IN THE SUPREME COURT OF PENNSYLVANIA

No. 47 EAP 2014
(consolidated with Nos. 45 & 46 EAP 2014)

UNITEDHEALTHCARE OF PENNSYLVANIA AND HEALTHAMERICA PENNSYLVANIA,

Appellees,

v.

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

Appellants.

BRIEF OF APPELLEES UNITEDHEALTHCARE OF PENNSYLVANIA, HEALTHAMERICA PENNSYLVANIA, AND AETNA BETTER HEALTH

On Appeal from the February 19, 2014 Order of the Commonwealth Court, at No. 1950 CD 2012, Reversing the September 17, 2012 Final Determination of the Office of Open Records, at OOR Docket No. 2011-1098

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Appellees UnitedHealthcare of Pennsylvania, HealthAmerica Pennsylvania, and Aetna Better Health hereby submit their merits brief in this matter.

I. COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This case involves an application of the specific facts of this dispute to a statutory enactment. This matter therefore involves mixed questions of fact and law. In such cases, with respect to factual findings by the court below, this Court "will accept the [lower] court's conclusions insofar as they are supported by the record." Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John, ___ A.3d ___, 2014 WL 7088712, *11 (Pa. 2014) (citation omitted).[1] Further, "[t]he more fact intensive the inquiry, the more deference a reviewing court should give to the findings below." Gentex Corp. v. WCAB (Morack), 23 A.3d 528, 534 n.10 (Pa. 2011).

Appellants therefore misstate the applicable standard of review on page 3 of their brief. They claim this Court's review is

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[1] Of course, as to any purely legal determinations, the Court will consider those on a *de novo* basis. Id. at *11.

entirely *de novo*, citing this Court's Bowling decision as support. But the holding there pertained only to the *Commonwealth Court's* standard and scope of review in Right-to-Know Law cases. See Bowling v. Office of Open Records, 75 A.3d 453, 477 (Pa. 2013) ("We hold that the Commonwealth Court correctly held that ***its*** standard of review is *de novo* and that ***its*** scope of review is broad or plenary when it hears appeals from determinations made by appeals officers under the RTKL." (emphasis added)).

Consistent with Bowling, the Commonwealth Court exercised *de novo* and plenary review of the record evidence in this case. See Dep't of Pub. Welfare v. Eiseman, 85 A.3d 1117, 1127 (Pa. Commw. 2014) ("we exercise our independent judgment based on the current record"), at 1131 (stating same), and at 1122 n.10 (noting that Commonwealth Court will exercise independent judgment based on *de novo* review). Appellants even admit that the Commonwealth Court "decided the case on the basis of the record developed before the OOR." (Appellants' Br. at 6.)

This Court's review, on the other hand, is more narrow. As set forth above, this Court will defer to the factual findings of the Commonwealth Court, as long as they have record support.[2]

With respect to the applicable scope of review, this Court, in cases that present mixed questions of fact and law, will consider only the record as it was established below. See In re Condemnation by Urban Redevelopment Authority of Pittsburgh, 913 A.2d 178, 183 (Pa. 2006) ("With regard to such mixed questions, we announce that we will … review the whole record.").

Applying the correct standard and scope of review, this Court should hold that the Commonwealth Court's decision, which is well-supported by the evidence in the record, must be affirmed.

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[2] Appellants nevertheless suggest that this Court should review the record and issue its own findings of fact. (Appellants' Br. at 37-38 n.12.) This Court has never remotely suggested, let alone held, that it will entertain the notion that it could or should undertake to independently review the record and issue new factual findings in Right-to-Know Law cases. See, e.g., Bowling, 75 A.3d at 479 (Castille, C.J., dissenting) (asserting that reading the Right-to-Know Law to provide for error review by this Court "borders on the absurd and unreasonable," and opining that in such an instance the Court would "need to erect a screening mechanism to avoid the inevitable inundation of fact-bound appeals").

II. COUNTER-STATEMENT OF THE QUESTION INVOLVED

Does the record support the Commonwealth Court's factual finding that the rates paid by private health plans to dental sub-contractors constitute "confidential proprietary information" exempt from disclosure under section 708(b)(11) of the Right-to-Know Law?

Suggested answer: Yes.

III. COUNTER-STATEMENT OF THE CASE

A. Introduction

From the outset, it is important to emphasize what this case is *not* about. This dispute does not relate to any payments actually made by the Pennsylvania government. The Court therefore is not required to decide whether any amount of money or rate paid by any government entity can be withheld under the Right-to-Know Law. The health plans[3] (which have been referenced in this litigation as managed care organizations or "MCOs") did not seek this Court's review of the aspect of the Commonwealth Court's decision below finding that the

[3] The five health plans in this case are: (1) UnitedHealthcare of Pennsylvania; (2) HealthAmerica Pennsylvania (also known as CoventryCares); (3) Aetna Better Health; (4) Health Partners; and (5) Keystone Mercy Health Plan. The undersigned represents the first three.

rates paid by the Department of Public Welfare (now known as the Department of Human Services) are not exempt under the Right-to-Know Law. Those rates therefore are no longer at issue.

What this case *is* about is whether the Right-to-Know Law forces a private contractor to disclose the confidential and proprietary rates it pays to a sub-contractor. The Commonwealth Court, after meticulously studying the evidence presented in this case, found that the health plans had proved, by a preponderance of the evidence, that the rates they paid their sub-contractors constitute "confidential proprietary information" and hence are exempt from disclosure under the Law. The health plans submit this Court should affirm that conclusion, as it is supported by the record established below.

B. The HealthChoices Program

HealthChoices is the Commonwealth's Medical Assistance (also known as Medicaid) managed care program. The people enrolled in the program receive quality medical care and timely access to health services through a health plan of their choosing. The plans compete with one another to offer a superior product in order to obtain the highest number of enrollees. (R. 206a.)

The Department of Public Welfare administers the HealthChoices program by contracting with a number of health plans. (R. 209a-210a.) The contract includes confidentiality provisions requiring the Department to keep secret any health plan proprietary information that is shared between the parties as a result of their relationship. The agreement specifically provides that each health plan

> considers its financial reports and information, marketing plans, Provider rates, trade secrets, information or materials relating to the [health plan's] software, databases or technology, and information or materials licensed from, or otherwise subject to contractual nondisclosure rights of third parties, which would be harmful to the [health plan's] competitive position to be confidential information. This information shall not be disclosed by the Department to other parties except as required by law ….

(R. 843a-844a).

The Department pays each health plan a rate on a per-enrollee or headcount basis. (R. 211a-213a; 224a-225a.) These rates have been referenced in this case as "Capitation Rates." These rates are no longer in dispute in this litigation, and thus are not at issue before this Court.

The health plans, in turn, enter into sub-contractual arrangements with dental sub-contractors.[4] (R. 374a-375a, 492a.) The plans, like the Department, pay the sub-contractors on a per-enrollee basis. (R. 493a.) These rates have been referenced as the "MCO Rates." They are the only rates at issue before this Court.

The rates between any given health plan and any given dental sub-contractor will vary, and are periodically renegotiated, at significant time and expense. (R. 375a.) Further, the sub-contracts between the plans and sub-contractors uniformly require the protection of confidential proprietary information, and in their course of dealing, the parties routinely do so. (R. 493a.) Pursuant to those sub-contracts, and otherwise, the plans and sub-contractors treat the payment and rate information that pertains to their relationship as highly confidential.[5] (Id.)

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[4] UnitedHealthcare of Pennsylvania sub-contracts with Dental Benefit Providers ("DBP"), and HealthAmerica Pennsylvania (also known as CoventryCares) and Aetna Better Health sub-contract with DentaQuest. (R. 375a, 492a.)

[5] The dental sub-contractors, in turn, enter into sub-sub-contracts with the dentists (the providers). The sub-contractors negotiate separate payment terms with each dentist. This often assumes the form of a fee schedule, which provides for the dentist to be paid depending on the actual dental procedure he or she

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The rates paid by the health plans to the dental sub-contractors are not readily available outside – or even inside – the health plans. External reporting is limited to situations where such is required by law or by government directive; internal disclosure is limited to a business need to know. (R. 378a.) In this way, the plans can protect their competitive position, which is essential to meaningful choice for prospective enrollees.

C. Appellants' Right-to-Know Law Request

This case arises from a Right-to-Know Law request that appellants, an advocacy organization and one of its lawyers, directed to the Department. (R. 1a-4a.) As it is relevant here, appellants' request asked for documents showing the "MCO Rates" – the rates paid by the health plans to their dental sub-contractors for each HealthChoices enrollee under age 21. (R. 3a at ¶4.) The Department denied the request, in part because the rates are the health plans' confidential proprietary information. (R. 12a.)

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performs on a patient. Those rates, which have been described as "Provider Rates," are not at issue here, but are at issue in the related Eiseman II matter.

D. The Office of Open Records Proceedings

Appellants took an appeal from the Department's denial to the Office of Open Records. The health plans timely intervened pursuant to 65 P.S. §67.1101(c), and opposed disclosure of the rates they pay their sub-contractors. (R. 31a-34a, 57a-59a, 61a-72a.)

To decide the matter, the OOR held a two-day hearing.[6] (R1. 148a.) At the hearing, the health plans jointly put forward the sworn testimony of a recognized expert in the field, Dr. Henry Miller. He unequivocally testified, under oath, that the rates petitioners sought were kept secret and confidential by the plans, and that the plans would be harmed by the rates' disclosure. (R1. 280a-322a, 673a-679a.) In addition, each of the five health plans called a high-ranking and knowledgeable executive to provide sworn testimony that the rates were kept confidential and secret, and that public disclosure of the rates

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[6] Appellants do not argue that the OOR's decision is entitled to deference due to credibility findings made at that level. With good reason, as the OOR did not make any credibility assessments. Indeed, the appeals officer who decided the matter did not personally sit as hearing officer. The OOR instead hired an outside attorney to serve as hearing officer. He did not make any credibility determinations either.

would cause harm to the health plans. (See, e.g., R. 366a-416a, 429a-414a, 485a-512a.)

Appellants did not call any witnesses at the OOR hearing. Appellants therefore did not offer any testimony to rebut the six witnesses that were presented by the health plans.

Nevertheless, in spite of the unrebutted evidence presented by the health plans, the OOR decided that the rates paid by the health plans to their sub-contractors were not exempt from disclosure under the Right-to-Know Law.

E. The Commonwealth Court Reverses

The health plans each timely appealed to the Commonwealth Court. The *en banc* court, in a thorough 25-page ruling authored by Judge Robert Simpson and decided by a nearly-unanimous 6 to 1 vote, reversed in relevant part. See Dep't of Pub. Welfare v. Eiseman, 85 A.3d 1117 (Pa. Commw. 2014) ("Eiseman I"). The Commonwealth Court, consistent with this Court's Bowling directive, exercised *de novo* review of the record evidence in this case, which the court described as a "fact-intensive" dispute. Id. at 1120; see also id. at

1122 n.10 (citing Bowling), at 1127 ("we exercise our independent judgment based on the current record"), and at 1131 (stating same).

Based on its painstaking, independent review of the evidence, the Commonwealth Court held that the health plans' testimony (principally that of Dr. Miller) demonstrated, by a preponderance of the evidence, that the rates paid by the health plans to the dental sub-contractors constituted "confidential proprietary information," and hence were exempt from disclosure under the Right-to-Know Law.[7] Id. at 1127-31.

Appellants thereafter sought this Court's discretionary review, which was granted.

IV. SUMMARY OF ARGUMENT

This Court should affirm the Commonwealth Court. The court below struck a fair balance, requiring that the government-paid rates must be disclosed under the Right-to-Know Law, but that the confidential and proprietary rates that the private contractor health

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[7] On the other hand, the court ruled in favor of the appellants that the rates paid by the Department to the health plans (the "Capitation Rates") were subject to disclosure. Id. at 1124-27. The health plans did not seek this Court's review of that determination. Accordingly, that set of rates is no longer at issue.

plans pay to the dental sub-contractors need not be disclosed. The court below enforced the public's right to know what the government has paid for a program, while simultaneously preserving the health plans' abilities to compete in the marketplace by shielding their confidential competitive information from harmful disclosure. The palpable equity of the Commonwealth Court's decision mirrors the balance among competing interests that is reflected in the Right-to-Know Law itself.

The health plans did not ask this Court to review the Commonwealth Court's determination that the rates paid by the Department to the health plans are subject to disclosure. Those rates are no longer part of this case. In fact, the Department of Public Welfare has handed those rates over to appellants, as they expressly admit. (Appellants' Br. at 6 n.2.) Appellants therefore have fully achieved their objective of determining *exactly* how the Department spends money on HealthChoices.

Appellants nevertheless crave more information – this time not from the government, but from private contractors. But they fail to explain how or why meddling into the affairs of *private contractors* will help promote *government* transparency. Appellants merely espouse

platitudes and abstractions about "accountability" and the like, without offering any specifics as to how disclosure of contractor-paid rates will help hold any government actor "accountable." And given the wealth of information on HealthChoices already in the public domain, it appears disclosure of the rates here is totally unnecessary to appellants' unspecified end.[8] This Court has been given no legitimate reason to start down a path of potentially requiring all government contractors of every kind (including those contracting with judicial agencies) to divulge their confidential and proprietary pricing information.

Appellants nevertheless ask this Court to help them pry into the protected files of the health plans, regardless of how they might suffer as a consequence. Appellants seem to be enthusiastic about the possibility that the Court might help them obliterate the right to business confidences enshrined in the Right-to-Know Law by the General Assembly.[9] The Court obviously cannot do so, as the Law

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[8] A list of some examples of the many HealthChoices materials in the public domain is attached as the *Appendix* to this brief.

[9] This is not to mention the potential harm that could be inflicted on the taxpayers, in the form of increased cost of government programs, if rate confidentiality were to be eroded by this Court. (See, e.g., R. 225a-226a.)

specifically provides that private contractors, like the health plans, are entitled to protect their competitive information from damaging disclosure.

That is all the health plans have sought to do here: to protect their confidential pricing information, so they are able to effectively compete against each other in the market. They proved they were entitled to do so, to the satisfaction of the Commonwealth Court. Based on the unrebutted witness testimony – in particular, that of a recognized expert with over 40 years of experience in the field – the court below held the rates exempt. Appellants do not challenge the court's factual findings. Nor could they, as the health plans' testimony was strong and unequivocal, and was not rebutted by appellants with any competing witness testimony. The testimony therefore was properly weighed by the Commonwealth Court, in its appropriate exercise of *de novo* review of the record evidence, under the preponderance of the evidence standard.

Instead of actually addressing the evidence, appellants resort to a number of collateral attacks on the decision below. Not one has any merit. Appellants' arguments rely on a twisted reading of the

language of the Right-to-Know Law. They claim the Law must be read as requiring automatic or reflexive disclosure anytime a document has even the slightest connection to "public funds," even though the Law does not say that. Appellants also rely on a Commonwealth Court panel decision that was overruled by that court, and which was decided under the old version of the Law. These obviously are not good reasons to ignore the evidence presented in this case. Nor do appellants provide any other good reason to inflict competitive harm on the health plans.

For these reasons, as explained in detail below, this Court should affirm the Commonwealth Court.

V. ARGUMENT

A. The record supports the Commonwealth Court's finding that the health plans' rates are exempt from disclosure under the Right-to-Know Law.

This Court should affirm because the record supports the Commonwealth Court's finding below: that the rates paid by the private contractor health plans to the dental sub-contractors constitute "confidential proprietary information" under the Right-to-Know Law.

1. The Law exempts "confidential proprietary information" from disclosure.

Under the Right-to-Know Law, a record that "constitutes or reveals" "confidential proprietary information" is exempt from disclosure. 65 P.S. §67.708(b)(11). "Confidential proprietary information" is defined by the Law as:

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

65 P.S. §67.102.

A document therefore is exempt from disclosure under this provision if it is shown, by a mere preponderance of the evidence, that the two elements of (1) confidentiality and (2) competitive harm are present. See 65 P.S. §67.708(a)(1) (stating "preponderance of the evidence" standard); Dep't of Pub. Welfare v. Eiseman, 85 A.3d 1117, 1130-31 (Pa. Commw. 2014) ("Eiseman I") (noting that the preponderance of the evidence standard "is the lowest evidentiary standard, tantamount to a more likely than not inquiry" (citation

omitted)). The health plans submit that the record supports the Commonwealth Court's finding that this two-part test was satisfied as to the rates paid by the health plans to the sub-contractors.

a. The record supports the Commonwealth Court's finding that the health plans' rates are confidential.

As the Commonwealth Court correctly explained, the first part of the "confidential proprietary information" test necessitates an inquiry into the efforts the health plans undertook to keep the rates they paid secret. See Eiseman I, 85 A.3d at 1128. Here, the court found the health plans' evidence satisfied this requirement. Undertaking a careful and thorough review of the evidence, the Commonwealth Court explained that "[t]he individual [health plans] compete with each other for members, and they make efforts to maintain the secrecy" of the rates they pay. Id. In this regard, the Court pointed out that the plans "provide contractual protections with confidentiality provisions in the contracts with their [dental] [s]ubcontractors." Id. The court also pointed out witness testimony that the plans "guard" the contracts containing these rates, noting, for example, that Aetna Better Health keeps contract documents "under lock and key and limits electronic

copies." Id. The court further noted that the health plans provide confidentiality training to employees to protect these records. Id. Because these facts demonstrated the health plans treat the rates they pay as confidential, the court found the first element of the test satisfied. Id.

The Commonwealth Court's determination is supported by the record – and it is correct. Dr. Henry Miller, an expert in the field of managed care contract negotiations, unequivocally testified that the health plans "absolutely" consider their rate information to be proprietary and confidential. (R. 297a.) He explained that the plans undertake great efforts to maintain the rate information as confidential. (R. 290a.) He noted, for example, that the plans limit the number of individuals within each organization who can access the rates. (R. 291a-292a.) Moreover, he explained, security efforts and controls are put in place to limit the ability of a person to gain access to rate information. (R. 291a.) Dr. Miller expressed that he has never seen an instance where rate information was publicly released by a health plan. (R. 294a.) Indeed, in his experience, it is very difficult for anyone outside the organization to obtain that information. (R. 297a.)

For their part, the health plan executives provided extensive testimony respecting the confidential nature and treatment of the rates they pay the sub-contractors, including testimony that: the information is accorded such treatment in the contracts with the plans' sub-contractors; access to the rates is limited to a "need to know" basis; security measures are in place to protect the rates; and internal and external disclosure is prevented. (R. 370a-371a, 378a, 489a-490a, 843a-844a, 375a, 493a, 378a-379a, 380a-381a, 433a-436a, 494a-495a.)

Appellants, in their brief, do not challenge this aspect of the Commonwealth Court's decision. Nor could they, as appellants did not put on any testimony to rebut the testimony of the health plans' witnesses that the rates the plans pay are kept confidential. Accordingly, appellants have not given this Court any reason to reverse on this issue.

b. The record supports the Commonwealth Court's finding that disclosure of the health plans' rates would cause them competitive harm.

As the Commonwealth Court correctly described, the second part of the "confidential proprietary information" test required consideration of whether the health plans would suffer actual – or even

just "potential" – competitive harm from disclosure of the rates they pay the sub-contractors. See Eiseman I, 85 A.3d at 1128.

Here, once again, the court below found the health plans' evidence satisfied this requirement – in particular, the testimony of the health plans' expert, Dr. Henry Miller. As the court explained, Dr. Miller is a health care expert with 40 years of experience in the field. Id. at 1130. The court noted that Dr. Miller testified that the rates paid by the health plans "are valuable in the industry because of the investment required to maintain a competitive edge in gaining enrollees." Id. Further, according to Dr. Miller, "[t]he rates represent significant investments by each [plan]." Id. The court found Dr. Miller's testimony "persuasive," noting that "[h]e explained the highly competitive [health plan] [r]ates reflect pricing methodologies that are an essential part of the [health plans'] business models." Id.

The Commonwealth Court's assessment of Dr. Miller's testimony is supported by the record. Dr. Miller did, in fact, expressly testify that a breach of confidentiality would lead to competitive harm to the health plans. (R. 294a-295a.) And he testified that, in his experience, the health plans "absolutely" maintain they will sustain

harm to their competitive positions if their rate information were to be disclosed. (R. 297a.) That testimony is supported by the executives of the health plans, each of whom testified to the substantial competitive harm the plans would sustain if the rates were disclosed.[10] (R. 381a, 496a, 382a-383a, 294a-295a, 297a.)

Appellants, once again, do not take issue with the Commonwealth Court's finding that the second element of the "confidential proprietary information" exemption was satisfied here. This, again, is for good reason, as appellants did not offer any testimony to rebut this evidence.[11] Accordingly, there is no basis here for reversal.

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[10] The Commonwealth Court decided the executives' testimony in this respect should not be given significant weight. The plans disagree with this assessment, as the executives' testimony was unequivocal. But even if viewed to the contrary, it should be noted that even "potential" harm is sufficient to meet the second element of the test. See Eiseman I, 85 A.3d at 1128. Certainly the executives' testimony supports the "potential" for harm to the plans. The Commonwealth Court, in fact, conceded that the executives' testimony provided "some support" here. Id. at 1130. In any event, the health plans agree with the court below that the testimony of Dr. Miller is sufficient to satisfy the second element of the test, and therefore the plans' disagreement with the court's assessment of the executives' testimony ultimately is of no moment.

[11] In an apparent effort to remedy their failure to call any witnesses at the hearing, appellants have secured an *amicus curiae* brief from Dr. Daniel Polsky. Polsky posits merely that rate disclosure in the Medicaid arena is "needed." "Need," of course, is not a basis to override an exemption to disclosure under the Right-to-Know Law. Even if it was, Polsky does not reference any of the wealth of publicly-available materials available on HealthChoices (some of which are

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Based on its assessment of the evidence in this "fact-intensive" case, the Commonwealth Court found that the health plans had demonstrated, by a preponderance of the evidence (which the court below correctly described is "the lowest evidentiary standard"), that the "confidential proprietary information" exemption applies. See Eiseman I, 85 A.3d at 1120, 1130-31. The court concluded that "[t]he importance of the [health plan-paid rates] to each [plan's] business model, and continued financial vitality in the industry, weighs in favor of holding the information constitutes confidential proprietary information." Id. at 1131.

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listed in the *Appendix* to this brief), let alone explain why the available materials are inadequate to assess the program. In fact, Polsky's submission is not even specific to Pennsylvania; it mostly speaks to nationwide rate disclosure. And on the sole occasion when Polsky *does* reference something Pennsylvania-specific (Polsky Br. at 5 & n.6), the document he cites (which appellants, not coincidentally, also cite in their Eiseman II brief, which was filed the very same day) expressly contradicts his claim that rate disclosure is needed because of some deficiency in the HealthChoices program. See *Healthy Pennsylvania 1115 Application* (Feb. 19, 2014) (available at http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/c_071204.pdf), at 11 (stating, right after the sentence quoted by Polsky: "Through the use of private market health insurers, this [proposal] will seek to increase provider access."), and at 168 ("The Department believes that utilizing private market plans will leverage networks and pricing strategies broadly available in the commercial marketplace, thus increasing access for Healthy Pennsylvania participants.").

It is no wonder that the Commonwealth Court, presented only with one-sided testimony, found that the health plans had cleared the low bar set by the relevant evidentiary standard. It bears repeating: appellants *did not call a single witness in this case.* Appellants therefore offered nothing in response to the uniform witness testimony that the rates paid by the health plans are confidential and proprietary.

Because the record supports the factual findings of the Commonwealth Court, which exercised *de novo* review of the record under this Court's Bowling decision, this Court should find the Commonwealth Court's decision is entitled to deference and therefore should affirm. See Gentex Corp. v. WCAB (Morack), 23 A.3d 528, 534 n.10 (Pa. 2011) ("[t]he more fact intensive the inquiry, the more deference a reviewing court should give to the findings below").

B. Appellants' collateral arguments lack any merit.

Appellants do not – and cannot – mount any direct challenge to the factual findings made by the Commonwealth Court below. Instead of addressing the actual testimony and evidence in this case,

appellants resort to a series of technical attacks that are separate from the merits. These arguments are meritless.

1. The health plans' rates are not found in the Department's "financial records."

Appellants' principal point of collateral attack is claiming that the "confidential proprietary information" exemption does not apply because it is inapplicable to an agency's "financial records." (Appellants' Br. at 17-18); 65 P.S. §67.708(c).

It is worth noting, at the outset, that the agency "financial records" provision in section 708(c) previously was at issue principally with respect to the rates paid by the Department to the health plans – the "Capitation Rates." Indeed, the Commonwealth Court found those rates were found in the Department's "financial records," and thus were not subject to exemption. See Eiseman I, 85 A.3d at 1124. As previously noted, the health plans did not seek this Court's review as to the Department-paid rates. Those rates therefore are no longer at issue in this litigation, as appellants admit. (Appellants' Br. at 5.)

a. Appellants misread the "financial records" statutory language.

But appellants nevertheless try to extend the *agency* "financial records" provision to rates found in the *health plans'* records. This argument (echoed in Judge McCullough's lone dissent below) profoundly misapplies the statute's plain language. The Law expressly defines an agency's "financial records" solely as contracts dealing with disbursements "***by*** an agency" or an "***agency's*** acquisition, use or disposal of services." 65 P.S. §67.102 (emphasis added). There is nothing ambiguous about this language. The statutory definition does *not* say it covers disbursements "by an agency *or its contractors*." Nor does it say an "agency's *or contractor's* acquisition, use or disposal of services." Nor does it expressly include any disbursements that originated with an agency. The General Assembly could have written the statute using one of these alternative formulations (or some other formulation) if it had wanted the "financial records" language to reach the records appellants wish that definition to cover. But the Legislature did not do so. It instead defined an agency's "financial records" as only those showing the agency's ***own*** disbursements. It plainly does not cover disbursements by ***others*** – such as contractors

(like the health plans). Appellants are, in effect, asking for language to be grafted onto the statute. The Commonwealth Court properly refused to do so, instead applying its plain language. See Eiseman I, 85 A.3d at 1127.

b. Appellants' "flow" of "public money" argument results in an absurd reading of the "financial records" provision.

As the above discussion demonstrates, the General Assembly elected, through the agency "financial records" provision, to draw a line between an agency's "financial records," on the one hand, and records belonging to private parties, on the other hand. This delineation makes sense, as there are good reasons to deprive government agencies from asserting certain exceptions to disclosure, while preserving those exemptions for private parties.

Appellants nevertheless try to use an overbroad reading of the agency "financial records" language as a wedge to force open the records of private contractors, claiming that any private contractor document that could relate to the nebulous "flow" of "public funds" automatically is a "financial record" that must be disclosed. But appellants' reading of the statute, if endorsed by this Court, would

entirely eviscerate the eight exemptions included in the "financial records" provision found in section 708(c). Indeed, under appellants' reading of the statute, all a requestor would need to do to defeat any of these eight separate exemptions would be to establish some connection, however remote, to "public funds."

Clearly recognizing this internal flaw in their own argument, appellants contend that this Court should draw an arbitrary line terminating the reach of the "financial records" provision in this scenario at the point when the dentists spend the money. (Appellants' Br. at 25.) But why stop there? If, in appellants' view, the funds remain "public" even after they are spent by the Department, received by the health plans, paid by the health plans, received by the sub-contractors, paid by the sub-contractors, and received by the dentists, then why would those funds suddenly become "private" when paid out by the dentists? Indeed, if a dentist uses "public money" to pay for dental supplies that he or she has used to treat a HealthChoices enrollee, then under appellants' analysis, that, too, would involve "public money." Any number of patent absurdities result from appellants' reading of the statute and their arbitrary line-drawing.

There is no logical termination point to appellants' "public money" argument. By their logic, the funds should be "public" in perpetuity, regardless of where they go. Appellants have given this Court no good reason to draw the agency "financial records" line at the point when the dentists spend the money. They just arbitrarily chose that point, which conveniently suits their ends.

In any event, appellants' "financial records" argument is inconsistent with the statutory language. The language of section 708(c) mandates that funds lose their public character when they are paid by the government and enter the private sector. The Commonwealth Court correctly held accordingly.

c. Responsible sub-contractor language in the standard contract does not mean the health plans pay "public money.

Appellants also try to support their unsupportable reading of the "financial records" provision by claiming the standard HealthChoices contract shows the funds remain "public" in nature until they are spent by the dentists. (Appellants' Br. at 26-27.) But those provisions merely demonstrate that the Department sought to ensure that the health plans engaged responsible sub-contractors who would

appropriately provide for care. Those provisions do not somehow give the funds paid out by the Department some kind of public "aura" that is carried all the way to the dentists. That the Department took care to make sure that the HealthChoices program was executed properly simply does not change the character of the money it pays for the program.

d. The *Lukes* decision is bad law that can be safely ignored.

In an attempt to support its flawed "financial records" arguments, appellants point to the prior Commonwealth Court decision in Lukes v. Department Public Welfare, 976 A.2d 609 (Pa. Commw. 2009). (Appellants' Br. at 18-21.) But that decision makes for an exceptionally weak reed on which to rely, as that lower court decision applied the former version of the Right-to-Know Law, and it has been distinguished and overruled by the very court that decided it. And, in any case, the Lukes court's rationale is inapplicable under the new Law. Lukes should be summarily ignored by this Court.

First and foremost, this Court – the highest court in the Commonwealth of Pennsylvania – is under no obligation to follow a lower court decision, and therefore need not pay any attention to Lukes.

While appellants try to buttress Lukes by claiming this Court lent "ongoing vitality" to it in SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012), that simply is not the case. The issue in Yankees was whether the state agency possessed the requested records under the new Right-to-Know Law. In reference to Lukes, this Court simply said, in a single footnote, that its interpretation of the term "records" under the new Law was consistent with the prior Law. Id. at 1044 n.19. There is no "records" issue (or even an agency possession issue) in this Eiseman I case. The Yankees decision therefore does not lend any support for appellants' attempt to rehabilitate Lukes here.

Second, the Commonwealth Court previously held on more than one occasion that its Lukes decision is irrelevant to cases under the new Right-to-Know Law.[12] See In re: Silberstein, 11 A.3d 629, 632 n.8 (Pa. Commw. 2011); Office of the Budget v. OOR, 11 A.3d 618, 622-23 (Pa. Commw. 2011). Even the Lukes opinion *itself* disclaims any precedential value under the new Right-to-Know Law. Lukes, 976 A.2d

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[12] In a footnote, appellants try to avoid the Silberstein and Office of the Budget decisions by claiming they dealt only with agency possession. (Appellants' Br. at 19 n.7.) But the same is true of the Yankees decision. Appellants are trying to have it both ways.

at 612 n.1 (noting that the prior law's provisions "have since been repealed and replaced by" the new Law, and stating that "[t]he sections of the Law referenced in this Opinion reflect the text of the repealed law"). And, of course, in this case, the Commonwealth Court expressly rejected Lukes' application here, and even went so far as to expressly overrule it, holding it "is no longer valid in cases under the current RTKL." Eiseman I, 85 A.3d at 1127.

Third, Lukes does not, and cannot, speak to the "confidential proprietary information" exemption of the new Right-to-Know Law, as that exemption did not exist under the prior version of the Law. As explained above, the "confidential proprietary information" exemption was the crux of the Commonwealth Court's decision in this case. Thus, Lukes simply does not offer any insight on the very exemption that was the focus of the decision below.

Fourth and finally, and most importantly, this Court should not apply Lukes because its rationale cannot be squared with the new Law. The court in Lukes refused to hold the requested records exempt on trade secrecy grounds for two reasons: (1) because a party that participates in a "public program" "has no legitimate basis to assert

that these activities are private"; and (2) because "[t]he threat of competition … is insufficient to invoke an exemption under the Law from disclosure." See Lukes, 976 A.2d at 626-27. Those assertions, which were not supported with citations to any authority, have no basis in the new Law. There is no automatic disclosure requirement contained in the new Right-to-Know Law anytime "public funds" are involved. Further, if it were true that the threat of competition never can justify exempting records from disclosure, then the "trade secret" and "confidential proprietary information" exemptions would be doomed, as the threat of unfair competition is *precisely* what those exemptions are designed to protect against. Thus, whatever the merits of the Lukes decision under the old Law and the associated older decisions referenced by appellants (Appellants' Br. at 21-24), it certainly cannot be justified under the new version of the Right-to-Know Law.[13] This Court can, and should, ignore that decision completely.

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[13] Appellants relatedly complain that the decision below holds exempt records that would not have been exempt under the old Law. (Appellants' Br. at 21.) That claim is predicated on the erroneous Lukes decision. In any event, there is no support for the notion that the old Law sets some kind of mandatory "floor" for disclosure that has to be laminated onto the new version of the Law.

2. Appellants erroneously focus on the Commonwealth Court's alternative "trade secret" rationale.

In a lengthy and convoluted argument full of histrionics about "grave error," appellants take the Commonwealth Court to task for its alternative finding that the rates paid by the health plans to the dental sub-contractors are exempt under the Uniform Trade Secrets Act. (Appellants' Br. at 30-37.) But the court's passing discussion of the Act was just two paragraphs long and merely noted, in "moreover" fashion, that many of the same reasons supporting application of the "confidential proprietary information" exemption also would support application of the Trade Secrets Act. Eiseman I, 85 A.3d at 1131. It is strange that appellants spend page after page of their brief attacking the Commonwealth Court's briefly-stated alternative rationale, but have virtually ignored the court's central finding – that the "confidential proprietary information" exemption applies. In any event, regardless of appellants' misdirected focus, the court's alternative

finding that the Trade Secrets Act applies was fair, and it was correct.[14] It therefore provides no basis to reverse.[15]

3. The requested rates are not "stale."

Appellants further claim the rates in question cannot have competitive value because they are "stale" or "too old." (Appellants' Br. at 38-40.) There is no support for this argument.

For starters, the Right-to-Know Law does not have a "too old" provision – and with good reason. If it did (or if the Court were to read one into it) problematic consequences likely would result. For instance, requestors would be incentivized to manipulate the process by engaging in protracted litigation in the hopes of "running out the clock" on an exemption.[16]

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[14] The Trade Secrets Act was properly considered by the court below because the Right-to-Know Law exempts from disclosure records "exempt from being disclosed under *any other Federal or State law*." 65 P.S. §67.102 (definition of "public record"); see also Eiseman I, 85 A.3d at 1124-25.

[15] Even if one were to assume the absence of the Trade Secrets Act discussion in the opinion below, or even presume (incorrectly) that the court's conclusion on this issue was in error, neither would have changed the outcome below. Nor should it here.

[16] Appellants' "too old" argument also raises thornier questions. Could an individual's psychiatric records become "too old" to implicate privacy concerns?

Moreover, there is no record support for appellants' claim that historical rates are "stale" because the rates fluctuate too much to have "predictive value." To the contrary, the health plans' witnesses testified that prior years' rates *do* predict future rates and *do* have competitive value. (See, e.g., R. 403a-404a, 496a, 501a, 509a-510a.) Indeed, the fact that rates are the subject of an intense annual negotiating process illustrates the secrecy of these rates and their critical nature to any ability to compete in this marketplace. (See, e.g., R. 403a.) Further, as the Commonwealth Court correctly determined, Dr. Miller "did not differentiate" between older and newer rates in his testimony respecting the competitive harm that would occur from disclosure. Eiseman I, 85 A.3d at 1130. Thus, the court below correctly found that the only difference between the current and older rates is "the passage of time," but that the older rates are no less entitled to exemption. Id.

4. Appellants' "genie" argument is a red herring.

Appellants' final argument is that the health plans have not kept their rates sufficiently secret because several of them hired the

same dental sub-contractor, DentaQuest.[17] (Appellants' Br. at 40-43.) There is no support for this argument, either.

Appellants' contention lacks any record support, as the health plans' witnesses uniformly and unequivocally testified that DentaQuest is obligated to keep all rates confidential. (R. 493a, 333a, 432a-433a, 516a-517a.) Thus, contrary to appellants' naked contention, DentaQuest is required to maintain the confidentiality of the rates paid to it by each plan, notwithstanding the fact that it has separate relationships with more than one health plan.[18] Were DentaQuest to internally share the rates paid by each plan, such would appear to be a breach of contract. Appellants obviously have not established, with

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[17] As appellants correctly admit, this argument does not apply to UnitedHealthcare of Pennsylvania, as it does not use the same sub-contractor as any other health plan.

[18] It is not hard to figure how DentaQuest might do so. It could use separate negotiating teams for each plan. Certainly it has that capacity, as it is the third largest dental benefits administrator in the country, with seven locations and a thousand employees. See http://www.dentaquest.com/ (visited Jan. 20, 2014). While appellants complain about a purported lack of evidence on this point, the evidence showed DentaQuest is contractually obligated to maintain confidentiality. In contrast, there is no evidence to back up appellants' claim that DentaQuest internally pools the rates paid by each plan, in violation of confidentiality requirements.

record evidence, that DentaQuest has breached its contracts with the health plans.

Perhaps more importantly, appellants' argument is a red herring. Just because one sub-contractor has been hired by more than one health plan does not change the competitive value that the plans *themselves* place in the rates. Each plan does not know what any other is paying DentaQuest, the sub-contractor. While that knowledge might help the *DentaQuest's* bargaining position, the plans *still* keep their competitive positions vis-à-vis *each other* by keeping the rates they pay secret *from each other*. The existence of a common sub-contractor thus is of no moment. The Commonwealth Court quickly recognized as much, and dispensed with appellants' argument in a footnote. Eiseman I, 85 A.3d at 1128 n.15.

VI. CONCLUSION

For the foregoing reasons, appellees UnitedHealthcare of Pennsylvania, HealthAmerica Pennsylvania, and Aetna Better Health respectfully request that this Honorable Court affirm the decision of the Commonwealth Court.

Respectfully submitted,

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APPENDIX

EXAMPLES OF PUBLIC INFORMATION ABOUT THE HEALTHCHOICES PROGRAM

- The standard form HealthChoices contract is publicly posted on the Department of Public Welfare's website. See http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/p_040149.pdf.

- The Department maintains a website devoted to publications disclosing a wealth of information about the HealthChoices program. Included are performance reports, consumer guides, rate charts, and external reports for each of the health plans participating in the program. See http://www.dhs.state.pa.us/publications/healthchoicespublications/.

- The Department has posted archival data from 2003 to present, listing the specific number of people, on a month-to-month basis, that have enrolled in particular Department programs, including children that have been provided with medical assistance. See http://listserv.dpw.state.pa.us/ma-food-stamps-and-cash-stats.html.

- The Pennsylvania government conducts audits and other reviews of the HealthChoices program, as well as each of the participating health plans. These materials depict the efficient and satisfactory operation of the program and plans, in particular as to the children's dental portion of the program.

    - For example, an extensive and exhaustive External Quality Review Report is publicly posted on the Department's website for the overall program and each of the participating plans. See, e.g., 2013 External Quality Review Report, Statewide Medicaid Managed Care Annual Report, Dep't of Pub. Welfare (Sept. 12, 2014) (providing specific facts and figures concerning the dental aspect of the program) (available at: http://www.dhs.state.pa.us/cs/groups/webcontent/documents/report/c_102845.pdf).

- Other reviews, reports and presentations supply a wealth of relevant information and demonstrate the success of the program. See, for example:

  - HealthChoices MCO Pay for Performance (P4P) Program, Seven Year Progress Review, July 2005 – December 2011, Dep't of Pub. Welfare (June 2013) – stating that average number of dental visits by children in HealthChoices increased every year from baseline 2008, and that the weighted average of such visits exceeded a national benchmark (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/communication/s_002207.pdf).

  - HealthChoices Performance Trending Report 2013, Office of Medical Assistance Programs, Division of Quality and Special Needs Coordination (Dec. 2013) – showing 82.6% overall satisfaction rate for children's health plans in HealthChoices (available at http://www.dpw.state.pa.us/cs/groups/public/documents/communication/s_002193.pdf).

  - ACCESS Plus and HealthChoices Consumer Assessment of Healthcare Providers and Systems (CAHPS) Measure Results (Mar. 21, 2011) – showing customer satisfaction for children with HealthChoices plans to be at or above benchmarks (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/presentation/p_011345.pdf).

  - HealthChoices Examination Guide, Behavioral & Physical Health, Dep't of Pub. Welfare (Dec. 2013) – providing mandatory standards for independent public accountants conducting mandated reviews of HealthChoices plans (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/c_074806.pdf).

- A privately commissioned study also showed significant cost savings to taxpayers as a result of implementation of HealthChoices. See An Evaluation of Medicaid Savings from Pennsylvania's HealthChoices Program, The Lewin Group (May 2011) (available at: http://www.lewin.com/publications/publication/439).

- The Department's 2014-15 budget presentation states that, "[b]ased on the success of its Medicaid managed care program, HealthChoices, the Department expanded statewide to all counties of the Commonwealth in March of 2013." Department of Public Welfare, Fiscal Year 2014-15 Executive Budget (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/p_040123.pdf).

CERTIFICATE OF COMPLIANCE

I, Karl S. Myers, certify that this brief complies with the length limitation of Pa.R.A.P. 2135 because this brief contains 7,186 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135.

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