STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 21-CV-174

THE VERMONT STATE AUDITOR,
DOUGLAS R. HOFFER,
Plaintiff,

v.

ONECARE ACCOUNTABLE CARE ORGANIZATION, LLC, D/B/A ONECARE VERMONT,
Defendant.

RULING ON ONECARE'S MOTION TO DISMISS

Defendant OneCare Accountable Care Organization LLC (OneCare) has contracted with the State of Vermont, Department of Vermont Health Access (DVHA) to provide "accountable care organization" services in Vermont. OneCare is a private business that, it says, "aims to improve healthcare outcomes for Vermont residents while stabilizing healthcare costs" "in furtherance of its members' tax-exempt purposes." OneCare's Motion to Dismiss at 3. Plaintiff Douglas R. Hoffer, Vermont's Auditor of Accounts, has sought the production of certain payroll and related records from OneCare to better evaluate a perceived rapid increase in such expenses.[1] OneCare has provided some responsive information but not to the Auditor's satisfaction. The Auditor filed this action asserting one claim only: breach of OneCare's contract with DVHA. The Auditor claims to be a third-party beneficiary of that contract and seeks specific performance requiring OneCare to produce the requested records.

OneCare has filed a motion to dismiss. It argues that the Auditor lacks constitutional standing to assert his claim because he cannot establish an injury for standing purposes. He cannot establish an injury, OneCare argues, because neither the contract nor the statutes describing the Auditor's powers give him the authority to demand the requested records.

Standing and the procedural standard

OneCare frames its dismissal argument as one of "standing." True standing is properly treated as a component of the court's subject matter jurisdiction. The parties thus treat OneCare's motion as falling under Rule 12(b)(1), which permits the evaluation of

[1] The court refers to Mr. Hoffer as the Auditor in this case, recognizing that he is acting here in his official capacity, and that references to the Auditor include references to either him or his staff.

extrinsic evidence, rather than Rule 12(b)(6), which generally does not.

The court sees no utility in characterizing the issue here as one of standing. Constitutional standing principles are applied in cases against the government to help moderate the separation of powers among the branches. 13A Wright & Miller et al., Federal Practice & Procedure: Juris. 3d § 3531; see also *Hinesburg Sand & Gravel Co., Inc. v. State*, 166 Vt. 337, 341 (1997) ("Standing doctrine is fundamentally rooted in respect for the separation of powers of the independent branches of government."). In litigation against private parties, ordinary cause of action principles are sufficient. See Wright & Miller § 3531 ("The question whether the law recognizes the cause of action stated by a plaintiff is frequently transformed into inappropriate standing terms. The Supreme Court has stated succinctly that the cause-of-action question is not a question of standing.").

Such is the case here. OneCare simply argues that the Auditor has no recognizable cause of action against it because neither the contract nor the relevant statutes authorize the requests he has made. Standing principles add nothing to the analysis.

OneCare's motion thus falls under Rule 12(b)(6) rather than Rule 12(b)(1). This makes no difference in this case, however. The Auditor incorporated into the complaint the entire universe of facts necessary to determine the legal question of his authority in this setting. What few additional facts have been added to the record in the course of briefing, such as statements the Auditor may have made in the past about the scope of his authority, are immaterial.

The contract and the Auditor's authority

The contract at issue here is the fourth extension of personal services contract #32318 between OneCare and DVHA, which first became effective on January 1, 2017. It covers in detail the complex undertaking of OneCare's accountable care organization (ACO) services for Vermont. An ACO is "an organization of health care providers that has a formal legal structure, is identified by a federal taxpayer identification number, and agrees to be accountable for the quality, cost, and overall care of the patients assigned to it." 18 V.S.A. § 9373(16). The contract has two provisions in particular that the Auditor claims authorizes his request for records: § 2.7 of Attachment A to the contract and ¶ 13 of Attachment C.

Section 2.7 (financial stability and accounting) of Attachment A provides in relevant part as follows:

> DVHA will monitor Contractor's financial performance. Contractor shall provide DVHA with copies of any filings Contractor is required to make to the Green Mountain Care Board (GMCB) related to Contractor's financial stability, within one business day of making filings with GMCB. . . .
>
> . . .
>
> Authorized representatives or agents of State of Vermont and the federal government shall have access to Contractor's accounting records and the accounting records of its subcontractors upon reasonable notice and at

reasonable times during the performance and/or retention period of the Contract for purposes of review, analysis, inspection, audit and/or reproduction.

Copies of any accounting records pertaining to the Contract shall be made available by Contractor within ten (10) days of receiving a written request from DVHA for specified records. DVHA and other state and federal agencies and their respective authorized representatives or agents shall have access to all accounting and financial records of any individual, partnership, firm or corporation insofar as they relate to transactions with any department, board, commission, institution or other state or federal agency connected with the Contract.

. . .

DVHA will require Contractor to produce the information on Contractor's financial condition at the close of its fiscal year and upon request by the DVHA Commissioner. Any financial statement submitted to DVHA shall be signed under penalty of perjury by Contractor's Chief Financial Officer, Chief Operating Officer or Chief Executive Officer. . . .

. . .

DVHA may make an examination of the affairs of Contractor as often as it deems prudent. The focus of the examination will be to ensure that Contractor is not subject to adverse actions which in DVHA's determination have the potential to impact Contractor's ability to meet its responsibilities with respect to its use of the payments received from DVHA and Contractor's compliance with the terms and conditions of any financial risk transfer agreement. Responses to DVHA requests shall fully disclose all financial or other information requested. . . .

While § 2.7 specifically refers in many places to DVHA's rights, it more generally provides that "[a]uthorized representatives or agents of State of Vermont and the federal government shall have access to Contractor's accounting records."[2]

Attachment C contains "standard state provisions for contracts and grants." Paragraph 13 provides:

Records Available for Audit: The Party shall maintain all records pertaining to performance under this agreement. "Records" means any written or recorded information, regardless of physical form or characteristics, which is produced or acquired by the Party in the performance of this agreement. . . . The records described shall be made

[2] To the extent that this section may be read to distinguish between a *request* for records and mere *access* to records that have been requested, there is no need to parse any such distinction in this case. The court assumes, for the sake of the argument, that a right of access implies a right to request.

> available at reasonable times during the period of the Agreement and for three years thereafter or for any period required by law for inspection by any authorized representatives of the State or Federal Government. If any litigation, claim, or audit is started before the expiration of the three-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved.

This provision similarly refers to "authorized representatives of the State or Federal Government."

Neither § 2.7 nor ¶ 13, or related provisions or the contract generally, more specifically define the scope of who may be "authorized" to access the referenced records. Moreover, nothing in the contract specifically says that the Auditor is so authorized or otherwise refers to the Auditor at all.

The question thus turns to whether there is some source of authority that would authorize the Auditor to demand the production of the disputed documents within the contemplation of the contract.

The "powers of" the Auditor "are determined by statutory provisions." *State v. Howard*, 83 Vt. 6, 17 (1909). The relevant statutes are 32 V.S.A. §§ 161–168. Notably, the Auditor's powers to audit and demand the production of records extends to "all *departments, institutions, and agencies of the State*, including the trustees or custodians of trust funds and all municipal, school supervisory union, school district, and county officers who receive or disburse funds for the benefit of the State." 32 V.S.A. § 167(a) (emphasis added); see also *id.* § 163(1)(C). The statute refers to departments, institutions, and agencies "of the State." This expression is not reasonably read to encompass a private entity such as OneCare simply because it has contracted with the State.

The Auditor nevertheless argues that OneCare is the "functional equivalent" of a public agency, and thus should be treated as a public agency, drawing on trial court decisions that have employed the so-called functional equivalence test in the access to public records setting. The test extends the applicability of the Public Records Act (PRA), 1 V.S.A. §§ 315–320, to private entities in limited circumstances. See, e.g., *Whitaker v. Vt. Info. Tech. Leaders, Inc.*, No. 781-12-15 Wncv, 2016 WL 10860908 (Vt. Super. Ct. Oct. 27, 2016); *Prison Legal News v. Corr. Corp. of Am.*, No. 332-5-13 Wncv, 2014 WL 2565746 (Vt. Super. Ct. Jan. 10, 2014). The Auditor argues that OneCare would be deemed the functional equivalent of a public agency were the subject of this case an access to public records request, and it would be absurd to make the requested records available to any member of the public but not the Auditor.

The court declines to analyze the functional equivalence test in this case and sees no absurdity in the plain meaning of the statutes describing the Auditor's duties and powers. Functional equivalence analysis in Vermont is a unique feature of a handful of trial court cases, and it is tethered closely to the access-to-public-records context in which it arose. It has never been applied more broadly in Vermont, and the Auditor fails to cite any authority that would apply it in this context. The court declines to conclude that this situation is so similar to a public request that the court should import that doctrine, and the Auditor has been clear that the requests giving rise to this case were asserted solely as an exercise of

his powers as Auditor and not as a PRA request.

Moreover, the Supreme Court has recently made clear that the trial courts that have applied the functional equivalence test in Vermont have done so in error (although not necessarily reaching the wrong results). The correct analysis, which is quite similar in substance, arises out of the plain meaning of "instrumentality," to which the PRA expressly extends. *Human Rights Def. Ctr. v. Correct Care Sols., LLC*, 2021 VT 63, ¶ 14, 2021 WL 4032925. The statutes empowering the Auditor do not extend to instrumentalities.

The court thus declines to analyze either the functional equivalence or instrumentality test in this case. Neither applies. Moreover, even if a requestor under the PRA could access documents directly from OneCare that the Auditor could not under his own powers as Auditor, there is no absurdity. The Auditor's role is defined, and limited, by statute, and those statutes do not authorize the demands he has made in this case.

Because he has no authority for those demands, there can be no breach of contract due to OneCare's refusal to more completely produce the requested documents in response to his requests.

Finally, throughout the briefing and oral argument, the Auditor has implied that if he is not capable of accessing these records, then OneCare will not be properly supervised or the public fisc may be at risk. The full scope of who, federal and state, would have authority to directly access the requested records is not clear. OneCare hardly has any ability to operate in the shadows, however. It is *pervasively* regulated by DVHA and the Green Mountain Care Board by statute, rule, and the terms of the contact, and both presumably are fully capable of seeking the disputed records if they wish. See 18 V.S.A. §§ 9373–9383; Vt. Admin. Code 4-7-5:5.100–600. The Auditor conceded at the hearing on the motion that he has never asked DVHA or the Green Mountain Care Board to request them from OneCare.

Order

For the foregoing reasons, OneCare's motion to dismiss is granted. Counsel for OneCare shall submit a form of judgment. V.R.C.P. 58(d).

Electronically signed on 10/21/2021 1:54 PM, pursuant to V.R.E.F. 9(d)

Robert A. Mello
Superior Judge