NO. CV 06 4010428 S HEALTH NET OF CONNECTICUT	: :	STATE OF CONNECTICUT SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 29, 2006

NO. CV 06 4010429 S COMMUNITY HEALTH NETWORK	: :	STATE OF CONNECTICUT SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 29, 2006

NO. CV 06 4010430S ANTHEM HEALTH PLANS	: :	STATE OF CONNECTICUT SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 29, 2006

NO. CV 06 4009521 S HEALTH NET OF CONNECTICUT	: :	STATE OF CONNECTICUT SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 29, 2006

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NO. CV 06 4009522S COMMUNITY HEALTH NETWORK	: :	STATE OF CONNECTICUT SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 29, 2006

NO. CV 06 4009534S ANTHEM HEALTH PLANS	: :	STATE OF CONNECTICUT SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 29, 2006

MEMORANDUM OF DECISION

I.

INTRODUCTION

Each of the three captioned plaintiffs has appealed from two decisions of the freedom of information commission (commission), all of which share many common facts and legal questions. All six appeals were heard together, and this memorandum decides all of them.[1]

[1] The administrative records for the three appeals involving Kari Hartwig (Hartwig Record) and the administrative records for the three appeals involving Barbara Hunt and Marisol Pratts have been separately consolidated and are sometimes, hereinafter, referred to collectively as the administrative record.

A. Hartwig

The following facts are undisputed as to Kari Hartwig (Hartwig):

> Hartwig (Hartwig) requested (Hartwig request) copies of certain records (Hartwig records) from the department of social services (dss) relating to contracts (collectively, dss/MCO contracts) between dss and the three named plaintiffs (MCOs) and Wellcare of Connecticut, Inc. (Wellcare) for the provision of health care to participants in Connecticut's Medicaid program (Medicaid) and in Connecticut's State Administered General Assistance program (SAGA);
>
> The Hartwig records are described in the Hartwig request, as follows:
>
> ". . . any documents relating to current cardiology and gastroenterology provider reimbursement rates under managed care contracts for Medicaid and SAGA enrollees . . . . This request also extends to documents relating to the fees paid for these services which are solely in the possession of these entities (MCOs) with which your agency contracts, to the extent that they receive more than $2.5 million per year in state contracts, as required to be produced under Conn. Gen. Stat. §§ 1-200 (11) and 1-218, since these contractors are performing a government function";
>
> Hartwig, an Assistant Clinical Professor in the Department of Epidemiology and Public Health at the Yale University School of Medicine, sought to investigate whether reimbursement rates paid to medical providers under Medicaid and SAGA were so low that qualified providers would not participate in those programs, which would allow her to determine whether low reimbursement rates effectively denied services to Medicaid recipients (recipients);
>
> DSS denied the Hartwig request on the following grounds: (1) the Hartwig records were in the possession of the MCOs, but not in the possession of dss; (2) the MCOs in possession of the Hartwig

documents did not perform a government function as defined in General Statutes § 1-200 (11) (all further section references are to the General Statutes); and, (3) Hartwig was not entitled to receive a copy of the Hartwig records, either under § 1-218 or pursuant to the dss/MCO contracts;

Hartwig complained to the commission about dss' denial (Hartwig complaint);

While the Hartwig complaint was pending before the commission, dss requested and obtained certain records from the MCOs relating to the Hartwig complaint, and dss, in turn, provided certain records that it had received from the MCOs to Hartwig; and

The three plaintiffs still have in their possession some Hartwig records which have not been provided to Hartwig.

B. Hunt/Pratts

The following facts are undisputed as to Barbara Hunt (Hunt) and Marisol Pratts (Pratts):

After the Hartwig request was filed with dss, Hunt and Pratts requested (Hunt/Pratts request) copies of certain records (Hunt/Pratts records) from dss relating to the provision of prescription drugs to participants in the Medicaid, SAGA and Connecticut Department of Social Services Pharmaceutical Assistance Contract to the Elderly and Disabled program (ConnPACE) under the dss/MCO contracts;

In particular, the Hunt/Pratts request sought documents containing statistics regarding preferred drug lists or drug formularies which are used by the MCOs in their performance of the dss/MCO contracts, as well as documents reflecting the number of recipients who did not receive prescribed drugs for lack of prior approval;

The Hunt/Pratts decision does not define the phrases "preferred drug lists," "drug formularies" or "prior approval";

> Dss denied the Hunt/Pratts request on the following grounds: (1) the Hunt/Pratts records were in the possession of the MCOs, but not in the possession of dss; (2) the MCOs in possession of the Hunt/Pratts documents did not perform a government function as defined in § 1-200 (11); and, (3) Hunt and Pratts were not entitled to receive a copy of the Hunt/Pratts records, either under § 1-218 or pursuant to the dss/MCO contracts;
>
> Hunt and Pratts complained to the commission about dss' denial of their request (Hunt/Pratts complaint);
>
> While the Hunt/Pratts complaint was pending before the commission, dss requested and obtained certain records from the MCOs relating to the Hunt/Pratts complaint, and dss, in turn, provided certain records that it had received from the MCOs to Hunt and Pratts;
>
> The three plaintiffs have some Hunt/Pratts records in their possession which have not been provided to Hunt and Pratts.

C. Hearing Below

The Hartwig complaint and the Hunt/Pratts complaint were consolidated by the commission for purposes of hearing, and, at the hearing, the MCOs argued that the requested records were not subject to disclosure for the following reasons:

> a.) The MCOs do not perform a governmental function within the meaning of §1-218; and,
>
> b.) The dss/MCO contracts do not contain the freedom of information provisions required by § 1-218 (foi provisions) for contracts between public agencies and entities performing a governmental function.

The commission's decisions on the Hartwig complaint (Hartwig decision) and on the Hunt/Pratts complaint (Hunt/Pratts decision) (the Hartwig decision and the

Hunt/Pratts decision are sometimes, hereinafter, referred to, collectively, as the decisions) both concluded that the MCOs perform a governmental function within the meaning of § 1-218 and ordered dss to do the following:

> a.) Obtain from the MCOs copies of the requested records which had not yet been disclosed and provide them to Hartwig, or to Hunt and Pratts, as appropriate; and,
>
> b.) Amend its contracts with the MCOs to include the foi provisions.

D. The Appeals

The MCOs have appealed the decisions, although dss and Wellcare have not appealed.

The MCOs, Hartwig, and Hunt and Pratts stipulated to the commission that any claims by the MCOs that any of the Hartwig records and/or the Hunt/Pratts records are exempt from disclosure under § 1-210 (b)(5)(A), as trade secrets, would not be immediately addressed by the commission and that, if it were ultimately determined that those materials are public records, such trade secret claims would be addressed subsequently by the commission.

E. Positions of MCOs

The MCOs argue that the dss/MCO contracts do not call for the performance by them of a governmental function, as defined in § 1-200 (11). Therefore, they contend that the dss/MCO contracts need not contain the foi provisions and that the Hartwig

records and the Hunt/Pratts records are not public records pursuant to § 1-200 (5). In support of this contention, they argue that, if they are found to be performing a governmental function, Connecticut's Medicaid program will be in violation of the federal statutory and regulatory scheme governing Medicaid, thereby jeopardizing Connecticut's ability to receive federal reimbursement for Medicaid.

The MCOs also argue that the decisions violate their constitutional rights in the following respects:

> a.) The Hartwig and Hunt/Pratts records are trade secrets, and their forced disclosure would constitute a taking without just compensation; and
>
> b.) The decisions violate the Contracts Clause of the United States Constitution.[2]

F. Relevant Freedom of Information Statutes

The portions of the Freedom of Information Act, § 1-200, et seq. (foia), controlling the freedom of information aspects of these appeals are set forth below. Section 1-210(a) provides, in excerpted form:

> "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. . . ."

---

[2] "No State shall . . . pass any law impairing the Obligation of Contracts . . . ." Article I, § 10, cl. 1.

Section 1-200(5) provides as follows:

> "'Public records or files' means any recorded data or information relating to the conduct of the public's business prepared, owned, used or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method."

Section 1-218 provides, in relevant part:

> "Each contract in excess of two million five hundred thousand dollars between a public agency and a person for the performance of a governmental function shall (1) provide that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function, and (2) indicate that such records and files are subject to the Freedom of Information Act and may be disclosed by the public agency pursuant to the Freedom of Information Act."

Section 1-200 (11) provides as follows:

> "'Governmental function' means the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency. 'Governmental function' shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency."

Section 1-206 (b) (2) provides, in excerpted form:

> "In any appeal to the Freedom of Information Commission . . . the

commission may confirm the action of the agency or order the agency to provide relief that the commission, in its discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act. The commission may declare null and void any action taken . . . ."

G. Relevant Contractual Language

The relevant portions of the dss/MCO contracts are set forth below.

Paragraph 3.34a of the dss/MCO contracts (further paragraph references are to the dss/MCO contracts) provides, in relevant part:

> "The MCO shall provide the State of Connecticut and any other legally authorized governmental entity, or their authorized representatives, the right to enter at all reasonable times the MCO's premises or other places, including the premises of any subcontractor, where work under this contract is performed to inspect, monitor or otherwise evaluate work performed pursuant to this contract."

Def. Exh. 1 (which is also part of the administrative record), 8/1/06 hrg., pp. 701-02.

Paragraph 3.35 is captioned "Examination of Records," and subsection (a) of that paragraph provides as follows:

> "The MCO shall develop and keep such records as are required by law or other authority or as the DEPARTMENT determines are necessary or useful for assuring quality performance of this contract. The DEPARTMENT shall have an unqualified right of access to such records in accordance with Part II Section 3.34."

Id., p. 702

Paragraph 3.35b provides as follows:

> "Upon non-renewal or termination of this contract, the MCO shall turn over or provide copies to the DEPARTMENT or to a designee of the DEPARTMENT all documents, files and records relating to persons

receiving services and to the administration of this contract that the DEPARTMENT may request, in accordance with Part II, Section 3.34."

Id., p. 708

Paragraph 3.35c provides, in relevant part:

"The MCO shall provide the DEPARTMENT and its authorized agents with reasonable access to records the MCO maintains for the purposes of this contract."

Id.

Paragraph 3.35e provides as follows:

"The MCO, for purposes of audit or investigation, shall provide the State of Connecticut, the Secretary of HHS and his/her designated agent, and any other legally authorized governmental entity or their authorized agents access to all the MCO's materials and information pertinent to the services provided under this contract, at any time, until the expiration of three (3) years from the completion date of this contract as extended."

Id., pp. 708-09

Paragraph 5.08 is captioned "Freedom of Information," and subsection (a) of that paragraph provides, in relevant part:

"Due regard will be given for the protection of proprietary information contained in all documents received by the DEPARTMENT; however, the MCO is aware that all materials associated with the contract are subject to the terms of the state Freedom of Information Act, Conn. Gen. Stat. Sections 1-200 et seq., and all rules, regulations and interpretations resulting therefrom."

Id., pp. 727-28

Paragraph 5.08a establishes the procedure by which the MCOs can ask dss to treat

particular materials as exempt from disclosure pursuant to the foia, subject to the following:

> "The final administrative authority to release or exempt any or all material [so identified] by the MCO or the subcontractor rests with the DEPARTMENT."

Id., p. 728.

Paragraph 5.08b provides, in relevant part:

> "The MCO is committed to providing the DEPARTMENT access to all information necessary to analyze cost and utilization trends; to evaluate the effectiveness of Provider Networks, benefit design, and medical appropriateness; and to show how the HUSKY population compares to the MCO's enrolled population as a whole."

Id.

H. Federal Statutory and Regulatory Framework for Medicaid

The federal and Connecticut statutes and regulations material to dss' operation of Medicaid are succinctly summarized in the plaintiffs' consolidated brief dated June 9, 2006, as follows:

> "Medicaid is a jointly funded federal and state program to provide medical assistance to certain poor, aged, blind, and disabled individuals. *See* 42 U.S.C. §§ 1301, 1396a *et seq.* If a state chooses to participate in Medicaid, it must comply with all applicable federal statutes and regulations, and the state's plan for administration of the program must be approved by the federal Department of Health and Human Services through its Centers for Medicare and Medicaid Services ("CMS"). 42 C.F.R. § 430.10, § 430.12, § 430.14, § 430.15. In accordance with 42 U.S.C. § 1396a(a)(5) and its implementing regulation, 42 C.F.R. § 431.10, a state that chooses to participate in Medicaid must designate a single state agency' that is responsible for administering and managing the state

> Medicaid plan. By statute, DSS is the single state agency in Connecticut with responsibility for administering the state's Medicaid plan. *See* 42 U.S.C. § 1396a(5); 42 C.F.R. § 431.10; General Statutes § 17b-2.
>
> "Congress has determined that, subject to certain restrictions, states may require Medicaid recipients to enroll in managed care plans. 42 U.S.C. § 1396u-2(a)(1). A state that chooses to mandate enrollment in Medicaid managed care plans must permit individuals to choose among competing plans. 42 U.S.C. § 1396u-2(a)(3). Consequently, no single MCO can provide all the managed care services for any state's entire Medicaid population."

Plaintiffs' brief, pp. 4-5.

II.

DISCUSSION

ISSUES

Whether the requested records are subject to the foia depends on whether they are public records under § 1-200 (5). That, in turn, depends on the answers to the following questions:

> 1. Do the dss/MCO contracts carry a consideration to the MCOs of more than $2,500,000, which is a condition of the extension of the foia to the MCOs pursuant to § 1-218?
>
> 2. Do the MCOs administer or manage a program of dss, which is an element of the definition of public records in § 1-200 (11) and a condition for the extension of the foia to the MCOs pursuant to § 1-218?
>
> 3. Is dss involved in, or does it regulate, to a significant extent the MCOs' performance of the dss/MCO contracts, which is an element of the definition of governmental function in § 1-200 (11) (B) and, derivatively, of the definition of public records pursuant to § 1-200 (5)?

4. Do the MCOs participate in the formulation of governmental policies or decisions, which is an element of the definition of governmental function in § 1-200 (11) (B) and, derivatively, of the definition of public records pursuant to § 1-200 (5)?

5. Are such policies or decisions (if any) binding on dss, which is an element of the definition of governmental function in § 1-200 (11) (B) and, derivatively, of the definition of public records pursuant to § 200 (5)?

6. Do the MCOs merely provide goods or services, without the delegated responsibility to administer or manage a program of dss, which would exclude their operations from the definition of governmental function pursuant to § 1-200 (11)?

Four of the above questions are easily answered. As to No. 1, each of the decisions contains a finding, which is not challenged by the MCOs, that the MCOs receive consideration of more than $2,500,000 under the dss/MCO contracts.

As to No. 3, there is substantial evidence in the administrative record to support the findings in the decisions that, pursuant to the dss/MCO contracts, dss is involved in, or regulates, to a significant extent the MCOs' performance.

As to No. 4, all counsel for the MCOs acknowledged at argument that the MCOs unilaterally decide the fees to be paid to medical providers, as well as which medications are placed on preferred drug lists and/or are subject to prior approval, all of which are held to be governmental policies or decisions.

As to No. 5, all counsel for the MCOs acknowledged at argument that dss cannot veto the MCOs' decisions about provider fees, preferred drug lists or prior approval which are, therefore, binding on dss.

The answers to No. 2 and No. 6 require the construction of the phrases "program of a public agency" and "administration or management," as they are used in § 1-200 (11).

A. Program of a Public Agency

There is no dispute among the parties that Connecticut's managed care operation under Medicaid (Medicaid managed care) is a program of dss. By federal statute, if dss employs managed care in Medicaid, dss must give recipients a choice of MCOs. Therefore, each MCO can operate only a portion of Medicaid managed care. Accordingly, the first issue in the construction of "program" is whether the portion of Medicaid managed care which is operated by each MCO is a program of dss. The text of § 1-200 (11) provides no guidance as to the meaning of "program," and so the court looks to extratextual material. §1-2z.

The MCOs argue, on two grounds, that none of them operates a program of dss. First, they contend that each MCO's piece of the Medicaid managed care program is not, itself, a program of dss. Second, they contend that the contractual retention by dss of the authority to review and veto many of an MCO's actions so encroaches on the MCOs' autonomy that the diminished scope of matters within their exclusive authority cannot be said to constitute a program of dss.

1. Multiple contractors

In support of their contention that Medicaid managed care is a unitary program

which cannot be divided into four separate programs for the purposes of § 1-200 (11), the MCOs cite the testimony of Mitchell Pearlman, then general counsel to the commission, before the Committee on Government Administration and Elections on the proposed bill (bill) which subsequently morphed into P.A. 01-169 (which contains what is now § 1-200 (11)), as follows:

> "For example, if somebody's building a highway for the State and they just – you know, they got the contract to build the highway. That does not apply here. If they ran the Department of Transportation, then it would apply."

Joint Standing Committee Hearings, GAE, Pt. 2, 2001 Sess., p. 556 (remarks of Mitchell Pearlman).

Mr. Pearlman's testimony apparently reflects his view that only the management of an entire state department would subject a contractor to the foia under the bill. However, the concept of contracting out the management of an entire department of the state of Connecticut is facially and statutorily absurd. Accordingly, if the bill applies to anything, a "program of a public agency" must mean something less than the entirety of a department's responsibilities.

The legislative history of the bill is barren of a clear directive on whether dividing a program among more than one contractor takes the portion performed by each contractor outside the definition of program. The only guidance the court finds is, by inference, from the remarks of Rep. Knopp, the House sponsor of the bill, in regard to a contract for the management of a municipal golf course, as follows:

> "And it would seem that, therefore, when the municipality and the golf course management company sit down and do up the contract and divvy up the different responsibilities and delegate some of those policies and responsibilities to the private entity, then those decisions by the private entity in carrying out the governmental function would be binding on members of the public, i.e. members of the public would have to comply with them."

Hartwig Record, pp. 1286-87.

If, as implied by Rep. Knopp (in contradiction to Mitchell Pearlman's remarks), the scope of the bill is not limited only to a contract for management of a municipality's entire parks and recreation department, but, rather, extends to a contract for management of a single golf course, then, presumably, it would also extend to multiple contracts, each for the management of a different golf course.

While there is little guidance in the legislative history of the bill for the construction of "program" in the context of multiple contractors, what little there is, when read in the context of the entire bill, leads the court to hold that the division of Medicaid managed care among four carriers is not a bar to each of their operations constituting a program of dss.

2. Division of authorities between dss and MCOs

As indicated above, there is substantial evidence in the record to support the finding in each decision that dss is involved in, or regulates, to a significant extent the MCOs' operations. The MCOs contend that this retention by dss of review and veto authority over some of their functions so diminishes their autonomy that those limited

matters over which they retain unilateral control cannot be said to constitute a program.

The legislative history of the bill contains three references in floor debate to contracts in which there is a public/private division of authority: two by Rep. Knopp and one by Sen. Fonfara. In his remarks quoted above, Rep. Knopp implied that some of the decisions made by a golf course management firm which shares responsibilities with a municipality would be subject to the bill. In his other reference, Rep. Knopp observed, in regard to a caterer at a municipal golf course, that ". . . the decision of whether to serve french fries or hamburgers is not the kind of management decision we're talking about." Hartwig Record, p. 1258.

In his remarks on the bill on the floor of the Senate, Sen. Fonfara responded to a question concerning the type of functions performed by a contractor which would fall within the scope of the bill, as follows:

> " . . . the entity participating in the formulation of governmental policies or decisions in connection with the administration or the management of the program...[t]hat's a high level of decision[-]making that is a condition of the definition of governmental function."

Hartwig Record, p. 1172.

From the remarks by Rep. Knopp and Sen. Fonfara, it is concluded that a division of authorities between dss and an MCO does not, per se, remove the MCO's operations beyond the scope of a "program." Rather, whether an MCO's operations constitute a program depends on the nature of those matters over which the MCO retains autonomy;

that is, does the MCO make high-level decisions.

Dss is obligated to provide quality care under its Medicaid managed care program. Whether quality care is provided depends, in significant part, on the quality of the medical providers participating in the program. Without question, the level of compensation paid to a provider is a significant factor in a provider's decision whether to participate. As a result, if provider fees are too low to attract quality providers, quality care will not be provided.

Federal law requires that Medicaid recipients who are to be enrolled in managed care must be given the right to select among competing MCOs. That requirement is intended to give a recipient the ability to make an informed consumer selection from among competitors.

Managed care is, simply, insurance. No potential insured would purchase a policy without knowing the benefits offered. For example, no one would purchase a life insurance policy without knowing the death benefit provided, and no one would select an automobile policy without knowing the limits provided. Similar to insureds under other types of policies, MCO insureds need to know the benefits offered by each plan in order to make informed consumer choices among competitors.

The benefits provided by a health insurance policy are the services of its participating providers. Because the quality of an MCO's participating providers may be affected by the level of its provider fees, a recipient cannot intelligently compare

competing MCOs without access to those provider fees.

The MCOs retain autonomy over provider fees. Because quality care is the purpose of the program, and because provider fees are a significant factor in whether quality care is provided, the authority to set those fees is one of the management prerogatives which is most critical to a successful program and constitutes, in the words of Sen. Fonfara, "a high level of decision[-]making." Hartwig Record, p. 1172.

From the above, it is held that those high-level decisions made by an MCO under its dss/MCO contract constitute a program of dss, even though some management decisions are left to dss under that contract.

B. Administer or Manage

Construction of the phrase "administer or manage" involves many of the materials reviewed in the construction of the word "program."

As indicated above, ultimate authority over an MCO's operations is divided, by task, between dss and the MCO. The MCOs argue that dss' retained authority is so great an infringement on their autonomy that they do not "administer or manage" their own operations.

Section 1-200 (11) extends the foia to contracts in the performance of which a public agency is involved, or which it regulates to a significant extent. If the phrase "administer or manage" were construed to apply only to those contracts over which a contractor enjoys total autonomy, and if an agency's involvement in or regulation of any

matters were an infringement on a contractor's autonomy, then § 1-200 (11) would apply to no contracts. Because the legislature obviously intended § 1-200 (11) to apply to some contracts, it is held that dss' review and control of some aspects of the dss/MCO contracts does not, by itself, take those contracts beyond the scope of § 1-200 (11). The question becomes, what is the nature of the authorities vested in dss, and in the MCOs, under the dss/MCO contracts.

Returning to the municipal golf course example, Rep. Knopp hypothesized that a catering service were contracted to provide food at a clubhouse, and he then remarked " . . . the decision of whether to serve french fries or hamburgers is not the kind of management decision we're talking about . . ." as being the performance of a governmental function. Hartwig Record, p. 1258. As Sen. Fonfara said, it is "a high level of decision[-]making that is a condition of the definition of governmental function." Id., p. 1172.

As both Rep. Knopp and Sen. Fonfara indicated, if the management decisions made by a contractor are merely incidental to the program (e.g., whether to serve french fries or hamburgers), those decisions are not within the scope of the bill. By implication, if the contractors' management decisions are of the essence of the program, those decisions are within the scope of the bill.

In this case, as indicated above, the MCOs' unilateral authority to set provider fees goes to the essence of Medicaid managed care. Therefore, it is held that the MCOs

do "administer or manage" their separate portions of the Medicaid managed care program.

To support their contention that the dss/MCO contracts are not covered by § 1-200 (11), the MCOs rely on the following colloquy between Sen. Roraback and Sen. Fonfara on the floor of the Senate:

"Sen Roraback:

> "And finally, Madam President, one more question, through you, if I may. Madam President, the state does have contracts with a number of Medicaid managed care providers and through you, Madam President, would the provision of insurance services through the Medicaid managed care program fall within the ambit of those services which this bill makes subject to the Freedom of Information laws. Through you, Madam President.

"The Chair:

"Senator Fonfara.

"Sen. Fonfara:

> "Thank you, Madam President. Through you, specifically related to Medicaid managed care, the answer is no. Although every case has to be determined on its facts and these plans are not a governmental function and all information pertaining to individuals which would be, of course, would be exempt from disclosure under FOI laws."

Hartwig Record, pp. 1163.

Sen. Fonfara's reference to "information pertaining to individuals" suggests that his previously stated "no" in response to Sen. Rorabach's inquiry may not have been a

categorical no. That is, Sen. Fonfara may have been focusing on the privacy of recipients' medical records when he indicated that Medicaid managed care was not covered. That view harmonizes with Sen. Fonfara's remark that high-level decisions were covered by the bill. It also harmonizes with Sen. Fonfara's remark that "every case has to be decided on its facts . . . ." Id.

The confusing remarks in the floor debate in the Senate do not excuse the court from construing the phrase "administer or manage." Rather, the court is obligated to integrate, to the extent possible, those remarks. In taking the House and Senate floor debates as a whole, it is concluded that the predominant intent of the legislature was to extend the foia only to those matters which require a "high level of decision[-]making," and not to extend it to all materials related to a particular contract, thereby leaving exempt from disclosure matters within a contractor's control which are not high-level decisions.

Because the establishment of provider fees, preferred drug lists and prior approval lists involve a high level of decision-making by an MCO, it is held that those matters are subject to disclosure. Whether any other matters within the MCOs' control are covered by the bill is left "to be determined on [their] facts." Id.

C. Violation of Federal Law

The MCOs argue that, if they exercise decision-making authority at a high enough level to subject them to the bill, then Medicaid managed care is not managed

solely by dss, as required by federal law. The construction of the relevant federal statutes and regulations is beyond the scope of these appeals. If the federal government chooses, in the future, to disqualify Medicaid managed care from federal reimbursement, it will be up to the General Assembly to decide what action, if any, should be taken.

D. Contracts Clause

The MCOs argue that, in ordering amendments to the dss/MCO contracts, the commission has violated the Contracts Clause of the U.S. Constitution. In New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U.S. 18, 85 S.Ct. 741 (1888), the court observed the following:

> " In order to come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. . . . The prohibition is aimed at the legislative power of the State, and not at the decision of its courts, or the acts of administrative or executive boards or officers or the doings of corporations or individuals." (Emphasis added).

Id. at 30.

Pursuant to Paragraph 3.35e of the dss/MCO contracts (all further paragraph references are to the dss/MCO contracts), the MCOs are obligated to provide to dss "all [of the MCOs'] materials and information pertinent to the services provided under this contract, at any time, until the expiration of three (3) years from the completion date of this contract as extended." Def. exh. 1, 8/1/06 hrg, pp. 702-03.

Pursuant to Paragraph 5.08a, the MCOs acknowledged that they were " . . . aware that all materials associated with the contract are subject to the terms of the state Freedom of Information Act, Conn. Gen. Stat. Sections 1-200 et seq. and all rules, regulations, and interpretations resulting therefrom." Id., pp. 727-28.

Pursuant to Paragraph 5.15, it was agreed that "[i]n the provision of services under this Contract, the MCO and its subcontractors shall comply with all applicable federal and state statutes and regulations, and all amendments thereto, that are in effect when the agreement is signed, or that come into effect during the term of this Contract." Id. at pp. 731-32 (emphasis added).

There can be no violation of the Contracts Clause when a party has contracted to be bound by subsequent extracontractual decisions. Accordingly, the court does not reach the constitutional issue raised by the MCOs.

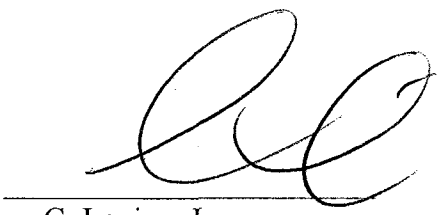
E. Unconstitutional Taking of Trade Secrets

The MCOs argue that the commission's order that they disclose the requested records constitutes an unconstitutional "taking" of their trade secrets. However, the MCOs agreed before the commission that their trade secret claims would be addressed by the commission in a subsequent proceeding, if these appeals are dismissed. Accordingly, it would be inappropriate for the court to address that constitutional issue until the commission has ruled on these claims.

III.

CONCLUSION

The appeals are dismissed.



G. Levine, J.