

indicated ‘his business interest and the 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.

DISCUSSION

Defense counsel argues that the informal advisory opinion authorized under Rule 8 of the Code of Ethics is specific to the person who requests the opinion and shall be considered confidential. (42 I.A.C. § 1-8-1(b)(1) and (2)). 42 I.A.C. § 1-8-1(b)(2) expressly references the confidentiality provided as an exception under the Indiana Access to Public Records Act (“APRA”)(I.C. § 5-14-3). Generally, APRA reflects the policy of our legislature to promote disclosure of the affairs of government. Chapter 3 “shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” *Id.* However, there are exceptions identified within APRA. Here Defense Counsel argues that the deliberative materials exemption (I.C. § 5-14-3-4(b)(6)) specifically referenced in Rule 8 (42 I.A.C. § 1-8-1(b)(2)) categorically exempts the Defendant from APRA’s public disclosure requirements at the discretion of the public agency.

Code of Ethics Rule 8 recognizes the general authority of the IG to issue informal advisory opinions. However, Rule 5 (42 I.A.C. § 1-5-1 *et seq*) specifically addresses the issue of outside employment. (42 I.A.C. § 1-5-5). “Outside employment restrictions are set forth in I.C. § 4-2-6-5.5.” *Id.* I.C. § 4-2-6-5.5 addresses incompatible outside employment and is the purview of the Indiana Ethics Commission (“Commission”). The Commission was established, in part, to act as an advisory body by issuing opinions to interpret Indiana Code chapters, I.C. § 4-2-6, I.C. § 4-2-7, or the rules adopted under those chapters upon the request of a state officer. (I.C. § 4-2-6-4(b)(1)(i). As acknowledged by the parties, the Code of Ethics Rules were adopted under I.C. § 4-2-7. The Commission is authorized by the legislature to interpret the Rules.

In the circumstances presented here, the IG’s Code of Ethics Rule 8 is not harmonious with Rule 5. The Rules address this incongruity in Rule 2 (42 I.A.C. § 1-2-1(a)) which recognizes that the Rules are generally aspirational, but “42 I.A.C. 1-3 through 42 I.A.C 1-5 are mandatory in character. . . .” *Id.* As discussed, Rule 8 generally addresses ethical concerns which state employees may have. Rule 5 (42 I.A.C. § 1-5-5) explicitly addresses the very issue at stake in these proceedings--outside employment. Rule 5 expressly recognizes the statutory

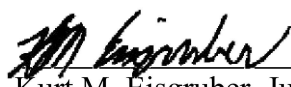
authority (I.C. § 4-2-6-5.5) of the Indiana Ethics Commission. In matters of outside employment, the Defendant's reasoning would allow a state employee to determine whether to request an informal advisory opinion under Rule 8, or be subject to a more public review by the Commission subject to APRA. Such a work around would allow the IG to promulgate rules which clearly exceed the IG's statutory authority. It would also circumvent the purpose of the Rules (42 I.A.C. 1-2-1(a)). Both the Rules and the law mandate a review of outside employment in compliance with the Commission's purview and APRA.

ORDER

In summary, this Court GRANTS Summary Judgment on behalf of the Plaintiff and DENIES the Defendant's Cross Motion for Summary Judgment, and more specifically finds as follows:

1. The informal advisory opinion addresses outside employment which is subject to review by the Indiana Ethics Commission and APRA. The deliberative materials exception (I.C. § 5-14-3-4(b)(6)) does not apply nor does any other APRA exception. In this unique circumstance, the opinion "shall be available for inspection and copying in accordance with I.C. § 5-14-3." (I.C. § 4-2-6-4(c)).
2. This Court has reviewed a copy of the opinion *in camera*, and invites the Defendant to present a redacted copy of the opinion for the Court's consideration not later than thirty (30) days from the date of this Order;
3. Pursuant to I.C. § 5-14-3-6(a), this Court will then issue a redacted copy of the informal advisory opinion; and
4. This Court does not award attorney's fees at this time.

So ORDERED January 3, 2023.


Kurt M. Eisgrubger, Judge
Marion Superior Court
Civil Division, room 6

Distribution to:

Service will be made electronically on all counsel of record via email generated by the Court's IEFS system.

