

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

ADMINISTRATIVE LAW JUDGE: D. MICHAEL CHAPPELL

IN THE MATTER OF:

DOCKET No. D09423

NATALIA LYNCH, APPELLANT

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**BRIEF OF APPELLANT IN ANSWER
TO JUDGE HIMES' ORDER OF JULY 11, 2024**

Appellant Natalia Lynch responds to the question posed in Your Honor's July 11, 2024 Order. The simple answer is, "no." HISA's attempt to restrict Ms. Lynch's lead counsel's access to evidence is wrong as a matter of fact, wrong as a matter of interpretation of the ADMC Rule upon which HISA seeks to rely, and flies in the face of long-settled jurisprudence on counsel's right to access evidence, without which an individual's fundamental right to counsel would be meaningless.

1. HISA has asserted that Mr. Boehning's status as a "Covered Person" supports confidentiality under ADMC 5620(b).¹ Your Honor has already rejected HISA's interpretation of ADMC 5620(b) in similar circumstances. June 26, 2024 Order of Judge Himes at 3. Mr. Boehning is registered as an owner with the New York Gaming Commission. He is also registered with HISA. At present, however, Mr. Boehning is not currently the owner or breeder of any horse.² In any event, Mr. Boehning is only a "Covered Person" when he is engaged in activities subject to HISA's jurisdiction. The practice of law is not such an activity. And, if HISA had concerns, the time to raise them was in December 2023, when it learned of Mr. Boehning's appearance on behalf of Ms. Lynch, not for the first time just days before the Hearing.³

2. ADMC Rule 5620(b) is inapposite. That Rule does not grant HISA the power to prohibit disclosure of confidential information in administrative hearings; to the contrary, the ADMC Rules allow disclosure "for any legitimate legal, law enforcement . . . [or] disciplinary

¹ HISA incorrectly cited ADMC Rule 5610(b) in its July 9 email to your Honor.

² HISA's online portal lists Mr. Boehning as the Owner of "Northway." Mr. Boehning sold his part interest in Northway on June 19, 2024. Mr. Boehning is willing to supply a declaration to this effect.

³ HISA's assertion also makes little sense given that a review of attorneys active in matters before HISA and the FTC suggests there are other "Covered Persons." And HISA itself must employ "Covered Persons" in these matters, including as expert witnesses.

. . . purpose.” ADMC Rule 5620(b). Adjudicative authorities have sufficient safeguards to prevent the unintended disclosure of confidential information, such as protective orders, *in camera* review, and the power to sanction violators. Rule 5620(b) is, at its core, designed to ensure whistleblowers or confidential informants have confidentiality protection, *except* as required by law. Nothing in the interview report discussed therein falls within the scope of the Rule.⁴ Arguments about relevance are belied by the fact that the HIWU investigator included it in his report and filed it in Ms. Lynch’s case, and that the information appears to permit the reader to situate certain events in time.

3. HISA’s assertion is also wrong because the guarantee of due process cannot be satisfied where, as here, a party and their counsel are not permitted to examine evidence produced to an ALJ and available to HISA. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’”) This notion is not new. Due process requires that Ms. Lynch be able to adequately consult with counsel about evidence which may be relevant to her case. *Cf. United States v. Medina*, 628 F. Supp. 2d 52, 54 (D.D.C. 2009) (“[A]ny consultation with counsel is rendered meaningless unless the defendants and their attorneys have an opportunity to review the evidence.”).

Accordingly, Mr. Boehning is entitled to view the unredacted documents as Ms. Lynch's attorney.

Dated: July 12, 2024

⁴ Further, to the extent HISA contends the redacted information is protected by Rule 5620(b) that cannot stand because HISA has not established how the redacted information would tend to reveal the identity of any informant, and such information, including the identity of any informant, must be produced here where it is clearly “relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.” *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); cited in *In re Kleberg County*, 86 F. App'x 29, 32-33 (5th. Cir. 2004).

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Respectfully submitted,

/s/ Grant S. May

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2024, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing to be filed and served as follows:

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