

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

UNITED STATES OF AMERICA,)	CASE NO. 1:06-CR-00394
)	
Plaintiff,)	JUDGE ANN ALDRICH
)	
v.)	
)	
JOSEPH H. SMITH, and)	<u>DEFENDANT SMITH'S MOTION</u>
ANTON ZGOZNIK,)	<u>REGARDING DESTRUCTION OF</u>
)	<u>EVIDENCE BY THE DIOCESE AND</u>
Defendants.)	<u>REQUEST FOR EVIDENTIARY</u>
)	<u>HEARING</u>
)	
)	

We have learned that the Catholic Diocese of Cleveland (“CDC”) destroyed documents that are relevant and exculpatory soon after it initiated this criminal prosecution in January 2004. The CDC destroyed records which have been the subject of extensive briefing and orders of the Court.

As the Court is aware, we have been seeking CDC records for use in Mr. Smith’s defense since the August 2006 Indictment. The government did not produce large categories of Diocesan records, stating that it had not obtained the documents from the CDC, and that they were not in its possession, custody or control. (ECF 42). At the Court’s direction, we subpoenaed these records from the CDC, which has resisted production vigorously. (ECF 50).

After many months of briefing, the CDC was ordered to produce to the Court and/or the parties certain records. (ECF 68). Thereafter, the CDC stated that it is unable to locate many of these documents and/or that they do not exist. (*See* letter of P. Kushner to the Honorable Ann Aldrich, dated July 31, 2007, and attachments thereto). Some of these claims are plainly implausible, such as the claim that it cannot produce entries from its general ledger from 2000 or 2004. Other documents, we have now learned, are missing as a result of the CDC's intentional destruction of evidence.

By order dated June 22, 2007, the Court instructed the CDC to produce for *in camera* review all Finance Council minutes for the period 1994 – 2003. (ECF 68). By order dated July 25, 2007, the Court instructed the CDC to produce to the parties all minutes of the Finance Council meetings that it had submitted to the Court and to “confirm, via sworn affidavit from the CDC's custodian of Finance Council minutes, that all minutes since 1994 have been produced to the court for review.” (ECF 78).

On July 31, 2007, the CDC submitted an affidavit from John Maimone, its CFO, stating that the CDC has been unable to locate minutes from prior to 10/11/00. What Mr. Maimone does not state, and what the CDC knows, is that in early 2004, the CDC destroyed Finance Council minutes. This was done at the instruction of Kevin O'Donnell, the acting chairman of the Finance Council. The specific circumstances of the destruction are set forth in the attached declaration of Vivian S. Gagen.

The CDC also claims that it is unable to locate other materials the Court has ordered produced, such as:

1. The management letters it received from its outside accountants for the period 1994 to 2002;

2. general ledger entries; and
3. authorizations of additional undisclosed compensation.

By itself, the CDC's inability to produce these documents is suspect. When coupled with the evidence of intentional destruction, it merits the Court's serious attention and additional relief.

Where evidence has been destroyed, the Court has authority to take appropriate action, including excluding evidence, permitting adverse inferences, or dismissal. *See, e.g., Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (in response to destruction of evidence, court has authority to exclude evidence and to instruct the jury to draw an adverse inference against the person or entity responsible, even where not done in bad faith); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 150 F.R.D. 563, 564-568 (E.D. Mich. 1993) (default judgment against party where non-party with "substantial interest in the litigation" ordered destruction of documents); *Welsh v. United States*, 844 F.2d 1239, 1246-1249 (6th Cir. 1988) (adverse inference based on destroyed and missing evidence is "generally accepted principle of law"); *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (holding bad faith destruction of evidence violates due process)(concurrency approving jury instruction that loss or destruction of evidence permits adverse inference against government). In addition, the government has affirmative obligations to investigate possible misconduct by its witnesses, particularly involving destruction or alteration of evidence. *See, e.g., Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1114-1117 (9th Cir. 2001) (conviction reversed based on due process where prosecutor failed to investigate evidence regarding misconduct of its own witnesses).

We request that the Court hold an evidentiary hearing at its earliest convenience to determine what materials have been destroyed and the appropriate remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Defendant Smith's Motion Regarding Destruction of Evidence by the Diocese and Request for Evidentiary Hearing* was filed electronically this 1st day of August, 2007. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Philip S. Kushner
Attorney for Defendant Joseph H. Smith