IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE Petitioner, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 1935 CD 2012
AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN, Petitioners, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 1949 CD 2012
UNITEDHEALTHCARE OF PENNSYLVANIA, INC. D/B/A UNITEDHEALTHCARE COMMUNITY PLAN AND HEALTHAMERICA PENNSYLVANIA, INC. D/B/A COVENTRYCARES, Petitioners, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 1950 CD 2012

BRIEF FOR PETITIONERS AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN

Petition for Review of the Final Determination of the Office of Open Records, at Docket No.: AP 2011-1098

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to review the September 17, 2012 Final Determination of the Pennsylvania Office of Open Records pursuant to 42 Pa.C.S. § 763 and 65 P.S. § 67.1301.

II. ORDER OR OTHER DETERMINATION IN QUESTION

This appeal challenges the Final Determination of the Pennsylvania Office of Open Records ("OOR"), issued on September 17, 2012, in the matter of *James Eiseman and the Public Interest Law Center of Philadelphia v. Pennsylvania Department of Public Welfare, et al.*, Docket No. AP 2011-1098. A copy of the Final Determination is attached hereto as Appendix A.

The "Conclusion" to the Final Determination states the following:

> 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.

(Appendix A at 19).

III. STATEMENT OF THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

An appellate court, in reviewing an order of the OOR, is entitled to "the broadest scope of review." *Bowling v. Office of Open Records*, 990 A.2d 813, 820, 822 (Pa. Commw. 2010). Thus, the scope of review is plenary.

The reviewing court independently reviews orders of the OOR and "may substitute its own findings of fact for that of the agency." *Id. at* 818. The usual deferential standard of review on appeal from Commonwealth agencies does not apply. *Id.* at 819. In *Bowling*, this Court described the standard of review of an OOR order as follows:

> [W]hile reviewing this appeal in our appellate jurisdiction, we function as a trial court, and we subject this matter to independent review. We are not limited to the rationale offered in the OOR's written decision. Accordingly, we will enter narrative findings and conclusions based on the evidence as a whole, and we will explain our rationale.

Id. at 820.

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. Did the OOR commit an error of law in concluding that the documents sought in Item 2 of the Request are not exempt from disclosure as "trade secrets" by applying the case *Lukes v. Dep't of Public Welfare*, 976 A.2d 609 (Pa. Commw. 2009), a case that was decided under the predecessor to the Pennsylvania Right-to-Know Law?

In its Final Determination dated September 17, 2012, the OOR held that this Court's opinion in *Lukes* required that the Pennsylvania Department of Public Welfare produce the documents sought in Item 2 of the Request.

B. Did the OOR err in concluding that Petitioners had failed to carry their burden of showing that the documents sought in Item 2 of the Request were protected from disclosure under the "confidential proprietary information" exemption of the Pennsylvania Right-to-Know Law, when the Petitioners presented extensive unrebutted testimony at the hearing supporting application of that exemption?

In its Final Determination dated September 17, 2012, the OOR held that Petitioners had not met their burden of proving that the documents sought in Item 2 of the Request were protected by the "confidential proprietary information" exemption, and thus the Pennsylvania Department of Public Welfare was required to produce those documents to the Requester.

C. Did the OOR commit an error of law in failing to separately consider whether the documents sought in Item 1 of the Request were exempt from disclosure under state laws or regulations other than the Pennsylvania Right-to-Know Law, specifically the Pennsylvania Uniform Trade Secrets Act and Pennsylvania's HMO regulations?

In its Final Determination dated September 17, 2012, the OOR stated that it would "only consider whether responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(11) [the exemptions for "trade secrets" and "confidential proprietary information"]," and did not consider whether Pennsylvania state laws or regulations precluded the disclosure of the documents sought in Item 1 of the Request.

D. Did the OOR commit an error of law in concluding that the "financial records" provision of 65 P.S. § 67.708(c) precluded application of the exemptions from disclosure for the documents sought in Item 1 of the Request, an issue that the OOR raised *sua sponte* after the record had closed, and without the parties having raised or argued the issue in the proceedings below?

In its Final Determination dated September 17, 2012, the OOR held that the documents sought in Item 1 of the Request were "financial records" and therefore were not protected from disclosure by either the "trade secret" or "confidential proprietary information" exemption of the Pennsylvania Right-to-Know Law.

V. STATEMENT OF THE CASE

A. Statement of the Form of the Action and Brief Procedural History of the Case

1. Form of Action

This is a Petition for Review of the Final Determination of the OOR dated September 17, 2012. In the Final Determination, the OOR held that the documents sought in Items 1 and 2 of the Request were not protected from disclosure by Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. § 67.101, *et seq.*, and that the Pennsylvania Department of Public Welfare ("DPW") was required to disclose them.

2. Brief Procedural History

On June 17, 2011, Respondents James Eiseman, Jr., and the Public Interest Law Center of Philadelphia (collectively, "Eiseman"), submitted a request (the "Request") to DPW pursuant to the RTKL. The Request sought various records for the period January 1, 2008 to June 15, 2011, including the following: (1) documents setting forth the rate of payment that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, and (2) documents setting forth the amount for individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.

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 OOR. On or about August 31, 2011, five Medicaid HMOs operating in the Southeast Zone

of Pennsylvania's HealthChoices program (the "HMOs") sought permission to participate in the appeal. The OOR granted permission to all five.[1]

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

The OOR issued the Final Determination on September 17, 2012.

B. Brief Statement of Prior Determination of Any Court

There were no other prior orders or determinations of any court in this case.

C. Name of Judge Whose Determination is to be Reviewed

The OOR Appeals Officer who issued the Final Determination was Charles Rees Brown, Esquire.

D. Chronological Statement of Record Facts

1. The Parties

Eiseman is a senior attorney with the Public Interest Law Center of Philadelphia ("PILCOP"). (R. 1a).[2] DPW is a Pennsylvania state agency that operates Pennsylvania's Medicaid Managed Care Program called "HealthChoices." (R. 203a, 206 a).

Petitioner Aetna Better Health, Inc. ("Aetna") is a Medicaid HMO that participated in the Southeast Zone of the HealthChoices program during the relevant period.[3] (R. 430a-432a). Petitioner Keystone Mercy Health Plan ("Keystone") is a Medicaid HMO that participated in the

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[1] The HMOs are Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, United Health Care Community Plan, and Coventry Health Care.

[2] Pursuant to agreement among counsel for all Petitioners, counsel for Petitioners United Health Care Community Plan and Coventry Health Care, Karl S. Myers, filed the Reproduced Record on behalf of all Petitioners.

[3] The relevant period is the period covered by the Request, namely, January 1, 2008 to June 15, 2011. (R. 3a).

Southeast Zone of the HealthChoices program during the relevant period. (R. 514a-515a). Petitioner 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. (R. 323a-325a).[4]

Petitioner United Health Care Community Plan ("United") is a Medicaid HMO that participated in the Southeast Zone of the HealthChoices program during the relevant period. (R. 367a-368a). Petitioner Coventry Health Care ("Coventry") is a Medicaid HMO that participated in the Southeast Zone of the HealthChoices program during the relevant period. (R. 486a-487a).

2. The Request

On June 17, 2011, Eiseman submitted the Request to DPW pursuant to the RTKL. (R. 1a-4a). 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." (R. 3a) ("Item 1").

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." (R. 3a) ("Item 2").

[4] Aetna, Keystone, and Health Partners will be referred to collectively as "the Petitioners."

3. The Contracts

a. DPW's Contracts with the HMOs

DPW has formed separate contracts with each of the HMOs for medical and dental services in the Southeast Zone of the HealthChoices program. (R. 324a-325a, 367a-369a, 431a-432a, 475a-476a, 486a-487a, 514a). The HMOs compete with each other for enrollees in the Southeast Zone of the HealthChoices program. (R. 340a-341a, 372a, 404a, 437a-438a, 487a, 499a, 530a). The HMOs have standard contracts with DPW pursuant to the HealthChoices program. (R. 680a-849a).

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. (R. 210a). Pursuant to the contracts, DPW pays the HMOs a per member per month amount, called a "PMPM rate," or "capitation rate." (R. 206a).

On an annual basis, DPW negotiates with each HMO individually as to the PMPM rate to be applied for the coming year. (R. 325a, 370a, 373a-374a, 478a, 489a-490a, 563a-564a). 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. (R. 213a-214a, 372a).

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

> The PH-MCO[5] 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

[5] The terms "HMO" and "MCO" (Managed Care Organization) are interchangeable. (R. 205a-206a).

> otherwise subject to contractual nondisclosure 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 be related to the administration and operation of the HealthChoices Program. The Department will notify the PH-MCO when it determines that disclosure of information is necessary for the administration of the HC Program. The PH-MCO will be given the opportunity to respond to such a determination prior to the disclosure of the information.

(R. 844a).

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

The HMOs ensure access to dental care by, primarily, subcontracting with third-party providers that in turn develop dental provider networks. (R. 325a, 374a-375a, 432a, 492a-493a, 514a-515a). The third-party subcontractor for dental services for Aetna, Health Partners, Coventry, and Keystone is Dentaquest. (R. 325a, 432a, 492a, 514a). The third-party subcontractor for dental services for United is Dental Benefit Providers. (R. 374a-375a).

The HMOs pay the subcontractors a negotiated per member per month rate for the services they provide pursuant to the subcontracts. (R. 326a, 375a, 432a, 493a, 515a). The subcontractors, not the HMOs, pay the dental providers for services rendered to the HMOs' enrollees. (R. 326a, 376a-377a, 432a, 494a, 516a). In addition to the PMPM amount, Aetna pays Dentaquest a separate amount as an administrative fee depending on the volume of the membership. (R. 432a, 437a).

In addition to the PMPM amount, Health Partners and Keystone Mercy reimburse Dentaquest for claims that Dentaquest has paid to the enrollees. (R. 326a, 338a, 515a). For the reimbursements, Dentaquest provides the HMOs with a summary invoice containing an aggregate amount for the claims paid, and not an itemized bill. (R. 338a-339a, 525a-526a).

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. (R. 326a-327a, 361a-363a, 433a, 456a, 515a-516a, 528a-529a). The HMOs' contracts with the subcontractors and providers have confidentiality provisions that forbid either party from disclosing rate information. (R. 333a, 375a, 433a-434a, 451a, 493a, 517a, 537a-538a).

4. The Rates

a. The PMPM Rates Paid By DPW to the HMOs

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. (R. 346a-347a, 378a-380a, 432a-433a, 476a-477a, 495a). The PMPM rates that DPW negotiates with each HMO are disclosed to only a small group of employees within the HMOs, on a business "need-to-know" basis. (R. 378a-379a, 433a-434a, 494a-495a).

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. (R. 377a-381a, 433a-434a, 476a-477a, 494a-495a). 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. (R. 347a-348a, 381a-383a, 412a-413a, 434a-435a, 484a, 496a, 498a-501a).

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. (R. 335a, 344a-346a, 373a-374a, 381a, 434a, 435a, 491a-492a). It would be extremely difficult for a person outside the HMOs to obtain the PMPM rates they get from DPW. (R. 346a-347a, 378a-380a, 476a-477a, 495a).

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

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 anyone outside the HMOs, including the other HMOs. (R. 290a-294a, 332a, 337a, 378a-380a, 432a-433a, 495a, 516a-517a). The rates that the HMOs pay the subcontractors and dental providers are disclosed to only a small group of employees within the HMOs, on a business need-to-know basis. (R. 291a-292a, 333a, 337a, 378a-379a, 433a-434a, 494a-495a, 517a).

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. (R. 291a-294a, 333a-334a, 337a, 377a-381a, 433a-434a, 494a-495a, 517a). The rates that the HMOs pay the subcontractors and dental providers have independent economic value to the HMOs, and their disclosure would competitively disadvantage one or more of the HMOs. (R. 291a, 294a-295a, 297a, 334a-337a, 381a-383a, 434a-435a, 484a, 496a, 517a-518a, 519a-521a, 545a-546a).

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. (R. 290a-291a, 335a, 373a-374a, 381a, 434a-435a, 472a-474a, 518a-519a,

529a). It would be extremely difficult for someone outside the HMOs to obtain the rates that the HMOs pay the subcontractors and dental providers. (R. 296a-297a, 335a-336a, 378a-380a, 436a, 495a, 519a).

5. Evidence Presented by Petitioners at the Hearing

The Petitioners presented testimony from four witnesses at the hearing: Henry Miller, Ph.D.; John Sehi; Deborah J. Nichols; and William C. Morsell.

a. Henry Miller, Ph.D.[6]

Dr. Miller is a health care consultant, and was at the time of the hearing a Director in the Health Analytics practice of the international consulting firm Berkeley Research Group. (R. 280a). Dr. Miller holds a Ph.D. in accounting and economics from the University of Illinois. (R. 281a-282a). For more than forty years, his practice as a health care consultant has been focused on managed care contracting and negotiation issues. (R. 282a). Over those years he has done a "great deal" of work for state Medicaid programs throughout the country. (R. 283a). Dr. Miller has worked in approximately 40 states, including Pennsylvania. (R. 283a-284a). He has worked in several states with Medicaid MCOs, and has specific experience in managed care negotiations involving dental care. (R. 284a). Hearing Examiner Finkelstein accepted Dr. Miller as an expert in managed care health contract negotiations. (R. 285a, 289a).[7]

Dr. Miller provided his expert opinion that the rates that MCOs pay either to subcontractors or to providers are trade secrets and confidential proprietary information to the MCOs. (R. 290a). He testified that in every instance that he has been involved in, the MCO expends a great deal of effort to keep those rates as confidential as possible. (R. 290a). Dr. Miller testified about the effect that release of these rates would have on the MCOs:

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[6] Dr. Miller was retained by, and testified for, all five HMOs. (R. 290a).

> [T]here's the impact that the release of the rates would have. And the specifics of that would be that the MCOs who go through a considerable amount of effort to developing those rates through negotiation and a considerable amount of effort in protecting those rates through modification to their rate systems, it would, in fact, reduce the value of what they invest if the rates were released and they became uncertain that their trade secret information would remain confidential.

(R. 291a, 1201a).[8]

Dr. Miller testified that in his experience the MCOs limit the internal disclosure of rates to those employees of the company with a need to know the information, and put security features in place to protect against disclosure of the information. (R. 291a-293a). In his more than 40 years in the health care industry, he has not seen instances where rate information was disclosed outside the MCOs. (R. 293a-294a). In his opinion, release of an MCO's rate information to one of its competitors would harm the MCO, because it would give the MCO's competitor an advantage in negotiations with providers. (R. 295a). Dr. Miller also testified that in his experience it is extremely difficult for someone outside the MCO to get access to the MCO's rate information, because of the protections the MCO puts in place to protect the information. (R. 295a-296a). Dr. Miller testified that MCOs consider their rate information to be proprietary and confidential, and they "absolutely" believe that it would harm their competitive position if the rates were exposed. (R. 297a).

b. <u>John Sehi</u>

John Sehi was, at the time of the hearing, the Vice President of Finance at Health Partners, a position he has held since June 1998. (R. 323a). Sehi testified that during the relevant period, Health Partners had a dental subcontractor, DentaQuest, that provided a network

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[7] Dr. Miller's resume is set forth at R. 673a-679a.

[8] R.1201a is the errata sheet which has been made part of the record.

of dental providers and paid those providers. (R. 325a-326a). Health Partners paid DentaQuest an administrative fee on a PMPM basis, and reimbursed DentaQuest every two weeks for payments to the dental providers. (R. 326a). Health Partners also had a program, called "Special Smiles," for children who need sedation during dental procedures. (R. 327a). Under the "Special Smiles" program, Health Partners pays the provider directly, rather than through DentaQuest. (R. 327a).

Sehi testified that Health Partners does not disclose the administrative fees that it pays to DentaQuest, or the rates it pays under the Special Smiles program, to anyone outside Health Partners. (R. 332a, 337a). Pursuant to Health Partners' contracts with DPW and DentaQuest, rate information is not to be released. (R. 332a-333a). Within Health Partners, rate information is available to a very limited number of employees, approximately 10 out of 500. (R. 333a, 337a). Health Partners keeps only one copy of the contracts containing the rate information, which are maintained by the legal department. (R. 334a, 337a). Health Partners has employees devoted to the contracting process, which is a lengthy process before a contract is finalized. (R. 335a). Sehi testified that rate information is "very secret," and therefore it would be "very difficult" for someone outside Health Partners to get access to that information. (R. 335a-336a, 337a). When asked about the effect that release of rate information would have, Sehi testified as follows:

> Q. Would you be concerned about a release of rate information? A. I would be concerned if the rate information was released. Q. Why? A. Again, I think it would give us a competitive disadvantage. Q. In your years in the healthcare industry, how many years, 20 plus? A. Healthcare 30. Q. In the 30 years, have you ever seen the rates that health plans pay to the subcontractors or health providers released publicly? A. No. No. Q. Have you ever, ever been asked to disclose such rates outside the company you work for? A. No.

(R. 336a-337a).

c. Deborah J. Nichols

Deborah Nichols was, at the time of the hearing, the CEO of Aetna. (R. 429a-430a). Nichols testified that during the relevant period, Aetna had a subcontract with DentaQuest, whereby Aetna paid DentaQuest a PMPM fee plus administrative costs. (R. 432a). Other than when required to report rates to a government agency, Aetna does not disclose the rates it pays DentaQuest to anyone outside Aetna. (R. 432a-433a). Aetna also has some contracts with oral surgeons whereby Aetna pays the providers directly. (R. 433a). For those direct contracts, the rates that Aetna pays are not disclosed outside Aetna. (R. 433a). Within Aetna, access to rate information is limited. (R. 433a-434a). Aetna provides confidentiality training to its employees. (R. 434a). Aetna also keeps hard copies of its contracts under lock and key, and limits access to electronic copies of contracts to those employees with a need to know the information. (R. 434a). Aetna takes these steps because it believes that the rate information is very valuable to its business, and expends a lot of time and resources in negotiating and maintaining its contracts. (R. 434a). When asked whether release of rate information would be harmful to Aetna, Nichols testified as follows:

> And do you feel that it would be harmful if those rates were exposed to the outside world and to your competitors? A. We do. Q. And why is that? A. Negotiating contracts is a complex process that we set multiple variables. If those rates were available to competitors or to other providers, then the sole focus becomes about how to get the best rate or the highest rate, and it – you know, it would completely change the way that the market works.

(R. 435a).

Nichols testified that because of the protections that Aetna has in place to protect its rate information, it would be difficult for someone outside Aetna to get access to the rate information. (R. 436a). Aetna considers the capitation rates that it receives from DPW to be its trade secret and its confidential proprietary information. (R. 477a).

d. William C. Morsell

William Morsell was, at the time of the hearing, Senior Vice President at Keystone. (R. 513a). Morsell testified that during the relevant period, Keystone had a subcontract with DentaQuest, pursuant to which Keystone paid DentaQuest a PMPM administrative fee and also funded payment of claims by DentaQuest. (R. 514a-515a). Keystone also had limited direct contracts with dental providers for members with special needs. (R. 515a). Keystone's rates, both those paid to DentaQuest and those paid directly to dental providers, are not available to anyone outside Keystone. (R. 516a-517a). The number of employees within Keystone who have access to the rate information is limited to very few employees, those with a need to know the information. (R. 517a). The contracts are kept under lock and key, and are not available electronically. (R. 517a). Keystone has confidentiality provisions in its contract with DentaQuest that precludes either party from disclosing rate information. (R. 517a). Morsell testified that Keystone's contracts are "critically important to the success of the health plan." (R. 518a).

Because of the protections that Keystone has in place for the rate information, it would be "impossible" for someone outside Keystone to access the information. (R. 519a). When asked about the effect of disclosure of rate information, Morsell testified as follows:

> Q. Do you think that the disclosure of the rates to your competitors – the disclosure of your rates to the competitors would disadvantage your competitiveness? A. I would believe so. Q. You believe what? A. It would be to their advantage. Q. And would that be to your disadvantage? A. I believe so.

(R. 521a).

On cross-examination, Morsell was asked why Keystone invests in keeping rate information confidential:

> Q. Okay. And when Mr. Casey was asking you questions about the steps that you take to – and the resources you expend to keep contract terms confidential, that includes the contract terms for the direct services that Keystone Mercy contracts for with individual providers? A. Yes. Q. Okay. And you do that because you -- it would put you at a competitive disadvantage if those contract terms became known outside your business; is that right? A. Yes.

(R. 529a).

On redirect examination, Morsell testified that "[a]ny information that would leak out as to how we pay, how much we pay, how we deal with our providers effectively, would be --- you know, would be damaging to us and our financial viability." (R. 546a).

E. Brief Statement of the Determination Under Review

The OOR's Final Determination held that the documents sought in Items 1 and 2 of the Request were not protected from disclosure by either the "trade secret" or "confidential proprietary information" exemptions from disclosure under the RTKL, or any other exemption from disclosure, and that DPW must disclose them to Eiseman.

F. Statement of Place of Raising or Preservation of Issues

The Petitioners raised the questions sought to be reviewed in this appeal at the hearing before Hearing Examiner Edward S. Finkelstein, Esquire, and in their post-hearing briefs. (R. 172a-672a, 1059a-1086a, 1165a-1181a). The only exception is Question D, which the Petitioners could not have raised below because the OOR addressed it *sua sponte* in the Final Determination, after the record had closed and without the parties having previously raised the issue. The Petitioners raised the questions sought to be reviewed by presentation of testimony and exhibits, oral argument, and post-trial briefs. In its Final Determination, the OOR passed on the issues as follows: (1) held that *Lukes* applied, and therefore the documents requested in Item 2 were not protected from disclosure; (2) held that the HMOs had not met their burden of showing that the "confidential proprietary information" exemption applied to the documents

requested in Item 2; (3) failed to address the argument that Pennsylvania state law and regulations protected the documents sought in Item 1 from disclosure; and (4) raised *sua sponte*, and decided, that the "financial records" provision of Section 708(c) of the RTKL precluded application of the "trade secret" or "confidential proprietary information" exemptions to the documents requested in Item 1.

Specific references to the Petitioners' raising these issues below include the following:

1. Issue A:

"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." (R. 1069a).

2. Issue B:

"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." (R. 1070a).

3. Issue C:

"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." (R. 1070a).

VI. SUMMARY OF ARGUMENT

This Court has the broadest scope of review of the OOR's Final Determination and has the ability to make its own findings of fact and conclusions of law. This Court should do so in this appeal, because the OOR repeatedly erred in its Final Determination.

First, the OOR erred in relying upon this Court's decision in *Lukes v. Dep't. of Public Welfare*, 976 A.2d 609 (Pa. Commw. 2009) to determine that the documents requested in Item 2 were not protected from disclosure under the RTKL. *Lukes* was decided pursuant to the old RTKL and therefore is not binding precedent. In the only two cases decided under the new RTKL in which *Lukes* was considered, this Court held that *Lukes* did not apply. Moreover, even if this Court is inclined to apply *Lukes* here, the case does not require that the rate information at issue here be disclosed. Here, the Petitioners provided substantial evidence that the documents at issue are their "trade secrets," and thus should not be disclosed.

Second, the OOR erred by ignoring the substantial and unrebutted testimony presented by the Petitioners in support of application of the "confidential proprietary information" exemption to the documents sought in Item 2. At the hearing before the Hearing Examiner, each of the Petitioners called witnesses who testified that the information in those documents is protected by the company as its confidential, proprietary information, and that the company would suffer competitive harm if the information were released. By concluding that Petitioners had not met their burden of showing "substantial harm," the OOR failed to follow this Court's decision in *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. 2011), as well as several previous OOR decisions.

Third, the OOR erred in failing to even consider whether the documents requested in Item 1 are protected from disclosure by "other ... State law or regulation," and therefore are not

"public records." By holding that it would "only consider whether responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(11)," the OOR effectively wrote out of the RTKL the second part of the definition of "public record"—*i.e.*, whether the documents are "exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree." Testimony by the Petitioners established that the documents sought in Item 1 meet the definition of "trade secret" under the Pennsylvania Uniform Trade Secrets Act, and therefore should not be disclosed. In addition, disclosure of those documents is specifically proscribed by Pennsylvania's HMO regulations.

Finally, the OOR erred in *sua sponte* raising an issue that none of the parties had addressed below—namely, that the "financial records" provision in Section 708(c) of the RTKL precludes application of the exemptions in section 708(b)(11) to the documents sought in Item 1. By deciding this issue against the Petitioners, the OOR violated their due process right to present argument as to why Section 708(c) should not apply here.

For all these reasons, this Court should make its own findings of fact and conclusions of law; reverse the September 17, 2012 Final Determination of the OOR with respect to Items 1 and 2; and order that no further action need be taken by DPW with respect to this matter.

VII. ARGUMENT

A. The OOR Committed an Error Of Law in Relying on the *Lukes* Case to Determine that the Exemptions in Section 708(b)(11) Did Not Apply to the Documents Sought in Item 2.

The primary basis for the OOR's conclusion that the documents requested in Item 2 were not protected from disclosure by the exemptions in Section 708(b)(11)[9] of the RTKL was that this Court's decision in *Lukes v. Dep't. of Public Welfare*, 976 A.2d 609 (Pa. Commw. 2009) required that result. Although conceding that *Lukes* was "not controlling, binding authority," the OOR held that "the analysis in *Lukes* is highly persuasive," and "[t]herefore, records responsive to Item 2 of the Request are not exempt from disclosure as trade secrets under 65 P.S. § 67.708(b)(11)." (Appendix A, at 17). But the OOR should never have applied *Lukes*, a case decided under the old RTKL. In the alternative, if this Court decides that *Lukes* should apply here, the rate information must still be protected as trade secrets and confidential proprietary information of the Petitioners.[10]

In *Lukes*, the requester sought access to provider agreements entered into between an HMO and hospitals pursuant to the HealthChoices program. DPW denied the request and the requester appealed to this Court, which reversed in a panel decision. The sections of the old RTKL that were relevant in that case—principally the definitions of "record" and "public record" under the old law—were repealed and replaced by the new RTKL. *Lukes*, 976 A.2d at 612 n.1. This Court held that the provider agreements met the definition of "public records."

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[9] Section 708(b)(11) exempts from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11).

[10] Petitioners raised this issue in their post-trial briefs. (R. 1069a).

This Court rejected DPW's argument that the agreements came within the old law's exception to "public records" for "any document ... access to or the publication of which is prohibited, restricted or forbidden by statute law," holding that Pennsylvania's Trade Secrets Act did not bar their disclosure. *Id.* at 626-27.

In the only two reported cases decided pursuant to the new RTKL in which this Court was faced with the choice of applying *Lukes*, this Court declined to do so. Importantly, in both cases the relevant sections of the RTKL had changed, the OOR had followed *Lukes* in granting the appeal of the requester, and this Court held that *Lukes* did not apply.

In *In re: Silberstein*, 11 A.3d 629 (Pa. Commw. 2011), the requester sought documents of a township commissioner that were not located at the township offices but on a personal computer at the commissioner's home. As in *Lukes*, the issue was whether those documents met the definition of "public record" set forth in the RTKL, but the definition was changed in the new law. Relying in part on *Lukes*, the OOR granted the requester's appeal and ordered the township to obtain the documents from the commissioner and provide them to the requester. *MacNeal v. York Township*, Docket No. AP 2009-0633 (Pa. OOR 2009). The township then appealed the OOR's ruling to the York County Court of Common Pleas, which reversed the OOR's ruling and held that the documents did not meet the definition of "public record." 11 A.3d at 631. The requester appealed to this Court, which affirmed the trial court decision. This Court addressed the applicability of *Lukes* in a footnote:

> 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.

11 A.3d at 632 n.8.

In *Office of the Budget v. OOR*, 11 A.3d 618 (Pa. Commw. 2011), the requester sought payroll records from a subcontractor on a state project. The Office of the Budget denied the request since the documents were not in its possession, and the project's grant agreements were not contracts relating to a governmental function so it had no obligation to obtain the documents from the subcontractor. The requester appealed to the OOR. The OOR agreed with the agency that the contracts did not relate to a governmental function, but held that pursuant to Section 901 of the RTKL (relating to an agency's obligation to determine whether the requested documents were within its "possession, custody or control") and *Lukes*, the agency must disclose the documents because they were within its custody or control. 11 A.3d at 620. The Office of the Budget appealed to this Court, which reversed the OOR's ruling. This Court disagreed with the OOR's statutory interpretation of Section 901, and again decided not to apply *Lukes*, stating that "unlike in *Lukes*, this Court is not free to consider factors beyond the statutory language because the current RTKL is not ambiguous on this point." 11 A.3d at 623.

Here, as in *Silberstein* and *Office of the Budget*, the issue is whether the requested documents must be disclosed pursuant to the new RTKL, the relevant sections of the law have changed (there was no "trade secret" or "confidential proprietary information" exemptions in the old law), and the requester is seeking to apply *Lukes* to these facts. *Silberstein* and *Office of the Budget* stand for the proposition that under these circumstances, *Lukes* does not apply because it was rendered pursuant to a repealed law. This Court should follow its earlier decisions and decline to apply *Lukes* here.

In support of its conclusion that *Lukes* should control the outcome here, the OOR states, erroneously, that "the Pennsylvania Supreme Court has recently approved of *Lukes* in analyzing

cases under the RTKL," citing *SWB Yankees v. Wintermantel*, 45 A.3d 1029 (Pa. 2012). But to say that in *SWB Yankees*, the Pennsylvania Supreme Court "approved of" *Lukes* is a stretch.

The issue in *SWB Yankees* was whether a concessionaire at a county-run baseball stadium performed a "governmental function" such that its records could be subject to the RTKL under Section 506(d) of the law. The *SWB Yankees* opinion mentions the *Lukes* decision twice, both times in *dicta* and both times in footnotes. In the first reference to *Lukes*, the Supreme Court observes that the trial court in *SWB Yankees* had noted that "disclosure of certain documents in the possession of third-party contractors was required under the previous open-records regime. *See, e.g., Lukes v. DPW*, 976 A.2d 609, 624 (Pa.Cmwlth. 2009)." 45 A.3d at 1035 n.8. In the only other reference to *Lukes*, the Supreme Court noted that its decision in *SWB Yankees* was consistent with another decision of the Supreme Court under the old RTKL "particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime. The same can be said relative to the Commonwealth Court's decision in *Lukes*." *Id.* at 1044 n.19.

The Supreme Court's references to *Lukes* say nothing about whether *Lukes* should be applied to a case under the new RTKL involving new statutory provisions. The most that can be said is that in a case dealing not with the trade secret or proprietary confidential information exemptions, but with the "governmental function" section of the RTKL, the Supreme Court noted *Lukes* as a case where records were ordered disclosed under the old RTKL. The Supreme Court neither "approved" nor disapproved of *Lukes*—it merely mentioned the case in *dicta*. To use *SWB Yankees* as justification for applying *Lukes* here amounts to an unjustified leap in logic.

But even if this Court decides that *Lukes* should be applied here, the documents requested in Item 2 should still be protected from disclosure. The *Lukes* panel cited approvingly an earlier

opinion of this Court, *Parsons v. Pennsylvania Higher Education Assistance Agency*, 910 A.2d 177 (Pa. Commw. 2006). In discussing the holding in *Parsons*, the panel stated the following:

> In [*Parsons*], this Court addressed the Trade Secrets Act as an exception to the Law. Therein, the newspaper requested the vouchers for expenses for travel and for the retreats conducted by PHEAA, which PHEAA denied. On appeal, PHEAA argued the documents were trade secrets and, therefore exempt from disclosure, but acknowledged that many of the vouchers and receipts would contain no competitive information at all. We determined that the requested documents were public records under the Law. We opined that to constitute a "trade secret" under state Trade Secrets Act, it must be an "actual secret of peculiar importance to the business and constitute competitive value to the owner." We rejected PHEAA's contention that the Trade Secrets Act may serve as an exception to the Law to exempt public records containing no trade secrets at all. The Law favors public access regarding any expenditure of public funds. ***We were cognizant of the fact that some of the requested records may refer to secret information of competitive value and determined that the information may be redacted and the balance supplied under Law.*** We retained jurisdiction over this matter should any disputes arise over the extent of any redaction.
>
> Here, there is no basis upon which to conclude that the Provider Agreements, which the Health Plan entered into with provider hospitals at the direction of DPW for the disbursement of public funds, are trade secrets. While the Intervenors presented evidence that the Provider Agreements contain confidentiality provisions and are not known outside of the Health Plan and UPMC, 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.

976 A.2d at 626-27 (citations omitted; emphasis added).

The highlighted language of this Court's opinion in *Lukes* shows that this Court has recognized that upon a proper showing of "secret information of competitive value," even documents considered "public records" may be redacted. In both *Parsons* and *Lukes*, the party seeking trade secret protection did not make an adequate showing to support a conclusion that

there was information in the requested documents that was "secret information of competitive value" such that it should be redacted from the documents produced. It appears that in *Lukes* the MCO attempted to establish that the provider agreements themselves—not, as Petitioners argue here, rate information contained in the agreements—were trade secrets, and this Court rejected that argument. Here, Petitioners have not made such a broad, sweeping argument that their entire contracts are trade secrets, and are not asserting that their "activities are private and should be shielded from public scrutiny." *Id.* at 627. Instead, what the Petitioners are arguing is that the ***rate information contained in the contracts*** constitutes a trade secret, and they have supported that argument with extensive, unrebutted testimony. It would be entirely consistent with both *Lukes* and *Parsons* for this Court to now determine—based upon the fully developed factual record showing that disclosure of the rate information requested is "secret information of competitive value" to the Petitioners (*see* pages 16-22, *supra*)—that the rate information itself is protected from disclosure, and that such rate information must be redacted from any disclosure.

Thus, even if this Court applies *Lukes* to this case, rate information in Petitioners' agreements, whether with subcontractors or dental providers, must be protected from disclosure, because Petitioners have made an adequate showing that the information is a trade secret.[11]

B. The OOR Erred in Concluding that Petitioners Had Not Carried Their Burden of Showing that the Documents Sought in Item 2 Met the Definition of "Confidential Proprietary Information."

Even if this Court decides that under the *Lukes* rationale the information requested in Item 2 does not constitute a "trade secret," the new RTKL contains a separate and independent exemption which, because it did not exist under the old law, was not addressed in *Lukes*, namely, the exemption for "confidential proprietary information" in Section 708(b)(11), 65 P.S. §

67.708(b)(11). The terms "trade secret" and "confidential proprietary information" are defined separately under the RTKL and therefore are not interchangeable. *Office of Governor v. Bari*, 20 A.3d 634, 647-48 (Pa. Commw. 2011). Thus, the "trade secret" and "confidential proprietary information" exemptions are separate exemptions that must be applied separately, and if a party asserting these exemptions proves that ***either one*** applies, the records are exempt. The OOR acknowledges that the "confidential proprietary information" exemption can alone protect the documents, but errs in its application of that exemption.[12]

The OOR's analysis that this exemption does not apply consisted of two sentences followed by a conclusion:

> 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.

(Appendix A, at 17-18).

The Petitioners' burden is to prove by a preponderance of the evidence that the "confidential proprietary information" exemption applies. 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. 2011). This Court has stated that "[a] preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence

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[11] Of course, this will not satisfy Eiseman, who seeks access to the contracts specifically for the rate information. But the plain fact is that *Lukes* would only support Eiseman's position if Petitioners were seeking to protect the entire contracts from disclosure, which is not the case here.

[12] Petitioners raised this issue in their post-trial brief. (R. 1070a).

presented by the other party." *Lehigh Valley Transportation Services, Inc. v. Public Utility Commission*, 56 A.3d 49, 56 n.6 (Pa. Commw. 2012) (citing *O'Toole v. Borough of Braddock*, 155 A.2d 848, 850 (Pa. 1959)). Here, the OOR does not explain how it came to the conclusion that the Petitioners had not met their burden, but it is difficult to reconcile this conclusion with the testimony presented at the hearing, particularly since Eiseman presented ***no evidence*** on the issue.

This Court has had occasion to determine whether a party seeking to protect documents under the "confidential proprietary information" exemption had shown "substantial harm." In *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. 2011), this Court affirmed the OOR's decision holding that information regarding the identity of foreign language translators employed by a translation company, Language Services Associates (LSA), which had a contract for telephone translation services with the Pennsylvania Department of General Services (DGS), was exempt from disclosure as confidential proprietary information. This Court agreed with the OOR that disclosure of the interpreters' identities would cause "substantial harm" to LSA's "competitive position in the interpretation industry." *Id.* at 617.

In support of application of the exemption, LSA submitted the affidavit of its CEO, Laura K.T. Schriver. That affidavit described the reasons why confidentiality with respect to the names of interpreters was important. *Id.* at 616. The affidavit also described the investment that LSA had made in its interpreters; the protections that LSA employed to guard the secrecy of their names; that only a limited number of LSA employees had access to the information; and that the list is not readily or easily available outside of LSA. *Id.* The only statement in the affidavit as to the harm that LSA would suffer if the names were disclosed was the following: "Divulging the names of LSA's interpreters will cause great business and economic harm to LSA by allowing

competitors to gain the fruits of LSA's labor in identifying a vast network of interpreters offering a quality of interpretation and languages unmatched in the industry." *Id.* at 616-17. Based solely upon the Schriver affidavit, this Court concluded that LSA had made an adequate showing of "substantial harm":

> Schriver's statements establish that: (1) LSA keeps the identities of its interpreters confidential to protect its investment in those interpreters and to ensure unbiased interpretations; (2) LSA's interpreters are its business assets; and (3) disclosing interpreter identities would cause substantial harm to LSA's competitive position in the interpretation industry. Accepting Schriver's statements as true, we conclude, like the OOR, that information identifying an interpreter falls within the definition of confidential proprietary information.

20 A.3d at 616-17 (emphasis added).

The showing made by the Petitioners here is very similar to that made by LSA in *Giurintano*. The Petitioners' witnesses testified that:

- Except for required disclosure to a government agency such as DPW, the rates that the Petitioners pay the subcontractors and dental providers are not disclosed by the Petitioners to anyone outside the company, including the other HMOs. (R. 290a-294a, 332a, 337a, 432a-433a, 516a-517a);
- The rates that the Petitioners pay the subcontractors and dental providers are disclosed to only a small group of employees within the company, on a business need-to-know basis. (R. 291a-292a, 333a, 337a, 433a-434a, 517a);
- The Petitioners consider the rates that they 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. (R. 291a-294a, 333a-334a, 337a, 433a-434a, 517a);

- The Petitioners invest a significant amount of time, effort and expense in negotiating the rates that they pay the subcontractors and dental providers, and in maintaining their confidentiality. (R. 290a-291a, 335a, 434a-435a, 472a-474a, 518a-519a, 529a);
- It would be extremely difficult for a person outside the company to obtain the rates that the Petitioners pay the subcontractors and dental providers. (R. 296a-297a, 335a-336a, 436a, 519a); and
- The rates that the Petitioners pay the subcontractors and dental providers have independent economic value to the Petitioners, and their disclosure would competitively disadvantage them. (R. 291a, 294a-295a, 297a, 334a-337a, 434a-435a, 484a, 517a-518a, 519a-521a, 545a-546a).

Each of the Petitioners' witnesses testified that release of the rates would cause competitive harm.

Dr. Henry Miller testified that, based upon his more than 40 years in the health care industry, release of an MCO's rate information to one of its competitors would harm the MCO, because it would give the MCO's competitor an advantage in negotiations with providers. (R. 295A). John Sehi, Vice President of Finance at Health Partners, testified that he "would be concerned if the rate information was released," because "it would give us a competitive disadvantage." (R. 336a-337a). Deborah Nichols, the CEO of Aetna Better Health, testified that it would be harmful to Aetna if rates were disclosed, and that such disclosure "would completely change the way that the market works." (R. 435a). William Morsell, Senior Vice President at Keystone, testified that disclosure of rates would put Keystone at a competitive disadvantage and "would be damaging to us and our financial viability." (R. 521a, 529a, 546a).

This testimony is at least as sufficient as the LSA affidaivit in *Giurintano*. The competitive disadvantage to which the Petitioners' witnesses testified is the same type of harm to which the LSA CEO testified. Although, unlike the LSA CEO, all of the Petitioners' witnesses were subject to cross-examination, their testimony was unrebutted, and Eiseman presented no contrary evidence. Thus, the Petitioners more than met their burden of proving by a preponderance of the evidence that the "confidential proprietary information" exemption applies here, and the OOR erred in finding that they did not.

Not only is the OOR's conclusion that the Petitioners have not met their burden to prove the applicability of the "confidential proprietary information" exemption at odds with this Court's decision in *Giurintano*, it is also at odds with the OOR's own decisions.

In *Rounsville v. Pa. Dept. of Health*, Docket No. AP 2011-0281 (Pa. OOR 2011), the OOR held that a software system used in connection with the delivery of mental health and substance abuse services for the Pennsylvania Department of Health (DOH) met the requirements of the "confidential proprietary information" exemption. In support of the exemption, DOH submitted a signed statement by an employee of the contractor Core Solutions. The OOR described the statement as follows:

> Ganesan [employee] attests the Risk/Issue Log, Problem Identification Reports and Business Analysis are proprietary and acquired by Core through its work in behavioral healthcare over the past ten years. He advises the information is not known outside Core's business and cannot easily be duplicated and that the information is protected by Core because its release would be detrimental to its business interests if acquired by its competitors. Ganesan identifies the Requester as a representative of one of its competitors, Dataquest, and advises that the use of the proprietary information would jeopardize Core in sales situations. He also explains the records contain technical documents and workings of the software application proprietary to Core.

Id. at 4 (emphasis added).

Based solely upon this signed statement, the OOR held that the exemption applied and that the documents were protected from disclosure: "The Statement is sufficient to establish that the release of this information acquired through its ten-year history, and developed as part of its software business, ***would be detrimental because it could be used by competitors like the Requester, resulting in harm to its business and sales***." *Id.* at 7 (emphasis added).

In *Zeshonski v. Pa. Dept. of Health*, Docket No. AP. 2011-0698 (Pa. OOR 2011), the requester sought, among other documents, fees and costs information of a private contractor with DOH named AllCare Home Health, Inc. AllCare submitted an affidavit by its administrator to support application of the "confidential proprietary information" exemption from disclosure. The affidavit stated, in relevant part, that disclosure of such confidential commercial information would cause substantial harm to AllCare's competitive position. In arguing that the information was protected by the exemption, AllCare relied upon the *Guirintano* case. The OOR agreed, stating that "[t]he OOR has previously held that fees and pricing information are confidential proprietary information that is properly protected by this exception." *Id.* at 10 (citation omitted).

In *Datatel, Inc. v. PSSHE*, Docket No. AP 2010-0818 (Pa. OOR 2010), the requester sought from the Pennsylvania State System of Higher Education ("PSSHE") submissions from third parties relating to procurement of Learning Management Systems. In response to the request, PSSHE redacted the proposals under Section 708(b)(11), including in its redactions cost/pricing information. As in this case, the only information at issue was cost and pricing information. One of the third-party vendors, Perceptis, submitted an affidavit of its vice-President of Sales, in which he attested that "the information is confidential and contains information not readily obtainable by proper means, has economic value and its disclosure could cause harm to Perceptis' competitive position," and that "disclosure of the [information] would

permit others to gain a large competitive advantage in future bidding because it would be aware of Perceptis' billing structure and strategy." *Id.* at 3. The OOR held that this factual record was sufficient to support the exemption: "The submitters, except for Perceptis, failed to substantiate necessary underlying facts to establish that withheld information qualifies for protection. With regard to Perceptis, the OOR finds that its pricing information is protected and was properly redacted." *Id.* at 5.[13]

Thus, in concluding that Petitioners had not met their burden of establishing that they would suffer "substantial harm" if their rates were disclosed, the OOR was not only ignoring the factual record in this case and prior precedent of this Court, it was also holding Petitioners to a higher standard than it has in the past held other third parties seeking to protect their documents under the "confidential proprietary information" exemption. The OOR's decision also flies in the face of the OOR's own repeated protection from disclosure of pricing information, as shown in *Zeshonski* and *Datatel*. In short, the OOR's decision is erroneous and must be reversed.[14]

C. The OOR Erred By Failing to Even Consider Whether the Documents Sought in Item 1 Were Protected by Pennsylvania State Laws and Regulations

In analyzing whether the documents sought in Item 1 are "public records," the OOR stated that it would "only consider whether responsive records are exempt from disclosure under

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[13] *See also Barnes v. Philadelphia School Dist.*, Docket No. AP 2011-0638 at 9-10 (Pa. OOR 2011) (affidavit of vendor's CEO stating that "release of the information would provide [requester] information it could use to facilitate the construction of [requester]'s own" competing product sufficient to meet "substantial harm" test); *Howard v. Pa. Dept. of Corrections*, Docket No. AP 2010-0776 at 5 (Pa. OOR 2010) (affidavit of government contractor that, because information relating to contractor's e-commerce, communication, and financial services program used by prison systems is not generally made available to the public, "disclosure of this information would result in substantial economic harm as [contractor]'s competitors would have access to [contractor]'s proprietary information" held sufficient to support application of exemption).

[14] To compound the error, the OOR's footnote 9—stating "[f]urthermore, 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" (Appendix A, at 18 n.9)—effectively reads the "confidential proprietary information" exemption out of the statute. That exemption, which did not exist when *Lukes* was decided, is now a part of the RTKL and must be considered and applied separately.

65 P.S. § 67.708(b)(11)." (Appendix A, at 13). Its rationale was that "trade secrets" are identically defined in the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq.* ("PUTSA"), and the RTKL. (*Id.*). But the OOR was required to separately consider whether the documents are "exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree." 65 P.S. § 67.102 (definition of "public record").[15]

Although the OOR set forth, at page 13 of the Final Determination, the definition of "trade secret" in the RTKL,[16] it failed to consider and apply each of the factors that Pennsylvania courts consider in determining whether a document or information qualifies as a trade secret under PUTSA. These factors are the following: (1) the extent to which the information is known outside the owner's business; (2) the extent to which the information is known by employees and others within the owner's business; (3) the extent of the measures taken by the owner to guard the secrecy of the information; (4) the value of the information to competitors; (5) the amount of effort or money expended to develop the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated. *Parsons*, 910 A.2d at 185. If the OOR had applied these factors, it would have been forced to conclude that the "trade secret" test has been met.

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[15] Petitioners raised this issue in their post-trial brief. (R. 1070a-1071a).

[16] 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.

With respect to the documents requested in Item 1, testimony at the hearing established that:

(1) Except for required disclosure to a government agency such as DPW, the PMPM rates that DPW negotiates with each Petitioner are not disclosed by the Petitioners to anyone outside the company, including the other HMOs. (R. 346a-347a, 476a-477a);

(2) The PMPM rates that DPW negotiates with each Petitioner are disclosed to only a small group of employees within the company, *i.e.*, on a business need-to-know basis. (R. 433a-434a);

(3) The Petitioners consider the PMPM rates that DPW negotiates with them 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. (R. 433a-434a, 476a-477a);

(4) The PMPM rates that DPW negotiates with each Petitioner have independent economic value to the Petitioners, and their disclosure could competitively disadvantage them in their negotiations with DPW. (R. 347a-348a, 434a-435a, 484a, 1202a);

(5) The Petitioners invest a significant amount of time, effort and expense in negotiating the PMPM rates they get from DPW and in maintaining their confidentiality. (R. 335a, 344a-346a, 434a-435a); and

(6) It would be extremely difficult for a person outside the company to obtain the PMPM rates the Petitioners get from DPW. (R. 346a-347a, 476a-477a).

Thus, the documents requested in Item 1 meet the definition of "trade secret" as applied by Pennsylvania courts, and thus should not be disclosed.

The OOR also erred in failing to even address Petitioners' argument that Pennsylvania's HMO regulations preclude disclosure of the documents requested in Item 1.

Those documents are not "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 (emphasis added). Specifically, state regulations (Pennsylvania's HMO regulations) protect the documents from disclosure.

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 [of Health] 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 Petitioners—the plans that provided the information—do not consent to the release of the reimbursement information (*i.e.*, the rates) in the contracts they form with DPW, the information cannot be a "public record" subject to disclosure under the RTKL unless a court orders such disclosure. For all the reasons set forth above, this Court should not order that this information be disclosed.

D. The OOR Erred by Raising *Sua Sponte*, and Deciding Against Petitioners, That the "Financial Records" Provision in Section 708(c) Precluded Application of the Exemptions in Section 708(b)(11) to the Documents Sought in Item 1.

As an alternative basis for determining that the documents requested in Item 1 are not exempt from disclosure under Section 708(b)(11), the OOR held that Section 708(c) of the RTKL, which states that the 708(b) exemptions do not apply to "financial records," requires

DPW to disclose its agreements with the HMOs "in their entirety." (Appendix A, at 15). But this issue was not raised by any of the parties in the OOR proceedings, and thus the OOR committed an error of law by raising the issue *sua sponte* and deciding it against Petitioners.

It is well-settled that a court may not raise an issue *sua sponte* that does not involve the court's subject matter jurisdiction. *Orange Stones Co. v. Borough of Hamburg Zoning Hearing Board*, 991 A.2d 996, 999 (Pa. Commw. 2010) (citing *Hertzberg v. Zoning Bd. Of Adjustment of City of Pittsburgh*, 721 A.2d 43, 46 n.6 (Pa. 1998)). There, Orange Stones Company applied for a zoning permit but the zoning officer denied the application, determining, *inter alia*, that the proposed use constituted a "hospital," which is prohibited in a floodplain. When the company appealed to the borough zoning hearing board, the board held hearings, after which it affirmed the decision of the zoning officer. The board agreed that the proposed use constituted a "hospital," but also concluded that it constituted a "jail or prison" because it included a "16 bed halfway house." *Id.* at 997. The company appealed to this Court, claiming, *inter alia*, that the board erred as a matter of law in deciding that the use constituted a "jail or prison," because that issue was not raised by the parties, not argued by the parties at the hearings, and in fact was not even a question until the board issued its decision. This Court agreed, and reversed and remanded the board's decision:

> *Sua sponte* consideration of an issue deprives counsel of the opportunity to brief and argue the issues and the Board of the benefit of counsel's advocacy. Moreover, raising issues *sua sponte* after the record is closed and without notice to the parties constitutes a due process violation.

Id. at 999 (citations omitted).

Here, the OOR's role was analogous to the board's role in *Orange Stones*, *i.e.*, it adjudicated Eiseman's appeal of the partial denial of the Request by DPW. The issue of the applicability of Section 708(c) was never raised or argued by any party, and, as in *Orange*

Stones, was raised for the first time by the OOR after the record was closed. Thus, by raising and then deciding the issue against Petitioners, the OOR usurped its role and violated Petitioners' due process rights. It is therefore clear that the OOR's decision must be reversed. *See also Danville Area School Dist. v. Danville Area Education Assn.*, 754 A.2d 1255, 1259 (Pa. 2000) ("*Sua sponte* consideration of issues disturbs the process of orderly judicial decision making. A reviewing court addressing an issue on its own deprives counsel of the opportunity to brief and argue the issues and the court the benefit of counsel's advocacy."); *Commonwealth v. Cavey*, 602 A.2d 494 (Pa. Commw. 1992); *Commonwealth v. Malone*, 520 A.2d 120 (Pa. Commw. 1987).[17]

[17] Even if the OOR, having conducted a fact hearing, is more appropriately considered akin to a trial court in this case, *sua sponte* consideration of issues is still error. *See Yount v. Department of Corrections*, 966 A.2d 1115, 1118-19 (Pa. 2009).

VIII. CONCLUSION

For all these reasons, Petitioners respectfully request an order of this Court reversing the September 17, 2012 Final Determination of the OOR with respect to Items 1 and 2 of the Request and ordering that no further action need be taken by DPW with respect to this matter.

Respectfully submitted,

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DATED: March 25, 2013

CERTIFICATE OF SERVICE

I, Christopher H. Casey, hereby certify that on the 25th day of March 2013, I caused to be served 2 copies of the Brief of Petitioners Aetna Better Health Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan, by the following means of service, on the following:

By First-Class Mail and Electronic Mail:

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Christopher H. Casey

Dated: March 25, 2013

APPENDIX A

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES EISEMAN AND	:	
THE PUBLIC INTEREST LAW CENTER	:	
OF PHILADELPHIA,	:	
Complainant	:	
	:	
v.	:	**Docket No.: AP 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 companies[5] 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, form 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 Intervenors 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.

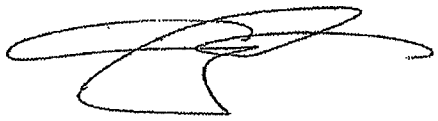
[10] During the course of the appeal, the Department's actuarial reports certifying the capitation "rate ranges" were provided to the Requester. N.T. 66 – 71 (5/21/2012).

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



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