IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENTAL BENEFIT PROVIDERS, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC. D/B/A UNITEDHEALTHCARE COMMUNITY PLAN, AND HEALTHAMERICA PENNSYLVANIA, INC. D/B/A COVENTRYCARES, Petitioners, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 945 CD 2013
AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., KEYSTONE MERCY HEALTH PLAN, AND DENTAQUEST, LLC, Petitioners, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 957 CD 2013
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, Petitioner, v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, Respondents.	No. 958 CD 2013 (CONSOLIDATED ACTIONS)

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

Petition For Review Of The Final Determination Of The Office Of Open Records, At Docket No.: AP 2012-2017

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to review the May 7, 2013 Final Determination of the Pennsylvania Office of Open Records pursuant to 42 Pa.C.S. § 763 and 65 P.S. § 67.1301.

II. ORDER OR OTHER DETERMINATION IN QUESTION

This appeal challenges the Final Determination of the Pennsylvania Office of Open Records ("OOR"), issued on May 7, 2013, in the matter of *James Eiseman and the Public Interest Law Center of Philadelphia v. Pennsylvania Department of Public Welfare, et al.*, Docket No. AP 2012-2017. A copy of the Final Determination is attached hereto as Appendix A.

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

> For the foregoing reasons, Requester's appeal is **granted** 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.

Appendix A, at 11.

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

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

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

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

Id. at 820.

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. Did the OOR err in holding that the records of dental subcontractors, who do not have a direct contract with the agency, are subject to disclosure as "public record(s) of the agency" under Section 506(d)(1) of the Pennsylvania Right-to-Know Law, where the plain language of that subsection of the statute does not include subcontractor records?

In its Final Determination dated May 7, 2013, the OOR held that Section 506(d) is applicable to records in the possession of the dental subcontractors, and thus those records are subject to disclosure under the RTKL.

B. Did the OOR err in concluding that the MCOs and subcontractors had failed to carry their burden of showing that the documents sought in the Request were protected from disclosure by either the "trade secret" exemption or the "confidential proprietary information" exemption in Section 708(b)(11) of the Pennsylvania Right-to-Know Law, where the MCOs and subcontractors presented extensive unrebutted testimony in their affidavits supporting application of each exemption?

In its Final Determination dated May 7, 2013, the OOR held that the MCOs and subcontractors had not met their burden of proving that the documents sought in the Request were protected by either the "trade secret" or "confidential proprietary information" exemption, and thus the DPW was required to produce those documents to the Requester.

C. Did the OOR err in holding that neither the Pennsylvania Uniform Trade Secrets Act nor Pennsylvania's HMO Regulations applied to protect the documents sought in the Request from disclosure?

In its Final Determination dated May 7, 2013, the OOR held that neither the Pennsylvania Uniform Trade Secrets Act (12 Pa. C.S. §§ 5301 *et seq.*) nor Pennsylvania' HMO regulations (28 Pa. Code § 9.604(a)(8)) applied to the documents sought in the Request.

V. STATEMENT OF THE CASE

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

1. Form of Action

This is a Petition for Review of the Final Determination of the OOR dated May 7, 2013. In the Final Determination, the OOR held that the documents sought in the Request were not protected from disclosure by Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. § 67.101, *et seq.*, and that the Pennsylvania Department of Public Welfare (the "DPW") was required to disclose them.

2. Brief Procedural History

This appeal involves the second request of the Requester seeking documents relating to dental rate information in the Southeast Zone of the HealthChoices Medicaid program administered by the DPW ("HealthChoices").

In the first request, dated June 17, 2011, the Requester sought the rates for dental services that the DPW pays to the five Medicaid Managed Care Organization ("MCOs") that participated in HealthChoices in the Southeast Zone during the period January 1, 2008 to June 15, 2011, and the rates that the MCOs paid for dental services during that period. The five MCOs are Aetna Better Health, Inc. ("Aetna"), Keystone Mercy Health Plan ("Keystone"), Health Partners of Philadelphia, Inc. ("Health Partners"), United Health Care Community Plan ("United"), and Coventry Health Care ("Coventry"). The DPW denied in part that

first request, and the Requester appealed to the OOR. The OOR reversed the DPW's partial denial, and the five MCOs and the DPW appealed that final determination to this Court. Those appeals have been consolidated and are currently pending (Docket Numbers 1935 CD 2012, 1949 CD 2012, and 1950 CD 2012).[1]

The request that is the subject of these consolidated appeals (the "Request") seeks different rate information than the first, namely, the rates that the dental subcontractors paid to the dental providers under Health Choices in the Southeast Zone, for the period July 1, 2008 until June 30, 2012.

The Requester submitted the Request to the DPW on October 3, 2012. On November 13, 2012, the DPW denied the Request. On December 3, 2012, the Requester filed an appeal to the OOR. On December 4, 2012, OOR Executive Director Terry Mutchler sent a letter to the Requester and the DPW constituting the Official Notice of Appeal. In that letter, Mutchler informed the DPW that it must notify any third party whose confidential or proprietary records may be subject to the appeal. On the same day, December 4, the DPW notified counsel for the third parties (including the MCOs and subcontractors) by email of the appeal.

[1] Those consolidated cases will be referred to herein as "Eiseman 1."

By letter dated December 18, 2012, Aetna, Keystone, Health Partners, and DentaQuest, LLC ("DentaQuest") (one of the two subcontractors whose rates are sought in the Request) sought permission to participate in the appeal. By separate letter the same day, United, Coventry, and Dental Benefit Providers, Inc. ("DBP") (the other subcontractor whose rates are sought in the Request) also sought permission to participate in the appeal. By letter dated December 21, 2012, the OOR granted permission to all seven third parties.[2]

The OOR issued the Final Determination on May 7, 2013.

The MCOs, the subcontractors, and the DPW all filed separate petitions for review before this Court. This Court consolidated the three petitions on July 26, 2013.

By Order dated August 8, 2013, this Court ordered that these consolidated petitions "present similar and related legal issues" to the cases consolidated at docket numbers 1935 CD 2012, 1949 CD 2012, and 1950 CD 2012, and that these consolidated cases would therefore be argued seriately with those cases on September 11, 2013.

B. Brief Statement of Prior Determination of Any Court

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

[2] These seven parties will be referred to herein as "the MCOs and subcontractors."

C. Name of Judge Whose Determination is to be Reviewed

The OOR Appeals Officer who issued the Final Determination was Kyle Applegate, Esquire.

D. Chronological Statement of Record Facts

Aetna, Keystone, Health Partners and DentaQuest incorporate by reference, as if fully set forth herein, the "Chronological Statement of Record Facts" in the March 25, 2013 brief of Aetna, Keystone and Health Partners in Eiseman 1 (the "Eiseman 1 Brief"). In addition, Aetna, Keystone, Health Partners and DentaQuest set forth the following facts.

1. The Parties

DentaQuest and DBP are dental subcontractors that participated in the Southeast Zone of the HealthChoices program during the relevant period. (R. 125a, 167a). During the relevant period, DentaQuest and DBP did not have direct contracts with the DPW; rather, the MCOs had a direct contract with the DPW, and DentaQuest and DBP subcontracted with the MCOs. (R. 125a-126a, 167a). DentaQuest and DBP, in turn, subcontracted with dental providers to provide dental services to each MCO's enrollees. (R. 127a, 167a).

During the relevant period, DentaQuest had subcontracts with Aetna, Keystone, Health Partners, and Coventry, and DBP had a subcontract with United. (R. 121a, 126a, 132a, 149a, 155a, 161a, 167a).

2. The Request

The Request seeks, for the period July 1, 2008 until June 30, 2012, any document 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." (R. 21a). The Requester specifically excluded from the Request any documents that it had previously requested from the DPW in the first request (the request that is the subject of Eiseman 1). (R. 21a). Unlike the first request, the Request specifically seeks rates that the dental subcontractors paid the dental providers during the relevant period. (R. 21a).

3. Evidence Presented in Affidavits to the OOR

Aetna, Keystone, Health Partners, and DentaQuest presented testimony to the OOR in the form of affidavits from the following witnesses: Denise M. Croce

of Aetna; John Sehi of Health Partners; William C. Morsell of Keystone; and Mark Haraway of DentaQuest.[3]

a. Denise M. Croce

Ms. Croce, who was the CEO of Aetna at the time of her affidavit before the OOR, has approximately 28 years of experience in the health care industry. (R. 149a). Ms. Croce states in her affidavit the following:

- Aetna considers documents and information showing the rates that either Aetna or its subcontractor DentaQuest paid to dental providers to be confidential, proprietary to Aetna, and Aetna's trade secrets. (R. 150a-151a).

- Consistent with standard industry practice, Aetna keeps provider rates confidential. Aetna's HealthChoices Agreement with the DPW specifically provides that rate information is confidential. (R. 151a).

- Other than required reporting to governmental agencies or as required by applicable law, Aetna never discloses provider rates to anyone outside Aetna. In those instances where Aetna is required to disclose such rates

[3] United, Coventry, and DBP also filed affidavits before the OOR. Those parties are separately represented by Karl S. Myers, Esquire, who is filing a separate brief on their behalf simultaneously with the filing of this brief.

to Pennsylvania agencies with oversight of Aetna, Aetna submits the rates in a confidential manner. (R. 151a).

- Aetna also takes steps to ensure that internal disclosure of provider rate information is as limited as possible, and that those Aetna employees with access to the information protect its confidentiality. Aetna provides confidentiality training to its employees to protect all confidential information. (R. 151a).

- Aetna maintains any documents containing rate information in both hard copy and electronic format. Hard copies of these documents are kept in a secure file cabinet with access limited to a "need to know" basis. Electronic copies of the documents are maintained in electronic files that are only made available to employees identified as having a business need for the information. Managers review, on a regular basis, the security rights of their staff to electronic folders. (R. 151a-152a).

- In those instances where Aetna uses provider information for the purpose of assisting committees within Aetna in evaluating a provider's or health plan's performance, information is presented with aggregate or blinded data to ensure that specific provider information or rates are not disclosed. (R. 152a).

- Aetna has expended substantial time, effort, and expense in developing its rates, in negotiating with DentaQuest, and in protecting the confidentiality of its rate information. (R. 152a).

- The disclosure of Aetna's and/or DentaQuest's rate information to Aetna's competitors, *i.e.*, other HMOs in the HealthChoices program, would substantially harm Aetna's and DentaQuest's ability to compete fairly in the market for reasonable contract rates. Armed with Aetna's and/or DentaQuest's rate information, Aetna's and/or DentaQuest's competitors could undercut Aetna and DentaQuest, causing both companies to suffer lost business. In addition, disclosure of the rate information of other HMOs or subcontractors to the providers could cause the providers to seek higher rates from Aetna and DentaQuest, to Aetna's and DentaQuest's economic detriment. For these reasons, Aetna's and/or DentaQuest's rate information has independent economic value to Aetna and, if disclosed, would have value to Aetna's competitors. (R. 152a).

- In addition, for these same reasons, the disclosure of Aetna's and/or DentaQuest's rate information would cause substantial harm to Aetna's competitive position if disclosed. (R. 152a).

- The documents and information sought in the Request have independent economic value to Aetna. (R. 153a).

- Because of Aetna's efforts to maintain the confidentiality of its and DentaQuest's provider rates as described above, it would be very difficult for others to acquire or duplicate those rates by legitimate means. (R. 153a).

b. John Sehi

John Sehi, the Vice President of Finance at Health Partners, has 31 years of experience in the health care industry. (R. 155a). Mr. Sehi states in his affidavit the following:

- Health Partners considers documents and information showing the rates that either Health Partners or its subcontractor DentaQuest paid to dental providers to be confidential, proprietary to Health Partners, and Health Partners' trade secrets. (R. 156a-157a).

- Consistent with standard industry practice, Health Partners keeps provider rates confidential. Health Partners' HealthChoices Agreement with DPW specifically provides that rate information is confidential. (R. 157a).

- Other than required reporting to governmental agencies or as required by applicable law, Health Partners never discloses its rates to anyone outside Health Partners. In those instances where Health Partners is required to disclose its rates to Pennsylvania agencies with oversight of Health Partners, Health Partners submits the rates in a confidential manner. (R. 157a).

- Health Partners also takes steps to ensure that internal disclosure of rate information is as limited as possible, and that those Health Partners employees with access to the information protect its confidentiality. Health Partners provides confidentiality training to its employees to protect all confidential information. Health Partners limits access to rate information to senior management and those employees with specific need for the information in the performance of their jobs, such as designated contract negotiators and managers with specific business accountability. (R. 157a).

- Health Partners maintains documents containing rate information in both hard copy and electronic format. Access to these documents is limited to a "need to know" basis. Electronic copies of the documents are maintained in electronic files that can only be accessed by employees

identified as having a business need for the information. Health Partners also ensures that managers review, on a regular basis, the security rights of their staff to electronic folders. (R. 157a-158a).

- Health Partners has expended substantial time, effort, and expense in developing its rates, in negotiating with DentaQuest, and in protecting the confidentiality of its rate information. (R. 158a).

- The disclosure of Health Partners' and/or DentaQuest's rate information to Health Partners' competitors, *i.e.*, other HMOs in the HealthChoices program, would substantially harm Health Partners' and DentaQuest's ability to compete fairly in the market for reasonable contract rates. Armed with Health Partners' and/or DentaQuest's rate information, Health Partners' and/or DentaQuest's competitors could undercut Health Partners and DentaQuest, causing both companies to suffer lost business. In addition, disclosure of the rate information of other HMOs or subcontractors to the providers could cause the providers to seek higher rates from Health Partners and DentaQuest, to Health Partners' and DentaQuest's economic detriment. For these reasons, Health Partners' and/or DentaQuest's rate information has independent economic value to

Health Partners and, if disclosed, would have value to Health Partners' competitors. (R. 158a).

- In addition, for these same reasons, the disclosure of Health Partners' and/or DentaQuest's rate information would cause substantial harm to Health Partners' competitive position if disclosed. (R. 158a).

- The documents and information sought in the Request have independent economic value to Health Partners. (R. 158a).

- Because of Health Partners' efforts to maintain the confidentiality of its and DentaQuest's provider rates as described above, it would be very difficult for others to acquire or duplicate those rates by legitimate means. (R. 159a).

c. William C. Morsell

Mr. Morsell, a Senior Vice-President of Keystone, has approximately 41 years of experience in the health care insurance industry. (R. 161a). Mr. Morsell states in his affidavit the following:

- Keystone considers documents and information showing the rates that either Keystone or its subcontractor DentaQuest paid to dental providers to be

confidential, proprietary to Keystone, and Keystone's trade secrets. (R. 162a).

- Consistent with standard industry practice, Keystone keeps provider rates confidential. Keystone's HealthChoices Agreement with the DPW specifically provides that rate information is confidential. (R. 163a).

- Other than required reporting to governmental agencies or as required by applicable law, Keystone never discloses provider rates to anyone outside Keystone. In those instances where Keystone is required to disclose such rates to Pennsylvania agencies with oversight of Keystone, Keystone submits the rates in a confidential manner. (R. 163a).

- Keystone also takes steps to ensure that internal disclosure of rate information is as limited as possible, and that those Keystone employees with access to the information protect its confidentiality. Keystone provides confidentiality training to its employees to protect all confidential information. Keystone limits access to rate information to senior management and those employees with specific need for the information in the performance of their jobs, such as designated contract negotiators and managers with specific business accountability. (R. 163a).

- Keystone maintains any documents containing rate information in hard copy format. These copies are kept in locked, fireproof file cabinets with access limited to a "need to know" basis. (R. 164a).

- Keystone has expended substantial time, effort, and expense in developing its rates, in negotiating with DentaQuest, and in protecting the confidentiality of its rate information. (R. 164a).

- The disclosure of Keystone's and/or DentaQuest's rate information to Keystone's competitors, *i.e.*, other HMOs in the HealthChoices program, would substantially harm Keystone's and DentaQuest's ability to compete fairly in the market for reasonable contract rates. Armed with Keystone's and/or DentaQuest's rate information, Keystone's and/or DentaQuest's competitors could undercut Keystone and DentaQuest, causing both companies to suffer lost business. In addition, disclosure of the rate information of other HMOs or subcontractors to the providers could cause the providers to seek higher rates from Keystone and DentaQuest, to Keystone's and DentaQuest's economic detriment. For these reasons, Keystone's and/or DentaQuest's rate information has independent economic value to Keystone and, if disclosed, would have value to Keystone's competitors. (R. 164a).

- In addition, for these same reasons, the disclosure of Keystone's rate information would cause substantial harm to Keystone's competitive position if disclosed. (R. 164a).

- The documents and information sought in the Request have independent economic value to Keystone. (R. 164a).

- Because of Keystone's efforts to maintain the confidentiality of its and DentaQuest's provider rates as described above, it would be very difficult for others to acquire or duplicate those rates by legitimate means. (R. 164a).

d. Mark Haraway

Mr. Haraway, Regional Vice President of DentaQuest, has approximately 23 years of experience in the health care industry. (R. 167a). Mr. Haraway states in his affidavit the following:

- DentaQuest considers documents and information showing the rates that DentaQuest paid to dental providers to be confidential, proprietary to DentaQuest, and DentaQuest's trade secrets. (R. 168a).

- Consistent with standard industry practice, DentaQuest keeps provider rates confidential. Each subcontract that DentaQuest has with the HMOs contains confidentiality provisions that protect from disclosure rate

information, including the rates that DentaQuest pays to dental providers. (R. 168a-169a).

- DentaQuest takes steps to ensure that internal disclosure of rate information is as limited as possible, and that those DentaQuest employees with access to the information protect its confidentiality. DentaQuest provides confidentiality training to its employees to protect all confidential information. DentaQuest limits access to rate information to senior management and those employees with specific need for the information in the performance of their jobs, such as designated contract negotiators and managers with specific business accountability. (R. 169a).

- DentaQuest maintains documents containing rate information in both hard copy and electronic format. Access to these documents is limited to a "need to know" basis. Electronic copies of the documents are maintained in electronic files that can only be accessed by employees identified as having a business need for the information. DentaQuest also ensures that managers review, on a regular basis, the security rights of their staff to electronic folders. (R. 169a).

- DentaQuest has expended substantial time, effort, and expense in developing its provider rates, and in protecting the confidentiality of its rate information. (R. 169a).

- The disclosure of DentaQuest's rate information to DentaQuest's competitors, *i.e.*, other subcontractors in the HealthChoices program, would substantially harm DentaQuest's ability to compete fairly in the market for reasonable contract rates. Armed with DentaQuest's rate information, DentaQuest's competitors could undercut DentaQuest, causing DentaQuest to suffer lost business. In addition, disclosure of the rate information of other HMOs or subcontractors to the providers could cause the providers to seek higher rates from DentaQuest, to DentaQuest's economic detriment. For these reasons, DentaQuest's rate information has independent economic value to DentaQuest and, if disclosed, would have value to DentaQuest's competitors. (R. 169a-170a).

- In addition, for these same reasons, the disclosure of DentaQuest's rate information would cause substantial harm to DentaQuest's competitive position if disclosed. (R. 170a).

- The documents and information sought in the Request have independent economic value to DentaQuest. (R. 170a).

- Because of DentaQuest's efforts to maintain the confidentiality of its provider rates as described above, it would be very difficult for others to acquire or duplicate those rates by legitimate means. (R. 170a).

In response to these affidavits, the Requester presented no evidence before the OOR, by affidavit or otherwise.[4]

E. Brief Statement of the Determination Under Review

The OOR's Final Determination held that the documents sought in the Request were "record(s) of the agency," and were not protected from disclosure by either the "trade secret" or "confidential proprietary information" exemptions from disclosure under the RTKL, or any other exemption from disclosure, and that DPW must disclose them to the Requester.[5]

[4] The Requester's letter brief to the OOR is at R. 215a-238a.

[5] Aetna, Keystone, Health Partners and DentaQuest raised the questions sought to be reviewed in this appeal in their letter briefs to the OOR. (R. 138a-147a, 252a-258a).

VI. SUMMARY OF ARGUMENT

This Court should exercise its broad powers of review in this appeal and reverse the OOR's decision, because the OOR made several errors in its Final Determination.

First, the OOR erred in holding that the dental subcontractors' records are subject to disclosure under 65 P.S. §67.506(d)(1), the "agency possession" section of the RTKL. Records in the possession of third parties only become subject to disclosure under that section if they are in the possession of a third party "*with whom the agency has contracted* to perform a governmental function." 65 P.S. § 67.506(d)(1) (emphasis added). Thus, by the statute's plain language, records in the possession of a third party with whom the agency has *not* contracted, such as DentaQuest, are not "public record(s) of the agency," and must not be disclosed. Instead of following the plain language of the RTKL, the OOR ordered the subcontractors' documents to be disclosed, improperly using a policy justification that "any other interpretation would frustrate the intent of Section 506(d)."

Second, the OOR erred in holding that the MCOs and subcontractors had failed to carry their burden to show that either the "trade secret" or "confidential proprietary information" exemption from disclosure applied. The affidavits submitted by the MCOs and subcontractors constitute substantial and unrebutted testimony that was more than sufficient evidence to satisfy either exemption. The

MCOs and subcontractors presented affidavits from company executives who stated that the information in documents sought in the Request is protected by the company as its confidential, proprietary information, and that the company would suffer competitive harm if the information were released. The OOR illogically seized upon language in certain affidavits to the effect that the rates at issue vary and are renegotiated periodically, but failed to explain how that language negates the MCOs' and subcontractors' strong showing in support of the exemptions. As the Requester provided no evidence on the applicability of the exemptions, the MCOs' and subcontractors' affidavits clearly met the preponderance of the evidence standard for applying the 708(b)(11) exemptions.

Third, the OOR erred in holding that neither the Pennsylvania Uniform Trade Secrets Act (12 Pa. C.S. §§ 5301 *et seq.*) (the "PUTSA") nor Pennsylvania's HMO regulations (28 Pa. Code § 9.604(a)(8)) applied to the documents sought in the Request. The RTKL specifically protects from disclosure any documents that are exempt from being disclosed under "any other Federal or State law or regulation," which includes those two provisions of Pennsylvania law. If, as it was required to, the OOR had separately applied the PUTSA to these records, it would have had to conclude that the documents were protected from disclosure. In addition, the HMO regulations at 28 Pa. Code § 9.604(a)(8) specifically protect from disclosure the documents sought in the Request.

For all these reasons, this Court should reverse the May 7, 2013 Final Determination of the OOR and order that no further action need be taken by the DPW with respect to this matter.

VII. ARGUMENT[6]

A. The OOR Erred in Holding that Subcontractors' Records Were "Record(s) of the Agency" and Thus Subject to Disclosure Under Section 506(d)(1) of the RTKL.

The OOR applied Section 506(d)(1) of the RTKL, the "agency possession" section, to determine that the records of DentaQuest, a subcontractor to Keystone, Aetna, Health Partners, and Coventry that did not have a direct contract with the DPW, were "public record(s) of the agency" subject to disclosure. But in so doing, the OOR improperly ignored the plain language of the statute in favor of a policy determination of how the law ***should*** work, rather than how it is written.[7]

Section 506(d)(1) reads as follows:

> (d) **Agency possession**.-
>
> > (I) 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 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).

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[6] Pursuant to Pa.R.A.P. 2137, Aetna, Keystone, Health Partners and DentaQuest adopt by reference the Eiseman 1 Brief, as well as the reply brief filed by Aetna, Keystone and Health Partners in that case on July 1, 2013 ("Eiseman1 Reply Brief"). In addition, Aetna, Keystone, Health Partners and DentaQuest adopt by reference the briefs filed in this appeal by the other petitioners.

[7] Aetna, Keystone, Health Partners and DentaQuest raised this issue in their April 3, 2013 reply brief before the OOR. (R. 252a-258a).

Thus, by the statute's plain language, to be a "public record of the agency" subject to disclosure under this subsection, the record must be in the possession of "a party ***with whom the agency has contracted...***" *Id.* (emphasis added). Records in the possession of a third party with whom the agency has *not* contracted, such as DentaQuest, are not "record(s) of the agency," and must not be disclosed. But instead of following time-honored rules of statutory construction, the OOR made a policy determination:

> While the [DPW] does not contract directly with the dental subcontractors, the dental subcontractors contract with the MCOs to perform services for the [DPW]. 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.

Appendix A, at 8 (emphasis added).[8]

This Court has recently had occasion to apply statutory construction principles in determining the meaning of a statute by referring to the statute's plain language:

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[8] To the extent that the OOR relied, in this part of the Final Determination (*see* Appendix A, at 7), on its earlier decision on the first request, Aetna, Keystone, Health Partners and DentaQuest hereby incorporate by reference the arguments in the Eiseman 1 Brief and Eiseman1 Reply Brief.

> When interpreting a statute, this Court is guided by the Statutory Construction Act of 1972, 1 Pa.C.S. §§ 1501–1991, which provides that "the object of all interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). "The clearest indication of legislative intent is generally the plain language of a statute." *Walker v. Eleby,* 577 Pa. 104, 5123, 842 A.2d 389, 400 (2004). A plain language approach also requires the court to "listen attentively to what a statute says[;][o]ne must also listen attentively to what it does not say." *Kmonk–Sullivan v. State Farm Mutual Insurance Co.,* 567 Pa. 514, 525, 788 A.2d 955, 962 (2001) (quoting Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L.Rev. 527, 536 (1947)). Only "[w]hen the words of the statute are not explicit" may this Court resort to statutory construction. 1 Pa.C.S. § 1921(c).

Hospital & Healthsystem Ass'n of Pennsylvania v. Ins. Comm., -- A.3d --, 2013 WL 4033850 at *5 (Pa. Commw. Aug. 9, 2013).

In *Hospital & Healthsystem Ass'n*, the issue before this Court was the proper interpretation of Section 712(d)(1) of the Medical Care Availability and Reduction of Error (MCARE) Act. That section established a formula by which the MCARE Fund calculates the funds it will need for the following year. The section reads as follows:

> For calendar year 2003 and for each year thereafter, the fund shall be funded by an assessment on each participating health care provider. Assessments shall be levied by the department on or after January 1 of each year. The assessment shall be based on the prevailing primary premium for each participating health care

> provider and shall, ***in the aggregate, produce an amount sufficient to do all of the following***...

Id. at *4 (emphasis added).

What followed were four obligations of the Fund, including providing a reserve amount of 10% of the other obligations. The dispute was over the interpretation of the phrase highlighted above.

The MCARE Fund's interpretation of the phrase allowed for an accumulation of funds from prior years, which the petitioners in that case, health care providers and trade associations, claimed was not justified by the statute and resulted in overcharges. This Court agreed with the petitioners that the MCARE Fund's interpretation distorted the actual language of the statute, and amounted to replacing the phrase "in the aggregate, produce an amount sufficient to do all of the following" with the phrase "be equal to the sum of the following." *Id.* at *5. This Court held that such an interpretation was improper: "As noted, in construing statutes, courts must be mindful of what the legislature did *not* say. Here, the legislature did *not* say that "the annual assessment shall be equal to the sum of the following four 'sums.'" *Id.* This Court went on to describe other ways in which "[t]he ***legislature's silence is significant.***" *Id.* (emphasis added).

Here, Section 506(d)(1) of the RTKL does *not* use the word "subcontractor." It merely says "in the possession of ***a party with whom the agency has***

contracted." 65 P.S. § 67.506(d)(1) (emphasis added). As the MCARE Fund's interpretation changed the plain language of the statute, here the OOR's interpretation of the statute adds, after "a party with whom the agency has contracted" the words "or a subcontractor of that party." As in *Hospital & Healthsystem Ass'n*, the legislature's silence here is significant—if it had intended to include subcontractors in Section 506(d)(1), it would have done so.

In *Hospital & Healthsystem Ass'n*, the MCARE Fund made a policy argument in support of its interpretation of the statute, arguing that its construction would "promote stability in annual assessments," and "offer[] potential uses for the unspent balances in the MCARE Fund." *Id.* at *6. But this Court stated that "[t]hese suggested uses of the unspent balances may be good ideas, but they are not provided in the MCARE Act." *Id.* This Court concluded "[w]e reject the MCARE Fund's proffered policy and statutory construction arguments offered to support its constructions of Section 712(d)(1) of the MCARE Act." *Id.* at *9; *see also Commonwealth v. Kerstetter*, 62 A.3d 1065, 1069 (Pa. Commw. 2013) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." (quoting Section 1921(b) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1921(b)).

Similarly here, this Court should reject the OOR's proffered policy and statutory construction arguments used to justify its extension of Section 506(d)(1) to subcontractors such as DentaQuest. With little analysis, the OOR concludes that these records (of subcontractors) ***should*** be subject to public access," because "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." Appendix A, at 8 (emphasis added). But the words of Section 506(d)(1) are clear and unambiguous—"in the possession of a party with whom the agency has contracted"—and cover only direct contractors with the agency. The OOR improperly disregarded the letter of these clear and unambiguous words of the RTKL "under the pretext of pursuing its spirit."

Although this Court has not previously squarely addressed the issue of the reach of Section 506(d)(1), it has indicated that the statute should not be extended to subcontractors. For example, in *Allegheny County Department of Administrative Services v. Parsons*, 61 A.3d 336 (Pa. Commw. 2013), this Court considered whether certain payroll information of a government contractor was encompassed within the "agency possession" provision of Section 506(d). This Court stated 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).[9] Moreover, in *Parsons*, this Court emphatically disapproved of parties substituting public policy arguments for statutory interpretation:

> Requester also asserts that as a matter of public policy, this information *should* be available for public scrutiny. We decline Requester's invitation: ***we cannot permit the public's right to know to devolve from a matter of statutory interpretation into a subjective exercise that varies depending on the perspective of the beholder.***

Id. at 347 (emphasis added).

The OOR erred in substituting its own view on how the RTKL *should* work for the statute's plain language. Thus, the OOR's decision that DentaQuest's records were subject to disclosure must be reversed.[10]

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[9] In *Parsons*, this Court also takes the requester in that case to task for arguing that government contractors are on par with government agencies for purposes of the RTKL:

> Requester seems to be under the misimpression that all records of government contractors are subject to the RTKL. ... Section 506(d) prescribes more restricted access precisely because it applies to private entities. ... Contrary to Requester's advocacy, a private contractor is not subject to the RTKL the same way as the government agency, and a private contractor's employee information is likewise not subject to the RTKL in the same way. All records "of" contractors who perform a government function are not accessible under Section 506(d).

Id. at 345-46.

[10] It also bears noting that the OOR has consistently ruled that the lack of a contract with the agency removes a third party's documents from Section 506(d)(1), including in two very recent opinions. *See, e.g., McCarthy v. West Pennsboro Twp.*, Dkt. No. AP 2013-1097, 2013 WL 3963991 (OOR July 25, 2013) at *3 ("Here, MDIA is not a contractor of the Township, but is a

B. The OOR Erred in Concluding that the MCOs and Subcontractors Had Not Carried Their Burden of Showing that the Documents Sought in the Request Met the "Trade Secret" or "Confidential Proprietary Information" Exemptions from Disclosure

The OOR concluded that the MCOs and subcontractors had not met their burden of proving that the records sought in the Request were protected from disclosure by Section 708(b)(11) of the RTKL, which exempts "a record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). "Trade secret" and "confidential proprietary information" are defined separately under the RTKL and therefore must be separately applied; if a party asserting these exemptions proves that ***either one*** applies, the records are exempt. *See Office of Governor v. Bari*, 20 A.3d 634, 647-48 (Pa. Commw. 2011). The OOR concluded that the MCOs and subcontractors had not established either

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contractor of the Western Cumberland Council of Governments in Cumberland County. Because MDIA does not maintain any contractual relationship with the Township, the Township is not obligated to obtain any responsive records from MDIA."); *VanSickle v. London Grove Twp.*, Dkt. No. AP 2013-1095, 2013 WL 3963986 (OOR July 24, 2013) at *3 (The township "attests that both CKC Landscaping and Coatesville Country Club are private businesses and have never been third party contractors of the township. Therefore, any records in the possession of these entities are not public records" under section 506(d)(1)); *Tignall v. Dallastown Area Sch. Dist.*, Dkt. No. AP 2011-1434, 2011 WL 6145408 (OOR Dec. 2, 2011) at *4 ("[T]he District is not required to obtain records from PAG that do not exist in the possession of the District as there is no evidence that a contractual relationship between the District and PAG exists such that Section 506(d) would apply."); *Campbell v. Souderton Area Sch. Dist.*, Dkt. No. AP 2010-1212, 2011 WL 382839 (OOR Jan. 21, 2011) at *4 ("The District also alleged under penalty of perjury that '[a]lthough the District is required by statute to compensate the tax collectors for their efforts, the District has no contract with them.' Accordingly, the OOR finds that the analysis under 65 P.S. §67.506(d) is inapplicable based on the nonexistence of a contractual relationship.").

exemption because they had not shown either (1) that they would suffer "substantial harm" if this information were disclosed (and thus had not shown that the information constituted "confidential proprietary information")[11] or (2) that the information derives economic value from not being generally known to competitors (and thus had not shown that the information constituted "trade secrets").[12] *See* Appendix A, at 10. But the OOR's conclusion ignores the substantial evidence presented by the MCOs and subcontractors supporting each of these exemptions, and relies upon an inference that finds no support in the record.[13]

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[11] The RTKL defines "confidential proprietary information" as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102.

[12] "Trade secret" is defined in the RTKL as follows:

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

65 P.S. § 67.102.

[13] Aetna, Keystone, Health Partners and DentaQuest raised this issue in both their January 14, 2013, brief and in their April 3, 2013 reply brief before the OOR. (R. 138a-147a, 252a-258a). To the extent that the OOR's decision on this issue was based upon this Court's decision in *Lukes v. Department of Public Welfare*, 976 A.2d 609, 618 (Pa. Commw. 2009) (*see* Appendix A, at 9-11), Aetna, Keystone, Health Partners and DentaQuest incorporate by reference, as if fully set forth herein, the Eiseman 1 Brief and Eiseman1 Reply Brief.

The OOR admits that the MCOs and subcontractors "consider rate information confidential," that they "attest that they each take measures to keep rate information confidential," and that they "attest that the 'harm' that they will suffer if this rate information is released is competition from competitors." Appendix A, at 10. But the OOR then seizes on language in the affidavits of United, Coventry and DBP—to the effect that dental rates vary by dental practice and are periodically "reevaluated and possibly renegotiated"—to reach the following conclusion:

> 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 (sic) or value, ***as the information may very well may (sic) be "outdated" by the time of its release.***

Appendix A, at 11 (emphasis added).

There are several problems with the OOR's faulty reasoning, any one of which would warrant reversal on its own.

First, the OOR's statement "the information may very well may (sic) be outdated by the time of its release" finds no support in the record. None of the affidavits provides any factual information about ***when or how often*** rates are "reevaluated" or "renegotiated," or whether any release of rate information would ever be "outdated." Thus, the OOR's leap, from the affidavits' benign reference to

rates being subject to change to "the information may very well may (sic) be outdated by the time of its release," is totally unjustified and constitutes a legal error. *See Equitable Gas Co. v. Pennsylvania Public Utility Comm.,* 405 A.2d 1055, 1059 (Pa. Commw. 1979) (holding that it is an error of law to consider evidence outside the record). The OOR appears to be saying that only when rates are totally static and unchanging would their release result in competitive harm. This argument simply makes no sense. As this is the only factual basis upon which the OOR reaches the conclusion 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," this conclusion is erroneous.

Second, the OOR's "no evidence" conclusion flies in the face of the facts that ***are*** in the record. Each of the affidavits states clearly that release of rates would result in competitive harm. The OOR fails to appreciate the important connection between the efforts that the MCOs and subcontractors undertake to protect the rate information and the competitive value of the information to them—if, as the OOR concludes, there is no current competitive significance to the rate information and the MCOs and subcontractors would not be harmed by its release, why would they go to such lengths to protect the confidentiality of the information? The OOR decision provides no explanation. In fact, it is precisely because of the competitive value of the rate information and the harm that would

result from its disclosure that the MCOs and subcontractors take such substantial steps to guard the information and maintain its confidentiality.

Third, the OOR erred in failing to apply the proper evidentiary standard. The MCOs' and subcontractors' burden is to prove by a preponderance of the evidence that ***either*** the "trade secret" ***or*** the "confidential proprietary information" exemption applies. 65 P.S. § 67.708(a)(1); *Allegheny County Dep't of Admin. Svcs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. 2011). This Court has stated that "[a] preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party." *Lehigh Valley Transportation Services, Inc. v. Public Utility Comm.*, 56 A.3d 49, 56 n.6 (Pa. Commw. 2012) (citing *O'Toole v. Borough of Braddock*, 155 A.2d 848, 850 (Pa. 1959)). Here, the OOR appears to have concluded that the MCOs and subcontractors had not met their burden to prove the applicability of either exemption based solely upon the language from the three affidavits quoted above. The OOR does not explain how it concluded that these lines from certain affidavits negate the substantial showing made by the MCOs and subcontractors through the affidavits, but the OOR certainly did not apply a preponderance of the evidence standard as required by the RTKL. We need look no further than the fact that the Requester presented ***no evidence*** on the issue to counter the MCOs' and subcontractors' strong showing.

That showing consisted of the following sworn evidence from Aetna, Keystone, Health Partners and DentaQuest:

- Each company considers documents and information showing the rates that DentaQuest paid to dental providers to be confidential, proprietary, and their trade secrets. (R. 150a-151a, 156a-157a, 162a, 168a).

- Consistent with standard industry practice, each company keeps provider rates confidential. Keystone's, Aetna's, and Health Partners' contracts with the DPW specifically provide that rate information is confidential, and each subcontract that DentaQuest has with the MCOs contains confidentiality provisions that protect from disclosure rate information, including the rates that DentaQuest pays to dental providers. (R. 151a, 157a, 163a, 168a-169a).

- Each company takes steps to ensure that internal disclosure of rate information is as limited as possible, and that those employees with access to the information protect its confidentiality. Each provides confidentiality training to its employees to protect all confidential information, and limits access to rate information to senior management and those employees with specific need for the information in the performance of their jobs. (R. 151a, 157a, 163a, 169a).

- Each company maintains copies of the documents containing rates in files that can only be accessed by employees identified as having a business need for the information. (R. 151a-152a, 157a-158a, 164a, 169a).

- Each company has expended substantial time, effort, and expense in developing provider rates, and in protecting the confidentiality of the rate information. (R. 152a, 158a, 164a, 169a).

- The disclosure of rate information to the companies' competitors or to dental providers would substantially harm their ability to compete fairly in the market for reasonable contract rates. This is because upon receiving the confidential rate information, their competitors could undercut the companies, causing them to suffer lost business. In addition, disclosure of the rate information of other MCOs or subcontractors to the providers could cause the providers to seek higher rates from the companies to their economic detriment. For these reasons, the rate information has independent economic value to the companies and, if disclosed, would have value to their competitors. (R. 152a, 158a, 164a, 169a-170a).

- Because of the companies' efforts to maintain the confidentiality of their provider rates, it would be very difficult for others to acquire or duplicate those rates by legitimate means. (R. 153a, 159a, 164a, 170a).

The showing made by Aetna, Keystone, Health Partners and DentaQuest easily meets the definition of "trade secret" in the RTKL. In addition, the showing is more than adequate to meet the test for "substantial harm" under the "confidential proprietary information" exemption.[14] While meeting ***either*** exemption is sufficient to protect the information from disclosure, both are met here.

C. The OOR Erred In Holding that Neither the Pennsylvania Uniform Trade Secrets Act Nor Pennsylvania's HMO regulations Applied to Protect the Documents Sought in the Request from Disclosure

Even if the documents sought in the Request were not specifically exempted pursuant to subsection 708(b)(11), they would still not meet the definition of "public records" because they are "exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree." 65 P.S. § 67.102.

[14] Aetna, Keystone, Health Partners and DentaQuest hereby incorporate by reference, as if fully set forth herein, the discussion of *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. 2011) in the Eiseman 1 Brief (*see* pages 30-35). For all of the reasons stated therein, the factual showing made here more than suffices under this Court's holding in the *Giurintano* case.

Specifically, a Pennsylvania state law (the PUTSA) and state regulations (Pennsylvania's HMO regulations) protect such rates from disclosure.[15]

Relying on its final determination on the first request, the OOR held in this case 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.'" Appendix A, at 5 (quoting *Eiseman v. DPW*, OOR Dkt. AP 2011-1098, 2012 PA O.O.R.D. LEXIS 1198)). But as Aetna, Keystone and Health Partners argued in the Eiseman1 Brief (at pages 35-38), the OOR was required to separately consider whether the documents are "exempt from being disclosed under any other Federal or State law or regulation," 65 P.S. § 67.102, and thus was required to separately apply the PUTSA.

The PUTSA, 12 Pa.C.S.A. § 5301, *et seq.*, provides for injunctive relief and recovery of damages for misappropriation of a trade secret. 12 Pa.C.S.A. §§ 5302-04. Pennsylvania courts consider the following factors in determining whether information qualifies as a "trade secret" under Pennsylvania law: (1) the extent to which the information is known outside of the company's business; (2) the extent to which the information is known by employees and others involved in the company's business; (3) the extent of the measures taken by the company to guard

[15] Aetna, Keystone, Health Partners and DentaQuest raised this issue in their January 14, 2013, brief before the OOR. (R. 138a-147a).

the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money the company spent in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated legitimately by others. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010). Had the OOR separately applied this test, as it was required to do under the RTKL, it would have had to conclude that the MCOs and subcontractors had satisfied it by their substantial showing as summarized above. Therefore, the PUTSA provides a separate and independent basis to protect the documents from disclosure under the definition of "public records" in the RTKL.

Moreover, Pennsylvania's HMO regulations provide that "reimbursement information" contained in "standard form health care provider contracts," which are submitted annually to the Pennsylvania Department of Health, "may not be disclosed or produced for inspection or copying to a person other than the Secretary or the Secretary's representatives, without the consent of the plan which provided the information, unless otherwise ordered by a court." 28 Pa. Code § 9.604(a)(8). "Reimbursement information" includes rates paid to dental providers. Because the MCOs do not consent to the release of records containing reimbursement information, and because no court has ordered their disclosure,

those records are exempt from disclosure under § 9.604(a)(8) (and thus are not "public records" subject to disclosure under the RTKL).

The OOR, in a cursory analysis, concluded that "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 [DPW]'s disclosure of the records at issue." Appendix A, at 5-6. But the OOR fails to explain why only a regulation of the DPW can protect the documents from disclosure. The definition of "public record" specifically excludes documents that are "exempt from being disclosed under ***any other Federal or State law or regulation***." 65 P.S. § 67.102 (emphasis added). The word "any" is significant, in that it encompasses the regulations of all state agencies, not just the DPW. The statute does not say "any other state regulation of the agency from whom the records are sought." It simply says "any other...State...regulation." Again applying statutory construction principles, *Hospital & Healthsystem Ass'n*, *supra*, the OOR erred in failing to apply the RTKL's plain language and extend the protections contained in the definition of "public record" to the Department of Health regulation. Thus, § 9.604(a)(8) provides a separate and independent basis for protecting the documents sought in the Request from disclosure.

VIII. CONCLUSION

For all these reasons, Aetna, Keystone, Health Partners and DentaQuest respectfully request an order of this Court reversing the May 7, 2013 Final Determination of the OOR and ordering that no further action need be taken by the DPW with respect to this matter.

Respectfully submitted,

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DATED: August 20, 2013

APPENDIX A

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES EISEMAN AND	:	
THE PUBLIC INTEREST LAW CENTER	:	
OF PHILADELPHIA,	:	
Complainant	:	
	:	
v.	:	**Docket No.: AP 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 records[2] 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 readably 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

Kyle Applegate

APPEALS OFFICER
KYLE APPLEGATE, ESQ.

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CERTIFICATE OF SERVICE

I, Christopher H. Casey, hereby certify that on the 20th day of August 2013, I caused to be served two (2) copies of the Brief and Reproduced Record of Petitioners Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC, by the following means of service, on the following:

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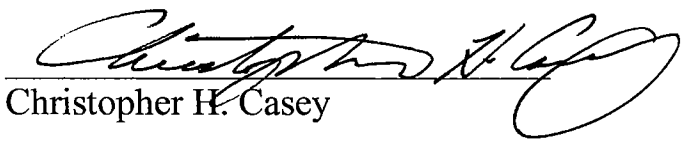

Christopher H. Casey