

DISTRICT COURT, DENVER CITY & COUNTY 1437 Bannock Street Denver, Colorado 80202 (720) 865-8301	DATE FILED: March 1, 2022 9:56 AM FILING ID: D45669DC2E657 CASE NUMBER: 2022CV30570
Plaintiffs: TIM O'BRIEN, CPA, in his official capacity as the DENVER AUDITOR and the DENVER AUDITOR'S OFFICE v. Defendant: DENVER CITY COUNCIL	Δ COURT USE ONLY Δ
Attorney for Plaintiff Denver Auditor's Office: Troy Rackham, #32033 Spencer Fane, LLP 1700 Lincoln St., Suite 2000 Denver, Colorado 80203 Phone: (303) 839-3860 Email: trackham@spencerfane.com	Case No.: Division:
COMPLAINT FOR DECLARATORY JUDGMENT	

Plaintiffs Tim O'Brien, CPA, in his official capacity as the Denver Auditor, and the Denver Auditor's Office, through counsel, hereby submit this Complaint for Declaratory Judgment. In support, Plaintiffs allege and state as follows:

I. NATURE OF CASE.

1. Plaintiffs, the Denver Auditor and the Denver Auditor's Office, files this action to seek the Court's determination of whether the City Council's amendments the Denver Revised Municipal Code ("DRMC") interfere with the obligations imposed upon, and the powers afforded to, the Denver Auditor to professionally, independently and ethically audit the City and County of Denver, its agencies, and its contractors.

2. The Denver Charter provides "[n]o ordinance shall compromise the independence of the Auditor as required by generally accepted government auditing

standards promulgated by the Comptroller General of the United States.” *Denver Charter*, §5.2.1(F).

3. Despite this provision, on May 10, 2021, the Denver City Council amended Section 20-276 of the Denver Revised Municipal Code (“DRMC”) to limit the Plaintiffs’ ability to obtain “confidential and/or proprietary records” from agencies or contractors of the City and County of Denver, restricting the Plaintiffs merely to having access to records offsite at the discretion of the agency, vendor or contractor being audited.

4. The City Council’s amendments to the DRMC interfere with the duties and obligations of the Denver City Auditor and his office, as reflected in the Denver Charter, which requires the Auditor to “conduct financial and performance audits of the City and County and its departments and agencies in accordance with generally accepted governmental auditing standards promulgated by the United States Comptroller General.” *Denver Charter*, § 5.2.1(a).

5. Further, the City Council’s amendments to the DRMC are inconsistent with the Charter’s mandate that the “[a]uditor shall have access at all times to all of the books, accounts, reports, vouchers, or other records or information maintained by the Manager of Finance or by any other department or agency of the City and County.” *Denver Charter*, § 5.2.1(a).

6. The City Council’s amendments to DRMC § 20-276 impose significant costs on the Plaintiffs by having to send staff offsite to copy records or record information using their own reconstruction of records. The City Council’s

amendments to DRMC § 20-276 also impair the Plaintiffs' ability to obtain and retain records necessary to perform audits with appropriate peer review and quality control methods. Further, the City Council's amendments to DRMC § 20-276 interference with the Plaintiffs' ability to use artificial intelligence, software, and other appropriate auditing methods. Most critically, the City Council's amendments to DRMC § 20-276 violate the Denver Charter's requirement that the Plaintiffs conduct audits "in accordance with generally accepted governmental auditing standards promulgated by the United States Comptroller General." *Denver Charter*, § 5.2.1(a).

7. Denver, as a home rule city, has a Charter that supersedes any inconsistent provisions in the municipal code. Plaintiffs seek a judicial determination that the City Council's amendments to DRMC § 20-276 violate the Denver Charter and therefore are unenforceable.

II. PARTIES, JURISDICTION AND VENUE.

8. Plaintiff Tim O'Brien, CPA, is the Denver Auditor, qualified and duly elected to his office pursuant to Denver Charter, §§ 5.1.1 and 5.1.2.

9. Tim O'Brien, CPA operates and manages the Plaintiff Denver Auditor's Office.

10. Defendant Denver City Council is the legislative branch of the City and County of Denver with the powers and functions identified in the Denver Charter, §§ 3.2.1 through 3.2.10 of the Denver Charter.

11. The Court has personal jurisdiction over the parties because all parties reside in the City and County of Denver and the legislation in question was enacted in the City and County of Denver.

12. The Court has subject matter jurisdiction over the parties because the legislation in question was enacted in the City and County of Denver and the District Court for the City and County of Denver “shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” C.R.C.P. 57(a).

III. FACTS.

A. Plaintiffs’ Mandate and Powers Under Denver Charter.

13. The Denver Auditor is an elected position. *Denv. Charter*, § 5.1.2.

14. Denver’s Charter mandates:

The Auditor shall conduct financial and performance audits of the City and County and its departments and agencies in accordance with generally accepted governmental auditing standards promulgated by the United States Comptroller General. The Auditor shall conduct audits of individual financial transactions, contracts and franchises of the City and County; and shall generally audit the financial and accounting systems and procedures administered by the Manager of Finance and other departments and agencies of the City and County, including records systems, revenue identification and accounting, and payment practices, for compliance with generally accepted accounting principles, best financial management practices, and any applicable laws and regulations governing the financial practices of the City and County. The results of any audit shall be reported by the Auditor to the Audit Committee as provided in Section 5.2.2. *Id.*, § 5.2.1(a)

15. The Charter mandates the Auditor to conduct his audits “in accordance with generally accepted governmental auditing standards promulgated by the United States Comptroller General.” *Id.*

16. Section 5.2.1(f) of Denver’s Charter provides that “[n]o ordinance shall compromise the independence of the Auditor as required by generally accepted government auditing standards promulgated by the Comptroller General of the United States.” Denver Charter, § 5.2.1(f).

17. Section 5.2.1(c) of Denver’s Charter mandates that the “Auditor shall have access at all times to all of the books, accounts, reports, vouchers, or other records or information maintained by the Manager of Finance or by any other department or agency of the City and County.” *Id.*

B. Governmental Auditing Standards Imposed by the Yellow Book.

18. The United States Comptroller General publishes generally accepted governmental auditing standards periodically, with the most recent edition revised and published in 2018.

19. The United States Comptroller General’s generally accepted governmental auditing standards are also known as the Yellow Book and will hereafter be referred to as the “Yellow Book.”

20. The Yellow Book explains that government audits “provide essential accountability and transparency over government programs” and “the oversight provided through auditing is more critical than ever.” *Yellow-Book*, p. 1.

21. The standards provided by the Yellow Book, which the Denver Charter expressly requires the Plaintiffs to follow, “provide a framework for performing high-quality audit work with competence, integrity, objectivity, and independence to provide accountability and to help improve government operations and services.” *Id.*

22. The Yellow Book outlines the requirements for audit reports, professional qualifications for auditors, and audit organization quality control.

23. Auditors of federal, state, and local government programs use these standards to perform their audits and produce their reports.

24. Among other requirements, the Yellow Book imposes important requirements to ensure that governmental auditing is performed in an ethical, professional and independent manner.

25. The Yellow Book also imposes specific requirements for quality control of audits and external peer review of the work and materials of an auditor.

26. Chapter 3 of the Yellow Book addresses the “fundamental ethical principles for auditors in the government environment.” *Yellow Book*, p. 26.

27. Section 3.11 of the Yellow Book explains that government “Auditors’ objectivity in discharging their professional responsibilities is the basis for the credibility of auditing in the government sector.” *Id.*, p. 37.

28. Section 3.42(a) provides examples of circumstances that interfere with an auditor’s objectivity and independence, jeopardizing the objectivity and reliability of the audit itself.

29. One example is when a government agency interferes or influences the audit by “exerting pressure to inappropriately reduce the extent of work performed in order to reduce costs or fees.” *Id.*

30. Another example of inappropriate interference, in violation of the Yellow Book standards, is when the government places “[r]estrictions on funds or other

resources provided to the audit organization that adversely affect the audit organization's ability to carry out its responsibilities." *Id.*, p. 38.

31. Section 3.47 of the Yellow Book explains when a threat to the independence of the auditor's work or processes is unacceptable:

"A threat to independence is not at an acceptable level if it either (a) could affect the auditors' ability to conduct an engagement without being affected by influences that compromise professional judgment; or (b) could expose the auditors or audit organization to circumstances that would cause a reasonable and informed third party to conclude that the integrity, objectivity, or professional skepticism of the audit organization, or an auditor, had been compromised."

32. Section 3.55(g) of the Yellow Book explains that as an essential "safeguard" of the independence and objectivity of the Auditor's process and work, the Auditor must have "access to records and documents related to the agency, program, or function being audited and access to government officials or other individuals as needed to conduct the engagement." *Id.*, p. 42.

33. Section 8.11 of the Yellow Book describes generally accepted procedures for gathering and analyzing information or evidence necessary to achieve audit objectives. *Id.*, p. 155.

34. Section 8.90 of the Yellow Book requires governmental auditors to "obtain sufficient, appropriate evidence to provide a reasonable basis for addressing the audit objectives and supporting their findings and conclusions." *Id.*, p. 179.

35. Section 8.92 of the Yellow Book explains that "[w]hen auditors use information provided by officials of the audited entity as part of their evidence, they

should determine what the officials of the audited entity or other auditors did to obtain assurance over the reliability of the information.” *Id.*

36. Section 8.96 of the Yellow Book explains that “[w]hen auditors use information that audited entity officials provided as part of their evidence, auditors may find it necessary to test management’s procedures to obtain assurance, perform direct testing of the information, or obtain additional corroborating evidence.” *Id.*, p. 180.

37. Section 8.98 of the Yellow Book explains that the independence and reliability of a governmental audit are affected by “[t]he nature, timing, and extent of audit procedures,” “the effectiveness of the audited entity’s internal controls over the information,” and “the level of detail presented in the auditors’ findings and conclusions in the context of the audit objectives” will be impacted. *Id.*, p. 180.

38. Section 8.98 requires governmental auditors to assess “[t]he sufficiency and appropriateness of computer-processed information ... regardless of whether this information is provided to auditors or auditors independently extract it,” but additionally requires governmental auditors to assess “the sufficiency and appropriateness of computer-processed information,” including “the completeness and accuracy of the data” provided. *Id.*

39. Section 8.100 of the Yellow Book explains that when appropriate, government auditors “may use statistical methods to analyze and interpret evidence to assess its sufficiency.” *Id.*, p. 181.

40. To use such methods, an auditor needs copies of the actual records and information reviewed.

41. Section 8.104 explains the type of evidence necessary to perform an effective governmental audit, including physical, documentary and/or testimonial evidence.

42. The Yellow Book explains that “[d]ocumentary evidence is already existing information, such as letters, contracts, accounting records, invoices, spreadsheets, database extracts, electronically stored information, and management information on performance.” *Id.*, p. 183.

43. To perform the duties required by the Denver Charter, the Denver Auditor and/or the Denver Auditor’s Office staff must have access to and retain original documents or authentic copies of original documents. *Id.*, p. 184.

44. Section 8.132 of the Yellow Book addresses a government auditor’s obligations to document audits. *Id.*, p. 190.

45. Section 8.132 of the Yellow Book explains that auditors “must prepare audit documentation related to planning, conducting, and reporting for each audit,” doing so “in sufficient detail to enable an experienced auditor, having no previous connection to the audit, to understand from the audit documentation the nature, timing, extent, and results of audit procedures performed; the evidence obtained; and its source and the conclusions reached, including evidence that supports the auditors’ significant judgments and conclusions.” *Id.*, p. 190.

46. To perform the duties required by the Denver Charter, the Denver Auditor and/or the Denver Auditor's Office staff must prepare and retain audit documentation and work papers, including retaining the audit documentation and work papers "that supports the findings, conclusions, and recommendations before they issue their report." *Id.*, p. 190.

47. Section 8.137 of the Yellow Book explains that "[a]udit documentation is an essential element of audit quality" and audit documentation "serves to (1) provide the principal support for the audit report, (2) aid auditors in conducting and supervising the audit, and (3) allow for the review of audit quality." *Id.*, p. 191.

48. The Yellow Book also clarifies that a government auditor must retain necessary documents and records to justify the results of its audit and to allow for peer review of the auditing process and reports. *Id.*, pp. 92, 94-95 & 219.

C. Defendant's 2021 Amendment to DRMC § 20-276 Interferes with Plaintiffs' Independence and Obligation to Perform Audits in Accordance with the Yellow Book.

49. On May 10, 2021, the Denver City Council amended DRMC § 20-276.

50. Formerly, Section 20-276(a) provided:

The auditor shall be provided access, in a timely manner to officers, employees, records, and property of entities as may be necessary to conduct an audit or perform audit duties as provided in section 20-275 of the D.R.M.C. Contractors with the city that have a contractual obligation to provide information shall provide access in a timely manner to the contractor's officers, employees, records, and property of entities as may be necessary to conduct an audit or perform audit duties. *DRMC § 20-276(a)* (2020).

51. The City Council's May 2021 amendment added an additional sentence, which provides "[t]he custodian of confidential and/or proprietary records or parts

of records sought under this 20-276 may provide the auditor timely and reasonable access to inspect such records on site in lieu of providing copies for off-site use.”
DRMC § 20-276(a) (May 10, 2021).

52. The amendment to DRMC § 20-276(a) violates the Denver Charter Section 5.2.1(a) because it interferes with the Denver Auditor’s ability to comply fully with the GAO governmental auditing standards.

53. Defendant’s amendment to DRMC § 20-276(a) imposes undue threats upon the Plaintiffs’ Charter-imposed duties of independence and avoiding undue influence, contrary to Sections 3.11, 3.42, 3.47 and 3.55 of the Yellow Book.

54. Defendant’s amendment to DRMC § 20-276(a) imposes additional costs on the Plaintiffs, contrary to the standards imposed by the Yellow Book.

55. Defendant’s amendments to DRMC § 20-276(a) violate Section 8.11 of the Yellow Book, which requires Plaintiffs to gather and analyze information or evidence necessary to achieve audit objectives determined by Plaintiffs.

56. Defendant’s amendments to DRMC § 20-276(a) violate Section 8.90 of the Yellow Book because it interferes with Plaintiffs’ ability to obtain sufficient, appropriate evidence to provide a reasonable basis for addressing the audit objectives and supporting their findings and conclusions.

57. Defendant’s amendments to DRMC § 20-276(a) also violate Section 8.92 of the Yellow Book because it interferes with Plaintiffs ability to ensure the reliability of the information of the auditing subject.

58. Defendant's amendments to DRMC § 20-276(a) violate Section 8.96 of the Yellow Book because it interferes with Plaintiffs' ability to test management's procedures to obtain assurance, perform direct testing of the information, or obtain additional corroborating evidence.

59. Defendant's amendments to DRMC § 20-276(a) violate Section 8.98 of the Yellow Book because it restricts Plaintiffs' discretion to determine the nature, timing, and extent of audit procedures, the effectiveness of the audited entity's internal controls over the information, and the level of detail presented in the auditors' findings and conclusions in the context of the audit objectives will be impacted.

60. Defendant's amendments to DRMC § 20-276(a) violate Section 8.98 of the Yellow Book because it limits or prevents Plaintiffs' ability to use computer-processed information and methods in performing its audit, while also evaluating the completeness and accuracy of the data utilized in the auditing process.

61. Defendant's amendments to DRMC § 20-276(a) violate Section 8.100 of the Yellow Book because it interferes with Plaintiffs' ability to use statistical methods to analyze and interpret evidence to assess its sufficiency and reliability.

62. Plaintiffs use information analytics techniques, which are endorsed by generally accepted government auditing standards, to efficiently audit subjects and validate audits.

63. Plaintiffs cannot use the information analytic techniques unless the actual records of the subject of the audit are produced.

64. Plaintiffs do not have sufficient resources to send teams of personnel offsite to agencies, contractors and vendors of the City and County of Denver to obtain copies of documents or record information identified in the documents contained in the records stored offsite by agencies, contractors and vendors of the City and County of Denver.

65. Additionally, Plaintiffs uses out of state experts to assist with audits, perform peer review, and validate the audits performed.

66. Plaintiffs cannot efficiently and cost-effectively use such experts if Plaintiffs are only provided access to records from the subject of the audit, compared to the actual records.

67. Defendant's amendment to DRMC § 20-276(a) violate Section 8.104 of the Yellow Book by restricting access to the actual records and information the Plaintiffs require to perform an effective governmental audit, which includes physical, documentary or testimonial evidence.

68. Defendant's amendment to DRMC § 20-276(a) violate Sections 5.2.1(a), 5.2.1(c), 5.2.1(f) of the Denver Charter.

69. Defendant's amendment to DRMC § 20-276(a) violate Sections 5.2.2(a), 5.2.2(b), 5.2.2(d), and 5.2.2(f) of the Denver Charter by interfering with Plaintiffs' ability to satisfy the requirements of the Audit Committee provisions.

70. By imposing additional costs and burdens on Plaintiffs without commensurate appropriations necessary to defray the costs and burdens, Defendant's amendment to DRMC § 20-276(a) violate Section 5.2.3 of Denver's Charter.

71. Defendant's amendment to DRMC § 20-276(a) violate Plaintiffs' obligation to obtain and retain necessary documentary evidence for Plaintiffs' auditing functions and obligations to document audits.

72. Defendant's amendment to DRMC § 20-276(a) creates ineffective ambiguities because it does not define or delineate "confidential and/or proprietary records" for which access may be provided "offsite" from other records which must be provided to Plaintiffs onsite at Plaintiffs' office.

73. Plaintiffs have had Defendant's amendment to DRMC § 20-276(a) reviewed by other governmental auditing offices and government auditors.

74. The other governmental auditing offices and government auditors have opined that Defendant's amendment to DRMC § 20-276(a) violates the essential standards of the Yellow Book and impair the professional ethics and independence of the Plaintiffs' auditing process.

75. For all of these reasons, and others to be established by Plaintiffs in this matter, the Court should conclude that Defendant's May 2021 amendment to DRMC § 20-276(a) violate Sections 5.2.1, 5.2.2 and 5.2.3 of the Denver Charter.

76. Defendant's May 2021 amendment to DRMC § 20-276(a) also are inconsistent with other provisions of Colorado law establishing the independence of government auditors and protecting government auditors ability to request and obtain records to be provided to the auditor. *See, e.g.*, C.R.S. § 2-3-103(3), C.R.S. § 2-3-107, C.R.S. § 26-1-114.5.

77. Defendant's May 2021 amendment to DRMC § 20-276(a) is preempted by C.R.S. § 26-1-114.5, at least as it relates to the same human or social services records, because C.R.S. § 26-1-114.5 addresses a matter of statewide concern.

78. The Court should determine that Defendant's May 2021 amendment to DRMC § 20-276(a) are unenforceable.

79. The Court should invalidate Defendant's amendment to DRMC § 20-276(a) because the amended ordinance now conflicts with the paramount obligations imposed by City and County of Denver's Charter.

IV. CLAIM FOR RELIEF (Declaratory Judgment)

80. Plaintiffs incorporate the allegations contained in paragraphs 1 through 79 above as if fully set forth herein.

81. Denver is a home rule municipality and a municipal corporation of the State of Colorado pursuant to Article XX of the Colorado Constitution.

82. Defendant's May 2021 amendment to DRMC § 20-276(a) is an enactment pursuant to the Defendant's legislative power under Section 3.2.1 of the Denver Charter.

83. Plaintiff Tim O'Brien, as the elected independent auditor for the City and County of Denver, has standing to challenge the validity of Defendant's May 2021 amendment to DRMC § 20-276(a) because the amendment has caused, or threatens to cause, injury to Plaintiff Tim O'Brien.

84. Plaintiff Denver City Auditor's Office has standing to challenge the validity of Defendant's May 2021 amendment to DRMC § 20-276(a) because the

amendment has caused, or threatens to cause, injury to Plaintiff Denver City Auditor's Office.

85. C.R.C.P. 57(b) provides, in relevant part, that “[a]ny person ... whose rights, status, or other legal relations are affected by a ... municipal ordinance ... may have determined any question of construction or validity arising under the ... ordinance ... and obtain a declaration of rights, status, or other legal relations thereunder.” *Id.*

86. For the reasons alleged above, the Court should declare that Defendant's May 2021 amendment to DRMC § 20-276(a) violates the Denver Charter and is invalid.

87. For the reasons alleged above, the Court should declare that Defendant's May 2021 amendment to DRMC § 20-276(a) results in an ordinance that is vague and ambiguous, interfering with the Auditor's mandatory obligation to perform their duties “in accordance with generally accepted governmental auditing standards promulgated by the United States Comptroller General.” *Denver Charter*, § 5.2.1(a).

88. For the reasons alleged above, the Court should declare that Plaintiffs are not limited to reviewing or obtaining any records from any department, agency, contractor or vendor of the City and County of Denver only through offsite access.

89. For the reasons alleged above, the Court should declare Defendant's May 2021 amendment to DRMC § 20-276(a) is invalid insofar it applies to records or documents covered by C.R.S. § 26-1-114.5.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully the Court enter a declaratory judgment in their favor and against the Defendant, finding that Defendant's May 2021 amendment to DRMC § 20-276(a) violates Denver's Charter, is invalid, violates C.R.S. § 26-1-114.5, interferes with the Plaintiffs' independence and ethical obligations, and otherwise is impermissibly vague and ambiguous.

Respectfully submitted this 1st day of March, 2022.

s/Troy R. Rackham

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