

HONORABLE LONNIE R. SUKO

HOWARD F. DELANEY
City Attorney
ROCCO N. TREPPIEDI
ELLEN M. O'HARA
SALVATORE J. FAGGIANO
Assistant City Attorneys
OFFICE OF THE CITY ATTORNEY
808 W. Spokane Falls Blvd.
SPOKANE, WA 99201-3326
Telephone: (509)625-6225
Fax:(509)625-6277

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTATE OF OTTO ZEHM, deceased, and
ANN ZEHM, in her personal capacity and
as representative of the Estate of Otto
Zehm,

Plaintiffs,

v.

CITY OF SPOKANE, JIM NICKS, KARL
THOMPSON, STEVEN BRAUN, ZACK
DAHLE, ERIN RALEIGH, DAN TOROK,
RON VOELLER, JASON UBERAGA, and
THERESA FERGUSON, each in their
personal and representative capacities,

Defendants.

NO. CV-09-80-LRS

DECLARATION OF
ROCCO N. TREPPIEDI REGARDING
UNITED STATES' MOTION TO STAY

I, ROCCO N. TREPPIEDI, declare under penalty of perjury, that the
following is true and correct.

1. I make the following declaration based upon my own personal
knowledge.

DECLARATION OF ROCCO N. TREPPIEDI
RE UNITED STATES' MOTION TO STAY - 1

HOWARD F. DELANEY, City Attorney
OFFICE OF THE CITY ATTORNEY
5th Floor Municipal Building
Spokane, WA 99201-3326
(509) 625-6225
FAX (509) 625-6277

1 2. I am one of the counsel for the defendants in this case.

2 3. If granted, the U.S.A.'s request to stay the entire civil case or, in the
3 alternative, the discovery process until the trial in *U.S. v. Thompson* is completed
4 would be very harmful to all of the defendants in this suit and would negatively
5 impact the ability of defense counsel to properly defend this case. The officers who
6 have been sued (and many others who are simply involved as witnesses) have been
7 bashed in the media for 3-1/2 years. Each of the defendants wants the
8 opportunity to clear his or her name in a court of law. Each is relying on the
9 opportunity to present sworn testimony in the context of all available evidence and
10 the law, as opposed to the way in which the media often runs with stories out of
11 context. Their personal and professional representations are sullied by the
12 plaintiffs (and at times by the U.S.A.) and they have no ability to respond other
13 than through this court.
14

15 4. If the stay is granted, it will literally be at least four years since the
16 event occurred before counsel will have had the opportunity to depose the many
17 percipient witnesses.
18

19 5. Defense counsel are poised to file motions to dismiss most of
20 plaintiffs' claims under state and federal law pursuant to Rule 12. Qualified
21 immunity motions for the police officers will also be filed.
22

23 6. The motion by the U.S.A. is designed solely to protect its own interest,
24 but it would do so with tremendous harm to the rights of all litigants in this civil
25 case.
26
27
28

DECLARATION OF ROCCO N. TREPPIEDI
RE UNITED STATES' MOTION TO STAY - 2

HOWARD F. DELANEY, City Attorney
OFFICE OF THE CITY ATTORNEY
5th Floor Municipal Building
Spokane, WA 99201-3326
(509) 625-6225
FAX (509) 625-6277

1 7. I do not believe that most of the remainder of this declaration would
2 be relevant to a standard motion to stay. However, the U.S.A.'s motion addresses
3 these points, and the defendants would risk the court being misled about the
4 following facts if we did not respond.
5

6 8. I have been a member of the Washington State Bar Association since
7 May, 1979. I am currently employed by the City of Spokane as an Assistant City
8 Attorney. I was an Assistant City Attorney from 1981 until April 2000, at which
9 point I entered private practice with the law firm of Perkins Coie. In 2003, I
10 returned to the City as an Assistant City Attorney.
11

12 9. I have had various assignments and responsibilities for the City over
13 the years. I have been the legal advisor to the Spokane Police Department for
14 many years, which has included defending the City, the police department, and
15 police officers in a variety of lawsuits in addition to providing in-house legal
16 advice, etc.
17

18 10. As an Assistant City Attorney, I often assisted in evaluating liability
19 and damages aspects of claims. Also, I would on occasion be assigned to defend
20 the City and/or its employees who had been sued in their employment capacity.
21

22 11. In January, 2005, I agreed to temporarily be the Risk Manager for the
23 City of Spokane. In late 2005, I was also assigned as the legal advisor for the
24 police department in addition to being the Risk Manager for the City. In March,
25 2006, I was filling two roles for the City, both as Risk Manager and as an Assistant
26
27
28

1 City Attorney assigned to the police department. The City was in the process of
2 recruiting and hiring a new Risk Manager.

3
4 12. One of the roles of the SPD legal advisor is to, when requested,
5 respond to the scene of "critical incidents" involving the Spokane Police
6 Department, such as officer-involved shootings. The basic role at such times is to
7 advise administrators about personnel laws, answer any legal questions, and
8 assess the situation from various perspectives, including potential liability.
9

10 13. In sum, advice may or may not be given depending upon the
11 situation, but an initial basic assessment about the circumstances is always
12 made, and plans for possible future action are made.
13

14 14. The legal advisor is not a criminal prosecutor or criminal investigator.
15 On occasion, advice about criminal law or criminal procedure may be given, or the
16 officer may be referred to an appropriate prosecutor for the City, County or other
17 agency.
18

19 15. On March 18, 2006, I was asked by Acting Interim Chief Jim Nicks to
20 respond to the scene of what appeared to be an in-custody death involving
21 Spokane police officers. I arrived long after Mr. Zehm had been transported to the
22 hospital. I reported to my client, Chief Nicks. I did not go into the store or into
23 any of the taped off crime scene. I did not interview anyone. The critical incident
24 protocol had already been invoked (the Spokane County Sheriff and the SPD Major
25 Crimes Unit were already on scene and investigating). I then went to the police
26
27
28

1 station to see if there were any legal issues that had arisen there and to make
2 further assessment.

3
4 16. Mr. Zehm died on March 20, 2006.

5 17. The City Attorney's Office was contacted by lawyers from the Center
6 for Justice on behalf of Mr. Zehm's family shortly after Mr. Zehm's death. I was
7 the legal liaison between the Center for Justice and the City. Just as I was
8 assessing potential liability on behalf of the City, the Center for Justice was
9 assessing the situation on behalf of the family with respect to filing a claim for
10 damages against the City and any of its employees, most notably police officers. I
11 worked with two attorneys for the Center, John Sklut and Terri Sloyer, and
12 ultimately worked out an "Agreed Protective Order" in the probate case in Spokane
13 County Superior Court for the estate of Otto Zehm. We agreed to use that order
14 as the most direct device to allow the estate to get access to police reports sooner
15 than they would become available under the public records statutes. Normally,
16 the police investigative report is not released to the public until the County
17 Prosecutor has reviewed the completed investigation. The lawyers for the Zehm
18 estate informed me that they would wait until the end of the investigation before
19 they would file a claim for damages.
20
21
22
23

24 18. Regardless of when they believed they would file a claim, it was clear
25 that they would file a claim. They were expressing their beliefs that the arrest of
26 Mr. Zehm was unlawful, that excessive force had been used, that there was
27
28

1 improper training of police officers, that the police department's policies and
2 procedures were deficient in certain ways, etc.

3
4 19. The City does not, and should not, have to wait for a claim for
5 damages to be filed against it before it can take steps to investigate potential
6 claims. In fact, every one of the City's insurance policies I am aware of requires
7 immediate notification (typically 30 days) of any significant potential liability-
8 creating events. Regardless of whether the City Attorney's Office and/or the Risk
9 Manager believes that the City is or might be liable, we are required to notify the
10 insurance carrier of the event. The City's Claims Adjusting firm would also
11 routinely establish a confidential reserve for anticipated defense expenses and/or
12 potential damages.
13
14

15 20. After the Spokane Police Department had finished its investigation
16 and the City Attorney's Office received a copy of the completed investigative report,
17 the City Attorney's Office began contacting officers regarding the potential claim to
18 be filed by the Zehm estate. On May 31, 2006, Detective Terry Ferguson
19 completed her summary report, and submitted her complete report to the County
20 Prosecutors for review. I forwarded that report and other documents to the Center
21 for Justice on June 5, 2009. On June 7, 2006, the Center for Justice submitted a
22 letter to my office, complaining about, from its perspective, an alleged violation of
23 the Agreed Protective Order that had been filed in the probate. It basically alleged
24 wrongful death and violation of Mr. Zehm's civil rights.
25
26
27
28

DECLARATION OF ROCCO N. TREPPIEDI
RE UNITED STATES' MOTION TO STAY - 6

HOWARD F. DELANEY, City Attorney
OFFICE OF THE CITY ATTORNEY
5th Floor Municipal Building
Spokane, WA 99201-3326
(509) 625-6225
FAX (509) 625-6277

1 21. I analyzed the allegations made by the Center for Justice, and
2 responded as an Assistant City Attorney on behalf of the City by letter dated June
3 21, 2006. (The June 7th and 21st letters were submitted by the U.S.A. in Ct. Doc.
4 No. 59, Exhibits 3 and 4, and are not repeated here.)
5

6 22. The Center for Justice did not file a formal claim for damages under
7 RCW 4.96.020 until July 23, 2007. Nevertheless, it was clear before that time that
8 they would be filing a claim. In fact, they had been engaged in several discussions
9 with the City Attorney in an effort to initiate settlement negotiations.
10

11 23. The City Attorney's Office has the responsibility under the Charter of
12 the City of Spokane to represent the City and its employees with respect to any
13 potential claim for damages, actual claim for damages, or lawsuit. In this case,
14 the City Attorney's Office knew from assertions made both in the media and
15 directly to our office that the estate for Mr. Zehm would be filing suit against the
16 City and a wide range of City employees. However, the identity of those who would
17 actually be sued was not established until the Complaint for damages in this case
18 was filed on March 13, 2009. In the meantime, the Center for Justice had made a
19 wide array of allegations against many unnamed City employees.
20
21

22 24. The basic allegations in the lawsuit are made against the City, its
23 acting chief of police at the time, the lead criminal investigator, and several officers
24 who attempted to detain and maintain the custody of Mr. Zehm.
25

26 25. Before the suit was filed, the City Attorney's Office considered who it
27 would designate as Federal Rule Civil Procedure 30(b)(6) designees for various
28

1 subjects, such as the conduct of the investigation by the police department,
2 training of officers on various subjects, etc. We consulted with several employees
3 in that regard within the attorney-client privilege.
4

5 26. When interviewing employees, either pre or post filing of a lawsuit, we
6 are careful to describe the attorney-client privilege with the employees. This
7 ensures that employees provide full and free information to us as attorneys so that
8 we can properly assess the circumstances and conduct a proper defense, as well
9 as to allow employees to ask any and all relevant questions about any concerns
10 they may have. All of these communications are protected by the attorney-client
11 privilege and the attorney work product doctrine.
12

13
14 27. City employees often receive subpoenas to testify in all kinds of legal
15 proceedings (criminal trials, civil trials, arbitration, administrative hearings, etc.)
16 related to their work. Sometimes, the employee who receives the subpoena is not
17 familiar with the legal forum, the process, etc., and they seek legal advice. The
18 City Attorney's Office is the designated lawyer for providing advice and assistance
19 to those employees. The general advice given is to explain the nature of the
20 proceeding, the basic procedural rules, explain direct examination and cross
21 examination, etc. I always remind a witness that their main responsibility is to
22 listen to each question, be sure to understand it, and answer it truthfully.
23
24

25 28. The City Attorney's Office has met with many City employees since
26 March 18, 2006 about the allegations made by the Center for Justice regarding
27
28

1 the anticipated civil claim and ultimately this lawsuit. For approximately three
2 years we did not know exactly who would be sued.

3
4 29. Based on the allegations we received over time, the plaintiffs could
5 have named any number of people as defendants from the following categories:
6 the Mayor; SPD Chief administrative officers; every supervisory SPD officer
7 involved in the investigation or who was involved in the March 18, 2006 events;
8 SPD trainers; any officer who investigated the events; any officer who responded to
9 the March 18, 2006 incident; and any firefighter who responded and attempted to
10 treat Mr. Zehm. The Center for Justice even discussed suing the dispatchers (9-1-
11 1, police and/or fire department operators). This list is not exhaustive, but we had
12 to review the circumstances for all of them. When we met with them it was within
13 the attorney-client privilege. It also helps the lawyers develop a better
14 understanding of the facts and circumstances, and constitutes attorney work
15 product.
16
17

18
19 30. I don't know exactly when the DOJ began its initial review of the
20 Zehm incident. Regardless of the actual date, the DOJ review is completely
21 independent of the City Attorney's review, the SPD's review, the Center for
22 Justice's review, and anyone else's. (For example, "Investigative reporters" from
23 the news media may conduct some form of investigation.)
24

25 31. The mere fact that the DOJ is investigating something does not mean
26 that the DOJ has exclusive jurisdiction over everything and everyone. On
27
28

1 occasion, the DOJ may want to talk to someone at or about the same time the
2 media, or the Center for Justice, or the City wants to.

3
4 32. The City and the SPD are not adverse to the scrutiny of the DOJ and
5 the grand jury process. The DOJ has made many requests for access to or copies
6 of many documents and items. The City and the SPD have always tried to comply
7 timely and thoroughly. The City Attorney's Office, the Mayor's Office, and the
8 Police Chief's Office have all made it clear to any City employee who receives a
9 request from the DOJ to respond promptly and thoroughly. To my knowledge, the
10 only documents that have ever been withheld are privileged communications
11 involving the attorney-client privilege (or some other legal privilege), and the DOJ
12 was so informed.
13
14

15 33. On occasion, there has been a delay in responding to a DOJ request.
16 Delays and any other practical problems that arise have always been resolved by
17 contacting the U.S. Attorney's Office.
18

19 34. I am not aware of any effort by anyone to intentionally delay or
20 withhold any documents or information in response to any request from the DOJ.
21 I am aware of questions from people who have received requests from the DOJ
22 such as, "What possible connection could this information have to the Otto Zehm
23 incident?" and "Are they serious? Do they know how long this will take?" Each
24 time such questions have been brought to the City Attorney's Office we have
25 advised that, regardless of whether we think anything is relevant, please comply
26 with the request. On occasion, we have contacted the U.S. Attorney's Office to
27
28

1 clarify a request because of the over-breadth or vagueness of the original request.

2 We have always managed to work out any such concerns.

3
4 35. There is no "gag order" to prevent anyone from the SPD (or any other
5 City department) from talking to an attorney in the City Attorney's Office about the
6 DOJ investigation. AUSA Durkin has insisted that the Police Chief's Office has, in
7 fact, issued such an order. Further, he has attempted to define the order
8 according to his needs and demands. That led to a significant discussion with Mr.
9 Durkin about RPC 4.2 and the fact that the DOJ cannot tell a witness not to talk
10 to his or her lawyer.
11

12
13 36. The first time I heard about any possibility of such a "gag order" was
14 after I had set up a meeting with an officer to discuss the claim for damages, and
15 when the officer contacted me a few days later he indicated that he could not talk
16 to me because of an order from the Chief's Office. I called Assistant Chief Nicks,
17 who explained that the order the officer referenced did not apply to the City
18 Attorney's Office. He told me the officer received a subpoena and he instructed the
19 officer not to tell anyone about it. However, Chief Nicks said that obviously did
20 not apply to the lawyers. In fact, officers who have received subpoenas have been
21 directed by the Chief's Office to contact the City Attorney's Office. Nevertheless,
22 AUSA Durkin has insisted that any such contact is a direct violation of the Chief's
23 order. The position taken by the U.S. Attorney's Office on the "gag order" is simply
24 incorrect.
25
26
27
28

1 37. The City Attorney's Office also had significant concerns about
2 information we had received that the U.S. Attorneys were asking some City
3 witnesses about their conversations with their attorney(s). I discussed these
4 concerns at length with AUSA Durkin. I discussed a case that had recently been
5 published, *U.S. v. Stein*, from the Second Circuit that excoriated the DOJ over its
6 practice of seeking to invade the attorney-client privilege and attorney work
7 product doctrine. I brought the so-called "Filip" memo to his attention, and the
8 fact that the DOJ's new policies instructed its lawyers not to question witnesses
9 about those topics. (A copy of the "Filip Memo" is attached hereto as Exhibit 1.)
10
11

12 38. The Center for Justice attempted to negotiate a financial settlement
13 even before they filed the first claim for damages. In discussions with the City
14 Attorney's Office, the lead counsel for the Center for Justice, Breean Beggs,
15 intimated more than once that he could get the FBI to drop the federal
16 investigation if the City settled their claims. Even as late as approximately
17 December, 2008, Mr. Beggs informed the City Attorney's Office that he knew that
18 the U.S. Attorney's Office was about to announce an indictment against Officer
19 Thompson, and that Officer Thompson was ready to plead guilty to some criminal
20 charge, but that he could prevent that from happening because the DOJ would
21 drop the investigation upon his word.
22
23
24

25 39. One of the people I needed to talk to during the course of investigating
26 the claim and preparing the answer to the lawsuit is Mr. Bob Bragg, the defensive
27 tactics instructor for the Washington State Criminal Justice Training Commission.
28

1 I spoke to Mr. Bragg with respect to factual information I needed to confirm about
2 the Commission's training standards and his direct training of SPD officers as of
3 March, 2006. During the course of my conversation with him, he informed me
4 that he had been hired by Mr. Durkin's office to provide some sort of expert
5 opinion. I told him I did not want to go into those topics and that we should not
6 discuss the matter any further until we had the opportunity to clarify his role and
7 our ability to confer with him with Mr. Durkin. Mr. Bragg informed me that he
8 would be in the Spokane area within the next two weeks and, depending on what
9 was worked out with Mr. Durkin, we could perhaps meet then.
10
11

12 40. I left a voicemail with Mr. Durkin asking him to call me. When I
13 conferred with AUSA Durkin by telephone about this issue, he had already leaped
14 to the conclusion that any contact with Mr. Bragg was inappropriate because Mr.
15 Bragg was their "expert witness" and I should have known that. The simple fact is
16 I did not know that until Mr. Bragg told me so.
17
18

19 41. AUSA Durkin insisted that the City Attorney's Office does not have
20 the authority to talk to Mr. Bragg as a fact witness because Mr. Bragg could not
21 possibly be a "percipient witness." AUSA Durkin does not believe that Mr. Bragg
22 can be a fact witness if he is his expert witness. AUSA Durkin then sent a series
23 of emails to my office. I reviewed those emails with Mr. Delaney and other
24 attorneys within the City Attorney's Office. We concluded that AUSA Durkin's
25 conclusion was incorrect, but that there was no longer any sense in debating the
26 issue with the U.S. Attorney's Office. Instead, it was an issue that we would take
27
28

1 up with the court at an appropriate time. We ^{figured} believed that might be during the
2 formal discovery process when we would issue a subpoena to Mr. Bragg and either
3 face a motion to quash or have to file a motion to compel and note a motion before
4 the court. I do not believe this dispute regarding Mr. Bragg's availability as a fact
5 witness in the civil case as opposed to being an expert witness in the criminal case
6 is relevant to the motion to stay.
7

8
9 42. The U.S.A.'s motion discusses the expert services provided by Mr.
10 Grant Fredericks, an audio visual technical expert. The U.S.A.'s motion seems to
11 argue that I had some direct involvement in securing Mr. Fredericks and directing
12 his activity as an expert for the SPD. The U.S.A.'s arguments are incorrect. Please
13 see the declaration of Detective Ferguson regarding the hiring of Mr. Fredericks
14 and the nature of his work in the summer of 2006. My only involvement with Mr.
15 Fredericks was to approve payment for his services after they were completed
16 through the Risk Management fund simply because neither the County Prosecutor
17 nor the SPD had a budget for his services.
18

19
20 43. Mr. Fredericks did provide the City Attorney's Office with a series of
21 still photographs that he apparently produced for the DOJ. The photographs were
22 unsolicited. He informed the DOJ that he was providing those photographs to me
23 at the time my office received them. The photographs are merely still pictures
24 produced from the security video at the ZipTrip store. There is no report or work
25 product associated with the photographs. My understanding is that these
26
27
28

1 photographs are simply created with software that takes the moving image from
2 the security video and creates still images.

3
4 44. My office recently contacted Mr. Fredericks to talk to him about the
5 report he prepared for the SPD in the summer of 2006. Mr. Fredericks indicated
6 we would need to talk to AUSA Durkin. AUSA Durkin refused to provide access to
7 Mr. Fredericks about the report he produced for the City and County in 2006.

8
9 45. In the fall of 2008, I conferred with City Attorney Howard Delaney and
10 other lawyers in the office to consider hiring special counsel to work with our office
11 to represent the City and its employees in the claim filed by the estate of Otto
12 Zehm. We unanimously concluded that Mr. Carl Oreskovich would be of
13 assistance. After we conferred with Mr. Oreskovich and he agreed to be of service,
14 the City Council adopted a resolution authorizing the expenditure of funds. The
15 resolution clearly authorizes Mr. Oreskovich to work with our office to represent
16 the City and the officers. See Exhibit 2 attached hereto. The City Attorney has
17 the authority and responsibility to determine how attorney resources are allocated.
18
19 When the lawsuit was filed in March, 2009, defense counsel discussed the nature
20 of who would represent whom. Mr. Oreskovich is still authorized to represent all
21 defendants under the resolutions passed by the City Council; at this point, he is
22 only representing Officer Thompson.

23
24
25 46. In May, 2009 the City Council adopted a supplemental resolution
26 which authorized additional payments for Mr. Oreskovich and his firm. See
27 Exhibit 3 attached hereto.
28

1 47. The City's retention of Mr. Oreskovich is limited to this civil case. The
2 City does not pay for any of his work on behalf of Karl Thompson in the criminal
3 case. Mr. Oreskovich has informed our office that, under the terms of a discovery
4 letter he received from the U.S. Attorney's Office in the criminal case, he cannot
5 disclose the discovery he receives to our office. He has not violated those
6 restrictions.
7

8
9 DATED this 22nd day of September, 2009.

10 s/ROCCO N. TREPPIEDI, WSBA #9137
11 Assistant City Attorney
12 Attorneys for City Defendants
13 Office of the City Attorney
14 808 W. Spokane Falls Blvd.
15 Spokane, WA 99201-3326
16 Telephone: (509) 625-6225
17 Fax: (509) 625-6277
18 Email: rtreppiedi@spokanecity.org
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2009, I electronically filed the foregoing "Declaration of Rocco N. Treppiedi Regarding United States' Motion to Stay" with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Brean L. Beggs
breean@cforjustice.org
Jeffrey Finer
jfiner@cforjustice.org
Center for Justice
35 West Main, Suite 300
Spokane, WA 99201
Attorneys for Plaintiffs

Carl J. Oreskovich
carl@ettermcmahon.com
Etter, McMahon, Lamberson, Clary & Oreskovich, P.C.
Bank of Whitman, Suite 210
618 West Riverside Avenue
Spokane, WA 99201
Attorneys for Karl Thompson

Timothy M. Durkin
Tim.Durkin@USDOJ.gov
Assistant United States Attorney
Eastern District of Washington
Post Office Box 1494
Spokane, WA 99210-1494
Attorneys for United States

s/Doris Stragier
Doris Stragier
Office of the City Attorney
808 W. Spokane Falls Blvd.
5th Floor, Municipal Building
Spokane, WA 99201-3326

EXHIBIT 1



Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines

**New York, NY
Thursday, August 28, 2008**

Good morning. I am here today to announce that the Department of Justice has made significant revisions to its policy for the investigation and prosecution of corporate crimes. The new policy addresses issues that have been of great interest to prosecutors and corporations alike, particularly in the area of cooperation between business organizations and the government.

Let me please begin with some background. For many years now, federal prosecutors have been guided by Department of Justice policy that governs how they investigate, charge, and prosecute corporate crimes. These matters are critical to the public interest, and they are a high priority for the Department. Through our investigation of corporate crime – and, where appropriate, our prosecution of corporate crime – the Department strives to protect the integrity of our Nation's free markets, and to safeguard investors, employees, and the general public from the potentially devastating effects of corporate wrongdoing. In this respect, the Department shares a common cause with responsible corporate leaders: we are both committed to promoting the public's trust and security in our capital markets. We are also committed to ensuring that corporations and corporate leaders who abide by the law are not disadvantaged in the marketplace at the expense of companies and corporate leaders who are prepared to profit by breaking the law.

In the investigation of corporate wrongdoing, the government often has an important ally: the corporation itself. In many cases, corporations are uniquely suited to identify relevant personnel and evidence, to provide relevant business records, and to convey pertinent information to the government. Moreover, corporations can often do this expeditiously, which means the government, with the corporation's help, can locate assets that would otherwise have disappeared, or arrest wrongdoers who would otherwise have fled, or restore money to victims who would otherwise have received nothing.

For all of these reasons, it has long been the Department's policy to give credit to a corporation in exchange for its cooperation. But the question of what exactly a corporation must do to earn such credit has been the subject of much attention and criticism in recent years. In particular, many in the legal community have argued that prosecutors have unfairly demanded that corporations produce privileged materials or waive attorney-client or work-product protections as a precondition for receiving cooperation credit. Others have expressed concern that the Department could unfairly withhold such credit from a corporation that advanced attorneys' fees to its employees, or failed to sanction culpable employees, or entered into joint defense agreements.

In response to these concerns, I had the privilege of engaging in thoughtful and extended discussions with members of Congress and representatives of a diverse array of groups. These groups represented, for example, the criminal defense bar, the civil liberties community, and the business community. In addition, I also had the chance to speak with former Department of Justice officials concerning these issues. The Department is grateful for the willingness of all of these various leaders to share their views.

The Justice Department also conducted our own careful and thorough review of these issues. As part of that effort, various Department prosecutive leaders and I reviewed our policies in this area at length to see if improvements could be made.

The changes to Department policy announced today reflect the insights gleaned from that dialogue, as well as lessons learned from the Department's prosecutions. The Department has been guided in this endeavor by three critical mandates: (1) to enforce the law aggressively; (2) to respect the rights of criminal defendants and others involved in the criminal justice process; and (3) to promote fair outcomes for the American people. We also have acted with the recognition that the attorney-client privilege and work product protection play critical roles in the

American legal system. For example, they promote responsible corporate behavior by encouraging self-regulation and by encouraging corporate efforts to comply on an ongoing basis with complex and often evolving regulatory regimes.

There are several revisions to the Department's corporate charging policy, but I would like please to discuss briefly a few of the principal changes.

First, credit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work product protection, or produced materials protected by attorney-client or work-product protections. It will depend on the disclosure of facts. Corporations that timely disclose relevant facts may receive due credit for cooperation, regardless of whether they waive attorney-client privilege or work product protection in the process. Corporations that do not disclose relevant facts typically may not receive such credit, just like any other defendant.

To put it another way, corporations will receive the same credit for disclosing facts that are contained in unprotected materials as they would for disclosing the identical facts contained in protected materials. The government will assess neither a credit nor a penalty based on whether the disclosed materials are protected by the attorney-client privilege or attorney work product.

Second, prior Department policy allowed federal prosecutors to request, under certain conditions, that a corporation disclose non-factual attorney-client privileged communications and work product, such as legal advice. This is what the old guidelines designated "Category II" information, and it lies at the core of the attorney-client privilege and work product protection. The new policy forbids prosecutors from asking for such information, with only two exceptions, both of which are well-recognized in existing law.

The sort of core attorney-client communications I'm talking about might occur, for example, when a salesperson at a pharmaceutical company asks the general counsel's office whether her marketing practices were lawful under a complicated body of potentially applicable federal law. Permitting and respecting the need for such attorney-client communications is particularly important, because such dialogue is often a necessary, and typically a salutary, part of a company's effort to obey the law on an ongoing basis.

Third, the new policy instructs prosecutors not to consider whether a corporation has advanced attorneys' fees to its employees, officers, or directors when evaluating cooperativeness. Under the earlier guidance, the Department reserved the right to consider such payments negatively in deciding whether to assign cooperation credit to a corporation. That is no longer the case. A corporation's payment of or advancement of attorneys' fees to its employees will be relevant only in the rare situation where it, combined with other circumstances, would rise to the level of criminal obstruction of justice. This of course will generally not be the case.

Fourth, under the new policy, federal prosecutors may not consider whether the corporation has entered into a joint defense agreement in evaluating whether to give the corporation credit for cooperating. There are legitimate reasons why a business would choose to enter, or not enter, that kind of agreement. The government may, of course, ask that a corporation refrain from taking information the government provided it and disclosing that information to third parties. But the mere participation in a joint defense agreement by a corporation will not be taken into account for the purpose of evaluating cooperation.

Fifth, prior guidance allowed prosecutors to consider whether a corporation disciplined or terminated employees for the purpose of evaluating cooperation. That is now disallowed. Prosecutors may only consider whether a corporation has disciplined employees that the corporation identifies as culpable, and only for the purpose of evaluating the corporation's remedial measures or compliance program.

Before concluding, let me please stress one additional point that may have been lost in the past concerning these issues, and that our new policy now makes very clear. No corporation is obligated to cooperate or to seek cooperation credit by disclosing information to the government. Refusal by a corporation to cooperate, just like refusal by an individual to cooperate, is not evidence of guilt. Put differently, if a business decides not to cooperate, that does not, in itself, support or require the filing of charges in any way. It simply means that the corporation will not be entitled to mitigating credit for cooperation, which might well be germane when a corporation otherwise could be properly prosecuted. This is a very basic point, but it's a critical one, as it flows from the presumption of innocence that underlays our entire criminal justice system.

Today's announcement, and the policy that we are now implementing, reflect the Department's firm commitment to two goals that I believe we all share: safeguarding the attorney-client privilege, which is so central to our criminal

Exhibit 1

justice system, and preserving the Department's ability to investigate corporate wrongdoing effectively, which benefits corporations and members of the public alike.

As an important element of that commitment, the revised principles will be set forth for the first time not as a memo, but in the United States Attorneys' Manual. They will be binding on all federal prosecutors within the Department of Justice, effective immediately.

I would like please to make one final point. This kind of general policy guidance is important. So is thorough training and supervision, which the Department will provide to ensure compliance with these revised principles. But there is no substitute for the application of considered judgment by line prosecutors and United States Attorneys around the country, and by their colleagues at the Department's headquarters.

The dedicated prosecutors of the Department of Justice have done an outstanding job of this in the past, and I have every confidence and expectation that they will continue to do so in the future.

Thank you very much, and I will be happy to take a few questions.

Press Release

Corporate Charging Guidelines

###

EXHIBIT 2

Submitting Dept.
 Legal

Contact Person/Phone No.
 Howard F. Delaney, 625-6225

Council

CLERK'S OFFICE
 SPOKANE, WA
 OPR 2008-0941

ADMINISTRATIVE SESSION

- Contract
- Report
- Claims

LEGISLATIVE SESSION

- Emergency Ord
- Resolution
- Final Reading Ord
- First Reading Ord
- Special Consideration
- Hearing

CITY PRIORITY

- Communications
- Economic Development
- Growth Management
- Human Services
- Neighborhoods
- Public Safety
- Quality Service Delivery
- Racial Equity/Cultural Diversity
- Rebuild/Maintain Infrastructure

CLERK'S FILE
 RENEWS
 CROSS REF
 ENG
 BID
 REQUISITION

STANDING COMMITTEES

(Date of Notification)

- Finance
- Neighborhoods
- Planning/Community & Econ Dev

- Public Safety
- Public Works

Neighborhood/Commission/Committee Notified:
 Action Taken:

AGENDA

WORDING:

(If contract, include the term.)

RESOLUTION approving Carl Oreskovich, and the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, as special counsel to the City of Spokane to work with the City Attorney's Office and represent the City of Spokane and its employee(s) in claim filed by the Estate of Otto Zehm and enter into a contract with the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, and that the contract maximum shall not exceed forty-five thousand dollars (\$45,000.00), with additional compensation authority requiring further City Council action.

BACKGROUND:

(Attach additional sheet if necessary)

A claim has been filed by the Estate of Otto Zehm against the City of Spokane. The expertise of independent counsel is sought to assist the City Attorney's Office in analyzing the claim and preparing for any potential litigation. This expenditure is covered by the Risk Management Fund.

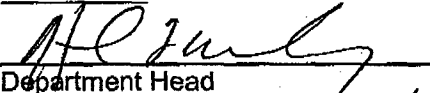
RECOMMENDATION:

Fiscal Impact: <input type="checkbox"/> N/A	Budget Account: <input type="checkbox"/> N/A
<input type="checkbox"/> Expenditure: \$45,000	#5800-78100-14780-54601
<input type="checkbox"/> Revenue: \$	#
<input type="checkbox"/> Budget Neutral	

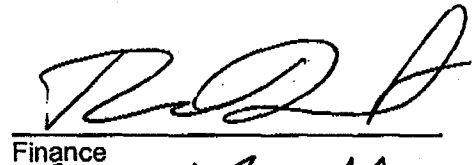
ATTACHMENTS: Include in Packets: Resolution.

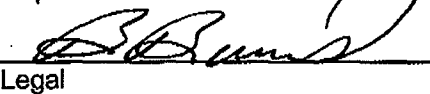
On file for Review in Office of City Clerk:

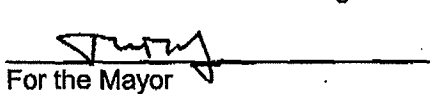
SIGNATURES:


 Department Head


 Division Director Risk Manager


 Finance


 Legal


 For the Mayor


 Council President

DISTRIBUTION:

Howard F. Delaney, Legal
 Legal, gcrockett
 Contract Acctg - msimon

Etter, McMahon, Lamberson,
 Clary, Troppmann &
 Oreskovich, PC

Pam Schroeder, Risk Manager

COUNCIL ACTION:

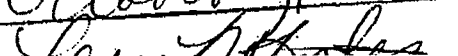
ADOPTED BY
 SPOKANE CITY COUNCIL:
 October 20, 2008


Exhibit 2

Declaration of R. Treppiedi Re United States' Motion to Stay - Page 21

2008-0096

RESOLUTION NO. 2008- 0096

A resolution approving Carl J. Oreskovich, and the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, as special counsel to represent City of Spokane employee(s) in the claim filed by the Estate of Otto Zehm.

WHEREAS, pursuant to Section 33 of the City Charter, the Mayor, upon approval of the City Council, at any time, may employ other or special counsel to take charge of special matters or to assist the City Attorney; and

WHEREAS, the City and City employees were involved in an incident in which the Estate for Otto Zehm has filed a claim for damages against the City; and

WHEREAS, the City Attorney's Office is representing the City of Spokane and its employees; and

WHEREAS, there are issues for which the expertise of private counsel will assist the City Attorney's Office;

NOW, THEREFORE, BE IT RESOLVED by the City Council for the City of Spokane that the Mayor's selection of Carl J. Oreskovich, and the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, be appointed as special counsel to assist in the representation of the City of Spokane and its employee(s) in the claim filed by the Estate of Otto Zehm and to work with the City Attorney's Office in handling the claim and any potential litigation;

BE IT FURTHER RESOLVED, that city staff is authorized to enter into a contract with the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, and that the contract maximum shall not exceed forty-five thousand dollars (\$45,000.00), with additional compensation authority requiring further City Council action.

ADOPTED BY THE CITY COUNCIL ON October 20, 2008.



City Clerk

Approved as to form:



Assistant City Attorney



Exhibit 2
Declaration of R. Treppiedi Re United
States' Motion to Stay - Page 22

cc
05.29.2009

RE

AGENDA SHEET FOR COUNCIL MEETING OF: May 26, 2009

EXHIBIT 3

MAY 17 2009
CITY CLERK'S OFFICE
COUNCIL SPONSOR
SPOKANE, WA



Submitting Dept.
Legal

Contact Person/Phone No.
Howard F. Delaney, 625-6225

ADMINISTRATIVE SESSION

- Contract
- Report
- Claims

LEGISLATIVE SESSION

- Emergency Ord
- Resolution
- Final Reading Ord
- First Reading Ord
- Special Consideration
- Hearing

CITY PRIORITY

- Communications
- Economic Development
- Growth Management
- Human Services
- Neighborhoods
- Public Safety
- Quality Service Delivery
- Racial Equity/Cultural Diversity
- Rebuild/Maintain Infrastructure

CLERK'S FILE

OPR 08-941

RENEWS

CROSS REF

ENG

BID

REQUISITION

Neighborhood/Commission/Committee Notified:

Action Taken:

STANDING COMMITTEES

(Date of Notification)

- Finance
- Neighborhoods
- Planning/Community & Econ Dev

- Public Safety
- Public Works

AGENDA

WORDING:

(If contract, include the term.)

RESOLUTION authorizing additional compensation authority for Carl Oreskovich, and the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, as special counsel to the City of Spokane to work with the City Attorney's Office and represent the City of Spokane and its employee(s) in the claim and lawsuit filed by the Estate of Otto Zehm and, revise the contract maximum from forty-five thousand dollars (\$45,000.00) to \$200,000, with additional compensation authority requiring further City Council action.

BACKGROUND:

(Attach additional sheet if necessary)

A lawsuit has been filed by the Estate of Otto Zehm against the City of Spokane and nine employees. The Council previously adopted Resolution 08-96 which approved the firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, to assist and represent the City and its employees. The maximum expenditure authorized therein was \$45,000. The claim did not settle and extensive litigation is underway. Additional work will now be undertaken by the firm as co-counsel with the City Attorney's Office. This expenditure is covered by the Risk Management Fund.

RECOMMENDATION: Approve
ADOPT

Fiscal Impact: <input type="radio"/> N/A	Budget Account: <input type="radio"/> N/A
<input type="radio"/> Expenditure: \$155,000	#5800-78100-14780-54601
<input type="radio"/> Revenue: \$	#
<input type="radio"/> Budget Neutral	

ATTACHMENTS: Include in Packets: Resolution.
On file for Review in Office of City Clerk:

SIGNATURES:

Department Head

Division Director Risk Manager

Finance

Legal

For the Mayor

Council President

DISTRIBUTION: Howard F. Delaney, Legal
Legal, Roxanne Imus
Contract Acctg - M. Lesesne

Etter, McMahon, Lamberson,
Clary, Troppmann &
Oreskovich, PC

Pam Schroeder, Risk Manager
Doris Stragler, Legal

COUNCIL ACTION:

ADOPTED BY
SPOKANE CITY COUNCIL:

May 26, 2009

Exhibit 3
Declaration of R. Treppiedi Re United
States' Motion to Stay - Page 23

RES 2009-0041

RESOLUTION NO. 2009- 0041

A resolution extending additional compensation to Carl J. Oreskovich, and the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, as special counsel to represent the City of Spokane and its employee(s) in the lawsuit filed by the Estate of Otto Zehm.

WHEREAS, pursuant to Section 33 of the City Charter, the Mayor, upon approval of the City Council, at any time, may employ other or special counsel to take charge of special matters or to assist the City Attorney; and

WHEREAS, the City and City employees were involved in an incident in which the Estate for Otto Zehm has filed both a claim for damages and a subsequent lawsuit against the City and nine of its employees; and

WHEREAS, the City Attorney's Office is representing the City of Spokane and its employees; and

WHEREAS, there are issues for which the expertise of private counsel will assist the City Attorney's Office; and

WHEREAS, Carl J. Oreskovich, and the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, were appointed as special counsel to assist in the representation of the City of Spokane and its employee(s) in the claim and lawsuit filed by the Estate of Otto Zehm and to work with the City Attorney's Office, via Resolution No. 08-96;

NOW, THEREFORE, BE IT RESOLVED, that city staff is authorized to amend the contract with the law firm of Etter, McMahon, Lamberson, Clary, Troppmann & Oreskovich, PC, by authorizing additional compensation, and that the contract maximum shall not exceed two hundred thousand dollars (\$200,000), with additional compensation authority requiring further City Council action.

ADOPTED BY THE CITY COUNCIL ON May 26, 2009.

[Signature]
City Clerk

Approved as to form:

[Signature]
Assistant City Attorney

