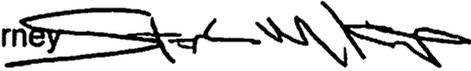




City of Peoria

OFFICE OF THE CITY ATTORNEY
8401 W. Monroe Street, Room 280
Post Office Box 4038
Peoria, AZ 85380-4043
T 623.773.7330
F 623.773.7043

OPINION NO. 2013 - 01

TO: Bob Barrett, Mayor
FROM: Stephen M. Kemp, City Attorney 
DATE: August 20, 2013
SUBJECT: Privilege for complaints under Arizona Open Meetings Act

This office renders formal legal opinions on issues of public importance that require a detailed analysis and statement of the law on the issue. These opinions represent the City Attorney's Office public statement of the law on a matter. Such opinions are not binding on any court and may be given such precedential value as courts and other offices determine. City Attorney Opinions pertain to the performance of the duties of a public officer or employee in their official capacity; they are not opinions as to the legal rights and liabilities of an individual in their personal capacity. This opinion is designed to address only the specific question presented and not any related issues.

QUESTION: Does immunity from civil liability for claims of defamation exist for a City Council Member who makes a complaint against another person alleging violation of the Arizona Open Meetings Act¹ based on legislative or reporting privileges.

OPINION:

The Mayor requested a formal legal opinion on the questions presented following the performance appraisal of the City Attorney. It is now being provided in accordance with that request.

As part of preparing this opinion, the question was extensively researched from authoritative sources both within and outside Arizona. Our research indicates that the question of an absolute privilege for complaints alleging a violation of a state open meetings law has not been addressed by any Arizona court of record² or a court of record in other states. Therefore, the question is a matter of first impression. As such

¹ Defamation is a civil cause of action alleging that an individual's reputation was harmed by the making of a false statement to a third party. In the cases of matters of public concern the falsity of the statement must be proven and the defendant's actual malice in making the statement.

² A court of record in Arizona is a court that issues reported opinions which are deemed to provide legal precedent in subsequent cases. As a common law jurisdiction, reported decisions of courts of record are used to establish the law in related areas.

OPINION NO. 2013-01

August 20, 2013

Page 2 of 8

the question is analyzed by looking at court decisions and statutes in similar but not identical factual situations.

A privilege is a specific legal right, exemption or exception to a duty under the law. The result of this legal right, exemption or exception to a legal duty is immunity, which is a defense to liability. This defense results in absolute or limited protection against liability. For purposes of this opinion, many cases use the terms interchangeably. However, the key point is that if the privilege is deemed absolute, then the immunity granted by the privilege will be absolute.

The starting point for consideration of the question presented is the Arizona Open Meetings Act (also referred to as the Arizona Open Meetings Law, hereinafter "OML"). The OML contains an explicit statement of public policy providing:

A.R.S. §38-431.09. Declaration of public policy

A. It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.

The rules of statutory construction provide that a statute must be interpreted with the goal of effecting this statement of legislative intent. *Estate of Braden ex rel Gabaldon v. State*, 228 Ariz. 323, 266 P.3d 349 (2011). This express statement of public policy must serve as the cornerstone for any analysis on the question presented.

The question presented involves analysis of two distinct legal issues. First, the applicability of legislative privilege. Legislative privilege is an immunity granted to members of legislative bodies while acting as a legislator for their actions and/or speech in acting as legislators. The rationale for this immunity is that the legislative process in a democratic system requires a full and free discussion of issues by the legislative body. This rationale was recognized by the United States Supreme Court in *Tenny v. Brandhove*, 341 U.S. 367 (1951). The United States Supreme Court found four justifications for immunity. (1) constitutional underpinnings (relationship to the speech and debate clause; (2) common law history of immunity for legislators; (3) policy rationales and (4) the existence of alternative checks on legislators through voting process, internal discipline and criminal prosecution.

OPINION NO. 2013-01

August 20, 2013

Page 3 of 8

Second, the applicability of a reporting immunity. Underlying this immunity is a recognition that society desires individuals to report acts of misconduct and if they can be put at risk for making such reports, individuals will be less likely to do so and the greater society will suffer the cost. Immunity comes at the price of leaving the genuinely wronged defendant without civil redress. Nevertheless, absolute immunity exists when the balance favors immunity over providing for civil liability. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The two forms of immunity will be addressed more specifically in the order outlined above.

Arizona has addressed the concept of legislative immunity and its applicability to members of a city council. Legislative immunity is relevant to the question presented as it considers statements of legislators in performing their duties in that capacity. It can be argued that when a city councilmember alleges a violation of the OML they are acting in their official capacity as a legislator, since as a member of the legislative body they have taken an oath to follow the laws of the state of which the OML is one in discharging their duties.

In *Sanchez v. Coxon* 175 Ariz. 93, 854 P.2d 126 (1993) our Supreme Court recognized that statements made by city council members speaking during a regularly scheduled meeting are entitled to absolute immunity. More importantly, our Supreme Court adopted the principle of the Restatement (Second) of Torts, §590 thereby extending the absolute immunity to legislators performing a legislative function, even when the defamatory matter has no relation to a legitimate object of legislative concern.³ Numerous federal courts have adopted the functional approach when analyzing immunity. Under this approach, if the act for which civil liability is claimed is a function performed by a city council member that is analogous to their legislative function, then absolute immunity based on a legislative privilege would apply. Compare, *Stapley v. Pestalozzi, et al*, No. 12-16146, ___ F.3d ___ (9th Cir. 2013).

The Supreme Court declared “without deciding whether all actions by city or town council members are legislative, we hold that Councilman Sanchez acted as a legislator when he spoke at Mammoth town council meeting. . . . It is the occasion of the speech, not the content that provides the privilege.” In the question presented, a report of a violation may not be an act of legislative concern arising from an action on a public agenda, but it is nonetheless, a legislative function of a member of a public body ensuring that the body as a whole comply with the public policy underlying Arizona’s

³ Sanchez arose from statements criticizing members of the police department made during a council meeting. The Supreme Court held the statements were entitled to absolute privilege, even though no legislation was “proposed, pending, or contemplated” at the time.)

OPINION NO. 2013-01

August 20, 2013

Page 4 of 8

OML. Importantly, pursuant to the OML both the jurisdiction and individual legislators may be subject to penalties for violations.

Moreover, the importance of this being an absolute, not a qualified immunity from suit was further addressed in *Sanchez*, our Supreme Court cited *Noble v. Temyik*, 273 Or. 39, 539 P.2d 658, 660 (1975) stating: “we agree with the Oregon Supreme Court’s observation that “a substantial number of capable people would be reluctant to serve if their statements, made in the course of their legislative duties, were ... privileged only if the finder of fact found the statements were not made maliciously. A qualified privilege would also hinder debate and discussion.”

We conclude this same rationale applies to the analysis of immunity for making a complaint alleging violation of the OML. If a public official only had a privilege for making a complaint alleging a violation of the OML if it was later determined that the complaint was not made maliciously, few public officials would ever complain even if their entity was violating the law. As a result, the OML’s purpose to promote open decision making would be impacted to the detriment of the public. The purpose of the OML is not to hinder debate and discussion but to ensure that the debate and discussion occurs in public for all to see.

Further, this rationale is also applicable to executive or closed sessions, which may be held for only one of seven specified purposes under the OML. See, A.R.S. §38-431.03.A.1-7. If a member of a public body could violate the executive session privilege without consequence, the discussion of privileged information such as attorney-client legal advice would be impaired and the legislative body as the client would be negatively impacted in its ability and right as a client to provide direction.

The immunity resulting from legislative privilege is not limited to actual city council meetings. A component of the legislative privilege is the deliberative process privilege which protects documents, discussions and materials considered by the legislative body. The Arizona Courts have extended the immunity resulting from legislative privilege to protect against the disclosure of documents in some situations. *Arizona Independent Redistricting Commission v. Fields*, 206 Ariz. 130, 75 P.3d 1088 (App. 2003). *Fields* arose out a special action where parties were seeking copies of documents prepared by the Independent Redistricting Commission (hereinafter “IRC”) and reviewed by the IRC’s consultants and expert witnesses.

In granting special action relief, the Court of Appeals stated: “We are persuaded the legislative privilege protects against disclosure of documents in appropriate

circumstances. Documentary evidence of such conduct and communications can be as revealing as oral testimony. . . . Therefore, to the extent the legislative privilege protects against inquiry about a legislative act or communications about that act, the privilege also shields from disclosure documentation reflecting those acts or communications." See, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C.Cir.1995). Communications about a meeting, particularly those that allege a violation of the OML may be as revealing as the meeting itself.

The deliberative process privilege is important to this question presented as communications regarding executive session discussions can occur by e-mail or other forms of documents. The same is true of a complaint made alleging violation of the OML. The deliberative process privilege results in immunity for the written or electronic documents created by a city council member alleging a violation of the OML.

The second form of privilege is a privilege for reporting matters to courts, law enforcement and regulatory bodies. Arizona has recognized a privilege in filing complaints before regulatory bodies, such as the State Bar of Arizona. *Drummond v. Stahl*, 127 Ariz. 122, 618 P.2d 616 (App. 1980)⁴. The Court of Appeals held "In our opinion, public policy and legal precedent compel us to adopt the position that there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney." *Drummond*, 127 Ariz. at 126, 618 P.2d at 620. The Court adopted the reasoning of the argument presented by the State Bar of Arizona that to allow a "conditional" privilege would allow the institution of a civil action by the mere addition of an "actual malice" allegation. This would permit a civil action against anyone who has complained to the State Bar and subject such complainant to the full, expensive scope of discovery and litigation, thus "chilling" the motivation of those who believe they have knowledge of improper legal behavior. The Court of Appeals further noted: "We must weigh the possible harm to attorneys in the filing of a malicious complaint against the need to encourage the reporting of unethical conduct. In weighing these conflicting interests, it is our opinion that public policy demands the free reporting of unethical conduct if we are to continue to enjoy the privilege of a self-regulating profession." *Drummond*, 127 Ariz. at 128, 618 P.2d at 622.

Recently, the Court of Appeals extended the concept of privilege to individuals who filed complaints with the State Bar over the conduct of document preparers. *Sobol v.*

⁴ *Drummond* arose out of a lawsuit where counsel filed a motion to disqualify opposing counsel and when they failed to agree, filed a bar complaint. Opposing counsel filed an action claiming libel and slander.

OPINION NO. 2013-01

August 20, 2013

Page 6 of 8

Alarcon, 212 Ariz. 315, 131 P.3d 487 (App. 2006).⁵ The Court of Appeals extended absolute immunity to an attorney who filed an ethics complaint to the State Bar accusing a document preparer of the unauthorized practice of law. The Court dismissed the defamation action filed by the document preparer. The Court of Appeals noted in its opinion: "As a defense to a defamation action, the Supreme Court of Arizona has recognized that certain statements that normally would be actionable will not be because the speaker is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *318**490; *Green Acres Trust v. London*, 141 Ariz. 609, 612, 688 P.2d 617, 620 (1984) (quoting Prosser, Law of Torts § 114, p. 776 (4th ed.1971)). One such protection is provided by what is known as absolute immunity or privilege. Absolute immunity is a complete exemption from civil liability and is generally provided to officials while performing important functions grounded on the "recognition that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interest." *Id.* at 612, 688 P.2d at 620.

As the Court of Appeals opinion states: "Because absolute immunity immunizes absolutely, it is reserved for "those situations where the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a defendant's motives." *Burns v. Davis*, 196 Ariz. at 160, 993 P.2d at 1124 (App.1996), quoting *Supry v. Bolduc*, 112 N.H. 274, 293 A.2d 767, 769 (1972).

Similar reasoning regarding the appropriateness of absolute immunity has been applied to matters involving crime victims. *Ledvina v. Cerasani*, 213 Ariz. 569, 146 P.3d 70 (App. 2006)⁶. In *Ledvina*, the Court of Appeals extended absolute immunity to those who file police reports, recognizing that in some jurisdiction only qualified immunity applies, and expressly rejecting that position. The Court noted: "We acknowledge the Ledvinas' legitimate concern that absolute immunity may on occasion work to protect those who make intentionally false and malicious defamatory statements to police. We also note the case law the Ledvinas cite from jurisdictions that have limited such protection to only qualified immunity. (*Cites omitted.*) But . . . we believe the precedent and public policy of Arizona strike a different balance that offers greater protection to victims of crimes as well as those who witness and report them."

⁵ Sobol involved an action by a document preparer against an attorney who filed a complaint with the State Bar of Arizona alleging the document preparer engaged in the unauthorized practice of law.

⁶ *Ledvina* involved an action against a crime victim by the alleged suspect claiming defamation.

OPINION NO. 2013-01

August 20, 2013

Page 7 of 8

This same rationale was adopted by the California Supreme Court in *Hagberg v. Cal. Fed. Bank FSB*, 7 Cal.Rptr.3d 803, 81 P.3d 244, 249 (Cal.2004) where it held that statements made to police about suspected criminal activity are absolutely privileged. Although *Hagberg* construed Cal. Civ.Code § 47 in determining an absolute privilege applied to citizen complaints, the same policies that inform that statute also inform the common law rule.

Analogous policy considerations exist in the context of the OML. As the Arizona Attorney General noted in its Local Government Handbook,⁷ it is abundantly clear that the Legislature intends for the OML to be broadly construed and to maximize the public access to governmental decision making. *Local Government Handbook, Ariz. Atty. Gen. Ch.4, §4.2*. More importantly, the legislature and courts have provided for independent sanctions for violations of the law.⁸

As a member of a governing body, city council members are covered by the OML. It would fundamentally defeat the purpose of the OML if a city council member would have immunity in a defamation action, where they discussed with staff a future item on an agenda, but could be subject to a defamation action if they reported on actions of other members of the governing body who sought to defeat the public's access to open government by acting in secret or to prevent the appropriate exercise of a legislative body's decision making by exposing privileged information.

Clearly, the persons with best knowledge of a violation of the OML would be other elected officials and city staff. If such persons were forced to rely on the defense of qualified immunity in defamation actions arising out of their complaint to the appropriate regulatory agencies of a possible violation of the OML and then faced with litigating the extent of immunity in a subsequent defamation action, it would have detrimental and potentially dire consequences for both the individual and the political subdivision. For example, an absence of immunity could potentially permit those violating the OML to harass and intimidate those who fulfilled the oaths of their office or employment and who reported the matter to the proper authorities. The mere possibility of retaliatory defamation claims would also tend to discourage free and unfettered reporting to those authorities who are authorized to assist the detection and prosecution of OML violations. The underlying intent of the act is to maximize public access would be defeated.

⁷ The Local Government Handbook was published by the Arizona Attorney General in the 1980's as a guide on the application of various laws to public officers and employees at the state and local government level.

⁸ Open Meeting Laws 3d ed, Ann Taylor Schwing, 2011, Florida and Tennessee Courts held City Attorney's could be disciplined for facilitating violation of state open meetings act.

OPINION NO. 2013-01

August 20, 2013

Page 8 of 8

The same rationale adopted by the Arizona Courts in disciplinary matters involving the State Bar exists in the OML question presented. If an individual could be sued for defamation for reporting individuals to the State Bar for alleged violations of the Rules of Professional Conduct,⁹ those same individuals would be more likely to ignore violations of the Rules of Professional Conduct, which would undermine the profession and injure clients. If City Council members could be sued for defamation for reporting OML violations, the most likely sources of information regarding OML violations would be silenced and the purpose of and requirements of the OML eviscerated. As a result the public would not have the open access to the actions of their legislative body that the law deems so important. Moreover, legislative bodies could be deprived of the information that they need to make important policy decisions.

Therefore it is the opinion of this Office that there is an absolute immunity for a City Council member who reports alleged violations of the OML. This absolute immunity precludes civil liability under the defamation law for an individual who reports the alleged violations of the OML to the appropriate regulatory authorities. This absolute immunity is based on Arizona applying the legislative privilege and the reporting privilege.

Should you have any further questions, please do not hesitate to contact me.

292870.docx
SMK:ei

⁹ The Arizona Rules of Professional Conduct, codified in Rule 42 of the Rules of the Supreme Court of Arizona are the governing code for the practice of law by lawyers in this state.