

TO: Office of Government Information Services
SUBJECT: FDA Case No. 14-0068-AA; Appeal No. 2013-7493
DATE: June 16, 2014



BACKGROUND

FoodQuestTQ is a small computer software company being forced out of business by the Food and Drug Administration (FDA). The FDA duplicated a suite of computer software tools being commercially sold by FoodQuestTQ LLC. The action by the FDA to provide duplicate tools free of charge to the food industry has resulted in the bottom dropping out of FoodQuestTQ LLC commercial sales which is now forcing the small company out of business.

PURPOSE OF THE FOODQUESTTQ ORIGINAL FOIA REQUEST AND SUBSEQUENT APPEAL

The purpose of the original FoodQuestTQ LLC FOIA request to the FDA and subsequent appeal to DHHS was to seek the release of documents showing the breadth of Department of Health and Human Services (DHHS) and FDA “blacklisting” of FoodQuestTQ within both the U.S. Government and the private sector.

PRIOR EVIDENCE OF DHHS AND FDA “BLACKLISTING” OF FOODQUESTTQ LLC

The original FoodQuestTQ Freedom of Information Act (FOIA) request made to the FDA and DHHS in the instant matter was predicated on evidence provided by the National Ombudsman for Small Business of the Small Business Administration (SBA) demonstrating that DHHS and the FDA are retaliating against FoodQuestTQ LLC for complaining to SBA about the actions being taken against them by the FDA and DHHS. For example, an internal FDA-DHHS memorandum provided by the SBA to FoodQuestTQ LLC documents a special government interview with a former FoodQuestTQ LLC business partner. Immediately after the FDA and DHHS conducted their special interview the business partner immediately terminated their teaming agreement with FoodQuestTQ LLC.

THE IMPORTANCE OF THIS FOIA REQUEST

FoodQuestTQ LLC has several outstanding FOIA requests for the e-mail traffic and resulting e-mail strings of several other FDA/DHHS employees and their contracted agents. For example, members of the FDA Food Defense Team are directly implicated in the duplication of FoodQuestTQ LLC’s suite of commercial computer software tools. It is possible that DHHS and the FDA will use the denial of this appeal to form a precedent in order to prevent the release of information under other pending FoodQuestTQ LLC FOIA requests and appeals that will show the true breadth and scope of DHHS and FDA “blacklisting” of FoodQuestTQ within the U.S. Government and the private sector.

FIVE REPRESENTATIVE EXAMPLES OF PRIOR FDA AND DHHS ATTEMPTS TO VIOLATE P.L. 89–554, 80 Stat. 378, 5 U.S.C. § 552 IN THE MATTER OF FOODQUESTTQ LLC

1. On January 8, 2014, FoodQuestTQ filed a FOIA request with the FDA to search the official government e-mail accounts of the lead Department of Health and Human Services (DHHS) counsel handling the FoodQuestTQ LLC matter and several FDA members of the Food Defense Team that were directly implicated in duplicating FoodQuestTQ’s suite of computer automated tools. In their FOIA request, FoodQuestTQ explicitly asked for all e-mails and

resulting e-mail strings initiated by the employees to determine if they contained derogatory information relating to FoodQuestTQ LLC. FoodQuestTQ was advised that the requested documents were being withheld from release based on lawyer client privilege. In this case, the use of the lawyer-client privilege was not a legitimate reason to withhold the requested documents since the allegations of fraud, waste and abuse were being made directly against the DHHS lead counsel and the members of the FDA Food Defense Team themselves creating a direct and actual conflict of interest. FoodQuestTQ LLC has raised concerns that activities involving the DHHS lead counsel and members of the FDA Food Defense Team rise to the level of intentional obstruction of justice. This matter is currently under appeal.

2. On January 9, 2014, in response to an official FOIA request, FoodQuestTQ LLC was advised by the FDA that they do not collect, maintain or require any type of sign-up for the use of the FDA computer software tools that duplicate FoodQuestTQ products. FoodQuestTQ subsequently confronted FDA with a computer “screenshot” taken directly from their official U.S. Government website demonstrating that the FDA does, in fact, collect such data and maintain computer sign in logs. This was an obvious attempt to deceive in order to avoid the disclosure of releasable information pursuant to Title 5 U.S.C. §552. FoodQuestTQ LLC has repeatedly raised concerns that activities by the Center for Food Safety and Nutrition (CFSAN) and members of the FDA Food Defense Team in blocking the identification and release of information pursuant to P.L. 89–554, 80 Stat. 378, 5 U.S.C. § 552 may rise to the level of intentional obstruction of justice. This matter is currently under appeal.
3. On January 19, 2014, FoodQuestTQ filed an official FOIA request with the FDA to respond to a series of questions. On April 8, 2014, FDA denied our request for responses citing the case law teachings of *Rodriguez-Cervantes vs. HHS* F. Supp. 2d 114, 116-17 (D.D.C. 2012). The case law teachings of *Rodriguez v. Cervantes* are totally irrelevant to the January 19, 2014, FOIA request made by FoodQuestTQ. This is another example of an attempt to deceive by intentionally misreading FOIA case law in order to avoid the disclosure of releasable information pursuant to P.L. 89–554, 80 Stat. 378, 5 U.S.C. § 552. This matter is currently under appeal.
4. On March 17, 2014, FoodQuestTQ filed an official FOIA request with the FDA asking for any and all internal FDA and DHHS documents of any kind including notes, descriptions, memoranda, signed or initialed concurrence copies, e-mail or any other records relating to the patent or copyright of the FoodQuestTQ LLC computer software tools that were duplicated by the FDA Food Defense Team. On March 31, 2014, the FDA denied our request. The denial letter simply dismisses FoodQuestTQ official FOIA request for FDA records stating that copies of issued government patents and copyrights are available from the U.S. Patent and Trademarks Office. This is another example of the FDA’s intentional actions to block and forestall the disclosure of properly releasable information pursuant to P.L. 89–554, 80 Stat. 378, 5 U.S.C. § 552. This matter is currently under appeal.
5. On September 18, 2013, FoodQuestTQ LLC submitted a Freedom of Information Act (FOIA) request to the Department of Health and Human Services (DHHS) and the FDA for all e-mails initiated by FDA employee Ms. Leanne Jackson that relate in any way to the matter of FoodQuestTQ and all resulting e-mail strings. The purpose of the FoodQuestTQ LLC FOIA

request was to determine if Ms. Jackson was engaged in “blacklisting” FoodQuestTQ LLC within the U.S. Government and with the food industry. In response to the request, the Center for Food Safety and Nutrition (CFSAN) of the FDA allowed Ms. Jackson to search her own e-mail accounts. Given the serious allegations made in this case that directly involve Ms. Jackson and by virtue of the manner in which the search was allowed to be conducted by CFSAN, the opportunity to delete the e-mail traffic requested in our original request becomes a major concern. For this reason, the manner in which DHHS and FDA searches for relevant documents in the entire matter of FoodQuestTQ LLC are not being reasonably calculated. To use the old adage, the methods used by DHHS and FDA to search for relevant documents in the matter of FoodQuestTQ LLC are akin to allowing the fox to guard the chicken house. This may yet be another example of DHHS and FDA intentional actions to destroy relevant documents in order to block and forestall the disclosure of properly releasable information pursuant to P.L. 89–554, 80 Stat. 378, 5 U.S.C. § 552.

THE INSTANT CASE (FDA Case No. 14-0068-AA; Appeal No. 2013-7493)

This brings us full circle to the instant case: FDA Case No. 14-0068-AA; Appeal No. 2013-7493.

On September 18, 2013, FoodQuestTQ LLC submitted a Freedom of Information Act (FOIA) request to the Department of Health and Human Services (DHHS) and the FDA for all e-mails initiated by FDA employee Ms. Leanne Jackson that relate in any way to the matter of FoodQuestTQ and all resulting e-mail strings. In response to our request we were provided with three e-mails internal to the FDA Center for Food Safety and Nutrition (CFSAN) originated by Ms. Jackson. No e-mail strings resulting from the electronic distribution via e-mail of FoodQuestTQ related documents within the U.S. Government and the private sector were provided as requested by FoodQuestTQ LLC’s September 18, 2013, FOIA request.

On November 20, 2013, FoodQuestTQ LLC filed an appeal with the FDA that they did not provide the full extent of records as specified in their September 18, 2013, FOIA request. In their appeal FoodQuestTQ LLC asserted that the FDA search for records was incomplete because it did not include **all** of the e-mail traffic initiated by Ms. Jackson nor any of the e-mail strings that resulted from her e-mail communications relating to FoodQuestTQ LLC.

On June 2, 2014, Mr. William Hall, DHHS, denied FoodQuestTQ’s appeal based on the following six assertions that: 1) the “plain language” of the original FoodQuestTQ LLC request did not seek all electronic records where Ms. Jackson “opened, forwarded or commented” on the subject of FoodQuestTQ LLC; 2) electronic records demonstrating that the FDA intentionally attempted to mislead FoodQuestTQ LLC have no bearing on FDA’s search for records; 3) a search of Ms. Jackson’s e-mail account by the Chief Information Officer of the FDA revealed no instances where Ms. Jackson forwarded any e-mails relating to FoodQuestTQ; 4) the FDA has already put forth a reasonably calculated search for the records requested by FoodQuestTQ LLC; 5) the commercial “Mail Chimp” e-mail tracking software demonstrating that Ms. Leanne Jackson opened e-mails relating to FoodQuestTQ LLC over 351 times is unreliable and inaccurate; 6) the FDA acted reasonably in interpreting what information the requestor sought.

The remainder of this brief addresses, in order, each of the six assertions made by DHHS as the basis upon which they are attempting to prevent the disclosure of the properly releasable information as requested by FoodQuestTQ pursuant to P.L. 89–554, 80 Stat. 378, 5 U.S.C. § 552.

NO. 1: THE DHHS "PLAIN LANGUAGE" ASSERTION

The FDA asserts that the "plain language" of the original FoodQuestTQ LLC FOIA request dated September 18, 2013, did not include e-mails that were merely opened by Ms. Jackson. **This is not correct.**

In their original FOIA request of September 18, 2013, and again in their appeal letter dated November 20, 2013, **FoodQuestTQ LLC specifically requested all electronic e-mail records related to the 351 times and dates that Ms. Jackson "opened, forwarded or commented" on a single FoodQuestTQ e-document.** The request included all related e-mail strings resulting from any communications initiated by the employee regarding the document as well as any "cc's" and "bcc's" for any e-mails that were responsive to the original request.

NO. 2: THE DHHS ASSERTION THAT THE E-MAIL TRACKING OF MS. JACKSON'S E-MAIL HAS NO BEARING ON THE MATTER

In denying the FoodQuestTQ LLC appeal, Mr. Hall asserts that FoodQuestTQ LLC's use of a commercial tracking service has no bearing on the FoodQuestTQ LLC appeal. In their response to FoodQuestTQ's original FOIA request the FDA represented that the three e-mails released to FoodQuestTQ at that time represented the entire e-mail record of the instances where Ms. Jackson "opened, forwarded or commented" on information related in any way to the FoodQuestTQ matter. **The electronic records provided to DHHS and the FDA by FoodQuestTQ on November 20, 2013, directly contradict the DHHS assertion that the three e-mails initially released to FoodQuestTQ represented the entire e-mail record of the instances where Ms. Jackson "opened, forwarded or commented" on information related to the subject FoodQuestTQ LLC document.**

NO. 3: THE FDA SEARCH REVEALED NO INSTANCES WHERE MS. JACKSON FORWARDED ANY E-MAILS RELATING TO THE MATTER OF FOODQUESTTQ LLC

Any test of reasonableness indicates that the same individual would not open the same electronic document 351 times over such a short period without making some use of the document. As of June 16, 2014, Ms. Jackson's number of recorded "Mail Chimp" openings of the same document now exceeds 600 times. This leads to the conclusion that the methods of search being employed by DHHS and the FDA are unreasonable because they are relying on the very same individuals and organizational units within DHHS and the FDA to produce and not destroy requested documents that would necessarily implicate them in fraud, waste, abuse and potentially other criminal activities.

NO. 4: THE FDA HAS PUT FORTH A REASONABLY CALCULATED SEARCH FOR RECORDS

Either the "Mail Chimp" e-mail tracking software is totally dysfunctional and dramatically inflating the number of times Ms. Jackson is opening the same document off of her computer or the FDA has not put forth a reasonably calculated search for records. The only remaining possibilities are that: 1) the "Mail Chimp" commercial e-mail tracking software is totally dysfunctional and dramatically inflating the number of times Ms. Jackson is opening the document off of her computer, or; 2) the FDA has intentionally deleted electronic evidence that implicates the agency and its employees in fraud, waste and abuse.

NO: 5 THE DHHS ASSERTION THAT “MAIL CHIMP” COMMERCIAL E-MAIL TRACKING SYSTEMS ARE UNRELIABLE AND INACCURATE

The assertion by DHHS and the FDA that the “Mail Chimp” commercial software product may be unreliable and inaccurate is self-serving and simply not true. The government itself uses the services of “Mail Chimp.” The accuracy and reliability of the “Mail Chimp” software package is demonstrated by the 24-7 maintenance of the system by over 250 employees and over six million satisfied users across the globe along with dramatically increasing sales based on high quality.

NO. 6: THE FDA ACTED REASONABLY IN INTERPRETING WHAT THE REQUEST SOUGHT

The assertion that the FDA acted reasonably in interpreting FoodQuestTQ’s original FOIA request and subsequent appeal is not true. Any test of reasonableness indicates that the same individual would not open the same electronic document 351 times over such a short time period without making use of the document.

[END]