

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



ATTORNEY GENERAL

February 24, 2009

Honorable Phil Mendelson
Chairperson, Committee on Public Safety and the Judiciary
1350 Pennsylvania Avenue, NW, Suite 402
Washington, DC 20004

RE: Response to Your Letter Concerning 10:00 PM Inmate Release Cut-off at the Central Detention Facility

Dear Chairperson Mendelson:

I have read thoroughly and reviewed your letter to me of February 19, 2009. I would like to respond to each of the issues you have raised.

I wholeheartedly agree that the executive and the legislative branches should always strive to reach consensus wherever possible. It was precisely in that vein that, on behalf of the Mayor, I attempted to enlist the Council's assistance in addressing what I have concluded to be the unconstitutional application of the 10PM to 7AM inmate release cut-off provision pursuant to D.C. Official Code § 24-211.02(b)(6)(10:00 PM cut-off). My present course of action was chosen only after it became abundantly clear, despite numerous actions taken by the Department of Corrections (DOC) during the last five years to reform the system for releasing inmates, that due to causes outside DOC's control there is a continual and irreducible number of inmates who are held longer than otherwise necessary because of the 10:00 PM cut-off. As you know, I have held repeated meetings with you, representatives from the U.S. Marshals Service, the Department of Corrections (DOC), and the Courts of the District. At one time or another all of these parties have attempted to convince you that the 10:00 PM cut-off should be repealed. My office has repeatedly asked to engage in a discussion concerning our legal analysis in support of such action, but you have declined to do so.

While the goal of pursuing collaborative legislative action is important, I have taken an oath not only to faithfully execute the laws of the United States and of the District of Columbia, but also to defend the Constitution of the United States. Therefore, I have a duty to insure that all of the laws of the District are applied in a manner that respects the constitutional rights of its citizens. I also have a duty to the Mayor and his subordinates to provide legal advice that from time to time may include a determination that a particular law or its application is unlawful and should therefore be considered of no legal force or effect. *See, e.g.*, Opinion of the Corporation Counsel, May 20, 2003 (holding that subparagraph 208(a)(1)(D-i)(ii) of the Inspector General Act should be considered null, void, and of no effect); Opinion of the Corporation Counsel, December 15, 1978 (holding that the Board

of Elections Conflict of Interest Rulemaking is unconstitutional, void, and thus having no legal force or effect).

The 10:00 PM cut-off when enacted was facially constitutional; hence, neither the Council's General Counsel nor my Office had reason to declare it unconstitutional at that point. The District has never conceded, nor do I now concede, that the 10:00 PM cut-off is unconstitutional facially. My Office has diligently defended this provision and has at every point argued that legitimate public safety and administrative issues are a defense from liability for inadvertent over-detentions. I will continue to vigorously present all available defenses where an over-detention is attributable to reasonable administrative delays.

I am gratified that you have recognized in your letter the substantial efforts of DOC Director Devon Brown in reducing the number of inmates that remain subject to the application of the 10:00 PM cut-off. DOC reports that the frequency of over-detentions has been reduced in the last year by approximately 40%. Since early 2007, DOC has reduced the number of over-detentions from as high as 45 per month to as low as eight per month in 2008. DOC has spent approximately five years working to improve its release procedures including:

- Completely overhauling, modernizing, and automating its Records Office.
- Adding an additional twenty-six employees to enhance the Records Office's productivity, efficiency and effectiveness.
- Implementing software to automate the sentence computation in FY 2007 and recently enhancing this software to further improve its accuracy and speed.
- Automating the Prisoner Transfer Request (PTR) to eliminate inmates being transferred between courtrooms without proper paperwork.
- Implementing Courthouse releases from several Superior Court Calendars, thereby reducing the time required to send the inmate and the paperwork back to the D.C. Jail for processing.
- Designating two FTE's to implement a full-time records retention/archiving system to enhance the accountability (filing and retrieval) of institutional records in the D.C. Jail and at the off-site records repository in Suitland, Maryland.
- Developing and implementing performance measures to monitor staff performance, proficiency, productivity and training needs.
- Transferring booking functions (scanning of documents, issuance of DCDC#, data entry and development of institutional records) from the Records Office to Receiving and Discharge (R&D) to reduce the internal operations and duties performed in the Records Office.

- Training in specific areas of expertise (sentence computation, jail credit, release processing, document reviews, etc).
- Initiating Post Orders, policies and procedures and required protocols.
- Touring, by senior staff members via Technical Assistance from the National Institute of Corrections (NIC) (October-November 2006), of four mega jail facilities to obtain applicable knowledge regarding design, construction, processes and operations for institutional booking systems.
- Developing the design and construction of a state-of-the-art booking center for processing all commitments and releases from the D.C. Jail.
- Conducting an executive level review of all over-detentions and their causes.

However, despite all of their efforts to reform the system and to comply with the 10:00 PM cut-off provision during the last five years, it has now become clear that, due to matters outside the control of DOC, there is a continual and irreducible number of inmates, up to six or seven per month, who are held longer than otherwise necessary due to the 10:00 PM cut-off. (The maximum number of inmates over-detained on any recent day has been four inmates.) While this number may seem small, the unconstitutional deprivation of liberty suffered by the affected individuals is obviously of considerable moment for them and their families. Consequently, the number of inmates who are over-detained because of the 10:00 PM cut-off is a significant contributor to the previous and pending litigation based on over-detentions at the D.C. Jail.

In my view there are no legitimate safety or public interest issues that can justify the blanket effect that the 10:00 PM cut-off works on those inmates who would otherwise be released but for its operation. Your reference to representations by prisoner advocates in favor of the 10:00 PM cut-off does not square with the plaintiffs' demand for damages in the previous and pending over-detention class actions. None of these plaintiffs have offered to give the District a "credit" for the time spent incarcerated as a result of the 10:00 PM cut-off. Nor have they suggested that it was in their best interest to wait until daylight for release.

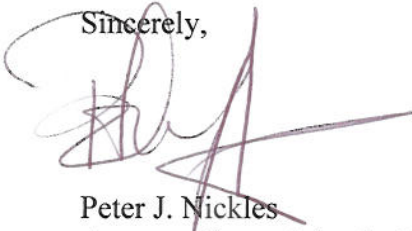
Additionally, I cannot share your view that the existing case law is so unsettled that the 10:00 PM cut-off's constitutionality can be conscientiously defended. The case law you cite is distinguishable for reasons we have shared with you. The bottom line is that the case law you mention is not predictive of how a court will rule on the 10:00 PM cut-off. By contrast, this Office's litigation experience, and my experience with our local and federal courts, has made it abundantly clear to me that those courts will strike down the application of the 10:00 PM cut-off if presented with the issue.

I also do not agree with your characterization of the development of the Inmate Processing Center (IPC). The Department of Corrections (DOC) has been working diligently with a nationally recognized A&E firm to design a new Inmate Processing Center (IPC) at the D.C. Jail in response to issues raised in the *Bynum* case. Extra time was given to the architects to explore the feasibility of adding sorely needed program space to the jail. In addition, the Chief Medical Officer and health care providers expressed their desire to conduct medical assessments on the first floor of the IPC rather than on the third floor of the D.C. Jail. The scheduled date for release of construction bid requests remains unchanged at September 2009. At this juncture, the IPC remains on schedule.

Additionally, I want to assure you and the community that, if the 10:00 PM cut-off is lifted, DOC will take appropriate steps to protect the community. The maximum number of inmates released from the jail on any given day has been four inmates. Inmates released after the curfew will receive Metro passes for use up until Metro closure time at midnight. Thereafter, the agency will provide vouchers for taxicab services until Metro reopens in the morning. The agency is currently arranging for those services through an existing contract and also exploring the use of a van through another agency until the taxicab system is in place. The cost of the transportation will be drawn from inmate commissary revenue, placing no burden on taxpayer funds. DOC will alert MPD of the curfew lift to provide additional police presence in the community if deemed warranted. All inmates will be released in their street clothes or DOC-issued civilian clothes so as not to be conspicuous or offensive to the community. The inmates will have a resource manual to direct them to available services within the District in order to avoid the need for them to linger in the neighborhood. Moreover, DOC will make special arrangements for inmates to be taken to a center that provides housing, drug treatment, and other accommodations. Inmates are also afforded the opportunity to telephone their families or friends to arrange for transportation if they so choose. In this manner we can assure the community that, unless an individual lives in the community immediately adjacent to the jail, an inmate will be taken to: 1) an address within the District of their choice; 2) a homeless shelter; or 3) a suitable form of public transportation determined by each inmate's specific discharge plan. A notice discussing the actions that DOC will be taking has been prepared and posted electronically on community listservs.

The Mayor and the Director will do everything in their power to put in place procedures to accelerate inmates' release. In the meantime, the remaining inmates affected by the cut-off provision are entitled to relief from its adverse effect. I again ask your assistance in providing that relief in the manner previously proposed by the Department of Corrections in Bill 17-532, the "Release From Confinement Act of 2007". Thank you.

Sincerely,

A handwritten signature in dark ink, appearing to read "Peter J. Nickles", with a long horizontal stroke extending to the right.

Peter J. Nickles
Attorney General for the District of Columbia

The Honorable Phil Mendelson
February 24, 2009
Page 5

PJN/ajp

cc: Bridget Davis, Director, EOM Office of Policy & Legislative Affairs
The Honorable Vincent Gray, Chairman
The Honorable Yvette Alexander
The Honorable Marion Barry
The Honorable Muriel Bowser
The Honorable Kwame Brown
The Honorable Michael Brown
The Honorable David Catania
The Honorable Mary Cheh
The Honorable Jack Evans
The Honorable Jim Graham
The Honorable Harry Thomas, Jr.
The Honorable Tommy Wells