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.

REPLY BRIEF OF PETITIONERS DENTAL BENEFIT PROVIDERS, UNITEDHEALTHCARE OF PENNSYLVANIA, & HEALTHAMERICA PENNSYLVANIA 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

Karl S. Myers (Id. No. 90307)
STRADLEY, RONON,
STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8193

Attorneys for Petitioners Dental Benefit Providers, UnitedHealthcare, and HealthAmerica d/b/a CoventryCares

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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 reply brief in further support of their petition for review in these consolidated matters.

For the reasons set forth below, as well as those set forth in their principal brief, 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. DPW does not possess the requested materials.

PILCOP claims at pages 13 through 22 of its brief that DPW has possession of the requested materials, yet somehow ignores the very statute it says gives DPW possession. Indeed, *PILCOP completely disregards the statutory prerequisite that an agency's constructive possession is limited to materials held by "a party* ***with whom the agency has contracted.****"* 65 P.S. §67.506(d)(1) (emphasis added). PILCOP avoids this plain language like the plague, despite the fact that it was a central feature of the MCOs' and subcontractors' briefs. PILCOP seems to pretend this language does not exist, as if doing so will make it go away.

The unambiguous directive of section 506(d)(1) limits an agency's constructive possession to materials held by a contractor that has directly contracted with that agency. Unless the agency has a contract with the party possessing the requested records, there is no constructive possession. No contract? No possession. Here, neither the subcontractors nor the dentists contracted with DPW. PILCOP does not dispute that in its brief.[1] Accordingly, there is no agency possession under section 506(d)(1).

Aside from ignoring crucial statutory language, it is also telling that PILCOP does not offer *any* defense of *any* aspect of the OOR's agency possession rationale – including OOR's purported "public policy" finding that the materials in question "should" be disclosed.

Instead, veering off in a new direction, PILCOP tries to invoke the terms of the agreement between DPW and the MCOs. PILCOP first argues at pages 14 and 15 that DBP, United, and Coventry have "selectively quoted" from the agreement by "omitting" these words: "documents and." But PILCOP does not explain how this makes any difference. PILCOP just says the word "documents"

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[1] PILCOP seems to make a half-hearted attempt to claim the MCOs themselves come into possession of the rates paid by the subcontractors to the dentists (at pages 7 and 17 and in footnote 8 of its brief), but PILCOP cites *nothing* supportive of that proposition. To be clear: there is *absolutely no evidence in this case* supporting the notion that the MCOs actually possess any of the rates paid by the subcontractors to the dentists.

"must include" the confidential and proprietary payment rates negotiated between the subcontractors and dentists, as if that conclusion is self-evident. It is not – and, actually, the opposite is true. Indeed, the contract passage PILCOP focuses on is expressly limited to documents "*pertaining to the provision of services to Recipients*." The confidential and proprietary rates paid by the subcontractors do not pertain to the "*provision of services to Recipients*" – those rates pertain to the *terms of compensation of the dentists.*

PILCOP similarly fixates at pages 14 to 16 on contract provisions that purportedly impose requirements on the MCOs relating to their subcontractors. However, these provisions appear to be in place only to ensure responsible subcontractors are utilized. They have no relevance to the question of agency *possession*. Just because the MCOs are required to hire reputable subcontractors does not somehow mean that either the MCOs or DPW suddenly "possess" the rates paid to the dentists under an entirely separate contract (to which none of the MCOs or DPW is a party). Thus, even assuming this new argument is factually accurate,[2] DPW *still* does not "possess" the rates between the subcontractors and the dentists. None of the provisions PILCOP relies on mandate (or even permit)

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[2] It bears noting that PILCOP never invoked these particular contract passages in the proceedings before the OOR, only raising it for the first time in its brief before this Court.

DPW access to the rates paid under the sub-sub-contracts between the subcontractors and the dentists.[3]

PILCOP also expresses concern at pages 18 and 19 with the possibility that agencies and contractors may try to use subcontracts to circumvent the RTKL. However, in order to sustain such a contention, this Court has indicated that a party must provide some evidence that a subcontract is really an attempt to play a "shell game." See Office of Budget v. Office of Open Records, 11 A.3d 618, 623 (Pa. Commw. 2011) (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"). There is absolutely no evidence of that here. Nor could there be, as at least some of the MCOs began participating in the HealthChoices program before the new RTKL even was enacted.[4] (See, e.g., R1. 368a) (testimony that United first participated in HealthChoices starting in 1989).

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[3] In fact, at page 7 of its brief, PILCOP specifically points out that provider agreements are discussed in the DPW-MCO contracts, but PILCOP never argues in its brief that DPW has any right to obtain the agreements between the subcontractors and dentists. Nor can it make that argument, because DPW has no such right.

[4] Thus, in order to buy PILCOP's subterfuge argument on the facts presented here, the Court would have to believe that the MCOs had crystal balls that revealed to them the future enactment of the new RTKL. PILCOP nevertheless claims at page 18 of its brief that it is DBP, United, and Coventry that have offered implausible hypotheticals. Not so. It is quite possible that contracted copying or janitorial services may be deemed directly related to a governmental function. It would seem reasonable to conclude that a clean office and the ability to make photocopies are essential to the function of almost any dental office.

Lastly, PILCOP attempts at pages 19 through 22 to avoid the decisional law cited by the MCOs and subcontractors (including this Court's Parsons decision) by splitting hairs, claiming that the facts of those cases are different from the facts here. But PILCOP does not explain why any of these minor factual distinctions make a *substantive* difference. They do not. Nor does PILCOP offer any of its own caselaw in an attempt to support its claim of agency possession. No such caselaw exists. As such, PILCOP has failed to establish agency possession.

II. PILCOP admits *Lukes* is inapplicable.

At pages 22 through 25 of its brief, PILCOP repeatedly admits that Lukes is inapplicable here. First, PILCOP concedes at page 23 that "funds in the instant case passed through two hands before reaching an actual provider, while the funds in Lukes passed through one."[5] On the next page, PILCOP admits that "Lukes was decided under a version of the RTKL that has since been replaced." And, on the page after that, PILCOP admits that "[i]t is true that the 'confidential proprietary information' exception did not appear in the version of the RTKL that was at issue in Lukes." PILCOP thus has cemented Lukes' inapplicability here.

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[5] PILCOP misconstrues the MCOs' and subcontractors' arguments on this point. Their argument is that the plain language of section 506(d)(1) must be applied as written and limits the reach of agency possession solely to records held by an agency's direct contractor.

All of this notwithstanding, PILCOP *still* claims Lukes mandates a finding against the MCOs and subcontractors. *But there was no question of agency possession in Lukes.* That case cannot possibly control the question of agency possession under 506(d)(1) of the new RTKL, as that issue was neither presented nor decided in that case. Nor could it have been, as Lukes arose under the old RTKL, not the current version. In any event, for the many reasons previously discussed, Lukes does not and cannot apply here anyway. Lukes therefore cannot support a ruling in PILCOP's favor in this case.

III. Rate variations from year to year do not undercut their proprietary and secret nature.

PILCOP also fails to muster any defense of the OOR's findings on the RTKL exemptions at issue here. While PILCOP notes at pages 26 and 27 that the rates in question vary from year to year, it (like OOR) offers no reasoning as to *why* that undercuts the MCOs' and subcontractors' arguments. As the MCOs and subcontractors have repeatedly explained, the slight variance in rates from year to year illustrates the high economic value in those rates, and the meticulous and costly efforts that are invested in negotiating those rates. A prior year's rates also provides a "roadmap" for a competitor so that it can learn of trends and directions in a competitor's future rates. In a nutshell, rate variation only *underscores* the proprietary and secret nature of the rates at issue – not the opposite.

IV. **Multiple MCOs' use of DentaQuest does not change the proprietary and secret nature of the rates.**

PILCOP also claims at pages 27 through 30 that the "genie is out of the bottle" because more than one MCO uses DentaQuest as an "agent." There are several responses here. First, by PILCOP's own admission in footnote 12, this entire discussion is inapplicable to DBP and United. Second, OOR did not buy this "common subcontractor" argument when PILCOP tried to sell it below. Third, DentaQuest is not the "agent" of any MCO – it is an arm's length subcontractor – and thus it does not "represent" any MCO in rate negotiations. Fourth, DentaQuest is obligated, under its contracts with each MCO, on the one hand, and under its separate contracts with each dental practice, on the other hand, to keep all rate information confidential. The same is true of the MCOs, on the one hand, and the dentists, on the other. While PILCOP says these claims of confidentiality are not substantiated, all of the affidavits submitted by the MCOs and subcontractors specifically affirm that these contracts require confidential treatment of the rates. PILCOP has offered no competing evidence on this point.

V. **The "financial records" provision is inapplicable here.**

PILCOP also argues at pages 31 and 32 that the "financial records" provision, section 708(c) of the RTKL, guts all of the exemptions invoked here. OOR did not buy this argument either, and with good reason. On its face, this

provision applies only to "the receipt or disbursement of funds ***by an agency***." 65 P.S. §67.102(1)(i) (emphasis added). This provision only applies to *DPW's* disbursement of funds pursuant to the DPW-MCO relationships. It does not apply to the *MCOs'* disbursements under their separate relationships with the subcontractors, or the *subcontractors'* disbursements under their separate relationships with the dentists. While PILCOP tries to dance around the plain language of this provision by claiming it is "analytically irrelevant" whether the MCOs use subcontractors or not, that is not the question posed by the statute. The "financial records" language, on its face, pertains only to the agency's disbursement of funds.

Moreover, and in any event, the "financial records" provision cannot apply to negate the "confidential proprietary information" exemption at all, 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 of section 708(c) were read to negate the "confidential proprietary information" exemption. PILCOP offers no response to this point in its brief, even though the MCOs and subcontractors have raised it previously.

VI. The MCOs and subcontractors are not **<u>using PUTSA to try to "rewrite" the RTKL.</u>**

Lastly, at page 33 of its brief, PILCOP claims the MCOs and subcontractors are trying to use the Pennsylvania Uniform Trade Secrets Act ("PUTSA") as a device to "rewrite" the RTKL. They are doing nothing of the sort. In fact, in arguing for exemption under PUTSA, the MCOs and subcontractors are applying the RTKL's plain language. On its face, the RTKL's "public record" definition exempts from disclosure all materials "exempt from being disclosed *under any other Federal or State law*." 65 P.S. §67.102 (emphasis added). Thus, even if the Court concluded that the "financial records" language of section 708(c) eviscerates all exemptions found within the RTKL itself, PUTSA still would apply, as section 708(c) does not reach PUTSA.

No alteration of the RTKL has been suggested by the MCOs and subcontractors. Their argument is only that PUTSA, as an "other Federal or State Law," requires exemption from disclosure, notwithstanding what the RTKL may provide. In fact, in arguing that PUTSA cannot apply, it is *PILCOP* that is arguing for an alteration of the RTKL by, in effect, asking this Court to negate the RTKL exemption for materials "exempt from being disclosed *under any other Federal or State law*" found within the "public record" definition. Obviously, this Court cannot render such a holding here.

VII. The Supreme Court in *Bowling* held that this Court owes *zero* deference to the Office of Open Records decision in this case.

Finally, a very recent and significant RTKL decision should not go unmentioned. On the same day that DBP, United, and Coventry submitted their merits brief in this case, the Pennsylvania Supreme Court decided Bowling v. Office of Open Records, ___ A.3d ___, 2013 WL 4436219 (Pa. Aug. 20, 2013). There, the Supreme Court affirmed this Court's holding that a decision by an appeals officer of the Office of Open Records is entitled to *no deference at all*, and that this Court is to conduct a full, *de novo*, plenary review in all Right-to-Know Law matters. See id. at *17 (RTKL and statutory construction principles "support[] the Commonwealth Court's determination to conduct full *de novo* review of matters appealed to that court from determinations made by OOR appeals officers."); id. at *21 (the broadest scope of review – plenary review – applies to RTKL matters). Indeed, the Supreme Court held that the courts of this Commonwealth "are the ultimate finders of fact and that they are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeals officers." Id. at *18.

The Supreme Court in Bowling viewed the powers and duties of an OOR appeals officer narrowly. According to the Court, "the duty of an appeals

officer … is simply to determine whether the underlying agency correctly denied a requester access to a document under one of the statutory exceptions."[6] Id. at *12; see also id. at *12 ("there appears to be little 'discretion' concerning whether a document may or may not be released to a requester"). The Court similarly issued a harsh rejection to the notion that the courts are to pay any respect to the OOR's interpretation of the RTKL. See id. at *12 n.15 (rejecting "categorically" the OOR's argument that the courts should defer to OOR interpretations of the RTKL).

Thus, under the Bowling decision, the job of an OOR appeals officer is simply to decide if the plain text of the RTKL requires disclosure. An appeals officer's job *never* is to make policy determinations – like the one the appeals officer made in this case. The Supreme Court therefore is in complete agreement with this Court's proclamation in Parsons that matters of policy *never* can be injected into RTKL disputes. See Allegheny County Dep't. of Admin. Svcs. v. Parsons, 61 A.3d 336, 347 (Pa. Commw. 2013) ("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

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[6] At page 11 of its brief, PILCOP suggests that this Court *must* adopt the appeals officer's findings in certain circumstances. That is self-evidently wrong based on a cursory reading of the Supreme Court's Bowling decision.

devolve from a matter of statutory interpretation into a subjective exercise that varies depending on the perspective of the beholder." (emphasis in original)).

Now that the Supreme Court has affirmed this Court's determination in Bowling that the courts need not give any regard to an OOR appeals officer's decision, there is no reason for this Court to pay any heed to the decision below. The Bowling decision also makes it clear that OOR appeals officers never can opine on matters of policy in their decision-making. Accordingly, deciding this case upon *de novo*, plenary review, this Court should reverse the decision below.

VIII. Conclusion

For the foregoing reasons, as well as those set forth in their principal brief, 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,

Karl S. Myers (Id. No. 90307)
STRADLEY, RONON,
STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8193
(215) 564-8120 facsimile

Attorneys for Petitioners Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan, and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares

Dated: September 5, 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 2,815 words and is less than 15 pages, excluding the parts of the brief exempted by Pa.R.A.P. 2135.

Karl S. Myers

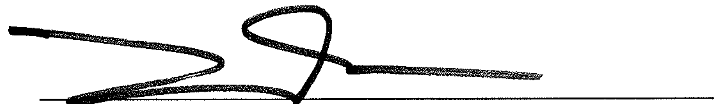
CERTIFICATE OF SERVICE

I, Karl S. Myers, hereby certify that on September 5, 2013, I caused the foregoing to be filed with the Court, and served the same via US Mail, postage prepaid, upon the following:

James Eiseman, Jr., Esq.
Benjamin D. Geffen, Esq.
Public Interest Law
Center of Philadelphia
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103

Leonard W. Crumb, Esq.
Senior Assistant Counsel
Department of Public Welfare
P.O. Box 2675
Harrisburg, PA 17105-2675

Christopher H. Casey, Esq.
Dilworth Paxson, LLP
1500 Market St., Ste. 3500E
Philadelphia, PA 19102-2101



Karl S. Myers