TEXAS COMMISSION ON JAIL STANDARDS

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TECHNICAL ASSISTANCE MEMORANDUM
#23-11

To: All Sheriffs and Jail Administrators
From: Brandon Wood, Executive Director
Date: August 23, 2023

RE: 291.2 Inmate Correspondence

In an effort to reduce the introduction of contraband and assist in providing a safe and secure environment for inmates and staff, the electronic scanning of physical Inmate Correspondence is becoming a common practice in our county jails. If you have implemented or are planning to implement this practice, please ensure that your required Operational Plan has been updated to reflect this change and that your Inmate Handbook explains the process.

At this time, the Commission is aware of two approaches that involve the scanning of mail. The first approach involves the scanning of inmate correspondence and subsequent delivery to the recipient as an email, attachment to an email, or as a message that can be accessed via portal or something similar. The second approach involves the scanning of the original and delivery of a physical hard copy to the recipient. With either approach, the question of how legal/privileged correspondence is to be handled will come up. Issues to consider are attached for your consideration and we highly recommend that you discuss these with your legal counsel and/or county attorney.

To have your Inmate Correspondence Plan reviewed, please submit it to Lupe Moreno at lupe.moreno@tcjs.state.tx.us.

Privileged Correspondence/Legal Mail

Safeguards shall be in place to ensure that privileged correspondence/legal mail is handled in accordance with 291.2(2) which states that "incoming privileged correspondence shall be opened only in the presence of the inmate with inspection limited to locating contraband." This prohibits the off-site scanning of correspondence that meets the criteria of privileged. Concerns have been raised that scanning or even copying privileged correspondence could violate the attorney-client privilege as facilities attempt to ensure the safety and security of the inmates and staff. At this time, we do not recommend that privileged correspondence/legal mail should be scanned or copied.

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Indigent Inmates

If your process requires the inmate to create an account that has an associated cost to access their scanned/electronic mail, ensure provisions are in place to allow indigent inmates the ability to access the system.

Non-Privileged Correspondence that may have legal significance.

An inmate may receive correspondence that is not considered privileged but may still have legal significance, such as original Marriage Certificates or Power of Attorney. These items should not be destroyed/disposed of and instead be placed in the inmate's property. If inmate mail is being scanned off-site, provisions should be made for the original to be kept, forwarded to the jail, or returned to sender.

Family Heirlooms

An inmate may receive correspondence that contains an item (photo, document, etc) that is considered a family heirloom. These items should not be destroyed/disposed of and instead be placed in the inmate's property. If inmate mail is being scanned off-site, provisions should be made for the original to be kept, forwarded to the jail, or returned to sender.

Release/Transfer of Inmate

While an inmate released from custody should have the ability to access scanned mail for a period of time, an inmate transferred to another facility or TDCJ may not have the same ability. Provisions should be made to address inmate access to their mail when they are transferred to an entity that does not allow electronic access to scanned mail.

Accessibility

Provisions should be made for inmates with a documented disability who can access and utilize any electronic system in place . This includes and is not limited to vision and dexterity disabilities.

Money Orders/Disability/SSI Checks

Regardless of policy and rules, there will be instances where money orders or disability payments (SSI, VA, etc) are sent to an inmate. Provisions should be made to address how funds mailed to an inmate are to be addressed

Disposal of Scanned Mail

If mail is scanned and destroyed, the jail should provide for the retention of the original mail for at least 30 days to allow inmates to appeal the destruction of their mail prior to the mail being destroyed. Otherwise, jails may find a court ruling that the jails have infringed on inmate rights without due process.

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Privileged Correspondence FAQ & Issues

QUESTION:
What constitutes privileged correspondence?

ANSWER:
See Minimum Jail Standards § 291.2.(2)

The U.S. Supreme Court has ruled(?) and Minimum Jail Standards §291.2 require that for correspondence to or from legal sources to be considered legal mail and therefore "privileged", the address must include the name of the attorney who represents the inmate.

The jail may require that mail from an attorney to an inmate be identified as such and that the attorney's name and address appear on the envelope and correspondence. The Supreme Court also ruled that a lawyer desiring to correspond with a prisoner may also be required first to identify himself and his client to the jail officials to ensure that letters marked "privileged" are actually from members of the bar.

See Wolf v. McDonnell, 418 U.S. 539, 904 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

QUESTION:
Is correspondence to or from the following or similar considered 'privileged correspondence': ACLU, Legal Aid Society/prisoner Rights project, Prison Task Force, Advocacy Inc.

ANSWER:
No, unless the correspondence is addressed to or from an attorney named on the envelope.

The ACLU employs attorneys, but the ACLU itself is not an attorney. To be privileged, it's not enough that the envelope address state "ACLU" or "Legal Aid Society." It must also have the name of the attorney who works for that organization and who is representing the inmate. Only then must it be considered privileged correspondence.

See Wolf v. McDonnell, 418 U.S. 539, 904 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

We recommend that the jail consult with its District Attorney on this matter.

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QUESTION:
May jails destroy inmates' incoming non-privileged correspondence after scanning it and delivering the scans to inmates?

ANSWER:
As of October 2020, there is no case law to prohibit jails from destroying mail after they have scanned it and delivered the scans to inmates. Do inmates insist that jails retain the physical mail? Why? It will not be given to the inmates for the same reason it was scanned: in order to intercept contraband, which the courts have long held is permissible for that purpose.

QUESTION:
May jails prohibit bulk mail?

ANSWER:
The Commission recommends that jails allow bulk mail. Because prohibiting bulk mail would violate inmate free speech as well as the senders' free speech (such as election mailings), the jail would have to demonstrate that the prohibition serves a legitimate penological purpose and that there is no less restrictive way to accomplish that purpose.

QUESTION:
Is an inmate's letter to their probation or parole officer privileged or non-privileged correspondence?

ANSWER:
Short answer: It is privileged correspondence. Jails must treat mail between inmates and their probation/parole officers the same as mail between inmates and their attorneys:

1) Jails may not open or read **outgoing** inmate mail sent to their probation or parole officers.
2) Jails may open **incoming** mail from probation or parole officers in the presence of the inmate only to search for contraband and only to further the safety and security interest of the jail but may not read the contents of the mail. Jails may open and inspect envelopes from any source when they feel that external screening is insufficient to detect contraband.

Taylor v. Sterrett, 532 F.2d 462, 1976.

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Citations:

"In the first instance, we see no justification whatsoever for opening or reading correspondence addressed to the courts, prosecuting attorneys, **parole** or probation **officers**, and identifiable attorneys. The content of this **outgoing** mail cannot, except on the most speculative theory, damage the security interests of jail administration. *See Preston v. Cowan*, W.D.Ky. 1973, 369 F. Supp. 14, 23; *Palmigiano v. Travisono*, 317 F. Supp. 776, 789. As a general proposition, it must be assumed that **mail** addressed to government offices or licensed attorneys containing contraband or information about illegal activities will be treated by the recipients in a manner that cannot cause harm.
Taylor v. Sterrett, 532 F.2d 462, 473-474, 1976 U.S. App. LEXIS 8788, *35

"B(1)...the inmate's right of access to the courts supports that portion of the district court's order requiring that **incoming** prisoner mail from courts, attorneys, prosecuting attorneys, and probation or **parole officers** be opened only in the presence of the inmate. This inspection is limited to locating contraband. It does not entail reading an enclosed letter. It should be emphasized that this requirement does not preclude a "probable cause" search or seizure of the envelope and its contents in the appropriate circumstances...

"The basic prisoner interest is in uninhibited communication with attorneys, courts, prosecuting attorneys, and probation or **parole officers**. Both pre-trial detainees and convicted prisoners have a vital need to communicate effectively with these correspondents. This is to insure ultimately that the judicial proceedings brought against or initiated by prisoners are conducted fairly. Since the prisoner's means of communicating with these parties are restricted sharply by the fact of incarceration, the essential role of postal communications cannot be ignored."
Taylor v. Sterrett, 532 F.2d 462, 475, 1976 U.S. App. LEXIS 8788, *39-41

"...the opening and reading of **outgoing** mail to government agencies is not significantly related to the advancement of jail security. Our decision, of course, in no way restricts the ability of prison authorities to ascertain whether this mail is addressed to the correct address of a government agency or to stamp inmate envelopes with language alerting government employees to report abusive correspondence.

"With respect to **incoming** mail from government agencies, there is a more realistic threat to jail security. The danger presented by this mail is that physical contraband will enter the jail. It is essential that prison officials have the discretion to **open and inspect envelopes from any source when they feel that external screening is insufficient to detect contraband.** We again note that the Supreme Court's language in *Wolff v. McDonnell*, 418 U.S. at 577, 94 S. Ct. at 2985, 41 L. Ed. 2d at 963, supports this result.

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"Our assessment of the threat posed by written communications about illegal activities in mail ***from*** courts, identifiable attorneys, prosecuting attorneys, and **parole or probation officers** is equally applicable to this category of correspondent. We hold, therefore, that the practice of **reading** this **[incoming]** mail ... is not essential or necessary to the interest of jail security. Government agencies are no more likely than courts and the other parties covered by our right of access analysis to generate abusive mail. This category of **incoming** mail is to be treated in accordance with the procedures for mail from legal correspondents set out in section B(1) (above)."
Taylor v. Sterrett, 532 F.2d 462, 480-481, 1976 U.S. App. LEXIS 8788, *59-61

QUESTION:
Can a jail copy an inmate's non-privileged correspondence without a warrant upon a request from the DA or other law enforcement entity?

ANSWER:
It is recommended that the jail obtain the request in writing. However, case law **generally** supports the collection of evidence from inmates without the requirements of a warrant.

Per Minimum Jail Standards Chapter 291.2(3)(C) incoming correspondence may be opened and read. Correspondence may be censored provided a legitimate penological interest exists. A copy of the original correspondence should be retained. If contraband is discovered, it shall be confiscated, and the inmate advised of the action.

In an unpublished opinion involving Bexar County, the Court of Appeals in the Fourth District held that an inmate's rights were not violated when the Bexar County District Attorney instructed Bexar County jail personnel to search an inmate's cell, copy, and forward any non-privileged writings. Among the personal writings were the inmate's legal notes regarding his case. The Court held that the confiscation of the notes was inadvertent and opined, "The United States Supreme Court has held 'that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell' "because 'loss of freedom of choice and privacy are inherent incidents of confinement.'" *State v. Scheineman*, 77 S.W.3d 810, 812 (Tex. Crim. App. 2002) (quoting *Hudson v. Palmer*, 468 U.S. 517, 525-26, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984)).

Prisoners have no fourth amendment protection of privacy or unreasonable search and seizure (*Hudson v. Palmer*). However, ensure that the reason for copying the mail reasonably relates to a legitimate jail interest.

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In sum, though it is permissible, county officials should have the county and/or district attorney issue the approval to do so, in writing.

QUESTION:
Is mail from the Police Department or Sheriff's Office considered privileged?

ANSWER:
No. Mail to or from the Police Department or Sheriff's Office generally is not privileged. However, if the correspondence is with the inmate's probation or parole officer, which of course are attached to police departments and sheriff offices, then the mail would be privileged. See the question: "Is an inmate's letter to their probation or parole officer privileged or non-privileged correspondence?"

The U.S. Supreme Court has ruled that an inmate's right to access to the courts depends on confidential correspondence with the inmate's attorney and correspondence between them must be marked as such. Since an inmate's probation or parole officer is not their attorney, they would not truthfully be able to mark their correspondence as privileged.

TCJS minimum jail standards definition of privileged correspondence includes more than an inmate's attorney or their probation or parole officer, but it does not include, in general, correspondence with police departments or sheriff offices.

See *Wolff v. McDonnell*, 418 U.S. 539, 477-78, 94S. Ct. 2963, 41 L. Ed. 2nd 935 (1974).

QUESTION:
Can a jail return to the send the entire contents of mail marked "privileged" when the contents partially contain non-privileged correspondence and/or contraband?

ANSWER:
Yes, the Commission recommends that jails return the entire contents of correspondence labeled "privileged" when it contains anything other than privileged correspondence only.

Nothing in case law suggests jails should not send back the entire contents of correspondence mislabeled "privileged" when any of its contents are non-privileged and/or contraband.

By returning the entire contents, jails discourage the practice of sending mixed contents inside privileged mail. It also prevents the inmate or the sender from claiming later that the jail

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discarded some privileged content along with the non-privileged content. If jails send it all back, then jails can avoid these issues.

As always, the Commission also recommends that jails consult with their county attorney.

As of 6/3/2021

QUESTION:
Can a jail censor an inmate's writing who threatens in his letters to harm a government official (i.e. The President of the United States)?

ANSWER:
Yes. In *Procunier v. Martinez*, the Supreme Court held that, "The legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence; among such permissible restraints are the refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity, whether within or without the prison, and encoded messages. Censorship of prisoner mail is justified if the regulation or practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression and limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved. In order to be valid, a regulation authorizing prisoner mail censorship must further one or more of the substantial governmental interests of security, order and rehabilitation."

"In my opinion, the jail would be well within its authority to prevent any further mailings from this inmate to the White House since the Secret Service has notified the jail of criminal activity (threats against the President) contained within previously-sent letters. However, the jail should provide due process to the inmate by notifying the inmate for the reason for the prohibition and afford him the right to appeal the prohibition. The jail may also wish to notify the court in charge of this inmate's case for assistance." *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800,