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MARJORIE R. ESMAN  
EXECUTIVE DIRECTOR

November 3, 2010

*By fax 504-826-7038*

*and by U.S. Mail*

Marlin N. Gusman

Orleans Parish Criminal Sheriff

819 South Broad Street

New Orleans, LA 70119

**Re: Public Records Act Request Related to Orleans Parish Prison Rebuilding Efforts**

Dear Sheriff Gusman:

This letter constitutes a public records act request pursuant to the Louisiana public records act, La. Rev. Stat. §44:1 *et seq.*, and Louisiana Constitution art. 12, § 3.

**BACKGROUND**

Even before Hurricane Katrina, New Orleans had the highest incarceration rate of any major city in the United States.<sup>[1]</sup> Today, even though it has a much smaller population and a somewhat smaller jail, New Orleans still holds that dubious title, and its incarceration rate is still three times the national average.<sup>[2]</sup> Nevertheless, the Orleans Parish Criminal Sheriff's Office plans to rebuild Orleans Parish Prison (OPP) as a much larger, 5,800-bed jail—large enough to incarcerate 1 out of every 60 residents of New Orleans. According to your public statements, FEMA is providing between 85 and 90 percent of the \$270 million required to build this new prison.<sup>[3]</sup>

The Orleans Parish Criminal Sheriff's Office has failed to produce a study validating the need to increase the size of OPP, and you have even argued that the "population of Orleans Parish is totally irrelevant to a decision regarding bed space."<sup>[4]</sup> But outside experts have shown that the jail could easily be reduced from its present size if the city adopts common-sense criminal justice policies.

In the wake of Hurricane Katrina, the City Council commissioned a report from the Vera Institute of Justice, a nationwide nonprofit organization that assists leaders in government and civil society to improve criminal justice policies and practices. After interviewing key stakeholders and reviewing data provided by the City, Vera issued a series of practical recommendations for how to "increase public safety and justice . . . using national best practice" in New Orleans' criminal justice system, focusing on those that could be implemented within 6 to 12 months that "promise the 'biggest bang for the buck.'"<sup>[5]</sup> Vera concluded that New Orleans should pursue four general policies: setting up mechanisms for early triage of cases and routine communication between police and prosecutors; expanding pretrial release options; providing community-service sentencing and greater use of alternatives to jail; and setting more appropriate and cost-effective sanctions for minor municipal offenses.<sup>[6]</sup> Many of these reforms would reduce the number of people who go to jail for minor offenses or reduce the length of stay

for those who do.<sup>[7]</sup> One such reform—the creation of a pretrial services system that would release less-dangerous individuals pending trial—has already been funded by a federal grant from the Bureau of Justice Assistance.<sup>[8]</sup>

As the Vera report highlighted, New Orleans' high incarceration rate stems in part from its failure to offer adequate opportunities for pretrial release of low-level offenders. According to Vera's preliminary analysis, up to 41% of the pretrial detainees currently held at OPP would be eligible for pretrial release in other jurisdictions.<sup>[9]</sup> And according to figures recently presented to the City Council, some 900 of the 3,200 prisoners presently held at OPP are serving state sentences, and they could be incarcerated at state prisons.<sup>[10]</sup>

Particularly in the past year, New Orleans residents have expressed mounting concerns about whether this massive expansion of OPP is truly necessary. On July 1, 2010, these concerns led the City Council to postpone final approval of your expansion plans until a special working group convened by Mayor Mitch Landrieu determines an optimal size for OPP.<sup>[11]</sup> Mayor Landrieu officially convened the working group by executive order on September 23, and the group is expected to release its findings in late November.<sup>[12]</sup> Thus, now may be the final window of opportunity to obtain further information about your expansion plan.

Independent scrutiny of your expansion plan is vital to this policy debate. The Orleans Parish Criminal Sheriff's Office has a financial interest in maximizing the number of people incarcerated—you receive a \$22.39 per diem payment for every city detainee and a \$26.39 payment for every state prisoner you hold at OPP.<sup>[13]</sup> As you are aware, these per diem payments add up: in your 2010 budget, for example, you anticipated that local and state per diem payments would together provide your office more than \$30 million in revenue.<sup>[14]</sup> Thus, you have a perverse incentive to maximize your per diem income by building a jail larger than what New Orleans actually needs and then keeping it as full as possible, regardless of whether that serves the broader interests of New Orleans residents. And if FEMA pays for most or all of the construction costs, this only strengthens your incentive to build a larger-than-necessary jail.

Additionally, it appears that you plan to use the FEMA funds to demolish OPP's existing city-owned buildings and replace them with buildings instead owned by your office. If true, this change of ownership would make you less accountable to the mayor and the City Council.

Your records would help illuminate what funding FEMA is providing to your office, what conditions FEMA has placed on the use of those funds, and whether those funds could be put to uses other than expanding OPP's already excessive capacity.

This information is currently missing from the public debate. Despite the controversy over the rebuilding plans, your public statements on the issue continue to be opaque, vague, and even self-contradictory. Most recently, you claimed that the FEMA funding would only pay for a 1400-bed facility,<sup>[15]</sup> which is difficult to reconcile with your earlier claim that FEMA funding would pay for 85 to 90 percent of the construction costs for an expanded jail complex.<sup>[16]</sup>

Your expansion plans seem to change depending on whom you speak to and when.<sup>[17]</sup> Most recently, for example, the Orleans Parish Criminal Sheriff's Office began construction of a "temporary" 400-bed facility which—according to your public statements—will also be paid for entirely with FEMA funds.<sup>[18]</sup> In September 2010, you told reporters that the temporary facility

would not result in any increase in the total number of prisoners, because you would merely be transferring prisoners to it after shutting down another facility.[19] But after the press obtained a March 2010 loan letter in which you predicted that the new buildings would result in “inmates increasing from approximately 3,500 to 3,900,” you reversed yourself and stated that the 3,900 number was correct.[20]

In short, you and your office have repeatedly failed to provide a complete and internally consistent explanation of your expansion plans. The public therefore needs to see the relevant documents from your records to clarify what construction plans FEMA approved and how much of the project FEMA is actually funding.

## **THE REQUESTOR**

The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil rights in the U.S. It is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU is specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution.

The ACLU has long been concerned with conditions at OPP. In the year after Hurricane Katrina, the National Prison Project of the ACLU received and reviewed written accounts from over 1,300 prisoners who were in OPP when Katrina struck. The information gleaned from those reports—along with information obtained through Louisiana Public Records Act requests—was collected in a comprehensive report revealing what happened to the thousands of men, women, and children trapped in OPP before, during, and after the storm.[21] One year later, the ACLU released a follow-up report, describing continuing concerns about conditions inside of OPP buildings reopened since the storm.[22] Most recently, the ACLU released a report critiquing the rise of modern-day debtors’ prisons, including OPP in New Orleans.[23] The ACLU has urged local officials to work with the Vera Institute to implement the recommendations in their report,[24] which would largely obviate the need to inject hundreds of millions of federal dollars into a rebuilding effort that is unnecessary, is not supported by local officials, does not promote public safety, and will subordinate the best interests of the city’s residents to the political influence and coffers of the Orleans Parish Criminal Sheriff’s Office. [25]

## **RECORDS REQUESTED**

The ACLU is seeking disclosure of any and all record(s)[26] created after August 29, 2005, concerning:

1. Any plans or proposals concerning the demolition, rebuilding, repair, or expansion of Orleans Parish Prison (OPP), including but not necessarily limited to plans or proposals concerning:
  - a. Destruction, removal, or repair of existing buildings;
  - b. Construction of new buildings; or

- c. Construction of any other facilities concerning OPP, including temporary facilities;
2. Any funds FEMA has allocated or disbursed for such demolition, rebuilding, repair, or expansion;
3. Anything that governs or in any way restricts the use of the funds referenced in responses to the above;
4. Anything reflecting how the funds referenced in responses to the above are being used, how FEMA has monitored their use, reporting by the Orleans Parish Criminal Sheriff on the use of the funds, and/or oversight by FEMA or its agents of the use of the funds.

Under the provisions of R.S. 44:32, if you raise a question as to whether any of the records requested is a public record, you are required to notify in writing the person making the request of your determination and the reasons, including the legal basis therefor. Notice shall be made within three days of the receipt of the request, exclusive of Saturdays, Sundays and legal public holidays. If you claim exemption for a record or records under the Public Records Act, or any other statute, include for each record the section of law under which exemption is claimed and your reasons for believing the statute is applicable to the record.

Under the provisions of R.S. 44:33, if the public record is not immediately available, you are required to certify this in writing promptly, and in your certificate fix a day and hour within three days, exclusive of Saturdays, Sundays and legal public holidays, for the exercise of the right granted in the Public Records Act.

Under R.S. 44:34, "If any public record applied for by any authorized person is not in the custody or control of the person to whom the application is made, such person shall promptly certify this in writing to the applicant, and shall in the certificate state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person has custody of the record and the manner and method in which, and the exact time at which it was taken from his custody and control. He shall include in the certificate ample and detailed answers to inquiries of the applicant which may facilitate the exercise of the right granted by this Chapter."

If you are invoking R.S. 44:34 to deny this request, please answer the following questions in detail:

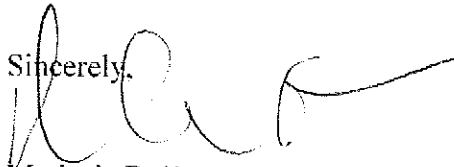
1. Is a copy of the requested public record usually located in your office?
2. Why is your copy of the requested public record absent from your office?
3. Where is your copy of the requested public record?
4. Who has received a copy of the requested public record?
5. How and from whom did the present custodian gain control of your copy of the requested public record?
6. What was the exact time your copy of the public record was taken from your custody and control?
7. When will your copy of the requested public record be returned to your office?
8. Is there any other public official who has a copy of the requested record?
9. What is/are the name(s) of anyone who has a copy of the requested public record?

10. What is/are the location(s) where the public record can be viewed?
11. What are the hours and dates when the requested public record can be viewed?

We request that any and all documents that are available, or that can be made available, be produced in electronic form. This request includes any documents that are in paper form but that can be scanned to electronic form, as well as digital copies of any recordings. Please produce all documents available electronically on the enclosed CD-ROM disc, to prevent incurring unnecessary copying costs. For those documents that cannot be produced in electronic form, if the cost of copies does not exceed \$50.00, proceed without further approval and send us an invoice with the records; otherwise, call to advise and gain approval to proceed. As you are aware, failure to abide by the Public Records Law may result in certain penalties and the award of attorney's fees. We trust that you will comply without the necessity of any further action on our part.

Thank you for your prompt attention to this matter. We eagerly await your response, and thank you for your assistance. Please furnish all responsive records to:

Carl Takei  
Staff Attorney  
ACLU National Prison Project  
915 15<sup>th</sup> St. NW, 7<sup>th</sup> Floor  
Washington, DC 20005

Sincerely,  
  
Marjorie R. Esman  
Executive Director

[1] Barry Gerharz and Seung Hong, *Down by Law: Orleans Parish Prison before and after Katrina*, DOLLARS & SENSE, March/April 2006, available at <http://www.dollarsandsense.org/archives/2006/0306gerharzhong.html>.

[2] Interview with Jon Wool, Vera Institute of Justice, Sept. 7, 2010. The figures were derived by combining the Bureau of Justice Statistics' midyear 2009 jail inmate data with the Census Bureau's July 2009 population estimates. See BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES, NCJ 230122, tables 1 & 9a (June 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf>; U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2009, NST-EST2009-01, available at <http://www.census.gov/popest/states/tables/NST-EST2009-01.xls>; U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR COUNTIES (LOUISIANA): APRIL 1, 2000 TO JULY 1, 2009, available at <http://www.census.gov/popest/counties/tables/CO-EST2009-01-22.xls>. See also Gerharz & Hong, *supra*.

[3] *Top 10 Construction Projects: Orleans Parish Prison complex, \$270 million*, NEW ORLEANS CITY BUSINESS, Feb. 22, 2010, at 15A, available at <http://neworleanscitybusiness.com/wp-files/events/construction-2010.pdf>.

[4] Matt Davis, *Sheriff: I have never housed arrestees 'to make money,'* THE LENS, Sept. 24, 2010, <http://thelensnola.org/2010/09/24/gusman-response-to-johnson/>.

[5] VERA INSTITUTE OF JUSTICE, PROPOSALS FOR NEW ORLEANS' CRIMINAL JUSTICE SYSTEM: BEST PRACTICES TO ADVANCE PUBLIC SAFETY AND JUSTICE, 1 (June 2007) (hereinafter "VERA REPORT").

[6] *Id.* at i.

[7] *Id.* at 38.

[8] Vera Institute of Justice, Press Release, *New Orleans to Develop a Comprehensive Pretrial Services System*, Oct. 1, 2010, available at <http://www.vera.org/news/new-orleans-develop-comprehensive-pretrial-services-system>.

[9] VERA REPORT, *supra* at 18.

[10] Laura Maggi, *Violent offenders, detainees mixed at Orleans Parish Prison, study finds*, THE TIMES-PICAYUNE (New Orleans), Oct. 15, 2010.

[11] Bruce Egger, *New prison complex plan approved by New Orleans City Council*, THE TIMES-PICAYUNE (New Orleans), July 1, 2010; Karen Gadbois, *Prison expansion on hold until advisory group speaks out*, THE LENS, July 1, 2010, <http://thelensnola.org/2010/07/01/council-on-opp/>.

[12] *Mayor Mitch Landrieu names panel to recommend 'optimal size' for parish prison*, THE TIMES-PICAYUNE (New Orleans), Sept. 23, 2010.

[13] Bruce Egger, *New Orleans Sheriff Marlin Gusman asks City Council for millions more to run jail*, THE TIMES-PICAYUNE (New Orleans), July 31, 2009.

[14] ORLEANS PARISH CRIMINAL SHERIFF'S OFFICE, ANNUAL BUDGET REPORT FOR THE YEAR ENDED DECEMBER 31, 2010, at 2 (Oct. 9, 2009).

[15] Laura Maggi, *Violent offenders, detainees mixed at Orleans Parish Prison, study finds*, THE TIMES-PICAYUNE (New Orleans), Oct. 15, 2010.

[16] See *Top 10 Construction Projects: Orleans Parish Prison complex, \$270 million*, NEW ORLEANS CITY BUSINESS, Feb. 22, 2010, at 15A, available at <http://neworleanscitybusiness.com/wp-files/events/construction-2010.pdf>.

[17] See Matt Davis, *Gusman: I've always advocated for smaller jail*, THE LENS, Oct. 15, 2010, <http://thelensnola.org/2010/10/15/gusmansmallerjail/> (describing how Gusman has variously described his plans as being for 4,200 beds, 5,800 beds, and 8,000 beds).

[18] Matt Davis, *Sheriff building 400 jail beds before working group meets*, THE LENS, Sept. 28, 2010, <http://thelensnola.org/2010/09/28/temp-jail-beds/>.

[19] *Id.*

[20] Matt Davis, *Temporary beds will expand jail population after all*, THE LENS, Oct. 19, 2010, <http://thelensnola.org/2010/10/19/gusman-temp-jail/>.

[21] ACLU, ABANDONED & ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA (Aug. 2006), available at <http://www.aclu.org/opp>.

[22] ACLU, BROKEN PROMISES: 2 YEARS AFTER KATRINA (Aug. 2007), available at <http://www.aclu.org/brokenpromises>.

[23] ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (Oct. 2010), available at <http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons>.

[24] *Id.* at 40.

[25] See David Morton, *Empire Falls: The Rise and Decline of the New Orleans Jail*, THE NEW REPUBLIC, Aug. 10, 2006.

[26] The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, faxes, files, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical specifications, training manuals, or studies.