AMERICAN CIVIL LIBERTIES UNION FOUNDATION of VERMONT

TO: Members of the House Committee on Corrections and Institutions
FROM: Lia Ernst, Staff Attorney/Public Advocate, ACLU of VT
DATE: February 16, 2016
SUBJECT: Confidentiality of Inmate and Offender Files

Thank you for the opportunity to address the Committee again on the issue of inmates' access to their own files. As I mentioned before, the ACLU-VT supports the modifications that this proposal contemplates; they make good sense from policy and good governance perspectives. Although the question of inmates' access to their own records was not originally at the forefront of this Committee's work, we appreciate the time and serious attention that you are giving this important issue.

The ACLU-VT recognizes that certain security issues arise in an incarcerative setting that may justify withholding access to particular records in particular circumstances. We also recognize that the Department of Corrections maintains a great many categories of data, and we agree with the Department that specifying how to treat each category is a task better handled through the rulemaking process than in statute. The Committee has expressed concern that 28 V.S.A. § 107, as presently drafted, may grant the Department undue discretion to determine the circumstances under which inmates may access their own records. We share this concern. In light of inmates' significant interest in reviewing and correcting errors in their own records, and in light of how the Department has interpreted 28 V.S.A. § 601(10) and implemented it through its directives, we believe that the bill must expressly provide that inmates presumptively may access their own records and that the Department may only limit that access via rules it adopts through rulemaking. Equally importantly, this rulemaking authority must be constrained by a statutory requirement that any limitation on access be narrowly tailored to serve specific Departmental interests that are not outweighed by an inmate's interest in accessing his or her own records.

We believe that the Department has given insufficient weight to the substantial interest inmates have in accessing and correcting information in their own records. Critical decisions are made on the basis of this information, but, absent a right to review and correct these records, decisions will routinely be based on false or incomplete information. Prohibiting people from seeing the records that supposedly or actually justify these decisions is also contrary to rehabilitative aims, insofar as those decisions may seem arbitrary and irrational; allowing inmates to see and understand the reasons for particular decisions is an integral part of the rehabilitative process.

The Committee has expressed interest in understanding how the federal prison system handles these issues. 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." 28 C.F.R. § 513.40, in turn, encourages inmates to use this Program rather than FOIA to request review of disclosable records in his/her central file. Disclosable records are defined quite broadly as including, but 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." Prison staff must also advise that, if documents are withheld, the inmate has the right to request them under FOIA. Importantly, inmates may submit requests for correction of a record through this same Program. In short, the Bureau of Prisons uses a streamlined procedure for access to and correction of inmate records, with FOIA serving as a backstop to challenge the withholding of particular records.

As illuminated by the federal system's provision of greater access to records, the Department's concerns do not justify the prohibitions it has placed on inmate access to records. The ACLU-VT supports the work the Committee is doing on this issue and urges it specify an express legislative intent that inmates presumptively may access their own records and that any limitations on that access must be carefully designed to respond to specific and legitimate correctional concerns without limiting more access than is necessary to meet those concerns.