



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 27, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

The Department of Justice (DOJ) has reviewed H.R. 738, "The Death in Custody Reporting Act of 2009", as passed by the House. Collecting additional information on deaths of persons in government custody would greatly assist DOJ in our enforcement of the Civil Rights of Institutional Persons Act of 1980 (CRIPA), 42 U.S.C. §1997, which gives the Attorney General the authority and responsibility to investigate institutional conditions and, where necessary, file suit to protect the basic rights of the Nation's most vulnerable persons.

While we support this legislation, we offer the following comments for your consideration, which would enhance the effectiveness of the bill and our ability to use the information gathered in our law enforcement efforts.

Section 2(c)(1)(B) Exception

We urge a review of the reporting exception created in Section 2(c)(1)(B) for states whose constitution forbids disclosure. The civil rights interests in federal statutes may trump the privacy provisions of state constitutions. In addition, some states already have attempted to enact laws forbidding the collection of information or promoting the rapid expungement of information that could be used to investigate confinement conditions or the actions of law enforcement officers. This exception could become an invitation for states to pass legislation or constitutional amendments to circumvent the reporting requirements.

Study and Report Section 2(f) and Section 3(c)

H.R. 738 should make it clear that the government is permitted to use the reported information for purposes other than merely study and report-writing. DOJ, for example, uses

purposes, it would be helpful if the legislation provided that DOJ may seek, without need for a court order or subpoena, any follow-up information regarding the incidents at issue, including any disciplinary records or personnel records of the officers involved in any incident or omission contributing to the death. Although some agencies provide such information to federal law enforcement agencies without subpoena, most do not. Furthermore, some state and local agencies have moved to quash subpoenas aimed at obtaining such information, requiring the government to spend time and money litigating its right to obtain such records. *See, e.g., In re Grand Jury, John Doe* No. G.J. 2005-2, 478 F.3d 581, 582 (4th Cir. 2007). We urge that any agency receiving federal funds covered by this bill should be required to disclose its records upon request.

Information Required – Deaths Following Release

Sections 2(a) and 3(a) outline the information that jurisdictions must report about deaths in custody. In addition to the current requirements, the legislation should require jurisdictions to report instances when an individual goes missing or dies within 24 or 48 hours following release from custody or following the dismissal of all charges. This additional category would increase the accuracy of the reports. Unfortunately, it is DOJ's experience that jurisdictions may not report deaths when, in reality, an inmate has died on their watch. Some jurisdictions have claimed that deaths did not occur in state custody when, for example, charges were dropped while the person was in the hospital or en route to the hospital, or when the jurisdiction simply released a person, who then died. This can occur when a jurisdiction is trying to avoid paying medical bills for inmates.

Further, the U.S. Marshals Service (USMS) does not, and in some instances cannot, track the whereabouts or medical status of individuals after they are released from its custody. In the case of a "missing" individual, the whereabouts of someone who is released from USMS custody and "goes missing" would be impossible to determine, track and report. With regard to those individuals in a medical facility and whose charges are dropped, the USMS does not track the medical disposition of these individuals. In fact, there is a question whether the USMS could legally request or receive additional medical information regarding an individual who is no longer in USMS custody.

The USMS has no electronic means to collect the requested information from its 94 district offices. The tracking of prisoners through the Justice Detainee Information System (JDIS) is a priority for the JDIS upgrade. However, funding shortages continue to preclude the implementation of a national database for purposes of tracking and trend analysis.

Expanded Coverage

If it does not dilute the purposes of the bill, DOJ recommends expanding coverage to all institutions currently covered by CRIPA.

Please do not hesitate to contact this office if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

A handwritten signature in black ink that reads "M. Faith Burton". The signature is written in a cursive style with a large initial "M".

M. Faith Burton
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member