

Karl S. Myers
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June 5, 2013

VIA OVERNIGHT DELIVERY

Office of the Prothonotary
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Ave.
Suite 2100
P.O. Box 69185
Harrisburg, PA 17106

Re: **Dental Benefit Providers, Inc. and UnitedHealthcare of
Pennsylvania, Inc., et al. v. James Eiseman, Jr. and The
Public Interest Law Center of Pennsylvania
Commonwealth Court of PA, Docket No. TBD**

Dear Prothonotary:

Enclosed please find for filing in the above-captioned matter the original and three (3) copies of a *Petition for Review*. I also enclose our firm check in the amount of \$73.50 in payment of your filing fee.

Please file the original and one copy and time-stamp and return the extra copies to me in the enclosed self-addressed, stamped envelope.

Thank you for your time and attention to this matter. Please contact the undersigned at (215) 564-8193 if you need further assistance.

Very truly yours,



Karl S. Myers

KSM/das
Enclosures

cc: James Eisenman, Jr., Esquire (w/encl. via first class mail and email)
Benjamin D. Geffen, Esquire (w/encl. via first class mail and email)
Leonard W. Crumb, Esquire (w/encl. via first class mail and email)
Christopher H. Casey, Esquire (w/encl. via first class mail and email)
Pennsylvania Office of Attorney General (w/encl. via certified mail)
Pennsylvania Office of Open Records (w/encl. via certified mail and email)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENTAL BENEFIT PROVIDERS,
INC.

AND

UNITEDHEALTHCARE OF
PENNSYLVANIA, INC. D/B/A
UNITEDHEALTHCARE
COMMUNITY PLAN

AND

HEALTHAMERICA
PENNSYLVANIA, INC. D/B/A
COVENTRYCARES,

Petitioners,

v.

JAMES EISEMAN, JR.

AND

THE PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA,

Respondents.

No. _____ CD 2013

Petition for Review of the Final
Determination of the Office of
Open Records, at Docket No.: AP
2012-2017

PETITION FOR REVIEW

Pursuant to Pennsylvania Rule of Appellate Procedure 1501, *et seq.*,
petitioners, Dental Benefit Providers, Inc. (“DBP”), UnitedHealthcare of

Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan (“United”) and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares (“Coventry”), hereby petition for review of the May 7, 2013 Final Determination of the Office of Open Records of the Commonwealth of Pennsylvania in the matter captioned Eiseman, et al. v. Pennsylvania Department of Public Welfare, et al., OOR Docket No. 2012-2017, and in support they assert as follows:

Statement of Jurisdiction

1. This Court has jurisdiction over this matter as a petition for review within its appellate jurisdiction, pursuant to 42 Pa.C.S. § 763, and as a matter arising under the Right-to-Know Law, pursuant to 65 P.S. § 67.1301.

Parties Seeking Review

2. There are three parties that bring this petition: (1) Dental Benefit Providers, Inc. (“DBP”), (2) UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan (“United”), and (3) HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares (“Coventry”).

3. Each of DBP, United, and Coventry were Direct Interest Participants in the proceedings below pursuant to 65 P.S. §67.1101(c).

Government Unit That Made Underlying Determination

4. The government unit that made the determination for which review is sought is the Office of Open Records of the Commonwealth of Pennsylvania.

Determination Sought to Be Reviewed

5. The determination for which review is sought is the Final Determination of the Office of Open Records issued on May 7, 2013 in the matter captioned Eiseman, et al. v Pennsylvania Department of Public Welfare, et al., OOR Docket No. 2012-2017. A copy of the Final Determination is attached hereto as *Exhibit A*.

General Statement of Objections to Determination

6. The Office of Open Records (“OOR”) erred by applying and 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).

7. The OOR erred in its construction and application of the Eiseman I and Lukes decisions.

8. The OOR erred in refusing to separately and independently consider application of the Pennsylvania Uniform Trade Secrets Act (“PUTSA”).

9. The OOR, in refusing to consider PUTSA, erred by consequently ignoring the provision of the RTKL exempting from disclosure records “exempt from being disclosed under any other Federal or State law,” as set forth in the definition of “public record” in 65 P.S. § 67.102.

10. The OOR erred in failing to recognize and in refusing to apply and give weight to federal regulations requiring 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 such federal 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).

11. The OOR erred in failing to recognize and in refusing to apply and give weight to Pennsylvania regulations exempting from disclosure the records in issue. See 28 Pa. Code § 9.604(a)(8).

12. The OOR erred in finding the requested materials are within the possession of DPW under 65 P.S. §67.506(d)(1).

13. The OOR erred in finding the requested materials are within the possession of DPW by failing to apply this Court's two-part test for determining agency possession.

14. The OOR erred in finding the requested materials are within the possession of DPW even though DPW did not contract with the dental subcontractors whose records are sought. See 65 P.S. §67.506(d)(1) ("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").

15. The OOR erred in finding the requested materials are within the possession of DPW by failing even to consider, much less apply, this Court's decision in Allegheny County Department of Administrative Services v. Parsons, 61 A.3d 336 (Pa. Commw. 2013), even though it was raised and argued by DBP, United, and Coventry.

16. In connection with its findings on agency possession, the OOR erred in its construction and application of Office of the Budget v. OOR, 11 A.3d 618 (Pa. Commw. 2011).

17. In connection with its findings on agency possession, the OOR misconstrued the agreement between DPW and the managed care organizations ("MCOs") in the HealthChoices program, by holding the contractual phrase requiring DPW to have access to "records of *transactions* pertaining to the

provision of services to Recipients” meant that DPW was required to have access to documents reflecting rates paid by subcontractors to providers.

18. The OOR erred in finding the requested materials are within the possession of DPW even though OOR acknowledged that DPW “does not contract directly with the dental subcontractors.”

19. The OOR erred in finding the subcontractors “contract with the MCOs to perform services for” DPW when, in fact, the subcontractors do not contract with DPW and therefore perform services for the MCOs – not DPW.

20. The OOR erred in engaging in public policy second-guessing of the Legislature in deciding that “these records *should* be subject to public access,” even though the express language chosen by the General Assembly does not provide for access and this Court in Parsons rejected the making of policy arguments in the context of the RTKL.

21. The OOR erred in deciding that non-disclosure here would “frustrate” the intent of section 506(d) of the RTKL even though the plain language of that statute (the best indicator of the Legislature’s intent in enacting that provision) does not provide for disclosure.

22. The OOR erred in deciding that “records showing how public monies are spent” should be available to the public, without citing or referencing

any provision of the RTKL providing that “records showing how public monies are spent” always must be disclosed under the RTKL.

23. The OOR otherwise erred in finding the requested materials are within the possession of DPW even though those records are held by a subcontractor and not a direct contractor with DPW.

24. The OOR erred in improperly construing and applying the “trade secret” exemption of the Right-to-Know Law (“RTKL”), found at 65 P.S. § 67.708(b)(11).

25. The OOR erred in improperly construing and applying the “confidential proprietary information” exemption of the RTKL, found at 65 P.S. § 67.708(b)(11).

26. The OOR erred in applying the Eiseman I and Lukes decisions, and in refusing to reconsider Eiseman I, in deciding whether the “trade secret” and “confidential proprietary information” exemptions of the RTKL applied, even though Eiseman I was erroneously decided and Lukes was decided under the predecessor to the RTKL, is distinguishable, and has been rejected by several subsequent decisions of this Court.

27. The OOR erred in failing to separately and independently apply the “trade secret” and “confidential proprietary information” exemptions of the RTKL (including by following the rationale of Eiseman I, which refused and failed

to separately consider these exemptions), even though this Court has held they must be separately applied.

28. The OOR erred in failing to even articulate, much less consider and apply, each of the elements and factors that are to be applied under the “trade secret” and “confidential proprietary information” exemptions of the RTKL, as well as the PUTSA, including but not limited to the six-factor “trade secret” test that is to be applied under Pennsylvania law.

29. The OOR erred in misconstruing and misapplying the affidavits submitted by DBP, United, and Coventry, which fully support their contention that the documents in issue are exempt from disclosure under the RTKL.

30. The OOR erred in reasoning that the following factors militate *against* a finding that the “trade secret” or “confidential proprietary information” exemptions apply, given that they *support* a finding of exemption: (1) that rates between dental practices vary; and (2) that rates are periodically renegotiated between subcontractors and providers, or are otherwise reevaluated.

31. The OOR erred in relying on Lukes for the proposition that “[t]he threat of competition ... is insufficient to invoke an exemption ... from disclosure,” as that rationale would entirely negate both the “trade secret” and “confidential proprietary information” exemptions of the RTKL.

32. The OOR erred in claiming “there is *no evidence* demonstrating how disclosure of this information undermines the parties’ present competitive positions or has present economic relevant [sic] or value,” when, in fact, there was such evidence presented to the OOR by DBP, United, Coventry, and the other Direct Interest Participants.

33. The OOR erred by speculating and guessing that “the information *may very well be ‘outdated’* by the time of its release,” a rationale that finds no support at all in the record and which, if adopted by this Court, would effectively negate every exemption under the RTKL in any case that is litigated over a considerable period of time.

34. The OOR otherwise erred in failing to fully consider the affidavits and other evidence presented below by DBP, United, Coventry, and the other Direct Interest Participants.

35. The OOR erred in finding that DBP, United, Coventry, DPW, and the other Direct Interest Participants failed to meet the preponderance of the evidence standard to show the requested materials are exempt under the RTKL.

36. The OOR erred in finding that DBP, United, Coventry, DPW, and the other Direct Interest Participants failed to meet the preponderance of the evidence standard to show the materials are exempt in light of the fact that their

affidavits were not rebutted by any affidavits or any other relevant evidence to the contrary presented by the Requester.

37. The OOR erred by following Eiseman I due to its improper, erroneous, and *sua sponte* application of the “financial records” provision of 65 P.S. § 67.708(c).


38. The OOR erred in failing to find any of the RTKL exemptions applied, given that prior OOR precedent has found pricing information similar to that at issue in the Request in issue exempt from disclosure, including but not limited to Dahlgren v. Dep’t of General Svcs., OOR Dkt. AP 2009-0631 (Sept. 10, 2009), and Zeshonski v. Dep’t of Health, OOR Dkt. AP 2011-0698 (July 20, 2011).

39. The OOR otherwise erred in concluding that the materials requested are subject to disclosure under the RTKL.

Short Statement of Relief Sought

40. For the reasons set forth above, Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan, and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares respectfully request an order of this Court reversing the May 7, 2013 Final Determination of the Office of Open Records, and further ordering that no further action must be taken by the Pennsylvania Department of Public Welfare with respect to this matter.

Respectfully submitted,



Karl S. Myers (Pa. Id. No: 90307)
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UnitedHealthcare Community Plan, and
HealthAmerica Pennsylvania, Inc.
d/b/a CoventryCares

Dated: June 5, 2013

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENTAL BENEFIT PROVIDERS,
INC.,
UNITEDHEALTHCARE OF
PENNSYLVANIA, INC. D/B/A
UNITEDHEALTHCARE
COMMUNITY PLAN, AND
HEALTHAMERICA
PENNSYLVANIA, INC. D/B/A
COVENTRYCARES,

Petitioners,

v.

JAMES EISEMAN, JR. AND
THE PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA,

Respondents.

No. _____ CD 2013

Petition for Review of the Final
Determination of the Office of
Open Records, at Docket No.: AP
2012-2017

NOTICE TO PARTICIPATE

To: DEPARTMENT OF PUBLIC WELFARE
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AETNA BETTER HEALTH, INC.
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KEYSTONE MERCY HEALTH PLAN
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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.

A handwritten signature in black ink, consisting of several fluid, overlapping strokes that form a stylized representation of the name Karl S. Myers.

Karl S. Myers

Dated: June 5, 2013

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENTAL BENEFIT PROVIDERS,
INC.,
UNITEDHEALTHCARE OF
PENNSYLVANIA, INC. D/B/A
UNITEDHEALTHCARE
COMMUNITY PLAN, AND
HEALTHAMERICA
PENNSYLVANIA, INC. D/B/A
COVENTRYCARES,
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No. _____ CD 2013

Petition for Review of the Final
Determination of the Office of
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2012-2017

PROOF OF SERVICE

I, Karl S. Myers, hereby certify that on June 5, 2013, I caused the foregoing *Petition for Review* to be filed with the Court via overnight delivery, and served the same via US Mail, postage prepaid, and email (except as noted below) upon the following:

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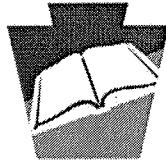
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Karl S. Myers

EXHIBIT “A”



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES EISEMAN AND	:	
THE PUBLIC INTEREST LAW CENTER	:	
OF PHILADELPHIA,	:	
Complainant	:	
	:	
v.	:	Docket No.: AP 2012-2017
	:	
PENNSYLVANIA DEPARTMENT OF	:	
PUBLIC WELFARE,	:	
Respondent	:	

INTRODUCTION

James Eiseman, Jr., Esq., on behalf of the Public Interest Law Center of Philadelphia, (collectively the “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Public Welfare (“Department”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking records related to the Department’s administration of the Medical Assistance (“Medicaid”) program in Southeastern Pennsylvania. The Department denied the Request, citing the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq.* (“PUTSA”), federal and state regulations, and various exemptions from disclosure under the RTKL. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On October 3, 2012, the Request was filed, seeking, for the period July 1, 2008 through June 30, 2012:

Each and every document, including contracts, rate schedules and correspondence in [the Department's] possession, custody, or control that: (a) sets forth the amount for any one or more dental procedure codes that any Medicaid HMO and/or Medicaid Dental Subcontractor pays or has paid to dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania, or (b) otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania.

Thus, the Request seeks payment rate information Medicaid insurers pay to dentists, as well as payment rate information Medicaid insurers pay to dental subcontractors and the payment rates those dental subcontractors pay to dentists. On November 13, 2012, after extending the period to respond by thirty (30) days pursuant to 65 P.S. § 67.902(b), the Department denied the Request, stating that the Department had notified five Managed Care Organizations ("MCOs") and two dental subcontractors of the Request and that each entity had notified the Department that the requested records are exempt from disclosure. Specifically, the Department argued that the requested records are exempt pursuant to:

- PUTSA;
- Section 708(b)(11) of the RTKL (exempting from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information");
- "[T]he Department of Health regulation that appears at 28 Pa. Code § 9.604;" and
- "[O]ther state and/or federal regulations and/or statutes."

On December 3, 2012, the Requester timely appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal

pursuant to 65 P.S. § 67.1101(c). On December 13, 2012, the Department provided a position statement, explaining that it had notified the relevant third parties and that the third parties would be providing evidence and argument. On December 18, 2012, Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan, HealthAmericaPennsylvania, Inc. d/b/a CoventryCares (collectively “Group A”) and Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, Amerihealth Mercy Health Plan, and DentaQuest, L.L.C. (collectively “Group B”) asserted a direct interest in the records subject to this appeal and requested to participate and provide information pursuant to 65 P.S. § 67.1101(c).¹ On December 21, 2012, both requests were granted, and the OOR established a briefing schedule for the parties.

On January 14, 2013, Group A provided a position statement, along with the affidavits of Heather Cianfrocco, President of UnitedHealthcare Community & State Northeast Region; Paul Hebert, President of Dental Benefit Providers, Inc.; and Nancy Hardy, Vice President of Operations for HealthAmerica Pennsylvania, Inc. Also on January 14, 2013, Group B provided a position statement, along with the affidavits of Denise Croce, CEO of Aetna Better Health Inc.; John Sehi, Vice-President of Finance for Health Partners of Philadelphia, Inc.; William Morsell, Senior Vice-President of Keystone Mercy Health Plan; and Mark Haraway, Regional Vice President of DentaQuest, L.L.C.

On January 28, 2013, the Requester provided a position statement. Finally, on April 3, 2013, the third parties made final submissions.

¹ Group A and Group B will be collectively referred to as “the third parties,” or, alternatively “MCOs” or “dental subcontractors” respectively.

LEGAL ANALYSIS

The RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901.

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such

proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. PUTSA does not apply

The third parties argue that the responsive records are protected from disclosure pursuant to the Pennsylvania Uniform Trade Secrets Act (“PUTSA”), 12 Pa. C.S. §§ 5301 *et seq.* However, the OOR has held that since PUTSA and the RTKL define “trade secret” identically, there “is no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL.” *Eiseman v. Pennsylvania Department of Public Welfare*, OOR Dkt. AP 2011-1098, 2012 PA O.O.R.D. LEXIS 1198. As the Department has raised Section 708(b)(11) of the RTKL, which exempts from disclosure trade secrets, the OOR need not consider the merits of PUTSA here.

2. Federal and state regulations do not apply to these records

The third parties argue that responsive records are confidential pursuant to federal and state regulations. *See* 45 C.F.R. §§ 5.65(B)(4)(ii); 74.53(f); 28 Pa. Code § 9.604(a)(8). However, none of these regulations are applicable to the respondent Department of Public Welfare. The cited federal regulations pertain only to the U.S. Department of Health and Human Services. *See, e.g.*, 45 C.F.R. § 5.1 (“This part contains the rules that the Department of Health and Human Services (HHS) follows in handling requests for records under the Freedom of Information Act (FOIA)”). Similarly, the cited state regulation applies only to the Pennsylvania Department of Health. *See* 28 Pa. Code § 9.602 (defining “Department” as “[t]he Department of

Health of the Commonwealth”). Therefore, none of the cited regulations prohibit the Department’s disclosure of the records at issue.

3. Sections 708(b)(5), 708(b)(6), and 708(b)(28) of the RTKL are no longer at issue

On appeal, the third parties argue that some responsive records² contain “identifiable health information” and are thus exempt from disclosure pursuant to Sections 708(b)(5), 708(b)(6), and 708(b)(28) of the RTKL. However, on appeal, the Requester has limited the scope of its appeal “to those documents that set forth the fees the MCOs and/or their dental subcontractors pay dentists that do not contain any such individual identifying information or individual health information.” Therefore, the applicability of these exemptions is no longer at issue.

4. The Department is required to obtain records in the possession of the dental subcontractors related to the payment rates paid to dentists

The Requester argues that records in the possession of dental subcontractors are public records required to be disclosed under the RTKL. Thus, the Requester argues that, in addition to the payment rates paid by the Department to the MCOs, and the payment rates the MCOs pay to both dental subcontractors and dentists, the Requester is also entitled to records of the payment rates paid by the dental subcontractors to dentists. Records in the possession of entities under contract with a Commonwealth or local agency to perform a governmental function may be subject to disclosure under the RTKL. *See* 65 P.S. § 67.506(d).

Section 506(d) of the RTKL states:

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 to perform a governmental function on behalf of the agency, and which directly relates to the governmental

² Ms. Croce’s affidavit refers to these records as “encounter files” and explains that they “contain members’ names and identification numbers, listings of the health care services delivered to the member, other confidential personal and medical information relevant to the service, and the rates for the services provided.”

function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). It is undisputed that Section 506(d) is applicable to the MCOs contracting with the Department. In addition, in *Eiseman, supra*, the OOR also held that the RTKL is applicable to medical providers entering into an agreement with the MCOs to provide medical services. Thus, records related to rates paid to the dental subcontractors by the MCOs are subject to public disclosure. However, the dental subcontractors – DentaQuest, L.L.C. and Dental Benefit Providers, Inc. – argue that Section 506(d) is inapplicable to records in the possession of these subcontractors as they relate to the payment rates the dental subcontractors pay to dentists because the dental subcontractors have not contracted directly with the Department. Instead, the dental subcontractors have contracted directly with the MCOs to provide dental services. The MCOs, in turn, are under contract with the Department to provide health insurance for Medicaid beneficiaries.

The dental subcontractors argue that *Office of the Budget v. Office of Open Records* supports its position. In that case, the requester sought payroll certifications in the possession of a subcontractor for a project in the City of York, which received grant funds from the Office of the Budget (“Budget”) for the project. 11 A.3d 618 (Pa. Commw. Ct. 2011). Because there was no contract between Budget and the City of York, the OOR found that Section 506(d) was not applicable. However, the OOR held that Budget possessed the records under Section 901 of the RTKL because it had the authority and duty under the grant agreement with the City of York to ensure that subcontractors comply with the Pennsylvania Prevailing Wage Act. On appeal, the Commonwealth Court reversed, holding that an interpretation that records “not in the possession of a government agency and not related to a contract to perform a governmental function ... are

disclosable to the public if any government agency has a legal right to review those records ... would greatly broaden the scope of the RTKL beyond its explicit language.” *Id.* at 623.

Office of the Budget is inapplicable to the present matter for two reasons. First of all, that case did not involve Section 506(d) of the RTKL. Secondly, the records at issue here *do* relate to a contract to perform a governmental function. The Department has contracted with the MCOs to provide medical services under the Medicaid program, and those MCOs have in turn subcontracted with the dental subcontractors to provide dental services to Medicaid recipients. The fact that the MCOs would in turn hire subcontractors is clearly contemplated by the agreements between the Department and the MCOs, wherein the Department “has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients,” including those records in the possession of the dental subcontractors.

The OOR finds that Section 506(d) is applicable to records in the possession of the dental contractors. While the Department does not contract directly with the dental subcontractors, the dental subcontractors contract with the MCOs to perform services for the Department. Because the records sought directly relate to a governmental function being performed by the dental subcontractors, these records should be subject to public access. The OOR finds that 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.

5. Section 708(b)(11) does not protect these records from disclosure

The Department and the third parties argue that the requested records are exempt from disclosure as confidential proprietary information and trade secrets. Section 708(b)(11) of the RTKL exempts from disclosure records that reveal “trade secrets” or “confidential proprietary

information.” See 65 P.S. § 67.708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

Confidential proprietary information: Commercial or financial information received by an agency: (1) which is privileged or confidential; **and** (2) the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.

Trade secret: Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; **and** (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of these two-part tests are met in order for the exemption to apply. See *Sansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; see also *Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information).

In *Eiseman*, *supra*, the OOR found that the direct interest participants, which included some of the third parties participating in the present appeal, did not meet their burden of proving that provider rates are exempt from disclosure pursuant to Section 708(b)(11). In making that determination, the OOR relied on *Lukes*, *supra*. In that case, decided under the prior Right-to-Know Law, the Commonwealth Court found that provider agreements disclosing payment rates did not constitute trade secrets. Specifically, the Court found:

[T]here is no basis on upon which to conclude that the Provider Agreements, which the [insurance company] entered into with provider hospitals at the direction of DPW for the disbursement of public funds, are trade secrets. While the Interveners presented evidence that the Provider Agreements contain confidentiality provisions and are not known outside of the [insurance company and hospitals], a party that voluntarily participates in a public program and is receiving and disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded

from public scrutiny. The threat of competition ... is insufficient to invoke an exemption ... from disclosure.

Id. at 626-27.

The third parties argue that the OOR incorrectly relied upon *Lukes* in *Eiseman*, and that, therefore, *Eiseman* should not apply to the present appeal. However, the OOR will not overturn *Eiseman* and instead finds that the reasoning in *Eiseman* is applicable to the present appeal. Here, like in *Eiseman*, the third parties have provided numerous affidavits attesting to the steps taken to keep the requested information secret and confidential. However, the third parties have not established that they would suffer “substantial harm” if this information was disclosed, or that the information derives economic value from not being generally known to competitors.

The third parties attest that they each take measures to keep rate information confidential. Further, the third parties attest that the “harm” that they will suffer if this rate information is released is competition from competitors. For example, the Croce, Sehi, Morsell, and Haraway affidavits attest that release of this rate information could: 1) enable competitors to “undercut” their businesses, and 2) “cause the providers [i.e., dentists] to seek higher rates.” Likewise, the Cianfrocco, Hardy, and Hebert affidavits attest that disclosure of this rate information “would offer solid parameters by which competitors could refine their own pricing strategies in an effort to win business away.” However, these affidavits go on to explain that “[r]ates vary by dental practice and are based on a variety of factors, including but not limited to the need for the practice in the network, the number of existing Medical Assistance enrollees that are patients of the practice, and the types of services rendered (i.e., general dentistry, pediatric dentistry, etc.)” and that “[t]he rates are also reevaluated and possibly renegotiated periodically.”

While the OOR understands that the third parties consider rate information confidential, like in *Lukes*, “[t]he threat of competition ... is insufficient to invoke an exemption ... from

disclosure.” See *Lukes, supra*. The third parties have shown that the rates paid to dentists change periodically, or are at least “reevaluated.” As such, there is no evidence demonstrating how disclosure of this information undermines the parties’ present competitive positions or has present economic relevant or value, as the information may very well may be “outdated” by the time of its release. Accordingly, the OOR finds that the requested information does not constitute a trade secret or confidential proprietary information and that the third parties failed to meet the burden of proving that this information is exempt from disclosure pursuant to Section 708(b)(11) of the RTKL. See 65 P.S. § 67.708(a)(1); *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011) (“[W]e believe it equally appropriate under the law to place the burden on third-party contractors ...”). Accordingly, the appeal is granted.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Department is required to disclose all responsive records to the Requester within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: May 7, 2013



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