IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners/Appellants/Requesters,

v.

DENTAL BENEFIT PROVIDERS, INC., 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, No. 945 C.D. 2013, Dated February 19, 2014, Which Reversed the Final Determination of the Office of Open Records, Dated May 7, 2013

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IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners/Appellants/Requesters,

v.

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

Respondents/Appellees.

PETITION FOR ALLOWANCE OF APPEAL

On Petition from the Order of the Commonwealth Court, No. 957 C.D. 2013, Dated February 19, 2014, Which Reversed the Final Determination of the Office of Open Records, Dated May 7, 2013

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IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners/Appellants/Requesters,

v.

DEPARTMENT OF PUBLIC WELFARE,

Respondent/Appellee.

PETITION FOR ALLOWANCE OF APPEAL

On Petition from the Order of the Commonwealth Court, No. 958 C.D. 2013, Dated February 19, 2014, Which Reversed the Final Determination of the Office of Open Records, Dated May 7, 2013

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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: *Dental Benefit Providers, Inc. and UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc., d/b/a CoventryCares v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 945 C.D. 2013; *Aetna Better Health Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and DentaQuest, LLC v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 957 C.D. 2013; and *Department of Public Welfare v. James Eiseman, Jr. and the Public Interest Law Center of Philadelphia*, No. 958 C.D. 2013 (collectively, *Eiseman II*).

A copy of the Majority Opinion (Simpson, J.) is attached as Exhibit A and is referenced herein as the "Opinion." A copy of the 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, based on the existing record, the final determination of the Office of Open Records is **REVERSED.**

Petitioners seek review by this Court of the Commonwealth Court's order.

III.
QUESTION PRESENTED FOR REVIEW

Whether records showing the rates dental providers receive for treating Medicaid enrollees are "public records" subject to disclosure under the Right-to-Know Law when DPW's contracts with managed-care organizations mandate that it have possession of or "ready access" to such records, and when such records directly relate to the governmental function of providing dental care to Medicaid enrollees?

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

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.[1] This petition arises from one

[1]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

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, *Commonwealth et al. v. Eiseman et al.*, Commonwealth Court Case Nos. 1935, 1949, & 1950 C.D. 2012 (*Eiseman I*), this case raises an issue of fundamental statewide importance under the RTKL.[2] The 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 below will allow agencies across state and local government to shield their activities from public scrutiny by delegating their core governmental functions to contractors and subcontractors.

Rather than making payments directly to doctors or 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 most instances 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:

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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.

[2] The Commonwealth Court ordered this case and *Eiseman I* 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 I* on the same day. Simultaneously with this petition, Petitioners are filing a petition for allowance of appeal from a portion of the order in *Eiseman I*.

DPW→MCOs→Subcontractors→Providers

This case concerns the flow of public funds in the last stage (Subcontractors to Providers), while *Eiseman I* concerns the two earlier stages. Like the Commonwealth Court, this petition will use the term "Provider Rates" to refer to rates paid by subcontractors to providers to treat patients enrolled in Medicaid.

In *Lukes v. Department of Public Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009), *alloc. denied*, 604 Pa. 708, 987 A.2d 162 (2009), decided under the predecessor Right-to-Know Act, 65 P.S. §§ 66.1-66.9 (repealed) (RTKA), the Commonwealth Court ordered the release of records showing payments to providers to treat Medicaid enrollees. The arrangement in *Lukes* differs from that here in only one way: in *Lukes*, the MCOs paid providers directly, not through subcontractors. In diagram form, the flow of public funds in *Lukes* looked like this:

> ***public*** **funds →DPW → MCOs→**
> **Providers receive *public* funds**

And the flow of public funds here looks like this:

> ***public*** **funds →DPW → MCOs→ Subcontractors →**
> **Providers receive *public* funds**

In the Commonwealth Court's analysis, however, adding an extra middleman performed alchemy, transmuting from public to private the Medicaid funds received by providers to treat Medicaid enrollees:

> ***public*** **funds →DPW → MCOs→ Subcontractors →**
> **Providers receive *private* funds**

This view is wholly unsupported by the law or by common sense. Review is essential to correct the Commonwealth Court's misinterpretations of the RTKL.

A. The Initial RTKL Request

James Eiseman, Jr. and the Public Interest Law Center of Philadelphia (Petitioners) filed a RTKL request with DPW, seeking "document[s], including contracts, rate schedules and correspondence in DPW's possession, custody, or control" showing the Provider Rates paid to dental providers to treat Medicaid patients in the five-county region of Southeastern Pennsylvania from July 1, 2008 until June 30, 2012. DPW denied the request, citing the RTKL exception permitting the withholding of "[a] record that constitutes or reveals a trade secret or confidential proprietary information," 65 P.S. § 67.708(b)(11), along with the Pennsylvania Uniform Trade Secrets Act (PUTSA), 12 Pa. C.S. §§ 5301 *et seq.*

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, 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 addition, the two dental subcontractors that the MCOs had engaged in Southeastern Pennsylvania during the requested period sought and obtained leave to participate in the OOR proceedings as direct interest participants. These subcontractors are DentaQuest, LLC (DentaQuest) and Dental Benefit Providers, Inc. (DBP) (collectively, the Subcontractors).

The OOR issued a final determination granting the request in full. First, it held that "since PUTSA and the RTKL define 'trade secret' identically, there 'is no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL.'" OOR Decision at 5 (quoting the OOR final determination at issue in *Eiseman I*).

Second, the OOR held that DPW would be required to obtain contracts showing the Provider Rates, because "the records sought directly relate to a governmental function." OOR Decision at 8. In support of this conclusion, it cited the Standard Contract, a copy of which DPW signed with each of the MCOs.[3] OOR Decision at 8. The provision in question (the Ready Access requirement) states:

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[3]Excerpts from the voluminous Standard Contract are attached as Exhibit D. In its references to the Standard Contract, the Commonwealth Court variously cited the reproduced record in this case and the reproduced record in *Eiseman I*. The Standard Contract was admitted into evidence on the MCOs' motion at the OOR hearing in *Eiseman I* as MCO Exhibit 2 (*Eiseman I* R.R. at 680a-849a). The Standard Contracts signed by DPW and each of the MCOs are also judicially noticeable public records available (with redactions) pursuant to Chapter 17 of the RTKL, 65 P.S. §§ 67.1701-.1702, on the website of the Pennsylvania Treasury Department, http://www.patreasury.gov/eContracts.html. For example, DPW's contract with Aetna, effective July 1, 2010, is available at http://contracts.patreasury.gov/View.aspx?ContractID=88205.

> [A]ll contracts or Subcontracts that cover the provision of medical services to the PH-MCO's Members must include the following provisions: . . . A requirement that ensures that the Department has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients.

Standard Contract at 163. The OOR further cited Section 506(d)(1) of the RTKL, which provides:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). The OOR held that not applying this provision to contracts containing the Provider Rates "would frustrate the intent of Section 506(d) by making records showing how public moneys are spent unavailable to the public even though they directly relate to a governmental function and a contract with a governmental agency." OOR Decision at 8.

Third, the OOR held that the Provider Rates were not "trade secrets" or "confidential proprietary information" exempt from disclosure under the RTKL, 65 P.S. § 67.708(b)(11). It relied in part on *Lukes v. Department of Public Welfare*, OOR Decision at 10-11. The OOR also concluded that:

> The third parties have shown that the rates paid to dentists change periodically, or are at least "reevaluated." As such, there is no evidence demonstrating how disclosure of this information undermines the parties' present competitive positions or has present

> economic relevan[ce] or value, as the information may very well may be "outdated" by the time of its release.

OOR Decision at 11.

C. The Appeal to the Commonwealth Court

The MCOs and the Subcontractors appealed to the Commonwealth Court. DPW also appealed, but its brief simply referenced the other appellants' arguments and stated that "DPW does not have a dog in this fight." The Commonwealth Court consolidated the appeals and, *sua sponte*, referred the case to the court *en banc*. The Commonwealth Court reversed the OOR Decision, on the grounds that "[t]he Provider Rates . . . are not accessible as records 'of' DPW . . . because they are not in the actual or constructive possession of DPW." Opinion at 21.

To arrive at this conclusion, the Commonwealth Court first noted that "the Standard Contract requires all subcontracts to include a requirement that ensures DPW has ready access to 'any and all documents and records of transactions pertaining to the provision of services to [Medicaid] Recipients.'" *Id.* at 10 (alteration in original). It went on to hold, however, that the Ready Access requirement does not apply to the contracts containing the Provider Rates, on the grounds that such contracts are not "Subcontracts," and thus that DPW does not have ready access to these documents. *Id.* The Commonwealth Court proceeded to discuss Section 901 of the RTKL, which states, in relevant part:

> Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.

65 P.S. § 67.901. The Commonwealth Court announced that it "does not infer constructive possession from the mere availability of the records to an agency upon request," Opinion at 11, and stated that the requested records "are not in DPW's possession," *id.* at 12.

The Commonwealth Court next discussed Section 506(d) of the RTKL, and held that "to reach records outside an agency's possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to that function." Opinion at 13. It held that neither element is satisfied here. First, it held that while "[n]one of the petitioners here contests that the administration of the HealthChoices Program constitutes a government function," the Subcontractors have "no contractual relationship with DPW" and therefore do not perform a government function "pursuant to a contract with a government agency." *Id.* at 14. Second, it held that while "the quality of the dental services rendered by providers directly relates to the performance of the government function . . . . the cost of obtaining those services . . . does not directly relate to the performance of the government function." *Id.* at 16-17.

Finally, the Commonwealth Court "explicitly reject[ed] *Lukes*," holding that *Lukes*'s "rationale for reaching records" was "based on now-repealed language that has been replaced with express language limiting access to third-party records in Section 506(d)." Opinion at 18. Ultimately, the Court concluded that "the public's right to know the amount of the funds spent ends before reaching private contractors who have no contract with the government." *Id.* at 20.

Judge McCullough, dissenting, would have found that DPW possesses the records. Dissent at 1. Under Section 506(d)(1), she would have held that "DPW and the MCOs are in an agency relationship, with DPW acting as the principal and the MCOs acting as the agents." *Id.* at 4. She also noted that "the only way in which the subcontracts can become valid and enforceable under the [Standard Contract] is if DPW ratifies or approves the subcontracts as the principal." *Id.* "Therefore, because the Subcontractors have directly contracted with DPW as principal and are in possession of the [contracts showing the Provider Rates] . . . DPW possesses 'public records' for purposes of section 506(d)(1) of the RTKL." Dissent at 4. In sum, the requested records "directly relate to the Subcontractors' performance of a government function. These agreements and rates are indispensably necessary to effectuate Medicaid and represent the very thing the Subcontractors contractually agreed to do for and on behalf of DPW." *Id.* at 5.

V.
REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

As Judge McCullough noted in her *Eiseman I* 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." *Eiseman I* 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. In the context of the Commonwealth's multibillion dollar Medicaid program, it is especially vital for the public to 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. 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. Moreover, there is no support in the RTKL for holding that channeling taxpayer dollars through middlemen in the administration of a public program does not "directly relate" to the performance of a governmental function.

This case presents the question whether the RTKL requires disclosure of agreements to which a public agency is not a direct party, but which are part of a chain of contracts with which the public agency is in privity, and which are for the purpose of providing services with public funds initially under the control of the public agency. This question is one of first impression and of such substantial

public importance as to require prompt and definitive resolution by this Court. Pa. R.A.P. 1114. As set forth below, there are several independent grounds on which this Court should review and reverse the decision of the Commonwealth Court.

Specifically, after full review, the Court should hold that contracts containing Provider Rates are financial records of DPW that must be released regardless of whether they contain trade secrets or confidential proprietary information. Such a holding would be consistent with the outcome of *Lukes v. Department of Public Welfare*, which was decided under the RTKA. *See also Wilmington Star-News v. New Hanover Reg'l Med. Ctr.*, 480 S.E.2d 53 (N.C. Ct. App. 1997) (ordering the release of provider rates under the North Carolina Public Records Act without regard to whether they were trade secrets, where the provider rates were the property of a governmental agency). If not reviewed, the Commonwealth Court's far-reaching decision would provide agencies and their contractors 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.

A. The Standard Contract Proves DPW Has "Possession, Custody or Control" of the Provider Rates

The Ready Access requirement gives DPW the contractual right to demand access to all contracts between DentaQuest or DBP and dental providers. This requirement imposes on the MCOs an obligation to ensure that all downstream

contracts provide for DPW's power to review such downstream contracts, so long as they pertain to the provision of Medicaid services. An MCO cannot evade the Ready Access requirement by re-delegating its duties to another middleman; rather, the requirement must be imposed on all downstream entities until it reaches the entity contracting with providers. The Commonwealth Court erred by misconstruing the Ready Access requirement.

The Ready Access requirement applies to "all ***contracts or Subcontracts***," but the Commonwealth Court elided the crucial words "***contracts or***" from its analysis. Opinion at 10 ("[T]he Standard Contract requires all subcontracts to include a requirement . . . ."). This omission may superficially appear slight, but it dramatically changes the meaning of the Ready Access requirement, as the two omitted words establish DPW's contractual right of access to the Provider Rates. Proceeding from its truncated version of the Ready Access requirement, the Commonwealth Court wrote that "the Standard Contract defines 'subcontracts' to 'exempt from this definition . . . Provider Agreements, which are not considered Subcontracts for the purpose of this Agreement and, unless otherwise specified herein, are not subject to the provisions governing Subcontracts.'" Opinion at 10 (emphases and ellipsis in original). "Thus, the contract language supports DPW's disclaimer of possession and access to the Provider Rates." *Id.*

This analysis is fatally flawed. "Subcontract" is a capitalized term with a defined meaning in the Standard Contract. Contrary to the Commonwealth Court's assumption, the records sought here are not "Subcontracts," which term means "[a]ny contract ***between the PH-MCO*** and an individual, business, university, governmental entity, or nonprofit organization . . . ." Standard Contract at 29 (emphasis added). The records containing the Provider Rates are "contracts" between DentaQuest or DBP and dental providers. None of the parties to them are "PH-MCOs," so they are "contracts" but not "Subcontracts."[4] Accordingly, the MCOs are obligated to require DentaQuest and DBP to include the Ready Access requirement in their downstream contracts with providers.

The Commonwealth Court also ignored the meaning of the capitalized term "Provider Agreement": "Any Department-approved written agreement ***between the PH-MCO and a Provider*** to provide medical or professional services to Recipients to fulfill the requirements of this Agreement" (emphasis added). Standard Contract at 27. Therefore, a contract is a "Provider Agreement" only if the parties to it are a provider and an ***MCO***. A contract between DentaQuest and a dental provider—the type of document at issue in this case—is not subject to the "Provider Agreement"

[4] As an undefined term in the Standard Contract, "contract" is to be given its ordinary meaning. *Kripp v. Kripp*, 578 Pa. 82, 90, 849 A.2d 1159, 1163 (2004). The distinction between "Subcontracts" and ordinary "contracts" is reflected throughout the Standard Contract, where some provisions apply to both, and others apply only to Subcontracts. *Compare* Standard Contract at 85 (section headed "Contracts and Subcontracts"), *with id.* at 86 ("The PH-MCO must make all Subcontracts available to the Department within five (5) days of a request by the Department.").

exemption from the Ready Access requirement, because DentaQuest is not a "PH-MCO." *See id.* at 26 (defining "PH-MCO" to mean "A risk bearing entity which has an agreement with the Department to manage the purchase and provision of Physical Health Services under the HealthChoices Program."). Although the "Provider Agreement" definition would exclude agreements directly between an MCO and a provider from the Ready Access requirement, such agreements are at issue in *Eiseman I*, not in this case, and no party has contested agency possession in *Eiseman I*.[5]

Section 901 of the RTKL requires that "an agency shall make a good faith effort to determine . . . whether the agency has ***possession, custody or control*** of the identified record." 65 P.S. § 67.901 (emphasis added). The Commonwealth Court stated that it "does not infer constructive possession from the mere availability of the records to an agency upon request," and it announced a "litmus test under Section 901": "whether the records document a transaction of the agency to which the request was directed, not whether they document a transaction of a private contractor." Opinion at 11.

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[5] If, *arguendo*, the requested records were "Provider Agreements," they would have to be "Department-approved written agreements." Standard Contract at 27. DPW would then have ***actual*** possession of the records. This explains why the Ready Access requirement applies to contracts but not Subcontracts. "Subcontracts" require prior approval of DPW and are thus in its actual possession. *See also id.* at 87 ("Subcontracts which must be submitted to the Department for advance written approval are . . . . contracts for . . . dental services . . . ."), 119 ("The PH-MCO must obtain Department's prior written approval of all Deliverables . . . . Deliverables include . . . Provider Agreements . . . ."). Other "contracts" do not require DPW's prior approval, so it maintains custody and constructive possession of them via the Ready Access requirement.

This "litmus test" is without foundation and should be rejected. By its plain terms, Section 901 is not limited to "transactions of the agency." Many agencies collect documents from their contractors detailing those contractors' transactions with the public or with subcontractors. Even though these records may be in the agencies' possession precisely so that they can assess the programs, this "litmus test" now excludes these documents from public review. Nor is Section 901 limited to whether the agency has "possession" of the record: it includes the words "custody or control." The Ready Access requirement establishes DPW's "control" of the records. *Cf. Tribune-Review Publ'g Co. v. Westmoreland Cnty. Hous. Auth.*, 574 Pa. 661, 672, 833 A.2d 112, 118 (2003) (in construing "possession, custody or control" in civil discovery, "the courts of the Commonwealth reject a narrow 'physical possession' test, focusing instead on whether the subpoenaed party has a legal right to custody or control of the documents in question").[6]

[6] Although DPW believes it "does not have a dog in this fight," if DPW has not been exercising its "Ready Access" power to review Provider Rates, that would represent a troubling abrogation of its responsibilities to ensure that Pennsylvania's Medicaid program is effective and in compliance with federal and state law. Such a failure to track the flow of billions of dollars in taxpayer funds, expended for the benefit of the neediest Pennsylvanians, would make the public importance of the issue presented here even greater.

On the same day that the Commonwealth Court announced its decision, DPW submitted its "Healthy Pennsylvania 1115 Demonstration Application" to the United States Department of Health and Human Services. *Healthy PA 1115 Waiver Application*, dated Feb. 19, 2014, available at http://www.dpw.state.pa.us/healthypa/. In it, DPW states that "Pennsylvania Medicaid provides payment rates for some services that are lower than Medicare or private market payers, causing some providers to forego [sic] participation in the program." *Id.* at 11. Besides the fact that DPW could not know this without access to provider rates, DPW's statement further highlights the substantial public importance of this case.

B. Section 506(d) of the RTKL Also Establishes That the Requested Contracts Are "Public Records"

The Standard Contract resolves the issue of whether the requested records are records "of" DPW. Even if this were not the case, reversal would still be warranted because the newly announced "litmus test" under Section 901 is contrary to Section 506(d)(1) of the RTKL, which provides:

> A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). Construing this provision, the Commonwealth Court found that the administration of Pennsylvania's Medicaid program "constitutes a government function," Opinion at 14, but held that "the cost of obtaining [dental] services . . . does not directly relate to the performance of the government function," *id.* at 16-17. That analysis is contrary to this Court's decision under Section 506(d) in *SWB Yankees LLC v. Wintermantel*, 615 Pa. 640, 45 A.3d 1029 (2012), ordering public disclosure of bids for a food-service contract submitted by private companies to a private baseball-park management company.

SWB Yankees stated that "[p]articularly in the context of a government agency's wholesale delegation of its own core governmental function to another entity, we find that a reasonably broad perspective concerning what comprises

transactions and activities of the agency should be applied." 615 Pa. at 665 n.19, 45 A.3d at 1044 n.19. Here, however, the Commonwealth Court applied an exceptionally narrow perspective, finding that exactly how many billions of dollars the Provider Rates represent "do[es] not 'directly relate' to performing the government function of administering" the Medicaid program. Opinion at 17. This narrow approach is at odds not only with *SWB Yankees* but also with an *en banc* decision of the Commonwealth Court. *Allegheny Cnty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 344 (Pa. Commw. Ct. 2013) (Simpson, J.) ("Assessing a direct relationship requires careful review of the contract at issue and the information related to performing the contractual obligations. ***The simple scenario presents when the contract requires the contactor to transmit the information sought to the agency***, or necessitates the exchange of such information as part of performing the contract." (emphasis added)). Surely, and contrary to the holding of the court below, it cannot be the law of this Commonwealth that the amount of public funds spent to provide government services, whether directly by a public agency or by a private entity on behalf of a public agency, does not relate to the performance of a "government function." *See also Lukes*, 976 A.2d at 625 ("The Provider Agreements reflect the expenditure of public funds for the benefit of Medicaid beneficiaries. DPW cannot circumvent the disclosure of this money trail by contracting indirectly through the Health Plan and other MCOs or HMOs.").

It was also error to construe Section 506(d)(1) as "requir[ing] a contractual relationship between" the Subcontractors and DPW. Opinion at 14-15. Under this cramped interpretation of the statutory term "contracted," any government contractor could shield from disclosure otherwise publicly available records simply by creating a second private entity through which public funds would be routed and thus hidden from public scrutiny. The Commonwealth Court all but recommended this workaround: "[T]he public's right to know the amount of the funds spent ends before reaching private contractors who have no contract with the government." *Id.* at 20. In short, the Commonwealth Court manufactured an exception that would swallow the rule the General Assembly set forth in Section 506(d)(1). This was an erroneous interpretation of the law. *Cf. SWB Yankees*, 615 Pa. at 665, 45 A.3d at 1044 ("While we have little doubt that the disclosure requirements pertaining to third-parties undertaking governmental functions may have bearing on their business decisions in dealing with agencies, this is within the range of considerations likely to have been taken into account in the General Assembly's open-records calculus.").

Judge McCullough's analysis, by contrast, is faithful to the letter and spirit of the RTKL. Under the law of principals and agents, she reasoned:

> In this case, DPW is the party principal to the subcontracts between the MCOs and the third party Subcontractors. The MCOs lack authority to enter into subcontracts with the Subcontractors, and the only way in which the subcontracts can become valid and enforceable

> under the HealthChoices Agreement is if DPW ratifies or approves the subcontracts as the principal. Therefore, because the Subcontractors have directly contracted with DPW as principal and are in possession of the Provider Agreements ("in possession of a party with whom the agency has contracted"), I would conclude that DPW possesses "public records" for purposes of section 506(d)(1) of the RTKL.

Dissent at 4; *see also* Dissent at 2-3 ("The RTKL does not define 'contract' and consequently, this term must be construed according to its legal meaning.").

It must also be noted that *Lukes* ordered the release of records under the old RTKA showing rates paid to Medicaid providers. Although the Commonwealth Court has previously distinguished other aspects of *Lukes* with no bearing on this case,[7] this Court has specifically recognized that *Lukes* has ongoing vitality under the new RTKL, "particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime," *SWB Yankees*, 615 Pa. at 665 n.19, 45 A.3d at 1044 n.19. By explicitly declining to apply *Lukes* under the new RTKL, Opinion at 17-19, the Commonwealth Court has held that financial records that were publicly 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

[7] 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).

Court's clampdown on access to *Lukes*-type records under the ***new*** RTKL is by itself grounds for review.

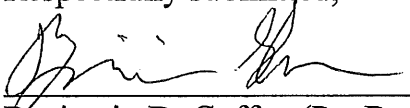
The Court should therefore grant this petition and correct the Commonwealth Court's misinterpretation of Section 506(d).

VI.
CONCLUSION

This case presents a matter of first impression that directly impacts 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 RTKL, 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,



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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:

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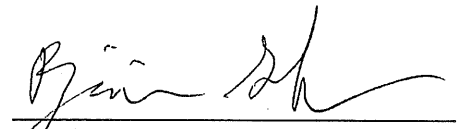

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