

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



January 18, 2014

REFERENCE: FOIA APPEAL (Case No. 2014-0469 WW)

Dear Mr. Hall:

This letter is to appeal our January 8, 2014, Freedom of Information Act (FOIA) request to search the official government e-mail accounts of: 1) Mr. Jason Bashura; 2) Mr. Jody Menikheim; 3) Ms. Marion Allen and 4) Mr. Dale Berkley to seek out all derogatory e-mails/e-mail strings using the terms John Hnatio, FoodQuestTQ and/or FoodquestTQ ranging from March 1, 2013 to January 6, 2014.

We are appealing the Department of Health and Human Services determination to withhold responsive documents in this matter based on the following factors.

The scope of the search for records is not responsive to our request. Your letter indicates that the FDA search for responsive documents was limited only to the Office of General Counsel, Department of Health and Human Services. In our FOIA request we specifically asked that the FDA go directly to the FDA server and the official government e-mail accounts of: 1) Mr. Jason Bashura; 2) Mr. Jody Menikheim; 3) Ms. Marion Allen and 4) Mr. Dale Berkley the to seek out all derogatory/defamatory e-mails/e-mail strings that were written by said employees to any third parties both inside and outside the government.

Your letter states that the responsive documents we request are exempt from release by virtue of the "lawyer-client" privilege. Please be advised that any e-mails or communications to any second or third parties, except those directly between Mr. Berkley himself and each of the above named individuals, fall outside scope of lawyer-client privilege. It is these documents we seek in the instant case.

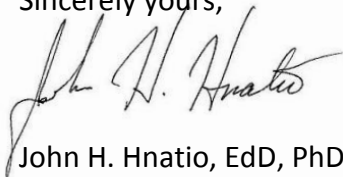
Your letter further states that the responsive documents fall under FOIA exemption (b) (5) as intra-agency and/or interagency communications relating the "deliberative process." Documents written by government employees for the purpose of "blacklisting" a small business in reprisal for filing a complaint with the National Ombudsman for Small Business do not relate to any "deliberative process" within the meaning of FOIA exemption (b) (5).

The Department of Health and Human Services determination to treat the communications between Mr. Berkley and the above named FDA employees as lawyer-client privileged information raises serious legal and ethical implications relating to any subsequent criminal investigation of alleged wrongdoing by Mr. Berkley and the above named employees involved in this matter.

We are concerned that the FDA and the Department of Health and Human Services may be unlawfully using the FOIA and lawyer-client privilege as the means to shield the alleged unlawful actions of the HHS and FDA employees that may be involved in fraud, waste and abuse in the FoodQuestTQ matter.

The withholding of responsive documents under false pretenses constitutes an egregious violation of the FOIA and could rise to the criminal level of obstruction of justice. Because of these grave concerns, we are providing a copy of this appeal directly to Mr. Daniel Levinson, the Inspector General of the Department of Health and Humans Services.

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:

Mr. Dan Levinson  
Mr. Dale Berkley  
Mr. Jason Bashura  
Mr. Jody Menikheim  
Ms. Marion Allen