**IN THE SUPREME COURT OF PENNSYLVANIA**

No. 48 EAP 2014
(consolidated with Nos. 49 & 50 EAP 2014)

DENTAL BENEFIT PROVIDERS, UNITEDHEALTHCARE OF PENNSYLVANIA, AND HEALTHAMERICA PENNSYLVANIA,

*Appellees*,

v.

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

*Appellants*.

# BRIEF OF APPELLEES DENTAL BENEFIT PROVIDERS, UNITEDHEALTHCARE OF PENNSYLVANIA, HEALTHAMERICA PENNSYLVANIA, AND AETNA BETTER HEALTH

On Appeal from the February 19, 2014 Order of the Commonwealth Court, at No. 945 CD 2013, Reversing the May 7, 2013 Final Determination of the Office of Open Records, at OOR Docket No. 2012-2017

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Appellees Dental Benefit Providers, UnitedHealthcare of Pennsylvania, HealthAmerica Pennsylvania, and Aetna Better Health hereby submit their merits brief in this matter.

## I. COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This matter involves an application of the facts of this dispute to a statutory enactment. This matter therefore involves mixed questions of fact and law. With respect to purely legal questions, the Court will consider those on a *de novo* basis. Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John, ___ A.3d ___, 2014 WL 7088712, *11 (Pa. 2014) (citation omitted). But with respect to factual findings by the Commonwealth Court, this Court "will accept the [lower] court's conclusions insofar as they are supported by the record." Id. at *11.

Appellants thus misstate the applicable standard of review on page 3 of their brief. They claim this Court's review is entirely *de novo*, citing this Court's Bowling decision as support. But the holding there pertained only to the *Commonwealth Court's* standard and scope of review in Right-to-Know Law cases. See Bowling v. Office of Open Records, 75 A.3d 453, 477 (Pa. 2013) ("We hold that the Commonwealth Court correctly held that ***its*** standard of review is *de novo* and that ***its***

scope of review is broad or plenary when it hears appeals from determinations made by appeals officers under the RTKL." (emphasis added)).

Consistent with Bowling, the Commonwealth Court exercised *de novo* and plenary review of the record evidence in this case. See Dental Benefit Providers, Inc. v. Eiseman, 86 A.3d 932, 935 n.6 (Pa. Commw. 2014) (noting that Commonwealth Court will exercise independent judgment based on *de novo* review); 936 (same). Appellants even admit that the Commonwealth Court "decided the case on the basis of the record developed before the OOR." (Appellants' Br. at 6-7.)

This Court's review, on the other hand, is more narrow. As set forth above, this Court will defer to the factual findings of the Commonwealth Court, as long as they have record support.

With respect to the applicable scope of review, this Court, in cases that present mixed questions of fact and law, will consider only the record as it was established below. See In re Condemnation by Urban Redevelopment Authority of Pittsburgh, 913 A.2d 178, 183 (Pa.

2006) ("With regard to such mixed questions, we announce that we will … review the whole record.").

Applying the correct standard and scope of review, this Court should hold that the Commonwealth Court's decision, which is well-supported by the evidence in the record, must be affirmed.

## II. COUNTER-STATEMENT OF THE QUESTION INVOLVED

Does the record support the Commonwealth Court's holding that the Department of Public Welfare does not possess the rates sought, given the rates are held solely by private sub-contractors and sub-sub-contractors, and thus are not held by "a party with whom the agency has contracted," as expressly required by section 506 of the Right-to-Know Law?

*Suggested answer: Yes.*

## III. COUNTER-STATEMENT OF THE CASE

### A. Introduction

As is true with the companion Eiseman I matter, it is important to emphasize that this dispute does *not* relate to payments made by the Pennsylvania government. The Court is not asked to decide whether any amount of money or rate paid by any government entity must be disclosed under the Right-to-Know Law.

The only issue in this case is whether the Right-to-Know Law reaches rates paid to a sub-sub-contractor by a sub-contractor of a direct agency contractor. The Commonwealth Court, applying the plain terms of the Right-to-Know Law to the facts of this case, held that those rates are not in the actual or constructive possession of the Department of Public Welfare (now known as the Department of Human Services), and hence are not captured within the sweep of the Right-to-Know Law.

This decision was correct, as the rates at issue are *two full contractual steps away* from the Department. The rates are not those paid by the Department to the health plans[1] (which also have been referenced in this litigation as managed care organizations or "MCOs"). Nor are they the rates paid by the health plans to the dental sub-contractors.[2] Rather, the rates at issue are paid by the dental sub-contractors to the sub-sub-contractors – the dentists. The

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[1] The five health plans in this case are: (1) UnitedHealthcare of Pennsylvania; (2) HealthAmerica Pennsylvania (also known as CoventryCares); (3) Aetna Better Health; (4) Health Partners; and (5) Keystone Mercy Health Plan. The undersigned represents the first three.

[2] The two dental sub-contractors are: (1) Dental Benefit Providers; and (2) DentaQuest. The undersigned represents the former. United sub-contracts with Dental Benefit Providers. HealthAmerica and Aetna sub-contract with DentaQuest.

Commonwealth Court correctly found this third set of rates is not within the Department's possession under relevant statutory terms. The dental sub-contractors and health plans submit this Court should affirm that conclusion.

### B. Appellants' Right-to-Know Law Request

This case arises from a Right-to-Know Law request that appellants, an advocacy organization and one of its lawyers, directed to the Department. (R. 18a-21a.) Appellants asked for documents showing the "Provider Rates" – the rates paid by dental sub-contractors to the dentists and dental practices (the providers) for treatment of HealthChoices enrollees under age 21. (R. 21a at ¶3.)

By way of brief background,[3] the rates sought in this Eiseman II case make up the third set of downstream rates associated with the dental portion of the HealthChoices program. The first set of rates are those paid by the Department to the health plans for each HealthChoices enrollee. Those rates are not at issue here, and are no

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[3] In order to spare the Court a repetitious reading of the details of the HealthChoices program, the undersigned instead incorporates by reference that discussion from his brief submitted at docket No. 47 EAP 2014 and submitted the same day as this brief.

longer in dispute in Eiseman I. The second set of rates are those paid by the health plans to the dental sub-contractors. Those rates also are not at issue here, but are in dispute in Eiseman I.[4]

The third and final set of rates are those paid by the dental sub-contractors to the sub-sub-contractors – the dentists and dental practices (the providers). Those rates typically take the form of a fee schedule that calls for the dentist to be paid different amounts for each type of dental procedures he or she performs on a patient. These are the only rates at issue in this case. They have been referenced as the "Provider Rates."

In diagram form, the separate and independent contractual relationships and rate sets of the various parties looks like this:

**Department → Health Plan → Sub-contractor → Dentist**

Put another way, the Department, which is the agency actually subject to the Right-to-Know Law – is two full contractual

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[4] In Eiseman I, the Commonwealth Court held those rates were exempt from disclosure, principally on the basis of the "confidential proprietary information" exemption of the Right-to-Know Law. The health plans submit that decision was correct, for the reasons set forth in their companion briefing in that matter.

steps away from the relationship that generates the rates paid to the dentists who provide treatment. Those are the rates appellants seek here.

### C. The Office of Open Records Proceedings

The Department denied appellants' Right-to-Know request. Appellants took an appeal from the Department's denial to the Office of Open Records.

The dental sub-contractors and health plans timely intervened pursuant to 65 P.S. §67.1101(c), and opposed disclosure of the rates paid to the dentists. (R. 101a-102a, 105a-106.) The dental sub-contractors and health plans specifically asserted to the OOR that the rates paid by the sub-contractors to the dentists were not within the Department's possession under the Right-to-Know Law. (R. 118a, 146a-147a.)

To decide the matter, the OOR elected to accept affidavit testimony, as is OOR's custom. Each of the seven sub-contractors and health plans furnished an affidavit from a high-ranking and knowledgeable executive, attesting unequivocally that the rates were confidential and secret, and that public disclosure of the rates would

cause them competitive harm. (See, e.g., R. 125a-129a, 120a-124a, 131a-135a, 149a-153a.)

Appellants did not submit any affidavits to the OOR. Appellants therefore did not offer any witness statements to rebut the seven witness statements that were presented by the dental sub-contractors and health plans.

In spite of the unrebutted evidence presented by the dental sub-contractors and health plans, as well as the sub-contractors' and health plans' contention that the Department did not possess the rates at issue, the OOR decided that the rates were subject to the reach of the Right-to-Know Law, and were not otherwise exempt.

### D. The Commonwealth Court Reverses

The dental sub-contractors and health plans each timely appealed to the Commonwealth Court. The *en banc* court, in a thorough 21-page ruling authored by Judge Robert Simpson and decided by a nearly-unanimous 6 to 1 vote, reversed in relevant part. See Dental Benefit Providers, Inc. v. Eiseman, 86 A.3d 932 (Pa. Commw. 2014) ("Eiseman II"). The court held that the rates paid by the dental sub-contractors were not subject to the reach of the Right-to-

Know Law. Id. at 942-43. The court provided three different rationales for its holding, each of which support its conclusion.

First, the court explained that the rates were not accessible as agency records under section 901 of the Law. Id. at 936-39, 942. Second, the court reasoned that the rates were not within the Department's constructive possession under section 506 of the Law, given the Department "has no direct contractual relationship with the Subcontractors, as is necessary to reach the records containing the Provider Rates." Id. at 942; see also id. at 939-40. Third and finally, the court reasoned that the rates also were not within the Department's constructive possession because there was no *direct* relationship between the downstream rates of payment between the dental sub-contractors and dentists, on the one hand, and the services the health plans were obligated to provide to the Department, on the other.[5] Id. at 940-41, 942.

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[5] The Commonwealth Court decided this case solely on the basis of lack of agency possession. The court therefore did not reach the dental sub-contractors' and health plans' alternative arguments that the rates paid to the dentists constitute "confidential proprietary information" and "trade secrets." Id. at 942. Accordingly, if this Court disagrees with the several possession rationales offered by the Commonwealth Court, then the case would have to be remanded

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Appellants thereafter sought this Court's discretionary review, which was granted.

## IV. SUMMARY OF ARGUMENT

This Court should affirm the Commonwealth Court. This case can, and should, be summarily resolved based on a single statutory phrase: "*with whom the agency has contracted*." 65 P.S. §67.506(d)(1). That phrase, contained in the provision of the Right-to-Know Law that gives an agency constructive possession over records actually held by third parties, sets a limit on the reach of the Law. It allows the Law to grasp records actually held by a third party – but only a "party with whom the agency has contracted." In other words, the Law extends to records held by *direct* agency contractors *only*. The Law draws a bright line: records possessed by direct agency contractors are subject to the reach of the Law, while those held by sub-contractors (and sub-sub-contractors, etc.) are not. The General Assembly could have written the Law to cast a wider net. It did not do so.

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for the Commonwealth Court to conduct *de novo* review of the record evidence concerning the alternative arguments, as required by the Bowling decision.

The rates at issue here plainly and indisputably fall *outside* the clear boundary set by section 506(d)(1) of the Right-to-Know Law. The rates are not held by a direct agency contractor. Appellants even admit the rates are in contracts "to which a public agency is not a direct party." (Appellants' Br. at 14.) The rates are instead held by a *sub*-contractor with which the government has *not* directly contracted. Indeed, the rates are *two full contractual relationships away* from any direct government contract. Accordingly, they are not within the reach of the Law, as the Commonwealth Court correctly held.

As if that were not enough, the court below provided two additional grounds upon which its decision can, and should, be affirmed. The Commonwealth Court found that the rates of compensation paid by the dental sub-contractors to the dentists lacked a *direct* relationship to the services that the health plans had contracted with the Department to perform. And the court further found that the rates also were not subject to Department access under section 901 of the Law.

Appellants have no answer for these alternative rationales, each of which is rooted in the plain statutory terms of the Law. They instead resort to language in the contracts between the Department and

the health plans. But appellants misinterpret that contract language, and in any case, the contracts cannot alter the plain language of the Right-to-Know Law.

Further, as was the case with the rates at issue in Eiseman I, disclosure of the private rates sought by appellants is not even necessary. While appellants claim to champion transparency for government spending on the HealthChoices program, they have already achieved that goal. The rates actually paid by the Department for HealthChoices have been disclosed to appellants. Accordingly, they know *precisely* what the Department pays for HealthChoices. That, coupled with other information on HealthChoices that already is in the public domain (which the undersigned discussed in his Eiseman I brief), open a more than sufficient window into the program such that the infliction of competitive harm on the dental sub-contractors and health plans is completely unnecessary.[6]

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[6] While appellants point to the Department's recent "Healthy PA" submission as somehow evidencing inadequacy in HealthChoices (Appellants' Br. at 15), that submission demonstrates the opposite is true – that the Department firmly believes the HealthChoices program is working. See *Healthy Pennsylvania 1115 Application* (Feb. 19, 2014) (available at http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/c_071204.pdf), at 11 (stating, right after the sentence quoted by appellants: "Through the use of private market health

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Appellants therefore have given this Court no reason to do anything other than to affirm. The dental sub-contractors and health plans ask that this Court now do so.

## V. ARGUMENT

### A. The Department does not constructively possess the rates paid by the dental sub-contractors to the dentists under section 506 of the Right-to-Know Law.

This Court should affirm because, under the plain language of the Right-to-Know Law, the Department does not constructively possess the procedure rates paid by the dental sub-contractors to the dentists. Under the Law:

> 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.

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insurers, this [proposal] will seek to increase provider access."), and at 168 ("The Department believes that utilizing private market plans will leverage networks and pricing strategies broadly available in the commercial marketplace, thus increasing access for Healthy Pennsylvania participants.").

65 P.S. §67.506(d)(1) (emphasis added). This plain and unambiguous language explicitly requires *two* things in order for an agency to be deemed to constructively possess records actually held by a third party:

> (1) The public record must be in the possession of "a party ***with whom the agency has contracted***,"
>
> ***and***
>
> (2) The public record must "***directly relate***" to the governmental function, and not be otherwise exempt under the Law.

Because of the conjunctive "*and*" in the statute, if *either* of the two required elements is missing, then the Law will not deem the agency to constructively possess records actually held by a non-governmental third party. Here, the Commonwealth Court appropriately found *both* of the two required elements were lacking.

### 1. The dental sub-contractors are not "part[ies] with whom the [Department] has contracted."

The first section 506 element is missing here because the Department contracted with the *health plans* – and *only* the health plans – to carry out the HealthChoices program. The Department did *not* contract with the dental sub-contractors. Nor did the Department contract with the dentists. The requested rates are two full contractual

steps away from DPW. There is no dispute about any of these facts. (See, e.g., R. 121a-122a ¶¶4-9, 126a-127a ¶¶4-9, 132a-133a ¶¶4-9, 149a-153a.)

The first essential element required under the plain language of section 506 of the Law is missing. Neither the sub-contractors, nor the dentists, are "part[ies] with whom [DPW] has contracted." 65 P.S. §67.506(d)(1). There is no direct contractual relationship, as required by the statute. Section 506 of the Law therefore does not allow the Law to reach the requested rates.

The Commonwealth Court correctly determined that the Department "has no direct contractual relationship with Subcontractors, as is necessary to reach the records containing the Provider Rates through Section 506(d)." Dental Benefit Providers, Inc. v. Eiseman, 86 A.3d 932, 942 (Pa. Commw. 2014) ("Eiseman II"). This decision was correct, based on the plain language of section 506 of the Right-to-Know Law. It should be affirmed.

### a. The HealthChoices contract does not provide a basis to ignore the plain text of section 506.

Appellants offer two reasons why they think this Court should usurp the plain language of section 506. Neither argument has any merit whatsoever.

First, appellants claim that a provision in the contracts between the Department and health plans (which appellants describe as the "ready access" provision) somehow establishes Department possession over the rates paid by the sub-contractors pursuant to contracts to which the Department is not a party. (Appellants' Br. at 17-21.) Not so.

For starters, contract language cannot alter the plain terms of the Right-to-Know Law.[7] Even if it somehow could, the language that appellants seize upon does not give the Department the right to access any rates. It permits the Department only to access records "of *transactions* pertaining to the *provision of services to Recipients*." (R.

[7] Appellants concede as much. (Appellants' Br. at 21) (stating how certain contract terms are defined "does not override the disclosure requirements of the RTKL."). Appellants thus agree that contractual language is essentially irrelevant in the face of the controlling language of the Law.

234a ¶4) (emphasis added); (Appellants' Br. at 17) (quoting same language). This contract language permits the Department to access only individual patient medical records showing the dental treatment provided to an individual HealthChoices enrollee. This sensible language gives the agency the ability to ensure that an individual enrollee is receiving appropriate treatment. But this provision does *not* permit the Department to have access to *any and all* records held by a dental sub-contractor, including the sensitive and proprietary contractual rates that are confidentially negotiated between the sub-contractors and the dental providers. This is especially so where, as here, there is no evidence in the record indicating those confidential rates are contained in any individual's medical records.[8]

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[8] Rather than address the actual language used in the "ready access" provision, appellants instead concoct an absurd and unreasonable reading of the contract's definitions. Appellants correctly concede that the contract exempts "Provider Agreements" from the "ready access" requirement (and other requirements). (Appellants' Br. at 18.) The obvious purpose of that language is to remove any agreements with the providers from requirements that would apply to other lower-tier contractors. But appellants argue those requirements *do* apply when providers contract with the dental sub-contractors, rather than directly with the health plans, due to the way certain terms are defined. That is a patently absurd reading of the contract that is at odds with the evident purpose of the contract's exemption for provider agreements. It does not appear the Department has ever asserted this warped contract interpretation. And, in any case, appellants' argument does not change the fact that the "ready access" requirement reaches only patient records, not records containing rates.

Not only is the contract provision appellants rely upon patently inapplicable, they also expressly waived their request to the extent it could be construed to cover the individual patient medical records covered by that contract provision (again, the *only* records covered by that provision). Indeed, appellants categorically waived and withdrew their request to the extent it could be read as pertaining to individual patient records.[9] (R. 230a) ("Requester does not seek any documents that reveal the identity of an individual Medicaid recipient and/or his or her individual health information and, to the extent its Request could be so construed, hereby withdraws any portion of its Request that seeks such documents."). Thus, appellants voluntarily

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[9] Appellants had good reason to waive and withdraw their request in this respect, as individual medical records are expressly exempt from disclosure under the Law. See, e.g., 65 P.S. §67.708(b)(5) (exempting "[a] record of an individual's medical … status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests … or related information that would disclose individually identifiable health information."); 65 P.S. §67.708(b)(6) (exempting "personal identification information"); see also 65 P.S. §67.708(b)(5) (exempting "[a] record of … enrollment in a health care program"); 65 P.S. §67.708(b)(28) (exempting "[a] record or information" relating to an individual's application or receipt of "social services"). The dental sub-contractors and health plans asserted these provisions in their objections to disclosure submitted to the OOR. (R. 119a.)

dropped their pursuit of any records that could be covered by the very contractual language upon which they now hang their hat.

### b. Appellants' invitation for this Court to re-write section 506 of the Law should be rejected.

Second, appellants claim that "requiring a contractual relationship" between the Department and sub-contractors is a "cramped interpretation" of section 506.[10] (Appellants' Br. at 26-27.) But the plain terms of the statute *do* "requir[e] a contractual relationship" for constructive agency possession to exist. There is nothing "cramped" about reading the plain statutory words as they were written.

Appellants' argument therefore is nothing more than a complaint about how the General Assembly drafted section 506. They carp that reading this provision as it was drafted could "shield" records where sub-contractors are involved. (Appellants' Br. at 27.) But that is

[10] While appellants also seem to rely on this Court's decision in SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012), in connection with the first section 506 element, that case did not pertain to that element. There, a direct contractual relationship existed between the agency and third party contractor from which the records were sought, and as such, it was conceded that the direct contractual relationship element was satisfied. Id. at 1032. Yankees therefore does not shed any light on the first element of the section 506 test.

how the General Assembly decided to write the statute. The General Assembly could have written section 506 to reach sub-contractors, but did not. Presumably the General Assembly was well aware that government contractors often do not carry out contracted functions themselves, and often sub-contract some part of the work to other parties. One need only think about transportation and infrastructure projects, which commonly utilize a host of sub- and sub-sub-contractors. The General Assembly could have fashioned the Right-to-Know Law's constructive possession language to reach any number of those records and at any or all of the various contracting layers. It chose not to. In appellants' own words, the General Assembly chose to "shield" records beyond those held by direct government contractors.[11] The fact that appellants think this is unfair is not a legitimate reason for this Court

[11] In attempting to circumvent the clear limit imposed by the statute, appellants rely on Judge McCullough's dissent below, which opined that the rates paid by the dental sub-contractors could be reached on an "agency law" theory. (Appellants' Br. at 27.) That argument rests on the erroneous premise that any of the parties in HealthChoices act as principal or agent None do. Every contracting party is in an arm's length contract. There is no evidence supporting the theory that records may be reached on an "agency" theory.

to somehow broaden or re-write the statute to say something more pleasing to appellants.[12]

### 2. The rates paid by the dental sub-contractors to the providers do not "*directly* relate" to the function that the Department contracted the health plans to perform.

The Commonwealth Court also found that the second element of the constructive possession statute was not present here. See Eiseman II, 86 A.3d at 940-41. That statutory requirement provides:

> A public record that is not in the possession of an agency but … which ***directly relates*** to the governmental function … shall be considered a public record of the agency for purposes of this act.

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[12] Appellants also raise the specter that some ill-willed government actor could create a sub-contracting "scheme as a workaround to public scrutiny." (Appellants' Br. at 27.) Appellants even draw an analogy to criminal money laundering. (Id. at 15.) Obviously there is absolutely no evidence that the Department has done anything of the sort here. Rather, the HealthChoices program operates through health plans that engage in the common managed care practice of sub-contracting dental services to reputable entities like Dental Benefit Providers and DentaQuest. And even if some hypothetical future case did involve evidence of an agency "shell game," then the courts may consider that evidence in construing agency possession. See, e.g., Office of Budget v. Office of Open Records, 11 A.3d 618, 623 (Pa. Commw. 2011). This, of course, is not such a case.

65 P.S. §67.506(d)(1) (emphasis added). As previously noted, the Court not even reach this issue, as there is no direct contractual relationship between the Department and the dental sub-contractors, and hence the first required section 506 element is not present. But even if this Court were to consider the second element, it should affirm anyway, as the record supports the Commonwealth Court's finding on this point.

In considering this issue, the Commonwealth Court, after discussing and summarizing a series of its prior decisions, pointed out that, in order to satisfy the "directly relates" prong, the records at issue must relate to the "performance" of the contracted government function. See Eiseman II, 86 A.3d at 940. Based on the court's prior cases, it explained that the cost of obtaining goods or services does not qualify as "performance," and hence documents depicting the cost of goods or services fail to meet the section element of section 506. Id.

Based on its prior cases, the Commonwealth Court concluded that the "directly relates" prong was not present here.[13] The

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[13] Given the nature of the holding below, it should be noted that a decision by this Court to the contrary could call into question an entire line of Commonwealth Court cases construing the "directly relates" requirement as including a "performance" requirement. This includes at least one case where this Court

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court explained that while the *quality* and *availability* of HealthChoices program dental services could relate to the performance of a government function, as could the *manner* in which the dental services were be performed, the same could not be said of the *cost* of obtaining dental services. Id. Accordingly, the court held that the second prong under section 506 was not present here. It is submitted that this fact-specific holding is entitled to deference under this Court's Bowling decision, and therefore should be affirmed.

While appellants contend the decision below was inconsistent with this Court's decision in SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012) (Appellants' Br. at 25-26), the opposite is true. It bears noting, at the outset, that Yankees dealt with a situation where the records in question were sought from a *direct* government contractor that had agreed to "accept[] delegation" of the governmental duty and act as the government's "agent" – not the more attenuated situation presented here, where a sub-contractor at arm's

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denied allowance of appeal. See Allegheny County Dep't of Admin. Svcs. v. Parsons, 61 A.3d 336 (Pa. Commw. 2013), appeal denied, 72 A.3d 604 (Pa. 2013).

length did not agree to do either of those things. Id. at 1043-44. Also, applying the Yankees test, the terms of compensation between a private sub-contractor and sub-contractor are truly "ancillary" to the separate undertaking of the health plans to provide HealthChoices services to enrollees (i.e., the actual governmental function). Underscoring the point, appellants' argument that the rates are "non-ancillary" contravenes a point this Court made in Yankees: that third-party access provisions must be read narrowly so as to prevent overbroad inquiry into private records. Id. at 1042-43. The decision below was in harmony with these key points from Yankees, and therefore it should be affirmed.[14]

### B. The Department does not possess the rates paid by the dental sub-contractors to the dentists under section 901 of the Right-to-Know Law.

Finally, the Commonwealth Court held that the Department does not possess the records showing the rates paid by the dental sub-contractors to the dentists under section 901 of the Right-to-Know Law.

[14] In connection with appellants' discussion of Yankees, they also try to rely on the Commonwealth Court's decision in Lukes. (Appellants' Br. at 28-29.) For the many reasons already explained in the undersigned's companion brief in Eiseman I (filed at docket No. 47 EAP 2014 on the same day as this brief), this Court can and should ignore the Lukes decision.

See Eiseman II, 86 A.3d at 936-39. For the reasons expressed above, this conclusion was correct. The court below correctly found that the Department "does not have actual possession of the Provider Rates." Id. at 937. The court further determined "[t]here is no evidence [the Department] sought to circumvent the [Law] by placing records of its activities into the hands of a third party." Id. at 939. Finally, the court correctly found the rates are privately negotiated between the sub-contractors and dentists, and therefore they "evince a transaction of Subcontractors of the [plans], with which [the Department] has no contractual relationship." Id. at 939. These determinations were correct, are properly rooted in the record of this case, and they should be affirmed.

## VI. CONCLUSION

For the foregoing reasons, appellees Dental Benefit Providers, UnitedHealthcare of Pennsylvania, HealthAmerica Pennsylvania, and Aetna Better Health respectfully request that this Honorable Court affirm the decision of the Commonwealth Court.

Respectfully submitted,

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Dated: January 20, 2015

## CERTIFICATE OF COMPLIANCE

I, Karl S. Myers, certify that this brief complies with the length limitation of Pa.R.A.P. 2135 because this brief contains 5,021 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135.

/s/ Karl S. Myers
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Dated: January 20, 2015

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