
IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 129, 130, 131, 132, 133 & 134 EAL 2014

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE
Respondent,

v.

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

(Caption at No. 129 EAL 2014; captions continued inside cover)

ANSWER TO THE PETITIONS FOR ALLOWANCE OF APPEAL OF DENTAL BENEFIT PROVIDERS, UNITEDHEALTHCARE, & HEALTHAMERICA (d/b/a COVENTRYCARES)

Petitions for Allowance of Appeal from the February 19, 2014 Orders of the Commonwealth Court of Pennsylvania, at Nos. 1935, 1949, & 1950 CD 2012 affirming in part and reversing in part the September 17, 2012 Final Determination of the Office of Open Records, OOR No. 2011-1098, and at Nos. 945, 957, & 958 CD 2013 reversing the May 7, 2013 Final Determination of the Office of Open Records, OOR No. 2012-2017

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Captions Continued:

Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., & Keystone Mercy Health Plan, *Respondents*
v.
James Eiseman, Jr. & The Public Interest Law Center of Philadelphia, *Petitioners*
(No. 130 EAL 2014)

UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan & HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares, *Respondents*
v.
James Eiseman, Jr. & The Public Interest Law Center of Philadelphia, *Petitioners*
(No. 131 EAL 2014)

Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc., & HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares, *Respondents*,
v.
James Eiseman, Jr. & The Public Interest Law Center of Philadelphia, *Petitioners*
(No. 132 EAL 2014)

Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, & DentaQuest, LLC, *Respondents*,
v.
James Eiseman, Jr. & The Public Interest Law Center of Philadelphia, *Petitioners*
(No. 133 EAL 2014)

Commonwealth of Pennsylvania, Department of Public Welfare, *Respondent*,
v.
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I. COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court deny allowance of appeal due to lack of any "special and important" reason to hear this case, where the Commonwealth Court correctly and even-handedly applied the Right-Know Law to the unique and complex facts presented, ruling that some of the documents petitioners requested must be disclosed, but that other documents were not to be disclosed?

II. COUNTER-STATEMENT OF THE CASE

A. Overview and Summary of Response to Petitions

In this Right-to-Know Law case, the Commonwealth Court partially ruled in favor of the petitioners (James Eiseman, Jr. and the Public Interest Law Center of Philadelphia), and partially ruled in favor of the respondents (the Department of Public Welfare, five health plans[1] (also referenced as managed care organizations or MCOs), and two dental subcontractors[2]). The court ordered documents showing the rates paid by the Department for one of its programs had to

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[1] The five health plan respondents are: (1) UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan, (2) HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares, (3) Aetna Better Health, Inc., (4) Health Partners of Philadelphia, Inc., and (5) Keystone Mercy Health Plan.

[2] The two dental subcontractor respondents are: (1) Dental Benefit Providers, Inc. and (2) DentaQuest, LLC.

be disclosed, as requested by petitioners – and over the respondents' objections.[3] As to other documents, the court ruled in favor of the respondents, as it agreed they demonstrated, through testimony and evidence, that the rates paid by contractors and their private subcontractors (i.e., rates *not* paid by the government) were exempt under the Right-to-Know Law or not within its reach.

The Commonwealth Court struck a fair balance between enforcing the public's right to know what the government pays for its program, on the one hand, while preserving the contractors' abilities to compete in the relevant marketplace by shielding their confidential competitive information from disclosure, on the other hand. The equity of the court's decision mirrors the balance among competing interests reflected in the Right-to-Know Law itself. While the health plans are not completely satisfied with the outcome (as they objected to *all* of petitioners' requests), it cannot be denied that the Commonwealth Court's decision was fair and reasonable.

Petitioners apparently do not agree. They are not content with the ruling that they are to be provided with government-paid rates, as they now ask this Court to assist them in threatening the contractors' and subcontractors' business

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[3] Petitioners therefore completely mischaracterize the Commonwealth Court's decision in claiming that "[t]he decision below has the effect of denying the public any right to know how much of its money is spent to provide care." (Pets. at 3-4 (Nos. 132-134 EAL 2014) & 3 (Nos. 129-131). The decision below *required* disclosure of what the government has paid.

models by prying into their business secrets and confidences. Petitioners, however, have absolutely failed to identify any "special and important" reason under Rule 1114 for this Court to do so. There is no conflict between the decision below and any decision of this Court or any other appellate court. Petitioners have not identified any issue of first impression that might have statewide impact outside of the distinctly unique factual setting of this case. Nor do petitioners present any issue of constitutional dimension. Petitioners are asking only that this Court delve into the record of this complex, fact-driven case to provide petitioners with individual relief for this case only.

Not only do petitioners fail to supply this Court with any reason to take this case, the relief petitioners seek does not even appear necessary. Petitioners claim to champion transparency and accountability for the Department's HealthChoices program. But the government-paid rates that were ordered produced in this case, coupled with information already in the public domain,[4] certainly provides ample information to understand how public money is

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[4] As petitioners admit, all of the HealthChoices contracts are publicly posted on the Department of Treasury's website. (Pet. at p.6 n.3 (Nos. 132-134).) Moreover, the Department of Public Welfare maintains a website devoted to publications disclosing a wealth of information about the HealthChoices program. See http://www.dpw.state.pa.us/publications/healthchoicespublications/. Included are performance reports, consumer guides, rate charts, and external reports for each of the health plans participating in the program. The DPW also has posted archival data from 2003 to present, listing the specific number of people, on a month-to-month basis, that have enrolled in particular DPW programs, including

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spent on the program. Further, the government already conducts audits and other reviews of the HealthChoices program and each of the participating health plans. All of the available information shows the program and plans are operating efficiently and satisfactorily – in particular as to the children's dental portion of the program that is of interest to petitioners.[5] Put simply, there already is transparency

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medical assistance. See http://listserv.dpw.state.pa.us/ma-food-stamps-and-cash-stats.html. This is but a sampling, as DPW and other agencies publicly share other information.

[5] An extensive and exhaustive External Quality Review Report is publicly posted on the DPW site for the overall program and each of the participating plans. See, e.g., *2012 External Quality Review Report, Statewide Medicaid Managed Care Annual Report*, Dep't of Pub. Welfare (Aug. 23, 2013) (providing specific facts and figures concerning the dental aspect of the program) (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/p_011512.pdf); see also http://www.dpw.state.pa.us/publications/healthchoicespublications/ (listing individual External Quality Review Report for each plan). Other reviews, reports and presentations supply a wealth of relevant information and demonstrate the success of the program. See, e.g., *HealthChoices MCO Pay for Performance (P4P) Program, Seven Year Progress Review, July 2005 – December 2011*, Dep't of Pub. Welfare (June 2013) (stating that average number of dental visits by children in HealthChoices increased every year from baseline 2008, and that the weighted average of such visits exceeded a national benchmark) (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/communication/s_002207.pdf); *HealthChoices Performance Trending Report 2013*, Office of Medical Assistance Programs, Division of Quality and Special Needs Coordination (Dec. 2013) (showing 82.6% overall satisfaction rate for children's health plans in HealthChoices) (available at: http://www.dpw.state.pa.us/cs/groups/public/documents/communication/s_002193.pdf); *ACCESS Plus and HealthChoices Consumer Assessment of Healthcare Providers and Systems (CAHPS) Measure Results* (Mar. 21, 2011) (showing customer satisfaction for children with HealthChoices plans to be at or above benchmarks) (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/presentation/p_011345.pdf); see also *HealthChoices Examination Guide, Behavioral & Physical Health*, Dep't of Pub. Welfare (Dec. 2013) (providing mandatory standards for independent public accountants conducting mandated reviews of HealthChoices plans) (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/c_074806.pdf). A privately commissioned study also showed significant cost savings to taxpayers as a result of implementation of HealthChoices. See *An Evaluation of Medicaid Savings from Pennsylvania's HealthChoices Program*, The Lewin Group (May 2011)

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and accountability in the HealthChoices program. There consequently is no need for this Court to consider the thorny question of whether to force contractors and subcontractors of government agencies – including judicial agencies – to expose confidential information and trade secrets under the Law.

As if that were not enough, there is yet another reason why this Court should deny allowance of appeal here: that it has recently, and repeatedly, spoken on the Right-to-Know Law, and is expected to speak again on it in the near future.[6] There is no need for this Court to speak – yet again – on this subject, especially in a fact-driven, judicial resource-consuming case like this one.[7] The Court should let the just and balanced decision by the Commonwealth Court – which provides partial relief to both sides – stand.

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(available at: http://www.lewin.com/publications/publication/439). Indeed, the DPW's recent 2014-15 budget presentation states that, "[b]ased on the success of its Medicaid managed care program, HealthChoices, the [DPW] expanded statewide to all counties of the Commonwealth in March of 2013." *Department of Public Welfare, Fiscal Year 2014-15 Executive Budget* (available at: http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/p_040123.pdf).

[6] See, e.g., Pa. Gaming Control Bd. v. Office of Open Records, No. 67 MAP 2013 (allowance of appeal granted Sept. 11, 2013); Bowling v. Office of Open Records, 75 A.3d 453 (Pa. 2013); Levy v. Senate of Pennsylvania, 65 A.3d 361 (Pa. 2013); Hearst Television, Inc. v. Norris, 54 A.3d 23 (Pa. 2012); Pa. State Educ. Ass'n v. Dep't of Comm. & Econ. Dev't, 50 A.3d 1263 (Pa. 2012); SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012).

[7] Also of note is that legislative developments in the General Assembly may moot or at least affect the legal issues in this case. Senate Bill 444 was introduced by State Senate Majority Leader Dominic Pileggi on April 26, 2013, and it contains several revisions to the Right-to-Know Law, including as to a number of the provisions applicable here.

B. Facts and Background

1. The Right-to-Know Law Requests

The companion decisions below arose from two Right-to-Know Law requests petitioners directed to the Department of Public Welfare relating to Pennsylvania's Medical Assistance (Medicaid) managed care program, which is known as HealthChoices. (R1. 1a-4a, R2. 18a-21a.)[8] They were directed to the Department because it contracts with health plans – including the managed care organization (MCO) respondents before the Court here – to provide HealthChoices benefits to people who qualify for the program. The requests asked for documents showing payment rates for the dental portion of the program – specifically, these three sets of rates:

1. Rates paid by the Department to the health plans for each HealthChoices recipient who enrolls with the plans;

2. Rates paid by the health plans to their dental subcontractors for each HealthChoices enrollee; and

3. Rates paid by the dental subcontractors to the dentists for treatment of HealthChoices enrollees,

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[8] All record citations are to the two Reproduced Records that the respondents filed below with the Commonwealth Court. See Pa.R.A.P. 1112(d). The Reproduced Record filed in the Eiseman I matter (Nos. 129, 130, 131 EAL 2014 in this Court, and Nos. 1935, 1949, 1950 CD 2012 in the Commonwealth Court) is referenced here as "(R1. ___)." The Reproduced Record in the Eiseman II matter (Nos. 132, 133, 134 EAL 2014 in this Court, and Nos. 945, 957, 958 CD 2013 in the Commonwealth Court) is referenced here as "(R2. ___)."

> such as rates paid to the dentists as set forth on dental procedure fee schedules.

(R1. 3a at ¶¶3-4, R2. 21a at ¶3.) The Department denied the requests, in part because the rates are trade secrets and confidential proprietary information. (R1. 7a-15a, R2. 34a-37a.)

2. The Office of Open Records Proceedings

Petitioners appealed the denials to the Office of Open Records. The managed care organizations and dental subcontractors timely intervened pursuant to 65 P.S. §67.1101(c), and before the OOR they opposed disclosure of each of the three sets of rates. (R1. 31a-34a, 57a-59a, R2. 101a-102a.)

To decide the first request (Eiseman I), which pertained to the first two sets of rates, the OOR held a two-day hearing.[9] (R1. 148a.) At the hearing, each of the health plans called a knowledgeable executive to provide sworn testimony that the rates were confidential and secret, and that public disclosure of the rates would cause harm to the plans. (See, e.g., R1. 336a-416a, 485a-512a.) The health plans also jointly put forward the sworn testimony of a recognized expert in the field, Dr. Henry Miller, who also testified under oath that the rates petitioners sought were kept secret and confidential by the plans, and that they

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[9] The OOR, however, did not make any credibility assessments, as the appeals officer who decided the case did not sit as hearing officer. The OOR instead hired an outside attorney to sit as hearing officer. He did not make any credibility determinations, either.

would be harmed by disclosure. (R1. 280a-322a, 673a-679a.)

To decide the second request (Eiseman II), which pertained to the third set of rates, the OOR elected to accept affidavit testimony from the health plans and dental subcontractors, as is OOR's custom. Each of the plans and dental subcontractors furnished a sworn affidavit of a knowledgeable executive, attesting unequivocally that the rates were confidential and secret, and that public disclosure of the rates would cause harm. (See, e.g., R2. 125a-129a, 120a-124a, 131a-135a.)

In spite of the unrebutted evidence presented by the plans and subcontractors, the OOR decided that all three sets of rates had to be disclosed.

3. The Commonwealth Court Rules for Both Sides

The health plans, subcontractors, and DPW each timely appealed both OOR decisions to the Commonwealth Court. The court, in companion 25- and 21-page rulings authored by Judge Robert Simpson, and decided by a nearly-unanimous 6 to 1 vote, affirmed in part and reversed in part. (See *Exhibit A* to each petition.) The court agreed with the petitioners that the first set of rates (paid by the Department to the health plans) were subject to disclosure under the Right-to-Know Law. As to the second set of rates (paid by the plans to the dental subcontractors) and the third set of rates (paid by the subcontractors to the dentists), the court held that those were not subject to disclosure under the Law. Petitioners now seek this Court's discretionary review of those decisions.

III. REASONS IN OPPOSITION TO ALLOWANCE OF APPEAL

A. The Commonwealth Court's decision was fair and just, and this case does not otherwise call for this Court's review.

This Court should deny allowance of appeal because there is no "special and important" reason for this Court to revisit the Commonwealth Court's decisions, which properly applied the Right-to-Know Law to reach an impartial resolution on the unique and complicated facts presented. Judge Simpson's decisions for the court reflect an exhaustive consideration of the facts, arguments, and legal issues presented. After that careful analysis, the court provided relief to both sides of this dispute. That result need not be disturbed.

As to petitioners' request for documents reflecting the first set of rates (paid by the Department of Public Welfare to the health plans), the Commonwealth Court ruled in petitioners' favor, holding those documents were to be disclosed. See slip op. at pp. 8-14 (*Exhibit A* to the petition at Nos. 129-131 EAL 2014). The court reasoned those documents could not be exempt because they were the Department's "financial records" under section 708(c) (65 P.S. §67.708(c)) of the Right-to-Know Law. Id. at 8-10; see 65 P.S. §67.102 (definition of "financial record"). The court also found that the Uniform Trade Secrets Act – which had to be separately considered because section 102 of the Law protects records "exempt from being disclosed under any other Federal or State law" – also did not shelter the first set of rates, as the court determined the evidence in this "highly fact-

specific" inquiry did not show the first set of rates were trade secrets. Slip op. at 12-14.

As to the second set of rates (paid by the health plans to the dental subcontractors), the court correctly held that documents showing those rates were not the Department's "financial records" under section 708(c) because they were neither contained in any contract with the DPW nor did they involve the DPW's disbursement of funds. Id. at 14-15. This finding was rooted in the language of the Right-to-Know Law, which states that an agency's "financial records" are only documents showing disbursements "*by* an agency," not disbursements by a third party like the plans and subcontractors. Id. at 15. Proceeding then to consider the exemptions for "confidential proprietary information" and "trade secrets" in section 708(b)(11) of the Law (65 P.S. §67.708(b)(11)), the court, carefully and thoroughly considering the testimony and evidence presented, decided those exemptions apply. Id. at 16-23. The court correctly found: "The importance of the [rates] to each [plan's] business model, and continued financial vitality in the industry, weighs in favor of holding the information constitutes confidential proprietary information and trade secrets." Id. at 24.

Finally, as to the third set of rates (paid by the dental subcontractors to the dentists), the Commonwealth Court correctly held that those rates were not subject to disclosure because they were not within the constructive possession of

the Department. This determination was based on the language of section 506(d)(1) of the Law (65 P.S. §67.506(d)(1)), which provides that a government agency's constructive possession of documents actually held by a third party is limited to documents held by "a party *with whom the agency has contracted*." 65 P.S. §67.506(d)(1) (emphasis added). Because neither the subcontractors, nor the dentists, had contracted with the Department, the court held the sweep of the Law did not reach the third set of rates. See slip op. at p. 14 (*Exhibit A* to the petition at Nos. 132-134). The court also reasoned that this set of rates, which reflected the amount of compensation between the subcontractors and providers, lacked a "direct relationship" with the governmental function of providing health care to patients, as further required by section 506(d)(1). Id. at pp. 15-17.

The Commonwealth Court's decisions in this case reflect a careful application of the Right-to-Know Law to the particular and unique facts of this case. Their fairness and reasonableness is manifest. No issue of broad statewide impact has been generated by those decisions. This Court therefore need not wade into the record and make its voice heard. Allowance of appeal should be denied.

B. Petitioners fail to give this Court any reason to hear this case.

Despite the Commonwealth Court's even hand, which resulted in partial victory for both sides, petitioners nevertheless attack the decisions below.

They offer nothing but a series of trumped-up and confused arguments that reflect an overall philosophy completely at odds with the Right-to-Know Law.

The text and structure of the Law reflect the General Assembly's intent to strike a balance between promoting government transparency and protecting sensitive documents from view. Included among the documents the Legislature decided to shield are those revealing third party confidential information and trade secrets, as well as documents held by third parties that do not contract with the government. See 65 P.S. §67.708(b) (listing 30 categories of exemptions, including for "confidential proprietary information" and "trade secrets" in #11); 65 P.S. §67.506(d)(1) (limiting constructive agency possession to documents held by parties directly contracting with the agency). The Commonwealth Court honored that balance by carefully weighing the parties' competing arguments and partially ruling for each side.

Petitioners now ask this Court to destroy the Law's balance. They boldly ask for a holding that the Law mandates disclosure of all records "*even if* those records may reveal trade secrets." (Pet. at 4 (at Nos. 129-131)); (Pet. at 12 (at Nos. 132-134) (stating same)). Such a holding would obliterate specific exemptions that the Legislature included in the Law. And it would be based on nothing more than petitioners' misguided belief in some need for transparency and accountability in the HealthChoices program – which, as discussed above, is

demonstrably unfounded. This Court should nurture the Law's balance and the fairness of the Commonwealth Court's decision by declining the invitation.

1. Petitioners misread the "financial records" provision.

Not only is the overall tone of petitioners' submissions fundamentally misguided, but their specific arguments are flawed, too. Petitioners first argue that the Commonwealth Court misconstrued the "financial records" provision (section 708(c)), claiming that the court held this provision "never" can apply to trade secrets. (Pet. at 14-17 (at Nos. 129-131)). It is difficult to understand why petitioners even are complaining about the court's rationale here because *they prevailed on that issue*. Indeed, the court's analysis led it to rule in petitioners' favor as to the first set of rates (the Department-paid rates). In any event, the court's holding is not remotely as described by petitioners. The court simply applied the plain language of the "public record" definition. That definition specifically requires independent consideration of other laws that may preclude disclosure, such as the Trade Secrets Act. The court below did just that.

Petitioners additionally claim that all three sets of rates are contained in "financial records" because, they insist, the provision has a broad sweep, capturing any and all documents that have even the slightest connection with the nebulous "flow" of public money. (Id. at 17-20.) But this argument (and Judge McCullough's lone dissent, which echoes it) profoundly misapplies the statute's

plain language. The Law expressly defines an agency's "financial records" as only contracts showing disbursements "*by* an agency."[10] 65 P.S. §67.102. It does *not* say disbursements "by an agency *or its contractors or subcontractors*." Nor does it say disbursements "that *originated* with an agency." The Legislature could have chosen to write the statute using one of these alternatives (or some other). It did not. It instead defined an agency's "financial records" as only those showing the agency's *own* disbursements. Petitioners' thus are asking for a judicial re-writing of the statute – hardly a good reason to hear this case.[11]

2. The rates are not "stale."

Petitioners also claim the records in question cannot have competitive value because they are "stale" or "too old," because they date from 2008 to 2011. (Pet. at 21-22 (at Nos. 129-131)). This argument obviously is specific to this case, and is not one of statewide import. There also is no support for it. The Right-to-Know Law does not have a "too old" provision.[12] Even if it did, there is no record

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[10] Petitioners also try to rely on the alternative "financial record" definition, but that is identically limited. It pertains only to an "*agency's* acquisition, use or disposal of services." 65 P.S. §67.102.

[11] Even if petitioners were not misreading the statute, this issue still would not be grant-worthy. The "financial records" provision applies only to a few Right-to-Know Law exemptions and pertains to a limited class of agency documents. Petitioners (and Judge McCullough, in her solitary dissent) completely overstate the import of this provision.

[12] With good reason. If it did (or if the Court were to read one into it), problematic consequences could result, as requesters would be incentivized to manipulate the process by engaging in protracted litigation in the hopes of "running out the clock" on an exemption.

support here. In fact, the opposite is true – the prior years' rates *do* have competitive value.[13] (See, e.g., R1. 403a-404a, 496a, 501a, 509a-510a.) The Commonwealth Court thus correctly found the mere passage of time did not alter its conclusion. See slip op. at pp. 22 (*Exhibit A* to the petition at Nos. 129-131).

3. Petitioners' "genie" argument is a red herring.

Petitioners further claim it somehow makes a difference here that some of the health plans hired the same dental subcontractor. (Pet. at 22-24 (at Nos. 129-131)). This argument is another that is specific to this case, and thus it does not support this Court's grant of review. It also similarly lacks any record support, as the witnesses uniformly testified the subcontractor is obligated to keep all rates confidential.[14] (R1. 493a, 333a, 432a-433a, 516a-517a.)

Perhaps more importantly, this argument is a red herring. Just because one subcontractor is hired by more than one health plan does not change the competitive value that the plans *themselves* place in the rates, as each plan does not know what any other is paying the subcontractor. While that knowledge might help the subcontractor's bargaining position, the plans *still* keep their competitive

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[13] There also is no support for petitioners' related suggestion that rate fluctuations from year to year somehow lessen the rates' competitive value. The opposite is true: the fact that rates are the subject of an intense annual negotiating process illustrates the secrecy of these rates and their critical nature to any ability to compete in this marketplace. (See, e.g., R. 403a.)

[14] Petitioners therefore are wrong in suggesting that the Commonwealth Court's decision here was based on representations by counsel. The decision was based on evidence in the record.

positions vis-à-vis *each other* by keeping the rates they pay secret *from each other*. The existence of a common subcontractor thus is of no moment.

4. <u>There is no evidence of "agency" relationships here.</u>

In connection with its "genie" argument, petitioners argue that the subcontractor acts as an "agent" for the health plans in negotiations with the dentists. (Pet. at 23-24 (at Nos. 129-131)). This argument (which Judge McCullough somehow endorsed in her lone dissent below) is completely made-up. There is no evidence in the record remotely suggesting *any* of the contracting parties in the HealthChoices program agreed to enter into a principal-agent relationship. To the contrary, every party in the program is at arm's length, independently negotiating separate contracts. The subcontractor negotiates rates of payment with each dental practice *for itself*, under its *independent* contracts with the dentists – not because it is obligated to act as "agent" of any health plan. Petitioners' case-specific "agency" mirage is no reason to grant review.

5. Petitioners' misinterpret the <u>"agency possession" provision.</u>

Petitioners additionally contend that the Commonwealth Court misapplied section 506(d)(1) of the Law (65 P.S. §67.506(d)(1)), which provides for constructive agency possession over third party records. (Pet. at 17-21 (at Nos. 132-134)). Petitioners persist in claiming that the third set of rates, which are paid to sub-sub-contractors that are two full contractual relationships away from the

agency relationship, somehow still are within the Department's "possession." The Commonwealth Court, however, correctly applied the language of section 506(d)(1), which does not permit an agency's constructive possession to reach that far. It instead limits possession to documents held by "a party *with whom the agency has contracted*." 65 P.S. §67.506(d)(1) (emphasis added). This unambiguous statutory command limits an agency's constructive possession to records held by direct agency contractors only.

Petitioners, however, insist this language means something other than what it says, and even make the silly claim that the decision below will invite contractors to go to the trouble of creating phony subcontractors just as a façade to avoid the Right-to-Know Law. The Commonwealth Court rightly was not swayed by petitioners' absurd protestations, as it properly applied the statute and Pennsylvania caselaw to the facts, including in its further determination that the third set of contractual rates of payment did not have a "direct relationship" to providing health care to patients.[15]

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[15] Petitioners try to set up a false conflict between the decision below and SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012). But they rely on a footnote in that decision discussing the definition of "record," not the agency possession provision. Id. at 1044 n.19. Yankees also differs because the agency possession issue here turns on the absence of a direct contract with the agency. That issue was not present in Yankees. Further, and contrary to petitioners' suggestion, the Yankees decision also recognized the "governmental function" analysis has firm limits. Id. at 1042 ("[w]e also believe the Legislature used the

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6. Petitioners misread irrelevant contract language.

Petitioners also spill much ink arguing about the meaning of the contract between the Department and the health plans, claiming aspects of that contract create agency possession here. (Pet. at 12-16 (at Nos. 132-134)). For starters, this argument is fundamentally beside the point, as contractual language does not alter the statutory Right-to-Know Law analysis, as the Commonwealth Court rightly recognized. See slip op. at p. 11 (*Exhibit A* to the petition at 132-134). Petitioners' convoluted contract language argument also is uniquely specific to the facts of this case, and thus does not present an issue of statewide importance meriting this Court's consideration.

Even if it did, petitioners misconstrue the language they seize upon. The provision they describe as the "Ready Access" requirement is found within a set of provisions that are intended to ensure the plans utilize responsible

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'governmental' function delimiter in Section 506 to narrow the category of third-party records subject to disclosure by some measure").

Petitioners also try (but fail) to use Yankees to prop up bad law – specifically, the Commonwealth Court's prior decision in Lukes v. Department Public Welfare, 976 A.2d 609 (Pa. Commw. 2009). This Court did not lend "ongoing vitality" to Lukes in Yankees as suggested by petitioners – it only made passing reference to it in a footnote as representative of an approach under the old Right-to-Know Law. Because Lukes was decided under the old Law, it has been repeatedly rejected as irrelevant to consideration of the new Law. See In re: Silberstein, 11 A.3d 629, 632 n.8 (Pa. Commw. 2011); Office of the Budget v. OOR, 11 A.3d 618, 622-23 (Pa. Commw. 2011); Honaman v. Twp. of Lower Merion, 13 A.3d 1014, 1020-22 (Pa. Commw. 2011). It is difficult to see why this Court's resources should be spent considering the validity of a lower court decision that applied a repealed law.

subcontractors – not that the subcontractors have to turn over their confidential rates to the Department on demand. (R2. 233a-234a.) Nor does the specific "Ready Access" language remotely support an agency possession argument. That provision merely allows Department access to records "of *transactions* pertaining to the *provision of services to Recipients*." (R2. 234a at ¶4) (emphasis added). In other words, the Department is entitled only to access individual patient medical records that show treatment provided to an individual HealthChoices enrollee[16] – not contracts showing sensitive and proprietary sub-sub-contractor payment rates.

7. There is no evidence of "laundering" or "middlemen" here.

Finally, in connection with their contract language argument, petitioners suggest that the Commonwealth Court's decision will invite agencies to "launder" public money by using contractors as "middlemen" so they can avoid the Right-to-Know Law. (Pet. at 12 (at Nos. 132-134)). But this argument stumbles at the starting gate because the Commonwealth Court's caselaw already prevents that from happening. As the Commonwealth Court explained below, it will, in fact, consider an argument in an appropriate case that the agency is playing a type of "shell game," provided there is evidence showing that to be true. See slip op. at p.

[16] Petitioners previously waived their request to the extent it could be construed to apply to individual patient medical records. (R2. 230a.)

11-12 (quoting Office of Budget v. Office of Open Records, 11 A.3d 618, 623 (Pa. Commw. 2011)). Thus, the Commonwealth Court already has built a bulwark against precisely the nefarious activity that petitioners claim to be worried about. Regardless, petitioners do not claim there is any evidence of a "shell game" in this case, nor could they.[17] The Commonwealth Court therefore correctly rejected petitioners' argument.

[17] Indeed, at least some of the plans started participating in HealthChoices before the new Right-to-Know Law even was enacted. (See, e.g., R1. 368a) (testimony that United first participated in HealthChoices starting in 1989).

IV. CONCLUSION

For the foregoing reasons, respondents Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. (d/b/a UnitedHealthcare Community Plan), and HealthAmerica Pennsylvania, Inc. (d/b/a CoventryCares) respectfully request that this Court **DENY** the petitions for allowance of appeal.

Respectfully submitted,

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Dated: April 7, 2014

CERTIFICATE OF SERVICE

I, Karl S. Myers, hereby certify that on April 7, 2014, I caused the foregoing to be electronically filed with the Court, and the same day served it via First Class US Mail, postage prepaid, upon the following:

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