

# TEXAS COMMISSION ON JAIL STANDARDS

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## Technical Assistance Memorandum

To: All Sheriffs and Jail Administrators  
From: Brandon Wood, Executive Director  
Date: October 10, 2013  
RE: Censorship

In recent months, the Texas Commission on Jail Standards has been made aware of counties being successfully sued for banning books, magazines, and periodicals. In some of these lawsuits, counties had a complete ban on either particular publications or all publications and periodicals. To prevent future lawsuits against counties, we believe that it is important to give the relevant case law and minimum jail standards in this matter to aid county officials in formulating and implementing policy.

The Supreme Court ruled in *Turner v. Safely*, 107 S. Ct 2254 that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution”. The constitutional right at issue here is the freedom of speech guaranteed under the First Amendment of the U.S Constitution.

The Supreme Court stated in the *Turner* case that federal courts have a duty to protect inmates’ constitutional rights. However, the Supreme Court recognized the inherent challenges of operating a prison or jail and acknowledged that judiciaries are not experts in jail operations. With that, the Supreme Court developed the four-part *Turner* test that assesses whether a jail policy is rationally and reasonably related to a legitimate penological or government interest.

The Court defined some penological interests as the safety and security of the facility and the rehabilitation of inmates. It should be stated that the 5<sup>th</sup> Circuit in *Mann vs. Smith*, 796 F.2d 79 rejected a county’s claim that periodicals created fire hazards because the court noted that other combustible materials, such as religious books, letters, and puzzle books, etc., were allowed into jail cells. For concerns of fire hazards or sanitation, jails should consider a one-for-one exchange of periodicals.

Minimum Jail Standard §291.2 requires jails to develop and implement an inmate correspondence plan. Within §291.2, the standard defines some legitimate government interests (listed below) and these may be considered when reviewing correspondence on a **case-by-case** basis.

- (i) containing information regarding the manufacture of explosives, weapons, or drugs;
- (ii) containing material that a reasonable person would construe as written solely for the purpose of communicating information designed to achieve the breakdown of jails through inmate disruption such as strikes or riots; and

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“The Commission on Jail Standards welcomes all suggestions and will promptly respond to all complaints directed against the agency or any facilities under its purview”.

To empower local government to provide safe, secure and suitable local jail facilities through proper rules and procedures while promoting innovative programs and ideas

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(iii) a specific factual determination has been made that the publication is detrimental to inmate's rehabilitation because it would encourage deviate criminal sexual behavior.

After the promulgation of §291.2, the Supreme Court issued a ruling in *Thornburgh v. Abbott*, 109 S. Ct 1874 that may provide jail officials with a blueprint to review questionable material. In *Thornburgh*, the Court upheld a prison's policy of a warden reviewing publications that might be detrimental to the safety and security of the facility after the publications were flagged by prison mail staff. The warden could not, according to the policy, reject publications that were "religious, philosophical, political, social or sexual, or because the content is unpopular or repugnant".<sup>1</sup> In other words, personal preferences of jail staff should not be a basis for banning a particular publication.

The upheld prison policy also provided inmates and the publisher/sender with a written notice of the rejection of a publication and gave the inmate/publisher the opportunity to appeal the rejection. In *Procurier v. Martinez*, 516 U.S. 396 the Court ruled that publishers/senders have a free speech right to communicate with willing inmates.

In summary, the First Amendment guarantees the right of free speech to all who want to send and receive, through subscription, publications. To restrict this right of inmates, jails officials must base their policies and decisions on the legitimate government interests of safety and security, order, or the rehabilitation of inmates. Jails may wish to review the *Thornburgh* case to help formulate their policy. **To be clear, policies that ban all or certain publications without proper review should never be implemented.**

We encourage sheriffs to review §291.2 and the cited case law in formulating their policies and, if necessary, consult with their local legal counsel. If you have any questions, please do not hesitate to contact our office.

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<sup>1</sup> *Thornburgh v. Abbot*, 490 U.S 401, 109 S Ct. 1877-78