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.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Court should dismiss Barbara Tully's complaint because it fails to state a claim for relief under the Access to Public Records Act. Tully seeks disclosure of an informal advisory opinion issued by the Inspector General to the Attorney General regarding the Attorney General's business interests and outside employment. But by rule, "[i]nformal advisory opinions are expressions of opinion that are communicated for the purpose of deliberation and decision making," 42 I.A.C. 1-8-1(b), and under APRA, "[r]ecords 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," "shall be excepted from" APRA's disclosure requirement "at the discretion of the public agency," Ind. Code § 5-14-3-4(b)(6). The Attorney General thus acted squarely within APRA's parameters when he exercised his discretion not to disclose the Inspector General's advisory opinion. Moreover, the Office of the Attorney General's

public disclosure of the existence of the informal advisory opinion and its bottom line does not foreclose reliance on APRA's deliberative-materials exception under long-standing precedent. And Tully's other claims for relief are similarly foreclosed by well-established Indiana law. Tully's complaint is thus legally insufficient to state an APRA claim.

I. Background

Indiana law authorizes the Inspector General to issue an informal advisory opinion to a state official who requests one. 42 I.A.C. 1-8-1(a); *see also* Ind. Code § 4-2-7-3(2), (5), (6), (8) (requiring the Inspector General to "[r]ecommend policies and carry out other activities designed to deter, detect, and eradicate … misconduct in state government," to promulgate rules, and to "[p]rovide advice to an agency on developing, implementing, and enforcing policies and procedures to prevent or reduce the risk of … wrongful acts within the agency"). While an informal advisory opinion does not bind the State Ethics Commission, a state official who acts in reliance on an informal opinion acts in good faith. 42 I.A.C. 1-8-1(a).

Critically, the Inspector General's informal advisory opinions are expressly confidential, deliberative material directed to a state official. They "are expressions of opinion that are communicated for the purpose of deliberation and decision making," and so "[t]he information and advice contained in" those opinions "shall be considered confidential under IC 5-14-3-4(b)(6)." 42 I.A.C. 1-8-1(b)(2). Indiana Code section 5-14-3-4(b)(6), in turn, excepts deliberative materials from APRA's disclosure requirements at the public agency's discretion.

Barbara Tully seeks disclosure from the Office of the Attorney General of an informal advisory opinion sought and received by Attorney General Rokita shortly after he assumed office in January 2021. On February 16, 2021, the *Indiana Business Journal* ran an article in which a spokesperson for the Office of the Attorney General stated that Attorney General Rokita "sought and received an opinion from the Indiana Inspector General's Office that indicated 'his business interest and outside employment are all squarely within the boundaries of the law and do not conflict with his official duties.'" Comp. ¶ 6; Comp. Ex. A. at 2.

Tully submitted a public records request in writing on or around February 25, 2021, seeking the Inspector General's informal opinion. Comp. ¶ 7. The Office of the Attorney General acknowledged receipt of Tully's records request on March 1, 2021. Comp. ¶ 8.

At some point thereafter—the complaint does not identify when—Tully filed a formal complaint with the Public Access Counselor (PAC) because she had neither received the requested records nor received a denial with the reason for why the requested document was excepted from disclosure. Comp. ¶ 8. On April 29, 2021, the PAC responded to Tully's formal complaint in a letter. Comp. ¶ 9; Comp. Ex. C. In his letter, he explained that informal opinions of the Inspector General are confidential by regulation, and noted that the regulation also provides that informal opinions are deemed deliberative material under Indiana Code section 5-14-3-4(b)(6). Comp. ¶ 10; Comp. Ex. C. He further noted that he did not consider Attorney General Rokita's decision to withhold the informal opinion to be an abuse

of discretion because "[i]t could very well contain other recommendations, suggestions, and conclusions that were not disclosed and are intended to be between a public official and the state ethics chief." *Id.* The PAC did not find the Attorney General's decision not to disclose the informal opinion to be arbitrary. *Id.* But the PAC did say he thought the "reasonable time" for responding to Tully's record request had elapsed. Comp. ¶ 12; Ex. C.

The Office of the Attorney General responded to Tully's records request in a letter dated July 26, 2021. Comp. ¶ 13. The Office denied Tully's records request on the bases of 42 Indiana Administrative Code 1-8-1 and Indiana Code section 5-14-3-4(b)(6) and stated that the Office was "exercising its statutory discretion to withhold this record." Comp. Ex. D. On July 28, 2021, Tully filed her complaint under Indiana Code section 5-14-3-9, which permits a person who has been "denied the right to inspect or copy a public record by a public agency" to file "an action in the circuit or superior court of the county in which the denial occurred to compel" disclosure. Ind. Code § 5-14-3-9(e).

II. Tully's complaint fails to state a claim upon which relief may be granted because the requested advisory opinion is excepted by APRA's disclosure obligation

The Court should dismiss Tully's complaint because "it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances." *Guideone Ins. Co. v. U.S. Water Sys.*, 950 N.E.2d 1236, 1243 (Ind. Ct. App. 2011) (internal quotation omitted). A motion to dismiss "tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint

establish any set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, 134 (Ind. 2006). For a court to dismiss a complaint for failing to state a claim, it must be "clear on the face of the complaint that the complaining party is not entitled to relief." *City of New Haven v. Reichhart*, 748 N.E.2d 374, 377 (Ind. 2001). Tully's complaint fails to state a claim because by law the Inspector General's informal advisory opinion is excepted from APRA's disclosure requirements at the Office of the Attorney General's discretion.

A. The Inspector General's informal advisory opinions are deliberative materials excluded from APRA's disclosure requirement at the public agency's discretion

Section 4(b)(6) of APRA allows a public agency to withhold from disclosure intra-agency or interagency deliberative materials. The deliberative-materials exception provides that "[r]ecords 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" may be withheld at the discretion of the agency. Ind. Code § 5-14-3-4(b)(6). The purpose of this exception "is to 'prevent injury to the quality of agency decisions,'" for "[t]he frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result." *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trs. of Indiana Univ.*, 787 N.E.2d 893, 909–10 (Ind. Ct. App. 2003) (quoting *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002)), *trans. denied*.

The Inspector General's informal advisory opinions are by definition expressions of opinion communicated for the purpose of deliberation and decision making and thus fall within the APRA exception for deliberative materials. The rule expressly provides that "[i]nformal advisory opinions are expressions of opinion that are communicated for the purpose of deliberation and decision making." 42 I.A.C. 1-8-1(b). And the rule further provides that all "information and advice contained in an informal advisory opinion … shall be considered to be confidential under IC 5-14-3-4(b)(6)." 42 I.A.C. 1-8-1(b)(2).

Because the Inspector General's informal advisory opinions always qualify as deliberative materials, Tully cannot show that the Inspector General's informal opinion was not "deliberative material." And because the informal advisory opinion is deliberative material, the Office of the Attorney General had discretion under APRA to maintain its confidentiality. *See* Ind. Code § 5-14-3-4(b)(6). The Court should dismiss the complaint.

B. The Office of the Attorney General did not waive the confidentiality of the advisory opinion by providing a brief statement about the opinion

The Office of the Attorney General did not waive the deliberative-materials exception by responding to a media inquiry and reporting the existence of the Inspector General's opinion and its bottom line. Tully claims that "by voluntarily disclosing the essence of the report, [OAG] waived any privilege to refuse to disclose it." Comp. ¶ 15. But the Court of Appeals has already rejected Tully's "all or nothing" approach with respect to waiving APRA's disclosure exceptions. The

reason: applying waiver any time a public agency acknowledges the existence of such materials "would frustrate the underlying purpose of APRA." *See Unincorporated Operating Div.*, 787 N.E.2d at 918–21.

A public agency does not waive its authority to resist disclosure of deliberative materials by releasing a general summation of those materials. Rather, waiver may be found only when the public agency voluntarily and intentionally relinquishes its rights under the exception by, for example, selectively disclosing materials to certain individuals but not others. *Id.* at 919. In *Unincorporated Operating Division of Indiana Newspapers*, which involved the Indy Star's APRA request for deliberative materials used in Indiana University's decision to fire Coach Bobby Knight, the Court of Appeals rejected the Star's argument that IU had waived the exception to disclosure by selectively disclosing portions of the deliberative materials to the media, thereby waiving any exception to disclosure under APRA. *Id.* at 918. The court explained that, rather than selectively disclosing materials, IU's three-page summary report released "general summations" consisting of "a very generalized overview" with "very little specific information concerning the underlying investigatory materials and without quotation of extensive and integral parts" of the materials. *Id.* at 921.

The Office of the Attorney General released even less information than the summary report released by IU. The Office provided a short summary statement about the existence and bottom line of the Inspector General's informal advisory opinion in response to a media inquiry. That statement contained no specifics, and

Tully has not plausibly alleged that the Office of the Attorney General selectively disclosed details to others or otherwise voluntarily and intentionally relinquished its right to the APRA exception for deliberative materials. Indeed, the information disclosed to the media in this case pales in comparison to the heap of information disclosed to the media when IU fired Coach Knight. There, IU had released an entire report summarizing the investigation and a report summarizing the sanctions imposed on Coach Knight. *See id.* at 898–900. Under Tully's view, a public agency waives an APRA exception simply by acknowledging a records existence and reporting the bottom line. That, of course, would discourage *any* communication about deliberative materials, result in less public knowledge, and undermine the purpose of APRA. *Id.* at 920.

Because the Attorney General did not waive the deliberative materials exception to disclosure by the Office's brief summation of the informal opinion, the Court should dismiss Tully's complaint.

C. Tully is not entitled to any relief

Tully cannot circumvent the Office of the Attorney General's proper invocation of the deliberative-materials exception and force disclosure on the ground that the Office did not respond to her request with an explanation within a reasonable time. Nor can Tully obtain declaratory relief or civil penalties on that or any other basis.

Under APRA, the pertinent inquiry is whether the agency properly denied access to a public record, not whether the agency took too long to offer an

explanation for the denial. 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").

Tully cannot obtain any of the relief she seeks. The Office of the Attorney General properly exercised its discretion to withhold the Inspector General's informal opinion. *See* Ind. Code § 5-14-3-4(b)(6); 42 I.A.C. 1-8-1(b). And Tully concedes in the complaint that the Office timely acknowledged her records request on March 1, 2021. *See* Ind. Code § 5-14-3-4.4(c) (requiring an agency to respond to a records request within 7 days when the request is in writing); Ind. Code § 5-14-3-3(b) (requiring an agency to provide the requested copies of records within a reasonable time). While she takes issue with the five-month delay between her request and the Office's response, that passage of time has no bearing on either the deliberative nature of the Inspector General's advisory opinion or the Office's authority to exercise its discretion to deny public access—the statute does not impose a time limit on a public agency's exercise of discretion.

Nor does a delay in responding to an APRA case render Tully a substantially prevailing party entitled to attorneys' fees and costs. A plaintiff's entitlement to

disclosure of the requested records is a necessary—though not sufficient—predicate to qualify as a substantially prevailing party. Indeed, in *Anderson v. Huntington County Board of Commissioners*, the Court of Appeals held that a plaintiff had not substantially prevailed *even when the agency provided the requested records* because the plaintiff had not made a reasonably particular request. 983 N.E.2d 613, 619 (Ind. Ct. App. 2013), *trans. denied*; *cf. Heber v. Indianapolis Metro. Police Dep't*, 58 N.E.3d 995, 997–98 & n.2 (Ind. Ct. App. 2016) (awarding attorneys' fees under Appellate Rule 67—not APRA—to plaintiff who had to bring an appeal to correct a "wholly meritless" preliminary ruling caused by the defendant because it was "unclear yet whether Heber [would] substantially prevail on the merits of his APRA claim"). Given that Tully is not entitled to the record she seeks, it follows that she falls short of any entitlement to attorneys' fees and costs.

Finally, Tully's request for civil penalties also fails as a matter of law. A court may impose a civil penalty on an agency or official only if the PAC has issued an advisory opinion to the complainant and the agency that "instructs the public agency to allow access to the public record" and the PAC issues the opinion before the complainant files suit in a circuit or superior court. Ind. Code § 5-14-3-9.5(e). In other words, civil penalties are allowed only when the PAC tells the agency (pre-suit) that it has disclose the public record and the agency refuses. Civil penalties thus are categorically unavailable in this case because the PAC determined that the Attorney General properly exercised his discretion to withhold disclosure; the PAC

did *not* instruct the Attorney General to allow access to all or part of the informal opinion. *See* Comp. Ex. D.

Tully is not entitled to any relief, even if the Court were to agree that five months to respond to and deny a records request is unreasonable. Tully simply cannot prevail on the core issue of disclosure because the Office of the Attorney General acted well within its statutory discretion in withholding access to the Inspector General's informal advisory opinion. Ind. Code § 5-14-3-4(b)(6); 42 I.A.C. 1-8-1(b).

III. Conclusion

Because Tully's allegations are legally insufficient to support a claim of an APRA violation, the Court should dismiss her complaint.

Respectfully submitted,

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

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

Courtney L. Abshire
Deputy Attorney General
Attorney Number 35800-49
Counsel for Defendant

Christopher M. Anderson
Deputy Attorney General
Attorney Number 31870-49
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that on October 12, 2021, I electronically filed the foregoing documents using the Indiana Filing System (IEFS). I further certify that on October 12, 2021, 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 Nieman Szyper
Deputy Attorney General
Attorney Number 30063-49

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