IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 945, 957 & 958 CD 2013 (consolidated actions)

DENTAL BENEFIT PROVIDERS, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC., & HEALTHAMERICA PENNSYLVANIA, INC. d/b/a COVENTRYCARES
Petitioners,

v.

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

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

v.

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE
Petitioner,

v.

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

BRIEF OF PETITIONERS DENTAL BENEFIT PROVIDERS, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC., & HEALTHAMERICA PENNSYLVANIA, INC. d/b/a COVENTRYCARES

On petition for review of the May 7, 2013 Final Determination of the Office of Open Records in Eiseman v DPW, OOR Docket No. 2012-2017

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Petitioners Dental Benefit Providers, Inc. ("DBP"), UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan ("United"), and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares ("Coventry"), hereby submit this brief in support of their petition for review in these consolidated matters.[1] For the reasons set forth below, DBP, United, and Coventry each submit that this Court should reverse the May 7, 2013 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.

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter as a petition for review within its appellate jurisdiction, pursuant to 42 Pa.C.S. §763, and as a matter arising under the Right-to-Know Law, pursuant to 65 P.S. §67.1301.

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[1] These consolidated matters relate to three petitions for review challenging the same determination below by the Office of Open Records. The petitions were filed by: DBP, United, and Coventry (at No. 945 CD 2013); DentaQuest, Aetna, Health Partners, and Keystone Mercy (at No. 957 CD 2013); and the Department of Public Welfare (at No. 958 CD 2013). These matters were consolidated by this Court on July 26, 2013. They have been collectively referenced by the parties as "Eiseman II" because they relate to a prior Right-to-Know Law request brought by Eiseman (which has been referenced by the parties as "Eiseman I") that is pending before this Court at Nos. 1935, 1949, and 1950 CD 2012. On August 8, 2013, the Court recognized that the Eiseman I and Eiseman II disputes present similar and related issues and, accordingly, directed that the matters be listed before the same panel and argued together. Given the overlap of the two disputes, DBP, United, and Coventry hereby adopt and cross-reference the briefs submitted by United and Coventry on March 25, 2013 and June 26, 2013 in the Eiseman I matter. See Pa.R.A.P. 2137. They also adopt, as appropriate, the briefs filed by the other petitioners in these consolidated cases. Id.

II. <u>DETERMINATION IN QUESTION</u>

The determination in question is the Final Determination of the Office of Open Records issued on May 7, 2013, at OOR Docket No. 2012-2017. The Final Determination concludes:

> For the foregoing reasons, Requester's appeal is **granted** and the Department [of Public Welfare] is required to disclose all responsive records to the Requester within thirty (30) days....

(OOR at 11.) The Final Determination is unreported, but is available at 2013 WL 1950593. A copy of the Final Determination is attached hereto as Exhibit "A."

III. <u>STATEMENT OF THE STANDARD AND SCOPE OF REVIEW</u>

The standard and scope of review applicable in Right-to-Know Law proceedings reflect that this Court owes absolutely no deference to the determination by the Office of Open Records. DBP, United, and Coventry submit that – given the multitude of errors committed by the OOR – this Court should reject the OOR's decision and rule in DBP's, United's, and Coventry's favor.

Indeed, this Court has held that its standard of review under the RTKL is *de novo*. This Court is not bound by any of the findings of the OOR, and instead will independently review the determination below and substitute its own findings for that of the OOR. <u>See</u> <u>Scott v. Delaware Valley Reg'l Planning Comm'n</u>, 56 A.3d 40, 43 n. 3 (Pa. Commw. 2012) (citing <u>Bowling v. Office of Open Records</u>, 990 A.2d 813, 818 (Pa. Commw. 2010), <u>appeal granted</u>, 15 A.3d 427 (Pa. 2011)).

De novo review under the RTKL "entails full consideration of a case another time; the court is 'substituted for ... the prior decision maker, and redecide[s] the case.'" Chester Cmty. Charter Sch. v. Hardy, 38 A.3d 1079, 1085 (Pa. Commw. 2012) (citation omitted). This "court conducts its own review without having to give deference to the OOR's appeals officer." Id.

Similar to its standard of review, this Court's scope of review is plenary. See Allegheny County Dep't. of Admin. Svcs. v. Parsons, 61 A.3d 336, 342 (Pa. Commw. 2013).

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Should this Court reverse the Office of Open Records for failing to hold that the requested materials are not in the "possession" of the Department of Public Welfare under section 506(d)(1) of the Right-to-Know Law, which limits an agency's constructive possession only to materials held by "a party *with whom the agency has contracted*," where the requested materials are not held by a party with whom DPW has contracted, but rather are held by certain subcontractors and dentists, none of which have contracted with DPW?

(Suggested answer: Yes.)

2. Should this Court reverse the OOR for failing to hold that the requested materials are exempt from disclosure under the "trade secret" exemption found in section 708(b)(11) of the RTKL, where the unrebutted affidavits showed

this exemption applies, and where the OOR offered flawed factual reasoning for refusing to apply this exemption, erroneously followed Lukes and Eiseman I, and failed to consider this exemption separately from the "confidential proprietary information" exemption?

(Suggested answer: Yes.)

3. Should this Court reverse the OOR for failing to hold that the requested materials are exempt from disclosure under the "confidential proprietary information" exemption found in section 708(b)(11) of the RTKL, where the unrebutted affidavits showed this exemption applies, and where the OOR offered flawed factual reasoning for refusing to apply this exemption, erroneously followed Lukes and Eiseman I, and failed to consider this exemption separately from the "trade secret" exemption?

(Suggested answer: Yes.)

4. Should this Court reverse the OOR for following its prior erroneous decision in Eiseman I as to its refusal to separately consider the Pennsylvania Uniform Trade Secrets Act, thus flouting the "public record" definition found in section 102 of the RTKL, which exempts from disclosure records "exempt from being disclosed under any other Federal or State law"?

(Suggested answer: Yes.)

V. STATEMENT OF THE CASE

A. Introduction

In this case, James Eiseman, Jr., a lawyer associated with the Public Interest Law Center of Philadelphia ("PILCOP"), is attempting to obtain, pursuant to the Right-to-Know Law, 65 P.S. §§67.101 to 67.3104, records reflecting the dental procedure code rates paid by dental subcontractors to the dentists who treat HealthChoices program enrollees in five counties in Southeastern Pennsylvania for the period July 1, 2008 to June 30, 2012.[2] (R2. 21a.)[3] Those rates are not subject to the constructive possession of the Department of Public Welfare under section 506(d)(1) of the RTKL, as the dental subcontractors that pay the dentists those rates are not "part[ies] *with whom the agency has contracted*," as is required for agency possession under the plain language of that statutory provision. Moreover,

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2 The parties agree that the rates sought here are separate and distinct from those sought in the Eiseman I dispute. In that matter, PILCOP requested the capitation rates (the per member, per month rates) paid by DPW to the MCOs who contract with DPW for the HealthChoices program, as well as the similar rates paid by the MCOs to the dental subcontractors, for the different period of January 1, 2008 to June 15, 2011. The request here expressly excludes those rates. (R2. 21a, ¶4.)

3 Given the relationship between this Eiseman II dispute and the Eiseman I dispute, references are made here to the reproduced records filed in both cases. The reproduced record in the Eiseman I matter was prepared by the undersigned by agreement of the petitioners, and was filed on March 25, 2013. The reproduced record in this Eiseman II matter was prepared by counsel for DentaQuest, Aetna, Health Partners, and Keystone Mercy, also by agreement of the petitioners, and was filed on August 20, 2013. The Eiseman I reproduced record is referenced here as "(R1. ___)," while the Eiseman II reproduced record is referenced here as "(R2. ___)."

the evidence presented by the managed care organizations ("MCOs"), dental subcontractors, and DPW in this dispute and in the Eiseman I dispute overwhelmingly demonstrates that the materials sought by PILCOP are protected from disclosure under each of the "trade secret" and "confidential proprietary information" exemptions found in section 708(b)(11) of the RTKL, as well as the Pennsylvania Uniform Trade Secrets Act. PILCOP has never made any attempt to refute any of this evidence, whether by competing affidavit or otherwise. Nevertheless, OOR, reflexively and erroneously following its prior Eiseman I ruling and this Court's inapplicable Lukes decision, held in its Final Determination that the materials requested must be disclosed. That flawed decision should be reversed by this Court, conducting *de novo* review under the RTKL.

B. Factual background

1. The HealthChoices program

This Eiseman II matter relates to the HealthChoices program, as is the case with the related Eiseman I matter. As United and Coventry discussed in detail in their opening merits brief submitted in Eiseman I, see Brief, March 25, 2013, at pp. 4-6, DPW directly contracts only with MCOs for the program. The MCOs – and only the MCOs – are obligated to DPW to provide the full spectrum of health services under the program, not just dental services. The contract between DPW and each of the MCOs also specifically provides that DPW agrees to protect from

disclosure all "confidential information," including "financial reports and information, ... *provider rates*, trade secrets, ... and information or materials ... subject to *contractual nondisclosure rights of third parties*...." (R1. 843a-844a) (emphasis added). Thus, the contract between DPW and the MCOs reflects that DPW has agreed to obligate itself to protect from disclosure all confidential rate information, including the confidential rates of non-parties to the MCO-DPW contracts, such as provider rates.

2. The MCOs subcontract with the dental subcontractors – DentaQuest and DBP

The MCOs, in turn, enter into contractual arrangements with dental subcontractors to carry out the dental portion of the program. (R2. 121a ¶7, 132a ¶7.) United subcontracts with DBP. (R2. 121a ¶7.) Coventry subcontracts with DentaQuest. (R2. 132a ¶7.) These subcontractors are engaged by the MCOs because they have built sophisticated networks of providers and can provide adequate services to the enrollees in a cost-effective manner. (R2. 122a ¶8, 124a ¶16, 127a ¶8, 129a ¶16, 132a ¶8, 135a ¶16.) The subcontractors do not directly contract with DPW.

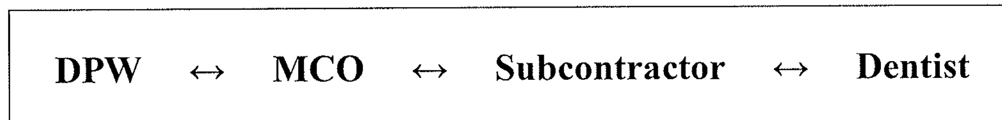
Each of the United-DBP and Coventry-DentaQuest subcontracts also require the protection of confidential information and trade secrets. (R2. 121a-122a ¶7, 126a ¶7, 132a ¶7.) And, in the course of dealing between these MCOs and subcontractors, the parties routinely protect such information. (Id.; R2. 123a

¶12, 127a ¶12, 133a ¶12.) Pursuant to those subcontracts and otherwise, the MCOs and subcontractors treat the payment and rate information that pertains to their relationship as highly confidential. (Id.)

3. The dental subcontractors in turn sub-sub-contract with the dentists

The dental subcontractors – DBP and DentaQuest – in turn, have sub-sub-contracts with the dental providers – the dentists who actually treat the patients enrolled in HealthChoices. (R2. 122a ¶8, 127a ¶8, 132a ¶8.) Neither DPW nor the MCOs directly contract with or negotiate terms with the dentists, nor do they possess the rates paid by the subcontractors to the dentists. (Id.)

Accordingly, in diagram form, the separate and independent contractual relationships of the various parties described above look like this:



Put another way, DPW – the government agency subject to the RTKL – is two full contractual steps away from the relationship that generates the rates paid to the dentists who provide treatment. Those rates are what PILCOP is seeking here.

4. The confidential, secret, and proprietary nature of the rates paid by the subcontractors to the dentists.

As noted, the subcontractors negotiate separate payment terms with individual dental practices. (R2. 122a ¶8, 127a ¶8, 132a ¶8.) Payment terms as

between each dental subcontractor and individual dental practice will vary, and those rates are reevaluated and renegotiated periodically.[4] (Id.) Substantial time, effort, and expense are spent negotiating and setting these various rates and payment terms. (R2. 124a ¶16, 129a ¶16, 135a ¶16.)

The payment terms are a matter of competition between the dental subcontractors and their competitors, and constitute an important aspect of the dental subcontractors' business models, as they have been carefully established so affordable care can be provided, while at the same time ensuring a sustainable business model. (Id.; R2. 123a-124a ¶¶13-15, 128a ¶¶13-15, 134a ¶¶13-15.)

Given the sensitive nature of the dental rates, the subcontractors' contracts with the dental providers specify that the parties must keep the terms of payment to the dental providers, such as fee schedules, strictly confidential. (R2. 122a ¶9, 127a ¶9, 133a ¶9.) That information therefore cannot be acquired or duplicated by a competitor through legitimate means.

Indeed, rate information is not readily available outside – or even inside – the dental subcontractors. (R2. 123a ¶12, 127a ¶12, 133a ¶12.) External reporting is limited to situations where such is required by law or by government

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[4] As discussed below, OOR misunderstood the meaning to be taken from the fact that the rates paid to the dentists are periodically renegotiated.

directive; internal disclosure is limited to a business need to know. (Id.) In this way, the dental subcontractors, and in turn the MCOs, can protect their competitive position, which is essential to offering a meaningful choice to prospective enrollees. (R2. 123a ¶¶13-14, 128a ¶¶13-14, 134a ¶¶13-14.) This is especially the case in the HealthChoices program, which is a relatively small market with few competitors. (Id.)

If the rate information sought here were to be accessed by a competitor, it would yield an unfair competitive advantage to set pricing not just in the Commonwealth of Pennsylvania, but also in those requests for proposal that are bid in other states by the dental subcontractors and also the MCOs. (R2. 123a ¶14, 128a ¶14, 134a ¶14.) The dental rates therefore would be of great value to competitors if disclosed, as the competitors then would have solid parameters by which they could refine their own pricing strategies in an effort to unfairly win business. (R2. 124a ¶15, 128a ¶15, 134a ¶15.)

C. Procedural history

On October 3, 2012, PILCOP, through Mr. Eiseman, submitted an open records request to DPW pursuant to the RTKL. (R2. 18a-21a.) In its request, PILCOP seeks records reflecting the rates paid by individual procedure (e.g., routine cleaning, tooth filling, dental implant, etc.) to dentists who treat HealthChoices enrollees in five counties in Southeastern Pennsylvania for the

period July 1, 2008 to June 30, 2012. (R2. 21a ¶3.) PILCOP does not seek in its request any rates paid by the agency, DPW. Nor does PILCOP seek any rates paid by the MCOs, with whom DPW directly contracted.[5] Indeed, the request expressly *excludes* these rates. (R2. 21a ¶4.) PILCOP seeks only the procedure rates paid by the dental subcontractors to the dentists – which, as noted, are two contractual steps removed from the agency to which PILCOP directed its request.

DPW provided PILCOP with a final response on November 13, 2012, wherein DPW denied the request. (R2. 34a-37a.) PILCOP appealed on December 3, 2012. (R2. 5a-16a.) Shortly thereafter, DBP, United, and Coventry each timely submitted notice to OOR requesting to participate in the proceedings, pursuant to 65 P.S. §67.1101(c), as well as their opposition to disclosure of the requested records. (R2. 101a-102a.) OOR granted DBP, United, and Coventry participant status. (R2. 108a.) PILCOP did not, and does not, object to the participation in this dispute of DBP, United, and Coventry, or to that of the other dental subcontractor and MCOs – DentaQuest, Aetna, Health Partners, and Keystone Mercy.

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[5] While PILCOP's request also includes rates paid directly to dentists by the MCOs, neither of United and Coventry directly compensate dentists in the HealthChoices program, and thus no such rates exist.

Along with their letter brief submissions to the OOR, each of DBP, United, and Coventry (as well as DentaQuest and the other MCOs) presented the affidavit of a knowledgeable executive.[6] DBP presented the affidavit of Paul Hebert, President of DBP. (R2. 125a-129a.) United submitted the affidavit of Heather Cianfrocco, former President of United (and current President of the UnitedHealthcare Community & State Northeast Region, of which United is a part). (R2. 120a-124a.) Coventry provided the affidavit of Nancy Hardy, Vice-President of Operations for CoventryCares. (R2. 131a-135a.) The affidavits of these witnesses are summarized above in the recitation of the underlying facts. As reflected there, each of these witnesses attested that the rates sought by PILCOP are trade secrets and confidential proprietary information. Similarly, the affidavits put forward by DentaQuest, Aetna, Health Partners, and Keystone Mercy also uniformly affirmed the secret and confidential nature of the rate information that PILCOP sought. (R2. 149a-170a.) PILCOP did not attempt to counter any of this evidence, whether by submission of any affidavits, or otherwise.

On May 7, 2013, the OOR issued its Final Determination. (Exhibit "A"; R2. 260a-271a.) In its 11-page decision, OOR granted PILCOP's appeal and

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[6] In the Eiseman I matter, OOR elected to hold a hearing. In this Eiseman II matter, OOR did not hold a hearing, and instead decided the matter based on the parties' submissions.

required DPW to disclose all responsive records. OOR's erroneous decision is discussed in detail below.

DBP, United, and Coventry, the other MCOs (Aetna, Health Partners, and Keystone Mercy) and DentaQuest, and DPW each timely filed petitions for review from the OOR's decision on June 6, 2013.[7] Those parties also intervened in one another's actions. The matters were consolidated by the Court on July 26, 2013. This brief is timely filed pursuant to the Court's orders pertaining to briefing of this matter.[8]

VI. SUMMARY OF ARGUMENT

This Court, which owes no deference at all to the Office of Open Records under the applicable standard of review, should reverse the decision below. As a threshold matter, the records requested by PILCOP are not within the possession of DPW, and thus are not subject to the reach of the RTKL. The plain language of RTKL section 506(d)(1) provides that the constructive possession of an agency extends only to a "party *with whom the agency has contracted*." The

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[7] The petition of DBP, United, and Coventry is docketed at No. 945 CD 2013. The petition of DentaQuest, Aetna, Health Partners, and Keystone Mercy is docketed at No. 957 CD 2013. The petition of DPW is docketed at No. 958 CD 2013.

[8] Pursuant to Pa.R.A.P. 2117(c) & 2119(e), DBP, United, and Coventry (as well as DentaQuest, Aetna, Health Partners, Keystone Mercy, and DPW) have preserved the issues raised on appeal by participating and objecting to disclosure throughout the OOR proceedings below and in filing a petition for review with this Court.

rates requested by PILCOP here are paid by dental subcontractors. Those dental subcontractors have not contracted with DPW to provide HealthChoices services. Under the plain language of section 506(d)(1), the RTKL does not require disclosure of those rates.

Moreover, the records requested by PILCOP are exempt from disclosure under each of the "trade secret" and "confidential proprietary information" exemptions found in section 708(b)(11) of the Right-to-Know Law. Those records also are exempt from disclosure under the Pennsylvania Uniform Trade Secrets Act. Contrary to OOR's determination, neither this Court's decision in Lukes nor the OOR's prior erroneous decision in Eiseman I require the opposite conclusion. Further, the unrebutted affidavits submitted below prove the exemptions apply. The procedure rates sought are held in the strictest confidence. The contracts the subcontractors have with the dentists require confidential treatment of those rates, and efforts are made to protect the confidentiality of the rates. Those rates are at least of "potential" economic value, and if disclosed, would be of value to competitors, who would use that information to visit substantial competitive harm.

For these reasons, as explained in detail below, the records sought are not subject to disclosure under the RTKL. Therefore, this Court should reverse the

OOR decision and hold that DPW is not required to take any further action on PILCOP's request.

VII. ARGUMENT

A. The materials requested are not in DPW's constructive possession

Disclosure is neither required nor permitted under the plain language of the agency possession provision of the RTKL, section 506(d)(1), because DPW does not constructively possess the procedure rates paid by the dental subcontractors to the dentists. Under the RTKL:

> 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) (emphasis added). This plain and unambiguous language explicitly requires ***two*** things in order for an agency to be deemed to constructively possess records actually held by a third party:

> (1) The public record must be in the possession of "a party ***with whom the agency has contracted***,"
>
> **and**
>
> (2) The public record must directly relate to the governmental function and not be otherwise exempt under the RTKL.

Because of the conjunctive "**and**" in the statute, if **either** one of the two required elements is missing, then the agency is not deemed by the RTKL to constructively possess records actually held by a third party. Both elements are required; not just one of them.

Here, DPW has contracted with the **MCOs** to carry out the HealthChoices program, **not** the dental subcontractors. DPW has no direct contractual relationship with the dental subcontractors. Nor does DPW have a direct contractual relationship with the dentists. Nor is there any evidence that the MCOs actually possess the requested rate information. There is no dispute about any of these facts. (R2. 121a-122a ¶¶4-9, 126a-127a ¶¶4-9, 132a-133a ¶¶4-9.) The requested rates are two full contractual steps away from DPW. (Id.) The first essential element required under the plain language of the RTKL agency possession provision is missing – neither the subcontractors, nor the dentists, are "part[ies] with whom [DPW] has contracted" 65 P.S. §67.506(d)(1). There is no direct contractual relationship, as required by the statute. DPW "possession" is not present. Disclosure under the RTKL thus is neither mandated nor permitted here.

Recently, this Court, in Allegheny County Department of Administrative Services v. Parsons, 61 A.3d 336 (Pa. Commw. 2013), provided guidance concerning the scope of section 506(d)(1). There, the requestor sought the payroll records of a county's social services contractor, including details

respecting the employees who actually carried out the social services the contractor had agreed to provide to the county. Id. at 338-39. This Court correctly stated the test for agency "possession" under section 506(d)(1), consistent with the plain language of the statute, as follows:

> 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). Applying this test, the Court rejected the requestor's claim of agency possession, pointing out that "[r]equester seems to be under the misimpression that all records of government contractors are subject to the RTKL." Id. at 345. The Court explained:

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

Id. at 346. The Parsons decision is instructive here, and counsels in favor of a finding that the records requested are not in the constructive possession of DPW.[9] See also Office of Budget v. Office of Open Records, 11 A.3d 618 (Pa. Commw. 2011) (records requested deemed not in possession of agency; records were in hands of contractor having no direct contractual relationship with agency).

1. The OOR refused to apply the plain language of the agency possession provision.

Without even acknowledging this Court's recent Parsons decision (which was specifically and extensively argued by the dental subcontractors and MCOs below (see R2. 246a-247a, 255a, 257a-258a)), let alone the plain language of section 506(d)(1), the OOR ruled that DPW "possessed" the records held by the dental subcontractors – even though OOR admitted that DPW "does not contract directly with the dental subcontractors." (OOR at 8.) That holding directly contradicts numerous other OOR rulings, including at least two rulings OOR has

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[9] While the Parsons decision appears to have focused more on the second element required for agency possession (the relationship of the record to the governmental function), it is nevertheless instructive here, in that it appropriately holds that there are distinct limits on an agency's constructive possession of materials held by a third party. Parsons also has enhanced meaning in this case because there appears to be little decisional authority from this Court squarely applying the first required element of the agency possession provision.

issued within the last month.[10] OOR gave two reasons why it ignored the statute's language and its own decisions. Neither has any merit.

First, OOR claimed that the contracts between DPW and the MCOs "contemplate" that the MCOs would engage subcontractors. (Id.) But whatever might be "contemplated" by a contract does not somehow change or inflate the identity or number of parties who actually contracted with the state agency. Again, the dental subcontractors are **not** parties to any of the DPW-MCO contracts. There is no dispute about that. Any "contemplation" between DPW and the MCOs does not, and cannot, change that fact. Nor can a contractual "contemplation" provide adequate reason to ignore the plain language of section 506(d)(1).

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[10] See, e.g., McCarthy v. West Pennsboro Twp., Dkt. No. AP 2013-1097, 2013 WL 3963991, *3 (OOR July 25, 2013) ("Because [the contractor] *does not maintain any contractual relationship* with the [agency], the [agency] is not obligated to obtain any responsive records from [the contractor]."); VanSickle v. London Grove Twp., Dkt. No. AP 2013-1095, 2013 WL 3963986, *3 (OOR July 24, 2013) (agency "attests that both CKC Landscaping and Coatesville Country Club are private businesses and *have never been third party contractors* of the [agency]. 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, *4 (OOR Dec. 2, 2011) ("the [agency] is not required to obtain records from [the contractor] that do not exist in the possession of the [agency] as *there is no evidence that a contractual relationship between the [agency] and [the contractor] exists such that Section 506(d) would apply*. Therefore, the appeal as to those … items requested is denied."); Campbell v. Souderton Area Sch. Dist., Dkt. No. AP 2010-1212, 2011 WL 382839, *4 (OOR Jan. 21, 2011) ("The [agency] also alleged under penalty of perjury that '[a]lthough the [agency] is required by statute to compensate the tax collectors for their efforts, *the [agency] 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*.").

Moreover, the contractual language seized upon by OOR does not even support its argument. That provision permits DPW to access only records "of *transactions* pertaining to the *provision of services to Recipients*." (R2. 234a ¶4) (emphasis added). This provision does not permit DPW to have access to *any and all* records held by a dental subcontractor; it permits access only to individual medical records showing the dental treatment provided to an individual HealthChoices enrollee. Certainly this language cannot be read as covering the waterfront of subcontractor materials, including sensitive and proprietary contractual rates that are confidentially negotiated between the subcontractors and the dental providers. This is especially so where, as here, there is no evidence in the record indicating those confidential rates are contained in any individual's medical records.

Furthermore, individual medical records – the only records covered by the contractual language relied on by OOR – were not even sought by PILCOP here. Indeed, PILCOP expressly waived and withdrew its request to the extent it pertains to records relating to individual enrollees' treatment.[11] (R2. 230a)

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[11] PILCOP had good reason to withdraw its request in this respect, as individual medical records are exempt from disclosure under the RTKL. See, e.g., 65 P.S. §67.708(b)(5) (exempting "[a] record of an individual's medical … status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests … or related information that would disclose individually identifiable health information."); 65 P.S. §67.708(b)(6)

(footnote continued on next page)

("Requester does not seek any documents that reveal the identity of an individual Medicaid recipient and/or his or her individual health information and, to the extent its Request could be so construed, hereby withdraws any portion of its Request that seeks such documents."). Thus, PILCOP voluntarily dropped its pursuit of any records that could be covered by the contractual language OOR hung its hat on below. The dental subcontractors and MCOs pointed this out to OOR (see R2. 245-246a), but OOR ignored them.

Second, OOR claimed public policy supported a finding of agency possession. Trading in its role as neutral arbiter for that of advocate, OOR claimed below that "these records **should** be subject to public access," and further argued that non-disclosure here would "frustrate" the intent of section 506(d) because, in OOR's view, "records showing how public monies are spent" should always be made available to the public. (OOR at 8) (emphasis added). Whether a record "should" be subject to public access, however, is a public policy determination to be made by the General Assembly, not the OOR. This Court recognized as much in Parsons (which, again, was completely ignored by OOR), where the Court

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(exempting "personal identification information"); see also 65 P.S. §67.708(b)(5) (exempting "[a] record of ... enrollment in a health care program"); 65 P.S. §67.708(b)(28) (exempting "[a] record or information" relating to an individual's application or receipt of "social services"). The dental subcontractors and MCOs asserted these provisions in their objections to disclosure submitted to OOR. (R2. 119a.)

expressly rejected precisely the same public policy argument that OOR adopted here:

> 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.

Parsons, 61 A.3d at 347 (emphasis in original). This Court got it absolutely right in Parsons. The plain text of section 506(d)(1) must be applied as written. That plain text imposes limits on an agency's constructive possession.

Public policy determinations are to be made by the popularly-elected representatives in the Legislative Branch. Here, the General Assembly made a policy judgment that access under the RTKL to records held by third parties is to be limited to parties who directly contract with a government agency. The Legislature could have included subcontractors within the reach of section 506(d)(1), but did not do so. It is therefore difficult, if not impossible, to see how it would "frustrate" the intent of section 506(d)(1) if the plain language of that provision – the best indicator of the Legislature's intent – is followed.

Similarly, OOR's policy declaration that "records showing how public monies are spent" always should be disclosed finds no support in the language of the RTKL, as enacted by the General Assembly. Had the Legislature desired to

provide for automatic disclosure under the RTKL for any "records showing how public monies are spent," it could have. It did not do so.[12]

2. PILCOP offered baseless reasons to fail to apply the plain language of the agency possession provision.

For its part, PILCOP claimed below, and probably will claim here, that the MCOs engage dental subcontractors just to avoid public scrutiny. Tellingly, the OOR did not adopt this argument – which makes sense, as there is absolutely no evidence supporting PILCOP's baseless claim.

The MCOs in the HealthChoices program do not merely "funnel" money from DPW to the dental subcontractors. Rather, as the affidavits submitted in this matter reflect, the MCOs are responsible for carrying out the overall delivery of health services to the individual enrollees in HealthChoices pursuant to their contracts with DPW. (R2. 120a-121a ¶¶3-6, 126a ¶¶4-6, 131a-132a ¶¶3-6.) The MCOs utilize dental subcontractors for the dental aspect of the HealthChoices program because the dental subcontractors have built sophisticated networks of providers, and can deliver a sufficient network to the enrollees in a cost-effective

[12] With good reason, as it does not seem like it would be a good idea for the General Assembly to enact such a sweeping RTKL provision. For example, the government spends public money in connection with homeland security and police investigations. There are very good reasons to keep such records from disclosure under the RTKL, even though public monies are involved.

way. (R2. 121a-122a ¶¶7-8, 126a-127a ¶¶7-8, 132a ¶¶7-8.) The MCOs do not engage the dental subcontractors just to avoid disclosure under the RTKL.

Perhaps this would be a different case if any evidence existed and was presented by PILCOP in support of its unsubstantiated "shell game" suggestion. See Office of Budget, 11 A.3d at 623 (rejecting request for records where there was no evidence of an "attempt[] to play some sort of shell game by shifting these records to a non-governmental body"). But the simple fact here is that the sub-contractual relationships were formed between the MCOs and subcontractors solely to ensure proper and efficient delivery of dental services, not as a means to avoid the RTKL.[13]

PILCOP also claimed below that the MCOs and dental subcontractors have "proposed" an "exception" that would "swallow the rule" respecting agency possession. OOR did not buy this argument either. Nor should the Court. The subcontractors and MCOs have not suggested a construction of the agency possession provision other than the one required by its plain text. No claim has been made in Eiseman I, for example, that the rates paid by DPW to the MCOs are

[13] It bears noting that some MCOs began participating in the HealthChoices program well before the new RTKL was enacted. (See, e.g., R1. 368a) (testimony that United first participated in HealthChoices starting in 1989).) Thus, for this Court to accept PILCOP's argument, it would have to believe the MCOs could see into the future, as they engaged their subcontractors in order to avoid a law that did not yet exist.

not in DPW's "possession" (although those rates are otherwise exempt from disclosure). Indeed, the agency possession provision is not even in issue in the Eiseman I case. The contention in this Eiseman II case is that the rates paid by the dental subcontractors to the dentists are not within DPW's constructive possession. That is wholly consistent with the plain language of the RTKL.

In truth, it is PILCOP that proposes a construction of the agency possession provision that would swallow crucial language within it. PILCOP's argument, followed to its logical conclusion, is that an agency's constructive possession has no limits; an agency constructively possesses a record regardless of the number of sub-contractual relationships that might separate the agency from the materials sought. In PILCOP's worldview, DPW "possesses" the timesheets for the employees of a janitorial services company that cleans the offices of a dentist who performs a checkup on a HealthChoices enrollee (assuming, of course, the other required elements for agency possession are satisfied). So too would DPW "possess" the maintenance logs for an equipment company that furnishes a photocopier to that same dental practice.

PILCOP's view cannot be squared with the "with whom the agency has contracted" language of section 506(d)(1). Indeed, that view, if adopted by this Court, would render that language surplus. Accordingly, PILCOP's position must be rejected. See, e.g., 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 surplus); 1 Pa.C.S. §1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). That viewpoint also must be rejected because it runs headlong into this Court's teaching in Parsons. Both that decision and the plain language of the agency possession provision impose limits on constructive possession by an agency. They do not permit PILCOP's "limitless possession" argument to carry the day here.

* * * * *

In the end, neither OOR nor PILCOP offer any meritorious reason supporting a finding of agency possession over materials reflecting the rates paid by the dental subcontractors to the dentists. Nor could they, as section 506(d)(1) limits agency possession to records held by the MCOs – the only parties that directly contracted with DPW. This Court therefore should reverse the holding of the OOR to the contrary, and hold that DPW need not take any further action on PILCOP's request. If the Court does so, it need proceed no further in this matter.

B. The subcontractors' rates are exempt from disclosure as "confidential proprietary information" and "trade secrets"

Even if the Court were to join OOR and PILCOP in ignoring the plain text of the agency possession provision of the RTKL, disclosure still is not permitted under the RTKL, as the materials sought are exempt from disclosure as confidential proprietary information and trade secrets. The OOR, however, refused

to hold that the requested materials – which contain the highly confidential and sensitive rates paid by the subcontractors – are exempt. The OOR erred in refusing to do so.

1. The *Lukes* and *Eiseman I* cases are not controlling here

OOR's first rationale for refusing to apply these exemptions was that it thought the matter was controlled by this Court's decision in Lukes and the OOR's prior decision in Eiseman I. (OOR at 9-11.) However, for the reasons set forth in the briefs submitted to this Court by United and Coventry in Eiseman I, which are incorporated herein by reference, it is submitted again that Lukes should not be applied here.[14] (See Brief, filed 3/25/13, at pp. 26-27; Reply Brief, filed 6/26/13, at pp. 2-8.) Moreover, each of the MCOs in Eiseman I, as well as DPW, have appealed from the OOR's ruling in that case, and they have asked this Court to reverse, as they assert that case was wrongly decided.

Even if Eiseman I was not on appeal, however, this is not the same case as Eiseman I. OOR's knee-jerk application of that decision was error.

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[14] For example, in its decision, OOR focused on Lukes' rationale that "[t]he threat of competition … is insufficient to invoke an exemption … from disclosure." (OOR at 10-11). As previously explained by United and Coventry in their Eiseman I reply, that rationale cannot apply under the new RTKL, as otherwise both of the "trade secret" and "confidential proprietary information" exemptions would be effectively nullified, as the threat of unfair competition is precisely what those exemptions are designed to protect against. (See Reply Brief, filed 6/26/13, at p. 8 n. 3.)

Different records are at issue in the two cases. In the Eiseman I case, the rates in issue are those HealthChoices rates that DPW paid to the MCOs for the entire scope of HealthChoices benefits to the enrollees, as well as the rates paid by the MCOs. This Eiseman II case, on the other hand, pertains only to the procedure rates paid to dentists by the dental subcontractors engaged by the MCOs solely for the dental portion of the program. (R2. 21a ¶4) ("This request is not intended to seek the production of any document which was previously requested" in Eiseman I). The rates paid to the dentists is a separate and distinct set of rates from the rates at issue in Eiseman I. Those separate rates are subject to separate confidentiality obligations between the dentists and dental subcontractors. Neither DPW nor any other government agency is a party to the agreements between the dentists and dental subcontractors. The dental subcontractors, DentaQuest and DBP, are parties to this proceeding, given their rates are in issue, and they are objecting to disclosure, whereas they were not parties to Eiseman I. OOR ignored these distinctions between the two cases, and mechanically applied its prior decision as if the two cases were identical.

2. OOR's findings that disclosure will not cause harm, and that the rates lack economic value, have no evidentiary support

In addition to refusing to recognize the distinctions between the two cases, OOR simply declared that the MCOs and dental subcontractors had failed to

show they will suffer harm from disclosure and that the rates have economic value from not being generally known. (OOR at 10.) But the evidence OOR cited actually *supported* both arguments.

OOR first correctly pointed out that the MCOs and subcontractors had provided affidavits attesting that "they each take measures to keep rate information confidential." (Id.) OOR also accurately stated that the MCOs and subcontractors had "attest[ed to] the 'harm' that they will suffer if this rate information is released is competition from competitors," explaining that release of the rates could enable competitors to "undercut" business and cause the dentists to seek higher rates, and "would offer solid parameters by which competitors could refine their own pricing strategies in an effort to win business away." (Id.) How, exactly, does this evidence cited by OOR show a *lack* of harm from disclosure, or a *lack* of economic value in the rates?

After discussing these points, OOR went on to say that, "however," rates vary by practice and are periodically renegotiated or reevaluated. (Id. at 10-11.) But that fact does not undercut the subcontractors' and MCOs' contentions – it *supports* them! OOR seemingly did not understand the meaning to be taken from these facts. Variance in rates between dental practices shows they are the subject of intense competition both as between dentists and as between subcontractors, and the time and effort put into negotiating and renegotiating those

rates illustrates the high economic value assigned to those rates. OOR apparently did not comprehend any of that.

Further, in claiming the MCOs and subcontractors had failed to meet their burden, OOR even went so far as to claim 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, as the information may very well may [sic] be '*outdated*' by the time of its release." (OOR at 11) (emphasis added). Neither of these "no evidence" and "outdated" contentions have any evidentiary foundation in the record whatsoever.

In fact, PILCOP itself never even argued the "outdated" claim. OOR simply cut this speculative conclusion from whole cloth. But that did not stop PILCOP from adopting this made-up argument as its own in its Eiseman I merits brief before this Court, claiming that the rates at issue there are "too old" or "too stale" to matter. United and Coventry dealt with this baseless argument in their reply brief before this Court in Eiseman I, which they incorporate by reference here. (See Reply Brief, filed 6/26/13, at pp. 14-19.)

3. PILCOP's arguments in favor of disclosure have no merit.

PILCOP also may claim here, as it did below, that the Eiseman I ruling should apply as to its discussion of the "financial records" provision of the RTKL, section 708(c). Notably, however, OOR did not adopt that argument. And,

once again, United and Coventry already addressed that meritless argument in their Eiseman I reply before this Court, which they again incorporate by reference. (See Reply Brief, filed 6/26/13, at pp. 12-14.) The "financial records" provision relates only to "the receipt or disbursement of funds *by an agency*," 65 P.S. §67.102(1)(i), not the rates paid *by the dental subcontractors* to the dentists. Those rates are two full contractual relationships away from the disbursement of funds by DPW, and thus are not the rates mentioned in this statutory provision.[15]

PILCOP probably will also repeat its "common subcontractor" red herring: that several MCOs' engagement of a common subcontractor, DentaQuest, somehow makes a difference here. For the reasons set forth in United's and Coventry's reply brief before this Court in Eiseman I, which are incorporated by reference, this argument has no merit. (See Reply Brief, filed 6/26/13, at pp. 19-22.) As previously noted, this argument does not even apply to United, because United did not contract with DentaQuest, and instead subcontracted with DBP,

[15] Moreover, even if the Court somehow concluded that the "financial records" language eviscerates all RTKL exemptions, that language has no impact whatsoever on exemption of the records pursuant to the Pennsylvania Uniform Trade Secrets Act, which is not subject to the reach of the "financial records" exemption. See 65 P.S. §67.102 ("public record" definition) (exempting from disclosure records "exempt from being disclosed under any other Federal or State law"). The "financial records" provision also cannot apply here to negate the "confidential proprietary information" exemption, as that exemption specifically includes within its scope "[c]ommercial *or financial* information." 65 P.S. §67.102. The words "*or financial*" would be rendered entirely meaningless if the "financial records" provision negated that exemption.

with whom no other MCO subcontracted. (R2. 121a ¶7, 126a ¶7.) Moreover, the subcontractors' affidavits reflect that the contracts between the subcontractors and dentists require that the rates paid pursuant to those contracts must be kept confidential. (R2. 127a ¶9, 168a-169a ¶5.) And, in any event, just because more than one dentist may contract with DentaQuest does not mean those dentists know one another's DentaQuest payment rates. In fact, their contracts with DentaQuest demand otherwise.

4. <u>The "trade secret" RTKL exemption applies</u>

As is obvious from OOR's decision below, it did not separately and independently consider the two RTKL exemptions invoked here, plus the Pennsylvania Uniform Trade Secrets Act, let alone apply each of their elements. Had OOR done so, it would have found the requested materials exempt.[16]

Starting with the "trade secret" exemption, the dental procedure rates are exempt under that provision. The RTKL defines the term "trade secret" as:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that

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[16] Doing so would have been consistent with prior OOR decisions finding as exempt pricing information similar to that at issue here. <u>See, e.g.</u>, <u>Dahlgren v. Dep't of General Svcs.</u>, OOR Dkt. AP 2009-0631 (Sept. 10, 2009); <u>Zeshonski v. Dep't of Health</u>, OOR Dkt. AP 2011-0698 (July 20, 2011).

> (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. §67.102. Thus, a "trade secret" is "information" that (a) actually or potentially "derives independent economic value" from "not being readily known" to those who might benefit from knowing it, and (b) is the subject of "reasonable" "efforts" to maintain its secrecy.

Here, as set forth in the unrebutted affidavits submitted by DBP, United, and Coventry (as well as DentaQuest and the other MCOs), each of the elements of this exemption is satisfied here. The dental rates clearly are "information." Further, as the affidavits explain, the rates are of competitive economic value due to their secret nature. Those rates are the principal means of competition for HealthChoices market share, and competitors would benefit by knowing those rates because they could use that information to underbid on pricing. (R2. 122a-123a ¶¶11, 13, 14, 127a-128a ¶¶ 11, 13, 14, 133a-134a ¶¶11, 13, 14.) Moreover, reasonable efforts are undertaken to keep the information secret, such as by blocking external disclosure except as may be required by law, and limiting internal access to a need-to-know basis. (R2. 123a ¶12, 127a-128a ¶12, 133a-134a ¶12.)

PILCOP did not submit any competing affidavits or otherwise attempt to rebut this evidence. Accordingly, the RTKL "trade secret" exemption applies here to preclude disclosure of the dental rates sought. OOR erred in failing to so find, and should be reversed.

5. <u>PUTSA applies to exempt the requested materials</u>

Relatedly, the requested materials also are exempt from disclosure under the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§5301–5308 ("PUTSA"). In particular, the dental procedure rates also satisfy the applicable test for exemption under PUTSA:

(1) the dental rates are only known to a very limited extent outside of the businesses, (R2. 123a ¶12, 127a-128a ¶12, 133a-134a ¶12);

(2) the rates are only known to a very limited extent inside the business, <u>id.</u>;

(3) measures are undertaken to limit internal and external disclosure; <u>id.</u>;

(4) the rates are valuable both to the companies and their competitors, (R2. 123a-124a ¶¶13-16, 128a-129a ¶¶13-16, 134a-135a ¶¶13-16);

(5) the companies expend significant effort developing the dental rates, (R2. 124a ¶16, 129a ¶16, 135a ¶16); and

(6) the dental rates could not be duplicated easily by outsiders, (R2. 123a-124a ¶¶12-16, 127a-129a ¶¶12-16, 133a-135a ¶¶12-16).

See Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010) (stating factors). Accordingly, PUTSA furnishes a separate and independent basis for exempting the dental rates from disclosure. See 65 P.S. §67.102 (defining "public record" to exclude records "exempt from being disclosed under any other Federal or State law").

OOR refused to separately consider PUTSA here because it had previously refused to do so in Eiseman I. (OOR at 5.) However, for the reasons set forth in United's and Coventry's briefs in Eiseman I, that decision was incorrect. (See Brief, 3/25/13, at pp. 25-26; Reply Brief, filed 6/26/13, at pp. 11-12.) Because OOR perpetuated that error here, this Court should reverse.

6. The "confidential proprietary information" RTKL exemption applies

Turning to the "confidential proprietary information" exemption, that exemption was not applied at all by the OOR in Eiseman I, and since the OOR in this case just followed that prior decision, the exemption was not applied here, either. Thus, in neither of its decisions in these Eiseman I and II cases did OOR ever separately apply the "confidential proprietary information" exemption.

That, in itself, was reversable error. This Court directed in Bari that, due to the disjunctive in the statute, the "trade secret" and "confidential proprietary information" exemptions *must* be applied separately, such that a record is exempt from disclosure even if it qualifies under just one of the two exemptions. See

Office of Governor v. Bari, 20 A.3d 634, 647-48 (Pa. Commw. 2011) ("Importantly, 'confidential proprietary information' and 'trade secret' are defined separately under Section 102 of the RTKL; therefore, *the terms are not interchangeable*." (emphasis added; footnote omitted)). The OOR erred in failing and refusing to apply the statute as directed by this Court in Bari.

The RTKL separately defines "confidential proprietary information" as:

> 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 person that submitted the information.

65 P.S. §67.102. Thus, "confidential proprietary information" is "commercial or financial information" (a) that is "privileged or confidential" and (b) the disclosure of which would cause substantial harm to the "competitive position" of the party.

Here, as set forth in the unrebutted affidavits submitted by DBP, United, and Coventry (as well as DentaQuest and the other MCOs), each of the elements of this exemption is satisfied here. There is no dispute that the dental rate information reflects "commercial or financial information." Further, as reflected in the affidavits, that information is treated by the MCOs and dental subcontractors as privileged and confidential. (R2. 121a-123a ¶¶7, 9, 12, 126a-128a ¶¶7, 9, 12,

132a-134a ¶¶7, 9, 12.) In addition, as explained in the affidavits, the dental subcontractors and MCOs would suffer substantial competitive harm if the dental rates were disclosed. (R2. 122a-124a ¶¶10-17, 127a-129a ¶¶10-17, 133a-135a ¶¶10-17.)

PILCOP did not submit any competing affidavits or otherwise attempt to rebut this evidence. Accordingly, the RTKL "confidential proprietary information" exemption applies here to preclude disclosure of the dental rates sought. OOR erred in failing to so find, and should be reversed. Compare Giurintano v. DGS, 20 A.3d 613, 616-17 (Pa. Commw. 2001) (holding that "confidential proprietary information" RTKL exemption applied to preclude disclosure where affidavit established that contractor kept information confidential to protect its investment and assets, and that disclosing information would cause substantial competitive harm to the contractor within its industry).

C. Federal and state regulations preclude disclosure here

In addition, OOR erred in failing to find the requested records exempt from disclosure under several federal and state regulations. Federal regulations require DPW to conduct all procurement processes for the purchasing of services with federal dollars (which is the case for HealthChoices, as a Medical Assistance/Medicaid program) in a manner designed to foster healthy and fair competition among potential government contractors. See 45 C.F.R. §74.43; 42

C.F.R. §434.70(a)(2) & (b) (providing that state governments failing to comply with federal conditions forfeit federal funding). Federal regulations presume the confidentiality of documents relating to the expenditure of federal funds where the disclosure of such documents would substantially harm the competitive position of the party submitting the information. See 45 C.F.R. §§5.65(B)(4)(ii), §74.53(f). Pennsylvania regulations similarly accord confidential treatment to records like those reflecting the rates in issue. See 28 Pa. Code §9.604(a)(8). OOR should have found these regulations required exemption of the materials sought, and erred in failing to so find.

VIII. CONCLUSION

For the foregoing reasons, Petitioners Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan, and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares respectfully request that this Court reverse the May 7, 2013 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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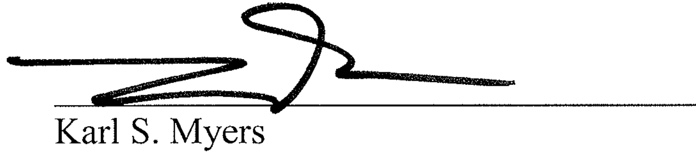
Dated: August 20, 2013

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 8,928 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 August 20, 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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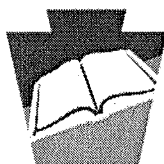
EXHIBIT "A"



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."

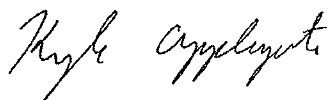
While the OOR understands that the third parties consider rate information confidential, like in *Lukes*, "[t]he threat of competition ... is insufficient to invoke an exemption ... from

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



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