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Via Email (kyapplegat@pa.gov)
& First Class US Mail

Kyle Applegate, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: Appeal of the Public Interest Law Center of Philadelphia
OOR Docket No. AP 2012-2017

Dear Mr. Applegate:

This firm represents Dental Benefit Providers, Inc. ("DBP"), UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan ("United"), and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares ("Coventry") (collectively, the "Direct Interest Participants") with respect to the above-referenced matter, which pertains to a request for records (the "Request") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. § 67.101 et seq., submitted on or about October 3, 2012 by the Public Interest Law Center of Philadelphia ("PILCOP" or "Requestor") to the Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"). The Direct Interest Participants previously requested and were granted permission, pursuant to 65 P.S. §1101(c), to appear and make submissions in connection with Requestor's appeal of DPW's denial of the Request, on account of their direct interest in the subject matter at issue in the appeal.

I. Introduction

The Direct Interest Participants make this timely letter brief submission in support of their contention that the Request seeks materials that cannot be required to be disclosed because: (1) the "trade secret" exemption of the Right-to-Know Law applies; (2) the "confidential proprietary information" exemption applies; (3) the agency does not possess the materials requested; (4) state and federal regulations exempt the materials from disclosure; and (5) the materials are exempt because they reflect individual patient information.

The Direct Interest Participants further submit, in support of this submission, the attached affidavits by the following individuals, each of which support the Direct Interest Participants' position that the information sought is protected from disclosure: (1) the Affidavit of Paul Hebert, President of DBP; (2) the Affidavit of Heather R. Cianfrocco, former President of United (and current President of the UnitedHealthcare Community & State Northeast Region, of which United is a part); and (3) the Affidavit of Nancy Hardy, Vice President of Operations for Coventry.

For the reasons expressed herein and in the enclosed affidavits, the Direct Interest Participants submit that DPW should not be required to take any further action as to the materials sought.

II. Facts and Background

A. The Request

The Request seeks records reflecting the rates of payment to dentists paid by managed care organizations ("MCOs") and their dental subcontractors for recipients of the Commonwealth of Pennsylvania's Medical Assistance Managed Care "HealthChoices" program in five counties in Southeastern Pennsylvania, for the period July 1, 2008 to June 30, 2012. See Request at ¶ 3. The Request expressly *excludes* the rates of payment paid by DPW to the MCOs participating in the HealthChoices program. Id. at ¶ 4.

B. The MCOs' and Subcontractors' Participation in the HealthChoices Program.

The Direct Interest Participants are one subcontractor (DBP) and two MCOs (United and Coventry) participating in the HealthChoices program, which is administered by the DPW.[1] Enrollees in that program receive quality medical care and timely access to health services through an MCO of their choosing. The MCOs therefore compete with one another to offer a superior product in order to obtain the highest number of enrollees.

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[1] The factual assertions set forth herein are supported by the three Affidavits of the Direct Interest Participants, which are submitted in tandem with this letter.

DPW administers the program by entering into agreements with each MCO; each such contract includes confidentiality provisions requiring the parties to keep confidential any proprietary information that is exchanged between them as a result of the parties' relationship.[2] Included among such confidential information are the terms of payment between DPW and each MCO, which are known as "capitation rates." These rates are paid based on headcount; in other words, the MCOs are paid on a per-member basis. The capitation rates paid by DPW to the MCOs are not in issue here.

The MCOs, in turn, enter into contractual arrangements with dental subcontractors, which require the subcontractors to provide certain dental services to the enrollees. Payment terms as between any given MCO and dental subcontractor will vary and are periodically renegotiated, at significant time and expense. United subcontracts with DBP, and Coventry subcontracts with DentaQuest, LLC. The subcontracts uniformly require the protection of confidential information and trade secrets, and in the course of dealing between the MCOs and their subcontractors, the parties routinely protect such information. The MCOs, like DPW, also pay their subcontractors based on capitation rates. Pursuant to those subcontracts and otherwise, the MCOs and their dental subcontractors treat the payment and rate information that pertains to their relationship as highly confidential.

The dental subcontractors, in turn, have built networks of dental providers, and the subcontractors negotiate separate payment terms with individual dental practices. Payment terms as between each dental subcontractor and individual dental practice also will vary, and those rates also are reevaluated and renegotiated periodically. Substantial time, effort, and expense are spent negotiating and setting these various rates and payment terms. These payment terms are a matter of competition between the dental subcontractors and their competitors, and constitute an important aspect of the dental subcontractors' business models, as they have been carefully established so affordable care can be provided, while at the same time ensuring a sustainable business model.

Given the sensitive nature of the dental rates, the subcontractors' contracts with the dental providers specify that the parties must keep the terms of payment to the dental providers, such as fee schedules, strictly confidential. That information cannot be acquired or duplicated by a competitor through legitimate means. Indeed, rate information is not readily available outside – or even inside – the dental subcontractors or the MCOs. External reporting is limited to situations where such is required by law or by government directive; internal disclosure is limited to a business need to know. In this way, the dental subcontractors and MCOs can protect their competitive position, which is essential to offering a meaningful choice

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[2] The standard form HealthChoices Agreement as between DPW and the MCOs provides for confidentiality at Section XIV on pages 164-65. The standard form Agreement is publicly available on DPW's Internet site at this link: http://www.dpw.state.pa.us/ucmprd/groups/webcontent/documents/communication/s_002105.pdf

to prospective enrollees. This is especially the case in the HealthChoices program, which is a relatively small market with few competitors.

If the pricing information were to be accessed by a competitor, it would yield an unfair competitive advantage to set pricing not just in the Commonwealth of Pennsylvania, but also in those requests for proposal that are bid in other states by the MCOs and dental subcontractors. The dental rates therefore would be of great value to competitors if disclosed, as they would then have solid parameters by which they could refine their own pricing strategies in an effort to unfairly win business.

Based on the foregoing, if the dental rates sought by Requestor were to be released by DPW, such would unfairly cause substantial harm to the competitive positions of the Direct Interest Participants and their dental subcontractors, and, ultimately, would cause harm to the enrollees.

III. Argument

A. The "Trade Secret" and "Confidential Proprietary Information" Exemptions Apply.

The dental rate information sought is exempt from disclosure under the separate "trade secret" and "confidential proprietary information" exemptions of the Right-to-Know Law.[3] See 65 P.S. § 67.708(b)(11). If a record satisfies the elements of either or both of these concepts, then it is not considered to be a "public record" under the RTKL and is, therefore, exempted from access to the public. See 65 P.S. § 67.101 (defining "public record" to exclude any record exempt under § 708); 65 P.S. § 67.301 (stating Commonwealth agencies, such as DPW, need only make "public records" available).

1. The "Trade Secret" Exemption Applies.

Starting with the "trade secret" exemption, the dental rate information is exempt under that provision. The RTKL defines the term "trade secret" as:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that

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[3] Due to the disjunctive in the statute, the "trade secret" and "confidential proprietary information" exemptions must be applied separately, such that a record is exempt from disclosure even if it qualifies under just one of the two exemptions. See Office of Governor v. Bari, 20 A.3d 634, 647-48 (Pa. Commw. 2011) ("Importantly, 'confidential proprietary information' and 'trade secret' are defined separately under Section 102 of the RTKL; therefore, the terms are not interchangeable." (footnote omitted)).

> (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.

65 P.S. § 67.102. Thus, a "trade secret" is information that (a) actually or potentially "derives independent economic value" from "not being readily known" to those who might benefit from knowing it, and (b) is the subject of "reasonable" "efforts" to maintain its secrecy.

Here, as set forth in the Direct Interest Participants' Affidavits, each of the elements of this exemption is satisfied here. The dental rate information clearly reflects "information," and, as the Affidavits explain, the rates are of competitive economic value to the MCOs and dental subcontractors due to their secret nature, as those rates are the principal means of competition for HealthChoices market share, and competitors would benefit by knowing those rates because they could use that information to underbid on pricing. See, e.g., Affidavits at ¶ 13. Moreover, the MCOs and dental subcontractors undertake reasonable efforts to keep the information secret, such as by blocking external disclosure except as may be required by law, and limiting internal access to a need-to-know basis. See, e.g., Affidavits at ¶ 12.

Accordingly, the RTKL "trade secret" exemption applies here to preclude disclosure of the dental rate information.[4]

2. The "Confidential Proprietary Information" Exemption Applies.

Even if the dental rate information somehow is not protected by the "trade secret" exemption, it nevertheless is exempt from disclosure because it qualifies under the "confidential

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[4] Pennsylvania courts, in considering whether material is protected as a trade secret under the Pennsylvania Uniform Trade Secrets Act, see 12 Pa.C.S. §§ 5301–5308, consider a six-factor test. The dental rate information satisfies that test, too, given: (1) the dental rates are only known to a very limited extent outside of the businesses, see Affidavits at ¶ 12; (2) the rates are only known to a very limited extent inside the business, see id.; (3) the companies take measures to limit internal and external disclosure; see id.; (4) the rates are valuable both to the companies and their competitors, see id. at ¶¶ 13-16; (5) the companies expend significant effort developing the dental rates, see id. at ¶ 16; and (6) the dental rates could not be duplicated easily by outsiders, see id. at ¶¶ 12-16. See Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010) (stating factors). Accordingly, the Pennsylvania Uniform Trade Secrets Act furnishes a separate and independent basis for exempting the dental rate information from disclosure. See 65 P.S. § 67.102 (defining "public record" to exclude records "exempt from being disclosed under any other Federal or State law").

proprietary information" exemption. The RTKL separately 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.

65 P.S. § 67.102. Thus, "confidential proprietary information" is "commercial or financial" information (a) that is "privileged or confidential" and (b) the disclosure of which would cause substantial harm to the "competitive position" of the party.

Here, the dental rate information is exempt because each of the foregoing elements is satisfied. Clearly, the dental rate information reflects "commercial or financial information." Further, as reflected in the Affidavits, that information is treated by the MCOs and dental subcontractors as privileged and confidential. See, e.g., Affidavits at ¶¶ 7, 9, 12. Moreover, as explained in the Affidavits, the MCOs and dental subcontractors would suffer substantial competitive harm if the dental rates were disclosed. See, e.g., Affidavits at ¶¶ 10-17.

Accordingly, the RTKL "confidential proprietary information" exemption applies here to preclude disclosure of the dental rate information.[5]

3. Prior OOR Decisions Require Application of the "Trade Secret" and "Confidential Proprietary Information" Exemptions.

Based on the foregoing, it is clear that this matter falls squarely in line with similar cases where the OOR has held that the "trade secret" or "confidential proprietary information" exemptions apply. For example, in Dahlgren v. Dep't of General Svcs., OOR Dkt. AP 2009-0631, pp. 8-9 (Sept. 10, 2009), the Department of General Services ("DGS"), in producing documents responsive to a RTKL request, redacted information used in determining the pricing that a pharmaceutical company quoted to DGS. Id. at pp. 2-4. Upon appeal by the requestor, the company argued that the redacted information was exempt from production

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[5] Requestor contends in its appeal that the "trade secret" and "confidential proprietary information" exemptions do not apply because those exemptions do not apply to "financial records." That carve-out does not apply here, however, at least because the "financial records" provision pertains only to "the receipt or disbursement of funds *by an agency*." 65 P.S. § 67.708(c). The rates Requestor seeks here are those paid by the dental subcontractors to the dental providers, and thus the requested materials do not pertain to any agency's receipt or disbursement of funds.

because it represented a confidential method by which the company determined pricing, and further argued that disclosure to the company's competitors would allow those competitors to gain an unfair economic advantage. Id. at p. 9. The company also argued that industry practice was to keep such information confidential, and that it took reasonable steps to keep the information confidential. The OOR agreed with the company, and denied the requestor's appeal. Id.

Similarly, the OOR has held that fees and pricing information "are confidential proprietary information that is properly protected by this exception." Zeshonski v. Pa. Dept. of Health, OOR Dkt. AP 2011-0698, p. 10 (July 20, 2011). In Zeshonski, the Pennsylvania Department of Health redacted the fees charged and the costs incurred by a health care provider, and the requestor appealed the redaction. Id. at p. 2. The health care provider submitted a verification that the information was internal business and operating information, which is confidential and integral to the commercial operations of the provider. Id. at p. 4. The OOR held that the fees and cost information was protected by the trade secret or confidential proprietary information exemptions, and withheld the materials from public access. Id. at 10.

Like Dahlgren and Zeshonski, the records requested here reflect dental rates that constitute confidential pricing methodologies that are a critical aspect of the dental subcontractors' and MCOs' business models. Maintaining the confidentiality of this information is integral to their operations. See Affidavits at ¶¶ 10-11. Indeed, the dental rates are matters of intense competition between the dental subcontractors and MCOs and their competitors. Disclosure would yield an unfair competitive advantage to the competitors of the Direct Interest Participants. Accordingly, it is plain that the exemptions for "trade secrets" and "confidential proprietary information" apply here such that disclosure is not permitted under the RTKL.[6]

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[6] The decision in Eiseman v. DPW, OOR Dkt. No. AP 2011-1098 (Sept. 17, 2012), should not be applied here for a number of reasons. That decision erroneously relied on Lukes v. Dept. Public Welfare, 976 A.2d 609 (Pa. Commw. 2009), which is no longer good law. Lukes was decided under the prior version of the RTKL, not the current version at issue here. At least two subsequent Commonwealth Court decisions have distinguished Lukes for this reason. See, e.g., In re: Silberstein, 11 A.3d 629, 632 n.8 (Pa. Commw. 2011) ("However, our decision in Lukes was rendered pursuant to the former version of the RTKL, which as noted herein, was repealed by the current RTKL. Therefore, our decision in Lukes is not controlling in this matter."); Office of the Budget v. OOR, 11 A.3d 618, 622 (Pa. Commw. 2011) (same). Moreover, the decision in Eiseman did not address any of the prior OOR decisions (such as Dahlgren and Zeshonski) that required a holding that the materials at issue there should have been deemed exempt from disclosure. In any event, the Eiseman decision has been appealed to the Commonwealth Court by the agency and interested parties thereto, and therefore that case has not reached a final disposition.

B. DPW Does Not "Possess" the Subcontractors' Materials.

In addition, the materials requested cannot be required to be produced by the dental subcontractors because those materials are not in the agency's possession. Under the RTKL:

> 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) (emphasis added). Under this provision, agency "possession" is satisfied respecting materials that are actually held by third parties only where: (1) the materials are in the hands of a third party with whom the agency has contracted, and (2) the materials pertain to a governmental function that the third party has contracted to carry out. As explained above, DPW has contracted with the *MCOs* to carry out the HealthChoices program, *not* the dental subcontractors. DPW has no direct contractual relationship with the dental subcontractors. Accordingly, the first essential element is missing such that agency "possession" is not satisfied here. As such, the OOR cannot compel disclosure of any materials in the hands of the dental subcontractors. See, e.g., Office of Budget v. Office of Open Records, 11 A.3d 618 (Pa. Commw. 2011) (records requested deemed not in possession of agency; records were in hands of contractor having no direct contractual relationship with agency).

C. Federal and State Regulations Exempt the Requested Records.

The dental rate information also should be deemed exempt under federal and state regulations. Under the RTKL, materials that are exempt from being disclosed under any other federal and state law are similarly exempt under the RTKL pursuant to its definition of "public record." See 65 P.S. § 67.102. In addition to the previously-discussed Pennsylvania Uniform Trade Secrets Act, see *supra* fn. 4, the dental rate information should be deemed exempt due to pertinent federal and state regulations.

In particular, federal regulations require DPW to conduct all procurement processes for the purchasing of services with federal dollars in a manner designed to foster healthy and fair competition among potential government contractors. See 45 C.F.R. § 74.43; see also 42 C.F.R. §§ 434.70(a)(2) & (b) (providing that state governments failing to comply with federal conditions forfeit federal funding). Further, federal regulations presume the confidentiality of documents relating to the expenditure of federal funds where the disclosure of such documents would substantially harm the competitive position of the party submitting the information. See 45 C.F.R. §§ 5.65(B)(4)(ii); 74.53(f). State regulations similarly protect from disclosure information that is disclosed by the MCOs to the Commonwealth under the

HealthChoices program. See, e.g., See 28 Pa. Code § 9.604(a)(8) ("Reimbursement information submitted to the Department under this paragraph may not be disclosed or produced for inspection or copying to a person other than the Secretary or the Secretary's representatives, without the consent of the plan which provided the information, unless otherwise ordered by a court.").

Because federal and state regulations require protection of confidential information such as the rate information at issue here, the materials requested are exempt from disclosure.

D. Exemptions Pertaining to Individual Health Information Apply.

Finally, the materials requested are exempt because they will reflect individual patient information. Materials that show the rates paid to providers that pertain to an individual patient's encounter with a dental provider will contain individually identifiable health information. See, e.g., Affidavits at ¶ 10. Several exemptions apply to such materials, precluding their disclosure. See 65 P.S. § 67.708(b)(5) (exempting "[a] record of an individual's medical . . . status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests . . . or related information that would disclose individually identifiable health information."); 65 P.S. § 67.708(b)(6) (exempting "personal identification information"). In fact, participation in the HealthChoices program, by itself, is a basis for exempting any materials reflecting information concerning an individual participant in the program. See 65 P.S. § 67.708(b)(5) (exempting "[a] record of . . . enrollment in a health care program"); 65 P.S. § 67.708(b)(28) (exempting "[a] record or information" relating to an individual's application or receipt of "social services").

IV. Conclusion

For the foregoing reasons, the Direct Interest Participants assert that the Request seeks materials that are not subject to disclosure under the RTKL. Accordingly, they ask that the Office of Open Records deny the appeal by the Requestor and that DPW not be required to take any further action.

Respectfully submitted,

Karl S. Myers

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