

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :
Department of Public Welfare, :
Petitioner :

v. :

No. ____ C.D. 2013

James Eiseman, Jr., :

and :

The Public Interest Law Center of :
Philadelphia, :

Respondents :

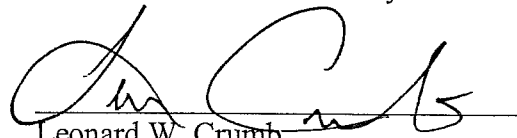
NOTICE TO PARTICIPATE

AETNA BETTER HEALTH, INC.
HEALTH PARTNERS OF
PHILADELPHIA, INC.
KEYSTONE MERCY HEALTH PLAN
DENTAQUEST, LLC
c/o:
Christopher H. Casey, Esq.
Dilworth Paxson, LLP
1500 Market St., Ste. 3500E
Philadelphia, PA 19102-2101

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

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

June 6, 2013



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	:	
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The Public Interest Law Center of	:	
Philadelphia,	:	
Respondents	:	

PETITION FOR REVIEW
IN THE NATURE OF AN APPEAL

Jurisdictional Statement

1. For purposes of the Right to Know Law (RTKL), the Petitioner is a “Commonwealth agency.” 65 P.S. § 67.102. Therefore, this Court has appellate jurisdiction over this petition for review pursuant to section 1301(a) of the Right to Know Law (RTKL), 65 P.S. § 67.1301(a), and Section 763(a)(2) of the Judicial Code, 42 Pa. C.S. § 763(a).

The Parties

2. The Petitioner is the Department of Public Welfare (DPW). For purposes of the RTKL, DPW is a “Commonwealth agency.” 65 P.S. § 67.102 (definition of “Commonwealth agency”).
3. In connection with that part of the Medical Assistance (MA) Program known as the “HealthChoices Program,” DPW has (and has had) contracts with various managed care organizations (MCOs) including, for the 5-county area of Pennsylvania known as the Southeastern Zone:
 - a. UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan (“United”).
 - b. HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares (“Coventry”).
 - c. Aetna Better Health Inc.
 - d. Health Partners of Philadelphia, Inc.
 - e. Keystone Mercy Health Plan.
4. The MCOs (but not DPW) have contracts with other companies that participated in the appeal filed in the Office of Open Records (OOR):
 - a. DentaQuest, LLC
 - b. Dental Benefit Providers, Inc. (“DBP”).

5. The entities identified in the two preceding paragraphs participated in the underlying appeal to the Office of Open Records and are referred to herein as the “Direct Interest Parties.”

6. The Respondents are the Public Interest Law Center of Philadelphia (PILCOP) and an attorney employed by PILCOP, James Eiseman, Jr.

Determination to be Reviewed

7. The OOR issued the original “final determination” on May 7, 2013, in the matter captioned Eiseman, et al. v. Pennsylvania Department of Public Welfare, et al., OOR Docket No. 2012-2017. A copy of that final determination is attached as **Exhibit A**.
8. The OOR’s final determination was issued by OOR Appeals Officer Kyle Applegate, Esquire.
9. As set forth in the “Conclusion” of the OOR’s final determination: “Requester’s appeal is **granted** and the Department is required to disclose all responsive records of the Requester within thirty (30) days.”

DPW's Objections to the OOR's Final Determination

10. The Office of Open Records (“OOR”) erred by applying and relying on Eiseman v. Department of Public Welfare, OOR Dkt. No. AP 2011-1098 (Sept. 17, 2012) (“Eiseman I”), and it erred in refusing to reconsider *Eiseman I* in deciding whether the “trade secret” and “confidential proprietary information” exemptions of the RTKL applied. .
11. The OOR erred in relying on Lukes v. Dep’t of Public Welfare, 976 A.2d 609 (Pa. Commw. 2009), a case that was decided under the predecessor to the RTKL and that is distinguishable from this case.
12. The OOR erred in failing to follow this Court’s decision in *In re: Silberstein*, 11 A.3d 629, 632 n.8 (Pa. Commw. Ct. 2011), in which this Court ruled that because *Lukes* was rendered pursuant to the predecessor law, which was repealed by the RTKL, *Lukes* was not controlling, and in *Office of the Budget v. OOR*, 11 A.3d 618, 623 (Pa. Commw. Ct. 2011), in which this Court again declined to apply *Lukes* to a case under the RTKL.
13. The OOR erred in refusing to separately and independently consider application of the Pennsylvania Uniform Trade Secrets Act (“PUTSA”), and by ignoring the provision of the RTKL exempting from disclosure records “exempt from being disclosed under any other Federal or State law,” as set forth in the definition of

“public record” in 65 P.S. § 67.102, thereby nullifying that provision, in contravention of well-established rules of statutory construction.

14. The OOR erred in failing to recognize and in refusing to apply and give weight to federal regulations requiring DPW to conduct all procurement processes for the purchasing of services with federal dollars in a manner designed to foster healthy and fair competition among potential government contractors, see 45 C.F.R. § 74.43; 42 C.F.R. §§ 434.70(a)(2) & (b), and such federal regulations that presume the confidentiality of documents relating to the expenditure of federal funds where the disclosure of such documents would substantially harm the competitive position of the party submitting the information. See 45 C.F.R. §§ 5.65(B)(4)(ii); 74.53(f).
15. The OOR erred in determining that Pennsylvania state regulations (*i.e.*, Pennsylvania’s HMO regulations, set forth at 28 Pa. Code § 9.604(a)(8)) are inapplicable to protect the requested records from disclosure.
16. The OOR erred in finding the requested materials are within the possession of DPW under 65 P.S. §67.506(d)(1). In that regard:
17. The OOR erred in finding the requested materials are within the possession of DPW by failing to apply this Court’s two-part test for determining agency possession.
18. The OOR erred in finding the requested materials are within the possession of DPW even though DPW did not contract with the dental subcontractors whose records are sought. See 65 P.S. §67.506(d)(1) (“A public record that is not in the possession of an agency but is in the possession of a party *with whom the agency has contracted* ... shall be considered a public record”).

19. The OOR erred in finding the requested materials are within the possession of DPW by failing even to consider, much less apply, this Court's decision in Allegheny County Department of Administrative Services v. Parsons, 61 A.3d 336 (Pa. Commw. 2013), even though it was raised and argued by DBP, United, and Coventry.
20. The OOR erred in failing to even consider, much less apply, this Court's decision in Allegheny County Department of Administrative Services v. Parsons, 61 A.3d 336 (Pa. Commw. 2013), in which this Court held that "Section 506(d) may reach records that are not in an agency's possession, custody or control ***provided the third party in possession has a contract with the agency*** to perform a governmental function, *and* the information directly relates to the performance of that function," *id.* at 340 (emphasis added), even though the Petitioners raised and argued below that *Parsons* applies here.
21. In connection with its findings on agency possession, the OOR erred in its construction and application of Office of the Budget v. OOR, 11 A.3d 618 (Pa. Commw. 2011).
22. In connection with its findings on agency possession, the OOR misconstrued the agreement between DPW and the managed care organizations ("MCOs") in the HealthChoices program, by holding the contractual phrase requiring DPW to have access to "records of *transactions* pertaining to the *provision of services to Recipients*" meant that DPW was required to have access to documents reflecting rates paid by subcontractors to providers.

23. The OOR erred in finding the requested materials are within the possession of DPW even though OOR acknowledged that DPW “does not contract directly with the dental subcontractors.”
24. The OOR erred in finding that the subcontractors “contract with the MCOs to perform services for” DPW when, in fact, the subcontractors do not have contracts with DPW and therefore do not perform services for DPW; rather, the subcontractors perform services for the MCOs, with whom they have contracts.
25. The OOR erred in holding that the dental subcontractors’ records are subject to disclosure under 65 P.S. §67.506(d)(1), because the dental subcontractors do not have a contract with DPW, and the plain language of Section 506(d)(1) states that “[a] public record that is not in the possession of an agency but is in the possession of a party *with whom the agency has contracted* ... shall be considered a public record of the agency.”). 65 P.S. §67.506(d)(1) (emphasis added).
26. The OOR erred in engaging in public policy second-guessing of the Legislature in deciding that “these records *should* be subject to public access,” even though the express language chosen by the General Assembly does not provide for access.
27. The OOR erred in deciding that non-disclosure here would “frustrate” the intent of section 506(d) of the RTKL even though the plain language of that statute (the best indicator of the Legislature’s intent in enacting that provision) does not provide for disclosure.
28. The OOR erred in deciding that “records showing how public monies are spent” should be available to the public, without citing or referencing any provision of the

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

29. The OOR otherwise erred in finding the requested materials are within the possession of DPW even though those records are held by a subcontractor and not a direct contractor with DPW.
30. The OOR erred in improperly construing and applying the “trade secret” exemption of the Right-to-Know Law (“RTKL”), found at 65 P.S. § 67.708(b)(11).
31. The OOR erred in improperly construing and applying the “confidential proprietary information” exemption of the RTKL, found at 65 P.S. § 67.708(b)(11).
32. The OOR erred in failing to separately and independently apply the trade secret and confidential proprietary information exemptions of the RTKL.
33. The OOR erred in failing to even articulate, much less consider and apply, each of the elements and factors that are to be applied under the “trade secret” and “confidential proprietary information” exemptions of the RTKL, as well as the PUTSA, including but not limited to the six-factor “trade secret” test that is to be applied under Pennsylvania law.
34. The OOR erred in misconstruing and misapplying the affidavits submitted by DBP, United, and Coventry in support of their contention that the documents in issue are exempt from disclosure under the RTKL.
35. The OOR erred in reasoning that the following factors militate *against* a finding that the “trade secret” or “confidential proprietary information” exemptions apply, given that they *support* a finding of exemption: (1) that rates between dental practices vary;

and (2) that rates are periodically renegotiated between subcontractors and providers, or are otherwise reevaluated.

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

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

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

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

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

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

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

42. The OOR erred in failing to consider and apply each of the elements and factors that Pennsylvania courts consider in determining whether a document or information qualifies as a trade secret, including but not limited to the six-factor test set forth in *Bimbo Bakeries USA v. Botticella*, 613 F.3d 102 (3d Cir. 2010).
43. The OOR erred in failing to follow prior OOR precedent holding that pricing information similar to the information in the records at issue is exempt from disclosure under the trade secret exemption, including but not limited to *Dahlgren v. Dept. of Gen. Serv.*, Docket No. AP. 2009-0631 (Pa. OOR 2009), *Howard v. Pa. Dept. of Corrections*, Docket No. AP 2010-0776 (Pa. OOR 2010), and *Maller v. W. Manheim Twp.*, Docket No. AP. 2009-0498 (Pa. OOR 2009).
44. The OOR erred in concluding that the evidence presented in the affidavits did not establish that the Direct Interest Participants would suffer “substantial harm” if the records at issue were disclosed.
45. The OOR erred in failing to follow prior precedent of this Court and the OOR holding that pricing information similar to the information in the records at issue is exempt from disclosure under the confidential proprietary information exemption, including but not limited to *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. 2011), *Rounsville v. Pa. Dept. of Health*, Docket No. AP 2011-0281 (Pa. OOR 2011), *Zeshonski v. Pa. Dept. of Health*, Docket No. AP. 2011-0698 (Pa. OOR 2011), and *Datatel, Inc. v. PSSHE*, Docket No. AP. 2010-0818 (Pa. OOR 2010).

46. The OOR erred by speculating and guessing that “the information *may very well be* ‘*outdated*’ by the time of its release,” a rationale that finds no support at all in the record and which, if adopted by this Court, would effectively negate every exemption under the RTKL in any case that is litigated over a considerable period of time.
47. The OOR erred in speculating that “the [rate] information *may very well be* ‘*outdated*’ by the time of its release,” a theory that finds no support in the record.
48. The OOR otherwise erred in failing to fully consider the affidavits and other evidence presented below.
49. The OOR erred in finding that the Direct Interest Participants failed to carry their burden to show the requested materials are exempt under the RTKL.
50. The OOR erred in finding that the Direct Interest Participants failed to carry their burden in light of the fact that their affidavits were not rebutted by any affidavits or any other relevant evidence to the contrary presented by the Requester.
51. The OOR erred by following Eiseman I due to its improper, erroneous, and *sua sponte* application of the “financial records” provision of 65 P.S. § 67.708(c).
52. The OOR erred in failing to find any of the RTKL exemptions applied, given that prior OOR precedent has found pricing information similar to that at issue in the Request in issue exempt from disclosure, including but not limited to Dahlgren v. Dep’t of General Svcs., OOR Dkt. AP 2009-0631 (Sept. 10, 2009), and Zeshonski v. Dep’t of Health, OOR Dkt. AP 2011-0698 (July 20, 2011).
53. The OOR otherwise erred in concluding that the materials requested are subject to disclosure under the RTKL.

Relief Sought

The DPW respectfully submits that the Court should reverse the Final Determination of the OOR and hold that DPW correctly denied Mr. Eiseman's RTKL request.

Respectfully submitted,

Date: June 6, 2013

A handwritten signature in black ink, appearing to read 'L. Crumb', written over a horizontal line.

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pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

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

INTRODUCTION

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

LEGAL ANALYSIS

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

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

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

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

1. PUTSA does not apply

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

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

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

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

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

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

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

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

Section 506(d) of the RTKL states:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental

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

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

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

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

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

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

The OOR finds that Section 506(d) is applicable to records in the possession of the dental contractors. While the Department does not contract directly with the dental subcontractors, the dental subcontractors contract with the MCOs to perform services for the Department. Because the records sought directly relate to a governmental function being performed by the dental subcontractors, these records should be subject to public access. The OOR finds that any other interpretation would frustrate the intent of Section 506(d) by making records showing how public monies are spent unavailable to the public even though they directly relate to a governmental function and a contract with a governmental agency.

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

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

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

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

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

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

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

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

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

Id. at 626-27.

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

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

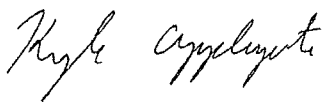
While the OOR understands that the third parties consider rate information confidential, like in *Lukes*, “[t]he threat of competition ... is insufficient to invoke an exemption ... from

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

CONCLUSION

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

FINAL DETERMINATION ISSUED AND MAILED: May 7, 2013



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
Department of Public Welfare,	:	
Petitioner	:	
	:	
v.	:	No. _____ C.D. 2013
	:	
James Eiseman, Jr.,	:	
	:	
and	:	
	:	
The Public Interest Law Center of	:	
Philadelphia,	:	
Respondents	:	

CERTIFICATE OF SERVICE

I, Leonard W. Crumb, hereby certify that on June 6, 2013, I caused the foregoing *Petition for Review* to be filed with the Court, and served the same via US Mail, postage prepaid, upon the following:

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June 6, 2013



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