STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT 6
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D06-2107-PL-025333

BARBARA TULLY,

Plaintiff,

v.

THEODORE ("TODD") ROKITA, in his official capacity as Indiana Attorney General,

Defendant.

DEFENDANT'S RESPONSE IN OPPOSITION TO TULLY'S MOTION TO AMEND/CLARIFY AND MOTION TO RECONSIDER

The Court should deny Tully's motion to amend and instead reconsider its order granting Tully's motion for summary judgment. There is nothing "unique" about this case. In fact, for 18 years the Inspector General has issued *confidential* informal advisory opinions to state employees and officials on myriad matters, from outside employment to other topics covered by the Ethics Code and statutes. Both individuals (and state agencies) have requested and received thousands of informal opinions believing them to be strictly confidential unless they choose to waive confidentiality. For years, they were repeatedly told this verbally and in writing by the Office of the Inspector General. This Court's decision has destroyed those reliance interests and nullified one of the Inspector General's primary tools for furthering the General Assembly's public policy in promoting good government, eviscerating a core component of the Inspector General's mission.

The Court's order is fundamentally flawed—and should be reversed—for three reasons: First, the Inspector General has the authority to (and frequently does) issue confidential informal advisory opinions to state employees on ethical questions arising from outside work. And critically, an informal advisory opinion by the Inspector General relating to outside work (or another ethics question) does not preclude an employee from *also* seeking a formal advisory opinion from the State Ethics Commission. Either process or both is available to an employee, so there is no conflict between the ethics rules. Second, the only issue in this narrow cause of action is whether an existing record—an informal advisory opinion—must be released under APRA. Whether the Inspector General had the authority to issue the opinion in the first place is beside the point. And finally, an informal advisory opinion issued by a state agency to another on an ethics question falls squarely within APRA's deliberative materials exemption, which permits an agency to withhold records "that are intra-agency or interagency advisory or deliberative material … that are expressions of opinion …and that are communicated for the purpose of decision making." Ind. Code § 5-14-3-4(b)(6). Indeed, that is the entire purpose of issuing interagency ethics advice: to foster good decision-making by state employees and officials who are seeking guidance for questions they have about how state ethics rules apply to various proposed fact patterns. So Tully is not entitled to any relief, including attorneys' fees.

I. The Court's order shatters the promise of confidentiality relied on by state employees and officials at the time they sought ethics advice from the Inspector General

The Court's decision in this APRA case over a single document threatens a sea change in the Inspector General's role. By eliminating all confidentiality for informal advisory opinions, the Court has handcuffed the Indiana General Assembly and Inspector General (indeed, all of Indiana state government) in their mission to promote good government. The informal-advisory-opinion mechanism has been used as a proactive tool to prevent waste, fraud, abuse, and bad government, and it has been successful because state employees and agencies have long operated under the reality that they can request informal ethics advice in confidence. People are more likely to request advice and be candid when the process is strictly confidential. But the Court has now improperly removed that shield, which means fewer people will seek proactive advice. Worse, the Court's decision has undercut the trust and reliance interests of countless state employees and agencies who already sought such advice on the promise of confidentiality.

Informal advisory opinions sought by state employees must remain confidential because the documents were created with that promise. In 2005, the General Assembly directed the Inspector General to implement a code of ethics through rulemaking. Ind. Code § 4-2-7-3(5). The Inspector General promptly met its charge by adopting rules establishing the Indiana Code of Ethics, 42 I.A.C. 1-5-1 et seq, which includes a component of offering informal advice from the Office of the Inspector General as to the meaning of the ethical rules to aid state officials and employees in

decision-making. And consistent with the confidentiality rule (42 I.A.C. 1-8-1) and the mission, the Office of the Inspector General advises those who seek an informal advisory opinion that the advice is confidential. In fact, state employees and officials are repeatedly assured that if they seek ethics advice it will remain confidential. For example:

- The Office of the Inspector General's website guarantees that informal advisory opinions "are confidential unless confidentiality is waived by the state employee." *See* https://www.in.gov/ig/request-advice/informal-advisory-opinions/
- The Office of the Inspector General's website repeats that informal advisory opinions "are confidential unless confidentiality is waived by the state employee" above the "complete informal advisory opinions form" button. *See* https://www.in.gov/ig/request-advice/
- In response to a frequently asked question of "how do I get ethics advice?", state employees are counseled that "[t]he OIG also provides written advice through written Informal Advisory Opinions (IAO) from the OIG staff attorneys. An IAO is confidential to the state worker unless the state worker waives confidentiality by sharing the written opinion with another." *See* https://faqs.in.gov/hc/en-us/articles/115005056307-How-do-I-get-ethics-advice-
- In a flyer regarding working outside of the office, the Office of the Inspector General has advised state employees to "request a confidential

informal advisory opinion from the OIG if you have questions or concerns about how the rules would apply to your specific opportunity." https://www.in.gov/ig/files/Outside-employment.pdf

- In its training materials that are studied by every on-boarding state employee and official and then reviewed yearly by all state employees and officials, the Office of the Inspector General informs all state employees and officials that informal advisory opinions are confidential in mandatory ethics trainings and refresher courses. *See* https://www.in.gov/ig/files/Ethics-Training-Accessibility-Version.pdf ("You can request an informal advisory opinion and receive a confidential answer to any ethics question within one to three business days.").
- And state agencies, too, advise their employees that "confidential advice may … be obtained from the Office of the Inspector General by submitting a request [link to OIG website]." *See, e.g.*, https://www.in.gov/health/thenervecenter/state-code-of-ethics/
- Even the professional services contract manual regarding the state contracting process advises that state employees and contractors "may seek a confidential informal advisory opinion from the Office of the Inspector General." *See* https://www.in.gov/idoa/files/2021-Contract-Manual-9.1.2021.pdf; Ind. Code § 4-2-6-1(9) (defining employee).

So for nearly two decades, all state employees who have sought informal advice have reasonably understood those opinions to be confidential by relying on repeated assurances of the Office of the Inspector General and their own state agencies.

Indeed, confidentiality is essential to the process, which facilitates openness and encourages state actors to seek advice, rather than quietly face difficult ethical questions without guidance. Stripping state employees and officials of promised confidentiality when they sought aid under a recognized and long-standing process is fundamentally unfair and will ultimately undermine the work of the Inspector General in promoting good government. According to the Inspector General, providing these opinions are a "critical service to state workers" and if the promise of confidentiality is abolished, there will be a "chilling effect on future state officers, employees and special state appointees." Ex. C. For that reason, all informal advisory opinions created under the assurance of confidentiality must remain confidential, unless officials are apprised at the outset that the advice is not confidential.

II. The Inspector General has the authority to issue informal advisory opinions to state employees on ethical questions arising from outside work alongside the State Ethics Commission's authority

The Court should reconsider its order because the Inspector General's authority to issue informal ethics advice on outside employment in no way conflicts with or impedes the State Ethics Commission's authority to issue formal written advisory opinions on the topic. In fact, the General Assembly designed the dual system to permit and encourage employees to seek out ethics advice from the Inspector General, the State Ethics Commission, or *both*. And each course of action offers state officials

and employees different protection to ethical questions posed: An informal advisory opinion affords the employee the benefit of a presumption of good faith should they be subject to a subsequent ethics proceeding. But a formal written advisory opinion issued by the Commission is considered conclusive proof of compliance with the ethics laws and is binding on the Commission and is not subject to judicial review. This multi-layered system is thus harmonious in that it provides alternative paths to employees and officials needing guidance should they choose to seek it out. And it allows the person seeking the advice to have the choice of either securing a rebuttable presumption (informal advisory opinion) or a binding and conclusive opinion (formal advisory opinion).

The Inspector General's role serves the State by heading off potential ethical dilemmas through comprehensive, particular, and responsive advice, which the person may later use before the Ethics Commission as evidence of acting in good faith. The General Assembly specifically tasked the Inspector General with providing advice to prevent and eradicate fraud, waste, abuse, mismanagement, and misconduct in state government, Ind. Code § 4-2-7-3, adopting rules to implement a code of ethics, Ind. Code § 4-2-7-3(5)–(6), and with preparing "interpretive and educational materials and programs," Ind. Code § 4-2-7-3(16), all of which authorize the informal advisory opinion process. The informal process is designed to improve state officials' and employees' compliance with state ethical standards by providing proactive legal advice on the application of the ethics rules before they act. And each year, the Office of the Inspector General issues hundreds of informal advisory opinions addressing

ethical questions on a variety of topics in the State Ethics Code, depending on the unique circumstances confronting the state official or employee. In fact, a "large percentage" of the Inspector General's informal advisory opinions address questions of outside employment or outside professional activity. *See* Ex. C (Letter from the Inspector General explaining that in 2022 that 82 out of 234 (or 35%) of the informal advisory opinions issued addressed outside employment/professional activity). The informal process exists to incentivize employees to obtain real-time ethics advice on tough questions. To that end, the rule provides that if the State Ethics Commission later finds that the "person committed a violation after relying on the informal advisory opinion and the violation is directly related to the advice rendered, the [Commission] *may* consider that the person acted in good faith." 42 I.A.C. 1-8-1. But nothing about the optional informal process trumps or impedes the formal process before the State Ethics Commission. It is entirely optional (to the employee's benefit or peril).

Distinct from the Inspector General's informal ethics advice, the State Ethics Commission issues formal advisory opinions under a longer process and only after public hearings. *See* 40 I.A.C. 2-2; 42 I.A.C. 1-7-1; Ex. C. The General Assembly empowered the Ethics Commission to, among other things, act as an advisory body by issuing advisory opinions to interpret state ethics laws and rules. Ind. Code § 4-6-2-4. Like the Inspector General, the Ethics Commission may render a formal advisory opinion at the request of state employees and officers, but also at the request of the Inspector General or on its own motion. Ind. Code § 4-6-2-4; 40 I.A.C. 2-2-1. The five-member Commission renders its opinion in a public meeting by majority vote, and

following the decision, the Commission staff prepare the written formal advisory opinion. 40 I.A.C. 2-2-1(e). And while an informal ethics opinion issued by the Inspector General may be used as a sign of good faith in a later proceeding before the Ethics Commission, "[a] formal advisory opinion rendered by the commission *is binding* on the commission in any subsequent allegations concerning the person who requested the opinion and who acted on the advice given by the commission in good faith, unless the person requesting the formal advisory opinion omitted or misstated material facts in the request for the formal advisory opinion or testimony before the commission." 40 I.A.C. 2-2-1(g); *see also, e.g.*, Ind. Code § 4-2-6-5.5(b) ("A written advisory opinion issued by the commission stating that an individual's outside employment does not violate [the law] is conclusive proof that the individual's outside employment does not violate [the law].").

Ultimately, the law affords employees and officials with the option of pursuing informal advice, formal advice, or both, leaving it to the employees and officials to determine whether they desire to be shielded by a rebuttable presumption of good faith or a binding and conclusive opinion, and whether they desire the advice to be privately given or public. Nothing in the text of Indiana Code section 4-2-6-5.5 or the rules mandates that an employee choose one route over another. And nothing about the Inspector General's work is meant to "circumvent" the Ethics Commission or the law. To the contrary, the Office of the Inspector General advises every individual seeking advice of the difference between informal and formal advisory opinions and informs those requesting advice that he or she has the option to request a formal

advisory opinion from the Commission. Ex. C. The ethics advice from the Inspector General and State Ethics Commission thus work in tandem, by law and in practice, to serve the same goal of promoting good government.

Because the plain language of the Rule 5 (42 I.A.C. 1-5-5) and Indiana Code section 4-2-6-5.5 do not mandate an employee to pursue a formal advisory opinion from the Ethics Commission (indeed, it is an option not required depending on the scenario), the Court should reconsider its sweeping decision that improperly eliminates the informal-advisory-opinion option and removes confidentiality for those that seek one. As it stands, the Court's order jeopardizes not only the past assertions and representations of the Office of Inspector General regarding confidentiality, but also the future work of this important agency in ways that are far reaching.

III. APRA only governs the production of public records

Even if the ethics laws required an employee or official to seek a formal advisory opinion for questions about outside work, the fact that an employee or official requests and obtains an informal advisory opinion is entirely beside the point for purposes of APRA. The only question presented here is whether the Office of the Attorney General must disclose an existing informal advisory opinion issued by the Inspector General under APRA. And under APRA, the pertinent inquiry is whether the agency properly denied access to a public record, not whether an employee or official should have requested the creation of a different record (a formal advisory opinion). Ind. Code § 5-14-3-9(f). For this reason, the only available remedies in an APRA case are compelled disclosure, imposition of a civil penalty under limited circumstances, and

imposition of attorneys' fees and costs under certain circumstances. *Id.* Declaratory relief is not one of the available forms of relief in an action brought under APRA. *See* Ind. Code § 5-14-3-9; Ind. Code § 5-14-3-9.5; *cf. Hinkle v. Howard*, 225 Ind. 176, 179, 73 N.E.2d 674, 675 (1947) (holding that relief under the Declaratory Judgment Act "cannot be had where another established remedy is available").

The Court's decision about the Inspector General's scope of authority with respect to issuing ethics advice on outside employment is thus far beyond the narrow cause of action here. At bottom, the Attorney General sought and obtained an informal advisory opinion, and that is what Tully seeks in this APRA case. Whether the Attorney General should have taken Tully's preferred route has absolutely no bearing on the question whether the opinion he did receive is subject to disclosure or may be withheld at the discretion of the Office of the Attorney General. Tully has not identified anything in APRA's text that renders the deliberative materials exception inapplicable to a record merely because that record should not have been created in the first place. Tully's beliefs about when a public official should pursue a formal advisory opinion from the Commission or seek informal advice from the Inspector General are thus entirely beside the point. And of course, there is no statutory or other legal requirement for an employee or official to seek one over the other concerning outside employment.

IV. An informal advisory opinion issued by a state agency to another on an ethics question falls squarely within APRA's deliberative materials exemption

The Inspector General's informal advisory opinions may be withheld at the discretion of the public agency under the deliberative materials exemption of APRA. The Inspector General's confidentiality rule merely embodies that exemption, which permits an agency to withhold, in its discretion, records "that are intra-agency or interagency advisory or deliberative material … that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making." Ind. Code § 5-14-3-4(b)(6). The Inspector General issues hundreds of informal advisory opinions annually for the very purpose of rendering that advice to those in other state agencies, which are expressions of the Inspector General's opinion on a particular ethics question communicated for the purpose of improving state officials' compliance with State Ethics Code. So by its plain text, the deliberative materials exemption squarely applies to an informal advisory opinion issued by the Inspector General to someone in a public agency.

Excusing informal advisory opinions from disclosure likewise fits within the aim of APRA's deliberative materials exception, which exempts "intra- or interagency advisory or deliberative material from public disclosure to 'prevent injury to the quality of agency decisions.'" *Sullivan v. Nat'l Election Defense Coalition*, 182 N.E.3d 859, 870 (Ind. Ct. App. 2022) (quoting *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002)). One key function of the Office of the Inspector General is to provide advice to public employees, officials, and agencies on ethics questions to aid in their

proactive decision-making to minimize the risk of waste, fraud, and abuse in state government. And no different than lawyers seeking advice from the Disciplinary Commission or clients seeking advice from lawyers, confidentiality is critical to facilitate openness and to encourage state actors to seek that ethics advice from the Inspector General in real time. Stripping informal advisory opinions of confidentiality thus would undercut the important work of the Inspector General, be contrary to the General Assembly's intent (and the reality) to foster good government and run afoul the plain language of APRA's deliberative materials exemption.

V. Tully is not entitled to attorneys' fees when the PAC found disclosure of the record was not required

Tully should not be entitled to attorneys' fees because APRA exempts disclosure of the record she seeks from the Office of the Attorney General. But even if she is entitled to the advisory opinion under the Court's novel holding, Tully should still not be entitled to fees because the Office of the Attorney General's decision to withhold the record was based on the longstanding confidentiality rule, the assurance of confidentially at the time the opinion was sought and received, and the public access counselor's assessment that the record fell within APRA's exemption. Fees should not be awarded when the Court rules on an issue that is a matter of first impression, and particularly when a public agency reasonably relies on the guidance of the public access counselor. After all, one of the purposes of the requirement that a requestor first seek an opinion from the public access counselor before she is eligible for attorneys' fees in a later court-action is to allow for the public agency to reassess if the public access counselor sides with the requestor. *See* Ind. Code § 5-14-3-9(i). And requiring

a plaintiff to obtain an opinion from the PAC as a precondition to fees would make no sense unless that opinion were favorable to the plaintiff. Here, the PAC sided with the Office of the Attorney General. The Court was thus correct to not award Tully attorneys' fees in its order.

VI. The Court should deny Tully's motion because APRA permits redactions

As Tully admits, APRA authorizes certain redactions. In fact, Indiana courts have long recognized redactions are appropriate and required if public records contain non-disclosable material. *Unincorporated Operating Division of Indiana Newspapers Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 908 (Ind. Ct. App. 2003). Indeed, that is the purpose of the Court's *in camera* review—to determine whether part of a record may be withheld. Ind. Code § 5-14-3-9(h).

The Court's order permitting redaction after reviewing the challenged record is thus proper. Redactions are permissible for a variety of reasons, including to protect privileged information, along with information that is confidential by statute. Furthermore, the Court's order only deemed the Inspector General's advice relating to outside employment to be disclosable under APRA. It did not categorically hold that all informal advisory opinions and all of their content are disclosable under APRA. So to the extent other information is included the informal advisory opinion not relating to advice on outside employment, that, too, may be appropriately redacted in the Attorney General's submission and considered by the Court *in camera* under Indiana Code section 5-14-3-4(b)(6).

Conclusion

The Court should deny Tully's motion to amend and reverse its order granting summary judgment in favor of Tully.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General
Attorney Number 18857-49

By: */s/Caryn N. Szyper*
Caryn N. Szyper
Deputy Attorney General
Attorney Number 30063-49
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on February 2, 2023, I electronically filed the foregoing documents using the Indiana Filing System (IEFS). I further certify that on February 2, 2023, the foregoing document was served upon the following person(s) via IEFS, if Registered Users, or by depositing the foregoing document in the U.S. Mail, first class, postage prepaid, if exempt or non-registered user.

William R. Groth, Esq.
429 N. Pennsylvania St., Ste 411
Indianapolis, IN 46204
Counsel for Plaintiff

/s/Caryn N. Szyper
Caryn N. Szyper
Deputy Attorney General

OFFICE OF INDIANA ATTORNEY GENERAL
IGC South Fifth Floor
302 W. Washington St.
Indianapolis IN 46204
Telephone: 317-232-6297
Email: Caryn.Szyper@atg.in.gov