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DATE: February 22, 2001

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BY FAX ONLY

TO: Fax Distribution List

FROM: Robert E. Kopp, Director
Appellate Staff, Civil Division

DATE: February 22, 2001

RE: Commonwealth of Pennsylvania Department of Public Welfare v. United States and U.S. Department of Health and Human Services, No. 99-175 (W.D. Pa.)

Attached is a copy of the recent decision by the district court. **Please note that, due to the decision's length, it is being faxed in three parts.**

Because this decision could have government-wide implications, we are soliciting your views on whether the government should pursue appeal.

Under the new timing guidelines established by the Solicitor General, your recommendation on whether to seek further review is due **March 8, 2001**. To speed processing, please fax your recommendation to 202-307-2551.

Unless we hear from you by that date, we will assume that you have determined to make no recommendation. Upon request, a copy of our memorandum will be provided to you when it is sent to the Solicitor General.

The attorney on the Appellate Staff assigned to this case is: Christine Kohl, Phone: 202-514-4027, Fax: 202-514-7964.

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Enclosure

1999V00115

ARH
Ken

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE,

Plaintiff,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

Civil Action No. 99-175

MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, Chief Judge:

In February 1999, the Commonwealth of Pennsylvania filed a lawsuit against defendants the United States of America and the Department of Health and Human Services ("HHS") to enforce certain provisions of the Freedom of Information Act ("FOIA"). Dkt. no. 1. The Commonwealth later filed an Amended Complaint, dkt. no. 32, in which it asserts two (2) claims. First, it alleges that defendants have violated FOIA by failing to properly index and publish statements of policy adopted by the agency. Second, it claims that three (3) sections of the Handbook of Public Assistance, a regulation promulgated by HHS more than fifty (50) years ago, are invalid and cannot be enforced against it in a pending audit proceeding. After over eight (8) months of discovery, the parties filed cross-motions for summary judgment. For the following reasons, I will grant judgment for the Commonwealth on its FOIA claim and dismiss its claim challenging the validity of the Handbook.

I. BACKGROUND

A. The AFDC, EA, and TANF Programs

For many years, Pennsylvania participated in a variety of cooperative Federal-State grant programs established under the Social Security Act. These programs included the Aid to Families with Dependent Children ("AFDC") program and the Emergency Assistance ("EA") program. Dkt. no. 40, ¶ 5. The purpose of these programs was to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them. Dkt. no. 46, Ex. A, ¶ 3. HHS was the federal agency that had overall responsibility for the AFDC and EA programs. In fact, the specific office within HHS that oversaw these programs was the Office of Family Assistance ("OFA"). Dkt. no. 40, ¶ 6.

In 1996, Congress replaced the old AFDC and EA programs with a new program entitled Temporary Assistance for Needy Families ("TANF"). Dkt. no. 46, Ex. A, ¶ 4; see also Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a), 110 Stat. 2105, 2112-60 (1996) [hereinafter "Welfare Reform Act of 1996"]. Not only did TANF repeal the AFDC and EA programs, but it also set up a new way of administering welfare grants to the States. Under TANF, federal funds are provided to States as block grants. States are then given flexibility to decide how to use the funds, as long as they satisfy certain statutory objectives: promote the care of children in their own homes; encourage parents to be self-sufficient; reduce out-of-wedlock pregnancies; and cultivate two-parent families. Dkt. no. 46, Ex. A, ¶ 4. Like AFDC and EA, TANF is administered by the OFA, an office in HHS. Dkt. no. 40, ¶ 6.

Even though Congress repealed the AFDC and EA programs in 1996, those programs,

and the regulations that govern them, still apply to select States that take part in the TANF program. Under 42 U.S.C. § 604(a)(2), otherwise known as the "grandfather clause," a State receiving a block grant under TANF, may choose to use this grant money "in any manner that the State was authorized to use amounts received" under the AFDC and EA policies "in effect on September 30, 1995, or (at the option of the State) August 21, 1996." 42 U.S.C. § 604(a)(2). In other words, under TANF, States have a choice. They can be subject solely to the rules and regulations that govern TANF; or they can take advantage of the grandfather clause and follow the AFDC and EA policies that were in effect in either 1995 or 1996. Pennsylvania decided to subject itself to the TANF's grandfather clause.

B. The Freedom of Information Act

Along with the Welfare Reform Act of 1996, there is another federal statute whose terms are at the heart of this litigation: FOIA. Signed by President Lyndon B. Johnson on July 4, 1966, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 1 (1974) [hereinafter "FOIA Source Book"]. FOIA's purpose was "to establish a general philosophy of full agency disclosure. . . and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." S.Rep. No. 813 (1965), reprinted in id. at 38; see also S.Rep. No. 1219 (1964), reprinted in id. at 93. President Johnson echoed this theme when he signed the Act. "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest." President Lyndon B. Johnson, quoted in id. at 1. Accordingly, FOIA "set a standard of openness for government from which only deviations in well-defined

areas would be allowed." Id. at 1.[1]

To effectuate its purpose of an open government, FOIA called for the disclosure of certain documents in the possession of administrative agencies. FOIA separates agency documents into three (3) distinct categories and establishes different disclosure rules for each kind of document. First, there are formal regulations issued by the agency. FOIA mandates that the agency "publish" these regulations "in the Federal Register. . ." 5 U.S.C. § 552(a)(1). The second category of documents that fall within FOIA's reach are "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." Id. § 552(a)(2)(B). The agency must "promptly publish[]" these documents in the Federal Register or "make [them] available for public inspection and copying." Id. § 552(a)(2). In addition, agencies must "maintain and make available for public inspection and copying current indexes" of these same documents. Id. (emphasis added). In fact, FOIA even goes so far as to require that "each agency" "promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto. . ." Id. (emphasis added). The final category of records under FOIA is a catchall category encompassing those records not available under the first two categories. As to these records, FOIA requires the agency to make them "promptly available to any person" upon request. Id. § 552(a)(3).

This litigation is about whether HHS complied with the indexing and publication requirements of FOIA in administering the AFDC, EA, and TANF programs. According to the Commonwealth, FOIA was meant to ensure that individuals and entities dealing with federal

[1] FOIA was subsequently amended in 1974 and 1996. When I refer to FOIA, I refer to the statute as amended.

agencies know what the law is. The Act was intended to end, once and for all, agency reliance on "secret law" in disputes with those who deal with the government. Afshar v. Department of State, 702 F.2d 1125, 1142 (D.C. Cir. 1983). Despite FOIA's attempt to end "secret law," the Commonwealth claims that "secret law" has governed the AFDC, EA, and TANF programs for many years. The Commonwealth has filed this lawsuit to require HHS to follow FOIA's command and inform the public precisely what law governs the administration of these Federal-State programs.

Knowing what law governs these programs is not only important for purposes of FOIA, it is also crucial to the continued existence of such programs. Like other Federal-State cooperative programs, the AFDC, EA, and TANF programs are voluntary and the States are given the choice of complying with the conditions set forth by the Federal government or foregoing the benefits of federal funding. Cf. Pennhurst State School v. Halderman, 451 U.S. 1, 11 (1980). These programs are implemented pursuant to Congress' power under the spending clause of the Constitution. Id. at 17.

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

Id. Whether under FOIA or the commands of the spending clause itself, at a minimum, the Federal government may have some obligation to inform States participating in the AFDC, EA, and TANF programs as to just what rules or regulations govern their conduct. Accordingly, it is important that I review just what policies governed these programs over the past thirty (30) years

and exactly how the Commonwealth learned of these policies.

C. The Handbook of Public Assistance

Prior to 1970, the principal way that States were informed of the policies that controlled the AFDC/EA programs was through a document called the Handbook of Public Assistance Administration ("Handbook"). Dkt. no. 40, ¶ 11. In simple terms, the Handbook contained statements of policy and interpretations of regulations that governed the conduct of those States that administered AFDC and EA programs. It was seven volumes in total, dkt. no. 37, at 23a, spread throughout twenty-seven looseleaf binders. Id. Portions of the Handbook date back to 1940. Id at 122a. Although the Handbook was never published in the Federal Register nor printed by the Government Printing Office, it was transmitted to all State agencies that administered AFDC and EA programs. Dkt. no. 40, ¶ 14; dkt. no. 46, Ex. F, ¶ 3.

Throughout the years, there were many changes made to the statements of policy contained in the Handbook. For one, in 1975 and again in 1978, portions of the Handbook were repealed by notices published in the Federal Register. Dkt. no. 37, at 52a. Other portions, although not formally revoked with a notice in the Federal Register, were rendered obsolete because they were revised and transferred in regulations. Id. Finally, when Congress repealed the AFDC and EA programs in 1996, the sections of the Handbook dealing with these programs simply became irrelevant, except to the extent a State took advantage of TANF's grandfather clause. Although HHS intended to codify certain portions of the Handbook into published regulations, it never did so. Dkt. no. 40, ¶ 18. By the late 1990's what remained of the legal status of the Handbook was unclear. HHS considered the document "obsolete," dkt. no. 37, at 23a, and even refused to attest to its accuracy. Id.

In an effort to end this confusion, OFA sent a series of policy announcements to all State agencies on February 10, 2000, months after the lawsuit in this case was filed. Id. at 52a-54a. These policy announcements clearly stated that only three (3) sections of the Handbook still applied to those States, like Pennsylvania, administering their welfare program under the TANF grandfather clause: sections 5212; 5214; and 5520. Id. Indeed, HHS considers these three portions of the Handbook to have the status of regulations. Id. at 122a; 36a. Accordingly, if a State fails to comply with these provisions of the Handbook, it may lose its Federal matching funds. Id. at 193a-94a. Although these three (3) remaining Handbook provisions have not been published on the HHS web site or anywhere else for that matter, they were printed and transmitted to all State agencies administering public assistance programs. Dkt. no. 46, Ex. F, Ex. 1. HHS transmitted section 5520 to the States on March 5, 1951, and it sent sections 5212 and 5214 on August 5, 1963. Id.

D. The Policy Issuance System Since 1970

Since 1970, HHS has shifted away from the Handbook as the primary means of informing the States and the public of its policies concerning State administered welfare programs.

Instead, for the AFDC and EA programs, the HHS basically moved to a three-tiered system for disseminating policy guidance concerning Federal statutes. First, the agency issued regulations that were published in the Federal Register. Id., Ex. A, ¶ 5. These regulations explained how HHS would implement the AFDC and EA programs. Second, the agency issued formal statements of policy and interpretations over the years. In particular, these documents

were known as "Action Transmittals" and "Information Memoranda." Dkt. no. 40, ¶ 27.[2] These documents were not published in the Federal Register, id. ¶ 28, but they were mailed to States at the time of their adoption. Id. ¶ 28; dkt. no. 46, Ex. A, ¶¶ 5, 7. Finally, HHS provided guidance to States by responding to specific questions posed by the States. Dkt. no. 37, at 165a; dkt. no. 46, Ex. A, ¶ 5. These responses often merely clarified existing policy. While the response itself was not binding, the States, obviously, were bound by the underlying policy that was being clarified. Dkt. no. 37, at 172a.[3] These responses were neither published, indexed, nor broadly distributed. Nonetheless, States could obtain them through a request under FOIA. Dkt. no. 46, Ex. A, ¶ 6.

With the adoption of the TANF program in 1996, HHS also has applied a similar three-tiered distribution system to its statements of policy. First, the agency has issued regulations in the Federal Register on the core provisions of TANF. Id. ¶ 7. Second, just as with the AFDC and EA programs, the agency has issued a number of formal statements of policy and interpretation since 1996. These documents are known as "Policy Announcements," "Program Instructions," and "Information Memoranda." Id. ¶ 7. The Policy Announcements and Program

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[2] Action Transmittals were binding on the States, while Information Memoranda were merely advisory. Id. ¶ 28.

[3] The defendants have argued that these responses to State inquiries, what the Commonwealth calls Level III documents, are not binding on the States. This argument seems to miss the point because the underlying policy itself is binding on the States, dkt. no. 37, at 172a, and the Level III documents are merely clarifications of the meaning of the underlying policy. Dkt. no. 46, Ex. A, ¶ 5 (stating that responses under AFDC and EA programs were "not binding on all the States," even though they merely "clarif[ied] existing statements of policy and interpretations."). Accordingly, the relationship between the underlying policy and the Level III documents is analogous to the relationship between a court decision and a statute. The statute itself governs, but the court decision can clarify what that statute means. As a litigant, it is important to be aware of both.

Instructions are binding on States, while the Information Memoranda are not. Dkt. no. 40, ¶ 28. Again, these documents were never published in the Federal Register, but they were mailed to the States at the time of their adoption. Id. ¶¶ 27-28. In addition, these documents are indexed and made available on the OFA's website. Dkt. no. 46, Ex. A, ¶ 7. Finally, HHS issues responses to specific questions from States participating in the TANF program. Id. ¶ 8. These interpretations and clarifications are binding on the States and have been posted on the OFA's website. Id.

E. The Indices Maintained By HHS

No doubt, keeping track of an agency's statements of policy and interpretations that are not published in the Federal Register can become a complicated and grueling task. Accordingly, HHS maintains indices of the statements of policy that it has not published in the Federal Register. These indices are meant to comply with FOIA, 5 U.S.C. § 552, which requires agencies to "maintain and make available for public inspection and copying current indexes" of statements of policy that they do not publish in the Federal Register. 5 U.S.C. § 552(a)(2). As the undisputed facts of this case show, HHS maintains two (2) such FOIA indices: one (1) for the AFDC/EA programs; and one (1) for the TANF program.

The AFDC/EA index is maintained in a looseleaf binder in an office at the OFA. Dkt. no. 40, ¶ 36; dkt. no. 38, at 278a-456a. In general, this document includes Action Transmittals and Information Memoranda. There are other documents, not part of the index, that are kept in the same looseleaf binder as the AFDC/EA index. Dkt. no. 40, ¶ 39; dkt. no. 47, ¶ 39. At one point, the index refers to a 1986 Information Memoranda that lists obsolete Action Transmittals. Dkt. no. 36, ¶ 4. Additionally, some of the documents listed in the index are obsolete, but no one,

including OFA, can identify the obsolete documents from the index alone. Id. The AFDC/EA index is not published in the Federal Register. And HHS has never published an order in the Federal Register stating that the publication of the index would be either unnecessary or impracticable. Dkt. no. 37, at 135a. The index does not include what the Commonwealth calls Level III documents -- memoranda issued by HHS in response to specific questions from States.

Up until the time the AFDC and EA programs were repealed by Congress in 1996, HHS regularly distributed the AFDC/EA index and supplements thereto in a number of ways. Dkt. no. 36, ¶ 1. For instance, between 1969 and 1986, OFA regularly sent Action Transmittals and Information Memoranda to the States administering the AFDC and EA programs. Id.; see also dkt. no. 37, 132a-35a. Between 1986 and 1999, HHS made use of a Bulletin Board System ("BBS") that could be accessed by anyone with a modem. On this BBS, the Department posted AFDC and EA Action Transmittals and Information Memoranda. Dkt. no. 37, at 134a. Not only did the BBS contain the AFDC/EA index, but it also contained the full text of each document on the index. Id. Additionally, at times, HHS made portions of the index available on the OFA website, dkt. no. 36, ¶ 1; dkt. no. 37, at 135a (stating that only post-1990 portions of the index were on the website), and placed it on resource tables at conferences sponsored by the Administration for Children and Families ("ACF"). Dkt. no. 36, ¶ 1. Finally, the AFDC/EA index was always available for inspection and copying at OFA in Washington, D.C. Id.

Since the passage of welfare reform in 1996, the Department has also started to maintain a TANF index. This index contains Policy Announcements, Program Instructions, and Information Memoranda for the TANF program. Id. ¶ 2. HHS distributes the TANF index by placing it on the OFA website. Id. In addition, the Policy Announcements, Program

Instructions, and Information Memoranda contained in the index are distributed to the States at the time they are adopted. Dkt. no. 37, at 120a. Just as with its AFDC/EA index, HHS has not published an order in the Federal Register stating that publication of the TANF index is unnecessary or impracticable. Id.

F. The Audit and the Lawsuit

Unsure about precisely which policy statements and regulations governed their participation in the AFDC and EA programs, Pennsylvania wrote to HHS in 1993. In particular, Pennsylvania asked to obtain the still-effective provisions of the Handbook, dkt. no. 32, ¶ 7, and an index and table of contents for the Handbook. Dkt. no. 37, at 23a. On November 5, 1993, the Commonwealth received the following response:

> Enclosed is a copy of Part 4 of the Handbook (1000 pages) which is the only section currently used by HHS. I have been informed by the Office of Family Assistance that it cannot assure the accuracy or currency of the requested material. The enclosed document is presented "as is." As you stated in your request and OFA confirmed, the Handbook has been obsolete for many years, and according to OFA, it has not been maintained.

Dkt. no. 32, Ex. A. Shortly over a month later, HHS wrote again:

> I have been informed by staff of the Administration for Children and Families (ACF) that the Handbook consists of only seven volumes. . . . The index for the first five volumes of the Handbook is all that is available and it is enclosed. However a copy of the table of contents of all seven volumes of the Handbook is enclosed. . . . As you were also informed earlier, the Handbook is obsolete and not updated and staff of the Office of Family Assistance/ACF cannot assure the accuracy or currency of any information that is enclosed.

Dkt. no. 37, at 23a. Based on this correspondence, Pennsylvania was unable to determine exactly which portions of the Handbook still governed its AFDC and EA programs.

In 1998, HHS began an audit of Pennsylvania's EA program. The purpose of the audit

was to determine if EA claims submitted by Pennsylvania for federal financial participation complied with federal statutes, regulations, and guidelines. Dkt. no. 46, Ex. D, ¶ 2. HHS advised Pennsylvania that unpublished policies and interpretations, including provisions of the Handbook, and other unpublished policy memoranda dating back to 1972, would govern the audit. Dkt. no. 32, Ex. B. In response to the HHS audit, Pennsylvania requested that HHS provide instructions on how to purchase the indices of all unpublished statements of policy and interpretations applicable to the repealed AFDC and EA programs and the TANF program. Id. Ex. C. After receiving no response, the Commonwealth wrote again on December 24, 1998. Id. Ex. D. In this letter, the Commonwealth specifically noted that it was requesting these indices pursuant to FOIA. Id. When HHS still did not respond, the Commonwealth filed this lawsuit on February 4, 1999. Dkt. no. 1.

The Commonwealth's original Complaint contained two counts. Count I demanded an order compelling HHS to "conduct and complete a reasonable search for the requested documents . . ." and to "release all documents responsive to Pennsylvania's FOIA request." Id. ¶ 16. Count II sought a declaration that HHS violated FOIA, as well as a declaration invalidating and forbidding HHS from relying on any unpublished policy or interpretation unless it properly indexed these materials. Id. ¶ 21. After the Complaint was filed in this case, HHS did provide the Commonwealth with indices for both the AFDC/EA programs and the TANF program. Dkt. no. 32, ¶ 10.

The Commonwealth then amended its original Complaint. Dkt. no. 32. This Amended Complaint was brought under the Administrative Procedures Act ("APA") in order to compel HHS to comply with the indexing and publication requirements of FOIA. 5 U.S.C. § 552(a)(2).

The Amended Complaint essentially boils down to two (2) claims. First, the Commonwealth seeks a declaration that HHS' current policy and interpretation issuance system for AFDC, EA, and TANF programs violates FOIA. Id. ¶ 17(a). Accordingly, it wants this Court to require HHS to maintain a system for providing public notice of its policies and interpretations that is consistent with FOIA. Id. ¶ 17(b). Second, it seeks both a declaration that the Handbook is an invalid, unpublished regulation and an Order barring HHS from enforcing the Handbook as is. Id. ¶ 17(c).

Shortly after the Commonwealth filed its Amended Complaint, it was told that the first stage of the audit of its program was complete. The Office of Inspector General ("OIG") sent the Commonwealth the OIG final audit report. Dkt. no. 46, Ex. D, ¶ 2. In this report, OIG recommended that $77.6 million of the $99.6 million submitted by the Commonwealth for Federal financial participation was unallowable. Id. ¶ 3. The report is not a final determination as to the action to be taken on the issues in the audit report as OIG does not have authority to implement the recommendations it makes. Id. In fact, the final decision on the audit will be made by the Grants Officer for the Administration for Children and Families in Region III. This final determination has not yet been made. Id. ¶ 3. After this final determination is made, the Commonwealth can appeal the legality of the audit's conclusions through a formalized appeal procedure established by the HHS. Dkt. no. 55, Ex. 1.

While awaiting a final decision on the audit, the parties filed cross-motions for summary judgment on the Commonwealth's Amended Complaint. Dkt. nos. 39 & 43. The Commonwealth's motion basically tracked its requested relief in its Amended Complaint, arguing that HHS has failed to comply with the indexing and publication requirements of FOIA

and that the three (3) still-effective provisions of the Handbook are unenforceable. Dkt. no. 41. In contrast, defendants' motion raises very different arguments. For one, they claim that neither FOIA nor the APA provide for judicial review of the claims at issue in this case. Dkt. no. 44. Additionally, they contend that the Commonwealth lacks standing to bring a number of its claims. Id. Of course, defendants argue that they have fully complied with the requirements of FOIA. Id.

No doubt, the Commonwealth's suit raises important questions about the requirements of FOIA. Nevertheless, this suit also poses significant questions about the power of this Court to hear and resolve this controversy. Federal courts are courts of limited jurisdiction. Our authority is limited by the Constitution, by statutes passed by Congress, and by our own respect for the separated and divided nature of our constitutional government. Accordingly, before I delve into the merits of the Commonwealth's suit, I must ensure that I have the authority to decide this case and to grant the Commonwealth the relief it requests.

II. JUDICIAL REVIEW AND JUSTICIABILITY

In its motion for summary judgment, defendants argue that this Court lacks both the statutory and constitutional authority to resolve this lawsuit. In particular, they allege that judicial review of the Commonwealth's claims is not permitted under either FOIA or the APA, that there is no final agency action in this case, that the Commonwealth has failed to exhaust its administrative remedies, and that the Commonwealth lacks standing. Concerning the Commonwealth's first claim for relief, I reject defendants' arguments and will proceed to the merits. Nevertheless, I will dismiss the Commonwealth's second claim because the Commonwealth has not exhausted its administrative remedies and the claim is neither ripe nor

the product of final agency action.[4]

A. Judicial Review and Remedy Under the APA

The most difficult issue raised by defendants' motion for summary judgment relates to this Court's statutory authority to review the Commonwealth's FOIA claim. In an earlier opinion in this case, I held that judicial review of the Commonwealth's FOIA claim was available under the APA. Dkt. no. 19, at 4. At that time, I noted that I had the authority to issue the relief sought by the Commonwealth, that is, to compel HHS "to maintain a true index if it is not already doing so," id. at 4, and to issue "a declaration that HHS's practices violate the FOIA," if indeed they do. Id. at 5. In their motion, the defendants again question this Court's statutory authority to order the relief sought by the Commonwealth in its first claim. And once again, I reject this claim.

FOIA § 552 contains an express provision that governs judicial review of matters covered under the Act. This provision provides in relevant part:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated . . . *has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld* from the complainant. In such a case the court shall determine the matter de novo. . .and the burden is on the agency to sustain its action.

5 U.S.C. § 552(a)(4)(B) (emphasis added). This provision applies to the judicial review of requests for information under 5 U.S.C. § 552(a)(2), the indexing and publication provision at issue in this case. S.Rep. No. 854, 93d Cong., 2d Sess. 9 (1974), reprinted in Freedom of

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[4] As discussed above, the Commonwealth basically asserts two (2) claims in this case: 1) that defendants violated FOIA's indexing and publication requirements; and 2) that three (3) provisions of the Handbook of Public Assistance cannot be enforced against it.

Information Act And Amendments of 1974, at 161 (U.S. Government Printing Office, Washington, D.C. 1975) [hereinafter FOIA 1974"] ("judicial review provisions apply to requests for information under subsections (a)(1) and (a)(2) of section 552 as well as under subsection (a)(3).").

Although this provision governs judicial review under FOIA, it grants district courts little authority to order wayward agencies to comply with FOIA's commands. In Kennecott Utah Copper v. United States Department of Interior, 88 F.3d 1191, 1202-03 (D.C. Cir. 1996), for instance, the D.C. Circuit held that, under FOIA, district courts have the authority to order agencies to "produce" withheld documents, but not to "publish" them. Id. "While it might seem strange for Congress to command agencies to 'currently publish' or 'promptly publish' documents, without in the same statute providing courts with the power to order publication, we think that is exactly what Congress intended." Id. The Court then continued:

> We think it significant. . . that § 552(a)(4)(B) is aimed at relieving the injury suffered by the individual complainant, not by the general public. It allows district courts to order 'the production of any agency records improperly withheld *from the complainant*,' not agency records withheld from the *public*. 5 U.S.C. § 552(a)(4)(B)(emphasis added). Providing documents to the individual fully relieves whatever informational injury may have been suffered by that particular complainant; ordering publication goes well beyond that need.

Id. at 1203 (emphasis in original). Accordingly, the Court held that it was without statutory jurisdiction over a claim that requested the Department of Interior to publish a document in the Federal Register. Id.; see also Tax Analysts v. I.R.S., 117 F.3d 607, 610 (D.C. Cir. 1997).

In support of its decision in Kennecott, the D.C. Circuit noted that FOIA had its own means of sanctioning those agencies that fail to comply with the publication requirements of the Act. Kennecott, 88 F.3d at 1203.

> Congress has provided an alternative means for encouraging agencies to fulfill their obligation to publish materials in the Federal Register. As amended in 1974, § 552(a)(1) protects a person from being "adversely affected by" a regulation required to be published in the Federal Register unless an agency either published the regulation or the person had actual and timely notice of it. This gives agencies a powerful incentive to publish any rules they expect to enforce. We thus conclude that § 552(a)(4)(B) does not authorize federal courts to order publication.

Id. at 1203. Although the enforcement language cited in Kennecott was § 551(a)(1) of FOIA, the same language is found in § 552(a)(2), the section of FOIA at issue in this case.[5]

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[5] Absent any Third Circuit guidance on the scope of judicial enforcement under FOIA, I will follow the holding in Kennecott which directly addressed the scope of FOIA's judicial review provision. Nevertheless, I note that some earlier FOIA cases may cast doubt on the Kennecott Court's limited reading of FOIA. See Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C.Cir. 1979) (requiring agency to provide "reasonable index" of requested decisions under FOIA); Ehm v. National Railroad Passenger Corp., 732 F.2d 1250, 1257 (5th Cir. 1984) (holding that an agency's failure to publish materials required to be published under 5 U.S.C. § 552(a) constitutes a "withholding" of that information under § 552(a)(4)(B), the judicial review provisions of FOIA); Taxation With Representation Fund v. IRS, 2 Gov't Disclosure Serv. (P-H) 81,028, at 81,080 (D.D.C. Apr. 22. 1980) (recognizing agency's "continuing duty" to make subsection (a)(2) records and indices available under FOIA); Tax Analysts v. IRS, 1998 WL 419755, at *4-6 (D.D.C. May 1, 1998) (ordering the IRS to make certain documents available to the public as "reading room" materials under FOIA); Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 17-20 (1974) (holding that federal courts retain inherent powers of a court sitting in equity when hearing FOIA cases). In addition, in 1983, the Senate passed a bill that would have expressly granted district courts the power "to enjoin the agency from failing to perform its duties" under FOIA's indexing and publication provisions. See Freedom of Information Reform Act: Hearings Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 1st Sess., at 15 (1983). This bill eventually died in the House of Representatives. While it often makes little sense to read anything into proposed legislation, in this case there is some significance to the proposal. In fact, in its Report on the bill, the Senate Judiciary Committee stated that the amendment was meant merely to "clarif[y] that courts may order injunctive relief against non-publication or non-indexing of records covered by subsection (a)(1) or (a)(2)." S. Rep. No. 98-221, 98th Cong., 1st Sess., at 18 (1983). In support of this statement, the Report cited American Mail Line, Ltd., et al. v. Gulick, 411 F.2d 696, 701 (D.C.Cir. 1969), a case in which the D.C. Circuit held that FOIA gives courts the power to enforce the provisions of § 552(a)(2). Accordingly, the amendment to FOIA was not an attempt to change existing law, but merely to codify it. This piece of history, along with the cases cited above, suggests that federal courts may indeed have the authority to order publication of indices under FOIA.

Although I conclude that FOIA does not give me the authority to order the relief requested by the Commonwealth, the APA does. In fact, the Kennecott court specifically left open the question whether the APA authorizes the district court to compel an agency to publish a current index. Id. at 1203; Tax Analysts, 117 F.3d at 610 n. 4. Under § 704 of the APA, judicial review of agency action is permitted only if 1) the statute in question expressly authorizes it, or 2) the action at issue is "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; see also American Disabled v. H.U.D., 170 F.3d 381, 389 (3d Cir. 1999). Because FOIA does not expressly authorize the kind of relief sought by the Commonwealth, I turn to whether there is "final agency action" here "for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

This is manifestly not the typical case of "final agency action." The Commonwealth points to no particular act of HHS that is "agency action." And HHS has issued no rule, regulation, or policy stating its refusal to comply with the requirements of FOIA. See, e.g., Hindes v. F.D.I.C., 137 F.3d 148, 162 (3d Cir. 1998) ("To be a final, reviewable action, . . . the agency action must be one that 'impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process.'") (citation omitted). What is at issue here are allegations that an administrative agency has failed, repeatedly, to comply with its basic statutory obligations. Indeed, the Commonwealth's case is more a case of agency inaction -- repeated failure to comply with the indexing and publication requirements of FOIA -- than it is a case of agency action.

Nevertheless, the kind of inaction alleged by the Commonwealth does constitute "final agency action" under the APA. For one, the APA itself includes "failure to act" in its definition

of "agency action." 5 U.S.C. § 551(13). Additionally, courts have held that agency inaction does amount to final agency action reviewable under the APA in some instances. See, e.g., Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987). In Sierra Club, for instance, the D.C. Circuit explained precisely how and when such inaction amounts to final agency action under the APA.

> [A]gency inaction may represent "agency recalcitrance . . . in the face of a clear statutory duty . . . of such magnitude that it amounts to an abdication of statutory responsibility." Examples of such clear duties to act include provisions that require an agency to take specific action when certain preconditions have been met. When an agency violates such a duty through inaction, "the court has the power to order the agency to act to carry out its substantive statutory mandates."

Id. at 793 (internal citations omitted). Indeed, as the court explained, if review in such an instance were unavailable, then "the agency might forever evade our review and thus escape its duties if we awaited final action before reviewing the claim." Id. When confronted with such a case, a federal court "would normally exercise jurisdiction over such a claim." Id.; see also Marathon Oil Co. v. Lujan, 937 F.2d 498, 500 (10th Cir. 1991) ("Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform.").

The instant case presents precisely the kind of inaction that the Sierra Club Court envisioned as satisfying the final agency action requirement of the APA. The indexing and publication requirements of FOIA, 5 U.S.C. § 552(a)(2), place a strict obligation on administrative agencies:

> Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto . . .

5 U.S.C. § 552(a)(2) (emphasis added). The Commonwealth has introduced sufficient evidence that HHS has failed either to maintain a "current" index or "promptly publish" that index. Based on the facts introduced to support these allegations, I conclude that the Commonwealth has surmounted the final agency action requirement of the APA.[6]

Even though there is final agency action, defendants still argue that judicial review under § 704 is not permitted because the Commonwealth has not shown that there is "no other adequate remedy in a court." 5 U.S.C. § 704. This requirement, like final agency action, is a jurisdictional prerequisite to a district court's ability to review agency action. Environmental Defense Fund v. Tidwell, 837 F.Supp. 1344, 1355 (E.D.N.C. 1992). Defendants claim that FOIA itself provides the Commonwealth with an "adequate remedy in a court," 5 U.S.C. § 704, by allowing a court to order the production of agency records improperly withheld. Dkt. no. 44, at 12. For the following reasons, I disagree.

The Supreme Court dealt with the meaning of the "adequate remedy" provision of the APA in Bowen v. Massachusetts, 487 U.S. 879, 901-905 (1988). In that case, HHS argued that

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[6] There are two sections of 5 U.S.C. § 552(a)(2) that are worth mentioning when discussing the final agency action requirement. First, FOIA provides that HHS may enforce its statements of policy against the Commonwealth as long as the Commonwealth "has actual and timely notice of the terms thereof." Id. Second, FOIA states that HHS need not publish an index if "it determines by order published in the Federal Register that publication would be unnecessary and impracticable." Id. Neither provision alters my conclusion that there is final agency action in this case. For one, just because certain statements of policy are enforceable even when an index has not been created does not mean that the index requirement of FOIA is without its own independent force. As one noted commentator has explained, the scope of FOIA's indexing requirement should not be measured by the scope of its sanction. See Kenneth Culp Davis, The Information Act: A Preliminary Analysis, 34 U. Chicago L.Rev. 240, 253 (1967). Second, although I admit that HHS can opt out of the publication requirement if it wants to, it has never done so.

the district court lacked the authority to review one of its orders because plaintiff, the Commonwealth of Massachusetts, had an adequate alternative remedy in that it could pursue its claim in the Court of Claims. Id. at 901. Calling the Department's argument "novel," id., "restrictive–and unprecedented," id. at 904, the Court rejected it.

According to the Supreme Court, § 704 had an extremely limited purpose: it was crafted to prevent the APA from duplicating "existing procedures for review of agency action." Id. at 903. As the Court explained, "at the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action." Id. Section 704 of the APA, therefore, was not meant "to duplicate the previously established statutory procedures relating to specific agencies." Id. Never did Congress intend by this provision "to defeat the central purpose of providing a broad spectrum of judicial review of agency action." Id. Indeed, the Court reiterated that the APA was not meant to limit review. Rather it was meant "to remove obstacles to judicial review. . . [created by] subsequently enacted statutes." Id. at 904 (quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955)).

The sole question under § 704, therefore, is whether FOIA establishes a special procedure for review of the defendants' actions in this case such that review under the APA would create a duplicative process. Environmental Defense Fund, 837 F.Supp. at 1356. There is nothing in either the statutory scheme or the legislative history to suggest that the APA's and FOIA's enforcement mechanisms are duplicative. Under FOIA, the Commonwealth can obtain any documents from HHS that are not exempt from the statute's reach. In addition, FOIA prevents an agency from enforcing a rule or policy that it has neither indexed nor published. 5 U.S.C. §

552(a)(2). While these remedies may be adequate in some cases, they are far from enough to satisfy the claims brought by the Commonwealth. The Commonwealth does not want to prevent HHS from enforcing certain policies. Rather, it seeks a different kind of relief: an order requiring HHS to comply with FOIA's indexing and publication provisions in the future. FOIA itself does not provide for such relief. Accordingly, the Commonwealth has "no other adequate remedy in a court," 5 U.S.C. § 704, and its suit can proceed under the APA.

Although the Commonwealth's FOIA claim satisfies § 704's basic requirements, there is one additional hurdle that the Commonwealth must surmount before its claim will be reviewable in this court. Under § 701(a)(1) of the APA, judicial review can be limited when the relevant statute precludes judicial review. 5 U.S.C. § 701(a)(1). "Whether and to what extent a statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." See Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984). Just as Congress can preclude review of agency action altogether, so too it can limit review to certain persons or provide for only certain remedies. Id. at 346. Nevertheless, a court should not find preclusion unless there is a "persuasive reason" demonstrated by "clear and convincing evidence," Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-71 (1986), that Congress intended to bar judicial review of an agency's decision. This "clear and convincing" standard is meant as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Block, 467 U.S. at 351.

There is nothing in either the statutory scheme or the legislative history of FOIA to

suggest that Congress intended to preclude judicial review beyond the limited scope of review provided for in FOIA itself. The statute itself is one that grants courts the power to review claims, not one that takes that power away. In addition, the legislative history shows no attempt by Congress to preclude review under the APA. In all of the debates surrounding the enactment of FOIA in 1966 and its subsequent amendment in 1974, there is no mention of a Congressional attempt to limit review under the APA. Likewise, the committee reports drafted by both houses of Congress make no reference to an intention to deprive courts of the right to review FOIA claims under the APA. If anything, the legislative history suggests that Congress wanted to grant the Courts the broadest possible authority to review FOIA's provisions. See, e.g., S. Rep. No. 854, 93rd Cong. 2d Sess., reprinted in FOIA 1974, at 157 (stating that the restructuring of FOIA's judicial review clause "should lay this issue to rest, making it clear that de novo judicial review is available to challenge agency withholding under any provision in section 552"). This is hardly the kind of clear and convincing evidence of preclusion needed to bar judicial relief under § 701(a)(1) of the APA. "Agency actions are typically presumed to be reviewable under the APA." American Disabled, 170 F.3d at 384, and this case is no exception.

My decision to review the Commonwealth's FOIA claim also is in keeping with the legislative history of the APA. In commenting on the APA, the Senate Committee on the Judiciary stated the following:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945) (emphasis added); see also H.R. Rep. No. 1980,

79th Cong., 2d Sess., 41 (1946) ("[t]he mere failure to provide specifically by statute for judicial review is certainly no evidence of intent to withhold judicial review.").

My decision is also consistent with the Third Circuit law interpreting the relationship between FOIA and the APA. In Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1190-91 (3d Cir. 1977), vacated on other grounds, Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Third Circuit held that "the APA provides a cause of action for enjoining an agency from disclosing submitter-generated information," even though FOIA itself does not. In this "reverse" FOIA case, an individual can obtain an order preventing an agency from disclosing documents under FOIA, even though FOIA itself only empowers a court "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). Accordingly, the Commonwealth's lawsuit is not the first time that a federal court in this Circuit has turned to the APA to enforce those provisions of FOIA that are not enforceable under FOIA itself.

With my authority to review this case firmly established, the next question I face goes to the scope of that review. This question is easily answered. Section § 706 sets forth the "scope of review" for actions brought pursuant to the APA. This section provides, in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
> (1) compel agency action unlawfully withheld or unreasonably delayed. . .

5 U.S.C. § 706(1) (emphasis added). The clear language of this section gives this Court the power to review agency inaction and, if unlawful, to compel action. In fact, the Third Circuit has noted that this provision directs courts to compel agency action when agency inaction is contrary

to a Congressional mandate. See Oil, Chemical, & Atomic Workers Union v. Occupational Safety & Health Administration, 145 F.3d 120, 124 (3d Cir. 1998) (noting that it can compel agency action when inaction is "contrary to a specific Congressional mandate," but refusing to do so). Accordingly, if I conclude that HHS has withheld action required by FOIA, I have the authority to order that HHS comply with the provisions of FOIA, even if this means ordering publication.

This Court also has an additional source of authority to compel defendants to comply with the law if they violated its clear command: the traditional powers that any equity court has to craft necessary relief. In Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 17-20 (1974), the Supreme Court specifically held that federal courts retain their discretion to craft equitable relief in cases brought under FOIA. Although the Court noted that Congress can deprive a district court of its broad authority to craft equitable relief in certain circumstances, it found nothing in FOIA that deprived district courts of that inherent authority.

> The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do; and the fact that the Act, to a definite degree, makes the District Court the enforcement arm of the statute, persuade us that the Babcock and Switchmen's Union principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest . . . that Congress sought to limit the inherent powers of an equity court.

Renegotiation Board, 415 U.S. at 19-20 (internal citations omitted). In fact, in a Memorandum written shortly after the passage of FOIA, the Attorney General, Ramsey Clark, agreed that "the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted." Attorney General's

Memorandum on the Public Information Section of the Administrative Procedure Act, at 28 (1967) [hereinafter 1967 Attorney General's Memorandum"].

Whether my authority to grant relief stems from the APA or the inherent equitable powers of a federal court is really beside the point. The fact remains that this court has the statutory and inherent authority to provide the Commonwealth with the kind of relief it requests on its FOIA claim. If the defendants did indeed violate the law, I can compel them to create, maintain, and publish an index that meets FOIA's basic requirements. Accordingly, I will reject defendants' first challenge to my authority to hear this case.

B. Exhaustion of Administrative Remedies

Defendants next argue that the Commonwealth's claims should be dismissed for failure to exhaust administrative remedies. As a general rule, before a plaintiff can bring a claim into this Court, it must exhaust administrative remedies. Kleissler v. United States Forest Service, 183 F.3d 196, 200 (3d Cir. 1999). The primary purpose of this rule is to prevent the courts from interfering with the administrative process before it has reached an end. Accordingly, federal courts follow the exhaustion rule because it will

> (1) avoid "premature interruption of the administrative process," (2) allow the agency to "develop the necessary factual background," (3) give the agency the "first chance" to exercise its discretion, (4) properly defer to the agency's expertise, (5) provide the agency with an opportunity "to discover and correct its own errors," and (6) deter the "deliberative flouting of administrative processes."

Id. at 201 (quoting McKart v. United States, 395 U.S. 185, at 194-95 (1969)). "Agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer" and they "ought to have an opportunity to correct [their] own mistakes. . .before [being] haled into federal court." McCarthy v. Madigan, 503 U.S. 140, 145

(1992).

With regard to its FOIA claim, there is nothing left for the Commonwealth to exhaust. In fact, defendants exhaustion attack is based on a mistaken impression of what the Commonwealth's FOIA claim is all about. Seizing on a reference in the Commonwealth's Amended Complaint about the audit of the Commonwealth's EA program, defendants claim that this lawsuit is merely "an attempt to undercut the criteria relied upon by the OIG audit." Dkt. no. 44, at 10. Therefore, they argue that the Commonwealth must follow HHS' detailed internal review proceedings that apply to the audit, 45 C.F.R. Part 16, before proceeding with this case. The Commonwealth's FOIA claim will have no effect on the audit at all. According to the clear language of FOIA, defendants will still be able to enforce any unindexed statements of policy against the Commonwealth in the audit proceedings as long as the Commonwealth had "actual and timely notice" of those policies. 5 U.S.C. § 552(a)(2). Whether I require defendants to maintain and publish a current index, therefore, will simply not affect the outcome of the audit. Additionally, no internal administrative proceedings have been pointed out to this Court that would control resolution of the Commonwealth's FOIA claim.[7] Accordingly, I reject defendants' claim that the Commonwealth must first exhaust HHS' internal review proceedings in pursuing its FOIA claim.

I reach a very different conclusion concerning the Commonwealth's second claim for relief: its claim that the Handbook cannot be enforced against it. Unlike the FOIA claim, this

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[7] These internal review proceedings only apply to "certain disputes arising under HHS programs." 45 C.F.R. § 16.1. These "certain disputes" are listed in Appendix A of Part 16 of the Title 45 of the Code of Federal Regulations. Id. App. A. Challenges under FOIA's indexing and publication provisions are simply not covered by these procedures.

second claim is a direct assault on the audit findings and it clashes directly with the kind of claims that must be reviewed by the HHS' Departmental Grant Appeals Board ("Appeals Board"). 45 C.F.R. Part 16. If the Commonwealth is successful on its second claim, then the three (3) Handbook provisions at issue cannot be applied against it by HHS in the current audit, even though that is precisely what HHS has sought to do. Dkt. no. 32, Ex. B. By asking this Court to weigh in on this claim at this time, the Commonwealth seeks to avoid appealing the audit findings through the appeal process set up by HHS itself. It attempts to undermine the foundation of the audit itself. And it tries to obtain a court ruling that will effectively end the audit before the audit itself is even complete. I will not permit such an end-run around the detailed regulatory review procedures set up by HHS.

A cursory review of the HHS regulations shows that the Commonwealth's entire second claim should first proceed through the Appeals Board. According to these regulations, the Appeals Board must review "certain disputes arising under HHS programs," id. § 16.1, including appeals of audit conclusions. Id. Appendix A. If HHS finally determines that the Commonwealth owes money for violating the three (3) provisions of the Handbook in question, then the Commonwealth is required to challenge those audit conclusions with the Appeals Board. Id. This challenge may include claims that the Handbook is unenforceable against the Commonwealth in this particular case and claims that the Handbook is invalid on its face.[8] The

[8] The Commonwealth's attack on the Handbook can be read in two different ways: 1) as a narrow challenge to the enforceability of the Handbook provisions in these particular audit proceedings; or 2) as a broad challenge to the validity of the three (3) sections of the Handbook. I conclude that the Commonwealth is required to exhaust its claim no matter how narrowly or broadly it is read. Nevertheless, I would suggest that it makes more sense to adopt the more narrow reading of the Commonwealth's second claim. If the Commonwealth is claiming that these three (3) provisions are invalid, regardless if they are enforced against it or not, then it runs

Board is empowered to hear all such claims and is required to fairly and impartially decide them. Id. § 16.14 (noting that the Board is "bound by all applicable laws and regulations."). This internal review proceeding is adversarial, id. § 16.8, relatively quick, id. § 16.23, thorough, id., and based on a detailed factual and legal record, id. § 16.21. Rather than have this Court interfere with these internal proceedings, it is best to defer and give the agency itself the first crack at resolving the merits of the Commonwealth's second claim.

The basic policies that undergird the exhaustion requirement support my decision concerning the Commonwealth's second claim. As a general matter, courts mandate exhaustion so that court proceedings do not prematurely interrupt an ongoing administrative process. Kleissler, 183 F.3d at 201. Nevertheless, if I were to delve into the merits of the Commonwealth's second claim, I would do just that. Proceeding to the merits would essentially strip the HHS Appeals Board of its authority to hear appeals from audit findings, it would deprive HHS of its discretion to proceed with its audit, and it would render the detailed HHS review mechanism essentially meaningless. As the United States Supreme Court has explained, the exhaustion doctrine is "an expression of executive and administrative autonomy." McKart,

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directly into the face of a statute of limitations problem. The applicable statute of limitations for civil actions against the United States under the APA is six years. Pennsylvania v. United States Dept. of Health and Human Services, 101 F.3d 939, 945 (3d Cir. 1996). The Handbook provisions at issue were adopted and sent to the Commonwealth in 1951 and 1963. Dkt. no. 46, Ex. F, Ex. 1. Accordingly, the statute of limitations on an invalidity challenge to these provisions would have run in 1957 for one section (5520) and in1969 for the other two (5212 and 5214). The Commonwealth has introduced no evidence suggesting that the statute was tolled on any of these sections before the statute would have run. In fact, the only evidence introduced by the Commonwealth shows that some confusion arose about the continuing validity of the Handbook sometime after 1970, long after the statute of limitations would have run. Rather than read the Commonwealth's claims in a way that bars their assertion, I read them as a challenge to the audit currently proceeding against it.

395 U.S. at 194. By deciding the Commonwealth's second claim at this time, I would undercut the autonomy of the Appeals Board and interrupt the detailed review mechanism established by the agency. The exhaustion doctrine advises against just such a result.[9]

Second, the exhaustion doctrine requires that administrative agencies be given the opportunity to "develop the necessary factual background" and correct their own errors. Kleissler, 183 F.3d at 201. No doubt, there are factual matters beyond the record of this case that the Appeals Board must confront. For instance, were the three (3) Handbook provisions actually enforced against the Commonwealth? Likewise, there is certainly a chance that HHS may reconsider its enforcement of these particular provisions. By allowing agencies to have the first crack at administrative disputes, we enhance the efficiency of the dispute-resolution mechanisms those agencies have put in place. For one, by carefully reviewing the dispute, making certain factual findings, and properly exercising its discretion, an administrative agency may bar the need for further litigation. In fact, if a litigant "is required to pursue his administrative remedies, the courts may never have to intervene." McKart, 395 U.S. at 195. Nevertheless, even if additional litigation becomes necessary, the prior record established by the agency will make judicial review more efficient. See id., at 194. It will narrow the factual and legal issues for

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[9] A related reason for requiring exhaustion arises from the need to recognize and promote the autonomy of the administrative branch involved in this litigation. By excusing the Commonwealth's failure to exhaust, I would be encouraging the deliberate "flouting of administrative processes." Kleissler, 183 F.3d at 201. Many courts have recognized that the "deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." McKart, 395 U.S. at 194-95. The Commonwealth has been involved in a dispute with HHS about the enforceability of these Handbook provisions since at least 1998. Rather than wait for the conclusion of the audit and take the issue up with the agency first, the Commonwealth came directly to this Court. This clear avoidance of the administrative scheme set up by HHS to deal with such disputes should neither be openly embraced nor tacitly encouraged.

review and will provide the court with a detailed record of the dispute. To promote the efficient resolution of the Commonwealth's second claim, it is best to require it to exhaust the administrative remedies now in place.

Third, requiring exhaustion of the Commonwealth's second claim avoids the risk of unnecessary duplication and inconsistent litigation. If I forgive the Commonwealth's failure to exhaust, then both this Court and the Appeals Board will confront the same factual and legal issues at approximately the same time. Different standards might apply in these different proceedings, and different results might emerge. Such a result imposes unnecessary costs on the parties and the court system. Accordingly, what the United States Supreme Court noted in a similar case is true in this case as well:

> [a] rejection of [the exhaustion] doctrine here would result in unnecessary duplication and conflicting litigation. . . . The different records, applications of different standards and conflicting determinations that would surely result from such duplicative procedures all militate in favor of the conclusion that the statutory steps provided in the Act are exclusive.

Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 422 (1965). Rather than steer a course that could potentially cause such problems, I conclude that exhaustion is the best course in this case.

Finally, the adversarial nature of the administrative proceedings before HHS supports applying the exhaustion requirement in this case. In a recent case, the United States Supreme Court explained when application of the exhaustion doctrine is appropriate and when it is not. "Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest. . . . Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a

court to require exhaustion are much weaker." Sims v. Apfel, 530 U.S. 103, 120 S.Ct. 2080, 2086 (2000). The proceedings before the HHS Appeals Board will be adversarial. The Commonwealth will have the opportunity to fully raise each of its arguments concerning the enforceability of the current Handbook, and the Board is obligated to resolve these matters. As the Supreme Court has explained, this is simply one of those cases where the rationale for requiring exhaustion "is at its greatest." Id.[10]

For the foregoing reasons, I conclude that the Commonwealth must exhaust its challenge to the enforceability of the Handbook before proceeding with this claim in this, or any other, court.

C. Ripeness and Standing

The final arrow in defendants quiver is one that they have chosen not to draw: a challenge to this Court's constitutional authority to hear the Commonwealth's claims. Article III, Section 2 of the United States Constitution requires actual "cases" and "controversies" before a federal court may exercise jurisdiction. U.S. Const. art. III, § 2. This constitutional provision was intended to ensure that the federal courts decided only those matters of "a Judiciary nature."

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[10] In various cases, the Third Circuit has applied three (3) exceptions to the exhaustion requirement. See Republic Indus. Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d 290, 293 (3d Cir. 1982). These exceptions apply when: 1) the non-judicial remedy is clearly shown to be inadequate to prevent irreparable injury; 2) resort to the non-judicial remedy would clearly and unambiguously violate statutory or constitutional rights; 3) exhaustion would be futile. The Commonwealth has not argued that an exception applies in this case. Nevertheless, on the merits of its second claim, it has argued that the Handbook clearly and unambiguously violates the provisions of the APA. While I make no ultimate determination on this second claim, I only note that numerous courts have considered the arguments raised by the Commonwealth and rejected them. See, e.g., Like v. Carter, 448 F.2d 798, 803 (8th Cir. 1971); Rodriguez v. Swank, 318 F.Supp. 289 (N.D. Ill. 1971); Worrell v. Sterett, CCH Pov.L.R. ¶ 10,575 (N.D. Ind. 1969). The Commonwealth has cited no cases to the contrary. This is certainly not the kind of clear and unambiguous statutory violation needed to excuse the Commonwealth's failure to exhaust.

Max Farrand, 2 Records of the Federal Convention of 1787, at 430 (1911). Two related limitations on a federal court's jurisdictional reach have emerged from this constitutional directive: ripeness and standing. Armstrong World Trade Industries v. Adams, 961 F.2d 405, 411 n. 13 (3d Cir. 1992). Although defendants have not raised a ripeness defense in their motion for summary judgment, and have asserted only a limited standing defense, see dkt. no. 44, at 12-17, I will address both issues in detail. Because standing and ripeness raise questions about this Court's constitutional authority to exercise jurisdiction over the Commonwealth's claims, I must address them whether the parties raise them or not. Felmeister v. Office of Attorney Ethics, 856 F.2d 529, 535 (3d Cir. 1988); Bender v. Williamsport Area School District, 475 U.S. 534, 546 n. 8 (1986). In the instant case, I find that the Commonwealth's FOIA claim is ripe for adjudication and the Commonwealth has standing to assert it. Nevertheless, I will dismiss the Commonwealth's second claim because it is not ripe.

(i) Are the Commonwealth's Claims Ripe for Review?

Under the ripeness doctrine, a court must decide *when* it is proper to address a plaintiff's claim. Pic-A-State PA, Inc. v. Reno, 76 F.3d 1294, 1298 n.1 (3d Cir. 1996); Felmeister, 856 F.2d at 535 (ripeness asks "when. . . it [is] appropriate for a court to take up the asserted claim."). The rationale of the ripeness doctrine "is to prevent the courts from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977).

In Abbott Laboratories, the Supreme Court held that ripeness turns on two issues: (1)

"the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." Id. at 149. Under the "fitness for review" prong of this two-part test, the Court should ask if the challenged action is "final agency action" within the meaning of 5 U.S.C. § 704, and whether the issues presented are purely legal. Philadelphia Federation of Teachers v. Ridge, 150 F.3d 319, 323 (3d Cir. 1998). Under the second prong of the Abbott Laboratories test, the "hardship" prong, the Court should consider whether the challenged action is "sufficiently direct and immediate as to render the issue appropriate for review at this stage." Abbott Laboratories, 387 U.S. at 152.

The Commonwealth's first claim -- that HHS has violated FOIA by failing to maintain and publish current indices -- is ripe for review. First, the Commonwealth's claim is fit for review. I have already discussed why there is "final agency action" in this case. See supra, at 18-20. As to the second hurdle of the fitness requirement -- that the issue be purely legal -- I have no difficulty concluding that this requirement has been met. Like the claims in Abbott Laboratories themselves, the Commonwealth's challenge to HHS's indexing procedures presents a strictly legal question. Id. at 149. At the heart of plaintiff's claim are the legal questions about what kind of index FOIA requires and how, precisely, administrative agencies must distribute and publish that index. Because the Commonwealth's claim presents issues that are "purely legal, and will not be clarified by further factual development," they are fit for review. Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985).

In addition to being fit for review, the Commonwealth's first claim also satisfies the "hardship" prong of the Abbott Laboratories test. The biggest problem that the Commonwealth suffers is that it simply does not know which policies govern the implementation of its AFDC,

EA, and TANF programs and which do not. As both sides have acknowledged, the present indices provided by HHS contain information that is obsolete. Dkt. no. 36, ¶ 4. Additionally, the Commonwealth has introduced facts showing that certain documents are not included in the HHS indices. Without up-to-date and complete indices, the Commonwealth will be continually forced to determine exactly which statements of policy it believes are obsolete and which may still be good law. The uncertainty of such an approach is precisely the kind of hardship that FOIA was meant to prevent. Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (1975) [hereinafter 1975 Attorney General's Memorandum]. Accordingly, I conclude that the Commonwealth would suffer hardship if its claim is not reviewed at this time. Abbott Laboratories, 387 U.S. at 152. Because the Commonwealth's first claim satisfies both prongs of the Abbott Laboratories test, it is ripe for review.

Again, I reach a different conclusion on the Commonwealth's second claim. In fact, the Commonwealth's second claim flunks both prongs of the Abbott Laboratories test. For one, the claim is not "fit" for review because it is not the product of final agency action. In determining whether something amounts to final agency action, the "core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 797 (1992). In other words, "[t]he action must be a 'definitive statement of [the agency's] position' with concrete legal consequences." Hindes, 137 F.3d at 162 (quoting FTC v. Standard Oil Co., 449 U.S. 232, 241 (1980)). It is undisputed that HHS has not reached a final decision on the OIG audit recommendation. Dkt. no. 46, Ex. D, ¶ 3. Not until the Grants Officer for the Administration for Children and Families disallows the Commonwealth's EA claims is there final agency action in

this case. Id. At present, all the audit has resulted in is a recommendation and nothing more. Id. This recommendation is simply not a "definitive statement" of HHS' position and it has no "concrete legal consequences." Hindes, 137 F.3d at 162. Because there is no final agency action here, I conclude that the Commonwealth's second claim is not fit for review.

The Commonwealth will also not suffer any hardship by my failure to review its claim at this time. "In measuring ripeness from the standpoint of whether withholding judicial review would result in hardship to the parties, the Supreme Court requires that the impact on the complaining party be 'sufficiently direct and immediate.'" Wilmac Corp. v. Bowen, 811 F.2d 809, 812-13 (3d Cir. 1987) (citations omitted). Those cases dealing with hardship have focused on the limitation of plaintiff's choices. In other words, did the plaintiff face a Hobson's choice: comply with the law and suffer damage by having to change your conduct or violate the law and suffer penalties for the violation. Id. Such was the case in Abbott Laboratories itself, a case where plaintiffs were faced with the choice of complying at considerable expense or not complying and facing civil or criminal penalties. Abbott Laboratories, 387 U.S. at 152-53.

Such a choice is simply not present in this case. For one, the audit concerns conduct that has already passed. Accordingly, the Commonwealth faces no choice at all for its past conduct. It did what it did. The only remaining questions are 1) did the Handbook provisions govern their conduct at that time? and, if so, 2) did the Commonwealth comply with those provisions? These issues can be resolved now or after the audit determination becomes final and we actually see the extent to which these provisions are applied against the Commonwealth. Delaying judicial review will not increase the harm to the Commonwealth. In fact, it will not alter the final calculation of what, if anything, the Commonwealth owes.

Second, my refusal to review the claim at this time does not cause the Commonwealth any future "hardship." For one, this claim is not like the Commonwealth's FOIA claim in which it seeks to learn precisely what law governs its future conduct. The Commonwealth knows perfectly well what provisions of the Handbook apply to it at this time. In February 2000, HHS sent a series of policy announcements to all States, including the Commonwealth, stating that §§ 5212, 5214, and 5520 still apply to those States administering their welfare programs under the TANF grandfather clause. Dkt. no. 37, at 52a-54a. Accordingly, my failure to proceed to the merits will not place the Commonwealth in a bind of not knowing what the law is.

Additionally, my decision to forego hearing this claim does not thrust the Commonwealth into a future Hobson's choice: comply with the law at great expense or suffer severe sanctions. The AFDC, EA, and TANF programs that the Commonwealth now administers are entirely voluntary. The Commonwealth is neither required to take part in them nor is it compelled to follow the Handbook's provisions. Pennhurst, 451 U.S. at 11. Even if the Commonwealth does continue its participation in these programs, the worst that will happen to it is that it will be denied Federal matching funds if it refuses to comply with the Handbook's provisions. No sanctions accompany this denial of matching funds, nor is the Commonwealth barred from offering welfare benefits to its residents, even in those cases where it is denied Federal funds. Accordingly, at worst, this is merely a case where the Commonwealth faces economic uncertainty. And, as the Third Circuit has explained, "[m]ere economic uncertainty affecting the [Commonwealth's] planning is not sufficient to support premature review." Wilmac, 811 F.2d at 813; see also CEC Energy Co. v. Public Service Commission of V.I., 891 F.2d 1107, 1111 (3d

Cir. 1989).[11]

Accordingly, I will dismiss the Commonwealth's second claim because it is not ripe for review. The Commonwealth will have to await a final decision from the HHS before it can proceed with its claim before this, or any other, court.

(ii) Does the Commonwealth Have Standing?

In contrast to ripeness, which focuses on *when* a lawsuit can be brought, standing focuses on *who* can bring a lawsuit. Armstrong, 961 F.2d at 411 n. 13. Standing has constitutional and prudential components, both of which must be met before a plaintiff can seek relief in federal court. UPS Worldwide Forwarding, Inc. v. U.S. Postal Service, 66 F.3d 621, 625 (3d Cir. 1995). In Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), the Supreme Court held that to satisfy the constitutional requirements of standing, a plaintiff must show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not

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[11] There is another ripeness test that the Third Circuit has applied in cases where a plaintiff seeks pre-enforcement relief under the Declaratory Judgement Act. Under that test, the court must consider (1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment. Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643, 647 (3d Cir. 1990). For the sake of thoroughness, I will briefly apply this test to the Commonwealth's second claim as well. The Commonwealth's second claim falls short on all three (3) prongs of the Step-Saver test. First, the first prong of the Step-Saver test is not satisfied when plaintiff's action "depends on a contingency which may not occur," Armstrong, 961 F.2d at 413. In the present case, it is unclear whether the three (3) Handbook provisions at issue will actually be enforced against the Commonwealth. See also Step-Saver, 912 F.2d at 648-49. The second prong of the Step-Saver test is not satisfied if the question presented requires the development of a factual record. Pic-A-State, 76 F.3d at 1300. As discussed above, there are key facts missing from this record, such as, whether the provisions at issue are actually being applied against the Commonwealth. Finally, under the third Step-Saver prong, "a case should not be considered justiciable unless 'the court is convinced that [by its action] a useful purpose will be served.'" Step-Saver, 912 F.2d at 649 (citation omitted). Often, the useful purpose is to advise the parties of what it expected of them in the future. As discussed in my hardship analysis above, I find that issuing a judgment at this time will provide little use to the Commonwealth.

conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id.; see also Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 180-81 (2000). Because I have already held that the Commonwealth's second claim should be dismissed under the exhaustion and ripeness doctrines, I will confine my standing analysis to only the Commonwealth's first claim.

I conclude that the Commonwealth has standing to assert its FOIA claim. First, the Commonwealth has suffered an "injury in fact" that is both concrete and actual. The Supreme Court has made perfectly clear that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to statute." Federal Election Commission v. Akins, 524 U.S. 11, 21 (1998). This rule applies to the Freedom of Information Act. Public Citizen v. United States, 491 U.S. 440, 449 (1989). The facts of record showing that HHS has failed to meet the indexing and publication requirements of FOIA satisfy the "injury in fact" threshold. The Commonwealth has been deprived of information – precisely the kind of deprivation that FOIA was meant to bar. Without current or complete indices – as mandated by statute – the Commonwealth is unable to determine precisely what rules and regulations govern its conduct and is without sufficient information to structure its AFDC, EA, and TANF programs in the future. Little more is needed to establish a constitutional injury in fact.

The next two (2) requirements of constitutional standing – traceability and redressibility – are also easily satisfied as to the Commonwealth's FOIA claim. The Commonwealth's alleged injury -- the inability to obtain information -- is fairly traceable to the challenged action of the HHS in this case. Indeed, it is the HHS' very failure to comply with the terms of FOIA that has

caused the injury allegedly suffered by the Commonwealth. Additionally, the Commonwealth's injury will be redressed by a favorable decision in this case. If this Court orders HHS to produce and publish a current index, the Commonwealth's injury will evaporate. The Commonwealth will know precisely what policies and rules govern its AFDC, EA, and TANF programs and it will be able to structure these programs in the future with little trouble determining what the law is.

In addition to the Article III standing requirements, federal courts have developed prudential standing rules "that are part of judicial self-government." Lujan, 504 U.S. at 560. According to the Third Circuit, these prudential standing rules require that:

> (1) a litigant "assert his [or her] own legal interests rather than those of third parties," (2) courts "refrain from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,'" and (3) a litigant demonstrate that her interests are arguably within the "zone of interests" intended to be protected by the statute, rule or constitutional provision on which the claim is based.

Wheeler v. Travelers Insurance Co., 22 F.3d 534, 538 (3d Cir. 1994) (citations omitted). No question has been raised about whether the Commonwealth satisfies the first two (2) requirements for prudential standing. Nevertheless, I have no difficulty concluding that they have.[12] Accordingly, I will focus my analysis on the third prong of this test.

In various cases over the past thirty (30) years, the Supreme Court has developed the "zone of interests" element of standing. See Association of Data Processing Service

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[12] While it could be argued that the Commonwealth's FOIA claim is a mere "generalized grievance," I reject such an argument. Although the remedy sought by the Commonwealth is publication for all the world to see, even defendants admit that the universe of people interested in this index is extremely limited. In fact, defendants contend that Pennsylvania is the only State that has had trouble determining what provisions apply to its conduct. Dkt. no. 48, at 6 n. 2. Accordingly, the Commonwealth's grievance is extremely specific.

Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970); Clarke v. Securities Industry Association, 479 U.S. 388 (1987); Bennett v. Spear, 520 U.S. 154 (1997); Akins, 524 U.S. at 19-20. In Clarke, for instance, the Supreme Court provided the following guidance on the zone of interests test:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding*; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke, 479 U.S. at 399-400 (emphasis added). The Third Circuit has endorsed the view that the zone of interests test is not to be "especially demanding." In Schering Corp. v. Food and Drug Administration, 51 F.3d 390 (3d Cir. 1995), the court noted that the test "is not so stringent that it requires the would-be plaintiff to be specifically targeted by Congress as a beneficiary of the statute." Id. at 395. The Third Circuit has even stated that it endorses a "liberal" approach to the zone of interest test. See, e.g., Davis v. Philadelphia Housing Authority, 121 F.3d 92, 98 (3d Cir. 1997).

The Commonwealth falls well within the zone of interests protected by FOIA. The FOIA indexing and publication requirements are expressly designed to serve the public's interests in obtaining information about the inner workings of administrative agencies. In fact, the legislative history concerning 5 U.S.C. § 552(a)(2) shows that Congress intended FOIA to equip those individuals and entities that deal with administrative agencies with "the essential information to enable [them] to deal effectively and knowledgeably with the Federal agencies." S.Rep. No. 813, 89th Cong., 1st Sess., reprinted in FOIA Source Book, at 42. Simply put, "the injury of which [the Commonwealth] complain[s] – the[] failure to obtain relevant information –

is injury of a kind that [FOIA] seeks to address." Akins, 524 U.S. at 20. What the Supreme Court said in Akins is true in this case as well. There is "nothing in the Act that suggests Congress intended to exclude [the Commonwealth] from the benefits of these provisions, or otherwise to restrict standing" in any way. Id.; see also Aiken v. Obledo, 442 F.Supp. 628, 647 (E.D.Ca. 1977) (holding that individuals who are not apprised of information required to be publicly available under FOIA arguably fall within the zone of interests protected by the statute). Accordingly, the doctrine of prudential standing does not bar the Commonwealth's claim for relief.

Defendants disagree with this conclusion and point to the language of FOIA to demonstrate that the Commonwealth has not suffered an "injury in fact," and, therefore, could not possibly fall within the protections of this statute. In particular, they argue that FOIA allows an agency to enforce a policy statement even when an index has not been maintained or published. Under 5 U.S.C. § 552(a)(2)(ii), HHS can enforce any of its policy statements as long as the Commonwealth "has actual and timely notice of the terms thereof." Because the defendants contend that they provided the Commonwealth with notice of any provision that could be cited against it in the current audit proceeding, they claim that the Commonwealth has not suffered an "injury in fact" in this case.

I disagree. For one, I do not believe that the "zone of interests" test was meant to hew so closely to the statutory language. As the Supreme Court noted in Clarke, the question for this Court is whether the Commonwealth's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke, 479 U.S. at 399-400. When the statute at issue states that an agency

"shall . . . maintain . . . [and] . . . publish" a "current" index, 5 U.S.C. § 552(a)(2), and the facts demonstrate that the agency has failed to do just that, a plaintiff like the Commonwealth certainly falls within the "zone of interests" protected by the statute. Because this legal hurdle is so easy to surmount in a FOIA case, one commentator has noted that "standing is irrelevant in a FOIA case." James T. O'Reilly, 1 Federal Information Disclosure § 8.08 (2d ed., 1999). While I do not consider standing to be irrelevant to this case, I do think that the Commonwealth has easily met its requirements.

Second, FOIA governs more than just what information should be disclosed. It also directs how that information should be disclosed: whether it need be published, produced, or indexed. Just as plaintiffs are injured when a government agency denies their request for information outright, so too they are injured when that same agency discloses information in a manner blatantly inconsistent with the requirements of the Act. By failing to maintain a current index, containing references to all of the necessary statements of policy, the defendants have "injured" the Commonwealth within the meaning of FOIA, whether the Commonwealth receives notice of the particular statements of policy at issue or not. Accordingly, the Commonwealth has standing to assert its FOIA claim.

With these important procedural matters put to rest, I can now proceed to the merits of the Commonwealth's FOIA claim.

III. THE INDEX AND PUBLICATION REQUIREMENTS

The thrust of the Commonwealth's claim is that HHS failed to comply with the indexing and publication requirements of § 552 (a)(2) of FOIA. In relevant part, this provision provides the following:

> Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct costs of duplication.

5 U.S. C. § 552(a)(2). The indexing and publication requirements "represent[] a strong Congressional aversion to 'secret agency law,'. . . and represent[] an affirmative Congressional purpose to require disclosure of documents which have the 'force and effect of law.'" NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (quoting H.R. Rep. No. 1497, reprinted in FOIA Source Book, at 28).

Both the indexing and publication requirements of the Act are mandatory. The statute states that "[e]ach agency shall . . . maintain" and "shall promptly publish" "current indexes." 5 U.S.C. § 552(a)(2) (emphasis added). As the Third Circuit has held, "when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (3d Cir. 1999). The Supreme Court has also repeatedly indicated that "shall" is meant to suggest a mandatory duty. See, e.g., United States v. Monsanto, 491 U.S. 600, 607 (1989) (by using "shall" in a civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases

where the statute applied"); Pierce v. Underwood, 487 U.S. 552, 569-70 (1988) (Congress' use of "shall" in housing subsidy statute constitutes "mandatory language"). Even Black's Law Dictionary recognizes that "shall," "as used in statutes . . . is generally imperative or mandatory." Black's Law Dictionary 1233 (5th ed. 1979). Under FOIA, therefore, federal agencies are required to maintain and publish current indices.[13] See also Department of Justice Guide to the Freedom of Information Act (1998), reprinted in 2 Jacob A. Stein et al., Administrative Law App. 10A-15 (2000) [hereinafter "DOJ FOIA Guide 1998"] (stating that records "must be indexed by agencies in order to facilitate the public's convenient access to them").[14]

Seizing on this mandatory language, the Commonwealth argues that HHS has violated FOIA in three (3) ways. Dkt. no. 41, at 15-21. First, it claims that HHS has never maintained a "current" AFDC/EA index. Id. at 15-17. Second, it alleges that HHS does not publish and

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[13] While agencies are permitted to opt out of the publication requirements of § 552(a)(2) by publishing an appropriate notice in the Federal Register, HHS has not done so. Dkt. no. 37, at 120a & 135a.

[14] The mere fact that agencies can enforce their statements of policy without maintaining or publishing an index does not sap these provisions of their mandatory nature. As noted earlier, FOIA contains the following sentence:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if –
> (i) it has been indexed and either made available or published as provided by this paragraph; or
> (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a)(2). As Congress recognized, this provision "gives agencies a powerful incentive," Kennecott, 88 F.3d at 1203, to maintain and publish indices of unpublished statements of policy. Nevertheless, the scope of FOIA's requirements should not be measured by the scope of its sanction. Even if FOIA itself only provides for a limited sanction of its mandatory indexing and publication requirements that does not mean that those requirements are not mandatory. The question is one of remedy: is this mandatory language enforceable beyond the explicit sanction provided for in FOIA itself? As I have discussed in detail above, I believe that it is. See supra, at 15-26.

distribute its AFDC, EA, and TANF indices as required by FOIA. Id. at 18-19. Finally, it contends that HHS has failed to include certain documents in its AFDC, EA, and TANF indices. Because the Commonwealth attacks the legality of both the AFDC/EA index and the TANF index, I will address the Commonwealth's claims index by index.

A. The Legality of the AFDC/EA Index

(i) Is the Index "Current"?

The Commonwealth's first claim is that the AFDC/EA index is not "current" as required by § 552(a)(2). In particular, it alleges that the AFDC/EA index includes obsolete policies that are of no legal effect. Dkt. no. 41, at 16.[15] The defendants do not dispute this. Dkt. no. 48, at 5-6. Accordingly, the controversy here is not about whether the index contains obsolete policy statements, but about whether such an index violates FOIA.

The statutory language does not resolve the controversy. Bailey v. United States, 516 U.S. 137, 144-45 (1995) (stating that courts should interpret undefined terms in statutes using the terms' meaning in ordinary usage). Although defined nowhere in FOIA, the term "current indexes" simply does not take a stand on whether obsolete material can be included in a FOIA index. According to Webster's Dictionary, "current" means "most recent," Webster's Ninth New Collegiate Dictionary 316 (1988). while an "index" is merely "a list . . .arranged usu[ally] in

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[15] The AFDC/EA index pertains to the AFDC and EA programs that were repealed by Congress in 1996 when it adopted the TANF program. Accordingly, the only remaining relevance that the AFDC/EA index has is for those States, like Pennsylvania, that choose to be subject to TANF's grandfather clause, 42 U.S.C. § 604(a)(2). Under this grandfather clause, a State receiving a block grant under TANF, may choose to use this grant money "in any manner that the State was authorized to use amounts received" under the AFDC and EA policies "in effect on September 30, 1995, or (at the option of the State) August 21, 1996." Id. Therefore, when the Commonwealth says that the AFDC/EA index is not "current," it is really saying that the index was not current on either September 30, 1995 or August 21, 1996.

alphabetical order of some specified datum." Id. at 613. Accordingly, "current indexes" are the "most recent" "lists" compiled by the federal agencies. There can be no doubt that these lists must contain the "most recent" information from the agency, but this could merely require the agency to add new statements of policy to the list as those statements are adopted. The language says nothing about whether the agencies must also remove obsolete information from these indices.

The remainder of § 552(a)(2) also does not supply an answer to the question. According to this provision, these "current indexes" must "provid[e] identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published." 5 U.S.C. § 552(a)(2). As to the issue in this case, this clause gives us little guidance. For one, it requires the indexing of "any matter," a term that could suggest that obsolete matters are to be included in the FOIA index. Yet, at the same time, only matters "issued, adopted, or promulgated" by the agency are to be included in the list. This wording implies that the index should be limited to just those matters having precedential significance. Again, the text of the statute leaves us without an answer.

The legislative history provides much more guidance. According to the House and Senate Reports on FOIA, the indexing requirement has two related purposes. First, it was intended to provide the public with access to any information that could be used by an agency as precedent. In other words, it was meant to "compel disclosure of what has been called 'secret law', or as the 1966 House Report put it, agency materials which have 'the force and effect of law in most cases.'" 1975 Attorney General's Memorandum, at 19 (quoting H.Rep. No. 1497). The House Report stated that the section was intended to "help bring order out of the confusion

of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all documents having precedential significance." H.Rep. No. 1497, reprinted in FOIA Source Book, at 29 (emphasis added); see also 1975 Attorney General's Memorandum, at 19 (stating that "(a)(2) materials consist of those documents which contain what the agency has treated as authoritative indications of its position on legal or policy questions"). The Senate Report agreed. "Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." S.Rep. No. 813, reprinted in FOIA Source Book, at 42. By requiring agencies to maintain an index listing precedential documents, Congress wished to "prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way to discover it." H. Rep. No. 1497, reprinted in id., at 29.

Second, Congress wanted agencies to do more than just disclose precedent to the public. It also wanted them to disclose it "in a usable and concise form." H.Rep. No. 876, 93rd Cong., 2d Sess., reprinted in id., at 125. This purpose was echoed by the Attorney General in a memorandum interpreting the indexing requirement of FOIA. "Careful and continuing attention will be required to distinguish 'documents having precedential significance' –the only ones required to be included in the index–from the great mass of materials which have no such significance and which would only clutter the index and detract from its usefulness." 1967 Attorney General's Memorandum, at 21 (quoting H.Rep. No. 1497) (emphasis added).

A few general rules, then, can be gleaned from the statutory language and legislative

history. First, a FOIA index must include those matters that the agency considers to be of precedential value. Second, while there is no absolute bar to including obsolete materials in the index, there must be some way to distinguish these materials from those that have precedential significance. Without such a distinction, the index would be "clutter[ed]" and its "usefulness" limited. Id. Finally, there is no set formula that an agency must follow in designing its index. Whether the index is organized alphabetically, chronologically, or by subject matter is left completely to the discretion of the agency itself.

Even the defendants agreed with this reading of the statute, long before this litigation began. On January 22, 1975, John Ottina, the Assistant Secretary for Administration and Management at the Department of Health, Education, and Welfare (HHS' predecessor agency) wrote a memorandum to some of his colleagues on FOIA's indexing requirement. Dkt. no. 37, at 26a. He wrote the memorandum to "provide some additional Department-wide guidance on the minimum standards to be met by the index. . ." Id. When Ottina began to discuss just what kind of index FOIA required, he wrote the following: "In order to keep the index a manageable and useful tool, as a minimum standard your initial index should include all items (opinions, orders, policies, interpretations, and manuals) that are of significant interest to the public and are current or precedent setting." Id. at 27a (emphasis added).[16] As indicated by Ottina's memorandum, HHS understood the requirements of FOIA: the agency's index must be "precedent setting" and

[16] A few years later, Eileen Shanahan, Assistant Secretary for Public Affairs, also wrote on FOIA's index requirement. Id. at 30a. Shanahan began her memorandum by noting that "[c]ompliance across the Department is spotty." Id. at 31a. She then continued: "I am concerned that the public is being denied access to policy decisions and interpretations of policy to their detriment. For many people our programs represent the only game in town. We need to let the public know the rules of the game if they're expected to play." Id.

be "a manageable and useful tool." Id.

While the AFDC/EA index includes "precedent setting" documents, it is neither a "manageable" nor a "useful tool." Id. The problem with the index is not that it includes obsolete documents. Inclusion of such documents is simply not barred under FOIA. Instead, the problem is that it is nearly impossible from the index alone to determine exactly which documents are precedent setting and which are obsolete. For instance, the index contains policies that "are applicable to programs which are no longer administered by the Office of Family Assistance," id. at 152a, ¶ 3, but there is no way of distinguishing these policies from the index alone. In addition, "[s]ome documents listed in the index that were issued after 1986 may be obsolete but the Office of Family Assistance cannot identify them from the index alone." Id. ¶ 4. When it enacted FOIA's indexing requirement, Congress made clear that it wanted these indices "in a usable and concise form." H.Rep. No. 876, reprinted in FOIA Source Book, at 125; see also 1967 Attorney General's Memorandum, at 21. No doubt, an agency need not "convert an index . . . into such a form that it can be used by the average layman without staff assistance." 1975 Attorney General's Memorandum, at 18. Nevertheless, in the present case, the undisputed facts show that even the defendants themselves cannot parse out the obsolete documents from reviewing the index alone. If the index is not useful to the defendants' own staff members, I can hardly see how the Commonwealth, or any member of the public, could find it so.

Accordingly, I conclude that defendants have violated FOIA's indexing requirement and will grant judgment for the Commonwealth on this claim.

(ii) Does the Index Satisfy FOIA's Publication Requirement?

The Commonwealth next claims that HHS has not published the AFDC/EA index as

required by § 552(a)(2). In many ways, this claim is closely related to the Commonwealth's first claim. More than anything else, the Commonwealth wants to know what law was in effect on two (2) dates: September 30, 1995 and August 21, 1996. States that administer their welfare programs under the TANF "grandfather clause," 42 U.S.C. § 604(a)(2), can choose to be subject to the regulations in effect on either of those two (2) dates. I have already held that the present AFDC/EA index does not properly distinguish between precedential and obsolete matters. Accordingly, the Commonwealth would have no way of knowing, simply by looking at the index, which documents were precedential and which were obsolete on the two (2) dates in question. The question now before me is whether HHS is required to "publish" and offer for sale an index of the AFDC/EA policies in effect on those dates.

The publication requirement was added to FOIA in a 1974 Amendment to the Act. FOIA 1974, at 195-96. The requirements of this provision are relatively straightforward. The agency must "promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto" unless it publishes an order in the Federal Register stating that "publication would be unnecessary or impracticable." 5 U.S.C. § 552(a)(2). HHS never placed an order in the Federal Register opting out of this publication requirement. Dkt. no. 37, at 135a. Accordingly, there is no doubt that HHS was required to publish and distribute an AFDC/EA Index back in 1995 and 1996. Only two (2) questions remain: 1) what did FOIA mean when it required HHS to "publish . . . and distribute," 5 U.S.C. § 552(a)(2), its index; and 2) did HHS comply with FOIA's command.

The legislative history clearly reveals what Congress meant when it ordered agencies to "publish. . . and distribute" current indices. Id. Three (3) general rules emerge from this history.

First, Congress wanted the indices to be put into hard copy, but it did not mandate printing by commercial printer. The Senate Report noted that "photocopy reproduction of indexes will constitute adequate 'publication' for those agencies for whom there is insufficient interest in their indexes in these situations to justify printing." S.Rep. No. 854, reprinted in FOIA 1974, at 160. Likewise, the House believed that "[a]n agency index in brochure form available for distribution would be an appropriate way to meet this requirement." H.Rep. No. 876, reprinted in id., at 125; see also 1975 Attorney General's Memorandum, at 16 (stating that the publication requirement could be satisfied by commercial printing, by brochure, or by photocopying). While not necessary, publication by a commercial firm certainly satisfied the requirements of the Act. H.Rep. No. 876, reprinted in FOIA 1974, at 125.

Second, although Congress wanted agencies to publish and distribute indices "quarterly or more frequently," it did not require the creation of a brand new index every quarter. Instead, Congress permitted agencies to publish "supplements" to their indices. 5 U.S.C. § 552(a)(2). As the Senate Report explained:

> To avoid possible problems in interpreting a requirement that such indexes be "currently" published, the new publication requirement would require only a "quarterly or more frequent[]" publication of these indexes–a modification adopted from a suggestion of the Federal Power Commission. Publication of supplements rather than republication of the entire index would fulfill this requirement.

S.Rep. No.854, reprinted in id., at 161.

Finally, Congress wanted to ensure that copies of indices were readily available to members of the public. For example, no matter how the index was printed, Congress mandated that it should be "made readily available for public use." H.Rep. No. 93-1380, 93rd Cong., 2d Sess. (1974), reprinted in id., at 224. Even if an agency opts out of the publication requirement,

"the agency must of course continue to maintain the index, make it available for public inspection, and 'provide copies* * * on request at a cost not to exceed the direct costs of duplication.'" 1975 Attorney General's Memorandum, at 17 (quoting H.Rep. No. 93-1380, reprinted in FOIA 1974, at 224). This requirement of public availability of indices was merely reinforced by the requirement that agencies "distribute" their indices. While the word, "distribute," "evidently does not contemplate an active delivery program," it does require "the publicized availability of copies on demand." 1975 Attorney General's Memorandum, at 17.

The undisputed facts of this case reveal that HHS did not publish or distribute a current index back in either 1995 or 1996. The parties spend much time debating exactly how the AFDC/EA index was published and distributed over the past twenty (20) years. Although HHS did much to distribute its AFDC/EA index, dkt. no. 36, ¶ 1; dkt. no. 37, at 134a-135a, this effort does not control my decision in this case. FOIA mandates that agencies "maintain," "publish," and "distribute" "current indexes." 5 U.S.C. § 552(a)(2). I have already concluded that HHS' AFDC/EA index is not current because it does not adequately distinguish between precedential and obsolete documents. Whether HHS properly distributed and published this index back in 1995 and 1996, therefore, is beside the point. What was published back then was an improper index. What FOIA requires is the publication and an index that complies with the terms of the Act. Accordingly, I will grant the Commonwealth's request for relief and order the defendants to publish and distribute their AFDC/EA index.

In one respect, however, I will deny the Commonwealth's requested relief. The Commonwealth asks for HHS to publish an index for September 30, 1995 and August 21, 1996. In other words, the Commonwealth wants HHS to publish two (2) different indices. FOIA only

requires agencies to publish indices on a "quarterly" basis. Since September 30, 1995 is the end of a quarter, I will order the Commonwealth to publish the AFDC/EA index that should have been in effect on that date. As to the August 21, 1996 date, however, I will leave that matter to the discretion of the agency. It may either publish an index for that date, or, if it prefers, it may publish the indices that should have been in effect at the end of June 1996 and September 1996, the two quarters nearest that date. Of course, these subsequent indices may be in the form of a supplement to the September 30, 1995 index. Much about the form of publication and distribution of indices under FOIA is left to the discretion of the agencies. Thus, I will not dictate the form of publication that the AFDC/EA indices must take. It is clear from the requirements of FOIA that, at a minimum, HHS must put these indices in hard copy, make them available to the Commonwealth, and inform the general public of their existence.

(iii) Is the Index Complete?

Having ordered the defendants to produce and publish a current AFDC/EA index, I must address the final question raised by the Commonwealth: is the index complete? In its motion for summary judgment, the Commonwealth argues that the index does not list all the documents that FOIA requires. At present, the AFDC/EA index includes documents called Action Transmittals and Information Memoranda, but it does not include memoranda issued by HHS in response to specific questions asked by the States, called Level III documents by the Commonwealth. The Commonwealth argues that these Level III documents should be included in the AFDC/EA index. Dkt. no. 41, at 20. I agree.

Level III documents are memoranda issued by the Director of the OFA to its regional offices concerning the requirements of the AFDC and EA programs. Dkt. no. 46, Ex. A, ¶ 6; see

also dkt. no. 37, at 111a-118a. As discussed earlier, OFA is the office within HHS that administers the AFDC and EA programs. Although Level III documents often dealt with State-specific problems, dkt. no. 46, Ex. A, ¶ 6, they were sent to all of the OFA regional offices so that every region would "know and understand the explicit operational procedures that are reflected in some of the responses to the regional inquiries. . ." Dkt. no. 37, at 173a. According to the defendants, these documents were not meant to adopt new policy. Dkt. no. 46, ¶ 6. Rather, they were meant as clarifications of existing statements of policy and interpretations. Id.

FOIA requires federal agencies to index "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." 5 U.S.C. § 552(a)(2)(B). Although FOIA does not define "statements of policy," "interpretations," or "adopted by the agency," the 1975 Attorney General's Memorandum does. According to the Attorney General, "statements of policy" are those "statements which articulate a settled course of action which will be pursued in a class of matters entrusted to agency discretion," and "'interpretations' are explanations or clarifying applications of laws, regulations, or statements of policy." 1975 Attorney General's Memorandum, at 21. In addition, statements of policy and interpretations are "adopted" only if they are "issued by the head of the agency, or by a responsible official who has been empowered by the agency to make authoritative issuance." Id.

Applying the clear language of FOIA to the undisputed facts of this case, I conclude that the Level III documents must be included in the AFDC/EA index. First, the Level III documents fall well within the meaning of "interpretations" under the Act. They are "clarifying applications of . . . statements of policy." Id. Even defendants concede that this is the purpose of the Level III documents. Dkt. no. 46, ¶ 6 ("we viewed the memoranda as clarifying existing statements of

policy and interpretations."); dkt. no. 37, ¶ 172 ("these are clarifications of existing policies and clarifications only."). Second, Level III documents are "adopted by the agency." They are issued by the Director of the OFA, the person in charge of administering the AFDC and EA programs within HHS. Dkt. no. 46, ¶ 6. Such documents can be said to have been "issued" "by a responsible official who has been empowered by the agency to make authoritative issuance." 1975 Attorney General's Memorandum, at 21. Finally, the Level III documents have not been published in the Federal Register. Dkt. no. 40, ¶ 28. When confronted with an "interpretation" that has been "adopted by the agency" and "not published in the Federal Register," 5 U.S.C. § 552(a)(2)(B), I have little choice but to order that it be indexed and made available to the public.

This conclusion is supported by the structure and the purpose of FOIA. See, e.g., Bailey, 516 U.S. at 145 (stating that "[w]e consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme."). Under 5 U.S.C. § 552(a)(1), federal agencies are required to publish in the Federal Register "interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D) (emphasis added). In contrast, § 552(a)(2)(B), the provision at issue in this case, requires merely that "interpretations" be made available to the public and indexed, but not published in the Federal Register. Id. § 552(a)(2)(B). "Read together these provisions can only mean that interpretations of general applicability are to be published in the Federal Register while all other interpretations adopted by an agency, i.e., those not of general applicability, are to be made available to the public. . ." Tax Analysts and Advocates v. Internal Revenue Service, 362 F.Supp. 1298, 1303-04 (D.D.C. 1973). Accordingly, interpretations like the ones adopted by HHS, applying only to one State or region, were intended to fall within FOIA's indexing provision.

The case law interpreting FOIA's indexing provision supports my conclusion as well. Id. In Tax Analysts and Advocates, the district court for the District of Columbia took up a case similar to the one that is before me today. In that case, plaintiffs sought access to two kinds of documents from the I.R.S., letter rulings and technical advice memoranda ("TAMs"). Letter rulings are written statements issued to an individual taxpayer in which the tax laws are applied to a specific set of facts. TAMs are similar to letter rulings in that they deal with a specific set of facts relating to a named taxpayer, with one exception: they are not issued directly to the taxpayer, but are sent to a District Director of the IRS. Id. at 1301. Although plaintiffs sought access to these documents, the IRS refused. In particular, the IRS claimed that these documents were not "precedent" and, therefore, did not fall within 5 U.S.C. § 552(a)(2)(B). The district court disagreed. The court held that the IRS had to disclose both the letter rulings and the TAMs. After reviewing FOIA's language, structure and history, the court concluded that FOIA was "clear and controlling" and that it covered "any interpretation issued by the agency. . ." Id. at 1303.

The Level III documents present an even stronger case for disclosure than the letter rulings and TAMs that fell within FOIA's reach in Tax Analysts and Advocates. While all three (3) documents apply general agency policies to a specific set of facts, the Level III documents go much further. Unlike the letter rulings and TAMs, the Level III documents were traditionally distributed by HHS to regional offices throughout the country in order to apprise them of the agency's view on matters of policy. Dkt. no. 37, at 173a. This broad dissemination alone signifies that Level III documents were meant to apply to more than just the individual State that requested assistance. Additionally, the structure and the language of the Level III documents

shows that they were meant to apply beyond the requesting State. See, e.g., dkt. no. 53, at 698a-747a. The issues on Level III documents often concerned broad matters of agency policy and were usually phrased very generally. See, e.g., id. at 708a-10a, 716a, 744a-47a. Nothing in the facts of Tax Analysts and Advocates suggests that letter rulings or TAMs had such a broad application.

Defendants disagree with my conclusion and point to FOIA's legislative history in support of their position. A House Report accompanying the original passage of FOIA, stated the following:

> [A]n agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as precedent in the disposition of other cases.

H.Rep. No. 1497, reprinted in FOIA Source Book, at 28. Seizing on this language, defendants argue that FOIA simply does not mandate disclosure of the Level III documents at issue in this case.

Defendants have greatly oversimplified the complex legislative history of FOIA. For one, within the same House Report relied on by defendants there are statements that suggest that FOIA intended to mandate broad disclosure in cases like the present one. Id. at 29. Second, a Senate Report on the same bill does not adopt the same restrictive language that is found in the House Report. S.Rep. No. 813, reprinted in id., at 41-42. Third, both Reports indicate that FOIA permits agencies to redact "personal identification from its public records." H.Rep. No. 1497, reprinted in id., at 29; see also S.Rep. No. 813, reprinted in id., at 42. If FOIA did not envision disclosure of interpretations concerning a "specific set of facts which is requested by and

addressed to a particular person," H.Rep. No. 1497, reprinted in id., at 28, this redaction provision would have little purpose. Finally, one court that has thoroughly reviewed the legislative history of FOIA has expressly rejected application of the language relied on by defendants. Tax Analysts and Advocates, 362 F.Supp. at 1304. I give little weight to the quotation from the House Report relied on by defendants and rely, instead, on the clear language, purpose, and structure of FOIA.

Accordingly, I conclude that defendants must include their responses to requests from States under the AFDC and EA programs in their AFDC/EA index.

B. The Legality of the TANF Index

Along with its attack on the AFDC/EA index, the Commonwealth has also raised a series of claims against defendants' maintenance of its TANF index. In light of my previous discussion of FOIA's indexing and publication requirements, I will briefly deal with the Commonwealth's TANF claims.

(i) Does the Index Satisfy FOIA's Publication Requirement?

Just as it did with the AFDC/EA index, the Commonwealth claims that HHS does not publish and distribute the TANF index in compliance with FOIA's publication requirement. HHS started to maintain this index after the passage of the Welfare Reform Act of 1996. This index contains Policy Announcements, Program Instructions, and Information Memoranda for the TANF program. Dkt. no. 36, ¶ 2. HHS distributes the TANF index in only one way: by placing it on the OFA website. Id. Just as with its AFDC/EA index, HHS has not published an order in the Federal Register stating that publication of the TANF index is unnecessary and impracticable. Dkt. no. 37, at 120a. The issue is whether publishing the TANF index on the

website alone is enough to satisfy FOIA's command. I conclude that it is not.

As discussed above, FOIA requires that federal agencies publish and distribute hard copies of its indices. See supra, at 51-53. Defendants themselves seem to understand this requirement. In a December 15, 1998 memorandum, Mack Storrs, then the Director of the Division of the AFDC Program, discussed the requirement that HHS indices be published and distributed in hard copy.

> The attention that the 1996 amendments focused on electronic availability of records and the creation of electronic reading rooms may have caused some of us to lose sight of the still binding requirement for hard copy record availability in actual reading rooms. The public has not overlooked this requirement[]. This office and the Office of the General Counsel recently have received several requests for indices and for the addresses of HHS's reading rooms.

Dkt. no. 37, at 40a. I agree with Mr. Storrs' assessment. FOIA has always, and still does, require that agencies publish and distribute indices of their unpublished policy statements in hard copy. Nothing in the 1996 amendments to FOIA (requiring that agencies make records available via the internet) alters this basic requirement. Because the TANF index is currently only available on the OFA website, it does not satisfy FOIA's publication requirement.

My decision today does not require HHS to publish its TANF index through a commercial printer. As discussed above, FOIA simply does not mandate what kind of hard copy the agency must maintain. Commercial publication would certainly satisfy FOIA, but so would printing a hard copy of the TANF index off the website every quarter. Of course, whatever course the agency chooses, it must make that hard copy "readily available for public use." H.Rep. No. 93-1380, reprinted in FOIA 1974, at 224.

(ii) Is the Index Complete?

Finally, the Commonwealth claims that the TANF index is not complete. In particular, it

alleges that direct responses to State inquiries, Level III documents, should be included in the indices. Dkt. no. 41, at 20. In response, defendants contend that the Commonwealth's claim is moot because they decided to include Level III TANF documents on their TANF index in July of last year. Dkt. no. 48, at 13. I will take defendants at their word and reject the Commonwealth's claim on this point. I will only add that this TANF index should comply with the requirements for a FOIA index that I have already outlined in this opinion.

C. Is There Actual and Timely Notice?

Defendants raise a general defense to all of the Commonwealth's claims brought under FOIA. They argue that they are entitled to summary judgment because they provided the Commonwealth with "actual and timely notice" of all the policy statements and interpretations that are at issue in this litigation. Dkt. no. 44, at 31. "Actual and timely notice" is a phrase that is lifted from FOIA itself. As discussed earlier, FOIA permits a federal agency to "rel[y] on, use[], or cite[] as precedent" any "statement of policy" and "interpretation" that "affects a member of the public" as long as the agency provides the affected person with "actual and timely notice of the terms thereof." 5 U.S.C. § 552(a)(2).

Defendants' statement of the law is correct, but it is also irrelevant to the present dispute. No doubt, the clear language of FOIA permits them to enforce statements of policy and interpretations whether or not they create a FOIA index.[17] Nevertheless, the issue in this case is

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[17] See United States v. San Juan Lumber Co., 313 F.Supp. 703, 706-07 (D.Colo. 1969); United States v. Aarons, 310 F.2d 341, 347-48 (2d Cir. 1962) (Friendly, J.); Teamey v. National Transportation Safety Board, 868 F.2d 1451, 1454 (5th Cir. 1989); Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1018 (9th Cir. 1987); Yassini v. Crossland, 618 F.2d 1356, 1361-62 (9th Cir. 1980); Aleknagik Natives, Ltd. v. United States, 635 F.Supp. 1477, 1496 (D.Alaska 1985); Giles Lowery Stockyards v. Department of Agriculture, 565 F.2d 321, 326 (5th Cir. 1977); Whelan v. Brinegar, 538 F.2d 924, 927 (2d Cir. 1977).

whether HHS complied with the indexing and publication requirements of FOIA, not whether it can enforce any particular statements of policy against the Commonwealth. Simply put, the "actual and timely notice" provision of FOIA is a supplement, and not a trump to, FOIA's indexing and publication requirement. Even the Attorney General recognized this in his 1967 Memorandum on the Act:

> As assurance against defects in publication and indexing, some agencies may find it desirable to supplement their compliance with the index requirement by establishing procedures whereby all regulated interests are given actual notice of the terms of materials which may be used against them, through the use of mailing lists or otherwise. . . . If such practice is adopted, it should be used in addition to rather than in lieu of the required publication and indexing, since the essential purpose of the subsection is to make available to the public the 'end product' materials of the administrative process.

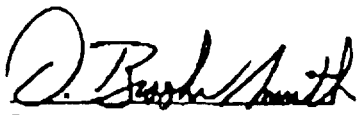
1967 Attorney General's Memorandum, at 22. It may be that the Commonwealth received notice of all the provisions in the AFDC/EA and TANF indices. It is not my charge today to resolve that dispute. Accordingly, I reject the argument raised by defendants in their motion for summary judgment.

IV. CONCLUSION

This case raises interesting and controversial questions about the Freedom of Information Act, the Administrative Procedures Act, and how, exactly, a court with limited jurisdiction can enforce their provisions. Although taking up more than sixty (60) pages, my conclusions are relatively straightforward. The Commonwealth will be granted judgment on its FOIA claim. The defendants must comply with the indexing and publication requirements of FOIA by maintaining and publishing current AFDC/EA and TANF indices. On the Commonwealth's challenge to the Handbook, however, I reach a different result, concluding that the claim should be dismissed for failure to exhaust, and lack of final agency action and ripeness.

An appropriate Order follows.

BY THE COURT:



D. Brooks Smith
Chief United States District Judge

cc: all counsel of record

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Civil Action No. 99-175

ORDER

AND NOW this 7th day of February, 2001, it is hereby ORDERED and DIRECTED that:

1) Plaintiff's motion for summary judgment, dkt. no. 39, is GRANTED IN PART and DENIED IN PART;
2) Defendants' motion for summary judgment, dkt. no. 43, is GRANTED IN PART and DENIED IN PART;
3) Judgment will be entered for the plaintiff on its claims under the Freedom of Information Act as stated in the attached Memorandum Opinion;
4) Plaintiff's claims challenging the Handbook of Public Assistance are dismissed as stated in the attached Memorandum Opinion;
5) The Clerk of Courts shall mark this case CLOSED.

BY THE COURT:

D. Brooks Smith
Chief United States District Judge

cc: all counsel of record