

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

AETNA BETTER HEALTH INC.,
HEALTH PARTNERS OF PHILADELPHIA,
INC.,
KEYSTONE MERCY HEALTH PLAN,
AND
DENTAQUEST, LLC,

Petitioners,

v.

JAMES EISEMAN, JR.,

AND

THE PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA,

Respondents.

NO. 957 C.D. 2013

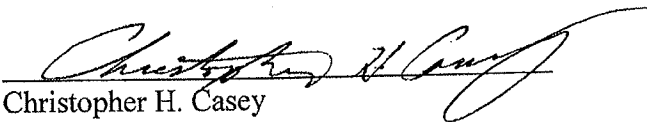
NOTICE TO PARTICIPATE

To: DEPARTMENT OF PUBLIC WELFARE
c/o Leonard W. Crumb, Esq.
Senior Assistant Counsel
Department of Public Welfare
P.O. Box 2675
Harrisburg, PA 17105-2675

DENTAL BENEFIT PROVIDERS, INC.
UNITEDHEALTHCARE OF PENNSYLVANIA, INC.
D/B/A UNITEDHEALTHCARE COMMUNITY PLAN AND
HEALTHAMERICA PENNSYLVANIA, INC. D/B/A COVENTRYCARES
c/o Karl S. Myers, Esq.
Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098

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OF PENNSYLVANIA
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If you intend to participate in this proceeding in the Commonwealth Court, you must serve and file a notice of intervention under Rule 1531 of the Pennsylvania Rules of Appellate Procedure within 30 days.


Christopher H. Casey

**PETITION FOR REVIEW OF AETNA BETTER HEALTH INC., HEALTH PARTNERS
OF PHILADELPHIA, INC.,
KEYSTONE MERCY HEALTH PLAN, AND DENTAQUEST, LLC**

Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC (collectively, "Petitioners") respectfully submit this Petition for Review pursuant to Pennsylvania Rules of Appellate Procedure 1501, *et seq.*, and state as follows:

STATEMENT OF JURISDICTION

1. This Court has appellate jurisdiction over this matter pursuant to 42 Pa.C.S. § 763, and 65 P.S. § 67.1301.

NAME OF PARTIES SEEKING REVIEW

2. The parties seeking review are Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC. Each of these parties was a Direct Interest Participant in the proceedings below pursuant to 65 P.S. § 67.1101(c).¹

**NAME OF GOVERNMENT UNIT THAT MADE THE DETERMINATION SOUGHT
TO BE REVIEWED**

3. The Pennsylvania Office of Open Records ("OOR") made the determination sought to be reviewed.

¹ In addition to Petitioners, other Direct Interest Participants in the proceedings below were Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares.

THE DETERMINATION SOUGHT TO BE REVIEWED

4. This Petition seeks review of the Final Determination of the OOR issued on May 7, 2013, in the matter of *James Eiseman and the Public Interest Law Center of Philadelphia v. Pennsylvania Department of Public Welfare, et al.*, Docket No. AP 2012-2017. A copy of the Final Determination is attached hereto as Exhibit A.

GENERAL STATEMENT OF OBJECTIONS TO DETERMINATION

Petitioners object to the Final Determination on the following grounds:

5. The OOR erred in relying on *Eiseman v. Department of Public Welfare*, OOR Dkt. No. AP 2011-1098 (Sept. 17, 2012) (“*Eiseman I*”), which in turn erroneously relied on *Lukes v. Dep’t of Public Welfare*, 976 A.2d 609 (Pa. Commw. 2009) (“*Lukes*”).

6. The OOR erred in its application of *Eiseman I* to this case.

7. The OOR erred in refusing to separately and independently consider application of the Pennsylvania Uniform Trade Secrets Act (“PUTSA”), thereby nullifying, or rendering superfluous, the provision of the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (“RTKL”), that protects from disclosure records that are “exempt from being disclosed under any other Federal or State law or regulation,” as set forth in the definition of “public record” in 65 P.S. § 67.102.

8. The OOR erred in determining that federal regulations (*i.e.*, those regulations requiring the Pennsylvania Department of Public Welfare (“DPW”) to conduct all procurement processes for the purchasing of services with federal dollars in a manner designed to foster healthy and fair competition among potential government contractors, *see* 45 C.F.R. § 74.43; 42 C.F.R. §§ 434.70(a)(2) & (b), and regulations that presume the confidentiality of documents

relating to the expenditure of federal funds where the disclosure of such documents would substantially harm the competitive position of the party submitting the information, *see* 45 C.F.R. §§ 5.65(B)(4)(ii), 74.53(f)) are inapplicable to protect the requested records from disclosure.

9. The OOR erred in determining that Pennsylvania state regulations (*i.e.*, Pennsylvania's HMO regulations, set forth at 28 Pa. Code § 9.604(a)(8)) are inapplicable to protect the requested records from disclosure.

10. The OOR erred in holding that the dental subcontractors' records are subject to disclosure under 65 P.S. §67.506(d)(1), because the dental subcontractors do not have a contract with DPW, and the plain language of Section 506(d)(1) states that "[a] public record that is not in the possession of an agency but is in the possession of a party *with whom the agency has contracted* ... shall be considered a public record of the agency."). 65 P.S. §67.506(d)(1) (emphasis added).

11. The OOR erred in failing to even consider, much less apply, this Court's decision in *Allegheny County Department of Administrative Services v. Parsons*, 61 A.3d 336 (Pa. Commw. 2013), in which this Court held that "Section 506(d) may reach records that are not in an agency's possession, custody or control *provided the third party in possession has a contract with the agency* to perform a governmental function, *and* the information directly relates to the performance of that function," *id.* at 340 (emphasis added), even though the Petitioners raised and argued below that *Parsons* applies here.

12. The OOR erred in substituting a public policy argument for interpretation of the plain language of the RTKL, by holding that the records of the dental subcontractors "*should* be

subject to public access...[because] any other interpretation *would frustrate the intent* of Section 506(d) by making records showing how public monies are spent unavailable to the public even though they directly relate to a governmental function and a contract with a governmental agency.” (Exhibit A, at 8.) In so doing, the OOR ignored this Court’s admonition in *Parsons* that “we cannot permit the public’s right to know to devolve from a matter of statutory interpretation into a subjective exercise that varies depending on the perspective of the beholder.” 61 A.3d at 347.

13. The OOR erred in finding that the subcontractors “contract with the MCOs to perform services for” DPW (Exhibit A, at 8) when, in fact, the subcontractors do not have contracts with DPW and therefore do not perform services for DPW; rather, the subcontractors perform services for the MCOs, with whom they have contracts.

14. The OOR erred in its construction and application of the “trade secret” exemption of the RTKL, found at 65 P.S. § 67.708(b)(11).

15. The OOR erred in failing to consider and apply each of the elements and factors that Pennsylvania courts consider in determining whether a document or information qualifies as a trade secret, including but not limited to the six-factor test set forth in *Bimbo Bakeries USA v. Botticella*, 613 F.3d 102 (3d Cir. 2010).

16. The OOR erred in failing to follow prior OOR precedent holding that pricing information similar to the information in the records at issue is exempt from disclosure under the trade secret exemption, including but not limited to *Dahlgren v. Dept. of Gen. Serv.*, Docket No. AP. 2009-0631 (Pa. OOR 2009), *Howard v. Pa. Dept. of Corrections*, Docket No. AP 2010-0776 (Pa. OOR 2010), and *Maller v. W. Manheim Twp.*, Docket No. AP. 2009-0498 (Pa. OOR 2009).

17. The OOR erred in its construction and application of the “confidential proprietary information” exemption of the RTKL, found at 65 P.S. § 67.708(b)(11).

18. The OOR erred in concluding that the evidence presented by Petitioners in their affidavits below did not establish that Petitioners and the other Direct Interest Participants would suffer “substantial harm” if the records at issue were disclosed.

19. The OOR erred in failing to follow prior precedent of this Court and the OOR holding that pricing information similar to the information in the records at issue is exempt from disclosure under the confidential proprietary information exemption, including but not limited to *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. 2011), *Rounsville v. Pa. Dept. of Health*, Docket No. AP 2011-0281 (Pa. OOR 2011), *Zeshonski v. Pa. Dept. of Health*, Docket No. AP. 2011-0698 (Pa. OOR 2011), and *Datatel, Inc. v. PSSHE*, Docket No. AP. 2010-0818 (Pa. OOR 2010).

20. The OOR erred in failing to separately and independently apply the trade secret and confidential proprietary information exemptions of the RTKL.

21. The OOR erred in holding that Petitioners, the other Direct Interest Participants, and DPW failed to carry their burden to show that either the trade secret or confidential proprietary information exemption applied.

22. The OOR, in holding that Petitioners, the other Direct Interest Participants, and DPW had not met their burden, erred in its application of the “preponderance of the evidence” standard, because Petitioners, the other Direct Interest Participants, and DPW offered extensive evidence supporting the exemptions, while Respondents offered no contrary evidence in rebuttal.

23. The OOR erred in refusing to reconsider *Eiseman I* in deciding whether the “trade secret” and “confidential proprietary information” exemptions of the RTKL applied.

24. The OOR erred in relying on *Lukes*, a case that was decided under the predecessor to the RTKL and that is distinguishable from this case.

25. The OOR erred in failing to follow this Court’s decision in *In re: Silberstein*, 11 A.3d 629, 632 n.8 (Pa. Commw. Ct. 2011), in which this Court ruled that because *Lukes* was rendered pursuant to the predecessor law, which was repealed by the RTKL, *Lukes* was not controlling.

26. The OOR erred in failing to follow this Court’s decision in *Office of the Budget v. OOR*, 11 A.3d 618, 623 (Pa. Commw. Ct. 2011), in which this Court again declined to apply *Lukes* to a case under the RTKL.

27. The OOR erred in misconstruing the affidavits submitted by Petitioners that explain in detail the steps that the Petitioners take to protect the rate information from disclosure, and which meet every element of both the “trade secret” and “confidential proprietary information” tests.

28. The OOR erred in reasoning that because rates vary among dental practices and are periodically reevaluated or renegotiated, disclosure of the rates would not cause competitive harm to Petitioners.

29. The OOR erred in concluding that “there is *no evidence* demonstrating how disclosure of this information undermines the parties’ present competitive positions or has present economic relevant [sic] or value,” (Exhibit A, at 11), when, in fact, the Petitioners

provided extensive evidence in their affidavits showing how disclosure of the rate information would harm their competitive position.

30. The OOR erred in speculating that “the [rate] information *may very well be* ‘*outdated*’ by the time of its release” (Exhibit A, at 11), a theory that finds no support in the record.

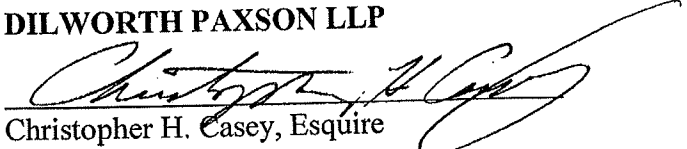
31. The OOR otherwise erred in concluding that the records at issue were subject to disclosure under the RTKL.

SHORT STATEMENT OF RELIEF SOUGHT

32. Petitioners respectfully request an order of this Court reversing the May 7, 2013 Final Determination of the OOR and ordering that no further action need be taken by DPW with respect to this matter.

Respectfully submitted,

DILWORTH PAXSON LLP


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Attorneys for Petitioners Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC

June 6, 2013

CERTIFICATE OF SERVICE

I, Christopher H. Casey, hereby certify that on the 6th day of June 2013, I caused to be served the Petition for Review of Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC, by the following means of service, on the following:

By First-Class Mail and Electronic Mail:

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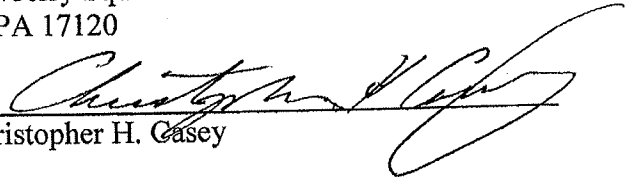
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Christopher H. Casey

Dated: June 6, 2013