

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY
LETITIA JAMES, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA, WAYNE LAPIERRE,
WILSON PHILLIPS, JOHN FRAZER, and
JOSHUA POWELL,

Defendants.

Index No. 451625/2020

Hon. Joel M. Cohen

Motion Seq. No. 37

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION,
PURSUANT TO CPLR 3104(d), FOR REVIEW AND REVERSAL OF CERTAIN
RULINGS IN THE SPECIAL MASTER'S ORDER, DATED NOVEMBER 29, 2022**

LETITIA JAMES
Attorney General of the
State of New York
28 Liberty St.
New York, NY 10005

Monica A. Connell
Emily Stern
Steven Shiffman
Stephen Thompson
Assistant Attorneys General

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
BACKGROUND	1
ARGUMENT	2
A. The OAG’s Communications with Law Enforcement Agencies Are Irrelevant and Privileged.....	2
i. The Category 2 Documents Are Irrelevant to Any Remaining Issues in This Action	4
ii. The Category 2 Documents Relate to Ongoing Law Enforcement Activities, Concern Confidential Investigative Activities and Are Privileged.	5
iii. The NRA Did Not, and Cannot, Challenge the Protection for Category 2 Documents That Are Work Product and Trial Preparation Materials	7
B. The NRA Has Failed to Meet Its Burden of Demonstrating that Communications with Relevant Third Parties Are Privileged, and that Privilege Was Not Waived	8
CONCLUSION.....	9

TABLE OF AUTHORITIES**CASES**

<i>Ambac Assurance Corp. v. Countrywide Home Loans, Inc.</i> , 27 N.Y.3d 616 (2016)	7, 9
<i>Bluebird Partners, L.P. v. First Fid. Bank, N.A.</i> , 248 A.D.2d 219 (1st Dep’t 1998)	8
<i>Brady v. Ottoway Newspapers, Inc.</i> , 467 N.Y.S.2d 417 (2d Dep’t 1983), <i>aff’d</i> , 63 N.Y.2d 1031 (1984)	6
<i>Brooklyn Union Gas Co. v. American Home Assur. Co.</i> , 23 A.D.3d 190 (1st Dep’t 2005)	9
<i>Cirale v. 80 Pine St. Corp.</i> , 35 N.Y.2d 113 (1974)	5-6
<i>Colgate Scaffolding & Equipment Corp. v. York Hunter City Servs., Inc.</i> , 787 N.Y.S.2d 305 (1st Dep’t 2005)	5
<i>Comptroller of City of New York v. City of New York</i> , 152 N.Y.S.3d 16 (1st Dep’t 2021)	6
<i>In re World Trade Center Bombing Litig.</i> , 93 N.Y.2d 1 (1999)	5-6
<i>Kindred Healthcare, Inc. v SAI Global Compliance, Inc.</i> , 169 A.D.3d 517 (1st Dep’t 2019)	6, 7
<i>One Beekman Place, Inc. v. City of New York</i> , 564 N.Y.S.2d 169 (1st Dep’t 1991)	5
<i>People v. Richmond Capital Group LLC</i> , 2021 WL 5412143 (N.Y. Sup. Ct. Nov. 19, 2021)	5
<i>People v. Trump Entrepreneur Initiative LLC</i> , 2014 WL 5241483 (Sup. Ct. N.Y. Cty. Oct. 8, 2014), <i>aff’d in relevant part</i> , 137 A.D.3d 409 (1st Dep’t 2014)	4
<i>Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.</i> , 11 N.Y.3d 843 (2008)	2

RULES

CPLR 3104.....	2
----------------	---

Plaintiff, the People of the State of New York (“Plaintiff”), submits this memorandum of law in support of its motion pursuant to CPLR 3104(d) for review and reversal of the Special Master’s order: (i) requiring the production of documents relating to the Office of the Attorney General’s (“OAG”) communications with sister law enforcement agencies and (ii) to the extent it found that certain communications between defendant The National Rifle Association of America (“NRA”) and third parties were protected by the attorney-client privilege.

BACKGROUND

This appeal stems from submissions made by Plaintiff and the NRA to the Hon. O. Peter Sherwood, the Special Master in this action, on October 20, 2022, and his November 29, 2022 decision concerning those submissions (“Decision”).

The NRA sought, in relevant part, an order compelling Plaintiff to supplement its privilege log and/or produce documents that Plaintiff designated as privileged.¹ Ex.² A (NRA 10/20/22 letter); Ex. B (OAG 11/4/22 opposition). The Special Master denied the NRA’s request in substantial part, but held that Plaintiff must produce documents relating to communications with (i) third-party witnesses (Category 1 on Plaintiff’s privilege log; “Category 1 Documents”) and (ii) between the OAG and other law enforcement agencies concerning their respective investigations of the NRA (Category 2 on Plaintiff’s privilege log; “Category 2 Documents”). Ex. F (Decision); *see* Ex. L (Plaintiff’s privilege log). Plaintiff has produced the Category 1 Documents, but, in this appeal, seeks review and reversal of the Special Master’s ruling that the Category 2 Documents must be produced.³

¹ Plaintiff’s certified privilege log was served on or about December 3, 2021. Affirmation of Stephen Thompson, dated December 20, 2022 (“Thompson Aff.”), ¶ 5, submitted herewith.

² References to “Ex. __” are to the exhibits to Thompson Aff.

³ On December 8, 2022, Plaintiff asked the Special Master to reconsider that portion of his Decision relating to the Category 2 Documents and, with his permission, has supplemented the record with respect thereto. Ex. M (OAG

Plaintiff sought, *inter alia*, an order compelling the NRA to produce communications with third parties identified on the NRA's privilege log ("NRA log"). Ex. C (OAG 10/20/22 letter); Ex. D (NRA 11/4/22 opposition); Ex. E (NRA log). In particular, Plaintiff sought production of documents with vendors material to the Complaint's allegations: (i) Aronson LLC and RSM US LLP, the NRA's independent auditors; (ii) Membership Marketing Partners, a marketing/fundraising vendor; (iii) McKenna & Associates, a strategic consultant; and (iv) TBK Strategies, a security services vendor. Ex. C. While the Special Master initially found that "approximately 24 separate documents [involving communications with third parties] ... meet the requirements of CPLR 4503(a)," he ultimately ruled that "the NRA largely failed to meet its burden of demonstrating the communications at issue are protected by either the attorney client privilege or the attorney work product doctrine." Ex. F at 5. Plaintiff seeks review and reversal of the Special Master's ruling to the extent that any of the NRA's communications with third parties were found to be protected by the attorney-client privilege.

ARGUMENT

Pursuant to CPLR 3104(d), the party moving for review of an order by a special master "shall set forth ... the order complained of, the reason it is objectionable, and the relief demanded." *See Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845 (2008) (court has discretion in such a review).

A. The OAG's Communications with Law Enforcement Agencies Are Irrelevant and Privileged

There are three independent reasons why the Special Master's ruling requiring production of the Category 2 Documents should be reversed. First, the documents are irrelevant and merely

Dec. 8, 2022 letter). However, to date, the Special Master has not issued a decision on Plaintiff's request for reconsideration and, because any appeal must be filed by December 20th, Plaintiff is filing this appeal to preserve its rights.

relate to communications between the OAG and the law enforcement agencies with which it cooperated; they do not contain any factual information relating to this case that is not privileged or that has not already been disclosed to Defendants. Second, the ruling that the Category 2 Documents are not protected by the law enforcement, public interest and common interest privileges was based on the incorrect premise that the Attorney General of the District of Columbia (“DCAG”) no longer has an ongoing enforcement matter with respect to the NRA, when, in fact, such a matter is pending. *See* Ex. H (12/5/22 Tr.) at 39-41. Finally, the Category 2 Documents are protected by privileges, including the work-product doctrine and the trial preparation privilege, that the NRA did not challenge.

As New York’s chief law enforcement officer, the Attorney General has an obligation to protect the public interest through, *inter alia*, investigations into suspected violations of state law. Here, the OAG and DCAG were cooperating to further their respective parallel and overlapping investigations, which each office was conducting of the NRA and its affiliates.⁴ As part of that cooperative effort, the OAG and DCAG conducted joint testimonial examinations of various NRA witnesses and both offices had access to documents produced by the NRA and its affiliates. To ensure the confidentiality of their investigations and to enable them to share portions of their work product without jeopardizing confidentiality, the OAG and DCAG entered into a Common Interest Agreement.⁵ Each investigation led to litigation. In addition to this litigation in New York, the DCAG has its own ongoing proceeding against the NRA and one of its affiliates in the District of

⁴ All but approximately 3 of the documents in Category 2 reflect communications with the DCAG. The identity of the other agency and content of the communications were intended to be kept confidential by both the OAG and that agency. If necessary, Plaintiff is prepared to provide those communications to the Court for *in camera* review.

⁵ The Common Interest Agreement is a confidential document. Plaintiff submitted it to the Special Master *in camera* and is prepared to provide it to the Court for *in camera* review.

Columbia. *See District of Columbia v. NRA Foundation Inc.*, 2020 CA 003454 B (D.C. Super. Ct. 2020).

i. The Category 2 Documents Are Irrelevant to Any Remaining Issues in This Action

The names of non-confidential witnesses and all documents provided by non-confidential sources that were exchanged with the DCAG have been disclosed to the defendants. Thompson Aff. ¶ 4. Thus, the only new information that the NRA would learn from the Category 2 Documents is how the NYAG conducted its investigation, a subject that is irrelevant to any remaining issue in this litigation.⁶ In this regard, this Court dismissed the NRA's counterclaims, which challenged how the OAG conducted its investigation, holding that the NRA's allegations "do not support any viable legal claims that the [OAG's] investigation was unconstitutionally retaliatory or selective" or deprived the NRA of any constitutional rights. (NYSCEF 706 at 2, 13.) That ruling is fatal to any affirmative defense that the NRA has asserted relating to the OAG's investigation, such as unclean hands, because such a defense must be premised on a constitutional violation that prevents the defendant from putting on a defense. *See People v. Trump Entrepreneur Initiative LLC*, 2014 WL 5241483, *12 (Sup. Ct. N.Y. Cty. Oct. 8, 2014), *aff'd in relevant part*, 137 A.D.3d 409 (1st Dep't 2014). Although the Special Master recognized that documents that related solely to the NRA's affirmative defenses are irrelevant, he erred by failing to consider the irrelevance of the Category 2 Documents when ordering that they be produced. (Ex. F at 9, 10.)

⁶ Indeed, the NRA admits that it seeks these documents because it wants further insight into the OAG's conduct of its investigation. Ex. G (11/14/22 Tr.) at 100-02.

ii. The Category 2 Documents Relate to Ongoing Law Enforcement Activities, Concern Confidential Investigative Activities and Are Privileged.

Because the law enforcement, public interest, and common interest privileges⁷ were properly asserted with respect to Category 2 Documents, the Special Master's ruling that they must be produced should be reversed.

When the OAG corresponds with other law enforcement agencies in connection with its investigations, those communications are protected by the law enforcement privilege. *See, e.g., Colgate Scaffolding & Equipment Corp. v. York Hunter City Servs., Inc.*, 787 N.Y.S.2d 305, 307 (1st Dep't 2005); *People v. Richmond Capital Group LLC*, 2021 WL 5412143, *2 (N.Y. Sup. Ct. Nov. 19, 2021). In particular, the law enforcement privilege "prevent[s] disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Colgate Scaffolding*, 787 N.Y.S.2d at 307 (citations omitted).

In addition, pursuant to the public interest privilege, the OAG's communications with other law enforcement agencies should be kept confidential to safeguard the OAG's ability to effectively investigate and prosecute violations of law on behalf of the public. New York courts have long recognized that "the public interest is served by keeping certain government documents privileged from disclosure." *One Beekman Place, Inc. v. City of New York*, 564 N.Y.S.2d 169, 170 (1st Dep't 1991). Thus, the public interest privilege attaches to "confidential communications between public

⁷ Contrary to the Special Master's finding, Plaintiff did not waive the common interest privilege in its submissions, but, rather, asserted that it was not necessary to separately analyze the application of that privilege because he had previously ruled on the viability of the law enforcement and public interest privileges – and those rulings were the law of the case. Ex. B at 2-3. In addition, Plaintiff's justifications for the assertion of the common interest privilege were set forth in our letter to the NRA, dated April 27, 2022, which was an exhibit before the Special Master here. (*Id.* at 1; Ex. I.)

officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged.” *In re World Trade Center Bombing Litig.*, 93 N.Y.2d 1, 8 (1999) (citations omitted); *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 117 (1974) (privilege applies “when the public interest would be harmed if the material were to lose its cloak of confidentiality”). Here, the public interest “in enabling the government effectively to conduct sensitive investigations involving matters of demonstrably important public concern” requires that the public interest privilege should apply to protect these communications from disclosure. *Brady v. Ottoway Newspapers, Inc.*, 467 N.Y.S.2d 417, 418 (2d Dep’t 1983), *aff’d*, 63 N.Y.2d 1031 (1984). The NRA has, in its possession, the substantive results of the OAG’s investigative efforts and is not entitled to privileged documents whose sole purpose would be providing the NRA with access to the OAG’s internal investigative decision-making process. *See Comptroller of City of New York v. City of New York*, 152 N.Y.S.3d 16, 20 (1st Dep’t 2021) (“privilege will be applied where the government demonstrates that the public interest in confidentiality outweighs the public interest in disclosure.”).

Finally, the Category 2 Documents are protected by the common interest privilege. *See Kindred Healthcare, Inc. v SAI Global Compliance, Inc.*, 169 A.D.3d 517 (1st Dep’t 2019). The OAG had a common interest with the DCAG in connection with the parallel investigations that each office conducted of the NRA and its affiliates and, in recognition thereof, they entered into an agreement to preserve the confidentiality of communications they exchanged. To protect the confidentiality of its investigation, the DCAG submitted a letter to the Special Master in support of the OAG’s request that the Special Master reconsider his ruling and hold that the Category 2 Documents reflecting communications with it were protected by the law enforcement and common interest privileges. Ex. J. Finally, because litigation was anticipated at the time the OAG and

DCAG shared the communications at issue, and litigation was actually commenced, the NRA's argument that the common interest privilege should not apply is unavailing. *See Kindred Healthcare*, 169 A.D.3d at 517.⁸

iii. The NRA Did Not, and Cannot, Challenge the Protection for Category 2 Documents That Are Work Product and Trial Preparation Materials

The Special Master's ruling requiring the production of the Category 2 Documents should be reversed for the additional reason that those documents were withheld based on privileges that the NRA did not challenge and the Special Master did not analyze. In its October 20, 2022 submission, the NRA only challenged Plaintiff's assertion of the law enforcement, public interest and common interest privileges with respect to the Category 2 Documents. However, the NRA did not challenge Plaintiff's assertion of work-product protection or the trial preparation privilege with respect to the Category 2 Documents and it did not seek production of all Category 2 Documents. *See* Ex. A. Plaintiff asserted both those privileges with respect to the Category 2 Documents on its privilege log. Exs. K, ¶ 5 & L. Indeed, as noted above, a number of investigative witness examinations were conducted jointly by the OAG and DCAG and many of the Category 2 Documents reflect attorney mental impressions shared between the two law enforcement agencies concerning their overlapping investigations. Ex. K, ¶ 7.

The Special Master ordered the production of all Category 2 Documents even though the NRA did not challenge Plaintiff's assertion of the work-product doctrine and trial preparation privilege with respect to those documents, and the Special Master did not analyze the applicability of those privileges. (Ex. F at 9.) Issuing such a broad order on an issue that was not raised by the

⁸ Although the Court of Appeals in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016), referred to the parties sharing a common interest in the same litigation, there is nothing in its analysis that counsels against the privilege being applied in parallel proceedings, rather than in one litigation, particularly where, as here, the parties sharing information are law enforcement agencies that will be asserting any claims they bring in their own jurisdictions.

NRA – and which the Plaintiff was not given the opportunity to address – was erroneous. Accordingly, the Court should hold that all Category 2 Documents that are subject to other, unchallenged privileges, such as the work-product doctrine and trial preparation privileges, should be exempt from production here.⁹

B. The NRA Has Failed to Meet Its Burden of Demonstrating that Communications with Relevant Third Parties Are Privileged, and that Privilege Was Not Waived

Judge Sherwood ruled that the NRA had “largely failed to meet its burden of demonstrating [communications sought by Plaintiff] are protected by either the attorney client privilege or the attorney work product doctrine.” Ex. F at 5. Plaintiff understands that this holding applies to *all* of the withheld communications at issue -- those between the NRA and third parties, and those concerning the NRA’s purported “course correction” and remedial actions. However, in the course of the Special Master’s examination of select communications, which the NRA provided for *in camera* review,¹⁰ Judge Sherwood observed that 24 unidentified documents were protected under CPLR 4503(a). Ex. F at 4-5.¹¹ The Decision does not articulate the basis for that observation. Nor is there any evidence in the record available to Plaintiff establishing that the NRA satisfied its burden of establishing that the communications with third parties identified in its supplemental

⁹ That the OAG shared these documents with the DCAG does not waive work product or trial preparation protection. *See Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 248 A.D.2d 219, 225 (1st Dep’t 1998) (“work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality”). Here, there was no likelihood that the material the DCAG and OAG shared would be revealed to an adversary because the DCAG and OAG not only shared a common interest in their investigations, but also expressly entered into a Common Interest Agreement that required that the materials be kept confidential. Moreover, the Protective Order entered in this case specifically permitted Plaintiff to share confidential information with other law enforcement agencies in connection with an actual or potential law enforcement investigation without prior notice to the producing party. NYSCEF 869, ¶ 5.

¹⁰ The NRA was directed by the Special Master, but did not, as he expressly found, provide a representative sample of the documents at issue for *in camera* review. Ex. F at 4.

¹¹ Plaintiff is not appealing Judge Sherwood’s ruling that the NRA must submit “evidence sufficient to meet [its] burden” with respect to the documents identified by Plaintiff, which Plaintiff understands to encompass the communications with third parties. Ex. F at 5.

privilege log are protected by the attorney-client privilege. There is no evidence that the communications were between counsel and the NRA as a client, and that the documents were for the purpose of seeking or providing legal advice. *Brooklyn Union Gas Co. v. American Home Assur. Co.*, 23 A.D.3d 190, 191 (1st Dep’t 2005) (“[t]he burden of establishing any right to protection [of documents] is on the party asserting it, and the protection claimed must be narrowly construed”).

In any event, even if the documents involve substantive information that would otherwise have been privileged, the attorney-client privilege is waived by sharing the communications with third parties. *Ambac*, 27 N.Y.3d at 624 (“communications made in the presence of third parties ... are not privileged from disclosure because they are not deemed confidential”). Here, the NRA has not argued that it meets any exception to waiver by making a factual showing that the third-party communication was “necessary to enable the attorney-client communication.” *Id.* Thus, the NRA has failed to demonstrate that it has not waived attorney-client privilege over communications with its vendors.

CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that the Court reverse the Special Master’s rulings in his Decision: (i) that the Category 2 Documents are not privileged and must be produced; and (ii) finding that certain communications between the NRA and third parties were protected by the attorney-client privilege.

Dated: December 20, 2022
New York, New York

LETITIA JAMES
*Attorney General
of the State of New York*



Steven Shiffman
Stephen Thompson
Assistant Attorneys General
NYS Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-6355
Steven.Shiffman@ag.ny.gov

EMILY STERN, *Co-chief of the Enforcement Section, Charities Bureau*
MONICA CONNELL, *Assistant Attorney General*

Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Steven Shiffman, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law complies with the word count limit set forth in the Order for Appointment of a Master for Discovery, dated February 7, 2022, because it contains fewer than 3,000 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court ([22 NYCRR 202.70\(g\)](#)). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: December 20, 2022
New York, New York



Steven Shiffman