

The Honorable Ronald B. Leighton

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

COWLITZ COUNTY, a political subdivision
of Washington, and COWLITZ COUNTY
YOUTH SERVICES CENTER, a department
of Cowlitz Superior Court,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

UNIVERSITY OF WASHINGTON, a
public education institution, and
ANGELINA GODOY, Center of Human
Rights of University of Washington,

Defendants.

Case No.: 3:19-cv-06250-RBL

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION
FOR REMAND**

TABLE OF CONTENTS

1

2 I. INTRODUCTION 1

3 II. STATEMENT OF FACTS AND BACKGROUND 1

4 III. ARGUMENT 5

5 A. Standard of Review 5

6 B. Removal and Remand Considerations Should Focus on Preemption 5

7 IV. CONCLUSION 6

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

TABLE OF AUTHORITIES

Cases

1

2

3 *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006) 5

4 *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) 6

5 *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009).....2

6 *Emily Pierson v. Alaska USA Fed. Credit Union*,

7 No. 2:19-cv-1685-RAJ, 2020 WL 747857, (W.D. Wash. Feb. 14, 2020).....5

8 *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553 (10th Cir. 2000)..... 6

9 *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689 (9th Cir. 2005)..... 5

10 *Limson v. Bridge Property Management Company*,

11 No. 19-CV-02795-JCS, 2019 WL 4645174, (N.D. Cal. Sept. 24, 2019).....5

12 *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241 (9th Cir. 2009)..... 5

13 *Sanford v. Member Works, Inc.*, 625 F.3d 550 (9th Cir. 2010)6

Federal Statutes and Regulation

14 5 U.S.C. § 5521

15 8 C.F.R. § 236.6 Passim

State Statute and Regulation

16

17 Wash.Rev.Code § 13.50.280 4

18 Wash.Rev.Code § 42.56 2,3

Court Rules and Other Authorities

19

20 Washington State Court General Rule [GR] 31.1 Passim

21 Washington State Court General Rule [GR] 31 2

22 Access to Administrative Records, General Principles,

23 Administrative Office of the Courts, Washington (current)..... 3

24 Suggested New Rule, GR 31.1—Access to Administrative Records,

25 Administrative Office of the Courts, Washington (2012).....2

26 Suggested New Rule GR 31A, Access to Administrative Records, Board for Judicial
Administration (BJA), Administrative Office of the Courts, Washington (2011).....2

1 **I. INTRODUCTION**

2 Although the Plaintiffs do not expressly oppose the Defendants’ University of Washington
3 and Angelina Godoy (collectively ‘UW’) efforts on remand, Plaintiffs view as a necessity that a
4 judicial decision from either venue be made on federal preemption of state court, administrative
5 records laws, as critical to any further state proceedings on this public records request.

6 As discussed below, and previously in Plaintiffs’ *Motion to Dismiss*¹, the Cowlitz Superior
7 Court’s review of UW’s records request halted before it began, when Plaintiff-Intervenor
8 United States (United States) declared that federal law fully preempted this matter and that any
9 request for documents must solely be vetted through the respective federal agency and under
10 the federal Freedom of Information Act, 5 U.S.C. § 552.²

11 Finally, Plaintiffs believe that this Court will benefit its consideration of remand with
12 clarification and supplementation so as to allow for a reasoned decisions on immediate remand
13 question, and to later decisions on retention versus remand on solely the state issues.

14 **II. STATEMENT OF FACTS AND BACKGROUND**

15 As previously pled, Plaintiff Cowlitz County is a Washington constitutional and statutory
16 subdivision of the State of Washington, and Plaintiff Cowlitz County Youth Services Center is
17 part of the county juvenile court and detention system, a division of the Cowlitz County
18 Superior Court (collectively hereinafter “Juvenile”).

19 Cowlitz County Superior Court is part of the state court system, and overseen as a
20 constitutional and statutory entity by the state Administrative Offices of the Court, and under
21 the general governance and rules of the Washington Supreme Court. Pursuant to such state
22 Supreme Court rules, the Cowlitz Superior Court adopted a local General Rules of Washington
23 State Courts (GR) 31.1 regarding the records created by court departments and under its
24 possession and control.

25
26 _____
¹ Dkt. 15, filed 01/27/20.

1 General Court Rule (GR) 31.1 was adopted by the Washington state Supreme Court for its
 2 lower courts because the public records laws in Wash. Rev. Code §42.56 applying to state
 3 agencies and political subdivisions did not apply to the Washington state courts, and because
 4 there were no consistent rules as to how local courts should manage the record request
 5 regarding various administrative duties and functions. *See, Suggested New Rule, GR 31.1—*
 6 *Access to Administrative Records*, Administrative Office of the Courts, Washington (2012) ³:

7 Overview. Proposed GR 31.1 is a revised version of proposed GR 31A. Proposed GR 31A was
 8 published for public comment in June, 2011, and a public hearing was held on February 6,
 2012. ...

9 Original proposal. GR 31A was originally proposed to fill a gap in existing laws, because the
 10 Public Records Act does not apply to judicial records and no other law broadly addresses
 11 public access to the judiciary's administrative records. *See City of Federal Way v. Koenig*, 167
 12 Wn.2d 341, 217 P.3d 1172 (2009). An existing court rule addresses public access to court case
 files and related documents about judicial proceedings, but it does not address administrative
 documents. *See* GR 31(b) and (c).

13 *And see Suggested New Rule GR 31A, Access to Administrative Records*, Board for Judicial
 14 Administration (BJA), Administrative Office of the Courts, Washington (2011)⁴ :

15 Need for a new rule. The suggested rule fills a gap in the existing laws. Currently, there is no
 16 law that broadly addresses public access to the judiciary's administrative records. The
 17 Washington State Public Records Act ("PRA") (Chapter 42.56 RCW) does not apply to judicial
 18 records. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009).
 19 Furthermore, General Court Rule 31, which addresses public access to "court records," does
 not apply to the judiciary's administrative records, *see* GR 31(b); it applies only to court case
 files and related documents about judicial proceedings. *See* GR 31(c) (defining "court records"
 as including "[a]ny document, information, exhibit, or other thing that is maintained by a court
 in connection with a judicial proceeding" as well as indices, calendars, dockets, orders, and
 other official records that are related to a judicial proceeding).

20 The BJA, and its Public Records Work Group, believe that public access to the judiciary's
 21 administrative documents is better addressed by court rule than by inclusion within the PRA.
 22 The BJA decided to draft a new rule – separate from GR 31 -- to address this topic, rather than
 23 expanding GR 31 to cover administrative records. Having two distinct rules makes clear that
 the existing procedures in GR 31 for access to case-related records are separate from, and are
 not being changed by, the new provisions on access to administrative records.

24 ² Dkt. 13-1, pg. 62 (Email from R. Jones, attorney for U.S. Immigration and Customs Enforcement to Chad
 25 Connors, Cowlitz Superior Court Administrator, Sept. 18, 2018, barring release of Plaintiffs' records and to direct
 the requesting parties (Defendants) to <https://www.ice.gov/foia/overview>).

26 ³ https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=285

⁴ http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=258

1 After Juvenile contacted United States through a third-party notification, emulating the
 2 process used in the state Public Records Act, a regional United States representative responded
 3 on June 28, 2018, saying, “It looks good.” Dkt. 13 at pp.5, 28, 31). Notably, GR 31.1
 4 incorporates the exemptions and prohibitions of Wash. Rev. Code §42.56, and application of
 5 such third party notification process was appropriate. See, GR 31.1, Access to Administrative
 6 Records, General Principles, Administrative Office of the Courts, Washington (current) ⁵ :

7 **(j) Administrative Records--General Right of Access.** Court and judicial agency
 8 administrative records are open to public access unless access is exempted or prohibited
 9 under this rule, other court rules, federal statutes, state statutes, court orders, or case law. *To*
 10 *the extent that records access would be exempt or prohibited if the Public Records Act*
 11 *applied to the judiciary’s administrative records, access is also exempt or prohibited under*
 12 *this rule. To the extent that an ambiguity exists as to whether records access would be*
 13 *exempt or prohibited under this rule or other enumerated sources, responders and*
 14 *reviewing authorities shall be guided by the Public Records Act, chapter 42.56 RCW, in*
 15 *making interpretations under this rule.* In addition, to the extent required to prevent a
 16 significant risk to individual privacy or safety interests, a court or judicial agency shall
 17 delete identifying details in a manner consistent with this rule when it makes available or
 18 publishes any public record; however, in each instance, the justification for the deletion
 19 shall be provided fully in writing.
 20 *[Emphasis added]*

21 It was only months later, on September 18, 2018, after initial records disclosures by
 22 Juvenile to UW, that United States through Washington D.C. counsel notified Juvenile that
 23 federal law, and specifically 8 C.F.R. §236.6, prohibited Juvenile from further processing
 24 UW’s records request, and that any request for any of Juveniles’ records involving the United
 25 States must come through the federal agency and FOIA, only. See fn.2, *supra*, and specifically:

26 Pursuant to 8 CFR § 236.6, no state or local government shall disclosure, or otherwise
 permit to be made public the name or, or *[sic]* other information relating to a [an ICE]
 detainee. This information remains under the control of ICE and shall be subject to public
 disclosure only pursuant to the provisions of applicable federal laws, regulations, and
 executive orders.

Dkt. 13 at p.62.

Juvenile suspended its processing of the records requests, but offered to both United States
 and UW to create (having already, separately, provided United States with an unredacted copy)

⁵ [https://www.courts.wa.gov/court_rules/pdf/GR/GA GR 31 01 00.pdf](https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_31_01_00.pdf)

1 exemption and privacy-redacted documents which could then be restricted for further release
2 by any other party under Wash.Rev.Code § 13.50.280. See Dkt. 13 at p.280 (Memorandum of
3 superior court administrator Chadwick Connors to Cowlitz Presiding Superior Court Judge
4 Bashor and Superior Court Judge Evens, Jan. 24, 2019):

5 Our office had previously provided un-redacted information to the Federal Government
6 and it's *[sic]* attorney and advised we would only send redacted (names and other
7 identification) versions to the requestor of said information. We were advised that even
8 with the stated redactions that would not change the position of ICE that federal law
9 prohibits release of any information related to federal immigration juvenile detainees in
10 County juvenile facilities.

11 In response, Juvenile filed a state action seeking determination on the federal preemption issue
12 of 8 C.F.R. §236.6, claimed by United States. Because there had (have) been no records review
13 (in accordance with court rules on exemptions and redactions), Juvenile limited its state claims
14 to whether, under GR 31.1, superior court could proceed with decision making on release of the
15 disputed records—to what extent and in what form. See, Declaration of Chadwick Connors in
16 Support of Plaintiff's Response to Motion to Intervene, Dkt. 13 at pp.290-296; and see,
17 Connors' Declaration within Juvenile's response on intervention, Dkt. 13, p.296, lns. 9-13:

18 In the pending proceedings, and to Youth Services Center in particular, Plaintiffs are
19 seeking a declaratory judgment on matters of statutory interpretation by a Washington
20 Court on assertions of federal preemption of state public records laws and policies—and not
21 a judgment over the extent to which its records are exempt or not exempt under Washington
22 laws.

23 And see, as previously described by United States in its pleadings to intervene as a party:

24 Plaintiffs [Juvenile] have brought a case and controversy “to be limited to obtaining
25 judgment from [the Superior] Court as to statutory interpretation on matters of preemption
26 of Washington GR31.1” Pls.' Rsps. at 1.

Dkt 13 at p.329.

And as previously described by United States in its *Notice of Removal*:

This case turns on a fundamental federal question—whether applicable state law is
preempted by federal law prohibiting the disclosure of the records at issue.

Dkt. 13 at p.346, lns.12-22.

1 The sole legal issue before the state court was the narrow question of statutory
 2 interpretation—with involvement of United States and any other third parties (should
 3 preemption not apply) as awaiting the restarting of document review by a state superior court,
 4 and discussions on specific redactions or exemptions of Juvenile documents per GR 31.1.

5 III. ARGUMENT

6 A. Standard of Review.

7 Both with removal and after removal of a state proceeding to federal court, the moving
 8 party bears the burden of defending that removal and, particularly in this case, defending those
 9 federal issues to be removed to federal court as opposed to remanding state issues to state court.
 10 See, e.g., *Emily Pierson v. Alaska USA Fed. Credit Union*, No. 2:19-cv-1685-RAJ, 2020 WL
 11 747857, (W.D. Wash. Feb. 14, 2020) (Order Granting Motion to Remand)(Pierson moved to
 12 remand her case involving state law claims to King County Superior Court):

13 Removal jurisdiction is strictly construed in favor of remand, and any doubt as to the right
 14 of removal must be resolved in favor of remand. *Harris v. Bankers Life & Cas. Co.*, 425
 15 F.3d 689, 698 (9th Cir. 2005). The party seeking a federal forum has the burden of
 16 establishing that federal jurisdiction is proper. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d
 676, 682-83 (9th Cir. 2006). The removing party must carry this burden not only at the time
 of removal, but also in opposition to a motion for remand. See *Moore-Thomas v. Alaska
 Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009).

17 B. Removal and Remand Considerations Should Focus on Preemption.

18 UW has presented the argument for remand to the state court in this case and controversy.
 19 Juvenile has separately argued it is solely seeking a judicial determination on the claimed,
 20 coextensive application of federal 8 C.F.R. §236.6 to the Washington state courts and GR 31.1.
 21 Juvenile would argue that should preemption be rejected by this Court, then a remand to the
 22 state court would be appropriate, to affirm application of GR 31.1 and to allow the Cowlitz
 23 County superior court to complete its GR 31.1 reviews and redactions, and, if so ruled, any
 24 protective rulings on release of the information. See, *Limson v. Bridge Property Management
 25 Company*, No. 19-CV-02795-JCS, 2019 WL 4645174, at *14 (N.D. Cal. Sept. 24, 2019), that
 26 where a court finds there is no longer a federal issue, “the Court will be required to decide

1 whether their State law claims should be remanded to State court”, writing:

2 Where a federal court dismisses all pending federal claims, State law claims over which the
 3 court exercised supplemental jurisdiction are typically remanded to State court. *Sanford v.*
 4 *Member Works, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (“ [I]n the usual case in which all
 5 federal-law claims are eliminated before trial, the balance of factors to be considered under
 6 the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—
 will point toward declining to exercise jurisdiction over the remaining state-law claims.’ ”)
 (quoting *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98
 L.Ed.2d 720 (1988), superseded on other grounds by statute as recognized in *Fent v. Okla.*
Water Res. Bd., 235 F.3d 553, 557 (10th Cir. 2000)).

7 In the present matter, as discussed above, the narrow issue presented to this Court is whether
 8 Juvenile’s plain reading and interpretation of 8 C.F.R. §236.6.

9 And as addressed above, there exists a detailed and comprehensive Washington state court
 10 judicial process for reviewing requests of juvenile records, including the records at issue here.
 11 It would appear from the pleadings that all parties are approaching this records disclosure
 12 matter in anticipation of the need for statutory and privacy exemptions and redactions.

13 **IV. CONCLUSION**

14 In deciding whether and how to address removal or remand, and should this Court
 15 thereafter adjudicate federal preemption, it should nevertheless abstain from additionally
 16 assuming the role of public records reviewer, and remand for state judicial processing.

17 RESPECTFULLY SUBMITTED this 18th day of February, 2020.

18 RYAN JURVAKAINEN, Prosecuting Attorney

19 /s/ Douglas E. Jensen

20 DOUGLAS E. JENSEN, WSBA #20127
 Chief Civil Deputy-Attorney for County
 21 DANA GIGLER, WSBA# 38193
 DAVID J. BERGER, WSBA# 48480
 22 Civil Deputy Prosecuting Attys.
 Cowlitz County Prosecuting Attorney
 23 Hall of Justice – Civil Division
 24 312 SW 1st Avenue
 Kelso, Washington 98626
 25 Telephone 360-577-3080
 Fax 360-414-9121
 26 Email jensend@co.cowlitz.wa.us

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Katie D. Fairchild

katie.fairchild@usdoj.gov; alexandra.m.melendez@usdoj.gov;
amy.hanson@usdoj.gov; CaseView.ECF@usdoj.gov;
thomas.everett@usdoj.gov; ECF-Civ.USAWAW@usdoj.gov;
ivette.moshe2@usdoj.gov,

for Plaintiff-Intervenor

Eric M. Stahl

ericstahl@dwt.com; christinekruger@dwt.com; granrx@dwt.com;
seadocket@dwt.com

for Defendants

Nancy S. Garland

nancysg@uw.edu; Jeanie.Hines@atg.wa.gov

for Defendants

Dated this 18th day of February, 2020

/s/ Douglas E. Jensen
DOUGLAS E. JENSEN, WSBA #20127
Chief Civil Deputy-Of Attorneys for Plaintiff