

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 02-03 (C3A010036).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A010036
v.	:	
	:	Hearing Officer - DMF
	:	
	:	
	:	
Respondents.	:	
	:	

**ORDER DENYING RESPONDENTS' MOTION FOR ORDER
DIRECTING ENFORCEMENT TO PRODUCE DOCUMENTS**

On January 22, 2002, respondents _____, _____ and _____ (the “_____”) filed a motion seeking an order requiring the Department of Enforcement “to produce documents and information concerning the FBI’s connection with the account that is the subject of this proceeding.” In support, the _____ Respondents point out that, during the initial pre-hearing conference, Enforcement counsel acknowledged that during the course of the NASD Regulation staff’s investigation, the staff sent information they had gathered to the FBI and also received information from the FBI. The _____ Respondents contend that they are entitled to discovery of all information provided by the FBI. On January 29, Enforcement filed an opposition to the motion. For the reasons set forth below, the motion is denied.

Enforcement’s general disclosure obligations are set forth in Rule 9251(a)(1), which requires Enforcement to make available for inspection and copying documents prepared or obtained by “Interested Association Staff” in connection with the

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investigation that led to the institution of proceedings. Rule 9251(b)(1) excepts from this obligation, among other things, confidential information that the staff may furnish to or receive from any federal, state or foreign regulatory authority in connection with a civil or criminal enforcement investigation or proceeding. Rule 9251(b)(2), however, provides that the exceptions do not authorize Enforcement to withhold material exculpatory evidence. See Brady v. Maryland, 373 U.S. 83 (1963)

It is clear from the _____ Respondents' motion and Enforcement's opposition that any information that the NASDR staff may have received from the FBI falls within the disclosure exceptions in Rule 9251(b)(1). Further, Enforcement counsel has submitted a sworn declaration stating that he has "reviewed the documents that were withheld in order to ascertain whether any of them contained material exculpatory evidence," and that, based on his review, "I can state that I did not find any documents from amongst those that had been withheld that contained material exculpatory evidence." There is nothing in the record that would call into question these representations. Therefore, the material that the _____ Respondents seek is not discoverable under Rule 9251.

The _____ Respondents contend that, even if information provided by the FBI is not discoverable under Rule 9251, it must be provided to them if "the relationship between the NASD and the FBI ... was to such a degree that the NASD in effect acted as a 'governmental agency' and not as a private organization. If that happened, then, in our opinion, this proceeding is tainted and the information and material provided to and/or by the FBI has to be suppressed."

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But the _____ Respondents offer no factual or legal support for this argument. First, they offer no evidence of any significant link between this proceeding and the FBI. In contrast, Enforcement represents that “[t]he conduct complained of in this case was identified during the NASD’s 1999 routine examination of Respondent _____,” and that “documents received from the FBI were not relied upon in initiating the investigation and the complaint nor will any information received from the FBI be relied upon by [Enforcement] in prosecuting this matter.”

Second, the _____ Respondents offer no legal authority to support their opinion that, if the staff cooperated with the FBI, the NASD might somehow have been transformed from a private organization into a “governmental agency.” Clearly, private individuals and organizations voluntarily cooperate with law enforcement officials on many occasions, as a matter of civic duty, without being considered part of the government; it is unclear why the _____ Respondents believe a different standard should apply to NASD Regulation.

Finally, even if NASD Regulation were treated as a “governmental agency,” the _____ Respondents fail to explain why that would require disclosure of any information that the FBI provided, unless that information included “material exculpatory evidence” disclosable under Brady. As noted above, however, Enforcement counsel has submitted a sworn declaration stating that he has determined that the documents withheld by Enforcement do not contain material exculpatory evidence. Under these circumstances, there is no basis for imposing more stringent disclosure obligations on Enforcement than those imposed under Rule 9251, and no basis for believing that Enforcement has not fulfilled its Rule 9251 obligations.

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The _____ Respondents also request, in the alternative, that the Hearing Officer require Enforcement to submit withheld documents for in camera review. In light of Enforcement's uncontested representations, there is no basis for conducting such a review.

The motion is denied.

SO ORDERED.

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
 January 30, 2002