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

PLAINTIFF TULLY'S BRIEF IN OPPOSITION
TO DEFENDANT ROKITA'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff, Barbara Tully, filed her Complaint in this Court on July 28, 2021, under the Indiana Access to Public Records Act ("APRA"), Ind. Code §§ 5-14-3-1, *et seq.,* seeking production of a purported opinion allegedly sought by Defendant, Todd Rokita, in his official capacity as Indiana Attorney General[1], issued by the Indiana Inspector General's ("IG") Office. That opinion purportedly absolves Rokita of any ethical implications arising out of his continued business interests and outside employment when he assumed the office of Indiana Attorney General.

[1] References to "Rokita" are to the Defendant, who is sued in his official capacity as Indiana Attorney General.

Having first sought and obtained an advisory opinion from the Indiana Public Access Counselor ("PAC"), Tully seeks (1) an order that Rokita produce that opinion for public inspection; (2) a declaration that Rokita violated APRA by failing to produce that opinion for inspection and/or timely responding to Tully's request; (3) an *in camera* review of the purported IG opinion as permitted by § 9(h) of APRA to determine *de novo* whether Rokita has sustained his burden to deny disclosure of the IG opinion under § 9(f) of APRA, as well as whether any portions of the IG opinion are factual and thus disclosable; (4) an assessment of civil penalties against Rokita as permitted by § 9(j) of APRA; (5) an award to Tully of her fees and costs as provided by § 9(i) of APRA; and (6) any other just and appropriate relief. She requests that the Court expedite its consideration of her Complaint pursuant to the mandate in § 9(l) of APRA that a court "shall expedite the hearing of an action" filed under APRA.

On October 12, 2021, after obtaining two extensions, Rokita filed his Motion to Dismiss under Ind. Trial Rule 12(B)(6), along with a supporting Memorandum of Law, in which he contends the Court should dismiss Tully's Complaint for failing to state a claim upon which relief may be granted. The Court should expeditiously consider, and deny, Rokita's motion and permit this case to proceed forward to resolution on the merits.

II. ARGUMENT

A. Rule 12(B)(6) Motions to Dismiss are strongly disfavored

Defendant Rokita seeks dismissal of Plaintiff's Complaint under Ind. Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted. When ruling on such a motion, this Court's obligations are straightforward and well-established. The Court is required to "view the pleadings[2] in the light most favorable to the nonmoving party [here, Tully], with *every reasonable inference construed in the non-movant's favor.*" *Robertson v. State,* 141 N.E.3d 585, 587 (Ind. 2020), citing *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015) (citation omitted) (emphasis added). A T.R. 12(B)(6) motion to dismiss tests only the legal sufficiency of the complaint, and it requires this Court to "accept as true the facts alleged in the complaint." *Trail v. Boys and Girls Clubs of Northwest Indiana,* 845 N.E.2d 130, 134 (Ind. 2006) (citation and brackets omitted). Dismissal is appropriate *only* if the allegations "are incapable of supporting relief under *any* set of circumstances." *Price v. Ind. Dept. of Child Services,* 80 N.E.3d 170, 173 (Ind. 2017) (quoting *Thornton,* 43 N.E.3d at 587) (emphasis added).

Rokita's Rule 12(B)(6) motion requires this Court to determine whether the allegations in Tully's Complaint establish *any* set of circumstances under which

[2] T.R. 10(C) provides that a copy of any written instrument which is an exhibit to a pleading "is a part thereof for all purposes."

Tully would be entitled to any relief. *Charter One Mortg. Corp. v.Condra,* 865 N.E.2d 602, 604, 605 (Ind. 2007). Since Rule 12(B)(6) dismissals are "rarely appropriate," *State v. Am. Fam. Voices, Inc.,* 898 N.E.2d 293, 295-96 (Ind. 2008), and are viewed with disfavor because they undermine the policy of deciding causes of action on their merits, *Duty v. Boys & Girls Club of Porter Co.,* 23 N.E.3d 768, 771 (Ind. Ct. App. 2014), Tully's Complaint may not be dismissed under Rule 12(B)(6) unless it appears to a certainty, *on the face of the Complaint*, that Tully is not entitled to *any* relief. *A.B. v. S.B.*, 837 N.E.2d 965, 966 (Ind. 2005) (emphasis added); *City of New Haven v. Reichhart,*748 N.E.2d 374, 377 (Ind. 2001); *Martin v. Shea*, 463 N.E.2d 1092, 1093 (Ind. 1984); *Heber v. Indianapolis Metro. Police Dept.,* 58 N.E.3d 995, 997 (Ind. Ct. App. 2016) (because APRA ensures that citizens have full and complete information regarding the affairs of government, APRA is to be liberally construed to implement this policy and places the burden of proof on the agency that would deny access rather than on the requestor).

B. *The Court is required to accept as true the allegations in Tully's Complaint*.

Tully, an Indiana citizen, filed this action against Defendant Rokita under APRA, seeking to compel the production of a purported[3] opinion from the IG's Office that Rokita claims concludes that his "interests and outside employment are

[3] The only evidence of the existence of this report at this juncture is the information provided by Rokita's spokespersons to certain members of the media.

all squarely within the boundaries of the law and do not conflict with his [Rokita's] official duties." (Complaint ¶ 6 & Exh. A).

Rokita's outside employment was first reported by the newsletter *Importantville*, and the purported IG's opinion was thereafter highlighted in an article by reporter Lindsey Erdody appearing in the *Indianapolis Business Journa*l on February 16, 2021. (Complaint ¶ 6 and Exhibit A). That article reported that Rokita was continuing to work for a private health care benefits company while serving in his elected position as Indiana Attorney General. It further reported that Rokita had been working for Indianapolis-based Apex Benefits since February 2019, and that he was continuing to serve as a strategic policy advisor for Apex, having previously worked as its general counsel and vice president of external affairs. It also reported that Rokita possessed an ownership interest in Apex.

The *IBJ* article contains a quote from Lauren Houck, identified therein as a spokeswoman for Rokita, in which Houck asserts that Rokita had "sought and received an opinion from the Inspector General's Office that indicated 'his interests and outside employment are all squarely within the boundaries of the law and do not conflict with his official duties.'" (Complaint Exh. A p. 2). Houck asserts therein that Rokita received this opinion on January 15, 2021, having requested it only three days earlier on January 12, 2021, and only one day after former Inspector General Lori Torres had joined Rokita's staff as his chief deputy

attorney general and chief of staff. Rokita's director of communications, Molly Deuberry Craft, claimed that Torres "was not involved whatsoever" with the opinion. (*Id.* p. 3).

On or about February 25, 2021, Tully submitted a written request to Rokita under APRA for the IG's opinion. (Complaint, Exhibit B). She waited several weeks after no response whatsoever before filing a formal complaint with the PAC. (*Id.* ¶¶ 8, 9). The PAC opined that Rokita as the recipient of the report had discretion under Ind. Code § 5-14-3-4(b)(6) not to disclose the purported IG opinion because it "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.* ¶¶ 10, 11; Exhibit C). However, the PAC was not given access to or allowed to review the opinion. The PAC also opined that the "reasonable time" for Defendant's required response under APRA had elapsed. (*Id.* ¶ 12). Rokita did not respond to Plaintiff's ARPA request until July 26, 2021, nearly three (3) months after the PAC had issued his informal advisory opinion. In his response, Rokita, for the first time, asserted that the IG's advisory opinion was "discretionarily disclosable under I.C. § 5-14-3-4(b)(6)" as "interagency advisory or deliberative material," and that his office was "exercising its statutory discretion to withhold this record." (*Id.* ¶ 13, Exhibit D).

Tully thereupon filed this action under APRA. In her Complaint she seeks several remedies. First, she requests that the Court review the purported IG opinion *in camera* pursuant to I.C. §§ 5-14-3-6(a) and -9(h) to determine whether any portions should be redacted as "deliberative materials" before disclosure.

Second, she seeks a declaration that Defendant violated the APRA both by failing to respond "[w]ithin a reasonable time" after her request was received [I.C. § 5-14-3-3(b)] either by providing the requested record or invoking a statutory exception to disclosure, and by refusing to produce the purported IG opinion.

Third, she asks this Court to order production of the document at issue.

Fourth, she asks this Court to assess the civil penalties against Defendant as permitted by I.C. § 5-14-3-9(j) and -9.5(e).

Fifth, she seeks attorney fees and costs as permitted by I.C. § 5-14-3-9(i).

C. Overview of the APRA

APRA is a comprehensive statute enacted to enforce the express public policy of Indiana that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." I.C. § 5-14-3-1. The legislature has expressly directed that the APRA be "liberally construed," with the burden for nondisclosure resting squarely on the public agency denying access. *ESPN, Inc. v. Univ. of Notre Dame Police Dep't.,* 62 N.E.3d 1192, 1196 (Ind.

2016) (citing *Evansville Courier & Press v. Vanderburgh Cty. Health Dept.,* 17 N.E.3d 922, 928 (Ind. 2014) ("APRA is intended to ensure Hoosiers have broad access to most government records.")). Given the APRA's express public purpose of promoting government transparency, all presumptions weigh in favor of disclosure, *Evansville Courier,* 17 N.E.3d at 929, and APRA's terms are to be applied and construed in a manner consistent with this statutory directive. *Shepherd Properties Co. v. Int'l Union of Painters & Allied Trades, Dist. Council 91*, 972 N.E.2d 845, 852 (Ind. 2012) ("We presume that the legislature intended the language used in the statute to be applied logically and consistently with the APRA's underlying policy and goals.").

Where (as here) there is no dispute that an agency is covered by APRA, the burden of proof in the trial court to sustain a denial of access is on the public agency. I. C. § 5-14-3-9(f), (g)(1). The trial court does not presume the agency's denial of access was appropriate, but rather "determine[s] the matter de novo." I.C. § 5-14-3-9(f). Where the agency denies access because it contends the record is subject to discretionary non-disclosure under § 4(b) of the APRA:

> (1) the public agency meets its burden of proof under this subsection by:
>
> (A) proving that:
>
> (i) the record falls within any one (1) of the categories of exempted records under § 4(b) of this chapter; and

> …
>
> (B) establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit; *and*
>
> (2) a person requesting access to a public record meets the person's burden of proof under this subsection by proving that the denial of access is arbitrary or capricious.

I.C. § 5-14-3-9(g)(1)-(2).

In keeping with the APRA's purposes and presumptions, as well as the statutory mandate that it be "liberally construed to implement" its policy of governmental transparency, I.C. § 5-14-3-1, all of the APRA's statutory exceptions to disclosure must be construed narrowly. *Consumer Attys. Servs., P.A. v. State,* 71 N.E.3d 362, 366 (Ind. 2017) ("Liberal construction of a statute requires narrow construction of its exceptions"); *Robinson v. Indiana Univ.*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995) (noting that the APRA's exceptions to disclosure must be narrowly construed); see also *Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J,* 952 P.2d 66, 69-70 (Ore. Ct. App. 1998) (application of a waiver to a claimed exemption of a public record from disclosure should be consistent with public policy that government be transparent and public records open to the public).

D. Whether Rokita waived the privilege to withhold release of the purported IG opinion is an issue wholly unsuited for resolution on a Rule 12 (B)(6) motion to dismiss

1. Whether waiver occurred is a factual determination

Rokita claims Tully's APRA Complaint should be dismissed for failure to state a claim merely because he invoked (albeit not until several months after receiving Tully's APRA request) the deliberative materials exception of § 4(b)(6) of the APRA to justify his refusal to disclose the purported IG opinion. As our Court of Appeals held in *Indianapolis Star v. Trustees of Indiana Univ.,* 787 N.E.2d 893, 918-19 (Ind. Ct. App. 2003), an entity subject to APRA[4] can waive the deliberative materials discretionary exception by disclosing the allegedly non-disclosable materials.[5] ("We disagree with the Trustees' suggestion that, simply because APRA contains no waiver provision, a public agency cannot waive the exceptions to public disclosure").

While the Court of Appeals in *Indianapolis Star* affirmed the lower court's finding that the trustees had not waived the exception, it is important to note that the trial court's rejection of waiver was made after a summary judgment proceeding in which the trial court had assessed evidentiary materials. The trial court's rejection of the newspaper's waiver contention was not made as a matter of law on a Rule 12 (B)(6) motion without the benefit of discovery and the

[4] Rokita does not dispute that his office is a public agency or that the IG opinion Plaintiff asks his office to produce is a public record.

[5] The waiver principle that our appellate courts have applied to APRA requests is consistent with Indiana Rule of Evidence 501(b), which states that a privilege to shield selected information from disclosure is waived if the holder of that privilege voluntarily discloses "any significant part of the privileged matter."

submission of evidence. In affirming the trial court's finding that the trustees had not waived the exemption, the *Indianapolis Star* Court held that an agency waives a discretionary exemption if it "has already disclosed the allegedly non-disclosable materials, [as] the purpose of the APRA exception will have already been compromised." Where an agency has publicly disclosed the materials that it subsequently refuses to provide access to upon request, the agency's refusal "could be considered an arbitrary and capricious abuse of discretion." 787 N.E.2d at 919.

Here, Rokita did not submit an affidavit under oath to justify his refusal to disclose the IG opinion as § 9(g) of APRA requires for him to meet his burden of proof. Therefore, since Rokita has refused to provide the evidence that the APRA requires him to provide in order to justify his refusal to disclose the IG opinion, his request to dismiss Tully's Complaint as a matter of law fails as a matter of law. Instead of following the law, Rokita asks this Court to ignore the law and assume, without evidentiary basis, that (1) the IG opinion exists, (2) it completely exonerates him from any ethical breaches, (3) there were no disclosures of the purported IG opinion apart from the verbal summary given to the media, and (4) the opinion contains no disclosable factual as opposed to non-disclosable deliberative materials. None of these issues may be adjudicated in a motion to dismiss, where all presumptions are to be drawn in favor of the non-movant. Dismissing Tully's Complaint at this preliminary stage would deny her the

opportunity to engage in even limited discovery to uncover evidence that Defendant's denial of access was "arbitrary and capricious" under § 9 (g)(2). See *Indiana ABC v. Spirited Sales, LLC,* 79 N.E.3d 371, 380 (Ind. 2017) (a decision is arbitrary and capricious if it is made without consideration of the facts and in total disregard of the circumstances).

2. Dismissal at this stage of this litigation would deny Plaintiff the opportunity to ask this Court to perform an *in camera* review of the IG opinion.

The Court of Appeals in *Indianapolis Star* squarely rejected the absolutist position Rokita is advocating—that the presence of *any* non-disclosable deliberative materials exempts the *entire* document from disclosure. The *Indianapolis Star* Court recognized that § 6 of APRA requires a public agency to separate disclosable materials in a public record from non-disclosable materials, I.C. § 5-14-3-6(a), and it remanded to the trial court "to review and redact or otherwise separate any [non-disclosable] information contained in the Reed materials." It further ordered that any "factual" (as opposed to deliberative) information be produced to the plaintiff newspaper. 787 N.E.2d at 921.

This is one aspect of the relief Tully seeks in her Complaint. ("Plaintiff respectfully requests that the Court…[r]eview the IG opinion *in camera* pursuant to I.C. §§ 5-14-3-6(a) and -9(h) to the extent needed to determine whether any portions should be redacted as 'deliberative materials' before disclosure.")

Complaint, ¶ 4. Dismissal of the Complaint at this early stage would deny this Court any opportunity to perform an *in camera* review of the IG opinion and would raise serious constitutional due process issues. In fact, it would be impossible for this Court to perform the analysis required by *Indianapolis Star* without first performing an *in camera* review of the IG opinion. *Tax Analysts v. Ind. Econ. Devel. Corp.,* 162 N.E.3d 1111, 1116 (Ind. Ct. App. 2020), *trans. denied* (determining records were statutorily exempt under APRA only after both the trial and appellate courts reviewed them *in camera*); *Groth v. Pence,* 67 N.E.3d 1104, 1112-13 (Ind. Ct. App. 2017) (holding that the particular record sought pursuant to APRA was not disclosable, but only after both the trial and appellate courts had reviewed it *in camera*).

3. Dismissal is particularly inappropriate where discovery may reveal official malfeasance

As a qualified rather than absolute privilege, the deliberative materials exception may be overcome where necessary to "shed light on alleged government malfeasance." *In re Sealed Case,* 121 F.3d 729, 737-38 (D.C. Cir. 1997). For this Court to grant Rokita's motion would deprive Tully of any opportunity to pursue limited discovery concerning whether the document exists or whether it may reveal potential malfeasance by an elected official. *In re Comptroller of the Currency,* 967 F.2d 630, 634 (D.C. Cir. 1992).

4. Tully's Complaint properly seeks declaratory relief and an assessment of statutory penalties

Despite his acknowledgement that he did not respond to Tully's APRA request within a reasonable time, Rokita nevertheless asks that Tullly's Complaint be dismissed, arguing that Tully is not entitled to seek declaratory relief or civil penalties provided by APRA. (Brief in Support of MTD, at 8-11). Once again, Rokita is incorrect as a matter of law.

Rokita says that declaratory relief is not available because it is not expressly authorized by APRA. *Id.* at 9. Yet, the Uniform Declaratory Judgment Act allows a party "whose rights, status, or other legal relations are affected by a statute…[to] have determined any question of construction or validity arising under the …statute" via declaratory judgment. I.C. § 34-14-1-2. The entitlement to declaratory judgment "is to be liberally construed and administered." I.C. § 34-14-1-12. A plaintiff seeking declaratory relief must only demonstrate a "substantial present interest in the relief sought." *Holcomb v. City of Bloomington,* 158 N.E.3d 1250, 1256 (Ind. 2020) (internal quotations and citations omitted).

Contrary to Rokita, declaratory relief is *always* available in any civil suit whenever the plaintiff has a substantial present interest in the relief sought and there is a justiciable controversy or question which is clearly defined and affects the legal right, status or relationship of parties having adverse interests. *Midwest Psychological v. Ind. Dep't of Administration,* 959 N.E.2d 896, 903 (Ind. Ct. App.

2011) (quoting *Hibler v. Conseco, Inc.,* 744 N.E.2d 1012, 1023 (Ind. Ct. App. 2001)); *Little Beverage Co., Inc. v. DePrez,* 777 N.E.2d 74, 83 (Ind. Ct. App. 2002). Declaratory relief is available where there is no available administrative remedy. *Carter v. Nugent Sand Co.,* 925 N.E.2d 356, 361 (Ind. 2010). APRA does not provide any administrative remedy, for though the PAC may issue an opinion under I.C. § 5-14-4-5 and -10(6), the opinion is advisory only and not binding on a court of law.

Indeed, declaratory relief has been frequently and routinely sought in APRA cases, and Rokita, save for an inapposite 75-year-old ruling, cites no authority holding that declaratory relief is unavailable under APRA, as no such authority exists. See, *e.g., Evansville Courier & Press v. Vanderburgh Co. Health Dep't.*, 17 N.E.3d at 929 (reversing denial of declaratory relief in an APRA action); *Risk Metrics Corp. v. Ind. Comp. Ratings Bureau,* 85 N.E.3d 891, 896 (Ind. Ct. App. 2017) (suit for declaratory relief under APRA); *Jent v. Fort Wayne Police Dep't.,* 973 N.E.2d 30, 31 (Ind. Ct. App. 2012) (suit under APRA for declaratory and injunctive relief); *Indianapolis Star v. Trustees of Indiana Univ.,* 787 N.E.2d at 906 (suit under APRA for declaratory and injunctive relief); *Indianapolis Newspapers v. Ind. State Lottery Comm'n,* 739 N.E.2d 144, 150 (Ind. Ct. App. 2000) (holding that trial court did not err in denying Rule 12(b)(6) motion to dismiss APRA suit seeking declaratory relief).

Rokita lastly contends (Memorandum in Support at 10) that civil penalties are not available to Tully because the PAC did not find Rokita had violated APRA other than by his unreasonable delay in responding to Tully's APRA request. He claims that civil penalties authorized by APRA are allowed "only when the PAC tells the agency (pre-suit) that it has [to] disclose the public record and the agency refuses." *Id.* However, Rokita once again cites no authority in support of that argument, and the statute, § 9(j) and 9.5, only requires, as a precondition to a court imposing a statutory fine, that a plaintiff has sought and obtained an advisory opinion from the PAC as Tully has done. There is no requirement whatsoever—either in the APRA or in the case law—that an APRA plaintiff obtain a favorable opinion for the PAC in order for the trial court to assess civil penalties against the public agency. And, the question before the Court at this juncture is not whether civil penalties should be assessed, but rather whether Tully is *potentially* entitled to this or any other relief under APRA. Since Tully has stated several viable claims for relief, Rokita's Motion to Dismiss must be denied.

III. CONCLUSION

For each of the foregoing reasons Defendant Rokita's T.R. 12 (B)(6) motion to dismiss should be expeditiously denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2021, 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.

/s/ William R. Groth
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