



FINAL DETERMINATION

IN THE MATTER OF	:
	:
JAMES EISEMAN AND	:
THE PUBLIC INTEREST LAW CENTER	:
OF PHILADELPHIA,	:
Complainant	:
	:
v.	:
	Docket No.: AP 2012-2017
	:
PENNSYLVANIA DEPARTMENT OF	:
PUBLIC WELFARE,	:
Respondent	:

INTRODUCTION

James Eiseman, Jr., Esq., on behalf of the Public Interest Law Center of Philadelphia, (collectively the “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Public Welfare (“Department”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), seeking records related to the Department’s administration of the Medical Assistance (“Medicaid”) program in Southeastern Pennsylvania. The Department denied the Request, citing the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§ 5301 *et seq.* (“PUTSA”), federal and state regulations, and various exemptions from disclosure under the RTKL. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On October 3, 2012, the Request was filed, seeking, for the period July 1, 2008 through June 30, 2012:

Each and every document, including contracts, rate schedules and correspondence in [the Department's] possession, custody, or control that: (a) sets forth the amount for any one or more dental procedure codes that any Medicaid HMO and/or Medicaid Dental Subcontractor pays or has paid to dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania, or (b) otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania.

Thus, the Request seeks payment rate information Medicaid insurers pay to dentists, as well as payment rate information Medicaid insurers pay to dental subcontractors and the payment rates those dental subcontractors pay to dentists. On November 13, 2012, after extending the period to respond by thirty (30) days pursuant to 65 P.S. § 67.902(b), the Department denied the Request, stating that the Department had notified five Managed Care Organizations (“MCOs”) and two dental subcontractors of the Request and that each entity had notified the Department that the requested records are exempt from disclosure. Specifically, the Department argued that the requested records are exempt pursuant to:

- PUTSA;
- Section 708(b)(11) of the RTKL (exempting from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information”);
- “[T]he Department of Health regulation that appears at 28 Pa. Code § 9.604,” and
- “[O]ther state and/or federal regulations and/or statutes.”

On December 3, 2012, the Requester timely appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal

pursuant to 65 P.S. § 67.1101(c). On December 13, 2012, the Department provided a position statement, explaining that it had notified the relevant third parties and that the third parties would be providing evidence and argument. On December 18, 2012, Dental Benefit Providers, Inc., UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan, HealthAmericaPennsylvania, Inc. d/b/a CoventryCares (collectively “Group A”) and Aetna Better Health, Inc., Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, Amerihealth Mercy Health Plan, and DentaQuest, L.L.C. (collectively “Group B”) asserted a direct interest in the records subject to this appeal and requested to participate and provide information pursuant to 65 P.S. § 67.1101(c).¹ On December 21, 2012, both requests were granted, and the OOR established a briefing schedule for the parties.

On January 14, 2013, Group A provided a position statement, along with the affidavits of Heather Cianfrocco, President of UnitedHealthcare Community & State Northeast Region; Paul Hebert, President of Dental Benefit Providers, Inc.; and Nancy Hardy, Vice President of Operations for HealthAmerica Pennsylvania, Inc. Also on January 14, 2013, Group B provided a position statement, along with the affidavits of Denise Croce, CEO of Aetna Better Health Inc.; John Sehi, Vice-President of Finance for Health Partners of Philadelphia, Inc.; William Morsell, Senior Vice-President of Keystone Mercy Health Plan; and Mark Haraway, Regional Vice President of DentaQuest, L.L.C.

On January 28, 2013, the Requester provided a position statement. Finally, on April 3, 2013, the third parties made final submissions.

¹ Group A and Group B will be collectively referred to as “the third parties,” or, alternatively “MCOs” or “dental subcontractors” respectively.

LEGAL ANALYSIS

The RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 427 (Pa. 2011). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901.

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such

proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. PUTSA does not apply

The third parties argue that the responsive records are protected from disclosure pursuant to the Pennsylvania Uniform Trade Secrets Act (“PUTSA”), 12 Pa. C.S. §§ 5301 *et seq.* However, the OOR has held that since PUTSA and the RTKL define “trade secret” identically, there “is no reason why the PUTSA should be interpreted to create a basis for withholding records independent from the RTKL.” *Eiseman v. Pennsylvania Department of Public Welfare*, OOR Dkt. AP 2011-1098, 2012 PA O.O.R.D. LEXIS 1198. As the Department has raised Section 708(b)(11) of the RTKL, which exempts from disclosure trade secrets, the OOR need not consider the merits of PUTSA here.

2. Federal and state regulations do not apply to these records

The third parties argue that responsive records are confidential pursuant to federal and state regulations. *See* 45 C.F.R. §§ 5.65(B)(4)(ii); 74.53(f); 28 Pa. Code § 9.604(a)(8). However, none of these regulations are applicable to the respondent Department of Public Welfare. The cited federal regulations pertain only to the U.S. Department of Health and Human Services. *See, e.g.*, 45 C.F.R. § 5.1 (“This part contains the rules that the Department of Health and Human Services (HHS) follows in handling requests for records under the Freedom of Information Act (FOIA”). Similarly, the cited state regulation applies only to the Pennsylvania Department of Health. *See* 28 Pa. Code § 9.602 (defining “Department” as “[t]he Department of

Health of the Commonwealth"). Therefore, none of the cited regulations prohibit the Department's disclosure of the records at issue.

3. Sections 708(b)(5), 708(b)(6), and 708(b)(28) of the RTKL are no longer at issue

On appeal, the third parties argue that some responsive records² contain "identifiable health information" and are thus exempt from disclosure pursuant to Sections 708(b)(5), 708(b)(6), and 708(b)(28) of the RTKL. However, on appeal, the Requester has limited the scope of its appeal "to those documents that set forth the fees the MCOs and/or their dental subcontractors pay dentists that do not contain any such individual identifying information or individual health information." Therefore, the applicability of these exemptions is no longer at issue.

4. The Department is required to obtain records in the possession of the dental subcontractors related to the payment rates paid to dentists

The Requester argues that records in the possession of dental subcontractors are public records required to be disclosed under the RTKL. Thus, the Requester argues that, in addition to the payment rates paid by the Department to the MCOs, and the payment rates the MCOs pay to both dental subcontractors and dentists, the Requester is also entitled to records of the payment rates paid by the dental subcontractors to dentists. Records in the possession of entities under contract with a Commonwealth or local agency to perform a governmental function may be subject to disclosure under the RTKL. *See* 65 P.S. § 67.506(d).

Section 506(d) of the RTKL states:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental

² Ms. Croce's affidavit refers to these records as "encounter files" and explains that they "contain members' names and identification numbers, listings of the health care services delivered to the member, other confidential personal and medical information relevant to the service, and the rates for the services provided."

function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1). It is undisputed that Section 506(d) is applicable to the MCOs contracting with the Department. In addition, in *Eiseman, supra*, the OOR also held that the RTKL is applicable to medical providers entering into an agreement with the MCOs to provide medical services. Thus, records related to rates paid to the dental subcontractors by the MCOs are subject to public disclosure. However, the dental subcontractors – DentaQuest, L.L.C. and Dental Benefit Providers, Inc. – argue that Section 506(d) is inapplicable to records in the possession of these subcontractors as they relate to the payment rates the dental subcontractors pay to dentists because the dental subcontractors have not contracted directly with the Department. Instead, the dental subcontractors have contracted directly with the MCOs to provide dental services. The MCOs, in turn, are under contract with the Department to provide health insurance for Medicaid beneficiaries.

The dental subcontractors argue that *Office of the Budget v. Office of Open Records* supports its position. In that case, the requester sought payroll certifications in the possession of a subcontractor for a project in the City of York, which received grant funds from the Office of the Budget (“Budget”) for the project. 11 A.3d 618 (Pa. Commw. Ct. 2011). Because there was no contract between Budget and the City of York, the OOR found that Section 506(d) was not applicable. However, the OOR held that Budget possessed the records under Section 901 of the RTKL because it had the authority and duty under the grant agreement with the City of York to ensure that subcontractors comply with the Pennsylvania Prevailing Wage Act. On appeal, the Commonwealth Court reversed, holding that an interpretation that records “not in the possession of a government agency and not related to a contract to perform a governmental function ... are

disclosable to the public if any government agency has a legal right to review those records ... would greatly broaden the scope of the RTKL beyond its explicit language.” *Id.* at 623.

Office of the Budget is inapplicable to the present matter for two reasons. First of all, that case did not involve Section 506(d) of the RTKL. Secondly, the records at issue here *do* relate to a contract to perform a governmental function. The Department has contracted with the MCOs to provide medical services under the Medicaid program, and those MCOs have in turn subcontracted with the dental subcontractors to provide dental services to Medicaid recipients. The fact that the MCOs would in turn hire subcontractors is clearly contemplated by the agreements between the Department and the MCOs, wherein the Department “has ready access to any and all documents and records of transactions pertaining to the provision of services to Recipients,” including those records in the possession of the dental subcontractors.

The OOR finds that Section 506(d) is applicable to records in the possession of the dental contractors. While the Department does not contract directly with the dental subcontractors, the dental subcontractors contract with the MCOs to perform services for the Department. Because the records sought directly relate to a governmental function being performed by the dental subcontractors, these records should be subject to public access. The OOR finds that any other interpretation would frustrate the intent of Section 506(d) by making records showing how public monies are spent unavailable to the public even though they directly relate to a governmental function and a contract with a governmental agency.

5. Section 708(b)(11) does not protect these records from disclosure

The Department and the third parties argue that the requested records are exempt from disclosure as confidential proprietary information and trade secrets. Section 708(b)(11) of the RTKL exempts from disclosure records that reveal “trade secrets” or “confidential proprietary

information.” *See* 65 P.S. § 67.708(b)(11). These terms are defined in Section 102 of the RTKL as follows:

Confidential proprietary information: Commercial or financial information received by an agency: (1) which is privileged or confidential; **and** (2) the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.

Trade secret: Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to and not being readably ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; **and** (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102 (emphasis added). An agency must establish that both elements of these two-part tests are met in order for the exemption to apply. *See Sansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *see also Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information).

In *Eiseman, supra*, the OOR found that the direct interest participants, which included some of the third parties participating in the present appeal, did not meet their burden of proving that provider rates are exempt from disclosure pursuant to Section 708(b)(11). In making that determination, the OOR relied on *Lukes, supra*. In that case, decided under the prior Right-to-Know Law, the Commonwealth Court found that provider agreements disclosing payment rates did not constitute trade secrets. Specifically, the Court found:

[T]here is no basis on upon which to conclude that the Provider Agreements, which the [insurance company] entered into with provider hospitals at the direction of DPW for the disbursement of public funds, are trade secrets. While the Interveners presented evidence that the Provider Agreements contain confidentiality provisions and are not known outside of the [insurance company and hospitals], a party that voluntarily participates in a public program and is receiving and disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded

from public scrutiny. The threat of competition ... is insufficient to invoke an exemption ... from disclosure.

Id. at 626-27.

The third parties argue that the OOR incorrectly relied upon *Lukes* in *Eiseman*, and that, therefore, *Eiseman* should not apply to the present appeal. However, the OOR will not overturn *Eiseman* and instead finds that the reasoning in *Eiseman* is applicable to the present appeal. Here, like in *Eiseman*, the third parties have provided numerous affidavits attesting to the steps taken to keep the requested information secret and confidential. However, the third parties have not established that they would suffer “substantial harm” if this information was disclosed, or that the information derives economic value from not being generally known to competitors.

The third parties attest that they each take measures to keep rate information confidential. Further, the third parties attest that the “harm” that they will suffer if this rate information is released is competition from competitors. For example, the Croce, Sehi, Morsell, and Haraway affidavits attest that release of this rate information could: 1) enable competitors to “undercut” their businesses, and 2) “cause the providers [i.e., dentists] to seek higher rates.” Likewise, the Cianfrocco, Hardy, and Hebert affidavits attest that disclosure of this rate information “would offer solid parameters by which competitors could refine their own pricing strategies in an effort to win business away.” However, these affidavits go on to explain that “[r]ates vary by dental practice and are based on a variety of factors, including but not limited to the need for the practice in the network, the number of existing Medical Assistance enrollees that are patients of the practice, and the types of services rendered (i.e., general dentistry, pediatric dentistry, etc.)” and that “[t]he rates are also reevaluated and possibly renegotiated periodically.”

While the OOR understands that the third parties consider rate information confidential, like in *Lukes*, “[t]he threat of competition ... is insufficient to invoke an exemption ... from

disclosure.” *See Lukes, supra.* The third parties have shown that the rates paid to dentists change periodically, or are at least “reevaluated.” As such, there is no evidence demonstrating how disclosure of this information undermines the parties’ present competitive positions or has present economic relevant or value, as the information may very well may be “outdated” by the time of its release. Accordingly, the OOR finds that the requested information does not constitute a trade secret or confidential proprietary information and that the third parties failed to meet the burden of proving that this information is exempt from disclosure pursuant to Section 708(b)(11) of the RTKL. *See* 65 P.S. § 67.708(a)(1); *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011) (“[W]e believe it equally appropriate under the law to place the burden on third-party contractors . . .”). Accordingly, the appeal is granted.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Department is required to disclose all responsive records to the Requester within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: May 7, 2013

A handwritten signature in black ink that reads "Kyle Appelquist". The signature is cursive and fluid, with "Kyle" on top and "Appelquist" below it, both starting with a capital letter.

APPEALS OFFICER
KYLE APPLEGATE, ESQ.

Sent to: James Eiseman, Jr., Esq. (via e-mail only);
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