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9 UNITED STATES DISTRICT COURT  
10 DISTRICT OF ARIZONA

11 Stephen Gesell,  
12 Plaintiff,

Case No: 3:24-cv-08090-DWL

13 v.

14 City of Cottonwood, a municipal  
15 corporation, Tim Elinski, an individual,  
16 Jesus Rodriguez, an individual, Jennifer  
17 Winkler, an individual, Amanda Wilber,  
18 an individual, and Helaine Kurot, an  
19 individual,

20 Defendants.

21 **DEFENDANTS' REPLY IN SUPPORT OF**  
22 **DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF**  
23 **PLAINTIFF'S COMPLAINT AND TO STRIKE REFERENCES TO**  
24 **PRIVILEGED/CONFIDENTIAL MATERIAL**  
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1 Plaintiff's Response to Defendants' Motion for Partial Dismissal of Plaintiff's  
2 Complaint and to Strike References to Privileged/Confidential Material [Dk. 018] (the  
3 "Response") articulates no valid basis to save the claims in the Amended Complaint (the  
4 "Complaint"). The Response is littered with indisputable inaccuracies. Plaintiff ignores  
5 and/or grossly mischaracterizes the law when it is inconvenient for his position, rewrites  
6 the facts of his Complaint (or attempts to create new ones), argues in favor of claims that  
7 do not exist, and urges this Court to deny Defendants' Motion for Partial Dismissal of  
8 Plaintiff's Complaint (the "Motion") based on his unsupported personal beliefs rather  
9 than controlling legal authority.<sup>1</sup> Controlling statutes and case law support granting  
10 Defendants' Motion with prejudice. [Dk. 013]

### 11 ARGUMENT

#### 12 **I. PLAINTIFF'S RESPONSE IGNORES CONTRADICTIONARY CASE 13 LAW REGARDING SERVICE OF A NOTICE OF CLAIM.**

14 Plaintiff disregards dozens of uncontroverted cases and decades of settled law in  
15 an attempt to avoid the consequences of his failure to comply with the most rudimentary  
16 requirements for a valid notice of claim—proper delivery to the individual. Plaintiff  
17 asks this Court to rewrite the Federal Rules of Civil Procedure and the language of  
18 A.R.S. § 12-821.01 and disregard controlling law.

19 Plaintiff argues that the Deputy Clerk should have advised him that service was  
20 insufficient. However, he cites no authority for the proposition that a party must educate  
21 its adversary on how to comply with a simple statutory requirement—one that mirrors a  
22 basic prerequisite for commencing any civil lawsuit against an individual—delivery to a  
23 named individual. The Arizona Court of Appeals has expressly so held in the notice of  
24 claim context:

25 Yahweh argues any deficiencies with his NOC could have been cured  
26 easily if the City had requested clarification. Public entities in Arizona

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27 <sup>1</sup> Plaintiff's Response erroneously asserts that Defendants' inclusion of information  
28 about the Osborn Maledon investigation converts the Motion to Dismiss into one for  
summary judgment. [See Resp. at pg. 4] Defendants did not rely on this information to  
support any of their arguments in the Motion. In fact, the investigation is irrelevant to  
the legal arguments advanced and is included solely as a contextual background.

1 are not duty-bound to assist claimants with statutory compliance. *See*  
2 *Backus v. State*, 220 Ariz. 101, 107 ¶ 28, 203 P.3d 499, 505 (2009) (A  
3 public entity is not required to request additional facts when a  
4 claimant’s NOC is deficient.). Rather, a claimant must strictly comply  
5 with § 12–821.01, and “[c]ompliance with this statute is not difficult.”  
6 *Deer Valley Unified Sch. Dist. No. 97*, 214 Ariz. at 296, ¶ 9, 152 P.3d  
7 at 493. Yahweh did not present the City with a valid, sum-certain  
8 settlement offer, and accordingly his claims were barred.

9 *Yahweh v. City of Phoenix*, 243 Ariz. 21, 23 (Ct. App. 2017); *see also Backus v.*  
10 *State*, 220 Ariz. 101, 107 ¶ 28 (2009) (finding that a public entity is not required to  
11 request additional facts when a claimant’s notice of claim is deficient).

12 Furthermore, Plaintiff entirely ignores myriad cases that have resoundingly  
13 rejected his argument that an individual may be served by leaving a document with their  
14 employer. *See, e.g., Andrich v. Kostas*, No. CV-19-02212-PHX-DWL, 2020 WL  
15 377093, at \*6 (D. Ariz. Jan. 23, 2020) (holding that a person “seeking to sue a  
16 government employee must personally serve the employee with the NOC”); *Drake v.*  
17 *City of Eloy*, No. CV-14-00670-PHX-DGC, 2014 WL 3421038, at \*2 (D. Ariz. July 14,  
18 2014) (finding that simply because an employee is employed by a municipality and is a  
19 defendant’s supervisor, does not give that employee authority to accept service on the  
20 defendant’s behalf). Just like serving a neighbor or a minor child is not proper service in  
21 a civil lawsuit, delivering a notice of claim to the Deputy Clerk is not proper service to  
22 the individual Defendants—regardless of what the Deputy Clerk may or may not have  
23 said.

24 As the Arizona Supreme Court has held, municipalities can only act with  
25 actual authority:

26 The corporation acts only through its agents, that is, its officers. In  
27 order to bind the principal by an act, the agent (here both the council  
28 and the marshal) must act strictly within the scope of his agency. . . .  
*Public officers or agents* are held more strictly within their prescribed  
powers than private general agents; and a contract made by a *public*  
*agent* within the apparent scope of his powers does not, if there be no  
estoppel, bind his principal in the absence of actual authority.

29 *Town of Tempe v. Corbell*, 17 Ariz. 1, 6 (1915) (emphasis added). Plaintiff has offered  
30 no facts even remotely suggesting that the Deputy Clerk possessed such authority in this  
31 case. Once again, he ignores the law.

1 Even if the concept of apparent authority existed in this context, which it does  
2 not, the facts would not support its application. Apparent authority requires evidence  
3 that the principal engaged in conduct that led another party to believe a third party was  
4 authorized to act on his or her behalf. *See, e.g., Ariz. Title Ins. & Trust Co. v. Pace*, 8  
5 Ariz. App. 269, 271–72 (Ct. App. 1968) (“[I]f the client places the attorney in a position  
6 where third persons of ordinary prudence and discretion would be justified in assuming  
7 the attorney was acting within his authority, then the client is bound by the acts of the  
8 attorney within the scope of his apparent authority.”); *Strickler v. Arpaio*, No. CV-12-  
9 344-PHX-GMS, 2012 WL 3596514, at \*2 (D. Ariz. Aug. 21, 2012). Here, Plaintiff has  
10 not even attempted to assert facts indicating that any individual Defendant caused him to  
11 believe that the Deputy Clerk was their authorized agent for purposes of service.

12 Furthermore, Plaintiff’s sole reliance on *Laurence v. Salt River Project Agric.*  
13 *Improvement & Power Dist.*, 255 Ariz. 95 (2023) is misplaced, as the *Laurence* court  
14 specifically acknowledged the dismissal as to the individual defendant for lack of  
15 service—and the remainder of the legal issues addressed in the *Laurence* case do not  
16 apply to the issues raised in the Motion.

17 Finally, Plaintiff again totally ignores that Defendant Wilbur is not even  
18 referenced in the notice of claim. *Florian v. Perkinson*, No. 05-CV-2067-PHX-FJM,  
19 2007 WL 1317263, at \*2 (D. Ariz. May 4, 2007) (notice of claim was invalid as to  
20 individuals who were not listed as addressees). Plaintiff cannot disregard facts and  
21 circumstances he finds detrimental. He must accept the law and facts as they exist.  
22 Here, they compel a single outcome: dismissal of his state law claims against the  
23 individuals for non-compliance with Arizona’s notice of claim statute.

24 **II. PLAINTIFF’S SECTION 1983 CLAIMS ARE FLAWED FOR**  
25 **MULTIPLE REASONS AND MUST BE DISMISSED.**

26 Plaintiff’s attempt to excuse his non-compliance with *Monell* is muddled and  
27 disjointed and misses the relevant analysis. A final policymaker must have committed  
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1 or ratified *the challenged act*. 436 U.S. 658, 691 (1978). Here, the alleged violation is  
2 the denial of due process. Due process requires that an employee may not be deprived  
3 of a protected property interest without notice and an opportunity to be heard. *Brewster*  
4 *v. Bd. Of Educ.*, 149 F.3d 971, 986 (9th Cir. 1998). Despite his numerous digressions,  
5 he avoids confronting the core issue of whether any defendant with policy-making  
6 authority denied him the right to notice and an appeal. The omission is unsurprising,  
7 given that none of the individual Defendants had the authority to create City policies  
8 regarding terminations/due process, as required to qualify as a final policymaker. Only  
9 the City Council is vested with this power. [See Dk. 013 at pg. 11]

10 At a minimum, Plaintiff is disingenuous, if not deliberately misleading, in  
11 asserting that the City Council was involved in the challenged acts. [Resp. at pg. 8] It is  
12 well-settled that a council can only act with a majority vote through a properly noticed  
13 meeting. A.R.S. § 38-431.01(A) (“All legal action of public bodies shall occur during a  
14 public meeting.”). Plaintiff’s Complaint is utterly devoid of any allegation whatsoever  
15 that the Council voted on any matters related to Plaintiff’s termination, much less  
16 committed or ratified the alleged violation of due process. Thus, Plaintiff’s claims  
17 arising under Section 1983 must be dismissed for failure to plead facts to hold a  
18 municipality liable for an alleged due process violation.

19 **A. Plaintiff Was an At-Will Employee and, Thus, Had No Property**  
20 **Interest in His Employment.**

21 Plaintiff’s procedural due process and Peace Officer Bill of Rights (“POBOR”)   
22 claims are fatally flawed because he was an at-will employee with no protected property  
23 interest in his position as Chief of Police. *See Blunt vs. Town of Gilbert*, No. CV-23-  
24 02215-PHX-SMB (D. Ariz. May 28, 2024) (POBOR amendment did not alter peace  
25 officer’s at-will status). Plaintiff’s efforts to differentiate *Blunt* are unavailing, as the  
26 outcome did not turn on the existence of a written employment contract. *Id.* at \*5. The  
27 court held, as a matter of law, that the September 2022 amendment to the POBOR was  
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1 not retroactive, meaning that an employee who was at-will prior to the amendment  
2 (whether through a written or implied contract or other circumstances) would not  
3 experience a change in status as a result of the statutory change. *Id.*

4 Here, Plaintiff was hired as an at-will employee pursuant to the City Code, which  
5 expressly states, “The police chief shall be appointed and serve at the pleasure of the city  
6 manager.” [Ex. 12 to Dk. 013]; *Ernst v. Arizona Bd. of Regents*, 119 Ariz. 129, 130  
7 (1978) (a public employee who “serves at the pleasure of the appointing authority is an  
8 employee whose employment may be terminated at-will.”). Furthermore, in Arizona, all  
9 employment relationships are contractual in nature. A.R.S. § 23-1501 (“The public  
10 policy of this state is that: 1. The employment relationship is contractual in nature.”);  
11 [Compl. at ¶ 81 (“Arizona considers all employment to be contractual”)] Thus, Plaintiff  
12 had an implied employment contract which necessarily incorporated the requirement in  
13 the ordinance that the chief of police is an at-will employee.<sup>2</sup> *Canfield v. Sullivan*, 774  
14 F.2d 1466, 1467 (9th Cir. 1985) (“Whether [plaintiff] possessed a protectible property  
15 interest in his employment is defined by reference to state law, including city  
16 ordinances.”); *see also cf. Higginbottom v. State*, 203 Ariz. 139, 142 (Ct. App. 2002) (“It  
17 has long been the rule in Arizona that a valid statute is automatically part of any contract  
18 affected by it, even if the statute is not specifically mentioned in the contract.”). The  
19 fact that there was no “written” contract is immaterial. Plaintiff failed to address the  
20 argument that the September 2022 amendment impaired his implied employment  
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23 <sup>2</sup> Plaintiff claims that the City Employee Manual included a list of at-will employees,  
24 which included the Police Chief, and that the City removed the list of at-will employees  
25 from the Manual entirely. [Resp. at pg. 12] Plaintiff disregards the fact that the list of at-  
26 will employees was merely relocated from the Manual and placed into an Administrative  
27 Regulation. [See City’s Administrative Regulation 8,  
28 <https://cottonwoodaz.gov/DocumentCenter/View/6718/AR-8-10-14-2019>]. The Court  
can consider this regulation as a public record. *Lee v. City of Los Angeles*, 250 F.3d 668,  
689 (9th Cir. 2001) (“[A] court may take judicial notice of ‘matters of public record.’”).

1 contract with the City.<sup>3</sup> Thus, the Court should view Plaintiff's omission as conceding  
2 that dismissal is appropriate on this basis. *See Fiori v. Peoria Police Dep't*, No. CV-19-  
3 03074-PHX-DJH, 2020 WL 95436, at \*1 (D. Ariz. Jan. 8, 2020) ("The Court may  
4 construe Plaintiff's failure to respond to all of Defendants' arguments as consent to  
5 granting the Motion to Dismiss on those grounds.").

6 Plaintiff is also mistaken in his assertion that Defendants are attempting to evade  
7 statutory protections in a manner that would render them meaningless. The Arizona  
8 Legislature routinely enacts changes that are forward-looking only. Here, Plaintiff was  
9 hired as an employee who could be terminated by the City Manager at any time, with or  
10 without cause or notice. [Ex. 12 to Dk. 013] His status remained the same at the time of  
11 his termination. No modifications were ever made to his "at-will" status, and he lost  
12 nothing he was promised.

13 Finally, the exception based on non-retroactivity, which this Court recognized in  
14 *Blunt*, will only impact a small subset of officers who were hired on an at-will basis  
15 prior to September 2022. In other words, Defendants are not, as Plaintiff falsely  
16 insinuates, arguing for nullification of the amendment. Because Plaintiff was an at-will  
17 employee, he had no property right in his employment and, thus, cannot assert a claim  
18 for a violation of due process or the POBOR.<sup>4</sup>

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21 <sup>3</sup> The fact that Plaintiff received a letter referring to the POBOR is irrelevant. Giving an  
22 employee additional procedural protections does not, in itself, create a constitutionally  
23 protected property interest in employment. *Bowen v. Mo. Dep't of Conservation*, 46  
24 S.W.3d 1, 8–9 (Mo.Ct.App. 2001) (The "granting of a right to appeal does not of itself  
25 change an employee's status as an employee at will."). Instead, Plaintiff must  
demonstrate a legitimate claim of entitlement to their job, which is granted through an  
independent source of state or local law. *Portman v. County of Santa Clara*, 995 F.2d  
898, 904 (9th Cir. 1993).

26 <sup>4</sup> Plaintiff failed to address Defendants' arguments in Section VII of their Motion that  
27 POBOR does not allow judicial review under the circumstances alleged in the  
28 Complaint and, in any event, any request for an appeal hearing is untimely. Thus,  
Plaintiff should be viewed as consenting to dismissal on these grounds.

1           **B. Plaintiff Has Failed to Identify How Defendants’ Conduct “Shocks the**  
2           **Conscience.”**

3           Plaintiff’s Response includes no explanation of why Defendants’ alleged conduct  
4           was so contrary to the fundamental principles of law that Count Six clears the  
5           exceptionally high “shocks the conscience” standard enunciated by the Ninth Circuit.  
6           [See Dk. 013 at pg. 19] Nor does Plaintiff explain why Defendants’ actions approach  
7           the “outer bounds of substantive due process protection[,]” which is typically limited  
8           only to “matters relating to marriage, family, procreation, and the right to bodily  
9           integrity.” *Nunez v. City of Los Angeles*, 147 F.3d 867, n.4 (9th Cir. 1998). The Court  
10          should decline Plaintiff’s invitation to “expand the concept of substantive due process,”  
11          particularly where courts in other employment cases have declined to do so. *See, e.g.,*  
12          *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Court “ha[s] always been  
13          reluctant to expand the concept of substantive due process...”); *Fuentes v. Cnty. of*  
14          *Santa Cruz*, No. CV-21-00220-TUC-DCB, 2023 WL 2528328, at \*3 (D. Ariz. Mar. 15,  
15          2023) (right to employment not a fundamental right for purposes of substantive due  
16          process). The Court should dismiss Plaintiff’s substantive due process claim.

16          **III. THE INDIVIDUAL DEFENDANTS ARE QUALIFIEDLY IMMUNE**  
17          **FROM DUE PROCESS LIABILITY, AND THE CITY IS**  
18          **ABSOLUTELY IMMUNE FROM PUNITIVE DAMAGES.**

19          The individual Defendants are entitled to immunity because they did not violate a  
20          clearly established right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The *Blunt*  
21          decision confirms that at-will status remains unchanged for officers who were at-will  
22          before the September 2022 amendment to POBOR, thus negating any claim that Plaintiff  
23          had a property interest in his position that was secured by due process. 2024 WL  
24          2722167, at \*5. In other words, this Court’s decision in *Blunt*, which permitted  
25          Defendants to terminate Plaintiff’s employment without or without cause, forecloses any  
26          determination that Defendants violated a “clearly established” right to due process. *Id.*  
27          Accordingly, the individual Defendants are immune from liability for alleged violations.



1           Additionally, Plaintiff continues to assert, without any legitimate basis, that  
2 punitive damages are recoverable from the City. This insistence is particularly troubling,  
3 as Plaintiff refuses to acknowledge unambiguous, settled law to the contrary. *See* 42  
4 U.S.C. § 1981a(b)(1); *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981);  
5 A.R.S. § 12-820.04.

6 **IV. PLAINTIFF’S RESPONSE DOES NOT RESCUE HIS AEPA CLAIM  
BASED ON DEFENDANT WINKLER’S INADVERTENT DISCLOSURE.**

7           Regardless of whether Defendant Jenny Winkler’s disclosure of an executive  
8 session recording was inadvertent, dismissal of Plaintiff’s AEPA claim remains  
9 warranted. The central issue is whether Plaintiff plausibly satisfied the elements of an  
10 AEPA claim to withstand a 12(b)(6) motion. As stated in Defendants’ Motion, the  
11 language of an AEPA claim requires a plaintiff to disclose information previously  
12 unknown to their employer. [*See* Dk. 013 at pg. 23] Here, Plaintiff disclosed  
13 information known to the City; indeed, he merely repeated information that the City  
14 shared with him. [*Id.* at 22] In the Response, Plaintiff fails to address this argument and  
15 instead focuses on whether the disclosure was inadvertent—a point irrelevant to the  
16 essential elements of an AEPA claim. Accordingly, this claim should be dismissed. *See*  
17 *Fiori*, No. CV-19-03074-PHX-DJH, 2020 WL 95436, at \*1.

18 **V. ARIZONA’S CRIMINAL TAMPERING STATUTE DOES NOT  
19 CREATE A PRIVATE RIGHT OF ACTION.**

20           The Arizona Court of Appeals has ruled that the Arizona criminal tampering  
21 statute, A.R.S. § 13-2407, does not create a private right of action:

22           The Arizona Supreme Court has yet to address the viability of the other two  
23 potential tort claims—obstruction of justice and tampering with public  
24 records and physical evidence. *Liberti* points to no Arizona authority  
25 recognizing them as such. And this court found none. Without any case law  
26 or statutory authority, this court looks to the Restatement (Third) of Torts for  
27 guidance. *See Arellano v. Primerica Life Ins. Co.*, 235 Ariz. 371, 378 ¶ 32  
28 (App. 2014). The Restatement also does not recognize those claims as  
independent torts. *See generally* Restatement (Third) of Torts. Moreover,  
obstruction of justice and tampering with public records already exist as  
criminal offenses. *See* A.R.S. §§ 13-2407, -2409. And as a general rule, this  
court will not infer a private cause of action for a criminal offense unless the  
legislature expresses an intent to create one “to protect any special group.”  
*Phoenix Baptist Hosp. & Med. Ctr. Inc. v. Aiken*, 179 Ariz. 289, 294 (App.

1 1994). Our legislature has not. We, thus, discern no basis in Arizona law that  
2 supports our creation of the torts for which Liberti advocates.

3 *Liberti v. City of Scottsdale*, No. 1 CA-CV 22-0599, 2023 WL 4078539, at \*2 (Ariz. Ct.  
4 App. June 20, 2023).

5 The Court should assign significant weight to this case, even though it is listed as  
6 not precedential authority, because it directly relates to the statute Plaintiff alleges was  
7 violated. Moreover, the case aligns with other authorities cited by Defendants in the  
8 Motion—authorities that Plaintiff does not refute. [See Dk. 013 at pgs. 24–25] Instead,  
9 Plaintiff makes a blanket statement, unsupported by any case law or legislative history,  
10 that he falls within the class of persons the statute is designed to protect. He offers no  
11 explanation of who belongs to the alleged group and how the Arizona legislature  
12 intended to provide protection, which is unsurprising because the Arizona Court of  
13 Appeals in the *Liberti* case found no indication that the Arizona legislature intended to  
14 protect a special group when enacting A.R.S. § 13-2407. *See Liberti v. City of*  
15 *Scottsdale*, No. 1 CA-CV 22-0599, 2023 WL 4078539, at \*2. Allowing Plaintiff to  
16 proceed with this claim would create a cause of action that does not exist. As such,  
17 Count Three to the Complaint should be dismissed.

18 **VI. PLAINTIFF’S DEFAMATION CLAIM FAILS AS A MATTER OF LAW.**

19 Apparently dissatisfied with Arizona law on defamation, Plaintiff seems to  
20 believe he can ignore controlling authorities and falsely label himself as a private citizen.  
21 The Arizona Court of Appeals has repeatedly held, in clear and unmistakable terms, that  
22 a police officer is a public official for purposes of defamation law. *Turner v. Devlin*,  
23 174 Ariz. 201, 204 (1993) (treating police officer as a public official); *Rosales v. City of*  
24 *Eloy*, 122 Ariz. 134, 135–36 (Ct. App. 1979) (police officer “was a ‘public official’  
25 under the law governing libel and slander.”). Thus, Plaintiff cannot avoid his heightened  
26 burden of proof by burying his head in the sand.

27 In arguing against dismissal of his defamation claim, Plaintiff erroneously  
28 focuses on the alleged harms caused by the challenged statements. That is not the test

1 for whether a statement may qualify as defamatory. To support liability, a statement  
2 must be provable as false. *Turner*, 174 Ariz. at 204. In contrast, statements that  
3 constitute mere opinion or rhetorical hyperbole are not actionable.

4 The fatal flaws with Plaintiff’s argument are laid bare by the decision in *Hinchey*  
5 *v. Horne*, No. CV13-00260-PHX-DGC, 2013 WL 4543994, at \*9 (D. Ariz. Aug. 28,  
6 2013). There, a criminal investigator alleged that the defendants were liable for  
7 defamation for describing her as “incompetent.” *Id.* Under Plaintiff’s reasoning, this  
8 statement would result in liability, since it would undoubtedly cause reputational harm.  
9 This Court, however, reached a different conclusion, holding that the term  
10 “incompetent” was “beyond the realm of factual ascertainment of proof.” *Id.* The same  
11 reasoning applies with respect to Defendant Kurot (“Kurot”)’s alleged statements that  
12 Plaintiff’s demeanor was “threatening” and that he “crossed a line.” There is no  
13 empirical test for the factual accuracy of these remarks, so they are non-actionable.

14 Although the Complaint is limited to Kurot’s two remarks, Plaintiff attempts to  
15 expand his defamation claim in the Response by making a vague reference to statements  
16 from the City’s Notice of Intent to Terminate without supplying quotes or the document  
17 itself. [*See Resp.* at pg. 19] Plaintiff’s Response cannot be used to amend the pleadings.  
18 In any event, the content of the Notice of Intent is not actionable because it accurately  
19 summarizes the findings of the ACRD investigation that there was discrimination  
20 against a female officer based on Plaintiff’s actions. [*See Ex. 1 to Dk. 013; Compl.* at ¶  
21 61; *Morris v. Warner*, 160 Ariz. 55, 62 (Ct. App. 1988) (for a statement to be  
22 defamatory, it must be false); *Hinchey v. Horne*, No. CV13-00260-PHX-DGC, 2013 WL  
23 4543994, at \*12 (D. Ariz. Aug. 28, 2013) (“The complaint alleges that Bistrow repeated  
24 allegations in the NOC (*Compl.*, ¶¶ 245, 248), and a review of the Bistro memo shows  
25 this to be true. The memo merely recounts allegations made in the NOC and attributes  
26 them to the NOC. *Doc. 1–2* at 34–35. Because the memo’s statement—that the NOC  
27 claimed Plaintiff fabricated evidence before a grand jury—was true (*Doc. 1–2* at 38–78),  
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1 it cannot provide the basis for a defamation claim.”). None of Plaintiff’s allegations in  
 2 the Complaint can support a defamation claim. As such, Count Five should be  
 3 dismissed.<sup>5</sup>

4 **VII. THE INFORMATION FOUND IN THE COMPLAINT IS PRIVILEGED  
 AND CONFIDENTIAL.**

5 Regardless of Plaintiff’s belief that the executive session exceeded the bounds of  
 6 privilege (which it did not), this does not grant him the right to unilaterally disclose what  
 7 transpired during the session. *See* A.R.S. § 38-431.03(F). The proper recourse was to  
 8 request *in camera* review by the Court, not to publicly disclose the matter. Furthermore,  
 9 the statements made during the executive session were also protected by the attorney-  
 10 client privilege, as counsel for the City provided legal advice to the City Council  
 11 regarding a pending ACRD matter. [Dk. 013 at 32–33] The privilege belongs to the  
 12 City and cannot be waived by Plaintiff. Any references to discussions from the  
 13 executive session should be stricken.

14 **CONCLUSION**

15 Plaintiff offers no valid argument to save his claims. The Court should grant  
 16 Defendants’ Motion and dismiss the following claims with prejudice: all state law  
 17 claims against the individual Defendants; Count Three against all Defendants; the  
 18 Section 1983 claims against all Defendants; Count One against the City; and Count Two  
 19 against the City, to the extent it is based on Plaintiff’s report regarding Winkler. Given  
 20 that such claims suffer from incurable flaws, leave to amend should be denied. In  
 21 addition, Defendants request that this Court strike paragraphs 25, 26, 28, 44, and 46 of  
 22 the Complaint.

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24 <sup>5</sup> Additionally, Plaintiff claims defamation per se. Defamation per se relieves a plaintiff  
 25 from proving damages, but the plaintiff is still required to establish all of the other  
 26 elements of defamation. *See Sebring v. Pamintuan*, No. 1 CA-CV 07-0478, 2008 WL  
 27 2497446, at \*2 (Ariz. Ct. App. June 17, 2008). Moreover, as a public official, Plaintiff  
 28 still bears the heightened burden of showing actual malice. Alleging defamation per se  
 does not exempt him from these requirements, and he cannot meet the necessary  
 elements.

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RESPECTFULLY SUBMITTED this 23rd day of December 2024.

**PIERCE COLEMAN PLLC**

By /s/Justin S. Pierce  
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*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 2024, I electronically transmitted the attached document to the Clerk’s Office using the ECF System for filing, causing a copy to be electronically transmitted to the following ECF registrants:

LAW OFFICES OF KIMBERLY A. ECKERT  
Kimberly A. Eckert  
keckert@arizlaw.biz  
*Attorney for Plaintiff*

By: /s/ Stephennie S. Stuart

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