is no court order
 15 there is absolutely no basis for their not
 16 being produced. That's number one.
 17 Number two, if there is an order
 18 it depends on what it is. Pursuant to
 19 Tennessee versus Adams, Rule 31 confidential
 20 settlement, based on our Supreme Court
 21 arbitration Rule 31. That is subject to
 22 disclosure. I would have to see the actual
 23 rule of civil procedure by which the Court
 24 actually closed it. I would say this: A
 25 federal case can't be confidential under the

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1 Tennessee Public Records Act. That's Swift
 2 v. Campbell at page 577.
 3 So we don't have any kind of
 4 preemption there. It's cited in my response
 5 filed on July 11th on page 12, but I don't
 6 know what they're talking about, the
 7 litigation --
 8 For identification I would like to
 9 mark this, Your Honor.
 10 THE COURT: All right.
 11 MR. CLARKE: I would be happy to
 12 respond to any other questions the Court has.
 13 THE COURT: Is there anything else
 14 you like to say? You have the burden so you
 15 have the last word.
 16 MR. CALLEN: Your Honor.
 17 THE COURT: All right. I've got a
 18 paper proposed here that says settlement
 19 report from 1/1 through 12/31/03. This is
 20 provided to educate the Court about what
 21 might be possible and about -- to give the
 22 Court an idea of what it is that the
 23 plaintiff thinks is there that he should be
 24 able to inspect, so I'm going to mark that as
 25 the next numbered exhibit, Number 6.

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1 MR. CLARKE: Thank you, Your
 2 Honor.
 3 MR. CALLEN: And Your Honor, just
 4 to begin with what is our burden, I agree
 5 that it is our burden here today to assert
 6 and show that certain documents are protected
 7 by attorney work product or are privileged.
 8 I dispute though, I think Mr. Clarke was
 9 making a suggestion that these documents
 10 that, you know, we had seen and don't know
 11 for sure where they exactly came from, they
 12 haven't been offered through testimony, the
 13 extent that he's arguing that those
 14 constitute some type of waiver of
 15 attorney/client privilege or work product
 16 protection, I would dispute that it is our
 17 burden to show that we haven't waived work
 18 product or attorney/client privilege through
 19 those documents that have been submitted, but
 20 what I want to circle back to is the specific
 21 request that Mr. Friedmann has made.
 22 His request for litigation
 23 spreadsheets or summaries or similar database
 24 tracking litigation is not limited and I'll
 25 read the specific language. I'm

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1 requesting -- I'll quote, "I am requesting
 2 all spreadsheets, summaries or similar
 3 databases showing all litigations including
 4 against CCA in Tennessee which resulted in
 5 payment of money damages, settlements,
 6 sanctions, claims and/or attorney fees from
 7 January 1st, 2002 through and including the
 8 date of this letter regardless of whether CCA
 9 contends that the payment of money damages
 10 are work confidential. Said documents should
 11 include the names of the parties, name and
 12 location of the court, case and claim number,
 13 the amount paid and the types of claims. All
 14 cases or claims involving prisoner property
 15 damage or lost property shall be excluded
 16 from these records," close quote.
 17 Just to go back to the first
 18 sentence or first phrase, "I'm requesting all
 19 spreadsheets, summaries or on the similar
 20 databases" and with the large scope of this
 21 request the database that litigation database
 22 that I've described to you today, Your Honor,
 23 would clearly fit within his request and that
 24 is why CCA is arguing that that database
 25 shouldn't be required to be produced. It

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1 would fit within the scope of his request and
 2 we contend for all the reasons that we put
 3 forward and particularly that are set forth
 4 in Mr. Groom's affidavit that that database
 5 is protected attorney work product and it
 6 also contains privileged communication. And
 7 because of the attorney work product, Your
 8 Honor, it's not as a simple a task as to
 9 simply excise certain information that is
 10 deemed privileged or confidential. The whole
 11 database itself is protected because it's
 12 attorney work product. It's created by CCA's
 13 attorney and maintained by CCA's attorney
 14 during impending litigation and the
 15 anticipation of future litigation, so the
 16 whole database itself is protected attorney
 17 work product and a disclosure shouldn't be
 18 required merely by excising certain
 19 information that could or could not be
 20 considered confidential or privileged because
 21 the whole database itself is protected work
 22 product.
 23 Now, I want to move back to the
 24 second category of documents that Mr. Clarke
 25 addressed and that's our settlement

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1 agreements. And what the type of settlement
 2 agreement that CCA contends are not subject
 3 to disclosure by settlement agreements that
 4 are under seal by court order. And I want to
 5 make that distinction clear to the Court
 6 because what's important here is that CCA
 7 doesn't want to end up in the crosswise
 8 position of being forced to choose which
 9 Court's order to comply with. If the Court
 10 were to order CCA to produce documents that
 11 are under seal and that has been ordered by a
 12 federal or state court not to produce, then
 13 CCA is going to be in a particularly
 14 difficult position. CCA would be forced to
 15 choose which Court's order to comply with and
 16 I do not think that that is required under
 17 the Tennessee Public Records Act.
 18 First, to begin with, there are
 19 settlement agreements that CCA has entered
 20 into that are under seal by state court
 21 order. We contend that those settlement
 22 agreements are not subject to disclosure
 23 under Tennessee's Public Records Act. We
 24 cited several cases in our opening brief that
 25 say that court order -- court orders under

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1 seal or settlement agreements trump the
 2 requirements of the Tennessee's Public
 3 Records Act.
 4 The second type of settlement
 5 agreements are settlement agreements that CCA
 6 has entered into under seal and that are
 7 under seal by federal court order and Mr.
 8 Clarke has argued that those particular
 9 settlement agreements that are under seal by
 10 federal court order are subject to disclosure
 11 and we dispute that. There are two reasons
 12 that those settlement agreements under seal
 13 by federal court order are exempt from
 14 disclosure under the Public Records Act.
 15 First, federal court orders
 16 entered pursuant to the Federal Rules of
 17 Civil Procedure 26(C) enter into those
 18 settlement agreements under seal, those
 19 orders combine the Federal Rules of Civil
 20 Procedure 26(C) preempt Tennessee's Public
 21 Records Act requirement.
 22 Second, second reason is that
 23 state courts based on the case law that we
 24 cited in our opening brief should avoid
 25 issuing orders that seek to void or otherwise

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1 reverse a federal court order requiring us to
 2 keep those documents under seal and
 3 confidential.
 4 I'll begin with the preemption
 5 issue first. When CCA entered into a
 6 settlement agreement and the federal court
 7 entered that order under seal it does so
 8 pursuant to Federal Rules of Civil Procedure
 9 26(C) which broadly grants federal courts the
 10 authority to enter protective orders
 11 requiring the filing of documents under seal
 12 and thereby ensuring their confidentiality.
 13 When a federal court enters an argument to
 14 CCA requiring CCA and the other party in the
 15 litigation to keep a settlement agreement
 16 confidential, that order combined with Rule
 17 26(C) trumps the required Public Records Act.
 18 The ruling in Swift versus
 19 Campbell is not inconsistent with this
 20 analysis. As Mr. Clarke suggested to the
 21 contrary, that case did not involve a
 22 settlement agreement. What was going in that
 23 case, Your Honor, was the Court was faced
 24 with a broad, vague claim that the federal
 25 rules of civil procedural somehow as a whole

1 trump the requirements of the Public Records
2 Act. That case, Your Honor, involved a
3 request from a federal public defender to a
4 state assistant attorney district general for
5 that state assistant district attorney
6 general litigation and investigation file for
7 the federal public defender's client. This
8 was occurring within the context of a pending
9 federal writ of habeas corpus petition. It
10 was pending in the district court. Instead
11 of using normal mechanisms of discovery in
12 federal case, the federal public defender
13 submitted a Public Records Act request to the
14 state district attorney general for his
15 litigation file. In response to that request
16 the state assistant district attorney general
17 made several arguments. First, he argued
18 that his files were protected by attorney
19 work product and privilege.

20 Next, he argued that even if
21 attorney work product or privileged
22 protection didn't apply, the Federal Rules of
23 Civil Procedure where the avenue that the
24 public defender has to use to get that
25 information and not a public record's

1 request. So that was the specific issue that
2 the Court in Swift versus Campbell was
3 dealing with and what the Court ultimately
4 said in dicta because they initially held
5 that large aspect of that file, the assistant
6 district attorney general's file was
7 protected by work product and privilege and
8 protection, they held that first, that in
9 dicta that went on to say well, it's also
10 true that we don't believe that the federal
11 rules somehow uphold or prevent a party from
12 also submitting a request through Tennessee's
13 Public Records Act for those documents.

14 That's totally not the situation
15 that we're dealing with here. We're dealing
16 with a federal court orders entered pursuant
17 to a specific Rule of Civil Procedure, Rule
18 26(C) that are requiring CCA to keep these
19 documents under seal and confidential. Those
20 rules and those, that rule and that order
21 combined together to trump any requirement
22 that CCA would otherwise have under
23 Tennessee's Public Records Act.

24 The second, even if you put aside,
25 Your Honor, the issue of preemption, we cited

1 to you several federal court of appeals cases
2 that discussed the danger of a state court
3 stepping in at a later date posthoc, after a
4 federal court has already issued an order and
5 then the state court seeking to reverse or
6 overturn or otherwise void the federal court
7 order. Those federal courts of appeals cases
8 that we cited made clear that this is not
9 something that state court should seek to do
10 and something that state court should avoid.

11 In particular we cited to you a
12 Ninth Circuit decision from 2003, JC and KB
13 Investments, Inc. versus Wilson. There the
14 Ninth Circuit was faced with a situation
15 where a federal district court had issued an
16 order confirming an arbitration award. A
17 later state court decision ruled that the
18 federal district court lacked jurisdiction
19 and the arbitration order was void and
20 vacated. The Ninth Circuit held that that
21 later state court order could not trump the
22 earlier federal court order.

23 Despite whether or not that prior
24 court order was correct or wrong on the
25 merit, in assessing whether a state court

1 could void a federal court decree nunc pro
2 tunc, the Ninth Circuit specifically held
3 that, quote, the well-established principle
4 is to the contrary for state courts have no
5 power to void federal court decree and the
6 federal court may join such impermissible
7 collateral tax on federal judgments, close
8 quote.

9 Your Honor, again I want to make
10 clear we're talking about two categories of
11 documents the type of settlement agreements
12 that CCA contends are not subject to
13 disclosure; those under seal by state court
14 order and those under seal by federal court
15 order. CCA obviously wants to avoid the
16 danger of being forced to choose which
17 Court's order to comply with, because those
18 courts, despite whatever this Court rules
19 today, those other court orders will still be
20 out there and still be binding on CCA.

21 If you have no questions, Your
22 Honor, I have nothing further.

23 THE COURT: Now, they have the
24 last word.

25 MR. CLARKE: Can I provide you a

1 cite, Your Honor, I mean a citation to Swift
 2 v. Campbell?
 3 THE COURT: No, I have a copy of
 4 it. Thank you. Anything else on this side
 5 of the table?
 6 Okay. What we ought to get done
 7 today is to produce an order that clearly
 8 states the reasoning why the Court has found
 9 that CCA is the functional equivalent of a
 10 government agency and, too, an order saying
 11 exactly what papers the plaintiff has
 12 requested that the plaintiff should be
 13 allowed by law under the Open Records Act to
 14 inspect. That's what I'm doing, I'm going to
 15 do that right now so everybody can see if
 16 there's any -- what I want to hear from you
 17 afterwards is if there is a fundamental
 18 question and you can't figure out what I
 19 mean, I do want to know that. I don't want
 20 to hear any more argument because we have
 21 done that. You've done a good job with your
 22 briefs. I don't really know what else you
 23 could tell me that you haven't already told
 24 me. I think we've looked at all the cases.
 25 I believe we have. If there is a question I

1 want to make the order as clear as I can
 2 because that's really what I'm supposed to
 3 do.
 4 So as to the plaintiff's request,
 5 this court orders that the plaintiff may
 6 inspect, and that means that CCA must make
 7 available at its offices in Nashville,
 8 Tennessee to the extent that CCA has these
 9 papers anywhere in its custody or under its
 10 control, all complaints against CCA in which
 11 the complaints originated in Tennessee.
 12 Now, the plaintiff appears to be
 13 most interested in those where resulted in at
 14 least a \$500 payment or so in damages,
 15 attorney's fees or settlements and rather
 16 than subrogating those out, if CCA wants to
 17 provide all of them, then I would just put
 18 all of them out for the plaintiff to inspect.
 19 If you choose to segregate those
 20 \$500 cases from the other complaints and just
 21 make those available, that seems to be, that
 22 would satisfy the plaintiff according to his
 23 letter and so I think that's just up to CCA,
 24 how you have them stored and that sort of
 25 thing. Whatever makes the most sense and

1 takes -- take it indoors and the amount of
 2 time you go through them and figure out which
 3 one are \$500 cases and give him all of them.
 4 Number two, the plaintiff may
 5 inspect verdict forms, releases, claim
 6 payment forms, settlement agreements, all
 7 settlement agreement whether confidential or
 8 not, unless there's a court order stating
 9 that the agreement is sealed. And in lieu of
 10 providing, in that case, in lieu of providing
 11 the settlement agreement, then CCA must make
 12 available for inspection the orders that seal
 13 the non provided settlement agreement and
 14 when I say provide, I don't mean make copies
 15 or do anything else, I just mean make them
 16 available so that the plaintiff can look at
 17 them and decide which copies it makes sense
 18 to pay for. And this is from the date
 19 January 1, 2002, so that CCA doesn't have to
 20 go through everything it's ever owned, but
 21 just from January 1, 2002.
 22 Number three has been conceded.
 23 The defendant, CCA, agrees that those papers
 24 that it has are and will be public documents
 25 under the Court's ruling.

1 Number four, I think is the same
 2 so long as there's no order sealing any of
 3 those findings and again if there is a
 4 sealing then the plaintiff would need to see
 5 the sealing order so the plaintiff can be
 6 assured that the plaintiff has been shown the
 7 documents, the public records that he's
 8 requested to inspect.
 9 Number five, the issue in number
 10 five is really not the database. The issue
 11 is providing the plaintiff in some form that
 12 is legible and can be copied, summaries or
 13 spreadsheets or databases or lists showing
 14 all litigation concluded against CCA in
 15 Tennessee, which resulted in payment of money
 16 damages or settlements or sanctions or claims
 17 or attorney's fees from January 1, 2002
 18 through and including the date of this
 19 letter. And that is whether the monies that
 20 were paid are subject to the confidentiality
 21 agreement. If they're subject to a sealing
 22 order then that needs to be provided or
 23 placed there so the plaintiff can see it and
 24 understand that that particular litigation
 25 settlement agreement is not being made

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1 available for inspection.
2 So here are the issues, it's not
3 Rule 26, it's not the spreadsheet, it's not
4 the database, it's making sure that the
5 plaintiff has available to the plaintiff to
6 inspect the gathering together or the summary
7 in whatever form of all of the litigation
8 concluded against CCA since January 1, 2002.
9 And then last I believe that the
10 defendant, CCA, has stated that given the
11 Court's ruling that these final executed
12 contracts and contract renewals between CCA
13 and the State of Tennessee and any county or
14 municipality regarding the ownership,
15 management or operations of a jail system
16 from January 1, 2000 through April 3, 2007 be
17 made available for inspection.
18 So I'm really not looking, the
19 plaintiff didn't ask for the lawyer's
20 thoughts or analysis of anything and so it
21 looks like it can be done in a fairly
22 straightforward way without, hopefully, a lot
23 of pain.
24 So is there anything that either
25 side wants to ask that is not clear?

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1 attorney's fees and I'll hear from CCA.
2 You've got the burden.
3 MR. CLARKE: Yes, Your Honor. The
4 statute says very, very basically that
5 somebody who willfully, it's 10-7-505(G) that
6 if there is a willful failure to disclose
7 public records that the Court in its
8 discretion may award reasonable attorney's
9 fees. We submit that in this case as this
10 Court found, while CCA made a number of
11 arguments about a lot of things of all the
12 issues with respect to functional equivalency
13 their basic defense to this case was, we're
14 not the government, and while I duly
15 appreciate the Court's careful and the
16 thoughtful analysis of everything, I think
17 when we read this transcript the Court really
18 came back to the fact that this is prison.
19 This is isn't an Airport Authority, this
20 isn't an arena, this isn't an ice hockey
21 rink, this isn't some daycare center. This
22 is a core governmental function, so in
23 determining whether or not the Court should
24 find a willful failure to disclose records, I
25 mean, it's no question they didn't give them

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1 MR. CLARKE: With respect to when
2 you said paragraph two, I believe, that
3 they'll produce all the verdicts and releases
4 and everything except if they are sealed, but
5 if there is a case that there was a verdict
6 or settlement that was sealed, they have to
7 produce an order and give us the basis of the
8 sealing. Now does the Court make any
9 distinction between a state order or federal
10 order in that?
11 THE COURT: No.
12 MR. CLARKE: Okay. So if there's
13 any order, then they produce that order and
14 if we have any other issues, I guess we will
15 bring it back to the Court's attention.
16 THE COURT: And that way the
17 plaintiff can know that he's not receiving a
18 public record and here's the reason why, so I
19 think maybe that will help.
20 MR. CLARKE: And that if the Court
21 has anything else I just want to make sure
22 that the Court was going to make a ruling at
23 this time on attorney's fees. I don't want
24 my silence to be a waiver of a request.
25 THE COURT: I'll hear you on the

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1 to us. There is no question they don't want
2 to be found as a governmental -- there's no
3 question in 2002 the Tennessee Supreme Court
4 and then in 2005, gave the Court guidance and
5 the ability to hold somebody like CCA as a
6 private entity as a functional equivalency as
7 a government.
8 I submit to the Court that despite
9 the very fine lawyering by CCA's lawyers,
10 they can't escape the fact that they didn't
11 want to produce this stuff. They didn't have
12 a legitimate legal basis to determine that
13 they should not be subject, based on the case
14 law that was out there.
15 They have been found in other
16 cases while they have wrote very extensive
17 and well-written briefs and law review
18 articles, in this case they didn't point out
19 to the Court certain cases where they have
20 been found to be a public entity. I think
21 that's important. I think with respect to
22 the transcripts, you know, of the first
23 hearing, you know, they tried to argue they
24 weren't funded while the Court said that the
25 contracts that were produced weren't

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1 probative of the issues that the Court had to
2 consider, they still did show that they are
3 receiving appropriated funds.
4 I think what we have is a
5 situation where somebody did not want to
6 produce something. They knew that. I don't
7 think there is an honest argument that a
8 prison could not, somehow be not subject to
9 the Public Records Act. We think, when we're
10 talking about willful under the act, we're
11 talking about with no legal justification,
12 and I think that CCA does not want to produce
13 this. They don't want to produce it to
14 Mr. Friedmann. I know that. In their
15 opening brief they smeared him. I mean, they
16 talked about what he does and which is
17 irrelevant under the statute. I think those
18 go to where this Court should make a
19 determination and finding that the conduct
20 was willing.
21 When they point out irrelevant
22 information to the Court in an effort to put
23 my client in a bad light, I think that is
24 very significant consideration for the Court,
25 but given that, this was a finding which

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1 faith conduct and the courts have repeatedly
2 held that the willful element in that is
3 synonymous with bad faith. It's not a
4 disagreement of the law. It's not even
5 negligence or even bad judgment. It's bad
6 faith conduct and we had and will continue to
7 have for a while, I think, a disagreement
8 here over the application of this act to CCA.
9 Your Honor has made your ruling,
10 but it was a careful, considered -- you
11 considered the case law. It's not, it wasn't
12 an easy decision it didn't appear to us, but
13 it required going through all the factors.
14 We've been in business for a while. We've
15 never been held subject to the Public Records
16 Act in Tennessee. We have never been held to
17 the functional equivalent of a governmental
18 agency in the State of Tennessee.
19 There are real and both factual
20 issues that need to go up to the Court of
21 Appeals and legal issues that need to go up
22 and ultimately decided on this issue and, you
23 know, there has simply been no showing by the
24 plaintiff here that CCA acted willfully in
25 bad faith.

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1 really went back to kind of the obvious, it
2 went back to what that Florida Court said. I
3 could not consider anything more uniquely
4 governmental than this, and with that can
5 they say with a straight face that they
6 actually thought that operating a prison was
7 not going to be the functional equivalent of
8 a governmental entity. I think not, Your
9 Honor. I think the answer is easy as the
10 first one, although I do understand the great
11 pain, effort and consideration that you gave
12 to the first one. It really came back to a
13 very simply issue. States run prisons and
14 jails. Private companies don't. With that I
15 submit it to the Court to see if their
16 refusal to give this stuff was willful and I
17 appreciate your consideration.
18 MR. WELBORN: Your Honor, we
19 submit that
20 Mr. Friedmann is not entitled to recover his
21 attorney's fees and costs here. The standard
22 that the Court must apply is very strict.
23 They have to show that we willfully, CCA
24 willfully failed to disclose records, and the
25 Court's interpretations of that requires bad

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1 The records or the courts say
2 you've got to engage in conscious doing of a
3 moral wrong because of dishonest purpose.
4 That's how the courts have described bad
5 faith conduct. There's been no showing of
6 that here by CCA. We have a legitimate
7 disagreement with Mr. Friedmann on whether we
8 are a functional equivalent of a Tennessee
9 governmental agency, and no court that has
10 ever ruled that we could find that a private
11 entity is a functional equivalent of
12 governmental entity has ever awarded
13 attorney's fees. They didn't award
14 attorney's fees in Cherokee. They didn't
15 award attorney's fees in Alien versus Day,
16 and we've never had that ruling, the
17 functional equivalency ruling against us.
18 Again, there's been no evidence
19 here presented to the Court. We presented
20 our arguments, Your Honor rejected those
21 arguments, but those were presented in good
22 faith. They are reasonable arguments and
23 while I respectfully disagree with Your
24 Honor's decision, they were put forth that
25 way and they have a legitimate basis for us

1 to make those arguments.
 2 You know, one case that is
 3 particularly good on this is the case where
 4 the Court says, and I'm trying to find it
 5 here in my notes, that it says that a request
 6 for fees have been denied, but the question
 7 was whether the record sought was publicly
 8 not straightforward or simple or involved
 9 complex interpretation of controlling case
 10 law, which this case involved. And the
 11 Tennessee Supreme Court has admonished that
 12 the Tennessee courts and this is particularly
 13 true here, must not compute to a governmental
 14 entity the duties that foretell an uncertain
 15 judicial future.
 16 We had an uncertain judicial
 17 future coming in here and, you know, until
 18 this is ultimately decided at the appellate
 19 level, it's going to remain uncertain. We
 20 had good faith reasons for why we didn't
 21 produce these documents. There are
 22 legitimate justifications privilege wise that
 23 Your Honor has ruled and we don't have to
 24 give the privileged information and orders
 25 under seal. There is a legitimate basis for

1 our objections to producing these records and
 2 there's been no showing of bad faith conduct.
 3 And Your Honor, just to get back
 4 to a point you mentioned earlier, where we
 5 might get today, I think this is a final
 6 ruling, so this is a final order and it can
 7 go forward and we can have this decision
 8 decided as you mentioned I think by --
 9 reviewed by the Court.
 10 MR. CLARKE: Your Honor, I'll just
 11 point out with respect to what Mr. Welborn
 12 stated. I don't believe the word bad faith
 13 is written into any terminology into the
 14 Public Records Act. It has to be willful and
 15 knowing. Nobody's going to argue that they
 16 didn't willfully produce anything. If they
 17 thought things were to be produced they
 18 conceded things. They didn't bring them
 19 though. There has been no conduct on their
 20 part from which to recognize that they have
 21 certain documents. The Court has ruled
 22 against them on confidentiality, has
 23 basically said produce the orders on the
 24 other things. It says, I'm going to quote
 25 you from the Tennessean versus Lebanon, it

1 says, Regardless of the sometime varying
 2 statements expressed by this Court as the
 3 standard for determining whether the refusal
 4 was willful and knowing, in actuality our
 5 courts have consistently applied the same
 6 analysis, which is their officials knew that
 7 the record sought is public and subject to
 8 disclosure. So it evaluates the validity of
 9 the refusing entity's legal position
 10 supporting its refusal. Critical to the
 11 determination is the evaluation of the law.
 12 Now, if Mr. Welborn's argument is
 13 stating to his logical conclusion, any case
 14 where you have to balance factors, you could
 15 not be entitled to attorney's fees. It's
 16 going to discourage lawyers like myself from
 17 handling cases for people like Prison Legal
 18 News and Mr. Friedmann which is the purpose I
 19 think the statute allowing attorney's fees is
 20 to allow for competent representation of
 21 people in cases where private paying -- they
 22 may not be able to pay for attorney's fees.
 23 If you look at the validity of the
 24 legal argument and if you're going to look
 25 at, I think it gets back to the Florida case.

1 There is nothing more unique than
 2 governmental entities. If this was the case
 3 that first announced that a private company
 4 could be subject to the Public Records Act,
 5 I'd give them that. I let Cherokee, I let
 6 Allen v. Day. Allen v. Day involved a
 7 corporation running an ice hockey rink or
 8 something. This is not the one where there
 9 is a legitimate dispute. That's number one.
 10 So if they thought they were going to comply
 11 with the act then they should have -- they
 12 never produced a privileged log and they
 13 didn't produce these other things that would
 14 allow us to evaluate things, so with all due
 15 respect to Mr. Welborn's articulation of the
 16 standard, I don't believe that is the case
 17 and the case I cite is from the Tennessean
 18 and it goes through that and what we have to
 19 look at is there legal justification. While
 20 this Court -- I think, both parties want to
 21 thank the Court for thoughtful consideration
 22 of the issues, I don't think that when we
 23 come back to it and we come all the way
 24 around and we look at it, sometimes the easy
 25 answer is right in front of you. This is a

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1 prison. The argument against it not being a
 2 public entity was well made, just wrong, dead
 3 wrong and to point that it's willful, I will
 4 point out that with all the cases that CCA
 5 cited in their 44-page memorandum, they never
 6 cited the one case where they were found to
 7 be the public, the functional equivalent of
 8 an entity.
 9 I think they just don't want to
 10 produce the stuff, Your Honor, and I think
 11 they put up a very nice defense. I just
 12 don't think it's legally justified as found
 13 by the Court. Thank you.
 14 THE COURT: Okay. Now lawyers,
 15 the next step, let me say about the
 16 attorney's fees, I think that there is
 17 certainly public policy that the Public
 18 Records Act should be read broadly and
 19 liberally, that probably goes to the
 20 attorney's fees as well. I haven't read
 21 closely the few cases that do provide
 22 attorney's fees. I'm going to do that. I'm
 23 going to do that this afternoon, so I'm going
 24 to take that under advisement for a very
 25 short time. We know that TCA 10-7-505 says

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1 that the Court is supposed to make conscious
 2 fact decisions through the law, which I have
 3 done. 505(E) says that upon judgment in
 4 favor of petition of the Court shall order
 5 that the record be made available to the
 6 petitioner unless there is a timely filing of
 7 appeal and the Court certifies that there
 8 exists and the Court certified the existence
 9 of substantial legal issue with respect to
 10 disclosure of the documents which ought to be
 11 resolved by the appellate courts.
 12 And so I made finding of
 13 conclusion. I said that the documents must
 14 be made available immediately because at the
 15 moment I don't have a motion for appeal or
 16 notice of appeal and I've taken under
 17 advisement the issue of the attorney's fee
 18 and because of the expedited nature of the
 19 Public Records Act requirements, if I don't
 20 get something out to you this afternoon, I'll
 21 get something out to you tomorrow morning.
 22 MR. CLARKE: Thank you, Your
 23 Honor.
 24 THE COURT: Any questions? Are
 25 y'all ready to go?

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1 MR. WELBORN: Your Honor, I assume
 2 that the other issues will be addressed at
 3 another motion hearing. This part about
 4 notice of appeal and state of appeal, we'll
 5 raise that.
 6 THE COURT: People need to figure
 7 that out.
 8 So we're now adjourned.
 9 MR. CLARKE: Thank you, Your
 10 Honor.
 11 THE CLERK: All rise.
 12 (Whereupon, the following proceedings were
 13 adjourned at 3:30 p.m., on July 29, 2008.)
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1 COURT REPORTER'S CERTIFICATE
 2
 3 I, JENNIFER SWAN HAYNIE, Notary
 4 Public and Court Reporter, do hereby certify
 5 that I recorded to the best of my skill and
 6 ability, by machine shorthand, all the
 7 proceedings in the foregoing transcript and
 8 that said transcript is a true, accurate, and
 9 complete transcript to the best of my
 10 ability.
 11 I further certify that I am not
 12 attorney or counsel of any of the parties,
 13 nor relative or employee of any attorney or
 14 counsel connected with the action, nor
 15 financially interested in the action.
 16 SIGNED this ___ day of _____, 2008.
 17
 18
 19 JENNIFER SWAN HAYNIE
 20 Notary Public
 21 State of Tennessee at Large
 22
 23
 24
 25

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