

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 1:06CR394
)	
Plaintiff,)	
)	JUDGE ANN ALDRICH
v.)	
)	GOVERNMENT'S RESPONSES TO
JOSEPH H. SMITH, et al.,)	DEFENDANT SMITH'S MOTION TO ORDER
)	PRODUCTION OF DOCUMENTS AND
Defendants.)	<u>ADDITIONAL SCHEDULING MOTIONS</u>

The United States respectfully submits the following response to defendant Joseph H. Smith's motion to order production of documents pursuant to Rules 16(d) and 17 of the Federal Rules of Criminal Procedure, and additional scheduling motions. The government opposes an order for production of records under Rule 16(d), principally on ground that the government does not have the requested records. With respect to Rule 17, the government opposes the motion for Rule 17(c) pre-trial subpoenas in part and voices no objection in part, as specified below. Our responses to the additional scheduling motions are set forth in the last section of this response.

I. MOTION FOR PRODUCTION OF DOCUMENTS

During discovery in this case, defense counsel requested various Diocese documents from the government which the government had not obtained in the investigation. An arrangement was made that the government would notify counsel for the Diocese of the requests, to see what documents might be produced without having to resort to subpoena compulsion. In some cases, the government agreed that the requests sought relevant information; in others we did not agree, but merely passed on the information so that the Diocese would be aware of the requests. The Diocese provided some of the requested information, reported that it could not locate some, and declined to produce others.

Smith's motion charges that the government "abdicated" its responsibility to compel the Diocese to comply with a broad subpoena it served for documents. To the contrary, the Diocese has not refused to produce any records called for in the subpoena or otherwise requested by the government. The government's intent and effort was to minimize the extent of the dispute in this anticipated motion, by giving advance notice of the requests to the Diocese (which did, in turn, produce some records which the government did not request or think necessary).¹

In this motion, Smith has requested many, but not all of the records the Diocese declined to produce, plus a number of other records not previously included in the requests to the government.

¹Once the indictment was filed, the government could not legally seek compulsion of records under the grand jury subpoena. The Diocese, nevertheless, voluntarily produced additional documents the government requested.

Rule 16(d)

The government represents that it does not have the documents requested in Smith's motion.² Rule 16(d) provides that a court may order discovery by a party which has failed to comply with Rule 16 discovery obligations. Smith's motion does not allege that the government has refused to permit discovery of any items in its possession, control, or custody. To the contrary, the motion specifies records in the possession of the Diocese or other Catholic organizations within the Diocese which the Diocese has not provided to the government. Thus, the precondition for a Rule 16(d) production order does not exist.³

Rule 17

Legal Standard

Rule 17(c) provides the authority and procedure for a court to order pre-trial production of documents, as follows:

(c) Producing Documents and Objects.

(1) **In General.** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the

²The only arguable exception involves requested records pertaining to a supposed IRS audit of the Catholic Universe Bulletin (of which this office presently has no knowledge). If such an audit took place, audit documents presumably would be in the possession of the IRS, a government agency. However, since such audit records would not directly relate to any tax return or tax liability involved in this case, there is a serious question whether the tax disclosure laws would allow the IRS to disclose such records even to this office, without a court order under 26 U.S.C. § 6103(h)(4). Thus, the records -- if they exist -- are not presently within the control of this office.

Also, if the Diocese locates and provides any requested records to the government, we will provide them to defense counsel.

³For reasons stated in our partial opposition to the motion pursuant to Rule 17, the government would have grounds to object to a number of the requests under Rule 16, if we had possession of the requested records.

subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) **Quashing or Modifying the Subpoena.** On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

In *United States v. Hughes*, 895 F.2d 1135 (6th Cir. 1990), the Sixth Circuit summarized the standards for production of records pursuant to Rule 17(c). To compel production, the proponent must establish that its requests meet the requirements of relevance, admissibility, and specificity, and are not unreasonable and oppressive. *Id.* at 1145-46 (citing *United States v. Nixon*, 418 U.S. 683 (1974)). Under *Nixon*, Rule 17(c) production is appropriate:

where it is shown that: (1) the documents are evidentiary and relevant; (2) they are not otherwise procurable, with due diligence, in advance of trial; (3) the party cannot properly prepare for trial without such production and inspection in advance of trial; and (4) the application was made in good faith and is not a fishing expedition.

Id. at 1146 (citing *Nixon*, 418 U.S. at 699).

Significantly, the *Hughes* opinion further noted that under *Nixon*, "the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." *Id.* (quoting *Nixon*, 418 U.S. at 701). *See also*, Order of Judge Wells in *United States v. Dyer*, 1:00CR62, N.D. Ohio, August 30, 2000 (Copy attached as Exhibit 1).

Discussion

The government believes that most of Smith's requests fail to meet the requirements of relevance and admissibility and/or run afoul of the *Nixon* prohibition against using 17(c) subpoenas for pretrial discovery of potential impeachment material. Because the motion does

not propose specific subpoena language, it also suffers in some instances from specificity problems. Before discussing the individual requests, an overview of the charges and purposes for which Smith seeks productions may be useful.

The indictment in this case charges two conspiracies – one to defraud the Cleveland Catholic Diocese and constituent entities, and the other to defraud the Internal Revenue Service – and an number of related substantive offenses. The two conspiracies have a significant connection, in that each involved a kickback scheme from mid-1997 through 2003 in which defendant Zgoznic's companies made kickback payments to defendant Smith paid by checks payable to business names used by Smith. The tax conspiracy also involved joint efforts by Smith and Zgoznic to conceal income Smith received through the use of a brokerage account at Fidelity investments in the name and tax identification number of the Diocese (the "DOC Fidelity Account"). The account was essentially a Smith account using the Diocese name as a nominee. The false return charges against Smith involve his failure to report or his disguising of income from the kickback scheme and, in some years, from the DOC Fidelity account, checks from the Catholic Cemeteries Association, and kickbacks from an Insurance Company.

In assessing Smith's motion, one needs to recognize that the alleged scheme to defraud the Diocese does not involve the use of "off-book" Diocesan financial accounts. The mail fraud charges describe a kickback scheme in which Smith received checks, payable to two business names Smith alone used (Tee Sports and JHS Enterprises), from bank accounts of private corporations owned and/or controlled by co-defendant Zgoznic, and in which Zgoznic caused false entries to be made on his corporation's books and records, supported by fictitious invoices issued in Smith's business names. Thus, the supposed pattern of using "off-book" accounts for

additional Diocesan compensation is simply not pertinent to the allegations in this case, or the credibility of Diocesan witnesses who will testify to their lack of knowledge of the Zgoznik-company payments.

Smith's motion states that he has personal knowledge of the various specific documents and transactions about which he seeks documents. The Court should also be aware that, more than having knowledge of Diocese financial practices, as of at least the mid-1990s, Smith, as Treasurer and CFO of the Diocese, was, in his own words, "Responsible for all accounting policy and reporting functions" in the Diocese, "Responsible for all audit functions," responsible to "establish accounting policies for over 500 entities" within the Diocese," and had "Direct Supervision of staff of 25 professionals and semi-professional" in the area of financial administration.⁴ Thus, whatever the truth may be about the numerous transactions identified by Smith, in many, if not most cases he most probably bore a responsibility – if not the major responsibility – for the practices.

This raises a fundamental problem with the motion. From the requests, it appears that Smith seeks to defend his conduct by attempting to tarnish the Diocese for financial practices which are not relevant to the case, for which he likely played a major role, and that may involve no improprieties. It would be a major and unnecessary distraction from the case to have to delve into and explain numerous irrelevant practices within the Diocese, including its 200-plus parishes. It would be more than ironic if Smith, as the principal person responsible for Diocesan

⁴Resume describing Smith's duties as Treasurer and CFO of the Diocese, attached as Exhibit 2. Although undated, the last page of the resume gives his age as 38, which would date it in approximately 1993 or 1994. Smith's duties only increased after that time.

accounting practices, could divert the focus of the trial onto many of those (irrelevant) practices in an effort to engender prejudice against the Diocese, as victim in this case.

As a related concern, the motion casts aspersions on Father Wright and Bishop Pilla, at least in part based on allegations that Smith should know are incorrect or misleading. For example, the motion alleges that Father Wright paid himself (and others) compensation through relatives, and requested details, among others, of checks to Wright Landscaping. Although the government does not have details of the various checks requested, we have been told that Wright Landscaping is a former Cemeteries Association vendor, totally unrelated to Father Wright, retained through the efforts of someone other than Father Wright, which happens to use his same last name.

More disturbing are the allegations about the Anthony M. Pilla Charitable Foundation. Again, while the government has not received or reviewed the documents of the specific McDonald & Co. account referenced in the motion, we understand that the account was set up on the advice and counsel of Smith, using Bishop Pilla's own funds. We are concerned that the motion did not at least acknowledge Smith's own knowledge of the source of funds (whether all or not, we don't know), and his involvement in advising Smith and handling the legal aspects, especially since the motion accuses the Bishop of concealing transactions.

If the Diocese has records which might help show that Smith, in good faith, believed he was entitled to the payments which the government expects to prove were kickbacks, or that somehow might bear on conduct and intent in not reporting income on his personal tax returns, he should be entitled to them. On the other hand, Smith should not be able to convert the trial into a broad inquiry into Diocese financial practices that have no bearing on the real issues in the

case. This is especially true with respect to practices over which Smith presided, which, even if not usual in private businesses or look unusual at first glance, he directed, approved, or condoned. In light of these considerations, the Court should not simply take the motion's assertions of need at face value, and should determine whether there is a real factual basis and relevance on which to require the Diocese to produce the requested records.

Summary of Smith's Requests and the Government's Responses

Smith has not presented specific language to be included in a Rule 17(c) subpoena to the Diocese. The following section attempts to summarize Smith's documents requests and the government's responses. Following the summary, we will discuss and amplify our responses.

- A. Request for Documents to impeach Wright's denial of knowledge of kickbacks (motion, Section II, B, at 5-9)

Documents Requested by Smith

1. Records re "additional compensation" to Wright's secretary, Mitzi Milos
2. Records re payments by CCA and Basilica Memorial Products to Kennick Die & Mold
3. Records re four CDC checks and four CCA checks (listed at motion, p. 6) alleged to be additional compensation to certain unnamed CDC and CCA employees
4. Records re three CCA checks to Race Track Chaplaincy of America, one CCA check to Ford Credit, one CDC check to CDC, and a 1992 Provident Bank cashier's check to Wright (Exh. D), alleged to be additional compensation to Wright, not characterized as such on CDC books
5. Records re monthly payments of \$800 to Renee Bales, wife of Deacon Jerry Bales, from 06/15/00 - 04/01/03 (listed at motion, Exh. E)

Government Response

Objection: relevance, purported impeachment use

Objection: relevance, purported impeachment use

Objection: relevance, purported impeachment use

Objection: relevance, purported impeachment use

Objection: relevance, purported impeachment use

Documents Requested by Smith

6. Records re 4 CDC checks to Orion Consulting (1999 & 2000), 7 CDC checks to Stephen T. Keefe (1997 & 1998), and 6 CAC checks to Wright Landscaping (1998-2000) (listed at motion, p.7)
7. Father Wright's "Confidential" and "Secret" personnel files (motion, 8-9)
8. Records re "the entry" on the CDC books re the \$185,000 payment to the DOC Fidelity account in March 1996

Government Response

Objection: relevance, purported impeachment use

Objection, in part: The government agrees that any portion of Wright's personnel file containing findings of dishonest or unethical conduct should be disclosed

No objection

- B. Request for Documents Showing that CDC used off-book accounts to pay additional compensation to employees (Motion, Section II, C, at 9-10)

Documents Requested by Smith

1. Yearly outside auditors reports for CDC and all parishes for 1996-present (motion, at 10)
2. Records re Merrill Lynch account #64604461 maintained by the Office of Catholic Education (OCE) (motion, at 10)
3. Records of recent efforts to eliminate off-book accounts, including emails and memos to employees (motion, at 10)

Government Response

Objection: relevance, purported impeachment use, and overbroad as to more than 200 parishes within the Diocese

Objection: relevance, purported impeachment use, including OCE witness(es)

Objection: relevance, purported impeachment use

C. Request for Documents to Show that Smith did not cause CDC to hire the Zgoznic Entities and that the Zgoznic Entities Performance and Fees Were Reviewed and Approved (Motion, Section II, D, at 11-12)

Documents Requested by Smith

1. Finance Council (FC) minutes, 02/14/01, re Council endorsement of outsourcing to Zgoznic Entities (motion, at 11)
2. Finance Council minutes, 11/07/01, re report by a council member (presumably Tony Lang) re work performed by the Zgoznic Entities (motion at 11).
3. Documentation re 12 checks paid to Tony Lang Consultants from 08/15/00 - 07/10/01 (motion at 11-12; checks listed at 12)
4. Finance Council minutes, 11/19/03, re auditors' praise of work of the Zgoznic Entities and approving additional payments to Smith for serving as a Director of a Diocesan-owned corporation (motion, at 12)
5. Minutes of any Finance Council meeting reflecting allegation that Smith misled the Council re the amount paid to the Zgoznic Entities (motion, at 12)
6. Center for Pastoral Leadership (CPL) purchase orders to Zgoznic Entities signed by Brian Houlahan, CFO of CPL (motion, at 12)

Government Response

No objection (government requested all FC minutes involving outsourcing to Zgoznic Entities and has provided all minutes provided)

No objection (see above)

Objection: relevance

No objection (see above)

No objection (see above)

Objection: relevance.

D. Request for Documents to Show that Payments from CCA to Smith were authorized and for services rendered (Motion, Section II, E, at 13)

Documents Requested by Smith

1. All regular minutes, notes, agendas and reports of the Board of Directors, Finance Counsel, and Management Committee of the CCA (motion, at 13)
2. Notes and reports of "the strategic planning process" (motion, at 13)
3. Documentation of trips by Smith to Pittsburgh and Chicago on behalf of CCA (motion, at 13)

Government Response

No objection, if request limited to statements reflecting Smith authorization or assignment to extra duties beyond regular Diocese CFO responsibilities

Objection: relevance, specificity

Objection: relevance.

E. Request for Documents to Show that Smith did not receive kickbacks from the insurance firm (Motion, Section II, F, at 13)

Documents Requested by Smith

1. Invoices from the Insurance Firm to the Diocese prior to March 1997 and from January 2000 present (motion, at 13)
2. Complete set of work product submitted by the Insurance Company to the CDC

Government Response

Objection: relevance.

Objection: relevance, unreasonably burdensome

F. Records relating to the Tax Charges against Smith (Motion, Section III, at 14-16)

Documents Requested by Smith

1. "IRS findings which establish the pattern of the CDC failing to accurately report to the IRS and individuals the additional income they received" (apparently in connection with an IRS audit of the Catholic Universe Bulletin) (motion, at 14)

Government Response

Objection: relevance, purported impeachment use

Documents Requested by Smith

2. All records re the Anthony M Pilla Charitable Account, including source of funds, and any activity reflecting on the books of CDC, plus records of specific transactions as follows: (motion, 15-16)

05/02/02 check to cash for \$180,000

2 checks in September 2001 for \$29,019.57 and \$56,806.04 (apparently to CDC), and check from CDC to First Federal Savings Bank in the combined amount of \$85,825.61, used to purchase FFSB official check to Pilla (Exhibit F)

Checks listed at pp. 15-16: 3 checks payable to Ivanhoe Furniture in 1997; 28 checks payable to cash from 1997-2001; 1 \$200 check to Pilla in 1997.

- G. Records re the Diocese internal investigation (Motion, Section IV, at 16-18)

Documents Requested by Smith

1. The "remainder" of the CDC internal investigation (not already produced), including witness statements (Motion, 17-18)

Government Response

Objection: relevance, purported impeachment use

Government Response

Objection, in part: relevance (Also, the Diocese should have opportunity to raise privilege claim)

Additional Discussion of Individual Requests

- A. Request for Documents to impeach Wright's denial of knowledge of kickbacks (motion, Section II, B, at 5-9)

As reflected in the summary, the government objects to the requests in this section of Smith's motion because they are both irrelevant and seek impeachment materials not subject to Rule 17(c) subpoenas under *Nixon*.

This section of Smith's motion (as well as the next section) rests on his contention that his superior in the Finance and Legal Office until mid-2000, Father John Wright, authorized him to receive the payments from Zgoznic's companies (and/or that Smith, in good faith, thought so). The motion contends that Diocese documents will show (1) a pattern of payments to Diocese employees of additional non-salary compensation, (2) using off-book bank accounts, (3) without the Diocese issuing tax reporting forms to the IRS – all of which will supposedly impeach Wright's contention that he did not know about the Zgoznic kickback payments.⁵

The problem with these first two sections of requests is a classic apples and oranges situation. Smith seeks records of "off-book" "additional compensation" using bank accounts under control of Diocese personnel. He suggests that such accounts may have been used improperly, although, later in the motion, asserts that such means of compensation were known and approved by the outside auditors. Such records and practices, however, if they existed, whether improper or proper, would not shed light on whether Father Wright and Bishop Pilla knew and approved of Smith being paid by outside vendors, from the vendors' corporate bank accounts, through fictitious invoices and entries on the vendors' books and records.

The motion also states that Father Wright contends he was "duped" and that the requested records will show that he is a financially-sophisticated lawyer, who arranged the "additional compensation" and use of "off-book" accounts.⁶ As noted above, the government expects Wright to testify that he approved a lump-sum bonus in 1996, to be in lieu of any raises for the next five years, with the details of payment to be left to Zgoznic and Smith. No amount

⁵For the last three and one-half years of the kickback scheme, Wright was not Smith's superior and had no authority over his compensation.

⁶The source of the word "duped," as quoted in the motion, is a newspaper reporter's characterization of what Wright's lawyer told the reporter – not a direct quote from Wright.

of financial sophistication and no amount of proof of Wright's alleged involvement with Diocese "additional compensation" and off-book accounts, however, would lend support to Wright's supposed knowledge of the Zgoznic Entity payments to Smith. Those payments to Smith, and the supporting false entries and fictitious invoices, were reflected only on Zgoznic's records -- not on any Diocese record, off-book or otherwise.

Individual items:

As to the first six items, the government objects on the grounds of relevance and the *Nixon* limitation on subpoenaing impeachment materials. We object in part to request 7, and have no objection regarding request 8. Based on the government's initial limited inquiries, we believe all of the circumstances for the requested items are irrelevant. They appear to involve no improprieties and, in some instances, appear to involve facts totally at odds with Smith's allegations.

1. Records re "additional compensation" to Wright's secretary, Mitzi Milos.

Objection. Although the government does not have any documentation or details, the government understands this was a loan transaction, not "additional compensation." One of the prior defense requests specifically referred to this as a loan.

2. Records re payments by CCA and Basilica Memorial Products to Kennick Die & Mold.

Objection. We understand Basilica to have been a company that sold cemetery vases, monuments, and markers and that Kennick made the dies for the company that manufactured vases for Basilica (and Cemeteries Association, when Basilica was not in operation). Our understanding is that the payments were for this service and that Father Wright had no relationship with anyone at Kennick. On first indication, Smith's allegations appear to be totally baseless.⁷

⁷Smith's motion alleges that the Diocese "withheld" the Basilica payment documents when it produced records to the government for disclosure to the defense. Defense counsel's previous requests to the government only sought records of transactions between CCA and Kennick; counsel did not mention Basilica. Accordingly, the government merely passed on the

3. Records re four CDC checks and four CCA checks (listed at motion, p. 6) alleged to be additional compensation to certain unnamed CDC and CCA employees.

Objection. These checks were not previously requested and we do not know the specific details.

4. Records re three CCA checks to Race Track Chaplaincy of America, one CCA check to Ford Credit, one CDC check to CDC, and a 1992 Provident Bank cashier's check to Wright (Exh. D), alleged to be additional compensation to Wright, not characterized as such on CDC books.

Objection. From our initial inquiries, these checks to Race Track Chaplaincy appear to be charitable contributions and the cashier's check was belated payment of several years of priest's stipends to which Father Wright was entitled but had not received. (The notes on Exh. D appear to reflect that). We do not know the details of the Ford Credit payment.

5. Records re monthly payments of \$800 to Renee Bales, wife of Deacon Jerry Bales, from 06/15/00 - 04/01/03 (listed at motion, Exh. E).

Objection. To our limited knowledge, these checks were not employee compensation.

6. Records re 4 CDC checks to Orion Consulting (1999 & 2000), 7 CDC checks to Stephen T. Keefe (1997 & 1998), and 6 CAC checks to Wright Landscaping (1998-2000) (listed at motion, p. 7).

Objection. As noted above, we understand that Wright Landscaping is unrelated to Father Wright. We believe the other payments are compensation for services rendered to the Diocese by persons related to Diocese officials. While they might involve a form of "nepotism," the payments do not seem relevant to the issues in the case.

7. Father Wright's "Confidential" and "Secret" personnel files (motion, 8-9).

Objection, in part. The government sees no need for production of these entire files. The government agrees that any portion of Wright's personnel file containing findings of dishonest or unethical conduct should be disclosed. Counsel for the Diocese has represented that the files do not reflect such conduct. The Court will have to determine if there is a procedure to determine whether any

request for documents of transactions between CCA and Basilica. We think the implication of an effort to withhold documents is inaccurate and unfair. We understand that Basilica was a separate entity from the CCA (although we don't know the exact legal status), which was set up for a period of time to sell the vases, etc.

records should be produced, without disclosing personal and/or sensitive matters of no possible use in this case. The government believes the Diocese should have the opportunity to be heard on this issue.

8. Records re "the entry" on the CDC books re the \$135,000 payment to the DOC Fidelity account in March 1996.

No objection. The government previously requested such documentation from the Diocese. While preparing this response, the Diocese provided some documentation, which its counsel indicated they had just located, and we forwarded copies to defense counsel.

- B. Request for Documents Showing that CDC used off-book accounts to pay additional compensation to employees (Motion, Section II, C, at 9-10)

The discussion above, as to request category A, covers this request category, as well.

The government objects to items 2 and 3 on the grounds of relevance and the *Nixon* limitation on subpoenaing impeachment materials. As to item 1, we object to the request as to audit reports of the more than 200 parishes within the Cleveland Catholic Diocese. We understand that each parish has its own Board and Financial Advisory Council, and maintains its own set of records with its own separate tax identification number. Compiling these reports would be an unnecessarily burdensome task to impose on the Diocese and individual parishes, with no likely relevance to the reports. We also question the relevance of the Dioceses's own audit reports to the allegations in this case.

Individual Items:

1. Yearly outside auditors reports for CDC and all parishes for 1996-present (motion, at 10). Objection. See discussion above.
2. Records re Merrill Lynch account #64604461 maintained by the Office of Catholic Education (OCE) (motion, at 10). Objection. See discussion above. We do not know the details of this account.
3. Records of recent efforts to eliminate off-book accounts, including emails and memos to employees (motion, at 10).

Objection. We have no indication (and we doubt) that any changes in record-keeping procedures that may be taking place are the result of discovery requests in this case or that such changes would be relevant, even if so, to the kickback scheme or other indictment allegations.

- C. Request for Documents to Show that Smith did not cause CDC to hire the Zgoznik Entities and that the Zgoznik Entities Performance and Fees Were Reviewed and Approved (Motion, Section II, D, at 11-12)

The government has no objection to Smith's requests for the specified Finance Council minutes (items 1, 2, 4, and 5). We had requested copies of all minutes relevant to the issues in this case, including outsourcing and Smith's compensation and outside income and activities. While preparing this response, the Diocese provided us excerpts of some additional minutes they located, which we forwarded to defense counsel.

The government objects to requests 3 and 6, for the reasons stated below.

Individual Items:

1. Finance Council (FC) minutes, 02/14/01, re Council endorsement of outsourcing to Zgoznik Entities (motion, at 11). No objection.
2. Finance Council minutes, 11/07/01, re report by a council member (presumably Tony Lang) re work performed by the Zgoznik Entities (motion at 11). No objection
3. Documentation re 12 checks paid to Tony Lang Consultants from 08/15/00 - 07/10/01 (motion at 11-12; checks listed at 12).

The government objects to this request; the motion presents no basis to establish any relevance to the listed checks.

4. Finance Council minutes, 11/19/03, re auditors' praise of work of the Zgoznik Entities and approving additional payments to Smith for serving as a Director of a Diocesan-owned corporation (motion, at 12). No objection
5. Minutes of any Finance Council meeting reflecting allegation that Smith misled the Council re the amount paid to the Zgoznik Entities (motion, at 12), No objection

6. Center for Pastoral Leadership (CPL) purchase orders to Zgoznic Entities signed by Brian Houlahan, CFO of CPL (motion, at 12).

Objection. The government objects to this request on the ground of relevance. The fact that a CPL official signed purchase orders has no bearing on whether Smith caused or induced Houlahan or any other CPL official to retain the Zgoznic Entities, especially since CPL maintained its offices at a separate location from the Diocese Financial Office.

- D. Request for Documents to Show that Payments from CCA to Smith were authorized and for services rendered (Motion, Section II, E, at 13)

The government has no objection to request #1, to the extent the records reflect authorization for him to receive extra compensation for extra duties on behalf of the Cemeteries Association, beyond his regular duties as CFO. Our understanding is that there are no invoices or purchase orders or other documentation specifically supporting the four checks Smith received in January of 1997 through 2000. If there are other documents, however, attesting to his entitlement to the extra compensation, he should be entitled to them. On the other hand, because Smith's CFO responsibilities included supervisory review of CCA accounting and finances, and since he was on the Board of that entity, the fact that he was involved in the strategic planning process and took a couple of trips has no probative value on that issue. Accordingly, the government objects to requests #2 and #3 on the ground of relevance.

Individual Items:

1. All regular minutes, notes, agendas and reports of the Board of Directors, Finance Counsel, and Management Committee of the CCA (motion, at 13). Objection, in part. See above.
2. Notes and reports of "the strategic planning process" (motion, at 13) Objection. See above. Also lacks specificity.
3. Documentation of trips by Smith to Pittsburgh and Chicago on behalf of CCA (motion, at 13). Objection. See above.

- E. Request for Documents to Show that Smith did not receive kickbacks from the insurance firm (Motion, Section II, F, at 13)

The government objects to Smith's requests in this category because the requested documents are irrelevant and, with respect to request #2, the effort to comply would be unreasonably burdensome. The indictment in this case makes no allegation that the Insurance Company did not perform actual work or provide significant value to the Diocese. Indeed, the better the job they did, the less likely anyone would question why the Diocese would use the company. There is simply no reason to require the Diocese to produce the actual work product.

The allegation in the indictment is only that the company paid undisclosed kickbacks to Smith during the years 1994 through 2000, which constituted a source of income which he either did not report or did not correctly identify on his tax returns. The payments are primarily relevant to the tax charges, which allege that he either failed to report the income (in some years), or reported the income in a manner that disguised the nature and source (on at least one return). Secondly, the arrangement is relevant to establish Smith's intent on the Zgoznik kickback scheme, and correspondingly rebut the defense discussed in his motion by showing that he arranged a separate set of kickbacks without any involvement by Father Wright. The content of the work product is wholly irrelevant to those issues.

Individual Items:

1. Invoices from the Insurance Firm to the Diocese prior to March 1997 and from January 2000 present (motion, at 13). Objection. See above
2. Complete set of work product submitted by the Insurance Company to the CDC. Objection. See above. (The Diocese has already produced a documents showing the amounts paid to the Insurance Company for 2001-04; the detailed invoices are not really needed.)

F. Records relating to the Tax Charges against Smith (Motion, Section III, at 14-16)

The government objects to the requests in this section of the motion on the grounds of relevance.

The tax conspiracy charge alleges, in part, that Smith and Zgoznic caused \$270,000 of Diocese funds to be paid to Smith in a way to conceal the income from the IRS by transferring the funds into a Fidelity brokerage account in Smith's control, with statements sent to his private residence, even though the account used the name and tax identification number of the Diocese. The evidence for the transfer of the first \$185,000 in 1996 will include documents containing Diocese check authorizations signed or initialed by Smith, Zgoznic, and Father Wright, as well account opening documents filled out by Smith and signed by Smith and Wright. We expect the evidence to show that Smith personally wrote the name of the account, the Diocese tax number, and the designation of the business as a "not-for-profit organization" on the account opening statement. The evidence for the \$85,000 transfer to the account in 1997 will include authorizations by Zgoznic.

The false return charges against Smith allege that he did not report the capital gains (or losses) on the stock trades he made in the account or the dividends earned by the account.

Assuming that Father Wright would testify that he agreed to the payment to Smith, but did not condone his concealment of the income from the IRS, the documents described above will be available to cross-exam him on that point. The government, however, challenges the relevance of whether the Catholic Universal Bulletin had some problem in accurately reporting income to some persons either to impeach Father Wright or otherwise exculpate Smith's failure to report the income he received from money deposited into and subsequently earned on this account.

Similarly, the circumstances of how Bishop Pilla handled the charitable account have no bearing on Smith's efforts to avoid reporting the income he received through the DOC Fidelity account. This is particularly true with respect to the false return charges, which involve income earned on the Fidelity account, which Fidelity reported only to Smith, on Fidelity statements mailed to Smith's residence. Diocese practices simply are not implicated and cannot excuse such alleged conduct.

Individual items:

1. "IRS findings which establish the pattern of the CDC failing to accurately report to the IRS and individuals the additional income they received" (apparently in connection with an IRS audit of the Catholic Universe Bulletin) (motion, at 14) Objection. Relevance. See above
2. All records re the Anthony M Pilla Charitable Account, including source of funds, and any activity reflecting on the books of CDC, plus records of specific transactions as follows: (motion, 15-16).

05/02/02 check to cash for \$180,000

2 checks in September 2001 for \$29,019.57 and \$56,806.04 (apparently to CDC), and check from CDC to First Federal Savings Bank in the combined amount of \$85,825.61, used to purchase FFSB official check to Pilla (Exhibit F)

Checks listed at pp. 15-16: 3 checks payable to Ivanhoe Furniture in 1997; 28 checks payable to cash from 1997-2001; 1 \$200 check to Pilla in 1997.

Objection. Relevance. See above.

- G. Records re the Diocese internal investigation (Motion, Section IV, at 16-18)
1. The "remainder" of the CDC internal investigation (not already produced), including witness statements (Motion, 17-18). Objection, in part.

This part of the motion contains a single request for all parts of the CDC internal investigation not already provided, with a particular emphasis on witness interviews. The government objects to this request, with one exception: we would request any witness interviews containing statements inconsistent with the results of the investigation that were presented in the Diocese's bonding claim or inconsistent with allegations in the indictment.

The government did not request or obtain documents reflecting interviews by attorneys, investigators, or anyone else on behalf of the Diocese in its internal investigation. Although our investigation came to some of the same conclusions as the Diocese asserted in its bond claim (and also uncovered other matters not in the claim), we did so through our own contacts with witnesses and analysis of records.

Smith's motion asserts that the interviews are "exculpatory," "material," and "may be used as evidence." The government does not see anything in the motion or know of any facts to support these assertions.

The Diocese has indicated that it will claim privilege as to these items. The government believes the Diocese is in best position to present the basis for the claim of privilege, whether in the context of this motion, or in a subsequent motion to quash, should this Court permit the issuance of a 17(c) subpoena for these items.

- H. Request for Grand Jury Subpoenas Issued in the Investigation.

In footnote 16 of the motion, Smith motion requests copies of the subpoena to the Diocese (which counsel states they have already seen) and "other subpoenas it issued." The

motion contains no legal analysis or justification for obtaining disclosure of grand jury subpoenas. The government believes this request is groundless and that there is no legal basis to require the government to disclose the subpoenas issued on behalf of the grand jury.

II. ADDITIONAL SCHEDULING MOTIONS

1. Request for permission for additional defense motions based upon facts learned through pre-trial disclosure of Jencks materials and records obtained through this subpoena.

No objection.

2. Request for court-ordered deadline for the government to identify its trial exhibits.

The government opposes an order imposing a deadline well in advance of trial by which it would have to list all exhibits, presumably on pain of not being able to offer other exhibits at trial. We are willing to provide counsel with a draft exhibit list when it becomes available, but we should not be prejudiced or have to establish good cause to add exhibits we may have overlooked in the draft, especially as we conduct final interviews with witnesses.

3. Request for deadline for defense motions *in limine*.

The government does not oppose a reasonable deadline for such motions, subject to the right to right to show good cause for subsequent motions. The government is also likely to file in limine motions, but may not be able to foresee all of the likely defense evidence to which we would object prior to trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2007, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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