

# FREDDOM OF INFORMATION ACT APPEAL

Mr. William Hall  
Director, News Division  
Mary E. Switzer Building  
U.S. Department of Health and Human Services  
Room 2206  
330 C Street S.W. Washington, DC 20201



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April 9, 2014

REFERENCE: FOIA APPEAL TO APRIL 8, 2014, LETTER FROM MR. JODY MENKHEIM DENYING REQUESTED INFORMATION UNDER 5 USC §552

Dear Mr. Hall:

This letter is in response to the April 8, 2014, letter we received from Mr. Jody Menikheim, Director, Food Defense and Emergency Coordination Staff, Office of Analytics and Outreach, Center for Food Safety and Applied Nutrition, Food and Drug Administration (FDA). A copy of Mr. Menikheim's letter is attached.

The letter denies our request for responses to a series of questions and cites the case law teachings of *Rodriguez-Cervantes vs. HHS* F. Supp. 2d 114, 116-17 (D.D.C. 2012). The Food and Drug Administration and the Department of Health and Human Services (HHS) cite *Rodriguez-Cervantes vs. HHS* as the legal basis for refusing to answer the questions contained in our January 19, 2014, Freedom of Information Act (5 USC §552) request.

This letter appeals the FDA and HHS denial of complete responses to these questions based on the case law teachings of *Rodriguez-Cervantes vs. HHS*. The case law teachings of *Rodriguez v. Cervantes* are completely irrelevant to our January 19, 2014, Freedom of Information Act request. The proper teachings of *Rodriguez-Cervantes vs. HHS* as they relate to our January 19, 2014, Freedom of Information Act (5 USC §552) request are set forth below.

In *Rodriguez-Cervantes v. HHS*, No. 11-1387, 2012 WL 1142552 (D.D.C. Apr.6, 2012) (Boasberg,J.), the Court held granting the social Security Administration's (SSA) motion for summary judgment on the basis that plaintiff failed to exhaust his administrative remedies where he did not submit a FOIA request to the agency, but merely requested documents in the course of litigation.<sup>1</sup>

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<sup>1</sup>U.S. Department of Justice, District Court Decisions, *Rodriguez-Cervantes v. HHS*, No. 11-1387, 2012 WL 1142552 (D.D.C. Apr.6, 2012) (Boasberg,J.) as retrieved from the World Wide Web on April 9, 2014 at: <http://www.justice.gov/oip/courtdecisions/exhaustion-admin-remedies.html>

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Quite to the contrary, FoodQuestTQ submitted an official Freedom of Information Act request pursuant to 5 USC §552 to Mr. Garfield Dailey, FOIA Officer, Department of Health and Human Services dated January 19, 2014. In the instant case, FoodQuestTQ was, in fact, aggressively pursuing the administrative remedies available to them under the Freedom of Information Act (5 USC §552) making the case law teachings of *Rodriguez-Cervantes v. HHS* completely irrelevant to the instant FoodQuestTQ matter.

In *Rodriguez-Cervantes v. HHS* the court further concluded based on a review of the plaintiff's correspondence with the agency, that plaintiff's letter to SSA asking if "there is any way/application to get [his] social security benefits before the age established by [SSA] policies" did not constitute a reasonably described request for agency records under the FOIA because it "contains no explicit or even implicit request for the production of any records." In *Rodriguez-Cervantes v. HHS*, the Court similarly determined that "neither of Plaintiff's two other letters to SSA was a FOIA request or anything that could be liberally construed to amount to a request for records," but rather notes that this correspondence "merely pose[s] questions to SSA or ask[s] for assistance in applying for social security benefits." Further, the court notes that plaintiff himself "admits that he has no FOIA request before SSA."<sup>2</sup>

Quite to the contrary, the official FoodQuestTQ Freedom of Information Act request does, in fact, "constitute a reasonably described request for agency records." Each and every question contained in the January 19, 2014, official FoodQuestTQ request being made pursuant to 5 USC §552 is highly specific and relates directly to an explicit record of determinations made by FDA and HHS in their handling of the FoodQuestTQ matter. Each and every question relates in a highly explicit fashion to the extensive documentation that is undeniably demonstrated by Mr. Dale Berkley's FDA/HHS own legal defense brief of April 26, 2013, thus making the case law teachings of *Rodriguez-Cervantes v. HHS* completely irrelevant to the instant FoodQuestTQ matter.

In response to our past Freedom of Information Act requests, we have experienced a disturbing pattern of intentionally incomplete and otherwise deceitful responses to our requests for information. We have also been confronted with improper determinations to withhold pertinent information because of Government claims that the actions taken against us were part of a Government "deliberative process" or that the wrongdoing committed by Government employees is now covered under "lawyer-client" privilege. Now we are confronted with FDA and HHS Office of General Counsel intentional misreading of case law.

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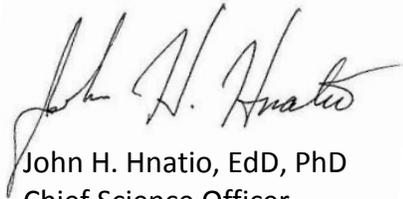
<sup>2</sup> U.S. Department of Justice, District Court Decisions, *Rodriguez-Cervantes v. HHS*, No. 11-1387, 2012 WL 1142552 (D.D.C. Apr.6, 2012) (Boasberg,J.) as retrieved from the World Wide Web on April 9, 2014 at: <http://www.justice.gov/oip/courtdecisions/exhaustion-admin-remedies.html>

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Intentional violations of the Freedom of Information Act and the withholding of information under false pretenses are most egregious and may rise to the level of conspiracy to obstruct justice in the matter of FoodQuestTQ versus the Food and Drug Administration and the Department of Health and Human Services. We are making the Inspector General of the Department of Health and Human Services aware of continuing FDA and HHS attempts to unlawfully withhold information that is, in fact, properly releasable to FoodQuestTQ under the Freedom of Information Act (5 USC §552).

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Sincerely yours,

A handwritten signature in black ink, appearing to read "John H. Hnatio". The signature is written in a cursive style with a large initial "J".

John H. Hnatio, EdD, PhD  
Chief Science Officer

cc:

Senator Mikulski  
Senator Leahy  
Senator Grassley  
Representative Delaney  
Representative Wittman  
Dr. Margaret Hamburg, Commissioner, FDA  
Ms. Kathleen Sibelius, Secretary, HHS  
Mr. Brian Castro, NOSB  
Mr. Dan Levinson, HHS-IG  
Mr. Garfield Daley, HHS  
Mr. Jody Menikheim, FDA