

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2011025780101

Hearing Officer – MC

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL THE
DEPARTMENT OF ENFORCEMENT TO PRODUCE WITHHELD DOCUMENTS**

I. Background

On May 10, 2013, Respondent filed a Motion to Compel. In it, Respondent seeks to compel the Department of Enforcement to produce documents relating to an investigation it conducted and closed prior to the investigation and Complaint in this case ("first investigation"). Respondent also requests an order requiring Enforcement to produce an affidavit describing the steps it has taken to comply with the requirements of *Brady v. Maryland*¹ to produce any material exculpatory evidence in its possession. In the alternative, Respondent asks the Hearing Officer to conduct an in camera review of the documents.

The first investigation focused on the same private placement offering that is the subject of this case. Respondent claims the documents contain material exculpatory information that Rule 9251 requires Enforcement to produce. The documents are Enforcement's closing memorandum for the first investigation and other documents relating to a tip FINRA received that prompted the first investigation. Respondent asserts that the closing memorandum and tip

¹ 373 U.S. 83 (1963).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 13-05 (2011025780101).

documents will “bolster” his defense that he did not willfully violate any FINRA rules, and will show an absence of misconduct, relevant to the consideration in a sanctions analysis of whether the misconduct charged here is isolated or part of a pattern. Respondent speculates that the “disgruntled” person who gave the tip that triggered the first investigation “may be a witness” in Enforcement’s case.

In its opposition to Respondent’s motion, Enforcement argues that Respondent’s Motion to Compel should be denied on several grounds. First, Enforcement argues the Motion to Compel is untimely because the deadline for filing motions in this case was March 1, 2013, and Respondent filed this motion on May 10. Next, Enforcement argues that the closing memorandum for the first investigation is not subject to disclosure because it is a confidential memorandum, attorney work product and, because it was prepared by a staff attorney for Enforcement management, it is attorney work product and a privileged attorney communication.

Enforcement proffers that the first investigation began with a tip to FINRA in April 2012, was assigned to a senior Enforcement attorney in a New York, and did not lead to the filing of the Complaint in this case. Enforcement further proffers that the closing memorandum is a confidential internal memorandum prepared by an attorney for senior Enforcement management, constitutes attorney work product, and is also a privileged attorney communication. As for the tip information, Enforcement proffers that the information would lead to the identification of the tipper, and Rule 9251 allows Enforcement to decline to disclose a document that would identify a source. Further, Enforcement cites NASD Notice to Members 02-52, which notes that a decision to close an investigation is not “probative evidence is a dispute on the merits of a related claim.”

On May 30, 2013, Respondent filed a Request to File a Reply to Enforcement's Opposition to Motion to Compel ("Request"), attaching his Reply to Enforcement's Opposition to Respondent's Motion to Compel and two exhibits ("Reply"). Enforcement filed a response opposing the Request, contending that it "offers no meaningful information." Given Respondent's assertion of the importance of his need to explain the timing of his filing of his Motion to Compel, Respondent's Request is granted. His Motion to Compel, however, is denied for the reasons set forth below.

II. Discussion

Respondent did not file his Motion to Compel in a timely manner. In his Request, Respondent argues that his tardy filing should be excused because he did not become aware of the existence of the closing memorandum or the tip documents until he received an email from Enforcement dated April 23, 2013, in which Enforcement informed him that it was providing a copy of the investigative file for the first investigation, except for the tip information and the closing memorandum. Enforcement argues that Respondent has been aware of the first investigation for three years, because he received two Rule 8210 requests for information related to that investigation. It is unclear, however, that Respondent was previously aware that the investigation was triggered by a tip, or that a closing memorandum had been prepared.

Therefore, his Motion to Compel is not denied because of its tardy filing.

Enforcement has, however, provided Respondent with more information than it was strictly required to produce. Enforcement's opposition to the Motion to Compel contains a sworn Declaration of the attorney who was assigned responsibility for the first investigation, and who, at its conclusion, prepared the closing memorandum. In the Declaration, the attorney states under oath that the first investigation focused on possible advertising violations and whether a general

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 13-05 (2011025780101).

solicitation had occurred, issues unrelated to this case. In addition, she discloses that the closing memorandum contains her evaluation of the first investigation and rationale for not recommending the institution of a formal disciplinary action.

Respondent provides no persuasive basis for his speculative contentions that the “fact that Enforcement staff did not find any violations in the first investigation ... is clearly exculpatory material, provides potential impeachment material of Enforcement’s witnesses, and provides potential rebuttals for arguments Enforcement would make to bolster its case and sanction requests.”² As noted, there is no apparent nexus between the two investigations. And FINRA has long made it clear that a determination “not to take action against a member or a member's associated person has no evidentiary weight in any mediation, arbitration, or judicial proceeding. Further, [FINRA] considers it inconsistent with just and equitable principles of trade ... for a member or a member's associated person to attempt to introduce such a determination into evidence in any of those proceedings.”³

The closing memorandum is protected from disclosure by Rule 9251(b)(1)(A) because it is attorney work product, containing “the attorney's thought processes, opinions, conclusions and legal theories.”⁴ Furthermore, even if it appeared that the closing memorandum contained exculpatory information falling within the ambit of *Brady*, Enforcement would not be required to produce it in derogation of the work product privilege because Enforcement has provided

² Respondent’s Request 3.

³ Notice to Members 02-53 (August 2002).

⁴ *SEC v. Nacchio*, 2007 U.S. Dist. LEXIS 5435, at *15 (D. Colo. Jan. 24, 2007)(citing *Religious Technology Center v. F.A.C.T.Net, Inc.*, 945 F. Supp. 1470, 1480 (D. Colo. 1996).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 13-05 (2011025780101).

Respondent with the investigative file for the first investigation, except for the tip information, giving him the facts upon which the memorandum is based.⁵

As for the tip information, Respondent's Motion to Compel is also denied. First, there is no indication that the tip that triggered the first investigation has any relevance to this case. Second, Enforcement properly withheld this information pursuant to Rule 9251(b)(1)(C) because it would divulge "the identity of a source ... that furnished information ... on a confidential basis regarding an investigation."

Respondent fails to make a showing of any potential violation by Enforcement of its *Brady* obligations, and therefore fails to establish a need to require Enforcement to produce an affidavit describing its *Brady* review in this case. Respondent cites OHO Order 01-14 as support for this request.⁶ In that case, however, Enforcement responded to a request for information under *Brady* in such a fashion as to raise the question of whether it had complied with its *Brady* obligations. No such question is present here.⁷

Finally, on the basis of the filings in this matter, there appears to be no need for an in camera inspection of the closing memorandum and tip documents.

For these reasons, the Motion to Compel is denied.

SO ORDERED.

Matthew Campbell
Hearing Officer

June 12, 2013

⁵ See *Stephen P. Clark*, Admin. Proc. File No. 3-7155, 1989 SEC LEXIS 5122, at *6-7 (June 16, 1989)(motion to compel disclosure of an action memorandum denied because the memorandum was properly withheld on the basis of work product and attorney-client privilege, and because source materials for any factual information summarized in the memorandum were disclosed).

⁶ Respondent's Motion to Compel 10 n.3 (Footnote 3 incorrectly cites to OHO Order 01-04; Respondent's Counsel informed the Office of Hearing Officers she meant to refer to OHO Order 01-14).

⁷ OHO Order 01-14, 6-7.