IN THE SUPREME COURT OF PENNSYLVANIA

No. 45 EAP 2014

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

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,

Appellee.

BRIEF OF APPELLANTS

On Appeal from the Order of the Commonwealth Court in Case No. 1935 C.D. 2012, Affirming in Part and Reversing in Part the Final Determination of the Office of Open Records in No. AP 2011-1098
(Eiseman I)

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 46 EAP 2014

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

Appellants,

v.

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

Appellees.

BRIEF OF APPELLANTS

On Appeal from the Order of the Commonwealth Court in Case No. 1949 C.D. 2012, Affirming in Part and Reversing in Part the Final Determination of the Office of Open Records in No. AP 2011-1098
(Eiseman I)

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 47 EAP 2014

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

Appellants,

v.

UNITEDHEALTHCARE OF PENNSYLVANIA, INC. d/b/a UNITEDHEALTHCARE COMMUNITY PLAN, and HEALTHAMERICA PENNSYLVANIA INC. d/b/a COVENTRYCARES,

Appellees.

BRIEF OF APPELLANTS

On Appeal from the Order of the Commonwealth Court in Case No. 1950 C.D. 2012, Affirming in Part and Reversing in Part the Final Determination of the Office of Open Records in No. AP 2011-1098 (*Eiseman I*)

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I. STATEMENT OF JURISDICTION

Appellants' Petition for Allowance of Appeal having been granted on October 23, 2014, Order, attached as Exhibit A, the Supreme Court has jurisdiction of this appeal pursuant to 42 Pa.C.S. § 724.

II. ORDER IN QUESTION

The Commonwealth Court Order at issue in this appeal reads:

> **AND NOW,** this 19th day of February, 2014, the Office of Open Records' final determination is **AFFIRMED IN PART, and REVERSED IN PART** in accordance with the foregoing opinion.

The Commonwealth Court entered the Order and Opinion below in three consolidated cases: *Commonwealth of Pennsylvania, Department of Public Welfare v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 1935 C.D. 2012; *Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 1949 C.D. 2012; and *UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania Inc. d/b/a Coventry Cares v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 1950 C.D. 2012 (collectively, *Eiseman I*).

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Because the issues presented in this appeal "are purely legal ones," the Supreme Court should "exercise a de novo standard of review and a plenary scope of review of the Commonwealth Court's decision." *Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013).

IV. STATEMENT OF THE QUESTIONS INVOLVED

As this Court set forth in its Order granting the Petition for Allowance of Appeal, the issues are:

1. Where Section 708(c) of the Right-to-Know Law specifically provides that a "financial record" is not exempt from disclosure on the basis that it contains a "trade secret" or "confidential proprietary information," is this explicit provision nullified by the earlier-enacted Pennsylvania Uniform Trade Secrets Act?

Answer of the Office of Open Records: No.
Answer of the Commonwealth Court: Yes.
Suggested answer: No.

2. When public funds are funneled through middlemen before reaching their intended beneficiaries, are the records documenting this flow of public funds "financial records" required to be disclosed under the current version of the Right-to-Know Law, as they were under the prior version of the law?

Answer of the Office of Open Records: Yes.
Answer of the Commonwealth Court: No.
Suggested answer: Yes.

3. Are historical rates paid by Medicaid managed-care organizations (MCOs) "confidential proprietary information" and "trade secrets," when the rates from one year do not reveal the rates for future years, and when most of the MCOs have already disclosed such rates to a subcontractor who negotiates rates with their competitors?

Answer of the Office of Open Records: No.
Answer of the Commonwealth Court: Yes.
Suggested answer: No.

V. STATEMENT OF THE CASE

A. Form of the Action and Procedural History

On June 17, 2011, Appellants, James Eiseman Jr. and the Public Interest Law Center of Philadelphia (Requesters), made requests to the Department of Public Welfare (DPW)[1] for certain records concerning the payment of public funds in Pennsylvania's Medical Assistance (Medicaid or MA) program. Requesters filed the requests pursuant to Pennsylvania's Right-to-Know Law (RTKL), 65 P.S. §§ 67.101 *et seq.* The only one of these RTKL requests remaining in issue seeks records containing certain rates by which managed-care organizations (MCOs) made payments of Medicaid funds to dental subcontractors or directly to dental providers, as explained in more detail below.

On July 25, 2011, DPW granted in part and denied in part the requests. Requesters timely appealed the partial denials to the Office of Open Records (OOR) on August 15, 2011. During late August 2011, five MCOs intervened in the proceeding before the OOR as direct-interest participants, asserting, *inter alia*, that the requested records contain trade secrets and confidential proprietary information and were therefore exempt from disclosure. On May 21 and 22, 2012, the OOR held an evidentiary hearing at which Requesters, DPW, and the five MCOs all

[1]In November 2014, the name of DPW changed to the Department of Human Services. Act of Sep. 24, 2014, P.L. 2458, No. 132. For consistency with the record materials and opinions below, this brief continues to use "DPW."

participated. On September 17, 2012, the OOR issued a Final Determination granting two of Requesters' requests.

On October 17, 2012, DPW and the MCOs filed three separate appeals to the Commonwealth Court, concerning the two granted RTKL requests. The Commonwealth Court consolidated the three appeals, *sua sponte* referred the case to an en banc panel, and decided the case on the basis of the record developed before the OOR. The Commonwealth Court issued an Opinion and Order on February 19, 2014 that affirmed the OOR as to one of the two requests there on appeal (Item 1) and reversed the OOR as to the second request (Item 2 or the Request). Requesters petitioned this Court for allowance of appeal as to Item 2 on March 20, 2014, and this Court granted allowance of appeal on October 23, 2014.[2] The Court simultaneously granted allowance of appeal in *Dental Benefit Providers et al. v. Eiseman et al.*, Case Nos. 48, 49, & 50 EAP 2014 (*Eiseman II*), but did not consolidate the cases. Requesters are filing a separate brief in *Eiseman II*.

B. Statement of Determinations Below

A copy of the Commonwealth Court Majority Opinion (the Opinion) and Order is attached as Exhibit B. A copy of the Commonwealth Court Concurring and Dissenting Opinion (the Dissent) is attached as Exhibit C. The Opinion, Order, and Dissent were reported at 85 A.3d 1117. The Majority Opinion and Order had

[2] The Order required DPW to fulfill the Item 1 request. Neither DPW nor the MCOs pursued any appeal from the Order, and DPW has since produced the records responsive to Item 1.

the effect of denying the Request, whereas the Dissent would have granted the Request.

The OOR's Final Determination is attached as Exhibit D. The Final Determination held that both the Item 1 and Item 2 requests should be fulfilled.

C. Names of the Judges or Other Officials Whose Determinations Are to be Reviewed

The author of the Opinion was the Hon. Robert Simpson. The author of the Dissent was the Hon. Patricia A. McCullough. The author of the Final Determination was Appeals Officer Charles Rees Brown, Esq.

D. Chronological Statement of Facts

1. Background

Medicaid is a joint federal-state program established by federal statute, 42 U.S.C. §§ 1396 *et seq.*, to provide, *inter alia*, medical and dental care to low-income children, adults and children with disabilities, and certain other adults in states, including Pennsylvania, that have chosen to participate. Pennsylvania's Medicaid program currently spends over $20 billion per year to provide benefits to 1 in 6 Pennsylvania citizens and accounts for some 30% of the Commonwealth's General Fund budget.[3] Under the recently approved "Healthy Pennsylvania"

[3]According to a 2013 DPW fact sheet: "Currently 1 out of every 6 citizens in Pennsylvania receives Medicaid benefits. Spending on Medicaid programs accounts for 75 percent of [DPW]'s $27.6 billion budget (including state, federal and other funds). DPW's budget constitutes 39 percent of the state's annual budget with Medicaid being the number one cost driver at 30 percent of Pennsylvania's General Fund." Department of Public Welfare, *Medicaid Expansion*

program, which will take effect on January 1, 2015, more than 600,000 additional Pennsylvanians will become eligible for Medicaid. *See* Department of Public Welfare, *Healthy PA Frequently Asked Questions*, http://www.dhs.state.pa.us/healthypa/faqs/index.htm (last visited Dec. 1, 2014).

DPW is the Pennsylvania agency that administers Medicaid. In southeastern Pennsylvania (SEPA), instead of making payments directly to the doctors and dentists providing the required services (providers), DPW has opted to use the services of MCOs to ensure access to dental care for eligible Medicaid recipients. (R. 205a-207a.) As required by the federal and state laws governing Medicaid managed-care programs, *e.g.*, 42 U.S.C. § 1396u-2; 40 P.S. §§ 991.2101-.2194, DPW has entered into a lengthy contract with each of the MCOs that strictly controls how the MCO must fulfill its delegated Medicaid responsibilities to ensure recipients receive the required services. (R. 680a-849a (the "Standard Contract").) For example, the Standard Contract requires the MCO "to arrange for the provision of those medical and related services essential to the medical care of those individuals being served, and to comply with all federal and Pennsylvania laws generally and specifically governing participation in the MA Program." (R. 715a.) The Standard Contract allows DPW to terminate the agreement for cause if an

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and Pennsylvania, http://www.portal.state.pa.us/portal/server.pt/document/1320335/aca-ma_expansion_sheet_pdf (last visited Dec. 1, 2014).

MCO does not comply with federal and state Medicaid requirements. (R. 835a-836a; *see also* R. 854a-855a (the "termination provisions in Section 18 of Exhibit D" referenced at R. 835a).)

To provide dental services, these MCOs have chosen to delegate their Medicaid responsibilities to subcontractors. (R. 8a.) Under the terms of the Standard Contract, an MCO must submit any such subcontract to DPW for advance written approval (R. 766a), and the MCO must devolve its Medicaid responsibilities downstream to the subcontractor (*e.g.*, R. 841a-843a). These subcontractors in turn contract with and pay providers to treat Medicaid enrollees. (R. 8a.) Providers may have contracts to treat patients enrolled with more than one of the MCOs. (*E.g.*, R. 327a (Special Smiles treats Health Partners patients); R. 516a (Special Smiles treats Keystone Mercy Health Plan patients).)

In diagram form, the flow of Medicaid funds and responsibilities from the state to providers can be depicted as follows:

DPW→MCOs→Subcontractors→Providers

Like the Commonwealth Court, this brief will use the term "MCO Rates" for the contractual rates that the MCOs agree to pay dental subcontractors (or, occasionally, to pay dental providers directly).[4] Records containing MCO Rates are

[4] In limited situations, the MCOs have contracted directly with dental providers instead of contracting via dental subcontractors. Opinion at 3 n.6. The Request for MCO Rates also extends to these situations.

the subject of this appeal. Records containing the "Provider Rates" that subcontractors use to pay providers are at issue in *Eiseman II*.

The Request concerns only the following five counties in SEPA: Bucks, Chester, Delaware, Montgomery, and Philadelphia. The Request is further limited to documents that concern the period July 1, 2008 through June 15, 2011 (the Requested Period). (R. 3a.) During the Requested Period in SEPA, DPW contracted with five MCOs to provide dental care to Medicaid enrollees: (1) Aetna Better Health, Inc. ("Aetna"), (2) HealthAmerica of Pennsylvania, Inc. d/b/a Coventry Cares ("Coventry"), (3) Health Partners of Philadelphia, Inc. ("Health Partners"), (4) Keystone Mercy Health Plan ("Keystone"), and (5) UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan ("United") (collectively, the MCOs). (R. 270a-271a, 563a.) Along with DPW, each of the MCOs is an Appellee in this case.

The Request focuses on records that contain information concerning the provision by DPW, through the MCOs, of dental care to Medicaid enrollees in SEPA. (R. 1a-4a.) In relevant part, the Request seeks the following:

> Each and every document, including correspondence and appendices, in DPW's possession, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.

(R. 3a.) The Request seeks negotiated payment rates, not encounter data concerning individual patients. (*See* Opinion at 3.) No party has disputed that DPW possesses the responsive records.

2. Dental Subcontractors

After Requesters had filed their requests, DPW and the MCOs disclosed that the MCOs provide dental care in SEPA almost exclusively by subcontracting with one of two companies (DentaQuest, LLC and Dental Benefit Providers, Inc.; collectively, Subcontractors) that create dental-provider networks and negotiate contracts with individual providers. (R. 8a, 325a, 340a, 375a-376a, 408a, 432a, 494a, 503a-504a, 514a-515a.) A Subcontractor, in return for payments from an MCO, establishes and makes payments to a network of dental providers available to provide care to the enrollees of the MCO. (*E.g.*, R. 432.) Four of the MCOs—Aetna, Coventry, Health Partners, and Keystone—subcontract their dental services through the ***same*** Subcontractor: DentaQuest. (R. 325a-326a, 432a, 492a-493a, 514a.) Nothing in the record rebuts the inferences that DentaQuest knows the rates by which each of the four MCOs pay it, as well as the rates DentaQuest pays to dental providers who accept Medicaid patients from two or more of those MCOs. Importantly, the record is also barren of any evidence that DentaQuest maintains ***internal*** information-sharing controls such as "Chinese walls" or "cones of silence" to prevent a single individual within DentaQuest from knowing the MCO

Rates of multiple MCOs, or from knowing the rates paid by DentaQuest to a provider who accepts patients enrolled with two or more of the MCOs. (*See* R. 507a (Coventry's Vice President for Operations testifying that she is unaware whether DentaQuest "has separate negotiating teams and groups with various provider networks that they create").)

3. Evidence Regarding the Secrecy or Confidentiality of the Requested Records

The MCOs jointly hired an expert witness, Henry Miller, Ph.D. (R. 290a.) Dr. Miller testified that the MCO Rates are "trade secrets" and "confidential proprietary information." (R. 290a.) Dr. Miller used the terms "trade secrets" and "confidential proprietary information" interchangeably. (R. 298a-300a.) He opined that if disclosed to an MCO, information about the rates the other MCOs pay to their Subcontractors would prompt that MCO to demand that its Subcontractor accept a lower rate. (R. 295a.) Dr. Miller did not in his testimony explain how four MCOs could keep secret and confidential the rates each was paying to the same Subcontractor, DentaQuest. He was unaware of any instances in which MCO Rates had been disclosed to outsiders (R. 293a-204a, 301a), even though MCO Rates have been ordered released under public records laws in Pennsylvania, *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609 (Pa. Commw. Ct.), *alloc. denied*, 987 A.2d 162 (Pa. 2009), and elsewhere, *e.g.*, *Wilmington Star-News v. New Hanover Reg'l Med. Ctr.*, 480 S.E.2d 53 (N.C. Ct. App. 1997).

In limited instances, some of the MCOs contract directly with dental providers instead of doing so via Subcontractors. For example, HealthPartners and Keystone both contract directly, on a per-child basis, with Special Smiles, which provides dental services to children with disabilities who require sedation when receiving dental treatments. (R. 327a, 362a, 516a.) Aetna similarly has "direct dental contracts with providers for certain special needs patients." (R. 433a.) Keystone's contract with Special Smiles does not require Special Smiles to maintain a separate team to negotiate rates with different MCOs or contain any other provision restricting the sharing of information within Special Smiles about the rates negotiated with various MCOs. (R. 537a-538a.)

E. Statement of the Order Under Review

The Order affirmed in part and reversed in part the Final Determination, and Requesters seek review of the Order only insofar as it reversed the Final Determination.[5]

[5] Requesters agree with the one-sentence Order insofar as it mandated the release of the Item 1 records. The Order's reversal as to the Item 2 records was based in part on legal analysis set forth in the Opinion as to the Item 1 records, and Requesters do challenge those aspects of the Opinion.

VI. SUMMARY OF ARGUMENT

The RTKL was enacted to promote confidence that public officials will spend tax dollars in an efficient manner and consistent with their intended purpose. Shielding from public view how nearly one third of the General Fund budget flows from DPW to providers substantially undermines that goal.

Sections 102 and 708(c) of the RTKL establish that the public's right to scrutinize the actions of government reaches its zenith when public funds are spent for public purposes. Judge McCullough rightly referred to them as "the most potent provisions of the RTKL." Dissent at 4. The decision below hollows out these provisions, announcing a novel doctrine that shields from public view a wide range of "financial records" relating to the expenditure of public funds by potentially ***all*** public agencies. It provides agencies with an easy way to circumvent—whether deliberately or incidentally—the public's right to trace payments of public money: simply using middlemen in conducting public programs, as many programs do, can now launder away from public view the flow of public money. In doing so, the court below has rejected established precedent applying the RTKL and its predecessor to contractors and subcontractors acting for a public agency. *E.g.*, *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012); *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609 (Pa. Commw. Ct.), *alloc. denied*, 987 A.2d 162 (Pa. 2009).

In the context of Pennsylvania's multibillion dollar Medicaid program, it is vital for the public to have access to financial records, including those that would allow comparison of (a) the funds that enter the program with (b) the funds that reach those who directly provide care to patients. Such information has previously been ordered released in Pennsylvania and elsewhere. Only with such disclosure can there be accountability with respect to the public funds committed to this program. To allow these records to be concealed from public view, as the decision below has done, is contrary to the text and intent of the RTKL.

Moreover, the decision of the Commonwealth Court is in direct conflict with *Lukes*, which addressed virtually the same issues as this case. *Lukes* was decided under the predecessor to the RTKL (the Right-to-Know Act or RTKA), and the RTKL was enacted to liberalize access to records. It was error to interpret the new RTKL as more restrictive than its predecessor with respect to financial records. It was also error to hold that the Pennsylvania Uniform Trade Secrets Act (PUTSA), 12 Pa.C.S. §§ 5301 *et seq.*, enacted in 2004, trumps the RTKL, enacted in 2008. Doing so violated two basic principles of statutory construction: that statutes should not be read to contain surplusage, and that earlier, more general legislation does not override later, more specific legislation.

Alternatively, even if the Commonwealth Court were correct that the records showing the MCO Rates are not "financial records" and that PUTSA trumps the

RTKL, it erred by holding that the MCO Rates are trade secrets and confidential proprietary information. This is because releasing past years' rates would not reveal later years' rates, and because four of the five MCOs have failed to maintain the confidentiality of the rates by which they pay MCOs, and of the rates by which providers are paid to treat such MCOs' enrollees.

VII. ARGUMENT FOR REQUESTERS

The Court should find that (A) the records documenting the MCO rates are financial records subject to disclosure under the RTKL, and (B) PUTSA does not trump the RTKL as to "financial records." On this basis, the Court should order DPW to fulfill the Request. If, however, the Court finds otherwise as to one or both of those points, it should proceed to the final question presented and find that (C) the facts in the record do not support the application of the "confidential proprietary information" and "trade secret" exceptions of the RTKL, and on that independently adequate basis it should order DPW to fulfill the Request.

A. Records Showing the Flow of Public Funds Through Middlemen Were Subject to Disclosure Under the RTKA and Should Remain Subject to Disclosure Under the RTKL as "Financial Records" Documenting the Flow of "Public Funds"

The RTKL defines "financial record" in relevant part as "(1) 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." 65 P.S. § 67.102. The records showing the MCO Rates are financial records under both prongs of the definition.

Section 708(b) of the RTKL exempts thirty categories of records from public access. 65 P.S. §§ 67.708(b)(1)-(30). But Section 708(c) creates a crucial exception to those exceptions:

> FINANCIAL RECORDS.— The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.

Id. § 67.708(c).[6] Section 708(c) reflects the General Assembly's judgment that public access to financial records is of the highest importance and should not be restricted by the exceptions that apply to other public records.

The decision below attempted to avoid the impact of the expansive disclosure requirements for financial records by declaring that financial records of a subcontractor are never records of an agency, Opinion at 14-15, thereby jeopardizing access to records well beyond the scope of the Medicaid rates at stake here. Further, this holding is a significant departure from the earlier reasoning of the court below, which had held that subcontractors' records were required to be disclosed under the RTKA, based on virtually the same language as now found in the RTKL.

1. The Subcontracts Deal With the Disbursement of Funds by DPW, As They Did Under the RTKA

In *Lukes*, which was decided under the RTKA, the Commonwealth Court held that "[u]ntil the public funding reaches the intended Medicaid recipient, the money remains public," 976 A.2d at 625, and went on to reject the argument that

[6] The eight subsections for which redactions are permissible under Section 708(c) are not at issue in this case, nor is undercover or covert law enforcement activity at issue.

agreements between a Medicaid MCO and ten hospitals that included specific payment rates were protected from disclosure on trade-secrecy grounds, reasoning 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," *id.* at 627. *Lukes* ordered the release of records showing payments by MCOs:

> ***Private entities that receive or control public funds have a duty to account for their handling of those funds.*** Disclosure of the Provider Agreements is the only way to ensure such accountability. To shield such documents from review would circumvent the public's ability to determine how tax dollars are spent. Thus, since the Provider Agreements reflect the disbursement of public funds in a public program, we conclude that those contracts are public records under the [RTKA].

Id. at 625-26 (emphasis added).

This Court has specifically recognized *Lukes*'s ongoing vitality under the RTKL, "particularly when considering that 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).[7] In *SWB Yankees*, this Court affirmed a RTKL decision of the Lackawanna County Court of Common Pleas requiring the disclosure of "certain documents in the possession of a private entity

[7] Although the Commonwealth Court distinguished *Lukes* in earlier RTKL cases, those cases dealt not with trade secrecy but with whether documents were in the "possession" of a public agency. *In re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011); *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Commw. Ct. 2011). DPW's possession of the records here is not disputed.

serving as the management agent for a municipal authority in the operation of a minor league baseball stadium." 45 A.3d at 1030. Discussing, with approval, the decision of the Court of Common Pleas, this Court stated:

> The court also noted that disclosure of certain documents in the possession of third-party contractors was required under the previous open-records regime. *See, e.g.*, *Lukes v. DPW*, 976 A.2d 609, 624 (Pa. Cmwlth. 2009) (holding that the Department of Public Welfare was required to produce provider agreements in the possession of third-party contractors, where the contractors performed duties which otherwise would have been undertaken by the government agency).

45 A.3d at 1035 n.8. The Court went on to write:

> Notably, the decision in [*Tribune-Review Publishing Co. v. Westmoreland County Housing Authority*, 833 A.2d 112 (Pa. 2003)]—holding that a settlement agreement generated and maintained by an insurance exchange on behalf of a local agency was subject to open-records disclosure under the predecessor to the RTKL—is consistent with our decision here, particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime. ***The same can be said relative to the Commonwealth Court's decision in* Lukes.**

45 A.3d at 1044 n.19. (emphasis added). It is impossible to square the Commonwealth Court's discarding of *Lukes* with the conclusion of *SWB Yankees* that the RTKL expands access to public records and with its favorable treatment of *Lukes*.

Nevertheless, the decision below declared that "*Lukes* . . . is no longer valid in cases under the current RTKL," and that Medicaid "funds lose their character as public funds once they leave an agency's hands and enter the private sector."

Opinion at 15. Having dispensed with precedent, the majority held that contracts establishing the MCO Rates "are not 'financial records' because they are not contained in contracts of a Commonwealth agency and do not involve disbursement of funds by a Commonwealth agency." Opinion at 14.

By rejecting *Lukes*'s application under the RTKL, the Commonwealth Court held that financial records that were available under the old RTKA are now to be concealed from public inspection. This is topsy-turvy. *See 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.").

In overruling *Lukes*, the majority also rejected a long line of earlier RTKA decisions of this Court and of the Commonwealth Court that had interpreted "public record" consistently with *Lukes*. In *Sapp Roofing Co. v. Sheet Metal Workers' International Association, Local Union No. 12*, 713 A.2d 627, 629 (Pa. 1998), this Court held that "the payroll records [of a private roofing contractor] are public records because they are records evidencing a disbursement by the school district." The Court emphasized that:

> The regulations implementing the Prevailing Wage Act require the officer of the public body charged with custody of the public funds to ensure that all wages due to workmen by the contractor are paid, and if not, the officer must withhold the amount of unpaid wages from disbursements to the contractor. Thus, the records submitted by Sapp Roofing are, indeed, an essential component of the school district's decision regarding whether and what amount to pay to Sapp Roofing.

Id. (citation omitted).[8] Similarly in the instant case, the Standard Contract requires MCOs to comply with the Medicaid Act among other laws (*e.g.*, R. 715a), requires MCOs to submit subcontracts for dental services (which would contain MCO Rates) to DPW for "advance written approval" (R. 766a), and allows DPW to terminate the agreement for cause if an MCO violates the requirements of the Medicaid program (R. 835a-836a, 854a-855a).

The Commonwealth Court's approach in *Lukes* was consistent with *Sapp Roofing* and with its own earlier decisions, all of which are now cast into doubt. In *Associated Builders & Contractors, Inc. v. Pennsylvania Department of General Services*, 747 A.2d 962, 965 (Pa. Commw. Ct. 2000), the Commonwealth Court held that "an agency may not shield a public document from disclosure by contracting with a third party that subsequently disperses [sic] the government funds. By paying through a third party, an agency does not change the character of those funds from public to private." Similarly, in *Morning Call, Inc. v. Lower Saucon Township*, 627 A.2d 297, 300-01 (Pa. Commw. Ct. 1993), it held that "[p]aying the money to the insurance carrier and not directly to Werner does not change the fact that it was used to satisfy the Township obligation, and,

[8] Although *Sapp Roofing* was a plurality decision, this Court has repeatedly and consistently followed it. *E.g.*, *Tribune-Review Publ'g Co. v. Bodack*, 961 A.2d 110, 116-17 (Pa. 2008); *Pa. State Univ. v. State Emps. Ret. Bd.*, 935 A.2d 530, 541 (Pa. 2007); *LaValle v. Office of Gen. Counsel*, 769 A.2d 449, 452 & n.6 (Pa. 2001); *N. Hills News Record v. Town of McCandless*, 722 A.2d 1037, 1038-39 (Pa. 1999).

'laundering' it through the insurance carrier does not somehow change the character of those funds from public to private."

Nothing in the new RTKL justifies a different outcome, let alone a more restrictive outcome. A "public record" under the RTKA is called a "financial record" under the RTKL, and the definitions of those terms are essentially identical:

RTKL 65 P.S. § 67.102 effective Jan. 1, 2009 definition of **"financial record"**	**RTKA** 65 P.S. § 66.1 repealed as of Jan. 1, 2009 definition of **"public record"**
(1) 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.	Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property . . . .

See Dissent at 5 ("[T]he definition of a 'financial record' under the current RTKL duplicates verbatim the definition of a 'public record' under the former Right to Know Act, and the two terms embody functionally equivalent concepts."). The General Assembly's decision in 2008 to use identical statutory wording triggers a familiar presumption: "when a court of last resort has construed the language used

in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." 1 Pa.C.S. § 1922(4); *see also Commonwealth v. Sitkin's Junk Co.*, 194 A.2d 199, 202 (Pa. 1963) ("Where the legislature, in a later statute, uses the same language as used in a prior statute which has been construed by the courts, there is a presumption that the language thus repeated is to be interpreted in the same manner such language had been previously interpreted when the court passed on the earlier statute.") The General Assembly was aware when it passed the RTKL in 2008 of the courts' interpretation of "public record" in *Sapp Roofing*, *Associated Builders*, and *Morning Call*, and its decision to make use of the same language in the new statute represents an endorsement of those longstanding interpretations.

The Commonwealth Court rests great weight on the phrase "disbursement of funds ***by*** an agency" in the definition of "financial record," concluding that the word "by" excludes payments issued by MCOs. Opinion at 15. But the "by" wording appeared also in the RTKA, and should be interpreted the same way under the RTKL. This is true both as a matter of stare decisis and as a matter of textual interpretation. As Judge McCullough wrote:

> [T]he Majority's interpretation . . . effectively renders the words "any," "dealing," and "disbursement" superfluous and without meaning, and also ignores the fact that the funds originate with DPW. . . . [S]ection 102 of the RTKL is broad enough to include public funds that trickle down through contractor and subcontractor contracts ("any contract") because these contracts nevertheless "deal"

> with, or simply pass along down the line, the "disbursement of funds by an agency."

Dissent at 10 (citation omitted). For these reasons, the moneys the MCOs pay to subcontractors (or directly to providers) are ***public*** moneys of DPW.

This Court should restore the logic of *Lukes* and find that the contracts with the MCO Rates are "financial records." Judge McCullough put it well:

> [T]he public funds originate with DPW, and no matter how many private entities the funds pass through, the funds end up in the hands of those performing the actual dental services and are the same funds that began with DPW. That is, public funds are used to pay for public dental insurance.

Dissent at 3; *see also id.* at 11 ("I cannot decipher how public funds designated for a public purpose become private funds when in the hands of a private party when that private party is obligated to use the funds for a public purpose.").

When the Commonwealth expends money, at some point the funds do "lose their character as public funds," Opinion at 15. Under the Medicaid managed-care transactions at issue in this case, that transformation occurs when the funds leave providers' pockets. When a dentist receives money from DentaQuest for filling a cavity in a low-income child's mouth, she is receiving public funds of DPW. When she writes a paycheck to her receptionist or a rent check to her landlord, she is expending private funds.

This transformation of funds from public to private does not happen at the earlier stage when MCOs make payments to dental subcontractors (or directly to

providers).[9] During the Requested Period, in many parts of the Commonwealth DPW administered Medicaid as a fee-for-service program, under which DPW made payments directly to providers. (R. 207a-208a.) *Accord, e.g.*, *Armstrong Cnty. Mem. Hosp. v. Dep't of Pub. Welfare*, 67 A.3d 160, 163 (Pa. Commw. Ct. 2013). The insertion of middlemen—MCOs and subcontractors—between DPW and providers does not change the fact that DPW receives and expends federal and state Medicaid moneys so that, ultimately, the child can get his cavity treated. The Commonwealth's purpose is not to issue payments to private insurance companies or to enrich providers, but to ensure that specified members of society have access to healthcare. *See, e.g.*, *Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 538 (3d Cir. 2002) (en banc) (Alito, J.) ("It is . . . apparent from the statutory language [in the Medicaid Act] that the intended beneficiaries of [42 U.S.C. § 1396(a)(30)(A)] are recipients, not providers."); *Medevac MidAtlantic, LLC v. Keystone Mercy Health Plan*, 817 F. Supp. 2d 515, 517 (E.D. Pa. 2011) (explaining that the MCOs "administer the Medicaid program for their members").

This public character of the funds is buttressed by the Standard Contract's exacting requirements for MCOs, subcontractors, and providers. (*E.g.*, R. 772a (an MCO must agree "to require, via contract, that . . . Health Care Providers [with

[9] By the same logic, this transformation also does not happen when Subcontractors remit Medicaid funds to providers, as is at issue in *Eiseman II*. The records at issue in *Eiseman II* are therefore also "financial records" subject to Section 708(c).

which the MCO subcontracts] comply with MA regulations and any enforcement actions directly initiated by [DPW] under its regulations, including termination and restitution actions, among others"); R. 842a ("[A]ll contracts or Subcontracts that cover the provision of medical services to the [MCO]'s Members must include the following [eight] provisions: . . .").) As these and other contractual requirements make clear, downstream parties must comply with the detailed specifications of the Medicaid program. *See, e.g.*, *Medevac MidAtlantic*, 817 F. Supp. 2d at 517 ("[T]he contracts between MCOs and the state must be approved by the federal government, and the contracts must comply with a series of statutory and regulatory requirements." (footnotes omitted)); *Solter v. Health Partners of Phila., Inc.*, 215 F. Supp. 2d 533, 535-36 (E.D. Pa. 2002). Funds with this many strings attached cannot rightly be said to have "enter[ed] the private sector," Opinion at 15.

The Commonwealth Court's holding is inconsistent with the statutory text and threatens the public's ability to follow funds in a multitude of public programs involving private contractors. *See generally Commonwealth v. Donahue*, 98 A.3d 1223, 1253-54 (Pa. 2014) (Stevens, J., concurring) ("By allowing access to official government records that the public would ordinarily be unable to obtain, the RTKL gives the public the power to prohibit secrets, scrutinize the acts of public officials, and make those officials accountable for their use of public funds. Thus, the RTKL

is an invaluable tool in our state government." (citations omitted)). Further, the Opinion was contrary to precedents not only of the Commonwealth Court (*Lukes*, *Associated Builders*, and *Morning Call*) but also of ***this*** Court (*Sapp Roofing*). Unless reversed, the Opinion will thwart public access to a wide range of records documenting the administration of public programs through private contractors.

2. The Subcontracts "Deal" With DPW's "Acquisition" or "Use" of "Services"

The Commonwealth Court also erred by ignoring the second half of the definition of "financial record," which provides an independent basis for reversal as to the second question presented. *See* 65 P.S. § 67.102 (defining "financial record" to mean "[a]ny account, voucher or contract dealing with . . . an agency's acquisition, use or disposal of services, supplies, materials, equipment or property").

The substantial funds DPW funnels through the MCOs to the dentists who provide services to Medicaid enrollees qualify as DPW's "acquisition" or "use" of "services" to carry out its Medicaid program. DPW is obligated to provide access to care for enrollees. *E.g.*, *Sabree v. Richman*, 367 F.3d 180, 182 (3d Cir. 2004) ("States are not required to participate in the program, but states that do accept federal funding must comply with the Medicaid Act and with regulations promulgated by the Secretary of Health and Human Services . . . ."). DPW fulfills its Medicaid obligations by "acquiring" or "using" the "services" of the MCOs.

See, e.g., *Medevac MidAtlantic, LLC v. Keystone Mercy Health Plan*, 817 F. Supp. 2d 515, 517 (E.D. Pa. 2011) (explaining that when states "provide healthcare services to Medicaid beneficiaries through managed care systems[,] . . . private contracting [MCOs] administer the Medicaid program for their members, contract with a network of providers, arrange for care, and pay providers for their services").

There can be no mistake that the second definition of "financial record" applies to the contracts between MCOs and Subcontractors or providers at issue here, as well as to the contracts between Subcontractors and providers at issue in *Eiseman II*:

- "contracts": it is undisputed that the Request extends to contracts
- "agency": DPW is an agency
- "an agency's . . . acquisition [or] use . . . of services": DPW must ensure access to dental care for Medicaid enrollees; rather than employing hundreds of dentists on its own, DPW acquires and uses the services of downstream entities (MCOs, Subcontractors, and providers) to help fulfill that obligation
- "dealing with": the requested records are directly related to how DPW acquires and uses the MCOs' and Subcontractors' services

As is true under the first definition of "financial record," the second definition embraces contracts between the MCOs and the Subcontractors or providers, and between the Subcontractors and providers.[10] Therefore, even if the Court affirms as to the first definition of "financial record," it should order the requested records to be disclosed under the second definition. The provisions of Section 708(c) limiting the application of the exceptions in Section 708(b) apply to "financial records" under either definition of the term.

B. The Commonwealth Court Erroneously Nullified Section 708(c) of the RTKL, Which Provides That Financial Records Must Be Disclosed Even Where They Contain Trade Secrets

It is an axiom of statutory construction that "the courts must attempt to give meaning to every word in a statute as we cannot assume that the legislature intended any words to be mere surplusage." *Holland v. Marcy*, 883 A.2d 449, 456 (Pa. 2005); *accord* 1 Pa.C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). The Commonwealth Court violated this axiom by reading entirely out of the RTKL the provision that trade secrets are not exempt from disclosure if they appear within financial records. This misinterpretation of the RTKL, if not reversed, would completely vitiate an

[10] The second definition's reach is also not infinite: it does not embrace contracts between providers and their vendors, landlords, etc. DPW "acquires" or "uses" the "services" of the MCOs, Subcontractors, and providers to give dental care to Medicaid enrollees. At the point an enrollee receives dental care and his provider receives payment, DPW's Medicaid obligations are fulfilled, and documents reflecting subsequent expenditures are not required to be disclosed under the RTKL.

important exception the General Assembly added to the new RTKL to expand the public's access to records documenting the expenditure of taxpayer money. *See generally Bowling v. Office of Open Records*, 75 A.3d 453, 457 (Pa. 2013) ("In 2008, the General Assembly enacted the RTKL, which replaced the RTKA and provided for significantly broadened access to public records."). The effect of the Opinion even extends beyond the trade secrecy context, eviscerating the exception-to-the-exception of Section 708(c).

Under the RTKL, the general rule is that "[a] record that constitutes or reveals a trade secret or confidential proprietary information" is "exempt from access by a requester." 65 P.S. § 67.708(b)(11). However, the RTKL more specifically provides that "***[t]he exceptions set forth in subsection (b) shall not apply to financial records***, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17)." *Id.* § 67.708(c) (emphasis added). Section 708(c) confers special status on financial records by making public access to them especially broad. Thus, as acknowledged by the Commonwealth Court, Section 708(c) instructs that a "financial record" cannot be restricted from release because it contains trade secrets or confidential proprietary information. *See* Opinion at 10.

Nonetheless, the Commonwealth Court held that PUTSA, an earlier-enacted statute, "takes precedence over other provisions in the RTKL" and "provides an

independent statutory bar to disclosure" of records containing trade secrets. *Id.* at 9-10. As acknowledged by the majority, Opinion at 23, the two statutes define "trade secret" with virtually identical language:

RTKL 65 P.S. § 67.102 effective Jan. 1, 2009 definition of **"trade secret"**	**PUTSA** 12 Pa.C.S. § 5302 effective Apr. 20, 2004 definition of **"trade secret"**
Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being 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.	Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Both Judge McCullough and the OOR appreciated the significance of this sameness. Dissent at 13 ("Minus the last clarifying sentence in section 708(b)(11) of the RTKL, the definition of a trade secret in the RTKL and the Trade Secrets Act is identical."); Final Determination at 13 ("As 'trade secrets' are identically defined by PUTSA and the RTKL, the OOR can discern no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL."). The majority, however, failed to acknowledge that its analysis would nullify in all instances the carveout in Section 708(c) for trade secrets in financial records. This holding—that there is never any application for Section 708(c)'s limitation on the "trade secret" exception—is a grave error of statutory construction with broad implications, requiring reversal by this Court.

Besides, the Commonwealth Court's rationale for applying PUTSA erroneously relies on cases applying PUTSA under the old RTKA, which contained no explicit trade-secrets provision. The RTKA's definitions section stated: "the term public records . . . shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court." 65 P.S. § 66.1 (repealed by RTKL). After the subsequent enactment of PUTSA in 2004, Commonwealth Court decisions held that PUTSA applied via Section 66.1 to records requests. *E.g.*, *Lukes*, 976 A.2d at 626; *Parsons*

v. Pa. Higher Educ. Assistance Agency, 910 A.2d 177, 186 (Pa. Commw. Ct. 2006). When the General Assembly replaced the RTKA with the RTKL in 2008 to broaden access to public records, it hard-wired a trade secrets exception into Section 708(b)(11) but provided that financial records under Section 708(c) are not exempt from disclosure because they contain trade secrets. It is clear the legislature was mindful of PUTSA when it passed the RTKL. These specific legislative enactments in the RTKL (enacted in 2008) superseded jurisprudence that applied the more general PUTSA (enacted in 2004) under the old RTKA (last amended in 2002). *See generally Commonwealth v. Ramos*, 83 A.3d 86, 92 (Pa. 2013) ("[A] special provision in a statute 'shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.'" (quoting 1 Pa.C.S. § 1933)). The Commonwealth Court violated this rule of statutory construction by holding that the older, more general PUTSA trumps a specific provision in the new RTKL. This Court should fix this error of law and restore force to the General Assembly's judgment that "financial records" relating to the expenditure of public funds must be subject to disclosure irrespective of whether they reveal trade secrets.

Sections 306 and 3101.1 of the RTKL do not dictate otherwise. Section 306 provides that "[n]othing in this act shall supersede or modify the public or

nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." 65 P.S. § 67.306. Section 3101.1 states: "If the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply." *Id.* § 67.3101.1. Superficially, these provisions might appear to support the application of PUTSA under the RTKL. But as discussed below, such an interpretation would render meaningless the trade secrecy exception of Section 708(b)(11) and the trade secrecy exception-to-the-exception of 708(c). Rather, Sections 306 and 3101.1 are implicated when a ***general*** provision in the RTKL conflicts with a more ***specific*** provision in a different law that forbids the public release of a record.

For example, the RTKL's general presumption of public access does not apply to driving records maintained by PennDOT, where the Pennsylvania Vehicle Code specifically "makes it unlawful for PennDOT to 'sell, publish or disclose . . . records or reports which relate to the driving record of any person.'" *Advancement Project v. Pa. Dep't of Transp.*, 60 A.3d 891, 895 (Pa. Commw. Ct. 2013) (quoting 75 Pa.C.S. § 6114(a)(1)). Similarly, the RTKL's general provisions favoring disclosure do not trump the specific mandate of the Vital Statistics Law of 1953, 35 P.S. § 450.801, that:

> [t]he vital statistics records of the department and of local registrars shall not be open to public inspection except as authorized by the provisions of this act and the regulations of the Advisory Health Board. Neither the department nor local registrars shall issue copies of

> or disclose any vital statistics record or part thereof created under the provisions of this or prior acts except in compliance with the provisions of this act and the regulations of the Advisory Health Board.

See Commonwealth v. Office of Open Records, 48 A.3d 503, 512 (Pa. Commw. Ct. 2012) (en banc), *rev'd on other grounds*, No. 67 MAP 2013, 2014 Pa. LEXIS 2928 (Pa. Nov. 10, 2014).

Here, by contrast, the General Assembly has specifically singled out financial records as ***not*** exempt from disclosure on trade secrecy grounds. *See* Dissent at 14 ("Indeed, it would be anomalous for our legislature to explicitly exclude trade secrets as an exception to disclosure of financial records in section 708(c) of the RTKL, while simultaneously implying that trade secrets are an exception requiring disclosure of the same financial records in section 3101.1 of the RTKL." (citing *Ling v. Commonwealth*, 79 A.3d 1, 5 (Pa. Commw. Ct.), *alloc. denied*, 81 A.3d 79 (Pa. 2013))). The RTKL defines "trade secrets" no less specifically than PUTSA: with a small, irrelevant exception, the definitions are the same. If the combination of Sections 306 and 3101.1 and PUTSA made records with trade secrets "nonpublic" for RTKL purposes, the trade secrets exception in Section 67.708(b)(11) would be a redundancy. Such a holding would violate not only the rule against surplusage but also the principle that "[t]he RTKL is remedial legislation; therefore, the exceptions from disclosure must be narrowly construed,"

Carey v. Pa. Dep't of Corr., 61 A.3d 367, 373 (Pa. Commw. Ct. 2013) (Simpson, J.).

C. Historical MCO Rates Cannot Be "Trade Secrets" or "Confidential Proprietary Information" When Disclosure of Historical Rates Would Not Reveal Present or Future Rates, and When Most MCO Rates Are Already Held by the Entity in Whose Hands They Could Do the Most Harm

Because the contracts containing the MCO Rates should be considered "financial records," and because PUTSA should not be held to trump the RTKL, the Court should reverse the decision of the Commonwealth Court and affirm the decision of the OOR without regard to whether those contracts contain "trade secrets" or "confidential proprietary information."[11] If, however, those RTKL exceptions applied, the Commonwealth Court erred by holding that years-old payment rates have present-day competitive value, and that four of the five MCOs had maintained the confidentiality of those rates even when they have shared those rates with a business that negotiated MCO Rates with their competitors.[12]

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[11] "Trade secret" and "confidential proprietary information" have different definitions under the RTKL, 65 P.S. § 67.102, but in practice they usually cover the same information, and in this case the parties, the MCOs' expert (R. 298a-300a), the Opinion, the Dissent, and the Final Determination have not identified any relevant distinction between the two terms. Because there is no distinction applicable in this case, this discussion treats them as interchangeable for purposes of MCO Rates and Provider Rates.

[12] Although the "trade secret" and "confidential proprietary information" exceptions "involve the application of fact to law," *Bowling v. Office of Open Records*, 75 A.3d 453, 482 (Pa. 2013) (Todd, J. dissenting), this Court should here exercise a de novo standard of review and a plenary scope of review. This case does not turn on disputes of fact.

If, in the alternative, there are any factual disputes, the Commonwealth Court opted not to expand the record developed before the OOR, Opinion at 13, so any Commonwealth Court findings of fact were based on a cold record and are owed no deference by this Court. DPW and

1. The Commonwealth Court Ignored Economic Reality by Holding That Revealing Historical MCO Rates in a Volatile Industry Would Reveal Prospective Confidences

To prove that the MCO Rates are "trade secrets," DPW and the MCOs had to show that the rates "derive[] 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 [their] disclosure or use." 65 P.S. § 67.102. To prove they are "confidential proprietary information," they had to show that "disclosure . . . would cause substantial harm to the competitive position of the person that submitted the information [to DPW]." *Id.* DPW and the MCOs proved neither, because releasing past years' MCO Rates does not reveal future years' rates.

The requested records date from July 2008 to June 2011. The Commonwealth Court recognized that to prove that the records contain trade secrets or confidential proprietary information, "[t]he MCOs needed to show the disclosure of rate information from 2008, 2009 and 2010 contracts is likely to result in present harm." Opinion at 22. However, the Commonwealth Court concluded with a non sequitur: "Although the rates fluctuate, such that disclosure

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the MCOs 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."); *SWB Yankees LLC v. Wintermantel*, 999 A.2d 672, 675 (Pa. Commw. Ct. 2010) (the same is true for third-party direct interest participants), *aff'd*, 45 A.3d 1029 (Pa. 2012). They have not carried this burden.

of one year's rate does not necessarily disclose all yearly rates, there is no evidence suggesting the rate information is 'stale' when it is five years old. There is only the passage of time." *Id.*

This reasoning gives short shrift to the economic reality that costs in the healthcare industry vary so significantly from year to year that past years' MCO Rates do not have predictive value for the MCO Rates to be negotiated for future years. In a case specifically concerning the future profitability of a pediatric dental clinic, this Court "acknowledge[d] . . . that the quantitative level of these profits will likely be determined by a multitude of factors," including, in the clinic's words, "supply and demand, competition, sales volume, macroeconomic conditions, cost and profitability analysis, revenue forecasts, marketing and advertising, and the condition of the industry and the local and/or regional economy." *Helpin v. Trs. of the Univ. of Pa.*, 10 A.3d 267, 275-76 (Pa. 2010). Here the situation is the same: MCO Rates necessarily change from year to year, and the release of historical rates would not reveal the rates under negotiation for the coming year. *Cf. GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) (disclosure of 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"); *Clark v. Prudential Ins. Co. of Am.*, No. 08-cv-

6197, 2011 U.S. Dist. LEXIS 51486, at *10-11 (D.N.J. May 13, 2011) ("As a general rule, business information that is substantially out of date is unlikely to merit protection under Rule 26(c). A party seeking to protect outdated information must make a specific showing of present harm. Speculative allegations of injury will not suffice." (citations omitted)); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 129 F.R.D. 483, 485 (D.N.J. 1990) ("The purported need for protection is substantially diminished where the passage of time has made such documents stale."); *Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety*, 658 N.W.2d 876, 887 (Minn. Ct. App. 2003) ("[F]inancial-statement-type data lose their significance over time").

The MCO Rates are too stale to have present-day competitive value. Even if the "trade secrets" and "confidential proprietary information" exceptions could apply to records containing MCO Rates, the records at issue here do not fall within those exceptions and should be disclosed.

2. The Genie Is Already Out of the Bottle

Four of the five MCOs—all but United—contract with one subcontractor, DentaQuest, LLC. DentaQuest of course knows how much it is paid by each MCO. To prove the MCO Rates are "trade secrets," DPW and the MCOs were required to prove they are "the subject of efforts that are reasonable under the circumstances to maintain [their] secrecy"; to prove they are "confidential proprietary information,"

they needed to prove they are "privileged or confidential." 65 P.S. § 67.102. This they cannot do when DentaQuest knows all the supposedly "secret" and "confidential" MCO Rates of four MCOs.[13] These MCOs all maintain that further disclosure of their rate information would substantially harm their ability to compete fairly in the market for MCO Rates. Yet each of them already shares its MCO Rates with a business it knows to have access to its competitors' rates. Evidently it has not harmed the MCOs to negotiate with a business that knew their competitors' rates.

The Commonwealth Court sidestepped this crucial issue. In its one-footnote treatment, the Commonwealth Court first stated: "We reject Requester's contention that Subcontractor DentaQuest's knowledge of four of the five MCO Rates undercuts their confidential nature. DentaQuest is not a competitor of the MCOs; rather, it is a Subcontractor." Opinion at 17 n.15. This is true but irrelevant, and it ignores business reality. DentaQuest knows the MCO Rates of all four MCOs (i.e., the rates by which each MCO pays DentaQuest to provide Medicaid dental services). DentaQuest additionally knows the Provider Rates by which every dentist or dental office in the network of each of the four MCOs is paid to treat patients (which may vary for a single provider depending on which MCO covers the patient). Thus when DentaQuest renegotiates MCO Rates with an MCO, it does

[13] This discussion applies to Aetna, Coventry, Keystone, and Health Partners, but not to United.

so with the benefit of knowing not only the Provider Rates for that MCO but also the MCO Rates and the Provider Rates for three competitor MCOs. Surely, the MCOs' disclosures of the MCO Rates to DentaQuest belie any suggestion that the MCOs have maintained the secrecy or confidentiality of their MCO Rates. To the contrary, the MCOs have knowingly provided that information to a sophisticated business that can profitably use it in its negotiations with competing MCOs.

The four MCOs might have rebutted this obvious inference by, for example, submitting evidence that their contracts with DentaQuest required the latter to put in place Chinese walls to prevent any single individual within DentaQuest from knowing the MCO Rates of multiple MCOs. Or they might have called a DentaQuest representative as a witness at the hearing. But they did nothing of the sort. Representatives of the MCOs testified generically that their contracts with DentaQuest required confidentiality. (R. 333a, 432a-434a, 493a-495a, 517a.) The Commonwealth Court found, also generically, that DentaQuest "is bound to maintain secrecy of the rates of MCOs with which it contracts." Opinion at 17 n.15. But the record testimony about such secrecy concerned practices within the MCOs, not DentaQuest, and it at most covered safeguards such as restricting access to files to "people who have business needs to know the information" (R. 494a) and keeping contracts "in locked, fireproof file cabinets" (R. 517a). There is absolutely nothing in the record suggesting that any MCO required DentaQuest to

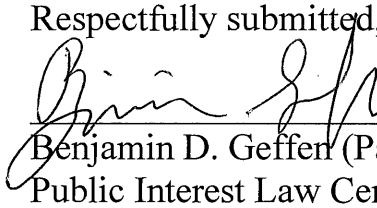
protect its supposed secrets by screening employees who knew that MCO's MCO Rates from participating in negotiations with competitor MCOs, nor is there any evidence about DentaQuest's internal practices. The MCOs thus failed to carry their burden of proving that they had kept their MCO Rates secret or confidential.

VIII. CONCLUSION

Requesters respectfully request that the Court reverse the Commonwealth Court's Order insofar as it reversed the Final Determination of the Office of Open Records.

Dated: December 2, 2014

Respectfully submitted,



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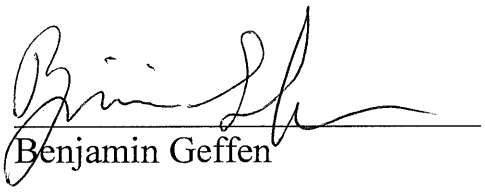
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the 14,000 word limit established by Pa. R.A.P. 2135.



Benjamin Geffen

Dated: December 2, 2014

CERTIFICATE OF SERVICE

I, Benjamin Geffen, hereby certify that on this day I am causing to be served this **Brief of Appellants** by e-mail, per agreement of the parties under Pa. R.A.P. 121(c)(4), and by United States Postal Service Priority Mail (2 copies per recipient) to:

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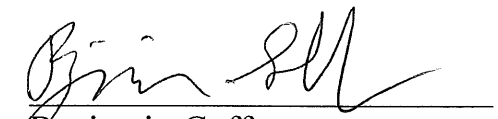

Benjamin Geffen

Dated: December 2, 2014

Exhibit A

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,	No. 129 EAL 2014
Respondent	Petition for Allowance of Appeal from the Order of the Commonwealth Court
v.	
JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,	
Petitioners	
AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN,	No. 130 EAL 2014
Respondents	Petition for Allowance of Appeal from the Order of the Commonwealth Court
v.	
JAMES EISEMAN, JR., AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,	
Petitioners	
UNITEDHEALTHCARE OF PENNSYLVANIA, INC. D/B/A UNITEDHEALTHCARE COMMUNITY PLAN AND HEALTHAMERICA PENNSYLVANIA INC. D/B/A COVENTRYCARES,	No. 131 EAL 2014
Respondents	Petition for Allowance of Appeal from the Order of the Commonwealth Court

v.

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

Petitioners

ORDER

PER CURIAM

AND NOW, this 23rd day of October, 2014, the Petition for Allowance of Appeal is **GRANTED**. The issues are:

(1) Where Section 708(c) of the Right-[t]o-Know Law specifically provides that a "financial record" is not exempt from disclosure on the basis that it contains a "trade secret" or "confidential proprietary information," is this explicit provision nullified by the earlier-enacted Pennsylvania Uniform Trade Secrets Act?

(2) When public funds are funneled through middlemen before reaching their intended beneficiaries, are the records documenting this flow of public funds "financial records" required to be disclosed under the current version of the Right-[t]o-Know Law, as they were under the prior version of the law?

(3) Are historical rates paid by Medicaid managed-care organizations (MCOs) "confidential proprietary information" and "trade secrets," when the rates from one year do not reveal the rates for future years, and when most of the MCOs have already disclosed such rates to a subcontractor who negotiates rates with their competitors?

The Prothonotary shall establish parallel briefing tracks for this case and Dental Benefit Providers, Inc. v. Eiseman, No. 132-34 EAL 2014, and the two cases, though not consolidated, shall be listed for argument at the same Court session.

Exhibit B

LM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Public Welfare, Petitioner	:	
v.	:	No. 1935 C.D. 2012
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	
Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan, Petitioners	:	
v.	:	No. 1949 C.D. 2012
James Eiseman, Jr., and the Public Interest Law Center of Philadelphia, Respondents	:	
UnitedHealthcare of Pennsylvania, Inc. D/B/A UnitedHealthcare Community Plan and HealthAmerica Pennsylvania Inc. D/B/A CoventryCares, Petitioners	:	
v.	:	No. 1950 C.D. 2012
	:	Argued: October 9, 2013
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION
BY JUDGE SIMPSON **FILED: February 19, 2014**

This fact-intensive Right-to-Know Law (RTKL)[1] petition for review from a final determination of the Office of Open Records (OOR) implicates rate-setting in the managed care industry.[2] OOR ordered disclosure of rates set by contracts related to the Department of Public Welfare's (DPW) administration of the Medicaid program. DPW asserted the rates were exempt under the Pennsylvania Uniform Trade Secrets Act, 12 Pa. C.S. §§5301-5308, (Trade Secrets Act), agency regulations and exceptions under the RTKL, including Section 708(b)(11) of the RTKL, 65 P.S. §67.708(b)(11), which protects confidential proprietary information and trade secrets. Five Managed Care Organizations (MCOs) submitted evidence as direct interest participants below. After a hearing, OOR reasoned these exemptions did not apply. Upon our independent review of the evidentiary record created below, this Court affirms in part and reverses in part.

I. Background

DPW administers the Medicaid program, which provides medical and dental care to low-income children, certain adults and some disabled persons in Pennsylvania. In part, the Medicaid program is funded through federal funds and administered in accordance with federal law, 42 U.S.C. §§1396- 1396w-5. In Southeast Pennsylvania, DPW operates Medicaid through the HealthChoices

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[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

[2] These consolidated cases were argued seriately with Dental Benefit Providers, Inc. v. Eiseman, (Pa. Cmwlth., Nos. 945 C.D. 2013, 957 C.D. 2013 & 958 C.D. 2013, filed February 19, 2014) (consolidated) (Eiseman II), as both appeals involve similar legal issues and share many parties in interest, including DPW.

Program, contracting with five MCOs to provide services to eligible program recipients. The MCOs provide dental care almost exclusively by subcontracting with dental subcontractors (Subcontractors). Four of the five MCOs use the same Subcontractor, DentaQuest.[3]

DPW does not negotiate rates for dental services, or set parameters for such rates in its contracts. DPW contracts with the MCOs requiring them to ensure access to dental care to eligible recipients.

Pursuant to the RTKL, James Eiseman, Jr. of The Public Interest Law Center of Philadelphia (Requester) requested the following records from DPW:

> Each and every document, including correspondence, and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid HMO[4] to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age. [OOR referred to as Item 1.]
>
> Each and every document including correspondence and appendices, in DPW's possessions, [sic] custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania. [OOR referred to as Item 2.]

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[3] One of the petitioners, United Healthcare of Pennsylvania, Inc., uses Dental Benefits Providers, Inc. (DBP), a party in Eiseman II. DentaQuest is also a party in Eiseman II.

[4] Health maintenance organizations, HMOs, refer to managed care organizations here.

> or (b) otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania.

(emphasis added). The request is limited to the period from July 1, 2008, through June 15, 2011, and focuses on the provision of dental services.

Essentially, Item 1 of the request sought rates paid by DPW to the MCOs, per member, per month, based on annually negotiated capitation rates (Capitation Rates).[5] Item 2 sought the rates the MCOs pay in turn primarily[6] to Subcontractors for dental services (MCO Rates).[7]

Depicted in simplified diagram form, the relationships are generally as follows:

DPW→ MCOs → Subcontractors → Providers.

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[5] During oral argument, counsel for Petitioners confirmed the Capitation Rates paid by DPW, per member, per month, also referred to as the PMPM rate, include all health services. The Capitation Rates do not isolate payments pertaining to dental services, which are at issue in this appeal.

[6] In limited programs involving special needs patients, certain MCOs pay providers directly, (e.g., Health Partners' Special Smiles program). Reproduced Record (R.R.) at 327a.

[7] The MCO Rates are comprised of the rates paid to Subcontractors and rates paid directly by MCOs to providers. As Requester does not distinguish between these parties in his analysis, we collectively refer to these rates by reference to the MCOs as payers. Provider Rates paid by Subcontractors are addressed in Eiseman II.

DPW denied the request, stating it notified the entities implicated as subjects of the Request, namely: United Healthcare of Pennsylvania, Inc. (United); Aetna Better Health, Inc. (Aetna); Health America of Pennsylvania, Inc. d/b/a CoventryCares (Coventry); Keystone Mercy Health Plan, Inc. (Keystone); and, Health Partners of Philadelphia, Inc. (Health Partners) (collectively, the MCOs). The MCOs advised DPW the records are exempt on the following grounds: the Trade Secrets Act; Section 708(b)(11) of the RTKL (confidential proprietary information and trade secrets exception); and, other state and/or federal regulations and/or statutes. Requester appealed to OOR.

The MCOs asked to participate in the proceedings. OOR permitted the MCOs to participate and, at the MCOs' request, authorized a hearing.

OOR designated a hearing officer to hold one of its first hearings under the RTKL.[8] During the hearing, the MCOs submitted testimony of one fact witness each: John Sehi, then Vice President of Finance at Health Partners; Deborah Nichols, CEO at Aetna; William Morsell, Senior Vice President at Keystone; Heather Cianfrocco, President at United; and, Nancy Sirolli-Hardy, Vice-President of Operations at Coventry. The MCOs' fact witnesses emphasized the confidentiality of the MCO Rates, both in their maintenance, and in confidentiality provisions of their upstream agreements with DPW and of their downstream agreements with Subcontractors.

[8] The designated hearing officer made evidentiary rulings, but did not submit recommended findings or any recommended decision based on the record.

In addition, Henry Miller, Ph.D., an expert in the field of health care consulting, testified. Dr. Miller testified about the formulation of MCO Rates (MCO→Subcontractors) and the significance of competitors knowing these rates. He opined that in his more than 40 years in the industry, he has not seen instances where rate information was disclosed outside the MCOs. He also provided his expert opinion that rates MCOs pay are trade secrets and confidential proprietary information to the MCOs. He testified that disclosure of MCO Rates would reduce the value of the MCOs' considerable investment in negotiating favorable rates. Notably, Dr. Miller did not testify about the Capitation Rates (DPW→MCOs).

Requester did not submit testimonial evidence or affidavits.

Based on the record created by the hearing officer, an appeals officer for OOR issued a final determination granting the appeal. Eiseman/The Public Interest Law Center v. Dep't of Pub. Welfare, OOR Dkt. No. AP 2011-1098 (Pa. OOR, filed Sept. 17, 2012). OOR reasoned none of the cited exemptions applied, and it ordered disclosure. OOR concluded the rates constituted financial records that must be disclosed, with minimal exceptions for redaction. Although the parties raised both the Trade Secrets Act and the RTKL exception protecting trade secrets, OOR only applied the trade secrets exception in Section 708(b)(11). In deciding the records were not trade secrets, OOR relied on this Court's holding in Lukes v. Department of Public Welfare, 976 A.2d 609 (Pa. Cmwlth. 2009), which was decided under the prior Right-to-Know Law (Prior Law).[9]

[9] Formerly Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§66.1-66.9 (repealed by RTKL).

The direct interest participants and DPW appealed to this Court[10] in separate actions.[11] This Court consolidated these appeals because they challenge the same final determination, and raise common legal issues.

II. Discussion

In their joint brief, United and Coventry (collectively, United) argue OOR erred when it relied on Lukes to hold the rates are financial records. United asserts both the Capitation Rates (DPW→MCOs) and the MCO Rates (MCO→Subcontractors) are exempt under the Trade Secrets Act. They also argue the Trade Secrets Act should be applied separately from the exception in Section 708(b)(11) of the RTKL. United contends the MCO Rates are also protected as confidential proprietary information under Section 708(b)(11) of the RTKL.

In their brief, Aetna, Health Partners and Keystone (collectively, Aetna) argue OOR erred in relying on Lukes in ordering disclosure of the MCO Rates. Aetna asserts the MCOs' evidence established the confidential proprietary exception in Section 708(b)(11). These MCOs also argue the MCO Rates are exempt as trade secrets under the Trade Secrets Act.

DPW agrees that Lukes does not control because it was not decided under the current RTKL. Further, it argues OOR erred in failing to analyze the

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[10] In a RTKL appeal involving a Commonwealth agency, this Court may independently review OOR's order and substitute its own findings of facts for those of an appeals officer. Bowling v. Office of Open Records, __ Pa. __, 75 A.3d 453 (2013).

[11] United and Coventry filed an appeal (Dkt. No. 1950 C.D. 2012) and Aetna, Health Partners, and Keystone filed an appeal (Dkt. No. 1949 C.D. 2012), here consolidated.

trade secrets exception in the RTKL separately from the Trade Secrets Act. DPW also asserts OOR ignored the potential economic value of the Capitation Rates, supported by the sizeable record. DPW did not address the MCO Rates in its brief.

Requester counters that this Court's decision in Lukes compels disclosure. Requester also asserts the documents constitute "financial records" as defined in the RTKL; therefore, exceptions applicable under the RTKL are very limited. Requester further contends that petitioners did not meet their burden of proving applicable exemptions. Requester submits that neither the Trade Secrets Act, nor Section 708(b)(11) of the RTKL protects the rates at issue.

The current RTKL contains a presumption of openness as to any records in an agency's possession. Bowling v. Office of Open Records, __ Pa. __, 75 A.3d 453 (2013). Records in possession of a Commonwealth agency are presumed to be public unless they are: (1) exempted by Section 708 of the RTKL; (2) protected by a privilege; or, (3) exempted "under any other Federal or State law or regulation or judicial order or decree." Section 305 of the RTKL, 65 P.S. §67.305. For a question of law under the RTKL, our scope of review is plenary. Dep't of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

DPW is a Commonwealth agency as defined by the RTKL. Section 102 of the RTKL, 65 P.S. §67.102. A Commonwealth agency bears the burden of proving a record is exempt from disclosure. Dep't of Transp. v. Office of Open Records (Aris), 7 A.3d 329 (Pa. Cmwlth. 2010). When a party with a direct interest participates before OOR, that party bears the burden of proving its asserted

exemptions. Allegheny Cnty. Dep't of Admin. Servs. v. Parsons (ASCI II), 61 A.3d 336 (Pa. Cmwlth. 2013) (en banc).

There is no dispute the Capitation Rates (DPW→MCOs) are in DPW's possession. As there is no apparent dispute that DPW also has access to the MCO Rates (MCO→Subcontractors), we accept for current purposes that DPW possesses the records at issue in this case.

A. Capitation Rates (DPW→MCOs)

In Item 1, Requester seeks Capitation Rates, which are the amounts paid per member, per month or "PMPM" in the Medicaid Program. A number of pertinent facts regarding the information are undisputed. There is no dispute that the Capitation Rates are paid by DPW directly to the MCOs. The agreements between DPW and the MCOs set forth the Capitation Rates, and the payments represent taxpayer funds disbursed for services performed on behalf of a Commonwealth agency. Also, there is no dispute regarding "agency possession." Further, there is no dispute that MCOs are contracted to perform a government function, "implementing the Commonwealth's Medicaid program." See Pet'r Aetna's Reply Br. at 4.

OOR concluded the Capitation Rates are "financial records." After analyzing the relevant statutory provisions, we agree.

1. Financial Record Status

The RTKL defines "records" in pertinent part as follows:

> Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.

Section 102 of the RTKL, 65 P.S. §67.102 (emphasis added).

The Capitation Rates are records within DPW's possession that evidence its transaction of paying MCOs pursuant to the Medicaid HealthChoices Program. Significant to our discussion, the records also qualify as "financial records." Redaction of "financial records" is precluded except under limited RTKL exceptions not raised here. In pertinent part, "financial records" are defined in Section 102 of the RTKL as "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." 65 P.S. §67.102.

Section 708(c) of the RTKL, 65 P.S. §67.708(c), provides that the exceptions in subsection 708(b) shall not apply to financial records, except certain information may be redacted under specifically enumerated exceptions. Section 708(b)(11) of the RTKL, which protects trade secrets and confidential proprietary information, is not among the RTKL exceptions for which redaction is allowed. As a consequence, such information cannot be redacted from financial records based on the trade secrets and confidential proprietary exception in the RTKL.

After concluding the Capitation Rates are financial records, OOR completed its inquiry, reasoning that trade secrets are not exempt because the

Legislature did not include Section (b)(11) (trade secret/confidential proprietary information) among the RTKL exceptions for which redaction is allowed. Further, OOR relied on Lukes, which rejected the Trade Secrets Act as an independent defense to disclosure.

Section 708(c) precludes the operation of most RTKL exceptions to "financial records;" however, as explained below, Section 708(c) cannot dilute operation of another law that provides an independent statutory bar to disclosure. We reach this conclusion in part because the RTKL expressly recognizes the superior position of other laws, statutory or regulatory, federal or state, in barring disclosure under the RTKL.

Notably, Section 306 of the RTKL (relating to nature of document), provides: "Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." 65 P.S. §67.306. Further, Section 3101.1 of the RTKL provides "if the provisions of [the RTKL] regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply." 65 P.S. §67.3101.1 (emphasis added). The Trade Secrets Act is a state law that takes precedence over other provisions in the RTKL.

Given these express provisions of the current RTKL, OOR erred in addressing trade secrets as a RTKL exception only, while discounting the stand-alone statutory basis for protection in the Trade Secrets Act.

In the course of analyzing whether the Capitation Rates are trade secrets, OOR consulted this Court's decision in Lukes. Lukes specifically addressed the Trade Secrets Act as an exemption to disclosure under the Prior Law. Lukes involved provider agreements between HMOs and provider hospitals. While most of the opinion in Lukes addressed statutory construction of the Prior Law, the opinion also briefly reviewed whether rates in the provider agreements are protected from disclosure as trade secrets.

The Lukes Court reasoned 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." Lukes, 976 A.2d at 627. In so doing, the Court emphasized the policy implications of the expenditure of public funds under contracts entered for the ultimate benefit of Medicaid recipients. OOR followed Lukes.

However, in light of the substantial differences between the current RTKL and the Prior Law, OOR erred in relying on Lukes here. This substantial difference is most obvious in the severe restriction on redaction of "financial records."[12] We thus conclude OOR erred in relying on Lukes, and it was required to apply the Trade Secrets Act as a separate statutory defense.[13]

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[12] Using similar reasoning, this Court repeatedly declines to follow Lukes in resolving cases under the new RTKL. Honaman v. Lower Merion Twp., 13 A.3d 1014 (Pa. Cmwlth. 2011) (distinguishing Lukes and holding records of tax collector are not records of agency, and are not reached under current RTKL because there is no contract between the tax collector and the agency); In re Silberstein, 11 A.3d 629 (Pa. Cmwlth. 2011) (stating that because Lukes was decided under the former version of the RTKL, it was not controlling); Office of the Budget v. **(Footnote continued on next page...)**

2. Exempt by Other Law:[14] The Trade Secrets Act

To the extent the Capitation Rates constitute trade secrets, that information may be redacted in accordance with the Trade Secrets Act. The Trade Secrets Act protects against misappropriation of trade secrets, which includes disclosure without consent. 12 Pa. C.S. §5302. This Court recognized the Trade Secrets Act as a statutory exemption from disclosure in Parsons v. Pennsylvania Higher Education Assistance Agency (PHEAA), 910 A.2d 177 (Pa. Cmwlth. 2006).

Trade secrets are defined as, "[i]nformation including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

> (1) derives 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]

(continued...)

Office of Open Records, 11 A.3d 618 (Pa. Cmwlth. 2011) (stating Lukes was inapposite to current case because it was decided under the Prior Law).

[13] The MCOs contend OOR raised the "financial records" basis for disclosure on its own motion, and it is, therefore, an improper basis for the final determination. We disagree. Lukes was central to OOR's analysis and thoroughly briefed by the parties, and it implicates the financial records definition since it was decided under the Prior Law. Moreover, the parties briefed the financial record issue to this Court, so any alleged prejudice is cured.

[14] Petitioners cite the Department of Health's (DOH) HMO regulation, 28 Pa. Code §9.602 regarding reporting requirements, as a regulatory exemption. The regulation pertains to reimbursement information submitted to DOH, not DPW. As DPW sets Capitation Rates, and there is no indication in the record that the Rates are submitted to DOH as "reimbursement information," the regulation has no obvious application.

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa. C.S. §5302.

Pennsylvania courts confer "trade secret" status based upon the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to his business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. See, e.g., Crum v. Bridgestone/Firestone N. Amer. Tire, 907 A.2d 578 (Pa. Super. 2006) (adopting standard from RESTATEMENT (SECOND) OF TORTS §757 (1965)). To constitute a "trade secret" under the Trade Secrets Act, it must be an "actual secret of peculiar importance to the business and constitute competitive value to the owner." PHEAA, 910 A.2d at 185. The most critical criteria are "substantial secrecy and competitive value." Crum.

Whether information qualifies as a "trade secret" is a highly fact-specific inquiry that cannot be distilled to a pure matter of law. Under other circumstances, we might remand to OOR to reconsider the evidence based on our guidance here. However, this case has already seen significant delays, and OOR commendably created a complete record after a full hearing where interested third parties participated. Therefore, this Court takes advantage of the extensive factual record developed below in determining whether the Capitation Rates are exempt as trade secrets by separate statute.

The record reveals little evidence of competitive value in the Capitation Rates. Dr. Miller, the health care consultant, confined his testimony to the MCO Rates. The MCOs' fact witnesses did not identify any competitive harm from Capitation Rate disclosure, except as to DPW. For its part, DPW submitted evidence indicating that its negotiating position may be undermined by each MCO knowing the Capitation Rate agreed to by other MCOs. However, a potentially weaker negotiating position does not establish trade secret status.

Other than confidentiality provisions in its contracts, DPW makes no special effort to maintain the secrecy of Capitation Rates. DPW did not submit evidence explaining how disclosure harms the potential economic value in the Capitation Rates. Relevant to this inquiry is that DPW does not have competitors in this market; DPW is the Commonwealth agency charged with administering the Medicaid program in Pennsylvania, and is in no danger of losing market share to competitors.

Because no party proved the Capitation Rates constitute trade secrets, and no statute establishes their protected nature, DPW is required to disclose them. We thus affirm OOR as to the Capitation Rates, albeit on different grounds.

B. MCO Rates (MCO→Subcontractors)

MCO Rates, by contrast, are not "financial records" because they are not contained in contracts of a Commonwealth agency and do not involve disbursement of funds by a Commonwealth agency.

The current RTKL refers to the source of funds in the definition of "financial records." While MCOs may very well be disbursing funds from DPW, the statute does not use the phrase "disbursement of agency funds;" rather, the definition refers to disbursement of funds "by an agency." 65 P.S. §67.102 (emphasis added). DPW disburses funds in its contracts with the MCOs. In contrast, MCO Rates involve disbursement by a contractor of an agency. This is a significant distinction OOR ignored. Because MCO Rates are not disbursed "by an agency," OOR erred in concluding MCO Rates are "financial records."

That MCOs disbursed funds they received from DPW to their subcontractors does not render the MCOs mere conduits for public funds. Based on the language of the current RTKL, the funds lose their character as public funds once they leave an agency's hands and enter the private sector. This is contrary to our statement in Lukes under the Prior Law. 976 A.2d at 625. To the extent that reasoning was central to the holding, Lukes it is no longer valid in cases under the current RTKL.

Because we conclude the MCO Rates are not "financial records," we next consider the RTKL exceptions that OOR did not fully analyze based on its adherence to Lukes. Typically, we would remand to OOR to serve as fact-finder. However, the unique circumstances here, including the complexity of the case, the number of parties involved, the robust record creation by hearing, and the amount of time already transpired, encourages us to retain jurisdiction and decide the merits. As we have sufficient information to analyze the issues, and we wish to resolve these complicated matters with as much expedition as is consistent with fairness, we

exercise our independent judgment based on the current record. Bowling. The following discussion constitutes our narrative findings and conclusions

Although Section 708(b)(11) protects both trade secrets and confidential proprietary information from disclosure in the same exception, the RTKL defines these terms differently. Thus, the terms must be analyzed separately. See Office of the Governor v. Bari, 20 A.3d 634 (Pa. Cmwlth. 2011).

1. Confidential Proprietary Information

The MCOs assert the MCO Rates constitute "confidential proprietary information," which the RTKL defines as:

> Commercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. §67.102 (emphasis added). To qualify as "confidential proprietary information," the information must meet both components of the two-part test.

a. Confidential Information

In considering whether the MCO Rates are "confidential," we consider the efforts the parties undertook to maintain their secrecy.

The individual MCOs compete with each other for members, and they make efforts to maintain the secrecy of MCO Rates. Specifically, the MCOs provide contractual protections with confidentiality provisions in the contracts with

their Subcontractors[15] and providers. The MCOs guard copies of the contracts containing MCO Rates, (*e.g.*, Health Partners keeps a single copy in its legal department; Aetna keeps copies under lock and key and limits electronic copies). MCOs also provide confidentiality training to employees to protect the records. As this record reflects the MCOs treat the MCO Rates as confidential information, the MCOs meet the first part of the test.

b. Substantial Harm to Competitive Position

i. Standard

In evaluating the "substantial harm" to "competitive position," we acknowledge that the terms have acquired special legal significance. In particular, we consider federal case law interpreting the Freedom of Information Act, 5 U.S.C. §552, (FOIA) and its exemption for "commercial or financial information obtained from a person." Notably, "substantial harm to competitive position" is the identical language used in FOIA. Under federal case law, a submitter of confidential records does not need to demonstrate *actual* competitive harm. See Cozen O'Connor v. U.S. Dep't of Treasury, 570 F.Supp.2d 749 (E.D. Pa. 2008) (citing Pub. Citizen Health Research Grp. v. Food & Drug Admin., 704 F.2d 1280 (D.C. Cir. 1983)). Potential harm may trigger protection.

In determining whether disclosure of confidential information will cause "substantial harm to the competitive position" of the person from whom the

[15] We reject Requester's contention that Subcontractor DentaQuest's knowledge of four of the five MCO Rates undercuts their confidential nature. DentaQuest is not a competitor of the MCOs; rather, it is a Subcontractor. Also, it is bound to maintain secrecy of the rates of MCOs with which it contracts.

information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released. Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1194 (9th Cir. 2011); GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1112 (9th Cir. 1994) (adopting the standard from Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir.1974)).

"Competitive harm analysis 'is limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position.'" Watkins, 643 F.3d at 1195 (citation omitted). The word "substantial" appears in the statute to characterize the degree of injury needed to apply this exception.

We applied the confidential proprietary information exception in Giurintano v. Department of General Services (DGS), 20 A.3d 613 (Pa. Cmwlth. 2011). In Giurintano, the requester sought independent contractor agreements between a private company and interpreters for telephone translation services. The private company subcontracted with interpreters to provide translation services under contract with a Commonwealth agency, DGS. The private company submitted evidence that the identity of its interpreters was highly valuable proprietary information. This Court concluded that interpreter identities in subcontracts were properly redacted because the company established the list of interpreters constituted a business asset, and was confidential.

To support the confidential proprietary information exception in Giurintano, the company submitted evidence. In its affidavit, the company described the investment involved in developing a list of quality interpreters. The company explained that the identities are closely guarded. Moreover, identities were protected by using unique identifiers for each interpreter rather than names, even internally, and limiting access of the list to few employees. The company emphasized the importance of a quality list to the success of a business in the interpretation industry, such that it invested substantial resources in obtaining a list of highly skilled interpreters of over 240 languages. Notably, the founder and CEO of the company attested:

> Divulging the names of [company's] interpreters will cause great business and economic harm to [company] by allowing competitors to gain the fruits of [its] labors in identifying a vast network of interpreters offering a quality of interpretation and languages unmatched in the industry.

Giurintano, 20 A.3d 616-17 (quoting CEO affidavit). Thus, in Giurintano, the company described the harm and described its degree.

ii. Fact Witnesses

Compared to the affidavit in Giurintano, the testimony of the fact witnesses here falls short. None of the fact witnesses definitively characterize the harm that is likely to result from disclosure of the MCO Rates as "substantial." Further, in response to questions about whether competitive harm may result from disclosure, the majority of fact witnesses state that they "think" or "believe so." See Reproduced Record (R.R.) at 521a (Keystone); 435a (Aetna).

In addition, case law does not fill this gap. The MCOs do not cite cases holding that rates paid to subcontractors in the managed care industry are proprietary information, the disclosure of which would cause substantial competitive harm. See, e.g., Wilmington Star-News v. N. Hanover Reg'l Med. Ctr., Inc., 480 S.E.2d 53 (N.C. App. 1997) (state statute specifically exempted health care confidential competitive information, *i.e.*, negotiated price lists, from the public records law, but protection only applied to private persons not corporations).

Here, the MCOs had to identify the competitive harm and submit evidence regarding how disclosure would cause "substantial harm" to their respective competitive positions. Facts regarding the alleged significant harm, and the relationship between the information redacted and the alleged harm, must be substantiated to support nondisclosure under Section 708(b)(11). Giurintano.

In this case, the actual competition in the relevant market among the five MCOs is apparent. The evidence shows the market for Medicaid managed dental care is small in Southeast Pennsylvania. As the MCOs compete for market share, gain for one means loss for another. R.R. 413a, 499a, 509a. In addition, a corporate representative from each MCO testified that disclosure of the MCO Rates would impair or harm that MCO's competitive position. However, the degree of harm is not apparent from the testimony of the MCOs' fact witnesses.

From our review of the record, the MCOs' fact witnesses did not explain how the harm quantifies as "substantial." The MCOs' fact witnesses testified as to their respective "beliefs" in the competitive harm that may result

from disclosure. "Although the court need not conduct a sophisticated economic analysis of the likely effects of disclosure ... conclusory and generalized allegations of substantial competitive harm ... are unacceptable and cannot support an agency's decision to withhold requested documents." Watkins, 643 F.3d at 1195 (construing FOIA).

Nevertheless, the testimony of MCOs' fact witnesses provides some support for non-disclosure. Nichols of Aetna explained the harm as follows: "Negotiating contracts is a complex process that we set multiple variables. If those rates were available to competitors or to other providers, then the sole focus becomes about how to get the best rate or the highest rate, and it—you know, it would completely change the way that the market works." R.R. at 435a. In addition, the MCOs' witnesses each testified about the significant time and funds invested in developing the rates.

iii. Expert Witness

Moreover, the expert testimony regarding industry practice, the highly sensitive nature of the information, and potential for substantial harm from its disclosure, tips the balance in favor of protecting MCO Rates as proprietary information. Dr. Miller's expert testimony weighs in favor of protection.

Over Requester's objection, the hearing officer accepted Dr. Miller, a health care consultant with 40 years' experience in the managed care industry, to offer expert testimony. Dr. Miller testified that MCO Rates are valuable in the industry because of the investment required to maintain a competitive edge in

gaining enrollees. The rates represent significant investments by each MCO, based on efficiencies, provider specialties and breadth of provider networks, quality of care, and, presumably small margins of profitability. Dr. Miller's expert testimony regarding industry practice to maintain confidentiality of MCO Rates is persuasive. He explained the highly competitive MCO Rates reflect pricing methodologies that are an essential part of the MCOs' business models.

Requester challenges the protected nature of the rates because many of the rates at issue are years old, and thus stale. The age of proprietary information may weigh against its protected nature. See Clark v. Prudential Ins. Co. of Amer., Civ. No. 08-6197, (D.N.J., filed May 13, 2011) (unreported) (decided in context of protective order) (citing Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483 (D.N.J.1990)). Thus, it is relevant that the MCOs submitted evidence regarding the annual fluctuation of rates based on a number of variables. The MCOs needed to show the disclosure of rate information from 2008, 2009 and 2010 contracts is likely to result in present harm.

Dr. Miller did not differentiate. Although the rates fluctuate, such that disclosure of one year's rate does not necessarily disclose all yearly rates, there is no evidence suggesting the rate information is "stale" when it is five years old. There is only the passage of time.

Ultimately, based on the expert testimony regarding the confidential proprietary nature of MCO Rates, we hold the evidence is sufficient to meet the preponderance of the evidence standard under Section 708(a) of the RTKL, 65 P.S.

§67.708(a). Delaware Cnty. v. Schaefer/Phila. Inquirer, 45 A.3d 1149 (Pa. Cmwlth. 2012) (en banc) (by a preponderance is the lowest evidentiary standard, tantamount to a more likely than not inquiry). Therefore, the MCO Rates are protected as confidential proprietary information under the trade secrets and confidential proprietary information exception in Section 708(b)(11) of the RTKL.

2. Trade Secrets

The Trade Secrets Act defines "trade secrets" identically to the RTKL. Compare Section 102 of the RTKL, 65 P.S. §67.102, with 12 Pa. C.S. §5302 of the Trade Secrets Act. While we recognize these exemptions are asserted as two independent denial grounds, because the RTKL and the Trade Secrets Act employ the same definition, it is unnecessary for this Court to conduct a separate analysis of trade secret status under the RTKL exception. Cf. Office of the Governor v. Scolforo, 65 A.3d 1095 (Pa. Cmwlth. 2013) (en banc) (incorporation of the privilege into the RTKL exception obviates the need to analyze the deliberative process privilege separately from the predecisional deliberative exception).

Having already held the MCO Rates are protected under the confidential proprietary information exception of the RTKL, it is not necessary to fully discuss their status as trade secrets. It is sufficient to observe that the fact witness and expert witness evidence discussed above establishes by a preponderance of the evidence the elements for trade secret status. Crum; see PHEAA.

III. Conclusion

The Capitation Rates (DPW→MCOs) are public records evidencing a disbursement of public funds by a Commonwealth agency, DPW. They are not exempt under the Trade Secrets Act because there is no indication of competitors for DPW, and no expert testimony was proffered regarding their trade secret status. The Capitation Rates, shared among government agencies managing health care, represent an investment of time, and a potential for undermining DPW's future negotiating position. However, that is a speculative harm, particularly as DPW is the only "game in town" as to the HealthChoices Program. In sum, we agree with the result OOR reached, although for different reasons.

As to the MCO Rates (MCO→Subcontractors), we exercise our independent judgment based on the existing comprehensive record. Bowling. Much of the evidence from fact witnesses, while strong as to the efforts to maintain secrecy, is weak as to the "substantial harm to competitive position" component. The evidence varies among the MCOs as to how they maintain confidentiality and how they develop their rates. What is true in all cases is that the MCOs take reasonable efforts to maintain confidentiality of the MCO Rates, and they do not share them. Most persuasive was Dr. Miller's expert testimony regarding the industry standard for strict confidentiality and the competitive harm that could result from disclosure.

The importance of the MCO Rates to each MCO's business model, and continued financial vitality in the industry, weighs in favor of holding the information constitutes confidential proprietary information and trade secrets.

For the foregoing reasons, we affirm OOR's final determination requiring disclosure of the Capitation Rates (DPW→MCOs), and we reverse OOR's determination as to the MCO Rates (MCO→Subcontractors).

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Public Welfare, Petitioner	:	
v.	:	No. 1935 C.D. 2012
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	
Aetna Better Health, Inc.,Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan, Petitioners	:	
v.	:	No. 1949 C.D. 201
James Eiseman, Jr., and the Public Interest Law Center of Philadelphia, Respondents	:	
UnitedHealthcare of Pennsylvania, Inc. D/B/A UnitedHealthcare Community Plan and HealthAmerica Pennsylvania Inc. D/B/A CoventryCares, Petitioners	:	
v.	:	No. 1950 C.D. 2012
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	

ORDER

AND NOW, this 19th day of February, 2014, the Office of Open Records' final determination is **AFFIRMED IN PART, and**

REVERSED IN PART in accordance with the foregoing opinion.

ROBERT SIMPSON, Judge

Exhibit C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Public Welfare, Petitioner	:	
v.	:	No. 1935 C.D. 2012
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	
Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan, Petitioners	:	
v.	:	No. 1949 C.D. 2012
James Eiseman, Jr., and the Public Interest Law Center of Philadelphia, Respondents	:	
UnitedHealthcare of Pennsylvania, Inc. D/B/A UnitedHealthcare Community Plan and HealthAmerica Pennsylvania Inc. D/B/A CoventryCares, Petitioners	:	
v.	:	No. 1950 C.D. 2012 Argued: October 9, 2013
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: February 19, 2014

In this Right-to-Know Law (RTKL)[1] case, James Eiseman, Jr. and the Public Interest Law Center of Philadelphia (Requesters) seek rates set by contracts entered into between the Pennsylvania Department of Public Welfare (DPW) and various private entities as they pertain to the administration of the dental care aspect of the Medicaid[2] program and the distribution of public funds to implement the program and pay dental care providers for their services.

DPW administers Medicaid, and through the HealthChoices Program, provides dental care to Medicaid recipients. No one disputes that the Medicaid funds for the HealthChoices Program derive from federal and state funds. Rather than contract directly with dental providers to establish a payment rate for their services, DPW delegates its duty to implement Medicaid dental coverage by executing a series of contracts with "middlemen" who eventually contract with dental providers and negotiate payment terms.

Specifically, within the geographic area covering Requester's request, DPW contracts with five different Managed Care Organizations (MCOs). DPW pays the MCOs a negotiated rate, a "Capitation Rate," and the MCOs are obligated to establish and maintain a provider network to ensure access to dental care for Medicaid beneficiaries. In this regard, DPW delegates its governmental duties to

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[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

[2] For a general discussion on Medicaid program, *see, e.g.*, *Lukes v. Department of Public Welfare*, 976 A.2d 609, 623 and n.10 (Pa. Cmwlth. 2009); *Commonwealth v. Lubrizol Corp. Employee Benefits Plan*, 737 A.2d 862, 869-70 (Pa. Cmwlth. 1999); *Oriolo v. Department of Public Welfare*, 705 A.2d 519, 520 (Pa. Cmwlth. 1998).

the MCOs, and the MCOs accept these undertakings. Pursuant to the HealthChoices Agreement, the MCOs expressly agree:

> to participate in the [Medicaid program] and to arrange for the provision of those medical and related services essential to the medical care of those individuals being served, and to comply with all federal and Pennsylvania laws generally and specifically governing participation in the [Medicaid program.] The [MCO] agrees that all services provided hereunder must be provided in the manner prescribed by 42 U.S.C. §300e(c). The [MCO] agrees to comply with all applicable rules, regulations, and Bulletins promulgated under such laws including, but not limited to, 42 U.S.C. §300e; 42 U.S.C. §1396 et seq; 62 P.S. §101 et seq.; 42 CFR Parts 431 through 481 and 45 CFR Parts 74, 80, and 84, and [DPW's] regulations. . .
>
> .

(Reproduced Record (R.R.) at 715a.)

The MCOs, on behalf of DPW, then enter into subcontract agreements with business entities (Subcontractors). Pursuant to these agreements, the MCOs pay the Subcontractors a per-member, per-month rate, known as the "MCO Rate," which ostensibly is drawn from the MCOs' Capitation Rates. The Subcontractors, in turn, secure written agreements with and pay negotiated rates to the dental providers for services rendered to the MCOs' enrollees.[3] As a general proposition, the MCOs and the Subcontractors are not obligated to contract with any willing dental provider. The rates paid to individual providers are not prescribed by law, but are determined in negotiations between the individual dental provider and the

[3] In a very clear manner, the Majority charts these parties' relationship as follows: **DPW→ MCOs → Subcontractors → Providers**. The "→" symbol denotes a contractual agreement, with their being a total of three different contracts.

Subcontractors, and may vary from one provider to the next. *See* 42 C.F.R. §438.12(a), (b)(2).

Notably, these "middlemen" (*i.e.*, the MCOs and Subcontractors) are in the business of realizing marginal profit gains. For example, if an MCO is able to control costs within the level of the capitation revenue, then it would earn a profit; if not, the MCO would suffer a loss. *Lukes v. Department of Public Welfare*, 976 A.2d 609, 613 (Pa. Cmwlth. 2009). Further, the rates paid by an MCO affect the Capitation Rate and payments DPW would make to the MCO in future years; a higher amount paid by the MCO correlates into a higher Capitation Rate payment by DPW to the MCO. *Id.* Ultimately, an increase in total Capitation Rate payments results in an increase to the total cost of the Medicaid program to DPW and the taxpayers of Pennsylvania. *Id.* at 613-14. In any event, the public funds originate with DPW, and no matter how many private entities the funds pass through, the funds end up in the hands of those performing the actual dental services and are the same funds that began with DPW. That is, public funds are used to pay for public dental insurance.

Although based on a different rationale, I join the Majority in its conclusion that the Capitation Rates negotiated between DPW and the MCOs are subject to disclosure. (Maj. op. at 8-14.) I respectfully disagree with the Majority that the MCO Rates negotiated between the MCOs and the Subcontractors cannot be disclosed. In my view, the MCO Rates qualify as "financial records" under section 102 of the RTKL, 65 P.S. §67.102, and pursuant to section 708(c) of the RTKL, 65 P.S. §67.708(c), the exceptions contained in section 708(b) prohibiting disclosure are inapplicable. I further believe that as a result of the MCO Rates having obtained financial records status, the inquiry in this case regarding those

rates is at an end; there is no independent exemption under the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§5301-5308, (Trade Secrets Act), because this body of law is already codified in sections 102 and 708(b)(11) of the RTKL, 65 P.S. §§67.105, 708(b)(11). Accordingly, and unlike the Majority, I would conclude that the Office of Open Records (OOR) did not err in ordering the disclosure of the MCO Rates.

"[T]he objective of the RTKL is to empower citizens by affording them access to information concerning the activities of their government." *Levy v. Senate of Pennsylvania*, ___ Pa. ___, ___, 65 A.3d 361, 381 (2013) (internal quotation marks and citation omitted). When compared to the former Right to Know Act of 1957 (Right to Know Act),[4] the current RTKL, enacted in 2008, "demonstrate[s] a legislative purpose of expanded government transparency through public access to documents." *Id.* at ___, 65 A.3d at 381. "[C]ourts 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." *Id.* (internal quotation marks and citation omitted).

From a requester's standpoint, the most potent provisions of the RTKL are arguably sections 102 and 708(c) pertaining to financial records. In relevant part, a "financial record" is defined in section 102 of the RTKL as "any account, voucher, or contract dealing with . . . the receipt or disbursement of funds by an agency." Section 708(c) of the RTKL permits financial records to be

[4] Act of June 21, 1957, P.L. 390, *formerly* 65 P.S. §§66.1--66.9, repealed by Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

redacted in certain enumerated circumstances, but, as the Majority points out, none of these circumstances are present in this case. (Maj. op. at 9, 11.) Further, section 708(c) of the RTKL states that all of the 30 exemptions from disclosure contained in subsection (b) "shall not apply to financial records . . . ." Therefore, our legislature placed paramount significance in financial records, deeming them to be *prima facie* public records that should be disclosed to the public, with the sole exception that disclosure would violate the nonpublic nature of a document as provided for "in Federal or State law, regulation or judicial order or decree." Section 306 of the RTKL, 65 P.S. §67.306.

The language defining a financial record in section 102 of the current RTKL is not foreign to our legislature or to this Court. In fact, section 1 of the former Right to Know Act employed identical language to define a "public record" as "any account, voucher, or contract dealing with . . . the receipt or disbursement of funds by an agency. . . ." Section 1 of the prior Right to Know Act, *formerly* 65 P.S. §66.1. Remarkably similar to the current RTKL, the former Right to Know Act granted unrestricted access to a "public record," with a few exceptions, including where disclosure was "prohibited, restricted or forbidden by statute law or order or decree of court. . . ." *Id.* Consequently, the definition of a "financial record" under the current RTKL duplicates verbatim the definition of a "public record" under the former Right to Know Act, and the two terms embody functionally equivalent concepts.

"If the Legislature, in a later statute, uses the same language used in a prior statute which has been construed by the courts, there is a presumption that the language thus repeated is to be interpreted in the same manner such language had

been previously interpreted when the court passed on the earlier statute." *Delaware County v. Schaefer*, 45 A.3d 1149, 1155 (Pa. Cmwlth. 2012) (*en banc*).

In *Lukes*, the requester sought contractual agreements, "Provider Agreements," between an MCO and health care providers in order to ascertain the negotiated payment rates. In construing the verbiage delineating a "public record," this Court concluded that the contractual agreements and payment rates constituted a "contract dealing with . . . the receipt or disbursement of funds by an agency. . . ." We reasoned, in pertinent part, as follows:

> Our Supreme Court has concluded that the first category, *i.e.*, documents dealing with the receipt or disbursement of funds, should be interpreted expansively. . . . This category of documents should be broadly construed and need only constitute records evidencing disbursement of government money. . . .
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> * * *
>
> Applying agency principals to the instant matter, we believe the Provider Agreements at issue are the product of the agency relationship between DPW and the [MCO]. The HealthChoices Agreement [*i.e.*, the contractual agreement between DPW and the MCO] constitutes a manifestation by DPW that the [MCO] shall administer the HealthChoices Program and the acceptance of the undertaking by the [MCO]. Since Pennsylvania's [Medicaid] program must meet all requirements of the federal and state law in order to acquire funding, DPW established strict controls in the HealthChoices Agreement. . . .
>
> Through Provider Agreements, the [MCO] agrees to pay hospital providers negotiated rates for medical services rendered to Medicaid enrollees. . . .
>
> In doing this, the [MCO] is fulfilling DPW's duties to administer the [Medicaid] program. Had DPW

> contracted directly with the hospitals to provide medical services, there would be no doubt that the Provider Agreements are public records subject to disclosure. While the HealthChoices Agreement between DPW and the [MCO] expressly states that the [MCO] is not to hold itself out as an agent or representative of DPW and that the relationship between the parties is that of independent contracting parties, the fact remains that the [MCO] is performing a duty that would ordinarily be handled by DPW. In essence, the [MCO] stands in the shoes of DPW in administering the HealthChoices Program. We, therefore, conclude that the Provider Agreements are the product of the agency relationship that exists between DPW and the [MCO].

976 A.2d at 621 and 623-24 (internal quotation marks, citations, and footnotes omitted). On this rationale, we concluded in *Lukes* that the provider agreements and payment rates evidenced the receipt and disbursement of public funds and, therefore, should be disclosed to the public.

Because this Court in *Lukes* interpreted language identical to that presently before this Court, and applied that language to facts indistinguishable from those currently before this Court, I find our reasoning in *Lukes* highly persuasive, if not binding, under principles of *stare decisis*. Following *Lukes*, I would conclude that Requester's request for MCO Rates is a request for "financial records" under section 102 of the RTKL because agency law dictates that the MCOs and Subcontractors stand in the shoes of DPW and receive and disburse public funds.

"When our Court renders a decision on a particular topic, it enjoys the status of precedent. The danger of casually discarding prior decisions is that future courts may regard the new precedent as temporary as well." *Hunt v. Pennsylvania State Police*, 603 Pa. 156, 164, 983 A.2d 627, 637 (2009). In order to pay due

respect to this Court's precedent, it is incumbent upon the Majority to provide a compelling reason to overrule *Lukes*, specifically explaining why that case was wrongly decided. (Maj. op. at 15.)[5] I do not believe the Majority accomplishes this task.

Without appreciating the fact that *Lukes*' discussion of receipt and disbursement of funds concerns the same exact statutory language that this Court is now asked to interpret, the Majority cites case law that distinguished or declined to follow *Lukes* insofar as *Lukes* determined the extent to which records can be considered to be within an agency's control when a third party possesses them. (Maj. op. at 11 n.12, citing *Honaman v. Lower Merion Township*, 13 A.3d 1014, 1019-22 (Pa. Cmwlth. 2011); *In re Silberstein*, 11 A.3d 629, 632 and n.8 (Pa. Cmwlth. 2011); *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 621-22 (Pa. Cmwlth. 2011)).[6] In this regard, *Lukes* was obviously superseded by a

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[5] Our Supreme Court further explained:

> Certainly, there are legitimate and necessary exceptions to the principle of stare decisis. But for purposes of stability and predictability that are essential to the rule of law, the forceful inclination of courts should favor adherence to the general rule of abiding by that which has been settled. Moreover, stare decisis has "special force" in matters of statutory, as opposed to constitutional, construction, because in the statutory arena the legislative body is free to correct any errant interpretation of its intentions, whereas, on matters of constitutional dimension, the tripartite design of government calls for the courts to have the final word.

603 Pa. at 165, 983 A.2d at 637-38 (citation omitted).

[6] In *Honaman*, this Court differentiated *Lukes* when the addressing the issue of whether a township had possession or control of tax records that were in the possession of a tax collector. In *In re Silberstein*, we distinguished *Lukes* in determining whether requested records contained on a township's commissioner's personal computer are public records in the possession or **(Footnote continued on next page...)**

change in statutory language. Section 1 of the former Right to Know Act defined a record, albeit vaguely, as "[a]ny document maintained by an agency, in any form, whether public or not . . . ." In contrast, section 506(d)(1) of the RTKL now states that "[a] public record that is . . . in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function . . . shall be considered a public record of the agency for purposes of this act." 65 P.S. §67.506(d)(1). However, and most importantly, there is no dispute that DPW possesses the requested documents in this case, (Maj. op. at 8); consequently, the Majority's reliance upon its cited case law to abrogate *Lukes* on a completely unrelated and separate point of law is misplaced. Nothing in our decisions in *Honaman*, *In re Silberstein*, or *Office of the Budget* question or otherwise undermine *Lukes*' precedential value and holding that MCOs and related entities receive and disburse agency funds.[7]

The Majority also uses canons of statutory construction to construe the phrase, "**any . . . contract dealing with . . . the receipt or disbursement of funds by an agency**," (emphasis added), in a manner that differs from that in *Lukes*. Emphasizing the word "by," the Majority concludes that the MCO Rates

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control of the township. Likewise, in *Office of the Budget*, we concluded that *Lukes* is no longer applicable on the issue of government possession of a record because the concept of possession was ambiguous under the former Right to Know Act but the current Right to Know Law explicitly defines the term.

[7] Additionally, the Majority points out that there are "substantial differences" between the current RTKL and the former Right to Know Act and contends that the "most obvious" difference is the "severe restriction on redaction of 'financial records.'" (Maj. op. at 11.) I am unable to discern how the manner in which financial records can or cannot be redacted has any relevant impact in determining whether the MCO Rates are financial records in the first place.

are not funds disbursed "*by* an agency" because the funds are being passed between two private contracting entities – *i.e.*, from the MCOs to the Subcontractors. (Maj. op. at 14-15.) Without engaging in extensive grammatical discourse, I am not convinced with the Majority's interpretation because it effectively renders the words "any," "dealing," and "disbursement" superfluous and without meaning, and also ignores the fact that the funds originate with DPW. *See Concerned Citizens for Better Schools v. Brownsville Area School District*, 660 A.2d 668, 671 (Pa. Cmwlth. 1995) ("[W]henever possible, the courts must interpret statutes to give meaning to all of their words and phrases so that none are rendered mere surplusage."). Instead, I believe that section 102 of the RTKL is broad enough to include public funds that trickle down through contractor and subcontractor contracts ("any contract") because these contracts nevertheless "deal" with, or simply pass along down the line, the "disbursement of funds by an agency." *See, e.g., Associated Builders & Contractors, Inc. v. Pennsylvania Department of General Services*, 747 A.2d 962, 965 (Pa. Cmwlth. 2000) (interpreting "any contract dealing with receipt or disbursement of funds") (concluding that "an agency may not shield a public document from disclosure by contracting with a third party that subsequently [disburses] the government funds. By paying through a third party, an agency does not change the character of those funds from public to private."). In my view, there is no textual basis in the current RTKL to discard *Lukes*' analysis on this point as obsolete or wrongly decided.

Relatedly, and in a cursory fashion, the Majority concludes: "That MCOs disbursed funds they received from DPW to their subcontractors does not render the MCOs mere conduits for public funds. Based on the language of the

current RTKL, the funds lose their character as public funds once they leave an agency's hands and enter the public sector." (Maj. op. at 15.)

Upon review, I am unable to locate any statutory language in the definition of financial records or the RTKL that supports the Majority's position. And I cannot decipher how public funds designated for a public purpose become private funds when in the hands of a private party when that private party is obligated to use the funds for a public purpose. On comparison, I find our examination of this topic in *Lukes* more persuasive than that of the Majority:

> There is no question that the Medicaid funds for the HealthChoices Program derive from federal and state funds. DPW argues, however, that once the public money is received by the [MCO], a private entity, the money belongs to the [MCO] and is private. Had the purpose of the money been simply to provide funding to private MCOs or HMOs . . . we would agree that the money became private once in the hands of those entities and how the money was spent would not be subject to disclosure. However, that is not the case here. The purpose of the public money disbursed by DPW is to provide medically necessary services to Medicaid recipients. The [MCO] does not administer these services, but instead acts as an intermediary by contracting with provider hospitals to provide such services. **Until the public funding reaches the intended Medicaid recipient, the money remains public.**
>
> * * *
>
> The Provider Agreements reflect the expenditure of public funds for the benefit of Medicaid beneficiaries. DPW cannot circumvent the disclosure of this money trail by contracting indirectly through . . . MCOs or HMOs. **Private entities that receive or control public funds have a duty to account for their handling of those funds. Disclosure of the Provider Agreements is**

> **the only way to ensure such accountability. To shield such documents from review would circumvent the public's ability to determine how tax dollars are spent.**

Lukes, 976 A.2d at 625 (emphasis added).

For all of these reasons, I would conclude that the MCO Rates and the agreements containing them are "financial records" for purposes of section 102 of the RTKL. As explained above, because the MCO Rates are financial records, the numerous exemptions contained in section 708(b) of the RTKL, including confidential proprietary information and trade secrets, are inapplicable.

Nonetheless, the Majority concludes in its discussion on Capitation Rates that the Trade Secrets Act, even though codified in section 708(b)(11) of the RTKL, is an independent and "stand-alone statutory basis for protection" from disclosure. (Maj. op. at 10, 23). I do not agree.

Section 708(b)(11) of the RTKL exempts from disclosure "[a] record that constitutes or reveals a trade secret," but, pursuant to section 708(c), this exception "shall not apply to financial records. . . ." Section 102 of the RTKL defines a "trade secret" as follows:

> **"Trade secret."** Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:
>
> (1) derives independent economic value, actual or potential, from not being generally known to and not being 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.

Id.

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

12 Pa.C.S. §5302.

Minus the last clarifying sentence in section 708(b)(11) of the RTKL, the definition of a trade secret in the RTKL and the Trade Secrets Act is identical. Although financial records may be exempt from disclosure where disclosure would "conflict with any other federal or state law," 65 P.S. §67.3101.1,[8] our legislature expressed its clear intention to incorporate and codify the Trade Secrets Act into sections 102 and 708(b)(11) of the RTKL. *See Office of Governor v. Scolforo*, 65 A.3d 1095, 1101-02 (Pa. Cmwlth. 2013) (concluding that where our legislature expressed its intent to codify the common law deliberative process privilege into section 708(b)(10)(i) of the RTKL, the legislature demonstrated its intent to

[8] Section 3101.1 of the RTKL states: "If the provisions of this act regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply."

specifically exempt the common law deliberative process privilege from disclosure). Since the two concepts are one and the same, intermingled into a collective and inseparable whole, I do not believe that the trade secrets mentioned and defined in the RTKL in any way "conflicts" with the trade secrets under the Trade Secrets Act.

Our legislature expressly stated in section 708(c) of the RTKL that trade secrets are not an exception to disclosure of financial records. There is no conceivable basis upon which to conclude that the legislature intended the more generally applicable Trade Secrets Act to override and displace this specific provision of the RTKL. Indeed, it would be anomalous for our legislature to explicitly exclude trade secrets as an exception to disclosure of financial records in section 708(c) of the RTKL, while simultaneously implying that trade secrets are an exception requiring disclosure of the same financial records in section 3101.1 of the RTKL. *See Ling v. Department of Transportation*, __ A.3d __ (Pa. Cmwlth., No. 1809 C.D. 2012, filed July 18, 2013), slip op. at 7 ("Given our holding that the Driveway Immunity Provision specifically confers DOT with statutory immunity, we need not determine whether an exception to sovereign immunity is applicable. . . . [I]t would be anomalous for our legislature to grant immunity in one statute and simultaneously abrogate that immunity in another statute."). Therefore, where, as here, financial records are involved, I believe that section 708(c) of the RTKL trumps any notion of an independent exception for trade secrets under the Trade Secrets Act.

Accordingly, because the contracts containing the MCO Rates are financial records and no exception to disclosure is applicable to this case, I would

affirm the OOR's determination requiring DPW and the pertinent parties to disclose the MCO Rates. On these grounds, I respectfully dissent.

PATRICIA A. McCULLOUGH, Judge

Exhibit D

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES EISEMAN AND	:	
THE PUBLIC INTEREST LAW CENTER	:	
OF PHILADELPHIA,	:	
Complainant	:	
	:	
v.	:	**Docket No.: AP 2011-1098**
	:	
PENNSYLVANIA DEPARTMENT OF	:	
PUBLIC WELFARE,	:	
Respondent	:	
	:	
And	:	
	:	
UNITEDHEALTHCARE OF	:	
PENNSYLVANIA, INC.,	:	
HEALTH AMERICA	:	
PENNSYLVANIA, INC.,	:	
AETNA BETTER HEALTH, INC.,	:	
HEALTH PARTNERS OF PHILA., INC.,	:	
and KEYSTONE MERCY HEALTH PLAN,	:	
Direct interest participants	:	

INTRODUCTION

James Eiseman, Jr., Esq., on behalf of the Public Interest Law Center of Philadelphia, (collectively the "Requester") submitted a request ("Request") to the Pennsylvania Department of Public Welfare ("Department") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"), seeking records related to the Department's administration of the Medical Assistance

("Medicaid") program in the five (5) county Southeast Pennsylvania region.[1] The Department partially denied the Request, citing the Pennsylvania Uniform Trade Secrets Act 12 Pa.C.S. §§ 5301 *et seq.*, ("PUTSA"), and various RTKL exemptions. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part** and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On June 17, 2011, the Request was filed, seeking, for the period January 1, 2008 through June 15, 2011:

> Each and every document, including correspondence and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age. [Item 1]
>
> Each and every document, including correspondence and appendices, in DPW's possessions, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania. [Item 2]
>
> Each and every actuarial report DPW possesses that sets forth the overall capitation rate and/or determines the "actuarial soundness" of an overall capitation rate that DPW pays to any Medicaid HMO operating in Southeastern Pennsylvania, including but not limited to each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates. [Item 3]
>
> Each and every actuarial report DPW possesses that sets forth a capitation rate for dental services to Medicaid recipients under 21 years of age and/or determines the actuarial soundness of such capitation rates for dental services to Medicaid recipients under 21 years of age, including but not limited to any such report DPW has made to the federal government to certify the actuarial soundness of such rates. [Item 4]
>
> Any corrective-action plan or sanctions DPW has imposed on or contracted with any Medicaid HMO for in Southeastern Pennsylvania that involves wholly, or in

[1] The Southeastern Pennsylvania region includes Berks, Chester, Delaware, Montgomery and Philadelphia counties.

part, the provision of dental care to Medicaid recipients under the age of 21. [Item 5]

Thus, the Request seeks: 1) the rates the Department pays insurance companies participating in the Medicaid program; 2) the rates insurance companies pay to provide dental services under the Medicaid program; 3) any actuarial reports regarding the soundness of the rates the Department pays insurance companies; 4) any actuarial reports regarding the soundness of the rates the insurance companies pay to provide dental services; and, 5) any sanctions imposed by the Department on insurance companies participating in the Medicaid program.

On July 25, 2011, after extending the period to respond by thirty (30) days pursuant to 65 P.S. § 67.902(b), the Department partially denied the Request. Specifically, with respect to Item 1, the Department denied the request for "capitation rates"[2] and "appendices" on the basis that such rates and appendices are confidential under PUTSA, and exempt from disclosure under Section 708(b)(1) of the RTKL, 65 P.S. § 67.708(b)(1) (relating to the loss of federal funding) and Section 708(b)(11) of the RTKL, 65 P.S. § 67.708(b)(11) (relating to trade secrets/confidential proprietary information). The Department denied the request for capitation rates for "dental services" on the basis that no records exist, and denied the remainder of records responsive to Item 1 on the basis that such records are exempt from disclosure pursuant to Section 708(b)(10) of the RTKL, 65 P.S. § 67.708(b)(10) (relating to internal, predecisional deliberations of an agency), and on the basis of the attorney-client privilege.

With respect to Item 2, the Department denied access to "payment rates" paid by health insurance companies to medical service providers pursuant to PUTSA and Section 708(b)(11) of the RTKL, 65 P.S. § 67.708(b)(11) (relating to trade secrets/confidential proprietary information). The Department denied other responsive records on the basis that they do not exist

[2] In the context of Item 1, a "capitation rate" is the amount the Department pays health insurance companies to provide health insurance coverage to participants enrolled in the Medicaid program.

or are exempt as internal, predecisional deliberations of the Department under 65 P.S. § 67.708(b)(10). The Department denied Item 3 of the Request. It explained that the Department's actuary only certified capitation rate "ranges" and not the actual capitation rates to the federal government, and, therefore, no responsive records exist. Finally, with respect to Items 4 and 5, the Department denied that any responsive records exist.

On August 15, 2011, the Requester timely appealed to the OOR, challenging the denial and stating grounds for disclosure.[3] The OOR invited both parties to submit evidence and argument for inclusion into the record.

Direct Interest Participants

On August 24, 2011, United Healthcare of Pennsylvania, Inc. ("United") filed a request to participate as a direct interest participant pursuant to 65 P.S. § 67.1101(c), asserting that records responsive to Item 2 are exempt from public disclosure as under 65 P.S. § 67.708(b)(11) and confidential under federal regulations. On August 25, 2011, the Department submitted a position statement and the affidavit of Allen Fisher, Director, Division of Financial Analysis, Office of Medical Assistance Programs, attesting that, with respect to Item 1, the Department considers the capitation rates it pays health insurance companies to provide medical coverage to Medicaid recipients to be trade secrets and that the Department possesses no records responsive to Items 3 and 4. On August 31, 2011, Aetna Better Health, Inc. ("Aetna"), Health Partners of Philadelphia, Inc. ("Health Partners"), Health America of Pennsylvania, Inc. d/b/a Coventry Cares ("Coventry") and Keystone Mercy Health Plan, Inc. ("Keystone") also filed requests to participate as direct interest participants, asserting that records responsive to Item 2 are exempt

[3] The Requester did not appeal the Department's denial as to Item 5, and, therefore, waives any challenge to this specific denial. *See DOC v. OOR*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

from disclosure under Section 708(b)(11) of the RTKL. Aetna and Coventry requested the OOR to conduct an evidentiary hearing.

Evidentiary Hearing

On October 25, 2011, the OOR ordered an evidentiary hearing and appointed a hearing officer. On May 21, 2012 and May 22, 2012, the OOR conducted an evidentiary hearing in which the Requester, the Department, and all five (5) direct interest participants ("Direct Interest Participants") presented evidence.[4]

At the hearing, the Department introduced documentary evidence and the testimony of Allen Fisher. Mr. Fisher testified that the Request sought records related to the HealthChoices Program, the Department's Medicaid Program within the five (5) county Southeast Zone of the Medical Assistance Program. N.T. 34–35 (5/21/2012).

According to Mr. Fisher, the Direct Interest Participants are insurance companies[5] participating in the HealthChoices Program, and are "at risk" contractors obligated to provide medical care to participants enrolled in the Department's Medicaid Program. N.T. 42- – 43 (5/21/2012). In other words, the Direct Interest Participants are paid a set fee by the Department and are responsible to provide medical coverage to Medicaid participants irrespective of the actual medical costs incurred by the Direct Interest Participants.

Mr. Fisher further testified that the fee paid to each Direct Interest Participant is based on the number of individuals participating in each Direct Interest Participant's insurance program

[4] The evidentiary hearing was initially scheduled for December, 2011; however, on November 3, 2011, the Requester sought a "substantial extension" of the hearing date because of counsel's attachment to a major case before the United States District Court for the Southern District of Florida. Thereafter, hearing was scheduled for March, 2012; however, one (1) week prior to hearing, the Direct Interest Participants sought a continuance of the hearing by reason of a change in the Department's legal position regarding disclosure of records responsive to Item 2 of the Request. The evidentiary hearing was ultimately conducted on May 21 – 22, 2012. Prior to the hearing, the Department, again, reversed position regarding disclosure of records responsive to Item 2 of the Request.

[5] The Direct Interest Participants are also referred to as Health Maintenance Organizations ("HMO") and Managed-care Organizations ("MCO").

each month, and is technically referred to as a "capitation rate." N.T. 42 – 43 (5/21/2012). The capitation rate paid to each Direct Interest Participant is negotiated annually and falls within a capitation rate range calculated by the Department's actuary. N.T. 40 (5/21/2012). The Department's capitation rate range is publicly available, and is provided to each Direct Interest Participant during the capitation rate negotiation process. N.T. 50 (5/21/2012).

During the capitation rate negotiating process, Mr. Fisher testified that the Department makes a first offer to Direct Interest Participants, N.T. 42 (5/21/2012), at the low end of the capitation rate range in order to minimize the cost to taxpayers.[6] N.T. 53 (5/21/2012). The final capitation rate is established to compensate the Direct Interest Participants for "its responsibility to provide ... medical services[.] The [capitation] rates also include an allowance that shows for administrative costs and a small allowance for profit." N.T. 43 (5/21/2012). Once a final capitation rate is determined, that rate is included in Appendices 3L and 3H of the Department's agreement with the Direct Interest Participants. N.T. 51 (5/21/2012). The capitation rates are disclosed to the Commonwealth's Office of the Budget and Treasury Department, and to the federal Center for Medicaid Services, N.T. 77, 104 (5/21/2012); however, the capitation rates are redacted from the Treasury Department's public contract database. N.T. 53 (5/21/2012). With respect to other records requested, Mr. Fisher further testified that the Department possesses no records responsive to Items 3 and 4 of the Request. N.T. 64, 74, 75. (5/21/2012).[7]

[6] Mr. Fisher further testified that the Department expends approximately $6 billion annually for the HealthChoices Program, with another $3 billion annual expenditure on the Behavioral HealthChoices Program. N.T. 54 (5/21/2012).

[7] Mr. Fisher explained that the Department's actuary certified the actuarial soundness of capitation "rate ranges." *Id.* at 74. The Request sought records reflecting the actuarial soundness of the actual capitation rates. Mr. Fisher testified that the actual capitation rates were within the capitation "rate ranges" determined by the Department's actuary. *Id.* at 40. Mr. Fisher also testified that the Department's actuary did not certify capitation rates or rate ranges with respect to dental services. *Id.* at 64.

Fisher Cross-examination

Under questioning by the Requester's counsel, Mr. Fisher clarified that while he does not believe the Department is prohibited by the terms of its contracts with the Direct Interest Participants from disclosing the final capitation rates, N.T. 227 (5/22/2012), the Department does not disclose the capitation rates because he believes the Department's negotiating position would be weakened if each Direct Interest Participant was aware of each other's capitation rate. N.T. 201 (5/22/2012). Mr. Fisher further testified that the Department does not disclose the capitation rates paid to Direct Interest Participants because it is "not in the best interest of the Department and the taxpayers to disclose this information." N.T. 228 (5/22/2012). Mr. Fisher also testified that none of the Direct Interest Participants, nor any other insurance company, has refused to participate in the HealthChoices Program after receiving an offered capitation rate from the Department. N.T. 81 (5/21/2012).

Direct Interest Participants' Testimony

In their case-in-chief, Direct Interest Participants Aetna, Health Partners, and Keystone introduced documentary evidence and the testimony of Dr. Henry Miller, an expert in the health care industry; John Sehi, Vice President of Finance, Health Partners; Debra Nichols, Chief Executive Officer, Aetna; and, William Morsell, Senior Vice President, Keystone.

Dr. Miller testified that, based on his extensive experience in the health care industry, the rates paid by Direct Interest Participants to medical service providers were considered trade secrets and confidential proprietary information, N.T. 119 (5/21/2012). Dr. Miller further testified that knowledge of the rates a competitor pays medical service providers would allow insurance companies to negotiate more favorable terms by demanding that they not pay more than their competitors. N.T. 124 (5/21/2012). Dr. Miller did not offer any testimony on whether

the capitation rates paid by the Department to the Direct Interest Participants were trade secrets or confidential proprietary information. N.T. 148, 150 (5/21/2012).

Mr. Sehi testified regarding the capitation rates paid by the Department to the Direct Interest Participants, and also testified regarding the rates paid by the Direct Interest Participants to medical service providers ("provider rates"). With respect to the Department's capitation rates, Mr. Sehi testified that he was responsible for negotiating the capitation rates on behalf of Health Partners, N.T. 154 (5/21/2012), and that as part of the negotiating process Health Partners responds to the Department's proposed capitation rate with a counter-offer that factors Health Partners' calculation of variables such as drug costs, costs-of-living and medical industry trends. N.T. 175 (5/21/2012). Mr. Sehi testified that additional factors affecting the Department's capitation rate negotiating process included enrollee-specific factors such as the number of enrollees per county, and enrollee demographic factors such as age, disability and medical condition. N.T. 179 – 180 (5/21/2012). Mr. Sehi did not testify that knowledge of prior year capitation rates would be relevant to on-going or future year negotiations between Health Partners and the Department. On this point Mr. Sehi conceded that knowledge of a competitor's capitation rate for FY 2007-2008 would be "irrelevant." N.T. 187 (5/21/2012). When asked whether knowledge of a competitor's capitation rate from FY 2010-2011 would be helpful in the negotiation process with the Department, Mr. Sehi responded: "Again, it depends --- it would be interesting to see, but I don't know if you'd want to make conclusions on it." *Id.*

With respect to the provider rates Health Partners pays medical service providers, Mr. Sehi testified that the provider rates were subject to a contractual confidentiality provision, N.T. 162 (5/21/2012), that knowledge of the provider rates was limited to select employees, *id.*, and never disclosed to competitors. N.T. 165 (5/21/2012). Mr. Sehi further testified that

HealthPartners' provider rates are considered trade secrets under its agreement with the Department. N.T. 193 (5/21/2012).

Ms. Nicholas testified that Aetna considered the capitation rates paid by the Department to be confidential proprietary information, N.T. 55 (5/22/2012), and required to be kept confidential pursuant to Aetna's agreement with the Department. N.T. 58 (5/22/2012). Ms. Nicholas also testified that she believed that knowledge of the capitation rates paid by the Department to Aetna's competitors would be "helpful" in negotiating Aetna's capitation rate with the Department, N.T. 56 (5/22/2012); however, when asked whether Aetna would be able to renegotiate a better capitation rate based on such knowledge, Ms. Nichols testified "I don't know. It's a complex process." N.T. 62 (5/22/2012). With respect to the provider rates paid to medical service providers, Ms. Nichols testified that Aetna kept such rates confidential, N.T. 12 (5/22/2012), and only disclosed provider rates to governmental regulators. N.T. 11 (5/22/2012).

Mr. Morsell testified that Keystone enters into contracts with medical service providers and considers provider rates paid to be confidential. N.T. 95 (5/22/2012). Mr. Morsell further testified that Keystone takes extensive efforts to keep the provider rates confidential, N.T. 97 (5/22/2012), explaining that the health care industry is an extremely competitive business and that knowledge how Keystone pays its providers, how much its providers are paid, and how it deals with providers would damage Keystone's financial viability. N.T. 124 (5/22/2012). Mr. Morsell offered no testimony on Keystone's agreement with the Department, and when recalled for the Requester's case-in-chief, testified that he had no knowledge of the capitation rates the Department pays Keystone or whether Keystone considers the capitation rates confidential. N.T. 142 (5/22/2012).

In their case-in-chief, Direct Interest Participants United and Coventry offered documentary evidence and the testimony of Nancy Sirolli-Hardy, Vice President of Operations for Coventry and Heather Cianfrocco, Health Plan President of United.

Ms. Sirolli-Hardy testified that Coventry considers the capitation rate paid by the Department to be confidential information, N.T. 68 (5/22/2012), as well as the capitation rate paid by Coventry to its dental insurance subcontractor. N.T. 71 (5/22/2012). Ms. Sirolli-Hardy further testified that disclosure of the Department's capitation rate to Coventry's competitors would adversely impact Coventry's financials and cause Coventry to lose market share. *Id.* at N.T. 73 (5/22/2012).

Ms. Cianfrocco testified that the provider rates United pays to medical service providers are confidential. N.T. 204 (5/21/2012). Ms. Cianfrocco also testified that United considers the capitation rates paid by the Department to United to be "highly confidential," N.T. 208 (5/21/2012), and that disclosure of the capitation rates would damage United's business because competitors could use knowledge of United's capitation rates to negotiate better rates with the Department, and competitors could determine United's cost structure and other trade secrets. N.T. 210-11 (5/21/2012). In Ms. Cianfrocco's opinion, United would lose market share if competitors were aware of the capitation rates paid to United by the Department. N.T. 212 (5/21/2012). While Ms. Cianfrocco testified that United considered the capitation rates to be "highly confidential," N.T. 208 (5/21/2012), on cross-examination, Ms. Cianfrocco acknowledged that United's knowledge of a competitor's capitation rate would be of no value to United in negotiating its own capitation rates, N.T. 219 (5/21/2012), and was unsure whether a competitor's knowledge of United's capitation rates would be disadvantageous to United. N.T. 222 (5/21/2012). Specifically, Ms. Cianfrocco testified as follows:

Q: You mentioned that it would be --- that you think that it would be of value to your competitors to learn what [United's capitation] rate is; is that right?

A: Yes.

Q: Would it be of value to you to learn what the rates were for Aetna or Keystone Mercy or any of the other competitors?

A: No, as to setting my own rates. Yes, potentially as to knowing how they're performing.

Q: So when you say, no, it wouldn't be of value to you in setting your own rates, do you believe it would be of value to them in setting their own rates if they knew about you, United?

A: If they would want to use the information to possibly propose lower rates or lower rates, possibly. Possibly, yes. But I guess when we get [the proposed capitation] rates we spend a lot of time determining whether we believe that they're accurate based on our history of utilization. Having the other [capitation] rates doesn't help me get that.

N.T. 219. (5/21/2012).

Q: [I]s there something about United that would make it uniquely disadvantageous to United for the other competitors to learn United [capitation] rates that wouldn't work the other way around?

A: I would like to believe so, because I work very hard to make sure that we provide a service that meets all the needs of the Department of Public Welfare and meet the needs of the members and still make money. And not every health plan does that.

N.T. 222 (5/21/2012).

LEGAL ANALYSIS

The RTKL is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed

relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Direct Interest Participants requested a hearing, and following an evidentiary hearing, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901.

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as "such proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. Records responsive to Item 1 of the Request – Department capitation rates - are required to be disclosed.

Item 1 of the Request seeks, *inter alia*, the capitation rates negotiated between the Department and each of the Direct Interest Participants. These rates reflect the amount of taxpayer funds paid to insurance companies to provide health insurance coverage to Medicaid participants. The Department denied Item 1 on the basis that responsive records are protected from disclosure by PUTSA and Sections 708(b)(1), 708(b)(10) and 708(b)(11) of the RTKL.

A "trade secret" is defined by PUTSA and the RTKL identically. Specifically, both PUTSA and the RTKL define a "trade secret" as:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: ... derives independent economic value, actual or potential, form 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 ... is subject to efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa.C.S. § 5302; 65 P.S. § 67.102. As "trade secrets" are identically defined by PUTSA and the RTKL, the OOR can discern no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL. PUTSA provides injunctive relief and monetary damages to parties who have been harmed by the misappropriation of trade secrets, *see* 12 Pa.C.S. §§ 5303-04, while the RTKL provides parties with protection from public disclosure by government agencies of records which contain trade secrets. *See* 65 P.S. § 67.708(b)(11). Therefore, the OOR will only consider whether responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(11).

Section 708(b)(11) of the RTKL exempts from public disclosure a "record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). As discussed above, the term "trade secret" is specifically defined by the RTKL.

65 P.S. § 67.102. The term "confidential proprietary information" is defined by the RTKL as "Commercial or financial information received by an agency; ... which is privileged or confidential; and ... the disclosure of which would cause substantial harm to the competitive position person that submitted the information." *Id.*; *see generally Office of the Governor v. Bari*, 20 A.3d 634, 647-48 (Pa. Commw. Ct. 2011) (noting that the terms "trade secret" and "confidential proprietary information" are not interchangeable).

The Department's witness, Mr. Fisher, testified that the Department keeps the capitation rates the Department pays the Direct Interest Participants confidential because he believes that disclosure would weaken the Department's position when negotiating capitation rates in the future, thereby increasing the Department's (and ultimately the taxpayers') costs. On the other hand, the Direct Interest Participants' witnesses testified that, while knowledge of their competitors' capitation rates would be of interest, the Direct Interest Participants' capitation rate negotiations with the Department are based on factors completely independent of the capitation rate previously paid by the Department. Thus, while it is clear that the Department and the Direct Interest Participants treat the capitation rates as confidential, it is not clear that disclosure of the capitation rates would provide any economic value to the Department's counter-parties in future negotiations or would cause substantial competitive harm to the Department. Therefore, the Department and the Direct Interest Participants have failed to meet their burden of proof that records responsive to Item 1 are exempt from disclosure under 65 P.S. § 67.708(b)(11). Assuming, *arguendo*, that the Department and Direct Interest Participants have met their burden of proof, records disclosing the expenditure of taxpayer funds may not be withheld as a trade secret or confidential proprietary information.

While 65 P.S. § 67.708(b), permits agencies to withhold certain records from public disclosure, the exemptions set out in Section 708(b) of the RTKL are not without limit. Section 708(c) of the RTKL provides, in pertinent part: "The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16), or (17)." 65 P.S. § 67.708(c). Section 102 of the RTKL defines a "financial record" as "Any account, voucher, or contract dealing with ... the receipt or disbursement of funds by an agency; or ... an agency's acquisition, use or disposal of services[.]" 65 P.S. § 67.102 (emphasis added). Here, the Department's contracts with the Direct Interest Participants deal with the disbursement of billions of dollars in taxpayer funds for the acquisition of health insurance for Medicaid participants. Therefore, the Department/Direct Interest Participant agreements, including the appendices disclosing the capitation rates, cannot be considered anything but a "financial record" under the RTKL. Notwithstanding the Department's and Direct Interest Participants' arguments that the capitation rates are confidential proprietary information and/or trade secrets, such information may not be redacted from "financial records." 65 P.S. § 67.708(c). Accordingly, the Department is required to disclose its agreements with the Direct Interest Participants in their entirety. Furthermore, as neither the Department nor the Direct Interest Participants has met the burden of proof that any other records responsive to Item 1 are exempt from public disclosure, the Department is required to provide all other records responsive to Item 1.[8]

[8] Neither the Department, nor the Direct Interest Participants offered any evidence or argued in their post-hearing briefs that records responsive to Item 1 are exempt from disclosure under either 65 P.S. § 67.708(b)(1) or 65 P.S. § 67.708(b)(10).

2. Records responsive to Item 2 of the Request – the Direct Interest Participants' provider rates - are required to be disclosed.

Item 2 of the Request seeks, *inter alia*, the provider rates paid by the Direct Interest Participants to medical service providers treating Medicaid participants. The Department and the Direct Interest Participants argue that these records are exempt from disclosure under PUTSA and 65 P.S. § 67.708(b)(11) (trades secrets/confidential proprietary information). The Requester argues that these records are required to be disclosed by reason of the Commonwealth Court's decision in *Lukes v. Dep't. of Public Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009). For the following reasons, the OOR holds that records responsive to Item 2 of the Request are not exempt from public disclosure as trade secrets or confidential proprietary information.

In *Lukes*, a requester filed a request under the prior Right-to-Know Law with the Department of Public Welfare seeking copies of agreements between a health insurance company and ten (10) hospitals entered into for the purpose of administering the HealthChoices Program. The requested agreements contained specific payment rates as well as confidentiality provisions. The Department denied the request, and an evidentiary hearing was held in which the health insurance company participated. The hearing officer concluded that the requested agreements contained information protected under PUTSA, and, therefore, were not subject to disclosure. On appeal, the Commonwealth Court considered the relationship between the insurance company and the public agency, as well as the confidentiality of the requested records. The Court concluded that the insurance company was performing a duty that would ordinarily be performed by the public agency, i.e., administering the Medicaid program. Pertinently, the Court noted that "[h]ad the [Department of Public Welfare] contracted directly with the hospitals to provide medical services, there would be no doubt that the Provider Agreements are public

records subject to disclosure." *Id.* at 624. In rejecting the argument that the provider agreements were protected as trade secrets, the Court stated:

> Here, there is no basis on upon which to conclude that the Provider Agreements, which the [insurance company] entered into with provider hospitals at the direction of DPW for the disbursement of public funds, are trade secrets. While the Intervenors presented evidence that the Provider Agreements contain confidentiality provisions and are not known outside of the [insurance company and hospitals], a party that voluntarily participates in a public program and is receiving and disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded from public scrutiny. The threat of competition ... is insufficient to invoke an exemption ... from disclosure.

Id. at 626-27 (emphasis added). Thus, *Lukes* squarely addresses that records responsive to Item 2 are not exempt from disclosure as trade secrets.

The Department and the Direct Interest Participants counter that the Commonwealth Court has held that, because *Lukes* was decided under the prior Right-to-Know Law, *Lukes* is not controlling under the RTKL. *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 622 (Pa. Commw. Ct. 2011); *In re: Silberstein*, 11 A.3d 629, 632 n.8 (Pa. Commw. Ct. 2011). While *Lukes* is not controlling, binding authority, the Pennsylvania Supreme Court has recently approved of *Lukes* in analyzing cases under the RTKL, *see SWB Yankees v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), and the analysis in *Lukes* is highly persuasive. Therefore, records responsive to Item 2 of the Request are not exempt from disclosure as trade secrets under 65 P.S. § 67.708(b)(11).

While records responsive to Item 2 of the Request are not exempt from disclosure as trade secrets, Section 708(b)(11) of the RTKL also exempts from disclosure "confidential, proprietary information." *See Office of the Governor*, 20 A.3d at 647-48. The Direct Interest Participants presented extensive testimony regarding the steps taken to keep the provider rates confidential, and the fact that competitors would be able to negotiate more favorable provider

rates if they were aware of another competitor's provider rates. The evidence presented, however, does not establish that the Direct Interest Participants would suffer "substantial harm" if their provider rates were disclosed. Accordingly, the Direct Interest Participants have not met their burden of proof that records responsive to Item 2 of the Request are exempt from disclosure as confidential, proprietary information.[9] *See* 65 P.S. § 67.708(a)(1) (placing the burden of proof on agencies to prove that records are not subject to public access); *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011) ("[W]e believe it equally appropriate under the law to place the burden on third-party contractors ...").

3. Records responsive to Items 3 and 4 of the Request –actuarial certifications - do not exist.

Items 3 and 4 of the Request seek actuarial reports that certify the soundness of the capitation rate paid by the Department to the Direct Interest Participants, and actuarial reports which certify the soundness the capitation rate regarding dental services provided to Medicaid participants. In its denial, the Department argued responsive records do not exist. At the hearing, Mr. Fisher testified that the Department possessed actuarial reports regarding capitation "rate ranges,"[10] and that the final capitation rates were within such rate ranges. Mr. Fisher also testified that the Department's actuary did not certify payment rates for dental services. "The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). As the Department's actuary does not certify the actual capitation rate or

[9] Furthermore, holding that these records are not exempt from disclosure as a "trade secret" but are exempt from disclosure as "confidential, proprietary information" would render *Lukes* meaningless. The RTKL was enacted to enhance access to records, and exemptions to disclosure must be narrowly construed. *Bowling*, 990 A.2d at 824. The OOR will not construe the RTKL to deny access to records required to be disclosed under the prior Right-to-Know Law.

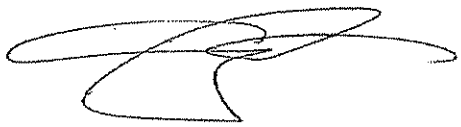
[10] During the course of the appeal, the Department's actuarial reports certifying the capitation "rate ranges" were provided to the Requester. N.T. 66 – 71 (5/21/2012).

certify capitation rates with respect to dental services, the Department has sustained its burden of proof that no responsive records exist. Accordingly, the appeal as to Items 3 and 4 is denied.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the Department is required to disclose all records sought in Items 1 and 2 of the Request. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: http://openrecords.state.pa.us.

FINAL DETERMINATION ISSUED AND MAILED: SEPTEMBER 17, 2012



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