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2017]

I FIND YOUR LACK OF A CONTRACT DISTURBING:  
PENNSYLVANIA LIMITS THE FORCE OF RIGHT TO KNOW  
LAW OVER MEDICAID SUBCONTRACTORS IN  
*DENTAL BENEFIT PROVIDERS, INC. v. EISEMAN*

PAMELA PUTNAM\*

“Secrecy is the linchpin of abuse of power . . . its enabling force.  
Transparency is the only real antidote.”<sup>1</sup>

I. INTRODUCTION: PRIVATIZATION CREATES A GREAT DISTURBANCE  
IN THE FORCE

In recent decades, state and local governments have increasingly turned to private contractors to carry out an ever-widening variety of government functions.<sup>2</sup> Depending on the community, many services traditionally provided by government—everything from public welfare programs to schools and prisons—are now delivered or operated by private entities on the government’s behalf.<sup>3</sup> Many scholars predict this trend will continue as cash-strapped legislatures, motivated by faith in mar-

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\* J.D. Candidate, 2018, Villanova University Charles Widger School of Law. This Note is dedicated to my friends and family who have supported me throughout my life and law school career. I would like to thank all those at the *Villanova Law Review* who provided valuable guidance and feedback while I was writing this Note, especially Elizabeth Flanagan, Rebecca Feuerhammer, Shane O’Halloran, Jillian Hart, Lauren Anthony, and Bob Turchick. I would also like to thank Laval Miller-Wilson of the Pennsylvania Health Law Project, who first introduced me to the *Eiseman* cases. The headings used throughout this Note were inspired by themes and dialogue from the *Star Wars* movie franchise.

1. GLENN GREENWALD, *NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE* 12 (2014).

2. See Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1451 (2009) (noting growing trend of privatization among state and local governments); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (“Privatization is now virtually a national obsession.”).

3. See Frankel, *supra* note 2, at 1451–52 & nn.13–20 (listing examples of “core government services” that have been privatized at state and local levels, including “operating prisons, providing medical care to prisoners, administering welfare and public benefits programs, processing parking tickets, providing private security services, collecting government debts, fighting fires, and overseeing foster care and child placement programs” (footnotes omitted)); Metzger, *supra* note 2, at 1377–94 (discussing several examples of privatization, including “Medicare and Medicaid managed care,” “private prisons,” “reliance on privatization” to run welfare programs such as TANF, Head Start, homeless shelters, and food banks, and increasing private control over public education due to charter schools, “education management organizations [ ], and voucher programs”).

ket-based solutions, look for new ways to reduce costs and improve efficiency.<sup>4</sup>

Pennsylvania is no exception to this privatization trend.<sup>5</sup> Beginning in 1997, Pennsylvania privatized its Medicaid delivery system, switching most Medicaid recipients from a traditional fee-for-service model to a managed care model, where the state contracts with private health insurance companies to administer Medicaid services through their provider networks.<sup>6</sup> As of July 2015, approximately 70%

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4. See Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 829 (2000) ("As governments continue to have difficult financial times, contracting out has become a widely considered option." (footnote omitted)); Metzger, *supra* note 2, at 1379 ("Privatization seems likely only to expand further in the near future, fueled by increasing belief in market-based solutions to public problems." (citing Martha Minnow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1240 (2003))).

5. See, e.g., Kate Giammarise, *State Prisons Could Outsource More Mental Health Services*, PITT. POST-GAZETTE (May 24, 2013, 7:51 PM), <http://www.post-gazette.com/news/state/2013/05/24/State-prisons-could-outsource-more-mental-health-services/stories/201305240175> [<https://perma.cc/2YCK-SQRD>] (discussing legislative proposal to outsource up to 187 mental health jobs from Pennsylvania Department of Corrections to private contractors); Julia Terruso, *State Says DHS Should Trim Staff*, PHILA. INQUIRER (Aug. 23, 2016, 1:08 AM), [http://www.philly.com/philly/news/20160823\\_State\\_says\\_DHS\\_should\\_trim\\_staff.html](http://www.philly.com/philly/news/20160823_State_says_DHS_should_trim_staff.html) [<https://perma.cc/BL6F-5Q56>] (discussing transfer of child and family service case management responsibilities from Philadelphia Department of Human Services to private community-based contractors).

6. See PA. DEP'T OF PUB. WELFARE, MED. ASSISTANCE BULLETIN NO. 99-96-08, IMPLEMENTATION OF THE HEALTHCHOICES PROGRAM 1 (1996) (announcing implementation of HealthChoices, Pennsylvania's mandatory managed care program). Pennsylvania implemented mandatory managed care in phases by region, beginning with the greater Philadelphia area in 1997 and ending with the northeast Pennsylvania region in 2013. See *id.* (announcing implementation of HealthChoices in five counties surrounding Philadelphia); see also PA. DEP'T OF PUB. WELFARE, MED. ASSISTANCE BULLETIN NO. 99-13-02, HEALTHCHOICES PHYSICAL HEALTH MANAGED CARE NEW EAST ZONE EXPANSION 1 (2013) (announcing implementation of HealthChoices in twenty-two counties in northeastern Pennsylvania effective March 2013); PA. DEP'T OF PUB. WELFARE, MED. ASSISTANCE BULLETIN NO. 99-12-08, HEALTHCHOICES PHYSICAL HEALTH MANAGED CARE NEW WEST ZONE EXPANSION 1 (2012) (announcing implementation of HealthChoices in thirteen counties in northwestern Pennsylvania effective October 1, 2012); PA. DEP'T OF PUB. WELFARE, MED. ASSISTANCE BULLETIN NO. 99-97-08, HEALTHCHOICES SOUTHWEST MANDATORY MANAGED CARE PROGRAM IMPLEMENTATION SCHEDULE 1 (1997) (announcing expansion of HealthChoices to Allegheny, Armstrong, Beaver, Butler, Fayette, Greene, Indiana, Lawrence, Washington, and Westmoreland counties beginning January 1999).

Under a fee-for-service model, the government pays healthcare providers directly for each service provided. See Metzger, *supra* note 2, at 1380 (explaining differences between fee-for-service and managed care models). Under managed care, the government pays a managed care organization (MCO), usually a private insurance company, a flat rate for each Medicaid beneficiary they enroll. See *id.* at 1380-81. Because the MCO receives the same capitated rate regardless of the services provided, this approach incentivizes MCOs to prioritize preventative services and cut down on unnecessary procedures or services. See *id.* at 1380-82.

of Pennsylvania Medicaid recipients were enrolled in a managed care plan.<sup>7</sup>

Some observers are concerned that increasing privatization will lead to less transparency with regard to the activities of publicly funded programs.<sup>8</sup> These commentators warn that although all fifty states have freedom of information laws providing for public access to certain government records, most of these statutes “do not explicitly grant access to documents that are in the hands of private entities.”<sup>9</sup> As a result, information that was once available to the media and the general public could become unavailable unless states update their freedom of information statutes.<sup>10</sup>

At least one scholar has argued that where legislatures are unable or unwilling to amend their statutes, courts must step in and enforce the spirit of freedom of information laws through judicial interpretation.<sup>11</sup>

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7. See VERNON K. SMITH ET AL., *MEDICAID REFORMS TO EXPAND COVERAGE, CONTROL COSTS AND IMPROVE CARE: RESULTS FROM A 50-STATE MEDICAID BUDGET SURVEY FOR STATE FISCAL YEARS 2015 AND 2016*, KAISER FAM. FOUND. 29 tbl.5 (Oct. 2015).

8. See, e.g., Feiser, *supra* note 4, at 826 & nn.3–5 (opining that unless right-to-know statutes are updated, states could shield records from the public by transferring them to private companies); John L. Gedid, *Pennsylvania's 2008 Right to Know Law: Open Access at Last*, 49 DUQ. L. REV. 459, 474 (2011) (expressing concern that overly general provisions of Pennsylvania's Right to Know Law will give agencies incentive to withhold records); accord Frankel, *supra* note 2, at 1452 (“As governments continue to delegate public functions to private companies, it is critically important to determine the appropriate set of background rules against which privatization takes place in order to ensure that private companies give proper respect to public values . . .”); Sarah Somers & Jane Perkins, *Sunshine and Accountability: The Pursuit of Information on Quality in Medicaid Managed Care*, 5 ST. LOUIS U. J. HEALTH & POL'Y 153, 154–55 (2011) (emphasizing “urgent need” for public access to information on healthcare spending and quality in Medicaid managed care programs).

9. See Feiser, *supra* note 4, at 826 (warning that failure to amend freedom of information statutes could undermine public access to information); see also *id.* at 835 (noting legislatures “overwhelmingly . . . have not accounted for the privatization trend”).

10. See *id.* at 826, 834 (summarizing fears raised by press members and efforts by media to push for updates to freedom-of-information statutes).

11. See, e.g., *id.* at 835 (observing that “as long as some legislatures remain silent on the issue, state courts will face decisions that require balancing the arguments and staying in tune with the spirit of the access laws . . . [T]he courts must tackle the issue in the absence of statutory amendments”); see also Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19, 22, 41 (2013) (noting “[i]n reality, the courts have had to do the heavy lifting” of interpreting freedom of information statutes and advocating “public good” standard for determining public access to non-public entity records); Gedid, *supra* note 8, at 474 (“One can only hope that [Pennsylvania] courts will construe the RTKL in a manner that is consistent with the legislative intent . . .”). Feiser advocates for judicial action in the absence of legislative action. See Feiser, *supra* note 4, at 835. Feiser surveys the variety of approaches taken by state courts confronted with gaps or ambiguities in their respective public access statutes. See generally *id.* at 835–61. Some states have taken more flexible approaches, permitting access where an entity performs a “public function,” or where the public nature of the records or the “totality of the factors”

The Supreme Court of Pennsylvania declined to take such an approach when it recently considered the reach of Pennsylvania's Right to Know Law (RTKL) with regard to the records of Medicaid contractors and subcontractors.<sup>12</sup> In *Department of Public Welfare v. Eiseman*<sup>13</sup> (*Eiseman I*), the court held that records revealing rates paid by Medicaid contractors to dental subcontractors, or directly to health care providers, were public records subject to disclosure under the RTKL.<sup>14</sup> However, in the companion case of *Dental Benefit Providers, Inc. v. Eiseman*<sup>15</sup> (*Eiseman II*), the court concluded the RTKL did *not* permit access to records showing the rates paid by dental subcontractors to individual dental providers because there was no direct contractual relationship between the subcontractors and a government agency.<sup>16</sup>

Although the holding in *Eiseman I* would appear to be a win for transparency, the court's reasoning, especially in *Eiseman II*, substantially limits the reach of the RTKL with regard to subcontractor records.<sup>17</sup> This Note discusses the important limitations of the RTKL highlighted by *Eiseman I* and *Eiseman II* and the implications of the decisions.<sup>18</sup> Part II provides

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supports public disclosure of the records. *See id.* at 837–53 (providing detailed examples of “flexible approaches” taken by state courts). Other states, Feiser concludes, have adopted more restrictive standards, requiring a certain amount of public funding, limiting the applicability of statutes to entities created by the legislature or previously determined to be subject to public information laws, or requiring some kind of possession or control of the records by a government agency. *See id.* at 853–60 (discussing state courts taking restrictive approaches to applying public records laws to private entities).

12. *See generally* *Dental Benefit Providers v. Eiseman (Eiseman II)*, 124 A.3d 1214, 1223 (Pa. 2015) (holding records of Medicaid subcontractors not subject to disclosure under RTKL and suggesting legislative action needed to address availability of subcontractor records).

13. 125 A.3d 19 (Pa. 2015).

14. *See id.* at 29–32 (concluding requested records were “financial records” subject to disclosure under RTKL). For further discussion of the court's reasoning in *Eiseman I*, see *infra* notes 106–16 and accompanying text.

15. 124 A.3d 1214 (Pa. 2015).

16. *See id.* at 1223 (announcing court's holding). For full discussion of the court's rationale in *Eiseman II*, see *infra* notes 117–29 and accompanying text.

17. *See* PUB. INT. L. CTR., *Case Updates: Pa. Supreme Court Rules Medicaid Payment Records Must Be Released to Public*, <http://www.pilcop.org/pa-supreme-court-rules-medicaid-payment-records-must-be-released-to-public/> [https://perma.cc/WD9G-US2N] (last visited Apr. 2, 2017) (characterizing *Eiseman I* decision as “an important win for transparency and accountability” (internal quotation marks omitted) (quoting Benjamin Geffen, Staff Attorney for Public Interest Law Center)); *see also Eiseman II*, 124 A.3d at 1223 (requiring contractual relationship for access to third-party records); *Dep't of Pub. Welfare v. Eiseman (Eiseman I)*, 125 A.3d 19, 33 (Pa. 2015) (declining implicitly to follow prior cases interpreting reach of RTKL broadly). For fuller explanation of how *Eiseman I* and *Eiseman II* limit the reach of the RTKL, see *infra* notes 130–53 and accompanying text.

18. See *infra* notes 130–63 and accompanying text for full analysis of the *Eiseman* decisions and their real-world impact.

background on the RTKL and relevant case law.<sup>19</sup> Part III recounts the facts and procedural history of *Eiseman I* and *Eiseman II*.<sup>20</sup> Part IV discusses how the Supreme Court of Pennsylvania arrived at its holding in each case.<sup>21</sup> Part V provides a critical examination of the court's reasoning in both cases with a particular emphasis on its rationale in *Eiseman II*.<sup>22</sup> Lastly, Part VI discusses the real-world impact of the *Eiseman I* and *Eiseman II* decisions and supports legislative action to revise the RTKL to permit access to subcontractor records.<sup>23</sup>

## II. THE RTKL AWAKENS: HISTORY OF THE PENNSYLVANIA RIGHT TO KNOW LAW

Pennsylvania's RTKL was initially passed in 1957.<sup>24</sup> Since then, the legislature has expanded the reach of the RTKL with major amendments in 2002 and 2008.<sup>25</sup> The 2008 RTKL, in particular, significantly broadened the categories of records considered public.<sup>26</sup> However, Pennsylvania courts applying the 2008 RTKL have frequently done so in ways that actually restrict, rather than expand, public access to records of government contractors and subcontractors.<sup>27</sup>

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19. For background information on the statutory provisions and case law relevant to the issues discussed in *Eiseman I* and *Eiseman II*, see *infra* notes 28–78 and accompanying text.

20. For a full discussion of the facts and proceedings leading up to the *Eiseman I* and *Eiseman II* decisions, see *infra* notes 79–101 and accompanying text.

21. For an explanation of the court's reasoning in *Eiseman I*, see *infra* notes 106–16 and accompanying text. For discussion of the court's reasoning in *Eiseman II*, see *infra* notes 117–29 and accompanying text.

22. For a critical analysis of the court's holdings in *Eiseman I* and *Eiseman II*, see *infra* notes 130–53 and accompanying text.

23. For discussion of the practical impact of the *Eiseman* decisions, see *infra* notes 154–63 and accompanying text.

24. See Gedid, *supra* note 8, at 461 (introducing history of RTKL). For additional historical background on the 1957 RTKL, see *infra* notes 28–30 and accompanying text.

25. See *id.* at 463–68 (discussing 2002 and 2008 amendments to RTKL). For fuller discussion of the 2002 and 2008 amendments to the RTKL and their impact, see *infra* notes 31–40 and accompanying text.

26. See generally Gedid, *supra* note 8, at 465–68 (discussing 2008 amendments to RTKL). For further analysis of the impact of the 2008 amendments to the RTKL, see *infra* notes 33–40 and accompanying text.

27. See, e.g., Office of the Budget v. Office of Open Records, 11 A.3d 618, 623 (Pa. Commw. Ct. 2011) (holding payroll records of government subcontractor were not subject to disclosure under RTKL because they were not within agency's possession and determining agency's right to audit records did not establish possession); Buehl v. Office of Open Records, 6 A.3d 27, 31 (Pa. Commw. Ct. 2010) (holding prison contractor's records showing purchase of items for prison commissary were not subject to disclosure under RTKL because they did not directly relate to its contract with Pennsylvania Department of Corrections).

A. *A Long Time Ago in a Legislature Far, Far Away . . .*

Pennsylvania originally passed its RTKL in 1957 in order to provide public access to certain enumerated categories of public records.<sup>28</sup> These included “[a]ny account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials equipment or other property.”<sup>29</sup> In 2002, the Legislature made significant amendments to the RTKL in an effort to address weaknesses in the 1957 statute.<sup>30</sup> While the earlier statute left agencies significant discretion in how or whether they handled RTKL requests, 2002 amendments established a procedure for processing RTKL requests and expanded the definition of records to include electronic files.<sup>31</sup> Importantly, however, the legislature retained the same definition of public records as the 1957 statute.<sup>32</sup>

B. *2008 RTKL Brings a New Hope*

In 2008, the legislature replaced the previous RTKL with an expanded version that significantly broadened the categories of records subject to public disclosure.<sup>33</sup> Under the current RTKL, a “public record” subject to disclosure includes any “record, including a financial record, of a Commonwealth or local agency” that is not privileged, subject to one of several exceptions enumerated in the statute, or otherwise exempt under a separate state or federal law.<sup>34</sup> Notably, the definition of “financial record” is virtually identical to the statutory definition of a public record under the 2002 RTKL; thus, the 2008 definition of public records incorpo-

28. See Gedit, *supra* note 8, at 461 (summarizing 1957 RTKL).

29. 65 PA. STAT. AND CONS. STAT. ANN. § 66.1 (West 2007) (repealed 2008) (defining “public record”).

30. See Gedit, *supra* note 8, at 463–65 (summarizing weaknesses addressed by 2002 Amendments to RTKL). Gedit notes several issues with the 1957 RTKL, most notably that it put the burden on the requester to prove that the records were public and that the need for public access outweighed any exceptions raised by the agency. See *id.* at 461 (discussing “balancing test” applied by courts under 1957 RTKL). Moreover, the statute had no penalties to deter agencies from arbitrarily denying RTKL requests or imposing onerous limitations on how the public could access records. See *id.* at 462.

31. See *generally id.* at 464 (describing 2002 RTKL amendments). The 2002 RTKL required agencies to cooperate with RTKL requests in “good faith,” in a timely manner, and to provide a written explanation of any decision to deny a request. See *id.* Additionally, the 2002 RTKL provided for an appeals procedure. See *id.* at 464–65.

32. See 65 PA. STAT. AND CONS. STAT. ANN. § 66.1 (West 2007) (repealed 2008) (defining “public record”).

33. See Gedit, *supra* note 8, at 466 (describing important changes to statutory definitions of “record” and “public record”); see also 65 PA. STAT. AND CONS. STAT. ANN. §§ 67.101–67.3104 (West 2016) (superseding Sections 66.1–66.9 effective February 14, 2008).

34. See 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 (providing definition of “public record”); see also *id.* § 67.708(b) (enumerating various categories of information exempt from disclosure).

rates a large category of documents that already would have been considered public under the previous statute.<sup>35</sup> The 2008 statute expands the reach of the prior RTKL even further by broadly defining a “record” as any “[i]nformation . . . that documents a transaction, business or activity of the agency.”<sup>36</sup>

Under Section 305(a) of the 2008 RTKL, “record[s] in the possession of a Commonwealth agency or local agency shall be presumed to be [ ] public record[s].”<sup>37</sup> Additionally, under Section 506(d)(1), records “in the possession of a party with whom the agency has contracted to perform a governmental function” are considered public records if they “directly relate [ ] to the governmental function.”<sup>38</sup> Section 708(b) exempts various categories of records from disclosure under the RTKL, including “trade secrets and confidential proprietary information.”<sup>39</sup> However, these exceptions do not apply to financial records.<sup>40</sup>

### C. *Don’t Get Technical with Me! Pennsylvania Courts Take on 2008 RTKL*

Pennsylvania courts applying the 2008 RTKL have acknowledged the need to interpret the statute broadly in light of its objective of promoting

35. Compare *id.* § 66.1 (repealed 2008) (defining “public record”), with *id.* § 67.102 (defining “financial record”). See also *Dep’t of Pub. Welfare v. Eiseman*, 85 A.3d 1117, 1134 (Pa. Commw. Ct. 2014) (McCullough, J., dissenting) (noting current definition of “financial record” “duplicates verbatim the definition of a ‘public record’” under prior statute).

36. See 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 (defining “record”); see also Gedit, *supra* note 8, at 466–67 (observing that under this broad definition, “virtually any information item . . . constitutes a record, as long as it is connected to the duties of the agency”).

37. See 65 PA. STAT. AND CONS. STAT. ANN. § 67.305(a) (establishing presumption of openness for records in possession of agency).

38. *Id.* § 67.506(d)(1). The exact language of Section 506(d)(1) is as follows: 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.

*Id.*

39. See *id.* § 67.708(b)(11) (exempting from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information”). Other categories of records exempt under Section 708(b) include: records that could create a security risk to public events, public buildings, infrastructure, or computer systems; records revealing various types of personal medical, financial, identification, or contact information for either public employees or beneficiaries of public services; certain types of employment records of public employees; several types of internal drafts or other unpublished work product reflecting pre-decision deliberations of agencies; academic transcripts; certain records related to criminal and noncriminal investigations; DNA records; autopsy reports; library records; draft minutes of agencies; communications between agencies and their insurance carriers; and certain communications between general assembly members and constituents. See generally *id.* § 708(b).

40. See *id.* § 708(c) (“The exceptions set forth in subsection (b) shall not apply to financial records . . .”).

greater transparency.<sup>41</sup> However, when faced with third-party records, courts have frequently chosen to read the 2008 RTKL in a way that actually restricts access to records of private contractors and subcontractors.<sup>42</sup> This restrictive reading is a shift from the more policy-oriented approach taken by courts under the 1957 and 2002 statutes.<sup>43</sup> The only prior deci-

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41. See, e.g., *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) (“The Commonwealth Court has aptly recognized that courts should liberally construe the RTKL to effectuate its purpose of promoting ‘access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.’” (quoting *Allegheny Cty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011))); *A Second Chance, Inc.*, 13 A.3d at 1037 (“[T]he General Assembly clearly and unambiguously contemplated that all ‘public records,’ regardless of where they are located, should be accessible to the public.”).

42. See, e.g., *In re Venango Cty. Tourism Promotion Agency*, 83 A.3d 1101, 1110 (Pa. Commw. Ct. 2014) (holding contractual relationship between agency and third party required in order to access third-party records); *W. Chester Univ. of Pa. v. Browne*, 71 A.3d 1064, 1068 (Pa. Commw. Ct. 2013) (holding contractor’s employee benefits plans did not constitute records under RTKL because they were unrelated to its contract with public university); *Allegheny Cty. Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336, 346 (Pa. Commw. Ct. 2013) (holding employee records belonging to county’s social services contractor were not subject to disclosure under Section 506(d)(1) of RTKL because they did not directly relate to its performance of services for county); *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011) (holding independent contractor agreements between government contractor and individual interpreters did not constitute public records under RTKL where interpreters did not actually perform translation services under contract); *A Second Chance*, 13 A.3d at 1035 (finding employee information belonging to social services contractor did not constitute public records under Section 305(a) or Section 102 of RTKL because contractor created, possessed, and owned information sought); *Honaman v. Twp. of Lower Merion*, 13 A.3d 1014, 1023 (Pa. Commw. Ct. 2011) (holding tax records in possession of township tax collector were not subject to disclosure under RTKL because tax collector was not agency subject to RTKL and records were not in possession of township); *In re Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011) (holding records stored on private computer of township commissioner reflecting township business were not subject to disclosure under RTKL because commissioner did not constitute government agency); *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 623 (Pa. Commw. Ct. 2011) (holding statutory presumption that records within agency’s possession are public records does not extend to all records within agency’s custody and control); *Buehl v. Office of Open Records*, 6 A.3d 27, 31 (Pa. Commw. Ct. 2010) (holding prison contractor’s records showing prices paid for items purchased for resale in prison commissary were not public records because they did not directly relate to contract with department). *But see* *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1043–44 (Pa. 2012) (holding concessions bids in possession of private contractor constituted public records where contractor managed county-owned baseball stadium as agent of county-created stadium authority); *Barkeyville Borough v. Stearns*, 35 A.3d 91, 97 (Pa. Commw. Ct. 2012) (finding private emails sent between borough council members related to borough business constituted public records).

43. See, e.g., *Tribune-Review Publ’g Co. v. Westmoreland Cty. Hous. Auth.*, 833 A.2d 112, 120 (Pa. 2003) (holding settlement agreement negotiated and possessed by third-party insurer on behalf of housing authority constituted public record under 1957 RTKL); *Sapp Roofing Co., Inc. v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 12*, 713 A.2d 627, 630 (Pa. 1998) (holding private contractor’s

sion addressing the applicability of Pennsylvania's RTKL to Medicaid contractors was *Lukes v. Department of Public Welfare*,<sup>44</sup> which was decided under the 2002 statute using this earlier, policy-oriented approach.<sup>45</sup>

1. *Presumption of Openness Under Section 305(a)*

The Supreme Court of Pennsylvania has interpreted Section 305(a) of the 2008 RTKL as a signal of the legislature's intent to "[expand] government transparency through public access to documents."<sup>46</sup> The effect

payroll records submitted pursuant to school district project constituted public records because they evidenced disbursement of funds by school district); *Associated Builders & Contractors, Inc. v. Pa. Dep't of Gen. Servs.*, 747 A.2d 962, 965 (Pa. Commw. Ct. 2000) (holding subcontract between construction management contractor and insurance broker was public record under 1957 RTKL); *Morning Call, Inc. v. Lower Saucon Twp.*, 627 A.2d 297, 300 (Pa. Commw. Ct. 1993) (holding settlement agreement between township and private party was public record under 1957 RTKL and disbursement of settlement payments by township's insurer did not change public character of funds).

In *Associated Builders*, the Commonwealth Court considered whether the Pennsylvania Department of General Services was obligated to disclose certain insurance agreements between one of the department's contractors and the contractor's insurer. *See Associated Builders & Contractors, Inc.*, 747 A.2d at 966. The department argued it was not party to the agreements between the contractor and its insurer, and therefore, the agreements were not public records. *See id.* The court disagreed, observing that "an agency may not shield a public document from disclosure by contracting with a third party that subsequently disperses the government funds. By paying through a third party, an agency does not change the character of those funds from public to private." *See id.* at 965 (citing *Morning Call, Inc.*, 627 A.2d at 300-01).

In *Tribune-Review Publishing Co.*, the Supreme Court of Pennsylvania permitted access to a civil rights settlement agreement prepared by the housing authority's insurer, even though the agreement was not in the authority's possession. *See Tribune-Review Publ'g Co.*, 833 A.2d at 120-21. The court reasoned that if records in the possession of an agency's insurer did not constitute public records, then agencies could shield records from the RTKL simply by having them prepared by an insurer or insurer's attorney. *See id.* at 118. Moreover, the court found that the insurer acted as the agent of the housing authority. *See id.* at 120.

44. 976 A.2d 609 (Pa. Commw. Ct. 2009).

45. *See id.* at 623, 625-26 (concluding provider agreements between Medicaid contractor and healthcare providers constituted public records because they were "the product of [an] agency relationship between DPW and the [Medicaid contractor]" and "reflect[ed] the disbursement of public funds in a public program"). For additional analysis of the *Lukes* decision, see *infra* notes 72-78 and accompanying text.

46. *See Levy*, 65 A.3d at 381 (inferring legislative intent from "significant [policy] changes" made in 2008 statute); *accord Gedid*, *supra* note 8, at 468 ("[I]t should be difficult to miss or mistake the legislative intent to drastically enlarge the definition and scope of the term 'public record.'").

In *Levy*, the Supreme Court of Pennsylvania considered a RTKL request by a journalist seeking contracts and billing records from the Pennsylvania State Senate relating to the hiring of outside counsel to represent a state senator under investigation. *See Levy*, 65 A.3d at 364 (providing background on case). The Senate initially responded to the request with redacted records, citing attorney-client privilege. *See id.* However, the senate later asserted other exceptions under Section 708(b), including attorney work product, grand jury secrecy, and ongoing

of Section 305(a) is to make records in the possession of an agency presumptively public unless some exception applies.<sup>47</sup> Thus, while under the prior statute the requester had to prove the records sought were subject to public disclosure, Section 708(a) shifts the burden onto the agency to show why the records should *not* be disclosed.<sup>48</sup> In light of this deliberate shift by the legislature, the Supreme Court of Pennsylvania has stated that “courts should liberally construe the RTKL to effectuate its purpose of promoting ‘access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.’”<sup>49</sup>

The Commonwealth Court of Pennsylvania (Commonwealth Court) has held that the presumption of openness under Section 305(a) applies only to records in the *possession* of a state or local government agency, not merely its custody or control.<sup>50</sup> A statutory or contractual right to access

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criminal investigation. *See id.* at 374. In prior cases, the Commonwealth Court had held an agency waived any exceptions to the RTKL that were not raised in its initial response to an RTKL request. *See id.* (discussing *Signature Info. Sols., LLC v. Aston Twp.*, 995 A.2d 510 (Pa. Commw. Ct. 2010)). In considering the validity of this waiver rule, the Supreme Court of Pennsylvania concluded the statute was ambiguous; therefore, the court looked to the purpose of the statute to attempt to infer the legislature’s intent. *See id.* at 380–81 (identifying issue and acknowledging need to “consider other indicators of legislative intent”). While acknowledging a clear legislative intent to promote greater transparency, the court also recognized a specific intent to shield certain privileged documents from disclosure. *See id.* at 381–82. Accordingly, the court held the redacted information was not subject to disclosure, and the senate did not waive its right to raise additional reasons for nondisclosure by not including them in its initial response to the RTKL request. *See id.* at 383 (summarizing court’s holding).

47. *See id.* at 381 (“[T]he RTKL presumes documents in the possession of an agency are public records subject to disclosure, unless protected by a specific exception.” (citing 65 PA. CONS. STAT. § 67.305 (2015))).

48. *See id.* (noting how Section 708 explicitly shifts burden of proving exception onto agency); Gedid, *supra* note 8, at 467–68 (discussing how Section 708(a) shifts burden from requester to agency, in contrast to earlier practices).

49. *See Levy*, 65 A.3d at 381 (quoting *Allegheny Cty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011)).

50. *See Office of the Budget v. Office of Open Records*, 11 A.3d 618, 623 (Pa. Commw. Ct. 2011) (holding subcontractor’s payroll records not subject to disclosure under Section 305(a)). In *Office of the Budget*, the requesters sought certain payroll records for a subcontractor working on a public works project. *See id.* at 619. The court rejected an argument by the requesters that Section 305(a) should be read together with Section 901 of the RTKL, which requires an agency to determine whether the agency has “possession, custody or control” of a record when it receives an RTKL request, to conclude that all records within an agency’s custody or control are presumed to be public records. *See id.* at 622. The court observed that the plain language of Section 305(a) mentions only possession, not custody or control. *See id.* at 621–22 (“Had the Legislature wanted to create the presumption that records in an agency’s custody and control, but not in its possession, were public records, it would have included those terms in Section 305, as it did in Section 901, but it did not.”). The court further noted that Section 901 describes only the procedure to be followed following an RTKL request, and “it does not define what records are subject to disclosure under the RTKL.” *See id.* at 622. Fearing that such a broad reading of Sections 901 and 305 would render Section

third-party records is not sufficient to establish agency possession over those records.<sup>51</sup> However, an agency may be deemed to have “constructive possession” over records where there is evidence suggesting the agency once had possession or is shifting records to a third party in an effort to evade disclosure.<sup>52</sup>

## 2. Access to Third-Party Records Under Section 506(d)(1)

Since the Pennsylvania legislature amended the RTKL in 2008, much of the case law related to Section 506(d)(1) has revolved around the definitions of “governmental function” and what activities “directly relate” to the government function.<sup>53</sup> The Supreme Court of Pennsylvania has in-

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506(d)(1) mere surplusage, the court refused to read Section 305(a) as applying to all records within the possession, custody, or control of an agency and held that the payroll records were not subject to disclosure under Section 305(a). *See id.* at 622–23. Because neither party was asserting that there was a contractual relationship, the court did not consider whether the payroll records might be accessible as third-party records under Section 506(d)(1). *See id.* at 621.

51. *See, e.g.,* Honaman v. Twp. of Lower Merion, 13 A.3d 1014, 1019–22 (Pa. Commw. Ct. 2011) (finding monthly reports sent by tax collector to township showing summarizing overall tax collection did not grant township possession over tax records); *Office of the Budget*, 11 A.3d at 623 (holding that explicit language of RTKL did not make payroll records in possession of private contractor public records merely because Pennsylvania Office of Budget had authority to audit them).

52. *See* Barkeyville Borough v. Stearns, 35 A.3d 91, 97–98 (Pa. Commw. Ct. 2012) (holding emails between borough council members stored on council members’ private computers were within constructive possession of borough); *Office of the Budget*, 11 A.3d at 623 (noting no evidence agency was “attempting to play some sort of shell game by shifting [ ] records to a non-governmental body”).

In *Barkeyville Borough*, the Commonwealth Court recognized that “constructive possession qualifies as possession under the RTKL to presume that a record is a public record based on Section 305.” *See Barkeyville Borough*, 35 A.3d at 96. Where a record is not entitled to the presumption of openness under Section 305(a), it may still be considered a “public record” under Section 102 if it is a record “of a Commonwealth or local agency.” *See* 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 (West 2016) (stating statutory definition of “public record”); *Barkeyville Borough*, 35 A.3d at 96 (stating that agency may rebut presumption under Section 305(a) by showing records do not meet Section 102 definition of “public record”); *A Second Chance, Inc.*, 13 A.3d at 1035 (looking to definition of “public record” at Section 102 after concluding records were not subject to presumption under Section 305(a)). In assessing whether information is a record “of” an agency, the court may consider whether the information “originated with” the agency, whether the agency “has any ownership or possessory interest in the information,” or whether the agency “played any role in creating the information.” *See A Second Chance, Inc.*, 13 A.3d at 1035–36 (holding employee records of social services contractor did not constitute public records under Section 102 because it was “information that only [the contractor] created, possesses, and owns”).

53. *See, e.g.,* SWB Yankees LLC v. Wintermantel, 45 A.3d 1029, 1044 (Pa. 2012) (holding management of baseball stadium by private company constituted “governmental function” where management company acted as agent of county-created Stadium Authority); *Allegheny Cty. Dep’t of Admin. Servs. v. Parsons*, 61 A.3d 336, 347 (Pa. Commw. Ct. 2013) (finding social service contractor’s records showing names, dates of birth, and hire dates of employees did not “directly re-

interpreted “governmental function” to include “delegation of some substantial facet of the agency’s role and responsibilities, as opposed to entry into routine service agreements with independent contractors.”<sup>54</sup> The court has endorsed a “reasonably broad construction” of what constitutes a governmental function.<sup>55</sup> However, the court has also reasoned that the legislature’s requirement that the activities be “governmental” was intended to limit the scope of Section 506(d)(1) in order to minimize any unnecessary burdens on private parties.<sup>56</sup> In interpreting the direct relationship requirement, the Commonwealth Court has held that the records must “directly relate to the contractor’s performance of [the government] function.”<sup>57</sup> Records not relating to the *performance* of the contract are

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late[ ]” to performance of government contract); *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 615 (Pa. Commw. Ct. 2011) (concluding independent contractor agreements between contractor and individual interpreters “directly relate” to governmental function only if interpreter has “actually performed” translation services); *Buehl v. Office of Open Records*, 6 A.3d 27, 30–31 (Pa. Commw. Ct. 2010) (holding prison contractor’s records showing prices paid by contractor for goods purchased for resale in prison commissary did not “directly relate” to contract with Department of Corrections); *E. Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496, 505 (Pa. Commw. Ct. 2010) (finding private foundation’s fundraising activities on behalf of public university constituted “governmental function”).

54. *SWB Yankees LLC*, 45 A.3d at 1043 (interpreting meaning of “governmental function”). In *SWB Yankees*, the Supreme Court of Pennsylvania authorized the disclosure of concessions bids in the possession of a private management company (SWB Yankees LLC) that managed a minor league baseball stadium as the contractual agent of the Multi-Purpose Stadium Authority of Lackawanna County. *See id.* at 1030–31 (discussing details of contractual relationship between stadium authority and contractor); *id.* at 1044 (holding concessionaire bids are public records under Section 506(d)(1)). The court rejected traditional distinctions between government and private roles, reasoning such a distinction would undermine the goals of the RTKL, particularly in light of projects, such as the stadium authority, that cause “line-blurring between public and private enterprise.” *See id.* at 1041–42. Instead, it concluded the proper standard was “the delegation of some non-ancillary undertaking of government.” *See id.* at 1042.

55. *See id.* (concluding that “a reasonably broad construction of ‘governmental function’ best comports with the objective of the [RTKL], which is to . . . afford[ ] [citizens] access to information concerning the activities of their government”).

56. *See id.* (opining legislature used “governmental” to narrow access to third-party records “presumably on account of the burden, expense, and other impositions attending wholesale disclosure”); *E. Stroudsburg Univ. Found.*, 995 A.2d at 504 (“The General Assembly also used the term ‘governmental function’ to limit access to only those records in a contractor’s possession that relate to that function, not other records that a contractor maintains during the normal scope of business.”).

57. *See Parsons*, 61 A.3d at 342 (citing *SWB Yankees LLC*, 45 A.3d at 1029) (explaining presumption of publicness under Section 305 does not apply to records in possession of third parties); *id.* at 346 (“Section 506(d) does not reach all records in possession of a private contractor that relate to the governmental function; rather, the records reached are only those that relate to *performance* of that function.” (citing *Giurintano*, 20 A.3d at 615)). In *Parsons*, the Commonwealth Court concluded employee information belonging to a private contractor did not “directly relate” to its contract to provide social services for the county. *See id.* at 344–45. The court relied considerably on the reasoning of *East Stroudsburg Univer-*

deemed outside the reach of Section 506(d)(1).<sup>58</sup>

3. *Evolution of the Contractual Relationship “Requirement” Under Section 506(d)(1)*

In a series of cases beginning with *Honaman v. Township of Lower Merion*,<sup>59</sup> the Commonwealth Court interpreted Section 506(d)(1) as requiring a direct contractual relationship between an agency and a third party in possession of the records.<sup>60</sup> In *Honaman*, the Commonwealth Court considered whether tax records in the possession of the Lower Merion Township Tax Collector, which was statutorily exempt from the RTKL, were nevertheless subject to disclosure by the township.<sup>61</sup> Drawing a com-

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*sity Foundation, Buehl, and Giurintano. See id.* at 341–47 (citing *E. Stroudsburg Univ. Found.*, 995 A.2d at 504; *Buehl*, 61 A.3d at 27; *Giurintano*, 20 A.3d at 613) (concluding “directly relates” test focuses on performance of contract, not who is performing it). In *East Stroudsburg University Foundation*, the court concluded the language of Section 506(d) was intended to restrict the statute’s reach to only those records that “‘directly’ relate to carrying out the governmental function,” not to “other records that a contractor maintains during the normal scope of business,” or records “that may relate to the contract but do not relate to its performance.” *See E. Stroudsburg Univ. Found.*, 995 A.2d at 504. Applying this reasoning, the *Buehl* court determined that records showing what a prison contractor paid for items purchased for re-sale in the prison commissary did not “directly relate” to its governmental function. *See Buehl*, 61 A.3d at 30–31. The price paid by the contractor, the court reasoned, was outside the scope of its contractual obligation, which was simply to provide commissary services for the Pennsylvania Department of Corrections. *See id.* at 31.

58. *See Giurintano*, 20 A.3d at 615 (holding independent contractor agreements with interpreters who never performed translation services did not “directly relate” to governmental function). The issue in *Giurintano* was whether independent contractor agreements between a government contractor and individual interpreters were subject to disclosure under Section 506(d)(1) when the interpreters never actually performed translation services. *See id.* The contractor in this case, Language Services Association (LSA), had a contract with the Pennsylvania Department of General Services to deliver telephone translation services. *See id.* at 614. To meet its obligations under the contract, LSA enlisted thousands of individual interpreters through independent contractor agreements. *See id.* at 614 n.2. The Commonwealth Court concluded that these agreements were not “directly related” to the government contract “because the interpreters have not actually performed, and may never perform, translation services under the [c]ontract.” *See id.* at 615 (concluding OOR properly denied RTKL request for agreements with non-performing interpreters).

59. 13 A.3d 1014 (Pa. Commw. Ct. 2011).

60. *See, e.g., In re Venango Cty. Tourism Promotion Agency*, 83 A.3d 1101, 1110 (Pa. Commw. Ct. 2014) (“This Court requires a contractual relationship between a third party and an agency to access third-party records.” (citing *Honaman*, 13 A.3d at 1022–23)).

61. *See Honaman*, 13 A.3d at 1015–18 (summarizing facts of case). By statute, the tax collector was not an “agency” subject to the RTKL. *See id.* at 1017 (discussing local tax collection law). Therefore, the tax collector was not obligated to disclose the records. *See id.* at 1017–18. Nevertheless, the requesters argued the records were subject to disclosure as records of the township because they were in the possession and control of the township. *See id.* at 1018–19.

parison with *Office of the Budget v. Office of Open Records*,<sup>62</sup> the *Honaman* court reasoned that the tax records could not be considered in the possession of the township because, among other reasons, there was no contract between the township and the tax collector.<sup>63</sup> Accordingly, the court held the tax records were not public records.<sup>64</sup> Notably, the *Honaman* court did not explicitly discuss Section 506(d)(1).<sup>65</sup>

In *In re Venango County Tourism Promotion Agency*,<sup>66</sup> the Commonwealth Court considered whether names and salary information of employees of a tourism promotion agency serving Venango County were public records under Section 506(d)(1).<sup>67</sup> Without any explanation, the court cited *Honaman* for the assertion that Section 506(d)(1) “requires a contractual relationship between a third party and an agency to access third-party records.”<sup>68</sup> The court also distinguished the relationship be-

62. 11 A.3d 618 (Pa. Commw. Ct. 2011). For a full summary of the *Office of the Budget* decision, see *supra* note 50 and accompanying text.

63. See *Honaman*, 13 A.3d at 1020–22 (analogizing to *Office of the Budget*). The issue in *Office of the Budget* was not Section 506(d)(1), but rather whether the presumption under Section 305(a) extended to all records in the custody and control of an agency. See *Office of the Budget*, 11 A.3d at 621–22.

64. See *Honaman*, 13 A.3d at 1022–23 (summarizing court’s reasoning). In addition to the lack of a contractual relationship, the court cited several other reasons for concluding the tax records are not public. See *id.* at 1022. The court reasoned that monthly reports submitted by the tax collector to the township, which showed overall tax revenues, did not give the township possession of records of individual taxpayers, which remained in the custody and control of the tax collector. See *id.* at 1019, 1022. Moreover, the court noted there was no indication that the township was trying to hide or shield the tax information by appointing the tax collector. See *id.* at 1022.

65. See generally *id.* at 1019–22 (mentioning Section 506(d) only in footnotes or quotations). Note that, while the *Honaman* court quoted Section 305(a) and the statutory definitions of “record” and “public record” in the text of its discussion, the language of Section 506(d) is reprinted only in a footnote clarifying a passing reference to that provision. See *id.* at 1019–20 (introducing relevant statutory provisions); *id.* at 1020 n.6. Moreover, the *Honaman* court cited an extended excerpt from *Office of the Budget* discussing why the presumption under Section 305(a) does not extend to all records within an agency’s custody or control. See *id.* at 1020–21 (quoting *Office of the Budget*, 11 A.3d at 621–23). For a fuller analysis of the *Honaman* decision’s applicability to Section 506(d)(1), see *infra* notes 143–47 and accompanying text.

66. 83 A.3d 1101 (Pa. Commw. Ct. 2014).

67. See *id.* at 1103–04 (providing factual background on case). Venango County appointed the Oil Region Alliance of Business, Industry, and Tourism (Alliance), a private non-profit corporation, as its “tourism promotion agency” to “promote economic development, recreation, and tourism” for the county. See *id.* at 1103–04 & n.2. The Requesters sought names and salary information on employees for the Alliance. See *id.* at 1103. The Alliance obtained some of its funding from tax revenues, but most of its funding came from private sources. See *id.* at 1109. Additionally, twenty-one out of twenty-five of the Alliance’s board members were from the private sector, and there was no evidence of government control. See *id.* at 1108. Accordingly, the court concluded the Alliance was *not* an agency for purposes of the RTKL, and proceeded to consider whether the employee information was accessible as third-party records under Section 506(d)(1). See *id.*

68. See *id.* at 1110 (citing *Honaman* without further analysis).

tween the Venango County and the Tourism Alliance from the principal-agent relationship at issue in *SWB Yankees LLC v. Wintermantel*,<sup>69</sup> concluding “*SWB Yankees* requires . . . a contractual relationship, conspicuously absent here.”<sup>70</sup> Finding no such contractual relationship, the court held the employee information was not a public record.<sup>71</sup>

#### 4. *Medicaid Managed Care and the 2002 RTKL*

The Commonwealth Court considered the application of the RTKL to Medicaid contractors for the first time in *Lukes v. Department of Public Welfare*.<sup>72</sup> Under HealthChoices, Pennsylvania’s managed care program for Medicaid, the Pennsylvania Department of Public Welfare (DPW) contracts with private insurance companies (Managed Care Organizations, or MCOs) to provide health insurance to Medicaid recipients.<sup>73</sup> The MCOs, in turn, negotiate contracts (Provider Agreements) with individual health care providers to deliver health care services.<sup>74</sup>

The issue in *Lukes* was whether the Provider Agreements were public records under the 2002 RTKL.<sup>75</sup> Although the contract between DPW

69. 45 A.3d 1029 (Pa. 2012). For a full summary of the facts and holding in *SWB Yankees LLC*, see *supra* note 54.

70. See *In re Venango Cty. Tourism Promotion Agency*, 83 A.3d at 1110 (explaining “*SWB Yankees* requires more than performance of a governmental function”). *SWB Yankees*, like *Office of the Budget*, did not actually address whether a contractual relationship is required under Section 506(d)(1); there was a contract, so the need for a contractual relationship simply was not an issue. See generally *SWB Yankees LLC*, 45 A.3d at 1041–44 (considering scope of “governmental function” under Section 506(d)(1), without considering need for contractual relationship).

71. See *In re Venango Cty. Tourism Promotion Agency*, 83 A.3d at 1110 (upholding lower court’s decision).

72. 976 A.2d 609 (Pa. Commw. Ct. 2009).

73. See *Lukes*, 976 A.2d at 613 (describing Pennsylvania’s Medicaid managed care program).

74. See *id.* (describing payment mechanism for HealthChoices). MCOs receive monthly payments from DPW based on the number of Medicaid recipients they enroll. See *id.* The MCOs then use these public funds to pay individual healthcare providers who deliver services to Medicaid beneficiaries. See *id.* However, MCOs are not required to segregate the taxpayer dollars it receives from DPW from other funding sources; MCOs may pay providers from a general account that combines public and private funds. See *id.*

75. See *id.* at 612 (providing factual background of case). The Requesters sought the Provider Agreement between the University of Pittsburgh Health Plan, a Medicaid MCO, and the University of Pittsburgh Medical Center, which was paid by the Health Plan to provide hospital services for Medicaid recipients. See *id.* As an initial matter, the *Lukes* court interpreted “record” to include “records within an agency’s possession, custody or control.” See *id.* at 615–21. The 2002 definition of “record” included documents “maintained by an agency[,]” which the court interpreted to include possession, custody, or control. Compare 65 PA. STAT. AND CONS. STAT. ANN. § 66.1 (West 2007) (repealed 2008), with *Lukes*, 976 A.2d at 616–20 (analyzing dictionary definition, legislative history, and purposes of RTKL to interpret meaning of “maintain”). Because DPW had access and the ability to “exert control” over the Provider Agreements, the court held that the agreements were “maintained” by DPW, and were therefore “records.” See *id.* at 621. This

and the MCOs stated the MCO was not formally an agent of DPW, the Commonwealth Court drew on earlier cases to conclude the Provider Agreements were nevertheless “the product of [an] agency relationship.”<sup>76</sup> Furthermore, the agreements reflected the expenditure of public funds; the transfer of taxpayer dollars from DPW to the MCOs did not make them private funds.<sup>77</sup> Accordingly, the court held the

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portion of the court’s analysis was effectively superseded by the 2008 amendments, which removed “maintains” from the statutory definition of “record.” See 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 (West 2016) (effective Feb. 14, 2008). The current statutory definition of a record is “[i]nformation, regardless of physical form or characteristics that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business, or activity of the agency.” *Id.*

76. See *Lukes*, 976 A.2d at 621–24 (finding agency relationship between DPW and MCOs). The HealthChoices Agreement signed between MCOs and DPW stipulates that the MCO and “its employees, services, agents, and representatives shall not be considered and shall not hold themselves out as the employees, servants, agents or representatives” of DPW. See *id.* at 613 (quoting HealthChoices Agreement from record).

The administrative law judge had concluded the Provider Agreements were not public records because the MCO was neither a commonwealth agency nor an agent of an agency. See *id.* at 614. The Commonwealth Court rejected this argument, agreeing with the Requesters that a formal agency relationship is not required. See *id.* at 622–23. The court applied the agency theory developed in *Associated Builders and Tribune-Review Publishing Co.*, which held an agency relationship can exist if “(1) there was a manifestation by the principal that the agent would act for it; (2) the agent accepted such an undertaking; and (3) the principal retained control over the endeavor.” See *id.* at 622 (citing *Tribune-Review Publ’g Co. v. Westmoreland Cty. Hous. Auth.*, 833 A.2d 112, 119–20 (Pa. 2003)). The court found DPW manifested its intent to have the MCO carry out its Medicaid obligations on its behalf, and the MCOs accepted that undertaking, in the HealthChoices Agreement. See *Lukes*, 976 A.2d at 623. Furthermore, the terms of the agreement gave DPW significant control by requiring Provider Agreements to adhere to strict terms and conditions and granted DPW access to MCO’s records in order to monitor compliance, among other things. See *id.* at 623–24 (enumerating “strict controls” within HealthChoices Agreement). Therefore, the court concluded the MCO was functioning as an agent of DPW. See *id.* at 624.

77. See *Lukes*, 976 A.2d at 624–25 (overturning ruling of administrative law judge that transfer of funds from DPW to health plan converted them to private funds). The Commonwealth Court emphasized that the disbursement of public funds to a private company does not make the funds private money. See *id.* at 624–25 (citing *Morning Call, Inc. v. Lower Saucon Twp.*, 627 A.2d 297, 300–01 (Pa. Commw. Ct. 1993)) (holding disbursement of settlement payments through township’s insurer did not change public character of funds and determining settlement agreement between township and private party was public record); see also *Sapp Roofing Co., Inc. v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 12*, 713 A.2d 627, 629 (Pa. 1998) (plurality opinion) (finding private contractor’s payroll records held by school district constituted public records because they “evidence[d] a disbursement by the school district”); *Associated Builders & Contractors, Inc. v. Pa. Dep’t of Gen. Servs.*, 747 A.2d 962, 965 (Pa. Commw. Ct. 2000) (“[A]n agency may not shield a public document from disclosure by contracting with a third party that subsequently disperses the government funds. By paying through a third party, an agency does not change the character of those funds from public to private.” (citing *Morning Call, Inc.*, 627 A.2d at 300–01)). Moreover, because the purpose of the funds was to pay for medical treatment, not

Provider Agreements constituted public records and were subject to disclosure.<sup>78</sup>

III. REVENGE OF THE SUBCONTRACTORS: THE COMMONWEALTH COURT  
BLOCKS ACCESS TO CONTRACTOR, SUBCONTRACTOR RECORDS  
IN *EISEMAN I* AND *EISEMAN II*

Five years after *Lukes*, the Commonwealth Court again considered the public's right to access records of Medicaid contractors, this time under the 2008 RTKL.<sup>79</sup> In *Eiseman I*, the Commonwealth Court was asked to decide whether the 2008 RTKL required disclosure of records in the possession of DPW showing Medicaid MCOs' payments to subcontractors retained to administer dental benefits.<sup>80</sup> In a companion case, *Eiseman II*, the court considered the more nuanced question of whether the 2008 RTKL reached records in the possession of dental subcontractors showing those subcontractors' payments to individual health care providers.<sup>81</sup>

A. *Eiseman's Request: Help Me, OOR, You're My Only Hope*

James Eiseman and the Public Interest Law Center (Requesters) filed a RTKL request with DPW in an effort to determine what portion of the DPW funds disbursed to MCOs for dental care ultimately went to dentists.<sup>82</sup> In order to meet their dental care obligations under the HealthChoices Agreement, several MCOs in southeastern Pennsylvania hired dental insurance companies (Subcontractors) to administer dental

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to support the MCOs, the *Lukes* court concluded the funding remained public "until [it] reaches the intended Medicaid recipient." See *Lukes*, 976 A.2d at 625 (emphasizing that MCO "does not administer [Medicaid] services, but instead acts as an intermediary by contracting with provider hospitals to provide such services").

78. See *id.* at 627 (noting that "a party that voluntarily participates in a public program and is receiving and disbursing public funds in furtherance of that program has no legitimate basis to assert that these activities are private and should be shielded from public scrutiny").

79. See generally *Dep't of Pub. Welfare v. Eiseman (Eiseman I Commw. Ct. Op.)*, 85 A.3d 1117, 1120–22 (Pa. Commw. Ct. 2014) (summarizing factual background of case), *rev'd*, 125 A.3d 19 (Pa. 2015).

80. See *id.* at 1121 (identifying records at issue). *Eiseman I Commw. Ct. Op.* also addressed whether records showing Capitation Rates paid by DPW to MCOs were subject to disclosure. See *id.* However, these records were not at issue when the case later went before the Pennsylvania Supreme Court. See generally *Eiseman I*, 125 A.3d at 26 (noting Capitation Rates were disclosed following Commonwealth Court decision).

81. See *Dental Benefit Providers, Inc., v. Eiseman (Eiseman II Commw. Ct. Op.)*, 86 A.3d 932, 933 (Pa. Commw. Ct. 2014) (identifying records at issue), *aff'd on narrower grounds*, 124 A.3d 1214 (Pa. 2015).

82. See *id.* at 934 (recounting factual history of case); see also PUB. INT. L. CTR., *supra* note 17 (discussing purpose of RTKL request). Eiseman and the Public Interest Law Center were concerned that low reimbursement rates were discouraging dentists from accepting Medicaid patients, making it harder for children on Medicaid to find dentists. See *id.*

benefits through the Subcontractors' provider networks.<sup>83</sup> Eiseman sought records showing: (1) the rates paid by DPW to MCOs (Capitation Rates), (2) rates paid by MCOs directly to Subcontractors or providers (MCO Rates), and (3) rates paid by Subcontractors to individual dental providers (Provider Rates).<sup>84</sup> DPW denied the request, in part on the grounds that the rates were trade secrets or confidential proprietary information exempt under Section 708(b)(11).<sup>85</sup>

Eiseman appealed to the Office of Open Records (OOR), which granted the request for the Capitation Rates and MCO Rates, concluding that these were financial records not protected under Section 708(b)(11).<sup>86</sup> The OOR also granted the request for Provider Rates, finding that these were third-party records accessible under Section 506(d)(1), even though there was no contract between DPW and the Subcontractors.<sup>87</sup>

B. *The Commonwealth Court Strikes Back, Finds MCO and Provider Rates Are Not Public Records*

DPW, the MCOs, and the Subcontractors appealed the OOR decision to the Commonwealth Court, which decided to consider the MCO Rates

83. *See Eiseman I*, 125 A.3d at 21 (discussing MCOs' use of dental subcontractors to fulfill their pediatric dental care obligations). The five MCOs whose records were at issue included: United Healthcare, CoventryCares, Aetna Better Health, Health Partners of Philadelphia, and Keystone Mercy Health Plan. *See id.* at 21 n.2. United Healthcare used Dental Benefits Providers as its dental subcontractor, and the remaining four MCOs used a different subcontractor, DentaQuest. *See Eiseman I Commw. Ct. Op.*, 86 A.3d at 1121 & n.3.

84. *See Eiseman II Commw. Ct. Op.*, 86 A.3d at 934, 937 (summarizing Eiseman's RTKL request with regard to Provider Rates); *Eiseman I Commw. Ct. Op.*, 85 A.3d at 1121 (summarizing details of Eiseman's RTKL request with regard to Capitation Rates and MCO Rates). The court used "Capitation Rates" to refer to "rates paid by DPW to the MCOs, per member, per month, based on annually negotiated capitation rates." *Eiseman I Commw. Ct. Op.*, 85 A.3d at 1121. "MCO Rates" includes rates paid by the MCOs *directly* to providers, as well as rates paid to Subcontractors; however, rates paid by the *Subcontractors* to providers would be considered "Provider Rates." *See id.* at 1121 n.7.

85. *See Eiseman I Commw. Ct. Op.*, 85 A.3d at 1122 (detailing grounds for initial DPW decision). DPW denied the records request upon the advice of the MCOs. *See id.* DPW also cited the Trade Secrets Act as a basis for its decision. *See id.*

86. *See id.* (summarizing OOR's decision). The OOR did not consider the MCOs' argument that the rates were protected under the Trade Secrets Act, but rather considered only the trade secrets exemption under Section 708(b)(11). *See id.* In reaching its conclusion regarding the MCO Rates, OOR relied heavily on *Lukes*. *See id.* at 1122 (citing *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009)). Specifically, the OOR looked to *Lukes* for the proposition that Provider Agreements between MCOs and hospitals were "public records" because the MCOs voluntarily participated in a public program and received public funds. *See id.* at 1122 (citing *Lukes*, 976 A.2d at 627).

87. *See Eiseman II Commw. Ct. Op.*, 86 A.3d at 935 (summarizing OOR decision regarding Provider Rates).

and Provider Rates separately.<sup>88</sup> *Eiseman I* addressed the Capitation and MCO Rates, while *Eiseman II* considered only the availability of the Provider Rates.<sup>89</sup>

1. *The Commonwealth Court Rules MCO Rates Not Subject to Disclosure in Eiseman I*

In *Eiseman I*, the Commonwealth Court, sitting en banc, affirmed the OOR's decision ordering disclosure of the Capitation Rates but reversed the decision to disclose the MCO Rates.<sup>90</sup> The court agreed with the OOR that the Capitation Rates were financial records and, consequently, the trade secrets and proprietary information protections under Section 708(b)(11) did not apply.<sup>91</sup> Although the court acknowledged the Trade Secrets Act might provide separate protection, the court ultimately concluded that protection did not apply in this case because the Capitation Rates did not constitute trade secrets.<sup>92</sup>

With regard to the MCO Rates, the Commonwealth Court held these were not financial records for purposes of the RTKL.<sup>93</sup> The majority concluded *Lukes* was not controlling because that case was decided under the 2002 RTKL.<sup>94</sup> The court went on to find the MCO Rates constituted confidential proprietary information and were thus shielded from disclosure

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88. See *Eiseman I Commw. Ct. Op.*, 85 A.3d at 1120 n.2. (explaining procedural position of case). The five MCOs—United Healthcare, CoventryCares, Aetna Better Health, Health Partners of Philadelphia, Keystone Mercy Health Plan—and two Subcontractors—Dental Benefit Providers (DBP) and DentaQuest—intervened in the OOR proceedings as direct interest participants. See *Eiseman II Commw Ct. Op.*, 86 A.3d at 935 & n.7. Following the OOR decision, the MCOs, Subcontractors, and DPW filed various appeals before the Commonwealth Court that were then consolidated in to two separate cases addressing the MCO Rates and Provider Rates, respectively. See *id.*

89. See *Eiseman I Commw. Ct. Op.*, 85 A.3d at 1121 & n.7 (identifying different items of Eiseman's request being addressed in each case).

90. See *id.* at 1131 (announcing court's holding).

91. See *id.* at 1124–25 (concluding Capitation Rates could not be redacted from financial records under trade secrets and proprietary information exception to RTKL).

92. See *id.* at 1124–27 (concluding OOR erred in not considering Trade Secrets Act as separate basis for protection).

93. See *id.* at 1127 (concluding MCO Rates were not “financial records”). The court interpreted the statutory definition of “financial records” strictly to mean only those funds disbursed “by an agency;” consequently, “the funds lose their character as public funds once they leave an agency's hands and enter the private sector.” See *id.* (emphasizing statutory definition of “financial records” under Section 102 of RTKL). Because the MCO Rates reflected disbursement of funds by contractors and not “by an agency,” the court concluded they were not “financial records.” See *id.*

94. See *id.* at 1125, 1127 (finding OOR's reliance on *Lukes* misplaced “in light of the substantial differences between the current RTKL and the [p]rior [RTKL]”).

under Section 708(b)(11).<sup>95</sup> Judge McCullough issued a strong dissent, arguing that the MCO Rates *were* financial records because, like the records in *Lukes*, they were the product of an agency relationship between DPW and the MCOs.<sup>96</sup>

2. *Eiseman II: The Commonwealth Court Rules Provider Rates Not Subject to Disclosure, Either*

In *Eiseman II*, an en banc panel of the Commonwealth Court reversed the OOR's decision regarding the Provider Rates.<sup>97</sup> First, the court held the Provider Rates were not presumed to be public records under Section 305(a) because DPW did not have "actual or constructive possession of" the records; consequently, the records must be analyzed as third-party records under Section 506(d)(1).<sup>98</sup> Second, the court concluded the Provider Rates were not subject to disclosure under Section 506(d)(1) because there was "no direct contractual relationship" between DPW and the Subcontractors, and the records did not directly relate to the contract between DPW and the MCOs.<sup>99</sup> Finally, reiterating the argument that *Lukes*

95. *See id.* at 1127–31 (finding sufficient evidence to show MCO Rates were confidential and that disclosure would cause "substantial harm" to MCOs' competitive position).

96. *See id.* at 1135 (McCullough, J., dissenting) (observing that "agency law dictates that the MCOs and Subcontractors stand in the shoes of DPW and receive and disburse public funds"). While acknowledging *Lukes* was abrogated in part by the change in statute, Judge McCullough nevertheless argued these changes did not impact *Lukes*'s "holding that MCOs and related entities receive and disburse agency funds." *See id.* at 1135–36 (agreeing that "*Lukes* was obviously superseded by a change in statutory language" to extent it discussed agency control over records possessed by third party but finding this immaterial given DPW had possession over records showing MCO Rates). Furthermore, Judge McCullough noted, the definition of "financial records" was identical to the definition of "public records" interpreted in *Lukes* and, thus, implicated the same analysis. *See id.* at 1135 ("Because . . . *Lukes* interpreted language identical to that presently before this Court . . . I find our reasoning in *Lukes* highly persuasive, if not binding . . .").

97. *See Eiseman II Commw. Ct. Op.*, 86 A.3d at 942 (announcing court's holding).

98. *See id.* at 936–39 (concluding DPW had no "actual or constructive possession" of records documenting Provider Rates). In doing so, the court explicitly rejected Eiseman's argument that contract provisions giving DPW "the right to review" subcontractor records created constructive possession. *See id.* at 938 ("[T]his Court does not infer constructive possession from the mere availability of the records to an agency upon request." (citing *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Commw. Ct. 2011))). Instead, the court held the "litmus test" for constructive possession was "whether the records document a transaction of the agency to which the request was directed." *See id.* at 938. Finding no evidence that DPW ever had possession over the records or was seeking to conceal them and no evidence that the records documented DPW activities, the court concluded this "litmus test" was not met. *See id.* at 938–39.

99. *See id.* at 940, 942 ("This Court requires a contractual relationship between a third party and an agency to access third-party records." (citing *Honaman v. Twp. of Lower Merion*, 13 A.3d 1014 (Pa. Commw. Ct. 2011))). Because the court found "no contract between DPW and the Subcontractors, the only way to reach the Provider Rates [was] through the MCO's contractual relationship with

was superseded by the 2008 RTKL, the court rejected the OOR's determination that the records were public records because they reflected disbursement of public funds.<sup>100</sup> Judge McCullough again dissented, applying *Lukes* and arguing that there *was* a contractual relationship between DPW and the Subcontractors because the MCOs were functioning as agents of DPW.<sup>101</sup>

#### IV. THAT'S NOT HOW THE RTKL WORKS! THE PENNSYLVANIA SUPREME COURT STEPS IN

Following the Commonwealth Court's decision, the Requesters appealed its rulings regarding the MCO Rates and Provider Rates.<sup>102</sup> Meanwhile, DPW released the Capitation Rates, making an appeal on that issue unnecessary.<sup>103</sup> In *Eiseman I*, the Supreme Court of Pennsylvania reversed the Commonwealth Court's decision and held the MCO Rates were, in fact, subject to disclosure.<sup>104</sup> However, in *Eiseman II*, the supreme court affirmed the lower court's decision on narrower grounds, ultimately agreeing the Provider Rates were not public records under the RTKL.<sup>105</sup>

##### A. *Eiseman I: These Are the "Financial Records" You're Looking for, After All*

As an initial matter, the supreme court rejected DPW's claim that they did not have possession of the records revealing the MCO Rates.<sup>106</sup> Then, the court determined that records showing the MCO Rates were financial records for purposes of the RTKL.<sup>107</sup> The majority emphasized that the definition of financial records includes records "dealing with" disburse-

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DPW." *Id.* at 940. The court went on to find the Provider Rates did not "directly relate" to the contract between DPW and the MCOs, specifically with respect to the "performance of [ ] dental services." *See id.* at 940–41 (citing *Buehl v. Office of Open Records*, 6 A.3d 27, 31 (Pa Commw. Ct. 2010)).

100. *See id.* at 942 (concluding "OOR erred in relying on [*Lukes*]").

101. *See id.* at 944–45 (McCullough, J., dissenting) (observing that MCOs could not enter into subcontract without DPW approval).

102. *See generally Eiseman I*, 125 A.3d at 23 (considering appeal of Commonwealth Court's decision regarding MCO Rates); *Eiseman II*, 124 A.3d at 1218 (addressing appeal of Commonwealth Court's denial of request for Provider Rates).

103. *See Eiseman I*, 125 A.3d at 26 (summarizing subsequent history regarding request for Capitation Rates).

104. *See id.* at 33 (announcing reversal of lower court's order and remanding for further proceedings).

105. *See Eiseman II*, 124 A.3d at 1223–24 (affirming lower court's decision on narrower grounds).

106. *See Eiseman I*, 125 A.3d at 29 (finding department's assertion that it "neither possess[ed] nor control[led]" documents "not well taken"). The court observed that DPW had never indicated it did not possess the records either in response to the initial RTKL request or during earlier hearings. *See id.* Moreover, the court noted that MCOs were "required to submit subcontracts delegating their healthcare-related responsibilities to DPW for . . . advance written approval." *Id.*

107. *See id.* (concluding MCO Rates constitute "financial records").

ments of agency funds.<sup>108</sup> The court rejected arguments by the MCOs that such a broad interpretation would eliminate any limits on disclosure of private contractor records, pointing out that the subcontracts at issue, unlike most private contractor records, had to be approved by DPW.<sup>109</sup> Because the MCO Rates “plainly ‘[dealt] with’ DPW’s disbursement of billions of dollars of public monies . . . as well as the Department’s acquisition of services to meet its own [Medicaid] obligations,” the court concluded the MCO Rates were financial records, and therefore, the confidential proprietary secrets and trade secrets exemptions under Section 708(b)(11) did not apply.<sup>110</sup> The court declined to take up the lower court’s discussion of *Lukes* or to decide “the downstream point at which public funding transforms into private monies.”<sup>111</sup>

The court then considered whether the MCO Rates were nevertheless protected by the Uniform Trade Secrets Act.<sup>112</sup> In the court’s view, whether the MCO Rates fit the statutory definition of trade secrets was debatable.<sup>113</sup> More importantly, the court concluded that the 2008 RTKL’s specific provisions governing trade secrets superseded the more general protection provided by the Uniform Trade Secrets Act.<sup>114</sup> There-

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108. *See id.* (rejecting narrow interpretation of “financial records” favored by DPW and MCOs) (citing 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 (West 2016); N. Hill News Record v. Town of McCandless, 722 A.2d 1037, 1039 (Pa. 1999)). Justice Eakin wrote a brief dissent, insisting “the plain language of the RTKL does not cover this situation” and generally endorsing the Commonwealth Court’s arguments that the MCO rates were not financial records. *See id.* at 33 (Eakin, J., dissenting). Justice Eakin would have “remand[ed] the matter to the OOR” to apply the exemptions under Section 708(b)(11). *See id.*

109. *See id.* at 30 (observing that “[i]t is this initial requirement [approval by a government agency] which separates subcontracts containing the MCO Rates from third-party records (to which a distinct legal analysis [under section 506(d)] applies)” (citing 65 PA. CONS. STAT. § 67.506(d) (2015))). The court went on to state that, in the absence of legislation specifically addressing public access to records showing expenditure of Medicaid funds, a “liberal interpretation” of the statutory language was more appropriate than a restrictive, and perhaps “under-inclusive,” reading. *See id.* at 31.

110. *See id.* at 30, 32 (referencing Section 102 in stating “we are simply unable to conclude that records which much be submitted to a government agency for approval, and which embody a delegation . . . of a governmental function of the agency, are not records ‘dealing with’ the agency’s monetary disbursements and services acquisitions” (citing 65 PA. CONS. STAT. § 67.102) (2015)); *id.* at 32 (noting lack of dispute that exceptions under Section 708(b) do not apply to financial records).

111. *See id.* at 33.

112. *See id.* at 32 (discussing relevance of Uniform Trade Secrets Act).

113. *See id.* (referencing Uniform Trade Secrets Act in observing that MCO Rates are not “a close fit with the concept of a ‘trade secret,’” because it is not “a formula, drawing, pattern, compilation . . . device, method, technique or process” (quoting 12 PA. CONS. STAT. § 5302 (2015)) (internal quotation marks omitted)).

114. *See id.* (concluding Uniform Trade Secrets Act does not apply). In this respect, the court relied explicitly on Judge McCullough’s dissent in the Commonwealth Court, which reasoned that the legislature intentionally incorporated the Trade Secrets Act into the trade secrets provision of the RTKL. *See Eiseman I*

fore, the Trade Secrets Act did not provide separate protection against disclosure.<sup>115</sup> Accordingly, the court reversed the Commonwealth Court's decision "relative to the MCO Rates."<sup>116</sup>

B. *Eiseman II: The Supreme Court Finds Lack of a Contractual Relationship Disturbing*

After recounting the lower court's reasoning, the Supreme Court of Pennsylvania affirmed the Commonwealth Court's conclusion that the RTKL "channels access to third-party records through Section 506(d)(1)"; therefore, the Provider Rates were not presumptively public records under Section 305.<sup>117</sup> The supreme court adopted the lower court's "litmus test" for constructive possession that asks "whether the records document a transaction of the agency to which the request was directed, not whether they document a transaction of a private contractor."<sup>118</sup> Although the court acknowledged the Requesters' concerns with this litmus test, the court nevertheless felt the test was consistent with the statutory definitions of records and public records.<sup>119</sup>

The Supreme Court of Pennsylvania similarly affirmed the Commonwealth Court's holding that Section 506(d)(1) "contemplates an actual contract with a third party in possession of salient records."<sup>120</sup> The majority provided limited rationale for accepting the lower court's conclusion; instead, the court simply cited to a portion of the Commonwealth Court's opinion and announced "we will affirm its order upon such basis."<sup>121</sup> In addition, the majority implicitly accepted the Commonwealth Court's conclusion that the necessary contractual relationship between DPW and the

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*Commw. Ct. Op.*, 85 A.3d at 1138 (McCullough, J., dissenting) (noting definitions of "trade secret" are identical in RTKL and Trade Secrets Act).

115. *See Eiseman I*, 125 A.3d at 32 (concluding specific treatment of trade secrets under RTKL "should control in this instance").

116. *See id.* at 33 (announcing reversal of Commonwealth Court's order and remanding for further proceedings).

117. *See Eiseman II*, 124 A.3d at 1223 (announcing court's holding).

118. *See id.* at 1219 (agreeing with Commonwealth Court that "record" encompasses "transaction or activity of an agency" within meaning of statute (citing 65 PA. CONS. STAT. § 67.102)).

119. *See Eiseman II*, 124 A.3d at 1223 (acknowledging that "Section 901 explicitly harkens back to the essential concept of a 'public record,' . . . and the incorporated definition of a 'record' does encompass the notion of a 'transaction or activity of an agency' to which the intermediate court majority has rightfully affording meaning" (citation omitted) (citing 65 PA. CONS. STAT. § 67.901 (2015))).

120. *See id.* at 1223 (announcing court's decision).

121. *See id.* (citing *Eiseman II Commw. Ct. Op.*, 86 A.3d at 939–40) (affirming "essential point" recognized by commonwealth court). In *Eiseman II Commw. Ct. Op.*, the court "require[d] a contractual relationship between a third party and an agency to access third-party records." *See Eiseman II Commw. Ct. Op.*, 86 A.3d at 939–40 (citing *Honaman v. Twp. of Lower Merion*, 13 A.3d 1014 (Pa. Commw. Ct. 2011)).

Subcontractors did not exist.<sup>122</sup> Having concluded such a relationship was required, the court declined to consider, as the Commonwealth Court had, whether the Provider Rates directly related to the contractual relationship between DPW and the MCOs.<sup>123</sup>

The court acknowledged, but ultimately rejected, numerous policy-based arguments from the Requesters and amici favoring greater access to records.<sup>124</sup> Instead, the court reiterated that the language of Section 506(d)(1) intentionally includes limitations on the otherwise broad access to private contractor records.<sup>125</sup> The majority further concluded that “particularized legislative consideration would seem to be in order relative to the openness or secrecy of third-party records downstream from actual Commonwealth agency contracts.”<sup>126</sup>

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122. See *Eiseman II*, 124 A.3d at 1220 (summarizing, without analysis, Commonwealth Court’s conclusion that requirement for contractual relationship was not met, as well as dissenting opinion finding contractual relationship *was* met).

123. See *id.* at 1220 n.7 (opining that lack of direct contractual relationship “would seem dispositive”). The court felt the Commonwealth Court’s “line of inquiry” as to whether the Provider Rates directly related to the contractual relationship between DPW and the MCOs (as opposed to Subcontractors) was not “anchor[ed]” to the language of 506(d)(1). See *id.* Furthermore, the court expressed “substantial misgivings” with the Commonwealth Court’s conclusion there was no direct relationship between the Provider Rates and the government function. See *id.* The court reiterated that “Section 506(d)(1) requires *both* possession by ‘a party with whom the agency has contracted to perform a governmental function’ *and* that the requested record ‘directly relates to the governmental function.’” *Id.* (citing 65 PA. STAT. AND CONS. STAT. ANN. § 67.506(d)(1) (West 2016)).

124. See *id.* at 1223 (acknowledging, but ultimately rejecting Requesters’ policy-based arguments). The Requesters emphasized a policy of liberal construction. See *id.* at 1221; see also *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) (“[C]ourts should liberally construe the RTKL to effectuate its purpose of promoting ‘access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.’” (quoting *Allegheny Cty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011))). The Requesters also argued that the Commonwealth Court’s requirement for a direct contractual relationship would permit contractors to shield records by putting them in the possession of subcontractors. See *Eiseman II*, 124 A.3d at 1221. The Requesters felt that the Commonwealth Court’s “litmus test” was too narrow, and should extend to records in the “custody and control” of a government agency. See *id.* at 1218 n.4. The *Eiseman II* court explicitly rejected this argument, relying on its reasoning in *Office of the Budget*. See *id.* at 1222 n.10 (citing *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 619–20 (Pa. Commw. Ct. 2011)). Finally, the Requesters worried that the Commonwealth Court’s ruling might “shift[ ] the burden . . . [onto] requesters” by requiring them to show that the agency was attempting to hide records with “non-governmental bod[ies]”. See *id.* at 1222.

125. See *id.* at 1223 (“[T]his Court also appreciates that the General Assembly had tempered such policy [of liberal access] with explicit limiting terms delineated in the [l]aw, ‘presumably on account of the burden, expense, and other impositions attending wholesale disclosure’ by non-public entities.” (quoting *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012))).

126. *Id.* at 1223; see also *id.* at 1222 (citing *Br. for Appellees Dental Benefit Providers*, at 19, *Eiseman II*, 124 A.3d 1214 (Pa. 2015) (No. 48 EAP 2014)) (stating

Justice Correale Stevens dissented, faulting the majority for reading Section 506(d)(1) “too narrowly” and not giving enough weight to the policy goals of the RTKL.<sup>127</sup> Justice Stevens then endorsed Judge McCullough’s argument that the agent-principal relationship between the MCOs and DPW created the requisite contractual relationship between DPW and the Subcontractors.<sup>128</sup> Emphasizing the importance of transparency, Justice Stevens warned that the majority’s holding would “prevent[ ] the public from holding government agencies accountable and does not require disclosure of information merely because a ‘middleman’ is involved.”<sup>129</sup>

#### V. ANALYSIS: THE SUPREME COURT UNDERESTIMATES THE POWER OF THE RTKL

The *Eiseman II* decision highlights an important blind spot in the RTKL: the statute fails to address the public’s right to access records of third-party subcontractors performing under downstream agreements with government contractors.<sup>130</sup> Rather than proactively addressing this gap through judicial interpretation, however, the Pennsylvania Supreme Court exercised deliberate restraint and left the task of crafting a solution up to the legislature.<sup>131</sup> Without explicitly overruling *Lukes*, the court quietly rejected much of *Lukes*’s reasoning in *Eiseman I* and *Eiseman II*.<sup>132</sup> Mean-

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Eiseman’s argument “is nothing more than a complaint about how the General Assembly drafted section 506”).

127. *See id.* at 1224 (quoting *Levy*, 65 A.3d at 361) (Stevens, J., dissenting) (stating “objective of the RTKL is ‘to empower citizens by affording them access to information concerning the activities of their government’” (quoting *SWB Yankees LLC*, 45 A.3d at 1042)).

128. *See id.* (Stevens, J., dissenting) (quoting *Eiseman II* Commw. Ct. Op., 86 A.3d 932, 944–45 (Pa. Commw. Ct. 2014) (McCullough, J., dissenting)).

129. *See id.* at 1225 (Stevens, J., dissenting) (criticizing majority decision). Citing several amicus briefs, Justice Stevens summed up the importance of transparency as follows:

[T]he lack of access to the negotiated Provider Rates prevents a full understanding of the relationship between fees and access, which is critical to addressing disparities in health care cost, quality, and outcomes. Moreover, lack of information concerning the Provider Rates prevents fully informed policy decisions regarding the state of Medicaid spending and impedes necessary analysis required to improve the functioning of the health care system. Furthermore, transparency in government in the government’s oversight of Medicaid is necessary toward the interrelated objective of improving healthcare quality.

*Id.* (citations omitted).

130. *See id.* at 1223 (suggesting legislative action needed to address “the openness or secrecy of third-party records downstream from actual Commonwealth agency contracts”).

131. *See id.* (“[O]ur present task is one of statutory construction, not independent judicial policymaking.”).

132. *See id.* at 1220 (rejecting argument that principal-agent relationship between DPW and MCO created requisite contractual relationship between DPW and Subcontractors); *Eiseman I*, 125 A.3d 19, 33 (Pa. 2015) (declining to follow broad reading of RTKL articulated in *Lukes*). For a further discussion of the treat-

while, the court interpreted Section 506(d)(1) as requiring a direct contractual relationship between the agency and a third party in possession of the records, even though such a reading was not compelled by the case law.<sup>133</sup> At the same time, the court deemphasized both the history of liberal construction of the RTKL and the policy goals behind it.<sup>134</sup> By deliberately choosing to read the RTKL narrowly, the court missed an opportunity to proactively resolve the subcontractor question in favor of broader transparency.<sup>135</sup> Moreover, the supreme court's treatment of *Lukes* and its insistence on an actual contract substantially limited the reach of the RTKL with respect to subcontractor records.<sup>136</sup>

#### A. *Is the Force Still Strong with Lukes?*

Although the supreme court did not explicitly overrule *Lukes*, the court's reasoning in *Eiseman I* and *Eiseman II* quietly rejected, and even

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ment of *Lukes* in *Eiseman I* and *Eiseman II*, see *infra* notes 137–42 and accompanying text.

133. See *Eiseman II*, 124 A.3d at 1217, 1223 (concluding “direct contractual relationship” is required to access third-party records under Section 506(d)(1)). For further analysis of the court's interpretation of section 506(d)(1), see *infra* notes 143–49 and accompanying text.

134. See generally *id.* at 1224–25 (Stevens, J., dissenting). For further critique of the court's treatment of policy arguments favoring transparency, see *infra* notes 150–53 and accompanying text.

135. See, e.g., Capeloto, *supra* note 11, at 22 (acknowledging “the courts have had to do the heavy lifting by applying judicial interpretation” where statute does not explicitly grant access to information in cases of privatization (citing Rani Gupta, *Privatization v. the Public's Right to Know*, REPORTERS COMM. FOR FREEDOM OF THE PRESS 10 (Aug. 1, 2007), <http://www.rcfp.org/rcfp/orders/docs/PRIVATIZATION.pdf> [<https://perma.cc/4SB7-BXWL>]); Feiser, *supra* note 4, at 834 (suggesting courts must “clarify the role of public-records laws” in absence of legislative action); Gedid, *supra* note 8, at 474 (expressing hope “courts will construe the RTKL in a manner that is consistent with the legislative intent”).

Feiser warns that “[w]ithout legislative or judicial intervention interpreting [right to know] statutes broadly, most state governments could effectively transfer their documents into the hands of private companies and avoid the reach of freedom of information acts.” See Feiser, *supra* note 4, at 826 (emphasis added). Capeloto argues courts interpreting state freedom of information statutes should be guided primarily by “whether nondisclosure harms or impedes the general well-being of a citizenry.” See Capeloto, *supra* note 11, at 41.

Further, Gedid emphasizes the broad array of “weapons” available to appellate courts to enforce the 2008 RTKL, including attorneys fees, civil penalties, and “any [other] penalty authorized under ‘applicable rules of court.’” See Gedid, *supra* note 8, at 472, 474 (discussing remedies and expressing “hope that the courts . . . will use the penalty provisions to enforce the RTKL”). At the same time, Gedid notes that the wide variety of exemptions under Section 708(b) will require “extensive judicial construction,” and expresses concern that courts will interpret the exceptions narrowly. See *id.* at 474. Gedid hopes the Commonwealth Court's “expertise in administrative law” will give that court greater insight into “the intent of the Pennsylvania legislature.” See *id.* at 475.

136. See *Eiseman II*, 124 A.3d at 1225 (Stevens, J., dissenting) (opining “[m]ajority's decision [ ] prevents the public from holding government agencies accountable”).

undermined, *Lukes*.<sup>137</sup> In *Eiseman I*, the court explicitly chose not to follow the *Lukes* court in attempting to draw a line between public and private funds.<sup>138</sup> This arguably calls into question the *Lukes* court's reasoning that records reflecting the expenditure of public funds remain public until the funds reach the intended recipient.<sup>139</sup> Although the *Eiseman I* court ostensibly agreed with Judge McCullough's dissent, which relied heavily on *Lukes*, the majority stopped short of endorsing Judge McCullough's reasoning.<sup>140</sup> Furthermore, in *Eiseman II*, the court implicitly rejected the possibility, raised by *Lukes* and Judge McCullough's dissent, that a principal-agent relationship between DPW and the MCOs could create a direct contractual relationship between DPW and the Subcontractors.<sup>141</sup> In light of the court's interpretation, it is unclear whether *Lukes*'s expansive, policy-oriented interpretation of the RTKL remains applicable for future courts.<sup>142</sup>

B. *Contractual Relationship Requirement Surrenders Subcontractor Records to the Dark Side*

Prior case law did not necessarily mandate the Supreme Court of Pennsylvania's conclusion that Section 506(d)(1) requires a contractual

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137. See generally *id.* at 1220–24; *Eiseman I*, 125 A.3d 29–33. For further discussion of the treatment of *Lukes* in *Eiseman I* and *Eiseman II*, see *infra* notes 138–41 and accompanying text.

138. See *Eiseman I*, 125 A.3d at 33 (“In terms of the discussion of the *Lukes* decision, we do not find it useful to consider the downstream point at which public funding transforms into private monies.”).

139. See *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609, 625 (Pa. Commw. Ct. 2009) (“Until the public funding reaches the intended Medicaid recipient, the money remains public . . . DPW cannot circumvent the disclosure of this money trail by contracting indirectly [through MCOs].”).

140. See generally *Eiseman I*, 125 A.3d at 29–30 (agreeing with Judge McCullough's conclusion that MCO Rates constitute financial records, without further discussion or analysis of Judge McCullough's reasoning). Although the court acknowledged the MCO position “greatly understates the relationship” between the MCOs and Subcontractors, the court did not explicitly endorse the position taken by Judge McCullough and the *Lukes* court that the MCOs act as agents of DPW. See generally *id.* (making no comment describing MCOs as agents of DPW).

141. Compare *Eiseman II*, 124 A.3d at 1220 (summarizing Judge McCullough's argument without analysis or commentary), and *id.* at 1219–20, 1223 (affirming, implicitly, Commonwealth Court's finding that no contractual relationship existed between DPW and Subcontractors), with *id.* at 1224–25 (Stevens, J., dissenting) (endorsing Judge McCullough's agency argument).

142. Compare *Eiseman I*, 125 A.3d at 125 (explicitly declining to consider “downstream point at which public funding transforms into private monies”), with *Lukes*, 976 A.2d at 624–25 (concluding funds disbursed by DPW remain public funds until they reach Medicaid recipients). Compare *Lukes*, 976 A.2d 621–24 (finding Provider agreements are product of agency relationship between DPW and MCO), with *Eiseman II*, 124 A.3d at 1223 (rejecting requester's position that principal-agent between DPW and MCO established requisite contractual relationship between DPW and Subcontractors).

relationship.<sup>143</sup> The Commonwealth Court cited *Honaman* to uphold the notion that “[t]his court requires a contractual relationship between a third party and an agency to access third party records,” an assertion the supreme court accepted without comment.<sup>144</sup> However, this formulation of *Honaman*’s holding came from *In re Venango County Tourism Promotion Agency*, not *Honaman*.<sup>145</sup> Moreover, it is questionable whether the *Honaman* decision actually addressed, or was intended to address, the extent of access to third-party records under Section 506(d)(1).<sup>146</sup> The discussion in *Honaman* actually focused on the scope of agency possession under Section 305(a), rather than access to third-party records.<sup>147</sup> Additionally, the *Honaman* court relied on *Office of the Budget* to conclude certain tax records were not “in the possession” of the township because there was no contractual relationship between the township and the tax collector.<sup>148</sup> However, *Office of the Budget* did not consider whether Section

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143. See generally *Honaman v. Twp. of Lower Merion*, 13 A.3d 1014, 1019–23 (Pa. Commw. Ct. 2011) (focusing on reach of Section 305(a), not Section 506(d)(1)); *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 621 (Pa. Commw. Ct. 2011) (explicitly stating Section 506(d)(1) was not at issue).

144. Compare *Eiseman II Commw. Ct. Op.*, 86 A.3d 932, 940 (Pa. Commw. Ct. 2014) (citing *Honaman*, 13 A.3d at 1022), with *Eiseman II*, 124 A.3d at 1223 (citing *Eiseman II Commw. Ct. Op.*, 86 A.3d at 940).

145. Compare *Eiseman II Commw. Ct. Op.* 86 A.3d at 940 (“This Court requires a contractual relationship between a third party and an agency to access third-party records.” (citing *Honaman*, 13 A.3d 1014)), with *In re Venango Cty. Tourism Promotion Agency*, 83 A.3d 1101, 1110 (Pa. Commw. 2014) (“This Court requires a contractual relationship between a third party and an agency to access third-party records.” (citing *Honaman*, 13 A.3d 1014)).

146. See generally *Honaman*, 13 A.3d at 1019–22 (discussing Section 506(d)(1) primarily in passing or in footnotes). The trial court in *Honaman* found Section 506(d)(1) inapplicable because the tax collector was “not an ‘agency’” subject to the RTKL and did not have a contract with the township. See *id.* at 1017–18. However, the primary issue before the Commonwealth Court was whether the township had possession or control over the records at issue. See *id.* at 1019 (summarizing issue in discussion heading).

147. See generally *id.* at 1019–22 (evaluating whether township had “[p]ossess[ion] [o]r [c]ontrol” over “the records generated and maintained by the tax collector”). In its discussion, the court excerpted provisions of the RTKL defining “record” and “public record,” as well as Section 305(a). See *id.* at 1019–20 (summarizing key rules). Then, the court provided an extended excerpt from *Office of the Budget* discussing whether the presumption under Section 305(a) extended to records “[within] an agency’s custody or control, not merely in its possession.” See *id.* at 1022–23 (quoting *Office of the Budget*, 11 A.3d at 621–23). However, the only reference to Section 506(d) in the *Honaman* court’s discussion is a single footnote quoting the statute added by the *Honaman* court to clarify a passing reference to Section 506(d) in the excerpt from *Office of the Budget*. See *id.* at 1020 n.6 (providing statutory language of Section 506(d)(1)).

148. See *id.* at 1020–22 (drawing comparison to facts of *Office of the Budget*). For additional background on the *Honaman* case, see *supra* notes 59–65 and accompanying text.

506(d)(1) could apply in the absence of a direct contractual relationship because neither party raised the issue.<sup>149</sup>

The plain language of Section 506(d)(1) provided more support for a contractual relationship requirement, a point the MCOs and Subcontractors recognized in their brief.<sup>150</sup> However, in crediting this argument, the court overlooked the policy of liberal construction of the RTKL articulated in earlier cases.<sup>151</sup> Similarly, the supreme court undervalued the numerous policy arguments favoring greater transparency.<sup>152</sup> By affirming the contractual relationship requirement, the court not only restricted the

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149. See *Office of the Budget*, 11 A.3d at 621 (declining to consider whether records would be disclosable under Section 506(d)(1)). The *Honaman* court was correct that there was no contract between the Office of the Budget and the subcontractor in that case. See *id.* (“[N]either the OOR nor the Requester argue that the Grant Agreement is a contract to perform a governmental function on behalf of Budget such that the requested payroll records are public records under Section 506(d)(1).”). However, precisely for that reason, the *Office of the Budget* court explicitly declined to consider whether those records were accessible under Section 506(d)(1). See *id.* (“[T]he issue of whether the payroll records would be disclosable pursuant to [Section 506(d)(1)] is not before this [c]ourt.”).

150. See 65 PA. STAT. AND CONS. STAT. ANN. § 67.506(d)(1) (West 2016) (“A public record . . . in the possession of a party *with whom the agency has contracted* . . . shall be considered a public record of the agency . . .” (emphasis added)); Br. for Appellees Dental Benefit Provides, *supra* note 126, at 19–20 (pointing out “the plain terms of the statute *do* ‘requir[e] a contractual relationship’ for constructive agency possession to exist” (alteration in original) (emphasis added)). In their brief to the Supreme Court of Pennsylvania, the MCOs and Subcontractors argued that “the General Assembly was well aware” of the use of subcontractors by government contractors but chose not to write Section 506(d)(1) in such a way as to reach subcontractors. See *id.* The supreme court appears to credit this argument in *Eiseman II*, acknowledging that “the General Assembly had tempered [a policy of liberal interpretation] with explicit limiting terms . . . ‘presumably on account of the burden, expense, and other impositions attending wholesale disclosure’ by non-public entities.” See *Eiseman II*, 124 A.3d at 1223 (quoting *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012)).

151. See *Eiseman II*, 124 A.3d at 1224 (Stevens, J., dissenting) (opining that majority inappropriately fails to apply “liberal construction”) (citing *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013); *SWB Yankees LLC*, 45 A.3d at 1042).

152. See *id.* (summarizing policy arguments in favor of broad disclosure). For full discussion of the policy arguments put forth by Justice Stevens and amici for the Requester, see *supra* note 129 and accompanying text. See also Gedid, *supra* note 8, at 474 (“The sponsors of the [2008 RTKL] and the legislature sought a broad definition of public documents and records in order to bring transparency, trust and accountability to . . . government.”); Somers & Perkins, *supra* note 8, at 154 (“It is [ ] crucial for Medicaid beneficiaries, policymakers, and the general public to have access to information indicating whether public money is being well spent and used so as to ensure that people obtain quality health care services.”). In explaining why transparency is crucial, Somers and Perkins emphasize the profit-maximizing incentives driving MCOs and provide several examples of how financial incentives led to underutilization of services and poor quality outcomes in managed care programs. See *id.* (citing NHELP, REPORT: THE PURSUIT OF MEDICAID MANAGED CARE QUALITY INFORMATION IN SIX STATES (2010)).

reach of the RTKL, but also missed an opportunity to further the statute's goal of promoting greater transparency.<sup>153</sup>

VI. CONCLUSION: HARD TO SEE, SUBCONTRACTOR RECORDS ARE  
(AMEND THE RTKL, THE LEGISLATURE MUST)

Going forward, the *Eiseman I* decision will give taxpayers and consumer advocates more information about how taxpayer dollars given to Medicaid contractors are being spent.<sup>154</sup> Not only will the public be able to access information on payments made by MCOs to subcontractors, like the dental subcontractors at issue here, taxpayers will also be able to see payments made directly by MCOs to medical providers, such as physicians, hospitals, and pharmacies.<sup>155</sup> Advocates for the Public Interest Law Center, the Requesters in the *Eiseman* cases, believe most contracts with medical providers and physician rate schedules will now be publicly available under *Eiseman I*.<sup>156</sup> *Eiseman I* could also improve public access to government contracts outside of Medicaid where a third party delivers government services under a direct agreement with a government contractor.<sup>157</sup>

However, where that government contractor and the third party delivering services are separated by a subcontractor, *Eiseman II* effectively

153. See *Eiseman II*, 124 A.3d at 1224 (Stevens, J., dissenting) (opining that majority's decision is contrary to purpose of RTKL); Capeloto, *supra* note 11, at 41 (calling on courts to apply "public good" standard in determining access to records of non-public entities); Feiser, *supra* note 4, at 836–53 (discussing examples of "twenty-two states" whose courts have employed "flexible standards" in applying their freedom-of-information statutes to private entities); Gedid, *supra* note 8, at 474 (expressing "hope that the courts will construe the [2008] RTKL in a manner that is consistent with legislative intent [of greater transparency]").

154. See Shayna Posses, *Pa. High Court Says Some Medicaid Rates Are Public Info*, LAW360 (Oct. 28, 2015, 4:14 PM), <http://www.law360.com/articles/720002/pa-high-court-says-some-medicaid-rates-are-public-info> [https://perma.cc/P6EK-UPUL] (reporting reactions by requesters to supreme court decision); PUB. INT. L. CTR., *supra* note 17 ("[T]he public has the right to scrutinize how billions of dollars in taxpayer funds flow from [DHS] to private insurance companies to operate the state's Medicaid program.").

155. See *id.* ("[T]he ruling also has broader implications beyond just dental rates because it should mean that physician rate schedules are also public record.").

156. See *id.* (reporting Requester's assessment of impact of *Eiseman I*); PUB. INT. L. CTR., *supra* note 17 ("Although most Medicaid dental provider contracts remain inaccessible, the high court's main decision means that medical provider contracts are subject to public release, because there are fewer middlemen between medical providers and DHS.").

157. See Posses, *supra* note 154 (quoting commentator characterizing *Eiseman I* as "an important win for transparency in government" that "recognizes that the public has the right to scrutinize how public funds are spent" (quoting Benjamin Geffen, Staff Attorney for Public Interest Law Center) (internal quotation marks omitted)).

shields the downstream contract from public scrutiny.<sup>158</sup> As Justice Stevens' dissenting opinion notes, policymakers and consumer advocates may be prevented from obtaining a clear picture of where Medicaid dollars are going, making it harder to control costs and address issues with healthcare access and quality.<sup>159</sup> Moreover, the *Eiseman II* decision could make it harder for the press and taxpayers to monitor spending not just within Medicaid, but anywhere taxpayer dollars are funneled through contractors and subcontractors.<sup>160</sup>

Looking ahead, the legislature should take the supreme court's advice and revisit the RTKL with respect to subcontractor records.<sup>161</sup> Extending the RTKL to reach downstream subcontracts, like those at issue in *Eiseman II*, would further the statute's goals of promoting transparency and accountability.<sup>162</sup> Given Pennsylvania's increasing reliance on private contractors and subcontractors, it is all the more important that the legis-

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158. See *Eiseman II*, 124 A.3d at 1224–25 (Stevens, J., dissenting) (expressing concern that “[m]ajority’s decision” will “prevent[ ] the public from holding government agencies accountable”); Joshua D. Bonn, *PA Supreme Court Clarifies Accessibility of Government Contractor/Subcontractor Records*, NAUMAN SMITH RIGHT TO KNOW & MEDIA L. BLOG (Nov. 13, 2015), <http://www.nssh.com/2015/11/pa-supreme-court-clarifies-accessibility-of-government-contractorsubcontractor-records/> [<https://perma.cc/896W-FNHC>] (noting *Eiseman II* decision “confirms that government contractors may enter subcontracts to shield the ultimate expenditure of public funds”).

159. See *Eiseman II*, 124 A.3d at 1225 (Stevens, J., dissenting) (summarizing policy arguments raised in amicus briefs). For a fuller explanation of these policy arguments, see *supra* note 129 and accompanying text. See also Somers & Perkins, *supra* note 8, at 154 (stressing importance of public “access to information indicating whether public money is being well spent and used so as to ensure that people obtain quality health care services”).

160. See *Eiseman II*, 124 A.3d at 1225 (Stevens, J., dissenting) (“[L]ack of information concerning the Provider Rates prevents fully informed policy decisions regarding the state of Medicaid spending and impedes necessary analysis . . . .”); Feiser, *supra* note 4, at 834 (discussing complaints by some press that “previously public records,” including health data and tax records, will become inaccessible due to privatization).

161. Cf. *Eiseman II*, 124 A.3d at 1223 (acknowledging “importance” of Medicaid program and “immense associated expense” as reasons why “legislative consideration would seem to be in order”); Somers & Perkins, *supra* note 8, at 154 (describing financial incentives for MCOs to reduce utilization of services).

162. See *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) (articulating purpose of RTKL); *Eiseman II*, 124 A.3d at 1223 (majority opinion) (acknowledging “salient policy considerations favoring public access” to subcontractor records and recommending legislative action); *id.* at 1224 (Stevens, J., dissenting) (faulting majority for reading RTKL too narrowly to fulfill legislative purpose of transparency); see also Gedid, *supra* note 8, at 460 (“Pennsylvania needs a stronger open records law because openness builds trust in government. Transparency gives the public the ability to review government actions, to understand what government does, to see when government performs well, and when government should be held accountable.” (quoting *Third Consideration and Final Passage of Right to Know Law: Hearing on S.B. 1 Before the General Assembly*, 2007 Leg., 191st Sess. (Pa. 2007) (statement of Sen. Pileggi, Bill Sponsor))); Feiser, *supra* note 4, at 833 (“Not only should the public be able to monitor the private company’s activities, but the monitoring should be on the same terms as when the agency was the information vendor.”).

lature take action before government-funded programs become buried under layers of privatization.<sup>163</sup>

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163. See Feiser, *supra* note 4, at 825–26, 834, 864 (expressing concern of some observers that “once-public” records could become inaccessible without changes to public access statutes (quoting Don Noel, *Privatization Shouldn’t Reduce Public Information*, HARTFORD COURANT, Apr. 16, 1997, at A11)); Frankel, *supra* note 2, at 1452 (“As governments continue to delegate public functions to private companies, it is critically important to . . . ensure that private companies give proper respect to public values and constitutional rights.”); Somers & Perkins, *supra* note 8, at 155 (stressing “urgent need” for public access to data showing how public funds are spent by MCOs).