IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

HENRY HODGES,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**No. 22-1440-III**
LISA HELTON, in her official capacity As Tennessee's Interim Commissioner Of Correction	)	
	)	
DR. KENNETH WILLIAMS, in his Official capacity as Asst. Commissioner Of Clinical Services, Chief Medical Officer Tennessee Department of Correction	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Plaintiff asks the Court to disregard the statutorily mandated confidentiality of the records Defendants have sought to protect in this case. The Tennessee General Assembly has unequivocally determined the records Plaintiff seeks to publicly disclose are confidential and not subject to view by the public because they go to the heart of the security of institutions the State has a responsibility to protect. Through Tenn. Code Ann. § 10-7-504, the General Assembly has outlined the specific manner in which these materials can be exchanged by parties in civil litigation, but it has expressly prohibited their public disclosure. Plaintiffs do not mention Tenn. Code Ann. § 10-7-504 once in their analysis. The materials Defendants seek to protect reside squarely within the statute and the well-established body of law in this area. As such, the records should be subject to a protective order of this Court.

And to be clear, the granting of a protective order will not harm Plaintiff in any way – Plaintiff will still receive the records, and he can use them to try to prove up his case. A protective order will merely ensure that the records will be used only by the parties and the Court, but that

information that goes to the heart of prison security will not be disseminated to the public.

LAW AND ARGUMENT

I. Standard of Review

"[T]he common law right of access to judicial records **is not absolute**." *In re Est. of Thompson*, 636 S.W.3d 1, 12 (Tenn. Ct. App. 2021). While it is true that Article I, Section 17 of the Tennessee Constitution provides explicitly that "the courts shall be open," Tennessee courts have long recognized that:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

In re NHC--Nashville Fire Litig., 293 S.W.3d 547, 560 (Tenn. Ct. App. 2008).

To protect confidential material from inappropriate disclosure, every court possesses "inherent supervisory authority over its own records and files" such that access may be denied under some circumstances, including when access would "promote public scandal or publication of libelous statements." *Thompson*, 636 S.W. 3d at 12 (quoting *In re Lineweaver*, 343 S.W.3d 401, 413 (Tenn. Ct. App. 2010)). As such, trial courts must balance the privacy of litigants against the public's right to access the courts and their records; however, "any restriction on public access to judicial proceedings and documents 'must be narrowly tailored to accommodate the competing interest without duly impeding the flow of information.'" *Id.* "This balance must be carefully struck." *Id.*

One method by which courts strike this delicate balance is through protective orders. *See Kocher v. Bearden*, 546 S.W.3d 78, 85 (Tenn. Ct. App. 2017) (citing *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996)) ("Protective orders strike a balance between [ ] public and private

concerns."). "Protective orders are intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings." *Kocher*, 546 S.W.3d at 86. In ordering certain materials be sealed, a trial court "relies on its inherent authority to seal its record[.]" *Bottorff v. Bottorff*, No. M2019-00676-COA-R3-CV, 2020 WL 2764414, at *8 (Tenn. Ct. App. May 27, 2020) (citing *Kocher*, 546 S.W.3d at 85 n.9).

A trial court's decision to seal its record is reviewed for an abuse of discretion. *Kocher v. Bearden*, No. W2017-02519-COA-R3-CV, 2018 WL 6423030, at *10 (Tenn. Ct. App. Dec. 5, 2018). Although the appellate courts review a trial court's order to seal its records for an abuse of discretion, "'[i]n light of the important rights involved, the ... decision is not accorded' the deference that standard normally brings." *Doe by Doe v. Brentwood Acad., Inc.*, 578 S.W.3d 50, 53 (Tenn. Ct. App. 2018) (quoting *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 306 (6th Cir. 2016)).

II. Tenn. Code Ann. § 10-7-504(m)(1) Prohibits Public Release of the Materials Plaintiff Seeks, and Mandates Issuance of a Protective Order by the Court.

Defendants have asked the Court to enter a protective order covering three sets of materials: (1) surveillance video of Riverbend Maximum Security Prison ("RMSI"), (2) Investigative Reports by the Tennessee Department of Correction, and (3) Logbooks from RMSI documenting inmate head counts, various security checks, and the times at which they all occur.

The Tennessee General Assembly has categorically established a "legitimate need for privacy or confidentiality" of these materials. *In re NHC--Nashville Fire Litig.*, 293 S.W.3d at 573. Tenn. Code Ann. § 10-7-504(a)(8) and (m)(1) provides:

> "**All investigative records and reports** of the internal affairs division of the department of correction or of the department of youth development shall be treated as confidential and **shall not be open to inspection by members of the public**....

> Information and records that are directly **related to the security of any government building** shall be maintained as confidential and shall not be open to public inspection … Such information and records include, **but are not limited to**:
>
> […]
>
> (C) **Assessments of security vulnerability**;
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> (D) **Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entit**y;
>
> (E) **Surveillance recordings, whether recorded to audio or visual format, or both**…

Id. (emphasis added).

Moreover, the General Assembly did not leave wide open any occasions on which the statutory mandate of confidentiality for these records may be overridden. In fact, it expressly designated the manner in which these materials can be disclosed:

> "[I]f the recordings are relevant to a civil action or criminal prosecution, then the recordings may be released in compliance with a subpoena or an order of a court of record in accordance with the Tennessee rules of civil or criminal procedure. The court or administrative judge having jurisdiction over the proceedings **shall issue appropriate protective orders, when necessary, to ensure that the information is disclosed only to appropriate persons**…"

Tenn. Code Ann. § 10-7-504(m)(1)(E) (emphasis added).

Furthermore, the General Assembly has made clear that these protections afforded prison security video cannot be waived. *Id.* ("Release of any segment or segments of the recordings shall not be construed as waiving the confidentiality of the remaining segments of the audio or visual tape.").[1]

[1] Plaintiff's suggestion that TDOC's publication several years ago of a general marketing video

Simply put, the statute mandates that the surveillance footage, investigation, and security logs Plaintiff seeks "***shall be maintained as confidential***," and to maintain this confidentiality, in the context of civil litigation, a court ***"shall issue appropriate protective orders."*** The statute demonstrates the compelling interest the State has in maintaining the confidentiality of security information related to its prisons. However, to the extent that the parties have suggested further inquiry is necessary, Defendants have plainly provided the Court with cause to follow the statute.

First, Defendants have satisfied this basic showing and have "articulated a legitimate need for privacy or confidentiality." *See* Declaration of Ernest Lewis, at ¶¶ 6-7. In asking the Court to ignore this, Plaintiff tells the Court to second-guess the sworn statements of the Associate Warden of Security for RMSI. There is simply no basis for the Court to entertain this request from Plaintiff.

Second, it is worth noting that both parties recognized and communicated the need for the confidentiality of these materials from the outset of their being produced. *See* Exhibit A, December 5, 2022, S. Griffin Email ("The videos were produced to Plaintiff's counsel in this matter with the understanding per our previous discussions that they are ***protected from public disclosure*** and would only be provided to the court under seal.") Plaintiff's counsel repeatedly agreed and even stated that "***anything*** that would cause a security risk would of course be something we could agree to a protective order about." *See* Exhibit B, December 5, 2022, K. Henry Email.

Defendants only filed their motion when Plaintiff, shortly after the videos were provided in good faith, suddenly refused to sign an Agreed Protective Order, essentially reneging on the basic understanding between the parties that facilitated the exchange of information up to that point. Thus, Plaintiff now seeks to litigate his own, subjective view of what is and is not a security

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intended to recruit new corrections officers could somehow be considered a waiver of its right to assert the confidentiality of the materials at issue in this case strains credulity and is undermined by the plain language of Tenn. Code Ann. § 10-7-504.

risk for RMSI. Because the materials are squarely within the scope of Tenn. Code Ann. § 10-7-504, and Defendants have satisfied the standard set forth in *In re NHC--Nashville Fire Litig*., the Court should grant Defendants' Motion.

III. Even Apart from Tenn. Code Ann. § 10-7-504, the State Has a Compelling Interest in Protecting Video and Security Logs that Evidence Points of Ingress and Egress; the Frequency of Security Checks; and the Roles of Individual Corrections Officers in Maintaining Prison Security

It is well-settled law, including in the Sixth Circuit, that "prison security is a compelling state interest," and "deference is due to institutional officials' expertise in this area." *Hayes v. Tennessee*, 424 F. App'x 546, 554 (6th Cir. 2011) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 717, 125 S. Ct. 2113, 2119, 161 L. Ed. 2d 1020 (2005)).

Courts find this compelling interest in prison security present when the State seeks protection of exactly the type of information at issue here – video surveillance and prison logs:

> Likewise, defendants urge that video surveillance footage from the prison should also be subject to a protective order because it depicts "the manner in which officers responded to the incidents at issue and the techniques used to gain control of [p]laintiff" and this information "could be used by inmates to create a disturbance or uprising, or attempt to escape." Again, I agree.
>
> Second Circuit case law concerning the protection of jail security footage is surprisingly scant. Nevertheless, in *McMillen v. Windham*, the United States District Court for the Western District of Kentucky granted a protective order with respect to video surveillance footage from a detention center. *McMillen v. Windham*, No. 3:16-CV-558-CRS, 2018 WL 652829, at *5 (W.D. Ky. Jan. 31, 2018). ***The court, conducting its own review of out-of-circuit case law, found support for the movant's argument that the detention center's safety concerns constituted sufficient good cause for the issuance of a protective order.*** "The Court is persuaded that to allow the production, dissemination, and use of the Lincoln Village video footage to be unrestricted could create security and safety risks to the current staff of that facility and to the public." Accordingly, the court entered a protective order limiting the usage of the footage for the purposes of the litigation at hand.

> This reasoning is persuasive. Defendants assert that allowing the dissemination of the video surveillance footage would put at risk the safety of corrections officers, other inmates, and the public. Like in McMillen, the court finds that there is good cause for a protective order preventing plaintiff disseminating the surveillance footage.

Harris v. Livingston Cnty., No. 14-CV-6260-DGL-JWF, 2018 WL 6566613, at *2–3 (W.D.N.Y. Dec. 13, 2018) (internal citations omitted).

The self-evident importance of keeping prison security video footage confidential is not unique to *Harris*; the standard approach of courts across the country when confronted with this issue has been to recognize the inherent sensitivity of the footage. *See, e.g.*, *Perasso v. Washington State Dep't of Corr*., No. 318CV05934BHSDWC, 2019 WL 2172857, at *2 (W.D. Wash. May 20, 2019) (holding a protective order was "appropriate to ensure prison security" because the evidence showed "***it is critical that offenders, their cohorts, and visitors not know the capabilities and the limitations of the DOC's surveillance systems*"** to maintain the secure and orderly operation of a prison (emphasis added)); *Fourhorn v. City & Cnty. of Denver*, 261 F.R.D. 564, 569 (D. Colo. 2009) (granting protective order regarding jail documentation because "[a]mple caselaw addressing issues relating to jail or prison security and safety concerns reflects ***a broad policy against Court interference in matters which affect those concerns***" and "despite the presumption in favor of public access, [the Court found] that ***good cause [was] shown to maintain the confidentiality designation of the jail policies at issue***" (emphasis added)); *Est. of Miller v. Michigan Dep't of Corr*., No. 22-10934, 2022 WL 3153794, at *2 (E.D. Mich. Aug. 8, 2022) (granting protective order and stating "[w]hile it is true that the videos do not reveal other security measures and that they capture areas already visible to individuals present at [the prison], that hardly undermines Defendants' compelling interest in safety and security at the prison. As Defendants suggest, leaving these videos unsealed would give individuals outside the prison the

ability to '***freeze images, slow playback, or zoom in to see details*** of the activities on camera that might not be apparent to the naked eye at full speed.' . . . ***So the Court finds that Defendants' interest in prison safety and security is compelling enough to merit sealing***."); *Sampel v. Livingston Cnty*., No. 17-CV-06548-EAW-MJP, 2019 WL 6695916, at *3 (W.D.N.Y. Dec. 9, 2019) (holding the "surveillance videos produced by defendants are of a sensitive and confidential nature" because they "provide information (*i.e.*, the geographical layout of the jail, the location of the cameras, the view from the cameras) that could be used to exploit potential gaps in surveillance. As in *Harris*, the Court finds good cause for a protective order against the surveillance footage.").

There is no reason for the Court to deviate from this consistently recognized and compelling State interest in confidentiality. Ernest Lewis, the Associate Warden of Security at RMSI, has addressed the clear and specific security concerns these videos depict, such as points of ingress and egress into some of the most sensitive areas of RMSI, the identities and actions of corrections officers and medical staff (who are not party to this lawsuit) handling some of the most sensitive matters at the facility, and the types of security equipment used by RMSI and the manner in which it is employed in the handling of dangerous and violent inmates or inmates in need of medical care. Moreover, the prison logs paint a complete picture of how security checks and procedures are performed, as well as the increments in which they happen and how they are recorded.

This great weight of authority cuts against second-guessing the sworn testimony of Warden Lewis, who is both familiar with these materials and tasked with providing assessments of the security concerns of the facility at issue.

As Warden Lewis has stated, and as is articulated again and again by courts across the country, the concern with public viewing of these videos extends beyond just those who may

innocently encounter them in the news, but to those who may seek to exploit and utilize these materials for other nefarious purposes that would directly harm RMSI, its employees, and the inmates housed there. Thus, the Court should recognize the long line of authority within the Sixth Circuit and across the country in concluding that Defendants have a compelling interest in protecting these video and security logs.

IV. Plaintiff Has No Legitimate Interest in the Public Dissemination of Confidential Prison Security Materials Because Plaintiff Will Have Access to the Materials Even With a Protective Order

By granting Defendants' motion for a protective order, this Court will not in any way deprive Plaintiff of access to the information Plaintiff seeks. Instead, the Court will simply ensure that the parties can exchange all discoverable prison security information for use in this litigation, without at the same time allowing disclosure to the general public. And Plaintiff cannot point to a single harm he or his case will suffer if this Court maintains the confidentiality of this information under protective order.

This Court should also ask what justification Plaintiff has proffered that weighs public disclosure over public safety. In *In re Secretary, Florida Department of Correction*, the Eleventh Circuit went so far as to reverse the trial court's denial of a protective order over "sensitive prison security and safety information," which included video footage, because the trial court ignored "the seriousness of the potential security and safety breaches" as well as "***the lack of harm to plaintiffs' case by having the [parties] handle the highly sensitive information***." *In re Sec'y, Fla. Dep't of Corr.*, No. 20-10650-J, 2020 WL 1933170, at *3 (11th Cir. Mar. 30, 2020). Ultimately, the Eleventh Circuit vacated the trial court's order denying the motion for a protective order and itself ordered that the motion be granted, wholly divesting the trial court of discretion over the matter.

Plaintiff is in no way harmed by being allowed all the information he seeks, with the caveat that he may not disclose it to the public. On the other hand, the risk to prison security of allowing surveillance video and logs to enter the public domain, forever accessible to all who wish to analyze it, is real, and one which Defendants implore this Court not to disregard.

Finally, Defendants appreciate that Plaintiff is open to negotiating security concerns "on a case-by-case basis" (Plaintiff's Opposition to Defendant's Motion for Protective Order, at p. 9); however, to achieve this, Plaintiff should have met and conferred with Defendants prior to filing his motion. Instead, Plaintiff side-stepped the meet and confer process and is now clearly asking the Court to allow public dissemination of the information. Plaintiff's December 5, 2022 "Notice", p. 2 ("Mr. Hodges requests records and exhibits regarding his custody and treatment . . . ***be open to the public***." (emphasis added).)

CONCLUSION

There exists no compelling reason to disregard the clear statutory mandate of the Tennessee General Assembly that the materials in question be kept confidential, nor to ignore its dictate that the courts of this state must enter appropriate protective orders to ensure their confidentiality. The great weight of authority from across the country only goes to bolster the statute's unequivocal mandate. That Plaintiff has ignored the statute in their opposition brief does not remove these materials from the statute's protection, nor diminish the fact that it is governing law. For these reasons, Defendants' motion for protective order should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing pleading has been sent via e-mail on December 12, 2022, upon the following recipients:

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