IN THE

Supreme Court of Pennsylvania

EASTERN DIVISION

No. 46 EAP 2014

James Eiseman, Jr. and the Public Interest Law Center of Philadelphia,

Appellants,

v.

Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest LLC,

Appellees.

BRIEF OF APPELLEES HEALTH PARTNERS OF PHILADELPHIA, INC., KEYSTONE MERCY HEALTH PLAN and DENTAQUEST LLC

Nos. 45 EAP 2014, 46 EAP 2014 and 47 EAP 2014: Consolidated Appeals from the Order of the Commonwealth Court No. 945 CD 2013, Reversing in part the Final Determination of the Office of Open Records, at OOR Docket No. 2012-1098.

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Answer of the Office of Open Records: No

Answer of the Commonwealth Court: Yes

Suggested Answer: Yes

2. Whether Section 708(c) of the RTKL, which precludes the application of the exemptions from disclosure enumerated in Section 708(b) to "financial records," requires disclosure of documents which would otherwise be protected from disclosure by the PUTSA.

Answer of the Office of Open Records: Yes

Answer of the Commonwealth Court: No

Suggested Answer: No

3. Whether the capitated payment rates privately negotiated between an MCO and a subcontractor for the provision of dental services to participants in the

Commonwealth's Medicaid Program are "financial records" as defined in the RTKL.

Answer of the Office of Open Records: Yes

Answer of the Commonwealth Court: No

Suggested Answer: No

4. Whether the capitated payment rates privately negotiated between an MCO and a subcontractor for the provision of dental services to participants in the Commonwealth's Medicaid Program constitute confidential, proprietary information or trade secrets?

Answer of the Office of Open Records: No

Answer of the Commonwealth Court: Yes

Suggested Answer: Yes

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

This case involves an application of the specific facts of this dispute to a statutory enactment. The issues therefore involve 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). Further, "[t]he more fact intensive the inquiry, the more deference a reviewing court should give to the findings below."[1] *Gentex Corp. v. WCAB (Morack)*, 23 A.3d 528, 534 n.10 (Pa. 2011). As to pure legal determinations, the Court will consider those on a *de novo* basis. *St. John*, 2014 WL 7088712, *11.

With respect to the applicable scope of review, this Court, in cases (like this one) 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

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[1] Appellants therefore have misstated the applicable standard of review. They rely on this Court's decision in *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013), to support their claim that review here is *de novo* (Appellants' Br. at 3), but that decision addressed only the *Commonwealth Court's* standard and scope of review in Right-to-Know Law cases. *Bowling* 75 A.3d at 477 ("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)). In contrast to the Commonwealth Court, which exercised *de novo* review, this Court will defer to the factual findings of the Commonwealth Court.

questions, we announce that we will ... review the whole record"). As the Commonwealth Court noted, this case presents "a highly fact-specific inquiry that cannot be distilled to a pure matter of law." Commonwealth Court Opinion ("Opinion") at 13.

Applying the above standard and scope of review, this Court should affirm the Commonwealth Court's decision, because it is well-supported by the evidence in the record.

COUNTER-STATEMENT OF THE CASE

This case involves the provision of dental services in one region, the Southeast Zone, of Pennsylvania's Medicaid managed care program called "HealthChoices." Under HealthChoices, the Pennsylvania Department of Public Welfare ("DPW") has standard contracts with five managed care organizations (MCOs) to provide health care services, including dental services, to their enrollees. The MCOs compete with each other for HealthChoices enrollees in the Southeast Zone.

Pursuant to their contracts with DPW, the MCOs are required to establish and maintain a provider network so as to ensure access to medical care, including dental care, for the Medicaid beneficiaries enrolled with their respective health plans. Pursuant to the contracts, DPW pays each MCO a per member, per month amount, called a "capitation rate." The capitation rate covers all medical and dental services that are required to be provided by the MCO under HealthChoices, and does not separately itemize the monthly cost for particular services, such as dental services, made available to HealthChoices patients.

The MCOs ensure access to dental care by, primarily, independently contracting with third parties who, in turn, develop and contract with dental provider networks. Four of the MCOs contract with DentaQuest, while United contracts with Dental Benefit Providers. DentaQuest and Dental Benefit Providers

each contract independently with the members of their provider networks. The MCOs pay their subcontractors a separately negotiated per member, per month rate for the services they provide pursuant to those contracts. In turn, the subcontractors pay their dental providers for services rendered to the MCOs' enrollees.

On June 17, 2011, the requesters, Appellants here, submitted a request (the "Request") to DPW pursuant to the RTKL. The Request sought, for the period January 1, 2008 to June 15, 2011, the following documents: (1) "Each and every document, including correspondence and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid MCO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age," and (2) "Each and every document, including correspondence and appendices, in DPW's possession, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid MCO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania." Commonwealth Court Opinion ("Opinion") at 2.

On July 25, 2011, DPW responded to the Request, granting it in part and denying it in part. Pertinent to the issues involved here, DPW denied the Request

to provide documents showing either DPW's capitation rates or the rates agreed to between the MCOs and their dental subcontractors. On or about August 15, 2011, Appellants appealed the partial denial of the Request to the Office of Open Records ("OOR"). On or about August 31, 2011, the MCOs sought permission to participate in the OOR appeal, which was granted.

The OOR conducted an evidentiary hearing on May 21 and 22, 2012. At the hearing, each of the MCOs presented testimony concerning the steps they take to protect the confidentiality of the privately negotiated rates they pay to their dental subcontractors (the "MCO rates"). The MCO witnesses testified that they keep their rates confidential. *Id.* at 4. In addition, the MCOs presented the testimony of an expert witness, Henry Miller, Ph.D., who testified concerning the confidential treatment of such information in the healthcare industry. Dr. Miller testified that in his more than 40 years in the healthcare industry he has not seen rate information disclosed outside the MCOs, and that disclosure of the rates would reduce the value of the MCOs' considerable investment in negotiating favorable rates. *Id.* at 5. Appellants did not present any testimony or affidavits at the hearing. *Id.*

Following the hearing, the OOR granted the appeal. In its Final Determination of September 17, 2012, the OOR ruled that (1) records containing DPW's capitation rates are "financial records," and therefore cannot be withheld under the RTKL exemptions for "trade secrets" or "confidential proprietary

information," (2) records containing the privately negotiated MCO rates cannot meet the definition of "trade secrets," relying on *Lukes v. Dep't. of Public Welfare*, 976 A.2d 609 (Pa.Cmwlth. 2009); and (3) the MCOs had not carried their burden of proving that the records containing the MCO rates constituted "confidential proprietary information."

DPW and the MCOs appealed the OOR Final Determination to the Commonwealth Court. The Commonwealth Court ordered these consolidated appeals to be argued with the appeals from a companion decision of the OOR permitting disclosure of the rates paid by the MCOs subcontractors, DentaQuest and Dental Benefit Providers, to their network providers (the "Provider rates"). The *en banc* Commonwealth Court heard oral argument on October 9, 2013.

In its Opinion dated February 19, 2014, the Commonwealth Court, after conducting its own "independent review of the evidentiary record created below" (Opinion at 1) affirmed in part and reversed in part the OOR's ruling. Calling the case "fact-intensive," the Commonwealth Court held as follows:

- Documents containing the MCO rates are not "public records," distinguishing and overruling *Lukes*. Opinion at 14-15.[2]

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[2] The Commonwealth Court held that DPW's capitation rates are not protected from disclosure by the RTKL or the PUTSA and must be disclosed. Opinion at 8-14. No further appeal has been taken with respect to those rates and they are not at issue in this appeal.

- The MCO rates meet the definition of "confidential proprietary information," based upon the testimony at the hearing before the OOR, and therefore documents containing those rates must be protected from disclosure. Opinion at 16-23.

- The same evidence at the hearing established that the MCO rates qualify as "trade secrets." Opinion at 23.

Appellants' Petition for Allowance of Appeal was filed and served on March 20, 2014. Also that day, Appellants filed a similar Petition, challenging the Commonwealth Court's ruling that the Provider rates are likewise protected from disclosure under the RTKL.

By orders dated October 23, 2014, this Court granted both petitions, and directed that the appeals be argued together.

SUMMARY OF ARGUMENT

The operative provisions of the RTKL provide for disclosure of "public records" as that term is defined in Section 102, 65 P.S. §67.102. A public record is a "record, including a financial record, of a Commonwealth" agency that is neither "exempt under section 708" of the RTKL nor "exempt from being disclosed under any other" law. *Id.*

By its terms, the RTKL gives priority to other applicable law, such as the PUTSA, in determining whether information is subject to disclosure. Moreover, the documents in dispute, contracts embodying the rates privately negotiated between the MCOs and their subcontractors for the provision of dental services, are not "public records" of DPW and, therefore, subject to disclosure under the RTKL. No complex statutory construction is required to reach that result.

The documents in question evidence private transactions between the MCOs and their dental subcontractors. They are not in the possession of DPW, and do not constitute "financial records" of the DPW.

Even if the documents were otherwise considered records of the agency, the Legislature has made clear in the express wording of the RTKL that the RTKL is not intended to eviscerate the existing exemption (or protection) from disclosure of any record under any other Federal or State law. 65 P.S. §§67.102, 306, 701 and 3101.1. In this case, after a careful analysis of a robust factual record by the

Commonwealth Court, documents containing the MCO rates and the separate Provider rates were found to embody trade secrets. This factual determination by the Commonwealth Court, and application of the PUTSA, required its determination that the documents were neither "public records" nor "financial records" as defined in the RTKL.

Appellants' reliance on the language of Section 708(c) of the RTKL, which denies the list of 30 exemptions in Section 708(b) to "financial records," does not require a different result for two reasons. First, the documents in question are not "financial records" as defined in Section 102 of the RTKL. Second, Appellants' characterization of these private documents as "financial records" of DPW does not alter the conclusion that because these materials are protected under another law, such as the PUTSA, such documents may not be disclosed under RTKL.

Accordingly, the rules of statutory construction, which Appellants seek to invoke to obtain access to these private documents, actually require the conclusion reached by the Commonwealth Court here, namely, that the provisions of the RTKL mandating deference to other applicable law in determining whether or not a document may be disclosed are controlling.

ARGUMENT

I. This Commonwealth Court Properly Held That the RTKL Does Not Permit Disclosure of the MCO Rates.

A. The RTKL Unambiguously Preserves the Protections Against Disclosure Provided by other Law, including the Pennsylvania Uniform Trade Secrets Act

1. The RTKL Explicitly Recognizes the Primacy of Other Legislation in Determining Whether Specific Information is Subject to Disclosure.

The RTKL provides for the disclosure, under specified circumstances, of public records, legislative records or financial records of Commonwealth or local agencies. In a number of its sections, the RTKL clearly articulates the Legislative intent that documents that are protected from disclosure under some other law are not made subject to disclosure by provisions of the RTKL.

These provisions include Section 102 of the RTKL, where the Legislature defined terms that are critical to the issues presented here.

> "**Public record.**" A record, including a financial record, of a Commonwealth or local agency that:
>
> (1) is not exempt under section 708;
>
> (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or
>
> (3) is not protected by privilege.

§65 P.S. §67.102.

Thus, a "record" exempt from disclosure either under section 708 of the RTKL or under any other Federal or State law, does not qualify as a "public record" subject to disclosure under the RTKL.

Section 306 of the RTKL reaffirms the Law's intent by providing:

> Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.

65 P.S. §67.306.

The import of other laws is reiterated in Section 701 of the RTKL, which states:

> *Unless otherwise provided by law*, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act.

65 P.S. §67.701(a). (emphasis supplied.)

Finally, Section 3101.1 of the RTKL provides:

> If the provisions of this act regarding access to records conflict with any other federal or state law, the provisions of this act *shall not apply*.

65 P.S. §67.3101.1 (emphasis supplied.)

Accordingly, to the extent that any other State or Federal law protects or otherwise regulates the disclosure of a record, it is not subject to disclosure under the RTKL.

2. The Pennsylvania Uniform Trade Secrets Act Applies and Protects the Documents at Issue from Disclosure.

As the Commonwealth Court noted in its opinion: "The Trade Secrets Act protects against misappropriation of trade secrets, which includes disclosure without consent. 12 Pa. C.S. §5302. This Court recognized the Trade Secrets Act as a statutory exemption from disclosure in *Parsons v. Pennsylvania Higher Education Assistance Agency*, 910 A.2d 177 (Pa. Cmwlth. 2006)." Opinion at 12.

The Commonwealth Court, after a thorough discussion of the "extensive factual record" before it, concluded that the rates paid by the MCOs to their subcontractors [the MCO Rates] are both (1) confidential and proprietary and (2) trade secrets, within the meaning of Section 708(11) of the RTKL and PUTSA.

As will be explained in greater detail below, the Commonwealth Court's fact-based determination is entitled to deference here and must be accepted so long as it is supported by substantial evidence. The Commonwealth Court's opinion clearly identifies and analyzes the substantial evidence that supports its conclusion. Opinion at 19-23.

B. The Commonwealth Court Correctly Found that the MCO Rates are not "Financial Records" and then Properly Found that the MCO Rates Are Confidential, Proprietary and Trade Secret Information.

The Commonwealth Court also properly held that the MCO Rates are not "financial records" as defined in the RTKL "because they are not contained in

contracts of a Commonwealth agency and do not involve disbursement of funds by a Commonwealth agency." Opinion at p. 14. The Commonwealth Court reached this conclusion by pointing out that the definition of "financial records" in Section 102 of the current law applies to contracts dealing with "disbursement of funds by an agency" rather than with funds which passed from an agency to its contractors and then were passed on to others.

Far from being mere conduits of public funds, the MCOs act as risk-bearing entities, responsible for providing all covered medical services, including dental services, to their members. Whether those services can be delivered at more or less cost to the MCO directly impacts the bottom-line of the MCO, not the finances of the Commonwealth.

Upon determining that the MCO rates are not "financial records," the Commonwealth Court applied the evidence presented at the OOR hearing to conclude that the requirements of Section 708(b)(11) were applicable, and that the MCO rates were exempt from disclosure. The Commonwealth Court's decision was supported by substantial, unrebutted testimony. Opinion at 16-23. The Commonwealth Court carefully analyzed all of the evidence presented by the MCOs before the OOR, which evidence clearly established that the MCOs treat the MCO rates as confidential information and that their disclosure would cause substantial harm.

The Commonwealth Court's evaluation included an analysis of the testimony of the MCO employees with a particular eye toward whether such testimony was sufficiently specific to prove that the competitive harm was "substantial." The Commonwealth Court recognized that the testimony provided support for non-disclosure, and found that the balance was tipped by the expert testimony of Dr. Henry Miller, a consultant with 40 years' experience in the managed care industry, who testified about established industry practice in maintaining the confidentiality of MCO rates.[3]

The Commonwealth Court readily, and properly, concluded that satisfaction of the criteria of the exception under the RTKL also established that the MCO rates are protected under the PUTSA. "It is sufficient to observe that the fact witness and expert witness evidence discussed above establishes by a preponderance of the evidence the elements for trade secret status." (Opinion at 23).

II. Appellants Rely on Cases Decided Under the Repealed Right to Know Act and an Erroneous Interpretation of the Language of the RTKL.

The fundamental flaw in Appellants' arguments is their reliance on the purported existence of a broad right of public access -- not contained in the language of the applicable statute -- to all documents having any connection

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[3] While Appellants objected to Dr. Miller's testimony before the OOR, they did not press that objection on appeal.

whatsoever with the carrying out of any governmental function, regardless of their remoteness from a government agency or their character as trade secrets.

A. *Lukes* Simply Does Not Apply.

The cornerstone of the Appellants' argument is the opinion of a Commonwealth Court panel in *Lukes*. On facts superficially similar to those presented here, the court there found that provider agreements between a health insurer and contracting hospitals were subject to disclosure under the now-repealed Right-to-Know Act ("RTKA"). The Commonwealth Court here properly found that *Lukes* was neither controlling nor persuasive, given that it was based on an analysis of the prior RTKA. Opinion at 11.

In particular, Appellants rely on *Lukes* for the broad principle that trade secret claims can never protect contracted rates under the Medicaid program, even if the rates are established in independently negotiated agreements between private parties, and regardless of whether they are confidential and proprietary or trade secrets. 976 A.2d at 626-27. However, as the Commonwealth Court here pointed out, the panel in *Lukes,* finding that the RTKA was ambiguous, relied upon "the policy implications of the expenditure of public funds under contracts entered for the ultimate benefit of Medicaid recipients." Opinion at 11. *See, Office of the Budget v. Office of Open Records*, 11 A.3d 618, 623 (Pa. Cmwlth. Ct. 2011)

("[U]nlike in *Lukes*, this Court is not free to consider facts beyond the statutory language because the current RTKL is not ambiguous on this point.")

The *en banc* court below found that the OOR erred in relying on *Lukes* "in light of substantial differences between the current RTKL and the Prior Law." The Commonwealth Court also noted that it has consistently declined to follow *Lukes* in resolving cases under the new RTKL. Opinion at 11, n.12 (citing cases).

Next, Appellants argue that this Court's references to *Lukes,* in *SWB Yankees v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), constitute this Court's endorsement of the rejection of trade secret protection. Contrary to Appellants' views, the *Yankees* references were *dicta* in footnotes and simply support the proposition that the new RTKL law was intended, generally, to enhance government transparency and public access to records. Nothing in this Court's *Yankees* decision recasts the trade secret character of the MCO rates or undercuts the protection of those rates from disclosure under either Section 708(b)(11) or the PUTSA.

B. Appellants' Strained Interpretations of the RTKL Are Also Non-Sensical.

1. Appellants' Expansive Interpretation of the Term "Financial Records" is Unsupported.

Appellants' argument that contracts containing the MCOs' privately negotiated rates, which documents are not in the possession of DPW, are "financial records" of DPW is also incredible.

Appellants' position would make a "financial record" subject to disclosure under the RTKL out of every document relating to disbursement of funds by the subcontractors or their network dental providers. Under Appellants' view, the flow or use of any funds that first originated with DPW falls within this definition. However, nothing in the RTKL creates a broad right in the public to access all documentation relating in any way to the "flow of public funds." Rather, as properly found by the Commonwealth Court, the right of access provided by the RTKL is for documentation relating to disbursements of funds *by an agency*, subject to the restrictions applicable under other laws. To hold otherwise would render all dollars used to pay MCO expenses "public funds" and the records relating to their use by the MCOs "financial records" of DPW, including the MCOs employee benefits, office rent and computer services.

The RTKL's trade secret definition specifically includes computer software that is subject to a license agreement prohibiting disclosure. Yet under Appellants'

application of the law, such software would also have to be disclosed if it had any arguable relationship to the flow of funds from the MCO in the direction of providers of dental or medical services. The absurdity of that is patent.

Appellants' argument here is carried to its logical extreme in the companion case, where they argue that not only the MCO rates, but also the Provider rates, are "financial records" subject to disclosure without regard to their trade secret character. The providers' payment of their electric bill to run their dental drills so that they can perform dental work on Medicaid patients would be "financial records" of the agency under Appellants' far-reaching view of the RTKL.

It is also important to recognize that the implications of Appellants' reasoning transcend the Medicaid program, and extend to every field in which the Commonwealth contracts for the provision of services from private entities. Appellants' view of the world would expose to public view a panoply of private records of business activity. Obviously, this suggestion could impair the willingness of private enterprise to do business with the Commonwealth. The consequent effect would be to limit the options available to the Commonwealth in securing goods and services necessary to allow the Commonwealth to serve the public.

Of course, the idea that all of these records are "financial records" subject to disclosure also strips away the protections otherwise provided by law for trade

secrets and confidential, proprietary information. The suggestion of such a legislative intent is belied not only by the multiple provisions of the RTKL that preserve the protections of other law, but also the express recognition of trade secrets in Section 707(b), which mandates that an agency address a request for access to a record as to which a third party has asserted a claim of trade secret or confidential proprietary information. 65 P.S. §67.707(b).

2. In Any Event, Appellants Misapply the Principles of Statutory Construction.

Appellants also argue that the Commonwealth Court's decision violates principles of statutory construction. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). "Generally, the best indication of the General Assembly's intent is the plain language of the statute." *Allstate Life Ins. Co. v. Commonwealth*, 52 A.3d 1077, 1080 (Pa. 2012). Where Legislative intent is clearly expressed in the language of the statute, it would be wrong to circumvent that intent by invocation of principles of statutory construction.

Appellants focus single-mindedly on Section 708(c), ignoring all other relevant portions of the RTKL, in violation of the principle that a statute must be construed harmoniously to give effect to all of its parts. 1 Pa. C.S. § 1921(a). In fact, Appellants argue that the Commonwealth Court majority "hollows out" Sections 102 and 708 of the RTKL (Appellants' Brief at p. 14) while themselves

conveniently ignoring the series of provisions, cited above, that establish the primacy of other applicable State or Federal law in determining when records are subject to disclosure, as well as provisions of the RTKL, other than Section 708, that recognize trade secret protection.

Indeed, contrary to Appellants' protestations, the only appropriate way to construe the RTKL to give effect to all of its provisions is to recognize that its provisions yield *by their own terms* to other applicable law.

This result is obvious because here, there is no ambiguity in the RTKL, nor is there a conflict between its provisions. Section 708(c) preserves the public nature of an agency's "financial records" despite the 30 separate exemptions from the coverage of the RTKL listed in Section 708(b); it does not expressly eliminate the trade secret exemption nor in any way modify the requirement that the RTKL be read so as to give effect to all other laws including the PUTSA.[4]

It is a gross distortion for Appellants to argue that "the General Assembly has specifically singled out financial records as not exempt on trade secrecy grounds" (Appellants' Brief at 36), where *no* specific language to that effect

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[4] Appellants argue that the Commonwealth Court's decision, to the extent it recognizes the existence of a trade secret protected under the PUTSA as an exception from public access, "eviscerate[s]" Section 708(c). This is clearly wrong. First of all, Section 708(c) plainly applies to 29 other exceptions in Section 708(b) other than exception 11. As such, the provision has a clear and effective meaning. Second, given the possibility that PUTSA may be amended or other legislation enacted that removes or modifies the protection afforded to trade secrets in general, or to MCO rates in particular, Sections 708(b)(11) and 708(c) clearly have vitality.

appears in the RTKL. The argument of the specific controlling the general also has no application here, where multiple provisions of the law plainly declare the primacy of other law in determining the right of access. Similarly, the argument that the protections of the PUTSA must yield to the later adopted RTKL completely ignores the specific provisions of the RTKL recognizing the primacy of other laws.

Next, Appellants urge this Court to view the repealed RTKA and the current RTKL as covering the same types of records, arguing that the two statutes use equivalent terms. (Appellants' Brief at 23). In particular, Appellants present a convoluted effort to have this Court read one term defined in the RTKL ("financial record") to be equivalent to the meaning ascribed to a different term ("public record") under prior law. Appellants rely on this Court's decision in *Commonwealth v. Sitkin's Junk Co.*, 194 A.2d 199, 202 (Pa. 1963) for the proposition that where the legislature uses in a later statute "the same language as used in a prior statute which has been construed by the courts, there is a presumption that the language thus repeated is to be interpreted in the same manner" as under the prior statute. (Appellants' Brief at 24).

Ironically, the next sentences of *Sitkin's* are more directly relevant here. The Court stated that if the legislature intended a construction identical to that under the prior statute, the legislature would merely have to use the same words. "Instead,

the legislature drafted a somewhat lengthy definition.... We have long held that, where a statute contains its own definition, the meaning of the terms as defined at common law or as constructed under prior statues is not controlling." *Id.* In any event, because "public record" is defined in the current RTKL, Appellants' contorted construction must be rejected.

C. Appellants' Factual Arguments are Unsupported by the Evidence and Were Properly Rejected by the Commonwealth Court.

Finally, Appellants seek to have this Court adopt the arguments they made ineffectually to the Commonwealth Court to defeat the strong, and unrebutted, affirmative evidence presented at the OOR hearing that the MCO rates constitute both confidential, proprietary information and trade secrets.

Specifically, Appellants reargue that the MCO rates cannot be trade secrets where they are historic and where the disclosure would not necessarily reveal present or future rates, and where multiple MCOs utilize the same contractor, DentaQuest, which necessarily has access to the rates of those four MCOs. The Commonwealth Court accepted Dr. Miller's expert testimony contradicting the "staleness" argument. Opinion at 22 Moreover, the MCOs presented unrebutted evidence that DentaQuest was required by contract to maintain the confidentiality of rate information, and there is no evidence in the record of any breach of that obligation. Opinion at 17, n. 5.

Having chosen not to introduce any affirmative evidence on these issues, Appellants can hardly claim that the Commonwealth Court erred in crediting the wealth of evidence presented by the MCOs.

CONCLUSION

For the foregoing reasons, the *en banc* decision of the Commonwealth Court should be affirmed.

Respectfully submitted,

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Dated: January 20, 2015

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CERTIFICATE OF SERVICE

I, James J. Rodgers, hereby certify that on the 20th day of January 2015, I caused to be served the Brief of Appellees Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan and DentaQuest LLC as follows:

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