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In the
Indiana Court of Appeals
Case No. **23A-PL-00705**

THEODORE ROKITA, *Defendant-Appellants* *v.*	Appeal from the Marion County Superior Civil Court D06 Trial Court Case No. 49D06-2107-PL-025333
BARBARA TULLY, *Plaintiff-Appellees*	The Honorable: Kurt Eisgruber, Judge

Brief of Appellant Theodore Rokita

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I. Statement of Issues [1]

Issue No. 1: Whether Indiana Code Section 4-2-7-3(9) (effective July 1, 2023), which declares all informal advisory opinions ("**IG Opinions**") confidential on a retroactive basis, applies to the IG Opinion at issue in this appeal.

Issue No. 2: Whether the Office of Inspector General ("**IG**") exceeded its statutory authority by issuing an IG Opinion on a question related to Attorney General Theodore Rokita's ("**AG Rokita**") outside employment.

Issue No. 3: Whether the IG was statutorily authorized to create an administrative rule stating the deliberative-materials exception (Ind. Code § 5-14-3-4(b)(6) (2023)) applies to IG Opinions it issues.

Issue No. 4: Whether the IG Opinion falls under APRA's deliberative-materials exception.

II. Statement of Case

The General Assembly created the IG and directed it to implement a code of ethics through rulemaking. I.C. § 4-2-7-3 (5) (2023), which the IG did by establishing the Indiana Code of Ethics, 42 Ind. Admin. Code 1-5-1 (2023) *et seq.*, ("**Rule(s)**"), a core component of which authorizes the IG and its staff to render advice to state employees concerning the Code of Ethics through confidential informal advisory opinions. I.C. §§ 4-2-7-3, -5; 42 Ind. Admin. Code 1-8-1 ("**Rule 8**"). AG Rokita sought and received an IG Opinion shortly after he assumed office in

[1] This Appellant's Brief is filed pursuant to this Court's Notice of Defect, dated July 20, 2023. Appellant has submitted the appealed order as a separate attachment in the envelope.

January 2021,[2] and Barbara Tully subsequently submitted a public records request, pursuant to Indiana's Access to Public Records Act (Ind. Code § 5-14-3-1, *et seq.*) ("**APRA**") for the IG Opinion. Appellant's App. Vol. II p. 54. But the Office of the Attorney General did not provide her a copy. *Id.* at 50-56.[3]

Ms. Tully then filed a complaint against the AG Rokita under APRA, *see id.* at 45-49, which creates a narrow cause of action for a person who has been "denied the right to inspect or copy a public record by a public agency" in order to compel disclosure of the record. Ind. Code § 5-14-3-9(e). On October 12, 2021, AG Rokita moved to dismiss the complaint (Appellant's App. Vol. II p. 58-60); the Court denied this motion on January 18, 2022. *Id.* at 102. AG Rokita then submitted the IG Opinion to the trial court for *in camera* review. *Id.* at 116-17. On August 15, 2022, Ms. Tully filed her motion for summary judgment (*id.* at 118-22), and AG Rokita filed a cross-motion for summary judgment. *Id.* at 148-51.

The trial court granted summary judgment in favor of Ms. Tully finding that the IG exceeded its authority when it issued an IG Opinion to AG Rokita, and that the Indiana Ethics Commission ("**Commission**") should have been the government body to issue any advisory opinion, not the IG. *Id.* at 13-15. Further, the trial court noted an advisory opinion from the Commission would be public. *Id.*

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[2]The IG Opinion at issue in this case was submitted to this Court for its *in camera* review on July 19, 2023, pursuant to this Court's order dated June 28, 2023.

[3]The Attorney General's Office received another APRA request for the IG Opinion at issue in this matter from an individual other than Ms. Tully. Appellant's App. Vol. II p. 168. It denied that request as well. *Id.*

The trial court found that, generally, APRA reflects the policy of the legislature to promote disclosure of the affairs of government. *Id.* at 14-15. The trial court recognized that APRA "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.* at 14. AG Rokita, however, argued below that there are exceptions to ARPA including (1) an informal advisory opinion, authorized under Rule 8, (42 IAC 1-8-1(b)(2)), which is specific to the person who requests the opinion and shall be considered confidential; and (2) the deliberative-materials exemption (I.C. § 5-14-3-4(b)(6)), specifically referenced in Rule 8, which exempted the IG Opinion AG Rokita received from APRA's public disclosure requirements. *See e.g.*, Appellant's App. Vol. II p. 64-65.

The trial court found, however, that, while Code of Ethics Rule 8 recognizes the general authority of the IG to issue informal advisory opinions, Rule 5 specifically addresses the issue of outside employment, and Indiana Code section 4-2-6-5.5 addresses "incompatible outside employment." Appellant's App. Vol. II p. 14. As a result, the court found that "the IG's Code of Ethics Rule 8 is not harmonious with Rule 5" and that:

> 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. . . ." 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.

Id. at 14-15 (citation omitted).

The court also found that allowing a state employee to determine whether to request an

informal advisory opinion under Rule 8 or be subject to "a more public review" by seeking a formal opinion under APRA would "allow the IG to promulgate rules which clearly exceed the IG's statutory authority" and would circumvent the purpose of the Rules. *Id.* at 15. The trial court held that both the Rules and the law mandate a review of outside employment by the Commission through a public formal opinion and ordered the IG Opinion to be made public. *Id.*

III. Statement of Facts

The General Assembly created the Office of Inspector General in 2005 and charged it with addressing fraud, waste, abuse, mismanagement, and wrongdoing in state government. Ind. Code § 4-2-7-2. The IG's duties include initiating investigations, receiving ethics complaints, recommending policies, and providing advice to prevent, and eradicate fraud, waste, abuse, mismanagement, and misconduct in state government, among other things. I.C. § 4-2-7-3. To that end, the General Assembly directed the IG to implement a code of ethics through rulemaking. *Id.* at (5), which the IG did by adopting the Rules. *See* 42 I.A.C. 1-5-1 *et seq*.

A core component of the Rules authorizes the IG and its staff to render advice to state employees concerning the Ethics Statutes through informal advisory opinions. I.C. §§ 4-2-7-3, -5; 42 I.A.C. 1-8-1. Alongside its mission to investigate and prosecute violations of the Ethics Code, the IG serves the State by heading off potential ethical dilemmas by providing informal advisory opinions on short order (in under two days), Appellant's App. Vol. II p. 154-55, which is a service available to the State's nearly 30,000 employees. *Id.* The process is designed to improve state officials' compliance with state ethical standards by providing proactive legal advice on the application of the ethics rules before officials act. The IG prioritizes informal

advisory opinions as necessary to "good government service." *Id.* at 161. And these informal advisory opinions are a significant part of the IG's work. For example, in 2021, the IG received 248 requests for informal advisory opinions from those seeking advice on the application of the Ethics Code to specific sets of circumstances and issued 246 informal advisory opinions. *Id.* By contrast, the Commission issued 11 formal advisory opinions in the same year. *Id.* at 162.[4]

The General Assembly has also recently adopted a statute which states the IG has the statutory authority to issue informal advisory opinions that are confidential on a retroactive basis. I.C. § 4-2-7-3(9) ("The [IG] shall do the following . . . Provide informal advisory opinions to current, former, and prospective state employees, state officers, and special state appointees."). This revised statute also specifies that an informal advisory opinion from the IG "is confidential under I.C. § 5-14-3-4, including any previously issued informal advisory opinion by the office of the inspector general that recites that it is confidential". This statute became effective on July 1, 2023, while this appeal was pending. *Id.*

Even before this new addition to the IG's statutory authorization, the IG had established by rule a confidential informal advisory opinion process. Rule 8 of the Code of Ethics provides that "informal advisory opinions are expressions of opinion that are communicated for the purpose of deliberation and decision making." 42 I.A.C. 1-8-1. And the "information and advice contained

[4]Unlike informal advisory opinions, which are intended to provide quick, confidential advice, the formal advisory opinion process is public—the Commission receives evidence under oath at a public meeting and issues a detailed opinion that serves as the final determination on the matter and is posted on the Inspector General's website. Appellant's App. Vol. II p. 162.

in an informal advisory opinion: (1) are specific to the person who requests the opinion and the facts presented; and (2) shall be considered confidential under I.C. § 5-14-3-4(b)(6)." *Id.* Moreover, if the 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." *Id.*[5]

To obtain an informal advisory opinion, a state employee or official may make a request to the IG by using the form on the its website. *See* IG: Informal Advisory Opinions, https://www.in.gov/ig/request-advice/informal-advisory-opinions/. The form requests the state employee's name, contact information, state agency, occupation within the state agency, and the ethics question. *Id.* AG Rokita sought and received an informal advisory opinion from the IG shortly after he assumed office in January 2021. *See In Camera* IG Opinion. A few weeks later, on February 16, 2021, the Indiana Business Journal ran an article in which a spokesperson for the Office of the Attorney General acknowledged that AG Rokita received an IG Opinion. Appellant's App. Vol. II p. 51. Later, Ms. Tully submitted a public records request for the IG Opinion, but the Office of the Attorney General did not provide her a copy. *Id.* at 54-57. Ms. Tully then turned to the Public Access Counselor, who agreed with the Office of the Attorney General that the opinion was not subject to disclosure under APRA, explaining that informal advisory opinions are confidential by regulation and exempt from disclosure as deliberative material. *Id.* at 55-56.

[5] Unlike informal advisory opinions, formal advisory opinions from the Commission are binding. *See* Appellant's App. Vol. II p. 162.

This litigation ensued thereafter as described in the Statement of the Case.

IV. Summary of Argument

This case is about protecting the confidentiality of, and preventing the disclosure of, thousands of IG Opinions, which disclosure would seriously undermine the IG's critical role of advising state employees in ethical quandaries and would erode the IG's laudable mission of fostering a culture of integrity and promoting good government through proactive ethics advice.

Though Ms. Tully conceded that IG Opinions—like the one she sought below—are confidential by rule, she still sought to upend the confidentiality of all IG Opinions. Though Ms. Tully's request was made to AG Rokita, the relief Ms. Tully seeks would suddenly make public thousands of IG Opinions and discourage tens of thousands of state employees from seeking ethics advice from the IG.

Recently, Indiana's General Assembly passed a statute that categorically states the IG has the statutory authority to issue confidential IG Opinions on a retroactive basis. I.C. § 4-2-7-3(9). By specifically granting the IG this authority, the General Assembly recognized how critical it is to protect the confidentiality of previously-issued IG Opinions and to ensure that state employees continue to feel comfortable approaching the IG with ethical questions. By making confidentiality retroactive, this statute also completely resolves this case in AG Rokita's favor. This Court may properly consider the retroactive confidentiality provided by this newly-enacted statute, because a final judgment from the highest authority in the state has not issued in this matter. But even without this newly-enacted statute, this case should be resolved in AG Rokita's favor because the trial court committed reversible error when it misinterpreted the applicable law.

The IG has always had the statutory authority to render confidential informal advisory opinions, even on questions concerning outside employment. *See* Part V.B. Issue 2. It also has always had the statutory authority to consider and treat informal advisory opinions as confidential because they were communicated for the purposes of deliberation and therefore met the pre-existing deliberative-materials exception under APRA. *See supra* Part V.B, Issue 3.

As a threshold matter, the trial court found that incompatible outside employment "is the purview" of the Commission, Appellant's App. Vol. II p. 14, which led it to conclude that the IG's rule regarding informal advisory opinions exceeded its statutory authority. *Id.* at 15. The trial court erred, as a matter of law, when it conflated the Commission's conclusive authority with an exclusive one. This error was prejudicial to AG Rokita because it led the trial court to hold that the IG exceeded its statutory authority when it promulgated Rule 8, at least as to questions related to outside employment.

Rule 8 does not create a "work around" of the public records disclosure requirements under APRA. Nor does it offer a work around of the Commission's authority concerning questions related to outside employment—because the Commission's authority is conclusive, not exclusive. Rule 8 simply recognizes that one of its functions (an informal advisory opinion) falls within the statutory definition of the pre-existing APRA deliberative-materials exception. Because Rule 8 lies within the IG's scope of statutory authority, is consistent with and reasonably necessary to carry out the purposes of the statute, and is reasonable, the rule's existence is consistent with the law and does not exceed the IG's statutory authority. The trial court erred, as a matter of law, when it found that the IG exceeded its statutory authority when it promulgated

Rule 8.

The IG Opinion is also confidential because it is categorically exempt from APRA's public-disclosure requirements under the deliberative-materials exemption. This Court has before it, for *in camera* review, the IG Opinion at the heart of this matter and can determine the IG Opinion's deliberative nature through this *in camera* examination. Because the record falls squarely within the deliberative-materials exemption, Ms. Tully's records request was properly denied.

The trial court, therefore, committed reversible error when it misinterpreted the law applicable to the issues relevant to the case that were prejudicial to AG Rokita. Because of this, this Court should reverse the trial court's decision and order judgment in favor of AG Rokita.

V. Argument

This Court should find the trial court committed reversible error and reverse the grant of summary judgment. To demonstrate "reversible error," the defendant must show that error occurred and that it was prejudicial. *State v. Eubanks*, 729 N.E.2d 201, 205 (Ind. Ct. App. 2000).

A. Standard of review on summary judgment decision

The appellate court reviews a trial court's grant or denial of a motion for summary judgment under the same standard as the trial court—that is, summary judgment "is appropriate only if the designated evidentiary matter shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Martin v. Brown*, 716 N.E.2d 1030, 1032 (Ind. Ct. App. 1999) (citing Ind. Trial Rule 56(C)). On appeal, the review is de novo; however, the appellate court considers only "the materials properly designated to the trial court, and we take all facts and draw all reasonable inferences in favor of the non-moving party." *Kesling v. Hubler*

Nissan, Inc., 997 N.E.2d 327, 331-32 (Ind. 2013).

Although the trial court's issuance of specific findings and conclusions assists in the appellate court's review "by giving insight into the trial court's rationale," the appellate court is not bound by those findings and conclusions. *Id.* at 331. The appellate court will affirm a summary judgment "if it is sustainable on any theory or basis found in the evidentiary matter designated to the trial court," *Sam & Mac, Inc. v. Treat*, 783 N.E.2d 760, 764 (Ind. Ct. App. 2003), but "must reverse the grant of a summary judgment motion if the record discloses an unresolved issue of material fact or an incorrect application of the laws to those facts," *Richards v. Goerg Boat & Motors, Inc.*, 384 N.E.2d 1084, 1090 (Ind. Ct. App. 1979) (trans. denied).

B. Issue Analysis

Issue No. 1: Whether Indiana Code section 4-2-7-3(9) (effective July 1, 2023), which declares all IG Opinions confidential on a retroactive basis, applies to the IG Opinion at issue in this appeal.

The recently enacted statute does apply to the IG Opinion. Because this statute completely resolves the question of the IG's statutory authority to issue confidential, informal advisory opinions, and because the statute retroactively applies to the IG Opinion here, this Court can reverse the trial court's decision on this basis alone.

1. This Court may consider a statute that became effective during the pendency of this appeal.

Indiana law permits courts to consider a statute that became effective during the pendency of an appeal, unless it would require a change in a final judgment. In fact, the Supreme Court of Indiana considered, *sua sponte*, whether an amended law applied retroactively to a litigant. *N.G.*

v. State, 148 N.E.3d 971, 973 (Ind. 2020) (relevant legislation containing retroactive clause enacted after oral arguments heard by the Court). Two companion cases also demonstrate an appellate court's ability to consider recently passed legislation if relevant to the issues before the court. *See Rodriguez v. State*, 129 N.E.3d 789 (Ind. 2019); and *State of Indiana v. Pebble Stafford*, 128 N.E.3d 1291, 2019 WL 3713998 (Ind. 2019). (involving sentence modification questions after a plea agreement). In both cases, the Indiana Supreme Court had remanded the cases back to the court of appeals for reconsideration after the General Assembly amended the relevant statutes.

This line of cases upholds the principle espoused by the Supreme Court of the United States—that is, that a judgment is not "final" unless appeals are exhausted in the court of highest authority or not pursued within the allotted time frame. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 212 (1995). In *Plaut*, the Court found that an appellate court can consider a retroactive change in the law if a case is pending on appeal. *Id.* The Court found that for the purposes of the separation of powers question, a judgment isn't "final" unless appeals are exhausted in the court of highest authority or not pursued within the allotted time frame. *Id.* Specifically, the Court held that any act by Congress that purports to invalidate a court's final judgment (concluded through appeal to the highest available authority) by virtue of retroactive application violates separation of powers, but not if the appeal is still pending. *Id.* The Seventh Circuit has followed this same principle in interpreting Indiana law. *Weil v. Metal Techs., Inc.*, 925 F.3d 352, 356 (7th Cir. 2019) (Citing *Plaut* for the proposition that "[t]here is no general prohibition on applying retroactive laws to cases pending on appeal" and observing that "[o]n the contrary, courts

generally must honor the legislature's choice to make a law retroactive" unless "applying the law retroactively would violate a vested right or constitutional guarantee." (citation omitted)).

Therefore, Indiana law permits courts to consider a retroactive statute that became effective during the pendency of an appeal, unless it would require a change in a final judgment.

2. The revised statute makes it clear that the IG Opinion is confidential and the deliberative-materials exception applies.

The General Assembly recently amended the language in the statute regarding the IG's duties:

> Provide informal advisory opinions to current, former, and prospective state employees, state officers, and special state appointees. An informal advisory opinion issued by the office of the inspector general is confidential under I.C. § 5-14-3-4, including any previously issued informal advisory opinion by the office of the inspector general that recites that it is confidential.

I.C. § 4-2-7-3(9). This resolves the questions of whether the IG had the authority to issue the IG Opinion in this matter, and whether AG Rokita had the right to claim confidentiality for the IG Opinion—both of these questions are completely resolved in AG Rokita's favor by this statute.

Issue No. 2: Whether the IG exceeded its statutory authority by issuing the IG Opinion on a question related to AG Rokita's outside employment.

No, the IG did not exceed its statutory authority by issuing the IG Opinion on a question related to AG Rokita's outside employment.

The trial court erred, as a matter of law, in finding the IG exceeded its authority when it issued the IG Opinion concerning AG Rokita's outside employment. Appellant's App. Vol. II p. 14-15. The trial court found the IG exceeded its authority by issuing an informal advisory opinion concerning questions of outside employment. *See id.* at 14. (finding issues of outside

employment to be "the purview of the Indiana Ethics Commission"). The plain language of the statutes at issue show that while the Commission has the authority to issue a conclusive opinion on questions of outside employment, that authority to advise is not exclusive, and the IG has its own statutory authority to issue an advisory opinion on outside employment in an effort to deter wrongdoing.

a. The Commission does not have *exclusive* statutory authority to advise state officers on questions concerning outside employment.

Under Indiana law, a state officer is subject to certain prohibitions concerning outside employment. I.C. § 4-2-6-5.5. Generally speaking, a state officer is prohibited from knowingly: (1) accepting employment that is inherently incompatible with the responsibilities of the individual's office; (2) accepting employment that would require the individual to disclose confidential information gained in the course of state employment; or (3) using the individual's official position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government. *Id.*

A written formal advisory opinion by the Commission is *conclusive* proof that the state officer's outside employment does not violate this law. *Id.* at (b) (emphasis added). But the statute does not state the Commission is the *exclusive* entity to issue any advisory opinion, nor does it prohibit the IG from doing so on questions of outside employment.[6] To the contrary,

[6]Ind. Code. § 4-2-6-9 (2023) requires any state officer with a potential conflict of interest in a specific "decision or vote, or matter relating to that decision or vote" to "seek an advisory opinion from the commission." This requirement is different from what Ms. Tully has sought to argue, that "any state officer who identifies a potential conflict of interest" is required to seek an advisory opinion from the Commission. Appellant's App. Vol. II p. 126 (citing I.C. § 4-2-6-

Indiana law specifically contemplates the complementary nature of the Commission and the IG on all ethical matters, including those concerning outside employment.

b. Neither the IG nor AG Rokita asked the Commission to exercise its authority to issue a formal advisory opinion, and such a request is statutorily required to activate the Commission's authority to do so.

The structure and authority of the Commission demonstrates the structural and practical relationship between the Commission and the IG, as well as the statutory limitations placed upon the Commission when exercising its authority.

The Commission *may* hear a complaint filed by the *IG* that alleges a violation of the statutes related to state officers' ethics and conflicts of interest, including any rules adopted under the ethics statute. Ind. Code § 4-2-6-4(a)(2) (2023) (emphasis added). By its plain language, this section of the statute, which outlines the powers and duties of the Commission, contemplates that the Commission may address allegations of ethical violations brought to its attention by the IG.[7] This highlights the symbiotic relationship between the Commission and the IG. The Commission's permissive authority is not limited to questions of violations concerning outside

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9(b)(1)). Ms. Tully's statement of the law neglects to include that "potential conflict of interest" applies to a specific decision, vote, or matter. Further, this requirement is not related to the prohibitions on outside employment under I.C. § 4-2-6-5.5, which does not include the mandatory language found in the conflict of interest statute. AG Rokita was not required to seek an advisory opinion from the Commission because no potential conflict of interest in any decision, matter, or vote arose.

[7] AG Rokita does not dispute the Commission's jurisdiction over him as a state officer. I.C. § 4-2-6-2.5. If the Commission had considered a complaint concerning AG Rokita brought to it by the IG, it would, of course, have had jurisdiction to consider this complaint. The question here is whether the IG had the statutory authority to issue an informal advisory opinion, not where or how an IG's complaint of a violation is heard.

employment, but those questions would certainly be included in the Commission's authority to consider if allegations of violations were brought to its attention by the IG. This section of the statute would be nonsensical if the IG did not have the authority to initially consider questions related to outside employment and then bring those questions to the Commission if necessary.

The Commission *must* issue formal advisory opinions to interpret the ethics and conflict of interest statutes, the statutes related to the Inspector General, or to the Rules adopted regarding the same *"upon the request of a state officer . . .* or the inspector general."[8] I.C. § 4-2-6-4(b)(1)(A)(i)(v) (emphasis added). By its plain language, the statute obligates the Commission to issue a formal advisory opinion on ethics statutes or rules, but only if requested to do so by a state officer or the IG.

The IG never alleged to the Commission that AG Rokita violated an ethical statute or rule, so the Commission's statutory authority to "receive and hear any complaint" was never initiated. Likewise, neither the IG nor AG Rokita ever requested the Commission issue an formal advisory opinion regarding the ethics statute or rules concerning outside employment by AG Rokita. So, the Commission's mandatory duty to issue an formal advisory opinion upon request by either the state officer or the IG was never activated.

c. The IG's general statutory obligations support its authority to issue a informal advisory opinion on questions of ethics, including those concerning outside employment.

The IG is responsible under Indiana law for "addressing fraud, waste, abuse, and

[8] That other people and entities may request an advisory opinion from the Commission is not relevant here.

wrongdoing in agencies." I.C. § 4-2-7-2(b). To execute this responsibility, the General Assembly set out a whole host of mandatory duties for the IG. Included in those mandatory duties is to "initiate, supervise, and coordinate investigations." I.C. § 4-2-7-3(1). But the IG is also required to "*recommend policies and carry out other activities designed to deter*, detect, and eradicate fraud, waste, abuse, mismanagement, and misconduct in state government." I.C. § 4-2-7-3(2) (emphasis added). Specifically, the IG is mandated to "[p]rovide advice to an agency on developing, implementing, and enforcing policies and procedures to prevent or reduce the risk of fraudulent or wrongful acts within the agency." Ind. Code § 4-2-7-8. In other words, the IG has been statutorily authorized to investigate wrongdoing in state government, but also has been authorized to create policies and act broadly to try to *prevent* wrongdoing in state government from happening in the first place (i.e., "deter"), and to provide advice to agencies to prevent wrongful acts. The plain language of this statutory authority does not exclude outside employment, and certainly, the IG's ability to offer an informal advisory opinion to a state officer who asks for guidance on any ethical question, including one concerning outside employment, is in line with carrying out its duty to deter wrongdoing and misconduct.

The IG's informal advice does not conflict with or undermine the Commission's authority. A formal advisory opinion by the Commission is *conclusive* proof that a state officer's outside employment does not violate the law. However, given the symbiotic relationship between the Commission and the IG provided in Indiana's statutes, this *conclusive* authority is not an *exclusive* one. The IG has statutory authority, and in fact, a mandatory duty, to investigate wrongdoing in state government and bring complaints to the Commission, including on questions

of outside employment. The Commission has a mandatory duty to issue an advisory opinion *only if* it is requested by either the IG or a state officer. Finally, the IG also has the mandatory duty to provide advice to agencies and to develop policies and other activities to deter such wrongdoing from taking place at all. None of this statutory authority contemplates that ethical questions concerning outside employment are the exclusive purview of the Commission. The IG had its own statutory authority to issue its advisory opinion under its duty to advise agencies and to deter wrongdoing, including regarding outside employment.

Thus, the trial court erred, as a matter of law, when it conflated the Commission's conclusive authority with an exclusive one. This error was prejudicial to AG Rokita because it led the trial court to hold that the IG exceeded its statutory authority when it promulgated Rule 8, at least as to questions related to outside employment.

Issue No. 3: Whether the IG was statutorily authorized to create an administrative rule stating that the deliberative-materials exception (Ind. Code § 5-14-3-4(b)(6)) applies to informal advisory opinions it issues.

Yes, the IG was statutorily authorized to create a rule that stated that the deliberative-materials exception applied to the informal advisory opinions it issues.

Administrative agencies—like the IG—are permitted to make rules and regulations to implement and enforce legislation. *Ind. Dep't of Envt'l. Mgm't. v. Twin Eagle LLC*, 798 N.E.2d 839, 847 (Ind. 2003).The Indiana Supreme Court recognizes that "agencies have implicit powers to regulate to effectuate their respective regulatory schemes outlined by statute." *Charles A. Beard Classroom Teachers Ass'n v. Bd. of Sch. Trs. of Charles A. Beard Mem'l Sch. Corp.*, 668 N.E.2d 1222, 1225 (Ind. 1996) (citations omitted). Judicial review of an agency's exercise of its

"rulemaking authority is highly deferential." *GPI at Danville Crossing, L.P. v. W. Cent. Conservancy Dist.*, 867 N.E.2d 645, 649 (Ind. Ct. App. 2007). When reviewing an administrative regulation, courts consider only "whether the rule lies within the scope of the authority conferred, whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statute, and whether the rule is reasonable." *Charles A. Beard Classroom Teachers Ass'n.*, 668 N.E.2d at 1224 (citations omitted). Here, the IG's rules at issue meet this deferential standard.

a. The IG's Rules fall within the scope of its statutory authority.

The IG has the statutory authority to adopt rules to implement the Ethics Statutes as well as the IG Statute. I.C. § 4-2-7-3(5). The General Assembly charged the IG with the broad responsibility of "addressing fraud, waste, abuse, and wrongdoing in agencies." I.C. § 4-2-7-2(b). To carry out that duty, the General Assembly specifically directed the IG to adopt rules "to implement a code of ethics," I.C. §§ 4-2-7-3, -5, and to "[p]rovide advice to an agency on developing, implementing, and enforcing policies and procedures to *prevent or reduce the risk of* fraudulent or wrongful acts within the agency," I.C. § 4-2-7-3(8) (emphasis added), and included in its directive that the IG "carry out other activities designed to deter, detect, and eradicate fraud, waste, abuse, mismanagement, and misconduct in state government." I.C. § 4-2-7-3(2).

The IG met his statutory directive in 2005 by adopting rules establishing the Indiana Code of Ethics, 42 I.A.C. 1-8, which includes the provision for providing ethics advice through confidential informal advisory opinions.

b. The IG's Rules are consistent with and reasonably necessary to carry out the purposes of the IG statute.

The IG's Rules implement the statutory charge of the IG to address various types of wrongdoing in state government. The purpose of the Rules is to set ethical standards for state employees and officials "so that the general public will have confidence that the conduct of state business is always conducive to the public good." 42 I.A.C. 1-1-2 ("**Rule 2**"). And a core component of the Rules authorizes the IG to render advice to state employees concerning the Code of Ethics through informal advisory opinions. 42 I.A.C. 1-8-1. Indeed, the IG offers his proactive ethics advice under the Rule to hundreds of state actors each year to promote good government. Appellant's App. Vol. II p. 161. And the confidentiality requirement serves that vital statutory mission because confidentiality facilitates openness and encourages state actors to seek ethics advice. *Id.*

c. The IG's Rules are reasonable.

This deliberative-materials exception and Rule 8 both recognize an important principle that must be considered when analyzing APRA. Absent the confidentiality provision, fewer employees would seek the IG's ethics advice over myriad ethical questions and instead would be left to their own devices. Reduced utilization of the informal advisory opinions thus stands to increase the risk of fraud, waste, and wrongdoing in state agencies, which would be directly contrary to the task delegated to the IG by the General Assembly.

The IG's Rules did not "create" a new exception under APRA. The IG's Rules simply recognized that one of its statutory functions met the statutory definition of the deliberative-

materials exception that already existed under APRA.

The trial court held that the IG's Opinion, if allowed, would be a "work around [that] would allow the IG to promulgate rules which clearly exceed the IG's statutory authority"). Appellant's App. Vol. II p. 15. The trial court analyzed three rules the IG adopted pursuant to its statutory authority. *See* Rule 2, Rule 5, Rule 8. The trial court found the following:

> Rule 8 is not harmonious with Rule 5. The Rules address this incongruity in Rule 2 [,] 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 [ ] explicitly addresses the very issue at stake in these proceedings--outside employment. Rule 5 expressly recognizes the statutory authority [ ] 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 [ ] . Both the Rules and the law mandate a review of outside employment in compliance with the Commission's purview and APRA.

Appellant's App. Vol. II p. 14-15. The trial court erred in its analysis of the Rules, just as it erred it its analysis of the IG's statutory authority.

Rule 5 states only that "[o]utside employment restrictions are set forth in I.C. § 4-2-6-5.5." 42 IAC 1-5-5. So, Rule 5 simply states the fact that there are outside employment restrictions and references the statute where those restrictions are detailed. Rule 2 states that Rule 5 is mandatory in character. 42 IAC 1-2-1(a). Of course it is mandatory that state employees comply with the statute concerning outside employment. AG Rokita does not argue that he is exempted from complying with the ethics statute concerning outside employment. To the contrary, AG Rokita respects the ethics requirements so much that he sought advice to help him make the best

decision possible regarding his outside employment. *See In Camera* IG Opinion. This is exactly the type of behavior both the ethics statute and the IG's Rules encourage. Since the ethics statute concerning outside employment does not give exclusive authority to the Commission, the IG is not excluded from offering advice to state employees in an effort to deter potential ethical violations concerning outside employment.

APRA contains two types of exceptions to its general rule of public disclosure—mandatory and discretionary. APRA lists numerous categories of public records that cannot be disclosed unless disclosure is required by law or by a court. For instance, public records containing trade secrets cannot be disclosed. I.C. § 5-14-3-4(a)(4).

APRA also describes a whole host of public records that *may* be excepted from disclosure at the discretion of a public agency. I.C. § 5-14-3-4(b) (emphasis added). Relevant here, one of the categories of public records that may be excepted from disclosure at the discretion of a public agency is defined as "[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." *Id.* at (6). This discretionary exception from the general rule of disclosure is herein referred to as the deliberative-materials exception.

Rule 8 simply recognizes that IG Opinions fit within the deliberative materials exception as defined by APRA. Rule 8 states that the IG has the authority to render informal advisory opinions but recognizes that these informal advisory opinions are "not binding on the [C]ommission." I.A.C. 1-8-1(a). Rule 8 then specifies that these informal advisory opinions "are expressions of opinion that are communicated for the purpose of deliberation and decision making." *Id.* at (b).

Rule 8 then states that the IG's informal advisory opinions are: (1) specific to the person who requests the opinion and the facts presented; and (2) shall be considered to be confidential under the deliberative-materials exception.

The IG issues hundreds of informal advisory opinions annually to those in other state agencies, opinions of the IG on a particular ethics question, which opinions are communicated for the purpose of improving state officials' compliance with State Ethics Code. Appellant's App. Vol. II p. 161. So by its plain text, the deliberate-materials exemption squarely applies to an informal advisory opinion issued by the IG.

One of the aims of APRA's deliberative-materials exception is to "prevent injury to the quality of agency decisions." *Sullivan v. National Election Defense Coalition*, 182 N.E.3d 859, 870 (Ind. Ct. App. 2022) (internal citations omitted). One key function of the IG 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 just as confidentiality is critical with 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 IG in real time. Stripping informal advisory opinions of confidentiality would thus undercut the important work of the IG, be contrary to the General Assembly's intent to foster good government, and run afoul of the plain language of APRA's deliberative-materials exemption.

In short, Rule 8 does not create a "work around" of the public records disclosure requirements under APRA. Nor does it offer a work around of the Commission's exclusive

authority concerning questions related to outside employment—because the Commission's authority is conclusive, not exclusive. Rule 8 simply recognizes that one of its functions (an informal advisory opinion) falls within the statutory definition of the pre-existing APRA deliberative-materials exception. Because Rule 8 lies within the IG's scope of statutory authority, it is consistent with and reasonably necessary to carry out the purposes of the statute, and is reasonable, the rule's existence is consistent with the law and does not exceed the IG's statutory authority.

The trial court erred, as a matter of law, when it found that the IG exceeded its statutory authority when it promulgated Rule 8, at least as to questions related to outside employment.

Issue No. 4: Whether the IG Opinion falls under APRA's deliberative-materials exception.

AG Rokita was acting lawfully in maintaining the confidentiality of an IG Opinion that is categorically exempt from APRA's public-disclosure requirements. Under APRA, a public agency meets its initial burden of non-disclosure by showing that the undisclosed record falls within a discretionary exception. And in general, a public agency satisfies that burden by proving that the record falls within one of the categories of exempted records under section 4(b) (records exempt at the discretion of public agency), and by "establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit." Ind. Code § 5-14-3-9(g).

Once the agency has met its initial burden of proof in the case of a discretionary exception, the burden shifts to the complaining party to demonstrate that the agency's denial of access to

those records was "arbitrary or capricious." *Id.* at (g)(2). And "[a]n arbitrary and capricious decision is one which is patently unreasonable and is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion." *Sullivan*, 182 N.E.3d at 870 (citations omitted).

The Attorney General met his burden to withhold the IG Opinion by establishing that the type of record sought—an informal advisory opinion—falls within the deliberative-materials exemption. *See* I.C. § 5-14-3-4(b)(6). The public agency's initial burden under the statute can be lower depending on how closely the class of documents resembles those protected under the particular exception. *Sullivan*, 182 N.E.3d at 873. And here, the type of document sought—an informal advisory opinion from the IG—tracks APRA's deliberative-materials exception precisely because the record is interagency advisory and deliberative material communicated for the purposes of decision-making. I.C. § 5-14-3-4(b)(6); 42 I.A.C. 1-8-1(b)(2).

The undisputed evidence establishes that the Attorney General sought an informal advisory opinion from the IG on January 12, 2021, and received the opinion on January 15, 2021. *See in camera* IG Opinion. The advisory opinion was signed by the State Ethics Director within the Office of the Inspector General. *Id.* The Attorney General thus carried his initial burden under I.C. § 5-14-3-9(g) by establishing that IG Opinion meets APRA's deliberative-materials exception and may be kept confidential.

In addition, this Court has before it, for *in camera* review, the IG Opinion at the heart of this matter. Therefore, this Court can determine the IG Opinion's deliberative nature through this *in camera* examination.

Because the record falls squarely within the deliberative-materials exemption, Ms. Tully's records request was properly denied.

VI. Conclusion

Based on the foregoing, AG Rokita requests this Court reverse the trial court's decision, deny Ms. Tully's motion for summary judgment and grant AG Rokita's cross-motion for summary judgment.

Dated: July 20, 2023

Respectfully submitted,

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I certify that on July 20, 2023, the foregoing document and all attachments thereto were filed using the Indiana E-filing System. I also hereby certify that on July 20, 2023, the foregoing and all attachments thereto were served, contemporaneously with this filing, via the IEFS, to the following:

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