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VIA ELECTRONIC MAIL (kyapplegat@pa.gov) AND FIRST-CLASS 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: PILCOP v. Department of Public Welfare
OOR Docket No. AP 2012-2017

Dear Mr. Applegate:

On behalf of our clients, Aetna Better Health Inc., ("Aetna"), Health Partners of Philadelphia, Inc. ("Health Partners"), Keystone Mercy Health Plan ("Keystone Mercy") and DentaQuest, LLC ("DentaQuest") (collectively, the "Interested Parties"), this letter, along with exhibits, constitutes the Interested Parties' submission in support of the denial by the Pennsylvania Department of Public Welfare ("DPW" or "Appellee") to the recent request (the "Request") by the Public Interest Law Center of Philadelphia ("PILCOP"), pursuant to Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. § 67.101, *et seq*. The Request seeks, among other items, documents containing rates that the Interested Parties pay to dental providers in the Southeast Region under Pennsylvania's HealthChoices program. Such documents and information are confidential and protected from disclosure by Pennsylvania law. The Interested Parties strongly object to their disclosure.

I. Background

a. The Parties

Appellant PILCOP is a public interest law firm based in Philadelphia. Appellee DPW is the state agency that operates Pennsylvania's Medicaid Managed Care Program called "HealthChoices."

Aetna, Health Partners and Keystone Mercy are Medicaid Health Maintenance Organizations (the "HMOs") (also called "Managed Care Organizations" or "MCOs") that participate in Pennsylvania's HealthChoices Program. Each of the HMOs subcontracts with DentaQuest to form contracts with dental providers for the HMO's enrollees.

b. The Request and DPW's Response

Appellant submitted the Request to DPW on October 3, 2012. The Request seeks any document that "(a) sets forth the amount for any one or more dental procedure codes that any Medicaid HMO and/or Medicaid Dental Subcontractor pays or has paid to dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania, or (b) otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania." PILCOP specifically excluded from the request any documents that it had previously requested from DPW in its June 17, 2011, request. The October 3, 2012 request, unlike the June 17, 2011 request, specifically seeks rates that the dental subcontractors paid the dental providers.

On November 13, 2012, DPW denied the Request. On December 3, 2012, Appellant filed this appeal. On December 4, 2012, OOR Executive Director Terry Mutchler sent a letter to Appellant and Appellee constituting the Official Notice of Appeal. In that letter, DPW was informed that it must notify any third party whose confidential or proprietary records may be subject to the appeal. On the same day, December 4, DPW notified the undersigned counsel by email of the appeal.

c. The Interested Parties' Protection of Their Rates Under the HealthChoices Program

Pursuant to the HealthChoices program, DPW has formed separate contracts with HMOs, including Aetna, Health Partners and Keystone Mercy, to provide for medical services, including dental services, to Medicaid recipients in the Southeast Region. The HMOs compete with each other for enrollees in the HealthChoices program in that region. Pursuant to their contracts with DPW, the HMOs are required to establish and maintain a provider network and to ensure access to care, including dental services, for the Medicaid beneficiaries enrolled with their respective health plans. DPW pays the HMOs a per member per month amount, called a "PMPM rate," or "capitation rate." The standard contracts between DPW and the HMOs contain a confidentiality clause that provides as follows:

> The PH-MCO considers its financial reports and information, marketing plans, Provider rates, trade secrets, information or materials relating to the PH-MCO's software, databases or technology, and information or materials licensed from, or otherwise subject to contractual nondisclosures rights of third parties, which would be harmful to the PH-MCO's competitive position to be confidential information. This information shall not be disclosed by the Department to other parties except as required

> by law or except as may be determined by the Department to other parties except as required by law or except as may be determined by the Department to be related to the administration and operation of the HealthChoices Program. The Department will notify the PH-MCO when it determines that disclosure of the information is necessary for the administration of the HC Program. The PH-MCO will be given an opportunity to respond to such a determination prior to the disclosure of information.

The HMOs each subcontract with DentaQuest to set up a network of dental providers and negotiate rates for dental services for the HMO's enrollees. (*See* Interested Parties' Affidavits, attached hereto as Exhibits A-D).

Consistent with long-standing practice in the healthcare insurance industry, HMOs and subcontractors like DentaQuest keep their rate information confidential, and take substantial precautions to protect their rates from disclosure. The HMOs and DentaQuest expend substantial time, effort and money in negotiating dental provider rates. In addition, both the HMOs and DentaQuest take steps to protect the confidentiality of rate information, including the following:

- As a matter of practice, limiting external disclosure of rates;
- Limiting internal disclosure of rates to a small group of employees on a "need to know" basis;
- Keeping the rate information in secure files; and
- Providing confidentiality training to employees.

As a result of the protections for rate information by the HMOs and DentaQuest, it would be extremely difficult for a person outside those companies to obtain those rates by legitimate means. (*See* Exhibits A-D.)

II. <u>Records Containing the Interested Parties' Rates are Not "Public Records" Under the RTKL, and Therefore Should Not be Released</u>

Under the RTKL, Commonwealth agencies must provide access to "public records" upon request. 65 P.S. § 67.301. "Public record" is defined as follows:

> A record, including a financial record, of a Commonwealth or local 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.

Subsection 708(b) lists thirty (30) specific exemptions from disclosure. Subsection 708(b)(11) exempts from disclosure "record[s] that constitute[] or reveal[] a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11).

a. The Records Are Exempt from Disclosure Under Subsection 708(b)(11)

Records containing the Interested Parties' rates "constitute[] or reveal[] a trade secret or confidential proprietary information," and are thus exempt from disclosure. 65 P.S. § 67.708(b)(11).

i. The Rates are "Trade Secrets" of the Interested Parties

A "trade secret" is defined in the RTKL as follows:

> Information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that:
>
> > (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
> >
> > (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102.[1]

Pennsylvania courts look to the following factors to determine whether information is properly protected as a trade secret: (1) the extent to which the information is known outside of the company's business; (2) the extent to which the information is known by employees and others involved in the company's business; (3) the extent of the measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money the company spent in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated legitimately by others. *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010).

The Interested Parties' rates meet all the criteria that Pennsylvania courts look to in determining whether information constitutes a trade secret.

First, with limited exceptions, the Interested Parties' rates are not known outside the Interested Parties' business. It has long been standard industry practice to keep confidential any information relating to rates that insurance plans or subcontractors pay their providers. Consistent with this practice, the Interested Parties keep rates confidential, and the HMOs' HealthChoices Agreement with DPW, as well as their contracts with DentaQuest, contain

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[1] The Pennsylvania Uniform Trade Secrets Act contains an identical definition of trade secret. *See* 12 Pa.C.S.A. § 5302.

specific confidentiality provisions. Other than required reporting to governmental agencies or as required by applicable law, and in other extremely limited circumstances, the Interested Parties never disclose their provider rates to anyone outside the companies.

Second, other than employees whose jobs require access to the rate information, the Interested Parties' employees have no access to such information, and the Interested Parties maintains strict internal controls to ensure that confidentiality is maintained.

Third, the Interested Parties takes substantial steps, such as limiting access to contracts containing rates to those with a "need to know," to ensure that rate information remains confidential.

Fourth, the rate information has economic value to the Interested Parties, and, if disclosed, would have economic value to their competitors. Disclosure of rates to the Interested Parties' competitors could potentially lead to the Interested Parties losing business to their competitors. Thus, the rates have independent economic value to the Interested Parties, and would have economic value to their competitors if disclosed.

Fifth, the Interested Parties have expended substantial time, effort, and money in negotiating rates to arrive a rate structure that is economically advantageous to them.

Sixth, because of the Interested Parties' extensive confidentiality protections as detailed in their affidavits, it would be very difficult for others to acquire or duplicate the rate information by legitimate means.

Thus, each record containing provider rates of the Interested Parties is a "record that ... reveals a trade secret," and is exempt from disclosure.

Despite the OOR's Final Determination issued on September 17, 2012, in the matter of *James Eiseman and the Public Interest Law Center of Philadelphia v. Pennsylvania Department of Public Welfare, et al.*, Docket No. AP 2011-1098, in which the OOR ordered the release of dental rate information of the HMOs, the OOR should decide this case differently.[2] In *Eiseman*, the OOR relied heavily on a case decided under the old RTKL, *Lukes v. Department of Public Welfare*, 976 A.2d 609, 618 (Pa. Commw. Ct. 2009). But the Commonwealth Court has ruled that *Lukes* does not control cases filed pursuant to the new RTKL. *In the Matter of Silberstein*, 11 A.3d 629, 632 n.8 (Pa. Commw. Ct. 2011) ("In support of this appeal, MacNeal relies heavily upon this Court's decision in [*Lukes*]. 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."). The Commonwealth Court again declined to apply *Lukes* to a case under the RTKL in *Office of the Budget v. OOR*, 11 A.3d 618, 622-23 (Pa. Commw. Ct. 2011). Therefore, the OOR should follow Commonwealth Court precedent and decline to apply *Lukes* here.

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[2] On October 17, 2012, DPW and all five HMOs that participated in the *Eiseman* appeal before the OOR (including Aetna, Health Partners and Keystone Mercy) filed petitions for review of the *Eiseman* Final Determination with the Commonwealth Court. Those petitions have been consolidated and the appeal is pending.

In addition, the *Eiseman* decision goes against several OOR decisions in which the OOR held that pricing information such as the rates involved here is exempt from disclosure under the trade secrets exemption. *See Dahlgren v. Dept. of Gen. Serv.*, Docket No. AP. 2009-0631 (Pa. OOR 2009) (pharmaceutical distributor's negotiated pricing information, proprietary program pricing, distribution fees and discounts were protected by trade secret exemption, because competitors could use the information to successfully win business from distributor in other government bids, distributor restricted access to the information, and industry standard was to keep information confidential); *Howard v. Pa. Dept. of Corrections*, Docket No. AP 2010-0776 (Pa. OOR 2010) (information relating to government contractor's e-commerce, communication, and financial services program used by prison systems was protected from disclosure based on proprietary/trade secret exemption where disclosure would result in significant economic harm to contractor); *Maller v. W. Manheim Twp.*, Docket No. AP. 2009-0498 (Pa. OOR 2009) (blueprints and architectural drawings prepared by contractor qualified as trade secrets where builder took reasonable steps to maintain secrecy of the records, including language requiring consent prior to disclosure on each page of drawings).

In *Dahlgren*, a pharmaceutical distributor, McKesson, was the successful bidder for a contract with the Pennsylvania Department of General Services ("DGS"). A request was made under the RTKL for information relating to McKesson's bid, including detailed information relating to the prices McKesson negotiated with the pharmaceutical manufacturers. McKesson sent a letter to DGS requesting that it withhold certain information from the requestor, including the pricing information. McKesson argued that "[t]he negotiated manufacturer pricing is the critical confidential proprietary information produced by McKesson and driving its competitive business model." Docket No. AP. 2009-0631, at 6. The OOR agreed:

> Here, the redacted information is part of a pricing method used to calculate a bid offer. The information has independent economic value because competitors could use the information to successfully win contracts from McKesson in other bids. Further, the information is not readily available as the (sic) McKesson's policy and the industry standard is to keep such information confidential. ... [T]he appeal of the denial of the Request under #5 is denied.

Id. at 9.

As in *Dahlgren*, the Interested Parties' provider rates have independent economic value to the Interested Parties, because to the extent that their competitors know those rates, their competitors could use the information to unfairly compete against the Interested Parties. Moreover, the Interested Parties' rates are not readily available because, consistent with the industry standard, the Interested Parties keep them confidential.

ii. The Interested Parties' Rates are Exempt as "Confidential Proprietary Information"

Subsection 708(b)(11) exempts "confidential proprietary information" from disclosure. The RTKL defines "confidential proprietary information" as "[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.

As shown in their affidavits, the Interested Parties keep their rates confidential, and the disclosure of those rates would cause substantial harm to their competitive position. Although it declined to do so in *Eiseman*, the OOR has held in other cases that pricing information of private entities, when properly supported by an affidavit or other evidence, is protected from disclosure as confidential proprietary information. *Zeshonski v. Pa. Dept. of Health*, Docket No. AP. 2011-0698 (Pa. OOR 2011) (fees and costs information of private company protected); *Datatel, Inc. v. PSSHE*, Docket No. AP. 2010-0818 (Pa. OOR 2010) (pricing information of contractor properly redacted).

In *Giurintano v. Department of General Services*, 20 A.3d 613 (Pa. Commw. Ct. 2011), the Commonwealth Court affirmed the OOR's decision holding that information regarding the identity of foreign language translators employed by a contractor was exempt from disclosure as confidential proprietary information. The Court held that disclosure of the interpreters' identities would cause "substantial harm" to the contractor's "competitive position in the interpretation industry." *Id.* at 617. In reaching this conclusion, the Court noted that the contractor "keeps the identities of its interpreters confidential to protect its investment in those interpreters," which is consistent with industry practice, and the interpreters are the contractor's "business asset." *Id; see also Rounsville v. Pa. Dept. of Health.* Docket No. AP 2011-0281 (Pa. OOR 2011) (software system used in connection with delivery of mental health and substance abuse services qualified as proprietary information that if released, would be used by competitors to contractor's detriment).

As the Interested Parties explain in their affidavits, they would suffer substantial competitive harm if their provider rates were publicly disclosed, and they expend considerable time, effort and expense to arrive at a rate structure that is economically advantageous to them. For these reasons, the Interested Parties' provider rates are "business assets" that, consistent with industry practice, should not be disclosed.

b. The Records are Exempt From Disclosure Under Subsection 708(b)(5)

The Request seeks records that are exempt from disclosure under another specific exemption under the RTKL, the one for health records set forth at Section 708(b)(5). That Section exempts from disclosure records "of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by person with disabilities, including vocational rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information." 65 P.S. § 67.708(b)(5) (emphasis added). The HMOs and DentaQuest have documents that reflect each encounter with a dental provider. These documents contain rate information, but also contain information specifically covered by the exemption, such as "an individual's medical ... history, "results of tests," "individually identifiable health information," etc. Because these records are exempt under Section 708(b)(5), they cannot be disclosed.

c. **The Records are Not "Financial Records," and Thus Subsection 708(c) Does Not Apply**

Appellant argues that these records should be disclosed because, as the OOR held in *Eiseman*, "the trade secrets exception to the obligation otherwise to produce public records does not apply to 'financial records,'" citing 65 P.S. § 67.708(c), and that "[i]t cannot be seriously contended that the records sought by PILCOP's October 3, 2012 Request are not equally 'financial records,' and thus the trade secrets exemption does not apply." Appellant's December 3, 2012, letter to Ms. Terry Mutchler ("Appellant's Letter Brief"), at 4-5. But Appellant provides no support for its argument that documents containing rates paid by the Interested Parties to dental providers under the HealthChoices program constitute "financial records." Contrary to Appellant's argument, it can be "seriously contended" that the records at issue in this case are not encompassed within the definition of "financial records," by simply applying straightforward rules of statutory construction.

In *Eiseman*, the OOR concluded that ***DPW's contracts with the MCOs***, including the capitation rates therein, constituted "financial documents," but did not apply the same analysis to the MCOs' contracts with subcontractors and providers. *Eiseman*, at 15-18. Appellant fails to support his interpretation of the definition of "financial record"—"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"[3]—as including documents showing rates paid by the Interested Parties to dental providers.

In fact, the documents at issue here—documents showing dental rates paid by the HMOs and/or DentaQuest to dental providers under the HealthChoices program—do not deal with "the receipt or disbursement of funds ***by an agency,***" but rather the disbursement of funds ***by contractors and subcontractors of an agency***. If the Pennsylvania legislature had wished to include such disbursements within the definition of financial record, it could have done so. Thus, the principle "*expressio unius est exclusio alterius*"—"the expression of one thing implies the exclusion of another thing not mentioned"—applies here. *See In re: Appeal of Costco Wholesale Corp.*, 49 A.3d 535, 541 (Pa. Cmwlth Ct. 2012) (exclusion of comparable provision "must be presumed intentional"). In short, Appellant's "financial records" argument has no merit.[4]

d. **Alternatively, the Rates are Exempt From Disclosure Under Pennsylvania Laws and Regulations**

Even if records containing the Interested Parties' provider rates were not specifically exempted pursuant to subsections 708(b)(11) and (b)(5), they would still not meet the definition of "public records" because they are "exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree." 65 P.S. § 67.102. Specifically, a

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[3] 65 P.S. § 67.102.

[4] Moreover, interpreting Section 708(c) to make *all* financial records public makes little sense, since one of the specific 708(b) exemptions, namely, subsection (b)(26), specifically exempts from disclosure "*financial information* of a bidder or offeror." 65 P.S. § 67.708(b)(26) (emphasis added). *See* 1 Pa.C.S.A. § 1921(a) (whenever possible each word in a statutory provision is to be given meaning and not treated as surplusage).

Pennsylvania state law (the Pennsylvania Uniform Trade Secrets Act, or the "PUTSA") and state regulations (Pennsylvania's HMO regulations) protect such rates from disclosure.

The PUTSA, 12 Pa.C.S.A. § 5301, *et seq.*, provides for injunctive relief and recovery of damages for misappropriation of a trade secret. 12 Pa.C.S.A. §§ 5302-04. Since the PUTSA contains the same definition of "trade secret" as the RTKL, and since, as we have shown, the Interested Parties' rates meet the RTKL definition of trade secret, records containing such rates are exempt under the PUTSA. Therefore, they are not "public records" under the RTKL. *See* 65 P.S. § 67.102.

Moreover, Pennsylvania's HMO regulations provide that reimbursement information in standard form health care provider contracts, which are submitted annually to the Pennsylvania Department of Health, "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." 28 Pa. Code § 9.604(a)(8). Because the Interested Parties do not consent to the release of records containing reimbursement information, and because no court has ordered their disclosure, those records are not "public records" subject to disclosure under the RTKL.

Appellant argues that the Department of Health regulations should not protect these records from disclosure because, although the HMOs argued against disclosure on that basis in the *Eiseman* case, the OOR decision was silent on the issue. In addition, Appellant argues, the regulations do not apply here. Appellant's Letter Brief, at 6-8. But upon close examination, Appellant's argument falls apart.

Appellant does not explain how the OOR's failure to address an argument made by the HMOs in a previous case has any bearing on whether the OOR should address the issue in this case. Appellant's claim that the argument was "effectively rejected" by the OOR because the OOR ruled in Appellant's favor in *Eiseman* (Appellant's Letter Brief, at 8) reads into the *Eiseman* opinion (which is currently on appeal) a ruling that is not there.

More importantly, "reimbursement information"—which the regulation protects from disclosure—clearly includes the rates that the HMOs and/or DentaQuest pay to dental providers. Appellant's argument that § 9.604(a)(8) does not apply here because "its plain terms cover certain reports that HMOs are required to make to the Department of Health and nothing more" (*Id.*) ignores the "plain terms" of the regulation. Those terms state that "reimbursement information" contained in "standard form health care provider contracts" (not "certain reports") are protected from disclosure. In fact, the Department of Health regulation at 28 Pa. Code § 9.604(a)(8) covers the very documents that Appellant seeks in the Request. Because the information in those documents is "exempt from being disclosed under ... [a] State ... regulation," the documents are not "public records," and therefore cannot be disclosed.

e. **Alternatively, DentaQuest's Records are Not Records "of the Agency" Under Section 506(d)(1), Because DentaQuest Does Not Have a Contract with DPW**

Records in the possession of third parties only become subject to disclosure under the RTKL if they are in the possession of a third party "with whom the agency has contracted to

perform a governmental function." 65 P.S. § 67.506(d)(1). Thus, by the statute's plain language, records in the possession of a third party with whom the agency has ***not*** contracted are not "agency records." Any such records do not come within the definition of "public record" ("a record, including a financial record, of a Commonwealth or local agency," 65 P.S. § 67.102), and therefore must not be disclosed. Because DPW has not contracted with DentaQuest, but rather with the HMOs which in turn subcontracted to DentaQuest, records in DentaQuest's possession cannot be public records and must not be disclosed.

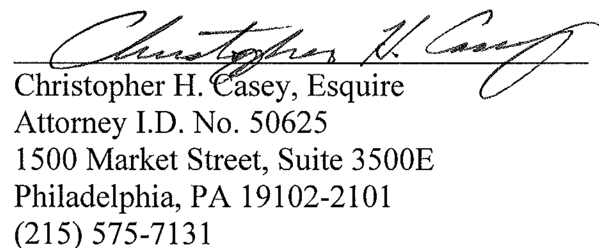
III. Conclusion

For all of the reasons set forth above, the Interested Parties respectfully request that the OOR affirm DPW's partial denial of the Request.

Please do not hesitate to contact me should you require additional information or have any questions.

Respectfully submitted,

DILWORTH PAXSON LLP



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Enclosures

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