IN THE

Supreme Court of Pennsylvania

EASTERN DIVISION

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

Nos. 48 EAP 2014, 49 EAP 2014 and 50 EAP 2014: Consolidated Appeals from the Order of the Commonwealth Court No. 958 CD 2013, Reversing the Final Determination of the Office of Open Records, at OOR Docket No. 2012-2017.

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COUNTER-STATEMENT OF THE ISSUE PRESENTED

Whether the Provider Rates, which are embodied in privately negotiated contracts between subcontractors and their third-party providers, to which the Commonwealth is not a party, are in the constructive possession of the Department of Public Welfare ("DPW") pursuant to Section 506(d) of the Right-to-Know Law 65 P.S. §67.101 *et seq.* ("RTKL") and, therefore, potentially subject to disclosure.

Answer of the Office of Open Records: Yes

Answer of the Commonwealth Court: No

Suggested Answer: No

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

This case involves interpretation of a statute – section 506(d)(1) of the RTKL. This Court's standard of review therefore is de novo, and its scope of review is plenary. See Pa. Gaming Control Bd. v. Office of Open Records, ___ A.3d ___, 2014 WL 6088622, *2 (Pa. 2014).

To the extent the Court holds Section 506(d)(1) of the RTKL makes the materials sought subject to disclosure, then 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, 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." *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. As to the scope of review, where the issues presented involve mixed questions of fact and law, the Court 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 above standards and scopes of review, this Court should hold that the Commonwealth Court's decision, which was correct as a matter of law and well-supported by the evidence in the record, must be affirmed.

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, 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 the Department of Public Welfare ("DPW"), the MCOs are required to establish and maintain a provider network and 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 the MCOs 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 under HealthChoices, and does not break out the monthly cost for 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 October 3, 2012, 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 30, 2012, the following documents:

> 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 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.

Commonwealth Court Opinion ("Opinion") at 2.

DPW denied the Request to provide documents showing the rates agreed to between the dental subcontractors and their network providers (the "Provider rates") on the ground that the records were exempt from disclosure under Section 702 (b)(11) of the RTKL, 65 P.S. §67.708 (b)(11), and the Pennsylvania Uniform Trade Secrets Action, 12 Pa. C.S. §§5301, *et seq.* ("PUTSA") . On or about August 15, 2011, Appellants appealed the partial denial of the Request to the

Office of Open Records ("OOR"). The MCOs and the dental subcontractors sought permission to participate in the OOR appeal, which was granted.

In its Final Determination of May 8, 2013, the Office of Open Records ("OOR") granted Appellants' appeal, ruling that, even though the information was not in DPW's possession, DPW was required under Section 506(d) of the RTKL to obtain and disclose to Appellants the Provider rates. OOR concluded that the Provider rates constituted records of a contract (between DPW and the MCOs) to perform a governmental function. OOR also found that the subcontractors had failed to prove the confidential or trade secret nature of the information for purposes of applying the exception to disclosure under Section 708(b)(11), of the RTKL, 65 P.S. §67.708 (b)(11). OOR also relied on its determination in the companion case that the PUTSA did not provide a basis for withholding records apart from the express exemption in the RTKL.

DPW, the MCOs, DentaQuest and Dental Benefit Providers appealed the OOR Final Determination to the Commonwealth Court. The Commonwealth Court ordered these consolidated appeals to be argued before the *en banc* Court with the appeals from the companion OOR decision regarding the capitation rates paid by DPW to the MCOs, and the rates paid by the MCOs to their dental subcontractors. The *en banc* court heard oral argument on October 9, 2013.

In its Opinion, dated February 19, 2014, the Commonwealth Court overturned OOR's ruling with respect to the Provider rates. The Commonwealth Court held that:

- The Provider rates are not accessible as records of DPW under Section 901 of the RTKL, 65 P.S. §67.901, because they are not in the actual or constructive possession of DPW;
- Because the Provider rates are not in possession of the MCOs, the only parties in a direct contractual relationship with DPW, that information is not subject to disclosure under Section 506(d) of the RTKL; and
- There is no direct relationship between the services the MCOs perform for DPW and the downstream Provider rates. (Opinion at 21).

The Petitions for Allocatur in this case were filed and served on March 20, 2014. Appellants also filed similar Petitions, challenging the Commonwealth Court's ruling that the MCO rates are also protected from disclosure under the RTKL. By orders dated October 23, 2014, this Court granted the petitions, and directed that the appeals be argued together.

SUMMARY OF ARGUMENT

The operative provisions of the RTKL address the 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.*

The specific issue in this case is whether the documents in dispute, contracts embodying the Provider rates, are "public records of" DPW and, therefore, subject to potential disclosure under the RTKL. Contrary to Appellants' arguments, these documents are not public records.

Rather, the documents in question evidence private transactions between the subcontractors and providers, not the actions of DPW. Moreover, the materials are not in the possession of DPW (nor the MCOs), and do not constitute "financial records" or "public records" of the agency.

ARGUMENT

I. This Court Should Affirm the Commonwealth Court's Holding That the Right to Know Law Does Not Permit Disclosure of the Provider Rates.

The Commonwealth Court held that the Provider rates are not subject to disclosure under RTKL since they are not "records 'of' DPW under Section 901 [of the RTKL] because they are not in the actual or constructive possession of DPW." Opinion at 21 In reaching its decision, the Commonwealth Court relied on the fact that DentaQuest, Dental Benefit Providers and their network providers have no contractual relationship with DPW. Moreover, "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." *Id.*

The subject matter of the Right to Know Law is "public records." An agency is required to produce such records upon a proper request, unless the record is exempt. 65 P.S. §67.302. A "record" is defined as information that "documents a transaction or activity of an agency" and "is created, received or retained…in connection with a transaction, business or activity of an agency." 65 P.S. §67.102.

It is undisputed that neither DPW nor the MCOs have actual possession of documents containing the Provider rates. Thus, Section 305 of the RTKL, which declares a presumption that a record in the possession of an agency is a public record (unless otherwise exempt) does not apply. 65 P.S. § 67.305.

The Commonwealth Court rejected Appellants' argument that DPW is in constructive possession of the Provider rates, pursuant to RTKL Section 506(d)(1), 65 P.S. §67.506(d)(1). That section provides that a "public record" (necessarily defined as a record of an agency) includes a record that is "in the possession of a party with whom the agency has contracted" and "which directly relates to the governmental function" performed by that party. Relying on its prior decision in *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Cmwlth. 2011), the court declined to infer constructive possession from the mere availability of the records to an agency upon request.

A. DPW's Contractual Right to Access Records Does Not Provide a Disclosure Obligation Under Section 901 of the RTKL.

Appellants devote more than seven pages of their brief to an argument based upon a host of provisions of the Standard Contract form entered into between DPW and the MCOs. They assert that these provisions establish that as a matter of contract, DPW has either the right to obtain access to, or should have possession of, the Provider Rates because they are reflected in contracts between DentaQuest and Dental Benefit Providers, on one hand, and direct providers of dental services,

on the other. Accordingly, Appellants argue that the information is subject to public access under the RTKL.

The asserted statutory basis for this argument is Section 901 of the RTKL. However, Section 901 does not establish any specific rights, and is merely a procedural section specifying the duty of an agency, upon receipt of a request, to determine (1) whether the information requested constitutes a "public record, legislative record or financial record" and (2) whether "the agency has possession, custody or control of the identified record." 65 P.S. §67.901. " By its plain language, Section 901 describes the actions that an agency is obligated to take when it receives a request for a record; it does not define what records are subject to disclosure under the RTKL." *Office of the Budget*, 11 A.3d at 619-620.

The Standard Contract also does not support Appellants' arguments. As the Commonwealth Court stated in applying Section 901: "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." Opinion at 11. The transactions documented in these records are between private parties, and do not involve DPW. The court noted, "there is no indication that [the documents] were created or received by DPW or that they evidence any transaction of DPW." Opinion at 12-13. Moreover, as the Commonwealth Court had previously noted in *Office of the Budget*,

> if Section 901 were read to render records within the custody or control of agencies presumptively public records pursuant to Section 305, Section 506(d) would become mere surplusage, a result that is not countenanced by the rules of statutory construction. 1 Pa. C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions.") Moreover, the fact that the Legislature chose to use the terms "custody" and "control" in Section 901, but chose not to include these terms in Section 305 must be recognized in our analysis. Had the Legislature wanted to create the presumption that records in an agency's custody and control, but not in its possession, were public records, it would have included those terms in Section 305, as it did in Section 901, but it did not.

11 A.3d at 622.

B. Section 506(d) Does not Apply Because There Is no Contract Between DPW and the Persons Who Are in Possession of the Provider Rates.

Next, Appellants argue that Section 506(d)(1) of the RTKL, which addresses when a public record that is not in the agency's possession may be considered a "public record of the agency," requires disclosure of the Provider rates. This argument is wrong.

Section 506(d)(1) presents a dual test, both prongs of which must be satisfied in order to permit a finding that a public record not in the agency's possession is nonetheless a public record of the agency. First, the record must be in the possession of a party who has contracted directly with the agency. Here, it is sufficient to observe that the records in question are not "in possession of a party

with whom the agency has contracted" since the MCOs do not have the Provider rates and there are no contracts directly between DPW and either the dental subcontractors or their network providers.

Second, under Section 506(d), the activity documented must directly relate to the performance of a governmental function. Given that the first element of Section 506(d)(1) cannot be met, it was unnecessary for the Commonwealth Court's further analysis of whether the activity being documented "directly relate[d] to the governmental function" which the agency contracted to be performed by the private party. However, the Commonwealth Court did correctly analyze the issue and found that the Provider rates do not directly relate to the performance of a governmental function, but rather to the manner in which a private, risk bearing party arranges to pay for services to be provided to by its network dentists.

Appellants' reasoning requires that the word "directly" be ignored as qualifying "relates." In rejecting Appellants' argument below, the Commonwealth Court followed its decision in *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Cmwlth. 2010) and concluded that to qualify as "directly related" under Section 506(d), the information must relate to performance under the contract, rather than relate to the contract in some other way. The court drew the distinction between

records regarding the quality of services provided and the cost of obtaining those services, as in *Buehl*. Opinion at 14-17.

Appellants also rely on this Court's decision in *SWB Yankees v. Wintermantel*, 45 A.3d 1029 (Pa. 2012). However, in *Yankees*, the records at issue were in the possession of a management company that had contracted directly with a stadium authority in question, satisfying the first prong of Section 506(d)(1). The bulk of the *Yankees* opinion dealt with the issue of whether or not the operation of food and beverage concessions at the stadium constituted a governmental function. In particular, the decision focused on whether the Court should adopt a "governmental vs. proprietary activity" distinction to govern this analysis. Ultimately, the Court decided that if a "non-ancillary" function of the government agency was delegated to a third party, that function would be considered a government function for purposes of Section 506(d). It is not disputed here that DPW's provision of dental services to Medicaid recipients through the managed care model is a governmental function.

However, in *Yankees*, this Court did not analyze what would constitute the "requisite connection to government" sufficient to render the records "records of the agency." Rather, it assumed that, where (1) the management agreement with the party in possession of the records acknowledged that the management company was an agent of the authority with the express power to bind the authority and (2)

there was an income sharing aspect of the management agreement between the management company and the authority, a sufficient nexus was established. Here, in sharp contrast, the financial interests of the Commonwealth are severed from the Provider rates by the fact that the MCOs and their subcontractors are both working with capitated rates and bear all of the financial risk of providing dental services to the HealthChoices members. As in *Buehl*, the Provider Rates pertain only to the cost of providing the dental services at issue, and not to their actual performance.

Accordingly, the decision of the Commonwealth Court that the records in question are not records of the agency and are, therefore, not subject to disclosure under the RTKL must be affirmed.

II. Even If This Court Should Find That the Provider Rates Are Records of DPW, it Should Remand to the Commonwealth Court to Determine Whether the Provider Rates are Protected as Confidential Proprietary Information and Trade Secrets

The Commonwealth Court's analysis in the companion case of Eiseman I provides an independent ground for ultimate affirmance here. Assuming, for the sake of argument, Appellants are correct on the issue presented in this appeal, that will only establish that the information in question constitutes a "public record" of DPW. Their request for disclosure still ultimately fails because the information is protected, not only by the explicit provisions of the RTKL but also by reference to the PUTSA, for the same reasons as argued in our briefs in the companion appeals, which are incorporated herein by reference.

Although it recognized that based its holding in *Eiseman I* the Provider rates were not "financial records," the Commonwealth Court found it unnecessary to analyze whether the statutory exemptions from disclosure were applicable. Opinion at 20. Accordingly, if it is not in a position to affirm the Commonwealth Court in its entirety, this Court should remand for the Commonwealth Court to conduct the analysis of whether the record supports application of the confidential proprietary and/or trade secrets exemptions in Section 708(b)(11) of the RTKL.

CONCLUSION

For all the foregoing reasons, the decision of the Commonwealth Court should be affirmed.

Respectfully submitted,

/s/James J. Rodgers

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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