

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
MICHAEL G. GAYNOR,

Petitioner,

-against-

TOWN OF SHELTER ISLAND,

Respondent.
-----X

Index No. 613512/2020

Assigned Justice: John H.
Rouse, J.S.C.

**RESPONDENT’S MEMORANDUM OF LAW
IN OPPOSITION TO PETITIONER’S MOTION FOR CONTEMPT**

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TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
ARGUMENT	3
THE TOWN COMPLIED WITH THE DECISION	3
A. The Court Directed the Town to Produce a Privilege Log	3
B. The Town Obeyed the Court’s Direction	6
C. There is No Prejudice to Petitioner From the Supposed Withholding of Documents	9
CONCLUSION	10
CERTIFICATE OF COMPLIANCE	12

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Bongiorno v. DiFrisco</i> , 196 A.D.3d 452 (2d Dep't 2021)	9
<i>Curry v. Nassau County Sheriff's Department</i> , 69 A.D.3d 622 (2d Dep't 2010)	8
<i>Daum v. Tessler</i> , 24 A.D.3d 214 (1st Dep't 2005)	8
<i>DeFabritis v. McMahon</i> , 301 A.D.2d 892 (3d Dep't 2003)	8
<i>El-Dehdan v. El-Dehdan</i> , 26 N.Y.3d 19 (2015)	3
<i>Engels v. Town of Parishville</i> , 86 A.D.3d 889 (3d Dep't 2011)	8
<i>Gajadhar v. New York Police Department</i> , 61 Misc.3d 1281(A) (N.Y. Co. Sup. Ct. 2018)	8
<i>Gould v. New York City Police Dep't.</i> , 89 N.Y.2d 267 (1996)	7
<i>Grabell v. New York City Police Dep't.</i> , 139 A.D.3d 477 (1st Dep't 2016)	8
<i>Livingston v. Hynes</i> , 72 A.D.3d 968 (2d Dep't 2010)	8
<i>Mendoza-Pautrat v. Razdan</i> , 160 A.D.3d 963 (2d Dep't 2018)	3
<i>O'Donnell v. Bloomberg</i> , 33 A.D.3d 367 (1st Dep't 2006)	8
<i>Rattley v. New York City Police Dep't</i> , 96 N.Y.2d 873 (2001)	6-7, 9-10
<i>Scialdone v. Stepping Stones Assocs., L.P.</i> , 148 A.D.3d 955 (2d Dep't 2017)	3

State Statutes

CPLR § 3122(b).....4

Judiciary Law § 753(A)(3)3

Regulations

22 NYCRR § 202.20-a4, 6

22 NYCRR § 202.8-c10

PRELIMINARY STATEMENT

The motion before the Court is merely an improper sur-reply masquerading as a motion for contempt. Petitioner Michael Gaynor well knows that the Town provided the Court with exactly the information that it was ordered to produce. Yet, he nevertheless engages the Court with motion practice to again attempt to advance his unsupported theory that the Town did not perform an exhaustive search of records in response to his four prior Freedom of Information Law (“FOIL”) requests.

Petitioner concedes, at page 1 of his Memorandum of Law in support of his motion, that he does not dispute the withholding of any document pursuant to a specific FOIL exemption. As a result, and through this motion, Petitioner has rendered moot this Court’s *in camera* inspection of the documents produced by the Town because he concedes that those withholdings were proper pursuant to FOIL.

Thus, all that the Court is left with is Petitioner’s repeated, and baseless, argument that the Town did not engage in a search of private email accounts used by Town staff, Town Board members or the Town’s Community Preservation Advisory Board members. The Town’s obligation in responding to Petitioner’s FOIL requests, therefore, was to perform a diligent search, not locate every document that might arguably have existed at some point in time. In this regard, the Town produced numerous emails from private email accounts in its approximately 6,825 pages of production. Likewise, Petitioner’s assertion that certain private email accounts were not searched in the course of preparing the Town’s responses to his FOIL requests is not a proper legal basis for a contempt motion with respect to the Court’s order for a privilege log related to the Town’s FOIL responses, and is legally inadequate to support an order for the relief he seeks through his Article 78 proceeding.

For these reasons, the Court is respectfully urged to deny the motion for contempt in its entirety.

STATEMENT OF FACTS

This special proceeding was commenced on September 22, 2020 by the filing of a hybrid proceeding/action. *See* 10/29/21 Decision and Order (“Decision”) at p. 5.¹ Petitioner then filed an amended complaint. *See id.* On October 29, 2021, this Court subsequently issued the Decision, resolving six separate motions that were then pending in the case. *See id.* at pp. 1-6. Pursuant to the Decision, the Town is the only remaining Respondent and the only remaining cause of action is Petitioner’s claim that the Town improperly withheld documents from him in response to four Freedom of Information Law (“FOIL”) requests. *See id.* at pp. 3-6.

Consistent with the Decision, the Court ordered the Town to produce, for an *in camera* inspection, any documents that were withheld from production in response to the FOIL requests and to file a privilege log “that identifies the statutory basis claimed [with] respect to each document it has withheld from inspection.” *See id.* at p. 6. Notice of entry of the Decision was served on November 10, 2021. *See* NYSCEF Doc. No. 235. Consistent with the Decision, within 45 days of that service, on December 22, 2021, the Town filed the privilege log for records withheld from the Town’s FOIL responses, and a redaction log for records partially withheld, along with copies of the withheld and redacted records. *See* NYSCEF Doc. Nos. 236-264. Petitioner’s motion for contempt was filed on December 23, 2021. *See* NYSCEF Doc. No. 265.

Additional facts may appear in the Argument.

¹ The Decision is located on the Court’s docket at NYSCEF Doc. No. 227.

ARGUMENT

THE TOWN COMPLIED WITH THE DECISION

Because the Town produced privilege and redaction logs, along with the documents that were identified and withheld in whole or in part from its FOIL responses for an *in camera* inspection, it has fully complied with the Decision. The motion for contempt, therefore, should be denied.

Judiciary Law § 753(A)(3) authorizes a court to punish, as appropriate, any party to a special proceeding that has disobeyed a lawful mandate of the court. To sustain a contempt motion, it is the movant's burden to establish by clear and convincing evidence that: (1) there was a clear and unequivocal mandate of the court in effect; (2) the order was disobeyed; (3) the party disobeying had knowledge of the mandate; and (4) the movant was prejudiced by the offending conduct. *See El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 29 (2015); *Scialdone v. Stepping Stones Assocs., L.P.*, 148 A.D.3d 955, 956 (2d Dep't 2017). A motion for civil contempt is left within this Court's sound discretion. *See Mendoza-Pautrat v. Razdan*, 160 A.D.3d 963, 964 (2d Dep't 2018).

A. The Court Directed the Town to Produce a Privilege Log

There can be no dispute over what the Court required in the Decision. At page 3 of the Decision, the Court ordered the Town to "e-file a privilege log with respect to all documents demanded by Petitioner that Respondent contends are exempt together with the specification of the authority for the exemption from disclosure under the Public Officers Law." The Court further ordered the Town to "file under seal to the court, with no access permitted to any other person or party, the documents it contends are exempt from disclosure under the Public Officers Law."

Further, at page 6 of the Decision, the Court directed: “Upon this claim that is subject to review under CPLR Article 78, the court, as provided in the orders above, directs the *in camera* inspection of the documents Respondent withheld and directs the Respondent to file a privilege log that identifies the statutory basis claimed [with] respect to each document it has withheld from inspection.” This direction was clear and unequivocal. The Town was to produce a privilege log with regard to any document it had previously identified but withheld pursuant to an exemption from production pursuant to FOIL in its responses to Petitioner’s FOIL requests dated August 19, 2020, August 20, 2020, August 21, 2020 and August 24, 2020.

A privilege log exists, consistent with CPLR § 3122(b), for the purpose of providing information about available documents that have been withheld from disclosure due to some exemption from that disclosure. The implication is, obviously, that a document exists, but is not being produced for some reason. The privilege log exists to provide the requesting party information about that document sufficient to analyze whether a motion to compel is appropriate. *See* 22 NYCRR § 202.20-a. There is, therefore, no reason to produce a privilege log for documents that were not subject to disclosure in the first place, such as because the document does not exist or is not responsive to a request. Thus, the Court’s direction was obviously to produce only those documents identified as responsive and withheld because of a statutory exemption.

As set forth in support of the Town’s motion to dismiss, Petitioner’s repeated assertions that the Town refused or failed to search relevant private email accounts of Town staff or volunteers is unsupported by the record. The Town Supervisor explicitly responded to Petitioner’s claim that the Town failed to search private email accounts and devices in responding to Petitioner’s appeal of the Town’s response to his August 19, 2020 FOIL by

advising Petitioner that this allegation was “not correct.” *See* NYSCEF Doc. No. 193. The Town Supervisor also advised Petitioner that the Town conducted a “diligent search” for responsive records for the August 19, 2020 and August 21, 2020 FOIL requests, which included emails from non-Town of Shelter Island accounts, and that the Town produced all nonexempt records. *See* NYSCEF Doc. Nos. 176, 182, 193.

Contrary to Petitioner’s assertion, the Town has never “admitted that it did not search the private email accounts of Town officials” in order to respond to Petitioner’s August 19, 2020, August 20, 2020, August 21, 2020 or second August 24, 2020 FOIL requests and Petitioner’s statement in his memorandum of law to that effect is misleading to the Court (Pet. MOL dated 12-23-21 at p. 4). The Town Supervisor wrote the October 21, 2020 letter in response to Petitioner’s appeal of the Town’s response to Petitioner’s first August 24, 2020 FOIL request (*see* Ogar Affidavit, Exs. D, T, U; NYSCEF Doc. Nos. 165, 183, 184). This FOIL request sought, among other things, the “personal email addresses” of each Town “officer and/or employee that has worked from home” during the COVID-19 Pandemic (Ogar Aff., Ex. J, NYSCEF Doc. No. 118). In response to Petitioner’s appeal of the Town’s response to that FOIL, the Town Supervisor advised Petitioner that the Town did not have a record containing the requested list of Town officer or employee personal email addresses and that, because these officers and employees had remote access to their official Town email addresses while they worked from home during the pandemic (March through August 2020), there was no reason to search these individuals’ personal email addresses for a document responsive to the FOIL request (that is, for a record containing these Town officer and employees’ names and personal email addresses because there was no reason to believe that their personal emails were being used for Town business during the relevant time period and, therefore, subject to a search

pursuant to a FOIL request for Town records). *See* Ogar Affidavit, Ex. U; NYSCEF Doc. No. 184.

Moreover, there would be no reason for this Court to have directed the production of a privilege log with regard to documents that the Town has not claimed to have withheld. A privilege log exists to provide the requesting party information about a document that the other party has determined not to produce sufficient to analyze whether a motion to compel production of that document is appropriate. *See* 22 NYCRR § 202.20-a. Thus, the only possible meaning of the Decision that the Town identify and produce for inspection those documents it located during its search and withheld from production.

B. The Town Obeyed the Court's Direction

There is no dispute that the Town, on December 22, 2021, produced both a privilege and redaction log as well as the withheld and redacted documents for the Court's *in camera* inspection. For this reason, the motion for contempt fails by virtue of the Town's compliance with the Decision.

Petitioner asserts that the alleged failure to identify additional private emails in the privilege log constitutes contemptible conduct. He bases this theory on Petitioner's belief, allegedly supported by eight unrelated and isolated documents, that the Town is aware of records or information from individuals' personal email accounts and intentionally withheld them. Because the Town certified that it conducted a diligent search for records and produced all non-exempt responsive records, *see* NYSCEF Doc. Nos. 176, 182, 193; Ogar Supp. Aff. at ¶¶ 13, 22,² the burden then shifts to Petitioner to produce tangible evidence giving this Court reason to believe that more non-exempt and undisclosed records exist. *See Rattley v. New York City Police*

² Ms. Ogar's Supplemental Affidavit is located on the Court's docket as NYSCEF Doc. No. 161.

Dep't, 96 N.Y.2d 873, 875 (2001). Petitioner has not, despite having had numerous opportunities, met this burden.

In order to do so, Petitioner was required to “articulate a demonstrable factual basis to support his contention that the requested documents existed and were within the [respondent’s] control.” *See Gould v. New York City Police Dep’t.*, 89 N.Y.2d 267, 279 (1996). In *Gould*, the Court of Appeals held petitioner’s “conjecture that the documents existed some 10 years ago was insufficient to warrant a hearing on the issue.” *Id.*

Here, Petitioner attaches eight documents, that he should have previously identified, but did not, and is now improperly putting before the Court under the guise of a contempt motion. Yet, eight documents spanning the course of over 20 years is *not per se* evidence of willful withholding.³ Instead, Petitioner must first establish, which he has not, that these random documents were in fact located and then not produced. Given the certifications and the Town’s production of numerous email messages produced from private email accounts in its FOIL responses, there can be no continuing legitimate dispute that the Town conducted a diligent search.

In addition, of the eight documents that Petitioner attaches to his motion papers, two of them, Exhibits G and H, are thank you notes, and not actual records related to any Town Community Preservation Fund (“CPF”) sale or purchase. Accordingly, those documents are not even responsive to any of the FOIL requests.

Exhibit F is a March 1, 2012 letter from Suffolk County to the Sylvester Manor Educational Farm, Inc. regarding a change to a grant. This is not related to a CPF sale or purchase and, as a result, is not responsive to any FOIL request and cannot be evidence of the

³ Petitioner has not indicated to this Court how he came to be in possession of emails from private email servers that were not part of the Town’s prior 6,825 page production.

lack of diligent search. Notably, though, this document references a February 10, 2012 letter from the County to the Sylvester Manor Educational Farm, Inc. containing details regarding a CPF purchase, which *was* produced in response to three of the FOIL requests. Finally, Exhibit E is a list of CPF purchases, although the source of the list is unknown. There is nothing in Petitioner's affidavit or in the document itself establishing it to even be a Town record.

Given the absence of any admissible evidence, this Court must apply *Gould* and disregard Petitioner's unsubstantiated claim that the Town did not diligently search its records. *See, e.g., Gajadhar v. New York Police Department*, 61 Misc.3d 1281(A) (N.Y. Co. Sup. Ct. 2018) (petitioner's submission of an affidavit and report did not prove respondent retained, located, or withheld responsive FOIL documents); *Grabell v. New York City Police Dep't.*, 139 A.D.3d 477, 479 (1st Dep't 2016) (nothing in petitioner's affidavit contradicted certification that all records were provided by respondent, and petitioner failed to articulate a demonstrable basis to the contrary); *Engels v. Town of Parishville*, 86 A.D.3d 889, 890 (3d Dep't 2011) (assertion by petitioner that respondent maintains records under a retention and disposition schedule insufficient to establish additional records exist); *Livingston v. Hynes*, 72 A.D.3d 968, 969 (2d Dep't 2010) (petitioner's offer of proof failed to establish that respondent possessed requested records); *Curry v. Nassau County Sheriff's Department*, 69 A.D.3d 622, 622-623 (2d Dep't 2010) (no basis offered to reject respondents' certification that requested videotapes could not be located after a diligent search); *O'Donnell v. Bloomberg*, 33 A.D.3d 367, 367 (1st Dep't 2006) (no persuasive reason offered by petitioner to reject respondents' statement that no other records could be found after a diligent search); *Daum v. Tessler*, 24 A.D.3d 214, 215 (1st Dep't 2005) (no persuasive reason offered to reject respondents' statement of diligent efforts to locate document); *DeFabritis v. McMahon*, 301 A.D.2d 892, 894, 754 N.Y.S.2d 117, 119 (3d Dep't 2003)

(unsupported speculation that records have been withheld was an insufficient basis to grant a petition).

C. There is No Prejudice to Petitioner From the Supposed Withholding of Documents

There has been no showing of prejudice to Petitioner and, as a result, his motion for contempt fails as a matter of law. Prejudice is established only where the movant shows that the non-movant's actions were calculated to or did frustrate or impair the movant's rights or remedies. *See Bongiorno v. DiFrisco*, 196 A.D.3d 452 (2d Dep't 2021).

While Petitioner asserts that he has been prejudiced because the Court did not receive documents that either do not exist, could not be located despite diligent efforts, or were simply not responsive to his FOIL requests (such as several of the documents he attached to his affidavit), the Court, respectfully, has all that it needs to determine whether the documents withheld, in whole or in part, were properly withheld pursuant to the Public Officers Law. In fact, Petitioner concedes that point at the very first page of his Memorandum of Law when he says that the FOIL-based redactions "are not disputed by Gaynor." Petitioner cannot, therefore, assert that he is prejudiced from the lack of production when he acknowledges that documents were properly withheld.

To the extent that several random and isolated documents might have escaped detection despite the Town's efforts, which included the search of private email accounts and culminated in the production of 6,825 documents, *see* NYSCEF Doc. Nos. 176, 182, 193, there is no authority establishing, and Petitioner does not cite any, that this discovery results in substantive prejudice warranting a finding of civil contempt related to an order to prepare a privilege log. The diligent search requirement is not a guarantee that every document ever created will be found. It is just that the Town took steps to locate everything in its control. *See Rattley*, 96

N.Y.2d at 875. That Petitioner may have, by whatever means, located one email from 2007 that could arguably be responsive to his multiple demands in 2020 does not defeat the diligent search requirement. Likewise, to the extent that Petitioner concedes that the Town’s assertions of the various FOIL exemptions to mandatory disclosure as set forth in the Public Officers Law in support of the Town’s withholding of responsive records in whole or in part, there can be no impairment of his rights.

Instead, this motion must be seen for what it is: Petitioner’s attempt to submit further argument and exhibits supporting his underlying petition. Consistent with 22 NYCRR § 202.8-c, sur-reply papers “are not permitted.” If anything, it is the Town that is prejudiced in having to yet again respond to Petitioner’s baseless, improperly raised arguments.

Accordingly, inasmuch as there is no prejudice to Petitioner, his motion for contempt must be denied.

CONCLUSION

For the reasons stated above, Respondent Town of Shelter Island respectfully urges the Court to deny the motion for contempt in its entirety and award the Town its costs, disbursements and attorneys’ fees incurred in opposing the motion, and awarding whatever other and further relief that the Court deems to be just and proper.

Dated: Melville, New York
January 12, 2022

Respectfully submitted,

LAMB & BARNOSKY, LLP



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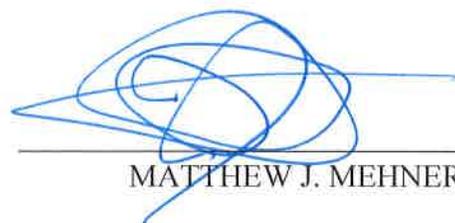
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CERTIFICATE OF COMPLIANCE

Pursuant to Court Rule 202.8-b

The foregoing brief was prepared on a computer. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 2,996.

Dated: Melville, New York
January 12, 2022



MATTHEW J. MEHNERT