COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

James Eiseman, Jr.,	:	
	:	
Requester,	:	
	:	
v.	:	
	:	**Docket No. AP 2011-1098**
Department of Public Welfare,	:	
	:	
Respondent.	:	

REQUESTER'S POST-HEARING BRIEF

Requester, James Eiseman, Jr., filed a written request for records under Pennsylvania's Right-To-Know Law ("RTKL"). Respondent, the Pennsylvania Department of Public Welfare ("DPW"), granted in part and denied in part the request. After the Requester filed a timely appeal with the Office of Open Records, five managed-care organizations ("MCOs") intervened in the matter, and the Office of Open Records conducted a two-day evidentiary hearing. DPW and the MCOs have filed their post-hearing briefs, and Requester now files this brief, which consists of a concise statement of the case, an abstract of the evidence relied upon, and proposed findings of fact and conclusions of law. See 1 Pa. Code § 35.192.

I. CONCISE STATEMENT OF THE CASE

DPW is a public agency that administers Pennsylvania's Medicaid program, including the provision of dental insurance for children living in poverty. Pursuant to contracts with DPW, the intervenor MCOs enroll children living in the five counties of Southeastern Pennsylvania for dental coverage. In this matter, Requester seeks documents containing two types of information: historical capitation rates negotiated between DPW and individual MCOs, and payment schedules agreed to between individual MCOs and dental-care providers. DPW and the MCOs

assert that both categories of information are exempt from disclosure as "trade secrets" or "confidential proprietary information." They have not carried their burden of proof, and the Office of Open Records should require the release of the requested documents, for the reasons set forth below.

II. ABSTRACT OF THE EVIDENCE RELIED UPON

The following Proposed Findings of Fact and Conclusions of Law contain citations to the transcripts of the hearing, which took place on May 21 and 22, 2012. The two days' transcripts are paginated non-consecutively and are cited as Tr. 5/21 and Tr. 5/22. The Proposed Findings of Fact and Conclusions of Law also contain citations to the hearing exhibits listed below.

- May 21 transcript: pages 27-28, 33, 34, 35-37, 40, 130, 141-142, 152, 154-155, 187, 196-197, 204-205, 233, 237.
- May 22 transcript: pages 8-10, 64, 70-71, 72, 81-82, 92-93, 116-117, 148-149, 170-173, 230, 231-233, 237-238.
- Requester Exhibits: 2, 5, 12.
- MCO Exhibit: 2.

III. PROPOSED FINDINGS OF FACT

1. During the entire period for which Requester's request seeks documents, (i.e., January 1, 2008 through June 15, 2011), Tr. 5/21 p. 33, DPW has operated Pennsylvania's Medical Assistance ("Medicaid") Program in the five counties of Southeastern Pennsylvania ("SEPA"), Tr. 5/21 p. 34, through MCOs to which it pays a capitation or per member per month ("pmpm") rate for each Medicaid enrollee, Tr. 5/21 pp. 35-37.

2. In the period January 1, 2008 through June 15, 2011, five Medicaid MCOs operated in SEPA, each pursuant to a separate annual contract with DPW. Each year, DPW negotiates separate pmpm rates with each such MCO. Tr. 5/21 p. 40.

3. The five MCOs have been: UnitedHealthcare Community Plan ("United"), Tr. 5/21 pp. 196-197; Health Partners ("HP") ,Tr. 5/21 p. 154; Aetna Better Health ("Aetna"), Tr. 5/22 p. 8-10; CoventryCares ("Coventry"), Tr. 5/22 p. 64; and Keystone Mercy Health Plan ("Keystone"), Tr. 5/22 p. 92.

4. For provision of dental care to most of their Medicaid enrollees, each of the five SEPA MCOs relies on a dental subcontractor to create a dental-provider network and to enter into contracts with individual dental providers in which rates are set. Tr. 5/21 pp. 154, 169 (HP); Tr. 5/21 pp. 204-205, 237 (United); Tr. 5/22 p. 10 (Aetna); Tr. 5/22 pp. 72, 81-82 (Coventry); Tr. 5/22 pp. 92-93 (Keystone).

5. The number of individuals enrolled in the SEPA Medicaid Program is "a little over" 500,000. Tr. 5/22 p. 230.

6. Of those 500,000-plus SEPA Medicaid enrollees, about 300,000 are enrolled with Keystone, Tr. 5/22 pp. 116-117, and 165,000 are enrolled with HP, Tr. 5/21 p. 152.

7. Four of the five MCOs that operate the Medicaid program in SEPA—including Keystone and HP, which account for about 465,000 of the 500,000-plus Medicaid enrollees—use the same dental subcontractor, viz., "Dentaquest" Tr. 5/21 pp. 154-155 (HP); Tr. 5/22 p. 10 (Aetna); Tr. 5/22 pp. 70-71 (Coventry); Tr. 5/22 p. 92 (Keystone).

8. Accordingly, since Dentaquest is the dental subcontractor for four of the five SEPA MCOs, which together account for the vast majority (i.e. more than 465,000 of a little over 500,000) Medicaid enrollees, the rates each MCO is paying its dental subcontractor

cannot be a trade secret or confidential proprietary information, because Dentaquest must know the amount every MCO is paying it. Moreover, to the extent Dentaquest enters into contracts with dental providers to provide service to enrollees of more than one of the SEPA MCOs for which Dentaquest is a subcontractor, the rates Dentaquest pays those dental providers on behalf of two or more competing MCOs are not secret from those individual dental providers. Working through this logical exercise demonstrates clearly that the rates competing MCOs pay Dentaquest, and the rates Dentaquest pays dentists available to enrollees of two or more of four MCOs, are not secret or confidential to the business entities with the largest interest in the matter.

9. On March 9, 2012, during the pendency of this proceeding, DPW through its counsel by written communication addressed to all parties herein withdrew its objection to producing the documents showing the capitation rates it pays SEPA MCOs. Requester's Exhibit 12; Tr. 5/21 pp. 27-28; Tr. 5/22 pp. 170-173. Even though on May 7, 2012 DPW reversed its position again and even though, between March 9, 2012 and May 7, 2012, DPW claims it did not in fact disclose the information, DPW's 180-degree change of position on March 9, 2012 completely undermines its contention that the capitation rates it pays SEPA MCOs are entitled to protection as "trade secrets" or "confidential proprietary information."

10. There was admitted at the hearing the form of the "Health Choices Agreement" between DPW and each MCO (but without specific pmpm rates). MCO Exhibit 2. Section XIV of this agreement form, at pp. 154-155, contains the provision that addresses confidentiality. The provision does <u>not</u> state that the pmpm or capitation rates that DPW pays the MCOs are confidential.

11. Keystone, the SEPA MCO with the largest enrollment of Medicaid beneficiaries, produced at the hearing only one witness, William Morsell. Morsell testified that he did not know whether Keystone considers capitation rates between Keystone and DPW as trade secrets. Tr. 5/21 pp. 141-142.

12. Requester proffered at the hearing two exhibits, Requester's Exhibit 2 (RX 2) from Connecticut and Requester's Exhibit 5 (RX 5) from Wisconsin, which show that in those states' Medicaid programs, (a) reimbursement rates paid by Medicaid MCOs to providers and (b) capitation rates paid by the state Medicaid agency to MCOs have been made public notwithstanding objections by the MCOs that such information is entitled to protection as a trade secret. Tr. 5/22 pp. 231-233, 237-238. RX 2 and RX 5 are admissible as evidence by virtue of being public documents described in 1 Pa. Code § 35.165. In other words, RX 2 and RX 5 are "judicially noticeable" by the Office of Open Records.

13. RX 2 is an opinion of the Attorney General of Connecticut dated October 14, 2005. It is available on the State of Connecticut's website at http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=305398. The opinion, over the objection of Medicaid MCOs in Connecticut, advises the Commissioner of Connecticut's Department of Social Services that she should, under Connecticut's Freedom of Information Law, "release all information concerning provider rate reimbursement," RX2 p. 1, notwithstanding a claim of exemption under the "trade secrets" provision thereof, RX2 p. 2. As a comparison of the statutory and case law authority cited by Connecticut's Attorney General in RX 2 with applicable provisions of Pennsylvania's trade secrets exception to the RTKL readily shows, the standards are the same. RX 2 shows that the rates MCOs pay providers should not be protected as "trade secrets"

and also undercuts the testimony of the MCOs' expert, Henry Miller, that this is never done, see Tr. 5/21 p. 130.

14. RX 5 is an official report of the State of Wisconsin dated April 2008 entitled "Dental Services for Medical Assistance Recipients." RX 5 may be found on a State of Wisconsin web site at http://legis.wisconsin.gov/lab/reports/08-MADental_Ltr.pdf. RX 5 focuses on four Wisconsin counties in which, as in SEPA, Medicaid recipients receive dental care through MCOs. See RX 5 p. 3. Table 4, RX 5 p. 5, lists for 2006 for each of five MCOs the total capitation-payment amount and the "average monthly medical assistance enrollment." By dividing the total capitation payments number by the enrollment number, a per member per year payment rate may be derived and, by dividing that per member per year payment rate by 12, the per member per month rate may be derived. RX 5, thus, is an instance in which, contrary to the evidence proffered by DPW and the MCOs in the instant case, per member per month medical assistance rates paid by a state to MCOs have been publicly disclosed. This disclosure from Wisconsin—where the sky has not fallen—shows, contrary to DPW's and the MCOs' contentions, the absence of any compelling economic reason why such information may not be publicly disclosed.

15. The request seeks documents concerning rates paid during the period January 1, 2008 through June 15, 2011. It does not seek documents relating to a later period. DPW's and the MCOs' contentions about alleged harm that disclosure of the rates from that period would cause are contradicted by the testimony given by the following witnesses: (1) John Sehi (HP's witness) testified that information about other MCOs' dental capitation rates for 2007-08 would be too old to affect current negotiations, and he was equivocal about data from 2010-11, Tr. 5/21 p. 187; (2) Heather Cianfroco (United's witness) testified that any competitive harm

from disclosure of previous years' rates would be less than that from disclosure of current rates, Tr. 5/21 p. 233.

IV. PROPOSED CONCLUSIONS OF LAW

1. DPW and the MCOs bear the burden of proving by a preponderance of the evidence that the public should not be allowed to learn how the public moneys in question were spent. 65 P.S. § 67.708(a)(1); accord Chester Cmty. Charter Sch. v. Hardy, 38 A.3d 1079, 1087 (Pa. Commw. Ct. 2012).

2. At the hearing, Requester and DPW stipulated that DPW does not object to producing documents on the grounds of the attorney-client privilege or the pre-decisional deliberative privilege Tr. 5/22 pp. 158-159.

3. DPW did not at the hearing or in its post-hearing brief establish grounds under federal law for withholding from Requester any of the documents Requester sought. See Tr. 5/22 pp. 148-149.

4. Neither DPW nor the MCOs have contested that the documents sought are in DPW's possession, custody, or control.

5. Among the documents Requester seeks in this matter are contracts between the MCOs and their dental subcontractors that set forth the amounts those subcontractors are paid to arrange for dental care for the MCOs' Medicaid enrollees. These documents are "public records" under the RTKL, because they document the carrying out (by the MCOs) of a governmental function, namely implementing the Medicaid program. As the RTKL states:

> 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 the purposes of this act.

65 P.S. § 67.506(d)(1); accord SWB Yankees LLC v. Wintermantel, 45 A.3d 1029, 2012 Pa. LEXIS 1232, at *6-7 (Pa. 2012); see also Office of the Budget v. Office of Open Records, 11 A.3d 618, 622 (Pa. Commw. Ct. 2011) ("[T]he records in [Lukes v. DPW, 976 A.2d 609, 622 (Pa. Commw. Ct. 2009)] . . . related to the governmental function of the Department of Public Welfare . . . ."). As the Commonwealth Court has explained, "Section 506(d)(1) appears to be the General Assembly's effort to ensure that some level of public access to information about governmental functions is preserved where an agency chooses to contract out the performance of that function to a third-party." Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc., 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011).

6. In this matter, Requester seeks, inter alia, production of the following categories of documents that have been withheld by DPW: (a) the appendices to the contracts between DPW and each of the MCOs that set forth the capitation rates paid by DPW to each of the MCOs for each of the years in question; and (b) the documents in DPW's possession, custody, or control that set forth the amount for any one or more individual dental procedure codes that any Medicaid MCO paid to provide dental services to Medicaid recipients in SEPA. DPW and the MCOs do not contest that contracts between the MCOs and subcontractors they employ to provide dental care to Medicaid enrollees are included in category (b).

7. Neither DPW nor the MCOs have contested that any of these documents is a "record" within the meaning of the RTKL. See 65 P.S. § 67.102 (defining "RECORD").

8. DPW is required to provide the requested documents if they qualify as "public records" under the RTKL. See 65 P.S. § 67.102 (defining "PUBLIC RECORD").

9. The RTKL provides that "a record in the possession of a Commonwealth agency shall be presumed to be a public record," but that the presumption shall not apply if the record

is proved by a preponderance of the evidence to be exempt under 65 P.S. § 67.708. 65 P.S. § 67.305(a).

10. The sole exception that DPW and the MCOs have asserted to excuse DPW from producing the requested material as public records is that they are records that "constitute a trade secret or confidential proprietary information." See 65 P.S. § 67.708(b)(ii).

11. The RTKL defines "TRADE SECRET" as

> [i]nformation, 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 know 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.

65 P.S. § 67.102.

12. The definition of "trade secret" in Pennsylvania's "Trade Secret Act," 12 Pa. Cons. Stat. § 5302, is word-for-word the same as that quoted above from 65 P.S. § 67.102, except it omits the final sentence (concerning "data processing software"), which is not germane to the instant matter.

13. On June 3, 2009, the Commonwealth Court decided a case entitled Lukes v. Department of Public Welfare, 976 A.2d 609 (Pa. Commw. Ct. 2009), alloc. denied, 604 Pa. 708 (2009), under the predecessor version of the RTKL.

14. Certain key facts in Lukes are on all fours with facts in the instant matter. Specifically, in Lukes, as in the instant case, the Requester sought documents that showed the rates that a Medicaid MCO, the University of Pittsburgh Medical Center Health Plan (referred

to throughout the Lukes opinion as "the Health Plan"), paid to certain hospitals that provided care to the Health Plan's Medicaid enrollees.

15. In Lukes, as in the instant case, the MCO involved intervened and along with DPW opposed the production of the records on the ground, among others, that the records were protected as "trade secrets."

16. The Commonwealth Court in Lukes reversed the order of the Chief Administrative Law Judge of DPW and required production of the documents. In doing so, the court rejected the contention of DPW and the Health Plan that the documents were "trade secrets" within the definition of "trade secrets" as set out in Section 5302 of Pennsylvania's Trade Secret Act, 12 Pa. Cons. Stat. § 5302. Lukes 976 A.2d at 626. See generally id. at 626-27 (holding, in the face of evidence that the contracts between a Medicaid MCO and a group of hospitals "contain confidentiality provisions," that "a party that voluntarily participates in a public program and is receiving and disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded from public scrutiny").

17. As noted above, the definition of "trade secret" in 12 Pa. Cons. Stat. § 5302, is in all material respects, identical to the definition in the current RTKL, 65 P.S. § 67.102. Accordingly, the two statutes should be interpreted identically.

18. The fact that Lukes was decided under a previous incarnation of the RTKL does not diminish the applicability of the Commonwealth Court's rejection of the argument that the documents containing the rates the MCO paid the providers to care for the MCOs enrollees were "trade secrets." This is because the definition of "trade secret" in force in the present

case, 65 P.S. § 67.102, is identical in all material respect to the language defining "trade secret" in Lukes.

19. DPW and the MCOs cite two cases decided since Lukes in an effort to suggest that Lukes is no longer good law. These cases are, however, readily distinguishable. In Office of the Budget v. Office of Open Records, 11 A.3d 618 (Pa. Commw. Ct. 2011), the Commonwealth Court cited Lukes not on the subject of trade secrets, but rather on the issue of whether the documents were deemed in the possession of the public agency by virtue of being "maintained" by the agency, where that term did not appear in the then-current RTKL. 11 A.3d at 622. In In re Silberstein, 11 A.3d 629 (Pa. Commw. Ct. 2011), the facts also did not involve Lukes's holding regarding trade secrets, but instead dealt solely with Lukes's interpretation of what constitutes an agency's "possession" of a document. Lukes remains binding law for the proposition that records involved here are not exempt from being a public document because they are a "trade secret," and the Office of Open Records should therefore apply Lukes to the instant matter.

20. Lukes is not only binding with respect to the MCOs' provider rates, but it also compels the conclusion that the pmpm rates negotiated between DPW and the MCOs are public records. The documents found to be public records in Lukes were in contracts to which DPW was not even a party, whereas the contracts between DPW and the MCOs feature a state agency as a party.

21. The RTKL exempts a document from production as a public records if it is "[a] record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). Neither DPW nor the MCOs have carried their burden of demonstrating how, as applied to the documents sought in this proceeding, the words "confidential proprietary

information" add anything identifiable to what is contained in the term "trade secret" and, indeed, none of the witnesses called in this proceeding in any way distinguished between what is a trade secret and what is confidential proprietary information. Even the MCOs' expert, Henry Miller, used the terms "trade secret" and "confidential proprietary information" interchangeably. Tr 5/21 pp. 127-128.

22. Nor does the fleeting reference by United and Coventry at page 15, footnote 7 of their brief to the discussion in Office of Governor v. Bari, 20 A. 3d 634, 647-48 (Pa. Commw. Ct. 2011) of the distinction between "trade secret" and "confidential proprietary information" compel a different conclusion. The discussion in Bari does not identify a single aspect of the term "confidential proprietary information" that, under the facts in the record in the instant case, is not encompassed by the definition of "trade secrets" in the current RTKL.

23. DPW and the MCOs have failed to carry their burden insofar as they have not explained why the release in other states of information like that sought here has not had the negative competitive effects they fear. In addition to the judicially noticeable Connecticut and Wisconsin examples discussed in the Proposed Findings of Fact supra at ¶¶ 12-14, the Office of Open Records can and should take judicial notice that at least two other states have permitted the release of information just like that sought here. Wilmington Star-News v. New Hanover Reg'l Med. Ctr., 480 S.E.2d 53 (N.C. Ct. App. 1997); Attorney General Letter Opinion 98-L-17 (N.D. Mar. 2, 1998), available at http://www.ag.state.nd.us/opinions/1998/Letter/98olso02.pdf. This multi-state phenomenon undermines the argument that the release of such information does not or must not occur, or that it would devastate the competitive marketplace, and it discredits the testimony of Henry Miller, who insisted that the release of such information would be unprecedented.

24. DPW and the MCOs have failed to carry their burden insofar as they have not demonstrated why the release of stale, historical information would undermine competitive processes going forward. See, e.g., GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994) (noting that disclosure of certain contract price information "is unlikely to work a substantial harm on the competitive positions of . . . contractors" because "[t]he data is made up of too many fluctuating variables for competitors to gain any advantage from the disclosure").

25. Two MCOs—HP and United—have fallen especially short of proving the competitive value of their historical rates. Even if the Office of Open Records finds the other three MCOs' evidence on these points to be convincing, each intervening party must prove its case on its own, and the Office of Open Records should find that HP's and United's historical capitation rates are public records.

26. Even if the Office of Open Records determines that the most recent years' historical information is exempt from disclosure, it should conclude that information from the earliest years at issue is not exempt because it is too old to have ongoing competitive significance.

27. The negotiated pmpm rates are, at bottom, the outcome of a competitive bidding process. The RTKL explicitly exempts from disclosure certain types of information from bids for public contracts, 65 P.S. § 67.708(b)(26), but not the type of information at issue here. Under such circumstances, the Latin maxim "expressio unius est exclusio alterius" applies. See, e.g., Atcovitz v. Gulph Mills Tennis Club, 571 Pa. 580, 589 (2002) (explaining the maxim as meaning that "the inclusion of a specific matter in a statute implies the exclusion of other matters"). Competitive bids, once the bidding process has concluded, are properly matters of

public record. See, e.g., 62 Pa. Cons. Stat. § 512(d) (competitive sealed bidding statute requiring that "[t]he amount of each bid and any other relevant information as may be specified by regulation, together with the name of each bidder, shall be recorded. The record shall be open to public inspection.").

28. It is not possible to square the MCOs' insistence that they jealously guard the secrecy of their provider rates with the fact that most of them share that "highly confidential" information with a single dental subcontractor. Each MCO's evidence on this point, as on all other points, must be considered individually to determine whether each MCO has carried its burden of proving that those rates are trade secrets or confidential proprietary information. The Office of Open Records should analyze each MCO's evidence separately, and should order the release of documents for each MCO that has not carried its individual burden.

29. For all of the foregoing reasons, the documents sought by Requester are not exempt from production as public records on the grounds that they are "trade secrets" or contain "confidential proprietary information."

Respectfully submitted,

/s James Eiseman

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Dated: August 3, 2012

CERTIFICATE OF SERVICE

I, Benjamin D. Geffen, hereby certify that on August 3, 2012, I caused the foregoing to be filed by electronic mail with the Office of Open Records, with electronic mail copies to the Appeals Officer and counsel, as set forth below. On August 3, 2012, I further caused a hard copy to be submitted to the Office of Open Records for filing via First Class U.S. Mail, postage prepaid, with a copy to the Appeals Officer and service upon counsel via First Class U.S. Mail, postage prepaid, as set forth below.

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