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Marion County, Indiana

STATE OF INDIANA))SS: COUNTY OF MARION)	IN THE MARION SUPERIOR COURT CAUSE NO. 49D06-2107-PL-025333
BARBARA TULLY, Plaintiff, -vs- THEODORE ("TODD") ROKITA, in his official capacity as Indiana Attorney General, Defendant.	)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Barbara Tully ("Tully"), by her undersigned counsel, having moved pursuant to Rule 56(A) of the Indiana Rules of Trial Procedure for summary judgment in her favor and against the Defendant, Todd Rokita, in his official capacity as Indiana Attorney General ("Rokita"), asserts that there are no disputed issues of material fact and that Tully is entitled to judgment as a matter of law on her claim against Rokita under the Indiana Access to Public Records Act (APRA), Ind. Code § 5-14-3-1, *et seq*., seeking the right to inspect and copy the public record at issue.

I. PROCEDURAL HISTORY

Plaintiff Tully filed her action under APRA in this Court on July 28, 2021.

On January 7, 2022, the Court denied Defendant's TR 12(B)(6) motion to dismiss. On January 18, 2022, Defendant answered Plaintiff's Complaint.

II. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., Ballard v. Lewis*, 8 N.E.3d 190, 193 (Ind. 2014); *Risk Metrics Corp. v. Ind. Comp. Rating Bureau*, 85 N.E.3d 891 (Ind. Ct. App. 2017) (APRA case). The Court may consider those portions of the pleadings, answers to interrogatories, admissions, matters of judicial notice, and any other designated matters by the moving party for purposes of the motion for summary judgment. TR 56(C).

B. Rokita's reliance on 42 IAC 1-8-1 is unavailing because that rule was not adopted by the OIG under specific authority granted to it by statute to classify public records as confidential.

1. *The role of the OIG and Ethics Commission in addressing fraud, waste, abuse, and wrongdoing in State government.*

The office of the Inspector General was created by statute in 2005. Its statutory mission is to address fraud, waste, abuse and wrongdoing in state agencies. Ind. Code § 4-2-7-2 (b). It is closely linked to and required by law to provide rooms and staff assistance for the Indiana Ethics Commission (Commission). *Id.* at (a). The inspector general is appointed by the governor and

normally serves for the term of the governor who appointed him or her. *Id.* at (c)(1). The OIG's enabling statute affirmatively declares that "Except for information declared confidential under this chapter," all of its records are "subject to public inspection under [APRA]," and its meetings are subject to the Indiana Open Door Law. *Id.* at (e) and (f).

The OIG's enabling statute authorizes the inspector general to engage in rulemaking for three purposes: (1) "to implement IC 4-2-6 and this chapter," (2) "to implement a code of ethics under section 5 of this chapter," and (3) "to implement a statewide code of judicial conduct for administrative law judges." I. C. § 4-2-7-3 (5), (6), and (17). The OIG's enabling statute declares as confidential only "reports summarizing the results of every investigation," I. C. § 4-2-7-4 (3), and the identity of any individual who serves as an informant, including investigative records. I. C. § 4-2-7-8 (a), (b). Its enabling statute nowhere confers upon the OIG any authority to adopt rules that classify any other category of documents as confidential and exempt from public inspection under APRA.

The Indiana Ethics Commission ("Commission") is authorized by I. C. § 4-2-6-2 and consists of five commissioners who are appointed by the governor. It may act upon complaints filed against state officials alleging a violation of ethics rules. The Commission is also authorized by I. C. § 4-2-6-4(b)(1) to issue advisory opinions on ethical issues. Pursuant to that authority, it has issued dozens of such

opinions at the requests of state officials and employees, all of which are required to be made available to the public and are posted on-line. www.in.gov/ig/opinions. Except for investigative records of the OIG made exempt by I. C. § 4-2-7-8(b), the Commission's proceedings are open to the public and a complaint filed with the Commission is subject to inspection under APRA after the Commission finds probable cause to exist. I. C. § 4-2-6-4 (b)(2)(D).

Under I. C. § 4-2-6-5.5, a current state officer or employee may not, *inter alia*, knowingly accept other employment involving compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of his public office. That statute also expressly provides a safe harbor to state officials and employees by stating that an advisory opinion issued by the Commission finding that the individual's outside employment does not violate this section "is conclusive proof that the individual's outside employment" is not a conflict of interest in violation of I. C. § 4-2-6-5.5 (b)." Any state officer who identifies a potential conflict of interest is not just permitted but *required* to seek an advisory opinion from the commission. ("*shall*... seek an advisory opinion *from the commission*" after "making full disclosure of any related financial interest in the matter."). I. C. § 4-2-6-9(b)(1) (emphasis added).

2. *Rather than seeking an advisory opinion authorized and arguably required by statute, Rokita inexplicably requests an informal opinion from the OIG.*

No statute recognizes a record called an "informal advisory opinion." The concept of an informal advisory opinion has its genesis, not in any statute, but in a rule promulgated by the OIG, 42 IAC 1-8-1. That rule cautions that an "informal" opinion is expressly not binding on the Commission. 42 IAC 1-8-1(b). Rokita's decision to seek an *informal* opinion from the OIG rather than an opinion from the Commission[1] conflicts with his statutory duty under I. C. § 4-2-6-9(b)(1) to seek an advisory opinion from the Commission. He has thus deviated from the existing statutory procedures a public official is required to use to determine his compliance with the state code of ethics.[2]

Had Rokita sought an advisory opinion from the Commission pursuant to I.C. §4-2-6-9(b), that opinion without question would have been public pursuant to

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[1] *See, e.g.*, *In re Storms,* 2 N.E.3d 681, 682 (Ind. 2014) (noting that Respondent had requested a formal advisory opinion from the Indiana State Ethics Commission pursuant to I. C. § 4-2-6-9 regarding his ability to accept a position with a private employer). The concept of a confidential "informal advisory opinion" is nowhere recognized by any Indiana statute and has its provenance in 42 IAC 1-8-1.

[2] It's unclear why the Attorney General did not request a formal and binding advisory opinion, the latter of which are routinely published and made public. *See*, *e.g.*, https://www.in.gov/ig/files/2018-f-017.pdf As was reported on December 30, 2020, then-Attorney General-elect Rokita hired the person who had served as IG since 2017 as his chief deputy attorney general and chief of staff. https://dailyjournal.net/2020/12/30/rokita-names-local-lawyer-as-chief-of-staff-deputy-ag-2/

APRA, as is explained on the OIG's website. https://www.in.gov/ig/request-advice/formal-advisory-opinions/. But rather than request a formal advisory opinion from the Commission, Rokita chose instead to seek an "informal" opinion from the OIG pursuant to rule, 42 IAC 1-8-1, which states that such an informal opinion is "confidential *unless confidentiality is waived by the state employee."* https://www.in.gov/ig/request-advice/informal-advisory-opinions/ (emphasis added).

Having sought and received an "informal" advisory opinion from the OIG, Rokita has refused to release that opinion to Plaintiff Tully and thus to the public. He premises his refusal on a rule, 42 IAC 1-8-1(b)(2), issued by the OIG, even though that opinion is "specific to the person who requests the opinion," *id.* at (b)(1), as opposed to an intra- or interagency communication within the meaning of section 4(b)(6) of APRA. Despite the obvious public interest in governmental transparency enshrined in APRA and in knowing whether elected public officials are complying with ethical requirements, Rokita is determined to keep that opinion secret by withholding it from Plaintiff even after publicly claiming it exonerated him.

3. *The OIG's enabling statute does not give it "specific authority" as required by section 4(a)(2) of APRA to issue "informal" secret advisory opinions contrary to APRA's transparency requirements.*

Section 4(a)(1) of APRA, I. C. § 5-14-3-4(a)(1), prohibits an agency from disclosing any public records "declared confidential by state statute." The OIG's enabling statute does not authorize confidential "informal advisory opinions" that are exempt from disclosure. Thus, section 4(a)(1) is inapplicable.[3]

Section 4(a)(2) of APRA prohibits an agency from disclosing records "declared confidential *by rule* adopted by a public agency under *specific authority* to classify public records as confidential granted to the public agency [here, the OIG] by statute." But the OIG's enabling statute is silent with respect to "informal advisory opinions." Its enabling statute also makes clear that "[e]xcept for information declared confidential *under this chapter*, records of the [OIG] *are* subject to public inspection under [APRA]." I. C. § 4-2-7-2(e) (emphasis added).

While the OIG is statutorily empowered to issue rules to implement a code of ethics for the conduct of state business, I. C. § 4-2-7-5(a), there is nothing in its enabling statute conferring upon the OIG "specific authority" as required by section 4(a)(2) of APRA to issue a rule to classify as confidential and exempt from

[3]Section 4(a) of APRA identifies categories of records that "may not be disclosed by a public agency" absent a court order or a state statute specifically requiring disclosure. Section 4(b) identifies categories of records that are excepted from disclosure "at the discretion of a public agency."

APRA's reach "informal advisory opinions," a category of record unknown to any statute.[4] In other words, the OIG's statutory mandate that its records are "subject to public inspection under [APRA]," I. C. § 4-2-7-2, cannot, in the absence of specific statutory authority, be overridden by a mere rule purporting to authorize the OIG to issue a secret "informal advisory opinion" in derogation of the OIG's statutory mandate that "records of the office of the inspector general are subject to public inspection under IC 5-14-3 [APRA]." Further, 42 IAC 1-8-1 gives as authority for its issuance I. C. §§ 4-2-7-3 and -5. But neither of those sections grants it "specific authority" to withhold from the public its advisory opinions requested by a state official or employee.

The General Assembly clearly knew how to put in the OIG's enabling statute provisions to exempt certain OIG records from APRA disclosure. For example, the statute expressly exempts from public disclosure the OIG's investigative reports, I. C. § 4-2-7-4 (3), as well as any records that would reveal the identity an informant. *Id.* at -8(a). However, there is no statutory provision,

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[4] While "administrative agencies may make reasonable rules and regulations to apply and enforce legislative enactments," *Indiana Dep't of Envtl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 847 (Ind. 2003), an agency may not promulgate a rule in excess of its statutory authority. Whether the OIG possessed authority to promulgate this particular rule, 42 IAC 1-8-1(b), is a pure question of law not dependent on any factual development. Thus, exhaustion of administrative remedies is not required. *Walczak v. Labor Works - Fort Wayne LLC,* 983 N.E.2d 1146, 1152-1153 (Ind. 2013); *Comm'r of the Ind. Dep't of Envt'l. Mgmt. v. Eagle Enclave Dev., LLC,* 120 N.E.3d 212, 218 (Ind. Ct. App. 2019).

much less one granting the OIG specific authority, to classify by rule any other categories of records as exempt from APRA's public disclosure requirements.

The PAC has previously construed sections 4(a)(1) and (2) of APRA in Case 03-FC-58 involving the State Lottery Commission.[5] Although the PAC's opinions are advisory and thus are not binding on the court, the Court of Appeals has stated that in the absence of case law or adequate statutory authority, it will give PAC opinions "considerable deference." *Anderson v. Huntington Co. Bd. of Comm'rs,* 983 N.E.2d 613, 618 (Ind. Ct. App. 2013). In the Lottery Commission case, a citizen made a request pursuant to APRA for a document containing the time a winning Powerball lottery ticket had been purchased at a particular retailer. The Lottery Commission claimed that the record was discretionarily exempt from disclosure by sections 4(b)(1), (10), and (11) of APRA, I. C. §5-14-3-4(b)(1), (10), and (11), by virtue of a rule the Commission had adopted in its regulations at 65 IAC 1-2-3 (b)(1), (5), and (6).

After noting the absence of any specific statute that declared the requested information confidential, the PAC turned to section 4(a)(2) and the Lottery Commission's claim that the rule it was relying on was authorized by a statute, I. C. § 4-30-11-1, which generally empowered the Commission to adopt rules

[5] A copy of the PAC's opinion in Case 03-FC-58 is available at https://www.in.gov/pac/files/advisory/2003fc58.pdf

establishing a "system of verifying the validity of tickets claimed to win prizes and to make payment of the prize." The Lottery Commission contended that since it was authorized by statute to adopt rules and it had issued a rule making the record exempt from public disclosure, section 4(a)(2) prohibited it from disclosing the requested records. The PAC disagreed, noting that although the Lottery Commission had been given authority to adopt rules concerning the establishment of a verification system, it had "not been given *specific authority* [by statute] to declare records confidential." The PAC thus concluded that section 4(a)(2) did not prohibit the requested records from being disclosed. The Court should apply that same analysis here.

Without 42 IAC 1-8-1(b)(2) to rely upon, the Attorney General's argument to maintain the secrecy of the OIG's opinion he requested collapses. The OIG routinely publishes its ethics advisory opinions. https://www.in.gov/ig/opinions/advisory-opinions-2022/. It has never claimed that those advisory opinions are "intra-agency or interagency deliberative material" discretionarily exempt under section 4(b)(6), nor would such an argument be legally supportable. Further, given the fact that these opinions are specific to the person requesting the opinion, they are not by definition intra- or interagency expressions of opinion communicated for the purpose of agency decision-making. They are opinions, but those opinions are issued for the benefit of a particular

public official or employee and not for the purpose of governmental decision-making.[6]

Here, too, the applicable statute creating the OIG is silent with respect to the OIG's authority to issue confidential "informal advisory opinions," much less to declare such opinions exempt from disclosure under APRA. While the statute gives the OIG general authority to promulgate rules, nowhere does it give the OIG *specific* authority to declare certain of its ethics opinions as confidential, contrary to the broad statutory requirement that all OIG records are available under APRA for inspection and copying by the public.

4. *Administrative agencies such as the OIG may not issue rules that are inconsistent with or beyond the scope of its statutory mandate, particularly a rule that seeks to alter the transparency requirements of APRA.*

It is axiomatic that an agency may engage in rulemaking only pursuant to clear statutory authority. The agency's rules must also be consistent with the statute giving it rulemaking authority. An agency's rulemaking authority is limited to the authority granted by its enabling statute and any rules it may choose to promulgate must be in harmony with its statutory purpose. As our Supreme Court

[6] *See, e.g.*, the August 5, 2019, Investigative Report, available at https://www.in.gov/ig/files/2019-04-0104-Office-of-the-Governor-Financial-Disclosure-Statement_WEB.pdf where the OIG issued a public report exonerating Governor Holcomb of violating the gift rule found in 42 IAC 1-5-1.

has explained, "[i]t is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute[.]" *Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 939 (Ind. 1993), *cert. denied* (1994); *see also Vehslage v. Rose Acre Farms, Inc.*, 474 N.E.2d 1029, 1033 (Ind. Ct. App. 1985) ("It is black-letter law that generally, administrative agencies are creatures of statute, and only the legislature has the broad power to provide for their creation. Administrative boards, agencies, and officers have no common law or inherent powers, but only such authority as is conferred upon them by statutory enactment."). Therefore, any act of an agency in excess of its power is *ultra vires* and void. *Howell v. Ind.-Am. Water Co.*, 668 N.E.2d 1272, 1276 (Ind. Ct. App. 1996), *trans. denied* (1997).

As creatures of statute, administrative agencies cannot exercise power beyond that given in the statute which created them. *Tyus v. Indianapolis Power & Light Co.,* 134 N.E.3d 389, 405 (Ind. Ct. App. 2019). The rule, 42 IAC 1-8-1, by which the OIG purports to modify a statute (APRA) it has no specific power to modify, is void as a matter of law.

Even when rulemaking powers have been expressly granted to an agency, a court will enforce only those rules that are of the nature clearly authorized and in harmony with the agency's statutory purposes. Where a rule is challenged as being *ultra vires*, a court must determine whether the rule is authorized by the plain

language of the statute, consistent with, and reasonably necessary to carry out the agency's purposes, and not arbitrary.

This principle has constitutional underpinnings, as the Indiana Constitution in Art. 4, § 1, vests the lawmaking power exclusively in the General Assembly. A legislative function cannot be delegated to a governmental officer, board, bureau, or commission. Simply put, the Legislature cannot delegate the power to an agency to make a law or amend one that already exists, as such is exclusively the province of the Legislature. *Tyus v. IPALCO, supra* (citing *Gunderson v. State DNR,* 90 N.E.3d 1171, 1186 (Ind. 2018)); *see also Burk v. State,* 257 Ind. 407, 411, 275 N.E.2d 1, 3 (1979) ("There is no language in the Act which could be construed to mean that the Indiana Board of Pharmacy has been given the authority to redefine a narcotic drug").[7] Similarly, the statute that created the OIG and defines its responsibilities and authority did not expressly give the OIG the power to create a category of ethics opinion unknown to statute and to declare such "informal"

[7] The United States Supreme Court in *West Virginia v. Environmental Protective Agency,* ___ U.S. ___, ___ S. Ct. ____, 2022 U.S. LEXIS 3268 (June 30, 2022), recently reiterated that federal agencies have only those powers given to them by Congress through enabling legislation and showed its willingness to strike down a rule promulgated without *explicit* legislative authority. Noting that extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]," *Whitman v. American Trucking Assn.,* 531 U. S. 457, 468 (2001), the Court observed that Congress typically does not use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 229 (1994).

opinions by rule exempt from disclosure despite APRA's public policy of governmental transparency. Only the Legislature, not an administrative agency, may authorize exceptions to APRA's transparency requirements.

While the General Assembly in section 4(a)(2) of APRA, I. C. § 5-14-3-4(a)(2), granted state agencies a tightly circumscribed power to exempt a public record otherwise subject to public inspection under APRA, that power may be exercised only if the agency's enabling statute specifically authorizes it to classify a particular type of record as confidential. For example, the OIG's enabling statute gives it the specific authority to keep investigative reports and records revealing the identity of informants confidential notwithstanding that they are public records otherwise available for public inspection. I. C. §§ 4-2-7-4(3) and -8(a). But that statute nowhere specifically confers upon the OIG any authority to issue secret advisory ethics opinions at the request of a public officeholder or state employee.

Because the OIG's enabling statute is silent with respect to its ability to issue secret informal advisory opinions to public officials, the OIG exceeded its rulemaking authority and 42 IAC 1-8-1(b)(2) is void and may not be used by Rokita as a reason to withhold the record at issue from Tully and the public.

C. Like any other privilege, the "deliberative materials" exception of section 4(b)(6) of APRA may not be used as both a shield and a sword.

Apart from the question of the validity of 42 IAC 1-8-1(b)(2), Rokita has abused and misused any privilege that rule confers. Tully became aware that Rokita had requested and received an informal opinion from the OIG only because Rokita's spokesperson *publicly* stated that Rokita had requested and received an ethics opinion. Then, going well beyond merely acknowledging his receipt of that opinion, Rokita's spokesperson claimed to a major Indianapolis publication (the *Indianapolis Business Journal*) that the opinion fully absolved him of any conflicts of interest. This public pronouncement waived any privilege of non-disclosure.

Our Supreme Court has ruled that evidentiary privileges, even when supported by sound public policy, "are not lightly created nor expansively construed [because] they are in derogation of the search for truth." *In re C.P.,* 563 N.E.2d 1275, 1277 (Ind. 1990) (quoting *United States v. Nixon,* 418 U.S. 683, 710 (1974)). Such privileges created to shield selected information from public disclosure and scrutiny "may not be wielded as swords at the will of a party." *Purdue Univ. v. Wartell,* 5 N.E.3d 797, 807 (Ind. Ct. App. 2014) (quoting *Madden v. IN DOT*, 832 N.E.2d 1122, 1128 (Ind. Ct. App. 2005)("legislatures [not administrative agencies] create evidentiary privileges to shield selected information from discovery, and those shields may not be wielded as swords at the

will of a party, in turn citing *Brown v. State,* 525 N.E.2d 294, 296 (Ind. 1988) ("The privilege against self-incrimination was designed as a shield and not a sword")). Thus, for example, a party waives the privilege against self-incrimination if he refuses to testify under oath after publicly proclaiming his innocence of the crime with which he's been charged. By the same token, neither may a party place his mental or physical condition at issue and then resist discovery of his medical records by invoking the physician-patient privilege. *Watson v. State,* 784 N.E.2d 515, 520 (Ind. Ct. App. 2003) (citing *Collins v. Bair,* 256 Ind. 230, 268 N.E.2d 95, 99 (1971) ("Where a patient in effect elects to publish the *substance* of these communications, the privilege's objective can no longer be legitimately accomplished and the privilege must be deemed waived") (emphasis added).

Our court of appeals has expressly adopted waiver in cases brought pursuant to APRA, finding that doing so would not undermine the purposes of APRA's statutory exceptions. *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.,* 787 N.E.2d 893, 919 (Ind. Ct. App. 2003) ("Nor do we believe that [adopting waiver] would frustrate the underlying purpose of the APRA exceptions, for if the agency has already disclosed the allegedly non-disclosable materials, the purpose of the APRA exceptions will have already been compromised"). *Ind. Newspapers* also observed that the decision to deny access after allowing it to others "could be considered an arbitrary and capricious abuse of

discretion" within the meaning of section 9(g)(2) of APRA, I. C. § 5-14-3-9 (g)(2). And while the Attorney General may wish to limit waiver to the facts of that case, *any* outside disclosure of the substance of an otherwise public record waives a common-law or statutory privilege of non-disclosure.[8]

Here, Rokita seeks to use the discretionary section 4(b)(6) "deliberative materials" exception of APRA as both a shield and a sword. He previously used it as a sword when his spokesperson publicly claimed the OIG opinion completely exonerated him of any violation of the code of ethics governing state employees. Just as a criminal defendant may not publicly claim innocence and then seek to avoid giving under-oath testimony by invoking the privilege against self-incrimination, a public official who claims that he has obtained an opinion from the State's chief ethics officer that completely exonerated him of any unethical conduct should not thereafter be permitted to misuse APRA to shield that opinion from public scrutiny. *All* privileges are subject to waiver when used offensively rather than defensively, i.e., as a "sword rather than a shield." *State v. IBM,* 964 N.E.2d 206, 212 (Ind. 2012) (Sullivan, J., concurring).

[8]Given APRA's broad policy in favor of governmental transparency, Indiana's appellate courts have directed that the exceptions from disclosure in APRA be strictly construed. *Sullivan v. NEDC,* 182 N.E.3d 859, 868 (Ind. Ct. App. 2022) (citing *Robinson v. Indiana Univ.,* 659 N.E.2d 153,156 (Ind. Ct. App. 1995)).

Moreover, the deliberative materials privilege is a qualified privilege which can be overcome by a sufficient showing of need on a case-by-case basis. For example, in cases under the Freedom of Information Act where (as here) the request involves a public official whose conduct has been questioned, the privilege is routinely denied on the grounds that even shielding internal governmental deliberations does not serve "the public's interest in honest, effective government." *In re Sealed Case,* 121 F.3d 729, 737-38 (D.C. Cir. 1997) (quoting *Texas Puerto Rico, Inc. v. Dep't of Consumer Affairs,* 60 F.3d 867, 885 (1st Cir. 1995)).

Rokita waived any discretionary non-disclosure privilege by publicly touting the OIG's opinion as a complete exoneration, and his refusal to grant Tully access to that opinion was arbitrary and capricious under section 9 (g)(2) of APRA, I. C. § 5-14-3-9 (g)(2).

D. The OIG's opinion is not "deliberative material" as it represents a final rather than a draft opinion.

Even if Rokita had not waived reliance on the deliberative materials exception, he could not successfully claim it because it does not apply. The purpose of the "deliberative materials" exception is to "prevent injury to the quality of agency decisions." *Ind. Newspapers,* 787 N.E.2d at 909-910 (quoting *Newman v. Berstein,* 766 N.E.2d 8, 12 (Ind. Ct. App. 2002) (in turn quoting *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132 (1975)). As the Supreme Court observed in *Ind. Newspapers*, *supra,* 787 N.E.2d. at 910, "it is difficult to see how the quality

of a decision will be affected by communications with respect to the decision *after* the decision is finally reached…as long as prior communications and the ingredients of the decision-making process are not disclosed." (emphasis added).

Tully does not seek earlier drafts or any information about the process itself, only the OIG's final opinion. Ordering the release of that opinion pursuant to APRA cannot conceivably harm the quality of the OIG's expedited response to Rokita's request. Moreover, the opinion at issue was submitted at the request and for the benefit of Rokita, not any department head or employee for the purpose of governmental decision-making. No other ethics opinions are considered exempt as "deliberative," and they are routinely released to the public, *supra,* at 10-11.

E. The OIG's opinion likely contains disclosable factual materials such that the Attorney General was required by section 6(a) to make those factual materials available for inspection.

Section 6(a) of APRA states that "if a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request, separate the material that may be disclosed and make that material available for inspection and copying," by redacting any nondisclosable materials. I. C. § 5-14-3-6(a); *Ind. Newspapers, Inc. v. Trs. of Ind. Univ.,* 787 N.E.2d at 902. This mandate is triggered automatically by a request for access under APRA and does not require a specific separate request for redaction by the party seeking access. *Id.* at n. 10.

This Court is fully competent to make this determination based on its *in camera* review of the OIG's opinion.

III. CONCLUSION

For the foregoing reasons Plaintiff Barbara Tully respectfully requests that the Court declare that the Defendant Theodore "Todd" Rokita, in his official capacity as the Indiana Attorney General, has violated the APRA by failing to make the OIG opinion available to her for inspection and copying and that he failed to timely respond to her APRA request. Tully also requests that the Court enjoin and/or order Rokita to produce that opinion to her for inspection and copying; that it award her reasonable attorneys' fees and costs pursuant to APRA section 9(i)'s mandatory fee-shifting provision; and that it grant her any further just and proper relief to which this Court may deem her entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2022, a copy of the foregoing was filed electronically. Service of this filing will be made on all IEFS-registered counsel by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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