



pennsylvania
OFFICE OF OPEN RECORDS

**RIGHT TO KNOW LAW APPEAL
DENIAL OR PARTIAL DENIAL**

Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
Fax: (717) 425-5343 E-mail: openrecords@pa.gov

Today's date: 12/03/2012

Requester's name: Public Interest Law Center of Philadelphia
Address/City/State/Zip: United Way Bldg., 1709 Benjamin Franklin Pkwy, Philadelphia, PA 19103

Request submitted by: Fax Mail E-mail In-Person (Please check one)
Date of Right to Know request: 10/03/2012 Date of Agency Response: 11/13/2012

Telephone and fax number: 215.627.7100 ext. 238 E-mail: bgeffen@pilcop.org
215.627.3183

Name and address of Agency: Dept. of Public Welfare, P.O. Box 2675, Harrisburg, PA 17105-2675
E-mail Address of Agency ra-dpwrtkl@pa.gov Fax of Agency 727.787.3422
Name and title of person who denied my request: Andrea Banks, Open Records Officer

I submitted a request for records to the agency named above. The agency either denied or partially denied my request. I am appealing that denial to the Office of Open Records (OOR), and I am providing the following information:

I was denied access to the following records (attach additional pages if necessary): See attached letter

The requested records are public records because (check all that apply) **(REQUIRED)**:
 the records document the receipt or use of agency funds
 the records are in the possession, custody or control of the agency and are not subject to the exemptions cited by the agency.
 Other See attached letter

The agency denied my request and I believe the denial was incorrect because (address EACH reason the agency gives for denying your request, attach additional pages if necessary) **(REQUIRED)**:
See attached letter

- I have attached a copy of my request for records. **(REQUIRED)**
- I have attached a copy of all responses from the agency regarding my request. **(REQUIRED)**
- I have attached any letters or notices extending the agency's time to respond to my request.

Respectfully Submitted, (must be signed)

You should provide the agency with a copy of this form and any documents you submit to the OOR.



PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA

AFFILIATED WITH THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

December 3, 2012

STAFF

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James Eiseman, Jr.
Senior Attorney

Benjamin D. Geffen
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Sonja D. Kerr
Director, Disabilities Rights Project

Edwin D. Wolf
Executive Director
1974-1976

SENT VIA E-MAIL

Ms. Terry Mutchler
Executive Director
Office of Open Records (OOR)
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120

Re: Right-To-Know Request No. 12-RTKL-308
(addressed to the Pennsylvania Department of Public Welfare)

Dear Ms. Mutchler:

A Request dated October 3, 2012, by the Public Interest Law Center of Philadelphia ("PILCOP") was transmitted via e-mail to Andrea Bankes, Agency Open Records Officer of the Department of Public Welfare ("DPW"), a copy of which is attached hereto marked Exhibit A.

On October 11, 2012, Agency Open Record Officer Bankes sent to PILCOP an "interim response" captioned "Right-To-Know Law Request No. 12-RTKL-308," indicating DPW would require an additional 30 days to respond to the Request, a copy of which interim response is attached hereto marked Exhibit B.

On November 13, 2012, Agency Open Records Officer Bankes sent via e-mail a letter setting forth DPW's "final response" to PILCOP's request, a copy of which is attached hereto marked Exhibit C.¹

This letter is written to appeal DPW's "final response" dated November 13, 2012, to PILCOP's October 3, 2012 Request.

A. Introduction and Overview

The September 17, 2012 decision of the Office of Open Records ("OOR") in Eiseman v. DPW, AP 2011-1098, requires that DPW's November 13, 2012 denial of PILCOP's October 3, 2012 Request be reversed by OOR for the reasons described below. A copy of the said September 17, 2012 decision is attached hereto marked Exhibit D.

On June 17, 2011, James Eiseman, Jr., acting on behalf of PILCOP, filed a Right-To-Know Law Request with DPW, paragraph 4 of which requested, among other things,

Each and every document, including correspondence and appendices, in DPW's possession, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipient in Southeastern Pennsylvania.²

¹ In Bankes' November 13, 2012 letter she refers to PILCOP's "First Request" and "Second Request," which were contained in paragraphs numbered 3 and 4 respectively of PILCOP's October 3, 2012 Request. Paragraphs numbered 1 and 2 in PILCOP's October 3, 2012 Request were merely definitional.

² OOR's September 17, 2012 opinion refers to paragraph 4 of the June 17, 2011 Request as "Item 2" because the first two paragraphs of the June 17, 2011 Request

DPW denied the above Request on July 25, 2011; PILCOP appealed the Request on August 15, 2011; and, after a two-day hearing, in an opinion dated September 17, 2012, the Office of Open Records ruled that DPW must produce the above described documents. See, Eiseman v. DPW, AP 2011-1098, pp 16-19.

Like Item 2 of Eiseman's June 17, 2011 Request, PILCOP's October 3, 2012 Request seeks production of documents that set forth how much of the money DPW pays to Medicaid HMOs³ is paid out by those HMOs to implement the dental component of the Medicaid program that DPW has contracted with the HMOs to carry out.

Such documents, OOR's ruling in the September 17, 2012 decision held, must be produced by DPW for essentially two principal reasons. Firstly, the decision of the Commonwealth Court in Lukes v. Department of Public Welfare, 976 A.2d 609, 626-27 (Pa. Commw. 2011) compels this result. As the OOR found in Eiseman v. DPW, AP 2011-1098, although Lukes was decided under a predecessor Right-To-Know Law, it still compels the holding that documents that set forth how DPW's agents, including the HMOs and their subcontractors, are disbursing public funds may not be shielded from production by DPW. Eiseman, *supra* at p. 16-17. Secondly, the "trade secrets" and "confidential proprietary information" exemptions contained

were solely definitional. See Eiseman v. DPW, AP 2011-1098 at page 2 of the opinion.

³ Ms. Bankes's letter uses the term "MCO," which is synonymous with "HMO" for all relevant purposes.

in 65 P.S. § 67.708(b)(11) to DPW's duty to produce such documents do not apply to "financial documents" by virtue of 65 P.S. § 67.708(c), Eiseman, supra, at p. 15.

PILCOP will now address seriatim the particular grounds asserted by DPW⁴ as a basis for denial of PILCOP's Requests.

B. Response to Particular Grounds of Objection

1. Trade Secrets under 12 Pa. C.S. §§5301 et seq.

DPW's November 13, 2012 denial asserts that both PILCOP's First and Second October 3, 2012 Request for documents should be denied because the documents would reveal rates that are "trade secrets protected by the Uniform Trade Secrets Act. 12 Pa C.S. §§5301 et seq." However, OOR rejected just this argument in its September 17, 2012 decision in Eiseman v. DPW, 2011-1098, for two separate reasons. Firstly, OOR pointed out that the definition of trade secrets in 12 Pa.C.S. §§ 5301, et seq. is identical to the definition in the Right-To-Know Law, 65 P.S. § 67.102 (Eiseman supra at p. 13). Secondly, the OOR in Eiseman, supra, determined that preventing the records there from being produced to the Requester was inconsistent with the decision in Lukes (see Eiseman at p. 16-17) and that the Lukes court's decision on this point should be followed even though Lukes had been decided under a predecessor version of the Right-To-Know Law. Eiseman supra, at

⁴ Curiously, DPW's November 13, 2012 letter does not explicitly assert that these are DPW reasons for denial, but rather asserts those are reasons put forth by the HMOs and the HMOs' two subcontractors for denial. In addition, DPW does not actually say in its November 13, 2012 letter that it is denying PILCOP's October 3, 2012 Request, although that October 3, 2012 Request would appear to be deemed denied by DPW's failure to produce the documents. See, 65 P.S. §§ 67.901-902.

p. 17. Thirdly, OOR in Eiseman supra, pointed out that under the current Right-To-Know Law, the trade secrets exception to the obligation otherwise to produce public records does not apply to “financial records,” citing 65 P.S. § 67.708(c). Eiseman supra, at p. 15. It cannot be seriously contended that the records sought by PILCOP’s October 3, 2012 Request are not equally “financial records,” and thus the trade secrets exemption does not apply.

2. Trade Secrets Under 67 P.S. § 67.708(b)(11)

The second ground asserted by DPW to deny PILCOP’s October 3, 2012 First and Second Requests is that the documents set forth rates that “are trade secrets that are protected by the trade secrets exemption to the Right-To-Know Law 65 P.S. § 67.708(b)(11).” The reasons OOR should reject a trade secrets protection based on 65 P.S. § 67.708(b)(11) are essentially the same as those detailed above in regard to the trade-secret protection contained in 12 Pa.C.S. §§ 5301 et seq.: (a) the definition of trade secrets in each statutory section is the same; (b) the Lukes decision rejected the application of a trade secret protection for the same type of records under the predecessor Right-To-Know Law; (c) OOR found Lukes compelling authority under the current Right-To-Know Law with regard to the same type of records; and (d) 65 P.S. § 67.708(c) states that 65 P.S. § 67.708(b)(11)’s trade secret exception does not apply if the records sought are, as here, financial records.

3. Confidential Proprietary Information Under 65 P.S. § 67.708(b)(11)

The documents sought by PILCOP's First and Second Request of October 3, 2012 are not exempt from production on the grounds that they may constitute "confidential proprietary information" under 65 P.S. § 67.708(b)(11). The Right-To-Know Law in 65 P.S. § 67.708(c) states that the "confidential proprietary information" exemption of 65 P.S. § 67.708(b)(11) to production does not apply to "financial records" such as those sought by PILCOP's October 3, 2012 Request. See Eiseman v. DPW, AP 2011-1098 at p. 15.

Moreover, even if 65 P.S. § 67.708(c) did not prevent the "confidential proprietary information" exemption from applying, DPW's November 13, 2012 denial has failed to demonstrate that DPW, the HMOs, or any HMO's subcontractor would, as required, suffer "substantial harm." See, Eiseman, supra at p. 18.

4. Department of Health Regulations 28 Pa. Code § 9.604

In DPW's November 13, 2012 denial of PILCOP's First and Second Request of October 3, 2012, DPW seeks to avoid production of the documents on the ground that the rates which the documents set forth "are removed from the Right-To-Know Law's definition of 'public record' at 65 P.S. § 67.102 by the Department of Health regulation that appears at 28 Pa. Code § 9.604." In summary, this argument fails: (a) because it was raised by the HMOs in their proposed conclusions of law in Eiseman v. DPW, AP 2011-1098 and not sustained in the OOR's decision therein; and (b) as detailed below, is otherwise devoid of merit.

65 P.S. § 67,102's definition of the terms "public record" on which DPW's November 13, 2012 denial purports to rely provides:

"PUBLIC RECORD." A record, including a financial record, of a Commonwealth or local agency that:

- (1) is not exempt under section 708;
- (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or
- (3) is not protected by a privilege.

The Regulation on which DPW now seeks to rely, 28 Pa. Code § 9.604, is a regulation of the Department of Health (not DPW) that requires health plans to make annual reports to the Department of Health which, pursuant to subsection 8, (28 Pa. Code § 9.604(8)) are to include:

Copies of the currently utilized generic or standard form health provider contracts including copies of any deviations from the standard contract and reimbursement methodologies.

The regulation then proceeds to provide as follows:

Reimbursement information submitted to the Department under that paragraph may not be disclosed or produced for inspection or copying to a person other than the Secretary or Secretary's representatives without the consent of the plan which provided the information, unless otherwise ordered by a court.

Merely to read this language is readily to see that it is simply inapplicable to the present situation. The documents sought by PILCOP's October 3, 2012 Request are not the HMO reports to the Department of Health to which 28 Pa. Code § 9.604,

by its terms applies; the documents sought by PILCOP's October 3, 2012 Request are documents in the possession, custody, or control of DPW by virtue of the facts that the HMOs and their subcontractors are parties to contracts to spend public funds that DPW is using to implement a governmental program, i.e., Medicaid. 28 Pa. Code §9.604(8) can have no greater application than its plain terms, and its plain terms cover certain reports that HMOs are required to make to the Department of Health and nothing more.

In Eiseman v. DPW, the disputed Request AP 2011-1098 sought from DPW documents of the same character as those sought from DPW in PILCOP's October 3, 2012 Request. In that earlier proceeding as well, certain of the HMOs sought to block production of documents based on 28 Pa. Code § 9.604(8). See Post Hearing Brief of Interested Parties Aetna Better Health, Inc., Health Partners of Philadelphia, Inc. and Keystone Mercy Health Plan filed July 13, 2012, attached hereto marked Exhibit E, at pp. 8-9, 23. The OOR's opinion in Eiseman v. DPW, AP 2011-1098, while not explicitly addressing the HMOs' argument based on 28 Pa. Code § 9.604(8), effectively rejected it by ruling in favor of the Requester and requiring DPW to produce the documents described in Item 2 of the June 11, 2011 Request, which contained rate information.

For the above two reasons, OOR should reject DPW's objection to producing the document based on 28 Pa. Code § 9.604.

5. Whether Other State or Federal Regulations or Statutes Keep PILCOP's Requested Documents From Being "Public Records" Subject to Production

The fifth ground on which DPW bases its denial of PILCOP's October 3, 2012 Request is that both PILCOP's First and Second Requests seek documents that are removed from the Right-to-Know Law's definition of "public record" under 65 P.S. § 67.102 because of unspecified state or federal regulations or statutes (other than 28 Pa. Code § 9.604). Clearly, this fifth ground of objection by DPW is without merit since it entirely fails to specify what state or federal regulation or statute it is talking about. See 65 P.S. § 67.903(2) ("[T]he denial shall be issued in writing and shall include . . . [t]he specific reasons for the denial, including a citation of supporting legal authority."). This is especially true when taking into consideration that the Right-to-Know Law provides:

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)(1). DPW does not dispute that the documents sought by PILCOP's October 3, 2012 Request are "records" as defined by the Right-to-Know Law. See 65 P.S. § 67.102. Accordingly, DPW's assertion that the documents sought by PILCOP's October 3, 2012 Request are exempt from production by the provisions of unspecified state or federal regulations or statutes is utterly without merit and too unspecific to be sustained.

Ms. Terry Mutchler
December 3, 2012
Page 10

C. Conclusion

The OOR should accordingly conclude that DPW's November 13, 2012 denial of PILCOP's October 3, 2012 Request must be reversed, and DPW should be ordered promptly to produce to PILCOP the documents requested therein.

Sincerely,



Benjamin D. Geffen

BDG/crm
Enclosures

cc: James Eiseman, Jr., Esquire

EXHIBIT A



PUBLIC INTEREST LAW
CENTER OF PHILADELPHIA

AFFILIATED WITH THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

October 3, 2012

12-RTKL-308

STAFF

Jennifer R. Clarke
Executive Director

SENT VIA EMAIL

INFO DUE TO OA: OCT 09 2012

Amy Laura Cahn
Skadden Fellow/ Staff Attorney

Andrea Banks
Department of Public Welfare
Right to Know Law Office
P.O. Box 2675
Harrisburg, PA 17105-2675
ra-dpwrtkl@pa.gov

INFO DUE TO REQUESTER: OCT 11 2012

Michael Churchill
Of Counsel

James Eiseman, Jr.
Senior Attorney

Benjamin D. Geffen
Staff Attorney

Dear Open Records Officer Banks:

Sorja D. Kerr
Director, Disabilities Rights Project

Pursuant to Pennsylvania's Right-to-Know Law, the Public Interest Law Center of Philadelphia writes to request certain documents and records from the Department of Public Welfare. The enclosed form details the request. If the responsive documents and records are already in digital format, or if conversion to digital format is not cost-prohibitive, then I would prefer to receive them in digital format.

Edwin D. Wolf
Executive Director
1974-1976

The Public Interest Law Center of Philadelphia is a not-for-profit organization incorporated in Pennsylvania.

If you would like to contact me in writing, I would prefer that you contact me via email at jeiseman@pilcop.org. I would also appreciate it if you would copy my colleague Ben Geffen on all correspondence, at bgeffen@pilcop.org.

Thank you for your attention and assistance.

Sincerely,

James Eiseman, Jr.
James Eiseman, Jr.

JEjr/crm
Enclosure

DEPUTY SECRETARY
OFFICE OF ADMINISTRATIVE

12 OCT -3 P3 57

RECEIVED



**REQUEST FOR ACCESS TO PUBLIC RECORDS UNDER
THE PENNSYLVANIA RIGHT-TO-KNOW LAW**

TO: Andrea Bankes Agency Open Records Officer Department of Public Welfare P.O. Box 2675 Harrisburg, PA 17105-2675	RTKL Request: _____ Date Request Received: _____ Date Response Sent: _____
REQUESTOR: Public Interest Law Center of Philadelphia Name United Way Building 1709 Benjamin Franklin Parkway, 2nd Floor Address Philadelphia, PA 19103 Address 215.627.7100 Ext. 226 Telephone 215.627.3183 Facsimile jeiseman@pilcop.org Email	SEND RESPONSE TO: Public Interest Law Center of Philadelphia Name United Way Building 1709 Benjamin Franklin Parkway, 2nd Floor Address Philadelphia, PA 19103 Address 215.627.7100 Ext. 226 Telephone 215.627.3183 Facsimile jeiseman@pilcop.org Email

Pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. § 67.101, et seq., I hereby request that the Department of Public Welfare provide me access to the records identified or described below.

1	Please see the attached request.
2	
3	
4	
5	
6	

Please Note: The Pennsylvania Right-to-Know Law allows the Department of Public Welfare to charge for the cost of postage, duplication, certification and other costs necessarily incurred to respond to your request.

1) As used in this request, the following terms have the meanings assigned to them below.

(a) "Southeastern Pennsylvania" means Philadelphia, Montgomery, Bucks, Delaware, and Chester Counties.

(b) "Medicaid" means Pennsylvania's medical assistance program conducted pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*

(c) "DPW" means the Pennsylvania Department of Public Welfare.

(d) "Medicaid HMO" means those corporations and/or other organizations with which DPW contracts or has contracted to provide coverage to Medicaid recipients.

(e) "Medicaid Dental Subcontractor" means those corporations, subsidiaries and/or other organizations (including, but not limited to, Dentaquest, and/or Dental Health Providers) with which any Medicaid HMO contracts and/or subcontracts, and/or has contracted and/or subcontracted, to engage dentists (and/or other providers of dental services) to provide dental services to Medicaid recipients.

(f) "Document" means any medium on which printed or electronic information is stored, including but not limited to paper and discs.

2) This request seeks all documents described below that contain information relating to any period from July 1, 2008 until June 30, 2012.

3) Each and every document, including contracts, rate schedules and correspondence in DPW'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.

4) This request is not intended to seek the production of any document which was previously requested in response to the request of the Public Interest Law Center of Philadelphia and James Eiseman, Jr. dated June 17, 2011. However, in interpreting the scope of that June 7, 2011 request, the ruling on May 21, 2012 of the Hearing Examiner in *Eiseman v. DPW*, AP-2011-1098, sustaining Mr. Casey's objection shall be deemed applicable and the scope of the June 17, 2011 request shall be deemed so limited. *See* Hearing Transcript, attached as Exhibit A, at 146; *see also id.* at 140-46.



**SARGENT'S
COURT
REPORTING**

Quality Work. Quality People.

Eiseman v. DPW

Date: May 21, 2012

Before: Hearing Examiner Finkelstein

Printed On: October 3, 2012

Sargent's Court Reporting Services, Inc.

Phone: 814-536-8908

Fax: 814-536-4968

Email: schedule@sargents.com

Internet: www.sargents.com

EXHIBIT

A

1 operates with the same dental subcontractor?

2 A. Do you mind saying that again?

3 Q. Sure. I'll rephrase that. I may have said it
4 confusingly. Is it ever the case that there are, for
5 example, two or more MCOs that use the same dental
6 subcontractor to negotiate rates for the individual
7 providers?

8 A. Yes.

9 Q. And so isn't it the case then when that happens
10 that subcontractor would know the rates that were
11 negotiated for individual dentists for two different
12 MCOs?

13 A. Certainly.

14 ATTORNEY CASEY:

15 I'm going to object at this point. He
16 has not asked --- the requests do not cover rates at
17 that level. He has asked for rates that the MCOs pay,
18 the MCOs pay only. It is not getting into what the
19 MCO pays the subcontractor, the subcontractor then
20 pays the provider. He's trying to get at those rates.
21 You haven't asked for those rates. They're not
22 relevant. I object to the relevance.

23 ATTORNEY GEFFEN:

24 A couple responses to that. One is that
25 DPW has conceded that it has in its possession,

1 custody or control the rates that are paid to dental
2 providers and would release that information to the
3 requester if the ultimate decision on the merits were
4 that those data are subject to release under the Right
5 to Know Law:

6 The second response is that if it's the
7 intervener's position that they don't possess or have
8 in their custody or control the rates paid to
9 individual providers, then I would submit that they
10 lack standing to challenge the release of that
11 information and that the wrong parties have intervened
12 in this case concerning the dental contractors. If
13 I ---.

14 ATTORNEY CASEY:

15 Can I just read the portion --- the only
16 request that involves the MCOs is number three. It
17 says each and every document including correspondence
18 and appendices that sets forth any rate payment
19 including but not limited to capitation rates that DPW
20 pay. Okay. That's DPW. Request number four,
21 paragraph four, each and every document including
22 correspondence and appendices in the DPW's possession,
23 custody or control that sets forth the amount of any
24 one or more individual dental procedure codes that any
25 Medicaid HMO pays to provide dental services to

1 Medicaid recipients in Southeastern Pennsylvania. So
2 if you are asking for the rates that their
3 subcontractors pay, you have not asked for that by
4 request.

5 ATTORNEY CRUMB:

6 And on behalf of DPW, I have not conceded
7 that we possess these things. We forwarded this
8 request for those rates that the MCOs pay to the MCOs.
9 And they claim those rates to be their trade secrets
10 and confidential proprietary information. I continue
11 to say that we may possess some of those rates in any
12 form. And, of course, there's still the trade secrets
13 and confidential proprietary information of the MCOs,
14 unless somebody hold to the contrary.

15 ATTORNEY CASEY:

16 Well, our position is they are not ---
17 the subcontractor's rates to providers are not
18 relevant.

19 HEARING EXAMINER:

20 Mr. Geffen, how would you ---?

21 ATTORNEY GEFFEN:

22 I'm looking at my document now at ---.

23 Forgive me now. Can we have a moment?

24 HEARING EXAMINER:

25 Sure.

1 ATTORNEY GEFFEN:

2 I'm referring to the August 25th, 2011

3 response by DPW to the Complainant's arguments. On
4 page --- it's not numbered, but it's page six.

5 There's a paragraph in the middle of the page. The
6 paragraph that begins, if the public record is not in
7 possession --- that paragraph. About halfway down it
8 says, each of the SE MCOs notified DPW that they
9 considered their dental rates to be trade secrets
10 and/or confidential proprietary information. To the
11 extent that the MCOs' position is held to be incorrect
12 by the Office of Open Records and/or Court, DPW
13 exercises its right and powers under its contract with
14 the MCOs for the purpose of obtaining those records
15 for the provision of Mr. Eiseman. So I mean, I'm
16 relying on the attorney's representation that the
17 pleading in this case is foundational in this case
18 that each of the SE MCOs notified DPW that they
19 considered their dental rates, et cetera ---.

20 ATTORNEY CASEY:

21 Okay. Stop there. The key word is
22 their, their dental rates. Now, as our witnesses will
23 testify, the MCOs' rates --- our witness will testify
24 that they have some subcontracting work and then some
25 direct with the provider. In each case they protect

1 the confidentiality of their rates to either the
2 provider or the subcontractor. But the subcontractor
3 deals with those contracts with its own provider
4 network. It's not called for by the request. And
5 he's asking for the MCOs' rates, whether it's the
6 subcontractor or the providers. What he's not getting
7 is that the witness is the subcontractor's witness,
8 which he did not ask for.

9 ATTORNEY MYERS:

10 And I would add that he's attempting to
11 use the DPW's response as a mechanism to expand the
12 scope of his request. You can't use someone else's
13 response. It doesn't matter what they say. You can't
14 expand the scope of your request. The request didn't
15 call for that information.

16 ATTORNEY GEFFEN:

17 And I would respond that our request does
18 call for that information.

19 ATTORNEY MYERS:

20 Where?

21 ATTORNEY GEFFEN:

22 Paragraph four, which is the request ---.

23 HEARING EXAMINER:

24 One at a time.

25 ATTORNEY GEFFEN:

1 And it says that we want each and every
2 document including correspondence and appendices in
3 DPW's possession, custody or control that sets forth
4 the amount for any one or more individual dental
5 procedure codes that any Medicaid HMO pays to provide
6 dental services to Medicaid recipients in Southeastern
7 Pennsylvania. And I believe the testimony will show
8 that the HMO pays the subcontractor because the
9 subcontractor will take steps to provide those dental
10 services to Medicaid recipients.

11 ATTORNEY CASEY:

12 I agree. You can ask him about the rates
13 the HMO --- ask all the witnesses about the rates that
14 the MCOs pay to their subcontractors. What I suggest
15 is that you cannot ask --- it's not relevant to this
16 hearing what the subcontractors in turn pay providers
17 in that situation, because you haven't asked for it.

18 ATTORNEY GEFFEN:

19 No, what we've asked for is the total
20 amount that the MCOs pay to the subcontractors. What
21 we have asked for is the amount for any one or more
22 individual dental procedure codes that they pay the
23 subcontractor.

24 ATTORNEY CASEY:

25 You can ask him about what they pay. You

1 can't ask him about the subcontractors. You should've
2 said the HMOs and/or the subcontractors.

3 ATTORNEY GEFFEN:

4 I don't know how we could've made
5 paragraph four much clearer.

6 ATTORNEY CASEY:

7 I do.

8 HEARING EXAMINER:

9 Mr. Casey's argument sounds --- that's
10 the way I read it.

11 ATTORNEY GEFFEN:

12 Then it's my understanding that there's
13 no party intervening today to challenge the release or
14 to assert that there's a trade secrecy or confidential
15 proprietary information interest in whatever portion
16 of the ---.

17 HEARING EXAMINER:

18 You never asked for it to begin with.

19 ATTORNEY GEFFEN:

20 Then to the extent that's the conclusion,
21 then we'll try and work through ---.

22 HEARING EXAMINER:

23 My ruling, I'm sustaining Mr. Casey's
24 objection.

25 BY ATTORNEY GEFFEN:

EXHIBIT B



October 11, 2012

SENT VIA EMAIL

James Eiseman, Jr.
Public Interest Law Center of Philadelphia
United Way Building
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, Pennsylvania 19103
Email: jeiseman@pilcop.org

RE: Right-To-Know Law Request No. 12-RTKL-308

Dear Mr. Eiseman:

On October 3, 2012, the open-records officer of the Department of Public Welfare (DPW) received your written request for information. DPW is responding to your request under the Pennsylvania Right-To-Know Law, 65 P.S. §67.101 *et seq.* (RTKL). A copy of your request is attached. Under the RTKL, a written response to your request is due on or before October 11, 2012.

This is an interim response, not a final response, to your request. Under the provisions of 65 P.S. §67.902(b)(2), you are hereby notified that your request is being reviewed for the reasons below and this agency will require up to an additional 30 days in which to respond to your request.

- Compliance with your request may require the redaction of certain information that is not subject to access under RTKL.
- Your request requires retrieval of one or more records that are stored at a remote location.
- Your request is under legal review to determine whether a requested record is a "public record" for purposes of the RTKL.
- The extent or nature of the request precludes a response within the required time period.

Further, the estimated or actual total for any fees that will be owed when the record becomes available will be included in our subsequent response. Prepayment is required

before providing access when the estimated cost to fulfill a request exceeds \$100.00.
65 P.S. § 67.1307(h). If you have any questions regarding this letter, please contact me.

Sincerely,

Andrea Bankes

Andrea Bankes
Agency Open Records Officer

Attachment

EXHIBIT C



November 13, 2012

SENT VIA EMAIL

James Eiseman, Jr.
Public Interest Law Center of Philadelphia
United Way Building
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, Pennsylvania 19103
Email: jeiseman@pilcop.org

RE: Right-To-Know Law Request No. 12-RTKL-308

Dear Mr. Eiseman:

On October 3, 2012, the open-records officer of the Department of Public Welfare (DPW) received your written request for information. DPW is responding to your request under the Pennsylvania Right-To-Know Law, 65 P.S. §67.101 *et seq.* (RTKL). On October 11, 2012, we notified you that DPW required an additional 30 days to respond to your request.

This letter sets forth DPW's final response to your written request.

Your First Request

You asked for "Each and every document, including contracts, rate schedules and correspondence in DPW's possession, custody, or control that ... 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."

"This request seeks all documents ... that contain information relating to any period from July 1, 2008 until June 30, 2012[,] i.e., for the 2008-2009, 2009-2010, 2010-2011, and 2011-2012 fiscal years.

You also state that "[t]his request is not intended to seek the production of any document which was previously requested in response to the request of the Public Interest Law Center of Philadelphia and [you] dated June 17, 2011," and you note the May 21, 2012, ruling that sustained Mr. Casey's objection and state that that ruling "shall be deemed applicable and the scope of the June 17, 2011 request shall be deemed so limited." In other words, you are not asking for documents that disclose the "rates that the MCOs pay ... the [dental] subcontractor[s]," but for documents that

disclose the rates that the dental subcontractors pay to providers of dental services. During the period in question, there were five MCOs that served the Southeastern Zone of the HealthChoices Program. Those MCOs used two dental subcontractors.

Also, and as established by the record in the appeal of your previous request, some of the MCOs sometimes make direct payments to dentists, in particular when those dentists participate in programs that service persons with special needs. Because your previous request encompasses records that disclose those rates, we interpret your current request to also exclude such records.

In short, we understand your first request to ask for records that disclose the amounts that each of the dental subcontractors paid to providers of dental services pursuant to its contract with any HealthChoices MCO doing business in the Southeastern Zone during the period in question, if those records disclose a "dental procedure code" and the associated payment for the coded procedure.

DPW's Response to Your First Request

DPW notified the five MCOs of your request, and they notified the two dental subcontractors. Each of these entities has notified DPW that it opposes your request, and each asserts that your request should be denied on the following grounds:

- The rates in question are trade secrets that are protected by the Uniform Trade Secrets Act. 12 Pa.C.S. §§ 5301 *et seq.*
- The rates in question are trade secrets that are protected by the trade secrets exemption to the RTKL. 65 P.S. § 67.708(b)(11).
- The rates in question are confidential proprietary information that, as such, are protected by the exemption to the RTKL pertaining to such information. 65 P.S. § 67.708(b)(11).
- The rates in question are removed from the RTKL's definition of "public record" at 65 P.S. § 67.102 by the Department of Health regulation that appears at 28 Pa.Code § 9.604.
- The rates in question are removed from the RTKL's definition of "public record" at 65 P.S. § 67.102 by operation of other state and/or federal regulations and/or statutes.

Your Second Request

You asked for "Each and every document, including contracts, rate schedules and correspondence in DPW's possession, custody, or control that ... 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.”

The only distinction between this request and your first request is that, instead of linking your request to the “amount for any one or more dental procedure codes,” you now ask for records that “otherwise establish the rate of payment by” that a dental subcontractor uses as a basis for determining the amount to be paid to a provider of dental services.

DPW’s Response to Your Second Request

As stated above, DPW notified the five MCOs of your request, and they notified the two dental subcontractors. Each of these entities has notified DPW that it opposes your request, and each asserts that your request should be denied on the following grounds:

- The rates in question are trade secrets that are protected by the Uniform Trade Secrets Act. 12 Pa.C.S. §§ 5301 *et seq.*
- The rates in question are trade secrets that are protected by the trade secrets exemption to the RTKL. 65 P.S. § 67.708(b)(11).
- The rates in question are confidential proprietary information that, as such, are protected by the exemption to the RTKL pertaining to such information. 65 P.S. § 67.708(b)(11).
- The rates in question are removed from the RTKL’s definition of “public record” at 65 P.S. § 67.102 by the Department of Health regulation that appears at 28 Pa.Code § 9.604.
- The rates in question are removed from the RTKL’s definition of “public record” at 65 P.S. § 67.102 by operation of other state and/or federal regulations and/or statutes.

Notice of Appeal Rights

You have a right to appeal this denial of information in writing to Terry Mutchler, Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) this response;
- 2) your request; and
- 3) the reason why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial, which you are challenging). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at:
<https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf>.

Sincerely,

Andrea Bankes

Andrea Bankes
Agency Open Records Officer

EXHIBIT D



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 2011-1098
	:	
PENNSYLVANIA DEPARTMENT OF	:	
PUBLIC WELFARE,	:	
Respondent	:	
	:	
And	:	
	:	
UNITEDHEALTHCARE OF	:	
PENNSYLVANIA, INC.,	:	
HEALTH AMERICA	:	
PENNSYLVANIA, INC.,	:	
AETNA BETTER HEALTH, INC.,	:	
HEALTH PARTNERS OF PHILA., INC.,	:	
and KEYSTONE MERCY HEALTH PLAN,	:	
Direct interest participants	:	

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 the five (5) county Southeast Pennsylvania region.¹ The Department partially denied the Request, citing the Pennsylvania Uniform Trade Secrets Act 12 Pa.C.S. §§ 5301 *et seq.*, ("PUTSA"), and various RTKL exemptions. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part** and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On June 17, 2011, the Request was filed, seeking, for the period January 1, 2008 through June 15, 2011:

Each and every document, including correspondence and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age. [Item 1]

Each and every document, including correspondence and appendices, in DPW's possessions, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania. [Item 2]

Each and every actuarial report DPW possesses that sets forth the overall capitation rate and/or determines the "actuarial soundness" of an overall capitation rate that DPW pays to any Medicaid HMO operating in Southeastern Pennsylvania, including but not limited to each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates. [Item 3]

Each and every actuarial report DPW possesses that sets forth a capitation rate for dental services to Medicaid recipients under 21 years of age and/or determines the actuarial soundness of such capitation rates for dental services to Medicaid recipients under 21 years of age, including but not limited to any such report DPW has made to the federal government to certify the actuarial soundness of such rates. [Item 4]

Any corrective-action plan or sanctions DPW has imposed on or contracted with any Medicaid HMO for in Southeastern Pennsylvania that involves wholly, or in

¹ The Southeastern Pennsylvania region includes Berks, Chester, Delaware, Montgomery and Philadelphia counties.

part, the provision of dental care to Medicaid recipients under the age of 21. [Item 5]

Thus, the Request seeks: 1) the rates the Department pays insurance companies participating in the Medicaid program; 2) the rates insurance companies pay to provide dental services under the Medicaid program; 3) any actuarial reports regarding the soundness of the rates the Department pays insurance companies; 4) any actuarial reports regarding the soundness of the rates the insurance companies pay to provide dental services; and, 5) any sanctions imposed by the Department on insurance companies participating in the Medicaid program.

On July 25, 2011, after extending the period to respond by thirty (30) days pursuant to 65 P.S. § 67.902(b), the Department partially denied the Request. Specifically, with respect to Item 1, the Department denied the request for “capitation rates”² and “appendices” on the basis that such rates and appendices are confidential under PUTSA, and exempt from disclosure under Section 708(b)(1) of the RTKL, 65 P.S. § 67.708(b)(1) (relating to the loss of federal funding) and Section 708(b)(11) of the RTKL, 65 P.S. § 67.708(b)(11) (relating to trade secrets/confidential proprietary information). The Department denied the request for capitation rates for “dental services” on the basis that no records exist, and denied the remainder of records responsive to Item 1 on the basis that such records are exempt from disclosure pursuant to Section 708(b)(10) of the RTKL, 65 P.S. § 67.708(b)(10) (relating to internal, predecisional deliberations of an agency), and on the basis of the attorney-client privilege.

With respect to Item 2, the Department denied access to “payment rates” paid by health insurance companies to medical service providers pursuant to PUTSA and Section 708(b)(11) of the RTKL, 65 P.S. § 67.708(b)(11) (relating to trade secrets/confidential proprietary information). The Department denied other responsive records on the basis that they do not exist

² In the context of Item 1, a “capitation rate” is the amount the Department pays health insurance companies to provide health insurance coverage to participants enrolled in the Medicaid program.

or are exempt as internal, predecisional deliberations of the Department under 65 P.S. § 67.708(b)(10). The Department denied Item 3 of the Request. It explained that the Department's actuary only certified capitation rate "ranges" and not the actual capitation rates to the federal government, and, therefore, no responsive records exist. Finally, with respect to Items 4 and 5, the Department denied that any responsive records exist.

On August 15, 2011, the Requester timely appealed to the OOR, challenging the denial and stating grounds for disclosure.³ The OOR invited both parties to submit evidence and argument for inclusion into the record.

Direct Interest Participants

On August 24, 2011, United Healthcare of Pennsylvania, Inc. ("United") filed a request to participate as a direct interest participant pursuant to 65 P.S. § 67.1101(c), asserting that records responsive to Item 2 are exempt from public disclosure as under 65 P.S. § 67.708(b)(11) and confidential under federal regulations. On August 25, 2011, the Department submitted a position statement and the affidavit of Allen Fisher, Director, Division of Financial Analysis, Office of Medical Assistance Programs, attesting that, with respect to Item 1, the Department considers the capitation rates it pays health insurance companies to provide medical coverage to Medicaid recipients to be trade secrets and that the Department possesses no records responsive to Items 3 and 4. On August 31, 2011, Aetna Better Health, Inc. ("Aetna"), Health Partners of Philadelphia, Inc. ("Health Partners"), Health America of Pennsylvania, Inc. d/b/a Coventry Cares ("Coventry") and Keystone Mercy Health Plan, Inc. ("Keystone") also filed requests to participate as direct interest participants, asserting that records responsive to Item 2 are exempt

³ The Requester did not appeal the Department's denial as to Item 5, and, therefore, waives any challenge to this specific denial. See *DOC v. OOR*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

from disclosure under Section 708(b)(11) of the RTKL. Aetna and Coventry requested the OOR to conduct an evidentiary hearing.

Evidentiary Hearing

On October 25, 2011, the OOR ordered an evidentiary hearing and appointed a hearing officer. On May 21, 2012 and May 22, 2012, the OOR conducted an evidentiary hearing in which the Requester, the Department, and all five (5) direct interest participants ("Direct Interest Participants") presented evidence.⁴

At the hearing, the Department introduced documentary evidence and the testimony of Allen Fisher. Mr. Fisher testified that the Request sought records related to the HealthChoices Program, the Department's Medicaid Program within the five (5) county Southeast Zone of the Medical Assistance Program. N.T. 34-35 (5/21/2012).

According to Mr. Fisher, the Direct Interest Participants are insurance companies⁵ participating in the HealthChoices Program, and are "at risk" contractors obligated to provide medical care to participants enrolled in the Department's Medicaid Program. N.T. 42- 43 (5/21/2012). In other words, the Direct Interest Participants are paid a set fee by the Department and are responsible to provide medical coverage to Medicaid participants irrespective of the actual medical costs incurred by the Direct Interest Participants.

Mr. Fisher further testified that the fee paid to each Direct Interest Participant is based on the number of individuals participating in each Direct Interest Participant's insurance program

⁴ The evidentiary hearing was initially scheduled for December, 2011; however, on November 3, 2011, the Requester sought a "substantial extension" of the hearing date because of counsel's attachment to a major case before the United States District Court for the Southern District of Florida. Thereafter, hearing was scheduled for March, 2012; however, one (1) week prior to hearing, the Direct Interest Participants sought a continuance of the hearing by reason of a change in the Department's legal position regarding disclosure of records responsive to Item 2 of the Request. The evidentiary hearing was ultimately conducted on May 21 - 22, 2012. Prior to the hearing, the Department, again, reversed position regarding disclosure of records responsive to Item 2 of the Request.

⁵ The Direct Interest Participants are also referred to as Health Maintenance Organizations ("HMO") and Managed-care Organizations ("MCO").

each month, and is technically referred to as a “capitation rate.” N.T. 42 – 43 (5/21/2012). The capitation rate paid to each Direct Interest Participant is negotiated annually and falls within a capitation rate range calculated by the Department’s actuary. N.T. 40 (5/21/2012). The Department’s capitation rate range is publicly available, and is provided to each Direct Interest Participant during the capitation rate negotiation process. N.T. 50 (5/21/2012).

During the capitation rate negotiating process, Mr. Fisher testified that the Department makes a first offer to Direct Interest Participants, N.T. 42 (5/21/2012), at the low end of the capitation rate range in order to minimize the cost to taxpayers.⁶ N.T. 53 (5/21/2012). The final capitation rate is established to compensate the Direct Interest Participants for “its responsibility to provide ... medical services[.] The [capitation] rates also include an allowance that shows for administrative costs and a small allowance for profit.” N.T. 43 (5/21/2012). Once a final capitation rate is determined, that rate is included in Appendices 3L and 3H of the Department’s agreement with the Direct Interest Participants. N.T. 51 (5/21/2012). The capitation rates are disclosed to the Commonwealth’s Office of the Budget and Treasury Department, and to the federal Center for Medicaid Services, N.T. 77, 104 (5/21/2012); however, the capitation rates are redacted from the Treasury Department’s public contract database. N.T. 53 (5/21/2012). With respect to other records requested, Mr. Fisher further testified that the Department possesses no records responsive to Items 3 and 4 of the Request. N.T. 64, 74, 75. (5/21/2012).⁷

⁶ Mr. Fisher further testified that the Department expends approximately \$6 billion annually for the HealthChoices Program, with another \$3 billion annual expenditure on the Behavioral HealthChoices Program. N.T. 54 (5/21/2012).

⁷ Mr. Fisher explained that the Department’s actuary certified the actuarial soundness of capitation “rate ranges.” *Id.* at 74. The Request sought records reflecting the actuarial soundness of the actual capitation rates. Mr. Fisher testified that the actual capitation rates were within the capitation “rate ranges” determined by the Department’s actuary. *Id.* at 40. Mr. Fisher also testified that the Department’s actuary did not certify capitation rates or rate ranges with respect to dental services. *Id.* at 64.

Fisher Cross-examination

Under questioning by the Requester's counsel, Mr. Fisher clarified that while he does not believe the Department is prohibited by the terms of its contracts with the Direct Interest Participants from disclosing the final capitation rates, N.T. 227 (5/22/2012), the Department does not disclose the capitation rates because he believes the Department's negotiating position would be weakened if each Direct Interest Participant was aware of each other's capitation rate. N.T. 201 (5/22/2012). Mr. Fisher further testified that the Department does not disclose the capitation rates paid to Direct Interest Participants because it is "not in the best interest of the Department and the taxpayers to disclose this information." N.T. 228 (5/22/2012). Mr. Fisher also testified that none of the Direct Interest Participants, nor any other insurance company, has refused to participate in the HealthChoices Program after receiving an offered capitation rate from the Department. N.T. 81 (5/21/2012).

Direct Interest Participants' Testimony

In their case-in-chief, Direct Interest Participants Aetna, Health Partners, and Keystone introduced documentary evidence and the testimony of Dr. Henry Miller, an expert in the health care industry; John Sehi, Vice President of Finance, Health Partners; Debra Nichols, Chief Executive Officer, Aetna; and, William Morsell, Senior Vice President, Keystone.

Dr. Miller testified that, based on his extensive experience in the health care industry, the rates paid by Direct Interest Participants to medical service providers were considered trade secrets and confidential proprietary information, N.T. 119 (5/21/2012). Dr. Miller further testified that knowledge of the rates a competitor pays medical service providers would allow insurance companies to negotiate more favorable terms by demanding that they not pay more than their competitors. N.T. 124 (5/21/2012). Dr. Miller did not offer any testimony on whether

the capitation rates paid by the Department to the Direct Interest Participants were trade secrets or confidential proprietary information. N.T. 148, 150 (5/21/2012).

Mr. Sehi testified regarding the capitation rates paid by the Department to the Direct Interest Participants, and also testified regarding the rates paid by the Direct Interest Participants to medical service providers ("provider rates"). With respect to the Department's capitation rates, Mr. Sehi testified that he was responsible for negotiating the capitation rates on behalf of Health Partners, N.T. 154 (5/21/2012), and that as part of the negotiating process Health Partners responds to the Department's proposed capitation rate with a counter-offer that factors Health Partners' calculation of variables such as drug costs, costs-of-living and medical industry trends. N.T. 175 (5/21/2012). Mr. Sehi testified that additional factors affecting the Department's capitation rate negotiating process included enrollee-specific factors such as the number of enrollees per county, and enrollee demographic factors such as age, disability and medical condition. N.T. 179 – 180 (5/21/2012). Mr. Sehi did not testify that knowledge of prior year capitation rates would be relevant to on-going or future year negotiations between Health Partners and the Department. On this point Mr. Sehi conceded that knowledge of a competitor's capitation rate for FY 2007-2008 would be "irrelevant." N.T. 187 (5/21/2012). When asked whether knowledge of a competitor's capitation rate from FY 2010-2011 would be helpful in the negotiation process with the Department, Mr. Sehi responded: "Again, it depends --- it would be interesting to see, but I don't know if you'd want to make conclusions on it." *Id.*

With respect to the provider rates Health Partners pays medical service providers, Mr. Sehi testified that the provider rates were subject to a contractual confidentiality provision, N.T. 162 (5/21/2012), that knowledge of the provider rates was limited to select employees, *id.*, and never disclosed to competitors. N.T. 165 (5/21/2012). Mr. Sehi further testified that

HealthPartners' provider rates are considered trade secrets under its agreement with the Department. N.T. 193 (5/21/2012).

Ms. Nicholas testified that Aetna considered the capitation rates paid by the Department to be confidential proprietary information, N.T. 55 (5/22/2012), and required to be kept confidential pursuant to Aetna's agreement with the Department. N.T. 58 (5/22/2012). Ms. Nicholas also testified that she believed that knowledge of the capitation rates paid by the Department to Aetna's competitors would be "helpful" in negotiating Aetna's capitation rate with the Department, N.T. 56 (5/22/2012); however, when asked whether Aetna would be able to renegotiate a better capitation rate based on such knowledge, Ms. Nichols testified "I don't know. It's a complex process." N.T. 62 (5/22/2012). With respect to the provider rates paid to medical service providers, Ms. Nichols testified that Aetna kept such rates confidential, N.T. 12 (5/22/2012), and only disclosed provider rates to governmental regulators. N.T. 11 (5/22/2012).

Mr. Morsell testified that Keystone enters into contracts with medical service providers and considers provider rates paid to be confidential. N.T. 95 (5/22/2012). Mr. Morsell further testified that Keystone takes extensive efforts to keep the provider rates confidential, N.T. 97 (5/22/2012), explaining that the health care industry is an extremely competitive business and that knowledge how Keystone pays its providers, how much its providers are paid, and how it deals with providers would damage Keystone's financial viability. N.T. 124 (5/22/2012). Mr. Morsell offered no testimony on Keystone's agreement with the Department, and when recalled for the Requester's case-in-chief, testified that he had no knowledge of the capitation rates the Department pays Keystone or whether Keystone considers the capitation rates confidential. N.T. 142 (5/22/2012).

In their case-in-chief, Direct Interest Participants United and Coventry offered documentary evidence and the testimony of Nancy Sirolli-Hardy, Vice President of Operations for Coventry and Heather Cianfrocco, Health Plan President of United.

Ms. Sirolli-Hardy testified that Coventry considers the capitation rate paid by the Department to be confidential information, N.T. 68 (5/22/2012), as well as the capitation rate paid by Coventry to its dental insurance subcontractor. N.T. 71 (5/22/2012). Ms. Sirolli-Hardy further testified that disclosure of the Department's capitation rate to Coventry's competitors would adversely impact Coventry's financials and cause Coventry to lose market share. *Id.* at N.T. 73 (5/22/2012).

Ms. Cianfrocco testified that the provider rates United pays to medical service providers are confidential. N.T. 204 (5/21/2012). Ms. Cianfrocco also testified that United considers the capitation rates paid by the Department to United to be "highly confidential," N.T. 208 (5/21/2012), and that disclosure of the capitation rates would damage United's business because competitors could use knowledge of United's capitation rates to negotiate better rates with the Department, and competitors could determine United's cost structure and other trade secrets. N.T. 210-11 (5/21/2012). In Ms. Cianfrocco's opinion, United would lose market share if competitors were aware of the capitation rates paid to United by the Department. N.T. 212 (5/21/2012). While Ms. Cianfrocco testified that United considered the capitation rates to be "highly confidential," N.T. 208 (5/21/2012), on cross-examination, Ms. Cianfrocco acknowledged that United's knowledge of a competitor's capitation rate would be of no value to United in negotiating its own capitation rates, N.T. 219 (5/21/2012), and was unsure whether a competitor's knowledge of United's capitation rates would be disadvantageous to United. N.T. 222 (5/21/2012). Specifically, Ms. Cianfrocco testified as follows:

Q: You mentioned that it would be --- that you think that it would be of value to your competitors to learn what [United's capitation] rate is; is that right?

A: Yes.

Q: Would it be of value to you to learn what the rates were for Aetna or Keystone Mercy or any of the other competitors?

A: No, as to setting my own rates. Yes, potentially as to knowing how they're performing.

Q: So when you say, no, it wouldn't be of value to you in setting your own rates, do you believe it would be of value to them in setting their own rates if they knew about you, United?

A: If they would want to use the information to possibly propose lower rates or lower rates, possibly. Possibly, yes. But I guess when we get [the proposed capitation] rates we spend a lot of time determining whether we believe that they're accurate based on our history of utilization. Having the other [capitation] rates doesn't help me get that.

N.T. 219. (5/21/2012).

Q: [I]s there something about United that would make it uniquely disadvantageous to United for the other competitors to learn United [capitation] rates that wouldn't work the other way around?

A: I would like to believe so, because I work very hard to make sure that we provide a service that meets all the needs of the Department of Public Welfare and meet the needs of the members and still make money. And not every health plan does that.

N.T. 222 (5/21/2012).

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, the Direct Interest Participants requested a hearing, and following an evidentiary hearing, 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. Records responsive to Item 1 of the Request – Department capitation rates - are required to be disclosed.

Item 1 of the Request seeks, *inter alia*, the capitation rates negotiated between the Department and each of the Direct Interest Participants. These rates reflect the amount of taxpayer funds paid to insurance companies to provide health insurance coverage to Medicaid participants. The Department denied Item 1 on the basis that responsive records are protected from disclosure by PUTSA and Sections 708(b)(1), 708(b)(10) and 708(b)(11) of the RTKL.

A “trade secret” is defined by PUTSA and the RTKL identically. Specifically, both PUTSA and the RTKL define a “trade secret” as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: ... 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 ... is subject to efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa.C.S. § 5302; 65 P.S. § 67.102. As “trade secrets” are identically defined by PUTSA and the RTKL, the OOR can discern no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL. PUTSA provides injunctive relief and monetary damages to parties who have been harmed by the misappropriation of trade secrets, *see* 12 Pa.C.S. §§ 5303-04, while the RTKL provides parties with protection from public disclosure by government agencies of records which contain trade secrets. *See* 65 P.S. § 67.708(b)(11). Therefore, the OOR will only consider whether responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(11).

Section 708(b)(11) of the RTKL exempts from public disclosure a “record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). As discussed above, the term “trade secret” is specifically defined by the RTKL.

65 P.S. § 67.102. The term “confidential proprietary information” is defined by the RTKL as “Commercial or financial information received by an agency; ... which is privileged or confidential; and ... the disclosure of which would cause substantial harm to the competitive position person that submitted the information.” *Id.*; see generally *Office of the Governor v. Bari*, 20 A.3d 634, 647-48 (Pa. Commw. Ct. 2011) (noting that the terms “trade secret” and “confidential proprietary information” are not interchangeable).

The Department’s witness, Mr. Fisher, testified that the Department keeps the capitation rates the Department pays the Direct Interest Participants confidential because he believes that disclosure would weaken the Department’s position when negotiating capitation rates in the future, thereby increasing the Department’s (and ultimately the taxpayers’) costs. On the other hand, the Direct Interest Participants’ witnesses testified that, while knowledge of their competitors’ capitation rates would be of interest, the Direct Interest Participants’ capitation rate negotiations with the Department are based on factors completely independent of the capitation rate previously paid by the Department. Thus, while it is clear that the Department and the Direct Interest Participants treat the capitation rates as confidential, it is not clear that disclosure of the capitation rates would provide any economic value to the Department’s counter-parties in future negotiations or would cause substantial competitive harm to the Department. Therefore, the Department and the Direct Interest Participants have failed to meet their burden of proof that records responsive to Item 1 are exempt from disclosure under 65 P.S. § 67.708(b)(11). Assuming, *arguendo*, that the Department and Direct Interest Participants have met their burden of proof, records disclosing the expenditure of taxpayer funds may not be withheld as a trade secret or confidential proprietary information.

While 65 P.S. § 67.708(b), permits agencies to withhold certain records from public disclosure, the exemptions set out in Section 708(b) of the RTKL are not without limit. Section 708(c) of the RTKL provides, in pertinent part: “The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16), or (17).” 65 P.S. § 67.708(c). Section 102 of the RTKL defines a “financial record” as “Any account, voucher, or contract dealing with ... the receipt or disbursement of funds by an agency; or ... an agency’s acquisition, use or disposal of services[.]” 65 P.S. § 67.102 (emphasis added). Here, the Department’s contracts with the Direct Interest Participants deal with the disbursement of billions of dollars in taxpayer funds for the acquisition of health insurance for Medicaid participants. Therefore, the Department/Direct Interest Participant agreements, including the appendices disclosing the capitation rates, cannot be considered anything but a “financial record” under the RTKL. Notwithstanding the Department’s and Direct Interest Participants’ arguments that the capitation rates are confidential proprietary information and/or trade secrets, such information may not be redacted from “financial records.” 65 P.S. § 67.708(c). Accordingly, the Department is required to disclose its agreements with the Direct Interest Participants in their entirety. Furthermore, as neither the Department nor the Direct Interest Participants has met the burden of proof that any other records responsive to Item 1 are exempt from public disclosure, the Department is required to provide all other records responsive to Item 1.⁸

⁸ Neither the Department, nor the Direct Interest Participants offered any evidence or argued in their post-hearing briefs that records responsive to Item 1 are exempt from disclosure under either 65 P.S. § 67.708(b)(1) or 65 P.S. § 67.708(b)(10).

2. Records responsive to Item 2 of the Request – the Direct Interest Participants’ provider rates - are required to be disclosed.

Item 2 of the Request seeks, *inter alia*, the provider rates paid by the Direct Interest Participants to medical service providers treating Medicaid participants. The Department and the Direct Interest Participants argue that these records are exempt from disclosure under PUTSA and 65 P.S. § 67.708(b)(11) (trades secrets/confidential proprietary information). The Requester argues that these records are required to be disclosed by reason of the Commonwealth Court’s decision in *Lukes v. Dep’t. of Public Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009). For the following reasons, the OOR holds that records responsive to Item 2 of the Request are not exempt from public disclosure as trade secrets or confidential proprietary information.

In *Lukes*, a requester filed a request under the prior Right-to-Know Law with the Department of Public Welfare seeking copies of agreements between a health insurance company and ten (10) hospitals entered into for the purpose of administering the HealthChoices Program. The requested agreements contained specific payment rates as well as confidentiality provisions. The Department denied the request, and an evidentiary hearing was held in which the health insurance company participated. The hearing officer concluded that the requested agreements contained information protected under PUTSA, and, therefore, were not subject to disclosure. On appeal, the Commonwealth Court considered the relationship between the insurance company and the public agency, as well as the confidentiality of the requested records. The Court concluded that the insurance company was performing a duty that would ordinarily be performed by the public agency, i.e., administering the Medicaid program. Pertinently, the Court noted that “[h]ad the [Department of Public Welfare] contracted directly with the hospitals to provide medical services, there would be no doubt that the Provider Agreements are public

records subject to disclosure.” *Id.* at 624. In rejecting the argument that the provider agreements were protected as trade secrets, the Court stated:

Here, there 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 Intervenor 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 (emphasis added). Thus, *Lukes* squarely addresses that records responsive to Item 2 are not exempt from disclosure as trade secrets.

The Department and the Direct Interest Participants counter that the Commonwealth Court has held that, because *Lukes* was decided under the prior Right-to-Know Law, *Lukes* is not controlling under the RTKL. *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 622 (Pa. Commw. Ct. 2011); *In re: Silberstein*, 11 A.3d 629, 632 n.8 (Pa. Commw. Ct. 2011). While *Lukes* is not controlling, binding authority, the Pennsylvania Supreme Court has recently approved of *Lukes* in analyzing cases under the RTKL, see *SWB Yankees v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), and the analysis in *Lukes* is highly persuasive. Therefore, records responsive to Item 2 of the Request are not exempt from disclosure as trade secrets under 65 P.S. § 67.708(b)(11).

While records responsive to Item 2 of the Request are not exempt from disclosure as trade secrets, Section 708(b)(11) of the RTKL also exempts from disclosure “confidential, proprietary information.” See *Office of the Governor*, 20 A.3d at 647-48. The Direct Interest Participants presented extensive testimony regarding the steps taken to keep the provider rates confidential, and the fact that competitors would be able to negotiate more favorable provider

rates if they were aware of another competitor's provider rates. The evidence presented, however, does not establish that the Direct Interest Participants would suffer "substantial harm" if their provider rates were disclosed. Accordingly, the Direct Interest Participants have not met their burden of proof that records responsive to Item 2 of the Request are exempt from disclosure as confidential, proprietary information.⁹ See 65 P.S. § 67.708(a)(1) (placing the burden of proof on agencies to prove that records are not subject to public access); *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 ...").

3. Records responsive to Items 3 and 4 of the Request –actuarial certifications - do not exist.

Items 3 and 4 of the Request seek actuarial reports that certify the soundness of the capitation rate paid by the Department to the Direct Interest Participants, and actuarial reports which certify the soundness the capitation rate regarding dental services provided to Medicaid participants. In its denial, the Department argued responsive records do not exist. At the hearing, Mr. Fisher testified that the Department possessed actuarial reports regarding capitation "rate ranges,"¹⁰ and that the final capitation rates were within such rate ranges. Mr. Fisher also testified that the Department's actuary did not certify payment rates for dental services. "The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). As the Department's actuary does not certify the actual capitation rate or

⁹ Furthermore, holding that these records are not exempt from disclosure as a "trade secret" but are exempt from disclosure as "confidential, proprietary information" would render *Lukes* meaningless. The RTKL was enacted to enhance access to records, and exemptions to disclosure must be narrowly construed. *Bowling*, 990 A.2d at 824. The OOR will not construe the RTKL to deny access to records required to be disclosed under the prior Right-to-Know Law.

¹⁰ During the course of the appeal, the Department's actuarial reports certifying the capitation "rate ranges" were provided to the Requester. N.T. 66 – 71 (5/21/2012).

certify capitation rates with respect to dental services, the Department has sustained its burden of proof that no responsive records exist. Accordingly, the appeal as to Items 3 and 4 is denied.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part and denied in part** and the Department is required to disclose all records sought in Items 1 and 2 of the Request. 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: SEPTEMBER 17, 2012



APPEALS OFFICER
CHARLES REES BROWN, ESQ.

Sent to: *Via e-mail only*
James Eiseman, Jr., Esq.
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EXHIBIT E



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July 13, 2012

VIA ELECTRONIC MAIL (CharleBrow@pa.gov) AND FIRST-CLASS MAIL

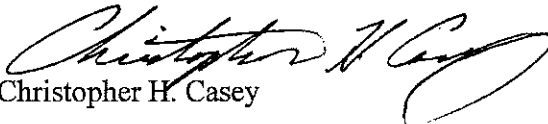
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**RE: James Eiseman, Jr. v. Department of Public Welfare
OOOR Docket No. AP 2011-1098**

Dear Mr. Brown:

Enclosed for filing in the above-reference matter please find a copy of the *Post-Hearing Brief of Interested Parties Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan.*

Respectfully submitted,



Christopher H. Casey

CHC/tc
Enclosure

cc: Hearing Officer Edward S. Finkelstein, Esquire (via e-mail and U.S. Mail, w/ encl)
James Eiseman, Jr., Esquire (via e-mail and U.S. Mail, w/ encl.)
Benjamin D. Geffen, Esquire (via e-mail and U.S. Mail, w/ encl.)
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Karl S. Myers, Esquire (via e-mail and U.S. Mail, w/ encl.)

BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS

JAMES EISEMAN, JR. :

Requester, :

v. :

DEPARTMENT OF PUBLIC WELFARE, :

Respondent. :

DOCKET NO. AP 2011-1098

**POST-HEARING BRIEF OF INTERESTED PARTIES AETNA BETTER HEALTH,
INC., HEALTH PARTNERS OF PHILADELPHIA, INC.,
AND KEYSTONE MERCY HEALTH PLAN**

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<i>Dahlgren v. Dept. of Gen. Serv.</i> , Docket No. AP. 2009-0631 (Pa. OOR 2009).....	passim
<i>Datatel, Inc. v. PSSHE</i> , Docket No. AP. 2010-0818 (Pa. OOR 2010).....	22
<i>Giurintano v. Department of General Services</i> , 20 A.3d 613 (Pa. Commw. Ct. 2011)	7, 22
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Pursuant to 1 Pa. Code § 35.192, Aetna Better Health, Inc., (“Aetna”), Health Partners of Philadelphia, Inc. (“Health Partners”), and Keystone Mercy Health Plan (“Keystone Mercy”) file the following Post-Hearing Brief opposing the disclosure of documents sought by the Requester, James Eiseman, Jr. (“Eiseman”) by the Pennsylvania Department of Public Welfare.

I. CONCISE STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 17, 2011, Eiseman submitted a request to the Pennsylvania Department of Public Welfare (“DPW”) pursuant to Pennsylvania’s Right-to-Know Law, 65 P.S. §§ 67.101. *et seq.* (the “RTKL”).

On July 25, 2011, DPW responded to the Request, granting it in part and denying it in part. On or about August 15, 2011, the Requester appealed the partial denial of the Request to the Office of Open Records (“OOR”). Five Medicaid HMOs operating in the Southeast Zone of Pennsylvania’s HealthChoices program, including Aetna, Health Partners, and Keystone Mercy sought permission to participate in the appeal.

The OOR conducted an evidentiary hearing before Hearing Officer Edward Finkelstein, Esquire on May 21 and 22, 2012. At the close of the hearing, the Hearing Officer ordered the parties to submit post hearing briefs pursuant to 1 Pa. Code § 35.192.

B. ARGUMENT

The Documents Sought in Paragraphs 3 and 4 of the Request are Not “Public Records” Under the RTKL, and Therefore Must Not be Released

The HMOs’¹ participation in this appeal is limited to Paragraphs 3 and 4 of the Request. Paragraph 3 of the Request sought--for the period January 1, 2008, to June 15, 2011--the following documents: “Each and every document, including correspondence and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age.” Request, paragraph 3.

Paragraph 4 of the Request sought--for the period January 1, 2008, to June 15, 2011--the following documents: “Each and every document, including correspondence and appendices, in DPW’s possession, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.” Request, paragraph 4.

The documents sought in these two paragraphs are exempt from disclosure. The HMOs presented substantial and consistent testimony at the hearing that established each of the elements of the applicable exemptions. The Requester failed to rebut that testimony and presented no contrary evidence, and thus the HMOs have clearly met their burden of proving the exemptions by a preponderance of the evidence.

¹ The five HMOs participating in this appeal will be referred to collectively herein as “the HMOs.”

Under the RTKL, Commonwealth agencies must provide access to “public records” upon request. 65 P.S. § 67.301. “Public record” is defined as follows:

A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under Section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.

65 P.S. § 67.102.

Subsection 708(b) lists thirty (30) specific exemptions from disclosure. Subsection 708(b)(11) exempts from disclosure “record[s] that constitute[] or reveal[] a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11).

1. The Documents Are Exempt from Disclosure Under Subsection 708(b)(11)

The documents sought in paragraphs 3 and 4 of the Request “constitute[] or reveal[] a trade secret or confidential proprietary information” of the HMOs, and are thus exempt from disclosure. 65 P.S. § 67.708(b)(11).

a. The Documents are “Trade Secrets” of the HMOs

A “trade secret” is defined in the RTKL as follows:

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.
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102.²

Pennsylvania courts look to the following factors to determine whether information is properly protected as a trade secret: (1) the extent to which the information is known outside of the company's business; (2) the extent to which the information is known by employees and others involved in the company's business; (3) the extent of the measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money the company spent in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated legitimately by others. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010) (citing *Crum v. Bridgestone/Firestone North American Tire, LLC*, 907 A.2d 578, 585 (Pa. Super. Ct. 2006)).

Both DPW's capitation rates (sought in paragraph 3) and the HMOs' rates to their subcontractors and providers (paragraph 4) (collectively, the "rate information") meet all the "trade secret" criteria that Pennsylvania courts consider in determining whether information constitutes a trade secret.

First, the rate information is not generally known outside the HMOs. *See* Proposed Findings of Fact ("Proposed Findings") 29, 35.

Second, the HMOs strictly limit the employees within the organization who have access to the rate information. Proposed Findings 30, 36.

² The Pennsylvania Uniform Trade Secrets Act contains an identical definition of "trade secret." *See* 12 Pa.C.S.A. § 5302.

Third, the HMOs take substantial steps to ensure that the rate information remains confidential. Proposed Findings 31, 37.

Fourth, the rate information has economic value to each of the HMOs, and, if disclosed, would have economic value to their competitors. Proposed Findings 32, 38.

Fifth, the HMOs expend significant time, effort, and resources in negotiating rates and protecting their confidentiality. Proposed Findings 33, 39.

Sixth, because of the extensive confidentiality protections that each HMO takes, it would be extremely difficult for others to acquire or duplicate the rate information by legitimate means. Proposed Findings 34, 40.

Thus, the documents sought in paragraphs 3 and 4 of the Request are “record[s] that ... reveal a trade secret” of the HMOs, and are therefore exempt from disclosure.

Case law from the Pennsylvania Office of Open Records (the “OOR”) applying the “trade secret” exemption supports this conclusion. *See Dahlgren v. Dept. of Gen. Serv.*, Docket No. AP. 2009-0631 (Pa. OOR 2009) (pharmaceutical distributor’s negotiated pricing information, proprietary program pricing, distribution fees and discounts were protected by trade secret exemption, because competitors could use the information to successfully win business from distributor in other government bids, distributor restricted access to the information, and industry standard was to keep information confidential); *Howard v. Pa. Dept. of Corrections*, Docket No. AP 2010-0776 (Pa. OOR 2010) (information relating to government contractor’s e-commerce, communication, and financial services program used by prison systems was protected from disclosure based on proprietary/trade secret exemption where disclosure would result in

significant economic harm to contractor); *Maller v. W. Manheim Twp.*, Docket No. AP. 2009-0498 (Pa. OOR 2009) (blueprints and architectural drawings prepared by contractor qualified as trade secrets where builder took reasonable steps to maintain secrecy of the records, including language requiring consent prior to disclosure on each page of drawings.).

In *Dahlgren*, a pharmaceutical distributor, McKesson, was the successful bidder for a contract with the Pennsylvania Department of General Services (“DGS”). A request was made under the RTKL for information relating to McKesson’s bid, including detailed information relating to the prices McKesson negotiated with the pharmaceutical manufacturers. McKesson sent a letter to DGS requesting that it withhold certain information from the requestor, including the pricing information. McKesson argued that “[t]he negotiated manufacturer pricing is the critical confidential proprietary information produced by McKesson and driving its competitive business model.” Docket No. AP. 2009-0631, at 6. The OOR agreed:

Here, the redacted information is part of a pricing method used to calculate a bid offer. The information has independent economic value because competitors could use the information to successfully win contracts from McKesson in other bids. Further, the information is not readily available as the (sic) McKesson’s policy and the industry standard is to keep such information confidential. ... [T]he appeal of the denial of the Request under #5 is denied.

Id. at 9.

As in *Dahlgren*, the rate information requested here has independent economic value to the HMOs. Proposed Findings 32, 38. Disclosure of the rate information could competitively

harm the HMOs. *Id.* Finally, the rate information is not readily available because the HMOs, like McKesson, keep it confidential. Proposed Findings 34, 40.³

b. Alternatively, the Documents are “Confidential Proprietary Information” of the HMOs

Subsection 708(b)(11) exempts “confidential proprietary information” from disclosure. The RTKL defines “confidential proprietary information” as “[c]ommercial 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 person that submitted the information.” 65 P.S. § 67.102.

The OOR has held that pricing information of private entities, when properly supported by an affidavit or other evidence, is protected from disclosure as “confidential proprietary information.” *Zeshonski v. Pa. Dept. of Health*, Docket No. AP. 2011-0698 (Pa. OOR 2011) (fees and costs information of private company protected); *Datatel, Inc. v. PSSHE*, Docket No. AP. 2010-0818 (Pa. OOR 2010) (pricing information of contractor properly redacted).

In *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. Ct. 2011), the Commonwealth Court affirmed the OOR’s decision holding that information regarding the identity of foreign language translators employed by a contractor was exempt from disclosure as “confidential proprietary information.” The Court held that disclosure of the interpreters’

³ In its brief, the Requester will likely rely upon a case decided under the old RTKL, *Lukes v. Department of Public Welfare*, 976 A.2d 609, 618 (Pa. Commw. Ct.), *petition for allowance of appeal denied*, 604 Pa. 708, 987 A.2d 162 (2009). But the Commonwealth Court has ruled that *Lukes* does not control cases filed pursuant to the new RTKL. *In re: Silberstein*, 11 A.3d 629, 632 n.8 (Pa. Commw. Ct. 2011) (“In support of this appeal, MacNeal relies heavily upon this Court’s decision in [*Lukes*]. However, our decision in *Lukes* was rendered pursuant to the former version of the RTKL, which as noted herein, was repealed by the current RTKL. Therefore, our decision in *Lukes* is not controlling in this matter.”). See also *Office of the Budget v. OOR*, 11 A.3d 618, 622-23 (Pa. Commw. Ct. 2011). Even if it could be considered applicable here, *Lukes* did not even address whether the records at issue were exempt under the “confidential proprietary” exemption, an alternative and sufficient basis to deny the appeal here.

identities would cause “substantial harm” to the contractor’s “competitive position in the interpretation industry.” *Id.* at 617. In reaching this conclusion, the Court noted that the contractor “keeps the identities of its interpreters confidential to protect its investment in those interpreters,” which is consistent with industry practice, and the interpreters are the contractor’s “business asset.” *Id.*; *see also Rounsville v. Pa. Dept. of Health*. Docket No. AP 2011-0281 (Pa. OOR 2011) (software system used in connection with delivery of mental health and substance abuse services qualified as proprietary information that if released, would be used by competitors to contractor’s detriment).

As the HMOs testified, they would suffer competitive harm if the rate information were disclosed, and they expend considerable effort and expense to ensure the confidentiality of this information. For these reasons, the rate information is a “business asset” of the HMOs that, consistent with industry practice, should not be disclosed.

2. Alternatively, the Documents are Exempt From Disclosure Under Pennsylvania Law and Regulations

Even if the documents containing the rate information were not specifically exempted pursuant to subsection 708(b)(11), they would still not meet the definition of “public records” because they are “exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree.” 65 P.S. § 67.102. Specifically, a Pennsylvania state law (the Pennsylvania Uniform Trade Secrets Act, or the “PUTSA”) and state regulations (Pennsylvania’s HMO regulations) protect the documents from disclosure.

The PUTSA, 12 Pa.C.S.A. § 5301, *et seq.*, provides for injunctive relief and recovery of damages for misappropriation of a trade secret. 12 Pa.C.S.A. §§ 5302-04. Since the PUTSA contains the same definition of “trade secret” as the RTKL, and since the rate information meets

the RTKL definition of trade secret, documents containing such rate information are exempt under the PUTSA. Therefore, they are not “public records” under the RTKL. *See* 65 P.S. § 67.102.

Moreover, Pennsylvania’s HMO regulations provide that reimbursement information in standard form health care provider contracts, which are submitted annually to the Pennsylvania Department of Health, “may not be disclosed or produced for inspection or copying to a person other than the Secretary or the Secretary’s representatives, without the consent of the plan which provided the information, unless otherwise ordered by a court.” 28 Pa. Code § 9.604(a)(8). Because the HMOs do not consent to the release of the contracts they form with DPW (paragraph 3 of the Request), and because no court has ordered their disclosure, those documents are not “public records” subject to disclosure under the RTKL.

For all these reasons, the HMOs seek an order affirming DPW’s partial denial of the Request.

II. ABSTRACT OF EVIDENCE RELIED UPON

Testimony:

Testimony of Andrea Bankes

Direct examination (Crumb): 5/21 Transcript: pages 26-29
Cross examination (Geffen): 5/21 Transcript: pages 30-31

Testimony of Allen Fisher

Direct examination (Crumb): 5/21 Transcript: pages 32-74
Cross examination (Myers): 5/21 Transcript: pages 75-77
Cross examination (Geffen): 5/21 Transcript: pages 78-107
Direct examination (Crumb): 5/22 Transcript: pages 132-136
Direct examination (Geffen): 5/22 Transcript: pages 169-230

Testimony of Dr. Henry Miller

Voir dire (direct) (Casey): 5/21 Transcript: pages 109-113
Voir dire (cross) (Geffen): 5/21 Transcript: pages 114-117
Direct examination (Casey): 5/21 Transcript: pages 118-126
Cross examination (Geffen): 5/21 Transcript: pages 126-150
Redirect examination (Casey): 5/21 Transcript: pages 150-151

Testimony of John Sehi

Direct examination (Casey): 5/21 Transcript: pages 151-166
Cross examination (Geffen): 5/21 Transcript: pages 166-191
Redirect examination (Casey): 5/21 Transcript: pages 192-193
Recross examination (Geffen): 5/21 Transcript: pages 193-194

Testimony of Heather Cianfrocco

Direct examination (Myers): 5/21 Transcript: pages 195-211
Cross examination (Geffen): 5/21 Transcript: pages 212-242
Redirect examination (Myers): 5/21 Transcript: pages 242-245

Testimony of Deborah J. Nichols

Direct examination (Casey): 5/22 Transcript: pages 7-14
Cross examination (Geffen): 5/22 Transcript: pages 14-52
Direct examination (Geffen): 5/22 Transcript: pages 53-62

Testimony of Nancy Sirolli-Hardy

Direct examination (Myers):	5/22 Transcript: pages	63-74
Cross examination (Geffen):	5/22 Transcript: pages	75-88
Redirect examination (Myers):	5/22 Transcript: pages	88-89
Recross examination (Geffen):	5/22 Transcript: pages	89-90

Testimony of William C. Morsell

Direct examination (Casey):	5/22 Transcript: pages	91-99
Cross examination (Geffen):	5/22 Transcript: pages	99-120
Redirect examination (Casey):	5/22 Transcript: pages	120-124
Direct examination (Geffen):	5/22 Transcript: pages	140-142

Exhibits:

Hearing Examiner Exhibit 1

MCO-1

MCO-2

III. PROPOSED FINDINGS OF FACT

A. The Parties

1. Appellant James Eiseman, Jr. is a senior attorney with the Public Interest Law Center of Philadelphia (“PILCOP”). June 17, 2011 Letter of Request from James Eiseman, Jr. to Andrea Bankes (“Request”).

2. Appellee Department of Public Welfare (“DPW”) is a Pennsylvania state agency in Harrisburg, Pennsylvania, which operates Pennsylvania’s Medicaid Managed Care Program called “HealthChoices.” Hearing Transcript, May 21, 2012 (“Tr. I”) at 32:23-33:7, 35:18-24.

3. Aetna Better Health, Inc. (“Aetna”) is a Medicaid Health Maintenance Organization (“HMO”) that participated in the Southeast Zone of the HealthChoices Program during the relevant period.⁴ Hearing Transcript, May 22, 2012 (“Tr. II”) at 8:1-23, 9:24-10:8.

4. Keystone Mercy Health Plan (“Keystone”) is a Medicaid HMO that participated in the Southeast Zone of the HealthChoices Program during the relevant period. Tr. II at 92:8-23, 93:5-10.

5. Health Partners of Philadelphia, Inc. (“Health Partners”) is a non-profit Medicaid HMO that participated in the Southeast Zone of the HealthChoices Program during the relevant period. Tr. I at 152:10-14, 153:15-17, 154:6-9.

6. United Health Care Community Plan (“United”) is a Medicaid HMO that participated in the Southeast Zone of the HealthChoices Program during the relevant period. Tr. I at 196:18-197:14.

7. Coventry Health Care (“Coventry”) is a Medicaid HMO that participated in the Southeast Zone of the HealthChoices Program during the relevant period. Tr. II at 64:16-65:4.⁵

⁴ The relevant period is the period covered by the Request, namely, January 1, 2008 to June 15, 2011. Unless otherwise specified herein, all proposed findings of fact refer to this period.

B. The Request

8. On June 17, 2011, Eiseman submitted a request to DPW pursuant to Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101. *et seq.* (the "RTKL"). Request.

9. Paragraph 3 of the Request sought--for the period January 1, 2008, to June 15, 2011--the following documents: "Each and every document, including correspondence and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age." Request.

10. Paragraph 4 of the Request sought--for the period January 1, 2008, to June 15, 2011--the following documents: "Each and every document, including correspondence and appendices, in DPW's possession, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania." Request.

C. The HealthChoices Contracts

11. DPW has formed separate contracts with each of the HMOs for medical and dental services in the Southeast Zone of the HealthChoices program. Tr. I at 153:15-154:2, 196:18-198:19; Tr. II at 9:24-10:8, 53:19-54:12, 64:20-65:8, 92:8-13.

12. The HMOs compete with each other for enrollees in the Southeast Zone of the HealthChoices program. Tr. I at 169:20-170:8, 201:7-10, 233:14-21; Tr. II at 15:12-16:10, 65:13-15, 77:6-9, 108:2-8.

⁵ The five HMOs involved in this appeal will be referred to collectively herein as "the HMOs."

13. The HMOs have standard contracts with DPW pursuant to the HealthChoices program. Exhibit MCO-2.

14. Pursuant to their contracts with DPW, the HMOs are required to establish and maintain a provider network and to ensure access to care, including dental care, for the Medicaid beneficiaries enrolled with their respective health plans. Tr. I at 39:12-22.

15. Pursuant to the contracts, DPW pays the HMOs a per member per month amount, called a "PMPM rate," or "capitation rate." Tr. I at 35:5-17.

16. On an annual basis, DPW negotiates with each HMO individually as to the PMPM rate to be applied for the coming year. Tr. I at 154:1-5, 199:12-23, 202:5-203:15; Tr. II at 56:1-11, 67:12-68:3, 141:1-142:15.

17. The PMPM rate covers all medical and dental services that are required to be provided under Medicaid, and does not break out dental coverage as a separate payment item. Tr. I at 42:19-43:10, 201:11-22.

18. The standard contracts between DPW and the HMOs contain a confidentiality clause that provides as follows:

The PH-MCO⁶ considers its financial reports and information, marketing plans, Provider rates, trade secrets, information or materials relating to the PH-MCO's software, databases or technology, and information or materials licensed from, or otherwise subject to contractual nondisclosures rights of third parties, which would be harmful to the PH-MCO's competitive position to be confidential information. This information shall not be disclosed by the Department to other parties except as required by law or except as may be determined by the Department to other parties except as required by law or except as may be determined by the Department to be related to the administration and operation of the HealthChoices Program. The Department will notify the PH-MCO when it determines that disclosure of the information is necessary for the administration of the HC Program. The PH-

⁶ The terms "HMO" and "MCO" (Managed Care Organization) are interchangeable. Tr. I at 34:22-35:4.

MCO will be given an opportunity to respond to such a determination prior to the disclosure of information.

Exhibit MCO-2, Section XIV, Part D, p. 165.

D. The HMOs' Contracts with Third Party Subcontractors and Dental Providers

19. The HMOs ensure access to dental care by, primarily, subcontracting with third-party providers that in turn develop dental provider networks. Tr. I at 154:6-25, 203:16-204:15; Tr. II at 10:9-16, 70:15-71:10, 92:14-93:20.

20. The third-party subcontractor for dental services for Aetna, Health Partners, Coventry, and Keystone is Dentaquest. Tr. I at 154:6-25; Tr. II at 10:9-16, 70:21-23, 92:14-23.

21. The third-party subcontractor for dental services for United is Dental Benefit Providers. Tr. I at 203:24-204:4.

22. The HMOs pay the subcontractors a negotiated per member per month rate for the services they provide pursuant to the subcontracts. Tr. I at 155:4-12, 204:8-15; Tr. II at 10:21-24, 71:2-10, 93:11-15.

23. The subcontractors, not the HMOs, pay the dental providers for services rendered to the HMOs' enrollees. Tr. I at 155:1-3, 205:17-206:3; Tr. II at 10:17-20, 72:9-11, 94:14-17.

24. In addition to the PMPM amount, Aetna pays Dentaquest a separate amount as an administrative fee depending on the volume of the membership. Tr. II at 10:22-24, 15:4-11.

25. In addition to the PMPM amount, Health Partners and Keystone Mercy reimburse Dentaquest for claims that Dentaquest has paid to the enrollees. Tr. I at 155:13-19, 167:7-22; Tr. II at 93:13-17.

26. For the reimbursements, Dentaquest provides the HMOs with a summary invoice containing an aggregate amount for the claims paid, and not an itemized bill. Tr. I at 167:23-168:23; Tr. II at 103:21-104:5.

27. In addition to the subcontracts, several HMOs have direct contracts for limited, specialty services, such as oral surgery and dental services to special-needs adults and children. Health Partners, Aetna and Keystone Mercy have such direct contracts, which form a very small part of their overall dental services in the Southeast Zone of the HealthChoices program. Tr. I at 155:24-156:15, 190:25-192:7; Tr. II at 11:9-16, 34:15-23; 93:23-94:13, 106:23-107:11.

28. The HMOs' contracts with the subcontractors and providers have confidentiality provisions that forbid either party from disclosing rate information. Tr. I at 162:3-10, 204:16-19; Tr. II at 11:21-12:5, 29:3-16, 71:11-20, 95:17-20, 115:15-116:11.

E. The PMPM Rates Paid By DPW to the HMOs

29. Except for required disclosure to a government agency such as DPW, the PMPM rates that DPW negotiates with each HMO are not disclosed by the HMOs to people outside the HMOs, including the other HMOs. Tr. I at 175:18-176:3, 207:6-208:2, 208:13-209:18; Tr. II at 10:25-11:8, 54:13-55:24, 73:8-25.

30. The PMPM rates that DPW negotiates with each HMO are disclosed to only a small group of employees within the HMOs, *i.e.*, on a business need-to-know basis. Tr. I at 207:6-208:12; Tr. II at 11:21-12:18, 72:14-73:7.

31. The HMOs consider the PMPM rates that DPW negotiates with each HMO to be confidential, and they take steps to protect the information from being disclosed, such as providing confidentiality training to employees, keeping hard copies of the contracts locked, and keeping electronic copies password-protected. Tr. I at 206:23-210:8; Tr. II at 11:21-12:25, 54:13-55:8, 72:14-73:25.

32. The PMPM rates that DPW negotiates with each HMO have independent economic value to the HMOs, and their disclosure could competitively disadvantage one or more

of the HMOs in their negotiations with DPW. Tr. I at 176:4-177:8; 210:17-212:6, 241:15-242:13; Tr. II at 12:19-13:11, 62:22-25, 74:1-18, 76:24-79:18.

33. The HMOs invest a significant amount of time, effort and expense in negotiating the PMPM rates they get from DPW and in maintaining their confidentiality. Tr. I at 164:5-12, 173:17-175:17, 202:25-203:15, 210:9-16; Tr. II at 12:19-25, 13:12-25, 69:12-70:14.

34. It would be extremely difficult for a person outside the HMOs to obtain the PMPM rates they get from DPW. Tr. I at 175:18-176:3, 207:6-208:2, 208:13-209:18; Tr. II at 54:13-55:24, 73:8-25.

F. The Rates Paid By the HMOs to Dental Subcontractors and Providers

35. Except for required disclosure to a government agency such as DPW, the rates that the HMOs pay the subcontractors and dental providers are not disclosed by the HMOs to people outside the HMOs, including the other HMOs. Tr. I at 119:6-123:5, 161:11-24, 166:6-15, 207:6-208:2, 208:13-209:18, Tr. II at 10:25-11:20, 73:8-25, 94:18-95:2.

36. The rates that the HMOs pay the subcontractors and dental providers are disclosed to only a small group of employees within the HMOs, *i.e.*, on a business need-to-know basis. Tr. I at 120:15-121:7, 162:11-23, 166:6-15, 207:6-208:12; Tr. II at 11:21-12:18, 72:14-73:7, 95:3-9.

37. The HMOs consider the rates that the HMOs pay the subcontractors and dental providers to be confidential, and they take steps to protect the information from being disclosed, such as providing confidentiality training to employees, keeping hard copies of the contracts locked, and keeping electronic copies password-protected. Tr. I at 120:15-123:5, 162:24-163:11, 166:6-15, 206:23-210:8; Tr. II at 11:21-12:25, 72:14-73:25, 95:10-24.

38. The rates that the HMOs pay the subcontractors and dental providers have independent economic value to the HMOs, and their disclosure could competitively disadvantage

one or more of the HMOs. Tr. I at 120:5-14, 123:7-124:23, 126:9-15, 163:12-164:4, 165:2-17, 166:6-15, 210:17-212:6; Tr. II at 12:19-13:11, 62:22-25, 74:1-18, 95:25-96:6, 97:25-99:12, 123:22-124:11.

39. The HMOs invest a significant amount of time, effort and expense in negotiating the rates that the HMOs pay the subcontractors and dental providers, and in maintaining their confidentiality. Tr. I at 119:6-120:14, 164:5-17, 202:25-203:15, 210:9-16; Tr. II at 12:19-25, 13:12-25, 50:5-52:25, 96:13-97:10, 107:12-18.

40. It would be extremely difficult for a person outside the HMOs to obtain the rates that the HMOs pay the subcontractors and dental providers. Tr. I at 125:16-126:7, 164:21-165:1, 207:6-208:2, 208:13-209:18; Tr. II at 14:1-13, 73:8-25, 97:16-21.

IV. PROPOSED CONCLUSIONS OF LAW

A. Legal Framework

1. As a “Commonwealth agency” under the RTKL, DPW is required to provide public records in response to the Request. 65 P.S. §§ 67.102, 67.301.

2. The RTKL defines “public record” as follows:

A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under Section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.

65 P.S. § 67.102.

3. The burden of proof is upon DPW and the HMOs to prove by a preponderance of the evidence that the records sought in the Request are not public records. 65 P.S. § 67.708(a)(1); *Allegheny County Dep't of Admin. Svcs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011).

4. Preponderance of the evidence means “evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Rounsville v. Pa. Dept. of Health*. Docket No. AP 2011-0281 (Pa. OOR 2011) (quoting Black’s Law Dictionary 1064 (8th ed.)).

5. “A record that constitutes or reveals a trade secret or confidential proprietary information” is exempt from disclosure. 65. P.S. 67.708(b)(11).

6. Because the exemption uses the disjunctive “or,” a party opposing disclosure under Section 708(b)(11) need only show that the documents in question are either a “trade secret” or “confidential proprietary information.” 65. P.S. 67.708(b)(11).

7. The RTKL defines “trade secret” as follows:

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.

8. There are six factors that Pennsylvania courts use in determining whether information constitutes a trade secret: (1) the extent to which the information is known outside of the company’s business; (2) the extent to which information is known by employees and others involved in the company’s business; (3) the extent of the measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money the company spent in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated legitimately by others. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010)

(citing *Crum v. Bridgestone/Firestone North American Tire, LLC*, 907 A.2d 578, 585 (Pa. Super. Ct. 2006)).

9. The RTKL defines “confidential proprietary information” as “[c]ommercial 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 person that submitted the information.” 65 P.S. § 67.102.

10. The Pennsylvania Uniform Trade Secrets Act prohibits misappropriation of a trade secret. 12 Pa.C.S.A. §§ 5302-04.

11. The Pennsylvania Uniform Trade Secrets Act contains an identical definition of “trade secret” as the RTKL. 12 Pa.C.S.A. § 5302.

12. Pennsylvania’s HMO regulations provide that reimbursement information in standard form health care provider contracts, which are submitted annually to the Pennsylvania Department of Health, “may not be disclosed or produced for inspection or copying to a person other than the Secretary or the Secretary’s representatives, without the consent of the plan which provided the information, unless otherwise ordered by a court.” 28 Pa. Code § 9.604(a)(8).

B. The Documents Sought in Paragraphs 3 and 4 of the Request are Not Public Records Under the RTKL

1. The Documents are Exempt from Disclosure Under Section 708(b)(11) of the RTKL

a. The Documents are Trade Secrets of the HMOs

13. The documents sought in paragraph 3 of the Request are trade secrets of the HMOs. 65 P.S. § 67.102; *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); *Maller v. W. Manheim Twp.*, Docket No. AP. 2009-0498 (Pa. OOR 2009).

14. The documents sought in paragraph 3 of the Request derive 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 their disclosure or use. 65 P.S. § 67.102; Proposed Finding 32.

15. The documents sought in paragraph 3 of the Request are the subject of efforts that are reasonable under the circumstances to maintain their secrecy. 65 P.S. § 67.102; Proposed Findings 29-31.

16. The documents sought in paragraph 3 of the Request satisfy the six factors that Pennsylvania courts consider in determining whether information constitutes a trade secret. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010) (citing *Crum v. Bridgestone/Firestone North American Tire, LLC*, 907 A.2d 578, 585 (Pa. Super. Ct. 2006)); Proposed Findings 29-34.

17. The documents sought in paragraph 4 of the Request are trade secrets of the HMOs. 65 P.S. § 67.102; *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); *Maller v. W. Manheim Twp.*, Docket No. AP. 2009-0498 (Pa. OOR 2009).

18. The documents sought in paragraph 4 of the Request derive 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 their disclosure or use. 65 P.S. § 67.102; Proposed Finding 38.

19. The documents sought in paragraph 4 of the Request are the subject of efforts that are reasonable under the circumstances to maintain their secrecy. 65 P.S. § 67.102; Proposed Findings 35-37.

20. The documents sought in paragraph 4 of the Request satisfy the six factors that Pennsylvania courts use in determining whether information constitutes a trade secret. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010) (citing *Crum v. Bridgestone/Firestone North American Tire, LLC*, 907 A.2d 578, 585 (Pa. Super. Ct. 2006)); Proposed Findings 35-40.

b. In the Alternative, the Documents are Confidential Proprietary Information of the HMOs

21. The documents sought in paragraph 3 of the Request are confidential proprietary information of the HMOs. *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. Ct. 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); *Datatel, Inc. v. PSSHE*, Docket No. AP. 2010-0818 (Pa. OOR 2010).

22. The documents sought in paragraph 3 of the Request are privileged or confidential to the HMOs. 65 P.S. § 67.102; Proposed Findings 29-34.

23. The documents sought in paragraph 3 of the Request are documents the disclosure of which would cause substantial harm to the competitive position of the HMOs. 65 P.S. § 67.102; Proposed Finding 32.

24. The documents sought in paragraph 4 of the Request are confidential proprietary information of the HMOs. *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. Ct. 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); *Datatel, Inc. v. PSSHE*, Docket No. AP. 2010-0818 (Pa. OOR 2010).

25. The documents sought in paragraph 4 of the Request are privileged or confidential to the HMOs. 65 P.S. § 67.102; Proposed Findings 35-40.

26. The documents sought in paragraph 4 of the Request are documents the disclosure of which would cause substantial harm to the competitive position of the HMOs. 65 P.S. § 67.102; Proposed Finding 38.

2. In the Alternative, the Documents are Exempt from Disclosure Under Pennsylvania State Law and Regulations

27. The documents sought in paragraph 3 of the Request satisfy the definition of trade secret in the PUTSA. 12 Pa.C.S.A. §§ 5302-04; Proposed Findings 29-32.

28. The documents sought in paragraph 4 of the Request satisfy the definition of trade secret in the PUTSA. 12 Pa.C.S.A. §§ 5302-04; Proposed Findings 35-38.

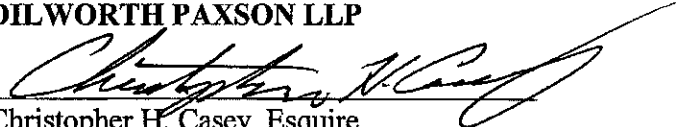
29. Because the HMOs do not consent to their release, the documents sought in paragraph 3 of the Request are exempt from disclosure under Pennsylvania's HMO regulations. 28 Pa. Code § 9.604(a)(8).

V. CONCLUSION

For all of the reasons set forth above, Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan respectfully request that the Office of Open Records affirm DPW's partial denial of the Request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher H. Casey, hereby certify that on the 13th day of July 2012, the Post-Hearing Brief of Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan has been electronically filed with the Office of Open Records and served First Class United States Mail and by email on the following:

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