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Legal Mail

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Table of Contents

| | |
|---|------------|
| Legal Mail | . 3 |
| Correspondence From Legal Organizations | . 3 |
| Correspondence From County Clerks | . 3 |
| Correspondence From State and Federal Courts | . 4 |
| Correspondence From Attorneys | . 4 |
| Outgoing Legal Mail | . 4 |

Legal Mail

Reference Number: CTAS-1406

Prison regulations or practices that affect a prisoner's legal mail are of particular concern because of the potential for interference with a prisoner's right of access to the courts. See *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). When the incoming mail is "legal mail," courts "have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts." *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) citing *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996) and *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003).

"In an attempt to accommodate both the prison's needs and the prisoner's rights, courts have approved prison policies that allow prison officials to open 'legal mail' and inspect it for contraband in the presence of the prisoner." *Sallier* at 874, citing *Wolff v. McDonnell*, 418 U.S. 539, 577, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (upholding such a policy against a Sixth Amendment attorney-client privilege claim and a 14th Amendment due process claim based on access to the courts).

"Not all mail that a prisoner receives from a legal source will implicate constitutionally protected legal mail rights." *Sallier* at 874. Nevertheless, "even constitutionally protected mail can be opened (although not read) and inspected for contraband. The only requirement is that such activity must take place in the presence of the recipient, if such a request has been made by the prisoner." *Id.*

In *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992), the Sixth Circuit addressed an opt-in system in which prison officials could open any mail sent to a prisoner unless the prisoner affirmatively requested that "privileged mail," defined by the policy as mail sent by a court or by counsel, be opened in his presence. The court found that the opt-in system was constitutionally sound as long as prisoners received written notice of the policy, did not have to renew the request upon transfer to another facility, and were not required to designate particular attorneys as their counsel. *Id.* If such a system is in place, the Sixth Circuit has held that "[a]s a matter of law, [prison officials] cannot be liable for having opened mail, even if it is 'legal mail,' prior to the time [the inmate] made his written request to have such mail opened in his presence." *Sallier*, 343 F.3d at 875.

Correspondence From Legal Organizations

Reference Number: CTAS-1407

Correspondence from an organization such as the American Bar Association may be opened pursuant to a prison's regular mail policy without violating the First Amendment rights of a prisoner when there is no specific indication that the envelope contains confidential, personal, or privileged material; that it was sent from a specific attorney at the organization; or that it relates to a currently pending legal matter in which the inmate is involved. *Sallier*, 343 F.3d at 875. Compare *Jensen v. Klecker*, 648 F.2d 1179, 1183 (8th Cir. 1981) (finding that a letter from the National Prison Project, bearing the name of an attorney and stamped "Lawyer Client Mail Do Not Open Except In Presence of Prisoner" appears to come well within the definition of protected attorney-client legal mail). Cf. *Boswell v. Mayer*, 169 F.3d 384, 388-89 (6th Cir. 1999) (upholding prison policy of treating mail from a state attorney general's office as protected legal mail only if (a) the envelope contains the return address of a licensed attorney and (b) the envelope has markings that warn of its privileged content); *Wolff v. McDonnell*, 418 U.S. 539, 576, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (finding it entirely appropriate for a state to require any communication from an attorney to be specially marked as originating from an attorney, including the attorney's name and address, if the communication is to be given special treatment).

Correspondence From County Clerks

Reference Number: CTAS-1408

Correspondence from a county clerk or register of deeds may be opened pursuant to a prison's regular mail policy without violating the First Amendment rights of a prisoner when there is no specific indication that the envelope contains confidential, personal, or privileged material; that it was sent from an attorney; that it relates to a currently pending legal matter in which the inmate is involved; or that it is to be opened only in the presence of the prisoner. As a general matter mail from a county clerk or register of deeds does not implicate constitutionally protected legal mail rights. *Sallier*, 343 F.3d at 876.

Correspondence From State and Federal Courts

Reference Number: CTAS-1409

Correspondence from a state or federal court constitutes "legal mail" and cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *Sallier*, 343 F.3d at 876-877. See also *Taylor v. Sterrett*, 532 F.2d 462, 475 (5th Cir.1976) (holding that an inmate's right of access to the courts requires that incoming prisoner mail from courts, attorneys, prosecuting attorneys, and probation or parole officers be opened only in the presence of the inmate)

Correspondence From Attorneys

Reference Number: CTAS-1410

Correspondence from an attorney cannot be opened outside the presence of a prisoner who has specifically requested otherwise. *Sallier*, 343 F.3d at 877-878 ("We find that the prisoner's interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process and, therefore, that as a matter of law, mail from an attorney implicates a prisoner's protect legal mail rights. There is no penological interest or security concern that justifies opening such mail outside of the prisoner's presence when the prisoner has specifically requested otherwise.") (citation omitted). See also *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992) (holding that a prisoner may not be required to designate ahead of time the name of the attorney who will be sending the prisoner confidential legal mail).

Correspondence from the attorney general's office requires similar protection because of the potentially confidential nature of such correspondence. *Muhammad v. Pitcher*, 35 F.3d 1081, 1083 (6th Cir. 1994) ("The conclusion that mail from an attorney general to an inmate may be confidential should not be surprising, for courts have consistently recognized that 'legal mail' includes correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general.") (citations omitted).

Outgoing Legal Mail

Reference Number: CTAS-1411

A prisoner's right to send "legal mail" is subject to prison regulations and practices that "further an important or substantial governmental interest unrelated to the suppression of expression," and that extend no further "than is necessary or essential to the protection of the particular governmental interest involved." *Bell-Bey v. Williams*, 87 F.3d 832, 838 (6th Cir. 1996) citing *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974) and *Martucci v. Johnson*, 944 F.2d 291, 295-96 (6th Cir. 1991). In *Bell-Bey*, the Sixth Circuit rejected an inmate's challenge to a prison mail policy, which required prison officials to "inspect" outgoing legal mail to determine whether the mail was in fact legal mail. The court upheld the policy, noting that there was no proof that the policy directed officials to read prisoners' legal mail. *Id.* at 839. In addition, the court noted that there were procedural safeguards that limited the prison official's inspection of a prisoner's legal mail. Under the policy at issue, "1) the official's inspection [wa]s limited to scanning legal mail for docket numbers, case title, requests for documents, et cetera; 2) the inspection [wa]s conducted in the prisoner's presence in his cell; and 3) the prisoner [could] seal his mail after the inspection [wa]s completed." *Id.* at 837.

While it is clear that an indigent inmate has no constitutional right to free postage for nonlegal mail, *Argue v. Hofmeyer*, 80 Fed.Appx. 427, 429 (6th Cir. 2003) (citations omitted), "[i]t is indisputable that indigent inmates must be provided at State expense with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them." *Bounds v. Smith*, 430 U.S. 817, 824-825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). "Bounds, however, does not require that inmates be provided with unlimited free postage." *Blaise v. Fenn*, 48 F.3d 337, 339 (8th Cir. 1995) citing *Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989); accord *Chandler v. Coughlin*, 763 F.2d 110, 114 (2d Cir. 1985). See also *Myers v. Hundley*, 101 F.3d 542, 544 (8th Cir. 1996) (Inmates do not have a right to unlimited stamp allowances for legal mail.); *Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (holding that inmates who were not permitted to work for money nor provided with any allowance or other form of income must be provided with one first-class stamp per week for legal mail); *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) ("However, although prisoners have a right of access to the courts, they do not have a right to unlimited free postage."); *Hoppins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir.1985) ("The constitutional right to access to the courts entitles indigent prisoners to some free stamps as noted in *Bounds* but not unlimited free postage as is urged by the plaintiff.").

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