

Learning Lessons Bulletin

Complaints investigations | Issue 6

Legal Mail: Rule 39

This Learning Lessons Bulletin examines complaints about the way prisons handle legal and confidential letters.

It is a fundamental aspect of the right to a fair trial and to access to justice, that correspondence between prisoners and their legal advisers is kept confidential. Prison instructions extend similar protection to correspondence with certain other bodies, such as my office. However, I receive frequent complaints from prisoners that their confidential mail has been opened, that staff may have read what can be sensitive documents and that this may prejudice them.

There are detailed rules for handling confidential mail. Such letters are sent and received sealed, and may only be opened by staff in exceptional circumstances. This is designed to ensure that prisoners are able to communicate with their legal advisers without fear of disclosure or interference, and that they are able confidentially to communicate with independent scrutiny bodies such as mine without fear of reprisals from staff. These are important safeguards.

This bulletin considers my investigations into complaints about the handling of confidential mail.

While I am in no way complacent, it is perhaps reassuring that, of the complaints I have upheld, most appear to be isolated incidents of human error where letters had been incorrectly opened. I found little evidence of deliberate or sinister tampering or of repeated failures at a prison. However, in a small number of cases there were more systemic issues such as poor processes, untrained staff or, in one prison, a local policy that was in contravention of national rules. In these cases, I had to call for improvement.

Prisoners need to be able to have confidence that their confidential communications will be respected. Even infrequent errors will undermine this; once a letter has been opened it is hard to reassure the prisoner that the contents were not read. It is, therefore, important that prisons have robust procedures and records, ensure staff dealing with confidential correspondence fully understand the policy, and monitor the quality of the handling of this correspondence to identify where improvements are needed.

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Background

Prison Rule 39 requires that a prisoner's correspondence with the courts and their legal adviser may only be opened, stopped or read in specific circumstances. Rule 39 applies to both correspondence sent to the prisoner and sent out by the prisoner. Correspondence protected in this way is often referred to as a "Rule 39 letter". For young offenders the same protections are contained in YOI Rule 17.

Prison Service Instruction (PSI) 49/2011 contains instructions and guidance on how prisons should observe Rule 39. The PSI also extends the provisions to include correspondence with a range of other named bodies, including the Ombudsman. This is called 'confidential access' correspondence, but the protections and the way the correspondence should be handled are the same as for the legal correspondence protected

by Rule 39. We refer to 'Rule 39 letters' for brevity in this bulletin and, unless stated, this also refers to correspondence under the confidential access provisions.

Rule 39 and the PSI state that these letters can only be opened on a case by case basis where there is reason to suspect they contain illicit items or are not from an organisation or person where Rule 39 applies. The reasons for suspicion must be recorded and the prisoner must be given the opportunity to be present when the letter is opened. If the letter appears to be genuine, it must not be read and should be passed straight to the prisoner. If, on opening, there are still concerns, a

governor must approve a request to read or stop the letter. The prisoner should be told that this is happening, and the letter re-sealed in their sight, before it is sent to the governor. This should be recorded and a Security Information Report made.

The PSI stresses that 'there must be strict compliance with the rules regarding privileged and confidential mail. Any breach, even if accidental, is likely to lead to legal challenge in both the domestic and international courts'. Governors should ensure 'that there are sufficient safeguards to avoid the possibility of such correspondence being opened inadvertently.'

Complaints to the Ombudsman

This bulletin considers complaint investigations completed by the Ombudsman between April 2014 and June 2015. There were 32 investigations where the main issue of the complaint was to do with Rule 39 and confidential access letters. The Ombudsman upheld half (16) of these complaints in favour of the prisoner.

Almost all the complaints came from prisoners who said they had received Rule 39 letters opened or unsealed in their absence. A smaller number of complaints concerned out-going letters being opened or delayed.

Letters opened in error

When prisoners complained to the Ombudsman about receiving opened Rule 39 letters, in most of the cases the prison accepted that the letter was open and that it should have been treated under Rule 39. Sometimes this was acknowledged right from the start – the letter had been recorded as 'opened in error', this was also marked on the envelope, and often the prison had apologised for the error. At other times the error was acknowledged in response to the complaint made to the prison. In a few cases, it was the Ombudsman's investigation that established the letter was likely to have been delivered open.

The Ombudsman faces a particular challenge investigating these complaints: after the event, it is very hard to establish when exactly an envelope was opened and by whom. In our investigation, we begin by looking at the quality of the prison's correspondence records. Ideally, this should track Rule 39 letters from arrival to reaching the prisoner – if there are problems, such as envelopes arriving

damaged in the post or envelopes opened by mistake, this should be recorded. If poor record keeping makes it impossible to establish whether Rule 39 correspondence is handled correctly, this is something we consider when deciding whether or not to find in favour of the prisoner.

We also look for evidence to check if there is a widespread problem, or deliberate tampering, with privileged correspondence. This involves reviewing the process in place to handle mail and considering whether staff show that they understand the policy, either in their responses to the original complaints or in interviews with our investigators. We will also look at whether there are other complaints about the Rule 39 correspondence from the same prison, and whether we have had to make recommendations in the past.

In general, our investigations found one-off and occasional errors; although there was a small number where we found that staff training or processes had not been sufficient to prevent repeated errors. However, to say that the evidence pointed to human error rather than deliberate interference is not to minimise the seriousness of the issue. Prison Service policy is clear that even accidental breaches of Rule 39 open the possibility of legal challenge. Governors are required to ensure there are adequate safeguards in place. This is because it is very difficult to prove, once opened, that correspondence was not read or otherwise interfered with.

Case study A

Mr A complained about two Rule 39 letters which had been opened before he had received them. Mr A had previously complained to the prison about his letters being opened. The prison was unable to determine whether the letters had been given to him open, but offered their apologies. Mr A was given assurances that it would not happen again.

In response to his complaint, Mr A was told that the Correspondence Department would only open legal or confidential letters which were not clearly marked Rule 39. If it did happen the prison said the error was meant to be recorded, and an explanation given to the prisoner. The prison had checked the error log and was unable to find any occasions where Mr A's letters had been opened in error. The prison apologised, but Mr A was not satisfied that the problem had been resolved. He asked the Ombudsman to investigate.

The Ombudsman's investigator examined the details of the Rule 39 letters that were alleged to have been opened in error and interviewed staff in the Correspondence Department. There was no log of all Rule 39 letters received at the prison, just a log of Rule 39 letters opened in the Correspondence Department. A copy of the "Opened in Error" log showed that, in the months leading up to the complaint, three letters had been opened in error by the Correspondence Department. An explanation about why each letter had been opened was provided, but none of the letters were for Mr A.

It was not possible to establish who opened Mr A's letters. In the responses to the original complaint, and in discussion with the investigator, staff in the Correspondence Department demonstrated that they understood which letters could be opened and what they should do in the event that a letter was opened in error. Therefore the investigation concluded that the letters were likely to have been opened elsewhere.

However, at the time of this complaint, no log was kept of Rule 39 letters opened in error in other areas of the prison. The investigator asked that the prison rectify this by recording all Rule 39 letters opened, regardless of whether this had happened in the Correspondence Department or elsewhere. This had been put in place by the time the investigation report was finalised. Given the large volumes of mail a local prison will receive, occasionally mistakes will be made. However the prison must be able to identify how and when such errors have occurred; both to provide an explanation to the prisoner and to highlight any weaknesses in the process.

The investigator also checked whether the Ombudsman had received other complaints about Rule 39 letters from the prison. There were no similar cases in recent years, suggesting Mr A's problem was an isolated incident. The investigator found no evidence to suggest that Mr A's post had been deliberately opened or interfered with.

Mr A's complaint highlights the importance of proper record keeping by the prison. If a prisoner raises a concern about their Rule 39 letters, the prison should be able to trace what happened with the letter from when it arrived to when it reached the prisoner, and identify if there were any problems. This level of detail is important not just in providing an appropriate explanation of errors to the prisoner, but also in allowing the prison to monitor the handling of confidential mail and identify where processes need to improve.

The complaints from Mr B and Mr C are both examples of where our investigation found good quality record keeping that, alongside other evidence, led the Ombudsman not to uphold the complaints. The investigation into Mr B's complaint found some particularly strong local procedures in place at the prison, with clear attention paid to ensuring Rule 39 letters were not opened. In the second case, while there was good record keeping and we found no evidence the letter in question had been opened by staff, we were still concerned that there had been other complaints about Rule 39 at the prison. Although we did not uphold the complaint we asked the Governor to remind staff of the proper procedures.

Case study B

Mr B complained that a letter had been opened by the prison. The envelope was marked 'Private and Confidential', but it was not from any of the organisations or individuals protected under Rule 39 or confidential access. The prison responded to the complaint by explaining that the letter had been opened because it was not subject to Rule 39.

The Ombudsman's investigator reviewed the prison's correspondence log. This recorded details of letters opened either in error or due to suspicion. The log recorded a number of instances where other prisoners' Rule 39 letters had been opened, including several errors indicating staff admitted when they made mistakes. There was no record of any of Mr B's Rule 39 letters having been opened.

The prison appeared to take their duty towards Rule 39 letters seriously. In addition to the log, and the procedures in place for when errors happened, the prison also had a system of marking Rule 39 and confidential access envelopes with a gold sticker when they first arrived at the prison. This further highlighted to staff that the envelopes were not to be opened. The prison also had a record so they could monitor complaints made in relation to Rule 39 letters.

Case study C

Mr C complained to the Ombudsman that he had received a letter from court that had been opened in the prison. From the prison's records, the Ombudsman's investigator was able to establish the date the letter arrived, that the letter had not been recorded as damaged upon arrival, and that there were no problems with the letter logged by the Censors Department. In addition to this, Mr C had signed for the letter without raising any concerns.

In order to uphold the complaint the Ombudsman would need clear evidence that the letter was opened prior to issue. The investigator found no evidence that the letter had been incorrectly opened. However, as we remained concerned that there had been a number of similar complaints, the prison agreed to re-issue instructions to all staff stressing the importance of handling Rule 39 mail in accordance with Prison Service guidelines.

Letters opened for security reasons

In a small number of cases, we found that legal and confidential letters had been deliberately opened on grounds of security but the proper procedures and protections had not been followed and the prisoner had not been present. Even though there were only a few such cases, they are highlighted here as they represent more serious breaches of Rule 39.

In general, we found no evidence of tampering or malicious intent - letters had been incorrectly opened when staff were unfamiliar with the proper protocols. We were however concerned to find one prison where the local policy breached the requirements of the national PSI. The PSI explicitly states that prisoners may hand in Rule 39 letters for sending already sealed, so Mr 64971/2014's complaint was illuminating.

Case study D

Mr D handed in a sealed legal letter to be posted under Rule 39. He was told that all letters had to be handed in unsealed. He told the officer that this was contrary to Prison Rule 39 but was told that the letter would be opened and checked before it was sent out. He was later told that the Head of Residence had authorised the letter to be opened, and that this had been done in the presence of two staff.

It is clear from the various responses to Mr D's complaint, that his mail was opened because of a general policy at the prison that all legal mail should be checked before being sent. The PSI makes it quite clear that legal correspondence should be handed in already sealed and that it should not be opened other than in exceptional circumstances. This is to ensure confidentiality, but also to safeguard the privilege that exists between legal parties and their clients.

When there are specific concerns about a particular letter - and permission is granted to open it - the prisoner should always be given the opportunity to be present. In this case, the prison failed in both respects: the letter was opened under a general policy rather than due to specific concerns, and Mr D was not invited to be present.

The Ombudsman was extremely troubled that this very well established rule was routinely being breached, and that senior managers were openly supporting this. We recommended that this immediately stop - that the prison make it clear to their staff that Rule 39 letters are submitted sealed, and can only be opened in exceptional circumstances in accordance with PSI 49/2011.

The PSI also caters for letters which are covered by Rule 39 but which are not explicitly marked as such. Although the letters Mr E complained about were not marked as Rule 39, it was clear from the envelopes that they were coming from organisations covered under the confidential mail handling procedures. The letters should have been treated just as if they were marked Rule 39. It is important that staff are aware of the full range of organisations and individuals covered by Rule 39 and Confidential Access, and that the confidential mail handling procedures do not just apply to solicitors letters. However, we have also had less clear cut cases where the sender was not immediately recognisable from the envelope.

In such cases, as soon as it is apparent that the letter is confidential – for example from the letterhead – the letter should be put back in its envelope and clearly marked as ‘opened in error’. The mistake should be explained to the prisoner, and ideally the envelope would be resealed to prevent any possibility of the letter being read when the letter is sent on to the wing. In one such instance, it was not clear until the headed paper was seen that the letter was from a legal advisor. The prison contacted the solicitor; firstly to apologise for opening the letter, but secondly to advise them on how better to identify their letters as confidential in future.

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Case study E

Mr E complained on a number of occasions to the prison when letters from the Royal Courts of Justice, Equality and Human Rights Commission, Medway Court, the Prisoners Advice Service, and his solicitor had been given to him opened. The staff delivering the letters had signed to confirm the letters had been opened. In each case the letters had not been marked ‘Rule 39’, but had clear franking on the envelopes showing where they had been sent from.

One of the first responses to Mr E’s complaints incorrectly stated that the prison had the right to open any letter not marked ‘Rule 39’. In fact, while it is best practice for the sender to mark the envelope to say Rule 39, the PSI clearly states that, if the mail is not marked as Rule 39 but appears to come from one of the organisations/ individuals covered under Rule 39 or Confidential Access, then the letters should be treated under the confidential handling procedures. The response to a subsequent complaint apologised to Mr E and said that the errors were due to a number of new staff starting in the Censors Department.

Mr E continued to receive opened Rule 39 letters. The replies to his complaints again incorrectly said that letters not been marked ‘Rule 39’ can be opened, and further replies suggested that staff shortages had meant other staff – unfamiliar with the procedures – had been brought in to handle the mail. Mr E then complained to the Ombudsman and asked for a guarantee that staff would start following correct procedure when dealing with confidential letters.

Our investigator alerted a governor at the prison to the problems Mr E had been experiencing, and particularly the evidence that the staff did not appear to understand the requirements of PSI 49/2011. The governor agreed to speak to the Censors Department to improve their processes and to ensure that the staff treated confidential letters correctly, even when they are not explicitly marked Rule 39. The prison apologised to Mr E once again for the mistakes.

Lessons to be learned

Lesson 1

Ensure that correspondence logs are sufficiently detailed to record the condition of Rule 39 mail on arrival at the prison, to record letters 'opened in error' regardless of where in the prison this occurred, and to record the reasons and the circumstances when any letters are opened on security grounds.

Lesson 2

Correspondence logs and prisoner complaints should be monitored to ensure errors in handling Rule 39 are recorded, and to identify any improvements necessary to ensure there are sufficient safeguards to avoid the possibility of such correspondence being opened inadvertently.

Lesson 3

Ensure staff working with prisoner letters fully understand the requirements of PSI 49/2011 for handling confidential correspondence. Staff must also be clear about which organisations and individuals are covered by Rule 39 and confidential access.

The Prisons and Probation Ombudsman investigates complaints from prisoners, young people in secure training centres, those on probation and those held in immigration removal centres. The Ombudsman also investigates deaths that occur in prison, secure training centres, immigration detention or among the residents of probation approved premises. These bulletins aim to encourage a greater focus on learning lessons from collective analysis of our investigations, in order to contribute to improvements in the services we investigate, potentially helping to prevent avoidable deaths and encouraging the resolution of issues that might otherwise lead to future complaints.

PPO's vision:

To carry out independent investigations to make custody and community supervision safer and fairer.

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