IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENTAL BENEFIT PROVIDERS, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC. D/B/A UNITED HEALTHCARE 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, Petitioners v. JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA Respondents.	958 CD 2013 CONSOLIDATED ACTIONS

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

BRIEF OF RESPONDENTS

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I. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

A. Are the records sought within the possession of the Department of Public Welfare or otherwise public records under 65 P.S. § 67.506(d)(1)?

Suggested Answer: Yes.

B. Does *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009), compel the granting of this request under the new Right-to-Know Law?

Suggested Answer: Yes.

C. Have the Petitioners carried their burden of proving that the requested documents contain "trade secrets" or "confidential proprietary information" and are therefore exempt from disclosure under the Right-to-Know Law?

Suggested Answer: No.

D. Regardless of whether they contain trade secrets or confidential proprietary information, should the records be disclosed as "financial records"?

Suggested Answer: Yes.

E. Do other statutes and regulations trump the Right-to-Know Law and bar disclosure of the requested records?

Suggested Answer: No.

II. COUNTER-STATEMENT OF THE CASE

A. Brief Procedural History of the Case

James Eiseman Jr. and the Public Interest Law Center of Philadelphia ("Requestor") adopt by reference the procedural history of the case set forth in the Brief of Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC, dated Aug. 20, 2013, at 6-8.

This brief will refer to the earlier appeal docketed at 1935 CD 2012, 1949 CD 2012, and 1950 CD 2012 as "*Eiseman I*," and to the instant appeal as "*Eiseman II*."

Requestor notes that the Final Determinations on appeal in these two cases were decided by different appeals officers.

B. Chronological Statement of Record Facts

Medical Assistance ("Medicaid") is a joint federal-state program established by federal statute, 42 U.S.C. §§ 1396 *et seq.*, for providing, *inter alia*, medical and dental care to low-income children, certain adults, and people with disabilities in states, including Pennsylvania, that have chosen to participate. The Department of Public Welfare ("DPW") is the Pennsylvania agency that administers Pennsylvania's Medicaid program. The request for documents (the "Request") at issue in this appeal concerns only the following five counties in southeastern

Pennsylvania ("SEPA"): Bucks, Chester, Delaware, Montgomery, and Philadelphia. (R2. 20a-21a.)[1] The Request is further limited to documents that concern the period July 1, 2008 through June 30, 2012 (the "Requested Period").[2] (R2. 21a.)

During the Requested Period, DPW operated the Medicaid program in SEPA through its "HealthChoices Program," under which DPW contracted with certain managed-care organizations ("MCOs," also sometimes known as "health maintenance organizations" or "HMOs") to provide dental and physical medical care to enrollees who reside in SEPA. (R1. 205a-207a.) Under contracts with DPW, the MCOs are obligated to establish networks of medical and dental providers and to reimburse these providers. (R1. 208a-210a.) During the Requested Period in SEPA, there were five MCOs with which DPW contracted to provide physical health and dental care: (1) United Healthcare of Pennsylvania, Inc. d/b/a United Healthcare Community Plan ("United"), (2) HealthAmerica of Pennsylvania, Inc. d/b/a Coventry Cares ("Coventry"), (3) Aetna Better Health, Inc. ("Aetna"), (4) Health Partners of Philadelphia, Inc. ("Health Partners"), and

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[1] References of the form "(R1. __)" are to the reproduced record in *Eiseman I*, and references of the form "(R2. __)" are to the reproduced record in *Eiseman II*. *See* Brief of Petitioners Dental Benefit Providers, Inc., United Healthcare of Pennsylvania, Inc., and HealthAmerica of Pennsylvania, Inc. d/b/a Coventry Cares, dated Aug. 20, 2013, at 5 n.3.

[2] The requested period in *Eiseman I* runs from July 1, 2008 to June 15, 2011.

(5) Keystone Mercy Health Plan ("Keystone") (collectively, the "MCOs"). (R2. 120a, 131a, 149a, 155a, 161a.)

In limited instances, some of the MCOs contracted directly with dental providers for the provision of services to enrollees.[3] In most instances, however, the MCOs subcontracted their provision of dental services through a dental subcontractor.[4] A dental subcontractor, in return for payments from one of the Petitioner MCOs, is obligated to establish and pay for a network of dental providers available to provide care to the enrollees of the MCO. (*E.g.*, R1. 432a.)

Four of the five MCOs—Aetna, Coventry, Health Partners, and Keystone—subcontracted solely through the same dental subcontractor, DentaQuest, LLC ("DentaQuest"). (R1. 325a-326a, 432a, 492a-493a, 514a; R2. 132a ¶ 7, 167a ¶ 2.) The fifth MCO, United, subcontracted through Dental Benefit Providers, Inc. ("DBP"). (R2. 121a ¶ 7.) United and DBP are subsidiaries of the same parent corporation, United Health Group. (R1. 384a, 387a.) Just two of the four MCOs that subcontract with DentaQuest account for about 465,000 of the somewhat more than 500,000 Medicaid enrollees in SEPA, or over 90% of the enrollees. (R1. 323a, 538a-539a, 652a.) Thus one subcontractor, DentaQuest, is charged with

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[3] These instances are among those at issue in *Eiseman I.*

[4] DPW and the MCOs did not reveal this arrangement to Requestor until after the filing of the requests in *Eiseman I.* (*See* R1. 8a, 314a-315a.)

establishing and paying networks of dental providers on behalf of 80% (4 out of 5) of the MCOs, and which dental providers are supposed to be available to over 90% of Medicaid enrollees in SEPA.

The Request in this case seeks, under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*:

> Each and every document, including contracts, rate schedules and correspondence in DPW's possession, custody, or control that . . . 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.
>
> [and]
>
> Each and every document, including contracts, rate schedules and correspondence in DPW's possession, custody, or control that . . . 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.

(R2. 21a.)

The terms of the MCOs' roles in providing Medicaid services are set forth in a standard DPW contract that each MCO signs (the "Standard Agreement").[5]

[5] The Standard Agreement was admitted into evidence on Petitioners' motion at the OOR hearing in *Eiseman I* as MCO Exhibit 2 (R1. 680a-849a), and the citations in this brief are to that

Under the terms of the Standard Agreement, "all contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include . . . [a] requirement that ensures that the Department [of Public Welfare] has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients." (R1. 842a.) The Standard Agreement also requires that "[t]he PH-MCO must make all Subcontracts available to the Department [of Public Welfare] within five (5) days of a request by the Department." (R1. 765a). It further requires that certain "Subcontracts . . . must be submitted to the Department for advance written approval," including "[a]ny Subcontract between the PH-MCO and any individual, firm, corporation or any other entity to perform part or all of the selected PH-MCO's responsibilities under this Agreement . . . . includ[ing] . . . dental services." (R1. 766a.) The Standard Agreement's "Definitions" section explains that "PH-MCO" stands for "Physical Health Managed Care Organization." (R1. 705a.) "Subcontract" refers to:

> [a]ny contract between the PH-MCO and an individual, business, university, governmental entity, or nonprofit organization to perform part or all of the PH-MCO's responsibilities under this Agreement.

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exhibit. The standard agreements signed by DPW and each of the MCOs are also judicially noticeable public records available (with redactions) pursuant to Chapter 17 of the RTKL, 65 P.S. §§ 67.1701-.1702, on the website of the Pennsylvania Treasury Department, http://www.patreasury.gov/eContracts.html. For example, R2. 233a-234a is an excerpt from the standard agreement between DPW and Aetna, effective July 1, 2010, available at http://contracts.patreasury.gov/View.aspx?ContractID=88205.

> Exempt from this definition are salaried employees, utility agreements and Provider Agreements, which are not considered Subcontracts for the purpose of this Agreement and, unless otherwise specified herein, are not subject to the provisions governing Subcontracts.

(R1. 708a-709a.) "Provider Agreement" is in turn defined as "[a]ny Department-approved written agreement between the PH-MCO and a Provider to provide medical or professional services to Recipients to fulfill the requirements of this Agreement." (R1. 706a.)

When an MCO subcontracts for the provision of dental services, it comes into possession of documents indicating the rates the subcontractor pays to providers. (*See, e.g.*, R2. 150a-153a, ¶¶ 4-14 (affidavit from Aetna's CEO stating, *inter alia*, that Aetna considers "documents and information showing the rates that either Aenta or its subcontractor DentaQuest paid to dental providers . . . . to be confidential, ***proprietary to Aetna***, and ***Aetna's*** trade secrets" (emphases added)), 156a-159a ¶¶ 4-13 (similar affidavit from executive of Health Partners), 162a-165a ¶¶ 4-13 (similar affidavit from executive of Keystone).)

When two or more MCOs subcontract through a single dental subcontractor, that subcontractor knows the rates negotiated for individual providers for each of those MCOs. (*E.g.*, R1. 311a (Henry Miller, Ph.D., the MCOs' expert witness in *Eiseman I*, testifying that a subcontractor working for two different MCOs would "[c]ertainly" know the provider rates negotiated for both MCOs).) Petitioners have

introduced no evidence suggesting the use of "silos" or other internal-information-sharing policies within DentaQuest to prevent individuals within DentaQuest from knowing the rates paid to providers for the treatment of enrollees of two or more of the four MCOs that subcontract with DentaQuest.[6]

At the hearing in *Eiseman I*, John Sehi, who is the Vice President of Finance at Health Partners and who also submitted an affidavit in this matter (R2. 155a), testified that the rates negotiated between DPW and Health Partners vary annually because of "medical trends from a year-to-year basis," including the availability of new drugs on the marketplace and changes in the cost of living. (R1. 343a-344a, 346a.) In the proceedings before the OOR in the present case, United, Coventry, and DBP submitted affidavits conceding that their payment rates negotiated with providers are "reevaluated and possibly renegotiated periodically" (R2. 122a ¶ 8,

[6] Mark Haraway, Regional Vice President of DentaQuest, submitted an affidavit stating that "DentaQuest takes steps to ensure that internal disclosure of rate information is as limited as possible" and that "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." (R2. 169a ¶ 6.) Notably absent from Mr. Haraway's affidavit is any averment that such "need-to-know" DentaQuest employees do not know the rate information of two or more MCOs.

Nancy Hardy, Coventry's Vice President of Operations, submitted an affidavit stating that "it is standard practice among subcontractors to MCOs to keep capitation and other payment rates confidential in order to protect each organization's competitive position. DentaQuest and Coventry take steps to limit access to this information to those who need to know it, including by electronic security and physical file security. Accordingly, the capitation and other payment rates at issue are not easily or readily available either inside or outside of DentaQuest or Coventry." (R2. 133a-134a ¶ 12.) There is no foundation for Ms. Hardy's statements regarding DentaQuest's practices, and in any event her affidavit contains the same gap as Mr. Haraway's.

133a ¶ 8, 128a ¶ 8), and characterizing the rates as "usually vary[ing] only slightly from year to year" (R2. 123a ¶ 13, 134a ¶ 13, 128a ¶ 13). Aetna, Health Partners, Keystone, and DentaQuest submitted no evidence in this case regarding the frequency or scale of changes to their provider-payment rates.

C. Brief Statement of the Determination Under Review

The OOR's Final Determination ordered the provision of documents responsive to the Request. (R2. 270a.)

III. SUMMARY OF ARGUMENT

This case seeks the release of information about the expenditure of public funds in past years to provide dental services to low-income children and other Medicaid enrollees in southeastern Pennsylvania. Specifically, the Request seeks records indicating the rates of payment to dental providers in SEPA for treating Medicaid enrollees during the Requested Period. These payments were made with public funds that flowed from DPW to MCOs and then to dental subcontractors before being used to provide dental services. This Court has previously ordered the release of records akin to those sought in the Request under the predecessor version of the RTKL. *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009), *alloc. denied*, 604 Pa. 708, 987 A.2d 162 (2009).

The OOR correctly determined that Petitioners wholly failed to carry their burden of proving that the documents sought are not in the possession of DPW or the five MCOs, or that they should be withheld under the "trade secret" or "confidential proprietary information" exceptions of the RTKL. This Court should affirm the OOR's Final Determination in its entirety.

The Supreme Court has recently emphasized that "courts should liberally construe the RTKL to effectuate its purpose of promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) (internal quotation marks and citation omitted). With that in mind, and as set forth below in full, the Court should hold as follows.

First, the Court should hold that the documents sought are in the possession (actual or constructive) of DPW, or, alternatively, that under 65 P.S. § 67.506(d)(1) they are otherwise public records.

Second, the Court should apply its reasoning in *Lukes* to the new RTKL, and should thus compel the release of the records requested here.

Third, the Court should affirm that the Petitioners have not proved that the records sought in the Request reveal trade secrets or confidential proprietary information. *See* 65 P.S. § 67.708(b)(11). The records sought are too stale to cause

substantial, if any, competitive harm to the Petitioners. In addition, all but one of the MCOs work through a single dental subcontractor, which by necessity knows their supposedly "secret" and "confidential" information.

Fourth, the Court should hold that the "financial records" provision of the RTKL independently requires the released of the requested records, regardless of whether they contain trade secrets or confidential proprietary information.

Finally, the Court should reject the argument that the Pennsylvania Uniform Trade Secrets Act somehow adds an exception to the RTKL apart from the "trade secrets" exception set forth in the RTKL itself, or that regulations of the Pennsylvania Department of Health or the United States Department of Health and Human Services govern the release of public records by DPW.

IV. ARGUMENT FOR RESPONDENTS

In an appeal from a final determination of the OOR, this Court is required "to conduct [a] full *de novo* review[]" and to "adopt[] the appeals officer's factual findings and legal conclusions when appropriate." *Bowling v. Office of Open Records*, No. 20 MAP 2011, 2013 Pa. LEXIS 1800, at *60 (Pa. Aug. 20, 2013). DPW, the Petitioner MCOs, and the subcontractors bear the burden of proving by a preponderance of the evidence that the public should not be allowed to learn how the public moneys in question were spent. 65 P.S. § 67.708(a)(1) ("The burden of

proving that a record of a Commonwealth agency . . . is exempt from public access shall be on the Commonwealth agency . . . receiving a request by a preponderance of the evidence."); *Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1087 (Pa. Commw. Ct. 2012) (the same is true for third-party direct interest participants). Each of the eight Petitioners was required to prove its own case, and even if this Court finds that some of the Petitioners have carried their burdens, it should affirm the Final Determination with respect to any Petitioner that has failed individually to do so. *See Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 342 (Pa. Commw. Ct. 2013) (en banc) ("Third-party contractors in possession of requested records are placed in the shoes of a local agency for purposes of the burden of proof when the contractor performs a governmental function on behalf of the agency, and those records directly relate to the contractor's performance of that function."). *See generally 500 James Hance Court v. Pa. Prevailing Wage Appeals Bd. Bureau of Labor Law Compliance*, 613 Pa. 238, 272-73, 33 A.3d 555, 575-76 (Pa. 2011) (noting that if the party with the burden of proof fails to make a prima facie case, the court must find for the other side, even if the other side puts on no evidence).

The Petitioners have challenged the Final Determination on several grounds. Brief of Intervenor-Petitioners Aenta, Health Partners, Keystone, and DentaQuest,

dated Aug. 20, 2013 (hereinafter "Group A Br."); Brief of Intervenor-Petitioners United, Coventy, and DBP, dated Aug. 20, 2013 (hereinafter "Group B Br."); Brief of Petitioner DPW, dated Aug. 20, 2013 (DPW merely references the arguments of the Group A and Group B Briefs and states, at page 7, that "DPW does not have a dog in this fight"). Requestor's brief addresses the Petitioners' arguments; all potential arguments not raised by any Petitioners in their opening briefs to this Court are waived and are not discussed here.

For the reasons set forth below, this Court should affirm the Final Determination in full.

A. The Requested Documents Are Public Records of DPW

1. DPW Possesses the Records Sought

The RTKL states that "[a] record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record." 65 P.S. § 67.305(a). "The true inquiry is whether the document is subject to the control of the agency. In other words, constructive possession qualifies as possession under the RTKL to presume that a record is a *public* record based on Section 305." *Barkeyville Borough v. Stearns*, 35 A.3d 91, 96 (Pa. Commw. Ct. 2012) (citations omitted); *see also* 65 P.S. § 67.901 ("Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record

requested is a public record . . . and whether the agency has possession, custody or control of the identified record . . . .").

There is no dispute that the standard agreement signed by DPW and each of the MCOs to govern the Medicaid managed-care program in SEPA states that:

> all contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include . . . [a] requirement that ensures that the Department [of Public Welfare] has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients.

(R2. 233a-234a.) In other words, the documents responsive to the Request are "subject to the control of DPW" and are therefore within the actual or constructive "possession" of DPW as that term is used in the RTKL. Moreover, these documents are indisputably "related to a contract to perform a governmental function," *see Office of the Budget v. Office of Open Records*, 11 A.3d 618, 623 (Pa. Commw. Ct. 2011).

Both Requestor's brief to the appeals officer (R2. 225a-226a) and the OOR's Final Determination (R2. 267a) relied on the text of the Standard Agreement to establish DPW's possession. Nonetheless, Aetna, Health Partners, Keystone, and DentaQuest (the "Group A Petitioners") have ignored the Standard Agreement completely. The discussion of the issue by DBP, United, and Coventry (the "Group B Petitioners") selectively quotes from the Standard Agreement, omitting the

words "documents and" from the phrase "documents and records of transactions pertaining to the provision of services to Recipients." Group B Br. at 20.

The phrase in the Standard Agreement "[d]ocuments . . . pertaining to the provision of services to Recipients" must include written contracts between dental subcontractors and individual dental providers that set forth payment rates for the provision of dental care to Medicaid enrollees. The analysis needs to proceed no further: the records sought are "documents" within DPW's "possession."

Even if the Court were to take the Group B Petitioners' truncated version of the Standard Agreement at face value, such contracts would be not only "documents" but also "records of transactions." The Petitioners characterize "records of transactions" as limited strictly to "individual medical records showing the dental treatment provided to an individual HealthChoices enrollee," Group B Br. at 20, but such a cramped reading is without textual support. *See, e.g.*, *Black's Law Dictionary* 1535 (8th ed. 2004) (defining "transaction," in first definition, as "[t]he act or an instance of conducting business or other dealings; esp., the ***formation***, performance, or discharge ***of a contract***" (emphases added)).

The Group B Petitioners' selective quotation of the Standard Agreement is made more troubling by the fact that a separate provision requires that MCOs "must make all Subcontracts available to the Department within five (5) days of a

request by the Department." (R1. 765a.) The Standard Agreement goes on to require MCOs to submit to DPW, for "advance written approval," all subcontracts between the MCOs and any corporation to which they delegate Medicaid-related responsibilities, including "dental services." (R1. 766a.)[7] These requirements further belie the claim that "the records requested by [Requestor] are not within the possession of DPW." Group B Br. at 13.

2. The MCOs Possess the Records Sought, and Those Records Directly Relate to a Governmental Function

As stated *supra* and in Requestor's brief to the appeals officer (R2. 225a-226a), the plain text of the Standard Agreement disposes of the question of DPW's

[7] The Standard Agreement defines "Subcontract" in a way that might superficially appear to exclude the subcontracts at issue in the Request, but a careful look at the Standard Agreement's definitions section reveals this not to be the case. The definition of "Subcontract" states that "[e]xempt from this definition are . . . Provider Agreements, which are not considered Subcontracts for the purpose of this Agreement and, unless otherwise specified herein, are not subject to the provisions governing Subcontracts." (R1. 708a-709a.) However, "Provider Agreement" is defined as "[a]ny ***Department-approved*** written agreement ***between the PH-MCO and a Provider*** to provide medical or professional services to Recipients to fulfill the requirements of this Agreement" (emphases added). (R1. 706a.) First, if a written agreement has been approved by DPW, then DPW *already* has actual possession of it, and there is no more question of agency possession. Second, and even more importantly, a contract is a "Provider Agreement" only if the parties to it are a provider and an ***MCO***. In other words, contracts between DentaQuest or DBP and dental providers—documents at issue in this case—are not subject to the "Provider Agreement" exemption, because DentaQuest and DBP are not "PH-MCOs." Although the "Provider Agreement" exemption could operate to exclude agreements directly between an MCO and a provider from the Standard Agreement requirements set forth at R1. 765a-766a, such agreements are at issue in Request #2 in *Eiseman I*, not in this case, and the Petitioners have not contested agency possession in *Eiseman I*.

possession of the records sought. Even if this were somehow not the case, the records would be public records under a separate provision of the RTKL:

> A public record that is not in the possession of an agency but [1] is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and [2] 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). The records sought here satisfy both criteria. First, the MCOs have in their possession a variety of types of documents showing such rates.[8] Second, these documents "directly relate to the governmental function" of providing Medicaid services: after all, they concern payments to dentists for treating low-income and/or disabled children, a quintessentially governmental function.[9]

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[8] The affidavits from Aetna (R2. 150a-153a, ¶¶ 4-15), Health Partners (R2. 156a-159a ¶¶ 4-14), and Keystone (R2. 162a-165a ¶¶ 4-14) acknowledge those three MCOs' possession of such documents. Although the affidavits from United (R2. 120a-124a) and Coventry (R2. 131a-135a) are vague as to whether those MCOs possess responsive documents, such omissions weigh against the parties bearing the burden of proof, i.e., those two MCOs themselves. *See Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011) ("[A]n agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.").

[9] As the Group A Petitioners put it in the context of *Eiseman I*, but with words that apply with equal force here: "[T]he MCOs have not contested that implementing the Commonwealth's Medicaid program is a governmental function." Reply Brief for Aetna, Health Partners, and Keystone Mercy, dated June 26, 2013, at 4 (internal quotation marks and citation omitted).

The Petitioners urge that "[i]n [Requestor]'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." Group B Br. at 25. But this *reductio ad absurdum* overlooks section 67.506(d)(1)'s second criterion. If a requestor were seeking such janitorial timesheets, there would be no need to resolve whether the timesheets satisfy the ***first*** criterion of section 67.506(d)(1), because those timesheets obviously do not satisfy the ***second*** criterion. Cleaning a private dentist's office does not "directly relate[] to [a] governmental function"; cleaning a disadvantaged child's teeth ***does***.

Instead, the absurd consequence that should trouble this Court is the same one that troubled the OOR: the risk that agencies and their contractors may circumvent the RTKL to shield the expenditures of public funds from public inspection simply by funneling moneys through an extra entity. (*See* R2. 267a.) *See also SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012) (RTKL decision requiring a public authority, which had been set up to create and operate a sports stadium, to disclose the bids made by all prospective concessionaires to a contractor of the authority who was managing the stadium business for the authority); *id.* at 1044 ("[I]t would undermine the clear aim of Section 506(d)(1)—which recasts certain third-party records bearing the requisite connection to

government as public records 'of the [government] agency,' 65 P.S. § 67.506(d)(1)—to require that that the materials actually be 'of such agency' in the first instance. While we have little doubt that the disclosure requirements pertaining to third-parties undertaking governmental functions may have bearing on their business decisions in dealing with agencies, this is within the range of considerations likely to have been taken into account in the General Assembly's open-records calculus." (second alteration in the original) (citation and footnote omitted)).

For their arguments under section 67.506(d)(1), the Petitioners rely heavily on a recent decision of this Court, *Allegheny County Department of Administrative Services v. Parsons*, 61 A.3d 336 (Pa. Commw. Ct. 2013) (en banc), *alloc. denied*, 2013 Pa. LEXIS 1653 (Pa. July 31, 2013). Group A Br. at 32-33; Group B Br. at 16-18. *Parsons* is easily distinguished. The request in *Parsons* sought payroll information showing the names, birthdates, and hire dates of the employees of a private contractor that performed social services for Allegheny County. *Id.* at 339. This Court observed that the contractor's employee information did not relate to the performance of a governmental function, as it was "not relevant to contract entry, management, supervision or the employees' performance of the governmental function of social services." *Id.* at 346-47. Here, by contrast, the

Request seeks information about the contractual rates paid to dental providers to treat Medicaid enrollees, which appropriately "focuses on *what* services are performed and ***how*** they are performed, not ***who*** performs them," *id.* at 347 (quotation marks and citation omitted). *See also Municipality of Monroeville v. Drack*, No. 2123 C.D. 2012, 2013 Pa. Commw. Unpub. LEXIS 561, at *12-17 (Pa. Commw. Ct. July 16, 2013) (finding that calibration of speed-timing devices is a "governmental function" and that training records of how technicians are trained to calibrate the speed timing devices "directly relate" to the function of calibrating the devices). Another distinction is that in *Parsons*, the only information the private contractor provided to the County pursuant to its contract was a "staff roster" listing employees by identification number, not name. 61 A.3d at 344-45. Here, by contrast, "[t]he simple scenario presents," because the Standard Agreement "requires the contactor to transmit the information sought to the agency." *Id.* at 344.

The Petitioners also cite several OOR decisions under section 67.506(d)(1). Group A Br. at 33 n.10; Group B Br. at 19 n.10. These cases are either not on point or not helpful to the Petitioners. *See McCarthy v. W. Pennsboro Twp.*, No. AP 2013-1097, 2013 PA O.O.R.D. LEXIS 610, at *7 & n.1 (Pa. OOR July 25, 2013) (a contractor, MDIA, maintained a relationship with the Western Cumberland

Council of Governments, "which would be required to obtain any records of MDIA in accordance with Section 501(d)(1) of the RTKL," but the requestor had erroneously requested records from West Pennsboro Township, which did not contract with MDIA); *VanSickle v. London Grove Twp.*, No. AP 2013-1095, 2013 PA O.O.R.D. LEXIS 607, at *7-8 (Pa. OOR July 24, 2013) (finding that two companies "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," but ***granting*** the request, because the Township official's "affidavit is silent on a salient issue, *i.e.*, whether the Township, itself, possesses any of the records requested . . . . The burden of proof is on the Township to demonstrate that it does not possess any responsive records. Here, however, the Township has not provided any evidence that it does not possess the requested records." (citation omitted)); *Tignall v. Dallastown Area Sch. Dist.*, No. AP 2011-1434, 2011 PA O.O.R.D. LEXIS 1209, at *10-11 (Pa. OOR Dec. 2, 2011) (Parent Advisory Group was not a "contractor" within the meaning of section 67.506(d)(1); rather, it was "an informal group that meets with the District, but is not controlled or created by the District to conduct District activities"); *Campbell v. Souderton Area Sch. Dist.*, No. AP 2010-1212, 2011 PA O.O.R.D. LEXIS 34, at *13-14 (Pa. OOR Jan. 21, 2011) (***granting*** request in relevant part,

where although tax collectors had no contract with the District, "records held by the tax collector constitute 'records' of ***both*** the tax collector ***and*** the District," and "[u]nquestionably, the collection of tax revenue is a critical government function for the District, and, accordingly, records related to this purpose are 'of' the District").

B. The Requested Records Must Be Released Under *Lukes*

The Petitioners argue that the documents sought are exempt from disclosure as public records on the grounds that they "constitute[] or reveal[] a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). But this Court rejected just such an argument in *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009), *alloc. denied*, 604 Pa. 708, 987 A.2d 162 (2009). In *Lukes*, as here, the requestor sought records showing payment rates for providers that treated Medicaid managed-care enrollees. This Court rejected the argument that such records were protected as "trade secrets" within the definition of that term as set out in 12 Pa.C.S. § 5302. 976 A.2d at 626. *See generally id.* at 626-27 (holding, in the face of evidence that the contracts between a Medicaid MCO and a group of hospitals "contain confidentiality provisions," that "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" (emphasis added)).

This analysis is unaffected by the fact that the Medicaid funds in the instant case passed through two hands before reaching an actual provider, while the funds in *Lukes* passed through one. In diagram form, the flow of public funds in *Lukes* looked like this:

> **public funds → DPW → MCO → provider received *public* funds**

And the flow of public funds here looked like this:

> **public funds → DPW → MCO → subcontractor → provider received *public* funds**

In the Petitioners' view, however, adding an extra middleman performed alchemy, transmuting from public to private the Medicaid funds received by providers to treat Medicaid enrollees:

> **public funds → DPW → MCO → subcontractor → provider received *private* funds**

This view is wholly unsupported by the law, the facts, or common sense.

Lukes was decided under a version of the RTKL that has since been replaced, 976 A.2d at 612 n.1, but, as the OOR recognized in its Final Determination (R2. 269a-270a), the holding of the Commonwealth Court's decision in *Lukes* applies as well to the version of the RTKL that is currently in force and is applicable to the instant case. First, the definition of "trade secret" in force in the present case, 65 P.S. § 67.102, is identical in all material respects to the language defining "trade secret" that the *Lukes* Court considered, 976 A.2d at 626. Second, the Supreme Court has explicitly recognized that with the new RTKL, "the Legislature intended greater, not lesser, openness under the new open-records regime." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1044 n.19 (Pa. 2012); *see also Bowling v. Office of Open Records*, No. 20 MAP 2011, 2013 Pa. LEXIS 1800 (Pa. Aug. 20, 2013) ("In 2008, the General Assembly enacted the RTKL, which replaced the RTKA and provided for significantly broadened access to public records."); *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) ("[T]he enactment of the RTKL in 2008 was a dramatic expansion of the public's access to government documents.").[10]

[10] Requestor's Brief in *Eiseman I*, at 14-15, explains that two 2011 decisions of the Court discussing whether the amended RTKL superseded *Lukes* are readily distinguishable.

It is true that the "confidential proprietary information" exception did not appear in the version of the RTKL that was at issue in *Lukes*. But as discussed *infra*, the requested records contain no confidential proprietary information.

C. *Lukes* Aside, the Records Sought Do Not Reveal Trade Secrets or Confidential Proprietary Information

The RTKL defines "trade secret" 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; and
> >
> > (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102. The same section of the RTKL 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.

Id. Although "the terms are not interchangeable," *Office of the Governor v. Bari*, 20 A.3d 634, 648 (Pa. Commw. Ct. 2011), neither the discussion in *Bari* nor the record in this case identifies a single aspect of the term "confidential proprietary information" that is not encompassed for purposes of this case by the definition of "trade secrets" in the current RTKL. In addition, here neither term applies to the requested records, because (1) the Petitioners have not carried their burden of proving that the exceptions apply, given the constant flux of healthcare economics, and (2) in the case of the four MCOs that subcontract with DentaQuest, there are effectively no secrets that foster competition in the SEPA Medicaid program.

1. The Historical Information in Question is Too Old to Have Competitive Significance

The Request does not seek records from after the 2011-2012 fiscal year, and the oldest records sought contain rates negotiated more than five years ago. The OOR correctly concluded 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 relevan[ce] or value, as the information . . . very well may be 'outdated' by the time of its release." (R2. 270a.) The Petitioners caricature this reasoning as "saying that only when rates are totally static and unchanging would their release result in competitive harm." Group A Br. at 37. But it is hardly

controversial to note that there are oscillations of many variables in the healthcare industry from year to year. The Petitioners have failed to carry their burden insofar as they have not demonstrated why the release of stale, historical information about dental provider rates would undermine competitive processes going forward. *See, e.g.*, *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) (noting that disclosure of certain contract price information "is unlikely to work a substantial harm on the competitive positions of . . . contractors" because "[t]he data is made up of too many fluctuating variables for competitors to gain any advantage from the disclosure"); *see also* Reply Brief for Aetna, Health Partners, and Keystone Mercy, dated June 26, 2013 ("Group A *Eiseman I* Reply Br."), at. 7-8 (referring, in the context of the *Eiseman I* requests, to "unremarkable testimony that the relevance of rate information decreases over time").[11]

2. The Genie is Already Out of the Bottle

A single business—DentaQuest—knows all the supposedly "secret" and "confidential" information of four of the MCOs. These four MCOs have all taken the position that the disclosure of their rate information to their competitors would

[11] Petitioners suggest that the theory discussed in this paragraph originated with the Final Determination on appeal in *Eiseman II*, and that Requestor then "adopt[ed] this made-up argument as its own in its *Eiseman I* merits brief before this Court." Group B Br. at 30. In fact, Requestor has been advancing this very point since August 2011, in Requestor's initial appeal to OOR from DPW's denial of the *Eiseman I* RTKL request. (R1. 22a; *see also* R1. 1145a ¶¶ 24-26 (Requestor's post-hearing brief, dated Aug. 3, 2012).)

substantially harm their ability to compete fairly in the market for reasonable contract rates. Yet each of these MCOs discloses such information to an agent, DentaQuest, that also acts as agent to competitor MCOs. *See* Group A *Eiseman I* Reply Br. at 9 (conceding that "DentaQuest knows the rates").[12]

The affiants from Aetna, Health Partners, and Keystone make the odd claim that "[o]ther than required reporting to governmental agencies or as required by applicable law, [the MCO] never discloses provider rates to anyone outside [the MCO]." (R2. 151a ¶ 6, 157a ¶ 6, 163a ¶ 6.) These assertions are plainly incomplete, as ***DentaQuest*** is well aware of the provider rates it pays on each MCO's behalf. In addition, individual dentists and other providers who treat each MCO's enrollees know well how much money they receive. The Petitioners go on to argue that "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." Group B Br. at 32. These arguments are completely unsubstantiated: there are no contracts or affidavits from dentists or provider groups in the record, and the affidavit of DentaQuest Regional Vice President Mark Haraway (R2. 167a-170a) offers no support for the brief's claim about contracts between DentaQuest and providers. Furthermore, common

[12] The discussion in this subsection does not apply to United, which does not subcontract with DentaQuest.

sense dictates that a dentist who treats enrollees of more than one Medicaid MCO knows how much she is paid to see each group of patients.[13]

The Petitioners cite *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010), for the factors to determine whether information is a trade secret. The first of these factors—"the extent to which the information is known outside of the company's business"—overwhelmingly militates against a finding of trade secrecy here, as the information is known by an agent of the company's competitors, i.e., a subcontractor that also negotiates with dental providers on behalf of competitor MCOs. The second and third factors—"the extent to which the information is known by employees and others involved in the company's business" and "the extent of the measures taken by the company to guard the secrecy of the information"—are also unsatisfied, because of the nebulous and general averments in the affidavits.[14] And to the extent that the test is different for

[13] Mr. Haraway avers that "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." (R2. 169a-170a ¶ 9.) But a provider who treats enrollees of both United and of one of the DentaQuest MCOs of course already knows such "rate information," at least with respect to her own practice.

[14] Mr. Haraway's affidavit makes conclusory averments such as that "DentaQuest takes steps to ensure that internal disclosure of rate information is as limited as possible." (R2. 169a ¶ 6.) But his affidavit is notably vague about which DentaQuest employees have access to such information, (*see* R2. 169a ¶¶ 6-7), and it says nothing about protections to keep any one DentaQuest employee from accessing the information of more than one MCO. Even more conclusory are the arguments of counsel, free from record citations, that "[i]t is not hard to figure

"confidential proprietary information," here the information sought has *already* been disclosed to the very party in whose hands it could do the most competitive harm: a subcontractor negotiating on behalf of competitor MCOs. *See also Moffitt v. Pa. Dep't of Gen. Servs.*, Docket No. AP 2012-147, 2012 PA O.O.R.D. LEXIS 1297, at *10 (Pa. OOR Oct. 15, 2012) (the party asserting trade secrecy or confidential proprietary information must "establish *how* disclosure would harm [its] competitive position").

D. The Requested Records Are "Financial Records"

The RTKL, at 65 P.S. § 67.708(c), provides that the "trade secrets" and "confidential proprietary information" exceptions to public access do not apply to "financial records." As explained below, the records sought by Requestor here meet the definition of "financial records." It is thus not necessary for this Court to decide whether *Lukes* applies to this request or whether the records sought are otherwise "trade secrets" or "confidential proprietary information." *See generally Dep't of Conservation & Natural Res. v. Office of Open Records*, 1 A.3d 929, 939

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out how DentaQuest *might* maintain the required confidences" and that "[w]ere DentaQuest to internally share the rates paid by each MCO, such *would appear to be* a breach of contract." Reply Brief of United and Coventry in *Eiseman I*, dated June 25, 2013, at 21 & n.16 (emphases added).

(Pa. Commw. Ct. 2010) (en banc) ("[I]n applying any of the exemptions set forth in Section 708(b), we must consider subsection (c).").[15]

The RTKL defines "financial record" in relevant part as "[a]ny account, voucher or ***contract*** dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) ***an agency's acquisition, use or disposal of services***, supplies, materials, equipment or property." 65 P.S. § 67.102 (emphases added). As Requestor noted before the Appeals Officer, the substantial funds DPW funnels through the MCOs via the dental subcontractors to the dentists who provide services to SEPA Medicaid enrollees qualify as DPW's "use" of "services" to carry out its Medicaid program. (R2. 222a.) *See Lukes*, 976 A.2d at 626 (noting that a Medicaid MCO had entered into agreements with providers "at the direction of DPW for the disbursement of public funds"); *id.* at 627 (the MCO is "voluntarily participat[ing] in a public program and is receiving ***and disbursing*** public funds in furtherance of that program" (emphasis added)). DPW is obligated to provide access to dental care for Medicaid enrollees; it accomplishes this by "using" the "services" of the MCOs; and it is analytically irrelevant whether the MCOs opt to perform these "services" (i.e., providing enrollees access to dental

[15] In the Final Determination on appeal in *Eiseman I*, the appeals officer raised the applicability of section 67.708(c) *sua sponte*. In the Final Determination on appeal in *Eiseman II*, Requestor made an argument under section 67.708(c) from the outset. (R2. 222a.)

care) by contracting directly with dental offices or by employing a subcontractor to do so. The funds that dental providers ultimately receive to treat Medicaid enrollees are ***public*** funds, regardless of how many hands they first pass through. *Cf. Dep't of Conservation & Natural Res.*, 1 A.3d at 941 (holding that third-party payroll records were "financial records" within the meaning of section 67.708(c)).

Because the records sought here are "financial records" dealing with DPW's use of services, they are public records pursuant to 65 P.S. § 67.708(c), irrespective of whether they contain trade secrets or confidential proprietary information.

E. Neither the Pennsylvania Uniform Trade Secrets Act Nor Federal and State Regulations Bar Disclosure of the Requested Documents

The Petitioners urge variously that the Pennsylvania Uniform Trade Secrets Act ("PUTSA"), 12 Pa.C.S. §§ 5301 *et seq.*, a regulation of the Pennsylvania Department of Health, 28 Pa. Code § 9.604(a)(8), and regulations of the United States Department of Health and Human Services ("HHS"), 45 C.F.R. §§ 5.65(b)(4)(ii), 74.43, 74.53(f); 42 C.F.R. §§ 434.70(a)(2) & (b), limit what records may be disclosed under the current version of the RTKL. Group A Br. at 41-44, Group B Br. at 34-35, 37-38. The Court should reject these arguments.

Requestor has previously detailed why PUTSA is inapplicable in the RTKL context. Brief of Requestor in *Eiseman I*, dated May 29, 2013 ("Requestor's *Eiseman I* Br."), at 26-27. Petitioners now additionally argue that the RTKL's

"financial records" provision, 65 P.S. § 67.708(c), "has no impact whatsoever on exemption of the records pursuant to" PUTSA, and "also cannot apply here to negate the 'confidential proprietary information' exception." Group B Br. at 31 n.15. In other words, section 67.708(c) reads "The exceptions set forth in subsection (b) shall not apply to financial records . . . ." But the Petitioners invite the Court to rewrite it as follows: "The exceptions set forth in subsection (b), except for the exception set forth at subsection (b)(11), shall not apply to financial records . . . ." The Court should decline the invitation.

Requestor has also previously explained the inapplicability of 28 Pa. Code § 9.604(a)(8), 45 C.F.R. § 74.43, and 42 C.F.R. §§ 434.70(a)(2) & (b). Requestor's *Eiseman I* Br. at 19-20 n.5. By way of additional response to the Petitioners' expanded reliance on 28 Pa. Code § 9.604(a)(8), even if this Department of Heath regulation controlled DPW's obligations under the RTKL—which it does not—the regulation by its own terms does not prohibit disclosure if "ordered by a court," e.g., this Court. In addition, by its own terms that regulation is limited to specific annual reports "in a format specified by the Department" of Health. 28 Pa. Code § 9.604(a). Finally, the only entity with a right of action to enforce 28 Pa. Code § 9.604 is the Department of Health, *see* 28 Pa. Code § 9.606, and the Department of Health has never had any involvement in this matter or in *Eiseman I*.

The other two federal regulations the Petitioners cite, 45 C.F.R. §§ 5.65(b)(4)(ii) & 74.53(f), pertain to the release of information by HHS under the federal Freedom of Information Act ("FOIA"). FOIA is not at issue here, and FOIA regulations promulgated by HHS have no relevance to this proceeding. *See SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042-43 (Pa. 2012) (noting that "extrapolating from other jurisdictions in the open-records [context] is difficult due to variances in the approaches taken in the governing statutes").

V. CONCLUSION

For all of the foregoing reasons, the Court should affirm the OOR's Final Determination in its entirety. If, alternatively, the Court finds that only some of the Petitioners have carried their burdens of proof, it should affirm the Final Determination with respect to those Petitioners that have not.

Dated: September 3, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limits set forth in Pennsylvania Rule of Appellate Procedure 2135.

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Dated: September 3, 2013

CERTIFICATE OF SERVICE

I, Benjamin Geffen, hereby certify that on this Third Day of September 2013, I caused to be served the **Brief of Respondents**, by the following means of service, on the following:

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