



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
ROOM 234 HEALTH AND WELFARE BUILDING
P.O. BOX 2675
HARRISBURG, PENNSYLVANIA 17105-2675

RIGHT TO KNOW LAW OFFICE

(717) 787-3422

July 25, 2011

SENT VIA EMAIL

Mr. James Eiseman, Jr.
Public Interest Law Center of Philadelphia
United Way Building
1709 Benjamin Franklin Parkway, Second Floor
Philadelphia, Pennsylvania 19103
Email: jeiseman@pilcop.org

RE: Right-To-Know Law Request No. 11-RTKL-209

Dear Mr. Eiseman:

On June 17, 2011, the open-records officer of the Department of Public Welfare (DPW) received your written request for information. DPW is responding to your request under the Pennsylvania Right-To-Know Law, 65 P.S. §§ 67.101, et seq. (RTKL). On June 24, 2011, we notified you that DPW required an additional 30 days to respond to your request.

BACKGROUND ON THE HEALTHCHOICES PROGRAM IN SOUTHEASTERN PENNSYLVANIA.

In 25 counties of Pennsylvania, physical health services including dental services are provided through the HealthChoices Program. That program uses managed care organizations (MCOs). In "Southeastern Pennsylvania" five MCOs participate in that program:

- AmeriHealth Mercy Health Plan (AMHP)
- Keystone Mercy Health Plan (KMHP)
- Aetna Better Health (Aetna)
- HealthPartners (HP)
- United Healthcare (United)

These are referred to herein as the "SE MCOs."

Each of the SE MCOs has a contract with DPW that sets forth the MCO's contractual rights and duties. DPW makes payments to the MCOs pursuant to those contracts.

Each MCO's contract contains an appendix that sets forth the **capitation rates** for the individual SE MCO. As the name implies, capitation rates are connected to the number of members that an MCO enrolls in its network. Basically, DPW computes its monthly payment to the SE MCO by multiplying the number of recipients enrolled in the MCO's network for that month by the applicable capitation rate. (This is, of course, a simplification of the terms of the contracts that are comprised of hundreds of pages.)

DPW negotiates separately with each MCO to arrive at the agreed-upon capitation rates for that MCO. In negotiating these rates, DPW is informed by input from its actuarial contractor (Mercer) regarding upper and lower range of rates that are actuarially sound. To be acceptable, the agreed-upon capitation rate must fall within that range. However, what DPW negotiates is a comprehensive rate. Thus, DPW does **not** negotiate a separate rate for dental services, much less a rate for dental services for persons under 21 years of age. Rather, DPW's contracts with the MCOs require that the MCOs provide dental services to qualifying MA recipients enrolled in their respective networks.

Your request pertains to MCOs operating networks in southeastern Pennsylvania. In each instance, the MCO uses a subcontractor to pay for dental services, i.e., the subcontractor pays the dentists and the MCO pays the subcontractor.

DPW receives matching federal funds, known as "FFP" (federal financial participation) for expenditures made according to its State Plan for Medical Assistance and/or a waiver granted by the federal Centers for Medicare and Medicaid Services (CMS). Federal regulations require that DPW assure to the federal government a vigorous and competitive procurement process when purchasing services that are funded in whole or in part by federal funds:

- "FFP," i.e., "federal financial participation, i.e., matching federal funds, "is available only for period during which the contract ... (2) Meeting the applicable requirements of 45 CFR part 74[.]" 42 CFR § 434.70(a)(2). "CMS may withhold FFP for any period during which the State fails to meet the State plan requirements of this part." 42 CFR § 434.70(b).
- "All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition." 45 CFR § 74.43. "The recipient [i.e., DPW] shall be alert to ... noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade." Id.
- "Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient." Id.

- HealthChoices contractors were required to submit proposed rates during the contract procurement process. Obviously, rates vary among the contractors within the various rate ranges. Release of the specific capitation rates for one contractor would enable the other contractors and potential contractors to bid alike, to determine the rate ranges, to escalate the capitation rates, and thus to undermine the competitive bidding process.
- In addition, provision of the rate information would jeopardize the waiver granted by the federal government that permits the HealthChoices program to remain operational. A condition of federal approval of the HealthChoices waiver and the HealthChoices contracts themselves is that the Department has in place an open and competitive procurement and contract process. Disclosure of the capitation rates would defeat the very purpose of having potential contractors and current contractors submit and negotiate their best price(s) in order to secure or retain a contract.
- The release of the actual capitation rates would disclose competitors' prices and, inevitably, the rate ranges developed by the Department, and would be antithetical to the competitive process that is a condition of the Department's receipt of federal funds for the HealthChoices program. 42 CFR § 434.70; 45 CFR § 74.43.
- Finally, the rate information in question also constitutes "confidential" information under applicable federal law since its release would "substantially harm the competitive position" of the Department (as well as the individual contractors) and would impair our interest in maintaining the cost effectiveness of the HealthChoices Program to assure maximum federal funding for this program. As confidential information relating to the expenditure of federal funds, the rates are exempt from disclosure under federal law. 45 CFR §§ 5.65(b)(4)(ii); 74.53(f).

SPECIFICITY.

The RTKL requires that a request be made with "sufficient specificity." 65 P.S. § 67.703. If a request is not made with sufficient specificity, the agency receiving that request is not obligated to provide records in response to it. See, e.g., Pennsylvania State Police v. Office of Open Records, 995 A.2d 515 (Pa.CmwltH 2010), in which the court held that a request for "[a]ny and all records, files, or communication(s) of any kind ..." related to vehicle stops, search and seizures was insufficiently specific: "What is overbroad, though, is the first clause of the request, which begins, 'Any and all records, files, or manual(s), communication(s) of any kind....'"; "Because the valid part of the request was included in a laundry list of requested materials and because of the newness of the law, the PSP may still raise any claim that access to the manuals, if they exist, should be denied under another provision of the RTKL." The Office of Open Records (OOR) has repeatedly held that requests that use language such as "each and every document" are insufficiently specific.

YOUR FIRST REQUEST.

You asked that DPW provide you with “[e]ach and every document [that contains information relating [to] any period from January 1, 2008 until June 15, 2011], including correspondence and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates that it pays to provide dental services to Medicaid recipients under 21 years of age.”

DPW’S RESPONSE TO YOUR FIRST REQUEST.

For the reasons set forth below, your first request is denied.

The capitation rates that DPW negotiates with an individual MCO are not “public records.” As explained above, DPW conducts one-on-one negotiations with each MCO, for the purpose of arriving at agreed-upon comprehensive capitation rates.

Disclosure of the rates negotiated with the other MCOs would adversely affect DPW’s negotiations with an individual MCO, to the disadvantage of the public fisc, these rates are trade secrets of DPW and, as such, are protected by the Uniform Trade Secrets Act. 12 Pa.C.S. §§ 5301 – 5308. See, also, 65 P.S. § 67.708(b)(11).

In addition, because federal rules require that DPW’s procurement process be competitive, and because disclosure of the negotiated rates of some MCOs would cause DPW’s negotiations with another MCO to be less competitive, disclosure of these rates would risk DPW’s ability to qualify for matching federal funds. 65 P.S. § 67.708(b)(1)(i).

Therefore, to the extent that your request asks that DPW disclose these rates to you, your request is denied.

Documents that “isolate the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age.” As explained above: (i) The rates that DPW uses to make payment to the SE MCOs are comprehensive capitation rates; (ii) DPW arrives at those rates through negotiations with the individual MCOs; and (iii) the fundamental constraint on the amount of any particular negotiated rate is that it must fall within a range that is certified by DPW’s actuary to be actuarially sound. Consequently, DPW does not calculate the portion of those comprehensive capitation rates that it “pays to any Medicaid HMO to provide dental services to Medicaid recipients under 21 years of age.” Because DPW does not

make the contemplated calculations, DPW possesses no documents that are responsive to this part of your first request.¹

Your request for “appendices” containing the comprehensive capitation rates for the SE MCOs. As explained above, the capitation rates that DPW pays to any particular MCO are set forth in an appendix to that MCO’s contract with DPW. For this reason, we interpret your request for “appendices” to ask for only these appendices for each of the SE MCOs. For the reasons set forth above, these rates are not public records. Therefore, your request for these appendices is denied.

Your request for “correspondence” that sets forth the comprehensive capitation rates for the SE MCOs. You asked for copies of any “correspondence ... that sets forth any rate of payment ... that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania.” For the reasons set forth above, the rates in question are not public records and, therefore, your request for any correspondence that sets forth those rates is denied on that basis. In addition, your request for correspondence is insufficiently specific. In addition, to the extent that your request may encompass any internal correspondence, including correspondence between DPW and its actuarial contractor, that correspondence is or may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client privilege. 65 P.S. § 67.102 (definition of “public record”).

Your request for “each and every” other document. In addition to “appendices” and “correspondence,” your request asks for a copy of “each and every [other] document ... that sets forth any rate of payment ... that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania” As explained above, such requests are insufficiently specific. By way of further response, even if the instant request is sufficiently specific, the rates are DPW trade secrets and any internal documents may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client and/or attorney-work product privileges. 65 P.S. § 67.102 (definition of “public record”).

YOUR SECOND REQUEST.

You asked for “[e]ach and every document [that contain[s] information relating [to] any period from January 1, 2008 until June 15, 2011], including correspondence and appendices, in DPW’s possession, custody or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.”

¹ Your request only asks for records showing amounts that “DPW calculates it pays to provide dental services” Consequently, we interpret your request to pertain only to records containing calculations made by DPW, i.e., your request does not ask for any computations that may have been made by DPW’s actuarial contractor. Therefore, to the extent that any such records may exist, they fall outside the scope of your request. (To the extent you may have intended your request to encompass any such records, we submit it was insufficiently specific.) In addition, any such records would likely be subject to the internal predecisional deliberations exemption, set forth at 65 P.S. § 67.708(b)(10).

DPW'S RESPONSE TO YOUR SECOND REQUEST.

For the reasons set forth below, your second request is denied.

Confidential information of the SE MCOs. The focus of your second request is on the amounts that the SE MCOs pay for dental services. Each of the SE MCOs has informed DPW that those amounts are trade secrets and/or confidential proprietary information and/or are otherwise protected against disclosure. 65 P.S. § 67.708(b)(11); 12 Pa.C.S. §§ 5301 – 5308. In addition, the SE MCOs have advised DPW that the terms of the contracts that establish the relationship between DPW and the SE MCOs expressly declare that these provider rates are confidential, and that DPW is not to disclose them (or other protected information) to third parties. The agreements between the SE MCOs and their dental subcontractors providers likewise protect such information.

Your request for “appendices.” Your *first* request asked that DPW provide you with “appendices.” As explained above, we interpreted your use of that term to pertain to the appendices to DPW’s contracts with the SE MCOs. In your *second* request, you use the same term. None of the appendices to DPW’s contracts with the SE MCOs set forth the amount that the MCO “pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.” Therefore, there are no appendices that are responsive to this request. (To the extent that you may have intended your reference to “appendices” to have some other meaning, we submit that your request is insufficiently specific. By way of further response, even if the request is sufficiently specific, the information on the amounts paid by the MCOs is protected against disclosure on the grounds set forth above.)

Your request for “correspondence” is insufficiently specific. By way of further response, even if the request is sufficiently specific, the information on the amounts paid by the MCOs is protected pursuant to the grounds set forth above. In addition, any internal correspondence is or may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client privilege. 65 P.S. § 67.102 (definition of “public record”).

Your request for other records. In addition to “appendices” and “correspondence,” your request asks for a copy of “each and every [other] document ... in DPW’s possession, custody or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania.” As explained above, such requests are insufficiently specific. By way of further response, even if the request is sufficiently specific, the information on the amounts paid by the MCOs is protected pursuant to the grounds set forth above. In addition, any internal correspondence is or may be subject to the “internal predecisional deliberations” exemption set forth at 65 P.S. § 67.708(b)(10) and/or the attorney-client privilege. 65 P.S. § 67.102 (definition of “public record”).

YOUR THIRD REQUEST.

You asked for “[e]ach and every actuarial report DPW possesses [that contain[s] information relating [to] any period from January 1, 2008 until June 15, 2011] that sets forth an overall capitation rate and/or determines the ‘actuarial soundness’ of an overall capitation rate that DPW pays to any Medicaid HOM operating in Southeastern Pennsylvania, including but not limited to each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates.”

DPW’S RESPONSE TO YOUR THIRD REQUEST.

For the reasons set forth below, your third request is granted in part and denied in part.

Certification letters sent by DPW to CMS. In this request you asked for a copy of “each report DPW makes to the federal government certifying the actuarial soundness of such capitation rates.” The entity that certifies to the actuarial soundness is DPW’s actuary, Mercer. However, Mercer does not certify any particular rates. Rather, as stated in its certification letters, “Mercer certifies that the rate ranges were developed in accordance with generally accepted actuarial practices and principles” However, these letters do not set forth any particular rates. Copies of these letters will be provided to you, upon payment of the fee set forth below. These are the only documents that are responsive to your third request.

Actuarial reports that set forth “an overall capitation rate.” As explained above, DPW’s actuary certifies the soundness of a rate range. As also explained above, DPW uses that rate range in the course of negotiating capitation rates with the individual MCOs. Therefore, the actuary’s reports do not “set[] forth an overall capitation rate” and, for that reason, there are no records that fall within the scope of this part of your request.

Other actuarial records created by Mercer. DPW possesses various other records created by Mercer. To the extent that you may have intended your request to reach any of these records, we submit that your request was insufficiently specific. In addition, many of these records contain information that constitutes trade secrets or confidential proprietary information of Mercer. 12 Pa.C.S. §§ 5301 – 5308; 65 P.S. § 67.708(b)(11). In addition, to the extent that these documents are used by DPW in the course of arriving at the negotiated rates, or are otherwise used as input into DPW’s decision-making processes, these documents are subject to the predecisional deliberations exemption set forth at 65 P.S. § 67.708(b)(10).

YOUR FOURTH REQUEST.

You asked for “[e]ach and every actuarial report DPW possesses [that contain[s] information relating [to] any period from January 1, 2008 until June 15, 2011] that sets forth a capitation rate for dental services to Medicaid recipients under 21 years of age and/or determines the actuarial soundness of such capitation rates for dental services to

Medicaid recipients under 21 years of age, including but not limited to any such report DPW has made to the federal government to certify the actuarial soundness of such rates.”

DPW'S RESPONSE TO YOUR FOURTH REQUEST.

In general. Your fourth request is modeled on your third, but replaces “an overall capitation rate” with “a capitation rate for dental services to Medicaid recipients under 21 years of age.” As explained above, DPW negotiates comprehensive capitation rates with the MCOs; it does not negotiate separate dental rates. For this reason, the rate ranges that Mercer certifies are rate ranges for comprehensive capitation rates. Mercer does not certify separate rate ranges for dental rates. Therefore, to the extent that the “certification letters” provided in response to your third request are also responsive to your fourth request, this request is granted. However, to the extent that you seek other certifications that pertain specifically to dental rates, there are no records that are responsive to your fourth request.

Other actuarial records created by Mercer. DPW possesses various other records created by Mercer. To the extent that you may have intended your request to reach any of these records, we submit that your request was insufficiently specific. In addition, some of these records contain information that constitutes trade secrets or confidential proprietary information. 12 Pa.C.S. §§ 5301 – 5308; 65 P.S. § 67.708(b)(11). In addition, to the extent that these documents are used by DPW in the course of arriving at the negotiated rates, or are otherwise used as input into DPW’s decision making processes, these documents are subject to the predecisional deliberations exemption set forth at 65 P.S. § 67.708(b)(10).

YOUR FIFTH REQUEST.

You asked for “[a]ny corrective action plan or sanctions [relating [to] any period from January 1, 2008 until June 15, 2011 in which] DPW has imposed on or contracted with any Medicaid HMO for in Southeastern Pennsylvania that involves wholly, or in part, the provision of dental care to Medicaid recipients under the age of 21.”

DPW'S RESPONSE TO YOUR FIFTH REQUEST.

There are no corrective action plans or sanctions letters that fall within the scope of this request.

Pursuant to the fee provisions established by the Office of Open Records, the cost of fulfilling your request is \$7.00 (the cost of a CD). Kindly remit payment in that amount to the above address, with a check made payable to the Commonwealth of Pennsylvania by **August 15, 2011**. Under the RTKL, “[a]ll applicable fees shall be paid in order to receive access to the record requested.” 65 P.S. § 67.901.

If we do not receive full payment of the estimated amount by **August 15, 2011**, we will note that payment was not timely received and that our obligations under the RTKL are ended with regard to this request, for lack of timely payment. Further, please note that failure to pay for records made available in response to a RTKL request to any executive agency will preclude you from obtaining further records from another executive agency, pursuant to the provisions of section 901 of the RTKL and Section IV (D) of our agency RTKL Policy, as published on our website. Also, if payment is not received and you request the same records again, the request may be considered as disruptive under 65 P.S. § 67. 506(a)(1).

With regard to the records that were not produced and also with regard to the fees required for production of the records to which access was granted, you have a right to appeal this response in writing to Terry Mutchler, Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) this response;
- 2) your request; and
- 3) the reasons: why you think the record is public (a statement of the grounds you assert for the requested record being a public record); and why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at: <https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf>.

Sincerely,

Andrea Bankes

Andrea Bankes
Agency Open Records Officer