# KNOW YOUR RIGHTS
# PRIVILEGED AND NON-PRIVILEGED MAIL

**ACLU National Prison Project**

**Important Note:** The law is always evolving. If you have access to a prison law library, it is a good idea to confirm that the cases and statutes cited below are still good law. The date at the bottom of this page indicates when this information sheet was last updated.

The Supreme Court has held that the First Amendment of the United States Constitution entitles prisoners to receive and send mail, subject only to the institution's right to censor letters or withhold delivery if necessary to protect institutional security, and if accompanied by appropriate procedural safeguards.[1]

A prison's restrictions on *mail received by prisoners* must be rationally related to a legitimate penological interest.[2]

A prison's restrictions on prisoners' *outgoing correspondence* must meet a more exacting standard. They must be "no greater than is necessary or essential" to protect an "important or substantial" government interest.[3]

Prison officials' ability to inspect and censor mail depends on whether the mail is privileged or not.

**Non-Privileged Mail (including commercial mail, letters from family members, friends and businesses)**

The Constitution permits incoming non-privileged mail to be opened outside the prisoner's presence.[4] Prison officials can read non-privileged mail for security or for other correctional purposes without probable cause and without a warrant.[5]

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[1] Hudson v. Palmer, 468 U.S. 517, 547 (1984). See also Parrish v. Johnson, 800 F.2d 600, 604 (6th Cir. 1986) ("Any 'arbitrary opening and reading of … mail [with] no justification – other than harassment' may violate the First Amendment.").

[2] Turner v. Safley, 482 U.S. 78, 89-91 (1987).

[3] Procunier v. Martinez, 416 U.S. 396, 413-14 (1974), overruled in part on other grounds by Thornburgh v. Abbott, 490 U.S. 401 (1989); Nasir v. Morgan, 350 F.3d 366 (3rd Cir. 2003); but see Ortiz v. Fort Dodge Correctional Facility, 368 F.3d 1024, 1026 n.2 (8th Cir. 2004) (applying Turner standard to restrictions on outgoing correspondence).

[4] See Martin v. Tyson, 845 F.2d 1451, 1456-57 (5th Cir. 1988), cert. denied, 488 U.S. 863 (1988).

[5] See Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir. 1991).

Business and commercial mail may be treated as non-privileged.

Some courts restrict the reading of outgoing mail.[6]

Prisons may not ban mail simply because it contains material downloaded from the internet.[7] Prisoners may not be punished for posting material on the internet with the assistance of non-incarcerated third parties.[8]

**Privileged Mail (including attorney-client communications)**
"Privileged" mail is entitled to greater confidentiality and freedom from censorship. Privileged mail may be briefly held to verify the identity of the addressee.[9] In order for mail to be treated as privileged, it must be clearly marked.[10] Privileged mail may be checked for contraband but cannot be read in the ordinary course of prison routine.[11] The "contraband" check must be conducted in front of the prisoner.[12] Outgoing privileged mail may generally be sent unopened.[13]

Some courts have accorded privileged status to mail to and from various public officials and agencies of state, local and federal government.[14]

**What can a prisoner do if privileged mail is opened outside the prisoner's presence?**
A court will not necessarily rule for the prisoner in every case in which privileged mail was opened outside of the prisoner's presence. This is not a reflection on whether the prisoner's right was violated, but instead reflects the deference the courts give to prison administrators. A court might rule, for example, that a prison receives a large volume of letters each day and may make a mistake once in a while.

A prisoner will have a greater chance of winning a lawsuit if there is a showing

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[6] See Wolfish v. Levi, 573 F.2d 118, 130 (2nd Cir. 1978), rev'd in part on other grounds sub nom, Bell v. Wolfish, 441 U.S. 520 (1979).

[7] Clement v. California Dep't of Corrections, 364 F.3d 1148 (9th Cir. 2004).

[8] Canadian Coalition Against the Death Penalty v. Ryan, 269 F.Supp.2d 1199 (D. Ariz. 2003).

[9] See Guajardo v.Estelle, 580 F.2d 748, 758-59 (5th Cir. 1978), clarified on other grounds by McFarland v. Leyh (In re Texas Gen. Petroleum Corp.), 52 F.3d 1330 (5th Cir. 1995).

[10] See O'Donnell v. Thomas, 826 F.2d 788, 790 (8th Cir. 1987).

[11] See Reneer v. Sewell, 975 F.2d 258, 260 (6th Cir. 1992).

[12] Id.

[13] See Davidson v. Scully, 694 F.2d 50, 53 (2nd Cir. 1982).

[14] See Muhammad v. Pitcher, 35 F.3d 1081, 1083-86 (6th Cir. 1994).

that he or she was actually harmed by the opening of the letter outside the prisoner's presence. Examples of actual harm would be if the prison official's policy is to open all privileged mail outside the recipient's presence, if the letter is copied, or if information contained in the letter is used against the prisoner.

When a prisoner receives a piece of privileged mail that has been opened outside his or her presence, the prisoner should file a grievance. Often, prison officials will admit that they erred, and that such accidents should not occur in the future. The prisoner should keep a copy of this grievance and any responses in case this act happens again. If the error happens again, the prisoner should file another grievance, mentioning the previous one and the prison official's response. If the prisoner can establish that the prison has a policy to open privileged mail outside the recipient's presence, then the prisoner has a better chance of succeeding in a lawsuit.