IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners/Appellants/Requesters,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., KEYSTONE MERCY HEALTH PLAN, UNITEDHEALTHCARE OF PENNSYLVANIA, INC. d/b/a UnitedHealthcare Community Plan, and HEALTHAMERICA PENNSYLVANIA INC. d/b/a CoventryCares,

Respondents/Appellees.

PETITION FOR ALLOWANCE OF APPEAL

On Petition from the Order of the Commonwealth Court, Nos. 1935 C.D. 2012, 1949 C.D. 2012, & 1950 C.D. 2012, Dated February 19, 2014, Which Affirmed in Part and Reversed in Part the Final Determination of the Office of Open Records, Dated Sept. 17, 2012

Benjamin D. Geffen, Esq.
Pa. Bar No. 310134
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
bgeffen@pilcop.org
Phone: 267-546-1308
Fax: 215-627-3183

Counsel for Petitioners/Appellants/Requesters

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I.
OPINIONS DELIVERED IN THE COURT BELOW

Petitioners file this Petition for Allowance of Appeal from the *En Banc* Order of the Commonwealth Court dated February 19, 2014, in accordance with Pennsylvania Rules of Appellate Procedure 1111-1122. The opinion below was entered in three consolidated cases: *Commonwealth of Pennsylvania, Department of Public Welfare v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 1935 C.D. 2012; *Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 1949 C.D. 2012; and *UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania Inc. d/b/a Coventry Cares v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 1950 C.D. 2012 (collectively, *Eiseman I*).

A copy of the Majority Opinion (Simpson, J.) is attached as Exhibit A and is referenced herein as the "Opinion." A copy of the Concurring and Dissenting Opinion (McCullough, J.) is attached as Exhibit B and is referenced herein as the "Dissent." A copy of the Final Determination of the Office of Open Records (OOR) is attached as Exhibit C and is referenced herein as the "OOR Decision."

II.
TEXT OF THE ORDER IN QUESTION

The Commonwealth Court entered the following order:

> **AND NOW,** this 19th day of February, 2014, the Office of Open Records' final determination is **AFFIRMED IN PART, and REVERSED IN PART** in accordance with the foregoing opinion.

Petitioners seek review by this Court of the portion of the Order reversing the final determination of the Office of Open Records.[1]

III.
QUESTIONS PRESENTED FOR REVIEW

1. Where Section 708(c) of the Right-To-Know Law specifically provides that a "financial record" is not exempt from disclosure on the basis that it contains a "trade secret" or "confidential proprietary information," is this explicit provision nullified by the earlier-enacted Pennsylvania Uniform Trade Secrets Act?

> Answer of the Office of Open Records: No.
> Answer of the Commonwealth Court: Yes.
> Suggested answer: No.

2. When public funds are funneled through middlemen before reaching their intended beneficiaries, are the records documenting this flow of public funds "financial records" required to be disclosed under the current version of the Right-To-Know Law, as they were under the prior version of the law?

> Answer of the Office of Open Records: Yes.
> Answer of the Commonwealth Court: No.
> Suggested answer: Yes.

3. Are historical rates paid by Medicaid managed-care organizations (MCOs) "confidential proprietary information" and "trade secrets," when the rates from one year do not reveal the rates for future years, and when most of the MCOs have

[1] Petitioners do not seek review of the portion of the Order affirming the final determination of the Office of Open Records.

already disclosed such rates to a subcontractor who negotiates rates with their competitors?

Answer of the Office of Open Records: No.
Answer of the Commonwealth Court: Yes.
Suggested answer: No.

IV.
STATEMENT OF THE CASE

Respondent the Department of Public Welfare (DPW) administers Pennsylvania's multibillion-dollar Medical Assistance (Medicaid) program, which provides medical and dental care to millions of individuals and accounts for some 30% of the Commonwealth's General Fund budget.[2] This petition arises from one of a pair of cases filed under the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (RTKL) to open to public scrutiny the flow of Pennsylvania's Medicaid funds. Like its companion case, *Dental Benefit Providers et al. v. Eiseman et al.*, Commonwealth Court Case Nos. 945, 957, & 958 C.D. 2013 (*Eiseman II*), this case raises issues of fundamental statewide importance under the RTKL.[3] The

[2]According to a 2013 DPW fact sheet: "Currently 1 out of every 6 citizens in Pennsylvania receives Medicaid benefits. Spending on Medicaid programs accounts for 75 percent of the Department of Public Welfare's (DPW) $27.6 billion budget (including state, federal and other funds). DPW's budget constitutes 39 percent of the state's annual budget with Medicaid being the number one cost driver at 30 percent of Pennsylvania's General Fund." *Medicaid Expansion and Pennsylvania*, available at http://www.portal.state.pa.us/portal/server.pt/document/1320335/aca-ma_expansion_sheet_pdf.

[3] The Commonwealth Court ordered this case and *Eiseman II* to be argued seriately, as both cases involve similar legal issues and share many parties in interest, including DPW. Opinion at 4 n.5. The Commonwealth Court issued its decisions in this case and *Eiseman II* on the same day. Simultaneously with this petition, Petitioners are filing a petition for allowance of appeal from the order in *Eiseman II*.

decision below has the effect of denying the public any right to know how much of its money is spent to provide care to low-income children, adults with disabilities, and other eligible individuals. More broadly, the decision voids the General Assembly's decision to grant public access to records of how taxpayer moneys are spent even if those records may reveal trade secrets—a result that will severely limit citizens' access to a wide range of financial records of state and local government bodies.

Rather than making payments directly to doctors and dentists, or "providers," DPW has chosen to contract with managed-care organizations (MCOs) to ensure access to dental services for eligible program recipients. To provide dental services, these MCOs have in turn chosen to delegate their obligations to subcontractors. These subcontractors in turn contract with and pay providers. In diagram form, this flow of public funds can be depicted as follows:

DPW→MCOs→Subcontractors→Providers

This case concerns the flow of public funds in the first two stages of that diagram, while *Eiseman II* concerns the last stage. Like the Commonwealth Court, this petition will use the term "Capitation Rates" to refer to the amounts paid by DPW to the MCOs, per member, per month, based on annually negotiated capitation rates, and the term "MCO Rates" for the amounts the MCOs pay primarily to

subcontractors.[4] (The "Provider Rates" by which subcontractors pay providers are at issue in *Eiseman II*.)

A. The Initial RTKL Request

James Eiseman, Jr. and the Public Interest Law Center of Philadelphia (Petitioners) filed a RTKL request with DPW, seeking, in relevant part, records showing the (1) Capitation Rates and (2) the MCO Rates, with both requests limited geographically to the five-county area of Southeastern Pennsylvania and limited temporally to the period from July 1, 2008 through June 15, 2011.

DPW denied the records request. It cited an exception within the RTKL permitting an agency to withhold "[a] record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). DPW also cited the Pennsylvania Uniform Trade Secrets Act (PUTSA), 12 Pa. C.S. §§ 5301 *et seq.*, in denying the request.

B. The Appeal to the Office of Open Records

Petitioners filed an appeal to OOR. Shortly thereafter, the five MCOs that contracted with DPW in Southeastern Pennsylvania during the requested period sought and obtained leave to participate in the OOR proceedings as direct interest participants. These MCOs are Respondents United Healthcare of Pennsylvania,

[4] In limited situations, the MCOs have contracted directly with dental providers instead of contracting via dental subcontractors. Opinion at 3 n.6. Petitioners' request for the MCO Rates also reaches these limited situations.

Inc. (United); Aetna Better Health, Inc. (Aetna); Health America of Pennsylvania, Inc. d/b/a CoventryCares (Coventry); Keystone Mercy Health Plan, Inc. (Keystone); and Health Partners of Philadelphia, Inc. (Health Partners) (collectively, the MCOs).

In May 2012, OOR held a two-day hearing at which eight witnesses testified. After the parties had filed their post-hearing briefs, OOR issued a final determination granting Petitioners' requests for both the Capitation Rates and the MCO Rates.

As for the Capitation Rates, OOR held that:

> while it is clear that [DPW] and the [MCOs] treat the capitation rates as confidential, it is not clear that disclosure of the capitation rates would provide any economic value to [DPW]'s counter-parties in future negotiations or would cause substantial competitive harm to [DPW]. Therefore, [DPW] and the [MCOs] have failed to meet their burden of proof that records responsive to [the request for Capitation Rates] are exempt from disclosure under 65 P.S. § 67.708(b)(11).

OOR Decision at 14.

OOR also held that the Capitation Rates "cannot be considered anything but a 'financial record' under the RTKL," and that as such they must be disclosed regardless of whether they contain trade secrets or confidential proprietary information. OOR Decision at 15. This holding was based on 65 P.S. § 67.708(c), the "financial records" rule. This rule says that even though Section 708(b)(11) restricts the release of records containing "trade secrets" or "confidential

proprietary information," those restrictions do not apply if the requested records are "financial records."

Respondents also argued before OOR that PUTSA provides an independent basis for withholding the Capitation Rates, apart from Section 708 of the RTKL. The definitions of "trade secret" in the two statutes are virtually identical:

RTKL (65 P.S. § 67.102)	**PUTSA** (12 Pa. C.S. § 5302)
Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.	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.

OOR rejected Respondents' reliance on PUTSA, stating that "[a]s 'trade secrets' are identically defined by PUTSA and the RTKL, the OOR can discern no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL." OOR Decision at 13.

As for the MCO Rates, OOR held that they could not be withheld as trade secrets, citing *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009), *alloc. denied*, 604 Pa. 708, 987 A.2d 162 (2009). OOR Decision at 16-17. In *Lukes*, which was decided under the RTKL's predecessor statute (the Right-to-Know Act or RTKA, 65 P.S. §§ 66.1-66.9 (repealed)), the Commonwealth Court rejected the argument that agreements between a Medicaid MCO and ten hospitals that included specific payment rates were protected from disclosure on trade-secrecy grounds, reasoning 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." 976 A.2d at 627. The OOR further held that the MCO Rates could not be withheld as confidential proprietary information, because "[t]he evidence presented . . . does not establish that the [MCOs] would suffer 'substantial harm' if their provider rates were disclosed." OOR Decision at 18. Finally, OOR reasoned that it would be anomalous to find these records exempt from disclosure, when *Lukes* had ordered similar rates released under the

predecessor statute, and when the current RTKL had been "enacted to enhance access to records." OOR Decision at 18 n.9.

C. The Appeal to the Commonwealth Court

DPW and the MCOs appealed to the Commonwealth Court, which consolidated the appeals and, *sua sponte*, referred the case to the court *en banc*. The Commonwealth Court "affirm[ed] OOR as to the Capitation Rates, albeit on different grounds." Opinion at 14. It agreed with the OOR that the contracts containing Capitation Rates are "financial records" within the meaning of 65 P.S. §§ 67.102 and 67.708(c), but held that PUTSA, an earlier-enacted statute, "takes precedence over other provisions in the RTKL" and "provides an independent statutory bar to disclosure." Opinion at 9-10. The Commonwealth Court went on to hold that DPW and the MCOs had not carried their burden of proving that the Capitation Rates are trade secrets. *Id.* at 13-14.

Judge McCullough, concurring in the result on this issue, agreed that financial records containing trade secrets or confidential proprietary information are not exempt from disclosure under Section 708 of the RTKL, but rejected the majority's conclusion that PUTSA provides an independent exemption. Dissent at 3-4. Judge McCullough emphasized that "[m]inus the last clarifying sentence in section 708(b)(11) of the RTKL, the definition of a trade secret in the RTKL and the Trade Secrets Act is identical," and concluded that "[s]ince the two concepts

are one and the same, intermingled into a collective and inseparable whole, I do not believe that the trade secrets mentioned and defined in the RTKL in any way 'conflicts' with the trade secrets under the Trade Secrets Act." Dissent at 13-14.

On the MCO Rates the Commonwealth Court reversed the OOR. It held first that contracts establishing such rates "are not 'financial records' because they are not contained in contracts of a Commonwealth agency and do not involve disbursement of funds by a Commonwealth agency." Opinion at 14.[5] The Commonwealth Court had held in *Lukes* that "[u]ntil the public funding reaches the intended Medicaid recipient, the money remains public," 976 A.2d at 625, but here the Commonwealth Court explicitly invalidated *Lukes*, announcing that Medicaid "funds lose their character as public funds once they leave an agency's hands and enter the private sector." Opinion at 15. The Commonwealth Court therefore held that the MCO Rates must not be disclosed if they contain confidential proprietary information or trade secrets. *Id.* It went on to conclude that the MCO Rates contain confidential proprietary information, *id.* at 23, even though a single subcontractor was already in possession of the MCO Rates of four of the five MCOs, *id.* at 17 n.15, even though "the MCOs' fact witnesses did not explain how the harm [to their competitive position from the rates' release] qualifies as 'substantial,'" *id.* at 20, and even though "the rates fluctuate, such that disclosure

[5] No party in this case has disputed that the requested records are "of" DPW and in DPW's possession.

of one year's rate does not necessarily disclose all yearly rates," *id.* at 22. The Commonwealth Court also stated that the MCO Rates are protected as trade secrets, based entirely upon the following reasoning: "It is sufficient to observe that the fact witness and expert witness evidence discussed above establishes by a preponderance of the evidence the elements for trade secret status." *Id.* at 23.

In dissent, Judge McCullough emphasized that rates paid by MCOs had been ordered disclosed in *Lukes* as "public records," and "the definition of a 'financial record' under the current RTKL duplicates verbatim the definition of a 'public record' under the former Right to Know Act, and the two terms embody functionally equivalent concepts." Dissent at 5. The relevant parts of the two definitions are:

RTKL (65 P.S. § 67.102) definition of **"financial record"**	**RTKA** (65 P.S. § 66.1 (repealed)) definition of **"public record"**
(1) 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.	Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property . . . .

Judge McCullough would have followed *Lukes* to hold that "the MCO Rates and the agreements containing them are 'financial records' for purposes of section 102 of the RTKL," and that "because the MCO Rates are financial records, the numerous exemptions contained in section 708(b) of the RTKL, including confidential proprietary information and trade secrets, are inapplicable." Dissent at 12.

V.
REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

As Judge McCullough noted in her dissent, "[f]rom a requester's standpoint, the most potent provisions of the RTKL are arguably sections 102 and 708(c) pertaining to financial records." Dissent at 4. Section 708(c) establishes that the public's right to scrutinize the actions of government is at its maximum when the government is spending the public's money. The breadth of the opinion of the court below extends to all financial records relating to the expenditure of public funds by all public agencies. It provides agencies with an easy way to circumvent the public's right to trace financial records: simply using middlemen in conducting public programs, as many public programs do, would launder away from public view the flow of public money. The RTKL was enacted to promote confidence that public officials will spend tax dollars in an efficient manner and consistent with their intended purpose. The decision of the Commonwealth Court that MCO contracts are not financial records substantially undermines that goal.

In the context of the Commonwealth's multibillion dollar Medicaid program, it is especially vital that the public have access to financial records, including those that would allow comparison of (a) the amounts that enter the program with (b) the amounts spent directly on the provision of care to patients. Only with such disclosure can there be accountability with respect to the public funds committed to this program. The holding of the Commonwealth Court imposes severe and dangerous limitations on public access to such records, contrary to the text and intent of the RTKL.

The decision of the Commonwealth Court is in direct conflict with *Lukes*, which addressed virtually the same issues as this case. *Lukes* was decided under the predecessor to the RTKL, and the RTKL was enacted to liberalize access to records. Accordingly, review is necessary to address whether the new RTKL is more restrictive than its predecessor with respect to financial records.

The Commonwealth Court, by applying PUTSA to trump the RTKL, has entirely removed the RTKL's limitation on the use of the "trade secret" exception to withhold financial records. It has done so without regard to the principles of statutory construction that statutes should not be read to contain surplusage and that earlier, more general legislation does not override later, more specific legislation.

Even if the Commonwealth Court were correct that the records showing the MCO Rates are not "financial records" and that PUTSA trumps the RTKL, it erred by holding that the MCO Rates are trade secrets and confidential proprietary information when releasing past years' rates would not reveal later years' rates, and when four of the five MCOs have not maintained the confidentiality of their MCO Rates.

The questions presented are of first impression and are of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court. Pa. R.A.P. 1114.

A. The Commonwealth Court Erroneously Nullified Section 708(c) of the RTKL, Which Provides That Financial Records Must Be Disclosed Even Where They Contain Trade Secrets

It is an axiom of statutory construction that "the courts must attempt to give meaning to every word in a statute as we cannot assume that the legislature intended any words to be mere surplusage." *Holland v. Marcy*, 584 Pa. 195, 206, 883 A.2d 449, 456 (2005); *accord* 1 Pa. C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). The Commonwealth Court violated this axiom by reading entirely out of the RTKL the provision that trade secrets are not exempt from disclosure if they appear within financial records. This misinterpretation of the RTKL, if not reversed, would completely vitiate an important exception the General Assembly added to the new RTKL to expand the

public's access to records documenting the expenditure of taxpayer money. *See generally Bowling v. Office of Open Records*, 75 A.3d 453, 457 (Pa. 2013) ("In 2008, the General Assembly enacted the RTKL, which replaced the RTKA and provided for significantly broadened access to public records.").

Under the RTKL, the general rule is that "[a] record that constitutes or reveals a trade secret or confidential proprietary information" is "exempt from access by a requester." 65 P.S. § 67.708(b)(11). However, the RTKL more specifically provides that "***[t]he exceptions set forth in subsection (b) shall not apply to financial records***, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17)." *Id.* § 67.708(c) (emphasis added). Thus, as acknowledged by the majority, Section 708(c) instructs that a "financial record" cannot be restricted from release because it contains trade secrets or confidential proprietary information. *See* Opinion at 10.

Nonetheless, the Commonwealth Court held that PUTSA "provides an independent statutory bar to disclosure" of records containing trade secrets. *Id.* The two statutes define "trade secret" with virtually identical language. *Supra* page 7; Opinion at 23 (recognizing that "the RTKL and the Trade Secrets Act employ the same definition"). The Commonwealth Court failed to acknowledge that its analysis would nullify in all instances the carveout in Section 708(c) for trade

secrets in financial records. This holding—that there is never any application for Section 708(c)'s limitation on the "trade secret" exception—is a grave error with broad implications, requiring review by this Court.

Besides, the Commonwealth Court's rationale for applying PUTSA rests on faulty logic. The old RTKA contained no explicit trade-secrets provision, but its definitions section stated: "the term public records . . . shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court." 65 P.S. § 66.1 (repealed by RTKL). After the subsequent enactment of PUTSA in 2004, lower courts held that PUTSA applied via Section 66.1 to records requests. *E.g.*, *Lukes*, 976 A.2d at 626; *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 186 (Pa. Commw. Ct. 2006). When the General Assembly replaced the RTKA with the RTKL in 2008, it hard-wired a trade secrets exception into Section 708(b)(11) but provided that financial records under Section 708(c) are not exempt from disclosure because they contain trade secrets. It is clear the legislature was mindful of PUTSA when it passed the RTKL. These specific legislative enactments in the RTKL (enacted in 2008) superseded jurisprudence that applied the more general PUTSA (enacted in 2004) under the old RTKA (last amended in 2002). *Commonwealth v. Ramos*, 83 A.3d 86, 2013 Pa. LEXIS 3246 at *9 (Pa. 2013) ("[A] special provision in a statute

'shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.'" (quoting 1 Pa. C.S. § 1933)). The Commonwealth Court's contravention of this rule of statutory construction requires review.

B. Records Showing the Flow of Public Funds Through Middlemen Were Subject to Disclosure Under the RTKA and Remain Subject to Disclosure Under the RTKL as "Financial Records" Documenting the Flow of "Public Funds"

Lukes ordered the release of records showing payments by MCOs:

> Private entities that receive or control public funds have a duty to account for their handling of those funds. Disclosure of the Provider Agreements is the only way to ensure such accountability. To shield such documents from review would circumvent the public's ability to determine how tax dollars are spent. Thus, since the Provider Agreements reflect the disbursement of public funds in a public program, we conclude that those contracts are public records under the Law.

976 A.2d at 625-26; *see also id.* at 627 ("[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."). Although the Commonwealth Court previously distinguished other aspects of *Lukes* with no bearing on this case,[6] this Court has

[6] The cases distinguishing *Lukes* dealt not with trade secrets but with whether documents were in the "possession" of a public agency. *In re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011); *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Commw. Ct. 2011).

specifically recognized *Lukes*'s ongoing vitality under the RTKL, "particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime," *SWB Yankees LLC v. Wintermantel*, 615 Pa. 640, 665 n.19, 45 A.3d 1029, 1044 n.19 (2012). By rejecting *Lukes*'s application under the RTKL, the Commonwealth Court has held that financial records that were available under the old RTKA are now to be concealed from public inspection. This is topsy-turvy. *See Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) ("[T]he enactment of the RTKL in 2008 was a dramatic expansion of the public's access to government documents."). The Commonwealth Court's clampdown on access to *Lukes*-type records under the RTKL is by itself grounds for review.

Lukes's analysis is as compelling under the RTKL as under the RTKA. As discussed below, that means the contracts with the MCO Rates are "financial records." Judge McCullough put it well:

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

Dissent at 3; *see also id.* at 11 ("I cannot decipher how public funds designated for a public purpose become private funds when in the hands of a private party when that private party is obligated to use the funds for a public purpose.").

The Commonwealth Court's RTKA decisions long interpreted "public record" in that way. *E.g.*, *Associated Builders & Contractors, Inc. v. Pa. Dep't of Gen. Servs.*, 747 A.2d 962, 965 (Pa. Commw. Ct. 2000) ("[A]n agency may not shield a public document from disclosure by contracting with a third party that subsequently disperses [sic] the government funds. By paying through a third party, an agency does not change the character of those funds from public to private."); *Morning Call, Inc. v. Lower Saucon Twp.*, 156 Pa. Commw. 397, 403-04, 627 A.2d 297, 300-01 (1993). A "public record" under the RTKA is called a "financial record" under the RTKL, and the definitions of those terms are essentially identical. *Supra* page 11. "Where the legislature, in a later statute, uses the same language as used in a prior statute which has been construed by the courts, there is a presumption that the language thus repeated is to be interpreted in the same manner such language had been previously interpreted when the court passed on the earlier statute." *Commonwealth v. Sitkin's Junk Co.*, 412 Pa. 132, 137, 194 A.2d 199, 202 (1963).

The moneys paid by the MCOs to subcontractors (or directly to providers) are ***public*** moneys of DPW, and can be disbursed by the MCOs only in accordance with provisions imposed by DPW. The contracts with the MCO Rates are "dealing with" the "disbursement of funds by an agency," 65 P.S. § 67.102. *See* Dissent at 10 ("[T]he Majority's interpretation . . . effectively renders the words 'any,'

'dealing,' and 'disbursement' superfluous and without meaning, and also ignores the fact that the funds originate with DPW."). The Commonwealth Court's holding to the contrary threatens the public's ability to follow funds in a multitude of public programs involving private providers. The Commonwealth Court also erred by ignoring the second half of the definition of "financial record." The substantial funds DPW funnels through the MCOs to the dentists who provide services to Medicaid enrollees qualify as DPW's "use" of "services" to carry out its Medicaid program. DPW is obligated to provide access to care for enrollees; it accomplishes this by "using" the "services" of the MCOs. Contracts showing the MCO Rates thus "deal[] with" DPW's "use . . . of services" and are financial records.

C. Historical MCO Rates Cannot Be "Trade Secrets" or "Confidential Proprietary Information" When Disclosure of Historical Rates Would Not Reveal Present or Future Rates, and When Most MCO Rates Are Already Known to the Entity in Whose Hands They Could Do the Most Harm

Because the contracts containing the MCO Rates should be considered "financial records," and because PUTSA should not be held to trump the RTKL, the Court should review the decision of the Commonwealth Court and affirm the decision of the OOR without regard to whether those contracts contain "trade secrets" or "confidential proprietary information." If, however, those RTKL exceptions applied, the Commonwealth Court erred by holding that years-old payment rates have present-day competitive value, and that four of the five MCOs

had maintained the confidentiality of those rates even when they have shared those rates with a business that negotiated MCO Rates with their competitors.

1. The Commonwealth Court Ignored Economic Reality by Holding That Revealing Historical MCO Rates in a Volatile Industry Would Reveal Prospective Confidences

To prove that the MCO Rates are "trade secrets," Respondents had to show that the rates "derive[] 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 [their] disclosure or use." 65 P.S. § 67.102. To prove they are "confidential proprietary information," they had to show that "disclosure . . . would cause substantial harm to the competitive position of the person that submitted the information [to DPW]." *Id.* The Commonwealth Court should not have found that Respondents proved either, because releasing past years' MCO Rates does not reveal future years' rates.

The requested records date from July 2008 to June 2011. The Commonwealth Court recognized that "[t]he MCOs needed to show the disclosure of rate information from 2008, 2009 and 2010 contracts is likely to result in present harm," but it concluded with a non sequitur: "Although the rates fluctuate, such that disclosure of one year's rate does not necessarily disclose all yearly rates, there is no evidence suggesting the rate information is 'stale' when it is five years old. There is only the passage of time." Opinion at 22. This reasoning gives short

shrift to the economic reality that costs in the healthcare industry vary so significantly from year to year that the requested MCO Rates do not have predictive value for the MCO Rates to be negotiated for future years. In a case specifically concerning the future profitability of a pediatric dental clinic, this Court "acknowledge[d] . . . that the quantitative level of these profits will likely be determined by a multitude of factors," including, in the clinic's words, "supply and demand, competition, sales volume, macroeconomic conditions, cost and profitability analysis, revenue forecasts, marketing and advertising, and the condition of the industry and the local and/or regional economy." *Helpin v. Trs. of the Univ. of Pa.*, 608 Pa. 45, 59, 10 A.3d 267, 275-76 (2010). Here the situation is the same: MCO Rates necessarily change from year to year, and the release of historical rates would not reveal the rates under negotiation for the coming year. *Cf. GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) (disclosure of 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").

2. The Genie Is Already Out of the Bottle

Four of the five MCOs—all but United—contract with one subcontractor, DentaQuest, LLC. DentaQuest of course knows how much it is paid by each MCO.

To prove the MCO Rates are "trade secrets," Respondents were required to prove they are "the subject of efforts that are reasonable under the circumstances to maintain [their] secrecy"; to prove they are "confidential proprietary information," they needed to prove they are "privileged or confidential." 65 P.S. § 67.102. This they cannot do when DentaQuest knows all the supposedly "secret" and "confidential" MCO Rates of four MCOs.[7] These MCOs all maintain that further disclosure of their rate information would substantially harm their ability to compete fairly in the market for MCO Rates. Yet each of them already shares its MCO Rates with a business it knows to have access to its competitors' rates. Evidently it has not harmed the MCOs to negotiate with a business that knew their competitors' rates.

The Commonwealth Court sidestepped this crucial issue with a non sequitur and by assuming a fact conspicuously absent from the record. In its one-footnote treatment, the Commonwealth Court first stated: "We reject Requester's contention that Subcontractor DentaQuest's knowledge of four of the five MCO Rates undercuts their confidential nature. DentaQuest is not a competitor of the MCOs; rather, it is a Subcontractor." Opinion at 17 n.15. This is true but irrelevant, and it ignores business reality. DentaQuest knows the MCO Rates of all four MCOs. Thus the MCOs have disclosed their rates to DentaQuest, which also acts as agent

[7] The discussion in this subsection applies to Aetna, Coventry, Keystone, and Health Partners, but not to United.

for each of these MCOs in negotiations for rates to be paid to providers. Surely, disclosure by the MCOs to this entity belies any suggestion that the MCOs have maintained the secrecy or confidentiality of the MCO Rates.

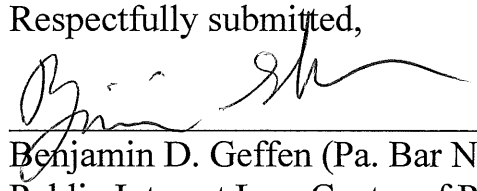
The four MCOs might have rebutted this obvious inference by, for example, submitting evidence that their contracts with DentaQuest required the latter to erect "silos" or "Chinese Walls" to prevent any single individual within DentaQuest from knowing the MCO Rates of multiple MCOs. Or they might have called a DentaQuest representative as a witness at the hearing. But they did nothing of the sort, and the record is barren of any evidence that DentaQuest has internal information-sharing controls. Undaunted, the MCOs insinuated in their briefs that they had required DentaQuest to maintain confidences, and the Commonwealth Court accepted their arguments in its footnote. Opinion at 17 n.15 ("Also, [DentaQuest] is bound to maintain secrecy of the rates of MCOs with which it contracts."). By disregarding the basic precept that "the arguments of counsel are not evidence," *Commonwealth v. Ligons*, 565 Pa. 417, 430, 773 A.2d 1231, 1238 (2001), the Commonwealth Court was led to its erroneous conclusion that the MCO rates were protected trade secrets that had not already been disclosed.

VI.
CONCLUSION

This case presents matters of first impression that directly impact the ability of citizens to examine the flow of billions of dollars in state funds to provide care to millions of the Commonwealth's neediest individuals. Beyond the Medicaid context, the Commonwealth Court's *en banc* decision, contrary to the terms of the Right-to-Know Law, will severely limit the accountability that is required of public agencies in connection with the expenditure of public funds. For all of the reasons stated above, the Court should grant this Petition for Allowance of Appeal.

Dated: March 20, 2014

Respectfully submitted,



Benjamin D. Geffen (Pa. Bar No. 310134)
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
bgeffen@pilcop.org
Telephone: 267-546-1308
Fax: 215-627-3183

Counsel for Petitioners/Appellants/ Requesters

CERTIFICATE OF SERVICE

I, Benjamin Geffen, hereby certify that on this Twentieth Day of March, 2014, I caused to be served this **Petition for Allowance of Appeal** by First-Class Mail on the following:

Leonard W. Crumb, Esquire
Department of Public Welfare
P.O. Box 1675
Health and Welfare Building, Third Floor West
Harrisburg, PA 17105

Karl S. Myers, Esquire
Stradley Ronon Stevens & Young
2005 Market Street, Suite 2600
Philadelphia, PA 19103

Christopher H. Casey, Esquire
Dilworth Paxson, LLP
1500 Market Street, Suite 3500 E
Philadelphia, PA 19102

Benjamin Geffen