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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Angellee Chen, a single woman,  
10 **Plaintiff,**

No. 12-CV-00814-PHX-GMS

**ORDER**

11 v.

12 Maricopa County, a political sub-division  
13 of the State of Arizona; and Mark Fischione  
(individually)

14 **Defendant.**

15 Pending before the Court is Defendants' Motion to Dismiss. (Doc. 28.) For the  
16 reasons set forth below, Defendants' Motion is granted in part and denied in part.

17 **FACTUAL BACKGROUND**

18 This case arises out of an employment relationship between Plaintiff Dr. Angellee  
19 Chen and the Maricopa County's Office of the Medical Examiner (the "OME"). Chen  
20 worked as a forensic pathologist for the OME from July 2007 until her employment was  
21 terminated in June 2011. (Doc. 24 ¶ 5.) In October 2009, Chen met with the OME's  
22 director, David Boyer, and Human Resources Administrator, Espy Gamez, regarding  
23 concerns she had about the OME and her supervisor and Chief Medical Examiner, Dr.  
24 Mark Fischione. (*Id.* ¶ 11.) She complained that OME medical examiners had to manage  
25 a heavy caseload because of recent reductions in force. (*Id.* ¶ 15.) Regarding Fischione,  
26 she expressed concern that he allegedly worked on significantly fewer cases for the OME  
27 because he was providing interim pathology services for the Yavapai County OME and  
28 had multiple private projects. (*Id.*) The Maricopa OME had approved Fischione's work

1 for the Yavapai OME. (*Id.* ¶ 9.) Chen also complained that Fischione treated male  
2 pathologists more favorably. (*Id.* ¶ 13.) She complained that Fischione had targeted  
3 another female pathologist, Dr. Ann Bucholtz, for termination in part because of her  
4 gender and that he took male pathologists to sporting events to the exclusion of the  
5 female pathologists. (*Id.*)

6 On January 7, 2010, Boyer addressed Chen’s concerns at a medical examiner team  
7 meeting, allegedly stating that pathologists were allowed to work for other counties if  
8 they were current with their Maricopa OME cases and that any discriminatory activity in  
9 the OME was unintentional. (*Id.* ¶ 18.) Chen discussed the meeting with her colleague  
10 Dr. Diane Karluk and both expressed dissatisfaction at how Chen’s concerns were  
11 handled. (*Id.* ¶¶ 19-20.) On February 3, 2010, Fischione summoned Chen to a meeting  
12 which included Boyer and Gamez. At the meeting, Fischione gave Chen a “Final Written  
13 Warning” (the “Warning”) which he described as the equivalent of a suspension without  
14 pay. (*Id.* ¶ 22.) Chen allegedly had not been disciplined before and Fischione had not  
15 addressed his concerns with Chen prior to the Warning. (*Id.*)

16 Over the next year, Chen made several complaints regarding Fischione, Boyer and  
17 the OME. On May 11, 2010, Chen complained to Alex Jamison, the Maricopa County  
18 Ombudsman, regarding Fischione’s Yavapai contract and the Warning he had given her.  
19 (*Id.* ¶ 26.) On August 8, 2010, Chen allegedly left a message on Maricopa County’s  
20 anonymous hotline regarding her concerns about Fischione’s Yavapai contract and his  
21 discriminatory conduct towards females and minorities. (*Id.* ¶ 28.) On January 26, 2011,  
22 Chen complained to Erin Erskine of the Human Resources Department (“HR”) that the  
23 Warning was given in retaliation for her discrimination complaint. (*Id.* ¶ 30.) Finally on  
24 May 10, 2011, Chen filled out Maricopa County’s annual Employee Satisfaction Survey  
25 in which she complained about the alleged mismanagement of the OME, citing a  
26 discriminatory environment towards females and minorities, Fischione’s conflicts of  
27 interest with outside projects, and the lack of responsiveness to her complaints by Boyer  
28 and other supervisors. (*Id.* ¶ 32.)

1 In April 2011, Dr. Jeffrey Nine applied for the Yavapai OME medical examiner  
2 position. (*Id.* ¶ 34.) Fischione served on the evaluation committee for that position while  
3 providing interim services until it was filled, a fact which was known to the OME. (*Id.* ¶¶  
4 7, 9, 10.) On June 7, 2011, Fischione signed a renewal contract to provide services  
5 through 2012, which was soon to be considered by the Yavapai County Board of  
6 Supervisors. (*Id.* ¶¶ 36-37.) He allegedly commented to Karluk that Nine would likely be  
7 offered the position to begin in January 2012, vitiating the need for his interim services.  
8 (*Id.* ¶ 35.)

9 On June 20, 2011, Chen was summoned to Boyer's office and Fischione gave her  
10 notice of her termination for "insubordination." (*Id.* ¶¶ 38-40.) In the following days,  
11 Fischione allegedly told Karluk that Chen's termination was related to "business" but  
12 told others that Chen was terminated because she was "trouble" and he was unhappy  
13 about Chen's complaints regarding him, Boyer and the OME. (*Id.* ¶¶ 41-43.)

14 On July 4, 2011, Fischione allegedly told another examiner, Dr. Robert Lyon, that  
15 he had not informed Nine about the OME's new opening created by Chen's termination.  
16 (*Id.* ¶ 44.) But Fischione expressed hope that Nine would view the job posting and chose  
17 to work at the Maricopa OME over the Yavapai OME. (*Id.*) On March 28, 2012, Nine  
18 allegedly told Chen that Fischione had contacted him when he applied for the Yavapai  
19 OME position to recruit him for the Maricopa OME instead. (*Id.* ¶ 46.)

20 Chen filed a charge of discrimination with the Equal Employment Opportunity  
21 Commission ("EEOC") on November 25, 2011.<sup>1</sup> (Doc. 31-1, Ex. A.) Chen filed a notice  
22 of claim for wrongful termination with the Maricopa County and Yavapai County Board  
23 of Supervisors, and with Fischione, Boyer, and the Manager of the Maricopa County

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24  
25 <sup>1</sup> The Court takes judicial notice of the EEOC charge of discrimination and the  
26 notice of claim because they are documents "whose contents are alleged in a complaint  
27 and whose authenticity no party questions, but which are not physically attached to the  
28 [plaintiff's] pleading." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (internal  
citation omitted). However, the parties offer additional evidence beyond the Complaint.  
The Court will not consider those documents in the context of a Rule 12(b)(6) motion to  
dismiss. See *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th  
Cir. 1990) (amended decision).

1 Office of Research and Reporting, Ken Andersen, on December 13, 2011. (Doc. 28-1,  
2 Ex. 2.) Chen received a notice of right to sue from the EEOC on January 18, 2012. (Doc.  
3 24-2.)

4 Chen brought this suit on April 18, 2012 and filed her Second Amended  
5 Complaint on October 2, 2012, alleging the following counts against Defendants  
6 Maricopa County and Mark Fischione: (1) Title VII retaliation; (2) First Amendment  
7 retaliation; (3) Arizona Civil Rights Act (“ACRA”) retaliation; (4) wrongful termination  
8 pursuant to A.R.S. § 23-1501(3)(b); (5) wrongful termination pursuant to A.R.S. § 23-  
9 1501(3)(c)(iii); (6) tortious interference with contract; and (7) wrongful denial of access  
10 to public records pursuant to A.R.S. § 39-121.02(A). On November 5, 2012, Defendants  
11 moved to dismiss Chen’s Complaint.

## 12 DISCUSSION

### 13 I. LEGAL STANDARD

14 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil  
15 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a  
16 “formulaic recitation of the elements of a cause of action;” it must contain factual  
17 allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*  
18 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need not contain  
19 detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is  
20 plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.  
21 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the  
22 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
23 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
24 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more than a  
25 sheer possibility that a defendant has acted unlawfully.” *Id.* When a complaint does not  
26 “permit the court to infer more than the mere possibility of misconduct, the complaint has  
27 alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (internal  
28 quotation omitted).

1           When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll  
2 allegations of material fact are taken as true and construed in the light most favorable to  
3 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,  
4 legal conclusions couched as factual allegations are not given a presumption of  
5 truthfulness, and “conclusory allegations of law and unwarranted inferences are not  
6 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
7 1998).

## 8       **II. NOTICE OF CLAIM**

9           Arizona law bars any claim against a public employee unless the claimant files a  
10 notice of claim with the public employee within 180 days of the incident from which the  
11 claim arose. A.R.S. § 12–821.01(A). A claimant may file the notice by delivering a copy  
12 of the claim to an individual personally or to an agent authorized to receive service of  
13 process, or by leaving copies at that individual’s “usual place of abode.” Ariz. R. Civ. P.  
14 4.1(d). “Compliance with the notice provision of § 12–821.01(A) is a mandatory and  
15 essential prerequisite to such an action . . . .” *Harris v. Cochise Health Sys.*, 215 Ariz.  
16 344, 351, 160 P.3d 223, 230 (Ct. App. 2007) “Actual notice and substantial compliance  
17 do not excuse failure to comply with the statutory requirements of [the statute].” *Falcon*  
18 *ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (Ct. App.  
19 2006).

20           Before bringing state law claims against Fischione, Chen was required by statute  
21 to file a notice of claim within 180 days after her cause of action accrued. Chen was  
22 terminated on June 20, 2011. She makes no assertion that her state law claims accrued on  
23 any other date. On December 13, 2011, Chen routed a copy of the notice of claim to  
24 Fischione through the receptionist at the Maricopa OME, his place of employment.  
25 However, Defendants contend that Fischione was never personally served at his office or  
26 his home and “he did not authorize anyone to accept service of process for claims being  
27 asserted against him individually.” (Doc. 28 at 3; Doc. 28-1, Ex. 1 ¶¶ 4, 5.) Chen does not  
28 allege the receptionist with whom she left the notice of claim was authorized to accept

1 service for Fischione regarding personal legal matters. She alleges that it was an accepted  
2 practice at the Office to receive legal process through the receptionist. (Doc. 31-2, Ex. 3  
3 ¶¶ 3-8.) But delivering the notice of claim in that manner did not satisfy the requirements  
4 of A.R.S. § 12–821.01(A). *See Simon v. Maricopa*, 225 Ariz. 55, 62, 234 P.3d 623, 630  
5 (Ct. App. 2010) (“[S]trict compliance with A.R.S. § 12–821.01(A) is required and  
6 substantial compliance is insufficient.”)

7 Further, the receptionist was not an ostensible agent of Fischione upon whom  
8 Chen could reasonably effect service of process. Chen has not alleged that Fischione  
9 represented that the receptionist was his agent or would accept service on his behalf.  
10 *Grand Canyon Resort Corp. v. Drive-Yourself Tours, Inc.*, CV-05-03469-PHX-SMM,  
11 2006 WL 1722314, \*6 (D. Ariz. June 22, 2006) (“Arizona courts have only allowed  
12 service on an ostensible agent where reliance on a defendant’s representations about an  
13 individual’s apparent authority was reasonable.”) (citing *Koven v. Saberdyne Sys.,*  
14 *Inc.*, 625 P.2d 907, 911 (Ct. App. 1980)).

15 Fischione admits that he received the notice of claim from Chen in his mailbox at  
16 the Office. (Doc. 28, Ex. 1 ¶ 3.) However, “actual notice” does not excuse Chen’s failure  
17 to comply with the statutory requirements of A.R.S. § 12–821.01(A). *Falcon ex rel.*  
18 *Sandoval*, 213 Ariz. at 527. Chen’s state law claims against Fischione for ACRA  
19 retaliation, wrongful termination, and tortious interference with contract are therefore  
20 barred and dismissed.

### 21 **III. TITLE VII AND ACRA RETALIATION**

22 Defendants argue that Chen has failed to allege a prima facie case of retaliation  
23 under either Title VII or the ACRA. Title VII prohibits retaliation against an employee  
24 because she has opposed any employment practice made unlawful by Title VII, or  
25 because she “has made a charge, testified, assisted, or participated in any manner in an  
26 investigation, proceeding, or hearing” related to Title VII enforcement. 42 U.S.C. §  
27 2000e–3(a). Chen may assert a claim of retaliation by alleging facts that, if true, would  
28 demonstrate that: (1) she engaged in an activity protected by Title VII; (2) her employer

1 subjected her to a materially adverse employment action; and (3) there was a causal link  
2 between the protected activity and the adverse action. *Vasquez v. County of Los Angeles*,  
3 349 F.3d 634, 646 (9th Cir. 2003). Title VII imposes civil liability only on employers, not  
4 employees. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993).

5 As to Chen's remaining ACRA retaliation claim against Maricopa County, the Act  
6 is "generally identical to Title VII, and therefore federal Title VII case law is persuasive  
7 in the interpretation of the Arizona Civil Rights Act." *Bodett v. CoxCom, Inc.*, 366 F.3d  
8 736, 742 (9th Cir. 2004) (citing *Higdon v. Evergreen Int'l Airlines, Inc.*, 138 Ariz. 163,  
9 165, 673 P.2d 907, 909-10, n.3 (1983)) (internal quotations omitted); see *Timmons v. City*  
10 *of Tucson*, 171 Ariz. 350, 354, 830 P.2d 871, 875 (Ct. App. 1991). The ACRA's  
11 prohibition against retaliation, A.R.S. § 41-1464(A), is "essentially identical" to the  
12 prohibition under Title VII. *Storey v. Chase Bankcard Services, Inc.*, 970 F. Supp. 722,  
13 731 (D. Ariz. 1997). The Court will analyze Plaintiff's retaliation claims under federal  
14 law.

15 **A. Protected Activity**

16 Informal and internal complaints that a supervisor has violated Title VII  
17 "constitute a protected activity, such that actions taken against [a plaintiff] after these  
18 initial complaints are appropriately the subject of [a] retaliation claim." *Passantino v.*  
19 *Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 506 (9th Cir. 2000) (internal  
20 citation omitted); see *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 963 (9th Cir.  
21 2009). Defendants admit that Chen engaged in protected activity in October 2009 when  
22 she complained to OME director David Boyer that Fischione generally treated male  
23 pathologists more favorably and created an atmosphere of discrimination, that he had  
24 targeted another female pathologist for a layoff in part because of her gender, and that he  
25 had taken several of the male pathologists to social events to the exclusion of the female  
26 pathologists. Chen provided documentation of her concerns to Boyer in November 2009  
27 and those concerns were addressed in a January 2010 team meeting. Chen contends that  
28 she also engaged in protected activity ten months later when she left a message on

1 Maricopa County’s anonymous hotline on August 8, 2010, made a verbal complaint to  
2 HR on January 26, 2011, and filled out an annual employee satisfaction survey on May  
3 10, 2011, all to report discriminatory conduct. These internal complaints constitute  
4 protected activity and satisfy the first requirement for stating a prima facie case of  
5 retaliation.

6 **B. Adverse Employment Action**

7 Under the second prong, Chen must allege that Defendants subjected her to a  
8 materially adverse employment action. “The antiretaliation provision protects an  
9 individual not from all retaliation, but from retaliation that produces an injury or harm.”  
10 *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). An action is  
11 materially adverse if it could “dissuade a reasonable worker from making or supporting a  
12 charge of discrimination.” *Id.* at 68.

13 In her Complaint, Chen alleges that Defendants took two adverse actions against  
14 her: a formal warning given to her by Fischione and her termination from employment.  
15 On February 3, 2010, Fischione gave Chen a “Final Written Warning” which was “the  
16 equivalent of suspension without pay.” (Doc. 24 ¶¶ 21-22.) Chen alleges she was “written  
17 up . . . after complaining about discrimination.” (Doc. 28, Ex. 3 ¶ 18.) The Warning was  
18 sufficiently severe to constitute a materially adverse employment action.

19 However, Chen did not timely file her charge of discrimination as it relates to her  
20 Warning. Section 2000e-5(e)(1) requires that a Title VII plaintiff file a charge with the  
21 EEOC 180 days “after the alleged unlawful employment practice occurred.” Chen was  
22 issued the Warning on February 3, 2010 but did not file a charge until November 25,  
23 2011, which is beyond the statutory period. Chen argues that because the allegedly  
24 discriminatory and retaliatory conduct continued until her termination in June 2011, the  
25 Court should toll the statute of limitations period. However, Title VII “precludes recovery  
26 for discrete acts of discrimination or retaliation that occur outside the statutory time  
27 period” and the continuing violation doctrine does not apply to retaliation claims.  
28 *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002). Thus, Chen may



1 not base her retaliation claim on the Warning as an adverse employment action because  
2 she did not timely file a charge of discrimination.

3 The second adverse action is that Defendants terminated Chen from employment  
4 on June 20, 2011. Chen's termination is a materially adverse and timely-filed action upon  
5 which she may base her retaliation claim. *See Burlington Industries, Inc. v. Ellerth* 524  
6 U.S. 742, 761 (1998).

### 7 C. Causation

8 Defendants argue that because Chen does not allege that Fischione or Boyer knew  
9 about her anonymous hotline complaint, employee survey and verbal complaint to HR,  
10 her retaliation claim lacks causation. Essential to the causal link are allegations that "the  
11 employer was aware that the plaintiff had engaged in the protected activity." *Cohen v.*  
12 *Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (internal citation omitted). Chen  
13 alleges that Fischione told "at least one person" that she was terminated because she was  
14 trouble, and he was unhappy about her complaints about him, Boyer and the OME. (Doc.  
15 24 ¶ 43.) She asserts that "Dr. Fischione chose to terminate me over any other pathologist  
16 because he and Mr. Boyer knew (either directly or from communications with other  
17 senior OME management personnel) about my prior complaints about their misconduct."  
18 (Doc. 31-2, Ex. 4, ¶ 59.) At this stage in the litigation, the causal link is construed  
19 broadly; a plaintiff must merely allege "that the protected activity and the negative  
20 employment action are not completely unrelated." *See Emeldi v. Univ. of Oregon*, 698  
21 F.3d 715, 726 (9th Cir. 2012) (citing *Poland v. Chertoff*, 494 F.3d 1174, 1181 n.2 (9th  
22 Cir. 2007)). Chen's factual allegations are sufficient to draw a reasonable inference that  
23 her supervisors were aware of her complaints. *See Iqbal*, 556 U.S. at 678. She has stated  
24 a claim for Title VII and ACRA retaliation against Maricopa County.

### 25 IV. § 1983 CLAIMS FOR FIRST AMENDMENT RETALIATION

26 Chen alleges that the OME and Fischione violated her First Amendment rights for  
27 "complaining about conduct which she reasonably believed was illegal, an abuse of  
28 authority or otherwise improper." To state a claim against a government employer for

1 violation of the First Amendment, Chen must show that: (1) she engaged in protected  
2 speech; (2) her employer took adverse employment action; and (3) her speech was a  
3 substantial or motivating factor for the adverse employment action. *Marable v. Nitchman*,  
4 511 F.3d 924, 929 (9th Cir. 2007) (citing *Coszalter v. City of Salem*, 320 F.3d 968, 973  
5 (9th Cir. 2003)). Further, “every person who, under color of [law] . . . , subjects, or causes  
6 to be subjected, any citizen of the United States . . . to the deprivation of any rights,  
7 privileges, or immunities secured by the Constitution and laws, shall be liable to the party  
8 injured.” 42 U.S.C. § 1983; see *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

9 **A. Protected Speech**

10 Chen must first allege facts that she engaged in protected speech. An employee’s  
11 speech is protected under the First Amendment if it addresses “a matter of legitimate  
12 public concern.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968). This determination  
13 is to be made with reference to “the content, form, and context” of the speech. *Connick v.*  
14 *Myers*, 461 U.S. 138, 147 (1983).

15 Although the Ninth Circuit “has defined the scope of the public concern element  
16 broadly,” there are limits. *Id.* at 709-10. “Speech that concerns issues about which  
17 information is needed or appropriate to enable the members of society to make informed  
18 decisions about the operation of their government merits the highest degree of first  
19 amendment protection.” *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)  
20 (internal quotations omitted). However, speech that deals with “individual personnel  
21 disputes and grievances” and that would be of “no relevance to the public’s evaluation of  
22 the performance of governmental agencies” is generally not of “public concern.” *Id.*

23 Chen alleges that in her October 2009 meeting with Boyer, she complained about  
24 the increased amount of cases that each medical examiner had to allegedly handle  
25 because of a recent reduction in force. She was specifically concerned about Fischione’s  
26 multiple outside projects resulting in him handling fewer cases with the OME. As Chief  
27 Medical Examiner, Fischione’s lack of attention to the OME’s cases allegedly increased  
28 an already strained workload for examiners. Chen’s complaint to Boyer addressed

1 subjects of public concern. She revealed concerns about the alleged mismanagement of  
2 the OME's workforce and cases as well as the Chief Medical Examiner's allegedly  
3 competing interests with outside projects leading to unmanageable demands on the team.  
4 *See Anthoine v. N. Cent. Cnty. Consortium*, 605 F.3d 740, 748 (9th Cir. 2010) ("Subjects  
5 of public concern include unlawful conduct by a government employee and the misuse of  
6 public funds, wastefulness, and inefficiency in managing and operating government  
7 entities.").

8 Chen's internal complaint does not lose First Amendment protection "simply  
9 because [it] concerns the subject matter of [her] employment." *Id.* (citing *Freitag v.*  
10 *Ayers*, 468 F.3d 528, 545 (9th Cir. 2006)). Further, that Chen "chose to convey her views  
11 privately rather than publicly is not determinative of whether her expression is entitled to  
12 protection." *See Thomas v. City of Beaverton*, 379 F.3d 802, 810 (9th Cir. 2004); *Givhan*  
13 *v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979) ("Neither the [First]  
14 Amendment itself nor our decisions indicate that this freedom is lost to the public  
15 employee who arranges to communicate privately with his employer rather than to spread  
16 his views before the public.").

17 However, "to qualify as protected speech under the first element, the employee  
18 must have uttered the speech as a citizen, not an employee." *Marable v. Nitchman*, 511  
19 F.3d 924, 929 (9th Cir. 2007) (internal quotation omitted). "Statements are made in the  
20 speaker's capacity as citizen if the speaker had no official duty to make the questioned  
21 statements, or if the speech was not the product of performing the tasks the employee was  
22 paid to perform." *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009) (internal citation  
23 and quotations omitted). Chen did not have a duty to complain about alleged  
24 mismanagement of the OME and Fischione's competing interests. While her complaints  
25 were related to her duties, at this stage of the litigation, Chen has alleged facts that she  
26 engaged in protected speech.

## 27 **B. Adverse Employment Action**

28 Under the second prong for stating a First Amendment retaliation claim, Chen

1 must allege that the OME took an adverse employment action against her. “[A]  
2 government act of retaliation need not be severe and it need not be of a certain kind.”  
3 *Coszalter*, 320 F.3d at 975. “Depending on the circumstances, even minor acts of  
4 retaliation can infringe on an employee’s First Amendment rights.” *Id.* A plaintiff can  
5 establish a valid claim of retaliation by showing that “the actions taken by the defendants  
6 were reasonably likely to deter [a plaintiff] from engaging in protected activity under the  
7 First Amendment.” *Id.* at 976 (internal quotations omitted). Chen alleges that on February  
8 3, 2010, Fischione gave her a “Final Written Warning” which was the equivalent of  
9 suspension without pay. Chen was ultimately terminated from employment on June 20,  
10 2011. Both the Warning and the termination constitute adverse employment actions. *See*  
11 *Anthoine*, 605 F.3d at 750 (holding that “a verbal warning for a ‘pattern of incidents of  
12 insubordination,’ an unsatisfactory evaluation, and termination of . . . employment” all  
13 constitute adverse employment actions); *Ulrich v. City and Cnty. of San Francisco*, 308  
14 F.3d 968, 977 (9th Cir. 2002) (holding that an adverse employment report is an adverse  
15 employment action constituting retaliation for protected speech).

### 16 **C. Causation**

17 The third prong of a First Amendment retaliation claim involves causation. Chen  
18 must allege that her protected speech was a substantial or motivating factor behind her  
19 Warning and termination. Regarding Chen’s termination, Fischione told at least one  
20 person that she was terminated because she was “trouble” and he was unhappy about her  
21 complaints regarding him, Boyer and the OME. Thus Chen’s Warning and termination  
22 were allegedly motivated by displeasure with her complaints. Taking Chen’s allegations  
23 as true, she has stated a First Amendment retaliation claim against Fischione and  
24 Maricopa County.

### 25 **V. WRONGFUL TERMINATION**

26 The Arizona Employment Protection Act (“AEPA”) provides that an employee  
27 has a claim against an employer for wrongful termination if “[t]he employer has  
28 terminated the employment relationship of an employee in violation of a statute of this

1 state.” A.R.S. § 23-1501(3)(b); *Higgins v. Assmann Electronics, Inc.*, 217 Ariz. 289, 294,  
2 173 P.3d 453, 458 (Ct. App. 2007).

3         Chen alleges in Count Four of her Second Amended Complaint that Fischione  
4 terminated her employment in violation of two Arizona statutes regarding the disclosure  
5 of conflicts of interest, A.R.S. § 38-503 and § 11-594(A)(9). A.R.S. § 38-503 states that:  
6 “[a]ny public officer or employee who has . . . a substantial interest in any decision of a  
7 public agency shall make known such interest in the official records of such public  
8 agency and shall refrain from participating in any manner as an officer or employee in  
9 such decision.” A.R.S. § 11-594(A)(9) requires the county medical examiner to  
10 “[o]bserve all policies adopted by the board of supervisors regarding conflicts of interest  
11 and disclosure of noncounty employment.” Chen asserts that Fischione had a substantial  
12 interest in terminating her employment because her termination gave him the opportunity  
13 to continue his interim medical services contract with the Yavapai OME. She alleges that  
14 in terminating her and creating an opening at the Maricopa OME, Fischione planned to  
15 lure away another examiner, Dr. Jeffrey Nine, from an open position with the Yavapai  
16 OME so Fischione could renew his contract with that office.

17         Chen has forfeited any state law claim for wrongful termination she may have had  
18 against Fischione due to her failure to timely serve him with a notice of claim. Thus, she  
19 must state a claim pursuant to A.R.S. § 23-1501(3)(b) against Maricopa County to  
20 survive Defendants’ Motion. The Maricopa OME allegedly approved Fischione’s interim  
21 contract with the Yavapai OME and was aware that he was on the evaluation committee  
22 for its medical examiner position. Further, Fischione had the authority to terminate  
23 Maricopa OME employees and he fired Chen. Nevertheless, Chen does not explain how  
24 the Maricopa OME violated the state conflict of interest statute. The statute pursuant to  
25 its own terms is only applicable to “any officer or employee” and the OME as an entity is  
26 neither an officer nor an employee. A.R.S. § 38-503(B); *see Maucher v. City of Eloy*, 145  
27 Ariz. 335, 337, 701 P.2d 593, 595 (Ct. App. 1985) (noting that A.R.S. § 38-503 was  
28 passed to protect the public from self-dealing by public employees). In other words, the

1 Maricopa OME’s act of terminating Chen’s employment was not “in violation of” the  
2 conflict of interest statute. A.R.S. § 23-1501(3)(b). Chen does not allege that the  
3 Maricopa OME terminated her employment in violation of any other state statutes.  
4 Therefore, Chen has not stated a claim that Maricopa County wrongfully terminated her  
5 pursuant to A.R.S. § 23-1501(3)(b).

6 Chen also alleges she was wrongfully terminated for her internal complaint that  
7 Fischione was violating Arizona’s anti-discrimination and conflict of interest laws. Under  
8 the AEPA, it is wrongful to terminate an employee for “[t]he disclosure by the employee  
9 . . . [that another] employee . . . has violated, is violating or will violate [state laws] to  
10 either the employer or . . . an employee of a public body . . .” A.R.S. § 23-1501(3)(c)(ii).  
11 Chen complained to Boyer in October 2009 about Fischione’s alleged conflict of interest  
12 arising from his medical services contract with the Yavapai OME as well as his  
13 discriminatory conduct. Fischione learned of Chen’s complaint in January 2010 during a  
14 team meeting. Chen alleges that after her termination, Fischione told others that she was  
15 terminated because of her complaints about him. Because Fischione acted under the  
16 authority of the Maricopa OME in terminating her employment, Chen has stated a claim  
17 for wrongful termination against Maricopa County pursuant to A.R.S. § 23-  
18 1501(3)(c)(ii).

## 19 **VI. PUBLIC RECORDS**

20 Defendants contend that the Court should decline to exercise supplemental  
21 jurisdiction over Chen’s public records claim because the facts underlying that claim are  
22 unrelated to the allegations surrounding the termination of her employment. The Court  
23 has supplemental jurisdiction over Chen’s state law claims if they form part of “the same  
24 case or controversy” as her federal law claims. 28 U.S.C. § 1367(a). A state law claim is  
25 part of the same case or controversy when it shares a “common nucleus of operative fact”  
26 with the federal claims and the state and federal claims would normally be tried  
27 together. *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004) (internal citation  
28 and quotations omitted). In exercising its discretion to decline supplemental jurisdiction,

1 a district court must undertake a case-specific analysis to determine whether declining  
2 supplemental jurisdiction "comports with the underlying objective of most sensibly  
3 accommodating the values of economy, convenience, fairness and comity." *Id.*

4 Chen's public records claim shares a common nucleus of operative fact with the  
5 remaining federal claims in this action. The public records that she requested from the  
6 OME were a subset of e-mails from her account and from the accounts of Boyer,  
7 Fischione, and Ken Anderson, manager of the Maricopa County Office of Research and  
8 Reporting. She requested those e-mails in order to develop the factual basis for her  
9 federal claims, of which the First Amendment retaliation cause of action remains. Thus,  
10 the Court has supplemental jurisdiction over Chen's public records claim.

11 Defendants argue that Chen has failed to sufficiently plead her public records  
12 claim because she alleges that documents were withheld from her inspection without  
13 providing a factual basis for that allegation. The public records statute provides a separate  
14 cause of action for "[a]ny person who has requested to examine or copy public records  
15 pursuant to this article, and who has been denied access to or the right to copy such  
16 records." A.R.S. § 39-121.02(A). The purpose of the public records law is to give the  
17 public "access to official records and other government information so that it may  
18 monitor the performance of government officials and their employees." *Phoenix New*  
19 *Times, L.L.C. v. Arpaio*, 217 Ariz. 533, 541, 177 P.3d 275, 283 (Ct. App. 2008). Thus,  
20 the statutes broadly define such records and presume that public records will be  
21 disclosed. *Griffis v. Pinal Cnty.*, 215 Ariz. 1, 4, 156 P.3d 418, 421 (2007).

22 Chen mailed a public records request to the custodian of the Office of Enterprise  
23 Technology on July 8, 2011 and to the Maricopa County Attorney's Office on July 29,  
24 2011. She requested "limited e-mails" from her e-mail account along with those of  
25 Boyer, Fischione and Andersen. She was given the opportunity to inspect the requested  
26 records on three occasions between January 24, 2012 and March 7, 2012 at the County  
27 Attorney's Office. However, she alleges that "some records that [she] had requested were  
28 withheld and no information was provided about what was excluded and for what

1 reason.” (Doc. 24 ¶ 97.)

2 Defendants contend that because Chen does not allege what documents she  
3 believes were wrongfully withheld or destroyed by them, her public records claim is  
4 purely speculative. Chen admits that Maricopa County produced documents in response  
5 to her requests on three separate occasions. She asserts that some records were withheld  
6 without describing the documents or types of documents that she was unable to inspect  
7 during her three visits, why they qualify as non-confidential public records, and her  
8 reason to believe they exist. *See Iqbal*, 556 U.S. at 663 (“Threadbare recitals of the  
9 elements of a cause of action, supported by mere conclusory statements, do not suffice.”).  
10 She fails to state a claim to the extent she alleges the County withheld public records in  
11 violation of the statute.

12 Chen also claims the public records she inspected were available as of July 2011  
13 but she was not given a reasonable explanation for the delay in filling her request. She  
14 seeks declaratory relief that such delay was a constructive denial of access and seeks  
15 costs and attorney fees pursuant to A.R.S. § 39–121.02(B). “Access to a public record is  
16 deemed denied if a custodian fails to promptly respond to a request for production of a  
17 public record.” A.R.S. § 39–121.01(E). Arizona courts have interpreted the word  
18 “prompt” to mean “quick to act” or to produce the requested records “without delay.”  
19 *Phoenix New Times*, 217 Ariz. at 538 (citing *West Valley View, Inc., v. Maricopa Cnty.*  
20 *Sheriff’s Office*, 216 Ariz. 225, 230, 165 P.3d 203, 208 (Ct. App. 2007)). However,  
21 whether a government agency’s response to a wide variety of public records requests was  
22 sufficiently prompt “will ultimately be dependent upon the facts and circumstances of  
23 each request.” *Id.* (internal quotation and citation omitted). “The court may award  
24 attorney fees and other legal costs that are reasonably incurred in any action if the person  
25 seeking public records has substantially prevailed [on the merits].” A.R.S. § 39–  
26 121.02(B).

27 Chen alleges that the Communications Director for Maricopa County, Cari  
28 Gerchick, received her public records request on July 29, 2011. Gerchick then asked for



1 permission from the employees listed in Chen’s request to produce the responsive e-mails  
2 on August 2, 2011. Chen claims that she inquired with Gerchick about the status of her  
3 requests numerous times between August 2, 2011 and December 15, 2011 to no avail.  
4 After contacting the Arizona Ombudsman Office on December 15, 2011 for assistance  
5 and speaking with Brandon Newton whom she was told “represented the County” on  
6 January 11, 2012, Chen was able to inspect the records she requested on January 24, 2012  
7 at the County Attorney’s Office. Thus Chen was allegedly required to wait 179 days after  
8 the County received her request on July 29, 2011 before it was filled. Defendants have  
9 not alleged that there were any extenuating circumstances or reasons for such a delay.  
10 Chen has sufficiently alleged that she was denied access to public records because the  
11 County failed to promptly respond to her request. *See Phoenix New Times, L.L.C.*, 217  
12 Ariz. at 547 (finding that Maricopa County’s delay in filling plaintiff’s various public  
13 records requests, ranging from 49 to 143 days, was a wrongful denial of access under  
14 A.R.S. § 39–121.01(D)(1)).

15 Defendants contend that Chen’s public records claim fails because she did not file  
16 a notice of claim as to these facts prior to bringing this action. *See* A.R.S. § 12–  
17 821.01(A). However, “[t]he notice of claim statute applies to a request for damages,  
18 rather than to a request for declaratory or injunctive relief.” *Home Builders Ass’n of Cent.*  
19 *Arizona v. Kard*, 219 Ariz. 374, 381, 199 P.3d 629, 636 (Ct. App. 2008) (internal  
20 citations omitted). Chen requests declaratory relief that the County’s delay in providing  
21 her access to the records violated the statute. (Doc. 24 at 17-18.) Non-compliance with  
22 the notice of claim statute does not preclude her from requesting costs and attorneys’ fees  
23 in conjunction with her request for declaratory relief. *Long v. Humboldt Unified Sch.*  
24 *Dist. No. 22*, CV-09-8045-PHX-FJM, 2009 WL 1868561, at \*2 (D. Ariz. June 29, 2009)  
25 (citing *Martineau v. Maricopa Cnty*, 207 Ariz. 332, 336-37, 86 P.3d 912, 916-17 (Ct.  
26 App. 2004) (holding that plaintiffs did not need to comply with the notice of claims  
27 statute where they sought declaratory relief even though they requested costs and  
28 attorneys’ fees)). Thus, Chen has stated a claim for the delay in receiving access to public

1 records against Maricopa County.

2 **CONCLUSION**

3 Defendants' Motion to Dismiss is granted as to Chen's claims against Mark  
4 Fischione for Title VII retaliation (Count One), ACRA retaliation (Count Three),  
5 wrongful termination pursuant to A.R.S. § 23-1501(3)(b) (Count Four) and A.R.S. § 23-  
6 1501(c)(iii) (Count Five), and tortious interference with contract (Count Six). The Motion  
7 is also granted as it pertains to Chen's wrongful termination claim pursuant to A.R.S. § 3-  
8 1501(3)(b) against the County (Count Four). The Motion is denied as to Chen's claims  
9 against Maricopa County and Fischione for First Amendment retaliation (Count Two).  
10 The Motion is also denied as to Chen's claims against Maricopa County for Title VII  
11 retaliation (Count One), ACRA retaliation (Count Three), and A.R.S. § 23-1501(c)(iii)  
12 (Count Five), and wrongful denial of access to public records pursuant to A.R.S. § 39-  
13 121.02(A) (Count Seven).

14 **IT IS THEREFORE ORDERED** that Defendants' Motion to Dismiss (Doc. 28)  
15 is **granted in part and denied in part.**

16 Dated this 14th day of March, 2013.

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20 G. Murray Snow  
21 United States District Judge  
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