



House Committee on Corrections and Institutions
Confidentiality of offender and inmate files
February 5, 2016

Notes for testimony* of Lia Ernst, Staff Attorney/Public Advocate, ACLU-VT

- 1) Modifications in existing proposal. The proposal would:
 - a) Move from 601(10) (powers and responsibilities of supervising officer) to new section (records of inmates and offenders) → consistency from facility to facility
 - i) ACLU-VT supports this; it makes sense and brings law in line with current practice
 - b) Require APA rulemaking, including exceptions to confidentiality and definition of “record”
 - i) ACLU-VT supports this as a matter of transparency, accountability, and good policy
 - c) Refer broadly to “offenders and inmates” to capture everyone on whom DOC maintains records
 - i) ACLU-VT supports this; it also makes sense and brings law in line with current practice
- 2) Release of records to prosecutors. Before I get into the meat of my testimony, there’s one area I’d like to comment on that this draft carries over from existing law: release of records to prosecutors with an ex parte order requiring a finding only that the “records may be relevant.”
 - a) This is too low a burden. Here you have private, personal records being given to prosecutors on a very low showing while simultaneously preventing the inmate him/herself from access on basically any showing; this is an unjustifiable imbalance.
- 3) Creation of an express right of access to one’s own records. The ACLU-VT believes that the bill should expressly provide that offenders and inmates presumptively have access to their own records and that DOC may adopt rules via APA detailing any limitations on that access.
 - a) Further, this rulemaking authority should be cabined by a requirement that any limitation on that access be narrowly tailored to serve important and specific DOC interests that are not outweighed by the offender’s or inmate’s interest in access to his or her own records.
 - b) In light of how 601(10) has been interpreted by DOC and implemented through its Directives, this guidance is necessary to prevent DOC from again creating a wholesale prohibition on inmate or offender access to their own records.
 - c) The DOC’s approach has afforded precious little attention to the substantial and profound interest offenders and inmates have in access to—and ability to correct misinformation in—their own records.
 - d) Critical decisions are made on the basis of information contained in these records (indeed, prosecutors are given access to these records by surmounting only the extremely low “may be relevant” standard and presumably they rely on these records to make significant decisions), but, absent a robust and enforceable right to review records and correct misinformation therein, these decisions will routinely be made based on false or incomplete information.
 - e) Whenever a governmental agency collects information about us and relies on that collected information to make decisions that affect us, it’s critical that we have the ability to see just what the agency has collected and to advise that agency when it’s gotten something wrong.

* My apologies for the roughness; I hadn’t planned to submit written testimony.

- i) Although it's easy to just refer to security needs in the incarceration context as a reason to depart from this general rule, in fact this particular setting is one in which the countervailing interest in access to records weighs much more heavily.
 - ii) In the incarceration context, essentially every aspect of prisoners' daily lives is dictated and circumscribed by the governmental agency, and the prisoner therefore has that much greater an interest in knowing the basis of governmental decision-making and ensuring that those decisions are based on accurate information.
 - iii) Yet, under existing law—and, I'm afraid—under this draft, DOC can continue to collect and maintain information about offenders and inmates that is effectively inaccessible, unreviewable, and uncorrectable by the people who are most directly affected by the decisions made in reliance on that information.
 - f) Prohibiting people from seeing the records based on which important decisions are made can also have anti-rehabilitative effects, insofar as those decisions may seem arbitrary and irrational, while allowing them to see and understand the reasons for particular decisions is an integral part of the rehabilitative process.
- 4) DOC's interpretation of existing law. Under existing law, DOC has promulgated directives that apply system-wide to create a wholesale prohibition on inmate access to records (inmates specifically, per wording of existing law and associated directives).
- a) 601(10): *Except as otherwise may be indicated by the rules and regulations of the department*, the content of the file of an inmate shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to inmates at the facility.
 - b) Directive 254.01, § 4.1.1.1.4, creates a confidentiality exception for access to case information for the person the record is about ("The person who is the subject of the information may be provided access at all reasonable times to completed staff work pertaining to that person except access is not permitted to confidential information.") → which, in combination with 601(10), DOC reads as meaning they're all confidential, so the directive's exception doesn't actually except anything from the blanket of confidentiality.
 - i) Similarly, § 4.1.1.1.5 grants, with the offender's express consent, the same access to the offender's authorized legal rep as is permitted to the offender—but, again, the same access equals no access.
- 5) Addressing DOC's concerns. We recognize that DOC has some legitimate concerns that are actually related to security or other needs in its facilities, but the appropriate response to those concerns is to figure out how, specifically, to address each concern rather than instituting a blanket policy of no access. I have two general points and then a few directed to the specific concerns DOC has raised:
- a) First, many if not all concerns raised about inmate access to records are inapplicable to those not in a DOC facility, so the DOC may wish to promulgate rules that, as appropriate, distinguish between these populations.
 - b) Second, we of course agree that certain information can and should be redacted: identities of otherwise-unknown informants with respect to disciplinary violations, information related to a victim's location or other info, etc. The need to withhold certain information, however, cannot justify the wholesale withholding contemplated by DOC.
 - c) Moving to the concerns expressed by DOC in prior hearings of this committee:
 - i) Other inmates could find out info re: disease, offense of conviction, or other vulnerability and use that info to the inmate's disadvantage
 - (1) On federal level, BOP similarly said inmate access to PSR presented security issue because inmates were pressuring other inmates to turn over their PSRs.

- (a) But, under Supreme Court precedent, *United States v. Julian*, 486 U.S. 1 (1988), inmates are entitled to access their own PSR under FOIA.
- (b) So BOP procedures state that inmates must be provided reasonable opportunities to access and review their PSRs and related sentencing documents.
- (2) Moreover, also on the federal level, 28 C.F.R. § 542.10 creates an Administrative Remedy Program that allows “an inmate to seek formal review of an issue relating to any aspect of his/her own confinement.”
 - (a) 28 C.F.R. § 513.40 encourages inmates to use this Program rather than FOIA to review disclosable records in his/her own Inmate Central File.
 - (i) Disclosable records are defined quite broadly: “Disclosable records in the Inmate Central File include, but are not limited to, documents relating to the inmate’s sentence, detainer, participation in Bureau programs such as the Inmate Financial Responsibility Program, classification data, parole information, mail, visits, property, conduct, work, release processing, and general correspondence. This information is available without filing a FOIA request.”
 - (b) Staff must also advise the inmate that, if documents were withheld, the inmate has the right to request those documents under FOIA.
 - (c) Inmates may submit requests for the correction of a record through this same Program.
 - (3) More generally, inmates can be given the choice of reviewing files or physically possessing them where there are particular concerns that the content of the records could put them at some risk.
- ii) Limits on property allowed in cell
 - (1) I have no doubt that DOC could find a way to deal with this: give inmates ability to review records and select the ones they want physical copies of, or use similar procedures to those worked out for extremely large court record files.
- iii) Staff time to review, redact, copy—would be cumbersome if had to produce with every request for file, esp. if PRA timelines attach
 - (1) Burden of complying must be borne by every other agency—this is just an argument against having a public records act.
 - (2) BOP uses more streamlined procedure for access to disclosable files, with FOIA as a backstop for records that BOP withholds; perhaps DOC could consider something similar.
- iv) With e-records, inmates would have to go in caseworker’s office to review; if inmate presents a danger, corrections officer must be there too.
 - (1) This strikes me as a red herring; today, a great number of public records are kept in electronic format and requestors are not required to use an agency computer to review them; e-records can be printed.
- d) On the whole, these concerns do not justify a blanket prohibition on inmate access to records. Any limitations on access must be carefully designed to respond to specific concerns without unduly limiting more access than is necessary to meet those concerns, and these limitations should be promulgated as rules through the APA process.