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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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|-------------------------|---|-----------------------|
| BRIAN J. DEBARR, |) | 3:12-cv-00039-LRH-WGC |
| |) | |
| Plaintiff, |) | <u>ORDER</u> |
| |) | |
| vs. |) | |
| |) | |
| TARA CARPENTER, et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

Before the court is Defendants’ Motion for Leave to File Certain Confidential and Highly Confidential Documents Referenced in the Renewed Motion for Summary Judgment Based on Qualified Immunity Under Seal. (Electronic Case Filing (ECF) No. 108.) Plaintiff filed a response (ECF No. 111), and Defendants filed a reply (ECF No. 113).

I. BACKGROUND

Defendants seek to file certain exhibits which support their renewed motion for summary judgment under seal; specifically, Exhibits H, I, J, K, L and N. (ECF No. 108 at 2.) They identify the exhibits as follows:

- Exhibit H: Transcript of DeBarr Disciplinary Hearing
- Exhibit I: Transcript of Gadsden Disciplinary Hearing
- Exhibit J: Transcript of Peterson Disciplinary Hearing
- Exhibit K: DeBarr Disciplinary Hearing Audio Recording
- Exhibit L: Gadsden and Peterson Audio Recordings; and
- Exhibit N: “Confidential” Deposition of Widmar

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1 Exhibits H, I, J and N can be found in the record at ECF Nos. 125-1, 125-2, 125-3 and 125-6,
2 respectively. Exhibits K and L, which are audio recordings, were manually filed by Defendants.

3 Defendants argue that the documents fall under the Amended Stipulated Protective Order
4 (ECF No. 100), and contain sensitive information concerning inmates' disciplinary hearings and discuss
5 the hearings of Plaintiffs (Plaintiff Brian J. DeBarr in this action, and Plaintiffs Chioke Gadsden and
6 Nathan Peterson in *Gadsden v. Carpenter.*, Case No. 3:12-cv-00098-MMD-VPC). In the case of
7 Widmar's deposition, they argue that it discusses disciplinary proceedings of third party inmates.
8 (ECF No. 108 at 1-2, 4.) Defendants cite Administrative Regulation (AR) 569 which states that
9 "[i]nmate information that is not specifically approved for disclosure within an NDOC Administrative
10 Regulation is considered confidential for purposes of disclosure, does not constitute a matter of public
11 record, and is not to be communicated and/or released to the general public or to the news media." (*Id.*
12 at 3.) They note that courts have granted requests to file case notes under seal citing legitimate
13 penological interests in keeping the confidential information from the public. (*Id.*, citing *Ortiz v. Cox*,
14 2010 WL 3025199 (D. Nev. July 29, 2010))

15 In his response, Plaintiff cites that he, as well as Gadsden and Peterson in their own actions, have
16 challenged the propriety of their disciplinary hearings and specifically put them at issue; thus, they have
17 waived any privacy right as to what took place during those hearings, and submit declarations from each
18 of the plaintiffs to that effect. (ECF No. 111 at 2, ECF No. 111-1 (DeBarr Decl.), ECF No. 111-2
19 (Gadsden Decl.), ECF No. 111-3 (Peterson Decl.)) Therefore, Plaintiff contends no compelling reasons
20 exist for sealing these documents. Insofar as Exhibit N (Widmar's deposition) is concerned, Widmar
21 apparently discusses the disciplinary hearings of other inmates around the same time and concerning the
22 same issue as Plaintiff's (submitting grievances concerning the pagan grounds). Plaintiff argues that
23 Defendants' concerns are adequately addressed by redacting the names and other identifying information
24 from the public filings. (*Id.* at 3.)

25 In their reply, Defendants argue that regardless of the waiver by these plaintiffs, there is a
26 question as to whether the recordings and transcripts are public records since there was no requirement
27 that the disciplinary hearings be recorded. (ECF No. 113 at 2.) In any event, Defendants assert that the
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1 court should balance the concerns of Defendants regarding what they describe as public access to highly
2 sensitive, confidential disciplinary proceedings which “could have serious safety and security
3 implications” in favor of sealing the documents. (*Id.* at 2.) Finally, Defendants disagree with the
4 approach of redaction for Widmar’s deposition transcript. (*Id.* at 3.) They point out that Plaintiff’s
5 counsel agreed to ask the questions that appear in this portion of the transcript outside the presence of
6 the parties due to the confidential nature of Widmar’s responses.

7 II. LEGAL STANDARD

8 “Historically, courts have recognized a general right to inspect and copy public records and
9 documents, including judicial records and documents.” *See Kamakana v. City and County of Honolulu*,
10 447 F.3d 1172, 1178 (9th Cir. 2006) (internal quotation marks and citation omitted). “Throughout our
11 history, the open courtroom has been a fundamental feature of the American judicial system. Basic
12 principles have emerged to guide judicial discretion respecting public access to judicial proceedings.
13 These principles apply as well to the determination of whether to permit access to information contained
14 in court documents because court records often provide important, sometimes the only, bases or
15 explanations for a court’s decision.” *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. Mar. 20,
16 2014) (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983)).

17 Documents that have been traditionally kept secret, including grand jury transcripts and warrant
18 materials in a pre-indictment investigation, come within an exception to the general right of public
19 access. *See Kamakana*, 447 F.3d at 1178. Otherwise, “**a strong presumption in favor of access is the**
20 **starting point.**” *Id.* (internal quotation marks and citation omitted) (emphasis added). “The presumption
21 of access is ‘based on the need for federal courts, although independent—indeed, particularly because
22 they are independent—to have a measure of accountability and for the public to have confidence in the
23 administration of justice.’” *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th
24 Cir. 2016), *cert. denied*, 137 S.Ct. 38 (October 3, 2016) (quoting *United States v. Amodeo (Amodeo II)*,
25 71 F.3d 1044, 1048 (2nd Cir. 1995); *Valley Broad. Co. v. U.S. Dist. Court-D. Nev.*, 798 F.2d 1289, 1294
26 (9th Cir. 1986)).

1 Insofar as Exhibits H, I, J, K, and L are concerned, Defendants only discuss the “confidentiality”
2 of the documents and potential safety and security concerns in generalities. They do not point out what
3 exactly is confidential about these particular documents, or what specific safety and security concerns
4 are implicated. The court tends to agree with Plaintiff that he, Gadsden and Peterson have put these
5 disciplinary hearings at issue and have described what occurred in those proceedings in this litigation;
6 therefore, the court does not perceive what would be accomplished at this time by sealing these particular
7 materials.

8 Defendants simply have not demonstrated how the substance of these hearing transcripts and
9 audio recordings—the filing of grievances concerning the pagan grounds—is “highly confidential,” such
10 that it should be shielded from public disclosure. From the complaint and other documents publicly filed
11 in this litigation, it is clear that the pagan and Native American inmates in the unit were told in January
12 2009 that the area they used for religious activities would be flattened somewhat because of construction
13 work occurring in the area, and a group of pagan inmates felt their grounds were disrespected and at least
14 fifteen inmates filed over twenty-one grievances (each) on various issues. The prison staff determined
15 that the grievances were designed to harass, and the inmates were charged with abuse of the grievance
16 process. The inmates maintained they were simply trying to exhaust their administrative remedies in
17 accordance with prison regulations, and that they were not notified they were doing something wrong
18 (i.e., they did not receive an improper grievance memorandum). DeBarr, Gadsden and Peterson were
19 found guilty of the disciplinary charges and each was sentenced to fifteen days of disciplinary
20 segregation. These same basic facts are divulged in the hearing transcripts of DeBarr, Gadsden and
21 Peterson.

22 The court does not see any reason to seal the disciplinary proceeding transcripts or audio
23 recordings for DeBarr, Gadsden, and Peterson, which essentially mimic the allegations of their
24 complaints, and are already in the public record. Nor do the transcripts or recordings reveal anything
25 about the prison disciplinary process that poses any apparent safety or security concern.

26 It is true that the court has permitted the filing of disciplinary hearing transcripts and recordings
27 under seal in the past, but the burden is on the party seeking to seal a document to overcome the
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1 presumption of public access in each instance. An order in one case is not carte blanche approval for the
2 filing of a disciplinary hearing transcript under seal in another case. Moreover, the cases cited by
3 Defendants' reply (*Depasquale*, 3:07-cv-00107-LRH-VPC, 2009 WL 2957967 (D. Nev. Sept. 10, 2009);
4 *Alexander*, 3:12-cv-00535-MMD-VPC; *Alexander*, 3:12-cv-00535-MMD-VPC, 2014 WL 11370483),
5 are all decisions by Magistrate Judge Cooke, who is free to make whatever determination she sees fit
6 in her cases under the guidance of Ninth Circuit case law on point.

7 Therefore, the motion for leave to file Exhibits H, I, J, K and L under seal is denied.

8 Insofar as Exhibit N (the Widmar deposition transcript) is concerned, the portion of the transcript
9 submitted for filing under seal was marked by the court reporter as confidential, and the parties were
10 cleared from the room during the testimony. The parties' attorneys found the testimony to be sensitive
11 enough to exclude the parties from that portion of the deposition, and the court appreciates the safety
12 and security concerns that are implicated by Widmar's testimony concerning why some inmates who
13 were initially involved in submitting the grievances did not also serve a disciplinary sanction. Therefore,
14 the court finds compelling reasons exist for sealing the exhibit and the motion is granted with respect
15 to Exhibit N.

16 **IV. CONCLUSION**

17 Defendants' motion (ECF No. 108) is **DENIED** with respect to Exhibits H, I, J, K and L. The
18 Clerk shall **UNSEAL** those exhibits.

19 Defendants' motion is **GRANTED** with respect to Exhibit N, which shall remain under seal.

20 **IT IS SO ORDERED.**

21 DATED: January 30, 2017.

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WILLIAM G. COBB
24 UNITED STATES MAGISTRATE JUDGE