ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Alaska

April 22, 2024

Brandon Jones
Superintendent
Hiland Mountain Correctional Center
9101 Hesterberg Road
Eagle River, AK 99577

Jen Winkelman
Commissioner
Alaska Department of Corrections
550 West 7th Ave., Suite 1800
Anchorage, AK 99501

Dear Superintendent Jones and Commissioner Winkelman,

I write to you on behalf of women incarcerated at Hiland Mountain Correctional Center. Our organization has recently become aware of several policies and practices at Hiland that deny these women their constitutional right to communicate with attorneys and violate multiple DOC policies. While this letter focuses on specific occurrences at Hiland, we are increasingly concerned that these sorts of practices are taking place across Alaska correctional facilities. Further, I understand that these practices are also interfering with client representation by the Public Defender Agency, the Office of Public Advocacy, the Federal Public Defender, and private defense counsel. My goal is to inform you of the problematic nature of these practices, with the hope that you can resolve these matters without the need for costly litigation.

All incarcerated people have a constitutional right to seek and receive the assistance of attorneys.[1] Necessary to the exercise of this constitutional right is the related concept of attorney-client privilege, which allows any client to refuse to disclose, and to prevent any other person from disclosing, confidential communications with their attorney.[2] To properly effectuate both the constitutional right and privilege, incarcerated persons must be able to speak confidentially with attorneys through in-person and telephonic visitation, exchange legal documents with attorneys, and correspond confidentially with attorneys through mail. Courts have provided specific parameters on permissible behavior for prison officials concerning these practices, which I will review in more detail below.

[1] *Procunier v. Martinez*, 416 U.S. 396 (1974).

[2] Alaska R. Evid. 503.

AMERICAN CIVIL LIBERTIES UNION OF ALASKA FOUNDATION
1057 W. Fireweed Lane, Suite 207 | Anchorage, AK 99503 | Tel: 907.258.0044 | Fax: 907.258.0288
www.acluak.org | ACLUofAlaska | @ACLUofAlaska

Recent practices we have observed or been told about violate both the inmates' constitutional rights and DOC policies designed to protect those rights. Staff within our organization have personally witnessed or been made aware of multiple recent violations, including:

Several incarcerated women have reported that women are reluctant to write to the ACLU because Hiland Mountain does not consider mail to the ACLU to be "legal mail" and, as a result, any correspondence sent to our organization is read before leaving the facility.

Prison inmates enjoy a First Amendment right to send and receive mail.[3] The 9th Circuit has made clear that prison officials may inspect an inmate's outgoing mail in the inmate's presence to make sure that it does not contain, for example, "a map of the prison yard, the time of guards' shift changes, escape plans, or contraband."[4] Prison officials may not, however, read outgoing attorney-client correspondence.[5] And courts have specifically held that correspondence between inmates and the ACLU must be treated as legal mail.[6]

DOC Policy reflects these legal holdings: DOC Policy 810.03 requires that privileged mail, including incoming and outgoing correspondence with the ACLU, may not be restricted or censored. More specifically, outgoing privileged mail may not be read or searched. Mailroom staff may review such mail only to verify, in the prisoner's presence, that the intended recipient of the mail is the same person as the privileged addressee.

Several incarcerated women have reported that, when meeting with attorneys at Hiland, they are required by facility staff to keep the door to the visitation room open, preventing them from having confidential conversations.

The right of confidential communication with attorneys is protected by the First Amendment to prevent a "chilling effect" on attorney-client communications.[7] For criminal defendants, the right to attorney-client confidentiality is further protected by the 6th Amendment.[8] To enforce these constitutional rights, communications during in-person visits between clients and attorneys must not be audible to other persons.[9]

Again, this constitutional mandate is properly reflected in Department policy: DOC Policy 810.02 requires that attorneys and legal representatives be allowed to meet with

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[3] *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

[4] *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014).

[5] *Id*. at 910-11.

[6] *See, e.g.*, *American Civil Liberties Union Fund of Michigan v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015) (enjoining prison's policy of not treating correspondence with the ACLU as "legal mail" as an "impingement on important First Amendment rights").

[7] *See Hayes v. Idaho Correctional Center*, 849 F.3d 1204, 1208 (9th Cir. 2017); *see also United States v. Yandell*, No. 2:19-CR-00107-KJM, 2020 WL 3858599, at *6 (E.D. Cal. July 8, 2020).

[8] *Nordstrom v. Ryan*, 762 F.3d 903, 909-11 (9th Cir. 2014).

[9] *Yandell*, 2020 WL 3858599 at *6.

inmates in a private and secure attorney-client interview space. During these visits, per the policy, attorneys and the inmate must be allowed to converse without being overheard or recorded.

A trusted source inside Hiland Mountain reported that at least some private phone calls between incarcerated women and the ACLU are being listened to.

As stated, the confidentiality of communications between attorneys and incarcerated clients is protected by the First and Sixth Amendments. Further, under DOC Policy & Procedure 810.01, inmate telephone calls with recipients on the *Privileged Organizations Designation List* may not be recorded or restricted unless specifically authorized by the Commissioner. The ACLU is included on the list of privileged organizations.

An incarcerated woman at Hiland had the discovery from her criminal case shared with facility staff and other inmates. From the information available, it appears this occurred because a Staff Sergeant failed to delete the discovery files from the computer where the woman was required to access them, thereby allowing other inmates to view the files. The woman was not the one who shared the documents. This woman filed a grievance related to the disclosure, and three months later she received a letter from the Deputy Commissioner confirming that she was "correct' and that "a mistake was made." The letter did not provide details about what measures are in place to prevent this going forward.

Discovery is provided to criminal defendants to assist in the preparation of their defense. These documents must be kept confidential, in part because they can include sensitive information such as photographs, witness accounts, and vulnerable details about the defendant and others.

The disclosure of this woman's discovery exposed infirmities in Hiland Mountain's procedures for allowing inmates to view their criminal discovery. When other inmates or facility staff can access this sensitive information, an inmate is exposed to potential harm and retaliation. It can also prejudice their criminal case.

A new mail policy at Hiland Mountain (and other DOC facilities) requires that all legal mail be copied and the originals destroyed in front of the incarcerated recipient.

The U.S. Supreme Court has held that prison officials may open legal mail and inspect it for contraband but may not read it.[10] The new mail policy in place at Hiland and other DOC facilities allows corrections staff the time and ability to read through materials that inmates receive from lawyers — and neither Hiland Mountain nor DOC has provided assurances that staff are prohibited from reading the letters that they copy. The ACLU has also heard reports from incarcerated women inside Hiland that facility staff performing the copying are in fact pressing the "scan" button on the copying machine, causing a digital version to be created of confidential documents.

[10] *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

When a similar legal mail policy was started by prison officials in Pennsylvania and Kentucky, the ACLU chapter of each state brought a lawsuit enjoining its use as a violation of the First Amendment rights of the organization and their incarcerated clients.[11] These lawsuits resulted in settlement agreements whereby an attorney verification system was created for legal mail.[12] This system allows prison officials to ensure that mail sent to the facility from an attorney is bona fide legal mail and prevents the introduction of contraband by persons posing as attorneys, while ensuring the protection of confidentiality in attorney-client communications.[13]

Two ACLU attorneys recently met with an incarcerated woman at Hiland for the purpose of obtaining legal paperwork. The woman informed the attorneys that facility staff prohibited her from bringing her legal paperwork to the meeting. When our attorneys contacted the CO about this denial, the CO stated that the woman's paperwork was not allowed because it was not "legal" because it included items like institutional Requests for Information. Our attorneys informed the CO that such items qualify as legal paperwork. The CO left to retrieve a folder of the legal paperwork. (It is not clear how the CO knew which documents to obtain, and the woman informed the attorneys that the documents the CO brought were a small subset of what she wished to share.) The CO took the folder of legal paperwork to the Hiland Superintendent to review. When the CO returned to the visitation room, she informed the ACLU attorneys that the Superintendent had reviewed the paperwork to ensure there were no "threats against facility staff."

This incident reflects significant issues with the treatment of legal paperwork by corrections staff at Hiland. When an incarcerated person shares documents with an attorney during a contact visit, this is equivalent to the sharing of documents with an attorney by sending them via outgoing legal mail. As discussed, the 9th Circuit has held that detailed inspection of outgoing legal mail by prison officials is a violation of the First Amendment.[14] While prison officials may inspect outgoing legal mail, "[a]t most, a proper inspection entails looking at a letter to confirm that it does not include suspicious features such as maps, and making sure that illegal goods or items that pose a security threat are not hidden in the

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[11] See *PILP v. Wetzel*, No. 18-02100 (M.D. Pa), Complaint, ECF No. 1; *Ky. Dep't of Pub. Advoc. v. Ky. Dep't of Corrections*, No. 2021-CI-806 (Franklin Cir. Ct.), Complaint (Oct. 21, 2021).

[12] The content of the settlement agreements can be found here: https://www.aclupa.org/sites/default/files/field_documents/filed_settlement_agreement_.pdf (Pennsylvania); https://www.aclu-ky.org/sites/default/files/20220727_agreed_order_of_settlement.pdf (Kentucky).

[13] Correctional facilities in other states employ similar attorney verification systems for legal mail. *See, e.g.*, Mich. Dep't of Corrections, Policy Directive 05.03.118, Prisoner Mail (Nov. 6, 2023); Ohio Dep't of Rehabilitation & Correction, Policy 75-MAL-03, Incarcerated Population Legal Mail (Feb. 1, 2022).

[14] *Nordstrom v. Ryan*, 856 F.3d 1265, 1274 (9th Cir. 2017).

envelope."[15] This must be akin to a "cursory visual inspection", and does not permit "reading the words on a page."[16]

As stated, the CO told the attorneys that the Superintendent had reviewed the legal paperwork for "threats against facility staff." This necessarily includes reading the paperwork, which is an undue invasion of the incarcerated woman's First Amendment right to communicate confidentially with her attorneys.

Additionally, this inspection occurred outside the presence of the inmate. Such inspections must occur in their presence. As courts have repeatedly stated, this requirement is necessary to ensure that legal mail is not read by the prison employee conducting the inspection.[17]

Finally, the statements of the CO indicate a significant misunderstanding about what qualifies as "legal" paperwork that can be exchanged between an inmate and their attorney. Legal paperwork consists of all correspondence between an inmate and her lawyer.[18] As stated by the 9th Circuit, the only items that an incarcerated client may not give an attorney are "suspicious features such as maps" or physical contraband like weapons or drugs.[19] Beyond these examples, all paperwork that an incarcerated person wishes to share with their attorney qualifies as "legal" paperwork.

During another recent legal visit at Hiland Mountain, ACLU attorneys were informed that, in order to give a legal document to a client, they would need to first give the document to the Staff Sergeant. The facility staff member who informed the attorneys of this policy stated that the Staff Sergeant would read the document before deciding whether to convey it to the client.

As already stated, the U.S. Supreme Court has held that incoming legal paperwork may be inspected for contraband but may not be read.[20] This inspection must be conducted in the inmate's presence, to ensure prison officials are not reading the paperwork. DOC Policy & Procedure 808.01 and 810.02 properly reflect this holding by mandating that attorneys and incarcerated clients be allowed to "exchange or review legal documents without interference from correctional staff, except for a search for contraband."

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[15] *Id.* at 1272.

[16] *Id.* (citing *Nordstrom v. Ryan*, 762 F.3d 903, 906 (9th Cir. 2014) and *Witherow v. Paff*, 52 F.3d 264, 265-66 (9th Cir. 1995)).

[17] *Hayes v. Idaho Correctional Center*, 849 F.3d 1204, 1210 (9th Cir. 2017) (citing cases from the Second, Third, Sixth, Eleventh, and Tenth Circuits); *Mangiaracina v. Penzone*, 849 F.3d 1191, 1196 (9th Cir. 2017); *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014); *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

[18] *See Thomas v. Pashilk*, No. 22-CV-01778-JSC, 2024 WL 24324, at *2 (N.D. Cal. Jan. 2, 2024).

[19] *Nordstrom v. Ryan*, 856 F.3d 1265, 1272 (9th Cir. 2017).

[20] *See Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

This new policy whereby a Staff Sergeant will "read" a legal document before conveying it to the inmate is an explicit violation of constitutional rights and Department policy.

I sincerely hope that some of these incidents are isolated ones. But I am increasingly concerned that they are not, and instead reflect a generalized staff misunderstanding about the contours of the constitutional right to communicate confidentially with attorneys.[21] And, as noted earlier, although this letter focuses on recent violations at Hiland Mountain, we have direct experience and communication from inmates indicating similar problems are occurring at other institutions, including recently at Anchorage Correctional Complex.

I urge you to reform facility practices, educate staff, and begin oversight to ensure these problematic practices do not continue. I also ask that you provide assurances that you have done so. Additionally, I request that the Department of Corrections replace the current legal mail policy with an attorney verification system similar to the ones in use in Pennsylvania and Kentucky, rather than waiting for the issue to be forced through litigation.

We welcome the opportunity to meet with you and/or your attorneys to discuss our concerns further. Time is of the essence because of the ongoing damage being done to the constitutional rights of women at Hiland Mountain, as well as others in DOC custody. Please contact us (personally or through counsel) to discuss this matter by May 15, 2024. If we do not hear from you by that date, we expect to share this letter with the media. We hope that, through constructive conversation, we will be able to resolve these issues expeditiously, without the need for widespread media attention or court proceedings.

Sincerely,

Ruth Botstein
Legal Director, ACLU of Alaska

Cc: Treg Taylor, Attorney General, State of Alaska
Andalyn Pace, Assistant Attorney General, State of Alaska
Nancy Dahlstrom, Lieutenant Governor, State of Alaska
Mike Dunleavy, Governor, State of Alaska

[21] Further, even isolated incidents are sufficient for courts to find constitutional violations. See *Hayes v. Idaho Correctional Center*, 849 F.3d 1204, 1212 (9th Cir. 2017) (concluding First Amendment claim properly stated based on two counts of legal mail being opened outside inmate's presence); *Merriweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009) (holding prison officials' improper opening of four pieces of legal mail is enough to state a constitutional claim); *Sallier v. Brooks*, 343 F.3d 868, 879 (6th Cir. 2003) (upholding jury award against two prison mail room clerks for three instances of improper mail opening).