IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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

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

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Intervenors Aetna Better Health Inc. ("Aetna"), Health Partners of Philadelphia, Inc. ("Health Partners"), Keystone Mercy Health Plan ("Keystone"), and DentaQuest, LLC ("DentaQuest") (collectively, the "Intervenors"), hereby file this brief in reply to the Brief of Respondents.

I. ARGUMENT[1]

A. Respondents Misstate the Holding of the *Bowling* Case.

Respondents start out their brief by misstating the holding of the Pennsylvania Supreme Court's recent decision in *Bowling v. Office of Open Records*, --- A.3d ---, 2013 WL 4436219 (Pa. Aug. 20, 2013). In *Bowling*, the Supreme Court decided two inter-related issues: (1) the proper ***standard*** of review of decisions of the OOR, and (2) the proper ***scope*** of review of such decisions. The OOR had argued for a deferential standard of review and a narrow scope of review. The Supreme Court clearly and unambiguously rejected the OOR's arguments, holding that (1) the standard of review is *de novo*, meaning that a reviewing court need provide no deference to the OOR's determination, and (2) the scope of review is broad or plenary, meaning that reviewing courts have the authority to "expand the record to fulfill their statutory role." *Id.* at *17-18, 21.

[1] Pursuant to Pa.R.A.P. 2137, the Intervenors adopt by reference the reply brief filed in these consolidated appeals by Petitioners Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc., d/b/a UnitedHealthcare Community Plan, and HealthAmerica Pennsylvania, Inc., d/b/a Coventry Cares.

Instead of correctly stating the holding of *Bowling*, Respondents cherry-pick phrases from the Court's opinion out of context, creating the impression that the Supreme Court imposed a requirement on this Court that it did not. Respondents claim that under *Bowling*, "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.'***" Respondents' Brief, at 11 (emphasis added). But while the Supreme Court clearly required reviewing courts to "conduct full *de novo* review," it did ***not*** require reviewing courts to adopt the OOR's factual findings and legal conclusions ***in any case***. A review of the full context of the Court's opinion makes this plain.

In responding to the OOR's argument that an expansive standard of review would jeopardize the expeditious resolution of disputes, the *Bowling* Court noted that "we perceive ***nothing in the RTKL that would prevent*** a Chapter 13 court from simply adopting the findings of fact and conclusions of law of an appeals officer when appropriate, thus, in the proper case, effectively achieving the result sought by the OOR." *Id.* at 17 (emphasis added). The Court concluded that "under the RTKL the Chapter 13 courts are the ultimate finders of fact and [] they are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeals officers, ***allowing for the adoption*** of the appeals officer's factual findings and legal conclusions when appropriate." *Id.* at 18 (emphasis added). The phrases

"nothing in the RTKL that would prevent" and "allowing for the adoption" show that the Supreme Court viewed adoption by reviewing courts of the OOR's findings of fact and conclusions of law to be permissive rather than mandatory. In asserting that the Supreme Court ***required*** such adoption in appropriate cases, Respondents misstated the Court's holding.

In fact, there is nothing in the *Bowling* holding that helps Respondents in the least. Contrary to Respondents' suggestion, this Court owes the OOR Final Determination in this case absolutely no deference, and has the power to write on a blank slate.

B. Respondents Rely on Contractual Language that Does Not Apply.

Respondents argue that the DPW has "constructive possession" of the records sought in the Request because, as a result of the standard contractual agreements between the DPW and the MCOs (the "standard agreements"),[2] the documents responsive to the Request are "subject to the control of DPW." Respondents' Brief, at 14. But the standard agreements do not cover the documents at issue here, and thus no "constructive possession" argument can be made based upon those agreements.

[2] The MCOs are Aetna, Health Partners, Keystone, UnitedHealthcare of Pennsylvania, Inc., and HealthAmerica Pennsylvania, Inc.

The language that Respondents claim as support for their argument comes under the heading "Subcontractual Relationships," at Section XIII of the standard agreements. (R. 233a-234a). Respondents spend three pages of their brief analyzing the various sections of the standard agreements dealing with subcontracts, and particularly focus on language in Section XIII stating that "all contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include the following provisions ... A requirement that ensures that the Department has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients." Respondents' Brief, at 14. This language, they claim, shows that the DPW has "constructive possession" of the documents at issue.

But the "Subcontracts" discussed in Section XIII of the standard contracts apply only to subcontracts between the MCOs and the subcontractors, *e.g.*, between Keystone Mercy and DentaQuest, not to the subcontracts between DentaQuest and the dental providers. This is because "Subcontract" is specifically defined as "[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." (R1. 708a-709a).[3] Thus, by the plain terms of the standard agreements, "subcontract" covers only

[3] "R1." refers to the Reproduced Record in the first Eiseman appeal ("Eiseman 1").

agreements between the MCOs and subcontractors, not the agreements at the next level down that are at issue here, *i.e.*, between the subcontractors and the dental providers. Thus, regardless of how one interprets the language of the standard agreements on which Respondents rely, those agreements are not applicable here.

Respondents do refer to the definitional section of the standard agreements in a footnote but they ignore the obvious—that the definition of "Subcontract" completely removes Section XIII of the standard agreements from having any bearing on this case. *See* Respondents' Brief, at 16 n.7. The footnote is helpful, though, in that it discusses another definition that is problematic for Respondents, namely, the definition of "Provider Agreement." As Respondents point out, "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." *Id.* (emphasis in original). Thus, as Respondents acknowledge, the definition of "Provider Agreement" also only encompasses agreements to which the MCOs are parties, and not agreements between subcontractors and dental providers such as those at issue here. This definition provides further confirmation that the agreements, documents, and transactions at the next level down—*i.e.*, between the subcontractors and the dental providers—are simply not covered by the standard agreements.

Thus, the standard agreements are totally irrelevant to this case.[4]

C. Respondents Concede That the "Governmental Function" Section Does Not Permit Disclosure of Documents in the Possession of the Dental Subcontractors.

Respondents state that "even if" their "constructive possession" argument does not work, the documents they seek are nonetheless public records by virtue of Section 506(d)(1), 65 P.S. § 67.506(d)(1), the "governmental function" section of the RTKL. Respondents' Brief, at 16-22. But in so doing, Respondents no longer argue that they are entitled to documents *in the possession of the dental subcontractors*, arguing instead that "the MCOs possess the records sought." *Id.* at 16. Thus, Respondents concede that Section 506(d)(1) provides no support for obtaining documents from the dental subcontractors.

In addition, Respondents do not argue, as they did before the OOR—and as the OOR itself held—that Section 506(d)(1) "should" be read to reach records in the possession of the dental subcontractors based upon public policy grounds. (*See* R. 226a-227a, 267a). Thus, Respondents have finally conceded that this public

[4] Respondents cite *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Comm. Ct. 2012), for the proposition that "constructive possession qualifies as possession under the RTKL." Respondents' Brief, at 13. But *Barkeyville Borough* is distinguishable from this case and is therefore inapposite. In that case, this Court held that the borough involved had constructive possession of emails of the borough's council members that resided on the members' personal email accounts. *Id.* The situation here is quite different, involving rates of a subcontractor ***two steps removed from the agency***.

policy argument has no merit, and that the statutory language of Section 506(d)(1) should control.

So, after conceding that the plain language of the statute cannot be read to encompass subcontractors and that their public policy argument fails, Respondents are left to argue that Section 506(d)(1) requires disclosure of the records because documents in the possession of the MCOs contain the rates from the subcontractors to the dental providers, and the MCOs are performing a "governmental function." Respondents' Brief, at 17. But the record does not support the factual basis for this argument.

Respondents assert that "the MCOs have in their possession a variety of types of documents showing such rates." *Id.* By "such rates," Respondents presumably mean the rates that the subcontractors pay the dental providers, which is what the Request seeks. Respondents consign to a footnote the alleged factual support for this assertion, claiming that the affidavits of Aetna, Health Partners and Keystone "acknowledge these three MCOs' possession of such documents." *Id.* at 17 n.8. But those affidavits do nothing of the kind. The paragraphs of those affidavits that Respondents cite merely discuss documents containing rate information, whether in the possession of the MCOs or in the possession of the dental subcontractors; in either case, the affidavits assert that such rate information

meets all the criteria for trade secret and confidential proprietary information. The affidavits do ***not*** state that the MCOs possess any particular responsive documents. (*See* R. 150a-153a, 156a-159a, 162a-165a). To conclude, as Respondents do, that the MCOs' affidavits prove that the MCOs possess these documents is disingenuous.

Left with no other support for the application of Section 506(d)(1), Respondents again retreat to a public policy argument, claiming that under *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), this Court should affirm the OOR's decision in order to avoid "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." Respondents' Brief at 18. But Respondents again ignore both the plain language of Section 506(d)(1), which does not include subcontractors' documents, and the obvious conclusion that if the legislature had intended to prevent such circumvention, it could have done so in the statute, but did not.

Moreover, *SWB Yankees* is completely inapposite to this case. That case involved the question of whether a private contractor (the Yankees) to a public authority was performing a "governmental function" in seeking bids from concessionaires to the stadium, such that the bids for such concessionaire contracts

were public records—in other words, a straightforward application of the "governmental function" test to the activities of the private entity that contracted with the government. The case did not involve subcontractors or the question of whether subcontractors were encompassed within Section 506(d)(1). The language from the Supreme Court's opinion that Respondents quote at pages 18-19 of their brief has nothing to do with the issues in this case; in that section of the opinion, the Court was explaining why written concessionaire bids were "records" under the RTKL. *Id.* at 1044. That language did not involve the policy question posed by Respondents about "funneling moneys through an extra entity," and has no bearing on this case.

D. Respondents' "Genie Out of the Bottle" Argument Does Not Stand Up to Scrutiny.

As they did in Eiseman 1, Respondents argue that "the genie is out of the bottle," because one subcontractor, DentaQuest, "knows all the supposedly 'secret' and 'confidential' information of four of the MCOs." Respondents' Brief, at 27. In making this argument, Respondents refer to DentaQuest as the MCOs' "agent." *Id.* at 28. But Respondents' attempt to show that rate information is widely known, and therefore not confidential, does not stand up to scrutiny.

First, Respondents provide no support for the notion that DentaQuest is an "agent" of the MCOs. In fact, DentaQuest is a subcontractor, not an agent, so any

implication that DentaQuest represents the interests of any MCO, or does not operate at arms' length with the MCOs, is completely unsupported.

Second, Respondents' "genie out of the bottle" argument breaks down at each level in the chain—the MCO level, the subcontractor level, and the provider level.

- **MCO Level**: Although Respondents argue that "the [rate] 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" (Respondents' Brief, at 30), they provide no support for the assertion that DentaQuest has ever "let the genie out of the bottle," *i.e.*, has ever shared one MCO's rate information—including the rates of the providers servicing the subscribers of that MCO—with another MCO. In fact, DentaQuest's affidavit, by Regional Vice President Mark Haraway (which is uncontested by any evidence from Respondents), makes clear that each of DentaQuest's subcontracts with the MCOs requires that DentaQuest maintain the confidentiality of rates, including the rates that DentaQuest pays to dental providers. (R. 169a). Thus, the record shows that the fact that four of the five MCOs subcontract with the same company does not make rate information more available to the MCOs.

- **Subcontractor Level**: Despite Respondents' claim that "DentaQuest is well aware of the provider rates it pays on each MCO's behalf" (Respondents' Brief, at 28), the record shows that rate information is closely guarded within DentaQuest. Haraway's affidavit states that access to rate information is limited to "senior management and those employees with specific need for the information in the performance of their jobs, such as designated contract negotiators and managers with specific business accountability." (R. 169a). Thus, Respondents' suggestion that rate information is widely shared within DentaQuest is belied by the record.

- **Provider Level**: Finally, Respondents' assertion that, as a result of DentaQuest's subcontracting with four of the five MCOs, the dental providers have broad access to rate information, is another assertion that is not supported by the record. Respondents suggest that "common 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." *Id.* at 28-29. But even accepting Respondents' "common sense" argument, Respondents have no explanation for the dental provider who treats enrollees of only one MCO; "common sense" dictates that that provider knows nothing about the rates that DentaQuest pays for the enrollees of the other MCOs. And in either scenario—the provider who treats more than one MCO's enrollees or the provider who only treats enrollees of one MCO—Haraway's

affidavit makes clear that DentaQuest keeps provider rates confidential and indeed that DentaQuest is required by its contracts with the MCOs to keep such rates confidential. There is no evidence that DentaQuest has ever violated this contract provision. Thus, the record simply does not support Respondents' claim that dental providers know the prices that DentaQuest is paying other providers.

In sum, Respondents' "genie out of the bottle" argument falls of its own weight.

Respondents claim that three of the six "trade secret" factors set forth in *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010) are not met here. They claim that the first factor, "the extent to which the information is known outside of the company's business," is not met because DentaQuest knows the rate information. Respondents' Brief at 29. But Respondents fail to acknowledge that DentaQuest limits disclosure of the rates both internally and externally, so the "extent" that the information is known outside the MCOs is still minimal. Respondents also claim that 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 not met because of the "nebulous and general averments" in the affidavits submitted by the MCOs and subcontractors.

Respondents specifically cite Haraway's affidavit as making "conclusory averments" that are "vague about which DentaQuest employees have access to such information." Respondents' Brief, at 29.

But Haraway's affidavit is quite specific about the individuals within the company who can access the rate information. He states that it is only "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" who can access the rates. (R. 169a). Respondents also fail to point out the Haraway affidavit's description of the steps that DentaQuest takes internally to protect the information, such as "DentaQuest takes steps to ensure that internal disclosure of rate information is as limited as possible, and that those DentaQuest employees with access to the information protect its confidentiality;" "DentaQuest provides confidentiality training to its employees to protect all confidential information;" "DentaQuest maintains documents containing rate information in both hard copy and electronic format. Access to these documents is limited to a "need to know" basis;" "Electronic copies of the documents are maintained in electronic files that can only be accessed by employees identified as having a business need for the information;" and, "DentaQuest also ensures that managers review, on a regular basis, the security rights of their staff to electronic folders." (R. 169a). As we pointed out in our

opening brief, this evidence, combined with the other affidavits by the MCOs and subcontractors, more than satisfies the Intervenors' burden of proof.[5]

E. The Requested Records are Not "Financial Records."

Finally, Respondents argue that the records they seek are "financial records" under 65 P.S. § 67.708(c), and therefore the "trade secret" and "confidential proprietary information" exceptions do not apply to them. Respondents' Brief, at 30-32. But Respondents fail to support their interpretation of the definition of "financial record"—"any 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"[6]—as including documents showing rates paid by the subcontractors to dental providers.

In fact, the documents at issue here do not deal with "the receipt or disbursement of funds ***by an agency,***" but rather the disbursement of funds ***by contractors and subcontractors of an agency***. If the Pennsylvania legislature had wished to include such disbursements within the definition of financial record, it could have done so, but it did not. Thus, the principle "*expressio unius est exclusio alterius*"—"the expression of one thing implies the exclusion of another thing not mentioned"—applies here. *See In re: Appeal of Costco Wholesale Corp.*, 49 A.3d

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[5] Moreover, Respondents do not contest that factors 4-6 of the *Bimbo Bakeries* "trade secrets" test are met here.

[6] 65 P.S. § 67.102.

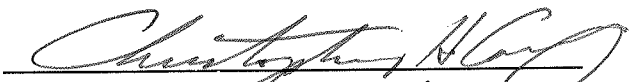
535, 541 (Pa. Commw. 2012) (exclusion of comparable provision "must be presumed intentional"). In short, under the RTKL's plain language, Respondents' "financial records" argument fails.

II. CONCLUSION

For all these reasons, and those stated in their opening brief, the Intervenors respectfully request an order of this Court reversing the May 7, 2013 Final Determination of the OOR and ordering that no further action need be taken by the DPW with respect to this matter.

Respectfully submitted,

DILWORTH PAXSON LLP



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DATED: September 17, 2013

CERTIFICATE OF SERVICE

I, Christopher H. Casey, hereby certify that on the 17th day of September, 2013, I caused to be served two (2) copies of the Reply Brief of Intervenors Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC, by the following means of service, on the following:

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