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Precap: *Krakauer v. State of Montana*; Montana's Constitutional Right to Know v. FERPA

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PRECAP; *Krakauer v. State of Montana*: Montana's Constitutional Right to Know v. FERPA

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I. QUESTION PRESENTED

Does the Family Education Rights and Privacy Act preempt the right to know provided in the Montana Constitution and prohibit disclosure of the Commissioner of Higher Education's records relating to Jordan Johnson's University disciplinary proceedings?

II. FACTUAL AND PROCEDURAL BACKGROUND

In May 2012, a University of Montana student was found guilty of rape by the University of Montana Dean of Students and expelled from the University.[1] The student appealed this determination to the Vice-President for Student Affairs and underwent a hearing before the University Court, which subsequently affirmed the decision of the Dean of Students.[2] The University Court's decision was then reviewed by the President of the University of Montana, Royce Engstrom, who also affirmed the decision of the Dean of Students.[3] In June 2012, the student's attorney appealed the President's decision to the Commissioner of Higher Education, Clayton Christian (the Commissioner).[4] The Commissioner's review was recorded in a written decision.[5] However, nothing is publically known about the results of the review or the determinations made by the Commissioner.[6]

In June 2012, U.S. District Court Judge Dana Christensen "unsealed a federal court file containing all of the records of the disciplinary action through the President's decision to affirm the expulsion recommendation" of the student referred to above.[7] In July 2012, the Missoula County Attorney publically charged University of Montana Student Jordan Johnson (Johnson) with sexual intercourse without consent.[8] The facts included in Johnson's charging documents were identical to the facts contained in the unsealed federal court file released

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[1] Appellee's Response Brief, *Krakauer v. State of Montana*, 2015 WL 6599701 at *7–8 (Mont. 2015) (No. DA 15-0502).

[2] *Id.* at *8.

[3] *Id.* at *9.

[4] *Id*.

[5] *Id.*

[6] *Id.* at *9–10.

[7] Appellee's Response Brief, *supra* note 1, at *12.

[8] *Id.* at *10.

by Judge Christensen in June.[9] All aspects of Johnson's trial and subsequent acquittal were thoroughly publicized by the media.[10]

While the results of the Commissioner's review of the student's disciplinary proceedings are not publically known, Johnson "remained in school and continued to participate as the Grizzly quarterback."[11] The unknown reasoning and procedure behind the Commissioner's apparent reversal of the determinations made by the Dean of Students, the University Court and the President are the driving force behind this litigation.

In January 2014, Appellee Jon Krakauer (Krakauer) filed a request with Appellant State of Montana, by and through the Commissioner, to inspect or receive copies of the Commissioner's records "that concern the actions of the Office of the Commissioner of Higher Education . . . regarding the ruling by the University Court . . . in which student Jordan Johnson was found guilty of rape."[12] The Commissioner refused Krakauer's request asserting that the demands of the student's privacy "clearly outweighed the merits of public disclosure of the documents" concerning the student's disciplinary proceeding, that Krakauer, as a non-resident, did not have a right to inspect or obtain copies of public documents in Montana and that both the Family Education Rights and Privacy Act (FERPA) and Montana Code Annotated § 20–25–515 prohibited disclosure.[13]

Krakauer initiated the present litigation alleging his rights to examine documents under the right to know enumerated in Article II, Section 9 of the Montana Constitution was infringed by the Commissioner and petitioning the Montana First Judicial District Court, Lewis and Clark County, to order the Commissioner to produce the records.[14] Both parties moved for summary judgment and, after oral argument, the District Court granted Krakauer's motion and directed the Commissioner to provide Krakauer with copies or access to the requested records with all students' names, birth dates, social security numbers, addresses and telephone numbers redacted.[15] The Commissioner appeals this judgment.

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *11; Appellant's Opening Brief, *Krakauer v. State of Montana*, 2015 WL 6599701 at *6 (Mont. 2015) (No. DA 15-0502).

[13] Appellant's Opening Brief, *supra* note 12, at *6–7; Appellee's Response Brief, *supra* note 1, at *11.

[14] Appellant's Opening Brief, *supra* note 12, at *7; Appellee's Response Brief, *supra* note 1, at *13.

[15] Appellant's Opening Brief, *supra* note 12, at *7.

III. SUMMARY OF ARGUMENTS

A. Appellant Commissioner of Higher Education

1. FERPA, As Amended, Prevents the Release of Any Records Responsive to Krakauer's Request.

The Commissioner asserts that "any education institution" receiving federal aid is "contractually bound to comply with the requirements of FERPA."[16] The Commissioner's primary contention is that FERPA prohibits him from releasing the disciplinary records unless he has obtained consent from the students to which the records relate, an exemption or exception applies, or the records do not contain personally identifiable information.[17] The Commissioner contends that FERPA prohibits disclosure in this case because none of these criteria have been met.

The Commissioner points out that the Montana Supreme Court decision in *Board of Trustees, Cut Bank Pub. Sch. v. Cut Bank Pioneer Press,*[18] upon which the District Court relied, does not interpret FERPA as amended and is therefore no longer legal precedent.[19] In *Pioneer Press*, the Court held that student disciplinary records could be released because the redacted records did not contain "personally identifiable information" and, therefore, would not violate FERPA.[20] The definition of "personally identifiable information" under FERPA has been amended since *Pioneer Press* to include "information requested by a person who the education agency or institution reasonably believes knows the identity of the student to whom the education record relates."[21] Accordingly, the Commissioner asserts that because Krakauer requested Johnson's records by name, the Commissioner is prohibited by FERPA from complying with the request.[22] Further, the Commissioner argues that the District Court misinterpreted *Pioneer Press* by summarizing the Court's holding in *Pioneer Press* as standing for the notion that anytime records are redacted their release does not violate FERPA.[23] The Commissioner asserts that the Court's holding in *Pioneer Press* was more nuanced, standing for the idea that "it was not the redactions in and of themselves that prevented a FERPA violation, but rather the ability of those redactions to conceal personally identifiable

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[16] *Id.* at *13.

[17] *Id.* at *7, 14–15.

[18] 160 P.3d 482 (Mont. 2007).

[19] Appellant's Opening Brief, *supra* note 12, at *14–15.

[20] *Id.* at *14.

[21] *Id.* at 14–15 (citing 34 C.F.R. § 99.3 (2008)).

[22] *Id.* at *16.

[23] *Id.*

information."[24] The Commissioner contends that redaction in this case cannot conceal the personally identifiable information because Krakauer has requested the records relating to a named student.[25]

Additionally, the Commissioner argues that FERPA prohibits an educational institution from "having a 'policy or practice' of releasing educational records" without consent or the application of an exemption or exception.[26] The Commissioner argues that enforcing a court order to produce student records amounts to a prohibited policy or practice under FERPA because it "will create binding precedent" requiring the release of student records whenever the "requestor knows the identity of the student" involved.[27] The Commissioner asserts that a court order of production "necessarily set[s] some kind of precedent . . . and a policy or practice to some extent would be established."[28] The Commissioner then contends that the "judicial subpoena or order" exception does not apply because this exception only "informs an educational institution when it may release educational records" but does not inform a court as to "when it may enter an order."[29] The Commissioner alleges that under FERPA, individual privacy interests are great and need to be outweighed by a demonstration of "genuine need" for the information by the requesting party, which is a "significantly heavier burden" than exists with respect to the discovery of other types of information.[30] Under this standard, the Commissioner claims that Krakauer's request does not outweigh the privacy interests at stake because Krakauer wants to use the information for economic gain.[31]

2. Montana Code Annotated § 20–25–515 Prevents the Release of Any Records Responsive to Krakauer's Request.

The Commissioner's next issue concerns whether or not Montana Code Annotated § 20–25–515 prohibited the District Court from compelling release of the requested records.[32] Montana Code Annotated § 20–25–515 allows a university to "release a student's academic record only when requested by the student or by a subpoena issued by a court . . . of competent jurisdiction."[33] The Commissioner points out that the

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[24] *Id.* (citing *Pioneer Press*, 160 P.3d at 487–88).

[25] Appellant's Opening Brief, *supra* note 12, at *16.

[26] *Id.* at *18 (quoting 20 U.S.C.A. § 1232g (2015)).

[27] *Id.* at *19–20.

[28] *Id.* at *19 (quoting Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 488 (Iowa 2012)).

[29] *Id.* at *20 (quoting *Press-Citizen Co.*, 817 N.W.2d at 492–93).

[30] *Id.* at *21–22 (quoting Moeck v. Pleasant Valley Sch. Dist., 2014 U.S. Dist. LEXIS 142431 at *6–8 (M.D. Pa. 2014)).

[31] Appellant's Opening Brief, *supra* note 12, at *22–23.

[32] *Id.* at *23–25.

[33] MONT. CODE ANN. § 20–25–515 (2015).

District Court did not issue a subpoena in this matter and contends that "it would have been inappropriate for the [District Court] to do so.[34]

3. The Privacy Rights of the Students Named in the Records Outweigh the Public's Right to Know in This Case.

The Commissioner claims that Montana's constitutional right to know, provided in Article II, Section 9, must be balanced with the constitutional right of privacy, enshrined in Article II, Section 10, and that the privacy rights of the students involved in the records outweigh the right to know in this case.[35] The Commissioner asserts that a two-part test is appropriate when a court balances these interests: first, the court must determine "whether the individual has a subjective or actual expectation of privacy," and second determine "whether society is willing to recognize that expectation as reasonable."[36] The Commissioner argues that the existence of both federal and state law protecting student records establishes that Montana students "have an actual expectation of privacy in their records" and the "reasonableness of that expectation."[37] Further, the Commissioner points out that other students, aside from the disciplined student, who have personal information contained in the report also have an expectation of privacy.[38]

The Commissioner also asserts that the publicity of Johnson's criminal trial is not relevant when considering his expectation of privacy under either federal or state law.[39] Moreover, the Commissioner also contends that the entire incident, other than the Commissioner's records, is not a matter of public record because it is speculative to conclude that the records unsealed by Judge Christensen involved Johnson.[40] This is because, as the Commissioner emphasizes, the unsealed records were redacted to protect the identity of the "unknown and unnamed students involved."[41] Lastly, the Commissioner points out that "a practice of releasing [student] disciplinary records" is potentially damaging to both the accused and the accuser because university disciplinary proceedings "do not provide students with the same procedural due process protections that criminal and civil defendants are afforded."[42]

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[34] Appellant's Opening Brief, *supra* note 12, at *23–24.

[35] *Id.* at *25–26.

[36] *Id.* at *25 (citing Bozeman Daily Chronicle v. City of Bozeman Police Dep't, 859 P.2d 435, 439 (Mont. 1993).

[37] *Id.*

[38] *Id.* at *26.

[39] *Id.* at *27.

[40] Appellant's Opening Brief, *supra* note 12, at *28.

[41] *Id.* at *29; Appellant's Reply Brief; *Krakauer v. State of Montana*, 2015 WL 9220797 at *6–8 (Mont. 2015) (No. DA 15-0502).

[42] Appellant's Opening Brief, *supra* note 12, at *29–31.

4. Krakauer, a Non-Resident, Does Not Have Standing to Avail Himself of Either the Right to Access Public Records or the Right to Know in Montana.

The Commissioner contends that Krakauer, as a Colorado Resident, does not have standing to avail himself of either the right to know enumerated in Article II, Section 9 of the Montana Constitution or "the accompanying open records laws" because both are bestowed solely upon Montana citizens.[43] First, the Commissioner points out that the right to access law, Montana Code Annotated § 2–6–102, provides access to "every citizen" and that Krakauer does not meet the definition of "citizen" as provided by Montana Code Annotated § 1–1–402.[44] Lastly, the Commissioner asserts that although Article II, Section 9 provides that "[n]o*person* shall be deprived of the right to examine documents," the goal of the provision is to provide access solely to citizens of Montana.[45] In support of this assertion, the Commissioner proffers transcripts of the 1972 Montana Constitutional Convention in which the delegates discuss the right to know while using the word "citizen."[46]

5. The District Court Abused Its Discretion in Awarding Fees to Krakauer.

The Commissioner's last contention is that the District Court abused its discretion by awarding attorney's fees to Krakauer.[47] In support of this argument, the Commissioner cites to Montana case law stating that a district court abuses its discretion "when it acts arbitrarily without employment of conscientious judgment."[48] The Commissioner goes on to claim that the District Court "failed to exercise conscientious judgment" by relying on Krakauer's version of the facts and the law when awarding attorney's fees to Krakauer.[49]

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[43] *Id.* at *32–36.
[44] *Id.* at *33–34; MONT. CODE ANN. § 2–6–102.
[45] Appellant's Opening Brief, *supra* note 12, at *34–36.
[46] *Id.*
[47] *Id.* at *37.
[48] *Id.* (citing Billings High Sch. Dist. No. 2 v. Billings Gazette, 149 P.3d 565, 573 (Mont. 2006).
[49] *Id.* at *38–39.

B. Appellee Jon Krakauer

1. FERPA Does Not Prohibit the Disclosure of the Commissioner's Records.

First, Krakauer asserts that FERPA is "essentially spending legislation" that does not "create individual rights."[50] Accordingly, Krakauer argues FERPA merely sets conditions for the "receipt of federal funds" without prohibiting anything and with entirely "speculative" repercussions.[51] Krakauer claims that a single incidence of disclosure through court order does not constitute a pattern or practice under FERPA because it is not a "*systematic* policy or practice."[52] Krakauer points out that under Montana case law, any decision concerning the disclosure of records is done on a "case-by-case basis" that prohibits a single incident of disclosure from setting a precedent that could constitute a "pattern or practice."[53] Further, this case-by-case analysis does not take into consideration the "petitioner's level, need, or validity of interest" in the requested information as the Commissioner suggests and such a consideration is "wholly misplaced" in light of the fact that Article II, Section 9 does not make such a limitation.[54]

Second, Krakauer asserts the Court's rationale in *Pioneer Press* is still controlling because it is not based upon the specific language of FERPA, but rather upon the balancing analysis between Montana's constitutional right to know and right of privacy.[55] Even if FERPA were amended before the Court's decision in *Pioneer Press*, Krakauer argues that the Court would have reached the same conclusion because FERPA's confidentiality provisions "do not factor into the constitutional balancing test nor mitigate the government's constitutional obligations."[56]

Third, Krakauer points out that the Commissioner claims FERPA preempts the application of Montana constitutional or statutory law but that a proper analysis of federal preemption doctrine leads to the opposite.[57] Krakauer asserts that a state law may only be preempted by express preemption, "occupy the field" preemption, or conflict preemption, and that none are applicable in the present case.[58] FERPA does not contain an express preemption clause, but rather allows disclosure

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[50] Appellee's Response Brief, *supra* note 1, at *21 (quoting *Pioneer Press*, 160 P.3d at 486).

[51] *Id.* at *21–22.

[52] *Id.* at *23 (emphasis in original).

[53] *Id.* at *24.

[54] *Id.* at *25.

[55] *Id.* at *29–30 (citing *Pioneer Press*, 160 P.3d at 489).

[56] Appellee's Response Brief, *supra* note 1, at *31 (quoting *Pioneer Press*, 160 P.3d at 489).

[57] *Id.* at *32.

[58] *Id.* at *33 (citing Fenno v. Mountain W. Bank, 192 P.3d 224, 227 (Mont. 2008); Favel v. Am. Renovation and Constr. Co., 59 P.3d 412, 423 (Mont. 2002)).

through a "valid state court order."[59] Nor does Congress "occupy the field" of education or educational records.[60] Lastly, Krakauer claims that for conflict preemption to apply, a "federal-state conflict must be actual and unavoidable, not merely possible."[61] Since FERPA does not punish educational institutions for every single instance of "non-consensual release of student records," but rather only if there is a "policy or practice of non-consensual disclosure," and FERPA does not sanction isolated instances that are allowable under Montana's case-by-case analysis, Krakauer maintains that no "actual and unavoidable conflict of law exists."[62] Since it is possibly to comply with both FERPA and state law, Krakauer directs the Court to next analyze whether the underlying policies of the state and federal provisions are conflicting.[63] Krakauer points out that an interest in protecting individual privacy is at the heart of both the state and federal provisions and, consequently, no conflict can exist because the state provision cannot stand as an obstacle to the objectives of Congress when they are shared by the state.[64] Accordingly, Krakauer asserts that Montana's statutory and constitutional right to know provisions are not preempted by FERPA.[65]

Lastly, Krakauer argues that FERPA does not protect the student disciplinary records he is requesting. Krakauer initially claims this is because FERPA allows a court to order disclosure of otherwise protected student information and will cover the Commissioner for any complaint of such an order being improper.[66] Next, Krakauer asserts that FERPA explicitly excepts the "final results" of a disciplinary proceeding against a student "alleged to have committed a rape offense."[67] Quoting the Sixth Circuit Court of Appeals in *United States v. Miami University*,[68] Krakauer further notes that if a university finds that a student violated the university's rules by committing a rape offense, "then the alleged perpetrator's privacy interests are trumped by the public's right to know about such violations."[69] Since Krakauer is seeking the Commissioner's decision concerning the University's determination that Johnson committed rape, and the Commissioner's records are the final result of the

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[59] *Id.*

[60] *Id.* at *33–34 (citing Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 432 (2002)).

[61] *Id.* at *34 (quoting *Favel*, 59 P.3d at 425).

[62] Appellee's Response Brief, *supra* note 1, at *34.

[63] *Id.* at *34–35 (citing *Fenno*, 192 P.3d at 230–31).

[64] *Id.* at *36.

[65] *Id.* at *37.

[66] *Id.* at *37–38.

[67] *Id.* at *38 (citing 20 U.S.C.A. § 1232g(6)(B)).

[68] 294 F.3d 797, 812–13 (6th Cir. 2002).

[69] Appellee's Response Brief, *supra* note 1, at *39.

disciplinary proceeding, Krakauer claims that the FERPA exception allows disclosure of the records.[70]

2. Montana Code Annotated § 20–25–515 Does Not Prevent Disclosure.

Krakauer asserts that the District Court correctly found that the disclosure order was "well within the subpoena process contemplated by" Montana Code Annotated § 20–25–515.[71] Additionally, Krakauer claims that even if the Commissioner's argument has merit, "a statutory prohibition of disclosure cannot trump the public's right to know under Article II, Section 9."[72]

3. The Merits of Public Disclosure Outweigh the Demands of Privacy in This Case.

Krakauer urges the Court to affirm the District Court's conclusion that "the demands of individual privacy in the disciplinary records do not clearly exceed the merits of public disclosure."[73] Krakauer contends that the Commissioner's insistence upon balancing the right to know against the right of privacy is not technically correct because Article II, Section 9 provides the framework for weighing these competing interests by providing that the right to examine government documents shall not be infringed "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."[74] Accordingly, Krakauer claims that the right to know "trumps" any privacy concerns in government documents unless clearly exceeded by the demands of individual privacy.[75] Further, Krakauer asserts that there is a "constitutional presumption of openness" unless disclosure is clearly outweighed by individual privacy interests.[76]

Applying the two-part test for determining the balance between the right to know and the right of privacy, Krakauer asserts that the individual privacy interests in this case do not clearly exceed the merits of disclosure.[77] Krakauer claims that the Commissioner inappropriately looks at the privacy expectations of university students generally but should be focusing on Johnson's actual or subjective expectations.[78] Focusing on

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[70] *Id.* at *40.
[71] *Id.* at *42.
[72] *Id.* at *41–42.
[73] *Id.* at *42.
[74] *Id.* at *43 (quoting Mont. Const. art. II, § 9).
[75] Appellee's Response Brief, *supra* note 1, at *43.
[76] *Id.*
[77] *Id.* at *48.
[78] *Id.* at *44.

Johnson's expectations, Krakauer claims that Johnson had a discounted expectation of privacy on account of his agreement to abide by the "Student-Athlete Conduct Code."[79] This Code requires athletes to acknowledge their heightened public visibility and the fact that "their actions are scrutinized more closely by the press."[80] Krakauer asserts that this acknowledgment also makes "any arguable expectation of privacy" Johnson may have had concerning the University's handling of his disciplinary proceedings unreasonable.[81] As further support for the argument that Johnson did not have a reasonable expectation of privacy, Krakauer points out that Johnson's dispute with the University and his entire criminal trial were all thoroughly publicized.[82] Lastly, Krakauer contends that "even if some level of reasonable privacy interests are implicated," the merits of public disclosure in this case "outweigh them."[83] This is because, Krakauer asserts, the public has an interest in "knowing how a publicly-funded university deals with a star quarterback accused of rape," particularly when the Commissioner apparently reversed findings that Johnson committed the crime.[84] Krakauer emphasizes that because the Commissioner holds a position of public trust, society has a right to know his "decision and rationale" for rejecting the findings of the Dean of Students, the University Court and the President.[85] Regardless of whether or not there are privacy interests to be protected in the Commissioner's records, Krakauer states that he is willing to accept redacted copies of the documents.[86]

4. Krakauer Has Standing to Enforce the Right to Know Provided in the Montana Constitution.

Krakauer asserts that the District Court properly interpreted the plain meaning of Article II, Section 9 to conclude that he had standing to seek enforcement of the right to know.[87] In *Associated Press v. Board of Public Education*,[88] the Court concluded that Article II, Section 9 "is unique, clear and unequivocal" and, therefore, the Court is "precluded by general principles of constitutional construction, from resorting to extrinsic methods of interpretation." Accordingly, Krakauer contends, the District Court could not resort to extrinsic evidence such as that proffered

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[79] *Id.* at *44–45.
[80] *Id.*
[81] Appellee's Response Brief, *supra* note 1, at *45.
[82] *Id.* at *45–46.
[83] *Id.* at *46.
[84] *Id.* at *47.
[85] *Id.*
[86] *Id.* at *48.
[87] Appellee's Response Brief, *supra* note 1, at *49–50.
[88] 804 P.2d 376, 379 (Mont. 1991).

by the Commissioner and was correct to conclude that the right to know applies to "all 'persons,'" not solely Montana citizens.[89]

5. The District Court Properly Awarded Attorney's Fees to Krakauer.

Krakauer argues that the Commissioner has not met his burden in establishing that the District Court abused its discretion in awarding attorney's fees by "acting arbitrarily, without employment of conscientious judgment," or by exceeding the "bounds of reason resulting in substantial injustice."[90] Krakauer claims that the Commissioner's contention that the District Court's decision is not legally supported is "merely the same legal argument" already presented.[91] Krakauer notes that he will not be entitled to fees if the Court reverses on the merits but asserts that the real issue "is whether the equities of the case justify the district court's exercise of discretion in awarding fees after it determined disclosure was authorized."[92] Krakauer affirmatively asserts, "they do."[93]

IV. ANALYSIS

The seminal issue in this case is whether FERPA preempts Montana's constitutional right to know. Krakauer analyzes federal preemption doctrine and appears to have the stronger argument when claiming that none of the three types of federal preemption apply. If the Court sides with Krakauer on this issue, then it must perform a two-part test to determine whether or not the right of privacy "clearly exceeds" the right to know in the present case.[94] The Court must first determine whether the "person has a subjective or actual expectation of privacy. If so, the Court must determine "whether society is willing to recognize that expectation as reasonable."[95] Here again, Krakauer appears to have the stronger argument. First, in this case, Johnson's acknowledgment to heighted visibility and public scrutiny, as well as his, and the University's, enjoyment of his publicity as the star quarterback certainly diminish his expectation of privacy. Second, the required acknowledgment and the extensive publicity of Johnson's entire ordeal, including both the University proceedings and the public criminal trial attest to society's unwillingness to recognize any subjective expectation Johnson may have

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[89] Appellee's Response Brief, *supra* note 1, at *50 (quoting Mont. Const. art. II, § 9).
[90] *Id.* at *51–52 (citing *Bozeman Daily Chronicle*, 859 P.2d at 439).
[91] *Id.* at *52.
[92] *Id.*
[93] *Id.*
[94] Billings Gazette v. City of Billings, 313 P.3d 129, 133–34 (Mont. 2013).
[95] *Id.*; MONT. Const. art. II, § 9.

had as reasonable. Further, even if Johnson had an expectation of privacy in the Commissioner's decision, society has an enormous interest in knowing why the Commissioner, an individual in a position of public trust, apparently reversed the findings of the Dean of Students, the University Court and the President that the star quarterback committed rape. Society's interest, as asserted by Krakauer, in analyzing the Commissioner's decision and rationale is certainly not clearly exceeded by Johnson's right of privacy. Further, although redaction will not protect Johnson at this point, it will protect all other individuals who may have a privacy interest implicated by the release of the records because their personal information is not a matter of public record. In short, the public has a right to know whether or not the Commissioner is dealing with allegations of rape fairly and without favoritism that overrides any privacy interests implicated by the release of the Commissioner's records.

If the Court determines that FERPA preempts and controls the disclosure of the Commissioner's records concerning Johnson's disciplinary proceeding, then the decision will hinge upon one of two questions. First, whether or not a court order compelling disclosure will establish a prohibited "policy or practice" of releasing education records. In Montana, it seems clear that this would not be the case because decisions regarding the disclosure of documents implicating privacy interests are decided on a case-by-case basis and the reasonableness of an expectation of privacy "may vary, even regarding the same information and the same recipient of that information."[96] If a court order were deemed to establish a policy or practice, the next question would become whether or not FERPA's amended definition of "personally identifiable information" prohibits the release of the requested information solely because Krakauer requested Johnson's records by name. Seeing as the amended definition of "personally identifiable information" is only irrelevant to a Montana constitutional analysis, if the Court determines that FERPA preempts Montana law, then the amended definition would prohibit disclosure in this case.

[96] Mont. Human Rights Div. v. City of Billings, 649 P.2d 1283, 1288 (Mont. 1982).