

Auditor's Office Ordinance Request Memo

The lack of a sufficient mechanism to obtain records, delays, increases costs, and prevents the Auditor's Office from completing its statutorily required duties.

Denver law requires the Auditor's Office to conduct financial and performance audits of the city and its contractors in accordance with Generally Accepted Government Auditing Standards.¹ In addition, Denver law requires the Auditor's Office to enforce Denver's wage ordinances.²

Denver law grants the Auditor's Office access to city and contractor records necessary to conduct these duties without limitation.³ Furthermore, at the onset of every audit, the Auditor's Office provides notice of this right, invites any relevant objection, and seeks the audited party's consent. Despite this right and consent, audited parties regularly refuse to produce necessary information.

Denver's Auditor is the only elected city official without subpoena authority.

The American Institute of Certified Public Accountants' Statements on Auditing Standards, which is adopted by reference in both Generally Accepted Government Audit Standards and Denver law, states management must provide unrestricted access to information and persons within an audited entity necessary to comply with audit standards for professionalism and independence.⁴

City or County Audit Functions with Subpoena Power:

- City of Albuquerque, NM
- City of Atlanta, GA
- Broward County, FL
- City of Chicago, IL
- District of Columbia
- City of Detroit, MI
- City and County of Honolulu, HI
- City of Kansas City, MO
- Montgomery County, MD
- Palm Beach County, FL
- City of Portland, OR
- City of San Diego, CA
- City of Santa Fe, NM
- Municipality of Monroeville, PA (Allegheny County)
- Miami-Dade County, FL

¹ Denver Charter §5.2.1(A); D.R.M.C. §20-275(A).

² D.R.M.C. §58-17; §20-76(d)(4).

³ Denver Charter §5.2.1(C); D.R.M.C. §20-276(a).

⁴ American Institute of Certified Public Accountants' Statements on Auditing Standards, AU-C §200.14 - Premise relating to the responsibilities of management and, when appropriate, those charged with governance, on which an audit is conducted, c(i)-(iii).

Audit agencies that have the authority to issue subpoena:

- Department of Examiners of Public Accounts, Alabama
- Division of Legislative Audit, Alaska
- Division of Legislative Audit, Arkansas
- Office of State Auditor, California
- Office of the State Auditor, Colorado
- Office of the Auditor of Accounts, Delaware
- Department of Audits and Accounts, Georgia
- Office of the Public Auditor, Guam
- Office of the Auditor, Hawaii
- Office of the Auditor General, Illinois
- State Board of Accounts, Indiana
- Office of the Auditor of State, Iowa
- Office of the Auditor of Public Accounts, Kentucky
- Legislative Auditor, Louisiana
- Office of the State Auditor, Maine
- Office of Legislative Audits, Maryland
- Office of the Auditor General, Michigan
- Office of the Legislative Auditor, Minnesota
- Office of the State Auditor, Minnesota
- Office of the State Auditor, Mississippi
- Office of the State Auditor, Missouri
- Office of the Auditor of Public Accounts, Nebraska
- Office of the State Auditor, New Mexico
- Office of the State Comptroller, New York
- Office of the State Auditor, North Carolina
- Office of the Auditor of State, Ohio
- Office of the State Auditor and Inspector, Oklahoma
- Division of Audits, Oregon
- Office of the Comptroller, Puerto Rico
- Department of Legislative Audit, South Dakota
- Office of the Comptroller of the Treasury, Tennessee
- Office of the State Auditor, Utah
- Office of the State Auditor, Vermont
- Office of the Auditor of Public Accounts, Virginia
- Office of the State Auditor, Washington
- Legislative Audit Bureau, Wisconsin
- Department of Audit, Wyoming

However, **UNLIKE OTHER CITY AGENCIES AND OFFICIALS, INCLUDING ALL OTHER ELECTED OFFICIALS** — the Mayor, City Council, and the Clerk and Recorder, Denver law does not provide the Auditor’s Office with the authority to subpoena the production of documents and information necessary to perform its duties.⁵

⁵ Mayor and Cabinet – Denver Charter 2.2.11; City Council – D.R.M.C. S13-31; Clerk and Recorder – Denver Charter §8.2.26; Career Service Board – Denver Charter §9.1.1; Board of Ethics – D.R.M.C. § 2-58; Excise and Licenses – D.M.R.C. §32-26.

Proposed Ordinance

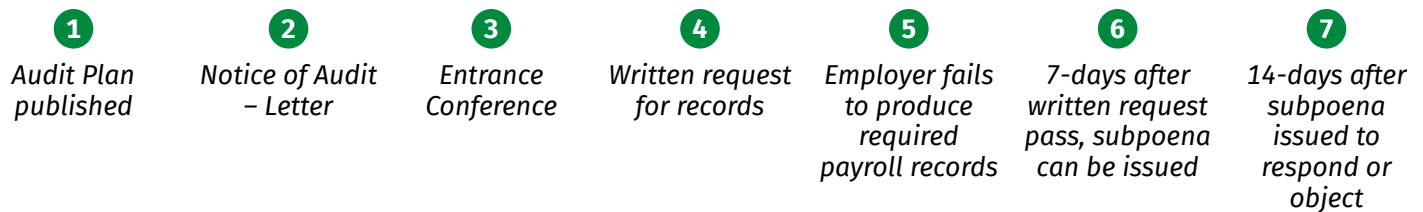
After discussing this inefficiency with the Mayor and the City Attorney's Office, a proposed ordinance amendment was filed on January 25, 2021.

Auditor would be limited to subpoena only information expressly for the performance of statutory duties.

The proposed amendment will:

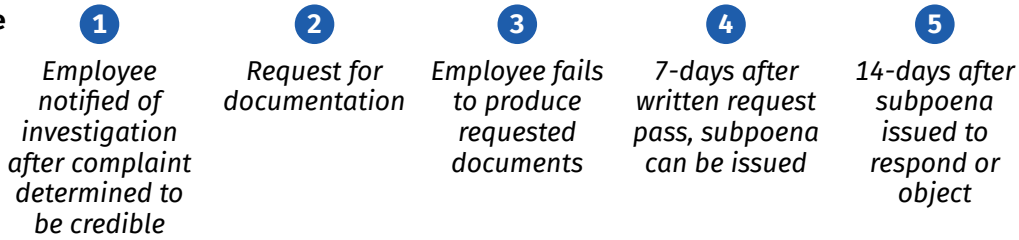
- Establish a new Section 20-278 within the code, in the same chapter that defines the Auditor's roles, duties, and authority.
- Grant the Auditor the authority to subpoena information with three notable limitations:
 1. the authority is expressly limited to the performance of one the Auditor's statutory duties;
 2. subpoenas will not be served or enforced against a city officer or employee; and
 3. due process protection to protect against unreasonable requests.
- Articulates that the subpoenaed party has the right to object to production.
- Encourage cooperation and permit the Auditor and subpoenaed party to mutually agree to a time and scope for production.
- Grant the Auditor authority to request and waive penalties for a failure to comply with a subpoena.
- Address recent court rulings that reviewed challenges to governmental subpoena power.

AUDIT SUBPOENA TIMELINE



WAGE ENFORCEMENT SUBPOENA TIMELINE

Minimum Wage



Prevailing Wage



Existing Mechanisms to Obtain Audit Information are Insufficient

No explicit recourse or remedy exists in Denver law that requires an audited party to provide the Auditor with requested records or sanctions an audited party for failing to comply with an information request from the Auditor’s Office.

The Auditor, with the approval and cooperation of the City Attorney’s Office, could sue a contractor for breach of contract to access records if the requisite audit clause is included in the parties’ contract. However, **NOT ALL CITY CONTRACTS INCLUDE LANGUAGE REQUIRING THE CONTRACTOR TO PRODUCE INFORMATION UPON REQUEST FROM THE AUDITOR’S OFFICE.** In some instances, contracts were specifically written to limit or modify the Auditor’s statutory authority.

Prevailing in costly, time-consuming litigation for breach of contract does not guarantee an order requiring specific performance, i.e., information production.⁶

Litigation can be costly and time-consuming, while still not guaranteeing the production of requested information.

| | Subpoena | Litigation |
|---------------|---|--|
| Burden | Takes two hours or less and is less burdensome for both the city and the community members involved | Could take as long as a year |
| Cost | Relatively inexpensive | Could incur significant costs for the city and community |

⁶ Cornerstone Grp. XXII, L.L.C. v. Wheat Ridge Urban Renewal Auth., 151 P.3d 601, 605 (Colo. App. 2006); Schreck v. T & C Sanderson Farms, Inc., 37 P.3d 510, 514 (Colo. App. 2001) (“The right to specific performance is not absolute”).

Unlike a city contract that’s intended purpose is the purchase of goods and services for the city, the express purpose of a subpoena is to obtain documents and information.⁷

As demonstrated by this sample of audits, the need for subpoena power is pressing and necessary:

| Audit | Records Requested | Issue |
|-------------------------------|--|---|
| Denver Zoo | Requested records and information related to the Zoo’s compliance with the operating agreement. | Massive delays occurred as the Zoo refused direct access to Zoo staff, and disputed its relationship to the city and its contractual duties. |
| DEN - Westin (Marriott) | Requested records related to performance of contract and meeting standards, including financial records and customer feedback. | Information was never provided. The vendor wanted to provide edited, aggregated, and adjusted information. Neither the city nor the Auditor’s Office could determine whether the vendor is complying with terms of the contract. |
| Denver County Courts | Requested case file documentation. | Initially argued Courts were a state entity and not part of the city and compliance with an audit would violate the separation of powers clause. Resulted in significant delays and withholding of certain information from the audit team. |
| Botanic Gardens | Requested records related to the Garden performing background checks on volunteers working in children’s programs. | Significant delays producing documents that relate to public safety and should be readily accessible to city auditors. |
| Rocky Mountain Human Services | Requested records about subcontractor activities. | Sub-contractors that receive mill levy funds were about a month late in providing requested information. |
| Airport Security | Requested Sensitive Secured Information (SSI) maintained by Airport Security. | Although TSA indicated approval of access, Airport Security personnel still limited access to all SSI information, which impacted the effectiveness and efficiency of the audit. |
| Denver Preschool Program | Requested procedures for education data from this tax-funded non-profit. | Late in the audit, the Board inserted itself into reviews of information being submitted, creating delays. |
| Denver Art Museum | Requested full access to inventory system. | Only extremely limited access was granted, resulting in incomplete information received for inventory testing. |
| Clerk & Recorder’s Office | Requested access to documentation to demonstrate retention and protection policies. | Greater than one month delay in production of records. |

In addition, the delays caused by inaccessible records is enormously costly to the city. **A DAY OF LOST TIME FOR A SMALL AUDIT TEAM OF FOUR AUDITORS COSTS THE CITY \$2,388 AND A WEEK OF LOST WORK COSTS THE CITY \$9,553.** We believe delays in the Art Museum slowed the audit by 4-6 weeks.

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⁷ Denver Post Corp. v. Colorado Civil Rights Div., 1994 WL 665684, at *1 (Colo. Dist. Ct. Sept. 26, 1994).

Legal Protections and Professionalism

The proposed ordinance will provide the Auditor’s Office with the most limited subpoena power of any agency with such authority in the city.⁸

All subpoenas, including those used by the Auditor’s Office, would be subject to the rule, determination, and review of the Court.

By law, the Auditor’s Office must perform its work under the strictest of government auditing standards. Those standards identify inaccessible information as a threat to professional compliance and prescribes a procedure for obtaining necessary information, i.e., a subpoena as a remedial safeguard.⁹ Those standards also require the Auditor’s Office to follow all applicable confidentiality laws and protect confidential audit information.¹⁰

Strict government auditing standards require adherence to all applicable confidentiality laws.

Records produced are protected from further production by Denver law.¹¹

Furthermore, the Auditor, as an elected official, is accountable to Denver voters for their use of the office’s authority.

Existing Mechanisms to Obtain Wage Enforcement Information are Insufficient

The Auditor’s Office enforces five wage ordinances with the goal of ensuring timely and accurate payment of earned wages.

All five ordinances provide the Auditor’s Office with access to employer payroll records. Only two of those ordinances permit the Auditor’s Office to withhold payment, and only three permit the office to levy fines as a means of obtaining information.



In 2020, the Auditor’s Office held the payment of 404 invoices totaling \$31,312,189 when contractors failed to furnish necessary records for a significant period of time. The Auditor’s Office regularly discusses fines with contractors but has never levied a fine in its history.

⁸ Denver Charter §§ 2.2.11; 8.2.26; 9.1.1; D.R.M.C. §§ 2-58; 13-31; 20-278; 28-106; 32-26.

⁹ US GAGAS §2.20; US GAGAS §3.55(g).

¹⁰ US GAGAS §3.09.

¹¹ D.R.M.C. §§20-276(f); 20-277(b).

As is the case with lengthy breach of contract litigation, withholding payments and fines are incorrect tools for obtaining information in a timely manner. The purpose of withholding payment is to stop city performance under a contract, i.e. making payment where a contractor has failed to perform some element of its contractual duties, i.e. complete a job, produce records, or meet expectations. The purpose of a fine is to punish prior bad behavior. By contrast, the express purpose of a subpoena is to obtain necessary information in a timely manner.

Unlike other tools available, the express purpose of a subpoena is to obtain necessary information in a timely manner.

Withholding payment and fines are blunt and cumbersome tools.

| Work | Tools |
|------------------------|---|
| Audit Services | No statutory tool exists to require compliance. |
| | We have not sued an auditee for breach of contract because sufficient audit clauses have not been in place, and the extreme delays and costs are not practical for an audit. |
| Prevailing Wage | Hold Invoices – In 2020, the Auditor’s Office held payment on 404 invoices totaling \$31,312,198. Holding payment resolved the issued on 370 invoices. On 29 invoices, the contractor has failed to provide requested documentation requested. On 5 invoices, the contractor has provide no documentation. |
| | Fines – Fines have been asserted once as part of litigation but were not recovered. The disputes and collections process associated with fines is lengthy and costly. |
| Minimum Wage | Fines – In the first year of the ordinance, there has not been cause to fine an employer. |

Not all city contracts that are subject to a wage requirement include the necessary language to permit the city to withhold payment for failing to produce records. The Auditor’s Office does not have an operational mechanism to withhold payment on all subject contracts. When the Auditor’s Office holds payment of an invoice it harms other compliant contractors billing on the same invoice, impairs the related city project, is sometimes overridden by another city agency, and does not necessarily result in more timely payment to the underpaid employees.

Holding payment could harm other compliant contractors billing on the same invoice and does not necessarily result in more timely payment to underpaid employees.

Likewise, fining an employer that is already unable or unwilling to produce records does not guarantee compliance. Instead, it incentivizes litigation or avoidance, hindering investigations and slowing payment to underpaid employees. The related litigation adds a layer of conflict and does not necessarily result in a court order requiring specific performance, i.e., the production of information. Instead, the city has to assert its right to a fine, send the contractor to collections, investigate assets, and potentially, if collectable, seek the ordered financial relief — never resulting in the production of the necessary information or resolution of the underlying wage investigation — all while the underpaid employees go unpaid.

Of the 404 invoices for \$31,312,189 held in 2020, \$857,339 remains held for 48 noncompliant contractors. Approximately 1/3 of invoice costs are labor costs. Denver’s prevailing wage law does not permit the city to recover collection costs. The last incidence where the Auditor’s Office used that process against one contractor cost \$6,200. The cost of imposing fines and the court process for collecting the fine and unpaid wages against 48 noncompliant contractors would well exceed the \$285,780 of unpaid wages it could possibly recover.

NO OTHER ELECTED OFFICIAL IS REQUIRED TO USE FINES AND UNDERTAKE MULTIPLE PHASES OF TIME-CONSUMING AND COSTLY LITIGATION TO OBTAIN THE INFORMATION NECESSARY TO PERFORM THE DUTIES OF THEIR OFFICE.

Stakeholder Outreach

Our office reached out to members of Council and other community stakeholders to answer questions and to add more information into our presentation and this memo. In addition to 12 meetings with members of Council, we also met with representatives from SEIU, the Trades Council, Towards Justice, the Restaurant Association, the Downtown Denver Partnership, the Colorado Competitive Council, and the Chamber of Commerce.

Goals

The goal of this ordinance is to permit the Auditor’s Office to perform its duties more effectively, within a reasonable period of time, and at a lower cost to the taxpayer.