

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HACER DINLER, *et al.*,

Plaintiffs,

-v-

THE CITY OF NEW YORK, *et al.*,

Defendants.

04 Civ. 7921 (RJS) (JCF)
ORDER

Lead Case: 04 Civ. 7922

Member Cases: 04 Civ. 9216; 04 Civ. 10178;
05 Civ. 1570; 05 Civ. 1562; 05 Civ. 1563; 05
Civ. 1564; 05 Civ. 1565; 05 Civ. 1566; 05
Civ. 1567; 05 Civ. 1568; 05 Civ. 1569; 05
Civ. 1571; 05 Civ. 1572; 05 Civ. 1573; 05
Civ. 1574; 05 Civ. 2910; 05 Civ. 2927; 05
Civ. 3616; 05 Civ. 3705; 05 Civ. 4949; 05
Civ. 5080; 05 Civ. 5150; 05 Civ. 5152; 05
Civ. 5268; 05 Civ. 5528; 05 Civ. 6193; 05
Civ. 6780; 05 Civ. 6918; 05 Civ. 7026; 05
Civ. 7536; 05 Civ. 7546; 05 Civ. 7547; 05
Civ. 7548; 05 Civ. 7577; 05 Civ. 7579; 05
Civ. 7580; 05 Civ. 7623; 05 Civ. 7624; 05
Civ. 7673; 05 Civ. 7625; 05 Civ. 7626; 05
Civ. 7670; 05 Civ. 3478; 05 Civ. 7546; 05
Civ. 7575; 05 Civ. 9974; 04 Civ. 7921; 07
Civ. 7741; 07 Civ. 7683; 05 Civ. 9483; 05
Civ. 9484; 05 Civ. 8453; 07 Civ. 7678; 05
Civ. 9738; 05 Civ. 7541; 05 Civ. 7668; 05
Civ. 7669; 05 Civ. 7672; 05 Civ. 9930; 05
Civ. 9985; 07 Civ. 7752; 05 Civ. 7789; 05
Civ. 9940; 05 Civ. 9987; 05 Civ. 10010; 05
Civ. 10024; 06 Civ. 0433; 06 Civ. 1779; 07
Civ. 7583; 07 Civ. 7751; 08 Civ. 9098

RICHARD J. SULLIVAN, District Judge:

On February 20, 2008, the Honorable James C. Francis IV, Magistrate Judge, issued an order (the "February 20 Order") granting a motion to quash a subpoena *duces tecum* dated July 27, 2007 (the "Subpoena") that Defendants served upon the New York City Chapter of the National Lawyers Guild (the "NLG"). Before the Court are Defendants' objections to the

February 20 Order (the “Objections”). For the reasons set forth below, the Court rejects the Objections and affirms the February 20 Order.

I. Background

A. Procedural History

The instant action is part of a larger group of cases relating to protests surrounding the 2004 Republican National Convention (the “RNC”), which have been consolidated before this Court and referred to Magistrate Judge Francis for general pretrial purposes.¹ Plaintiffs in this action were arrested by the New York Police Department (the “NYPD”) during the RNC. The Court presumes the parties’ familiarity with the facts and procedural history of these actions, and recites only those facts necessary to resolution of Defendants’ objections.

The NLG was not a party in any of the RNC actions, but it provided legal representation to many individual protesters who were arrested during the RNC. (*See* NLG’s Mot. to Quash Third Party Subpoena *Duces Tecum* and Mem. in Support (the “NLG Mem.”) at 1, 3.)² Specifically, the NLG created a “mass defense committee to . . . represent people in criminal court arrested as a result of mass protests and refer arrestees to attorneys for both criminal and civil litigation.” (*Id.* at 2.) The NLG’s “mass defense office” helps to file habeas corpus petitions for individuals who have been arrested and it represents people in New York City’s criminal courts. (*Id.*) The NLG filed a habeas corpus petition “[a]fter the mass arrests of August 31, 2004 . . . on behalf of all individuals arrested during the RNC” (*Id.* at 3.)

¹ The RNC cases, including the instant actions, were previously assigned to the Honorable Kenneth M. Karas, District Judge. These actions were reassigned to the undersigned on October 2, 2007.

² NLG’s Memorandum, which was docketed in all of the RNC cases on March 18, 2008, is not dated. (*See* No. 04 Civ. 7921, Doc. No. 153-2, Ex. C.)

Between the RNC arrests and April 2005, Defendants and the NLG entered into a settlement over a contempt motion that the NLG had filed against Defendants. During this period, the NLG “was in continual communication with the arrestees concerning aspects of the contempt case.” (*Id.* at 4.) On July 27, 2007, Defendants issued the Subpoena, which commanded the NLG to produce, *inter alia*, “[a]ll emails to or from the . . . NLG[] regarding conduct by the NYPD or protestors during the . . . RNC”³ (*See* Defs.’ Mem. Ex. A, App. B.) By letter dated September 13, 2007, Defendants agreed to limit the Subpoena’s scope to the approximately 500 emails (the “Emails”) that were sent between August 20, 2004 and December 20, 2004, by Plaintiffs who had been arrested during the RNC and then sued Defendants. (*See id.* at 3; *see also* Defs.’ Mem. Ex. B (Defs.’ Letter dated Sept. 13, 2007 (“Defendants’ Letter”)).)

NLG’s motion to quash the Subpoena (the “Motion”) was filed on or around October 8, 2007. (*See* NLG Mot., attached as Ex. C to Defs.’ Mem.; *see also* Defs.’ Mem. at 3.) The NLG asserted that all of the Emails sought by the Subpoena were protected by the attorney-client privilege, and it stated that “[e]ach and every item of email correspondence . . . fell into one of three categories: A) responses to emails concerning participation in the RNC contempt proceedings; B) interest in participation in civil damage actions against the City; and C) questions about representation in the criminal charges against the protestors.” (*See* NLG Mot. ¶¶ 5-6.) The NLG also stated that creating a privilege log would consume “at least one hundred hours” and cost “at least \$300,000,” and it sought permission to submit “a sampling of the emails” so that Magistrate Judge Francis could make “a realistic determination concerning the

³ Defendants state that before they issued the Subpoena, they served demands upon all Plaintiffs that directed them “to identify and produce their RNC-related emails.” (Defs.’ Mem. at 2.) According to Defendants, “[w]hile at best a handful of the approximately 500 [P]laintiffs complied, the vast majority: (i) denied the existence of any such emails in their *verified* responses to [D]efendants’ Interrogatories, (ii) did not produce any such emails, and (iii) failed to list any such emails on any privilege log.” (*Id.*)

necessity for a privilege log.” (NLG Mem. at 7.) On January 18, 2008, Magistrate Judge Francis issued an order (the “January 2008 Order”) that directed the NLG to promptly submit the Emails to the Court for *in camera* review in lieu of a privilege log.

Magistrate Judge Francis issued the February 20 Order after having reviewed *in camera* the 574 pages of responsive documents (the Emails) that NLG submitted in response to the January 2008 Order.⁴ Judge Francis concluded: “Without exception, these documents are protected from disclosure by the attorney-client privilege and/or the work product doctrine. They reflect information provided to counsel in connection with the provision of legal advice or information collected by counsel in connection with anticipated or ongoing litigation.” (Feb. 20 Order ¶ 1.) Magistrate Judge Francis also found that Defendants had “no compelling need for these documents, as the factual information they contain is available from other sources, including the arrestees themselves.” (*Id.*) Defendants timely filed their Objections to the February 2008 Order, and the Court heard oral argument on May 6, 2009.

B. The Objections

Defendants object to Magistrate Judge Francis’ ruling on two principal grounds. First, Defendants argue that Magistrate Judge Francis’ order was erroneous because the attorney-client and work product privileges had already been waived by Plaintiffs at the time the order to quash was issued. (Defs.’ Mem. at 1, 5-6). Second, Defendants argue that Magistrate Judge Francis

⁴ The NLG’s *in camera* submission also included a letter dated February 1, 2008 (the “February 1 Letter”), that was attached to the Emails. The February 1 Letter detailed the following four categories of privileged documents contained in the Emails: (1) Emails from people who have a criminal case pending and are seeking legal representation or legal advice; (2) Emails from people who were both clients of NLG and litigants, providing requested information for the purpose of the then-ongoing contempt litigation; (3) Emails from people who were wrongfully arrested and/or mistreated by police officers seeking advice with respect to potential civil litigation; and (4) Emails falling into the attorney work product category, dealing with strategy in connection with the litigation. (*See* No. 04 Civ. 7921, Doc. No. 213.) By letter dated May 7, 2009, the NLG consented to place the February 1 Letter in the court file. (*See id.*, Doc. No. 214.)

erred by failing to give Defendants an opportunity to address the issue of work product immunity and to make a showing of “substantial need” for the Emails, as contemplated by the Federal Rules of Civil Procedure. (*See* Defs.’ Mem. at 1, 3-5.)

II. Discussion

A. Legal Standard

Rule 72(a) and the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A), provide that district courts may designate a magistrate judge to hear and decide non-dispositive matters. Parties in a case may file written objections to a magistrate judge’s non-dispositive order within ten days of receiving it. Fed. R. Civ. P. 72(a). When reviewing such an order, the district judge “must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law.” *Id.*; *see also* 28 U.S.C. § 636(b)(1)(A); *Fielding v. Tollaksen*, 510 F.3d 175, 178 (2d Cir. 2007). Pretrial discovery matters are “non-dispositive,” and thus are reviewed under this highly deferential standard.⁵ *See Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990); *Popular Imports, Inc. v. Wong’s Int’l, Inc.*, 166 F.R.D. 276, 277 (E.D.N.Y. 1996).

⁵ Defendants propose that the February 20 Order should be subject to *de novo* review. Defendants cite one case in which a district court in another circuit reviewed *de novo* a magistrate judge’s denial of a motion to compel production of documents pursuant to a government agency’s issuance of an administrative subpoena. (*See* Defs.’ Mem. at 5 (citing *In re Admin. Subpoena Blue Cross Blue Shield of Mass., Inc.*, 400 F. Supp. 2d 386, 388-89 (D. Mass. 2005) (determining that the government’s motion to compel was a dispositive motion, even though an administrative subpoena is not one of the enumerated motions listed in § 636(b)(1), because the government’s motion was “the entire proceeding” before that court and as such, “determines with finality the duties of the parties and seals with finality the district court proceeding and is subject to appellate review.” (internal citation and quotations omitted))).) The Court finds that the case cited by Defendants is legally distinguishable from this action under Second Circuit precedent. First, the Second Circuit has held that “[u]nder traditional finality principles, a district court’s decision to compel compliance with a subpoena or to deny a motion to quash a subpoena is generally not a ‘final decision’ and therefore is not immediately appealable.” *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 574 (2d Cir. 2005). Second, the instant action does not involve a government agency’s administrative subpoena, which can be appealed immediately because the agency proceeding “may be deemed self-contained” and is therefore subject to a “different rule.” *Id.* (internal citations and quotations omitted). In any event, the Court would reach the same result even if the February 2008 Order were subject to *de novo* review.

A magistrate judge's order is clearly erroneous if the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (internal quotation marks omitted). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Thompson v. Keane*, No. 95 Civ. 2442 (SHS) (AJP), 1996 WL 229887, at *1 (S.D.N.Y. May 6, 1996) (internal quotation marks omitted). Therefore, pursuant to these standards, a magistrate judge's orders regarding discovery matters are entitled to substantial deference. *U2 Home Entm't, Inc. v. Hong Wei Int'l Trading Inc.*, No. 04 Civ. 6189 (JFK), 2007 WL 2327068, at *1 (S.D.N.Y. Aug. 13, 2007) ("Consistently, it has been held that a magistrate's report resolving a discovery dispute between litigants should be afforded substantial deference and be overturned only if found to be an abuse of discretion." (quoting *Nikkal Indus., Ltd. v. Salton, Inc.*, 689 F. Supp. 187, 189 (S.D.N.Y. 1988))); accord *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002).

B. Analysis

1. Waiver of Privilege

As a threshold matter, Defendants argue that the attorney-client privilege has been waived by (1) the failure of Plaintiffs to produce the Emails as part of discovery in the RNC cases, or to assert attorney-client privilege when the subpoena was served on the NLG; and (2) the failure of the NLG to produce a privilege log in connection with its motion to quash the subpoena. (Tr.

14:13-20.)⁶ For the reasons set forth below, the Court rejects each of these arguments and concludes that Plaintiffs have not waived the attorney-client privilege in this matter.

a. Waiver of Attorney-Client Privilege By Plaintiffs During Discovery

According to Defendants, Judge Francis erred when he “found a privilege, which the plaintiffs themselves had waived.” (Tr. 5:5-6; *see also* Defs.’ Mem. at 2, 6, 8.) Specifically, Defendants contend that they asked Plaintiffs to produce the Emails in their document request at the commencement of the litigation, but Plaintiffs “never produced them, and they never asserted any privilege over them. They therefore waived the attorney-client privilege long before the subpoena was ever served. . . . [T]he privilege was gone when Judge Francis issued his order.” (Tr. 5:8-13, 16-19.)

The burden of establishing waiver of the attorney-client privilege normally “rests with the opponent of the privilege.” *JA Apparel Corp. v. Abboud*, No. 07 Civ. 7787 (THK), 2008 WL 111006, at *2 n.1 (S.D.N.Y. Jan. 10, 2008) (collecting cases). Here, Defendants have not demonstrated that those Plaintiffs who sent emails to the NLG were ever shown the email correspondence that was ultimately produced to Judge Francis or were necessarily aware that such correspondence still existed. Indeed, Defendants’ own brief concedes that at least some Plaintiffs “admit[ted] that they had communicated with the NLG regarding the RNC. However, virtually all claimed that they no longer could access those emails and no longer recalled what those emails stated.” (Defs.’ Mem. at 2.) Moreover, there appears to be some factual dispute as

⁶ Defendants also reiterated during oral argument that the NLG had waived work product protection because Rule 45 and Local Rule 26 require that a privilege be expressly asserted and “[t]he work product privilege was never asserted by anyone.” (Tr. 3:7-9; 13-14 (citing Fed. R. Civ. P. 45 and S.D.N.Y. R. 26.)) However, as previously noted, NLG’s February 1 Letter – which was submitted to Magistrate Judge Francis for *in camera* review but was not docketed until after the oral argument – expressly asserted “attorney work product” protection over some of the Emails. *See supra* n. 4.

to whether some Plaintiffs did, in fact, assert attorney-client privilege with respect to the communications at issue before the Court. For example, during oral argument, Jeffrey A. Rothman, counsel for certain RNC Plaintiffs in this action, stated that “whenever the City has in the course of discovery . . . sought communications with my client and my clients’ attorneys or any attorney-client privileged communication, I have invoked the attorney-client privilege.” (Tr. 30:7-11.) Mr. Rothman cited as an example “the deposition of my client, Joel Miller, in the *Phillips* case[,] . . . [who had] made some communication . . . [with] the NLG,” and on whose behalf Mr. Rothman asserted the attorney-client privilege as a basis for refusing to produce email correspondence between his client and the NLG. (Tr. 30:11-19.)⁷

In any event, the Court concludes that the NLG properly asserted the attorney-client privilege on behalf of Plaintiffs at the time it was served with the Subpoena. *See Fisher v. United States*, 425 U.S. 391, 402 n.8 (1976) (“[I]t is universally accepted that the attorney-client privilege may be raised by the attorney.”); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967) (“Not only may an attorney invoke the privilege in his client’s behalf when the client is not a party to the proceeding in which disclosure is sought, . . . he is duty-bound to raise the claim in any proceeding in order to protect communications made in confidence.”) (internal citations and quotations omitted)). In light of the record before the Court, it is clear that the NLG had the authority to, and did in fact, assert the attorney-client privilege on behalf of Plaintiffs. Accordingly, the Court finds that Defendants have failed to show that

⁷Mr. Rothman also stated that Magistrate Judge Francis instructed him not to independently assert privilege on his clients’ behalf in response to certain subpoenas, concluding that “[i]f there is any assertion of the privilege to be made here, it’s going to be made by. . . the NLG.” (Tr. 31:3-10.)

Plaintiffs in this action waived attorney-client privilege “long before the subpoena was ever served.”

b. The NLG’s Failure to Submit a Privilege Log

Defendants next argue that the NLG waived the attorney-client privilege by failing to submit a privilege log in connection with its motion to quash the subpoena. (Tr. 12:10-16.) The Court disagrees. Under both the Federal Rules and this District’s Local Rules, a party that asserts a privilege as a basis for withholding documents must normally submit a privilege log. *See* Fed. R. Civ. P. 26(b)(5)(A); S.D.N.Y. R. 26.2(c); *Grand River Enters. Six Nations, Ltd. v. King*, No. 02 Civ. 5068 (JFK), 2009 WL 63461, at *3 (S.D.N.Y. Jan. 12, 2009). The Local Rules provide that “the privilege log ‘shall be furnished in writing at the time of the response to such discovery or disclosure, *unless otherwise ordered by the court.*’” *Id.* (quoting S.D.N.Y. R. 26.2(c)) (emphasis added). While failure to timely produce a privilege log “may result in a waiver,” courts in this District have found that such failure alone “does not warrant a waiver of the attorney-client privilege.” *Id.* at *3 (internal citations and quotations omitted). Indeed, “only ‘flagrant’ violations [of Fed. R. Civ. P. 26(b)(5) and Local Civil Rule 26.2] require such an outcome.” *Id.* (quoting *Pem-Ameica, Inc. v. Sunham Home Fashions, LLC*, No. 03 Civ. 1377 (JFK) (RLE), 2007 WL 3226156, at *1-2 (S.D.N.Y. Oct. 31, 2007) (quoting *In re InStore Adver. Sec. Litig.*, 163 F.R.D. 452, 457 (S.D.N.Y. 1995) (internal quotations omitted)); *see also 105 Str. Assocs., LLC v. Greenwich Ins. Co.*, No. 05 Civ. 9938 (VM) (DF), 2006 WL 3230292, at *4 (S.D.N.Y. Nov. 7, 2006) (“Judges in this district have repeatedly held that the unjustified failure to list privileged documents on the required log . . . in a timely and proper manner operates as a waiver of any applicable privilege. . . . N[o]netheless, of relevance to such a determination is the nature of the violation, its willfulness or cavalier disregard for the rule’s requirements, and the

harm which results to other parties.” (internal citations and quotations omitted)). Moreover, the Second Circuit has recognized that a district court has “broad discretion to direct and manage the pre-trial discovery process” *Wills v. Amerada Hess. Corp.*, 379 F.3d 32, 41 (2d Cir. 2004); *see also Newmarkets Partners, L.L.C. v. Sal. Oppenheim Jr. & Cie. S.C.A.*, No. 08 Civ. 04213 (WHP) (THK), 2009 WL 497373, at *12 (S.D.N.Y. Feb. 26, 2009) (“[T]he scope of [a party’s] waiver of the attorney-client and work product privileges [is] a determination that lies within the sound discretion of the trial court” (internal citations and quotations omitted)).

After Defendants agreed to limit the scope of the Subpoena, the NLG (as a non-party) sought permission to provide the Court with “a sampling of the emails that fall within the scope of the Subpoena under seal” as a substitute for a privilege log, which it asserted “would be a wasteful and purely academic process” (NLG Mot. at 7.) Thereafter, Magistrate Judge Francis decided to dispense with the need for a privilege log and have the documents submitted to him instead. As such, the NLG was complying with Magistrate Judge Francis’s directive to produce the Emails for *in camera* review pursuant to the January 2008 Order. Defendants have not cited a single case in which a plaintiff’s compliance with a judicial order was construed as a waiver on the part of the plaintiff. Thus, pursuant to its discretion in assessing waiver, the Court does not find that the NLG’s submission of the Emails to Judge Francis for *in camera* review was a “flagrant” violation or “willful” disregard of either the Federal Rules of Civil Procedure or of Local Civil Rule 26.2. Accordingly, the Court rejects Defendants’ argument that the NLG has waived any applicable privileges.

c. Magistrate Judge Francis's *In Camera* Review of the Emails to Assess Privilege

For the first time at oral argument, Defendants raised a new objection to Magistrate Judge Francis's ruling, contending that Judge Francis's *in camera* review of the Emails to determine whether they were privileged (as a substitute for a privilege log) was an "improper procedure" in that "Judge Francis . . . doesn't have the powers as a nonarticle [III] judge to trump or to invalidate [F]ederal [R]ule 26 or 45." (Tr. 13: 18-20; 14:18-20; 18:12-13.) According to Defendants, "[n]o magistrate has ever done what this magistrate did below." (Tr. 18:18-19.)

Pursuant to Rule 72, "[a] party waives all objections to a magistrate[] [judge's] order that are not filed '[w]ithin ten days after being served with a copy [of such order],' and as such, Defendants' new objection is "plainly beyond the ten-day deadline." *Four Start Capital Corp. v. Nynex Corp.*, 183 F.R.D. 91, 111-12 (S.D.N.Y. 1997) (quoting Fed. R. Civ. P. 72(a)). Moreover, Defendants have not shown "good cause" for their delay in raising this new objection to the magistrate judge's "power" as a non-Article III judge to conduct the *in camera* review of the Emails. *See* Fed. R. Civ. P. 6(b). The Court, therefore, finds that this new objection is untimely. It is also untenable.

Contrary to Defendants' assertions, the Second Circuit has held that submitting responsive documents for *in camera* review is "a practice both long-standing and routine in cases involving claims of privilege." *In re Grand Jury Subpoenas*, 318 F.3d 379, 386 (2d Cir. 2003) (collecting cases). Indeed, magistrate judges frequently make determinations concerning privilege by conducting *in camera* review of contested documents, and district courts have rejected previous challenges to a magistrate judge's authority to make such determinations. *See*

Eisai Ltd. v. Dr. Reddy's Labs., Inc., 406 F. Supp. 2d 341, 342 & n.1 (S.D.N.Y. 2005) (rejecting defendant's objections to a magistrate judge's ruling that certain documents were privileged and noting the "Magistrate Judge's determination . . . is owed 'substantial deference'" and that the determination was not "an abuse of the 'broad discretion'" normally accorded magistrate judges on these sorts of matters (quoting *Dubin v. E.F. Hutton Group Inc.*, 125 F.R.D. 372, 373 (S.D.N.Y. 1989)); *Verschoth v. Time Warner, Inc.*, No. 00 Civ. 1339 (AGS), 2001 WL 546630, at *1 & n.1 (S.D.N.Y. May 22, 2001) (rejecting similar Rule 72 objections and declining to find a due process violation as a result of Judge Francis's *ex parte* hearing to determine whether certain communications were privileged); *Abrams v. Gen. Elec. Co.*, No. 95 Civ. 1734 (FJS), 1997 WL 458446, at *1-2 (N.D.N.Y. Aug. 4, 1997) (rejecting defendant's Rule 72 objections to a magistrate judge's order to submit documents for *in camera* review and noting "[t]his Court cannot find any authority suggesting that an *in camera* review of documents to determine whether they are privileged is an abuse of discretion").

Accordingly, Defendants' assertion that Judge Francis lacked authority to review the Emails *in camera* is rejected as untimely and unpersuasive.

2. Work Product Privilege

Defendants next argue that Magistrate Judge Francis erred by granting the motion to quash "without permitting defendants any opportunity to address the work product immunity or to make the showing of 'substantial need' contemplated by the Federal Rules." (Defs.' Mem. at 1, 5-6.) As noted above, Magistrate Judge Francis "reviewed *in camera* the 574 pages of responsive documents culled by NLG," and concluded that the Emails were "protected from disclosure by the attorney-client and/or the work product doctrine." (February 20 Order at 1.)

Having conducted its own *in camera* review of the Emails, the Court finds that all of the relevant documents produced by the NLG are indeed “protected from disclosure by the attorney-client privilege.” (*Id.*)⁸ With respect to the five (5) pages of documents over which NLG asserted a work product privilege, the Court finds that at least four also contain communications protected by the attorney-client privilege. The fifth document (bearing bates stamp 000544) also includes what is clearly a privileged communication, however, it appears that the sender is not a named Plaintiff in these actions and that the Email in question is therefore not covered by the Subpoena. In light of this *in camera* review, the Court concludes that Magistrate Judge Francis’ February 20 Order quashing the subpoena was not clearly erroneous or contrary to law, and that it was not necessary to grant Defendants an “opportunity to address the work product immunity or to make the showing of ‘substantial need’ contemplated by the Federal Rules.” (Defs.’ Mem. at 1).

III. Conclusion

For the reasons stated above and on the record during the May 6, 2009 conference, the Court finds that Magistrate Judge Francis’ February 20 Order quashing the Subpoena was not clearly erroneous or contrary to law. Accordingly, the Court affirms the February 20 Order and

⁸ Defendants argue that NLG’s “failure” to provide any information from which to assess the existence of privilege was “particularly egregious because the NLG . . . was not a law firm,” but comprised of “‘law students, legal workers and jailhouse lawyers’ as well as lawyers.” (Defs. Mem. at 4 & n.3 (quoting NLG Mem. at 1.) The Court is not persuaded by Defendants’ argument since the attorney-client privilege that protects confidential communications between client and counsel also extends to an attorney’s agents under certain circumstances. See *In re Grand Jury Proceeding*, 79 F. App’x 476, 477 (2d Cir. 2003) (“Generally, the [attorney-client] privilege applies only to communications between a client and its lawyer[;] . . . [u]nder certain limited circumstances, however, the attorney-client privilege may extend to communications with a third party . . . if [such communications are] ‘made *in confidence* for the purpose of obtaining legal advice from the lawyer.’” (quoting *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961))). Here, the communications at issue involved named Plaintiffs and an email address established by NLG (nycmassdefense@riseup.net) to facilitate NLG’s state court representation of individuals previously arrested by the NYPD during the RNC. Accordingly, the Court rejects Defendants’ assertion that Magistrate Judge Francis’ finding of privilege was based on “speculation” or otherwise violated Defendants’ due process rights.

denies Defendants' Objections. The Clerk of the Court is respectfully directed to terminate the following docket entries: No. 04 Civ. 7921, Doc. Nos. 153, 154, and 161.

SO ORDERED.

Dated: New York, New York
September 3, 2009



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE