District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3792	DATE FILED: March 28, 2022 5:06 PM CASE NUMBER: 2022CV30101
DEMANDING INTEGRITY IN GOVERNMENT SPENDING, a Colorado nonprofit corporation, *Plaintiff* v. **BOULDER COUNTY, a county of the State of Colorado**; **BOARD OF COUNTY COMMISSIONERS, COUNTY OF BOULDER; MATT JONES, CLAIRE LEVY, and MARTA LOACHAMIN, in their official capacity as members of the Boulder County Board of County Commissioners**, *Defendants*	**▲ COURT USE ONLY ▲**
Attorneys for Plaintiff: Chad Williams, Esq., Mark Champoux, Esq., Molly Kokesh, Esq. *Attorneys for Defendants*: David Hughes, Esq., Catherine Ruhland, Esq.	Case Number: **2022CV30101** Division: **COC** Courtroom: **S**
ORDER RE: PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	

This matter is before the court to address the issues raised by the plaintiff's motion for temporary restraining order and preliminary injunction, the defendants' response, and the plaintiff's reply. In its reply to the defendants' response to the motion, plaintiff withdrew its request for an order declaring that the contract award related to RFP 730-22 is invalid and that no such award should be given until the conclusion of an open and transparent bidding process. A hearing was conducted on the record by FTR on March 18, 2022. Plaintiff was represented by Chad Williams, Esq. and Molly Kokesh, Esq. Defendants were represented by David Hughes, Esq.

At the hearing the plaintiff confirmed that it was no longer seeking to invalidate the contract award. The court ordered that any request for relief affecting the validity of the award was withdrawn and that, as a result, any request for a temporary restraining order was denied. The

remaining issues raised by plaintiff's motion concern whether the evaluation committee meetings were subject to the Open Meetings Law ("OML") and whether the executive sessions of the Boulder County Commissioners violated the OML. In their response to the motion, the defendants asserted that plaintiff had no standing to bring its claims. Plaintiff filed a reply asserting that it does have standing. At the hearing held on March 18, 2022, each party presented additional oral arguments. The court will first address the standing issue.

Standing is a jurisdictional prerequisite to a case and if the court determines that standing does not exist it must dismiss the case. *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002 (Colo. 2014). In *Wimberly v. Ettenberg*, the Colorado Supreme Court created a two-prong test for standing: (1) the plaintiff must have suffered an injury in fact, and (2) the injury was to a legally protected right. 570 P.2d 535, 539 (Colo. 1977). Both tangible and intangible injuries may satisfy the injury-in-fact requirement. *Hickenlooper*, 338 P.3d at 1011. An injury that is overly "indirect and incidental" in relation to the defendant's conduct will not, however, convey standing. *Id.* at 1007.

Under the OML, "any person denied or threatened with denial of any of the rights that are conferred on the public…has suffered an injury in fact, and therefore, has standing to challenge the violation." C.R.S. § 24-6-402(9)(a). In *Weisfield v. City of Arvada*, the Colorado Court of Appeals found that the statute "creates a legally protected interest on behalf of Colorado citizens to have public business conducted openly in conformity with the statutory provisions." 361 P.3d 1069, 1073 (Colo. App. 2015). The Court of Appeals noted that Plaintiff Weisfield was both a citizen of Colorado *and* a resident of Arvada, where the issue arose, and that because he was a resident of Arvada, he "plainly falls within the sphere" of a citizen who has standing in his case. *Id.* However, the court declined to determine "whether the expansive language of section 24-6-402(9) should be read literally to allow any citizen of Colorado to challenge any violation of the

OML, even if, for example, the citizen does not reside within the jurisdiction of the public body whose actions are being challenged." *Id.*

The *Weisfield* opinion recognized in a footnote that C.R.S. § 24-6-402(9) was amended in 2014 to add Subsection 9(a) which states: "Any person denied or threatened with denial of any of the rights that are conferred on the public by this part 4 has suffered an injury in fact and, therefore, has standing to challenge the violation of this part 4." The footnote stated that the language of Subsection 9(a) was added "apparently in response to the district court's ruling that Weisfield lacked standing in this case." However, the court concluded that it should not consider the amendment because neither party contended that the amendment was retroactive.

It is undisputed that plaintiff is not a resident or citizen of Boulder County. The complaint lists plaintiff's address as being in Centennial, Colorado, and there was nothing submitted to suggest plaintiff, or any individual affiliated with plaintiff, had any particular connection to Boulder County. Defendants assert that Colorado citizenship alone is insufficient to confer standing to challenge whether a county violated the OML unless the plaintiff is a resident of that county. Plaintiff does not claim that it would benefit or suffer harm based on the outcome of the bid award.[1] Instead, plaintiff asserts that C.R.S. § 24-6-402(9) confers standing on any citizen of Colorado to assert that any local public body violated the OML. In effect,

[1] In its motion, plaintiff asserted that the citizens of Colorado could be injured because those citizens, including plaintiff, could "bear the brunt" of the clean-up costs if FEMA claws back its funds due to Boulder County's alleged violation of the OML. In its reply, plaintiff withdrew its request to have the bid award invalidated and identified its claimed injury as "the impairment of the rights afforded to it under the OML." Plaintiff has apparently abandoned any claim for injury related to citizens having the financial burden of paying for cleanup costs in the event FEMA claws back its funding. In any event, a declaratory judgment is not available for advisory purposes where no real controversy exists. *Beacom In and For Seventeenth Judicial Dist. V. Board of County Com'rs*, 657 P.2d 440, 447 (Colo. 1983). Finally, the legal controversy presented must be current; it cannot be one that may arise at some future time. *Heron v. City & County of Denver*, 411 P.2d 314, 315 (Colo. 1966). FEMA has issued approval letters for the work to be performed. The possibility of injury related to a FEMA claw back is not current and is speculative at best. Standing is not conveyed by the "remote possibility of a future injury." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Therefore, plaintiff's allegation does not establish an injury in fact.

plaintiff contends that, as a citizen of Centennial, Colorado, it has standing to allege OML violations by, for example, the Silverton Town Council, the county commissioners for Moffat County, the Otero County Land Use Planning Commission and the Julesburg Board of Trustees.

Since the General Assembly amended the OML in 2014 to add C.R.S. § 24-6-402(9)(a), there appear to be no published decisions in Colorado addressing standing of a non-resident to allege that a political subdivision has violated the OML. If, as suggested by the Court of Appeals in *Weisfield* and argued by plaintiff, the statutory amendment was a response to the district court's conclusion that the plaintiff in *Weisfield* had no standing, the amendment does not address the issue presented in this case. The plaintiff in the *Weisfield* case was a resident of the City of Arvada who was alleging the City of Arvada had violated the OML. The district court in the *Weisfield* case found that the plaintiff had no standing. An amendment making it clear that a citizen of a political subdivision has standing to assert that the political subdivision violated the OML is not authority supporting plaintiff's claim that a resident of Colorado who is not a resident of a political subdivision can assert that the political subdivision violated the OML.

C.R.S. § 24-6-402(9)(b) provides in part that courts have jurisdiction to issue injunctions to enforce the purposes of the section upon application by any citizen of the state. The purpose of the section is set forth in C.R.S. § 24-6-401: "It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret." Logically, the "public" referenced in the statute is the people who may be affected by the public business being conducted, which would primarily be the citizens of the political body forming the public policy. Plaintiff focuses on the language in Subsection 9(b) that courts have jurisdiction to address alleged OML violations upon application by any citizen of the state. However, jurisdiction and standing are two different issues. Subsection 9(a) still

requires that an action be brought by a person who has been denied or threatened with denial of rights. It makes sense that any citizen of the State of Colorado can sue a state-wide public body for violation of the OML, but to extend that to allow *any citizen* of the state the ability to sue *any local/municipal* public body goes against the basic principle that a plaintiff must personally suffer an injury in fact. A plaintiff does not have standing where plaintiff's injury is indirect and incidental to the defendant's conduct. *See Hickenlooper*, 338 P.3d at 1008–09.

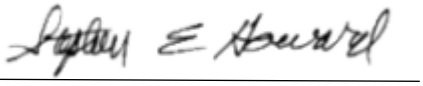
In *Pueblo School District No. 60 v. Colorado High School Activities Association*, 30 P.3d 752, 753 (Colo. App. 2000), the plaintiffs asserted standing under the language of Subsection 9 that courts have jurisdiction to enforce the OML upon application by any citizen of this state. The Court of Appeals stated that "requiring one bringing suit to have standing prevents litigants from asserting rights or legal interests of others." In concluding that the plaintiff did not have standing, the Court held that: "while a statute may purport to grant a cause of action to a large group of persons, a plaintiff must, nevertheless, suffer an injury in fact," and that "standing is not a requirement that may be abrogated by statute." *Id.* at 753–54. Although the amendment to the OML that created C.R.S. § 24-6-402(9)(a) was not in effect when the Court of Appeals issued its opinion in the *Pueblo School District* case, the amendment does nothing to change the standing requirement.

C.R.S. § 24-6-402(9)(a) "may purport to grant a cause of action to a large group of persons," but that does not open the door for any plaintiff to sue any local public body. There is no evidence that plaintiff will suffer any consequences as a result of defendant's claimed violation of the OML. Where, as here, the plaintiff is not a resident of the county alleged to have violated the OML, its purported injury is "overly indirect." *Hickenlooper*, 338 P.3d at 1007. Therefore, plaintiff does not have standing to assert its claims.

"A court does not have subject matter jurisdiction if a plaintiff lacks standing to invoke its judicial power." *Pueblo School Dist.*, 30 P.3d at 753. Because this court has no jurisdiction, it cannot address the remaining issues raised by plaintiff's motion. The case is dismissed, and the hearing scheduled for March 30, 2022 is vacated. Each party shall pay their own costs and fees.

SO ORDERED: March 28, 2022

BY THE COURT:



Stephen E. Howard
District Court Judge