



COUNTY OF ERIE

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August 12, 2009

Shanetta Y. Cutlar, Chief
Special Litigation Section
U.S. Department of Justice
Civil Rights Division
Special Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Investigation of the Erie County Holding Center and Erie County Correctional Facility
Our File No.: 31-20070052

Dear Ms. Cutlar:

We would like to thank you and the other attorneys from U.S. Department Of Justice Civil Rights Division ("USDOJ") for taking the time to meet with us on August 10, 2009. As you know, we came fully prepared to discuss substantive issues related to the report including, but not limited to, the content of the report, the threshold constitutional standards to be applied to the County and its Sheriff, and what the USDOJ proposed for inclusion in a consent decree with the County of Erie ("County" or "Erie County"). I must confess that we left the meeting disappointed that the USDOJ was not prepared to discuss any of these specific issues but, rather, took the position that, if the County provided USDOJ access to our facilities ("EHC/ECCF"), we could discuss these issues later.

As we advised at the close of the meeting, we were not authorized to bind Erie County to any commitments with the USDOJ until we had time to further evaluate your proposal with our clients and research several legal issues that arose in the context of our discussions. While Erie County remains committed to working cooperatively and in good faith with USDOJ toward a resolution of this matter, having reviewed your letter of August 11, 2009 and having reflected on our discussions and the meeting, we cannot sign the agreement you proposed. Instead, we offer the following proposal in the spirit of cooperation and as an alternative for moving forward.

1) Our office and USDOJ will, first and foremost, work on defining what the applicable constitutional standards are for the different areas identified in your letter of July 15, 2009 ("Findings Letter"). Specifically, we can discuss and come to an agreement as to what types of policies, protocols, and levels of services are required by the case law interpreting constitutional requirements in the Second Circuit, the governing jurisdiction for this matter.

This must be the starting point for negotiations because the legal authority cited in the Findings Letter recites standards applicable in cases against individual officials, rather than a supervisor such as the Sheriff or municipality such as the County. As you are aware, there is no vicarious or strict liability for alleged constitutional violations committed by individual employees. The case law requires a demonstration of an unconstitutional policy or custom. Moreover, one cannot simply cobble together a series of individual events in an attempt to meet the constitutional threshold.

In many instances the consent decrees USDOJ has entered into with other municipalities have contained standards and requirements, to be funded by local taxpayers, that far exceed the minimum constitutional requirements, as articulated by the courts, for conditions of confinement. For example, as mentioned at the meeting, one of USDOJ's consent decrees in another case required the jurisdiction to provide mammograms to every female inmate regardless of age or symptomology. This is not the constitutional standard for confinement. Inclusion of such a requirement in a consent decree is thus inappropriate given that it would force local taxpayers to fund costly medical services for inmates that exceed what is constitutionally required.

Similarly, USDOJ's Findings Letter regarding Erie County sets forth many recommendations that are not constitutionally mandated under existing case law. Indeed, the Findings Letter fails to cite any case law that establishes that any of the Findings Letter's recommendations are the minimally acceptable standards for conditions of confinement under the Constitution. Given that Erie County taxpayers will ultimately bear the financial burden of implementing any changes included in a consent decree, we are bound by our duty to the people of Erie County to commit the County to only those changes, if any, which are constitutionally required. Changes to conditions of confinement which are in excess of constitutional requirements must ultimately be approved by the people of Erie County given that spending more on improvements in prisons ultimately requires spending less on other public works such as roads and schools. For this reason, I am sure that you can understand why we cannot possibly proceed with a cooperative review of our detention facilities until we have clearly identified the constitutionally mandated conditions of confinement that will be the guide for recommended changes, if any, within the detention facilities.

Accordingly, the County and USDOJ should work together to define the standards to be applied in determining whether the conditions of the Erie County Holding Center and Erie County Correctional Facility meet constitutional standards as a starting point. Once very specific standards and guidelines are identified and agreed upon, the parties can move forward with further negotiations with the intent and commitment of resolving this matter.

2) Assuming we reach agreement on the applicable constitutional requirements, which we anticipate will be the result given the commitment to negotiate in good faith, USDOJ would agree to exchange and share all of the information it has gathered to date in its investigation of this matter with our office.

3) Once the above-referenced items are resolved, the County would then consider granting USDOJ access to our facilities. As you have already issued a Findings Letter summarizing USDOJ's findings in its investigation and communicated your intent to commence a lawsuit against Erie County and its Sheriff, any inspection and access to our facility should be defined as being granted for the express purpose of settlement negotiations, without prejudice, to resolve this matter. We would be agreeable to allowing an inspection on the terms and conditions set forth below and in accordance with Federal Rules of Civil Procedure. Thus, any information provided by the County could not be used against it in the event of litigation. Information would include, but would not be limited to, any facts, statements, documents and any and all information gathered during the inspection. In addition, any experts utilized by USDOJ during the inspection phase could not be called as experts against the County in the event of litigation.

This is a reasonable request given the representations by USDOJ that it is truly committed to providing technical assistance to resolve alleged deficiencies and to have frank dialog toward resolution of this matter. Such resolution can be obtained to the mutual benefit of both the USDOJ and the County where there is complete transparency in this process, which includes the following:

a) A representative from our office will accompany USDOJ on all interviews of all employees of the County, including but not limited to, employees of the Sheriff's Office, Public Works, Health Department, and Mental Health Department. This will not be limited to managerial employees. Lower level employees who speak with USDOJ expose themselves to potential litigation from inmates based upon any facts or statements gathered by the USDOJ for which the County must provide defense and indemnification. Accordingly, a representative of our office would need to be present during all employee interviews. With respect to inmates, if the inmates consent to allowing a representative from our office to be present, the interviews will proceed with a representative from our office present. If the inmate will not consent, the interview will be tape recorded with a copy of the entire, unredacted recording to be provided to our office.

b) As you are aware, our office did provide USDOJ with a substantial amount of documentation at the beginning of your investigation. USDOJ will provide an updated list of documents you are requesting at this juncture. We will review the updated requests and advise of our position. We have again reviewed the legal authority provided regarding the alleged exemption from Health Insurance Portability and Accountability Act ("HIPAA") and other statutes governing public health information in Mr. Gonzalez' letter of March 12, 2008. Because we take our HIPAA obligations to respect the privacy of our inmates very seriously, we ask that you provide us with legal authority from the United States Supreme Court or from courts within the Second Circuit that have held that the privilege does not apply in New York during the investigatory stage under CRIPA. We believe an exemption from the

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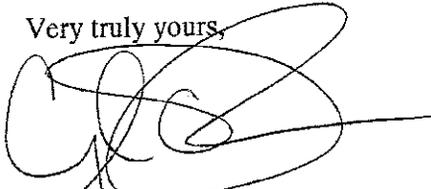
privilege may only apply, if at all, after USDOJ has filed suit. However, if you have binding legal authority to the contrary, please provide it to our office and we will take it under advisement.

c) At the conclusion of your agency's review of the facilities, your agency will provide the County with a copy of all reports, notes and opinions rendered by your experts in connection with the inspection. Again this exchange is for the express purpose of cooperatively resolving the issues.

We look forward to the opportunity of working cooperatively and in good faith with the USDOJ in resolving its investigation. While we do not agree with your assertion that there have been constitutional violations at the ECCF and ECHC based on the scope of constitutional conditions of confinement as established in existing case law, we are hopeful that a truly cooperative, interactive process, as outlined above, will result in finalization of this matter for both parties.

Please review and advise whether this proposal is acceptable to you. Otherwise, we intend to submit a formal written response, no later than September 10, 2009, addressing the issues raised in your Findings Letter.

Very truly yours,



CHERYL A. GREEN
Erie County Attorney

KK/dbm