

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.	)	MOTION FOR RECONSIDERATION
	)	OF COURT’S JUNE 14, 2007 ORDER
JOSEPH H. SMITH, <i>et al.</i> ,	)	REGARDING SUBPOENAS FOR
	)	PRODUCTION OF DOCUMENTS
Defendants.	)	
	)	
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Non-Parties Catholic Diocese of Cleveland, Bishop Anthony M. Pilla, Catholic Cemeteries Association, and Catholic Universe Bulletin (“Non-parties”) respectfully move this Court for reconsideration of its June 14, 2007 Order relating to the production of subpoenaed documents.

## INTRODUCTION

The Non-Parties' request for reconsideration is two-fold.

First, we ask the Court to undertake an *in camera* review of the documents contested on relevance/evidential grounds. The substantial weight of authority contemplates just such a review in circumstances of this kind before production can be required. We believe examination by the Court will demonstrate that the subpoenaed documents do not meet the relevance test, in most instances by a large margin.

Second, we ask the Court to revisit and withdraw its decision requiring delivery of documents covered by privilege and work product. The Court's decision, which rests upon what it thought was a waiver, is based on a misunderstanding regarding the nature of the material delivered to the Diocese's insurance company (and then later to the government and the defense). A clarification of what that material actually represents, and its non-privileged character, alters the analysis and, in turn, the result.

## ARGUMENT

### **I. THE DOCUMENTS CONTESTED ON RELEVANCE/EVIDENTIAL GROUNDS SHOULD BE REVIEWED *IN CAMERA* BEFORE A DETERMINATION OF WHETHER TO REQUIRE PRODUCTION.**

A criminal defendant's proposed subpoena for third-party documents initiates a two-step process before production may be ordered. Only the first step has occurred here, and for that reason, an order to make production is premature.

In the first step, the Court uses standard submissions to assess whether it appears the defendant has met the required threshold burden of showing, *prima facie*, the relevance, admissibility and specificity of materials sought. United States v. Nixon, 418 U.S. 683, 699 (1974). Then, if and when that initial, limited burden is found to be discharged, the court moves

to the second phase of reviewing the documents *in camera* to determine whether, in fact, the documents actually are relevant and should be produced. E.g., United States v. Arditti, 955 F.2d 331, 347-48 & n.9 (5th Cir. 1992) (Goldberg, J., concurring) (collecting cases); United States v. Cuthbertson, 651 F.2d 189, 195 (3d Cir. 1981) (district court may not release documents sought by subpoena unless determination of admissibility is met); United States v. Segal, 276 F. Supp. 2d 896, 901 (N.D. Ill. 2003) (same); United States v. Dale, 155 F.R.D. 149 (S.D. Miss. 1994). Such a review is particularly important when a person's privacy rights are implicated. Dale, 155 F.R.D at 151-52 (holding that subpoena calling for a personnel file implicates privacy rights and determination of relevancy should be made through *in camera* review).

From the June 14th Order, it appears the Court has determined that Smith made a threshold showing on all but a few of the requested documents. To the extent that may be so, we respectfully, but vigorously, disagree with the determination. Nonetheless, even acknowledging the current state of the decisional record, there remains the need for the Court to review the subpoenaed documents *in camera* before actually ordering production. It is critical for the Court to examine and consider the data at this additional level of scrutiny before making a determination that puts a third-party, including these Non-Parties, to difficult choices of whether and how to pursue and protect the important rights they have at stake here.

The requirement for *in camera* consideration applies to all groups of documents contested on relevance/evidential grounds, although in at least some instances within a generally homogeneous category, the review could occur on a sample basis. The burden ought not be substantial for materials in these Non-Parties' possession, assuming a sampling approach were used in the limited circumstances where volume would otherwise be significant (such as

materials referable individually to each of the more than 230 parish units in the eight county Diocese).<sup>1</sup>

Furthermore, we are prepared to, and we do below, arrange the specified materials in two segments, in the order we suggest the Court perform the review and make its determinations. This approach will allow the Court to focus initially on materials of greatest moment to the Non-Parties in terms of privacy concerns, demonstrable irrelevance, and burden. The remainder of the review will benefit from and be expedited by the framework provided by consideration of the initial segment.

#### A. Segment One

— Item No. 7:<sup>2</sup> Father Wright’s Secret and Confidential Files.<sup>3</sup>

The sole justification Smith has advanced for why he should have access to Father Wright’s file is the possibility that it might contain impeachment materials. Defendants should not, however, have any access, much less on a wholesale basis, to a file that implicates Father Wright’s privacy rights (and the rights of others whose circumstances inherently may be, and in this instance are, reflected in the file) based simply on speculation that the file may contain such materials. We submit that it does not contain any such data. In any event, before this Court makes a determination whether to allow others to have access to the file -- which Smith seeks in gross, and without specifying particular items -- it is incumbent upon the Court to review the file *in camera*. We are confident that that review will demonstrate to the Court’s satisfaction that

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<sup>1</sup> In many instances we are able to give the Court approximations about the quantity of material likely to be involved.

<sup>2</sup> Item numbers correspond to the specifications in the subpoena.

<sup>3</sup> As noted in prior submissions, Father Wright never had a “secret” file, and the “confidential” classification for priest’s files was abandoned in 2002.

there is no proper basis for requiring production of the file. The requested file is only about a one-half inch thick.

— Item No. 11: Unredacted Finance Council Minutes.

Some of the minutes previously produced were redacted because they contain privileged communications regarding matters totally unrelated to the Smith matter. For example, some minutes contain privileged communications relating to handling legal matters involving allegations of sexual abuse. Others include legal advice regarding real estate transactions. The Diocese should, at a minimum, not be forced to reveal ordinary-course, privileged communications of this kind. In the absence of an *in camera* review to help the Court understand that at least certain redactions must be permitted, that is precisely what this Court would be ordering the Diocese to do. That is just not a fair or justifiable result here. There are about 45 pages in this category.

— Item No. 17: Anthony M. Pilla Charitable Trust Account.

These documents are irrelevant, and like a personnel file, they implicate privacy rights. They relate to a personal financial account of Bishop Pilla. Data concerning this account is, and should remain, private information. Neither the Non-Parties nor McDonald & Company (now KeyBanc) should be ordered to produce the documents without an *in camera* review. We have not seen the documents held by KeyBanc, and therefore cannot give an indication of overall quantity from that source, nor are we currently certain of the quantity in the possession of the Diocese. But their nature should make them amenable to review by the Court on a sampling basis.

— Item 8a: “Agreed Upon Procedures” For The Parishes.

Each of the more than 230 parishes is a separate financial unit, and all are separate in that regard from the Diocese. Smith has made no attempt to link parish finances to the alleged

schemes in which he participated at the Diocese, nor, we submit, would it be possible to make any such link no matter how hard he were to try. An *in camera* review of these documents is clearly called for prior to ordering such an intrusive, far-flung production. In this instance, the volume of material will (we believe) be very substantial, and the collection process will be both lengthy and burdensome. So we would suggest review of a small sample -- perhaps one such document from each of four parishes. That selection could be expected to come to perhaps 45 pages.

— Item No. 16: IRS Audit Of Catholic Universe Bulletin.

According to Smith, these documents should be produced because they would reveal that the Universe Bulletin consistently failed to report to the Internal Revenue Service additional income it paid to individuals. That is false. The audit report bears not at all on that subject. An *in camera* review will reveal the audit documents for what they really are, not what Smith has represented them to be, and will show their utter lack of relationship to the subject matter of this prosecution. This item will consist of some 15 pages.

## **B. Segment Two**

The subject matter of the remaining documents has, in some instances, already received treatment to varying levels of specificity in the press. But just because Smith has chosen to prompt public discussion with information he possessed by virtue of his previous high level position of trust and confidence with the Diocese, he should not be able to force delivery of actual documentation on these matters, without a proper *in camera* review to determine whether they meet the applicable test.

The items within this category include:

— Item No. 1: Maria Milos Loan  
(Approximately 90 pages)

- Item No. 2: Documents Relating To CCA's Payments To Basilica Memorial Products  
(Approximately 130 pages )
- Item No. 3: Documents Relating To Checks Issued To Provident Bank, Sue Gagen, Colleen Gallagher, Andrej Lah and Robert Winnicki  
(Approximately 25 pages)
- Item No. 4: Item No. 4: Documents Relating To Checks Issued To Race Track Chaplaincy of America, Ford Credit, Catholic Diocese of Cleveland and Provident Bank.  
(Approximately 15 pages)
- Item No. 5: Documents Relating To Payments To Renee Bals  
(Approximately 40 pages)
- Item No. 6: Documents Relating To Checks Issued To Orion Consulting, Stephen T. Keefe, and Wright Landscaping  
(Approximately 65 pages)
- Item No. 8b: Management Letters Issued By Independent Public Accountants For CDC And Its Constituent Organizations For The Period 1994 To The Present  
(Approximate number of pages not yet determined)
- Item No. 9: Documents Relating to The Office Of Catholic Education's Account With Merrill Lynch, Account No. 64604461  
(Approximately 30 pages within possession of Office of Catholic Education; number of pages within possession of Merrill Lynch unknown, but the material should be amenable to review on a sampling basis.)
- Item No. 10: Documents Relating To Efforts To Eliminate Off-Book Accounts  
(Approximate number of pages not yet determined)
- Item No. 12: Documents Relating To Payments to Tony Lang Consultants  
(Approximately 35 pages)
- Item No. 14a: CCA Board Minutes from 1997 Through 2000  
(Approximately 65 pages)
- Item No. 18: Documents Relating To CDC Payments to Ivanhoe Furniture, Cash and Bishop Pilla  
(Approximately 85 pages)
- Item No. 20: Documents Relating To Compensation Of John Maimone and Brother Patrick Shea  
(Approximately 40 pages)

- Item No. 21: Form 1099s Issued to Kevin Burke and Gerald Arnold Relating To Director’s Fees For Ninth Street Plaza.  
(4 pages)

**II. THE DIOCESE’S SUBMISSION OF THE INSURANCE CLAIM DID NOT WAIVE ITS ATTORNEY CLIENT PRIVILEGE OR WORK PRODUCT PROTECTION.**

Item 19a-c of the subpoena called, in essence, for reports of interviews conducted and written statements obtained by the Diocese or its agents in what Smith calls the “CDC Internal Investigation”. These types of materials are quintessentially privileged and/or work product-protected.<sup>4</sup> The Court ruled that that protection had been waived because the Diocese submitted a claim package to its fidelity insurance carrier seeking reimbursement for Smith’s defalcations, and later delivered a copy of that claim package to the government and the defense. The Court apparently concluded that the claim materials were privileged, and so when they were given to the parties in this case, there was a waiver of some sort, and that waiver would extend to reports of interviews that underlay those claim materials.

The basic conclusion concerning the claim materials reflects a critical factual misunderstanding by the Court. That misapprehension appears to have been fostered largely by repeated misdescriptions in Smith’s papers, where he talks of internal investigation “reports” and “materials” as having been, in turn, delivered to the insurance carrier, as if there were pre-existing documents intended to be privileged but subsequently delivered outside the privileged group – that is, to the carrier. That description is entirely incorrect. The insurance claim package, including component items, was specifically prepared and assembled for submission to the insurance company. By its very nature, it was not created as, or with the intent that it would be, privileged; the insurance company is itself a third party in this instance, and so a submission

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<sup>4</sup> An additional segment of this item, No. 19d, calls for correspondence with the government. This material is not privileged and will be produced.



made for and delivered to it does not receive protection in the first place. Accordingly, there was no privilege protection, either intended or actual, for the claim package from the outset of its creation; no basis in privilege to withhold it later from the government or the defense; and no privilege in existence to waive when it was turned over, either originally to the carrier or later to the parties to this proceeding. Seen in this clarified factual light, the predicate of “waiver” for the Court’s ruling on the interview materials does not exist.

In this regard, an insurance claim of this sort is much like a civil complaint, a statement of claim in arbitration, a pre-litigation demand letter, or numerous other pleading- or claim-type documents. Each such item is normally preceded by (and at least in the case of a federal complaint, *required* to be preceded by) due diligence inquiry into the existence of, basis for, and strength of a potential claim. That inquiry necessarily involves privileged communications and development of work product (generally including interviews, frequently several of them), for which protection would justifiably be expected by the inquiring party, on an ongoing basis. On the other hand, the complaint, statement of claim, demand letter, etc., while surely based on the protected diligence work, would be prepared for the specific purpose of unprotected delivery to others and would not itself bear any privilege.<sup>5</sup> Yet no one would legitimately suggest, and it is manifestly not the law, that the simple delivery of these made-for-publication documents somehow work a waiver of privilege, thus opening to examination underlying interview reports

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<sup>5</sup> Smith cites an analysis by Ernst & Young that was a part of the insurance claim, and a separate analysis by Howard, Wershale & Co. that was a claim addendum. But what Smith does not say is that, as reflected in the E&Y letter delivering its report, the report was prepared specifically for use in the insurance claim -- that is, the report itself was not privileged from the beginning. Similarly, the addendum addressed a discrete subject that became an issue in the claim process and was intended by the Diocese not to be privileged but rather for publication to the carrier, and therefore bore no intended or actual privilege at any time.

To assist the Court in understanding the true nature of the original claim submission, we suggest that the Court consider reviewing it. To that end, we will make a copy available to the Court.

always intended for protection. Interview reports (and other items that are part of the supporting diligence work undertaken by counsel and counsel's agents) remain privileged. See, e.g., Zenith Radio Corp. v. United States, 764 F.2d 1577, 1580 (Fed. Cir. 1985) (party does not waive privilege simply by bringing suit); In re Woolworth Corp. Securities Class Action Litig., Case No. 94 Civ. 2217 (RO), 1996 U.S. Dist. LEXIS 7773 (S.D.N.Y. June 7, 1996), at \*6 (publication or delivery of a non-privileged report that is based on privileged communications does not waive the privilege for underlying privileged communications).

Just as with civil complaints and analogous types of claim documents, the Diocese's preparation of a non-privileged claim document for, and its delivery to, an insurance company, does not waive any privilege applicable to underlying investigatory materials developed and considered when preparing the claim document. That course of conduct most assuredly does not waive a privilege for reports of investigative interviews themselves created explicitly to be privileged and never delivered to any outside party -- including the fidelity carrier itself. Any different ruling would mean that any submission of a claim to an insurance company (or via complaint in court, or in arbitration) would *ipso facto* work a waiver of privilege and work product protection for the subject matter of the claim. There is simply no law saying any such thing.

The principal case upon which the Court relied, In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002), involved a wholly different circumstance. Smith's false characterizations of what happened here seeks to mimic that circumstance, but the facts are otherwise. In that case, the documents whose delivery to the government were held to work a waiver had been specifically prepared to be privileged documents in the first place, for internal use and not to be delivered outside the company; they were indeed consciously

privileged documents. Later the company determined, despite the privileged character of the pre-existing documents, to deliver them to the government, and yet continue to wall them off from others as retaining their privileged status. The Sixth Circuit held that it could not do so; rather, said the court, delivering documents originally made and maintained as privileged, to those outside the protected circle, worked a waiver. The court did not hold that submission of *non-privileged* documents to the government (or elsewhere outside the circle) would or could work a privilege waiver. That, however, is exactly the result of this Court's June 14 Order, and there is simply no basis in law for that result.<sup>6</sup>

### CONCLUSION

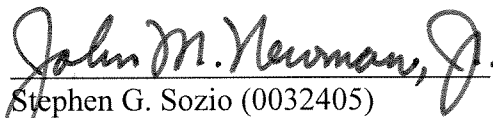
In summary, these Non-Parties urge the Court to reconsider its June 14 Order, withdraw the order for production, and instead, enter an order providing:

1. For an *in camera* review of the items as to which privilege and work product are not claimed, based upon which the Court will then enter an order as to whether and if so to what extent production will be required;
2. That the materials described in specification 19(a) – (c) of the subpoena, for which privilege and work product protection are claimed, need not be produced.

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<sup>6</sup> Smith also relies on In re OM Securities Litig., 226 F.R.D. 579 (N.D. Ohio 2005). There too, however, originally privileged documents were revealed to persons found to be outside the privilege umbrella. As explained above, that is not this case.

Respectfully Submitted,



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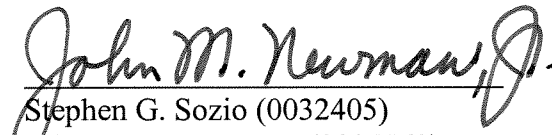
Bishop Anthony M. Pilla,

Catholic Cemeteries Association,

And Catholic Universe Bulletin

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2007, a copy of the foregoing Motion for Reconsideration of the Court's June 14, 2007 Order Regarding Subpoenas for Production of Documents 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. Parties may access this filing through the Court's system.



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