IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 1935, 1949, & 1950 CD 2012

DEPARTMENT OF PUBLIC WELFARE, Petitioner
v.
JAMES EISEMAN, JR., , et al. Respondents

AIETNA BETTER HEALTH, INC. et al., Petitioners
v.
JAMES EISEMAN, JR., et al., Respondents

UNITEDHEALTHCARE OF PENNSYLVANIA, INC. et al., Petitioners
v.
JAMES EISEMAN, JR., et al., Respondents

BRIEF of the DEPARTMENT OF PUBLIC WELFARE

Petition for Review of the Final Determination issued by the
Office of Open Records, dated September 17, 2012,
OOR Docket No. AP 2011-1098

Leonard W. Crumb
Senior Assistant Counsel

Office of General Counsel
Department of Public Welfare
625 Forster Street
Harrisburg PA 17102

Date Filed: March 25, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Judicial Opinions

Rules of Court

STATEMENT OF JURISDICTION

The Office of Open Records (OOR) entered a "Final Determination" in favor of the requester James Eiseman, Jr., Esquire, and against the Department of Public Welfare (DPW) under the Right-to-Know Law (RTKL), 65 P.S. §§ 67.101 *et seq.* DPW is a "Commonwealth agency" for purposes of the RTKL. 65 P.S. § 67.102. Therefore, the Commonwealth Court has jurisdiction to hear this appeal pursuant to 65 P.S. § 67.1301(a) and 42 Pa.C.S. § 763(a).

ORDER OR OTHER DETERMINATION IN QUESTION

The OOR issued its Final Determination on September 17, 2012. In the "Conclusion" to that document, the OOR stated:

> 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.

A copy of that Final Determination – *Eiseman v. Department of Public Welfare*, OOR Docket No. AP 2011-1098 – is reproduced as Appendix A to this brief.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The scope of this Court's review extends to the entire record, i.e., "the evidence as a whole." 65 P.S. § 67.1301(a). Therefore, its scope of review is plenary. Moreover, according to the same provision of the RTKL, this Court is not obliged to give any deference to any of the OOR's findings of fact or conclusions of law. Id. Therefore, its standard of review is *de novo.*

STATEMENT OF THE QUESTIONS INVOLVED

1. Is the 2009 panel decision in *Lukes v. Department of Public Welfare*, inapplicable, either because it applied a now-repealed statute or because it conflicts with the new Right to Know Law?

   Answered by the OOR in the negative.
   Suggested answer: YES

2. Did the OOR err in holding that it could ignore the Pennsylvania Uniform Trade Secrets Act and, instead, resolve all 'trade secret' disputes by merely applying the provisions of the RTKL?

   Answered by the OOR in the negative.
   Suggested answer: YES

3. Did the OOR err in holding that, as a matter of fact, the per-member-per month (PMPM)'capitation' rates are not 'trade secrets,' inasmuch as the OOR failed to address the "potential" economic value of those rates, and inasmuch as it failed to consider or apply the applicable burden of proof?

   Answered by the OOR in the negative.
   Suggested answer: YES

4. Does the evidence support the finding of fact that it is more likely than not that the capitation rates have actual or potential economic value, either to DPW or to the MCOs, or both?

   Answered by the OOR in the negative.
   Suggested answer: YES

STATEMENT OF THE CASE

As indicated by the caption, DPW's appeal has been consolidated with two other appeals filed by a total of five managed care organizations (MCOs). Pennsylvania Rule of Appellate Procedure 2137 states, in pertinent part: "In cases involving more than one appellant ... including cases consolidated for purposes of the appeal pursuant to Rule 513 ... any number of either may join in a single brief, and any appellant ... may adopt by reference any part of the brief of another." Pursuant to that Rule, DPW hereby adopts the "Statement of the Case" set forth in the briefs filed on behalf of the MCOs.

SUMMARY OF ARGUMENT

In 2009, in *Lukes v. Department of Public Welfare*, a panel of this Court held that the right of public access to records that arose under the old RTKL prevailed over any protections that would otherwise be afforded by the Pennsylvania Uniform Trade Secrets Act (PUTSA). The holding in that decision does not control this appeal because (1) the old RTKL was repealed, and (2) three separate provisions of the new RTKL make abundantly clear that, in the event of a conflict between the new RTKL and any other state statute, the other state statute must prevail.

Second, the OOR erred in holding that it could ignore the PUTSA because the RTKL's definition of "trade secret" is (virtually) identical to the PUTSA's definition. The RTKL excludes "financial records" from its trade secret protections; the PUTSA does not; therefore the statutes conflict and the PUTSA must prevail.

Third, the OOR erred in finding, as a matter of fact, that the information in dispute was not a "trade secret." The OOR's finding of fact ignored the fact that the definition of "trade secret" applies to both "actual or potential" economic value. In addition, the OOR erred in failing to apply (or correctly apply) the proper evidentiary standard, i.e., whether the evidence showed that it was more likely than not that the information had actual or potential economic value.

The fourth argument implicates this Court's scope and standard of review. When the Court reviews the record as a whole, and considers that record *de novo*, DPW submits that the correct finding of fact is that, more likely than not, the PMPM rates have actual or potential economic value and, therefore, that they are "trade secrets" for purposes of the PUTSA.

ARGUMENT

I. The panel decision in *Lukes v. Department of Public Welfare* does not control the outcome of these appeals.

In *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa.Cmwlth 2009), appeal denied, 604 Pa. 708, 987 A.2d 162 (2009), a three-judge panel of this Court considered whether rates paid by an MCO to hospitals enrolled in its provider network could be "trade secrets" and, therefore, shielded from access under the old Right to Know Law (Old RTKL). 65 P.S. §§ 66.1 et seq. (repealed). However, despite the similarity of facts, the *Lukes* decision is not controlling.

In *Lukes*, the tension was between the effect of the Pennsylvania Uniform Trade Secrets Act (PUTSA), which protects information against public disclosure, and the Old RTKL, which granted a right of public access to certain records. In Lukes, the Court held that because the moneys being disbursed by the MCO to the hospitals were "public funds," withholding public access to the records in question "would circumvent the public's ability to determine how tax dollars are spent." *Lukes*, 976 at 625. Thus, in effect, the *Lukes* panel held that the interests involving public access to information had to take precedence over any contrary right that may have arisen from the PUTSA.

The new Right to Know Law repealed the Old RTKL. 65 P.S. § 3102(2)(ii). Consequently, the *Lukes* decision does not present a controlling precedent in this instant case. Rather, the question is whether the rights arising out of the new RTKL take precedence over any rights arising from the PUTSA that shield information against public access. Three provisions of the new RTKL make clear that, under the new RTKL, rights arising under the PUTSA must prevail.

The first provision is the definition of "public record," set forth at 65 P.S. § 67.102. The new RTKL only grants a right of access to a "record" if it is a "public record." See, e.g., 65 P.S. §§ 67.301(a). According to the new RTKL's definition of "public record," that concept does not include a record that is "exempt from being disclosed under any other ... State law ...." 65 P.S. § 67.102. Thus, if information is a "trade secret" for purposes of the PUTSA, that information is not a "public record" for purposes of the new RTKL.

The second provision is section 306 of the new RTKL. It states: "Nothing in this act shall supersede or modify the public ***or nonpublic*** nature of a record or document established in Federal ***or State law,*** regulation or judicial order or decree." 65 P.S. § 67.306 (emphasis added). The PUTSA is a state law and it protects trade secrets against public disclosure. Therefore, according to the new RTKL itself, nothing in the new RTKL is to be interpreted to disturb any of the protections arising from the PUTSA.

The third provision is section 3101.1 of the new RTKL. It states: "If the provisions of this act regarding access to records conflict with any other federal ***or state law,*** the provisions of this act ***shall not apply.***" 65 P.S. § 67.3101.1 (emphasis added). The PUTSA is a state law that protects trade secrets. Therefore, to the extent that the provisions of the new RTKL may contain provisions that would permit the disclosure of those trade secrets, section 3101.1 clearly states that those RTKL provisions are not to be applied. Thus, by means of three separate provisions, the new RTKL makes clear that protections afforded by the PUTSA must take precedence over any provision of the new RTKL that would otherwise permit the disclosure of trade secrets. Consequently, *Lukes* has been statutorily overruled.

II. The Office of Open Records erred in holding that it could ignore the PUTSA and, instead, resolve all "trade secret" disputes by merely applying provisions of the RTKL.

The PUTSA and the RTKL define "trade secret" in nearly identical terms. 12 Pa.C.S. § 5302; 65 P.S. § 67.102.[1] Because of this similarity, the OOR therefore reasoned that it need not consider the effect of the PUTSA, and held that it would "only consider whether [the] responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(11)." *Eiseman v. DPW*, at *21. Thus, in ignoring the PUTSA, the OOR erred as a matter of law.

The provision cited by the OOR – section 708(b)(11) of the RTKL – does exempt "[a] record that constitutes or reveals a trade secret" from the RTKL's definition of "public record." 65 P.S. §§ 67.708(b)(11); 67.102 (definition of "public record"). However, section 708(c) of the RTKL removes that protection for records that are "financial records." 65 P.S. § 67.708(c). Because the per-member-per-month (PMPM) rates that DPW uses to make payments to the managed care organizations (MCOs) are set forth in contracts between DPW and the individual MCOs, each such rate is indisputably a "financial record" as the RTKL defines that term, as is each such contract. 65 P.S. § 67.102 (definition of "financial record"). Therefore, if only the terms of the RTKL are considered, the PMPM rates cannot be withheld, ***regardless*** whether they satisfy the new RTKL's definition of "trade secret."

[1] Contrary to the OOR's characterization of the definitions as "identical," the RTKL definition includes a concluding sentence that does not appear in the PUTSA's definition.

However, the new RTKL is not the only statute that protects "trade secrets." Indeed, not only does the PUTSA protect trade secrets but, unlike the new RTKL, the PUTSA does not contain any provision that permits the public release of a trade secret so long as it is a "financial record." 12 Pa.C.S. §§ 5301 – 5308. Therefore, because the protections afforded by the PUTSA are broader than those afforded by the new RTKL, these statutes conflict.

The PUTSA is a state statute. Section 3101.1 of the new RTKL states: "If the provisions of this act regarding access to records conflict with any other federal ***or state law,*** the provisions of this act ***shall not apply.***" 65 P.S. § 67.3101.1 (emphasis added). Similarly, section 306 of the new RTKL states: "Nothing in this act shall supersede or modify the public ***or nonpublic*** nature of a record or document established in Federal ***or State law,*** regulation or judicial order or decree." 65 P.S. § 67.306 (emphasis added). Consequently, if the PMPM rates are "trade secrets" for purposes of the PUTSA, the PMPM rates are not "public records" for purposes of the new RTKL.

III. The OOR erred in holding that, as a matter of fact, the PMPM rates are not "trade secrets."

In Pennsylvania, whether information is a "trade secret" has traditionally been an issue for the jury or, in the absence of a jury, the finder of fact. See, e.g., *West Mountain Poultry Co. v. Gress*, 455 A.2d 651 (Pa.Super. 1982). The PUTSA's definition of "trade secret" demonstrates that this is still the case. According to the PUTSA, information is a "trade secret" if it is:

> 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.

12 Pa.C.S. § 5302. All of these conditions are factual in nature. Indeed, the factual nature of the definition demonstrates that the PUTSA provides no basis for excluding (on 'public policy' grounds, any information that – as a matter of fact – satisfies the definition.

The OOR purported to make findings of fact. In so doing, however, it ignored a significant part of the definition: Information is a "trade secret" if it has "actual ***or potential***" economic value. Id. The OOR only focused on the "actual" value and found that "it is not clear that disclosure of the PMPM rates would provide any economic value to the Department's counter-parties in future negotiations or would cause substantial competitive harm to the Department." *Eiseman v. DPW*, at *23.

In arriving at that finding, the OOR also ignored the applicable burden of proof. According to the new RTKL, the burden of DPW (and therefore the MCOs) is to prove the facts that support their prima facie case by a "preponderance of the evidence." 65 P.S. § 67.708(a)(1). "'A preponderance of the evidence is such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.'" *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 439 (Pa.Cmwlth 2011), *quoting*, *Department of Transportation v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821 (Pa.Cmwlth 2010).

As a result of these errors, nothing in the OOR's decision addresses the question whether, based on the evidence of record, it was ***more probable than not that the PMPM rates have potential economic value.***

IV. For the reasons set forth in the MCOs' briefs, the Court should hold that the PMPM rates are "trade secrets" protected by the PUTSA.

Although this Court exercises appellate jurisdiction over this appeal, the RTKL provides that this Court is to give no deference to the OOR's findings of fact. Rather, the RTKL states that "[t]he decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole." 65 P.S. § 67.1301(a).

"[T]he evidence as a whole" is set forth in the Reproduced Record. The briefs for the MCOs will be addressing that evidence in more detail. Therefore, pursuant to R.A.P. 2137, DPW adopts by reference those parts of the MCOs' arguments, as filed in the appeals docketed at 1949 CD 2012 and 1959 CD 2012. In addition, DPW also adopts all other arguments offered by the MCOs with regard to the proposition that the PMPM rates are exempted from the RTKL's definition of "public record."

CONCLUSION

For the reasons set forth above, and/or for the reasons set forth in the MCOs' briefs, this Court should (1) either hold that *Lukes v. Department of Public Welfare* does not set forth a controlling precedent or, in the alternative, overrule that precedent; (2) hold that the OOR erred in disregarding the PUTSA; (3) hold that the OOR's findings of fact pertaining to the PMPM rates were based on a legally-erroneous reading of the definition of "trade secret" and/or failed to apply the correct burden of proof; (4) find as a matter of fact that the PMPM rates are trade secrets for purposes of the PUTSA; and (5) reverse the OOR's final determination.

Respectfully submitted,

March 25, 2013

Leonard W. Crumb
Senior Assistant Counsel
Department of Public Welfare
Health & Welfare Building
Office of Legal Counsel, 3d Fl.
P.O.Box 2675
Harrisburg, PA 17105-2675
(717) 783-2600
Supreme Ct ID No. 56107

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.

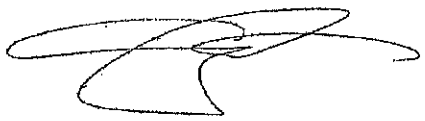
[10] During the course of the appeal, the Department's actuarial reports certifying the capitation "rate ranges" were provided to the Requester. N.T. 66 – 71 (5/21/2012).

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



APPEALS OFFICER
CHARLES REES BROWN, ESQ.

Sent to: *Via e-mail only*
James Eiseman, Jr., Esq.
Benjamin Geffen, Esq.
Leonard Crumb, Esq.
Christopher Casey, Esq.
Karl Myers, Esq.

CERTIFICATE OF SERVICE

Department of Public Welfare, Petitioner	:	
v.	:	**No. 1935 CD 2012**
James Eiseman, Jr., Esquire Respondent	:	

I, Leonard W. Crumb, hereby certify that I am this day serving the foregoing PETITIONER'S BRIEF upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121

James Eiseman, Jr. and Benjamin D. Geffen, Esquire
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

Karl S. Myers, Esquire
STRADLEY RONON STEVENS & YOUNG, LLP
2005 Market Street, Suite 2600
Philadelphia, PA ~~191-307018-~~ 19103

Christopher H. Casey, Esquire
DILWORTH PAXSON, LLP
1500 Market Street, Suite 3500E
Philadelphia, PA 19102

March 25, 2013

Leonard W. Crumb
Senior Assistant Counsel
Department of Public Welfare
Office of General Counsel
Health & Welfare Building, 3rd Floor
625 Forster Street
P.O. Box 2675
Harrisburg, PA 17105-2675