

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. 39

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE NRA'S MOTION
FOR REVIEW OF THE SPECIAL MASTER'S RULING DATED NOVEMBER 29, 2022
PERTAINING TO ALLEGED DEFICIENCIES IN PLAINTIFF'S PRIVILEGE LOG
AND PRODUCTION OF RECORDS**

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Plaintiff, the People of the State of New York, by Letitia James, Attorney General of the State of New York, through the Office of the Attorney General (“OAG”), submits this memorandum of law in opposition to the National Rifle Association of America’s (“NRA”) motion pursuant to CPLR 3104(d) for review of the Special Master’s ruling, dated November 29, 2022, pertaining to alleged deficiencies in the OAG’s privilege log and production of records. For the reasons set forth below, the NRA’s motion should be denied and the Special Master’s rulings should be upheld.

PRELIMINARY STATEMENT

The NRA’s requests for supplementation of the OAG’s privilege logs, and for additional discovery of irrelevant documents, should be denied. First, the NRA’s request for more specific senders and recipients in particular categories of the OAG’s privilege logs has been mooted by the OAG’s document productions and later orders by the Special Master. Second, the only reason the NRA proffers for needing to know the specific dates of communications on the OAG privilege logs is the unacceptable one of supporting its dismissed bias claim against the Attorney General. Third, the NRA failed to demonstrate for the Special Master or the Court that it ever asked for, and is entitled to, an updated privilege log from the OAG post-dating the filing of the complaint in this action. Finally, the NRA is not entitled to a supplemental privilege log or production of documents concerning Everytown for Gun Safety (“Everytown”)—the documents are irrelevant to any claim or defense in this action, and in any event the NRA never asked that the OAG run additional searches in the year it had the OAG’s privilege logs.

Plaintiff respectfully requests that the Special Master’s orders be upheld and the NRA’s requests be denied.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal stems from submissions made by the OAG and the NRA to the Hon. O. Peter Sherwood, the Special Master in this action, on October 20, 2022, and the resulting November 29, 2022 ruling by the Special Master.

The NRA served its first request for production of documents in this action on February 3, 2021, seeking “[a]ll Documents and Communications concerning” the OAG’s investigation of the NRA. NYSCEF 984 at 7. In response, the OAG objected to the NRA’s overbroad request, but nevertheless promptly produced its entire non-privileged investigatory file, consisting of approximately 1.5 million pages of documents and testimony. Thompson Aff. ¶ 4 and Ex. A.

The NRA served its second set of requests for production on October 14, 2021. NYSCEF 985. The OAG objected to the NRA’s requests, and specifically stated that it would not be producing any documents in response because, among other things, they were directed to the Attorney General herself, in her official and individual capacities, as counterclaim defendant, and the requests “relate[d] to Defendant NRA’s counterclaims.” *See, e.g.*, Thompson Aff. Ex. B at 3-4. At that time, discovery on the counterclaims was stayed. The counterclaims have since been dismissed. NYSCEF 706. The NRA never moved to compel production in response to its October 14, 2021 document requests. Thus, the NRA’s only operative document request in this action is its February 2021 request seeking documents related to the OAG’s investigation of the NRA.¹

On December 3, 2021, the OAG provided the NRA with a categorical privilege log related to the NRA’s first request for production of documents. NYSCEF 986. The log contained five

¹ A third request for production of documents served by the NRA in May 2022, which sought time records for each individual within the OAG who performed work on the NRA investigation, was subject to motion practice resulting in a protective order granted by the Special Master. *See* NYSCEF 710.

categories of documents: 1) communications with witnesses or their counsel; 2) correspondence with law enforcement agencies; 3) correspondence with consultants; 4) draft and final interview memoranda; and 5) communications with and documents obtained from or relating to complainants and confidential sources. *Id.*

As that document request related to the OAG's investigation of the NRA, the OAG appropriately applied a timeframe that ended the day the OAG filed the initial complaint against the NRA in this action: August 6, 2020. NYSCEF 1. After commencement of this action, the OAG provided the NRA and all other defendants with copies of all materials the OAG received in response to discovery demands and subpoenas. On May 25, 2022, the OAG provided the NRA with a supplemental privilege log, updating the number of documents in Category 1 of the privilege log only (collectively with the December 3, 2021 log, the "OAG Privilege Log"). NYSCEF 987.² In both logs, the OAG provided the NRA with the certification required by the Commercial Division Rules, including a list of search terms used to identify documents "with the exception of those used to capture and identify confidential subjects or information." *See, e.g.*, NYSCEF 986 at ¶ 6.

After fact discovery closed, the NRA first moved the Special Master for an order compelling Plaintiff to supplement the OAG Privilege Log. NYSCEF 988 (NRA submission); NYSCEF 989 (OAG's response). Specifically, the NRA sought (1) the specific senders and recipients for communications in categories 1, 2, 3 and 5 on the OAG Privilege Log; (2) the specific timeframes for documents in each of the categories on the OAG Privilege Log; and (3) an updated search for documents related to Everytown, a "gun violence prevention organization,"³

² The document is erroneously dated May 25, 2021.

³ *See* <https://www.everytown.org/about-everytown/> (last accessed on January 17, 2023).

which is not involved in this action. NYSCEF 988.

On November 29, 2022, the Special Master held (1) that the NRA did “not contend that the OAG failed to apply a timeframe the NRA demanded previously or that the search parameters used failed to meet any specific parameter previously demanded,” and (2) that communications related to Everytown “became moot after the court dismissed the NRA’s counterclaims. The fact that the court has not yet dismissed the affirmative defenses that are based on the previously rejected legal theories, does not render those defenses any more viable than the counterclaims.” NYSCEF 991 at 10. The NRA now brings the instant appeal for review of the Special Master’s Nov. 29, 2022 order.

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.” This Court has discretion in its review of the Special Master’s ruling. *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845 (2008).

For the reasons set forth below, (1) the NRA’s request for specific senders and recipients in certain categories on the OAG Privilege Log has been mooted; (2) the NRA has failed to justify why Plaintiff should provide more specific date ranges in its categorical privilege log other than the improper purpose of seeking information to support its dismissed bias claim against the Attorney General; (3) the NRA has failed to articulate any appropriate basis for obtaining information about records post-dating the filing of Plaintiff’s initial complaint in August of 2020; and (4) the NRA’s requests for documents related to communications with Everytown are irrelevant, were denied as a practical matter in connection with the NRA’s failed motion to compel compliance with a subpoena issued to Everytown, and in any event the NRA’s year-long delay in

raising concerns about the search terms used by Plaintiff for locating responsive documents is too little, too late.

A. The NRA's request for specific senders and recipients in particular categories on the OAG Privilege Log is moot.

The NRA's request for supplementation of the OAG's log to add the specific senders and recipients to particular categories has been mooted by the OAG producing documents, providing the NRA with the certification it requested, or by the Special Master's subsequent rulings.

In its October 2022 submission to the Special Master, the NRA sought the identity of specific senders and recipients in Categories 1, 2, 3, and 5 of the OAG Privilege Log. 3. Plaintiff subsequently produced the Category 1 documents. NYSCEF 982 at 3 n.4. And the NRA narrowed its request with respect to Category 3—which relates to non-testifying consultants with whom the OAG spoke—and Category 5—which relates to confidential witnesses: For both categories, the NRA requested the identity of the recipients only to the extent that the OAG intends to call the recipient as a witness at trial. NYSCEF 988 at 5. In its November 2022 response, the OAG agreed that the identities would have to be provided if they were to testify and provided the requested confirmation that, at this time, it does not intend to use any recipients in Categories 3 and 5 as witnesses, mooted the NRA's appeal with respect to those categories. NYSCEF 989 at 4 n.5.⁴ Accordingly, only Category 2 documents are at issue still.

With respect to Category 2, the only remaining issue concerns four emails (including one duplicate) with an unnamed law enforcement agency with which the OAG communicated during

⁴ With respect to Category 3, the NRA recognized that “the identities of non-testifying expert consultants are typically protected from disclosure.” NYSCEF 988 at 5. And with respect to Category 5, the identities of confidential witnesses are, in any event, protected from disclosure by the public interest privilege. *In re World Trade Center Bombing Litig.*, 93 N.Y.2d 1, 8 (1999). This is particularly crucial here, where the OAG has alleged numerous instances of retaliation by the NRA against whistleblowers. See NYSCEF 646 at ¶¶ 461-493, 502-515.

its investigation of the NRA. These communications are irrelevant to any claims remaining in this action. Nevertheless, in light of the Special Master's ruling, the content of the communications and after notifying the other law enforcement agency, the OAG determined that the documents could be produced without violating any privileges, and produced the documents today. The remaining documents in Category 2 relate to communications with the D.C. Office of the Attorney General ("DCAG"), which was subject to separate motion practice, and all of such communications were determined by the Special Master to be privileged in their entirety. NYSCEF 1009. The NRA did not challenge that ruling with respect to the DCAG communications. Accordingly, the NRA's application with regard to Category 2 documents is moot.

The NRA's request for supplementation of the senders and recipients in particular categories on the OAG Privilege Log should be denied.

B. The NRA has not shown that it is entitled to a more specific statement of dates in the OAG Privilege Log .

Now the NRA demands that the OAG provide specific dates ranges for each distinct category in its privilege log, but the NRA has failed to articulate any legitimate reason why these specific date ranges are necessary. The only rationale the NRA has offered is that the information would supposedly be probative of its dismissed counterclaims alleging unconstitutional bias. NYSCEF 982 at 5-6 (proffering only its dismissed bias claim as a reason why the NRA needs to know the specific dates of privileged communications); *see also* NYSCEF 990 at 116:14-117:7. The NRA has not articulated how knowing the specific dates of privileged communications would help it determine whether or not to challenge the privileged status of a document, and so is not entitled to that information.

C. The NRA is not entitled to a supplemental privilege log post-dating the filing of the complaint in this action.

The Special Master correctly held that “the NRA does not contend that the OAG failed to apply a timeframe the NRA demanded previously,” denying the NRA’s request for a privilege log for documents after August 6, 2020. NYSCEF 991 at 10. The only operative request for production of documents the NRA has in this action is one seeking documents related to the OAG’s investigation of the NRA. NYSCEF 984 at 7. For more than a year, the NRA has known that the OAG defined the relevant time period for its investigation of the NRA to be between the Fall of 2018 and the filing of the complaint in August of 2020. *See* NYSCEF 986 at ¶5. Thus, the log requires no supplementation after the filing of the complaint.

In any event, logs for privileged documents the OAG created or obtained after the commencement of litigation would represent a departure from standard practices and are not normally exchanged; courts typically refuse to require them unless there is a specific reason that they are needed. *See, e.g., Harleysville Worcester Ins. Co. v. Sharma*, 2015 WL 3407209, at *2 (E.D.N.Y. May 26, 2015); *In re Snap Inc. Securities Litig.*, 2018 WL 7501294, at *1 (C.D. Cal. Nov. 29, 2018); *see generally* Cohen, *Reviewing Documents for Privilege: A Practical Guide to the Process*, New York State Bar Journal, 72-Sep N.Y. St. B.J. 43 (Sept. 2000) (“parties commonly do not log otherwise privileged documents relating to the litigation that are created after its commencement”).

The NRA attempts to draw a false equivalence between the OAG’s requests for updates to the NRA’s log and the NRA’s requests regarding the OAG Privilege Log. NYSCEF 982 at 9. But, unlike the NRA, Plaintiff has a claim for equitable relief that the NRA intends to defend against with evidence of alleged ongoing reforms. The NRA’s reliance on such actions makes documents relating to the same relevant and subject to ongoing pretrial disclosure. *See, e.g.,* NYSCEF 371 at

22-24 (NRA's memorandum of law in support of second motion to dismiss, submitting arguments regarding the NRA's alleged ongoing "course correction"). The NRA has no such justification for requiring ongoing supplementation by Plaintiff.

D. The NRA is not entitled to supplemental production or a supplemental privilege log concerning Everytown for Gun Safety.

The Special Master properly held that the NRA is not entitled to an updated privilege log with respect to documents related to Everytown, which the NRA subpoenaed for documents (*see* Mot. Seq. No. 25), should be upheld. First, the Special Master correctly ruled that the NRA failed to identify any specific requests for searches it made of the OAG that were rejected. Second, the NRA failed to articulate any relevance Everytown-related documents have to any viable claim or defense the NRA has in this action. And third, the Special Master correctly ruled that the only potential relevance Everytown-related documents had was to the NRA's since dismissed counterclaims, and that the NRA's mirror image affirmative defenses do not salvage the NRA's relevance arguments.

First, having sat on the OAG Privilege Log for a year, the NRA challenges the adequacy of the search terms used by the OAG for the first time on this appeal. *Compare* NYSCEF 988 at 5 (NRA's October 2022 submission, in which it fails to identify particular alleged deficiencies in the searches run by the OAG) *with* NYSCEF 982 at 7-8 (NRA's memorandum of law in the instant motion, for the first time identifying alleged search term deficiencies in the OAG's year-old privilege log). The Special Master correctly ruled that the NRA "does not contend the . . . search parameters used failed to meet any specific parameter previously demanded" by the NRA. NYSCEF 991 at 10. The Court would search the record in vain for any indication that the NRA ever requested that the OAG run additional searches or use particular search terms. The NRA's

belated, post-fact-discovery complaints about the search terms and manner in which the OAG searched for responsive documents should be denied.

Second, the NRA points only to “the potential bias of the [OAG] and its witnesses” to argue for the alleged relevance of Everytown-related documents. NYSCEF 982 at 9. Any claim of alleged bias on the part of the OAG has already been adjudicated and dismissed by this Court. NYSCEF 706; *see also* NYSCEF 654 (Special Master’s ruling that NRA’s Everytown subpoena was relevant only to the NRA’s counterclaims). And the OAG has no intention, and never said it has the intention, of calling Everytown as a witness. The NRA’s citation to *Matter of Alexander M. v. Cleary*, 188 A.D.3d 1471 (3d Dep’t 2020) is unavailing. *Cleary* involved an administrative hearing conducted in accordance with the Education Law, which specifically enumerates rights that students have during investigations. *Id.* at 1474-75. Here, the NRA’s recourse was to allege that the OAG’s investigation violated its Constitutional rights—the NRA asserted such claims and they failed.

Finally, the Special Master alternatively (and correctly) ruled that the NRA’s request for documents related to Everytown is not relevant to any claim or viable defense.⁵ NYSCEF 991 at 10. In so ruling, the Special Master noted that the NRA’s previous efforts to subpoena Everytown, which had been submitted to the Special Master for review, “became moot after the court dismissed the NRA’s counterclaims.” NYSCEF 991 at 10; *see also* NYSCEF 654 (Special Master’s ruling holding that NRA’s subpoena to Everytown was stayed pending outcome of motion to dismiss the

⁵ The NRA’s suggestion, without citation to authority, that the OAG admitted to the relevance of Everytown-related documents by searching for them in preparing its privilege log is baseless. NYSCEF 982 at 8. Regardless of whether any such communications were relevant to the NRA’s counterclaims, which were in place when the OAG’s categorical privilege log was prepared (*see, e.g.,* NYSCEF 230, the NRA’s original counterclaims filed February 23, 2021), those claims have since been dismissed. NYSCEF 706.

NRA's counterclaims). The NRA's argument that the Special Master exceeded his authority by "sua sponte dismiss[ing] the NRA's affirmative defenses" is meritless. NYSCEF 982 at 10. The Special Master has the specific authority, granted by this Court, to "supervise . . . without limitation, disputes regarding written disclosure, document productions, privilege logs and claims of privilege, [and] ESI protocols and searches" NYSCEF 579 at ¶2. This authority necessarily entails adjudicating documents' relevance to the action.

CONCLUSION

For the reasons provided herein, Plaintiff respectfully requests that the NRA's motion for supplementation of the OAG Privilege Log and supplemental production be denied.

Dated: January 17, 2023
New York, New York

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Attorney Certification Pursuant to Order Appointing Special Master

I, Stephen Thompson, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Opposition to the NRA's Motion for Review of the Special Master's Ruling Dated November 29, 2022 Pertaining to Alleged Deficiencies in Plaintiff's Privilege Log and Production of Records complies with the word count limit set forth in the Order for Appointment of a Special Master for Discovery (NYSCEF 579) because the memorandum of law contains 2,997 words, excluding the parts exempted by Rule 17 of the Commercial Division Rules. 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: January 17, 2023
New York, New York

/s/ Stephen Thompson

Stephen C. Thompson