IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 1935, 1949 & 1950 CD 2012

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE
Petitioner,
v.
JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
Respondents

AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN,
Petitioners,
v.
JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
Respondents

UNITED HEALTHCATRE OF PENNSYLVANIA, INC. D/B/A/ UNITED HEALTHCARE COMMUNITY PLAN AND HEALTHAMERICA PENSNYLVANIA, INC. D/B/A/ COVENTRYCARES,
Petitioners,
v.
JAMES EISEMAN, JR. AND THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
Respondents

BRIEF of the RESPONDENTS

Petition for Review of the Final Determination of the Office of Open Records at Docket No.: AP 2011-1098

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Date Filed: May 29, 2013

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I. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

A. Does *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Commw. 2009) compel the granting of similar requests for documents under the new version of the Right-to-Know Law?

Suggested Answer: Yes.

B. Even if *Lukes* were not dispositive, have the Petitioners carried their burden of proving that the requested documents contain "trade secrets" or "confidential proprietary information" and are therefore exempt from disclosure under the Right-to-Know Law?

Suggested Answer: No.

C. Does the Pennsylvania Uniform Trade Secrets Act add an exception to the Right-to-Know Law that differs from the Right-to-Know Law's "trade secret" exception and that bars disclosure of the requested documents?

Suggested Answer: No.

D. Should the documents requested be disclosed as "financial records"?

Suggested Answer: Yes.

II. COUNTER-STATEMENT OF THE CASE

A. Brief Procedural History of the Case

On June 17, 2011, James Eiseman Jr. and the Public Interest Law Center of Philadelphia ("Requestor") made, under Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, requests to the Commonwealth's Department of Public Welfare ("DPW") for certain documents concerning the payment of public funds in Pennsylvania's Medical Assistance ("Medicaid") program. On July 25, 2011, DPW granted in part and denied in part the said requests. Requester timely appealed the partial denials of the requests to the Office of Open Records ("OOR") on August 15, 2011. During late August of 2011, five Medicaid managed-care organizations ("MCOs") intervened in the proceeding before the OOR as direct-interest

participants. The core of the defense by both DPW and the MCOs to the production of the requested documents is that the documents contain "trade secrets" and "confidential proprietary information" that the RTKL entitled DPW and the MCOs to protect from disclosure.

On March 9, 2012, DPW announced via email that it would "no longer assert that the rates of payment, 'including but not limited to capitation rates, that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania' are trade secrets, or that they should be withheld pursuant to the 'federal funds' exemption in the RTKL." (R. 1003a.) By email dated May 7, 2012, DPW declared that "after further consideration, DPW again assert [sic] that the rates are its trade secrets." (R. 1003a.)

On May 21 and 22, 2012, the OOR held an evidentiary hearing on the appeal, at which Requester, DPW, and the five MCOs all participated. On September 17, 2012, OOR made a final determination granting the two requests that are at issue in this appeal. DPW and the MCOs filed three separate appeals to this Court on October 17, 2012, which, with the consent of all parties, the Court consolidated in the instant appeal on December 13, 2012.

B. Chronological Statement of Record Facts

1. Background

Medicaid is a joint federal-state program established by federal statute, 42 U.S.C. §§ 1396 *et seq.*, for providing, *inter alia*, medical and dental care to low-income children, certain adults, and people with disabilities in states, including Pennsylvania, that have chosen to participate. DPW is the Pennsylvania agency that administers Medicaid. Respondents' requests for documents (the "Requests") concern only the following five counties in southeastern Pennsylvania ("SEPA"): Bucks, Chester, Delaware, Montgomery, and Philadelphia. The

Requests are further limited to documents that concern the period July 1, 2008 through June 15, 2011 (the "Requested Period"). (R. 3a.)

During the Requested Period, DPW operated the Medicaid program in SEPA through its "HealthChoices Program," under which DPW contracted with certain managed care organizations ("MCOs," also sometimes known as "health maintenance organizations" or "HMOs") to provide dental and physical medical care[1] to enrollees who reside in SEPA. (R. 205a-207a.) Under contracts with DPW, the MCOs are obligated to establish networks of medical and dental providers and to reimburse these providers. (R. 208a-210a.) DPW pays the MCOs by providing a specific dollar amount per member (i.e., enrollee of the MCO) per month (a "pmpm rate" or "capitation rate"). (R. 211a, 213a-214a.) During the Requested Period in SEPA, there have been five MCOs with which DPW has contracted to provide physical health and dental care: (1) Aetna Better Health, Inc. ("Aetna"), (2) HealthAmerica of Pennsylvania, Inc. d/b/a Coventry Cares ("Coventry"), (3) Health Partners of Philadelphia, Inc. ("Health Partners"), (4) Keystone Mercy Health Plan ("Keystone"), and (5) United Healthcare of Pennsylvania, Inc. d/b/a United Healthcare Community Plan ("United") (collectively, the "Petitioner MCOs"). (R. 270a-271a, 563a.) Each of these five MCOs intervened in the proceedings below, and each is a petitioner in the Commonwealth Court.

The Requests focus principally on documents that contain information concerning the provision by DPW, through the Petitioner MCOs, of dental care to Medicaid enrollees in SEPA. (R. 1a-4a.) In relevant part, the Requests seek the following:

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[1] To provide Medicaid-covered mental-health care in SEPA, DPW contracted with a different set of MCOs. Mental-health care and those mental-health MCOs are not involved in this case.

[Request #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 HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age.

[Request #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 HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.

(R. 3a.)[2]

The OOR's Final Determination, dated Sept. 17, 2012, ordered the disclosure of the records sought in both Request #1 and Request #2. (R. 1222a.)

2. Dental Subcontrators

After the filing of the Requests, DPW and the Petitioner MCOs disclosed that the Petitioner MCOs provide dental care in SEPA almost exclusively by subcontracting with separate insurers ("dental subcontractors") that create dental-provider networks and negotiate contracts with individual providers. (R. 8a, 325a, 340a, 375a-376a, 408a, 432a, 494a, 503a-504a, 514a-515a.) A dental subcontractor, in return for payments from one of the Petitioner MCOs, is obligated to establish and pay for a network of dental providers available to provide care to the enrollees of the MCO. (*E.g.*, R. 432.) Four of the Petitioner MCOs—Aetna, Coventry, Health

[2] Requests #1 and #2 were set forth in the original application to DPW as paragraphs 3 and 4; paragraphs 1 and 2 stated definitions and the temporal scope of the requests. (R. 3a.) The OOR's Final Determination , dated Sept. 17, 2012, refers to Requests #1 and #2 as "Item 1" and "Item 2." (R. 1205a.)

The remaining three requests (paragraphs 5-7) were denied on the grounds that responsive documents do not exist. (R. 4a, 1207a, 1221a-1222a.) Requestor has not appealed from those denials.

Partners, and Keystone—subcontract their dental services through the ***same*** dental subcontractor: DentaQuest. (R. 325a-326a, 432a, 492a-493a, 514a.) Just two of these four MCOs account for about 465,000 of the somewhat more than 500,000 Medicaid enrollees in SEPA, or over 90% of the enrollees. (R. 323a, 538a-539a, 652a.) Thus one subcontractor, DentaQuest, is charged with establishing and paying networks of dental providers who are supposed to be available to over 90% of Medicaid enrollees in SEPA. Nothing in the record rebuts the obvious inferences that DentaQuest knows the amount each MCO pays to it[3] and that the rates the dental subcontractors pay to dental providers on behalf of two or more competing MCOs are not secret from those individual dental providers.

3. Evidence Regarding the Secrecy or Confidentiality of the Records Sought in Request #1 (the Capitation Rates DPW Pays to MCOs)

Included in the evidence admitted at hearing was the form of the "Health Choices Agreement" between DPW and each MCO (but without specific pmpm rates). (R. 680a-849a.) Section XIV of that agreement form contains the provisions that address confidentiality, but notably absent therefrom is any statement that the pmpm or capitation rates that DPW pays the MCOs constitute trade secrets or confidential proprietary information. (R. 843a-844a.) Insofar as Section XIV restricts the circumstances under which DPW may disclose other types of information of an MCO, it imposes no such restrictions on the MCO itself. (R. 844a; *see also* R. 379a, 388a-389a, 415a (United's witness testifying that the provision limits disclosures only by DPW); R. 483a (same, from Aetna's witness).)

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[3] In post-hearing briefing, Coventry and United speculated that DentaQuest "must maintain the information for each MCO in a figurative 'silo'" and that it cannot "internally 'pool' that information." (R. 1151a.) No evidence in the record, however, even hints at the existence of "silos" or other ***internal***-information-sharing policies within DentaQuest.

Allen Fisher, of DPW's Office of Medical Assistance Program (*see* R. 203a-204a), testified that DPW annually renegotiates the pmpm rate with each MCO. (R. 212a.) These negotiations are individual between DPW and each MCO. (R. 212a.) DPW renegotiates these rates every year because of "[c]onstant change" in the costs of providing care. (R. 628a.) The moneys DPW pays to the MCOs are public funds. (R. 224a.)

DPW discloses the final negotiated rates to various state and federal agencies, and there is no evidence in the record as to any confidentiality policies or practices of those agencies. (R. 222a-223a, 248a, 275a.) Mr. Fisher believes that there are no contractual or legal bars to DPW's disclosing the rates negotiated with one MCO to the other MCOs. (R. 649a.) DPW prefers not to disclose the rates only because it believes doing so "would increase [DPW]'s costs." (R. 650a.)

Each of the Petitioner MCOs produced one fact witness at the hearing. Keystone, the SEPA MCO with the largest enrollment of Medicaid beneficiaries (R. 538a), produced William Morsell, who testified that he did not know whether Keystone considers capitation rates between Keystone and DPW to be trade secrets or confidential proprietary information (R. 563a-564a). Mr. Morsell stated that it would be "impossible" for anyone outside Keystone to get access to the pmpm rates it has negotiated with DPW (R. 519a), but did not testify as to any steps Keystone takes to keep those pmpm rates confidential. Mr. Morsell also did not testify about any competitive impacts of the disclosure of those pmpm rates.

The fact witness for Health Partners, John Sehi, stated that the pmpm rates "should vary" each time they are renegotiated because of "medical trends" that change on "a year-to-year basis" such as the availability of new drugs on the marketplace, the emergence of generic versions of pharmaceuticals, and variations in the cost of living. (R. 343a-344a, 346a.) In light of these annual variations, Mr. Sehi testified that knowledge of the capitation rates that the other

MCOs had negotiated with DPW for fiscal year 2007-08 would be "irrelevant" to current negotiations because "[t]hings have changed in those four or five years" and it would not be possible to figure out from such information what capitation rates the other MCOs have negotiated for the current year with DPW. (R. 358a.) Asked about the relevance of such information from the fiscal year beginning July 1, 2010, Mr. Sehi stated (at the hearing in May 2012) that "I don't know if you'd want to make conclusions on it." (R. 358a.)

United's fact witness, Heather Cianfrocco, testified on direct examination that United "deems [the captition rates negotiated with DPW] highly confidential" (R. 379a), and speculated that if the other MCOs learned United's capitation rates "they could use that to potentially negotiate different amounts and get potentially preferential treatment from [DPW]" and that "United could end up losing market share[]" (R. 382a-383a). On cross-examination, however, she acknowledged that it would be of no rate-setting value to United to learn the other MCOs' capitation rates. (R. 390a.) Given several opportunities, Ms. Cianfrocco was unable to reconcile her testimony that (1) learning the other MCOs' capitation rates would provide no competitive advantage to United but (2) the other MCOs would gain a competitive advantage if they learned United's rates. (R. 390a-394a.)

Aetna's fact witness, Deborah Nichols, testified that Aetna considers the capitation rates it has negotiated with DPW to be trade secrets and confidential proprietary information. (R. 477a.) Although she testified that "we keep our rates confidential" (R. 483a), she offered no testimony indicating any contractual provisions or physical- or electronic-security measures Aetna undertakes to keep them confidential.

Coventry's fact witness, Nancy Sirolli-Hardy, testified that Coventry's annual negotiation with DPW is "a very difficult process" that involves "probably a hundred" Coventry employees.

(R. 491a-492a.) She believes that if the pmpm rates negotiated between DPW and the MCOs became public knowledge, DPW would be at a competitive disadvantage and Coventry would be at a competitive advantage in subsequent renegotiations over Coventry's pmpm rate from DPW. (R. 500a.)

4. Evidence Regarding the Secrecy or Confidentiality of the Records Sought in Request #2 (the Rates the MCOs Pay to the Dental Subcontractors or Directly to Providers)

The Petitioner MCOs jointly hired an expert witness, Henry Miller, Ph.D. (R. 290a.) Dr. Miller testified that the rates the MCOs pay to dental subcontractors or directly to providers (i.e., the rates contained in the documents sought in Request #2) are "trade secrets" and "confidential proprietary information." (R. 290a.) Dr. Miller used the terms "trade secrets" and "confidential proprietary information" as if they had identical meanings. (R. 298a-300a.) He did not offer any opinion as to whether the records sought in Request #1 contain trade secrets or confidential proprietary information. (R. 321a.) He opined that if disclosed to an MCO, information about the rates the other MCOs pay to dental subcontractors would prompt that MCO to demand that its dental subcontractor accept a lower rate. (R. 295a.) He was unaware of any instances in which Medicaid MCOs in other states had disclosed their current fee-for-service schedules for providers. (R. 301a.) Dr. Miller did not in his testimony explain how four MCOs enrolling more than 90% of the Medicaid enrollees in SEPA could keep secret and confidential the rates each was paying to the same dental subcontractor, DentaQuest.

In limited instances, some of the MCOs contract directly with dental providers instead of doing so via dental subcontractors. For example, HealthPartners and Keystone contract directly, on a per-child basis, with Special Smiles, which provides dental services to children with disabilities who require sedation when receiving dental treatments. (R. 327a, 362a, 516a.)

Keystone's contract with Special Smiles does not require Special Smiles to maintain a separate team to negotiate rates with different MCOs or any other provision restricting the sharing of information within Special Smiles about the rates negotiated with various MCOs. (R. 537a-538a.) Aetna similarly has "direct dental contracts with providers for certain special needs patients." (R. 433a.)

C. Brief Statement of the Determination Under Review

The OOR's Final Determination ordered the provision of documents responsive to Requests #1 and #2. (R. 1222a.) These documents fall into three categories, all of them limited to SEPA and to the Requested Period: (a) capitation or pmpm rates paid by DPW to each of the Petitioner MCOs (Request #1), (b) rates paid by each of the Petitioner MCOs to the dental subcontractors for the provision of dental services (Request #2), and (c) rates paid by each of the Petitioner MCOs directly to dental service providers (Request #2).

III. SUMMARY OF ARGUMENT

This case seeks the release of information about the expenditure of public funds in past years to provide dental and other services to low-income children in southeastern Pennsylvania. There are two RTKL requests at issue, one seeking documents indicating capitation rates that the Department of Public Welfare paid to managed-care organizations, and the other seeking documents indicating the rates those managed-care organizations paid to dental subcontractors and to individual providers. This Court has previously ordered the release of documents like those sought in Request #2 under the predecessor version of the RTKL. *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009), *alloc. denied*, 604 Pa. 708, 987 A.2d 162 (2009).

Although the Petitioners received the opportunity of a two-day evidentiary hearing to make their case that the documents requested are exempt from disclosure, they wholly failed to

carry their burden of proof. The OOR correctly determined that *Lukes* requires the release of the documents, that the Petitioners had failed to show that the documents contain "trade secrets" or "confidential proprietary information," that the Pennsylvania Uniform Trade Secrets Act does not independently bar granting the requests, and that the RTKL's "financial records" exception provides independent and sufficient grounds for disclosure. This Court should affirm the OOR's Final Determination in its entirety.

The Supreme Court has recently emphasized that "courts should liberally construe the RTKL to effectuate its purpose of promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." *Levy v. Senate of Pa.*, No. 44 MAP 2012, 2013 Pa. LEXIS 788, at *55 (Pa. Apr. 24, 2013) (internal quotation marks and citation omitted). With that in mind, and as set forth below in full, the Court should hold as follows.

First, the Court should hold that its conclusion in *Lukes* concerning "trade secrets" in the context of Medical managed-care contracts remains binding precedent.

Second, the Court should affirm that the Petitioners have not proved that the records sought in Request #1 reveal trade secrets or confidential proprietary information. *See* 65 P.S. § 67.708(b)(11). The records are too old to be of competitive significance, at least some Petitioners have not shown that the rates have any competitive value or that they undertake any efforts to maintain the secrecy of their rates, the only party whose competitive position might be harmed by the records' release is DPW, and information like that sought in Request #1 has become available in other states without causing any demonstrated harm.

Third, the Court should affirm that the Petitioners have not proved that the records sought in Request #2 reveal trade secrets or confidential proprietary information. The information

sought is too stale to cause substantial, if any, competitive harm; multiple MCOs contract with a single dental subcontractor or a single provider, by necessity revealing their supposedly "secret" and "confidential" information; and the Petitioners have offered no evidence that MCOs elsewhere in Pennsylvania or in other states have suffered harm as a result of the disclosure of rates like those sought here.

Fourth, the Court should reject the argument that the Pennsylvania Uniform Trade Secrets Act somehow adds an exception to the RTKL apart from the "trade secrets" exception set forth in the RTKL itself. *See* 12 Pa.C.S. §§ 5301 *et seq.*

Finally, the Court should affirm that the "financial records" provision of the RTKL independently requires the release of the documents sought in Request #1, and it should further hold that the "financial records" provision independently compels the release of the documents sought in Request #2. *See* 65 P.S. §§ 67.102, .708(c).

IV. ARGUMENT FOR RESPONDENTS

The scope of this Court's review of the OOR's conclusions of law is plenary. *E.g.*, *Office of the Governor v. Raffle*, No. 1168 C.D. 2012, 2013 Pa. Commw. LEXIS 124, at *8 n.4 (Pa. Commw. Ct. Apr. 24, 2013) (en banc). This Court may substitute its own findings of facts based on its review of the record. *Id.* DPW and the Petitioner MCOs bear the burden of proving by a preponderance of the evidence that the public should not be allowed to learn how the public moneys in question were spent. 65 P.S. § 67.708(a)(1) ("The burden of proving that a record of a Commonwealth agency . . . is exempt from public access shall be on the Commonwealth agency . . . receiving a request by a preponderance of the evidence."); *Chester Cmty. Charter Sch. v. Hardy*, 38 A.3d 1079, 1087 (Pa. Commw. Ct. 2012) (the same is true for third-party direct interest participants). Each of the six Petitioners was required to prove its own case, and

even if this Court finds that some of the Petitioners have carried their burdens, it should affirm the Final Determination with respect to any Petitioner that has failed individually to do so. *See Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 342 (Pa. Commw. Ct. 2013) (en banc) ("Third-party contractors in possession of requested records are placed in the shoes of a local agency for purposes of the burden of proof when the contractor performs a governmental function on behalf of the agency, and those records directly relate to the contractor's performance of that function.").

The Petitioners have challenged the Final Determination on several grounds. *See* Brief of Department of Public Welfare, dated Mar. 25, 2013 ("DPW Br."); Brief of Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan, dated Mar. 25, 2013 ("MCO Group A Br."); Brief of UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares (dated Mar. 25, 2013) ("MCO Group B Br."). Requestor's brief addresses the Petitioners' arguments; all potential arguments not raised by any Petitioners in their opening briefs to this Court are waived and are not discussed here.

For the reasons set forth below, this Court should affirm the Final Determination in full.

A. The Requested Documents Are Not Trade Secrets or Confidential Proprietary Information Exempt from Disclosure

1. Binding Precedent Compels Granting Requests #1 and #2

The Petitioners argue that the documents sought in Request #2[4] are exempt from disclosure as public records on the grounds that they "constitute[] or reveal[] a trade secret or

[4] In their post-hearing reply brief, the Group B MCOs, United and Coventry, asserted the brand-new argument that the Request sought only records setting forth rates paid by MCOs directly to dental service providers, not rates paid by MCOs to dental subcontractors. (R. 1157a.) The

confidential proprietary information." 65 P.S. § 67.708(b)(11). But this Court rejected just this argument in *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009), *alloc. denied*, 604 Pa. 708, 987 A.2d 162 (2009). In relevant part, the facts in *Lukes* are on all fours with the facts in the instant matter, and the outcome should be the same as well.

In *Lukes*, as in Request #2, the requester sought documents that showed the rates that a Medicaid MCO (the University of Pittsburgh Medical Center Health Plan, referred to throughout the *Lukes* opinion as "the Health Plan") paid to certain providers, namely hospitals that provided care to the MCO's Medicaid enrollees. In *Lukes*, as here, the MCO intervened and, along with DPW, opposed the production of the records on the grounds, among others, that the records were protected as "trade secrets." This Court in *Lukes* nevertheless required production of the documents. In doing so, this Court rejected the contention of DPW and the MCO that the documents were "trade secrets" within the definition of "trade secrets" as set out in 12 Pa.C.S. § 5302. *Lukes*, 976 A.2d at 626. *See generally id.* at 626-27 (holding, in the face of evidence that the contracts between a Medicaid MCO and a group of hospitals "contain confidentiality provisions," that "a party that voluntarily participates in a public program and is receiving and

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Group B MCOs have abandoned this argument on appeal. MCO Group B Br. at 6 n.3 ("[T]he rates paid by . . . the MCOs to the subcontractors[] are in issue here."). Before submitting their post-hearing reply brief, these two Petitioner MCOs proceeded under the (correct) premise that both categories were part of the Request #2. For example, they hired an expert on the issue (*e.g.*, R. 290a, 292a-293a), elicited testimony on the issue during their direct examination of their own fact witnesses at the hearing (*e.g.*, R. 375a, 380a-381a (United); R. 493a-496a (Coventry)), and candidly acknowledged in their opening post-hearing brief that "[t]he rate information sought here" included "[t]he contracts the MCOs have with . . . their subcontractors" (R. 1034a). The other three Petitioner MCOs have acknowledged all along that Request #2 targets the documents in both categories. (*E.g.*, R. 1066a, 1167a.)

disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded from public scrutiny").

Lukes is not only binding with respect to Request #2, but it also compels the conclusion that the documents sought in Request #1 (the pmpm rates negotiated between DPW and the MCOs) are public records. The documents found to be public records in *Lukes* were in contracts to which DPW was not even a party, whereas the contracts between DPW and the MCOs feature a state agency as a party.

Lukes was decided under a version of the RTKL that has since been replaced, 976 A.2d at 612 n.1, but, as the OOR held in its Final Determination, the holding of the Commonwealth Court's decision in *Lukes* applies as well to the version of the RTKL that is currently in force and is applicable to the instant case. First, the definition of "trade secret" in force in the present case, 65 P.S. § 67.102, is identical in all material respects to the language defining "trade secret" that the *Lukes* Court considered, 976 A.2d at 626. Second, the Supreme Court has explicitly recognized that *Lukes* has ongoing vitality under the new RTKL, "particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1044 n.19 (Pa. 2012); *see also Levy v. Senate of Pa.*, No. 44 MAP 2012, 2013 Pa. LEXIS 788, at *54 (Pa. Apr. 24, 2013) ("[T]he enactment of the RTKL in 2008 was a dramatic expansion of the public's access to government documents.").

The Petitioner MCOs cite two cases decided since *Lukes* in an effort to suggest that *Lukes* is no longer good law. MCO Group A Br. at 24-25; MCO Group B Br. at 26. These cases are, however, readily distinguishable. In *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Commw. Ct. 2011), this Court cited *Lukes* not on the subject of trade secrets, but rather on the issue of whether the documents were deemed in the possession of the public agency by virtue

of being "maintained" by the agency, where that term did not appear in the then-current RTKL. 11 A.3d at 622. In *In re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011), the facts also did not involve *Lukes*'s holding regarding trade secrets, but instead dealt solely with *Lukes*'s interpretation of what constitutes an agency's "possession" of a document. Accordingly *Lukes* remains binding law for the proposition that records involved here are not exempt from being a public document because they are a "trade secret," and the Court should therefore apply *Lukes* to the instant matter.

It is true, as the Petitioner MCOs note, that the "confidential proprietary information" exception did not appear in the version of the RTKL that was at issue in *Lukes*. MCO Group A Br. at 28; MCO Group B Br. at 21. But neither did the "trade secrets" exception; rather, the *Lukes* Court held that the Pennsylvania Uniform Trade Secrets Act applied to the interpretation of the predecessor RTKL. 976 A.2d at 626. The Petitioners argue that the addition of the "confidential proprietary information" exception to the RTKL avoids the applicability of *Lukes* to the instant request, but this analysis would accomplish the opposite of what the Legislature intended when it liberalized the RTKL. *See SWB Yankees*, 45 A.3d at 1044 n.19. In any event, as discussed *infra*, the requested records contain no confidential proprietary information.

In addition to the *Lukes* decision itself, the OOR's conclusion—that the documents by which the Petitioner MCOs contracted with dental subcontractors and dental providers are public records that DPW must produce—is supported by section 506(d)(1) of the current RTKL, which provides as follows:

> (d) AGENCY POSSESSION—
>
> (1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the

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

65 P.S. § 67.506(d)(1). Reading *Lukes* together with section 506(d)(1) and subsequent cases decided under the current RTKL leaves no question that implementing the Commonwealth's Medicaid program is a governmental function and that the records of MCOs carrying out that program are "public records" that must be produced. *See, e.g.*, *SWB Yankees*, 45 A.3d at 1032 ("the Right-to-Know Act applies to certain records in the possession of third parties"); *see also Office of the Budget v. Office of Open Records*, 11 A.3d 618, 622 (Pa. Commw. Ct. 2011) ("[T]he records in *Lukes* . . . related to the governmental function of the Department of Public Welfare . . . ."). As this Court has explained, "Section 506(d)(1) appears to be the General Assembly's effort to ensure that some level of public access to information about governmental functions is preserved where an agency chooses to contract out the performance of that function to a third-party." *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011) (en banc). Moreover, "[t]he RTKL is remedial legislation; therefore, the exceptions from disclosure must be narrowly construed." *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 373 (Pa. Commw. Ct. 2013).

2. *Lukes* Aside, the Records Sought in Request #1 Do Not Reveal Trade Secrets or Confidential Proprietary Information

The RTKL defines "trade secret" as follows:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:
>
> > (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

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

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102. The same section of the RTKL defines "confidential proprietary information" 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.

Id. Although "the terms are not interchangeable," *Office of the Governor v. Bari*, 20 A.3d 634, 648 (Pa. Commw. Ct. 2011), in practice they usually cover the same information, and the discussion in *Bari* does not identify a single aspect of the term "confidential proprietary information" that, under the facts in the record in the instant case, is not encompassed by the definition of "trade secrets" in the current RTKL. Here, neither term applies to the requested records, because the rates change too much every year for historical data to have value to competitors; at least some of the Petirioners have failed to prove that the rates have competitive value or that they undertake any efforts to maintain the secrecy of their rates; to the extent that the disclosure of the rates would cause any party harm, that party is DPW; and information like that sought here has become available in other states without causing any demonstrated harm.

It must be kept in mind that the Requested Period covers a date range ending June 15, 2011. Allen Fisher explained at the hearing in May 2012 that the reason DPW renegotiates the pmpm rates each year is that constant change in the healthcare industry and broader economy requires frequent adjustments to the rates. (R. 628a.) The witness for Health Partners testified

similarly. (R. 343a-344a, 346a.) Coventry's witness characterized the annual renegotiations as "a very difficult process" requiring "probably a hundred" staff members. (R. 491a-492a.) United and Coventry admitted in their post-hearing brief that their capitation rates with DPW "are not static; they change from year to year" and that both MCOs "expend significant time and effort negotiating their rates with DPW." (R. 1037a.) Given the year-to-year changes of so many variables, and the complexity of these year-to-year changes as demonstrated by the need to expend significant resources to adjust the rates every year, DPW and the MCOs have failed to carry their burden insofar as they have not demonstrated why the release of stale, historical information would undermine competitive processes going forward. *See, e.g., GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) (noting that disclosure of certain contract price information "is unlikely to work a substantial harm on the competitive positions of . . . contractors" because "[t]he data is made up of too many fluctuating variables for competitors to gain any advantage from the disclosure"). As the OOR's Final Determination put it, the Petitioner MCOs' "witnesses testified that, while knowledge of their competitors' capitation rates would be of interest, [their] capitation rate negotiations with [DPW] are based on factors completely independent of the capitation rate previously paid by the Department." (R. 1217a.) Indeed, the witnesses for two Petitioner MCOs, Health Partners and United, explicitly acknowledged that outdated pmpm rate information would be of no value in setting rates going forward. (R. 358a, 390a.) Accordingly, the Petitioners have not shown that historical pmpm rates—which continue to grow older—have "economic value, actual or potential," 65 P.S. § 67.102 (definition of "trade secret").

Three MCOs' witnesses gave testimony about measures they use to guard the secrecy of the capitation rates at which DPW pays them. (*E.g.*, R. 378a-379a (United's witness describing

limited internal access to the records and electronic security measures); R. 333a-334a (witness from Health Partners); R. 494a (Coventry).) The other two Petitioner MCOs, Keystone and Aetna, put on ***no*** evidence that they satisfy subpart 2 of the definition of "trade secret." Keystone's witness made only the conclusory assertion that it would be "impossible" for somebody outside the company to get access to the rates but did not substantiate that assertion. (R. 519a.) Aetna's witness stated vaguely that "we keep our rates confidential." (R. 483a.) As for DPW, Mr. Fisher explained that DPW discloses the final negotiated rates to various state and federal agencies, but there is no evidence in the record as to any confidentiality policies or practices of those agencies concerning records received from DPW, and therefore no evidence to establish that they take any steps to maintain the secrecy of those records. (R. 222a-223a, 248a, 275a.)[5] Notably, while the Petitioner MCOs believed they had taken a legal step to restrict

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[5] The Petitioner MCOs make reference to an irrelevant regulation of the Pennsylvania Department of ***Health***, 28 Pa. Code § 9.604(a)(8). (MCO Group A Br. at 38; MCO Group B Br. at 16.) That regulation requires health plans to make annual reports to the Department of Health that are to include: "Copies of the currently utilized generic or standard form health provider contracts including copies of any deviations from the standard contract and reimbursement methodologies." The regulation then proceeds to provide as follows:

> Reimbursement information submitted to the Department under that paragraph may not be disclosed or produced for inspection or copying to a person other than the Secretary or Secretary's representatives without the consent of the plan which provided the information, unless otherwise ordered by a court.

Id.; *see also id.* § 9.602 (defining "Department" as "The Department of Health of the Commonwealth"). Merely to read this language is to see that it is inapplicable to the present situation. The documents sought here are not reports submitted by the Petitioner MCOs or their dental subcontractors to the Department of Health.

Two Petitioner MCOs also suggest that "the records in issue here, if disclosed, could threaten the Commonwealth with a loss of federal funding." (MCO Group B Br. at 16 n.9; *see also id.* at 16 (citing 45 C.F.R. § 74.43; 42 C.F.R. § 434.70(a)(2) & (b)).) The federal regulations they cite contain very general language regarding fair competitive practices, and it requires a vivid

disclosure of the capitation rates by DPW in the form of a standard contract, DPW's witness testified that DPW is free to disclose those rates (R. 649a-650a); and as the text of that standard contract makes plain, and as confirmed by witnesses, there is no contractual bar to disclosure of the rates by the Petitioner MCOs (R. 843a-844a; *see also* R. 379a, 388a-389a, 415a, 483a.) Finally, Keystone's witness did not provide any testimony suggesting that his company's pmpm rates have any actual or potential economic value, as required by subpart 1 of the definition of "trade secret."

The preceding two paragraphs focus on the definition of "trade secret," but the same analysis reveals the non-confidentiality of the records under the definition of "confidential proprietary information." In addition, records are not covered by the confidential proprietary information exception unless they are "received by an agency" and, if disclosed, "would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102. In other words, the "confidential proprietary information" exception would apply here only if the release of the information would cause harm ***to the Petitioner MCOs.*** The testimony in the record makes clear, however, that the competitive harm, if any, would be felt by ***DPW.*** Mr. Fisher stated that "[w]e're concerned that the disclosure would increase the

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imagination to suppose that the federal government would attempt to invoke them to end Pennsylvania's multibillion dollar Medicaid grants if DPW released to the public information that is already available to various state and federal agencies, the Petitioner MCOs, their subcontractors, and dentists throughout Greater Philadelphia, and that the federal government would do so in spite of the public release of such information in Pennsylvania following *Lukes* and in other states as well, *see, e.g.*, *Wilmington Star-News v. New Hanover Reg'l Med. Ctr.*, 480 S.E.2d 53 (N.C. Ct. App. 1997). DPW asserted and then abandoned this very argument before the OOR (R. 570a-571a), and it should carry no more weight with this Court. Besides, when, as here, petitioners raise a brief argument in a footnote, and do not even include the argument in their summary of argument, no review of their argument is warranted. *See Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa. 595, 610 n.8, 735 A.2d 100, 109 n.8 (1999).

Department's costs" and that it would be harmful to DPW if the MCOs released the rates. (R. 650a.) Coventry's witness likewise testified that if the rates were disclosed, the party whose competitive position would be undermined is DPW. (R. 500a.) There is no evidence in the record that the release of the records responsive to Request #1 would cause substantial harm to the competitive position of any of the Petitioner MCOs.

Lastly, DPW and the MCOs have failed to carry their burden insofar as they have not explained why the release in other states of information like that sought via Request #1 has not had the negative competitive effects they fear. As argued below (*e.g.*, R. 1138a, 1144a), the Court can and should take judicial notice, *see* 42 Pa.C.S. §§ 5327-5328, that at least two other states, North Dakota and Wisconsin, have permitted the release of information just like that sought here. Attorney General Letter Opinion 98-L-17 (N.D. Mar. 2, 1998), *available at* http://www.ag.state.nd.us/opinions/1998/Letter/98olso02.pdf, attached as Exhibit 1; State of Wisconsin Legislative Audit Bureau, Dental Services for Medical Assistance Recipients (Apr. 2008), *available at* legis.wisconsin.gov/lab/reports/08-MADental_Ltr.pdf, attached as Exhibit 2.[6] This multi-state phenomenon undermines the argument that the release of such information does not or must not occur, or that it would devastate the competitive marketplace.

3. *Lukes* Aside, the Records Sought in Request #2 Do Not Reveal Trade Secrets or Confidential Proprietary Information

[6] The State of Wisconsin report focuses on four Wisconsin counties in which, as in SEPA, Medicaid recipients receive dental care through MCOs. *See* Exhibit 2 at 3. Table 4, at page 5 of Exhibit 2, lists for 2006 for each of five MCOs the total capitation-payment amount and the "average monthly medical assistance enrollment." By dividing the total capitation payments number by the enrollment number, a per-member-per-year payment rate may be derived and, by dividing that per-member-per-year payment rate by 12, the per-member-per-month rate may be derived. This report is thus an instance in which pmpm Medicaid rates paid by a state to MCOs have been publicly disclosed.

Lukes and its rationale squarely establish that the records sought in Request #2 are public records that must be produced under the RTKL. There are other reasons as well why this Court should affirm the Final Determination's holding with respect to Request #2 that "[t]he evidence presented . . . does not establish that the [Petitioner MCOs] would suffer 'substantial harm' if their provider rates were disclosed." (R. 1221a.) First, the information sought is too stale to cause substantial, if any, competitive harm; second, multiple MCOs contract with a single dental subcontractor or a single provider, by necessity revealing their supposedly "secret" and "confidential" information at issue; and third, the Petitioners have offered no evidence that MCOs elsewhere in Pennsylvania or in other states have suffered actual or potential economic harm as a result of the disclosure of such rates.

As discussed *supra* with respect to Request #1, costs in the healthcare industry and in the economy as a whole fluctuate significantly from year to year, and so, as is undisputed, the Petitioner MCOs must invest significant resources in refining and renegotiating their contracts each year. Even if, *arguendo*, disclosure of the current year's rates would harm the competitive position of an MCO vis-a-vis the other MCOs or vis-a-vis its subcontractors and providers, the disclosure of information that was already one year old at the time of hearing would be less harmful—and the Court can reasonably infer that the disclosure of five-plus-year-old information would be less harmful still. The OOR recently had occasion to revisit this issue in a proceeding that involved the same parties as the instant case, along with the Petitioners' dental subcontractors, DentaQuest and Dental Benefit Providers. *Eiseman v. DPW* (*Eiseman II*), Dkt No. AP 2012-2017, 2013 PA O.O.R.D. LEXIS 297 (Pa. OOR May 7, 2013).[7] The request in

[7] The OOR assigned a different Appeals Officer to *Eiseman II*.

Eiseman II sought, *inter alia*, records showing historical payment rates of dental subcontractors to dental providers for the provision of Medicaid services within SEPA. *Id.* at *1-2. That request therefore sought information one step further "downstream" from the information sought here in Request #2. The OOR granted in full the request in *Eiseman II*. *Id.* at *19. The OOR convincingly reasoned as follows:

> Here, like in [the instant case], the third parties have provided numerous affidavits attesting to the steps taken to keep the requested information secret and confidential. However, the third parties have not established that they would suffer "substantial harm" if this information was disclosed, or that the information derives economic value from not being generally known to competitors.
>
> The third parties attest that they each take measures to keep rate information confidential. Further, the third parties attest that the "harm" that they will suffer if this rate information is released is competition from competitors. For example, the [Aetna], [Health Partners], [Keystone], and [DentaQuest] affidavits attest that release of this rate information could: 1) enable competitors to "undercut" their businesses, and 2) "cause the providers [i.e., dentists] to seek higher rates." Likewise, the [United], [Coventry], and [Dental Benefit Providers] affidavits attest that disclosure of this rate information "would offer solid parameters by which competitors could refine their own pricing strategies in an effort to win business away." However, these affidavits go on to explain that "[r]ates vary by dental practice and are based on a variety of factors, including but not limited to the need for the practice in the network, the number of existing Medical Assistance enrollees that are patients of the practice, and the types of services rendered (i.e., general dentistry, pediatric dentistry, etc.)" and that "[t]he rates are also reevaluated and possibly renegotiated periodically."
>
> While the OOR understands that the third parties consider rate information confidential, like in *Lukes*, "[t]he threat of competition . . . is insufficient to invoke an exemption . . . from disclosure." *See Lukes*, *supra*. The third parties have shown that the rates paid to dentists change periodically, or are at least "reevaluated." As such, there is no evidence demonstrating how disclosure of this information undermines the parties' present competitive positions or has present economic relevant or value, as the information may very well may be "outdated" by the time of its release. Accordingly, the OOR finds that the requested information does not constitute a trade secret or confidential proprietary information and that the third parties failed to meet the burden of proving that this information is exempt from disclosure pursuant to Section 708(b)(11) of the RTKL.

2013 PA O.O.R.D. LEXIS 297, at *16-18.

Here, the principal thrust of the Petitioner MCOs' resistance to the provision of the documents sought in Request #2 is that production of the documents would invade the MCOs' interest in maintaining as trade secrets and confidential proprietary information what the MCOs pay their dental subcontractors, thus harming their ability to compete fairly in the market for reasonable contract rates. *E.g.*, MCO Group A Br. at 32; MCO Group B Br. at 23. But with four of the five Petitioner MCOs, together accounting for more than 90% of Medicaid enrollees in SEPA, subcontracting with the same dental subcontractor (DentaQuest), this Court may readily see that DentaQuest knows what each of those four MCOs is paying it; accordingly, there cannot be secrets or confidences that could be protected even if a correct interpretation of the RTKL would otherwise have entitled this information to protection.[8] In other words, a single business—DentaQuest—knows all of the supposedly "secret" and "confidential" information of four of the Petitioner MCOs. It is impossible to square the Petitioner MCOs' insistence that they jealously guard the secrecy of their provider rates with the fact that most of them share that "highly confidential" information with DentaQuest, the same agent that also acts as agent to competitor MCOs.[9]

[8] The discussion in this paragraph and the following paragraph does not apply to United, which does not subcontract with DentaQuest.

[9] The MCO Group A Brief makes the peculiar claim that "[e]xcept for required disclosure to a government agency such as DPW, the rates that the Petitioners pay the subcontractors and dental providers are not disclosed by the Petitioners to anyone outside the company, including the other HMOs." MCO Group A Br. at 31. This assertion is plainly incomplete, as all the MCO Group A Petitioners disclose their provider rates to ***DentaQuest*** as a necessary component of their business negotiations.

The Petitioners cite *Parsons v. Pennsylvania Higher Education Assistance Agency*, 910 A.2d 177, 185 (Pa. Commw. Ct. 2006) (en banc), and *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010), for the factors to determine whether information is a trade secret. MCO Group A Br. at 36; MCO Group B Br. at 12. The first of these factors—"the extent to which the information is known outside of the company's business"—overwhelmingly militates against a finding of trade secrecy here, as the information is known by an agent of the company's competitors. And to the extent that the test is different for "confidential proprietary information," here the information sought has ***already*** been disclosed to the very party in whose hands it could do the most harm: a subcontractor negotiating on behalf of competitor MCOs. *See also Moffitt v. Pa. Dep't of Gen. Servs.*, Docket No. AP 2012-1470, 2012 PA O.O.R.D. LEXIS 1297, at *10 (Pa. OOR Oct. 15, 2012) (the party asserting trade secrecy or confidential proprietary information must "establish ***how*** disclosure would harm [its] competitive position"). An analytically identical situation obtains with respect to Health Partners' and Keystone's contracts with Special Smiles.

Finally, as argued below (*e.g.*, R. 1137a, 1144a), information like that sought in Request #2 has been released in other locations, but the Petitioners have not identified any harm that has flowed from those disclosures. First and foremost, this Court in *Lukes* ordered the release of information about certain provider rates paid in Pittsburgh. In addition, a North Carolina decision ordered the release of similar information in that state. *Wilmington Star-News v. New Hanover Reg'l Med. Ctr.*, 480 S.E.2d 53 (N.C. Ct. App. 1997). These releases of information discredit the testimony of Henry Miller that publication of rates would harm the competitive interests of the MCOs, as he was unaware that such releases had even occurred. (R. 293a-294a, 301a.)

B. The Pennsylvania Uniform Trade Secrets Act Does Not Bar Disclosure of the Requested Documents

Several of the Petitioners urge that the Pennsylvania Uniform Trade Secrets Act ("PUTSA"), 12 Pa.C.S. §§ 5301 *et seq.*, limits what records may be disclosed under the current version of the RTKL. DPW Br. at 7-12; MCO Group B Br. at 12, 25-26. The OOR's Final Determination convincingly dispensed of this argument with half a paragraph:

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

(R. 1216a.) PUTSA and the RTKL do not "conflict," as DPW argues, DPW Br. at 10; rather, they address completely different scenarios. PUTSA provides mechanisms for parties to seek injunctions, 12 Pa.C.S. § 5303, monetary damages, *id.* § 5304, attorney fees, *id.* § 5305, or litigation-related tools such as in camera hearings, *id.* § 5306, none of which any party has requested in the instant matter.

Because 65 P.S. § 67.708(c) instructs that the trade secrecy exception set forth at section 67.708(b)(11) does not apply to "financial records," DPW argues, PUTSA trumps the RTKL to exempt from disclosure "financial records" containing trade secrets. DPW Br. at 9-10. But the Legislature specifically omitted the section 67.708(b)(11) exceptions, including trade secrecy, from the list of exceptions to the exceptions in section 67.708(c), and PUTSA provides absolutely no reason to read it back in. This is both because the two statutes address different scenarios and because the texts of the trade secrecy provisions of the RTKL and PUTSA are, in

relevant part, worded identically; DPW does and cannot explain how PUTSA may alter the later-enacted RTKL provisions at sections 67.708(b)(11) and 67.708(c).[10]

C. The Documents Should Be Disclosed as "Financial Records"

Even if the Court were to conclude that the documents sought in the Requests would reveal trade secrets or confidential proprietary information, it should affirm the Final Determination on the independent and sufficient grounds that the documents sought in Request #1 are "financial records." (R. 1218a.) As the Final Determination correctly noted, the RTKL exception for trade secrets and confidential proprietary information set forth at 65 P.S. § 67.708(b)(11) "shall not apply to financial records." 65 P.S. § 67.708(c); *accord Dep't of Conservation & Natural Res. v. Office of Open Records*, 1 A.3d 929, 939 (Pa. Commw. Ct. 2010) (en banc). The RTKL defines "financial record" in relevant part as "[a]ny account, voucher or ***contract*** dealing with: (i) the receipt or ***disbursement of funds by an agency***; or (ii)

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[10] The *Lukes* Court's analysis of the predecessor RTKL took PUTSA into account. *See* 976 A.2d at 626 ("The definition of 'public record' states that the term 'shall not include any . . . document . . . access to or the publication of which is prohibited, restricted or forbidden by statute law . . . .") (quoting 65 P.S. § 66.1 (repealed as of Jan. 1, 2009)). In arguing for the application of PUTSA under the new RTKL, the Petitioners cite 65 P.S. § 67.102, which defines "public record" in relevant part as a record that "is not exempt from being disclosed under any other Federal or State law . . . ." DPW Br. at 7-12; MCO Group B Br. at 12, 25-26. Consistent with the overall liberalization of the new RTKL, this new definition of "public record" is less restrictive than the predecessor version, replacing the language "prohibited, ***restricted*** or forbidden" (emphasis added) with the more limited exception of "exempt from being disclosed." Under this new definition, records are not "public records" only when a different statute specifically forbids their disclosure, as opposed to merely providing remedies for a party concerned about their disclosure. *See, e.g., Advancement Project v. Pa. Dep't of Transp.*, 60 A.3d 891, 895 (Pa. Commw. Ct. 2013) (applying this exception in the new RTKL to a request for release of driving records, where Pennsylvania Vehicle Code "makes it unlawful for PennDOT to 'sell, publish or disclose . . . records or reports which relate to the driving record of any person'" (quoting 75 Pa.C.S. § 6114(a)(1))).

an agency's acquisition, use or disposal of services, supplies, materials, equipment or property." 65 P.S. § 67.102 (emphases added). There can be no question that the contracts between DPW and the Petitioner MCOs setting forth pmpm rates are contracts dealing with the disbursement of funds by DPW.

Aetna, Health Partners, and Keystone correctly note that the OOR raised the issue of the "financial records" provision sua sponte after the close of the record. MCO Group A Br. at 38-40. If, *arguendo*, this was error, it was entirely harmless error, because as those same MCOs note elsewhere in their brief, "[a]n appellate court, in reviewing an order of the OOR, is entitled to the broadest scope of review," and it "may substitute its own findings of fact for that of the agency." MCO Group A Br. at 3 (quotation marks and citations omitted). In other words, the Petitioners had a full and fair opportunity to explain—***in their opening briefs to this Court***—why section 67.708(c) does not apply to the documents sought. But the Petitioners chose not to avail themselves of this opportunity.

The Petitioners have identified no facts they would have developed on the issue of the application of section 67.708(c) to Request #1. This is because there ***could not be any such facts***. The records sought are incontrovertibly contracts. The question of whether they are "financial records" within the meaning of the RTKL is a pure question of law. Moreover, it is an easy question of law, which perhaps explains why the Petitioner MCOs eschewed it in their briefs. For its part, DPW ***concedes*** that each contract setting forth the pmpm rates it has negotiated with an MCO is "indisputably a 'financial record' as the RTKL defines that term." DPW Br. at 9.

The controlling precedent concerning appeals from decisions that raised issues sua sponte is *Yount v. Pennsylvania Department of Corrections*, 600 Pa. 418, 966 A.2d 1115 (2009). Oddly,

the Group A MCOs cite *Yount* as supporting their position, MCO Group A Br. at 40 n.17, even though quite the opposite is true. In *Yount*, the Supreme Court held that it had been "inappropriate" of the Commonwealth Court to "grant[] summary judgment on an issue raised sua sponte." 600 Pa. at 424, 966 A.2d at 1119. Nonetheless, the Supreme Court ***affirmed*** the decision. *Id.* at 430, 966 A.2d at 1122. It concluded that "no party will be prejudiced" by the Commonwealth Court's sua sponte determination, because the Supreme Court "afforded both parties argument on the merits of the dispositive issue." *Id.* at 425, 966 A.2d at 1119; *see also id.*, 966 A.2d at 1119 ("It would unduly place form over function to remand the matter for a futile reconsideration below, since we considered the merits with the benefit of advocacy from both parties and a lower court opinion. To remand would require additional time and expense from the parties and the [tribunal below] when, in the end, our interpretation of prevailing law would be based on the same record and advocacy. . . . [T]he relevant issue was fully briefed and discussed before this Court, and the parties were afforded the appropriate judicial attention to which they are entitled.").

The Group A Petitioner MCOs have urged that by raising the issue sua sponte, the OOR "violated [their] due process rights" and that the Final Determination therefore "must be reversed." MCO Group A Br. at 40. The cases they cite do not help their cause. They rely principally on *Orange Stones Co. v. Borough of Hamburg Zoning Hearing Board*, 991 A.2d 996 (Pa. Commw. Ct. 2010), which concerned an application for a zoning permit for a "68 bed inpatient non hospital rehabilitation center for drug and alcohol persons with 16 bed Halfway house," *id.* at 997. The Borough's zoning officer denied the application on the grounds that the structure would be a "hospital" and thus prohibited at the floodplain site in question. *Id.* The applicant appealed to the Borough's Zoning Hearing Board, which held fact-finding hearings

over two days related to the issue of whether the structure would be a "hospital." *Id.* The Board's final decision denying the application, however, also invoked a separate provision in the zoning code concerning "jail[s] or prison[s]." *Id.* The issue of whether the halfway-house component of the application triggered the "jail or prison" zoning rule was never discussed during the evidentiary hearings, and the applicant thus did not put on evidence to flesh out the nature of the proposed "halfway house." *Id.* at 999-1000 & n.9. This Court ruled that the Board had committed reversible error because it had deprived the applicant "of notice and an opportunity to address the issue on the record." *Id.* at 1000. In the instant case, by contrast, there are no relevant ***factual*** issues in dispute.

The other cases the three Petitioner MCOs cite—all of which predate *Yount*—are not on point. *See* MCO Group A Br. at 40. First, in *Danville Area School District v. Danville Area Education Association*, 562 Pa. 238, 247, 754 A.2d 1255, 1259 (2000), the Supreme Court disapproved of "the sua sponte raising of issues ***by an appellate court*** to reverse a judgment" (emphasis added). The OOR is not an appellate court. Second, *Commonwealth v. Cavey*, 145 Pa. Commw. 154, 602 A.2d 494 (Pa. Commw. Ct. 1992), concerned the suspension of a driver's license after the licensee did not provide a second breath sample for breathalyzer testing. Although neither party had raised the issue before the trial court, the trial court sua sponte found that "Officer Soule's request [for a second breath sample] was unreasonable, as he had no other reason to give Mrs. Cavey a second test except to confirm the accuracy of the first one." *Commonwealth v. Cavey*, 11 Pa. D. & C.4th 545, 547 (Pa. Ct. Com. Pl. 1991); *see also id.* at 550 ("The first breath test contains all the evidence necessary for the Commonwealth to make a case against the driver for driving under the influence . . . ."). Sitting in its appellate capacity, the Commonwealth Court lacked the benefit of a fully developed evidentiary record on which to

review the trial court's conclusion, and it reversed the trial court. The standard of review is markedly different in RTKL cases. *Bowling v. Office of Open Records*, 990 A.2d 813, 820 (Pa. Commw. Ct. 2010) (en banc) ("[W]e function as a trial court, and we subject this matter to independent review. We are not limited to the rationale offered in the OOR's written decision. Accordingly, we will enter narrative findings and conclusions based on the evidence as a whole, and we will explain our rationale."), *alloc. granted*, 609 Pa. 265, 15 A.3d 427 (2011). The third case the three Petitioner MCOs cite similarly reversed the decision of a trial court that had raised a fact-dependent issue sua sponte, because the trial court had deprived the losing party of the "opportunity to proffer any explanation which might have clarified uncertain matters." *Commonwealth v. Malone*, 103 Pa. Commw. 295, 297, 520 A.2d 120, 122 (Pa. Commw. Ct. 1987).

In sum, if the Court declines to affirm the Final Determination as to Request #1 on other grounds, it should follow *Yount* and affirm the Final Determination for the reason that the records requested sought in Request #1 are "financial records" and thus public records not subject to any exception for trade secrets or confidential proprietary information. Similarly, if the Court declines to affirm the Final Determination as to Request #2 on other grounds, it should order their disclosure on the grounds that they too are "financial records" within the meaning of section 67.708(c). As with the records responsive to Request #1, there is simply no dispute of relevant fact. Each of the responsive documents is a "contract dealing with . . . an agency's [namely, DPW's] acquisition, use or disposal of services . . . ." 65 P.S. § 67.102. This is because the substantial funds DPW funnels through the Petitioner MCOs via the dental subcontractors to the dentists who provide services to SEPA Medicaid enrollees qualify as DPW's "use" of "services" to carry out its Medicaid program. *See Lukes*, 976 A.2d at 626 (noting that a Medicaid

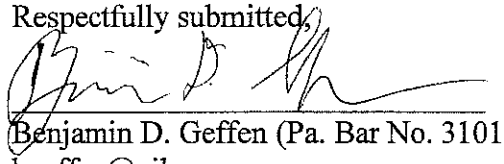
MCO had entered into agreements with providers "at the direction of DPW for the disbursement of public funds"); *id.* at 627 (the MCO is "voluntarily participat[ing] in a public program and is receiving and disbursing public funds in furtherance of that program").

V. CONCLUSION

For all of the foregoing reasons, the Court should affirm the OOR's Final Determination in its entirety. If, alternatively, the Court finds that only some of the Petitioners have carried their burdens of proof, it should affirm the Final Determination with respect to those Petitioners that have not.

Dated: May 29, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Benjamin D. Geffen, hereby certify that on this 29th Day of May 2013, I caused the foregoing Brief of Respondents to be filed with the Court, and caused two copies of the same to be served by First-Class Mail on each of the following, which satisfies the requirements of Pa.R.A.P. 121:

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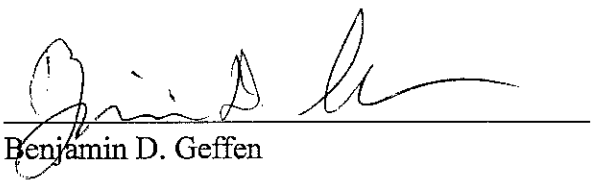

Benjamin D. Geffen