



Executive Director  
Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

Today's date: August 15, 2011

**Right to Know Law Appeal - Denial or Partial Denial by Agency**

This appeal is filed under the Pennsylvania Right to Know Law, 65 P.S. §67.101, *et seq.* I requested documents from the Department of Public Welfare. The Agency denied or partially denied my request for information. I am appealing the denial of my request, under section 1101 of the Right-to-Know Law and provide the following information in accordance with the Law:

Requester's name: James Eiseman, Jr.  
Address/City/State/Zip: PILCOP, 1709 Benjamin Franklin Parkway, 2nd Floor, Philadelphia PA 19103  
Date of Right to Know request: June 17, 2011 Date of Agency Response: July 25, 2011  
Telephone and fax number: tel: 215-627-7100 x226 fax: 215-627-3183  
Email: jeiseman@pilcop.org

Concise statement of facts (may attach additional pages if necessary)

Please see the attached.

Name and address of Agency:

Department of Public Welfare, Room 234 Health & Welfare Building, P.O. Box 2675, Harrisburg PA 17105-2675

Name and title of the Agency official who denied the request for records:

Andrea Bankes, Agency Open Records Officer

Description of the records requested: Please see exhibit A to the attached.

List all grounds upon which the requester asserts that the record is a public record – why you believe the requested record is a public record – a general statement that it is public under the Right-to Know Law is insufficient: (may attach additional pages if necessary)

Please see the attached.

Address all grounds relied upon by the Agency for denial of the request – why you believe the agency's denial, arguments, and exemptions are incorrect: (may attach additional pages if necessary)

Please see the attached.

Respectfully Submitted, James Eiseman, Jr. (must be signed)

**Required documents to include with this completed appeal form – copies of original RTK request, the Agency denial**

## **INTRODUCTION**

I write to appeal the denial by the Department of Public Welfare (“DPW”) of my request for information under Pennsylvania’s Right-To-Know Law, 65 P.S. §§ 67.101 *et seq.* (“RTKL”).

By way of background, I am a Senior Attorney at the Public Interest Law Center of Philadelphia (“PILCOP”), a not-for-profit legal organization whose work includes efforts to improve the delivery of health-care services to low-income children. As part of those efforts on behalf of individuals enrolled in state Medicaid programs, over the last twenty years PILCOP has advocated for the rights of children under the provisions of 42 U.S.C. §§ 1396a(a)(8), (10), and (30)(A), which require state Medicaid programs to make dental services available to enrolled children with reasonable promptness and with access equal to that of children who have other public or private insurance.

There are about 400,000 children in Southeastern Pennsylvania enrolled in the Medicaid program. Considerably less than one half of them receive any dental service in the course of a year. Because of the public importance of this document request, I ask that the Office of Open Records hold a hearing in this matter pursuant to 65 P.S. § 67.1102(a)(2).

## **BACKGROUND**

I filed the RTKL request at issue on June 17, 2011, setting forth five requests for documents. (“Request,” attached as Ex. A.) The Request seeks information pertaining to the provision of dental services to children in Southeastern Pennsylvania during the period from January 1, 2008 through June 15, 2011. By letter dated June 24, 2011, DPW informed me that it needed an additional thirty days to respond. (Letter, attached as Ex. B.) On July 25, 2011, DPW sent me its response. (“Response,” attached as Ex. C.) DPW denied all of my requests except for

part of my Third Request. I appeal from all of DPW's denials, except for those denials premised on the nonexistence of the requested documents (including the Fifth Request in its entirety).<sup>1</sup>

## DISCUSSION

Before discussing DPW's denials of my request in detail, I will briefly summarize the factual and legal context. As the Commonwealth Court recently explained:

DPW is an agency of the Commonwealth and the single state agency responsible for administering the Commonwealth's Medical Assistance (also referred to as Medicaid) program. The Medical Assistance program is a cooperative federal-state program through which various healthcare services are provided to those who qualify. The HealthChoices Program is the Commonwealth's managed care program for Medical Assistance recipients. DPW administers the HealthChoices Program through a series of HealthChoices Agreements with Medicaid MCOs [Managed Care Organizations] and/or Medicaid HMOs [Health Maintenance Organizations]. Pursuant to these contracts, the Health Plan agrees to pay the providers negotiated rates for medical services rendered to Medicaid MCO/HMO recipients.

*Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609, 612-13 (Pa. Commw. Ct. 2009), *appeal denied*, 604 Pa. 708 (2009).

In Southeastern Pennsylvania (i.e., Philadelphia, Montgomery, Bucks, Chester, and Delaware Counties), five MCOs participate in the HealthChoices Program (the "SE MCOs"). (E.g., Response at 1.) As DPW has explained, "[e]ach of the SE MCOs has a contract with DPW that sets forth the MCO's contractual rights and duties," and each of those contracts "contains an appendix that sets forth the *capitation rates* for the individual SE MCO." (*Id.* at 2.) "The

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<sup>1</sup>In several instances, DPW denied the Request on grounds of insufficient specificity. (Response at 5-8 & n.1.) See generally 65 P.S. § 67.703 ("A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested . . ."). I contest DPW's denials of my requests as insufficiently specific, in no small part because in each instance DPW manages correctly to deduce which types of documents my allegedly unspecific requests seek. In any event, even if one (or more) of my requests is held to be in some respect insufficiently specific, that would provide no justification for DPW to deny it with respect to those items as to which it is sufficiently specific, as DPW's response clearly indicates; i.e., the contracts, the appendices thereto, and the actuarial reports.

capitation payments are paid to the [MCOs] to manage and pay for medical services and products for Medicaid enrollees.” *Lukes*, 976 A.2d at 613. According to the DPW, each of the SE MCOs “uses a subcontractor to pay for dental services, i.e., the subcontractor pays the dentists and the MCO pays the subcontractor.” (Response at 2.)

DPW has not contested that any of the requested documents in existence are “records,” and DPW therefore bears the burden of proving that the records are exempt from public access. *See* 65 P.S. § 67.708(a)(1); *accord Cnty. of York v. Pa. Office of Open Records*, 13 A.3d 594, 597-98 (Pa. Commw. Ct. 2011). DPW has also not contested that these documents are in its “possession.” *See* 65 P.S. § 67.305(a).

#### **1. First Request**

The First Request asks DPW to provide any document:

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 that it pays to provide dental services to Medicaid recipients under 21 years of age.

(Request ¶ 3.) DPW denied the request, arguing that the documents requested are not “public records.”

As noted above, DPW has admitted the documents are “records” within the meaning of the RTKL, and the RTKL defines “public record” as any

record . . . of a Commonwealth . . . agency that

(1) is not exempt under section 708;

(2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or

(3) is not protected by a privilege.

65 P.S. § 67.102. Moreover, the RTKL places the burden on DPW to prove any of these exemptions. 65 P.S. § 67.708(a)(1); *Cnty. of York*, 13 A.3d at 597-98. As more particularly set forth below, DPW has not carried its burden of showing these documents are not public records. Consequently, the Office of Open Records should reject DPW's arguments.

**a. Trade Secrets and Loss of Federal Funds**

DPW's contention that "[t]he capitation rates that DPW negotiates with an individual MCO are not 'public records,'" (Response at 4; *see also id.* at 5 (making an identical argument with respect to appendices to contracts between DPW and the SE MCOs)), is based on essentially two exceptions in the RTKL: (1) that disclosure would "reveal[] a trade secret," 65 P.S. § 67.708(b)(11); *see also* 12 Pa. Cons. Stat. §§ 5301-5308, and (2) that it "would result in the loss of Federal . . . funds by [DPW]," *id.* § 67.708(b)(1)(i). (Response at 4.) Both of these arguments are without merit.

In an important decision that the Response wholly omits to mention, the Commonwealth Court squarely rejected the argument that agreements such as those at issue here are "trade secrets." *Lukes*, 976 A.2d at 626-27. Under the holding in *Lukes*, DPW's "trade secrets" argument in this case must be rejected.<sup>2</sup>

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<sup>2</sup> *Lukes* concerned a predecessor version of the RTKL, *see* 976 A.2d at 612 n.1, but the current RTKL does not differ in any respects relevant to DPW's "trade secrets" argument. *Compare* 976 A.2d at 626 (setting forth definition of "trade secret" relied on in *Lukes*), *with* 65 P.S. § 67.102 (setting forth identical definition of the term in the current RTKL). Notably, the documents at issue in *Lukes* were contracts between a Medicaid MCO and a group of hospitals, *see* 976 A.2d at 612, as opposed to the information sought here about the relationship between Medicaid MCOs and DPW; in other words, the documents found to be "public records" in *Lukes* were in contracts to which DPW was not even a direct party, whereas here the records are parts of contracts to which DPW is a direct party.

Nevertheless, DPW argues that “[d]isclosure of the rates negotiated with the other MCOs would adversely affect DPW’s negotiations with an individual MCO, to the disadvantage of the public fisc,” and that therefore the capitation “rates are trade secrets of DPW.” (Response at 4.) DPW bears the burden of proving that factors relevant to trade secrecy warrant nondisclosure of the requested information, but DPW here has offered barely any argument. Indeed, the only argument to be found in the Response is the claim that “[r]elease of the specific capitation rates for one contractor would enable the other contractors and potential contractors to bid alike, to determine the rate ranges, to escalate the capitation rates, and thus to undermine the competitive bidding process.” (Response at 3.) That argument falls well short of carrying DPW’s burden. It scarcely addresses the factors relevant to assertions of “trade secrets,” and it completely fails to explain why, for example, the release of capitation rates for the current year and for prior years would undermine the competitive bidding process for future years.<sup>3</sup>

DPW’s fear that “disclosure of these rates would risk DPW’s ability to qualify for matching federal funds” is also not well founded. (*See* Response at 4.) The Response does not explain why the decision in *Lukes* did not put Pennsylvania’s federal matching funds in jeopardy. Other states have also permitted the release of such information, apparently without losing matching federal Medicaid funds. *See, e.g., Wilmington Star-News v. New Hanover Reg’l Med. Ctr.*, 480 S.E.2d 53 (N.C. Ct. App. 1997); 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>. Furthermore,

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<sup>3</sup> In order to address the concerns expressed by DPW about injury to the competitive process and the need to protect DPW’s predecisional deliberations, I am willing to exclude from my request any document that sets forth a proposed capitation rate (1) for a contract that has not yet been entered into between DPW and a SE MCO, and (2) in the case of an actuarial report, for a time period later than the period for which contracts between DPW and SE MCOs have already been entered into.

DPW does not explain why disclosure of past years' capitation rates would undercut negotiations for future years. *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"); *cf. also* 62 Pa. Cons. Stat. § 512(d) (competitive sealed bidding statute requiring that "[t]he amount of each bid and any other relevant information as may be specified by regulation, together with the name of each bidder, shall be recorded. The record shall be open to public inspection."). Lastly, the RTKL explicitly exempts from disclosure certain types of information from bids for public contracts, 65 P.S. § 67.708(b)(26), but not the type of information at issue here. Under such circumstances, the Latin maxim "*expressio unius est exclusio alterius*" applies. *See, e.g., Atcovitz v. Gulph Mills Tennis Club*, 571 Pa. 580, 589 (2002) (explaining the maxim as meaning that "the inclusion of a specific matter in a statute implies the exclusion of other matters"). In sum, DPW has not nearly carried its burden of demonstrating that the types of information requested are not "public records."

**b. Specificity**

DPW also raises various specificity arguments. (Response at 5 & n.1.) *See generally* 65 P.S. § 67.703 ("A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested . . .").

DPW interprets the Request as not requesting "any computations that may have been made by DPW's actuarial contractor." (Response at 5 n.1.) DPW's said interpretation is not justified and I contest it. Inasmuch as DPW's actuarial contractor was acting as DPW's agent, the contractor's calculations are DPW's calculations.

DPW goes on to state that “any such records *would likely be* subject to the internal predecisional deliberations exemption . . . .” (Response at 5 n.1 (citing 65 P.S. § 67.708(b)(10)) (emphasis added).) It is impossible to respond to DPW’s “predecisional deliberations” argument until and unless DPW actually asserts it (as opposed to stating that it “likely” applies) and until and unless DPW elaborates on the argument by detailing which documents fall under the exemption and why. *See generally* 65 P.S. § 67.903(2) (obligating the agency to state “[t]he specific reasons for the denial, including a citation of supporting legal authority”). Regardless, the limitation offered in footnote 3 *supra* should alleviate DPW’s concerns about predecisional deliberations.

For the same reasons, it is not now possible to respond to DPW’s implication that “correspondence between DPW and its actuarial contractor . . . is *or may be* subject to the ‘internal predecisional deliberations’ exemption’ . . . and/or the attorney-client privilege.” (Response at 5 (citing 65 P.S. §§ 67.708(b)(10)), 67.102) (emphasis added).) For instance, DPW has not identified what correspondence to which DPW’s actuarial contractor is a party is asserted to be subject to DPW’s attorney-client privilege, and on what basis DPW’s attorney-client privilege may be asserted as to any such correspondence. DPW should at least be required to provide a log of such attorney-client privileged correspondence that sets forth the bases of each such claim. DPW’s omissions leave the undersigned in no position to challenge the denial, and they leave the Office of Open Records in no position to evaluate the merits of DPW’s claims that the information is (or “may be”) privileged. In any event, the assertion that my request is insufficiently specific to reach such correspondence is unconvincing.

Finally, DPW contends that my request for “each and every [other] document that sets forth any rate of payment . . . that DPW pays to any Medicaid HMO to provide Medicaid



coverage to recipients in Southeastern Pennsylvania” is “insufficiently specific.” The Office of Open Records should reject this specificity argument, because to require a requester to formulate a more specific request than that would presuppose that the requester knows exactly what sorts of documents would set forth such payment rates, which is just the sort of chicken-or-egg predicament for requesters that the RTKL’s burden-shifting provision is intended to eliminate. DPW also urges that responsive documents would reveal “trade secrets,” which is an untenable position under *Lukes* as discussed *supra*. DPW goes on to state that “any internal documents *may be* subject to the ‘internal predecisional deliberations’ exemption . . . and/or the attorney client and/or attorney-work product privileges.” (Response at 5 (emphasis added).) Once again, unexplained assertions that various exemptions “may” apply are too vague to permit a meaningful appeal or review of DPW’s denials, and in any event my proposed limitation of my request as set forth in footnote 3 *supra* would cure any such problems.

## **2. Second Request**

The Second Request asks for “document[s] . . . that set[] forth the amount for any one or more individual dental procedure codes that any [SE MCO] pays to provide dental services to Medicaid recipients . . . .” (Request ¶ 4.) DPW rejected this request, citing two justifications: (1) that “[e]ach of the SE MCOs has informed DPW that those amounts are trade secrets and/or confidential proprietary information and/or are otherwise protected against disclosure,” and (2) that “the SE MCOs have advised DPW that the terms of the contracts that establish the relationship between DPW and the SE MCOs expressly declare that these provider rates are confidential, and that DPW is not to disclose them (or other protected information) to third parties.” (Response at 6.)

DPW's first justification essentially restates its rationale for rejecting the First Request, and it falls short for the reasons discussed above, including most particularly the holding in the *Lukes* case. Curiously, DPW stops short of averring that the requested information *actually is* exempt from disclosure; rather, DPW states simply that private corporations have "informed" it that the exemptions apply. If DPW is not even willing to put its own imprimatur on such claims of privilege, it cannot carry its burden. As the Commonwealth Court noted in analyzing a different provision of the RTKL, the legislature's intent is "to ensure that 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).

DPW's second justification is curiouser still. Not only does DPW again stop short of endorsing its own argument ("the SE MCOs *have advised* DPW"), but it also appears to suggest that the terms of its contracts with private parties trump the requirements of the RTKL. If public entities could simply contract their way around the RTKL, that exception would swallow the rule. Besides, *Lukes* holds otherwise. *See* 976 A.2d at 626-27 (holding, in the face of evidence that 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 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").

DPW rejects the remainder of the request on the same unconvincing specificity grounds that it cites in its denial of the First Request. (*See* Response at 6.) DPW's specificity arguments concerning the Second Request should be rejected. As with the First Request, DPW alludes to other grounds for denying more specific requests, and its justifications are similarly too

conditional (“any internal correspondence is *or may be* [exempt]”) and too vague to allow for an appeal. (*Id.* (emphasis added).)

### 3. Third Request

The Third Request asks for

[e]ach and every actuarial report DPW possesses that sets forth an overall capitation rate and/or determines the “actuarial soundness” of an overall capitation rate that DPW pays to any Medicaid HMO operating in Southeastern Pennsylvania, including but not limited to each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates.

(Request ¶ 5.) DPW granted the Third Request in part (Response at 7), and on August 5th I mailed payment for production of those documents as the Response directed (*see id.* at 8).

DPW denied the Third Request in part, on the grounds that it was insufficiently specific. DPW does not explain why there are certain documents in its possession that are exempt from disclosure yet so indistinctly described as to leave DPW puzzled as to the scope of the Third Request.

In its specificity argument regarding the Third Request—unlike in its responses to the First and Second Requests—DPW alleges that certain exemptions actually *do* apply, as opposed to stating that exemptions “may” or “likely” apply. (*Id.* at 7.) But again, DPW has failed to explain why those exemptions apply. For instance, DPW states that “*many of these records contain information that constitutes trade secrets or confidential proprietary information of Mercer*<sup>4</sup>” (*id.* (emphasis added)), but DPW does not offer to produce those records *not* containing such information. The “trade secrets” argument is erroneous under *Lukes*. To the extent that *Lukes* does not control the case of reports generated for DPW by its actuarial contractor, DPW has not even tried to carry its burden of demonstrating why the reports satisfy any factor required

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<sup>4</sup> Mercer is DPW’s actuarial contractor. (Response at 2.)

to classify information as trade secrets. As for the suggestion that the documents contain “confidential proprietary information” of Mercer, the RTKL defines that term as follows: “[c]ommercial 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. DPW has utterly failed to explain why either factor applies, and the undersigned is hard-pressed to understand how, for example, the disclosure of years-old actuarial reports would cause “substantial” harm to the competitive position of Mercer.

Finally, DPW states that “*to the extent that* these documents are used by DPW in the course of arriving at the negotiated rates, or are otherwise used as input into DPW’s decision-making process, these documents are subject to the predecisional deliberations exemption . . . .” (*Id.* (emphasis added).) DPW fails to explain to what “extent” the documents are *not* so used. DPW cannot carry its burden by presenting such nebulous arguments. In addition, the limitation on production I agree to in footnote 3 cures any issue under the “predecisional deliberation” exemption.

#### **4. Fourth Request**

The Fourth Request asks for

Each and every actuarial report DPW possesses that sets forth a capitation rate for dental services to Medicaid recipients under 21 years of age and/or determines the actuarial soundness of such capitation rates for dental services to Medicaid recipients under 21 years of age, including but not limited to any such report DPW has made to the federal government to certify the actuarial soundness of such rates.

(Request ¶ 6.) DPW granted the Fourth Request in part by offering to produce the same documents offered in response to the Third Request, and it stated that other types of documents requested do not exist. (Response at 9.)

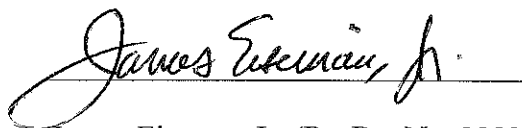
DPW also denied the Fourth Request on specificity grounds insofar as it seeks the disclosure of records created by DPW's actuary that are in DPW's possession. (*Id.*) In a by-now familiar turn, DPW also states that "*some of these records* contain information that constitutes trade secrets or confidential proprietary information." (*Id.* (emphasis added).) DPW makes no effort to identify which subsets of the records allegedly fall under those exemptions, and as discussed *supra* it fails to carry its burden of proving that the various exemptions it cites apply.

### CONCLUSION

For all of the reasons set forth above, the Office of Open Records should order the DPW to make available all of the requested documents.

Dated: August 15, 2011

Respectfully submitted,



James Eiseman Jr. (Pa. Bar No. 3882)  
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1709 Benjamin Franklin Parkway, Second Floor  
Philadelphia, PA 19103  
Telephone: (215) 627-7100 x226  
Facsimile: (215) 627-3183

# Exhibit A



PUBLIC INTEREST LAW  
CENTER OF PHILADELPHIA  
AFFILIATED WITH THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

June 17, 2011

STAFF

**SENT VIA EMAIL**

Jennifer R. Clarke  
*Executive Director*

Michael Churchill  
*Of Counsel*

Adam H. Cutler  
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James Eiscman, Jr.  
*Senior Attorney*

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1974-1976*

Andrea Bankes  
Department of Public Welfare  
Right to Know Law Office  
P.O. Box 2675  
Harrisburg, Pennsylvania 17105-2675  
ra-dpwrtkl@state.pa.us

Dear Open Records Officer:

Pursuant to Pennsylvania's Right-to-Know Law, I write to request certain documents and records from the Department of Public Welfare. The enclosed form details my request. If the responsive documents and records are already in digital format, or if conversion to digital format is not cost-prohibitive, then I would prefer to receive them in digital format.

I am a legal resident of the Commonwealth of Pennsylvania.

If you would like to contact me in writing, I would prefer that you contact me via email at [jeiseman@pilcop.org](mailto:jeiseman@pilcop.org).

Thank you for your attention and assistance.

Sincerely,

James Eiscman, Jr.



**REQUEST FOR ACCESS TO PUBLIC RECORDS UNDER  
THE PENNSYLVANIA RIGHT-TO-KNOW LAW**

<b>TO:</b>	Andrea Bankes Agency Open Records Officer Department of Public Welfare P.O. Box 2675 Harrisburg, PA 17105-2675	RTKL Request: _____ Date Request Received: _____ Date Response Sent: _____
<b>REQUESTOR:</b>	<p style="text-align: center;"><b>James Eiseman, Jr.</b> Name</p> <p style="text-align: center;"><b>Public Interest Law Center of Philadelphia</b> Address</p> <p style="text-align: center;"><b>1709 Benjamin Franklin Pkwy., 2nd Fl.</b> Address</p> <p style="text-align: center;"><b>215-627-7100 x226</b> Telephone</p> <p style="text-align: center;"><b>215-627-3183</b> Facsimile</p> <p style="text-align: center;"><b>jeiseman@pilcop.org</b> Email</p>	<p style="text-align: center;"><b>SEND RESPONSE TO:</b></p> <p style="text-align: center;"><b>James Eiseman, Jr.</b> Name</p> <p style="text-align: center;"><b>Public Interest Law Center of Philadelphia</b> Address</p> <p style="text-align: center;"><b>1709 Benjamin Franklin Pkwy., 2nd Fl.</b> Address</p> <p style="text-align: center;"><b>215-627-7100 x226</b> Telephone</p> <p style="text-align: center;"><b>215-627-3183</b> Facsimile</p> <p style="text-align: center;"><b>jeiseman@pilcop.org</b> Email</p>

Pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. § 67.101, et seq., I hereby request that the Department of Public Welfare provide me access to the records identified or described below.

1	<b>Please see the attached request.</b>
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3	
4	
5	
6	

Please Note: The Pennsylvania Right-to-Know Law allows the Department of Public Welfare to charge for the cost of postage, duplication, certification and other costs necessarily incurred to respond to your request.



1) As used in this request, the following terms have the meanings assigned to them below.

- (a) "Southeastern Pennsylvania" means Philadelphia, Montgomery, Bucks, Delaware, and Chester Counties.
- (b) "Medicaid" means Pennsylvania's medical assistance program conducted pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*
- (c) "DPW" means the Pennsylvania Department of Public Welfare.
- (d) "Medicaid HMO" means those corporations and/or other organizations with which DPW contracts to provide coverage to Medicaid recipients.
- (e) "Document" means any medium on which printed or electronic information is stored, including but not limited to paper and discs.

2) This request seeks all documents described below that contain information relating any period from January 1, 2008 until June 15, 2011.

3) 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.

4) 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.

5) Each and every actuarial report DPW possesses that sets forth an overall capitation rate and/or determines the “actuarial soundness” of an overall capitation rate that DPW pays to any Medicaid HMO operating in Southeastern Pennsylvania, including but not limited to each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates.

6) Each and every actuarial report DPW possesses that sets forth a capitation rate for dental services to Medicaid recipients under 21 years of age and/or determines the actuarial soundness of such capitation rates for dental services to Medicaid recipients under 21 years of age, including but not limited to any such report DPW has made to the federal government to certify the actuarial soundness of such rates.

7) Any corrective-action plan or sanctions DPW has imposed on or contracted with any Medicaid HMO for in Southeastern Pennsylvania that involves wholly, or in part, the provision of dental care to Medicaid recipients under the age of 21.

# Exhibit B



COMMONWEALTH OF PENNSYLVANIA  
**DEPARTMENT OF PUBLIC WELFARE**  
ROOM 234 HEALTH AND WELFARE BUILDING  
P.O. BOX 2675  
HARRISBURG, PENNSYLVANIA 17105-2675

RIGHT TO KNOW LAW OFFICE

(717) 787-3422

June 24, 2011

**SENT VIA EMAIL**

Mr. James Eiseman, Jr.  
Public Interest Law Center of Philadelphia  
United Way Building  
1709 Benjamin Franklin Parkway, Second Floor  
Philadelphia, Pennsylvania 19103  
Email: [jeiseman@pilcop.org](mailto:jeiseman@pilcop.org)

**RE: Right-To-Know Law Request No. 11-RTKL-209**

Dear Mr. Eiseman:

On June 17, 2011, the Department of Public Welfare (DPW) received your request for information pursuant to the Pennsylvania Right-To-Know Law, 65 P.S. §§ 67.101, *et seq.* (RTKL), wherein you asked for various records pertaining to Medicaid. Under the RTKL, a written response to your request is due on or before June 24, 2011.

This is an interim response, not a final response, to your request. Under the provisions of 65 P.S. §67.902(b)(2), you are hereby notified that your request is being reviewed for the reason(s) checked below and this agency will require up to an additional 30 days in which to respond to your request.

- Compliance with your request may require the redaction of certain information that is not subject to access under RTKL.
- A response by the mailing date of this letter could not be accomplished due to bona fide staffing limitations.
- Your request is under legal review which is necessary to determine whether a requested record is a "public record" for purposes of the RTKL.
- The extent or nature of the request precludes a response within the required time period.

Further, the estimated or actual total for any fees that will be owed when the record becomes available will be included in our subsequent response. Prepayment is required

before providing access when the estimated cost to fulfill a request exceeds \$100.00.  
65 P.S. § 67.1307(h). If you have any questions regarding this letter, please contact me.

Sincerely,

*Andrea Bankes*

Andrea Bankes  
Agency Open Records Officer

# Exhibit C



COMMONWEALTH OF PENNSYLVANIA  
**DEPARTMENT OF PUBLIC WELFARE**  
ROOM 234 HEALTH AND WELFARE BUILDING  
P.O. BOX 2675  
HARRISBURG, PENNSYLVANIA 17105-2675

RIGHT TO KNOW LAW OFFICE

(717) 787-3422

July 25, 2011

**SENT VIA EMAIL**

Mr. James Eiseman, Jr.  
Public Interest Law Center of Philadelphia  
United Way Building  
1709 Benjamin Franklin Parkway, Second Floor  
Philadelphia, Pennsylvania 19103  
Email: [jeiseman@pilcop.org](mailto:jeiseman@pilcop.org)

**RE: Right-To-Know Law Request No. 11-RTKL-209**

Dear Mr. Eiseman:

On June 17, 2011, the open-records officer of the Department of Public Welfare (DPW) received your written request for information. DPW is responding to your request under the Pennsylvania Right-To-Know Law, 65 P.S. §§ 67.101, et seq. (RTKL). On June 24, 2011, we notified you that DPW required an additional 30 days to respond to your request.

**BACKGROUND ON THE HEALTHCHOICES PROGRAM IN SOUTHEASTERN PENNSYLVANIA.**

In 25 counties of Pennsylvania, physical health services including dental services are provided through the HealthChoices Program. That program uses managed care organizations (MCOs). In "Southeastern Pennsylvania" five MCOs participate in that program:

- AmeriHealth Mercy Health Plan (AMHP)
- Keystone Mercy Health Plan (KMHP)
- Aetna Better Health (Aetna)
- HealthPartners (HP)
- United Healthcare (United)

These are referred to herein as the "SE MCOs."

Each of the SE MCOs has a contract with DPW that sets forth the MCO's contractual rights and duties. DPW makes payments to the MCOs pursuant to those contracts.

Each MCO's contract contains an appendix that sets forth the **capitation rates** for the individual SE MCO. As the name implies, capitation rates are connected to the number of members that an MCO enrolls in its network. Basically, DPW computes its monthly payment to the SE MCO by multiplying the number of recipients enrolled in the MCO's network for that month by the applicable capitation rate. (This is, of course, a simplification of the terms of the contracts that are comprised of hundreds of pages.)

DPW negotiates separately with each MCO to arrive at the agreed-upon capitation rates for that MCO. In negotiating these rates, DPW is informed by input from its actuarial contractor (Mercer) regarding upper and lower range of rates that are actuarially sound. To be acceptable, the agreed-upon capitation rate must fall within that range. However, what DPW negotiates is a comprehensive rate. Thus, DPW does **not** negotiate a separate rate for dental services, much less a rate for dental services for persons under 21 years of age. Rather, DPW's contracts with the MCOs require that the MCOs provide dental services to qualifying MA recipients enrolled in their respective networks.

Your request pertains to MCOs operating networks in southeastern Pennsylvania. In each instance, the MCO uses a subcontractor to pay for dental services, i.e., the subcontractor pays the dentists and the MCO pays the subcontractor.

DPW receives matching federal funds, known as "FFP" (federal financial participation) for expenditures made according to its State Plan for Medical Assistance and/or a waiver granted by the federal Centers for Medicare and Medicaid Services (CMS). Federal regulations require that DPW assure to the federal government a vigorous and competitive procurement process when purchasing services that are funded in whole or in part by federal funds:

- "FFP," i.e., "federal financial participation, i.e., matching federal funds, "is available only for period during which the contract ... (2) Meeting the applicable requirements of 45 CFR part 74[.]" 42 CFR § 434.70(a)(2). "CMS may withhold FFP for any period during which the State fails to meet the State plan requirements of this part." 42 CFR § 434.70(b).
- "All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition." 45 CFR § 74.43. "The recipient [i.e., DPW] shall be alert to ... noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade." Id.
- "Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient." Id.



- HealthChoices contractors were required to submit proposed rates during the contract procurement process. Obviously, rates vary among the contractors within the various rate ranges. Release of the specific capitation rates for one contractor would enable the other contractors and potential contractors to bid alike, to determine the rate ranges, to escalate the capitation rates, and thus to undermine the competitive bidding process.
- In addition, provision of the rate information would jeopardize the waiver granted by the federal government that permits the HealthChoices program to remain operational. A condition of federal approval of the HealthChoices waiver and the HealthChoices contracts themselves is that the Department has in place an open and competitive procurement and contract process. Disclosure of the capitation rates would defeat the very purpose of having potential contractors and current contractors submit and negotiate their best price(s) in order to secure or retain a contract.
- The release of the actual capitation rates would disclose competitors' prices and, inevitably, the rate ranges developed by the Department, and would be antithetical to the competitive process that is a condition of the Department's receipt of federal funds for the HealthChoices program. 42 CFR § 434.70; 45 CFR § 74.43.
- Finally, the rate information in question also constitutes "confidential" information under applicable federal law since its release would "substantially harm the competitive position" of the Department (as well as the individual contractors) and would impair our interest in maintaining the cost effectiveness of the HealthChoices Program to assure maximum federal funding for this program. As confidential information relating to the expenditure of federal funds, the rates are exempt from disclosure under federal law. 45 CFR §§ 5.65(b)(4)(ii); 74.53(f).

### **SPECIFICITY.**

The RTKL requires that a request be made with "sufficient specificity." 65 P.S. § 67.703. If a request is not made with sufficient specificity, the agency receiving that request is not obligated to provide records in response to it. See, e.g., Pennsylvania State Police v. Office of Open Records, 995 A.2d 515 (Pa.Cmwith 2010), in which the court held that a request for "[a]ny and all records, files, or communication(s) of any kind ..." related to vehicle stops, search and seizures was insufficiently specific: "What is overbroad, though, is the first clause of the request, which begins, 'Any and all records, files, or manual(s), communication(s) of any kind....'"; "Because the valid part of the request was included in a laundry list of requested materials and because of the newness of the law, the PSP may still raise any claim that access to the manuals, if they exist, should be denied under another provision of the RTKL." The Office of Open Records (OOR) has repeatedly held that requests that use language such as "each and every document" are insufficiently specific.

### YOUR FIRST REQUEST.

You asked that DPW provide you with “[e]ach and every document [that contains information relating [to] any period from January 1, 2008 until June 15, 2011], 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 that it pays to provide dental services to Medicaid recipients under 21 years of age.”

### DPW’S RESPONSE TO YOUR FIRST REQUEST.

For the reasons set forth below, your first request is denied.

**The capitation rates that DPW negotiates with an individual MCO are not “public records.”** As explained above, DPW conducts one-on-one negotiations with each MCO, for the purpose of arriving at agreed-upon comprehensive capitation rates.

Disclosure of the rates negotiated with the other MCOs would adversely affect DPW’s negotiations with an individual MCO, to the disadvantage of the public fisc, these rates are trade secrets of DPW and, as such, are protected by the Uniform Trade Secrets Act. 12 Pa.C.S. §§ 5301 – 5308. See, also, 65 P.S. § 67.708(b)(11).

In addition, because federal rules require that DPW’s procurement process be competitive, and because disclosure of the negotiated rates of some MCOs would cause DPW’s negotiations with another MCO to be less competitive, disclosure of these rates would risk DPW’s ability to qualify for matching federal funds. 65 P.S. § 67.708(b)(1)(i).

Therefore, to the extent that your request asks that DPW disclose these rates to you, your request is denied.

**Documents that “isolate the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age.”** As explained above: (i) The rates that DPW uses to make payment to the SE MCOs are comprehensive capitation rates; (ii) DPW arrives at those rates through negotiations with the individual MCOs; and (iii) the fundamental constraint on the amount of any particular negotiated rate is that it must fall within a range that is certified by DPW’s actuary to be actuarially sound. Consequently, DPW does not calculate the portion of those comprehensive capitation rates that it “pays to any Medicaid HMO to provide dental services to Medicaid recipients under 21 years of age.” Because DPW does not

make the contemplated calculations, DPW possesses no documents that are responsive to this part of your first request.<sup>1</sup>

**Your request for “appendices” containing the comprehensive capitation rates for the SE MCOs.** As explained above, the capitation rates that DPW pays to any particular MCO are set forth in an appendix to that MCO’s contract with DPW. For this reason, we interpret your request for “appendices” to ask for only these appendices for each of the SE MCOs. For the reasons set forth above, these rates are not public records. Therefore, your request for these appendices is denied.

**Your request for “correspondence” that sets forth the comprehensive capitation rates for the SE MCOs.** You asked for copies of any “correspondence ... that sets forth any rate of payment ... that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania.” For the reasons set forth above, the rates in question are not public records and, therefore, your request for any correspondence that sets forth those rates is denied on that basis. In addition, your request for correspondence is insufficiently specific. In addition, to the extent that your request may encompass any internal correspondence, including correspondence between DPW and its actuarial contractor, that correspondence is or may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client privilege. 65 P.S. § 67.102 (definition of “public record”).

**Your request for “each and every” other document.** In addition to “appendices” and “correspondence,” your request asks for a copy of “each and every [other] document ... that sets forth any rate of payment ... that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania ....” As explained above, such requests are insufficiently specific. By way of further response, even if the instant request is sufficiently specific, the rates are DPW trade secrets and any internal documents may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client and/or attorney-work product privileges. 65 P.S. § 67.102 (definition of “public record”).

## **YOUR SECOND REQUEST.**

You asked for “[e]ach and every document [that contain[s] information relating [to] any period from January 1, 2008 until June 15, 2011], 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.”

<sup>1</sup> Your request only asks for records showing amounts that “DPW calculates it pays to provide dental services ....” Consequently, we interpret your request to pertain only to records containing calculations made by DPW, i.e., your request does not ask for any computations that may have been made by DPW’s actuarial contractor. Therefore, to the extent that any such records may exist, they fall outside the scope of your request. (To the extent you may have intended your request to encompass any such records, we submit it was insufficiently specific.) In addition, any such records would likely be subject to the internal predecisional deliberations exemption, set forth at 65 P.S. § 67.708(b)(10).

**DPW'S RESPONSE TO YOUR SECOND REQUEST.**

For the reasons set forth below, your second request is denied.

**Confidential information of the SE MCOs.** The focus of your second request is on the amounts that the SE MCOs pay for dental services. Each of the SE MCOs has informed DPW that those amounts are trade secrets and/or confidential proprietary information and/or are otherwise protected against disclosure. 65 P.S. § 67.708(b)(11); 12 Pa.C.S. §§ 5301 – 5308. In addition, the SE MCOs have advised DPW that the terms of the contracts that establish the relationship between DPW and the SE MCOs expressly declare that these provider rates are confidential, and that DPW is not to disclose them (or other protected information) to third parties. The agreements between the SE MCOs and their dental subcontractors providers likewise protect such information.

**Your request for “appendices.”** Your *first* request asked that DPW provide you with “appendices.” As explained above, we interpreted your use of that term to pertain to the appendices to DPW's contracts with the SE MCOs. In your *second* request, you use the same term. None of the appendices to DPW's contracts with the SE MCOs set forth the amount that the MCO “pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.” Therefore, there are no appendices that are responsive to this request. (To the extent that you may have intended your reference to “appendices” to have some other meaning, we submit that your request is insufficiently specific. By way of further response, even if the request is sufficiently specific, the information on the amounts paid by the MCOs is protected against disclosure on the grounds set forth above.)

**Your request for “correspondence”** is insufficiently specific. By way of further response, even if the request is sufficiently specific, the information on the amounts paid by the MCOs is protected pursuant to the grounds set forth above. In addition, any internal correspondence is or may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client privilege. 65 P.S. § 67.102 (definition of “public record”).

**Your request for other records.** In addition to “appendices” and “correspondence,” your request asks for a copy of “each and every [other] document ... 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.” As explained above, such requests are insufficiently specific. By way of further response, even if the request is sufficiently specific, the information on the amounts paid by the MCOs is protected pursuant to the grounds set forth above. In addition, any internal correspondence is or may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client privilege. 65 P.S. § 67.102 (definition of “public record”).

### YOUR THIRD REQUEST.

You asked for “[e]ach and every actuarial report DPW possesses [that contain[s] information relating [to] any period from January 1, 2008 until June 15, 2011] that sets forth an overall capitation rate and/or determines the ‘actuarial soundness’ of an overall capitation rate that DPW pays to any Medicaid HOM operating in Southeastern Pennsylvania, including but not limited to each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates.”

### DPW’S RESPONSE TO YOUR THIRD REQUEST.

For the reasons set forth below, your third request is granted in part and denied in part.

**Certification letters sent by DPW to CMS.** In this request you asked for a copy of “each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates.” The entity that certifies to the actuarial soundness is DPW’s actuary, Mercer. However, Mercer does not certify any particular rates. Rather, as stated in its certification letters, “Mercer certifies that the rate ranges were developed in accordance with generally accepted actuarial practices and principles ....” However, these letters do not set forth any particular rates. Copies of these letters will be provided to you, upon payment of the fee set forth below. These are the only documents that are responsive to your third request.

**Actuarial reports that set forth “an overall capitation rate.”** As explained above, DPW’s actuary certifies the soundness of a rate range. As also explained above, DPW uses that rate range in the course of negotiating capitation rates with the individual MCOs. Therefore, the actuary’s reports do not “set[] forth an overall capitation rate” and, for that reason, there are no records that fall within the scope of this part of your request.

**Other actuarial records created by Mercer.** DPW possesses various other records created by Mercer. To the extent that you may have intended your request to reach any of these records, we submit that your request was insufficiently specific. In addition, many of these records contain information that constitutes trade secrets or confidential proprietary information of Mercer. 12 Pa.C.S. §§ 5301 – 5308; 65 P.S. § 67.708(b)(11). In addition, to the extent that these documents are used by DPW in the course of arriving at the negotiated rates, or are otherwise used as input into DPW’s decision-making processes, these documents are subject to the predecisional deliberations exemption set forth at 65 P.S. § 67.708(b)(10).

### YOUR FOURTH REQUEST.

You asked for “[e]ach and every actuarial report DPW possesses [that contain[s] information relating [to] any period from January 1, 2008 until June 15, 2011] that sets forth a capitation rate for dental services to Medicaid recipients under 21 years of age and/or determines the actuarial soundness of such capitation rates for dental services to

Medicaid recipients under 21 years of age, including but not limited to any such report DPW has made to the federal government to certify the actuarial soundness of such rates.”

#### **DPW’S RESPONSE TO YOUR FOURTH REQUEST.**

**In general.** Your fourth request is modeled on your third, but replaces “an overall capitation rate” with “a capitation rate for dental services to Medicaid recipients under 21 years of age.” As explained above, DPW negotiates comprehensive capitation rates with the MCOs; it does not negotiate separate dental rates. For this reason, the rate ranges that Mercer certifies are rate ranges for comprehensive capitation rates. Mercer does not certify separate rate ranges for dental rates. Therefore, to the extent that the “certification letters” provided in response to your third request are also responsive to your fourth request, this request is granted. However, to the extent that you seek other certifications that pertain specifically to dental rates, there are no records that are responsive to your fourth request.

**Other actuarial records created by Mercer.** DPW possesses various other records created by Mercer. To the extent that you may have intended your request to reach any of these records, we submit that your request was insufficiently specific. In addition, some of these records contain information that constitutes trade secrets or confidential proprietary information. 12 Pa.C.S. §§ 5301 – 5308; 65 P.S. § 67.708(b)(11). In addition, to the extent that these documents are used by DPW in the course of arriving at the negotiated rates, or are otherwise used as input into DPW’s decision making processes, these documents are subject to the predecisional deliberations exemption set forth at 65 P.S. § 67.708(b)(10).

#### **YOUR FIFTH REQUEST.**

You asked for “[a]ny corrective action plan or sanctions [relating [to] any period from January 1, 2008 until June 15, 2011 in which] DPW has imposed on or contracted with any Medicaid HMO for in Southeastern Pennsylvania that involves wholly, or in part, the provision of dental care to Medicaid recipients under the age of 21.”

#### **DPW’S RESPONSE TO YOUR FIFTH REQUEST.**

There are no corrective action plans or sanctions letters that fall within the scope of this request.

Pursuant to the fee provisions established by the Office of Open Records, the cost of fulfilling your request is \$7.00 (the cost of a CD). Kindly remit payment in that amount to the above address, with a check made payable to the Commonwealth of Pennsylvania by **August 15, 2011**. Under the RTKL, “[a]ll applicable fees shall be paid in order to receive access to the record requested.” 65 P.S. § 67.901.

If we do not receive full payment of the estimated amount by **August 15, 2011**, we will note that payment was not timely received and that our obligations under the RTKL are ended with regard to this request, for lack of timely payment. Further, please note that failure to pay for records made available in response to a RTKL request to any executive agency will preclude you from obtaining further records from another executive agency, pursuant to the provisions of section 901 of the RTKL and Section IV (D) of our agency RTKL Policy, as published on our website. Also, if payment is not received and you request the same records again, the request may be considered as disruptive under 65 P.S. § 67. 506(a)(1).

With regard to the records that were not produced and also with regard to the fees required for production of the records to which access was granted, you have a right to appeal this response in writing to Terry Mutchler, Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4<sup>th</sup> Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) this response;
- 2) your request; and
- 3) the reasons: why you think the record is public (a statement of the grounds you assert for the requested record being a public record); and why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at:  
<https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf>.

Sincerely,

*Andrea Bankes*

Andrea Bankes  
Agency Open Records Officer