THE HONORABLE RONALD B. LEIGHTON

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,

vs.

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

Defendants.

and

UNITED STATES OF AMERICA,

Intervenor,

Case No. 3:19-cv-06250 RBL

UNITED STATES' OPPOSITION TO COWLITZ COUNTY'S MOTION TO DISMISS AND STRIKE

Noted for Consideration: February 21, 2020

AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Cross-Motion for Partial Summary Judgment Noted for Consideration: March 13, 2020

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

COMES NOW, the United States by and through Brian T. Moran, United States Attorney, Western District of Washington, and Katie Fairchild, Assistant United States Attorney for said District, and hereby files this Opposition to the Motion to Dismiss and Strike Pleadings, Dkt. 15, filed by Cowlitz County and Cowlitz County Youth Services Center (collectively "Cowlitz"). In addition, through this Opposition, the United States cross-moves for partial summary judgment regarding the central legal issues in this case: whether 8 C.F.R. § 236.6 prohibits Cowlitz from disclosing records concerning minors detained by the U.S. Immigration and Customs Enforcement ("ICE") under the authority of the Immigration and Nationality Act ("INA"), and whether the records at issue are federal records that belong to the United States.

I. INTRODUCTION

The central legal question in this case is one of ownership, specifically, who owns the records concerning minors detained by ICE under the authority of the INA? The records at issue (the "Protected Information") include minor mental health records, medical information, personally-identifiable information, third-party personally-identifiable information, ICE detainers, internal operation deliberations, and law enforcement sensitive information. *See* Declaration of Jeffrey Chan ("Chan Decl."), Dkt. 9 Ex. C. The United States' position is that pursuant to federal law, and in particular 8 C.F.R. § 236.6, the Protected Information are federal records. Section 236.6 was promulgated under the INA to ensure (1) that the privacy of federal detainees is protected; (2) that the disclosure of information relating to federal detainees is subject to uniform treatment under the law; and (3) to prevent ongoing criminal or national security investigations from being adversely impacted. Because the Protected Information belongs to the federal government, if records concerning ICE juvenile detainees may be released at all, any request for records must be made pursuant to federal law, such as the Freedom of Information Act ("FOIA"), and any release must come from the federal government.

Cowlitz disagrees. Cowlitz appears to believe that because it entered into an "Intergovernmental Service Agreement for Housing Federal Detainees" ("IGSA") with the

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

Immigration and Naturalization Service ("INS"), ICE's predecessor agency,[1] to house ICE juvenile detainees on behalf of ICE, the Protected Information belongs to Cowlitz. Cowlitz further appears to believe it may release the Protected Information, or parts of it, under state law in response to public records requests served on Cowlitz and over the objections of the United States. Cowlitz asserts that any concerns about privacy may be alleviated through redactions that Cowlitz makes at its discretion. *See* Dkt. 15, pp. 10-13.

While the United States and Cowlitz disagree as to whom the records belong and how they may be released, they agree that interpretation of 8 C.F.R. § 236.6 is the central issue in this case. This is a legal question that is ripe for resolution, and resolution would go a long way towards resolving this action, if not resolve it entirely depending on how this Court rules. It is therefore confounding that Cowlitz's Motion to Dismiss appears to seek dismissal of the United States from this action. *See* Dkt. 15 at 8-9. It is well-established that the United States has the right to bring claims and arguments to protect federal records in federal court. None of the arguments asserted by Cowlitz provide for a contrary result or for the exclusion of the United States from this action. Finally, to the extent that this Court believes that re-aligning the parties or conforming the pleadings would allow for a more efficient resolution in this case, this Court has the inherent authority to do so, and the United States would respectfully request leave of the Court to re-plead if the Court deems it necessary.

II. BACKGROUND

The federal government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012); U.S. Const. art. I, § 8, cl. 4 (granting Congress the power to "establish a uniform Rule of Naturalization"). "Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States" and "has specified which aliens

[1] Any difference between ICE and INS is not relevant to this Cross-Motion and Opposition. Therefore, for consistency and to avoid confusion, in this Cross-Motion and Opposition the United States may use the term "ICE" to refer to both ICE and/or INS.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

may be removed from the United States and the procedures for doing so." *Arizona*, 567 U.S. at 395-96. Through the INA, Congress granted the Executive Branch authority to enforce immigration laws and authorized it to investigate, arrest, and detain aliens who are suspected of being, or found to be, unlawfully present in the United States and to effectuate their removal. *See* 8 U.S.C. §§ 1182, 1225, 1226, 1231, 1357.

The INA contains detailed provisions regarding the detention of aliens pending removal proceedings, as well as after the issuance of a final order of removal. For example, the INA authorizes federal immigration officials to issue warrants through which "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). For aliens not subject to a final order of removal, federal officials generally have authority to detain the alien or to release the alien on bond. *Id.* However, certain aliens with a final administrative order of removal are subject to mandatory detention. *Id.* § 1231(a)(2). Additionally, detention is mandatory for certain categories of aliens, including certain aliens with criminal history who are subject to mandatory detention without bond upon their release from state or local custody. *See id.* § 1226(c). This provision may apply to both adult and juvenile aliens. *Id.* In addition, minors held by Cowlitz County are also detained in accordance with the Flores Settlement Agreement (FSA). The FSA sets forth a nationwide policy for the detention, release, and treatment of minors in DHS custody including procedures and timeframes for the processing, transport and detention of minors following apprehension, as well as confidentiality of their personal information.

The INA requires the federal government to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1). Congress expressly contemplated that some of those aliens may be housed in facilities operated by an entity other than the federal government. *Id.* § 1231(g)(1)-(2) (lease or rental facilities); *id.* § 1103(a)(11) (authorizing payment to states and localities for bed space for detainees). As a part of executing these responsibilities, the INA directs the federal government to "control, direct[], and supervis[e]" all of the "files and records" concerning ICE detainees, 8 U.S.C.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

§ 1103(a)(2), and to arrange by contract with state and local governments "for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by [ICE] pursuant to Federal law under an agreement with a State or political subdivision of a State," 8 U.S.C. § 1103(a)(11)(A). All facilities housing detainees, whether federal or nonfederal, are subject to federal regulations that prohibit disclosure of "the name of, or *other information relating to*," federal immigration detainees unless authorized by federal law. 8 C.F.R. § 236.6 (emphasis added).

Relevant here, in 2001, Cowlitz County entered into an IGSA for housing juvenile ICE "Federal Detainees." *See* Dkt. 9, Ex. A. The purpose of the IGSA is to provide "detention and care of [ICE] juveniles detained under the authority of the Immigration and Nationality Act, as amended." *Id*. at 1. The IGSA provides that "[a]ll [ICE] juvenile detainees placed in a licensed program remain in the legal custody of [ICE] and shall only be released under the authority of [ICE]." *Id.* at 12. In particular, the agreement provides that Cowlitz County will house ICE juvenile detainees with a criminal or otherwise violent history, categorized as a "List 1" detainee. List 1 detainees include: "(1) juveniles classified criminal, chargeable as a criminal, and/or subject to extant criminal proceedings, (2) escape risks, (3) adjudicated delinquents, (4) juveniles who have committed a violent and/or threatening act toward self or another, and (5) juveniles who engaged in disruptive behavior while in a licensed shelter program." *Id.* at 2. Under the IGSA, ICE may only place List 1 detainees with Cowlitz County.

On or about July 18, 2018, Professor Angelina Snodgrass Godoy, the Director of the Center for Human Rights at the University of Washington, ("the Requester" and "UW"), submitted a records request to Cowlitz County under the Washington State Public Records Act ("PRA"), RCW 42.56, *et seq*. The Request asked for:

> 1) A copy of IGSA, MOU, or underlying agreement between Cowlitz County and ICE that allows the detention of adults and minors for ICE in Cowlitz County facilities.
>
> 2) The complete jail file (redacted to conceal personally-identifying information)

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

> of all minors housed in Cowlitz County facilities for ICE from 1/1/2015-7/15/2018. (Please note that under RCW 70.48.100, access to otherwise confidential potions of inmates' jail records is allowed to "higher education institutions of Washington state for the purpose of research in the public interest.")

See Dkt. 9, Ex. B. Cowlitz provided notice to ICE of the Requester's Request. In response to the first part of the Request, ICE notified Cowlitz that it did not object to release of the IGSA, but asked that the personal information of the contracting officer be redacted. Dkt. 13-1 at 61. However, in response to the Request for the "complete jail file" of ICE juvenile detainees, ICE informed Cowlitz that it may not release that information, *i.e.*, the Protected Information, because those records belong to ICE. ICE informed Cowlitz that the Protected Information is governed by 8 C.F.R § 236.6, which prohibits public disclosure by any state or local government entity.

Section 236.6 provides:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of [ICE] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be 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. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

Id. Section 236.6 was promulgated to ensure (1) that the privacy of federal detainees is protected; (2) that the disclosure of information related to federal detainees is subject to uniform treatment under the law; and (3) to prevent ongoing criminal or national security investigations from being adversely impacted. *See* Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508-01 (Apr. 22, 2002) (explaining interim rule); Release of Information Regarding Immigration and Naturalization Service Detainees

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

in Non-Federal Facilities, 68 Fed. Reg. 4364-01 (Jan. 29, 2003) (adopting interim rule as final).

For several weeks Cowlitz and the United States continued to communicate regarding the applicability of 8 C.F.R. § 236.6 to the Protected Information. *See* Dkt. 13-1 at 63-64, 149. Eventually, Cowlitz identified to the United States approximately 600 pages of documents that it asserted could be released to the Requester. *See* Chan Decl., ¶ 10. Upon review, it is clear to the United States that the documents that Cowlitz asserts may be released are protected by 8 C.F.R. § 236.6. All of the documents include "information relating to" juvenile ICE detainees in federal custody. The documents include minor mental health records, medical information, personally-identifiable information, third-party personally-identifiable information, ICE detainers, internal operation deliberations, and law enforcement sensitive information. *See* Chan Decl., ¶ 10.

Ultimately, Cowlitz and the United States were unable to reach an agreement as to the applicability of 8 C.F.R. § 236.6 to the Protected Information. The United States understands that Cowlitz's position is that it may release the Protected Information to the Requester because she works for UW, a state agency, either in full or with some personal information redacted at the discretion of Cowlitz. *See* Dkt. 15 at 12. The United States is not aware of any steps that Cowlitz has taken to notify ICE juvenile detainees or any third-parties identified in the Protected Information that their personal information may be released by Cowlitz. Cowlitz has not provided the United States with any assurances or authority that once it releases the Protected Information to the Requester that it will not be subject to further release at the Requester's discretion. Accordingly, the United States informed Cowlitz that it was seeking authority to initiate a lawsuit in federal court to enjoin release. Dkt. 13-1 at 149.

However, before the United States was able to complete the administrative process that would allow it to initiate a lawsuit in federal court, Cowlitz filed a declaratory judgment action in Cowlitz County Superior Court against the Requester and UW, on February 1, 2019. *See* Dkt. 1-1. Cowlitz sought a declaratory ruling that the Protected Information was not subject to the PRA, but could be released by Cowlitz pursuant to GR 31.1 if Cowlitz waived certain exemptions. *Id.* at pp. 6-7. The United States understands that the Requester and UW, like Cowlitz, support release

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

of the Protected Information under state law.[2]

Subsequently, the United States filed a Motion to Intervene "for the purpose of removing this action to the United States District Court for the Western District of Washington, and defending this action in that court," citing 28 U.S.C. § 1442. Dkt. 13-1 at 174-93. On December 10, 2019, the Clark County Superior Court granted the United States' Motion.[3] The Clark County Superior Court's Order stated, "Pursuant to CR 24(a), the U.S. is permitted to intervene in this matter. The U.S. shall be joined as a Plaintiff." Dkt. 13-1 at 334. The United States removed this action to this Court on December 30, 2019. On January 6, 2020, the United States asserted claims against Cowlitz and responded to the allegations in Cowlitz's Complaint against the Requester and UW. The United States styled its filing as a Counterclaim and Answer. On January 27, 2020, Cowlitz filed a Motion to Dismiss and Strike Intervenor's Counterclaim. Dkt. 15. In its Motion, Cowlitz asserts that (1) the United States may only assert a claim against UW and not Cowlitz (despite that the dispute over ownership is between Cowlitz and the United States, as UW does not appear to claim an ownership interest and only wants Cowlitz to release the Protected Information); (2) that the United States "filing of an answer and counterclaim serve no purpose in this federal preemption-question, removal case other than to obfuscate the statutory interpretation issue pending before this court;" and (3) that this "Court should abstain from addressing other than preemption." *Id*. at 8-12. The United States agrees that this case turns on the applicability of 8 C.F.R. § 236.6 to the Protected Information and ownership of the records. Therefore, the United States cross-moves for partial summary judgment as a part of this Opposition.

III. ARGUMENT

A. Legal Standard for Summary Judgment

Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving

[2] It appears that while they all support release of the Protected Information under state law, they may disagree as to which state law dictates release. *See* Dkt. 17.

[3] The entire Cowlitz County Bench was recused from the state court action, and a visiting judge from Clark County was assigned to hear all proceedings. Dkt. 13-1 at 159.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

party has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party must identify evidence that it "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). Cases pertaining to disputes over disclosure of information are particularly appropriate for summary judgment. *Cf. Wickwire Gavin, P.C. v. United States Postal Serv.*, 356 F.3d 588, 591 (4th Cir. 2004) (summary judgment is the procedural vehicle by which nearly all cases brought under the Freedom of Information Act are resolved).

After the moving party meets its burden to prove no genuine issue of material fact exists, the burden then shifts to the opposing party to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at 324. To avoid summary judgment, the opposing party cannot rely on speculation or conclusory allegations to defeat the motion. *Nelson v. Pima Cmty. College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) ("Mere allegation and speculation do not create a factual dispute for purposes of summary judgment."); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990) (Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed.). Finally, the nonmoving party is required to establish that any fact at issue is: (1) material, *i.e.*, that it is a fact that might affect the outcome of the suit under controlling law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Electric Serv. Inc. v. Pacific Electric Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987); and (2) that the dispute is genuine or that the evidence is of the nature that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248-49.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

B. Records Concerning Minors Detained by ICE under the Authority of the INA are Federal Records that Belong to the Federal Government and May Not be Released by Cowlitz

1. 8 C.F.R. § 236.6 Prohibits Release of the Protected Information by Any State or Local Entity

By its plain language, 8 C.F.R. § 236.6 prohibits disclosure of the Protected Information by Cowlitz in response to a state public records request. 8 C.F.R. § 236.6 clearly states that "[n]o person, *including any state or local government entity* or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of [ICE]. . . shall *disclose* or otherwise permit to be made public *the name of, or other information relating to, such detainee*." *Id.* (emphasis added). In addition to prohibiting a state or local entity from disclosing ICE detainee information, 8 C.F.R. § 236.6 makes clear that this information remains "under the control of" the federal government. *Id*. In other words, the records and information are federal property, and "shall not be public records" of a state or local entity. *Id.* To the extent that information regarding federal detainees may be disclosed, 8 C.F.R. § 236.6 provides that any disclosure must be made pursuant to federal law by the federal government, for example, under FOIA.

Courts that have considered the question here, whether a state or local entity may fulfill a state public record request for ICE detainee information, have held that 8 C.F.R. § 236.6 prevents disclosure by the state or local government. For example, *ACLU of New Jersey, Inc. v. City of Hudson*, which was decided shortly after 8 C.F.R. § 236.6 was enacted, is instructive. 352 N.J. Super. 44 (App. Div. 2002). In *ACLU of New Jersey*, plaintiff's representative wrote to the "custodian of records for Hudson County Correctional Center . . . and custodian of records for the Passaic County Jail, requesting copies of records pertaining to each person committed to those facilities since September 1, 2001." *Id.* at 59. INS informed the New Jersey counties that it objected to the release of any information regarding INS detainees housed at the New Jersey County facilities as the INS detainees were detained "under the sole authority of the federal

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

government." *Id*. at 59-60. A lawsuit soon followed, and *prior* to the promulgation of 8 C.F.R. § 236.6, the trial court found that various state laws mandated disclosure. On appeal, the United States argued that the new regulation "8 C.F.R. § 236.6 pre-empts State law and forbids disclosure of the requested information." *Id*. at 61. The New Jersey Appellate Court agreed with the United States. It held that records pertaining to INS detainees housed in a county facility could not be released because 8 C.F.R. § 236.6 prohibited it:

> The trial court held several State laws to mandate that information be provided to plaintiffs concerning the federal detainees. However, the plain language of 8 C.F.R. § 236.6 prohibits the disclosure of such information. There is, therefore, a clear conflict between State law as posited by the trial court and the federal regulation because compliance with both would be impossible

Id. at 74. The court further rejected an argument 8 C.F.R. § 236.6 did not actually conflict with state public records laws explaining that that there was an "operational conflict" because compliance with both was impossible:

> We have concluded that it is of no consequence, as the issues come before us, whether the disclosure sought by plaintiffs is required as a matter of State law. To the extent the State laws involved may be viewed as requiring public disclosure of information regarding INS detainees, they would be in conflict with 8 C.F.R. § 236.6. Therefore, the federal regulation must be seen as pre-empting State law bearing upon its subject matter.

Id. at 75, 89.

Similarly, in *Voces De La Frontera, Inc. v. Clarke*, the Wisconsin Supreme Court considered a state public records request to the Milwaukee County Sheriff requesting "copies of all I-247 forms that the Sheriff received from ICE since November 2014." 373 Wis. 2d 348, 354 (2017).[4] The *Voces* court held that 8 C.F.R. § 236.6 prohibited release under the state public records law, explaining that "8 C.F.R. § 236.6 precludes the release of any information pertaining to individuals detained by a state or local facility and I-247 forms contain such information." *Id*. at 374. Likewise, in *Commissioner of Correction. v. Freedom of Information Commission*, the

[4] "I-247 forms are requests by the federal government to a state or local entity to hold an individual for a period of time not to exceed forty-eight hours after the individual is released from state custody." *Id*. at 354 n.4.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

Connecticut Supreme Court held that 8 C.F.R. § 236.6 prevented a Connecticut state correctional center from disclosing copies of National Crime Information Center ("NCIC") reports that would show whether a detainee was on a "violent gang and terrorist organization" list. 307 Conn. 53 (2012). The state correctional center housed ICE detainees pursuant to an IGSA with the Department of Homeland Security ("DHS"). *Id*. at 57. As a part of that relationship, the state correctional center ran inquiries about ICE detainees on an NCIC database and generated printed reports which the correctional center then kept in its files. *Id*. at 57-58. A former detainee requested a copy of his NCIC report pursuant to Connecticut's public records act. *Id*. at 59. The Connecticut Supreme Court held that the state facility was prohibited from releasing the NCIC report to him under a state public records act[5] pursuant to 8 C.F.R. § 236.6. *Id*. at 74-83.

It makes perfect sense then, that when faced with a state public records request for information concerning ICE detainees, multiple state attorney general offices and public records officers have found that 8 C.F.R. § 236.6 prohibits disclosure of ICE detainee information under a state's public records law. *See e.g.*, Ky. Op. Att'y Gen. 17-ORD-159 (2017), 2017 WL 3567955 (denying a state public records request to a local government entity "for copies of federal immigration detainer forms received from the Department of Homeland Security . . . and other records for individuals for whom a detainer was issued," because "the disclosure of I-247 forms by [local government entity] is prohibited pursuant to 8 C.F.R. § 236.6"); Tex. Att'y Gen. Op. OR2019-03031 (2019), 2019 WL 498458 ("Based on our review, we find the Sheriff's office is required to abide by rules promulgated by the DHS with regard to the detainees"); Tex. Att'y Gen. Op. OR2019-26062 (2019), 2019 WL 4644630 ("request for eight categories of information during a defined time period pertaining to a specified county center, [ICE], and [DHS]" denied, in part, due to 8 C.F.R. § 236.6). This Court should likewise conclude that 8 C.F.R. § 236.6 precludes release of the Protected Information by Cowlitz in response to the Requester's public records

[5] The Connecticut court noted that the former detainee had also submitted a FOIA request for information related to his detention to the federal government, as 8 C.F.R. § 236.6 allows, and the former detainee did receive some information sought by his request. *Id*. at 82 n.32.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

request.

Cowlitz's claim that its argument for a contrary result is "bolstered" by a single case, *United States v. California*, 314 F. Supp. 3d 1077, 1092-93 (E.D. Cal. 2018), *aff'd in part, rev'd in part and remanded*, 921 F.3d 865 (9th Cir. 2019) rings hollow. Dkt. 15 at 10. The case is distinguishable and the part of the decision on which Cowlitz relies was not adopted by the Ninth Circuit, which reversed the District Court, in part.[6] In *California*, the District Court was not considering a public records request. Rather, the District Court was considering the constitutionality of "three [California] laws expressly designed to protect its residents from federal immigration enforcement: AB 450, which requires employers to alert employees before federal immigration inspections; AB 103, which imposes inspection requirements on facilities that house civil immigration detainees; and SB 54, which limits the cooperation between state and local law enforcement and federal immigration authorities." *California*, 921 F.3d at 872. The District Court, in considering whether 8 C.F.R. § 236.6 prohibited a state or local detention facility from providing information to the California Attorney General concerning noncitizens detained at state or local facilities, for the purpose of overseeing conditions at detention facilities, found that 8 C.F.R. § 236.6 did not prohibit information sharing for this limited purpose. *California*, 314 F. Supp. 3d at 1092-93. Critical to the court's analysis was (1) that the "Attorney General conducts these reviews in his capacity as the chief law officer of the State, and not as a member of the public;" and (2) further disclosure of any shared information "was unlikely because much if not all of the information in question remains confidential under state law." *Id*. at 1092 (internal citation omitted).

Neither factor is present here. The Requester's demand for information comes from a state public records act request. *See* Dkt. 9, Ex. B. The state records request was not made for the

[6] On appeal, the Ninth Circuit reversed the District Court's decision regarding AB 103, the relevant California statute on which Cowlitz's relies, and remanded for further proceedings. *California*, 921 F.3d at 882-86, 895. The Ninth Circuit reversed without opining on the part of the District Court's decision on which Cowlitz cites as bolstering its claim that Cowlitz may release the Protected Information. *Id*. The United States has petitioned for Supreme Court review of the Ninth Circuit's opinion, which, as indicated, did not adopt the District Court's language on which Cowlitz relies.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

purpose of state oversight of the condition of Cowlitz's facilities, nor for state law enforcement purposes. Nor is the information sought by the Requester limited to those matters. The Protected Information here potentially includes minor mental health records, medical information, personally-identifiable information, third-party personally-identifiable information, ICE detainers, internal operation deliberations, and law enforcement sensitive information. *See* Chan Decl. ¶¶ 6-10. Importantly, unlike the circumstances in *California*, there is nothing in the record that would indicate that the Requester would not, or could not, further distribute any information received from Cowlitz concerning ICE juvenile detainees, in her discretion or otherwise. First, Cowlitz has not identified anything that would prevent the Requester from simply publishing any and all information received. Second, the Requester, as an employee of UW, is herself subject to state public records act laws, as is UW, and Cowlitz has not identified anything that would prevent further disclosure through that avenue as well.[7] In sum, even beyond the doubtful value of *California* as persuasive authority, the facts, reasoning, and conclusion are readily distinguishable and provide no reason under the facts of this case to depart from the long line of persuasive authority holding that 8 C.F.R. § 236.6 prohibits a state or local entity from disclosing ICE detainee information in response to a state public records request.

2. The Protected Information is Federal Property

The Protected Information was created and compiled by ICE for the purpose of executing its authority and duties under the INA to house, secure, and care for juvenile ICE detainees. *See* Chan Decl. ¶¶ 4-10. It was shared with Cowlitz County only pursuant to an IGSA concerning the housing of these federal detainees. *Id.*; *see also* Dkt. 9, Ex. A. 8 C.F.R. § 236.6 provides that information concerning ICE detainees held in a state or local facility pursuant to a contract with ICE "shall be under the control" of ICE. Consequently, the United States maintains a property right to control the use and dissemination of the Protected Information.

[7] Such public records requests could come to the Requester in any number of ways. For example, UW or the Requester could simply receive a PRA request for all information received from Cowlitz. Or, a PRA request for information or emails from the Requester could encompass information received from Cowlitz.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

Courts have long recognized that, as a matter of federal common law, the United States has the authority to enforce its property interest in its records in the context of state public records acts. In *United States v. City of Seattle*, for example, the City of Seattle was permanently enjoined from disclosing under the PRA information provided by the FBI concerning covert surveillance pole cameras. No. 16-CV-889 (RAJ), 2017 WL 176541, at *1 (W.D. Wash. Jan. 17, 2017). The court held that this information was "federal property, subject to the FBI's right to control and prohibit[ed] the disclosure of the information by the City, absent the express authorization of the FBI." *Id*. Similarly, in *United States v. Loughner*, the court prohibited a county sheriff from disclosing information in his possession as a result of participation in a federal-state investigation led by the FBI. 807 F. Supp. 2d 828, 833-35 (D. Ariz. 2011). The court rejected the invocation of Arizona's public records law as a means for disclosure, explaining that "while the news organizations label their request as one for *state* records, it is more accurately characterized as a request for records pertaining to a *federal* investigation." *Id*. at 834. And, in *United States v. Story County, Iowa*, the court enjoined the county from disclosing emails that were located on a county server but that were sent and received by a county sheriff in his capacity as board member of First Responders Network Authority, a federal board under the United States Department of Commerce. 28 F. Supp. 3d 861 (S.D. Iowa 2014). The court held that the records were "the property of the United States," and "federal records . . . not subject to Iowa's Public Records Act." *Id.* at 877, 872. The *Story County* court emphasized that the fundamental issue was one of ownership. *Id*. at 872, 876-77. The same issue is central to this case: The United States' authority to enforce its property interest. This Court should reach the same result and rule that the Protected Information is federal property not subject to state records laws.

3. If State Law is Interpreted to Require Release of the Protected Information by Cowlitz, It Would be Preempted by 8 C.F.R. § 236.6

For all of the reasons explained above, the Protected Information are federal records that, pursuant to federal law, belong to the United States and are not subject to disclosure under state law. As federal property, the Protected Information is not subject to the PRA as the Requester

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

appears to contend,[8] nor G.R. 31.1 as Cowlitz contends.[9] However, in the alternative, to the extent that state law is interpreted to require or allow disclosure of the Protected Information to the Requester over the objections of the United States through a state public records request, it would be preempted by 8 C.F.R. § 236.6.

The Supremacy Clause of the United States Constitution provides that federal law preempts conflicting state law. U.S. Const. art. VI, cl. 2. Preemption principles apply equally to federal regulations and federal statutes. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Federal law may preempt state law in three ways:

> First, Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. Second, States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. Finally, state laws are preempted when they conflict with federal law, such that compliance with both federal and state regulations is a physical impossibility, ... [or] the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Nat'l Fed'n of the Blind v. United Airlines Inc., 813 F.3d 718, 724 (9th Cir. 2016) (internal citations and quotations omitted). "Regardless of the type of preemption involved—express, field, or conflict—[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id*. Congressional intent to preempt may be established through, *inter alia*, statutory text, legislative history, and regulations. *Id*. at 724, 738. For regulations, "[t]he intent to displace state law altogether can be inferred from a framework of regulation so pervasive ... that Congress left no room for the States to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 567 U.S. at 399.

When considering laws and regulations that concern noncitizens or immigration, courts have found preemption in a variety of contexts. *See Arizona Dream Act Coal. v. Brewer*,

[8] *See* Dkt. 17. The Protected Information does not qualify as "public record" under the PRA. *See* RCW 42.56.010(3).

[9] *See* Dkt. 15. The Protected Information does not qualify as "public record" under GR 31.1. *See* GR 31.1(i)-(j).

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

855 F.3d 957, 972-73 (9th Cir. 2017) (collecting cases). For example, in *Arizona v. United States*, the Supreme Court held that a state law making it a misdemeanor to fail to comply with federal-alien registration requirements was preempted. 567 U.S. 400-03. The Court explained that the "federal statutory directives provide a full set of standards governing alien registration," and concluded that these laws "reflect[ed] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Id*. at 401. "What this means is that the federal registration provisions not only impose federal registration obligations on aliens but also confer a federal right to be free from any other registration requirements." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018). In *Arizona Dream Act Coalition v. Brewer*, the Ninth Circuit held that "Arizona's policy [that] classifies noncitizens based on Arizona's independent definition of 'authorized presence,'" was "preempted by the exclusive authority of the federal government to classify noncitizens" pursuant to the INA. 855 F.3d 957, 963 (9th Cir. 2017); *see also Cmty. Refugee & Immigration Servs. v. Petit*, 393 F. Supp. 3d 728, 735 (S.D. Ohio 2019). And, in *ACLU of New Jersey, Inc. v. City of Hudson*, a case with facts that mirror this one, the court found an "operational conflict" between 8 C.F.R. § 236.6 and a lower court's interpretation of state laws. 352 N.J. Super. at 74. Comparing the plain language of 8 C.F.R. § 236.6 against the lower court's interpretation of "several State laws to mandate that information be provided to plaintiffs concerning the federal detainees," the court concluded that, compliance with both the trial court's interpretation of state laws and 8 C.F.R. § 236.6 would be impossible. *Id*.

Here, evidence of intent to preempt conflicting state law that would require or allow disclosure of ICE detainee information by a state or local entity in response to a public records request is manifest. First, the language is clear. 8 C.F.R. § 236 directs that (1) all "information relating to" ICE detainees "shall be under the control" of the federal government; (2) this information "shall [not be] disclosed or otherwise permit[ed] to be made public" by "any state or local government entity" that "houses, maintains, provides services to, or otherwise holds any detainee on behalf of" ICE; and (3) if "any documents or other records contain such information, *such documents shall not be public records*." *Id*. (emphasis added). To avoid any confusion,

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

8 C.F.R. § 236 further provides that "[t]his section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information." *Id.* There is no room in this language to read in an allowance for Cowlitz to disclose the Protected Information in response to a public records request under state law. *See ACLU of New Jersey*, 352 N.J. Super. at 74.

Second, the purposes of 8 C.F.R. § 236, as set forth in the Federal Register notices demonstrate an intent to displace conflicting state law. *See* Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508-01 (Apr. 22, 2002) (explaining interim rule); Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364-01 (Jan. 29, 2003) (adopting interim rule as final). 8 C.F.R. § 236 was promulgated under the INA, to "supersede[] State or local law relating to the release of such information," in order to ensure (1) the privacy of federal detainees is protected;[10] (2) the disclosure of information relating to federal detainees is subject to uniform treatment under the law;[11] and (3) to prevent ongoing criminal or national security investigations from being adversely impacted.[12] *Id.* "All of these purposes would be

[10] *Id.* ("In some instances, the release of information about a particular detainee or group of detainees could have a substantial adverse impact on . . . the detainee's privacy. . . . State law, unlike Federal law, may not be well adapted to the . . . privacy concerns implicated by the release of this type of information.").

[11] *Id.* ("The rule bars release of such information by non-Federal providers in order to preserve a uniform policy on the release of such information. Accordingly, any disclosure of such records will be made by the Service and will be governed by the provisions of applicable Federal law, regulations, and Executive Orders. . . . In view of the primacy of Federal law in this area, it would make little sense for the release of potentially sensitive information concerning Service detainees to be subject to the vagaries of the laws of the various States within which those detainees are housed and maintained, by specific arrangement with the Service, for the United States.").

[12] *Id.* ("In some instances, the release of information about a particular detainee or group of detainees could have a substantial adverse impact on security matters . . . . For example, specific aliens detained under administrative arrest warrants may possess significant foreign intelligence or counterintelligence information that is sought by the United States. The disclosure of those aliens' detention and the location of their detention could invite foreign intelligence activity contrary to the best interests of the United States. Similarly, the premature release of the identity or other information relating to those aliens could jeopardize sources and methods of the intelligence community. Release of information about a specific detainee or group of detainees could also have a substantial adverse impact on ongoing investigations being conducted by federal law enforcement agencies in conjunction with the Service. Even though an individual detainee may choose to disclose his own identity or some information about himself, the release by officials housing detainees of a list of detainees or other information about them could give a terrorist organization or other group a vital roadmap about the course and progress of an investigation. In certain instances, the detention of a specific alien could alert that alien's coconspirators to the extent of the federal investigation and the imminence of their own detention, thus provoking flight to avoid detention, prosecution and removal from the United States. . . . *Officials of*

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

undermined by allowing state and local entities to disclose information about a detainee . . . subject only to their own policies and procedures." *Comm'r of Correction*, 307 Conn. at 71-72.

Cowlitz's proposal that Cowlitz and UW may unilaterally decide on "statutory and privacy" redactions in the course of disclosing the Protected Information highlights the conflict with the language and purpose of 8 C.F.R. § 236. *See* Dkt. 15 at 12 (arguing that "there exists a detailed and comprehensive Washington state court judicial process for reviewing requests on juvenile records," and "[Cowlitz] and UW are approaching this records disclosure in anticipation of the need for statutory and privacy exemptions and redactions within that judicial process."). For one, neither Cowlitz nor UW is in a position to adequately evaluate all of the potential privacy concerns that could be implicated for each juvenile ICE detainee and/or any third party identified within the Protected Information.[13] Neither has access to all of the information that the federal government has regarding a federal detainee. There are a number of statutes and regulations that could potentially be implicated by release of information regarding an ICE detainee or noncitizen, depending on facts that neither Cowlitz nor UW would have available to it.[14] *See Voces De La Frontera*, 373 Wis. 2d at 372 ("the federal government is in a better position to determine whether there are privacy and safety risks innate in releasing records that it created.").

Additionally, it cannot reasonably be disputed that neither Cowlitz nor UW is in a position to adequately identify any criminal or national security matters that may be adversely impacted by disclosure. *See ACLU of New Jersey*, 352 N.J. Super. at 69 ("counties are not privy to the character and extent of federal investigations in progress nor, apparently, do they possess any independently acquired information regarding the role of the [ICE] detainees in those investigations."). Under

---

the non-Federal providers may not possess information regarding the progress of Federal investigations and cannot make judgments about the risk of release of information relating to Service detainees.") (emphasis added).

[13] UW and the Requester, of course, have a vested interest in disclosure as the ones seeking the information.

[14] *See e.g.*, 8 C.F.R. §§ 208.6; 1208.6 (prohibiting release of asylum-related information except in certain limited circumstances or with written permission of the individual applicant); 8 C.F.R. § 214.14(e) (confidentiality relating to U-visas); 8 U.S.C. §§ 1367(a)(2), (b) (confidentiality relating to T-visas and applications for protection under the Violence Against Women Act); 8 C.F.R. §§ 244.16; 1244.16 (governing confidentiality of applications for Temporary Protected Status); INA §§ 245A(c)(4), (5) (confidentiality relating to Legalization applications); INA § 210(b)(6) (confidentiality relating to applications under the Special Agricultural Worker program).

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

the IGSA, Cowlitz houses ICE detainees that may be "subject to extant criminal proceedings," or otherwise involved in criminal matters. Dkt. 9, Ex. A at 2. While Cowlitz may have access to some information related to these matters, as it may relate to housing ICE detainees, there is nothing in the record to indicate that either Cowlitz or UW is in position to know or evaluate whether ongoing criminal or national security investigations would be adversely impacted by the release of the Protected Information, or whether such information should be withheld under a federal law enforcement privilege. *See ACLU of New Jersey*, 352 N.J. Super. at 69; *see also City of Seattle*, 2017 WL 176541, at *1 (holding that information shared between the FBI and the City was "protected by the federal law enforcement privilege" and enjoining release).

Finally, even if Cowlitz and UW were in an adequate position to evaluate these matters, allowing state actors to make decisions about protections and redactions in the Protected Information, rather than the federal government, upends the uniform treatment of federal detainee information under the law. A federal detainee's privacy rights should not be subject to different treatment depending on the location in which they are housed. Consequently, to the extent that state law may be interpreted to require or allow disclosure of the Protected Information pursuant to a state public records act request, as Cowlitz contends, it would be preempted by 8 C.F.R. § 236. *See ACLU of New Jersey*, 352 N.J. Super. at 74.

C. Cowlitz's Motion to Dismiss Provides No Valid Reason for this Court to Dismiss the United States from this Action or Strike its Claims or Defenses

The crux of Cowlitz's Motion to Dismiss appears to be an argument that the state court directed the United States to assert claims against UW, and that only Cowlitz is permitted to assert arguments or identify legal issues in need of this Court's resolution. *See* Dkt. 15 at 1, 8-9 (arguing that the United States "has filed a Counterclaim against [Cowlitz] rather than UW—choosing to circumvent court rules and obligations"). Nothing in the state court's order on intervention, however, required the United States to assert claims against UW or the Requester. *See* Dkt. 13-1 at 333. Such a requirement would not make sense given that the dispute in this case is over ownership and disclosure of the Protected Information, which neither UW nor the Requester claim

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

to control.

The state court order provided that the United States "is permitted to intervene in this matter," and "shall be joined as a Plaintiff." *Id*. at 334. Following removal of the action to this Court, the United States endeavored to assert claims and defenses to protect the Protected Information consistent with the state court's directive and with the United States' interest in the Protected Information. Notably, Cowlitz and the United States agree that the central issue in this case is interpretation of 8 C.F.R. § 236 and its application to the Protected Information. *See* Dkt. 15 at 10-12. But it appears that Cowlitz does not like how the United States has asserted its arguments concerning this central issue. Nothing in Cowlitz's Motion, however, provides a valid reason to dismiss the United States from this action or to strike its pleading. At best, Cowlitz may be making an argument that this Court should exercise its inherent authority to re-align the parties or conform the pleadings.

1. The United States has the Right to Seek Protection of Federal Records in Federal Court

"The federal government has a property interest in its own documents and can sue to recover such documents loaned to state or local entities." *Chinn v. Blankenship*, No. 09-5119 RJB, 2010 WL 11591399, at *4 (W.D. Wash. Feb. 26, 2010). In particular, the United States has the right to bring an action in federal court seeking injunctive relief to protect federal documents. *See, e.g.*, *City of Seattle*, 2017 WL 176541, at *1 (United States filed an action in U.S. District Court to enjoin City from disclosing information the FBI shared with the City concerning covert surveillance cameras mounted on City Light electric power transmission poles); *Story Cty., Iowa*, 28 F. Supp. 3d at 866 (United States filed declaratory judgment action in U.S. District court "asking for injunctive relief against Story County . . . and requesting an order declaring that the FirstNet records are the property of the United States").

The United States has the right to seek protection of federal records in federal court in other ways too. For example, the United States may intervene in a pending federal action or file a

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

statement of interest. *See, e.g., Blankenship*, 2010 WL 11591399, at *1 (statement of interest). Where other parties initiate an action in state court that involves federal records, the United States may remove the action to federal court in order to assert its claim over the records. *See generally* 28 U.S.C. § 1442. The process for doing so may vary depending on the circumstances of the case. For example, in *In re Motion to Compel Compliance with Subpoena Directed to Minnesota Dep't of Health*, the Department of Health and Human Services ("DHHS"), who was not a party to the underlying wrongful death action, moved for a limited intervention and removed to federal court a challenge to subpoena pursuant to 28 U.S.C. § 1442(a)(1) while the state court retained jurisdiction over the wrongful death action. No. 19-MC-35 (DWF/BRT), 2019 WL 4917176, at *2 (D. Minn. Oct. 4, 2019). Where, as here, a dispute over federal documents is central to the litigation, the United States may remove the entire action. In *Golden v. New Jersey Inst. of Tech.*, for instance, a requester filed suit in state court against a public university seeking disclosure of records under New Jersey's Open Public Records Act. 934 F.3d 302, 308 (3d Cir. 2019). Because the FBI asserted that the records were federal records, the university filed a third-party complaint for indemnification against the FBI in the event that it was not successful in the state court litigation. *Id*. The FBI then removed the entire action to federal court pursuant to 28 U.S.C. § 1442(a)(1), and counterclaimed against the university to prevent release of federal records. *Id*. In *Miami Herald Media Co. v. Florida Department of Transportation*, plaintiffs filed suit against the Florida Department of Transportation ("FDOT") seeking disclosure of records under a state public records law. 345 F. Supp. 3d 1349 (N.D. Fla. 2018). The United States filed a statement of interest in the state court action arguing that FDOT was prohibited from producing records by federal regulation. *Id*. at 1360. The state court disagreed and directed FDOT to produce the records, so the United States removed the action under 28 U.S.C. § 1442(a)(1) and moved to quash the state court's production order. *Id.* 1361.

Cowlitz's arguments that the United States' claims and response to Cowlitz's allegations should be dismissed and/or stricken are baseless. Dkt. 15 at 8-9. The state court did not direct the United States to assert claims against UW in order to intervene in this action, as Cowlitz appears

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

to contend. *Id*. at 8 (arguing that the United States improperly asserted claims against Cowlitz rather than UW); *see* Dkt 13-1 at 333-34 (Order on Intervention). Accordingly, the United States did not "purposely and expressly ignore[] the court order on intervention" by failing to do so. Dkt. 15 at 9. In its Motion to Intervene, the United States declared its intent to remove this action pursuant to 28 U.S.C. § 1442 and assert that the "subject 'jail files' are federal records that are protected from disclosure by federal law." Dkt. 13-1 at 174-75. Following the state court's order granting the United States' request to intervene, the United States removed this action and endeavored to file a pleading consistent with its interests in the Protected Information and with the state court's directive that it be joined as a plaintiff, *i.e.*, assert claims in this action. The state court did not limit the claims that the United States could assert, nor would such a limitation have been warranted.[15] *See generally United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (district court correctly refused to abstain from hearing dispute over federal documents after state court denied motion to intervene). The United States also responded to the allegations in Cowlitz's Complaint as they relate to the United States, because Cowlitz's allegations and the United States' position are relevant to the dispute. Moreover, as set forth above, the United States has the right to seek protection of federal documents in federal court. None of the cases that Cowlitz cites hold otherwise.[16] Simply put, Cowlitz provides no basis for this Court to dismiss the United States from this action.

2. This Court has Authority to Re-Align the Parties or Conform the Pleadings if Necessary

There does not seem to be any dispute between Cowlitz and the United States as to what the core legal issues are in this litigation: interpretation of 8 C.F.R. § 236 in connection with the Protected Information and whether the Protected Information are federal records. *See* Dkt. 15 at

[15] Following removal, the United States has asserted its arguments in a number of ways. *See e.g.*, *Golden*, 934 F.3d at 308 (filing a counterclaim after removal); *Miami Herald Media Co.*, 345 F. Supp. 3d at 1361 (filing a motion to quash after removal).

[16] For example, the United States was not granted a limited intervention right restricting it from participating in the merits of litigation as in *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559 (9th Cir. 2009). Nor would such a limitation be appropriate in this case as all other parties to this action—Cowlitz, UW, and the Requester—advocate for disclosure of the protected information. *See Napper*, 887 F.2d at 1530.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

10-12. Both parties seek Court resolution of these key issues even if they frame them in different ways and their legal positions differ on what the result should be. These legal issues are ready for resolution. The United States has cross-moved for partial summary judgment as a part of its Opposition and Cowlitz previously moved for summary judgment in state court, though it has not re-filed its motion in this Court. *See* LCR 101(c). Cowlitz's current Motion and arguments for dismissal seem to elevate form over substance by insisting that the United States has incorrectly labeled itself or mis-styled its pleadings. *See generally* Fed. R. Civ. P. 1 (the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

This Court possesses the authority to re-align the parties or conform the pleadings. *See FCE Benefits Administrators, Inc. v. Training, Rehab. & Dev. Inst., Inc.*, No. 15-CV-01160-JST, 2016 WL 4426897, at *3 (N.D. Cal. Aug. 22, 2016) ("A complaint's alignment of the parties is not binding on the courts" and "[o]ne of the tools within the Court's inherent power is to realign the parties when it properly reflects the dispute before it") (internal quotation omitted); *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154-55 (9th Cir. 2014) (District Court should have allowed plaintiff so amend its pleading to conform to the parties' arguments on summary judgment). Therefore, in the event that this Court finds that labels, captions, or pleadings are incorrect and/or should be amended, the United States respectfully requests leave to amend consistent with this Court's directive.[17]

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant summary judgment in its favor and hold that: (1) 8 C.F.R. § 236 prohibits disclosure of the Protected Information by Cowlitz in response to a state public records request; and (2) the Protected Information is federal property that belongs to the United States. Additionally, this Court should deny Cowlitz's Motion to Dismiss and/or Strike in its entirety.

[17] The United States will refer to itself as Intervenor in captions until receiving further direction from the Court.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

DATED this 18th day of February, 2020.

Respectfully submitted,

BRIAN T. MORAN
United States Attorney

s/ Katie D. Fairchild
KATIE D. FAIRCHILD WSBA #47712
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-4358
Fax: 206-553-4067
E-mail: katie.fairchild@usdoj.gov