IN THE SUPREME COURT OF PENNSYLVANIA

No. 48 EAP 2014

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

Appellants,

v.

DENTAL BENEFIT PROVIDERS, INC., 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. 945 C.D. 2013, Reversing the Final Determination of the Office of Open Records in No. AP 2012-2017
(Eiseman II)

Benjamin D. Geffen, Esq.
Pa. Bar No. 310134
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
bgeffen@pilcop.org
Phone: 267-546-1308
Fax: 215-627-3183

Counsel for Appellants

IN THE SUPREME COURT OF PENNSYLVANIA

No. 49 EAP 2014

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

Appellants,

v.

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

Appellees.

BRIEF OF APPELLANTS

On Appeal from the Order of the Commonwealth Court in Case No. 957 C.D. 2013, Reversing the Final Determination of the Office of Open Records in No. AP 2012-2017
(Eiseman II)

Benjamin D. Geffen, Esq.
Pa. Bar No. 310134
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
bgeffen@pilcop.org
Phone: 267-546-1308
Fax: 215-627-3183

Counsel for Appellants

IN THE SUPREME COURT OF PENNSYLVANIA

No. 50 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. 958 C.D. 2013, Reversing the Final Determination of the Office of Open Records in No. AP 2012-2017
(Eiseman II)

Benjamin D. Geffen, Esq.
Pa. Bar No. 310134
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
bgeffen@pilcop.org
Phone: 267-546-1308
Fax: 215-627-3183

Counsel for Appellants

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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 entered the following order:

> AND NOW, this 19th day of February, 2014, based on the existing record, the final determination of the Office of Open Records is **REVERSED.**

The Commonwealth Court entered the Order and Opinion below in three consolidated cases: *Dental Benefit Providers, Inc. and UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc., d/b/a CoventryCares v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 945 C.D. 2013; *Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 957 C.D. 2013; and *Department of Public Welfare v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 958 C.D. 2013 (collectively, *Eiseman II*).

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); *see also McMullen v. Kutz*, 985 A.2d 769, 773 (Pa. 2009) ("[T]he interpretation of the terms of a contract is a question of law for which our standard of review is de novo, and our scope of review is plenary.").

IV. STATEMENT OF THE QUESTIONS INVOLVED

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

Whether records showing the rates dental providers receive for treating Medicaid enrollees are "public records" subject to disclosure under the Right-to-Know Law when DPW's contracts with managed-care organizations mandate that it have possession of or "ready access" to such records, and when such records directly relate to the governmental function of providing dental care to Medicaid enrollees.

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

V. STATEMENT OF THE CASE

A. Form of the Action and Procedural History

On October 3, 2012, Appellants, James Eiseman Jr. and the Public Interest Law Center of Philadelphia (Requesters), made a request 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 request (the Request) pursuant to Pennsylvania's Right-to-Know Law (RTKL), 65 P.S. §§ 67.101 *et seq.* The Request at issue in this case is distinct from that on appeal in the related case *Eiseman et al. v. Commonwealth et al.*, Case Nos. 45, 46, & 47 EAP 2014 (*Eiseman I*).

The Request sought "document[s], including contracts, rate schedules and correspondence in DPW's possession, custody, or control" showing rates paid by dental subcontractors to dental providers to treat Medicaid patients in the five-county region of Southeastern Pennsylvania from July 1, 2008 until June 30, 2012.

DPW denied the Request, citing the RTKL exception permitting the withholding of "[a] record that constitutes or reveals a trade secret or confidential proprietary information," 65 P.S. § 67.708(b)(11), along with the Pennsylvania Uniform Trade Secrets Act (PUTSA), 12 Pa.C.S. §§ 5301 *et seq.*

[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."

Requesters filed an appeal to the Office of Open Records (OOR). Shortly thereafter, the five managed-care organizations (MCOs) that contracted with DPW in Southeastern Pennsylvania during the requested period sought and obtained leave to participate in the OOR proceedings as direct-interest participants. These MCOs are Appellees UnitedHealthcare 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). DPW and the MCOs are the appellees in *Eiseman I*. In addition, the two dental subcontractors that the MCOs had engaged in Southeastern Pennsylvania during the requested period sought and obtained leave to participate in the *Eiseman II* OOR proceedings as direct interest participants. These subcontractors are Appellees DentaQuest, LLC (DentaQuest) and Dental Benefit Providers, Inc. (DBP) (collectively, the Subcontractors).

The OOR issued a final determination granting the Request in full.

The MCOs and the Subcontractors appealed to the Commonwealth Court. DPW also appealed, but its brief simply referenced the arguments of the MCOs and the Subcontractors and stated that "DPW does not have a dog in this fight." The Commonwealth Court decided the case on the record developed before the

OOR. After consolidating the appeals and, *sua sponte*, referring the case to the court en banc, the Commonwealth Court reversed the OOR Decision.

According to the Commonwealth Court, the basis for reversal, in addition to the reasons set forth in *Eiseman I*, was twofold: (1) DPW does not have "possession, custody or control of the identified record[s]" under 65 P.S. § 67.901, limiting the reach of Section 901 to "transactions of the agency"; and (2) 65 P.S. § 67.506(d)(1) of the RTKL, which requires disclosure of certain records not in the possession of an agency, did not apply because there was no direct contract between DPW and the Subcontractors, and because "the cost of obtaining [dental] services . . . does not directly relate to the performance of the government function" of providing access to dental services for Medicaid enrollees, Opinion at 16-17.

Requesters petitioned this Court for allowance of appeal on March 20, 2014, and this Court granted allowance of appeal on October 23, 2014. The Court simultaneously granted allowance of appeal in *Eiseman I* but did not consolidate the cases. Requesters are filing a separate brief in *Eiseman I*.

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 Dissenting Opinion (the Dissent) is attached as Exhibit C. The Opinion, Order, and Dissent

were reported at 86 A.3d 932. The Opinion and Order had the effect of denying the Request, whereas the Dissent would have granted the Request.

The OOR's Final Determination is attached as Exhibit D.

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 Kyle Applegate, 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 accounting for some 30% of the Commonwealth's General Fund budget.[2] Under the recently approved "Healthy Pennsylvania"

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

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, instead of making payments directly to the doctors and dentists providing the required services (providers), DPW has opted to implement the HealthChoices Program, which uses the services of MCOs to ensure access to dental services for eligible Medicaid recipients. (*E.g.*, R. 131a-132a.) 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 (the Standard 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.[3]

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[3]Excerpts from the voluminous Standard Contract are attached as Exhibit E, and the citations in this brief are to the Standard Contract's page numbering. In its references to the Standard Contract, the Commonwealth Court variously cited the reproduced record in this case and the reproduced record in *Eiseman I*. The Standard Contract was admitted into evidence on the MCOs' motion at the OOR hearing in *Eiseman I* as MCO Exhibit 2 (*Eiseman I* R.R. at 680a-849a). The Standard Contracts signed by DPW and each of the MCOs are also judicially noticeable public records available (with redactions) pursuant to Chapter 17 of the RTKL, 65 P.S. §§ 67.1701-.1702, on the website of the Pennsylvania Treasury Department, http://www.patreasury.gov/eContracts.html. For example, DPW's contract with Aetna, effective July 1, 2010, is available at http://contracts.patreasury.gov/View.aspx?ContractID=88205 (last visited Dec. 1, 2014).

To provide dental services, these MCOs have chosen to delegate most of their Medicaid responsibilities to subcontractors. (*E.g.*, R. 132a.) These subcontractors in turn contract with and pay dental providers to treat Medicaid enrollees. (*E.g.*, R. 132a-133a.)

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

DPW→MCOs→Subcontractors→Providers

The Request focuses on records that contain the "Provider Rates" that subcontractors use to pay dental providers for treating Medicaid enrollees. The "MCO Rates" that the MCOs agree to pay to the Subcontractors, or occasionally to dental providers, are the subject of *Eiseman I.*[4]

2. The Standard Contract

Several provisions of the Standard Contract are implicated in this appeal. First is the "Ready Access requirement," which states:

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

[4] In limited situations, the MCOs have contracted directly with dental providers instead of contracting via dental subcontractors. *Eiseman I* Opinion at 3 n.6. Records documenting those aspects of Pennsylvania's Medicaid program are at issue in *Eiseman I.* To the extent such records would also be responsive to the Request in this case, the legal issues are identical to those in *Eiseman I.*

Standard Contract at 163. The capitalized terms in the Ready Access requirement have meanings specified in the Standard Contract's definitions section. Those definitions are:

- Subcontract: "Any contract between the PH-MCO and an individual, business, university, governmental entity, or nonprofit organization to perform part or all of the PH-MCO's responsibilities under this Agreement. Exempt from this definition are salaried employees, utility agreements and Provider Agreements, which are not considered Subcontracts for the purpose of this Agreement and, unless otherwise specified herein, are not subject to the provisions governing Subcontracts." Standard Contract at 29.
- Physical Health Managed Care Organization (PH-MCO): "A risk bearing entity which has an agreement with the Department to manage the purchase and provision of Physical Health Services under the HealthChoices Program." *Id.* at 26.
- Member: "An individual who is enrolled with a PH-MCO under the HealthChoices Program and for whom the PH-MCO has agreed to arrange the provision of Physical Health Services under the provisions of the HealthChoices Program." *Id.* at 23.
- Department: "The Department of Public Welfare (DPW) of the Commonwealth of Pennsylvania." *Id.* at 15.

- Recipient: "A person eligible to receive Physical and/or Behavioral Health Services under the MA Program of the Commonwealth of Pennsylvania." *Id.* at 28.

Two other significant defined terms are:

- Provider: "A person, firm or corporation, enrolled in the Pennsylvania MA Program, which provides services or supplies to Recipients." *Id.* at 27.
- Provider Agreement: "Any Department-approved written agreement ***between the PH-MCO and a Provider*** to provide medical or professional services to Recipients to fulfill the requirements of the Agreement." *Id.* (emphasis added).

The Standard Contract contains various provisions concerning Subcontracts and Provider Agreements, including:

- section headed "Contracts and Subcontracts," *id.* at 85;
- "The PH-MCO must make all Subcontracts available to the Department within five (5) days of a request by the Department," *id.* at 86;
- "Subcontracts which must be submitted to the Department for advance written approval are . . . . contracts for . . . dental services . . . ," *id.* at 87;
- "The PH-MCO must obtain Department's prior written approval of all Deliverables . . . . Deliverables include . . . Provider Agreements . . . ," *id.* at 119.

E. Statement of the Order Under Review

The Order reversed the Final Determination, and Requesters seek reversal of the Order.

Insofar as the Opinion made reference to the Commonwealth Court's simultaneously issued Opinion in *Eiseman I* for the proposition that "the Provider Rates are not public as 'financial records' because they do not represent payments by an agency," Opinion at 20, Requesters note that reversal of the Commonwealth Court's decision in *Eiseman I* would also compel reversal of this aspect of the *Eiseman II* Opinion: a holding in *Eiseman I* that the records sought are "financial records" and must be released regardless of whether they contain trade secrets or confidential proprietary information would apply with equal force to the Request here. Similarly, a holding in *Eiseman I* that historical rates have no ongoing competitive value, or that the use of a common subcontractor undermines claims of secrecy, would also apply to the Request here.

VI. SUMMARY OF ARGUMENT

The records at issue in this case are contractual agreements to which a public agency is not a direct party, but which are part of a chain of contracts with which the public agency is in privity, and which are for the purpose of providing public services with public funds under the control of the public agency. The Commonwealth Court held that these records are not in DPW's constructive possession, even though the Subcontractors are contractually obligated to provide DPW with "ready access" to the records. In addition, the Commonwealth Court departed from precedent by holding that the addition of a subcontractor to the chain transformed the records from public to private.

The Commonwealth Court's decision was founded on two errors of law, and reversal on either grounds would compel fulfillment of the Request. First, the Opinion found that DPW lacks possession of the records. This holding was based on an erroneous reading of the Standard Contract. Second, it found that the records are not "public records" of DPW under Section 506(d)(1) of the RTKL, contrary to precedents including *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012). Under the RTKL, when an agency channels taxpayer dollars through middlemen in the administration of a public program, the contracts documenting that flow of public funds "directly relate" to the performance of a governmental function. The far-reaching Opinion below 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 the context of the Commonwealth's multibillion-dollar Medicaid program, it is vital for the public to have access to such financial records, which would allow comparison of (a) the funds that enter the program with (b) the funds that reach those who directly provide care to patients, and which would help establish whether rates are adequate to engage sufficient providers to meet the needs of Medicaid recipients. DPW itself has recently highlighted the public significance of the records. On the very day the Order issued, DPW submitted to the United States Department of Health and Human Services a document stating that "Pennsylvania Medicaid provides payment rates for some services that are lower than Medicare or private market payers, causing some providers to forego [sic] participation in the program." Department of Public Welfare, *Healthy PA 1115 Waiver Application*, 11 (Feb. 19, 2014), *available at* http://www.dhs.state.pa.us/cs/groups/webcontent/documents/document/c_071204.pdf (last visited Dec. 1, 2014). The Medicaid Act requires, among other things, that participating states "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the

general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A).[5] DPW's recent statement raises important questions about whether Pennsylvania is in compliance with the Medicaid Act; the requested records would help answer those questions.

[5] *See also Clark v. Richman*, 339 F. Supp. 2d 631, 644 (M.D. Pa. 2004) ("[T]o determine whether the Commonwealth has violated § 1396a(a)(30)(A), plaintiffs may demonstrate unequal access through a variety of indicators, such as: (1) the level of reimbursement to participating dentists in the market and the costs of providing such services; (2) the level of dentist participation in the MA program; (3) whether there are reports that recipients are having difficulty obtaining care; (4) whether the rate at which MA recipients utilize dental services is lower than the rates at which the generally insured population uses those services; and (5) whether DPW agents have admitted that reimbursement rates are inadequate.").

VII. ARGUMENT FOR REQUESTERS

There are two independent grounds that support reversal. First, the Standard Contract establishes that DPW has "possession, custody or control of the identified record[s]," 65 P.S. § 67.901, which must therefore be disclosed as a financial record of DPW. Second, 65 P.S. § 67.506(d)(1) mandates disclosure of the contracts containing the Provider Rates as third-party records that directly relate to the governmental function of providing Medicaid services.

A. The Standard Contract Proves DPW Has "Possession, Custody or Control" of the Provider Rates

The Ready Access requirement gives DPW the contractual right to demand access to all contracts between DentaQuest or DBP and dental providers. The Ready Access requirement does not bind only the MCOs, which directly contract with DPW; it also requires those MCOs to devolve the Ready Access requirement onto the Subcontractors. In other words, all downstream contracts that pertain to the provision of Medicaid services must provide for DPW's power to review such contracts. Standard Contract at 163 ("[A]ll contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include the following provisions: . . . A requirement that ensures that the Department has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients."). The requested records are indisputably "documents" that "pertain[] to the provision of services to Recipients." An MCO

cannot evade the Ready Access requirement by re-delegating its duties to another middleman; rather, as mandated by the Ready Access requirement itself, the requirement must be passed down to all downstream entities until it reaches the entity contracting with providers.[6] This all-encompassing requirement establishes the control called for by the RTKL and applies to the documents requested.

The Ready Access requirement applies to "all ***contracts or Subcontracts***," Standard Contract at 163 (emphasis added), but the Commonwealth Court's analysis elided the crucial words "***contracts or***": "the Standard Contract requires all subcontracts to include a requirement . . . .". Opinion at 10. This omission may superficially appear slight, but it dramatically changes the meaning of the Ready Access requirement, because it focuses on limitations in the definition of "Subcontracts" that do not apply to "contracts." Proceeding from its truncated version of the Ready Access requirement, the Commonwealth Court wrote that "the Standard Contract defines 'subcontracts' to 'exempt from this definition . . . Provider Agreements, which are not considered Subcontracts for the purpose of this Agreement and, unless otherwise specified herein, are not subject to the provisions governing Subcontracts.'" Opinion at 10 (emphases and ellipsis in

[6] The Ready Access requirement does not extend infinitely far. For example, a dentist's lease for office space is not a "contract . . . that cover[s] the provision of medical services," but a contract that covers the provision of office space, so it is not subject to the Ready Access requirement. In the context of this case, the Ready Access requirement applies to a contract between DentaQuest or DBP and a provider, but it does not apply to the provider's contracts with its landlord, vendors, employees, and so on.

original). "Thus, the contract language supports DPW's disclaimer of possession and access to the Provider Rates." *Id.*

This analysis is fatally flawed, because the agreements between Subcontractors and providers are ***contracts***, not "Subcontracts." "Subcontract" is a capitalized term with a defined meaning in the Standard Contract. Contrary to the Commonwealth Court's assumption, the records sought here are not "Subcontracts," which term means "[a]ny contract ***between the PH-MCO*** and an individual, business, university, governmental entity, or nonprofit organization . . . ." Standard Contract at 29 (emphasis added). The records containing the Provider Rates are contracts between DentaQuest or DBP and dental providers, and to which an MCO is not a party. Since none of the parties to these agreements is a "PH-MCO," the agreements are "contracts," not "Subcontracts."[7] The Ready Access requirement applies not only to "Subcontracts" but also to "contracts." Accordingly, the MCOs are obligated to require DentaQuest and DBP to include the Ready Access requirement in their downstream contracts with providers.

[7] As an undefined term in the Standard Contract, "contract" is to be given its ordinary meaning. *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004). The distinction between "Subcontracts" and ordinary "contracts" is reflected in many places throughout the Standard Contract, where some provisions apply to both, and others apply only to Subcontracts. *Compare* Standard Contract at 85 (section headed "Contracts and Subcontracts"), *with id.* at 86 ("The PH-MCO must make all Subcontracts available to the Department within five (5) days of a request by the Department.").

The Commonwealth Court also ignored the meaning of the capitalized term "Provider Agreement": "Any Department-approved written agreement ***between the PH-MCO and a Provider*** to provide medical or professional services to Recipients to fulfill the requirements of this Agreement." Standard Contract at 27 (emphasis added). Pursuant to the emphasized words, a contract is a "Provider Agreement" only if the parties to it are a provider and an ***MCO***. A contract between DentaQuest and a dental provider—the type of document at issue in this appeal—is not subject to the "Provider Agreement" exemption from the Ready Access requirement, because DentaQuest is not a "PH-MCO." *See id.* at 26 (defining "PH-MCO" to mean "A risk bearing entity which has an agreement ***with the Department*** to manage the purchase and provision of Physical Health Services under the HealthChoices Program" (emphasis added)). Although the "Provider Agreement" definition would exclude agreements directly between an MCO and a provider from the Ready Access requirement, such agreements are at issue in *Eiseman I*, not in this case, and no party has contested agency possession in *Eiseman I*.[8]

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[8] If, *arguendo*, the requested records ***were*** "Provider Agreements," they would have to be "Department-approved written agreements." Standard Contract at 27; *see also id.* at 87 ("Subcontracts which must be submitted to the Department for advance written approval are . . . . contracts for . . . dental services . . . ."), 119 ("The PH-MCO must obtain Department's prior written approval of all Deliverables . . . . Deliverables include . . . Provider Agreements . . . ."). DPW would then indisputably have ***actual*** possession of the records.

This distinction makes clear why the Ready Access requirement applies to contracts but not Subcontracts. "Subcontracts" require prior approval of DPW and are thus in its actual possession. So DPW does not need the Ready Access requirement to be able to obtain Subcontracts. Other "contracts" do not require DPW's prior approval, so DPW needs the Ready Access requirement in order to maintain custody and ***constructive*** possession of such documents.

On a more fundamental level, whether the agreements containing the rates paid to providers are "contracts" or "Subcontracts" does not override the disclosure requirements of the RTKL. In accordance with the Statutory Construction Act, the RTKL must be construed "to favor the public interest as against any private interest." 1 Pa.C.S. § 1922(5). Under this presumption, the scope of disclosure of information relating to the expenditure of public funds should not turn on whether an agreement governing the expenditure of such public funds calls the requested document a "contract" or a "Subcontract." Going forward, such a holding would produce "a result that is absurd," *id.* § 1922(1), by permitting or encouraging entities that do business with the government to shield from disclosure how public funds are spent by setting up a subcontractual relationship.

Section 901 of the RTKL requires that "an agency shall make a good faith effort to determine . . . whether the agency has ***possession, custody or control*** of the identified record." 65 P.S. § 67.901 (emphasis added). The Commonwealth Court stated that it "does not infer constructive possession from the mere availability of the records to an agency upon request," and it announced a "litmus test under Section 901": "whether the records document a transaction of the agency to which the request was directed, not whether they document a transaction of a private contractor." Opinion at 11.

This "litmus test" is without foundation and should be rejected as substantially curbing access to documents pertaining to the conduct of public business. By its plain terms, Section 901 is not limited to "transactions of the agency." Many agencies collect documents from their contractors detailing those contractors' transactions with the public or with subcontractors. *E.g.*, *Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12*, 713 A.2d 627, 629 (Pa. 1998) (school district required private contractor to submit payroll records "to ensure that all wages due to workmen by the contractor are paid" in compliance with the Prevailing Wage Act). Even though such records may be in agencies' possession precisely so the agencies can assess whether contractors are complying with a law, this "litmus test" will broadly exclude these records from public review.

Nor is Section 901 limited to whether the agency has "possession" of the record: it includes the words "custody or control." The Ready Access requirement establishes DPW's "custody or control" of the records. *Cf. Tribune-Review Publ'g Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112, 118 (Pa. 2003) (in construing "possession, custody or control" in civil discovery, "the courts of the Commonwealth reject a narrow 'physical possession' test, focusing instead on whether the subpoenaed party has a legal right to custody or control of the documents in question").

Contrary to the Opinion's implication, a requester asserting constructive possession by an agency should not have to present "'evidence . . . that [the agency] is attempting to play some sort of shell game by shifting these records to a non-governmental body.'" Opinion at 11 (quoting *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 621 (Pa. Cmwlth. 2011)). First, this would improperly place the burden of proof on the requester instead of the agency. *See* 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 . . . ."). Second, it should not matter whether an agency lacks actual possession because it is trying to hide something, or simply as a byproduct of how it has chosen to perform a public function. Such a distinction is entirely absent from Section 901 and the rest of the RTKL.

Although DPW believes it "does not have a dog in this fight," Opinion at 6, if DPW has not been exercising its "Ready Access" power to review contracts setting forth the Provider Rates, that would represent a troubling abrogation of its responsibilities to ensure that Pennsylvania's Medicaid program is effective and in compliance with federal and state law. Under the Medicaid Act, "a state must ensure that its state plan incorporates adequate reimbursement rates to enlist a sufficient number of dentists to assure that dental care is available to MA recipients to the same extent and quality of care as dental care available to the general

population in certain geographic areas." *Clark v. Richman*, 339 F. Supp. 2d 631, 643 (M.D. Pa. 2004). The Ready Access requirement is a key tool for DPW to accomplish this objective. DPW ought to have been using that tool, and ought therefore to have ***actual*** possession of the contracts containing the Provider Rates. If DPW has not been reviewing such records, it has failed to track the flow of billions of dollars in taxpayer funds that were expended for the benefit of the neediest Pennsylvanians. Such a failure by DPW to convert constructive possession into actual possession of the requested records would scarcely militate in favor of shielding the records from public inspection.

B. Section 506(d)(1) of the RTKL Also Establishes That the Requested Records Are "Public Records"

The Standard Contract resolves the issue of whether the requested records are records "of" DPW. Even if this were not the case, reversal would still be warranted because the "litmus test" newly announced by the majority is contrary to Section 506(d)(1) of the RTKL, which provides:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). Construing this provision, the Commonwealth Court found that the administration of Pennsylvania's Medicaid managed-care program

"constitutes a government function," Opinion at 14, but held that "the cost of obtaining [dental] services [for Medicaid enrollees] . . . does not directly relate to the performance of the government function," *id.* at 16-17. That analysis is contrary to this Court's decision under Section 506(d)(1) in *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012) ordering public disclosure of bids for a food-service contract submitted by private companies to a private baseball-park management company.

SWB Yankees stated that "[p]articularly in the context of a government agency's wholesale delegation of its own core governmental function to another entity, we find that a reasonably broad perspective concerning what comprises transactions and activities of the agency should be applied." 45 A.3d at 1044 n.19. Here, however, the Commonwealth Court applied an exceptionally narrow perspective, finding that the Provider Rates, pursuant to which Medicaid recipients receive publicly financed dental care, "do not 'directly relate' to performing the government function of administering" the Medicaid program. Opinion at 17. This approach conflicts first and foremost with *SWB Yankees*, but is also at odds with an en banc RTKL decision of the Commonwealth Court. *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 344 (Pa. Commw. Ct.) (en banc) (Simpson, J.) ("Assessing a direct relationship requires careful review of the contract at issue and the information related to performing the contractual obligations. The simple

scenario presents when the contract requires the contactor to transmit the information sought to the agency, or necessitates the exchange of such information as part of performing the contract."), *alloc. denied*, 72 A.3d 604 (Pa. 2013). Surely, and contrary to the holding of the court below, it cannot be the law of this Commonwealth that the rates by which public funds are expended to provide government services, whether directly by a public agency or by a private entity on behalf of a public agency, does not relate to the performance of a "government function." *See also Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609, 625 (Pa. Commw. Ct.) ("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 the Health Plan and other MCOs or HMOs."), *alloc. denied*, 987 A.2d 162 (Pa. 2009). Further, the holding that the Provider Rates do "not directly relate to the performance of the government function," Opinion at 17, is premised on a mistaken view of the "government function" established by the Medicaid Act. *See, e.g., Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 538 (3d Cir. 2002) (en banc) (Alito, J.) (holding that 42 U.S.C. § 1396a(a)(30)(A) "demand[s] that payments [to providers] be set at levels that are . . . sufficient to meet recipients' needs").

It was also error to construe Section 506(d)(1) as "requir[ing] a contractual relationship between" the Subcontractors and DPW. Opinion at 14-15. Under this

cramped interpretation of the statutory term "contracted," any governmental contractor could shield from disclosure—either deliberately or incidentally—otherwise publicly available records simply by creating a second private entity through which public funds would be routed. The Commonwealth Court all but recommended this scheme as a workaround to public scrutiny: "[T]he public's right to know the amount of the funds spent ends before reaching private contractors who have no contract with the government." *Id.* at 20. In short, the Commonwealth Court manufactured an exception that would swallow the rule the General Assembly set forth in Section 506(d)(1). This was an erroneous interpretation of the law. *Cf. SWB Yankees*, 45 A.3d at 1044 ("While we have little doubt that the disclosure requirements pertaining to third-parties undertaking governmental functions may have bearing on their business decisions in dealing with agencies, this is within the range of considerations likely to have been taken into account in the General Assembly's open-records calculus.").

Judge McCullough's analysis, by contrast, is faithful to the letter and spirit of the RTKL. Under the law of principals and agents, she reasoned:

> In this case, DPW is the party principal to the subcontracts between the MCOs and the third party Subcontractors. The MCOs lack authority to enter into subcontracts with the Subcontractors, and the only way in which the subcontracts can become valid and enforceable under the HealthChoices Agreement is if DPW ratifies or approves the subcontracts as the principal. Therefore, because the Subcontractors have directly contracted with DPW as principal and are in possession of the Provider Agreements ("in possession of a party with whom the

> agency has contracted"), I would conclude that DPW possesses "public records" for purposes of section 506(d)(1) of the RTKL.

Dissent at 4; *see also* Dissent at 2-3 ("The RTKL does not define 'contract' and consequently, this term must be construed according to its legal meaning.").[9]

It must also be noted that *Lukes* ordered the release of records showing rates paid to Medicaid providers under the RTKL's predecessor (the Right-to-Know Act or RTKA, 65 P.S. §§ 66.1-66.9 (repealed)). The arrangement in *Lukes* differs from that here in only one way: in *Lukes*, the MCOs paid providers directly, not through subcontractors. In diagram form, the flow of public funds in *Lukes* looked like this:

> ***public*** **funds →DPW → MCOs→**
> **Providers receive *public* funds**

And the flow of public funds here looks like this:

> ***public*** **funds →DPW → MCOs→ Subcontractors →**
> **Providers receive *public* funds**

According to the Opinion, however, adding an extra middleman performed alchemy, transmuting from public to private the Medicaid funds received by providers to treat Medicaid enrollees:

> ***public*** **funds →DPW → MCOs→ Subcontractors →**
> **Providers receive *private* funds**

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

---

[9] The reach of Section 506(d)(1) is also not infinite, and it does not extend to the contracts that providers may have with their vendors, landlords, and other private parties. *Cf. SWB Yankees*, 45 A.3d at 1043 (holding that Section 506(d)(1) applies when there has been "an act of delegation of some substantial facet of the agency's role and responsibilities, as opposed to entry into routine service agreements with independent contractors").

This Court has specifically recognized that *Lukes* has ongoing vitality under the new RTKL, "particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime," *SWB Yankees*, 45 A.3d at 1044 n.19. By rejecting *Lukes*'s application under the new RTKL, Opinion at 17-19, the Commonwealth Court has held that financial records that were publicly 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."). The Court should correct the Opinion's misinterpretation of Section 506(d)(1) and its curtailment of access to *Lukes*-type records under the new RTKL.

VIII. CONCLUSION

Requesters respectfully request that the Court reverse the Commonwealth Court's Order.

Dated: December 2, 2014

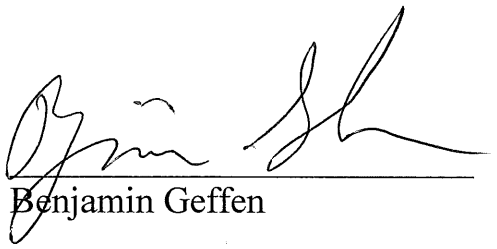
Respectfully submitted,

Benjamin D. Geffen (Pa. Bar No. 310134)
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
bgeffen@pilcop.org
Telephone: (267)546-1308
Fax: (215)627-3183

Counsel for Appellants/Requesters

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:

Leonard W. Crumb, Esquire
Department of Public Welfare
P.O. Box 1675
Health and Welfare Building, Third Floor West
Harrisburg, PA 17105
lcrumb@pa.gov

Karl S. Myers, Esquire
Stradley Ronon Stevens & Young
2005 Market Street, Suite 2600
Philadelphia, PA 19103
kmyers@stradley.com

James J. Rodgers, Esquire
Dilworth Paxson, LLP
1500 Market Street, Suite 3500 E
Philadelphia, PA 19102
jrodgers@dilworthlaw.com

Benjamin Geffen

Dated: December 2, 2014

Exhibit A

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

DENTAL BENEFIT PROVIDERS, INC. AND UNITEDHEALTHCARE OF PENNSYLVANIA, INC. D/B/A UNITEDHEALTHCARE COMMUNITY PLAN AND HEALTHAMERICA PENNSYLVANIA, INC., D/B/A COVENTRYCARES,	No. 132 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	

AETNA BETTER HEALTH INC., HEALTH PARTNERS OF PHILADELPHIA, INC., KEYSTONE MERCY HEALTH PLAN, AND DENTAQUEST, LLC,	No. 133 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	

DEPARTMENT OF PUBLIC WELFARE,	:	No. 134 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	:	

ORDER

PER CURIAM

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

> Whether records showing the rates dental providers receive for treating Medicaid enrollees are "public records" subject to disclosure under the Right-to-Know Law when DPW's contracts with [MCO]s mandate that it have possession of or "ready access" to such records, and when such records directly relate to the governmental function of providing dental care to Medicaid enrollees[.]

The Prothonotary shall establish parallel briefing tracks for this case and Department of Public Welfare v. Eiseman, No. 129-31 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

Dental Benefit Providers, Inc. and UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc., d/b/a CoventryCares, Petitioners	:	
v.	:	No. 945 C.D. 2013
James Eiseman, Jr. and The Public Interest Law Center of Philadelphia, Respondents	:	
Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC, Petitioners	:	
v.	:	No. 957 C.D. 2013
James Eiseman, Jr., and The Public Interest Law Center of Philadelphia, Respondents	:	
Department of Public Welfare, Petitioner	:	
v.	:	No. 958 C.D. 2013
	:	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**

These consolidated Right-to-Know Law (RTKL)[1] petitions for review implicate multiple issues regarding third-party records. The Office of Open Records (OOR) ordered disclosure of the rates managed care organizations (MCOs) paid to subcontractors, and the rates subcontractors paid to providers of dental services under the Department of Public Welfare's (DPW) administration of the Medicaid program in Southeast Pennsylvania. Although DPW is a party to contracts with the five MCOs that serve Southeast Pennsylvania, DPW does not directly contract with the subcontractors or dental providers whose rates are at issue.

On behalf of third parties, DPW argued the rates are exempt under the Pennsylvania Uniform Trade Secrets Act, 12 Pa. C.S. §§5301-5308, (Trade Secrets Act), federal regulations, and RTKL exceptions, including Section 708(b)(11) of the RTKL, 65 P.S. §67.708(b)(11), which protects confidential proprietary information and trade secrets from disclosure. DPW also asserted as a defense to disclosure a Department of Health (DOH) regulation applicable to "reimbursement information," 28 Pa. Code §9.604. The third parties submitted evidence as parties with a direct interest. OOR reasoned the exemptions did not apply because the records evidence disbursements of public funds, and this Court previously held that such information is accessible under the prior Right-to-Know Law, repealed by the current RTKL (Prior Law).[2] Upon review, we reverse.

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

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

I. Background[3]

Pursuant to the RTKL, James Eiseman, Jr. of The Public Interest Law Center of Philadelphia (Requester) requested the following records from DPW, for the period of July 1, 2008 to June 30, 2012:

> contracts, rate schedules and correspondence in DPW's possession, custody, or control that: (a) sets forth the amount for any one or more dental procedure codes that any Medicaid HMO[4] and/or Medicaid Dental Subcontractor pays or has paid to dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania, or (b) otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania.

Reproduced Record (R.R.) at 21a. Essentially, Requester sought rate information paid by Medicaid MCOs or Medicaid dental subcontractors to dental providers. The response would show how much of the money DPW pays to Medicaid MCOs is later paid to subcontractors and providers.

DPW denied the request based on the objections of third parties whose information was targeted for disclosure. DPW notified the five MCOs: UnitedHealthcare of Pennsylvania, Inc. d/b/a, United Healthcare Community Plan

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[3] We incorporate the more detailed explanation of the relationships between DPW and the MCOs and the MCOs and their subcontractors and providers as set forth in Department of Public Welfare v. Eiseman, (Pa. Cmwlth., Nos. 1935 C.D. 2012, 1949 C.D. 2012 & 1950 C.D. 2012, filed February 19, 2014) (consolidated) (Eiseman I).

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

(United); HealthAmerica Pennsylvania, Inc., d/b/a/ CoventryCares (Coventry); Aetna Better Health, Inc., (Aetna); Health Partners of Philadelphia (Health Partners); Keystone Mercy Health Plan (Keystone); and, two subcontractors of the MCOs, Dental Benefit Providers, Inc. (DBP), and, DentaQuest, LLC (DentaQuest) (collectively, Subcontractors). The MCOs and Subcontractors 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); DOH regulation 28 Pa. Code §9.604; and, other state and/or federal regulations and/or statutes. Requester appealed to OOR.

Each of the seven third parties in interest asked to participate in the proceedings. Collectively, DBP, United and Coventry comprise the "DBP Group" and Aetna, Health Partners, Keystone and DentaQuest comprise the "Aetna Group."

The DPB Group and the Aetna Group submitted position statements, accompanied by affidavits of the providers and MCOs. Requester also submitted a position statement, without affidavits. OOR did not hold a hearing.

Based on the written submissions, OOR issued a final determination granting the appeal and ordering disclosure. Eiseman v. Dep't of Pub. Welfare, OOR Dkt. No. AP-2012-2017 (Pa. OOR, filed May 8, 2013). OOR concluded none of the cited exemptions applied. With regard to the Trade Secrets Act, OOR relied upon its decision in Eiseman v. Department of Public Welfare, OOR Dkt.

No. AP 2011-1098 (Pa. OOR, filed Sept. 17, 2012) (Eiseman I (OOR)).[5] OOR held the Trade Secrets Act does not create a basis for withholding records apart from the trade secrets exception in Section 708(b)(11) of the RTKL. OOR relied on Lukes v. Department of Public Welfare, 976 A.2d 609 (Pa. Cmwlth. 2009), to conclude a threat of competition cannot suffice to support an exemption. OOR also held the parties failed to establish substantial harm because the rates paid to providers vary based on multiple factors. The DOH regulation did not protect the records, OOR held, because that law applied to agencies other than DPW.

Regarding possession of the records containing the rates, OOR interpreted Section 506(d) of the RTKL (access to third-party records) broadly to reach rates paid by Subcontractors to providers. Recognizing DPW had no contractual relationship with Subcontractors, OOR nevertheless held the records related to a government function the MCOs performed on behalf of DPW.

By ordering disclosure, OOR required DPW to obtain records in possession of contractors and subcontractors. Specifically, OOR held the Requester was not only entitled to records containing rates the MCOs pay to Subcontractors and dentists (MCO Rates), but he was also entitled to records containing rates paid by Subcontractors to providers (Provider Rates). OOR explained the Provider Rates are contemplated by the DPW agreements.

[5] Eiseman I (OOR) is on appeal in three different cases consolidated at docket No. 1935 C.D. 2012, which was argued seriately with this case during October 2013 argument.

The MCOs and Subcontractors, as direct interest participants, and DPW appealed to this Court[6] in separate actions.[7] These consolidated appeals challenge the same final determination and assert the records are not accessible through the RTKL. The appeals further assert the MCO Rates and the Provider Rates are exempt as confidential proprietary information.

II. Discussion

The DBP Group argues OOR erred when it concluded the Provider Rates (Subcontractors→Providers) are accessible under Section 506(d) of the RTKL, 65 P.S. §67.506(d) (access to third-party records), when DPW has no contractual relationship with Subcontractors. The DBP Group asserts the MCOs and Subcontractors established the Provider Rates are confidential proprietary information that is not accessible.

The Aetna Group argues OOR erred in holding the records of Subcontractors, which do not have a contract with DPW, are subject to disclosure under Section 506(d) of the RTKL (access to third-party records). The Aetna Group asserts the evidence established the trade secret/confidential proprietary information exception in Section 708(b)(11) of the RTKL applies because Requester did not refute the extensive submissions regarding the protected nature

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[6] In a RTKL appeal from an OOR final determination involving a Commonwealth agency, this Court may exercise independent, de novo review. Bowling v. Office of Open Records, __ Pa. __, 75 A.3d 453 (2013).

[7] DBP, United and Coventry (the DBP Group) filed an appeal docketed at 945 C.D. 2013; Aetna, Health Partners, Keystone and DentaQuest (the Aetna Group) filed an appeal docketed to 957 C.D. 2013; and, DPW's appeal is docketed at 958 C.D. 2013. In its brief, DPW notes it does not claim the asserted exemptions itself, and merely serves as a conduit for the records at issue.

of the information. In addition, the Aetna Group contends OOR erred in holding that neither the Trade Secrets Act, nor the DOH regulations protect the records at issue.

DPW does not take a position regarding the substantive exemptions, and it incorporated by reference the arguments of the DBP and Aetna Groups. DPW advised it "does not have a dog in this fight." Pet'r DPW's Br. at 7.

Requester counters that this Court's decision in Lukes compels disclosure, and its rationale should be applied under the current RTKL. Requester asserts the Provider Rates are paid with public funds that flowed from DPW to MCOs, to Subcontractors, and, ultimately to providers. Requester submits the rates are in DPW's constructive possession, or, alternatively, are accessible under Section 506(d) of the RTKL (access to third-party records). Requester further contends that none of the petitioners met their respective burdens of proving applicable exemptions. Requester also asks this Court to hold the rates are "financial records," regardless of trade secret status.

The 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). Under the RTKL, 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). As to

factual disputes, this Court may exercise functions of a fact-finder, and has the discretion to rely upon the record created below or to create its own. Bowling.

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); see also Jones v. Office of Open Records, 993 A.2d 339 (Pa. Cmwlth. 2010) (Board of Probation and Parole bore burden to prove regulatory exemption).

In this case, the parties dispute whether the Provider Rates (Subcontractors→Providers) are within DPW's actual possession. Notably, DPW disclaims possession of the Provider Rates that appear in contracts between Subcontractors and individual dentists or other providers. Therefore, as an initial matter, we must consider whether the Provider Rates should be analyzed under Section 901 of the RTKL, 65 P.S. §67.901 (agency shall make good faith effort to determine whether it has possession, custody or control of record) as records "of" DPW, or whether the records are those of a third party, which are only accessible under the current RTKL through Section 506(d) of the RTKL, 65 P.S. §67.506(d).

A. Section 901 and Agency Possession

As a first step in evaluating a request, an agency must discern whether requested records are within its possession, custody or control, such that it may be obligated to disclose them. 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 by underlining and bolding).

This Court consistently construes "documents" when used as a verb in the definition of record to mean "proves, supports, [or] evidences." See Office of the Governor v. Bari, 20 A.3d 634, 641 (Pa. Cmwlth. 2011); Dep't of Admin. Servs./ASCI v. Parsons, 13 A.3d 1025, 1034-35 (Pa. Cmwlth. 2011) (en banc) (ASCI I). The preposition "of," as in records "of" an agency, indicates the record's "origin, its owner or possessor, or its creator." Bari, 20 A.3d at 643. However, for records to be "of" an agency, they do not need to originate with or be created by the agency. ASCI I.

DPW pays each of the MCOs a negotiated rate that pertains to all Medicaid services under the HealthChoices Program, a "Capitation Rate."

The MCOs contract with Subcontractors to carry out the dental portion of the program, for which they pay "MCO Rates." See Dep't of Pub. Welfare v. Eiseman, (Pa. Cmwlth., Nos. 1935 C.D. 2012, 1949 C.D. 2012, 1950 C.D. 2012, filed February 19, 2014) (consolidated) (Eiseman I). United subcontracts with DBP, whereas the remaining MCOs contract with DentaQuest. Subcontractors have built sophisticated networks of providers, enabling them to

provide services to enrollees in a cost-effective manner. Subcontractors do not directly contract with DPW.

Subcontractors in turn subcontract with providers, including dentists. Significantly, neither the MCOs nor DPW possesses the Provider Rates paid by Subcontractors to dentists.

Depicted in diagram form, the contractual relationship described is:

DPW (public funds)→ MCOs → Subcontractors → Providers.

Thus, DPW is two contract links removed from providers. Nevertheless, Requester contends the funds flowing from Subcontractors as payments to providers are as public as the funds DPW pays to the MCOs.

The MCO Rates (MCO→Subcontractors) are protected under Section 708(b)(11) of the RTKL. See Eiseman I. In this appeal, Requester seeks both the MCO Rates and the Provider Rates (Subcontractors→Providers). Because the MCO Rates are analyzed in the companion case, Eiseman I, this opinion addresses only the remaining records in dispute: those containing the Provider Rates.

The parties dispute whether the Provider Rates are in DPW's actual or constructive possession (reached directly as agency records under Section 901). They also dispute whether the Provider Rates are only in the possession of third parties (indirectly accessible through Section 506(d)).

There is no evidence DPW has actual possession; accordingly, under Bowling, this Court could find that DPW does not have actual possession of the Provider Rates. Nonetheless, Requester asks this Court to draw an inference that constructive possession exists.

1. Section 901 and Constructive Possession

Pursuant to the "Standard Contract" with DPW, all subcontracts of MCOs are subject to DPW approval. Further, the Standard Contract requires all subcontracts to include a requirement that ensures DPW has ready access to "any and all documents and records of transactions pertaining to the provision of services to [Medicaid] Recipients." R.R. at 233a-234a (emphasis added). Based on this provision, Requester contends that we may presume DPW has constructive possession of the Provider Rates.

Specifically, the Standard Contract requires MCOs to submit all subcontracts between MCOs and any entity to which they delegate Medicaid responsibilities, including dental services, for "advance written approval." R.R. at 766a. Importantly, the Standard Contract defines "subcontracts" to "exempt from this definition ... Provider Agreements, which are not considered Subcontracts for the purpose of this Agreement and, unless otherwise specified herein, are not subject to the provisions governing Subcontracts." R.R. at 708a-709a (emphasis added). Thus, the contract language supports DPW's disclaimer of possession and access to Provider Rates.

Constructive possession focuses on an agency's access to a record. The analysis emphasizes the statutory language in Section 901 of the RTKL that mandates an agency "determine whether [it] has possession, custody or control of the identified record." 65 P.S. §67.901. We recognize constructive possession under Section 901 as a means of access so agencies cannot frustrate the purposes of the RTKL by placing their records in the hands of third parties to avoid disclosure. See Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa. Cmwlth. 2012); Office of the Budget v. Office of Open Records, 11 A.3d 618 (Pa. Cmwlth. 2011).

However, this Court does not infer constructive possession from the mere availability of the records to an agency upon request. Office of the Budget (construing "control" narrowly as to records of a private contractor). The litmus test under Section 901 remains whether the records document a transaction of the agency to which the request was directed, not whether they document a transaction of a private contractor. This Court explained: "Similarly, while [the Office of the] Budget has the right to audit these payroll records, there is no evidence that they have ever been in Budget's possession or that Budget is attempting to play some sort of shell game by shifting these records to a non-governmental body." Office of the Budget, 11 A.3d at 621.

That DPW has the contractual right and ability to request records from a private contractor does not convert private contractor records into records "of" DPW. Id. Further, because the Standard Contract exempts Provider Agreements from DPW approval, DPW does not "control" records containing Provider Rates.

This Court recently re-emphasized the importance of agency possession in the context of a private contractor's records in West Chester University of Pennsylvania v. Browne, 71 A.3d 1064 (Pa. Cmwlth. 2013).

In Browne, the requester sought the benefits plan offered by private contractors of a university. The university argued the contractor's benefits plan did not constitute a "record" of the university. The university then argued that even if the benefits plan was a record, it was not a public record pursuant to Section 506(d) (access to third-party records). OOR held the records directly related to a governmental function and ordered disclosure.

On appeal, this Court determined the benefits plan was not created in connection with the private contractor performing a governmental function for the university. Id. The benefits plan related to the relationship between the contractor and its employees, not between the contractor and the university. The contract between the university and the contractor did not require or provide for a benefits plan.

Similarly, here the Provider Rates are not "records" of DPW as that term is defined in the RTKL, quoted above. There is no evidence DPW sought to circumvent the RTKL by placing records of its activities into the hands of a third party. Rather, the Provider Rates are negotiated between Subcontractors and providers, and do not involve DPW. They are not in DPW's possession.[8] Also,

[8] During oral argument, counsel for the MCOs represented the MCOs also do not have possession of the Provider Rates.

there is no indication that they were created or received by DPW, or that they evidence any transaction of DPW. At most, the Provider Rates evince a transaction of Subcontractors of the MCOs, with which DPW has no contractual relationship.

Because the Provider Rates do not evidence any transaction of DPW, they are not "records" of DPW. To discern accessibility of records of third parties in the possession of those parties, we analyze Section 506(d) of the RTKL. See SWB Yankees, LLC v. Wintermantel, 615 Pa. 640, 45 A.3d 1029 (2012).

2. Section 506(d) and Third Party Records

Under the current RTKL, to reach records outside an agency's possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to that function. Allegheny Cnty. Dep't of Admin. Servs./A Second Chance Inc. v. Parsons, 61 A.3d 336 (Pa. Cmwlth. 2013) (ASCI II). Accordingly, non-exempt records of a third party may be subject to disclosure, provided the third party in possession has a contract with the agency to perform a governmental function, and the information directly relates to the performance of that function. Id.

Section 506(d)(1), with emphasis added, provides:

> A public record that is not in the possession of an agency but is in possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. §67.506(d)(1).

OOR concluded the Provider Rates are accessible under Section 506(d) without first finding that both prerequisites of access are met.

a. Governmental Function Pursuant to Contract

"Section 506(d)(1) … recasts certain third-party records bearing the requisite connection to government as public records 'of the [government] agency' …." SWB Yankees, 615 Pa. at 665, 45 A.3d at 1044. Thus, "records" of a third party may qualify as "records" under the RTKL when they document or evidence an activity of an agency that is performed by a third party pursuant to a contract. That activity or service has a connection to government because it is a function generally performed by that agency, and is not ancillary to the agency's functions. Id.

None of the petitioners here contests that the administration of the HealthChoices Program constitutes a government function. However, that does not end the inquiry. The government function must be performed pursuant to a contract with a government agency.

Here, the parties to the contract with a government agency are DPW and an MCO. The third party in possession of the records containing Provider Rates, a Subcontractor, has no contractual relationship with DPW. This Court requires a contractual relationship between a third party and an agency to access

third-party records. See Honaman v. Lower Merion Twp., 13 A.3d 1014 (Pa. Cmwlth. 2011).

As there is no contract between DPW and Subcontractors, the only way to reach the Provider Rates is through the MCOs' contractual relationship with DPW. Thus, we consider whether records containing the Provider Rates directly relate to the government function the MCOs provide to DPW.

b. Direct Relationship

The information that is the subject of the request must "directly relate" to the performance of the government function. For the "directly relates" prong, this Court considers whether the Provider Rates "directly relate" to performance of the dental services. See ASCI II; Giurintano v. Dep't of Gen. Servs. (DGS), 20 A.3d 613 (Pa. Cmwlth. 2011).

In this case, the MCOs perform a government function. To perform that function, the MCOs enter agreements with Subcontractors and providers. The issue is whether the Provider Rates "directly relate" to how the MCOs perform the government function.

This Court construed "directly relates" in a number of cases involving Section 506(d). See ASCI II, 61 A.3d 336 (Pa. Cmwlth. 2013) (en banc) (while social services performed by contractor fulfill government function, contractor employee information does not directly relate to performing the services under the contract); Giurintano (holding subcontracts for interpretation services with

contractors who are not selected are not directly related as there is no contract performance); Buehl v. Office of Open Records, 6 A.3d 27 (Pa. Cmwlth. 2010). Summarizing the holdings in these cases, to satisfy the "directly relates" prong, the records must relate to the performance of the government function.

For example, in Buehl, this Court explained that to qualify as "directly related" under Section 506(d), information must relate to performance under the contract, rather than relate to the contract in some other way. The requester in Buehl sought the cost of commissary items purchased by the private party who contracted with the Department of Corrections to provide commissary services. This Court held that operating a commissary at a prison qualifies as a governmental function. Significant for current purposes, however, the Court held that the cost the private contractor paid to acquire the goods to be re-sold at the commissary did not "directly relate" to the contractors' performance of operating the commissary. Buehl, 6 A.3d at 31 ("what [the contractor] paid for the items is beyond the parameters of its contract with the Department—it does not directly relate to performing or carrying out this governmental function."). Therefore, the requester was not entitled to learn the costs the private contractor paid to purchase goods for the agency.

There is no question that the quality of the dental services rendered by providers directly relates to the performance of the government function formalized in the DPW/MCO contracts. The same may be true as to the availability of the services and the manner in which the services are delivered. However, the cost of obtaining those services, like the cost of acquiring goods for

resale in Buehl, does not directly relate to the performance of the government function.

By way of review, OOR erred when it failed to analyze whether the Provider Rates were in the possession of an entity which had a contract with DPW. In addition, OOR erred when it failed to follow recent cases and analyze whether the Provider Rates, which reflect the cost of acquiring services rather than the quality or delivery of the services, "directly relate" to the performance of a contract with DPW.

We follow Buehl to hold the Provider Rates do not "directly relate" to performing the government function of administering the HealthChoices Program. Therefore, the Provider Rates are not accessible under Section 506(d) of the RTKL, and DPW has no obligation to obtain them.

B. Lukes and Third-Party Records

Ultimately, OOR determined the Provider Rates are subject to disclosure because payments to providers are made with public funds. OOR relied on its determination in Eiseman I (OOR) and this Court's decision in Lukes to conclude the Provider Rates remain records of DPW because the payments represent funds received from DPW.

In Lukes, this Court determined records were accessible under the Prior Law if they were maintained by an agency, broadly construing "maintain" in a now-repealed provision to encompass records within an agency's purported control. In so doing, the Lukes Court reasoned that contracts between HMOs and

providers are maintained by DPW because such records were within the agency's constructive control, albeit not its physical possession.

By its reliance on Lukes, OOR revived a rationale for reaching records based on now-repealed language that has been replaced with express language limiting access to third-party records in Section 506(d).

However, in interpreting the current RTKL, this Court explicitly rejects Lukes. See In re Silberstein, 11 A.3d 629 (Pa. Cmwlth. 2011) (Lukes does not control interpretation of current RTKL; communications on commissioner's personal computer are not records "of" township); Office of the Budget, (payroll records of third party performing work on contract unrelated to government function and not within agency's possession are not agency records); see also Honaman (distinguishing Lukes; records of tax collector are not records of agency, and are not reached under current RTKL because there is no contract between tax collector and agency).

Thus, in Office of the Budget, the requester sought the certified payroll records of a contractor that received funds from a program administered by the Office of the Budget. Although OOR recognized that the contractor did not perform a government function on behalf of the agency, it reasoned the payroll records remained accessible because the contractor needed to make such records available for auditing compliance. Accordingly, OOR held the contractor's payroll records were within the Office of the Budget's control because that agency maintained the right to review them. To support its decision, OOR relied on

Lukes. On appeal, this Court rejected this approach because it disregarded the current statutory language.

In Office of the Budget, this Court explained that unlike the Prior Law, where the statutory language was ambiguous as to the degree of access to records outside an agency's possession, the current RTKL specifies a test requiring two elements be met. Specifically, this Court stated:

> Moreover, unlike in Lukes, this Court is not free to consider factors beyond the statutory language because the current RTKL is not ambiguous on this point, as discussed above. To adopt the OOR's reasoning would mean that records of a private company, not in the possession of a government agency and not related to a contract to perform a governmental function, are disclosable to the public if any government agency has a legal right to review those records. Such interpretation would greatly broaden the scope of the RTKL beyond its explicit language.

Office of the Budget, 11 A.3d at 623.

The holding in Lukes, does not control. This Court's reasoning in Lukes was based on the use of public funds rather than on the statutory language that dictates the result now. As this Court repeatedly rejected Lukes as to its broad agency possession rationale, OOR erred in relying on it here.

C. Public Nature of Records and Independent Exemptions

The MCOs and Subcontractors treat rate information as confidential information, and they specify the protected nature of the information in their contracts. In that manner, the MCO Rates and the Provider Rates are similar.

Requester asserts the Provider Rates are "financial records" that are public by definition,[9] based upon the reasoning in Lukes. However, in rejecting Lukes' broad reach, this Court concludes the public's right to know the amount of the funds spent ends before reaching private contractors who have no contract with the government. Office of the Budget.

Further, the Provider Rates are not public as "financial records" because they do not represent payments by an agency (DPW). See Eiseman I, slip op. at 14-15.[10] Rather, Provider Rates represent payments by Subcontractors.

Because we hold Provider Rates are not accessible under Section 506(d), we need not address the independent statutory and regulatory exemptions asserted to protect them.

III. Conclusion

Pursuant to Eiseman I, the MCO Rates (MCO→Subcontractors) are exempt.

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[9] 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.

[10] Since Requester argued the Provider Rates qualify as "financial records," OOR committed legal error by failing to analyze the Trade Secrets Act as an independent separate statutory exemption. The Trade Secrets Act is a state law that shall take precedence over other provisions in the RTKL. Section 306 of the RTKL, 65 P.S. §67.306.

The Provider Rates (Subcontractors→Providers) are not accessible as records "of" DPW under Section 901 of the RTKL because they are not in the actual or constructive possession of DPW.

Further, as to third party records, DPW has no direct contractual relationship with Subcontractors, as is necessary to reach the records containing the Provider Rates through Section 506(d). When OOR ignored the lack of a contractual relationship, it committed an error of law. Further, under the only relevant contract involving a government agency, between DPW and an MCO, there is no direct relationship between the services the MCOs perform for DPW and the downstream Provider Rates. This is because case law addressing the "directly relates" prong evaluates performance of the services, not the price to acquire the services.

Therefore, we reverse OOR's final determination ordering disclosure, and we hold the MCO Rates are exempt and the Provider Rates are not accessible through Section 506(d) of the RTKL.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dental Benefit Providers, Inc. and UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc., d/b/a CoventryCares, Petitioners	:	
v.	:	No. 945 C.D. 2013
James Eiseman, Jr. and The Public Interest Law Center of Philadelphia, Respondents	:	
Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC, Petitioners	:	
v.	:	No. 957 C.D. 2013
James Eiseman, Jr., and The Public Interest Law Center of Philadelphia, Respondents	:	
Department of Public Welfare, Petitioner	:	
v.	:	No. 958 C.D. 2013
James Eiseman, Jr., and The Public Interest Law Center of Philadelphia, Respondents	:	

ORDER

AND NOW, this 19th day of February, 2014, based on the existing

record, the final determination of the Office of Open Records is **REVERSED**.

ROBERT SIMPSON, Judge

Certified from the Record

FEB 19 2014

and Order Exit

Exhibit C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dental Benefit Providers, Inc. and UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc., d/b/a CoventryCares, Petitioners	:	
v.	:	No. 945 C.D.2013
James Eiseman, Jr. and The Public Interest Law Center of Philadelphia, Respondents	:	
Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC, Petitioners	:	
v.	:	No. 957 C.D. 2013
James Eiseman, Jr., and The Public Interest Law Center of Philadelphia, Respondents	:	
Department of Public Welfare, Petitioner	:	
v.	:	No. 958 C.D. 2013 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

DISSENTING OPINION
BY JUDGE McCULLOUGH

FILED: February 19, 2014

I respectfully dissent. For the reasons stated in the dissenting portion of my opinion in *Department of Public Welfare v. Eiseman*, __ A.3d __ (Pa. Cmwlth., No. 1935 C.D. 2012, filed February 19, 2014) (McCullough, J. concurring and dissenting), I would conclude that the Managed Care Organization (MCO) Rates[1] should be disclosed. Because my analysis in *Eiseman* is equally applicable to Provider Rates, I would conclude that these rates should also be disclosed. The only remaining issue in this case is whether the Provider Agreements are in the possession of the Department of Public Welfare (DPW) under section 506(d)(1) of the Right-To-Know Law (RTKL).[2] Unlike the Majority, I would conclude that they are.

The facts relevant to our inquiry can be summarized as follows. To effectuate and pay for the dental care aspect of Medicaid, DPW enters into contracts with MCOs; the MCOs, on behalf of DPW, then enter into contracts with various business entities (Subcontractors); and the Subcontractors enter into contracts with the Providers. The contracts between the Subcontractors and the Providers, "Provider Agreements," contain the payment rates, "Provider Rates," that a person/entity receives for rendering dental services to Medicaid beneficiaries.

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[1] As discussed in *Eiseman* and simplified and charted by the Majority: **DPW→ MCOs (MCO Rates) → Subcontractors → Providers (Provider Rates)**. The "→" symbol denotes a contractual agreement, with their being a total of three different contracts. The rates listed in the "()" represent the rates that the parties negotiated for in the relevant contract.

[2] Act of February 14, 2008, P.L. 6, 65 P.S. §67.506(d)(1).

In pertinent part, section 506(d)(1) of the RTKL states:

> A public record that is not in the possession of an agency but is in 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) (emphasis added).

The Majority concludes that this two-part test is not met -- first because "the third party in possession of the records containing Provider Rates, a Subcontractor, has no contractual relationship with DPW." (Maj. op. at 14.) Second, the Majority concludes that the rate to be paid from public funds for dental services "do not 'directly relate' to performing the government function of administering [Medicaid]." *Id.* at 16-17. I disagree with both propositions.

Initially, no one disputes, and the Majority agrees, that the Provider Agreements are in the physical possession of the Subcontractors and that the administration and implementation of the dental care aspect of Medicaid is a "government function." Therefore, in order for the Provider Agreements to be deemed the public records of DPW under section 506(d)(1), the following must occur: (1) the Subcontractors must have "contracted" with DPW to perform a government function; and (2) the Provider Agreements must "directly relate" to the administration or implementation of dental care for Medicaid beneficiaries.

"[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." *Levy v. Senate of Pennsylvania*, ___ Pa. ___, ___, 65 A.3d 361, 381 (2013). The RTKL does not define "contract" and consequently, this term must be

construed according to its legal meaning. *See Pantuso Motors, Inc. v. Corestates Bank, N.A.*, 568 Pa. 601, 608, 798 A.2d 1277, 1281 (2002) ("Terms that have acquired specialized meaning, however, are to be interpreted according to such meaning.").

Here, the HealthChoices Agreement between DPW and the MCOs states that the MCOs are obligated to establish and maintain a provider network. (R.R. at 915a.) Specifically, the MCOs are "required to have written Provider Agreements with a sufficient number of [p]roviders to ensure [m]ember access to all medically necessary services covered by [Medicaid]." *Id.* at 784a. Under the HealthChoices Agreement, the MCOs do not have the authority to independently bind DPW through contractual arrangements with third parties. *Id.* at 714a. Although the HealthChoices Agreement permits the MCOs to subcontract their duty to obtain Provider Agreements to Subcontractors, these subcontracts are not valid unless they receive advance written approval from DPW. *Id.* at 865a-66a.

When an agent contracts on behalf of a principal, "the general rule [is] that where there is a disclosed principal, known as such at the inception of the transaction, the principal alone is liable for a breach of the contract." *Levy v. Conly*, 340 Pa. 332, 336, 17 A.2d 382, 383 (1941). Even when an agent lacks apparent authority and is not authorized to conduct a transaction, if a principal approves or ratifies the contractual agreement of an unauthorized agent and a third party, the contract is valid and the principal is held liable upon the contract to the third party. *Todd v. Skelly*, 384 Pa. 423, 427, 120 A.2d 906, 909 (1956); 1 P.L.E. §101. In other words, the principal's actions in ratifying or approving the contract replaces the agent's unauthorized behavior and the principal becomes the main party to the contract with the third party. *See* Restatement (Third) of Agency §4.02

cmt. b. (2005) ("Ratification creates claims not otherwise present, giving the principal and the third party enforceable rights against each other. . . ."); *Sheppard v. Aerospatiale, Aeritalia*, 165 F.R.D. 449, 452 (E.D. Pa. 1996) ("[G]eneral agency law supports the proposition that ratification will bind a principal.").

As explained in my dissenting opinion in *Eiseman*, DPW and the MCOs are in an agency relationship, with DPW acting as the principal and the MCOs acting as the agents. (Dissenting op. at 8, quoting *Lukes v. Department of Public Welfare*, 976 A.2d 609, 623-24 (Pa. Cmwlth. 2009) ("Applying agency principles 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 constitutes a manifestation by DPW that the [MCO] shall administer the HealthChoices Program and the acceptance of the undertaking by the [MCO].")). In this case, DPW is the party principal to the subcontracts between the MCOs and the third party Subcontractors. The MCOs lack authority to enter into subcontracts with the Subcontractors, and the only way in which the subcontracts can become valid and enforceable under the HealthChoices Agreement is if DPW ratifies or approves the subcontracts as the principal. Therefore, because the Subcontractors have directly contracted with DPW as principal and are in possession of the Provider Agreements ("in possession of a party with whom the agency has contracted"), I would conclude that DPW possesses "public records" for purposes of section 506(d)(1) of the RTKL.

Moreover, as used in the RTKL, the term "governmental function" is materially ambiguous; yet, it should be construed generally "to connote an act of delegation of some substantial facet of the agency's role and responsibilities." *SWB Yankees, LLC v. Wintermantel/The Scranton Times Tribune*, ___ Pa. ___, 45

A.3d 1029, 1041 and 1043 (2012). So long as the requested documents directly relate to the governmental function that is contracted out to the third party, the records are considered to be in the agency's possession under the RTKL. 65 P.S. §67.506(d)(1).

In this case, the request for Provider Agreements and Provider Rates falls squarely within the terms of the Subcontractors' contractual duties and explicit governmental undertakings. Via sub-contractual arrangements, the Subcontractors assume DPW's governmental obligation to implement Medicaid and ensure that dental care is available for Medicaid recipients. Pursuant to their governmental and contractual duties, the Subcontractors are not only obligated to secure dental services through Provider Agreements, but are also required to negotiate Provider Rates with the dental providers. On these facts, I would conclude that the Provider Agreements and Provider Rates directly relate to the Subcontractors' performance of a government function. These agreements and rates are indispensably necessary to effectuate Medicaid and represent the very thing the Subcontractors contractually agreed to do for and on behalf of DPW.

For these reasons, I would conclude that the Provider Agreements are in the possession of a government agency for purposes of section 506(d)(1) of the RTKL. Accordingly, I 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 2012-2017**
	:	
PENNSYLVANIA DEPARTMENT OF	:	
PUBLIC WELFARE,	:	
Respondent	:	

INTRODUCTION

James Eiseman, Jr., Esq., on behalf of the Public Interest Law Center of Philadelphia, (collectively the "Requester") submitted a request ("Request") to the Pennsylvania Department of Public Welfare ("Department") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"), seeking records related to the Department's administration of the Medical Assistance ("Medicaid") program in Southeastern Pennsylvania. The Department denied the Request, citing the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq*. ("PUTSA"), federal and state regulations, and various exemptions from disclosure under the RTKL. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted** and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On October 3, 2012, the Request was filed, seeking, for the period July 1, 2008 through June 30, 2012:

> Each and every document, including contracts, rate schedules and correspondence in [the Department's] possession, custody, or control that: (a) sets forth the amount for any one or more dental procedure codes that any Medicaid HMO and/or Medicaid Dental Subcontractor pays or has paid to dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania, or (b) otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania.

Thus, the Request seeks payment rate information Medicaid insurers pay to dentists, as well as payment rate information Medicaid insurers pay to dental subcontractors and the payment rates those dental subcontractors pay to dentists. On November 13, 2012, after extending the period to respond by thirty (30) days pursuant to 65 P.S. § 67.902(b), the Department denied the Request, stating that the Department had notified five Managed Care Organizations ("MCOs") and two dental subcontractors of the Request and that each entity had notified the Department that the requested records are exempt from disclosure. Specifically, the Department argued that the requested records are exempt pursuant to:

- PUTSA;
- Section 708(b)(11) of the RTKL (exempting from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information");
- "[T]he Department of Health regulation that appears at 28 Pa. Code § 9.604;" and
- "[O]ther state and/or federal regulations and/or statutes."

On December 3, 2012, the Requester timely appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal

pursuant to 65 P.S. § 67.1101(c). On December 13, 2012, the Department provided a position statement, explaining that it had notified the relevant third parties and that the third parties would be providing evidence and argument. On December 18, 2012, Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan, HealthAmericaPennsylvania, Inc. d/b/a CoventryCares (collectively "Group A") and Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, Amerihealth Mercy Health Plan, and DentaQuest, L.L.C. (collectively "Group B") asserted a direct interest in the records subject to this appeal and requested to participate and provide information pursuant to 65 P.S. § 67.1101(c).[1] On December 21, 2012, both requests were granted, and the OOR established a briefing schedule for the parties.

On January 14, 2013, Group A provided a position statement, along with the affidavits of Heather Cianfrocco, President of UnitedHealthcare Community & State Northeast Region; Paul Hebert, President of Dental Benefit Providers, Inc.; and Nancy Hardy, Vice President of Operations for HealthAmerica Pennsylvania, Inc. Also on January 14, 2013, Group B provided a position statement, along with the affidavits of Denise Croce, CEO of Aetna Better Health Inc.; John Sehi, Vice-President of Finance for Health Partners of Philadelphia, Inc.; William Morsell, Senior Vice-President of Keystone Mercy Health Plan; and Mark Haraway, Regional Vice President of DentaQuest, L.L.C.

On January 28, 2013, the Requester provided a position statement. Finally, on April 3, 2013, the third parties made final submissions.

[1] Group A and Group B will be collectively referred to as "the third parties," or, alternatively "MCOs" or "dental subcontractors" respectively.

LEGAL ANALYSIS

The RTKL is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

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

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: "(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as "such

proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. PUTSA does not apply

The third parties argue that the responsive records are protected from disclosure pursuant to the Pennsylvania Uniform Trade Secrets Act ("PUTSA"), 12 Pa. C.S. §§ 5301 *et seq*. However, the OOR has held that since PUTSA and the RTKL define "trade secret" identically, there "is no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL." *Eiseman v. Pennsylvania Department of Public Welfare*, OOR Dkt. AP 2011-1098, 2012 PA O.O.R.D. LEXIS 1198. As the Department has raised Section 708(b)(11) of the RTKL, which exempts from disclosure trade secrets, the OOR need not consider the merits of PUTSA here.

2. Federal and state regulations do not apply to these records

The third parties argue that responsive records are confidential pursuant to federal and state regulations. *See* 45 C.F.R. §§ 5.65(B)(4)(ii); 74.53(f); 28 Pa. Code § 9.604(a)(8). However, none of these regulations are applicable to the respondent Department of Public Welfare. The cited federal regulations pertain only to the U.S. Department of Health and Human Services. *See, e.g.*, 45 C.F.R. § 5.1 ("This part contains the rules that the Department of Health and Human Services (HHS) follows in handling requests for records under the Freedom of Information Act (FOIA)"). Similarly, the cited state regulation applies only to the Pennsylvania Department of Health. *See* 28 Pa. Code § 9.602 (defining "Department" as "[t]he Department of

Health of the Commonwealth"). Therefore, none of the cited regulations prohibit the Department's disclosure of the records at issue.

3. Sections 708(b)(5), 708(b)(6), and 708(b)(28) of the RTKL are no longer at issue

On appeal, the third parties argue that some responsive records[2] contain "identifiable health information" and are thus exempt from disclosure pursuant to Sections 708(b)(5), 708(b)(6), and 708(b)(28) of the RTKL. However, on appeal, the Requester has limited the scope of its appeal "to those documents that set forth the fees the MCOs and/or their dental subcontractors pay dentists that do not contain any such individual identifying information or individual health information." Therefore, the applicability of these exemptions is no longer at issue.

4. The Department is required to obtain records in the possession of the dental subcontractors related to the payment rates paid to dentists

The Requester argues that records in the possession of dental subcontractors are public records required to be disclosed under the RTKL. Thus, the Requester argues that, in addition to the payment rates paid by the Department to the MCOs, and the payment rates the MCOs pay to both dental subcontractors and dentists, the Requester is also entitled to records of the payment rates paid by the dental subcontractors to dentists. Records in the possession of entities under contract with a Commonwealth or local agency to perform a governmental function may be subject to disclosure under the RTKL. *See* 65 P.S. § 67.506(d).

Section 506(d) of the RTKL states:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental

[2] Ms. Croce's affidavit refers to these records as "encounter files" and explains that they "contain members' names and identification numbers, listings of the health care services delivered to the member, other confidential personal and medical information relevant to the service, and the rates for the services provided."

> function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). It is undisputed that Section 506(d) is applicable to the MCOs contracting with the Department. In addition, in *Eiseman, supra,* the OOR also held that the RTKL is applicable to medical providers entering into an agreement with the MCOs to provide medical services. Thus, records related to rates paid to the dental subcontractors by the MCOs are subject to public disclosure. However, the dental subcontractors – DentaQuest, L.L.C. and Dental Benefit Providers, Inc. – argue that Section 506(d) is inapplicable to records in the possession of these subcontractors as they relate to the payment rates the dental subcontractors pay to dentists because the dental subcontractors have not contracted directly with the Department. Instead, the dental subcontractors have contracted directly with the MCOs to provide dental services. The MCOs, in turn, are under contract with the Department to provide health insurance for Medicaid beneficiaries.

The dental subcontractors argue that *Office of the Budget v. Office of Open Records* supports its position. In that case, the requester sought payroll certifications in the possession of a subcontractor for a project in the City of York, which received grant funds from the Office of the Budget ("Budget") for the project. 11 A.3d 618 (Pa. Commw. Ct. 2011). Because there was no contract between Budget and the City of York, the OOR found that Section 506(d) was not applicable. However, the OOR held that Budget possessed the records under Section 901 of the RTKL because it had the authority and duty under the grant agreement with the City of York to ensure that subcontractors comply with the Pennsylvania Prevailing Wage Act. On appeal, the Commonwealth Court reversed, holding that an interpretation that records "not in the possession of a government agency and not related to a contract to perform a governmental function … are

disclosable to the public if any government agency has a legal right to review those records … would greatly broaden the scope of the RTKL beyond its explicit language." *Id.* at 623.

Office of the Budget is inapplicable to the present matter for two reasons. First of all, that case did not involve Section 506(d) of the RTKL. Secondly, the records at issue here *do* relate to a contract to perform a governmental function. The Department has contracted with the MCOs to provide medical services under the Medicaid program, and those MCOs have in turn subcontracted with the dental subcontractors to provide dental services to Medicaid recipients The fact that the MCOs would in turn hire subcontractors is clearly contemplated by the agreements between the Department and the MCOs, wherein the Department "has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients," including those records in the possession of the dental subcontractors.

The OOR finds that Section 506(d) is applicable to records in the possession of the dental contractors. While the Department does not contract directly with the dental subcontractors, the dental subcontractors contract with the MCOs to perform services for the Department. Because the records sought directly relate to a governmental function being performed by the dental subcontractors, these records should be subject to public access. The OOR finds that any other interpretation would frustrate the intent of Section 506(d) by making records showing how public monies are spent unavailable to the public even though they directly relate to a governmental function and a contract with a governmental agency.

5. Section 708(b)(11) does not protect these records from disclosure

The Department and the third parties argue that the requested records are exempt from disclosure as confidential proprietary information and trade secrets. Section 708(b)(11) of the RTKL exempts from disclosure records that reveal "trade secrets" or "confidential proprietary

information." *See* 65 P.S. § 67.708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

> Confidential proprietary information: Commercial or financial information received by an agency: (1) which is privileged or confidential; **and** (2) the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.
>
> Trade secret: Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readably ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; **and** (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of these two-part tests are met in order for the exemption to apply. *See Sansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *see also Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information).

In *Eiseman, supra*, the OOR found that the direct interest participants, which included some of the third parties participating in the present appeal, did not meet their burden of proving that provider rates are exempt from disclosure pursuant to Section 708(b)(11). In making that determination, the OOR relied on *Lukes, supra*. In that case, decided under the prior Right-to-Know Law, the Commonwealth Court found that provider agreements disclosing payment rates did not constitute trade secrets. Specifically, the Court found:

> [T]here is no basis on upon which to conclude that the Provider Agreements, which the [insurance company] entered into with provider hospitals at the direction of DPW for the disbursement of public funds, are trade secrets. While the Interveners presented evidence that the Provider Agreements contain confidentiality provisions and are not known outside of the [insurance company and hospitals], a party that voluntarily participates in a public program and is receiving and disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded

> from public scrutiny. The threat of competition ... is insufficient to invoke an exemption ... from disclosure.

Id. at 626-27.

The third parties argue that the OOR incorrectly relied upon *Lukes* in *Eiseman,* and that, therefore, *Eiseman* should not apply to the present appeal. However, the OOR will not overturn *Eiseman* and instead finds that the reasoning in *Eiseman* is applicable to the present appeal. Here, like in *Eiseman*, the third parties have provided numerous affidavits attesting to the steps taken to keep the requested information secret and confidential. However, the third parties have not established that they would suffer "substantial harm" if this information was disclosed, or that the information derives economic value from not being generally known to competitors.

The third parties attest that they each take measures to keep rate information confidential. Further, the third parties attest that the "harm" that they will suffer if this rate information is released is competition from competitors. For example, the Croce, Sehi, Morsell, and Haraway affidavits attest that release of this rate information could: 1) enable competitors to "undercut" their businesses, and 2) "cause the providers [i.e., dentists] to seek higher rates." Likewise, the Cianfrocco, Hardy, and Hebert affidavits attest that disclosure of this rate information "would offer solid parameters by which competitors could refine their own pricing strategies in an effort to win business away." However, these affidavits go on to explain that "[r]ates vary by dental practice and are based on a variety of factors, including but not limited to the need for the practice in the network, the number of existing Medical Assistance enrollees that are patients of the practice, and the types of services rendered (i.e., general dentistry, pediatric dentistry, etc.)" and that "[t]he rates are also reevaluated and possibly renegotiated periodically."

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

disclosure." *See Lukes, supra*. The third parties have shown that the rates paid to dentists change periodically, or are at least "reevaluated." As such, there is no evidence demonstrating how disclosure of this information undermines the parties' present competitive positions or has present economic relevant or value, as the information may very well may be "outdated" by the time of its release. Accordingly, the OOR finds that the requested information does not constitute a trade secret or confidential proprietary information and that the third parties failed to meet the burden of proving that this information is exempt from disclosure pursuant to Section 708(b)(11) of the RTKL. *See* 65 P.S. § 67.708(a)(1); *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011) ("[W]e believe it equally appropriate under the law to place the burden on third-party contractors …"). Accordingly, the appeal is granted.

CONCLUSION

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

FINAL DETERMINATION ISSUED AND MAILED: May 7, 2013

APPEALS OFFICER
KYLE APPLEGATE, ESQ.

Sent to: James Eiseman, Jr., Esq. (via e-mail only);
Benjamin Geffen, Esq. (via e-mail only);
Leonard Crumb, Esq. (via e-mail only);
Andrea Bankes (via e-mail only);
Karl Myers, Esq. (via e-mail only)
Christopher Casey, Esq. (via e-mail only)

Exhibit E

HEALTHCHOICES AGREEMENT

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Concurrent Review — A review conducted by the PH-MCO during a course of treatment to determine whether the amount, duration and scope of the prescribed services continue to be Medically Necessary or whether any service, a different service or lesser level of service is Medically Necessary.

County Assistance Office (CAO) — The county offices of the Department that administer all benefit programs, including MA, on the local level. Department staff in these offices perform necessary functions such as determining and maintaining Recipient eligibility.

Cultural Competency — The ability of individuals, as reflected in personal and organizational responsiveness, to understand the social, linguistic, moral, intellectual and behavioral characteristics of a community or population, and translate this understanding systematically to enhance the effectiveness of health care delivery to diverse populations.

Daily Membership File — An electronic file in a HIPAA compliant 834 format using data from DPW/CIS that is transmitted to the Managed Care Organization on state work days. This 834 Daily File includes TPL information and is transmitted via the Department's PROMISe™ contractor.

Deliverables — Those documents, records and reports required to be furnished to the Department for review and/or approval pursuant to the terms of the RFP and this Agreement.

Denial of Services — Any determination made by the PH-MCO in response to a request for approval which: disapproves the request completely; or approves provision of the requested service(s), but for a lesser amount, scope or duration than requested; or disapproves provision of the requested service(s), but approves provision of an alternative service(s); or reduces, suspends or terminates a previously authorized service. An approval of a requested service which includes a requirement for a Concurrent Review by the PH-MCO during the authorized period does not constitute a Denial of Service.

Denied Claim — An Adjudicated Claim that does not result in a payment obligation to a Provider.

Department — The Department of Public Welfare (DPW) of the Commonwealth of Pennsylvania.

Deprivation Qualifying Code — The code specifying the condition which determines a Recipient to be eligible in nonfinancial criteria.

Developmental Disability — A severe, chronic disability of an individual that is:

- The service or benefit will, or is reasonably expected to, prevent the onset of an illness, condition or disability.

- The service or benefit will, or is reasonably expected to, reduce or ameliorate the physical, mental or developmental effects of an illness, condition, injury or disability.

- The service or benefit will assist the Member to achieve or maintain maximum functional capacity in performing daily activities, taking into account both the functional capacity of the Member and those functional capacities that are appropriate for Members of the same age.

Determination of Medical Necessity for covered care and services, whether made on a Prior Authorization,Concurrent Review, Retrospective Review, or exception basis, must be documented in writing.

The determination is based on medical information provided by the Member, the Member's family/caretaker and the Primary Care Practitioner, as well as any other Providers, programs, agencies that have evaluated the Member.

All such determinations must be made by qualified and trained Health Care Providers. A Health Care Provider who makes such determinations of Medical Necessity is not considered to be providing a health care service under this Agreement.

Member — An individual who is enrolled with a PH-MCO under the HealthChoices Program and for whom the PH-MCO has agreed to arrange the provision of Physical Health Services under the provisions of the HealthChoices Program.

Member Record — A record contained on the Daily Membership File or the Monthly Membership File that contains information on MA eligibility, managed care coverage, and the category of assistance, which help establish the covered services for which a Recipient is eligible.

Mental Retardation — An impairment in intellectual functioning which is lifelong and originates during the developmental period (birth to twenty-two (22) years). It results in substantial limitations in three or more of the following areas: learning, self-direction; self care; expressive and/or receptive language; mobility; capacity for independent living; and economic self-sufficiency.

Midwifery Practice — Management of the care of essentially healthy women and their healthy neonates (initial twenty-eight [28] day period). This includes intrapartum, postpartum and gynecological care.

transfer of information between the Department and the MCOs. The Department is currently using Information Resource Management (IRM) Standards.

Physical Health Managed Care Organization (PH-MCO) — A risk bearing entity which has an agreement with the Department to manage the purchase and provision of Physical Health Services under the HealthChoices Program.

PH-MCO Coverage Period — A period of time during which an individual is eligible for MA coverage and enrolled with a PH-MCO and which exists on CIS.

Physical Health (PH) Services — Those medical and other related services, provided to Members, for which the PH-MCO has assumed coverage responsibility under this Agreement.

Physician Incentive Plan — Any compensation arrangement between an MCO and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services furnished to Medicaid Recipients enrolled in the MCO.

Post-Stabilization Services — Medically Necessary non-emergency services furnished to a Member after the Member is stabilized following an Emergency Medical Condition.

Preferred Provider Organization (PPO) — A Commonwealth licensed person, partnership, association or corporation which establishes, operates, maintains or underwrites in whole or in part a preferred provider arrangement as defined in 31 Pa. Code 152.2.

Prescription for Pennsylvania (Rx for PA) — A set of integrated practical strategies for improving health care and containing costs for all Pennsylvanians. The core components are affordability, accessibility and quality.

Primary Care Case Management (PCCM) — A program under which the Primary Care Practitioners agree to be responsible for the provision and/or coordination of medical services to Recipients under their care.

Primary Care Practitioner (PCP) — A specific physician, physician group or a CRNP operating under the scope of his/her licensure, and who is responsible for supervising, prescribing, and providing primary care services; locating, coordinating and monitoring other medical care and rehabilitative services and maintaining continuity of care on behalf of a Recipient.

Primary Care Practitioner (PCP) Site — The location or office of PCP(s) where Member care is delivered.

Prior Authorization — A determination made by the PH-MCO to approve or deny payment for a Provider's request to provide a service or course of treatment of a specific duration and scope to a Member prior to the Provider's initiation or continuation of the requested service.

Prior Authorization Review Panel (PARP) — A panel of representatives from within the Department who have been assigned organizational responsibility for the review, approval and denial of all PH-MCO Prior Authorization policies and procedures.

Prior Authorized Services — In-Plan Services, the utilization of which the PH-MCO manages in accordance with Department-approved Prior Authorization policies and procedures.

PROMISe™ Provider ID — A 13-digit number consisting of a combination of the 9-digit base MPI Provider Number and a 4-digit service location.

Provider — A person, firm or corporation, enrolled in the Pennsylvania MA Program, which provides services or supplies to Recipients.

Provider Agreement — Any Department-approved written agreement between the PH-MCO and a Provider to provide medical or professional services to Recipients to fulfill the requirements of this Agreement.

Provider Appeal — A request from a Provider for reversal of a denial by the PH-MCO, with regard to the three (3) major types of issues that are to be addressed in a Provider Appeal system as outlined in this Agreement at Section V.K, Provider Dispute Resolution System. The three (3) types of Provider Appeals issues are:

- Provider credentialing denial by the PH-MCO;
- Claims denied by the PH-MCO for Providers participating in the PH-MCO's Network. This includes payment denied for services already rendered by the Provider to the Member; and
- Provider Agreement termination by the PH-MCO.

Provider Dispute — A written communication to a PH-MCO, made by a Provider, expressing dissatisfaction with a PH-MCO decision that directly impacts the Provider. This does not include decisions concerning medical necessity.

Provider Medical Assistance Identification Number (MAID #) — Unique identification number which was formerly assigned by the Department to each individual Provider, Provider Group and PH-MCO and which is required on Claim

and Encounter Data report forms. The MAID # was replaced by the PROMISe™ Provider ID.

Provider Reimbursement (and) Operations Management Information System electronic (PROMISe™) — A claims processing and management system implemented by the Department of Public Welfare that supports the Fee-for-Service and Managed Care Medical Assistance delivery programs.

Quality Management (QM) — An ongoing, objective and systematic process of monitoring, evaluating and improving the quality, appropriateness and effectiveness of care.

Recipient — A person eligible to receive Physical and/or Behavioral Health Services under the MA Program of the Commonwealth of Pennsylvania.

Recipient Month — One Recipient covered by the HealthChoices Program for one (1) calendar month.

Rejected Claim — A non-claim that has erroneously been assigned a unique identifier and is removed from the claims processing system prior to adjudication.

Related Parties — Any entity that is an Affiliate of the PH-MCO or subcontracting PH-MCO and (1) performs some of the PH-MCO or subcontracting PH-MCO's management functions under contract or delegation; or (2) furnishes services to Members under a written agreement; or (3) leases real property or sells materials to the PH-MCO or subcontracting PH-MCO at a cost of more than $2,500.00 during any year of a HealthChoices physical health contract with the Department.

Residential Treatment Facility (RTF) — A facility licensed by the Department of Public Welfare that provides twenty-four (24) hour out-of-home care, supervision and Medically Necessary mental health services for individuals under twenty-one (21) years of age with a diagnosed mental illness or severe emotional disorder.

Retrospective Review — A review conducted by the PH-MCO to determine whether services were delivered as prescribed and consistent with the PH-MCO's payment policies and procedures.

Routine Care — Care for conditions that generally do not need immediate attention and minor episodic illnesses that are not deemed urgent. This care may lead to prevention or early detection and treatment of conditions. Examples of preventive and routine care include immunizations, screenings and physical exams.

Rural — Consists of territory, persons and housing units in areas throughout the Commonwealth which are designated as having less than 2,500 persons, as defined by the U.S. Census Bureau.

School-Based Health Center — A health care site located on school building premises which provides, at a minimum, on-site, age-appropriate primary and preventive health services with parental consent, to children in need of primary health care and which participates in the MA Program and adheres to EPSDT standards and periodicity schedule.

School-Based Health Services — An array of Medically Necessary health services performed by licensed professionals that may include, but are not limited to, immunization, well child care and screening examinations in a school-based setting.

Special Needs — The circumstances for which a Member will be classified as having a special need will be based on a non-categorical or generic perspective that identifies key attributes of physical, developmental, emotional or behavioral conditions, as determined by DPW and as described in this Agreement at Section V.P, Special Needs Unit (SNU) and Exhibit NN, Special Needs Unit.

Special Needs Unit — A special dedicated unit within the PH-MCO's and the EAP contractor's organizational structure established to deal with issues related to Members with Special Needs.

Start Date — The first date on which Recipients are eligible for medical services under this Agreement, and on which the PH-MCOs are operationally responsible and financially liable for the provision of Medically Necessary services to Recipients.

Step Therapy — A form of automated Prior Authorization whereby one or more prerequisite medications, which may or may not be in the same drug class, must be tried first before a Step Therapy medication will be approved

Stop-Loss Protection — Coverage designed to limit the amount of financial loss experienced by a Health Care Provider.

Subcapitation — A fixed per capita amount that is paid by the PH-MCO to a Network Provider for each Member identified as being in their capitation group, whether or not the Member received medical services.

Subcontract — Any contract between the PH-MCO and an individual, business, university, governmental entity, or nonprofit organization to perform part or all of the PH-MCO's responsibilities under this Agreement. Exempt from this definition are salaried employees, utility agreements and Provider Agreements, which are not considered Subcontracts for the purpose of this Agreement and, unless

notification of the results of the review to BPI, Member, Provider(s) and CAO.

- Performing necessary administrative activities to maintain accurate records.
- Educating Members and Providers to the restriction program, including explanations in handbooks and printed materials.

MA Recipients have the right to appeal a restriction by requesting a DPW Fair Hearing. Members may not file a Complaint or Grievance with the PH-MCO regarding the restriction action. A request for a DPW Fair Hearing must be in writing, signed by the Member and sent to:

Department of Public Welfare
Office of Administration
Bureau of Program Integrity
Division of Program and Provider Compliance
Recipient Restriction Section
P.O. Box 2675
Harrisburg, Pennsylvania 17105-2675

Phone number: (717) 772-4627

3. Contracts and Subcontracts

PH-MCO may, as provided below, rely on subcontractors to perform and/or arrange for the performance of services to be provided to Members on whose behalf the Department makes Capitation payments to PH-MCO. Notwithstanding its use of subcontractor(s), PH-MCO accepts and acknowledges its obligation and responsibility under this Agreement:

a. for the provision of and/or arrangement for the services to be provided under this Agreement;

b. for the evaluation of the prospective subcontractor's ability to perform the activities to be delegated;

c. for the payment of any and all claims payment liabilities owed to Providers for services rendered to Members under this Agreement, for which a subcontractor is the primary obligor provided that the Provider has exhausted its remedies against the subcontractor; provided further that such Provider would not be required to continue to pursue its remedies against the subcontractor in the event the

subcontractor becomes Insolvent, in which case the Provider may seek payment of such claims from the PH-MCO. For the purposes of this section, the term "Insolvent" shall mean:

i. The adjudication by a court of competent jurisdiction or administrative tribunal of a party as a bankrupt or otherwise approving a petition seeking reorganization, readjustment, arrangement, composition, or similar relief under the applicable bankruptcy laws or any other similar, applicable Federal or State law or statute; or

ii. The appointment by such a court or tribunal having competent jurisdiction of a receiver or receivers, or trustee, or liquidator or liquidators of a party or of all or any substantial part of its property upon the application of any creditor or other party entitled to so apply in any insolvency or bankruptcy proceeding or other creditor's suit; and

d. for the oversight and accountability for any functions and responsibilities delegated to any subcontractor.

The above notwithstanding, if the PH-MCO makes payments to a subcontractor over the course of a year that exceed one-half of the amount of the Department's payments to the PH-MCO,the PH-MCO is responsible for any obligation by the subcontractor to a Provider that is overdue by at least sixty (60) days.

PH-MCO shall indemnify and hold the Commonwealth of Pennsylvania, the Department and their officials, representatives and employees harmless from any and all liabilities, losses, settlements, claims, demands, and expenses of any kind (including but not limited to attorneys' fees) which are related to any and all Claims payment liabilities owed to Providers for services rendered to Members under this Agreement for which a subcontractor is the primary obligor, except to the extent that the PH-MCO and/or subcontractor has acted with respect to such Provider Claims in accordance with the terms of this Agreement.

The PH-MCO must make all Subcontracts available to the Department within five (5) days of a request by the Department. All Contracts and Subcontracts must be in writing and must include, at a minimum, the provisions contained in Exhibit II of this Agreement, Required Contract Terms for Administrative Subcontractors.

Subcontracts which must be submitted to the Department for advance written approval are:

Any Subcontract between the PH-MCO and any individual, firm, corporation or any other entity to perform part or all of the selected PH-MCO's responsibilities under this Agreement. This provision includes, but is not limited to, contracts for vision services, dental services, Claims processing, Member services, and pharmacy services. This provision does not include, for example, purchase orders.

4. Lobbying Disclosure

The PH-MCO is required to complete and return a "Lobbying Certification Form" and a "Disclosure of Lobbying Activities Form" found in Exhibit JJ of this Agreement, Lobbying Certification and Disclosure.

5. Records Retention

The PH-MCO will comply with the program standards regarding records retention, which are set forth in Exhibit D, Standard Contract Terms and Conditions for Services, of this Agreement, except that, for purposes of this Agreement, all records must be retained for a period of five (5) years beyond expiration or termination of the Agreement, unless otherwise authorized by the Department. Upon thirty (30) days notice from the Department, the PH-MCO must provide copies of all records to the Department at the PH-MCO's site, if requested. This thirty (30) days notice does not apply to records requested by the state or federal government for purposes of fiscal audits or Fraud and/or Abuse. The retention requirements in this section do not apply to DPW-generated Remittance Advices.

6. Fraud and Abuse

The PH-MCO must develop a written compliance plan that contains the following elements described in CMS publication "Guidelines for Constructing a Compliance Program for Medicaid Managed Care Organizations and Prepaid Health Plans" found at www.cms.hhs.gov/states/fraud:

- Written policies, procedures, and standards of conduct that articulate the PH-MCO's commitment to comply with all Federal and State standards related to Medicaid MCOs.

SECTION VI: PROGRAM OUTCOMES AND DELIVERABLES

The PH-MCO must obtain Department's prior written approval of all Deliverables prior to the operational date of the Initial Term and throughout the duration of the Agreement unless otherwise specified by the Department. Deliverables include, but are not limited to: operational policies and procedures, required materials, letters of agreement, Provider Agreements, Provider reimbursement methodology, coordination agreements, reports, tracking systems, required files, QM/UM documents (See Exhibit M(3) of this Agreement, Quality Management/Utilization Management Deliverables), and referral systems.

The Department may require the MCO to resubmit for Department approval previously approved Deliverables, as needed, to conform to the Agreement or applicable law. Unless otherwise specified by the Department, previously approved deliverables remain in effect until approval of new versions. If the MCO makes changes to previously approved Deliverables, these Deliverables must be resubmitted for Department review and approval unless otherwise specified by the Department.

The Department may conduct on-site Readiness Reviews, for implementation of a new procurement or reprocurement, to document the PH-MCO's compliance with this Agreement. Additional information on Readiness Reviews can be found in Appendix 6 of this Agreement, Readiness Review Requirements.

SECTION VII: FINANCIAL REQUIREMENTS

A. Financial Standards

As proof of financial responsibility and adequate protection against insolvency in accordance with 42 CFR 438.116, the PH-MCO agrees to the requirements in Section VII.A.

1. Risk Protection Reinsurance for High Cost Cases

If this Agreement includes a High Cost Risk Pool, risk protection reinsurance is not required. Reinsurance is also not required if the PH-MCO has, at a minimum, a combined membership of 60,000 Members across all Pennsylvania lines of business.

a. If risk protection reinsurance is required, the reinsurance must cover, at a minimum, eighty (80) percent of Inpatient costs incurred by one (1) Member in one (1) year in excess

Business Days of the Department's request. Copies of such records must be mailed to the Department if requested.

D. Review of Records

1. The PH-MCO must make all records relating to the HealthChoices Program, including but not limited to the records referenced in this Section, available for audit, review, or evaluation by the Department, or federal agencies. Such records shall be made available on site at the PH-MCO's chosen location, subject to the Department's approval, during normal business hours or through the mail. The Department will, to the extent required by law, maintain as confidential any confidential information provided by the PH-MCO.

2. In the event that the Department or federal agencies request access to records, subject to this Agreement, after the expiration or termination of this Agreement or at such time that the records no longer are required by the terms of this Agreement to be maintained at the PH-MCO's location, but in any case, before the expiration of the period for which the PH-MCO is required to retain such records, the PH-MCO, at its own expense, must send copies of the requested records to the requesting entity within thirty (30) days of such request.

SECTION XIII: SUBCONTRACTUAL RELATIONSHIPS

A. Compliance with Program Standards

As part of its Contracting or Subcontracting, with the exception of Provider Agreements which are outlined in Section V.S.1 of this Agreement, Provider Agreements, the PH-MCO agrees that it must comply with the procedures set forth in Section V.O.3 of this Agreement, Contracts and Subcontracts and in Exhibit II, Required Contract Terms for Administrative Subcontractors.

The written information that must be provided to the Department prior to the awarding of any contract or Subcontract must provide disclosure of ownership interests of five percent (5%) or more in any entity or subcontractor.

All contracts and Subcontracts must be in writing and must contain all items set forth in this Agreement.

The PH-MCO must require its subcontractors to provide written notification of a denial, partial approval, reduction, or termination of service or

coverage, or a change in the level of care, according to the standards outlined in Exhibit M(1) of this Agreement, Quality Management and Utilization Management Program Requirements and using the denial notice templates provided in Exhibits N(1) – N(7) and Exhibits BBB(3) – (5), Standard and Pharmacy Denial Notices. In addition, all contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include the following provisions:

1. A requirement for cooperation with the submission of all Encounter Data for all services provided within the time frames required in Section VIII of this Agreement, Reporting Requirements, no matter whether reimbursement for these services is made by the PH-MCO either directly or indirectly through capitation.

2. Language which ensures compliance with all applicable federal and state laws.

3. Language which prohibits gag clauses which would limit the subcontractor from disclosure of Medically Necessary or appropriate health care information or alternative therapies to Members, other Health Care Providers, or to the Department.

4. A requirement that ensures that the Department has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients.

5. The definition of Medically Necessary as outlined in Section II of this Agreement, Definitions.

6. The PH-MCO must ensure, if applicable, that its Subcontracts adhere to the standards for Network composition and adequacy.

7. Should the PH-MCO use a subcontracted utilization review entity, the PH-MCO must ensure that its subcontractors process each request for benefits in accordance with Section V.B.1 of this Agreement, General Prior Authorization Requirements.

8. Should the PH-MCO subcontract with an entity to provide any information systems services, the Subcontract must include provisions for a transition plan in the event that the PH-MCO terminates the Subcontract or enters into a Subcontract with a different entity. This transition plan must include information on how the data shall be converted and made available to the new subcontractor. The data must include all historical Claims and service data.

The PH-MCO must make all necessary revisions to its Subcontracts to be in compliance with the requirements set forth in Section XIII.A of this Agreement, Compliance with Program Standards. Revisions may be completed as contracts and Subcontracts become due for renewal provided that all contracts and Subcontracts are amended within one (1) year of execution of this Agreement with the exception of the Encounter Data requirements, which must be amended immediately, if necessary, to ensure that all subcontractors are submitting Encounter Data to the PH-MCO within the time frames specified in Section VIII.B of this Agreement, Systems Reports.

B. Consistency with Policy Statements

The PH-MCO agrees that its agreements with all subcontractors must be consistent, as may be applicable, with Department of Health regulations governing HMO Contracting with Integrated Delivery Systems at 28 Pa. Code §§ 9.721 – 9.725 and Pennsylvania Insurance Department regulations at 31 Pa. Code §§ 301.301 – 301.314.

SECTION XIV: CONFIDENTIALITY

A. The PH-MCO must comply with all applicable federal and state laws regarding the confidentiality of medical records. The PH-MCO must also cause each of its subcontractors to comply with all applicable federal and state laws regarding the confidentiality of medical records. The PH-MCO must comply with the Management Information System and System Performance Review (SPR) Standards, available on the HealthChoices Intranet, regarding maintaining confidentiality of data. The federal and state laws with regard to confidentiality of medical records include, but are not limited to: Mental Health Procedures Act, 50 P.S. 7101 et seq.; Confidentiality of HIV-Related Information Act, 35 P.S. 7601 et seq.; 45 CFR Parts 160 and 164 (Standards for Privacy of Individually Identifiable Health Information); and the Pennsylvania Drug and Alcohol Abuse Contract Act, 71 P.S. 1690.101 et seq., 42 U.S.C. 1396a(a)(7); 62 P.S. 404; 55 Pa. Code 105.1 et seq.; and 42 CFR 431 et seq.

B. The PH-MCO must be liable for any state or federal fines, financial penalties, or damages levied upon the Department for a breach of confidentiality due to the negligent or intentional conduct of the PH-MCO in relation to the PH-MCO's systems, staff, or other area of responsibility.

C. The PH-MCO agrees to return all data and material obtained in connection with this Agreement and the implementation thereof, including confidential data and material, at the Department's request. No material can be used by the PH-MCO for any purpose after the expiration or termination of this