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Attorney for The Bozeman Daily Chronicle

GALLATIN COUNTY CLERK
OF DISTRICT COURT
JENNIFER BRANDON

2011 JUN 13 AM 11 22

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DEPUTY

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

THE BOZEMAN DAILY CHRONICLE and
THE MONTANA NEWSPAPER
ASSOCIATION,

Plaintiffs,

-vs-

MONTANA STATE UNIVERSITY,

Defendant.

Cause No. DV-11-581 A
Judge Holly Brown

**THE BOZEMAN DAILY
CHRONICLE'S COMPLAINT AND
PETITION FOR DECLARATORY
RELIEF**

Plaintiffs The Bozeman Daily Chronicle and the Montana Newspaper

Association hereby petition for the release of public documents. For its petition
against Montana State University, the Plaintiffs state:

FACTS

1. The Bozeman Daily Chronicle (hereinafter "The Chronicle") is a member of
the media doing business in Bozeman, Montana and the outlying region.
The Chronicle has a legitimate interest in the University's actions, both as a

- news gathering business in the region and as a representative of the public.
2. The Montana Newspaper Association is an affiliation of daily and weekly newspapers with offices in Helena, Montana. The Bozeman Daily Chronicle is a member of the Association. As an organization representing newsgatherers, The Montana Newspaper Association has a legitimate interest in access to public documents generally and these documents in particular.
 3. The University is a public body subject to Article II, Sections 8 and 9 of the Montana Constitution, the Freedom of Information Act, and Section 2-6-102, MCA. .
 4. The University has employed Mr. Shuichi Komiyama since 2006 as an associate professor of music. He also acts as conductor of the Montana State University Symphony Orchestra. As part of this employment, he has arranged traveling tours for the Orchestra, which included a three-week tour of Vietnam, Singapore and Thailand in 2009. Teenage students have been included on tour.
 5. In May, 2011, the University suspended Mr. Komiyama, placing him on administrative leave.
 6. On May 12, 2011, the Chronicle requested public records from the University regarding the investigation into Mr. Komiyama's conduct which resulted in his suspension. A copy of the request for information is attached as Ex. 1.
 7. On May 13, 2011, the University responded to the Chronicle's request. Attorney Leslie Taylor denied the request, stating that in her opinion, "the

individual privacy rights of the students and faculty member clearly outweigh the public's right to know." (See Ex. 2, attached).

8. The documents requested by the Chronicle are held and generated by a public body, the University. As such, the documents are subject to public disclosure unless the demands of individual privacy clearly outweigh the public's right to know. *Becky v. Butte-Silverbow School District 1*, 274 Mont. 131, 138, 906 P.2d 193, 197 (1995).
9. The law is well settled: Public employees who occupy positions of trust have no legitimate right of privacy to investigations of their conduct. *Citizens to Recall Whitlock v. Whitlock*, (1992), 255 Mont. 517, 844 P.2d 74; *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, (1993), 260 Mont. 218, 859 P.2d 435; *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, ¶31, 325 Mont. 365, ¶31, 106 P.3d 548, ¶31.
10. The Chronicle seeks access to documents pertaining to the investigation or review of Mr. Komiyama's conduct which led to his suspension. The Chronicle does not seek personnel records or personnel reviews conducted in the normal employment cycle, but rather seeks only information gathered to determine whether Mr. Komiyama should be suspended, and the conduct leading to that suspension.
11. Mr. Komiyama occupies a position of public trust. He is a public employee and a teacher of young adults and minors. He has traveled with groups of young adults and apparently minors to foreign countries on tours associated

with the University.

12. The Chronicle has not requested educational records of students or other third parties. The Chronicle requests that the privacy interests of the students involved in the investigation of Mr. Komiyama's conduct be protected by redaction of names and other information revealing their identities. This method of protection of third-party privacy interests has been approved by the Montana Supreme Court. See, *Yellowstone County v. Billings Gazette*, 2006 MT 218, 333 Mont. 390, 143 P.3d 135; *Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press*, 2007 MT 115, 337 Mont. 229, 160 P.3d 482.
13. The University has impermissibly violated the public's right to inspect and copy documents held or generated by a public body.

COUNT I: PETITION FOR RELEASE OF DOCUMENTS

14. Plaintiffs hereby incorporate the allegations contained in the previous paragraphs of this Complaint.
15. This request for documents was made pursuant to Article II, Section 9 of the Montana Constitution, which provides the public with the constitutional right to inspect the documents of 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.
16. Jurisdiction is vested in this Court pursuant to Section 27-8-101, et seq., and the authority established by the Montana Supreme Court in *Bozeman Daily*

Chronicle v. City of Bozeman, (1993), 260 Mont. 218, 859 P.2d 435.

17. The Chronicle is entitled to receive documents in the possession of the University concerning the investigation of an associate professor into conduct resulting in his suspension.
18. The Chronicle is entitled to receive documents generated in that investigation.
19. As an associate professor, conductor of the Orchestra, and tour leader with responsibility for working with young students, Mr. Komiyama has no reasonable expectation of privacy in the University's investigation.
20. The public's right to know clearly outweighs any privacy interests which might be asserted by this public employee.
21. Any privacy interests of third parties named in the documents can be protected by redaction of their names, addresses and social security numbers, where appropriate. Other identifying information may also be redacted.
22. Plaintiffs are entitled to attorneys' fees pursuant to § 2-3-221, MCA and § 27-8-313, MCA.

WHEREFORE, Plaintiffs request the following:

1. An order requiring the University to produce the requested documents;
2. Attorneys' fees and costs incurred by the Plaintiffs for enforcing the public's right to know pursuant to both § 2-3-221, MCA and § 27-26-402, MCA
3. Such other and further relief as this court deems appropriate.

DATED this 10th day of June, 2011.

SHEEHY LAW FIRM

By *Martha Sheehy*
MARTHA SHEEHY

P. O. Box 584
Billings, Montana 59103-0584

Attorney for The Chronicle and MNA

From: Nick Ehli [mailto:nehli@dailychronicle.com]
Sent: Thursday, May 12, 2011 5:26 PM
To: Taylor, Leslie C
Cc: Gail Schontzler; Stephanie Pressly
Subject: Request for information

Hello,

My name is Nick Ehli, managing editor of the Bozeman Daily Chronicle, and I wish to make a specific request under the provisions of the Freedom of Information Act and the Montana Constitution for any documents, paper or electronic, pertaining to the leave and/or suspension of Shuichi Komiyama from his position at Montana State.

The Montana Constitution imposes an affirmative duty on government officials to make all of their records and proceedings available to public scrutiny. The documents may only be shielded from inspection if individual privacy interests clearly outweigh the public's right to know.

The University is a public body subject to these constitutional provisions. The employee being investigated has no reasonable expectation of privacy. He occupies a position of public trust, and the investigation involves an aspect of that trust. The Montana Supreme Court has already determined that teachers occupy positions of public trust, and have no reasonable expectation of privacy in investigations into their conduct as public employees. See *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, ¶31, 325 Mont. 365, ¶31, 106 P.3d 548, ¶31.

Our intent is to publish a story in in our May 14 edition regarding Mr. Komiyama's leave of absence and his past criminal record. As such, I would appreciate your prompt response to this request.

Thank you.

Sincerely,

Nick Ehli
Managing editor
Bozeman Daily Chronicle
582-2647
nehli@dailychronicle.com

EX. 1

From: "Taylor, Leslie C" <lesliet@montana.edu>
Date: Fri, 13 May 2011 16:48:43 -0600
To: Nick Ehli <nehli@dailychronicle.com>
Cc: Gail Schontzler <gails@dailychronicle.com>, Stephanie Pressly
<spressly@dailychronicle.com>
Subject: RE: Request for information

Dear Mr. Ehli:

Thank you for your email. Although I am not sure which documents you are seeking specifically, my review of the documents in the university's possession pertaining to the administrative leave of the faculty member leads me to deny your request. I cannot share the documents because the documents are educational and personnel records for which there is a reasonable expectation of privacy.

Montana State University is subject to the provisions of the Family Educational Rights and Privacy Act [FERPA], 20 U.S.C. 1232 et seq. and 34 CFR 99, Subpart D, and Section 20-25-515, MCA. These laws preclude the university from disclosing educational records without the students' prior written consent.

It is my opinion that the individual privacy rights of the students and the faculty member clearly outweigh the public's right to know.

MSU has previously provided you with the public information regarding the administrative leave status of Dr. Komiyama.

I also reviewed the case you cite and would disagree with your suggestion that the case cited is applicable to your request. The case is distinguishable because it concerns the release of criminal justice information records by a county attorney, a K-12 teacher and information that had been previously disclosed. The case does not analyze the application of FERPA or state statutory and case law regarding the release of student and personnel records by a university.

Leslie C. Taylor
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EX. 2