



AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC.
355 NORTH 300 WEST, SALT LAKE CITY, UT 84103
(801) 521-9862 PHONE • (801) 532-2850 FAX
ACLU@ACLUUTAH.ORG • WWW.ACLUUTAH.ORG

THE ACLU OF UTAH AND COMPLAINTS REGARDING INMATE MAIL AND ACCESS TO PUBLICATIONS IN UTAH'S JAILS AND PRISONS

Introduction

Thank you for contacting the American Civil Liberties Union (ACLU) of Utah. We are committed to combating unconstitutional jail and prison conditions and practices, and your complaint is important because it helps us identify problems in Utah's correctional facilities.

The First Amendment

The Supreme Court has said that the First Amendment of the United States Constitution allows inmates to send and receive mail, limited only by the institution's right to restrict mail in an indiscriminate manner "reasonably related to legitimate penological interests," and only when accompanied by appropriate procedural protections. *Turner v. Safley* (1987); *Hudson v. Palmer* (1984). In practice, courts generally accept the judgment of jail and prison authorities in deciding whether censorship is reasonable.

Even if a policy is *facially* constitutional, (meaning that the policy as written does not violate the Constitution) it may violate the Constitution when put to use. It also depends upon the type of material within the mailing. Please note the law is not final on the somewhat greater protections that courts may grant to pre-trial detainees held in jails, as well as immigration detainees.

Privileged Mail

Prison and jail officials' ability to inspect and restrict mail depends on whether the mail is "non-privileged" (commercial mail and letters from family members, friends, and businesses) or "privileged" (attorney-client mail, including mail from the ACLU of Utah).

NON-PRIVILEGED MAIL: The Constitution allows the opening of incoming non-privileged mail outside the inmate's presence. *Martin v. Tyson* (7th Cir. 1988). Jail and prison officials can read non-privileged mail for security or for other correctional purposes without probable cause and without a warrant. *Smith v. Boyd* (8th Cir. 1991).

PRIVILEGED MAIL: Privileged mail receives more privacy and freedom from censorship. In order for mail to be considered privileged, it must be clearly marked. *O'Donnell v. Thomas* (8th Cir. 1987). Officials may hold privileged mail temporarily to verify the recipient's identity. *Guajardo v. Estelle* (5th Cir. 1978). Administrators may also check mail for contraband in front of the inmate, but cannot read it in the normal course of jail or prison routine. *Reneer v. Sewell* (6th Cir. 1992). Some courts have given privileged status to mail to and from several public officials and agencies of state, local, and federal governments. See *Mubammad v. Pitcher* (6th Cir. 1994); but see *O'Keefe v. Van Boening*, (9th Cir. 1996) (Prison's refusal to treat letters to state agencies and officials as privileged "legal mail" did not violate the First Amendment). Disagreements exist about whether or not mail to and from the media is privileged.

Be aware that a jail or prison may have the authority to read an inmate's mail if it has probable cause to believe that the inmate is conspiring with persons outside the prison to bring in contraband or to arrange a breakout.

What can you do if administrators open privileged mail outside your presence?

You should file a grievance if you receive a piece of privileged mail opened outside your presence. If administrators open privileged mail more than once, you should file another grievance, mentioning the previous grievance and the jail or prison's response. If you can prove that the jail or prison opens privileged mail outside the recipient's presence in a way that is not accidental, or that the opening harms the prisoner, then he or she may be able to file a successful federal lawsuit. Examples of harm would be if the jail or prison official's policy is to open all privileged mail outside of the recipient's presence, if they copied the letter, or if they used information inside the letter against you.

Restrictions on inmate access to publications that come in the mail

Jails and prisons may block publications, within the limits of certain protective procedures, if they contain material considered harmful to jail or prison security. *Thornburgh v. Abbott* (1989). However, both the sender and the intended recipient must receive notice of the censorship and the opportunity to appeal. (*Montcalm Publishing Corp. V. Beck*, 1996).

Also, a ban on photographs, newspapers, and magazines that are not legal or religious in nature for prisoners in long-term segregation or for detainees held for a short period does not necessarily violate the First Amendment. *E.g., Beard v. Banks* (2006) (prison may ban inmates in long-term segregation from receiving publications); *Hause v. Vaught* (4th Cir. 1993) (jail holding detainees for short periods may ban publications sent by mail). *But see Mann v. Smith* (5th Cir. 1986) (striking down jail's categorical ban on magazines and newspapers).

Courts have found that prisons or jails *may not*:

- Require the use of special shipping labels for books ordered from approved vendors (*Asbker v. California Dept. of Corrections*, 2003).
- Ban gift subscriptions for publications from religious or nonprofit organizations (*Sorrels v. McKee*, 2002).
- Ban receiving subscription publications sent by bulk, third, or fourth class mail (*Morrison v. Hall*, 2001).
- Ban prisoners from receiving non-subscription bulk mail and catalogs (*Prison Legal News v. Lehman*, 2005).
- Ban mail simply because it contains material downloaded from the Internet (*Clement v. California Dept. of Corrections*, 2004).
- Punish inmates for posting material on the Internet with the assistance of non-imprisoned third parties (*Canadian Coalition Against the Death Penalty v. Ryan*, 2003).

What can you do if you cannot obtain a publication in the mail?

You should file a formal grievance with the prison.

The ACLU of Utah compiled the above information from the following sources:

1. "Know Your Rights: Mail in Prison" by the ACLU National Prison Project, November 2003
2. "Know Your Rights: Prison Law Libraries" by the ACLU National Prison Project, November 2003