IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 1935, 1949, & 1950 CD 2012 (consolidated actions)

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE
Petitioner,

v.

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

AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., and KEYSTONE MERCY HEALTH PLAN,
Petitioners,

v.

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

UNITEDHEALTHCARE OF PENNSYLVANIA, INC. D/B/A UNITEDHEALTHCARE COMMUNITY PLAN & HEALTHAMERICA PENNSYLVANIA, INC. D/B/A COVENTRYCARES,
Petitioners,

v.

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

REPLY BRIEF OF PETITIONERS UNITEDHEALTHCARE OF PENNSYLVANIA, INC. d/b/a UNITEDHEALTHCARE COMMUNITY PLAN AND HEALTHAMERICA PENNSYLVANIA, INC. d/b/a COVENTRYCARES

On petition for review of the September 17, 2012 Final Determination of the Office of Open Records in Eiseman, et al. v Pa. Dep't of Pub. Welfare, et al., OOR Docket No. 2011-1098

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I. INTRODUCTION

In attempting to defend OOR's error-ridden decision in this case, PILCOP's brief misapplies (or outright fails to apply) the law, and attempts to mislead or misdirect on the facts. PILCOP relies principally on the Lukes case, which is no longer good law and is otherwise inapplicable, yet PILCOP simultaneously refuses this Court's directives in Bari and refuses to apply the RTKL in rejecting application of the Pennsylvania Uniform Trade Secrets Act. PILCOP also claims the rates in issue are "too old" or "too stale" to matter, but that claim misconstrues the RTKL inquiry before the Court as well as the facts of this case. PILCOP similarly advances a factually baseless red herring by claiming the rates in issue are not secret because the MCOs engage a "common subcontractor." PILCOP even flouts the evidentiary rulings of the OOR's Hearing Officer, referencing "evidence" respecting irrelevant matters in other states that the Hearing Officer specifically excluded. PILCOP otherwise fails to advance the ball in rebutting the submissions of the petitioner managed care organizations ("MCOs") and the Department of Public Welfare ("DPW"). Accordingly, this Court, which owes no deference at all to the OOR under the applicable standard of review, should reverse the wholly flawed decision below.

II. ARGUMENT

A. *Lukes* is bad law.

PILCOP hangs its hat on Lukes v. Department Public Welfare, 976 A.2d 609 (Pa. Commw. 2009), calling it "binding precedent" in this case. (PILCOP at 10, 12, 12-16.) PILCOP's characterization could not be more inaccurate. Lukes cannot apply here for a multitude of reasons: (1) it has been expressly rejected by this Court in two subsequent published opinions as arising solely under the old RTKL; (2) the Lukes opinion itself rejects any argument that it offered guidance under the new RTKL; (3) the Supreme Court's Yankees decision, upon which PILCOP relies to support Lukes, did not even opine on – let alone approve – Lukes' "trade secret" rationale; (4) Lukes did not, and could not, shed any light on the new RTKL's separate and independent "confidential proprietary information" exemption, which did not even exist under the old RTKL; and (5) in any event, Lukes is distinguishable and otherwise should not be followed here.

First, contrary to PILCOP's claim, this Court *already* has held Lukes is *not* "binding precedent" under the new RTKL. In its decision in In re: Silberstein, 11 A.3d 629 (Pa. Commw. 2011), this Court said:

> [O]ur decision in Lukes was rendered pursuant to the former version of the RTKL, which as noted herein, was repealed by the current RTKL. Therefore, *our decision in Lukes is not controlling in this matter.*

Id. at 632 n.8 (emphasis added). Similarly, in Office of the Budget v. OOR, 11 A.3d 618 (Pa. Commw. 2011), this Court said:

> The OOR also relies upon Lukes in support of its position .... *Lukes is inapposite to the current case.* Lukes was decided under the Prior Law ....

Id. at 622-23 (emphasis added). Lukes simply cannot be deemed "binding precedent" by any stretch of the imagination, as this Court has subsequently ruled Lukes "inapposite" and "not controlling" because it was decided under the prior RTKL.

Second, the Lukes opinion *itself* disclaims any precedential value under the new RTKL. In footnote 1 of that decision, former Senior Judge Kelley wrote for the Court that the prior law's provisions

> have since been *repealed and replaced* by the [new RTKL] .... The sections of the Law referenced in this Opinion reflect the text *of the repealed law* ....

Lukes, 976 A.2d at 612 n.1 (emphasis added). Thus, Lukes *itself* recognizes its limitations and *itself* holds it is "inapposite" and "not controlling" under the new law. Even PILCOP begrudgingly admits "Lukes was decided under a version of the RTKL that has since been replaced." (PILCOP at 14.) PILCOP simply cannot back up its "binding precedent" claim. It is completely wrong.

Third, PILCOP tries, but fails, to buttress Lukes by claiming the Supreme Court lent "ongoing vitality" to it in SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012). (PILCOP at 14.) The issue in Yankees was whether the state agency possessed the requested records under 65 P.S. §67.506(d)(1) of the new RTKL.[1] The Court simply said, in a single footnote, that its decision on the *agency possession* issue was consistent with an *agency possession*-related holding rendered under the prior RTKL in Lukes. Id. at 1044 n.19. The Supreme Court did not endorse Lukes' *trade secret* analysis. In fact, it could not have done so, since there was no trade secret issue before the Court in that case. In fact, the term "trade secret" *is not even mentioned* in the Yankees opinion. How PILCOP can claim this decision affirmed the trade secret rationale of Lukes, without so much as *mentioning* that very term, is anyone's guess.

Remarkably, PILCOP tries to avoid this Court's decisions rejecting Lukes (Silberstein and Office of the Budget, discussed above) by claiming they dealt only with agency possession, not trade secrets. (PILCOP at 14-15.) But, as noted above, the same is true of the Yankees decision. Incredibly, PILCOP claims

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[1] Although PILCOP invokes the agency possession provisions of section 506(d), (PILCOP at 15-16), that is not in issue. Even if it was, PILCOP does not reference this Court's recent and key decision on the subject, Allegheny County Department of Administrative Services v. Parsons, 61 A.3d 336 (Pa. Commw. 2013), which makes clear that, in light of the Yankees decision, there are limitations on an agency's "possession" of records held by a contractor.

the Yankees decision, which dealt only with agency possession, *supports* Lukes, while at the same time claims that Silberstein and Office of the Budget are *inapplicable* … because they dealt only with agency possession. These positions cannot be reconciled. Nor is it even of any moment that Silberstein and Office of the Budget turned on agency possession, as their holding that Lukes does not control under the new RTKL applies regardless of the issue presented.

Fourth, Lukes does not, and cannot, speak to the "confidential proprietary information" exemption of the new RTKL because, as PILCOP admits, "[i]t is true … that the 'confidential proprietary information' exception *did not appear in the version of the RTKL that was at issue in Lukes*." (PILCOP at 15) (emphasis added). PILCOP claims this does not matter because the "trade secret" exemption also did not exist under the prior RTKL. (Id.) That is an odd argument because it runs headlong into PILCOP's claim, just a page earlier in its brief, that Lukes' trade secret rationale is *binding* here. (Id. at 14.) The best PILCOP can muster is that Lukes should apply even in the face of the brand-new "confidential proprietary information" exemption because the new RTKL was intended to "liberalize" access to records. (Id. at 15.) But that broad platitude does not deal with the discrete point that Lukes does not address the separate "confidential proprietary information" exemption – and could not have done so, given it did not exist at that time.

Fifth and finally, even if none of the foregoing realities existed, Lukes *still* would not apply, based on a close examination of that decision. In Lukes, this Court was required to confront a multitude of difficult issues in connection with the former version of the RTKL, of which trade secrecy was but one. The five issues before the Court pertained to a wide range of matters including standing, agency possession, the scope of an agency's relationship with a third party, and other related issues. The diffuse and extensive nature of the issues raised by the parties may have caused the parties and the Court to focus less on the question of trade secrecy. The Court's analysis of the trade secrecy issue was contained in one paragraph at the end of the opinion, in which the Court provided a single rationale for refusing to find trade secrecy: that a third party receiving public funds cannot claim activities relating to those funds are private. See Lukes, 976 A.2d at 626-27.

Lukes' lone rationale for refusing to find trade secrecy might have been understandable in the context of the old RTKL. Under the old law, a record constituted a "public record" subject to disclosure *when it involved public funds*. See id. at 621 ("Under Section 1 of the [prior] Law, a 'public record' is defined as 'any account, voucher or contract *dealing with the receipt or disbursement of funds by an agency* ....'" (quoting former 65 P.S. §66.1)). In deciding the records in question were "public records," the Lukes court relied on prior caselaw under the old law that focused on that now-superseded statutory language. See, e.g.,

Morning Call, Inc. v. Lower Saucon Twp., 627 A.2d 297, 299 (Pa. Commw. 1993) (relied on by Lukes) ("Section 66.1 [of the prior law] defines a public record, in part, as a contract 'dealing with' the disbursement of public funds, not merely one disbursing public funds directly to the other party. By using this language, the General Assembly indicated that *as long as the contract dealt with the possible appropriation of public funds*, the contract was a public record subject to inspection." (emphasis added)); Parsons v. Pa. Higher Educ. Assistance Agency, 910 A.2d 177, 185-87 (Pa. Commw. 2006) (relied on by Lukes) (stating that the prior RTKL "favors public access regarding any expenditure of public funds").

The new RTKL, however, unlike the old law, does not hinge on the question of whether the records sought pertain to an expenditure of public funds. The new RTKL instead defines a "public record" as documenting "a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency...."[2] 65 P.S. §67.102. The new RTKL therefore *does not* turn on the crucial "public funds" distinction of the old law. Whatever the merits of the Lukes rationale under the old

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[2] This language is found in the new RTKL's "record" definition, which in turn is captured within the "public record" definition. The "public record" definition includes only those "records" that are *not* exempt under section 708, are *not* exempt pursuant to any other state or federal law or regulation or judicial order or decree, or which are *not* protected by a privilege.

version of the law,[3] it certainly cannot be sustained under the new version of the RTKL. United and Coventry are not aware of any provision of the new RTKL that provides for automatic disclosure, without exemption, anytime public funds are implicated.[4] The lone Lukes rationale simply does not apply under the new RTKL.

B. PILCOP agrees with OOR's defiance of this Court's *Bari* decision.

While putting too much stock in Lukes, PILCOP puts too little in Office of Governor v. Bari, 20 A.3d 634 (Pa. Commw. 2011). There, this Court held that, "[i]mportantly, 'confidential proprietary information' and 'trade secret' *are defined separately* under Section 102 of the RTKL; therefore, *the terms are not interchangeable*." Id. at 647-48 (emphasis added; footnote omitted). Despite this

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[3] The Lukes opinion is vulnerable because it did not support the rationale that privacy or secrecy concerns are inapplicable whenever public funds are involved. In fact, the one case Lukes did reference in depth on this issue expressly recognized that a third party *could* successfully claim trade secrecy, notwithstanding the fact that public funds are in play. See Parsons, 910 A.2d at 186-87. Moreover, if, as Lukes stated, "[t]he threat of competition ... is insufficient to invoke an exemption ... from disclosure" under the new RTKL, then that rationale would doom both the "trade secret" and "confidential proprietary information exemptions," as the threat of unfair competition is precisely what those exemptions are designed to protect against. The Court need not reach the Lukes rationale, however, given it can be set to one side for the many reasons expressed above.

[4] Although PILCOP claims disclosure is in the public's interest, the opposite is true. Disclosure would result in increased costs for the HealthChoices program, which ultimately would be passed on to the taxpayers. (R. 225a-226a) ("It is important for the Department to effectively manage the program, which means ensuring the recipients the access to the services that they're entitled to, but also to minimize the cost of the program to the taxpayer. We take that last part very seriously. We try hard to not pay more for this program than we absolutely have to.... It is important to the Department to keep those various terms confidential so as to avoid other MCOs asking for additional revenue.").

Court's clear directive in Bari (which the petitioners specifically pointed out to the OOR), the OOR refused this Court's instructions, declaring "[t]he OOR will not construe the RTKL to deny access to records required to be disclosed under the prior Right-to-Know Law." (OOR at 18 n.9.) That conclusion finds no support in the text of the RTKL, and flies in the face of this Court's Bari decision.

PILCOP, to its credit, expressly acknowledges this Court's holding in Bari that the "trade secret" and "confidential proprietary information" exemptions "*are not interchangeable.*" (PILCOP at 17) (quoting Bari). However, PILCOP promptly dismisses this Court's holding, proclaiming that "in practice [the two exemptions] usually cover the same information." (Id.) PILCOP cites absolutely nothing in support of this bold proposition. Nor could it, as it obviously runs headlong into Bari's command that these exemptions pertain to separate matters. Yet, instead of backing away from this contention, PILCOP instead doubles down on it, effectively challenging this Court by claiming that "the discussion in Bari *does not identify a single aspect of the term* 'confidential proprietary information' that, under the facts in the record in the instant case, is not encompassed by the definition of 'trade secrets' in the current RTKL." (Id.) (emphasis added). In other words, PILCOP locks arms with the OOR in telling this Court it was wrong in Bari to give both provisions meaning by construing them separately. Instead, OOR, and

now PILCOP, argue this Court should have treated one of these statutory provisions as surplus of the other.[5]

Perhaps it is understandable that PILCOP is struggling to defend OOR's indefensible refusal to apply the separate and independent "confidential proprietary information" exemption. Nevertheless, PILCOP's naked claim respecting the "practice" respecting these two exemptions, as well as its frontal assault on Bari, should be summarily rejected. OOR's holding and PILCOP's argument violate the most basic tenet of statutory construction that statutory provisions should be given full effect, and must not be deemed surplus. See Allegheny County Dep't of Admin. Svcs. v. A Second Chance, Inc., 13 A.3d 1025, 1037 (Pa. Commw. 2011) (rejecting application of RTKL that would render provision "redundant of other provisions of the RTKL and would amount to mere surplusage."); 1 Pa.C.S. §1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). The "confidential proprietary information" exemption must be given meaning and applied, as this Court directed in Bari. OOR erred in refusing to do so.

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[5] PILCOP, like the OOR, also similarly fails to even reference, let alone distinguish, this Court's decision in Giurintano v. Department of General Services, 20 A.3d 613 (Pa. Commw. 2011), notwithstanding its prominence in United's and Coventry's principal brief. (See United/Coventry Br. at 19-21.)

C. PILCOP also agrees with OOR's refusal to follow the plain language of the RTKL in rejecting PUTSA.

In addition to sanctioning OOR's defiance of this Court's Bari decision, PILCOP also believes this Court should sustain OOR's refusal to consider the Pennsylvania Uniform Trade Secrets Act ("PUTSA"). (PILCOP at 26-27.) Consideration of PUTSA is required because the RTKL exempts from disclosure records "exempt from being disclosed under *any other Federal or State law*." 65 P.S. §67.102 (definition of "public record"). OOR rejected this statutory language, holding that "OOR will only consider whether responsive records are exempt from disclosure under 65 P.S. §67.708(b)(11)." (OOR at 13.) PILCOP now says this Court should sign off on OOR's conclusion.

In attempting to support OOR's refusal to follow the dictates of the RTKL, PILCOP argues "PUTSA and the RTKL … address completely different scenarios." (PILCOP at 26.) This is a strange argument, as it directly contradicts PILCOP's claim that Lukes, which applied provisions of PUTSA, is *controlling* in this case. (PILCOP at 13) ("this Court [in Lukes] rejected the contention of DPW and the MCO that the documents were 'trade secrets' within the definition of 'trade secrets' *as set out in 12 Pa.C.S. §5302 [of PUTSA]*."); see also (PILCOP at 27 n.10). PILCOP is trying to have its cake and eat it too. It wants to apply Lukes' trade secrecy holding for purposes of the new RTKL (which Lukes was not even

construing), but then, when the shoe is on the other foot, tries to run away from that decision by claiming PUTSA addresses a "completely different scenario."

PILCOP also claims application of PUTSA would amount to "reading back in" to RTKL a trade secrecy exemption that PILCOP claims is eliminated by operation of 65 P.S. §67.708(c). (PILCOP at 26-27.) The problem with this argument is that the RTKL, in its "public records" definition, expressly requires that "any other Federal or State law" be "read in" to RTKL where such other law requires exemption from disclosure. See 65 P.S. §67.102. PUTSA simply is unaffected by the "financial records" provision of section 708(c) of the RTKL.

PILCOP's invocation of the "financial records" language in section 708(c) also is problematic because the OOR invoked that exception *sua sponte.* PILCOP admits this is what happened. (PILCOP at 28.) PILCOP thus concedes the OOR deprived the MCOs of their right to address this issue before the OOR. Yet PILCOP says this deprivation is no big deal because the MCOs could have addressed the issue in their briefs to this Court, but did not. That is not true; Coventry and United *did* address this issue in their brief. (United/Coventry Br. at 24 n.15.)

In any event, even if OOR had not raised the issue *sua sponte*, section 708(c) could not apply to the rates the MCOs pay their subcontractors. That statutory provision pertains only to a "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. §67.708(c) (emphasis added). The rates paid by the MCOs to their subcontractors obviously are not agency disbursements – they are MCO disbursements.[6] Further, and as noted above, this provision obviously cannot have any impact on PUTSA's exemption from disclosure, given PUTSA is not found within the confines of the RTKL, but applies by way of the RTKL's "public records" definition.

PILCOP avoids theses critical limitations on section 708(c), in particular by burying its argument respecting the rates paid by the MCOs to the subcontractors at the bottom of page 31 of its brief. There, PILCOP gives only one reason why it thinks the MCO-subcontractor rates are subject to section 708(c): because DPW purportedly "funnels" money to the subcontractors through the MCOs. (PILCOP at 31.) There is absolutely no evidence supporting this claim. The MCOs in the HealthChoices program do not merely "funnel" money from DPW to the dental subcontractors. Rather, the MCOs are contractually obligated to DPW to carry out the entire delivery of health services (not just dental services) to the individual enrollees in HealthChoices. DPW does not tell the MCOs how to

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[6] Thus, PILCOP's contentions respecting DPW's limited disclosure of the rates it pays to other agencies have no bearing on the rates paid by the MCOs to the subcontractors, given that DPW does not know those rates. (PILCOP at 19.)

deliver those services, let alone direct the MCOs to use dental subcontractors or otherwise "funnel" money to them. Rather, the MCOs have made their own decision to engage dental subcontractors for that aspect of the HealthChoices program. They made this voluntary choice because the dental subcontractors have built sophisticated networks of providers and can deliver appropriate dental care in a cost-effective way. PILCOP's claim of "funneling" is meritless, and certainly does not justify ignoring the plain language of the RTKL that limits the reach of the "financial records" provision solely to materials pertaining to "disbursement[s] of funds *by an agency*" – not disbursements by non-government parties, like the MCOs.

In the end, the simple fact of the matter is that the RTKL mandates application of PUTSA by way of the "public record" definition found in section 102 of the RTKL. The OOR expressly refused to apply PUTSA. PILCOP offers no meritorious explanation for what OOR did. Nor can it. OOR's conclusion must be rejected by this Court.

D. The baseless "too old" or "too stale" contention.

In addition to either refusing to apply or misapplying the cases and the plain language of the RTKL, PILCOP also advances factual arguments devoid of support. Foremost among them is PILCOP's repeated contention, which it never

briefed before in this litigation,[7] that the requested information is "too old" or "too stale" for disclosure to cause any harm to the MCOs. (PILCOP at 10, 11, 17-18, 22.)

For starters, however, there is no provision of the RTKL that nullifies application of the RTKL's exemptions when the information sought becomes "too old" in the subjective eye of the requester. Indeed, the RTKL does not contemplate records becoming "too old" during open records litigation. Rather, the question that the OOR and this Court are asked under the RTKL is whether the agency, *at the time it issued its response to PILCOP's request*, correctly deemed the requested records exempt.[8] Here, DPW's final response was issued on July 25, 2011. (R. 7a.) The question therefore before the OOR, and now this Court, is whether that response, *when issued*, was correct. The question is not whether DPW's decision should be deemed correct as if it were hypothetically issued sometime in 2013 – some two years later.

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[7] Relatedly, PILCOP claims United and Coventry asserted a new argument in their reply before the OOR, but now have dropped it. (PILCOP at 12-13 n.4.) But United and Coventry did not do so, and the referenced page of their reply (R. 1157a) does not support PILCOP's claim. PILCOP either is confused or is attempting to mislead the Court.

[8] See, e.g., 65 P.S. §67.901-903 (providing for agency response to request); id., §67.1101(a)(1) (providing for an appeal to OOR *from the agency denial*); id., §67.1101(a)(2) (providing that OOR "shall assign an appeals officer *to review the denial.*"); id., §67.1310(a)(5) (providing that OOR shall "[a]ssign appeals officers *to review appeals of decisions by Commonwealth agencies or local agencies*"); id., §67.1301(a) (providing for an appeal to this Court *from the OOR decision*).

Moreover, even if that were the inquiry, there is no evidence supporting PILCOP's "too old" contention. PILCOP just speculates that because the rates in issue are adjusted from year to year, that this automatically means release of a prior year's rates does not implicate competitive concerns.[9] (PILCOP at 18.) But just because rates are adjusted over time does not undermine the competitive interest in keeping them secret. In fact, the opposite is true: the fact that rates are subjected to an intense annual negotiating process illustrates that the secrecy of these rates is extremely critical to an MCO's ability to compete in the HealthChoices marketplace.

PILCOP's claim that rate changes undermine the need for secrecy is rooted in OOR's conclusion that rate negotiations with DPW are based on factors "completely independent" of prior rates.[10] (OOR at 14.) However, as previously

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[9] In this regard, PILCOP references the federal Ninth Circuit's decision in GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109 (9th Cir. 1994), but that case is not on point, as that decision arose under the federal Freedom of Information Act. Moreover, in that case (unlike this one) the party opposing disclosure "failed to show" how a competitor in possession of the information sought could use it to undermine another's competitive position. Id. at 1114-15.

[10] PILCOP references the subsequent OOR decision in Eiseman v. DPW, OOR Docket No. 2012-2017 ("Eiseman II"). (PILCOP at 22-24.) That decision obviously is not binding on this Court. See Scott v. Delaware Valley Regional Planning Comm'n, 56 A.3d 40, 44 (Pa. Commw. 2012) (refusing to follow OOR decision because "decisions of administrative boards or tribunals have no precedential value [in] this Court"). Moreover, the petitioners in that case have petitioned for review of the OOR's decision by this Court. See 945, 957, & 958 CD 2013. In any case, the Eiseman II decision rests on the same speculative and

(footnote continued on next page)

demonstrated, OOR failed to support that broad conclusion with any testimony. (See United/Coventry Br. at 23-24.) Nor does PILCOP supply the missing record support. That is because it does not exist. As the MCOs' witnesses testified, prior years' rates need to remain secret in no small part because they factor into the ensuing years' negotiations as a launching point for contractual discussions. Disclosure of prior years' rates thus can provide a competitor with a "roadmap" relating to the MCO's rates.

For example, the United witness, on cross-examination by PILCOP, specifically testified that "past utilization" was one factor that was considered in the rate negotiations with DPW. (R. 403a.) She further testified that learning United's prior rates *would be of benefit to a competitor* in negotiating its own rates with DPW:

> Q. Okay. So it's your testimony that there would be harmful to the competitive position of United for its competitors to learn of the capitation rates that is negotiated for the current fiscal year; is that right?
>
> A. Well, *for any fiscal year*, but yes, for the current fiscal year.
>
> Q. And but *it would also be harmful if they learned the rates from the previous fiscal year and the year before that and so on*?

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meritless "too old" logic that PILCOP employs here, as the OOR speculated and guessed that "the information *may very well be 'outdated'* by the time of its release."

A. *Yes.*[11]

(R. 403a-404a) (emphasis added). Thus, PILCOP's own questioning of the United witness firmly established that the MCOs would sustain competitive harm if previous years' rates were disclosed.[12]

More fundamentally, PILCOP's "too old" argument, if adopted by this Court, could lead to problematic consequences. By PILCOP's logic, a RTKL exemption is effectively nullified whenever an open records dispute is subjected to protracted litigation. This would incentivize requesters like PILCOP to try to "run out the clock" in the hopes of obtaining a finding that an exemption is inapplicable due to passage of time. It would effectively gut the RTKL if a requester could

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[11] In spite of this testimony, PILCOP claims the United witness actually testified that "outdated" rates "would be of *no value* in setting rates going forward." (PILCOP Br. at 18) (emphasis added). The transcript page referenced by PILCOP does not contain any testimony about "outdated" rates. Moreover, in the passage referenced by PILCOP, the United witness testified that it *would* be of value to United's competitors to learn United's rates (in that they could propose lower rates to DPW), and that United could use other MCOs' rates to learn how they were "performing" and possibly "inappropriately underbid" them. (R. 390a-394a.) Thus, the United witness *did* testify that knowing a competitor's rates could provide a competitive advantage to United. That testimony supports, at a minimum, application of the "potential" economic value language of the "trade secret" definition, a matter addressed nowhere by PILCOP.

[12] Likely due to its lack of success in establishing its "too old" claim via the United witness, PILCOP did not even bother trying this tact with Coventry's witness. She unequivocally testified that release of the rates (which pertained to several prior years) would visit competitive harm on Coventry. (R. 496a, 501a, 509a-510a.)

manipulate the process by trying to outlast an exemption's "sell-by date."[13] Such extensive and frivolous litigation would only further burden this Court, which already has an extensive docket of RTKL cases. Fortunately, these consequences can be avoided, as PILCOP's "too old" argument has no basis in the law or under the facts of this case.

E. The baseless "common subcontractor" red herring.

PILCOP also claims it makes a difference that several of the MCOs engage the services of a single dental subcontractor, DentaQuest. (PILCOP at 4-5, 8, 24.) PILCOP claims this generates an "obvious inference" that "there cannot be secrets or confidences" respecting the rates paid by the MCOs to it. But PILCOP's argument is just a made-up theory, without any evidentiary support. It also is a red herring, having no logical basis.

It is important to note at the outset the limited scope of PILCOP's argument. The "common subcontractor" claim does not pertain to United, because United did not contract with DentaQuest, and instead subcontracted with Dental Benefit Providers ("DBP"), with whom no other MCO subcontracted.[14] (R. 375a.)

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[13] PILCOP's "too old" argument also raises thornier questions. For example, could an individual's psychiatric records become "too old" to implicate any personal privacy concerns?

[14] United's contract with DBP nevertheless requires DBP to maintain the confidentiality of the rates paid to it by United. (R. 375a.)

Moreover, there was no evidence that DentaQuest knows of any of the rates paid by DPW to any of the MCOs. Rather, the only rates of which DentaQuest could possibly be aware are those paid by the MCOs to DentaQuest.[15]

Further, there was no evidence adduced during the hearing that the capitation rates (also known as per-member per-month (pmpm) rates) paid out by the four MCOs lost their secret or confidential nature simply because those rates were paid under separate contracts with DentaQuest. Each and every one of the MCO witnesses testified that the MCOs' separate contracts with DentaQuest required DentaQuest to maintain the confidentiality of the rates paid to it. For example, the Coventry witness clearly and unequivocally testified:

> Q. … [I]s there a mechanism for payment in the contract between Coventry and DentaQuest?
>
> A. Yes.
>
> Q. And what's that mechanism?
>
> A. It's a capitation rate.
>
> Q. Okay. So the capitation rate, is that a similar type of payment as the contract between DPW and Coventry?

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[15] PILCOP attempts to blend into this case rates that are not at issue, specifically, the rates paid by DentaQuest to the dentists who provide care to HealthChoices customers. (PILCOP at 5.) Those rates are not in issue, as PILCOP's request does not cover them. (R. 311a-317a). Even if those rates were in issue, PILCOP's claim that the dental providers know how the rates they are paid differ respecting each MCO is wholly speculative.

A. It's per member per month.

Q. Okay. And does that contract – the contract between Coventry on the one hand and DentaQuest on the other, … [d]o you understand that to have a confidentiality provision, confidentiality requirements?

A. Yes.

Q. Okay. *And do you understand those confidentiality requirements pertain to the capitation rate information in that contract*?

A. *Yes.*

(R. 493a); see also (R. 333a) (testimony of HealthPartners); (R. 432a-433a) (testimony of Aetna); (R. 516a-517a) (testimony of Keystone). Thus, contrary to PILCOP's contention, DentaQuest is required to maintain the confidentiality of the rates paid by each MCO to it, notwithstanding the fact that it has separate relationships with more than one MCO.[16] Were DentaQuest to internally share the rates paid by each MCO, such would appear to be a breach of contract. PILCOP

[16] It is not hard to figure how DentaQuest might maintain these required confidences. The OOR's Hearing Officer suggested that DentaQuest could utilize separate negotiating teams for each MCO. DentaQuest certainly has the capacity for this; it is the third largest dental benefits administrator in the country, with seven locations and a thousand employees. See http://www.dentaquest.com/ (visited June 11, 2013). While PILCOP complains about a purported lack of evidence on this point, (PILCOP at 5 n.3), the evidence showed DentaQuest is contractually obligated to maintain confidentiality. In contrast, there is no evidence to back up PILCOP's claim that DentaQuest internally pools the rates paid by each MCO, in violation of confidentiality requirements.

obviously did not establish at the hearing that DentaQuest had breached its contracts with the MCOs.

Even putting aside its evidentiary failures, PILCOP's argument is logically fallacious. Just because more than one MCO uses the same dental subcontractor does not automatically mean the rates paid by the MCOs to DentaQuest lose their secret or confidential character. Even if one were to assume (incorrectly) that DentaQuest violates its confidentiality obligations to the MCOs and internally shares the rates paid by the MCOs, each MCO *still* would not know any rate paid by any other MCO to DentaQuest.[17] While it is possible that *DentaQuest* might obtain some kind of bargaining advantage over the MCOs in this hypothetical scenario, the *MCOs* still maintain a competitive advantage *as to each other* by keeping the rates they pay DentaQuest secret *from each other*. The MCOs *still*, in this hypothetical, protect and preserve their competitive advantage and interest. The fact that the MCOs have a common subcontractor thus is of no moment; it does not change the secret nature of the rates *as between the competing MCOs*. PILCOP's contention is just a red herring.

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[17] PILCOP oddly claims DentaQuest is an "agent" for the MCOs and is "negotiating on behalf of competitor MCOs." (PILCOP at 24, 25.) There is no evidence to suggest that is true. To the contrary, the MCOs and DentaQuest negotiate with each other at arm's length.

F. Other states are irrelevant.

PILCOP also repeatedly references alleged events that have taken place in other states, as if that matters. (PILCOP at 10, 11, 20 n.5, 21 & n.6, 25.) PILCOP's references to what might be happening in other states is both improper and, further, those collateral matters are irrelevant to this Pennsylvania case applying Pennsylvania law.

For starters, PILCOP's reference to matters in other states is inappropriate, as it flouts the evidentiary rulings of the Hearing Officer below. At the hearing, PILCOP attempted to introduce "evidence" and elicit testimony about other states. The Hearing Officer halted those lines of questioning, however, and refused to admit into evidence PILCOP's exhibits concerning other states, due to PILCOP's failure to lay a foundation and due to lack of relevance. (R. 655a) (rejecting admission of PILCOP's proposed Connecticut exhibit); (R. 658a-660a) (rejecting admission of PILCOP's proposed Wisconsin exhibit: "I still don't see the relevance of what Wisconsin is doing that pertains to Pennsylvania").

In spite of these rulings (which PILCOP conveniently fails to mention in its brief), PILCOP nevertheless tries to shoehorn into this case allegations about other states. It even goes so far as to attach materials to its brief that are not in the record, including the same Wisconsin document that the Hearing Officer refused to admit into evidence. See, e.g., Anam v. WCAB (Hahnemann), 537 A.2d 932, 934

(Pa. Commw. 1988) ("when an appellate court is petitioned to review an administrative agency decision, it may not consider matters not made part of the record before the administrative agency"); Starr v. Zdrok & Zdrok, P.C., 614 A.2d 1209, 1211-12 (Pa. Super. 1992) (rejecting consideration of document attached to brief that was not found in the record).

In any event, PILCOP's claims, for which it laid no foundation at the hearing,[18] shed no light on whether the *Pennsylvania* rates in issue here are exempt from disclosure under the *Pennsylvania* Right-to-Know Law. PILCOP just says that some rates have been disclosed in other jurisdictions – as if it is self-evident that the records requested here must be disclosed and will inflict no competitive harm on the MCOs. That is not the case. And even a cursory examination of the "evidence" from other states reveals it proves nothing here.[19] PILCOP's

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[18] While PILCOP makes passing reference to judicial notice, (PILCOP at 21), it fails to explain how these materials are judicially noticeable.

[19] PILCOP references three states in its brief: North Dakota, Wisconsin, and North Carolina. The "evidence" pertaining to each one is either distinguishable or irrelevant:

- North Dakota: PILCOP relies on a North Dakota attorney general opinion (which is not even binding law in North Dakota). (PILCOP at 21.) That opinion does not apply Pennsylvania law. Moreover, it appears that only a single MCO's rate information was at issue, and thus no issue of competitive harm seems to have been presented. The opinion also does not reference any confidentiality provision between the government and MCO, which is obviously different than this case. Further, the opinion states that "[p]ublic disclosure of contract prices is generally considered a part of doing business with the government," 1998 WL 1058312, at *4, but that cannot be the case here, given that DPW expressly agreed to confidentiality with the MCOs.

(footnote continued on next page)

speculative and unsubstantiated claims do not provide any basis for disclosure, particularly given the testimony of the live, sworn witnesses presented by the MCOs, all of whom testified to the negative competitive harm that would be suffered if the rates were released.

G. The MCOs and DPW have carried their burden of proof.

As demonstrated in their principal briefs, the MCOs and DPW have demonstrated that the requested materials are exempt from disclosure. In its brief, PILCOP merely nibbles at the edges of these proofs, but none of that is persuasive. Nowhere in its brief does PILCOP engage in any point-by-point or element-by-element discussion of the MCOs' and DPW's proofs and explain how and why the evidence presented is lacking. For example, PILCOP does not address the basic threshold set by the RTKL's definition of a "trade secret," which requires only "potential" economic value for that exemption to apply. See 65 P.S. §67.102. The

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- Wisconsin: PILCOP references a report by that state's "Legislative Audit Bureau." (PILCOP at 21.) That report does not pertain to Pennsylvania. Moreover, it actually *supports* the MCOs' contention that their rate information is confidential and proprietary, as it states on page 7 that "[t]he [MCOs] also consider their payments to [their subcontractors] to be proprietary." It appears the only reason certain limited information was disclosed in Wisconsin was through negotiations with the MCOs – not because Wisconsin law required disclosure.
- North Carolina: PILCOP references a North Carolina decision, Wilmington Star-News, Inc. v. New Hanover Regional Med. Ctr., Inc., 480 S.E.2d 53 (N.C. App. 1997). (PILCOP at 20 n.5, 25.) That case did not apply Pennsylvania law. That case also did not pertain to disclosure of rates in a program like HealthChoices. It instead dealt only with disclosure of price lists for a hospital's services to customers of a health plan. The court concluded that the lists could be deemed "trade secrets." Id. at 57. Ultimately, however, the court ruled for disclosure because of a peculiar aspect of the North Carolina statute, which protected only records that are the "property" of a "private person."

proofs advanced by the petitioners certainly clear that low bar. Yet PILCOP never even addresses that point – or any other – in any detail. In fact, by reciting many instances of testimony favorable to the petitioners, PILCOP seemingly concedes that the MCOs and DPW met their burden. (PILCOP at 5-9.)

On those occasions when PILCOP does appear to attack the proofs offered, it fails miserably. For example, PILCOP claims the MCOs would not suffer competitive harm from disclosure, and that instead only DPW would suffer harm. (PILCOP at 20-21.) While it is true that DPW would be harmed by disclosure, the MCOs demonstrated they *too* would be harmed. Yet PILCOP, citing a single page of the transcript, still claims "Coventry's witness likewise testified that if the rates were disclosed, *the party whose competitive position would be undermined is DPW*." (PILCOP at 21) (citing R. 500a; emphasis added). This statement is misleading, as *on the very next page of the transcript*, the Coventry witness testified that disclosure of rates "would *also* be a disadvantage to us [Coventry] competitively." (R. 501a.) That testimony is consistent with other testimony by the Coventry witness that disclosure would cause competitive harm to Coventry and the other MCOs. (R. 496a, 498a-499a, 509a-510a.) PILCOP's misleading claim has no basis in the record.

PILCOP similarly misleads by implying disclosure is mandated because the HealthChoices agreement between DPW and each MCO does not

prohibit the MCOs from disclosing the rates. (PILCOP at 5, 6, 20.) But just because a party might not be *prohibited* from doing something does not mean they automatically *would* do something. As the MCO witnesses uniformly testified, the MCOs would keep rates confidential *regardless* of whether the contract with DPW required confidential treatment. (R. 379a-380a, 415a-416a, 511a.) This is for the obvious reason that voluntary disclosure would cause competitive harm. And, for its part, DPW would not voluntarily disclose due to the harm that would be caused to the taxpayers in the form of the increased cost of the program. (R. 225a-226a.)

Finally, while PILCOP claims each MCO bears a separate burden here, it omits the fact that Dr. Henry Miller, an expert in the field of managed health care contract negotiations, testified for *each and every one of the MCOs*. (R. 673a-679a.) As previously set out at length in the principal United/Coventry brief, Dr. Miller testified unequivocally in support of exemption of the requested materials from disclosure. (See United/Coventry Br. at 17-18.) Similarly, the DPW witness, Allen Fisher, testified equally as to each MCO, and a number of the MCO witnesses testified about their broader experiences within the industry. (See, e.g., R. 374a, 495a.) In any event, each and every one of the MCOs' witnesses testified in full satisfaction of the requirements for exemption under the RTKL, as demonstrated in the petitioners' principal briefs. PILCOP's brief does not alter that reality.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in their principal brief, Petitioners UnitedHealthcare and HealthAmerica Pennsylvania respectfully request that this Court reverse the September 17, 2012 Final Determination of the Office of Open Records and order that no further action must be taken by the Pennsylvania Department of Public Welfare with respect to this matter.

Respectfully submitted,

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Dated: June 25, 2013

CERTIFICATE OF COMPLIANCE

I, Karl S. Myers, certify that this brief complies with the length limitation of Pa.R.A.P. 2135 because this brief contains 6,973 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135.

Karl S. Myers

CERTIFICATE OF SERVICE

I, Karl S. Myers, hereby certify that on June 25, 2013, I caused the foregoing to be filed with the Court, and served the same via US Mail, postage prepaid, upon the following:

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