MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JON KRAKAUER, Petitioner, v. STATE OF MONTANA, by and through its COMMISIONER OF HIGHER EDUCATION, Clayton Christian, Respondent.	Cause No. ADV-2014-117 **ORDER ON MOTION FOR RELEASE OF RECORDS**

This case is before this Court on remand from the Montana Supreme Court, which issued its opinion in *Krakauer v. State*, 2016 MT 230, 384 Mont. 527, 381 P.3d 524, on October 5, 2016. Vivian V. Hammill and Helen C. Thigpen represent Respondent State of Montana, by and through the Office of the Commissioner of Higher Education (Commissioner). Peter Michael Meloy

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represents Petitioner Jon Krakauer. David R. Paoli represents intervenor John Doe.

STATEMENT OF FACTS

A more complete factual and procedural background of the case is set forth in *Krakauer,* ¶¶ 2-8. It is useful, however, to recite several relevant points of recent procedural history. Krakauer's filed his petition in the Montana First Judicial District Court on February 12, 2014, and the case was assigned to Judge Kathy Seeley. On September 25, 2014, Judge Seeley issued a memorandum and order granting summary judgment for Krakauer and ordering the Commissioner to release all the documents he requested, with all student names, birth dates, social security numbers, addresses, and telephone numbers redacted. (Memo. & Order Cross-Mots. S.J. (Sept. 25, 2014).) Judge Seeley subsequently stayed her order pending the parties' appeals to the Montana Supreme Court.

Following extensive motion practice and appeals, the Montana Supreme Court published its opinion in *Krakauer v. State*, 2016 MT 230, 384 Mont. 527, 381 P.3d 524, wherein it remanded the case back to the District Court with instructions for the Court to perform an *in camera* review of the requested documents prior to ruling on Krakauer's petition.

Upon remand, the Commissioner filed a motion to substitute Judge Seeley. The Honorable James P. Reynolds assumed jurisdiction over the case on October 19, 2016. On November 17, 2016, Doe filed a motion to intervene and a motion to substitute Judge Reynolds. In a February 8, 2017 Order, Judge Reynolds granted Doe's motions. On March 3, 2016, the Honorable Michael F. McMahon assumed jurisdiction over the case. On April 11, 2017, Krakauer moved to substitute Judge McMahon. The undersigned assumed jurisdiction of

the case on April 11, 2017. This Court granted Krakauer's motion for an *in camera* review on August 3, 2017. The Commissioner provided the requested documents to the Court on August 31, 2017.

PRINCIPLES OF LAW

In *Krakauer*, the Supreme Court addressed the following issues:

1. Did Krakauer have standing to petition the Commissioner for a release of documents pursuant to Article II, section 9, the right-to-know provision of the Montana Constitution?

2. Is the Commissioner prohibited from releasing the requested documents by the Family Educational Rights and Privacy Act of 1974, as amended (FERPA), 20 U.S.C.S. § 1232g, or by Montana Code Annotated § 20-25-515?

3. How does the right-to-know provision of the Montana Constitution apply to Krakauer's request to release documents?

The Supreme Court first concluded Krakauer does have standing to pursue his request. *Krakauer*, ¶ 16.

The Supreme Court next considered the application of FERPA, which broadly prohibits universities from releasing "Personally Identifiable Information" about students. The Supreme Court determined the documents at issue could contain personally identifiable information, and that FERPA would therefore bar the Commissioner from releasing those records. *Krakauer*, ¶¶ 19-24. However, the Supreme Court noted that FERPA contains an exception which allows the release of documents containing personally identifiable information when the documents are released pursuant to a valid court order, as was issued in this case. Thus, the majority concluded that, given a valid order from a district

court, the Commissioner may release personally identifiable information about a student without running afoul of FERPA. *Krakauer*, ¶ 25-27.

The Supreme Court then considered the application of Montana Code Annotated § 20-25-515, which provides:

> A university or college shall release a student's academic record only when requested by the student or by a subpoena issued by a court or tribunal of competent jurisdiction. A student's written permission must be obtained before the university or college may release any other kind of record unless such record shall have been subpoenaed by a court or tribunal of competent jurisdiction.
> The majority concluded the exceptions in the rule for "subpoenaed" records were satisfied by a valid court order releasing them.

Krakauer, ¶¶ 28-30.

Finally, the Supreme Court considered Article II, section 9, of the Montana Constitution, which provides: "[n]o person shall be deprived of the right to examine documents . . . 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."

The Supreme Court recognized that although Montana law places significant emphasis on the public's right to know, the right is not absolute. Rather, the public's right to know is balanced by the right to individual privacy, also expressly preserved in the Montana Constitution. The Supreme Court remanded the case to the District Court with instructions to conduct an *in camera* review of the documents and to reapply the constitutional test balancing an individual right to privacy with the public's right to know.

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ANALYSIS

Balancing Privacy and Transparency

Article II, section 9, of the Montana Constitution presumes that all records of public institutions shall be available to the public, unless a compelling privacy interest dictates otherwise. The Montana Supreme Court has adopted a two-part analysis to determine whether an individual privacy interest exists. A court must determine (1) the individual involved had a subjective or actual expectation of privacy, and (2) which society is willing to recognize as reasonable. *Great Falls Tribune Co. v. Day*, 1998 MT 133, ¶ 20, 289 Mont. 155, 959 P.2d 508. If both parts of this test are satisfied, a court must then balance that individual privacy interest against the public's right to know, and so determine whether any documents should be released to the public.

In remanding this matter to the District Court, the Supreme Court identified several "unique interests at issue in this case," and directed this Court to re-conduct the constitutional balancing test "[a]fter giving due consideration" to these interests. *Krakauer*, ¶ 42. The unique interests identified by the Court are: (1) the enhanced privacy interests of student records; and (2) the potential futility of redaction. Having taken these interests into consideration, and after conducting an *in camera* analysis of the documents at issue here, this Court essentially concurs with Judge Seeley's Order, though with narrower parameters on the documents to be released.

Doe's Expectation of Privacy

The Supreme Court recognized that student records are subject to an "enhanced privacy interest," which this Court must consider when weighing the student's privacy interest against the public's right to know. *Krakauer*, ¶¶ 37-38.

In the present matter, however, even when accounting for Doe's enhanced expectation of privacy, this Court concludes Doe does not have a subjective or actual expectation of privacy in the records at issue here.

Krakauer's request for documents is not aimed at gathering information about Doe's alleged behavior, but rather seeks information about the actions and decisions of the Commissioner and university officials regarding the disciplinary proceedings against Doe. The Court acknowledges these records may still contain information in which Doe retains a privacy interest. However, having conducted an *in camera* review, this Court concludes the personal information contained therein has already been made substantially available to the public through unsealed court records and significant national media coverage of a public criminal trial. In this circumstance, this Court concludes, under the first prong of the *Great Falls Tribune* test, Doe does not have an actual or subjective expectation of privacy. Even where public policy ascribes an enhanced privacy interest, there is no expectation of privacy for information that has already been made public, such as Doe's alleged conduct which led to the university's disciplinary proceedings.[1]

Futility of Redaction

Because Krakauer directed his records request regarding a specifically named individual student, the Supreme Court considered the possibility that "redaction of records provided in response to a request about a particular student

[1] The Court reiterates this conclusion is made only with respect to the documents to be released pending this Order. Some of the records provided by the Commissioner for review, e.g., the transcript of the University Court hearing, contain private information that was not made publicly available through other means, and would implicate Doe's enhanced privacy interest and the privacy interests of other individuals who participated in the hearing. In the event this Court directed the Commissioner to release a transcript of the disciplinary hearing, a thorough constitutional balancing test analysis, weighing Doe's enhanced privacy interest against the merits of disclosure, would be warranted.

may well be completely futile," thus affecting the balancing test. *Krakauer*, ¶ 38. Because this Court concludes that Doe does not have an actual or subjective privacy interest in the records to be released, the question whether redaction would be futile is moot.

However, although redacting Doe's name from the records may be futile, this Court will order the Commissioner to redact from any record to be released, all personally identifying student information, including Doe's. There are two reasons for doing so – first, Krakauer has repeatedly stated he is willing to accept records with personally identifying student information redacted and, second, redacting the records at issue here case can do no harm. If, as the Supreme Court suggests, redaction is futile, then there are no practical differences between releasing redacted and unredacted documents. To the extent redacting the records may not be entirely futile, stripping the documents of personally identifying student information will serve to tailor the document production to the document request – the stated aim of which is to reveal the disciplinary procedures of the University system. As the United States District Court for the District of Montana explained in *John Doe v. University of Montana*, 2012 U.S. Dist. LEXIS 88519, 2012 WL 2416481:

> The University of Montana is a public institution, and while there may be good reasons to keep secret the names of students involved in a University disciplinary proceeding, the Court can conceive of no compelling justification to keep secret the manner in which the University deals with those students.
> Thus, despite the possibility that redaction as a means of protecting Doe's identity may be futile, this Court will order all personally identifying student information, including Doe's, redacted from the released documents.

Balancing Test

As set forth herein, this Court concludes that previous public disclosure of the details of Doe's behavior preclude him from any expectation the details of the activity would remain private. Nonetheless, the Court will apply the constitutional analysis weighing the public's right to know and Doe's expectation of privacy.

When performing this balancing test, the district court "must consider all of the relevant facts of each case." *Krakauer*, ¶ 40. The Supreme Court identified a non-comprehensive list of factors to weigh, including:

> the publicity that has followed this case, the source of the original request, the reasons behind the request, the named student's status as an athlete at a publicly-funded university, and the prior litigation, all of which may be considered and weighted by the District Court when conducting the balancing test.

Krakauer, ¶ 40.

Here, weighing favorably in Doe's right to privacy is his enhanced privacy interest in his student records. On the other hand, a variety of factors weigh against Doe's right to privacy and in favor of the public's right to know. First, Doe's status as a high-profile student athlete weighs against his right to privacy. Prior to the commencement of disciplinary proceedings and criminal litigation against him, Doe was a well-known individual in Montana and enjoyed a position of prominence and popularity by virtue of his athletic position. Second, the University of Montana is a public institution, and Doe, while not a paid athlete, receives valuable consideration for his skills in the form of an athletic scholarship. Although he is not a public official or university employee, Doe is a public representative of the University of Montana. Third, the details of

Doe's alleged bad acts have been publicly aired through national and local media coverage, a publicly held criminal trial, and a nationally bestselling book. Fourth, the public has a compelling interest in understanding the disciplinary procedures employed by a state university, especially where the student in question is a prominent and popular campus figure whose education is paid for in part by public funds.

When taking these factors into consideration, this Court cannot conclude that Doe's privacy interest "clearly exceeds the merits of public disclosure," as contemplated by Article II, section 9, of the Montana Constitution.

ORDER

IT IS HEREBY ORDERED:

1. The Commissioner is directed to redact all personally identifying student information from the following documents:

From the disc entitled "OCHE Record":

All files in folder #4 "Exhibits to Appeal Before Commissioner."

All files in folder #5 "Submissions of Parties on Appeal before Commissioner"

All files in folder #6 "Counsel's Responses to Questions Posed by Commissioner"

All files in folder #7 "Commissioner's Decision on Appeal.

From the disc entitled "Remand Record":

All files on disc.

This Court emphasizes that, when redacting information in these records, "[e]very precaution should be taken to protect the personal information of third party students." *Krakauer*, ¶ 39.

2. After preparing the files, the Commissioner is directed to deliver the files to the Court for a final review before release.

Furthermore, as the Supreme Court noted, "the exception to FERPA that allows for release of documents pursuant to a court order requires advance notice to the affected student or parents, and a district court must comply with this directive before releasing protected information." *Krakauer*, ¶ 42. Following the Court's review of the redacted documents, but prior to their release, the Commissioner is directed to comply with the requirements of 20 U.S.C.S. § 1232g(b)(2)(B), and provide notice of this order to Doe and Doe's parents.

DATED this 19th day of October 2017.

MIKE MENAHAN
District Court Judge

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