

IN THE SUPREME COURT OF PENNSYLVANIA

No. 48 EAP 2014

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

Appellants,

v.

DENTAL BENEFIT PROVIDERS, INC., UNITEDHEALTHCARE OF
PENNSYLVANIA, INC. d/b/a UNITEDHEALTHCARE COMMUNITY PLAN,
and HEALTHAMERICA PENNSYLVANIA, INC., d/b/a COVENTRYCARES,

Appellees.

**BRIEF OF *AMICUS CURIAE*, THE PENNSYLVANIA NEWSMEDIA
ASSOCIATION and THE PENNSYLVANIA FREEDOM OF
INFORMATION COALITION, IN SUPPORT OF APPELLANTS**

**On Appeal from the Order of the Commonwealth Court in Case No. 945 C.D.
2013, Reversing the Final Determination of the Office of Open Records in No.
AP 2012-2017**

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 49 EAP 2014

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

Appellants,

v.

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

Appellees.

**BRIEF OF *AMICUS CURIAE*, THE PENNSYLVANIA NEWSMEDIA
ASSOCIATION and THE PENNSYLVANIA FREEDOM OF
INFORMATION COALITION, IN SUPPORT OF APPELLANTS**

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 50 EAP 2014

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

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC
WELFARE,

Appellee.

**BRIEF OF *AMICUS CURIAE*, THE PENNSYLVANIA NEWSMEDIA
ASSOCIATION and THE PENNSYLVANIA FREEDOM OF
INFORMATION COALITION, IN SUPPORT OF APPELLANTS**

**On Appeal from the Order of the Commonwealth Court in Case No. 945 C.D.
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I. INTEREST OF THE *AMICUS CURIAE*

The Pennsylvania NewsMedia Association (PNA) is a Pennsylvania non-profit member corporation with its headquarters located in Harrisburg, Pennsylvania. The PNA represents the interests of more than three hundred (300) daily and weekly newspapers and other media-related organizations across the Commonwealth in ensuring that the press can gather information and report to the public. A significant part of PNA's mission is to defend the news media's statutory right of access to public records in Pennsylvania.

The Pennsylvania Freedom of Information Coalition (Coalition) is a Pennsylvania non-profit corporation founded in 2005 and headquartered in Harrisburg, Pennsylvania. The Coalition consists of journalists, librarians, attorneys, educators, community and business leaders and is dedicated to protect the right of all Pennsylvania citizens to open and unfettered access to all levels of Commonwealth, county and local government. Access to public records, guaranteed by the Pennsylvania Right-to-Know Law is of particular concern to the Coalition. The Coalition is also a member of the National Freedom of Information Coalition, an alliance of non-profit, state, freedom of information and First Amendment organizations and academic centers concentrating on First Amendment related issues. Another of the Coalition's primary goals is the

education of Pennsylvanians on the various rights of access to government proceedings and records under the Sunshine Act and the RTKL.

The press' and public's ability to access records that illustrate the expenditure of public funds is critical to their ability to understand government action and hold public officials accountable. The PNA and Coalition wish to participate in this appeal pursuant to Pa.R.A.P. 531 to highlight the legal and policy considerations that mandate an interpretation of the Right to Know Law in a manner that provides access to records of government contractors receiving public funds and performing duties on behalf of government agencies.

II. STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this appeal pursuant to 42 Pa.C.S. § 724.

III. ORDER IN QUESTION

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

The Commonwealth Court entered the Order and Opinion below in three consolidated cases: *Dental Benefit Providers, Inc. and UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc., d/b/a CoventryCares v. James Eiseman, Jr. and the Public*

Interest Law Center of Philadelphia, No. 945 C.D. 2013; *Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 957 C.D. 2013; and *Department of Public Welfare v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 958 C.D. 2013 (collectively, *Eiseman II*).

IV. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Because the issues presented in this appeal ‘are purely legal ones,’ the Supreme Court should ‘exercise a de novo standard of review and a plenary scope of review of the Commonwealth Court’s decision.’ Bowling v. Office of Open Records, 75 A.3d 453, 466 (Pa. 2013); *see also* McMullen v. Kutz, 985 A.2d 769, 773 (Pa. 2009) (‘[T]he interpretation of the terms of a contract is a question of law for which our standard of review is de novo, and our scope of review is plenary.’).

V. STATEMENT OF THE QUESTIONS INVOLVED

The PNA and Coalition write to address the following question on appeal:

- I. When public funds are funneled through middlemen before reaching their intended beneficiaries, the contracts and records documenting this flow of public funds are public records and financial records required to be disclosed under the Right-to-Know Law?

Answer of the Office of Open Records: Yes

Answer of the Commonwealth Court: No

Suggested answer: Yes

VI. STATEMENT OF THE CASE

The PNA and Coalition hereby incorporate the Statement of the Case of Appellants, James Eiseman and the Public Interest Law Center (PILC) as if set forth fully herein.

VII. SUMMARY OF ARGUMENT

The records requested in this case are contracts involving a public agency and financial records illustrating the expenditure of public funds. The agency, the Department of Public Welfare (DPW), is required by state and federal law to, *inter alia*, provide public health services paid for with public funds as part of Medicaid programs. To accomplish this duty, DPW has entered into contracts with Medicaid managed-care organizations (MCOs) to facilitate these services and payments to health care providers. In some cases, the MCOs have contracted with additional contractors who facilitate health care and distribute public funds to health care providers in accordance with the Medicaid Act¹. The fact that there is more than one contractor involved in the administration of public health care benefits and the corresponding payment process does not transform otherwise public records into non-public records, and subcontracting public duties of an agency cannot preclude public access to records that illustrate how public funds are spent.

¹ 42 U.S.C. §§ 1396, *et seq.*

The RTKL in general is intended to allow maximum access to records that track public funds, and more specifically, Section 506(d) of the RTKL was expressly designed to provide access to records in the possession of private companies that perform the duties on behalf of a government agency. Whenever a record would be required to be produced by a government agency pursuant to the RTKL, it must likewise be produced by any contractor that has taken on the government's role, whether directly or by operation of an agreement to perform a government function. A contrary interpretation allows government agencies and contractors to thwart public access by contract or subcontract, a result that defeats the fundamental purpose of the RTKL and ignores its plain language, as well as the strong public policy arguments supporting open, accessible government.

The proper analysis is not based on who created or possesses the record; the proper analysis must focus on the content of the record and whether the record would be available from the government agency in the absence of the agency's contract with a third party. The Commonwealth Court's decision below threatens the public's ability to access records in the possession of government contractors and hold government officials accountable for the expenditure of public funds. The Commonwealth Court's decision contradicts basic principles of open government, this Court's holdings on the issue of access to records in the

possession of government contractors, and frustrates the legislative intent to facilitate access to records in the possession of government contractors.

VIII. ARGUMENT

- I. When public funds are funneled through middlemen before reaching their intended beneficiaries, the contracts and records documenting this flow of public funds are public records and financial records required to be disclosed under the Right-to-Know Law.

The primary goal of the Right to Know Law (RTKL), 65 P.S. § 67.101, *et seq.*, is to enable public access to records in order to allow the public to understand and scrutinize government actions and government expenditures. Anything less frustrates the plain language and intent of the Law and hinders the public's ability to hold their government accountable. Only meaningful public access can guarantee government accountability. With these goals in mind, the Legislature expressly drafted the RTKL to provide maximum access to financial records and contractor records such as those requested in this case .

The Commonwealth Court's decision below misconstrues the legislative intent and principles of open government that underpin the law, and would allow government agencies to easily contract away the public's right to know. This cannot be the result of remedial legislation intended to increase public access and accountability. See Bowling v. Office of Open Records, 990 A.2d 813, 824 (Pa.Cmwlth. 2010) (holding the [RTKL] is remedial legislation designed to

promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions), aff'd by Bowling v. Office of Open Records, 75 A.3d 453 (Pa. 2013).

The fact that middlemen are involved in the performance of DPW's duties under the Medicaid Act and the expenditure of public funds pursuant to that law cannot interfere with the public's ability to track public funds and hold government agencies accountable. The contracts between the MCO and the middlemen and resulting payment records showing the disbursement of public funds "directly relate" to DPW's obligations under Medicaid, originally contracted to the MCO and subsequently contracted to middlemen (subcontractors). As such, section 506(d) applies to require public access to both the contracts and the financial records.

A. The Law is intended to provide maximum access to records that deal with the receipt or disbursement of public funds.

The Law expressly defines "financial record" to include:

"Any account, voucher or contract dealing with:
(i) the receipt or disbursement of funds by an agency; or
(ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property."

65 P.S. § 67.102

This broad definition clearly illustrates the Legislative intent to allow the public to follow public funds as they are administered by public agencies. Moreover, of the 30 exemptions making certain records non-public, the vast majority do not apply to financial records, and even if an exemption applies, the statute only authorizes redaction of non public information, not complete withholding of a financial record. 65 P.S. § 67.708(c).²

The records in this case show how contractors perform duties required to be performed by DPW and how public funds are paid for the provision of dental services under Medicaid programs. The Commonwealth Court's prohibition of public access to these records runs afoul of the plain language and intent of the law, and bars the public's ability to determine the appropriateness of Medicaid dental reimbursements paid for with public funds. This cannot be the result.

B. Records in the possession of private parties performing a government function pursuant to contract are subject to public access.

In addition to the expansive access to financial records under the RTKL, the Legislature further guaranteed public access to records in possession of government contractors who have agreed to perform services on behalf of a government agency.

Section 506(d) of the Law states:

² 65 P.S. § 67.708(c) states “[T]he exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4),(5), (6), (16) or (17).”

“[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).

Again, the plain language of the Law shows the legislative intent to prevent government agencies from contracting away the public’s right to know and hold government agencies accountable. Simply put, the law grants public access to records that directly relate to government services provided by contactors, such as the provision and payment for publicly funded health care services.

Moreover, this Court has interpreted section 506(d) in a manner that provides access to the records requested in this case. In SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012), this Court rejected a narrow interpretation of section 506(d) in favor of a broader interpretation by which public access is triggered when an agency has delegated “some substantial facet of the agency’s role and responsibilities” by contract. Id. at 664.

The majority below misconstrued this Court’s holding and underlying analysis in SWB Yankees when it found that that the administration of Pennsylvania’s Medicaid program “constitutes a government function,” Opinion at 14, but held that “the cost of obtaining services . . . does not directly relate to the performance of the government function,” id. at 16, because a subcontractor is

involved. This analysis is contrary to this Court's decision in SWB Yankees because it ignores this Court's broad interpretation of Section 506(d)(1) in favor of a very narrow reading of the law. This narrow interpretation ignores the controlling fact that absent the contract between DPW and the MCO, and between the MCO and the subcontractors in this case, the requested records would be public directly accessible from DPW.

The Commonwealth Court's holding allows DPW to contract away the public's right to know based on the involvement of a subcontractor, while disregarding the nature and content of the requested records. The proper analysis must focus on content of the records and whether the records would be public in the absence of the contracts. In this case, it is clear that absent the contracts in this case, DPW is required by the Medicaid Act to administer health care services and facilitate payments to providers in accordance with the law. The requested records would be public from DPW in the absence of the contracts. Because the records would be public from DPW, section 506(d) and this Court's holdings guarantee that the records are no less public because contractors are involved in the process.

In this case, DPW has delegated its duties under the Medicaid Act to contractors – MCOs - who perform DPW's role in facilitating health care services and providing payments to providers. These duties are "substantial facets" of DPW's role and statutory responsibilities, but despite this fact, the majority below

refused to follow this Court's precedent because the MCOs further delegated DPW's duties to subcontractors. Adding a contractor to the equation does not change the fundamental nature of the records at issue or the duties required to be performed by DPW, the MCOs or the subcontractors. Each party must comply with the requirements of the Medicaid Act, with DPW bearing the definitive duty to ensure compliance. Access and accountability must follow the performance of a public duty, and the lower Court's holding does not recognize this basic principle of open government.

C. The RTKL is remedial legislation intended to increase public access and accountability.

The holding below not only ignores the broad intent of the RKTL and section 506(d), it results in less access than was provided under the old, more restrictive RTKL³, thereby ignoring the RTKL's remedial nature. See Bowling, supra.

The Commonwealth Court was presented with a similar factual scenario under the prior, more restrictive version of the RTKL, but nonetheless found the records at issue to be public. The Court's opposite result in the present case ignores the remedial nature of the RTKL, resulting in less public access and accountability, which cannot be the result.

³ 65 P.S. §§ 66.1-66.9, *repealed*

In Lukes v. Dep't of Pub. Welfare, 976 A.2d 609, 625 (Pa. Commw. Ct. 2009), *alloc. denied*, 987 A.2d 162 (Pa. 2009), a requester sought from DPW access to contracts between Medicaid managed care organizations (MCOs) and competing providers. The Lukes Court held that the prior RTKL required DPW to obtain and provide public access to contracts between MCOs and health care providers, noting that public agencies “may not shield a public document from disclosure by contracting with a third party that subsequently [disburses] government funds.” Id. at 625, (internal citations omitted). Although decided under the prior, more restrictive RTKL, the Lukes Court remarked on the revised RTKL’s expanded language regarding access to contractor in section 506(d), when it found the proper analysis for determining an agency’s possession of a records is “whether the agency has access and can exert control over such records.” Id. at 621.

The contracts, legal rights and duties of DPW, MCOs and subcontractors before the Lukes court are nearly identical to the present case, yet the majority below ignored Lukes in favor of a narrow interpretation of the revised, remedial RTKL.

PNA and Coalition urge this Court to reinstate the holding and reasoning in Lukes, which found under the prior, more restrictive law that:

“DPW cannot circumvent the disclosure of its money trail by contracting indirectly through the Health Plan and other MCOs or HMOs. Private

entities that receive or control public funds have a duty to account for their handling of those funds. Disclosure of the Provider Agreements is the only way to ensure such accountability. To shield such documents from review would circumvent the public's ability to determine how tax dollars are spent.”

Id. at 625.

It is counterintuitive to suggest that the prior, more restrictive law provided access to records that are now shielded from public access under the revised, remedial RTKL. The new RTKL is intended to increase public access and accountability, and the language of the law and decisions by the courts favor public access in this case.

Finally, PNA and Coalition suggest that the dissent below is on point and recognizes the important public access policies at play, as well as this Court’s holdings on the issue. Judge McCullough wrote in her dissent:

[T]he Majority’s interpretation . . . ignores the fact that the funds originate with DPW. . . . [S]ection 102 of the RTKL is broad enough to include public funds that trickle down through contractor and subcontractor contracts (“any contract”) because these contracts nevertheless “deal” with, or simply pass along down the line, the “disbursement of funds by an agency.”

Dissent at 10.

Judge McCullough also aptly notes that:

“the public funds originate with DPW, and no matter how many private entities the funds pass through, the funds end up in the hands of those performing the actual dental services and are the same funds that began with DPW. That is, public funds are used to pay for public dental insurance.”

Dissent at 3.

The records at issue in this case illustrate the expenditure of public funds by DPW, albeit via contractor and subcontractors rather than direct payments. The public funds do not transform into non-public funds because DPW is involved in a multi-tier contractual agreement with private entities, and it does not change DPW's statutory obligations to comply with the Medicaid Act farmed out to MCOs and subcontractors. The obligations are imposed by statute, and the funds provided by the public. Accordingly, the public is entitled to know how the funds are spent, whether the expenditure is appropriate, and whether the Medicaid Act has been followed. The records requested in this case allow the public to do just that. The decision below could enable public agencies to thwart public access by contract, and that cannot be the result.

IX. CONCLUSION

For all the foregoing reasons, the PNA and Coalition respectfully request that this Court reverse the Commonwealth Court's Order insofar as it reversed the Final Determination of the Office of Open Records.

Dated: December 2, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

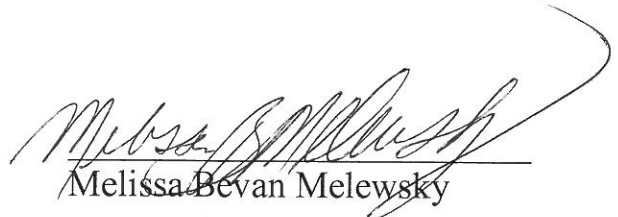
I, Melissa Bevan Melewsky, hereby certify that on this day I am causing to be served two copies of the foregoing **Brief of Amicus Curiae** by first-class mail to:

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