



COMMONWEALTH of VIRGINIA

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The Honorable Octavia Johnson
Sheriff of the City of Roanoke
P.O. Box 494
Roanoke, Virginia 24003

Dear Sheriff Johnson:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether personnel in your office lawfully may inspect and censor inmate mail at the request of an outside law enforcement agency when such request is based on an investigation or circumstances arising outside your facility.¹

Response

It is my opinion that personnel in your office, at the request of an outside law enforcement agency, lawfully may inspect incoming and outgoing inmate mail to determine whether the correspondence contains discussion of, or is being used in furtherance of, criminal activities. Further, personnel in your office may censor any discussions of criminal activities contained in such correspondence or any correspondence used in furtherance of criminal activities.

Background

You relate a concern regarding the appropriate inspection and censorship of inmate mail. You state that you are familiar with your authority to inspect and censor mail in furtherance of security and internal order as determined by your analysis of a particular threat or situation. You note, however, that you are unclear regarding your authority to inspect and censor mail based on an investigation or circumstances that arise outside your facility. Because there are distinctions concerning the legal standards of inspection and censorship of incoming and outgoing inmate mail, I will address each separately.²

¹After further inquiry, it is my understanding that the scope of your request concerns general, not legal or privileged, inmate mail regarding criminal activity outside of your facility. Therefore, this opinion addresses the legal issues within the scope you describe.

²Though the distinctions appear to be slight, courts continue to apply separate standards. See *Koutnik v. Brown*, 396 F. Supp. 2d 978, 983-84 (W.D. Wis. 2005); *Nasir v. Morgan*, 350 F.3d 366, 371 (3d Cir. 2003).

Applicable Law and Discussion

“Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison.”³ In a local correctional facility where pretrial detainees and convicted prisoners may be housed together, inspection and censorship of inmate mail applies equally to pretrial detainees and convicted prisoners.⁴

Concerning incoming inmate mail, the State Board of Corrections has established a regulation providing, in part, that “all incoming general correspondence will be opened, searched and may be read by authorized staff where there is a reasonable suspicion that a particular item of correspondence threatens the safety and security of the facility, the safety of any person, or *is being used for furtherance of illegal activities.*”⁵ Furthermore, regulations concerning the inspection and censorship of incoming inmate mail that reasonably are related to legitimate penological interests do not violate inmates’ constitutional rights.⁶

Concerning outgoing inmate mail, “the opening and inspecting of an inmate’s outgoing mail is reasonably related to legitimate penological interests, and, therefore, constitutional.”⁷ A stricter standard of proof is applied to the censorship of outgoing inmate mail. Censorship is justified if the following criteria are met:

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.⁸

“Censorship of personal correspondence that include[s] threats, blackmail, contraband, plots to escape, *discusses criminal activities*, or otherwise circumvents prison regulations, is essential to the protection of

³ McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964).

⁴ See Bell v. Wolfish, 441 U.S. 520, 545-46 (1979) (explaining that maintenance of institutional goals of security, order, and discipline may require limitation or retraction of constitutional rights of both pretrial detainees and convicted prisoners).

⁵ 6 VA. ADMIN. CODE § 15-40-640 (2003) (emphasis added).

⁶ See Oliver v. Powell, 250 F. Supp. 2d 593, 605-08 (E.D. Va. 2002) (holding that operating procedure of Virginia Department of Corrections regulating inmate correspondence reasonably was related to legitimate penological interests as reviewed under Turner v. Safley, 482 U.S. 78 (1987); otherwise, prisoners permitted access to incoming general correspondence apart from inspection by prison officials could conduct illegal activities without warning, thereby threatening safety and security of facility); see also Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (determining that regulations concerning censorship of incoming inmate mail should be reviewed under Turner test).

⁷ Altizer v. Deeds, 191 F.3d 540, 547-48 (4th Cir. 1999).

⁸ Procunier v. Martinez, 416 U.S. 396, 413 (1974), *overruled in part by Thornburgh*, 490 U.S. at 401.

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substantial governmental interests.”⁹ Furthermore, prison officials do not violate inmates’ constitutional rights when they read their outgoing mail because, in addition to security concerns, inmates have a diminished expectation of privacy.¹⁰

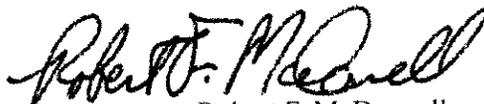
Consequently, when jail officials have a reasonable basis to believe from outside law enforcement agencies that inmate correspondence contains discussions of criminal activities or that the correspondence is being used in furtherance of illegal activities, then inspection and censorship of inmate correspondence not only are reasonable, but they further the substantial governmental interest of preserving institutional security, order, and rehabilitation.

Conclusion

Accordingly, it is my opinion that personnel in your office, at the request of an outside law enforcement agency, lawfully may inspect incoming and outgoing inmate mail to determine whether the correspondence contains discussion of, or is being used in furtherance of, criminal activities. Further, personnel in your office may censor any discussions of criminal activities contained in such correspondence or any correspondence used in furtherance of criminal activities.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

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⁹ *Oliver*, 250 F. Supp. 2d at 609 (emphasis added).

¹⁰ See e.g., *United States v. Whalen*, 940 F.2d 1027, 1035 (7th Cir. 1991).