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STATE OF ILLINOIS

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STATE MATTERS:
Utilizing Private Contractors To
Transport Illinois Prisoners

The Honorable Gary Forby
Chair, Senate Labor Committee
Illinois State Senate
M122 Capitol Building
Springfield, Illinois 62706

Dear Senator Forby:

I have your letter inquiring whether it violates the Private Correctional Facility Moratorium Act (730 ILCS 140/1 *et seq*. (West 2002)) for the Illinois Department of Corrections (the Department) to utilize private contractors to transport Illinois inmates to and from out of state. For the following reasons, it is my opinion that the Private Correctional Facility Moratorium Act prohibits the use of private contractors to transport persons under the jurisdiction of the Department to and from Illinois.

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In recent years, the Department has contracted with a private vendor to transport persons under its control to and from correctional facilities or other locations outside of the state. Under the current contract, the Department can and does, with varying degrees of frequency, use a private company to transport individuals that fall into three categories: (1) Illinois inmates who are being transferred to an out-of-state prison for confinement or who are being returned to an Illinois correctional facility after having been incarcerated in an out-of-state prison; (2) Illinois inmates who have escaped from a work release program, left the State and are being returned to an Illinois correctional facility; and (3) parolees or persons on mandatory supervised release who have violated the conditions of their release, left the State and are, at the direction of the Department, being returned to an Illinois correctional facility. (All three will be referred to collectively as "prisoners.")

Under the contract, the private contractor travels, at the request of the Department, to the location of an Illinois prisoner. The private contractor accepts supervision and control of the prisoner and transports the prisoner to or from an Illinois correctional facility as appropriate. According to your letter, the private contractors "are also armed and may exercise lethal force in restraining the inmates."

The practice of privatizing any correctional service must be analyzed under the Private Correctional Facility Moratorium Act (the Moratorium Act). In enacting this law, the General Assembly "declare[d] that the management and operation of a correctional facility or

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[1]On April 8, 2005, the Department solicited invitations for bids for a new contract for a private vendor to provide inmate transportation services.

institution involves functions that are inherently governmental." 730 ILCS 140/2 (West 2002). Thus, the General Assembly determined "that issues of liability, accountability and cost warrant a prohibition of the ownership, operation or management of correctional facilities by for-profit private contractors." 730 ILCS 140/2 (West 2002). To this end, section 3 of the Moratorium Act (730 ILCS 140/3 (West 2002)) currently[2] provides:

> After the effective date of this Act, the State shall not contract with a private contractor or private vendor for the provision of services relating to the operation of a correctional facility or the incarceration of persons in the custody of the Department of Corrections; however, this Act does not apply to State work release centers operated in whole or part by private contractors or to contracts for ancillary services, including medical services, educational services, repair and maintenance contracts, or other services not directly related to the ownership, management or operation of security services in a correctional facility.

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly (*People v. Botruff*, 212 Ill. 2d 166, 174 (2004)); legislative intent is best demonstrated by the language used in the statute. *Kingbrook, Inc. v. Pupurs*, 202 Ill. 2d 24, 29 (2002). Where the statutory language is clear and unambiguous, it must be given effect as written. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 426 (2002).

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[2]Language pertaining to juvenile residential facilities was added to section 3 of the Moratorium Act by Public Act 88-680, effective January 1, 1995. In 1999, Public Act 88-680 was declared unconstitutional for violating the single subject rule of the Illinois Constitution (Ill. Const. 1970, art. IV, §8(d)). *See People v. Cervantes*, 189 Ill. 2d 80, 91 (1999); *see also People v. Lindsey*, 324 Ill. App. 3d 193, 201-02 (2001), *appeal denied*, 197 Ill. 2d 574 (2001). "The effect of an enactment of an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the unconstitutional amendment." *People v. Brown*, 309 Ill. App. 3d 599, 609 (1999), *appeal denied*, 188 Ill. 2d 568 (2000), citing *People v. Gersch*, 135 Ill. 2d 384, 390 (1990). Therefore, when reviewing section 3 of the Moratorium Act, the language must be reviewed as it existed prior to the amendments made by Public Act 88-680. The language quoted above omits the language added by Public Act 88-680.

Section 3 of the Moratorium Act prohibits the Department from contracting with private contractors or private vendors to provide "services relating to the operation of a correctional facility or the incarceration of persons in the custody of the Department." However, neither the phrase "services relating to the operation of a correctional facility" nor the phrase "services relating to * * * the incarceration of persons in the custody of the Department" is defined in the Act. Therefore, it is necessary to look beyond the Moratorium Act for assistance in construing those terms.

Under the Unified Code of Corrections (730 ILCS 5/1-1-1 *et seq.* (West 2002)), the Department's duties expressly include "accept[ing] persons committed to it by the courts of this State for care, custody, treatment and rehabilitation" and "assign[ing] such persons to institutions and programs under its control or transfer[ring] them to other appropriate agencies." 730 ILCS 5/3-2-2(1)(a), (b) (West 2002), as amended by Public Act 93-839, effective July 30, 2004. In carrying out its duties, the Department "has the sole discretion with respect to placing, handling, and transferring inmates within its control" (*People v. Lego*, 212 Ill. App. 3d 6, 8 (1991), *appeal denied*, 141 Ill. 2d 552 (1991)), including the location to which inmates are assigned to be housed. *See People v. Fowler*, 14 Ill. 2d 252, 259 (1958); *Lego*, 212 Ill. App. 3d at 8. Under the Interstate Corrections Compact (730 ILCS 5/3-4-4 (West 2002)), the Department may transfer Illinois inmates to a facility in another state out of concern for a particular inmate's safety or the overall security of an Illinois correctional facility. The inmates transferred to an out-of-state facility remain subject to the jurisdiction of the Department. *See* 730 ILCS 5/3-4-4 (art.

IV)(c) (West 2002). Similarly, the Department retains custody of all persons placed on parole or mandatory supervised release. *See* 730 ILCS 5/3-14-2(a) (West 2002), as amended by Public Act 93-979, effective August 20, 2004. Based upon the Department's broad authority to handle prisoners, the assignment of prisoners to correctional facilities and the transportation of prisoners among correctional facilities or other locations, regardless of whether the prisoners are located within or outside of Illinois, is an integral part of the "operation of a correctional facility" and the "incarceration of persons in the custody of the Department." Without the ability to transport prisoners, the Department would cede its exclusive discretion in the placing, handling and transferring of prisoners within its custody, and its ability to maintain custody and control of those persons committed to the Department would be restricted. Consequently, under the general prohibition contained in section 3 of the Moratorium Act, it is my opinion that the transportation of prisoners is a service that relates "to the operation of a correctional facility or the incarceration of persons in the custody of the Department[.]"

Section 3 of the Moratorium Act contains two exceptions to the general prohibition against the use of private contractors. The first exception, which is inapplicable to your inquiry, permits the operation of State work release centers by private contractors. second exception relates to contracts for "ancillary services." Although section 3 does not define the phrase "ancillary services," it provides that these services include "medical services, educational services, repair and maintenance contracts, or other services not directly related to the ownership, management or operation of security services in a correctional facility.

ILCS 140/3 (West 2002). Because a contract to transport Illinois prisoners cannot reasonably be characterized as a medical or educational service, or a repair or maintenance contract, such a contract may fall within the second exception to the general prohibition only if it may properly be characterized as involving "other services not directly related to the ownership, management or operation of security services in a correctional facility."

The decision to transport an Illinois prisoner to or from an out-of-state correctional facility or to return and assign an Illinois prisoner to a particular Illinois correctional facility from another location outside the state is based on security concerns and on the need to resume and retain custody and control of the prisoner. The Department is the custodian of all prisoners committed to its jurisdiction regardless of whether an inmate is being transported to a facility outside Illinois or is an escapee, parolee or person on mandatory supervised release being returned to a correctional facility in Illinois. Because the Department is the custodian of these persons, their transportation is integral to the Department's ability to exercise control of its prisoners.

Transferring a prisoner to another facility or bringing an Illinois prisoner back into Department custody and control from an out-of-state location directly impacts that prisoner's security, the security of the correctional facilities involved, and the Department's ability to exercise control over a person committed to its custody. Moreover, transporting a potentially dangerous and violent prisoner through Illinois communities poses serious security risks. Thus, the transportation services are directly related to and an integral part of the Department's

management and operation of security services and its duty to maintain custody of prisoners within its control, and do not fall within the second exception. Although these services are not provided inside a correctional facility, the language of the Moratorium Act and its legislative history establish that the determination of whether a service may be privatized does not turn simply on the location of the services.

This construction of section 3 of the Act finds support in the rules of statutory construction, which indicate that when a statute provides a list that is not exclusive, that is, when it uses the term "includes," then "the class of unarticulated things will be interpreted as those that are similar to the named things." *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 48 (2002); *People v. Hofer*, 346 Ill. App. 3d 1095, 1100 (2004), *appeal denied*, 209 Ill. 2d 590 (2004). The phrase "ancillary services" implies services that are subordinate or secondary to the actual operation or management of a correctional facility. Unlike the services specifically categorized as ancillary services, the transportation of prisoners is not a matter that is secondary to the operation of a correctional facility, but rather is directly related to its operation. As discussed earlier, transporting prisoners is directly related to the duty and responsibility of the Department to maintain the care, custody, supervision and control of persons committed to its custody. Therefore, the transportation of prisoners cannot be deemed an "ancillary service" within the purview of the Moratorium Act. As a result, neither exception in section 3 applies to the contract to transport Illinois prisoners to and from correctional facilities or other out-of-state locations.

This conclusion is consistent with the policy underlying the passage of the Moratorium Act. During House debate on House Bill 4027, which, as Public Act 86-1412, effective September 11, 1990, enacted the Moratorium Act, Representative Phelps, the House sponsor, stated:

> "Thank you, Mr. Speaker, Ladies and Gentlemen of the House. The central issue in this Bill is to prohibit prison privatization at the state level. There are a number of reasons why we need to support this concept. Despite the proponent claims, private prisons have not proven to be cheaper to operate. Several southern states have adopted this policy, it has proven to be quite threatening in many instances. Illinois prisons have dangerous, violent offenders in them and *we need the accountability and security that only public management can provide. No matter what we want to think, however, we try to rationalize, we cannot escape the liability issues with respect to inmates. It simply remains a fact that the state is ultimately liable, whether we are private or public if inmates are violated. So it is not wise to turn over these operations to private management.* Nowhere else in state government is such a practice tolerated. I appreciate your 'aye' vote." (Emphasis added.) Remarks of Rep. Phelps, May 18, 1990, House Debate on House Bill No. 4027, at 41-42.

The security risks in transporting prisoners are obvious. As this legislative history demonstrates, the General Assembly determined that to ensure the public's safety, as well as that of the prisoners, the operational aspects of correctional facilities should be provided by government employees who are directly accountable to the public. Moreover, to grant private contractors the discretion to take custody of prisoners and possibly use lethal force to control them raises grave liability issues for which the State may ultimately be held responsible. This is the type of operational, accountability and liability issue that the General Assembly intended for

the Department, not private contractors, to address. Therefore, it is my opinion that the Department is prohibited by the Moratorium Act from contracting with private contractors for the transportation of Illinois prisoners.

Very truly yours,

LISA MADIGAN
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