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KRAKAUER II: STUDENT PRIVACY OVER RECORD DISCLOSURE

Emily Bruner*

I. INTRODUCTION

The Montana Constitution includes both a right to know and a right to privacy. These rights are implicated and in conflict when the release of governmental information is at issue. Additionally, the federal Family Educational Rights and Privacy Act (“FERPA”), Montana statutes, and the University of Montana’s Student Code of Conduct bar the release of students’ educational records to third parties, except under specific circumstances. In *Krakauer v. State ex rel. Christian*¹ (“*Krakauer I*”), the Montana Supreme Court merged these privacy protections to form a new standard governing the release of student records. The Court enhanced student privacy rights with applicable federal, state, and University statutes but declined to bolster the right to know with those statutes’ exceptions.

The decision in *Krakauer II* demonstrates the Court’s shift from the longstanding principles of open government toward an emphasis on individual privacy. Part II of this Note examines the history of Montana’s right to know and right to privacy, as well as the legal framework controlling the release of governmental records. A background of *Krakauer v. State ex rel. Christian*² (“*Krakauer I*”) and *Krakauer II* is provided in Part III. Part IV analyzes the Court’s application of the relevant laws in *Krakauer II* and the impact the decision will have on future cases involving the release of governmental records.

II. BACKGROUND

Article II, Section 9 of the Montana Constitution encompasses “the right to examine documents or to observe the deliberations of all public bodies or agencies of state government”—the now well-recognized “right to know.”³ Citizens shall not be deprived of this right “except in cases in which the demand of individual privacy clearly exceeds the merits of public

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1. 445 P.3d 201 (Mont. 2019) [hereinafter *Krakauer II*].

2. 381 P.3d 524 (Mont. 2016) [hereinafter *Krakauer I*].

3. MONT. CONST. art. II, § 9.

disclosure.”⁴ It should be noted at the outset that the “clearly exceeds” language found within the right to know creates a “constitutional presumption that . . . [public officials’] records are amenable to public inspection.”⁵ The right to know finds a competing companion in Article II, Section 10, the constitutional right to privacy.⁶

The rights’ coexistence creates a natural tension and has “attracted, and arguably necessitated, a healthy rash of litigation.”⁷ The Montana Supreme Court has relied on a variety of tests when balancing the weight of the right to know and the right to privacy. Since the rights were adopted nearly 50 years ago, the right to know has often reigned supreme. However, the Court’s more recent decisions, including the *Krakauer* line of cases, indicate a shift in favor of privacy. Additionally, the Court has examined special cases in which federal and state laws provide protections for certain individuals’ privacy of records but also include exceptions for disclosure under specific circumstances. The unique issue of student disciplinary record privacy was raised in *Krakauer II*. As discussed below, the Court’s holding resulted in an unbalanced distribution of applicable law and conflicted with the constitutional presumption in favor of the right to know.

A. *Montana’s Constitutional Tension and Balance Between the Right to Know and Right to Privacy*

1. *Origins of Montana’s Right to Know*

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Mont. Const. art. II, § 9

The Constitutional Convention Studies produced by various researchers ahead of the 1972 Constitutional Convention provide valuable context for the delegates’ drafting of Montana’s right to know. Constitutional Convention Study No. 10 chronicles the “long-standing principle of democratic theory . . . that the activities of government be public at all levels.”⁸ Evidence and support of this theory in the United States can be traced as far back as the writings of James Madison and Thomas Jefferson.⁹ The right to

4. *Id.*

5. *Great Falls Tribune v. Mont. Pub. Serv. Comm’n*, 82 P.3d 876, 886 (Mont. 2003).

6. MONT. CONST. art. II, § 10.

7. Rick Applegate, *The 1972 Montana State Constitution Declaration of Rights and the Opportunities on the Bumpy Road Ahead*, 43 PUB. LAND & RESOURCES L. REV. 103, 122 (2020).

8. RICK APPLGATE, BILL OF RIGHTS 111 (Mont. Constitutional Convention Comm’n, Constitutional Convention Study No. 10, 1972).

9. *Id.*

know at the state level developed alongside the federal Freedom of Information Act and the associated difficulties of “reorienting government to a disclosure-oriented posture rather than one that is withholding-oriented.”¹⁰

When the delegates drafted the right to know in the early 1970s, most states, including Montana, had already codified the right to know in the form of open meeting and open record laws and constitutional provisions on open legislative deliberations.¹¹ Against this legislative backdrop and the history summarized in Constitutional Convention Study No. 10, the delegates made the openness of government permanent as the constitutional right to know. The express nature of the right “gives [it] more prominence than it has in most other states.”¹² Accordingly, since the right’s adoption, the Montana Supreme Court has remained “particularly vigilant and uncompromising in protecting” the right to know.¹³

2. *Origins of Montana’s Right to Privacy*

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.
Mont. Const. art. II, § 10

Constitutional Convention Study No. 10 also provides perspective on the origins of Montana’s right to privacy.¹⁴ Individual privacy rights developed in part from an essay written by Louis Brandeis and Samuel Warren in 1890.¹⁵ The essay articulated the need for legal protection for privacy not only in tangible property but also the “intangible factors of life.”¹⁶ Subsequent U.S. Supreme Court cases defined and expanded the right to privacy and today it is recognized in most states.¹⁷

Montana courts have recognized privacy in various forms, including the right of personal security, of personal liberty, to be let alone, and to liberty and the pursuit of happiness.¹⁸ Montana is also one of only eleven states to express a right to privacy in its Constitution.¹⁹ The express nature

10. *Id.* at 112–13.

11. *Id.* at 113.

12. Adam Wade, Note, *Billings Gazette v. City of Billings: Examining Montana’s New Exception to the Public’s Right to Know*, 76 MONT. L. REV. 186 (2015).

13. *Id.* at 188 (quoting Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L. REV. 297, 311 (2005) (citing *Goldstein v. Comm’n on Practice of the Sup. Ct. of Mont.*, 995 P.2d 923, 946 (Mont. 2000) (Nelson, J., dissenting))).

14. APPLGATE, *supra* note 8, at 215.

15. *Id.* at 238.

16. *Id.* at 238 (referencing Samuel Warren & Louis Brandeis, *The Right to Privacy*, HARV. L. REV. 4 (1890)).

17. *Id.* at 238–39.

18. *See, e.g.*, *Welsh v. Pritchard*, 241 P.2d 816, 819 (Mont. 1952).

19. *Privacy Protections in State Constitutions*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 6, 2020), <https://perma.cc/54W3-2WKQ>.

of the right provides more protection than even the United States Constitution.²⁰

3. *The Montana Supreme Court's Development of Balancing Tests and Shift Toward Enhanced Privacy Rights*

Since their adoption in 1972, the right to know and right to privacy have conflicted in a multitude of cases. Prior to the early 1980s, the Montana Supreme Court determined the outcome of this conflict by balancing the demand of individual privacy with the merits of disclosure—the test encompassed by the right to know. Again, it is critical to note the “clearly exceeds” language found within the constitutional right to know. In fact, during deliberations at the Constitutional Convention, “[a] key turning point . . . occurred when the right [to know] was revised offline so that the demand of individual privacy had to ‘clearly’ exceed the merits of public disclosure.”²¹

The Court has also specified the right to know balancing test must be conducted “within the context of the facts of each case” and is dependent on public interest.²² Over the decades, the importance of disclosure has often outweighed the benefits of concealment and confidentiality in Montana courts,²³ aligning the decisions with the presumption in favor of the right to know. The right to know has outweighed the privacy interests of law enforcement officers, elected officials, public defenders, public school teachers, and various other government employees.²⁴ The Court has cautioned, however, that “the right to know is not absolute.”²⁵ The Court’s line of cases in which these rights competed demonstrates the non-absolute nature of both the right to know and right to privacy.

The Court gave significant weight to the right to privacy in 1982 by turning away from right to know balancing when it decided *Montana Human Rights Division v. City of Billings*.²⁶ There, the disclosure of city employees’ personnel files and disciplinary records was at issue.²⁷ The Court analyzed whether the state demonstrated a compelling interest that overcame the right to privacy—the test encompassed in the constitutional right to privacy.²⁸ The Court then applied the *Katz v. United States*²⁹ two-

20. Patricia A. Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99, 102 (2003).

21. Applegate, *supra* note 7, at 120–21.

22. *Missouliau v. Board of Regents of Higher Educ.*, 675 P.2d 962, 971 (Mont. 1984).

23. *Wade*, *supra* note 12, at 187.

24. *Id.* at 189 n. 40.

25. *Associated Press, Inc. v. Mont. Dep’t of Revenue*, 4 P.3d 5, 10 (Mont. 2000).

26. 649 P.2d 1283 (Mont. 1982).

27. *Id.* at 1285.

28. *Id.* at 1285–86.

part test for determining whether a constitutionally-protected right to privacy exists.³⁰ The *Katz* test states the existence of the right to privacy depends on (1) whether the person had an actual or subjective expectation of privacy and (2) whether society is willing to recognize that expectation as reasonable.³¹ Critically, the Court made no mention of the right to know under the state constitution whatsoever. This omission is significant because the Court has repeatedly relied on *Montana Human Rights Division* in subsequent public record disclosure cases.³²

The Court leaned further into its privacy analysis when it held that whether an individual has an expectation of privacy depends on whether the individual had notice the records were subject to public disclosure or were already publicly available.³³ This decision resulted in *Havre Daily News, LLC v. City of Havre*,³⁴ where a newspaper sought unredacted police reports detailing alleged preferential treatment of an officer's child.³⁵ Similar to the *Montana Human Rights Division* shift in focus to the privacy inquiry, the *Havre Daily News* notice analysis has also continued to inform the Court's decisions on whether disclosure of governmental documents is warranted.

In 1997, the Court held the right to privacy “encompasses not only ‘autonomy privacy’ but confidential ‘informational privacy’ as well.”³⁶ However, in the same case—*State v. Nelson*³⁷—the Court also held, “[i]n requiring a ‘compelling state interest’ [the right to privacy] does not . . . establish a new or heightened level of protection for any particular privacy interest.”³⁸ Thus, the breadth but not the level of the privacy right was expanded.

The Court in *Billings Gazette v. City of Billings*³⁹ again bolstered privacy rights by creating an exception to the right to know for public employees not in positions of “public trust.”⁴⁰ Further, the Court stated, “general assertions that public disclosure will foster public confidence in public in-

29. 389 U.S. 347 (1967).

30. *Mont. Human Rights Div. v. Billings*, 649 P.2d 1283, 1287 (Mont. 1982).

31. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

32. Peter Michael Meloy, *Double and Nothing Open Government in Montana Under Article II, Section 9 and Section 10*, 79 MONT. L. REV. 49, 67 (2018).

33. *Havre Daily News, LLC v. City of Havre*, 142 P.3d 864, 871 (Mont. 2006).

34. 142 P.3d 864 (Mont. 2006).

35. *Id.* at 867–68.

36. *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997).

37. 941 P.2d 441 (Mont. 1997).

38. *Id.* at 449.

39. 313 P.3d 129 (Mont. 2013).

40. *Wade*, *supra* note 12, at 185; *Billings Gazette*, 313 P.3d at 140.

stitutions and maintain accountability for public officers are not sufficient to establish a strong public interest.”⁴¹

The Court has reviewed few cases in which the public has requested student education or disciplinary records. In *Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press*⁴²—the student records case most relevant to *Krakauer II*—a newspaper requested a school board release the disciplinary records of two students involved in shooting other students with plastic BBs on school property.⁴³ The Court again applied the two-step *Katz* privacy analysis.⁴⁴ In doing so, the Court stated the following:

It is clear that [the newspaper] is not requesting the identity of the students involved in the BB shooting incident; rather, it simply wants to know what disciplinary action the Board took. The discipline imposed by the Board on students of the school, particularly students involved in potentially injurious actions, is a matter of public concern. The Board’s assertion that unidentified students have a privacy interest in the disciplinary measures imposed upon them which would prohibit a general report to the public about the Board’s action in the matter is unpersuasive.⁴⁵

Accordingly, the Court held, “[a]ny subjective expectation of privacy here, given [the newspaper’s] limited request, would not be considered reasonable by society and is outweighed by the merits of public disclosure.”⁴⁶

The Montana Supreme Court’s historical treatment of the competing constitutional rights leading up to *Krakauer II* was varied, and its analyses have shifted back and forth between the tests surrounding each right. Generally, the Court has continued to honor the 1972 delegates’ intent in maintaining an open government. However, as the cases noted above and the *Krakauer II* decision suggest, the Court seems intent on shifting away from decades of precedent favoring the public’s right to know in favor of protecting the privacy rights of public and private citizens.

B. Special Considerations for Student Record Privacy under Federal, State, and University Law

Federal, state, and University of Montana laws provide specific protections for student educational records in Montana. These protections include significant exceptions, however, which must be accounted for when examining the laws’ interplay with the constitutional right to know and right to privacy.

41. *Billings Gazette*, 313 P.3d at 141.

42. 160 P.3d 482 (Mont. 2007).

43. *Id.* at 483.

44. *Id.* at 488.

45. *Id.* at 489.

46. *Id.*

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1. *Family Educational Rights and Privacy Act (FERPA) 20 U.S.C.A. 1232g*

Congress enacted FERPA in 1974 to protect the privacy of students and their parents.⁴⁷ FERPA prohibits educational institutions from releasing students' education records or their personally identifiable information to third parties and conditions the receipt of federal funding on compliance with those procedures.⁴⁸

FERPA includes two significant exceptions to its general prohibition of disclosure, however. First, FERPA allows for the release of:

[T]he final results of any disciplinary proceeding . . . against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.⁴⁹

Importantly, in *Pioneer Press*, the Montana Supreme Court held FERPA does not prevent the public release of *redacted* student disciplinary records.⁵⁰ A second FERPA exception allows disclosure of student records "in compliance with judicial order, or pursuant to any lawfully issued subpoena."⁵¹

The Court in *Krakauer I* referenced the expanded definition of "personally identifiable information," which includes "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."⁵² The student records at issue met that expanded definition, and thus, the Court held the release of records would violate FERPA.⁵³ Author John Krakauer, the person seeking the student records, argued any funding loss to the University was speculative, and further, the U.S. Department of Education has never discontinued funds to educational institutions for FERPA violations.⁵⁴ The Court ordered the district court to determine on remand whether there was an adverse final ruling against the student during his

47. John E. Theuman, *Annotation, Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)* (20 U.S.C. § 1232g), 112 A.L.R. FED. 1, § 2(a) (Westlaw through April 15, 2020).

48. *Id.* § 2(a).

49. Family Educational Rights and Privacy Act of 1974 § 1232g(b)(6)(B) (Westlaw through Pub. L. No. 116–259).

50. Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press, 160 P.3d 482, 488 (Mont. 2007).

51. Family Educational Rights and Privacy Act of 1974 § 1232g(b)(2)(B) (Westlaw through Pub. L. No. 116–259).

52. 381 P.3d 524, 530 (Mont. 2016) (quoting 34 C.F.R. § 99.3 (Westlaw through April 15, 2020)).

53. *Id.* at 529.

54. Appellee's Response Brief at 22, *Krakauer v. State*, 381 P.3d 524 (Mont. 2016) (No. DA 15-0502).

disciplinary proceedings, which would allow for the release of those records under the FERPA disciplinary proceeding exception.⁵⁵ However, the district court did not make a finding on this exception, and did not discuss the judicial order or subpoena exception.⁵⁶

2. *Montana Code Annotated § 20-25-515 Release of Student Records*

Montana state law operates similarly to FERPA. Montana Code Annotated § 20-25-515 codified a 1973 Act that stated the legislature intended Montana university system institutions to respect students' rights to privacy in their records. Like FERPA, Montana's law also allows record releases if subpoenaed by a court.⁵⁷

In *Krakauer I*, the Court read the state law not as restricting the exception to the issuance of an actual subpoena, but as simply requiring some form of legal process by a court.⁵⁸ However, merely filing a lawsuit and requesting a records subpoena without a court's consideration of a student's privacy interests would fail to satisfy the statute's requirement that student privacy be protected.⁵⁹ Ultimately, the Court held the Montana Constitution controls in student privacy cases, and the constitutional balancing test needed to be completed before records could be released under state law or FERPA.⁶⁰

3. *University of Montana Student Code of Conduct and Grizzly Athletics Student-Athlete Handbook*

The University of Montana Student Code of Conduct states the University "complies with the principles of privacy described in the Montana Constitution, the Montana Code Annotated, and the federal Family Educational Rights and Privacy Act (FERPA)," and that students have certain privacy and confidentiality rights.⁶¹ The Code bars the University from disclosing information to anyone not connected with student disciplinary proceedings except as required by law.⁶² The Code also states the University "will disclose the results of the proceeding, including sanctions imposed, only to those who need to know for purposes of record keeping, enforce-

55. *Krakauer I*, 381 P.3d 524, 535 (Mont. 2019).

56. *Krakauer II*, 445 P.3d 201, 205 (Mont. 2019).

57. MONT. CODE ANN. § 20-25-515.

58. *Krakauer I*, 381 P.3d 524, 532.

59. *Id.*

60. *Id.*

61. THE UNIVERSITY OF MONTANA STUDENT CODE OF CONDUCT 3 (2020), <https://www.umt.edu/student-affairs/community-standards/student-code-of-conduct-2020-pdf>.

62. *Id.*

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ment of the sanctions, further proceedings, eligibility for participation in certain University activities, or compliance with federal or state laws.”⁶³

The 2020–2021 Grizzly Athletics Student-Athlete Handbook describes student records as “subject to state and federal privacy protection, as well as University policies regarding confidentiality.”⁶⁴ The Handbook’s provision on misconduct records includes a note that closely resembles the language of FERPA:

The University will disclose to an alleged victim the final results of a disciplinary proceeding against an alleged perpetrator. The University will also disclose to anyone the final results of a disciplinary proceeding if it determines that the student-athlete is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and with respect to the allegation made, the student-athlete has committed a violation of the Student Conduct Code or the Discrimination and Sexual Harassment policy.⁶⁵

This provision was also included in the 2019 Handbook, the governing edition at the time the Court decided *Krakauer II*.⁶⁶

The Student Code of Conduct and Student-Athlete Handbook generally protect student records from disclosure. However, they also include exceptions for the release of certain disciplinary proceeding results and those requested by court order or subpoena.

III. THE KRAKAUER CASES

A. *Krakauer I*

In 2012, several sexual assault allegations arose at the University of Montana (“University”).⁶⁷ Those allegations grew into a broader cultural concern about sexual assault on and near campus.⁶⁸ In 2014, as a part of his research for a book about sexual assault at the University, author Jon Krakauer requested the Commissioner of Higher Education Clayton Christian (“Commissioner”) release the educational records of a specific University student in connection with one of the 2012 allegations.⁶⁹ The Commissioner denied the request, and Krakauer filed a petition in the First Judicial District Court of Montana.⁷⁰ *Krakauer I* and *II* resulted.

63. *Id.*

64. GRIZZLY ATHLETICS STUDENT-ATHLETE HANDBOOK 11 (2020–2021), https://s3.amazonaws.com/sidearm.sites/gogriz.com/documents/2020/7/28/2020_21_SA_Handbook.pdf.

65. *Id.* at 11–12.

66. GRIZZLY ATHLETICS STUDENT-ATHLETE HANDBOOK 11–12 (2018–2019); GRIZZLY ATHLETICS STUDENT-ATHLETE HANDBOOK 11–12 (2019–2020).

67. *Doe v. University of Mont.*, No. CV 12-77-M-DLC, 2012 WL 2416481, at *1 (D. Mont. June 26, 2012).

68. *Krakauer I*, 381 P.3d 524, 526 (Mont. 2016).

69. *Id.* at 526–27.

70. *Id.* at 527.

In support of his petition, Krakauer referenced unsealed court documents from *Doe v. University of Montana*,⁷¹ which showed that a University student accused student John Doe (“Doe”) of raping her in her apartment.⁷² Dean of Students Charles Couture determined Doe committed sexual intercourse without consent and recommended Doe’s immediate expulsion for violating the University of Montana Student Code of Conduct.⁷³ Doe appealed to the University Court, which concluded Doe had committed the offense and that he should be expelled.⁷⁴ Doe then requested that the President of the University, Royce Engstrom, review the holding per the Code.⁷⁵ Engstrom upheld the court’s findings and recommended Doe’s expulsion.⁷⁶ Finally, Doe appealed Engstrom’s decision to the Commissioner.⁷⁷ The Commissioner’s review of the case, which is not a part of the record, was the information Krakauer sought.⁷⁸

In his request of the Commissioner, Krakauer asserted that the “Doe” in *Doe v. University of Montana* was the starting quarterback of the University’s football team, who was acquitted of rape in a nationally publicized criminal trial in 2013.⁷⁹ Krakauer theorized “the Commissioner must have overturned the University’s decision to expel Doe,” because he remained enrolled as a student and a member of the football team.⁸⁰ The Commissioner denied Krakauer’s request and stated that because he requested Doe’s records specifically, FERPA and Montana Code Annotated § 20-25-515 prohibited the records release.⁸¹ Krakauer sued, asserting his right to know under Article 2, Section 9 of the Montana Constitution.⁸² The district court granted summary judgment in favor of Krakauer and ordered the Commissioner release Doe’s records.⁸³ The Commissioner appealed.⁸⁴

In *Krakauer I*, rather than acknowledge them as separate, the Court merged the privacy protections found in FERPA, state law, and the University of Montana Student Code of Conduct to create a new “legislatively-cloaked, enhanced privacy protection” for students.⁸⁵ The Court found Doe

71. 2012 WL 2416481.

72. *Krakauer I*, 381 P.3d at 526.

73. *Id.* at 526.

74. *Id.* at 526–27.

75. *Id.* at 527.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 529.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Krakauer II*, 445 P.3d 201, 206 (Mont. 2019).

did not have notice his records were subject to disclosure, despite the explicit exceptions found within federal and state law and the University Student Code of Conduct.⁸⁶ Accordingly, the Court reversed the district court's decision and remanded the case for an in-camera review of Doe's records.⁸⁷ The Court ordered the district court to determine whether a FERPA exception allowed the records to be released if the Commissioner's final ruling was against Doe.⁸⁸ The Court also instructed the district court to re-balance Krakauer's right to know with Doe's newly-created enhanced student right to privacy; determine whether redacting Doe's personally identifiable information affected the analysis; and determine which records, if any, could be released.⁸⁹

On remand, the district court granted Doe's motion to intervene in the case and conducted the in-camera review of his records.⁹⁰ The court applied the two-part *Katz* test and concluded Doe did not have a subjective expectation of privacy, because his information was available through unsealed court documents and media coverage.⁹¹ Further, even if Doe had an expectation of privacy, the court determined it did not clearly exceed the merits of public disclosure.⁹² The court ordered the Commissioner to release Doe's records to Krakauer.⁹³ The Commissioner and Doe appealed, and *Krakauer II* ensued.⁹⁴

B. Krakauer II

1. *Krakauer II* Majority

On appeal, the Commissioner and Doe argued students' enhanced privacy interests meant Doe had an expectation of privacy requirement in his educational records.⁹⁵ Krakauer argued the Grizzly Athletics Student-Athlete Handbook informed Doe he had less privacy as a student athlete and would be subject to increased scrutiny.⁹⁶ Krakauer also reiterated the already public nature of Doe's records barred him from asserting any expectation of privacy.⁹⁷

86. *Id.* at 208.

87. *Krakauer I*, 381 P.3d at 535.

88. *Id.* at 531.

89. *Id.* at 534–35.

90. *Krakauer II*, 445 P.3d at 205.

91. *Id.* at 205.

92. *Id.*

93. *Id.*

94. *Id.* at 204.

95. *Id.* at 206.

96. *Id.*

97. *Id.*

The Montana Supreme Court merged the federal, state, and university privacy analyses. First, the Court commenced the *Katz* two-part test to determine whether Doe had a right to privacy in his student records.⁹⁸ In determining whether Doe had an actual or subjective expectation of privacy, the Court turned to its prior analysis on notice.⁹⁹ That analysis dictates that “[if] the person had notice his records were subject to public disclosure or the public entity already made them publicly available, then he cannot have an actual or subjective expectation of privacy in the records.”¹⁰⁰ The Court acknowledged FERPA, Montana Code Annotated § 20-25-515, and the University of Montana Student Code of Conduct provide exceptions for student record releases in the event of a court subpoena.¹⁰¹ Nevertheless, the Court held these statutes and policies deprived Doe of adequate notice.¹⁰² In fact, the Court went further and stated, “[q]uite the opposite, the statutes and policies provide students like Doe with steadfast assurances that the university system will affirmatively protect their records from disclosure, just as the University and the Commissioner have done here.”¹⁰³ Thus, the Court refuted Krakauer’s argument that Doe had a diminished right of privacy under the Grizzly Athletics Student-Athlete Handbook.¹⁰⁴

Krakauer’s argument regarding the public nature of Doe’s records was also countered.¹⁰⁵ The Court reasoned “information contained in a student’s educational records is broader than that offered during a public criminal trial, which is governed by rules of evidence, burdens of proof, and constitutional protections not applicable to educational records.”¹⁰⁶ Public knowledge of Doe’s records did not negate his expectation of privacy in them.¹⁰⁷ As a result, the Court held Doe had an actual or subjective expectation of privacy in his records.¹⁰⁸

The Court then turned to the second prong of the *Katz* test and analyzed whether society would recognize Doe’s expectation of privacy as reasonable.¹⁰⁹ The Court distinguished *Krakauer II* from its previous decisions where it held society is less willing to recognize public officials’ expectation of privacy as reasonable, explaining, “Doe was not, for example, a law enforcement officer, teacher, or government official, nor was he charged

98. *Id.*

99. *Id.* at 207.

100. *Id.*

101. *Id.*

102. *Id.* at 208.

103. *Id.*

104. *Id.*

105. *Id.* at 210.

106. *Id.* at 209.

107. *Id.* at 208–09.

108. *Id.* at 209–10.

109. *Id.* at 210.

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with performing public duties. Doe was a student.”¹¹⁰ Notably, the statutorily-enhanced student privacy interest again played a significant role in the Court’s analysis:

Were we to expand the group of public officials having a reduced privacy interest to include, as suggested here, any student in whom the public is interested, the enhanced student privacy interest would be rendered meaningless. Statutes enacted by our legislature embody public policy. The federal and state statutes providing enhanced privacy protections support the idea that society is willing to recognize Doe’s privacy expectation is reasonable. Accordingly, we conclude society is willing to recognize as reasonable Doe’s actual or subjective expectation of privacy in his educational records.¹¹¹

Ultimately, the Court reversed the district court’s order to release Doe’s records and dismissed Krakauer’s petition with prejudice.¹¹²

2. *Justice James Rice, Concurrence in Part*

In his concurrence in part, Justice Rice agreed Doe had an enhanced privacy interest in his records society would find reasonable, and he agreed with the reversal of the district court. However, Justice Rice stated Doe did have notice his records could be released, because FERPA and the Student Conduct Code inform students of that possibility. Further, Justice Rice stated that when weighing the constitutional rights, there is a presumption favoring the release of documents. Finally, he determined the Court need not reach a “yes-or-no, all-or-nothing decision” about Doe’s records. He determined Krakauer’s request should have been honored to an extent by releasing the records with redactions. Justice Rice reasoned the right to know outweighed Doe’s enhanced right to privacy.¹¹³

IV. ANALYSIS

A. *The Court’s Inequitable Distribution of Student Privacy Protections and Exceptions in Constitutional Balancing*

The *Krakauer II* Court enhanced student privacy rights with FERPA, Montana student record law, and University law, but it failed to bolster the right to know with those statutes’ exceptions. In his concurrence in part, Justice Rice illustrated this foundational issue in the majority’s reasoning by referencing *Doe v. University of Montana*:

110. *Id.*

111. *Id.*

112. *Id.* at 214.

113. *Id.* at 215 (Rice, J., concurring in the judgment in part and dissenting in part).

[L]ost in all of this is the valid and compelling interest of the people in knowing what the University of Montana is up to. It has been established that the prevalent and long-standing approach of the federal courts is to reject secret proceedings. There are very few exceptions to this rule. The principle of openness in the conduct of the business of public institutions is all the more important here, where the subject matter of the litigation is a challenge to the administrative disciplinary process of a state university.¹¹⁴

Justice Rice expanded on the United States District Court for the District of Montana's reasoning and stated, "[T]he people of the state simply must be able to learn about and know—in some degree—a decision made by the Commissioner of Higher Education about a University matter, including a matter involving a student."¹¹⁵ Further, the issue in *Krakauer II*, Justice Rice stated, was more than a mere human resource issue; it was in fact, "a contested case before a high official in the state government, exercising statewide authority."¹¹⁶ As such, in this case, the public had a constitutional right to know their government "[was] not engaged in inappropriate conduct."¹¹⁷ Justice Rice supposed such inappropriate conduct could entail the Commissioner exhibiting favoritism towards Doe or succumbing to outside influence in his decision making.¹¹⁸ In sum, Justice Rice concluded, "Doe's enhanced privacy right must be weighed and balanced against the vital, democratic function of the public's right to know these answers."¹¹⁹

Justice Rice's concurrence in part illustrates the heavy burden those claiming a right to privacy must bear when confronted with the public's right to know. In such cases, there is a constitutional presumption in favor of the right to know,¹²⁰ and an individual must show her privacy interest "*clearly exceeds* the merits of public disclosure."¹²¹ Thus, the plain language of the right to know, and much of the Montana Supreme Court's precedent on constitutional balancing, weigh heavily in favor of the public's right to know. Any balancing the Court performed in *Krakauer II* should have been conducted in step with this "long-standing principle of democratic theory . . . that the activities of government be public at all levels,"¹²² with an eye toward maintaining a "disclosure-oriented" government as was intended by the authors of the right to know.¹²³

114. *Id.* (Rice, J., concurring in part and dissenting in part (citing *Doe v. University of Mont.*, No. CV 12-77-M-DLC, 2012 WL 2416481, at *4 (D. Mont. June 26, 2012))).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Great Falls Tribune v. Mont. Pub. Serv. Comm'n*, 82 P.3d 876, 886 (Mont. 2003).

121. MONT. CONST. art. II, § 9 (emphasis added).

122. APPLGATE, *supra* note 8, at 111.

123. *Id.* at 112–13.

The Court in *Krakauer II*, however, opted to enhance the right to privacy with federal, state, and University of Montana law, but it ignored the exceptions found within those same laws. Had the Court given due weight to those exceptions, its privacy analysis would have logically produced the opposite outcome—that Doe’s right to privacy did *not* clearly exceed the merits of his records’ disclosure.

1. *FERPA and Montana Code Annotated*

As the Court articulated in *Krakauer I*, “FERPA contains several non-consensual exceptions that permit an institution to release educational records,” despite its general prohibition on student record releases.¹²⁴ Specifically, FERPA allows for the release of:

[T]he final results of any disciplinary proceeding . . . against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution’s rules or policies with respect to such crime or offense.¹²⁵

Krakauer argued this exception “explicitly authorizes disclosure of records related to the Commissioner’s decision since it is, undisputedly, the ‘final result’ of the [MUS]’s disciplinary proceeding against [the named student].”¹²⁶

In *Krakauer II*, the Court again used FERPA’s general protection of student records as a building block for the Court’s newly-created enhanced student privacy right. However, the disciplinary proceeding exception to FERPA played no part in the Court’s analysis. This could be—as *Krakauer* suspects—due to the fact the Commissioner found Doe did not commit a violent or nonforcible sex crime.¹²⁷ In such a case, the exception would not apply because there would be no offense nor any perpetrator’s information to disclose. Still, if the Court allowed the general FERPA provision to enhance privacy rights, it should have given equal weight to the right to know with an analysis of the disciplinary proceeding exception.

FERPA includes a second exception to its general prohibition of record releases, which allows disclosure “in compliance with judicial order, or pursuant to any lawfully issued subpoena.”¹²⁸ As the Court stated in *Krakauer I*, “FERPA thus generally authorizes the release of records upon

124. *Krakauer I*, 381 P.3d 524, 531 (Mont. 2016).

125. Family Educational Rights and Privacy Act of 1974 § 1232g(b)(6)(B) (Westlaw through Pub. L. No. 116–259).

126. *Krakauer I*, 381 P.3d at 531.

127. *Id.* at 527.

128. Family Educational Rights and Privacy Act of 1974 § 1232g(b)(2)(B) (Westlaw through Pub. L. No. 116–259).

orders from courts acting properly within their jurisdiction. Krakauer's petition sought an order pursuant to this exception."¹²⁹ Similarly, Montana's student record law also allows disclosure pursuant to a subpoena.¹³⁰ The Court clarified in *Krakauer I* that "the Legislature intended student records would be subject to release following legal process conducted 'by a court or tribunal of competent jurisdiction,' and did not intend to restrict that legal process exclusively to the issuance of a 'subpoena,' the purpose of which is to compel a person's attendance in a court or proceeding."¹³¹ Further, the Court held "[t]he statute is satisfied by the issuance of a court order upon completion of that legal process." The district court ordered the Commissioner release Doe's records in its Memorandum and Order.¹³² Accordingly, the exception appears to have been met. Nonetheless, the Court in *Krakauer II* declined to bolster the right to know with the seemingly heavy weight of the exceptions and construed the state student privacy law as further enhancing student privacy rights.¹³³

2. *The University of Montana Student Code of Conduct and Grizzly Athletics Student-Athlete Handbook*

The University of Montana Student Code of Conduct bars the University from disclosing information to anyone not connected with student disciplinary proceedings *except as required by law*.¹³⁴ Also under the Code, the University "will disclose" the results of disciplinary proceedings in order to comply *with federal or state laws*.¹³⁵ Further, the current edition of the Student-Athlete Handbook states the University "will disclose . . . to anyone the final results of a disciplinary proceeding if it determines that the student-athlete is an alleged perpetrator of a crime of violence or a non-forcible sex offense."¹³⁶

Thus, just as federal and state student record laws provided, the University's laws generally protect records but allow for specific and weighty exceptions in the event of a disciplinary hearing or in order to comply with federal or state laws. Again, Doe's records appear to fall squarely within the exceptions to the general prohibition of disclosure for the same reasons discussed in the federal and state law analysis above. And, again, the Court

129. 381 P.3d at 531–32.

130. MONT. CODE ANN. § 20-25-515.

131. 381 P.3d at 532.

132. *Id.*

133. *Krakauer II*, 445 P.3d 201, 207 (Mont. 2019).

134. THE UNIVERSITY OF MONTANA STUDENT CODE OF CONDUCT 3 (2020), <https://www.umt.edu/student-affairs/community-standards/student-code-of-conduct-2020-pdf> (emphasis added).

135. *Id.*

136. GRIZZLY ATHLETICS STUDENT-ATHLETE HANDBOOK 11–12 (2020-2021).

declined to account for the exceptions and instead determined the University laws also enhance student privacy rights.

If the Court had given due weight to the right to know by performing an analysis of the FERPA, state, and University laws' exceptions, it would have likely found that Doe *did* have notice his records would be subject to disclosure and therefore did *not* have an expectation of privacy. These conclusions, contrary to the actual *Krakauer II* decision, tip the constitutional balance in favor of disclosure. These statutes' *exceptions*, if "taken together" as the Court did, balance out—if not completely negate—the "statutorily-enhanced" student right to privacy. In such a case, Doe's right to privacy could not "clearly exceed" the merits of his records' disclosure. This result aligns with the authors' intent in drafting the constitutional right to know, accounts for the presumption in favor of disclosure, and is echoed across years of Montana Supreme Court precedent.

B. The Court's Enhancement of Privacy Rights with the Futility of Redacted Records

The Court in *Krakauer II* further contradicted precedent when it held futility of redaction weighs in favor of a student's right to privacy. The Court determined in *Yellowstone County v. Billings Gazette*¹³⁷ that redaction can protect privacy and allow the disclosure of relevant information to the public.¹³⁸ Further, the Court stated Montana's right to know permits "access to the 'widest breadth of information possible,' even where the individuals whose privacy interests were implicated did not work in the public realm."¹³⁹ Even more importantly, in *Pioneer Press*, the Court upheld the release of redacted documents even though the school board emphasized that the newspaper already had the students' identifying information.¹⁴⁰ Additionally, in *Svaldi v. Anaconda-Deer Lodge County*,¹⁴¹ the Court held the public's prior knowledge of the information sought weighed against a teacher's claim that her privacy rights were violated.¹⁴² These cases were in line with decades of precedent that demonstrated the right to know outweighed the right to privacy, and, when possible, redacted documents must be released to the public.

The Court in *Krakauer II*, however, determined futility of redaction weighed in favor of the right to privacy, in direct contradiction of *Pioneer*

137. 143 P.3d 135 (Mont. 2006).

138. *Id.* at 141.

139. *Id.* (quoting *Lincoln Cty. Comm'n v. Nixon*, 968 P.2d 1141, 1144 (1998)).

140. *Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press*, 160 P.3d 482, 489 (Mont. 2007).

141. 106 P.3d 548 (Mont. 2005).

142. *Id.* at 552.

Press.¹⁴³ Further, the Court held no records whatsoever could be released, “largely turning upon the wording of Krakauer’s request for the records.”¹⁴⁴ Even if redaction of Doe’s records would have been futile, and notwithstanding the *Pioneer Press* decision, the records should have been released to the extent possible. In his concurrence in part, Justice Rice stated this would entail a “limited release of information that discloses the decision the Commissioner made and the grounds upon which he made it.”¹⁴⁵

Additionally, the Court’s flawed application of *Svaldi* to the facts of *Krakauer II* further confused the right to privacy analysis. The Court distinguished *Svaldi* simply by reiterating that Doe is not a public official as the teacher was in *Svaldi*.¹⁴⁶ There, the Court stated, “*Svaldi* cannot seriously claim her privacy rights were violated by the release of the initial offense report when it was already public knowledge that the allegations were against her.”¹⁴⁷ In *Krakauer II*, however, the Court based its determination to the contrary on the fact Doe was not in a “position of public trust.”¹⁴⁸ This assertion references only a select portion of the Court’s reasoning in *Svaldi*. The Court determined *Svaldi*’s privacy rights were not violated primarily because the records at issue had already been released, not because she was in a position of public trust.¹⁴⁹ The reasoning in *Krakauer II* shifts the futility of redaction to weigh in favor of privacy rights instead of public disclosure. The Court departs from its *Svaldi* analysis and decades of precedent.

V. CONCLUSION

Viewed in light of the Montana Supreme Court’s recent decisions favoring the right to privacy over the right to know, the *Krakauer II* holding comes as no surprise. In those cases, rather than give credence to the long-standing presumption in favor of open government, the Court instead chose to bolster the right to privacy by placing the “compelling interest” burden on the party seeking disclosure. In *Krakauer II*, the Court opted to strengthen the right to privacy by paying special attention to the protections of FERPA, Montana statutes, and University of Montana law. However, the Court ignored the explicit exceptions found within those same laws. Paying equal attention to these exceptions and distributing their due weight to the

143. *Krakauer II*, 445 P.3d 201, 211 (Mont. 2019).

144. *Id.* at 215 (Rice, J., concurring in the judgment in part and dissenting in part).

145. *Id.* (Rice, J., concurring in the judgment in part and dissenting in part).

146. *Id.* at 209.

147. *Svaldi v. Anaconda-Deer Lodge Cty.*, 106 P.3d 548, 553 (Mont. 2005).

148. *Krakauer II*, 445 P.3d at 209.

149. *Svaldi*, 106 P.3d at 553.

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right to know would have produced a more just outcome aligned with Montana’s constitutional history and precedent.

The Court did state that it “does not foreclose the possibility” the public’s right to know could outweigh a student’s right to privacy even where redaction is futile and that the outcome will “depend on the facts of each case.”¹⁵⁰ Still, the *Krakauer II* decision will allow courts in future cases to be selective about the factors they use in the constitutional balancing test to stack even more weight in favor of the right to privacy.

150. *Krakauer II*, 445 P.3d at 213.

