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IN THE
INDIANA COURT OF APPEALS

Case No. 23A-PL-705

THEODORE EDWARD ROKITA,	) Appeal from the Marion Superior Court,
	) Case No. 49D06-2107-PL-025333
Appellant/Cross-Appellee,	)
	) Hon. Kurt Eisgruber, Judge
v.	)
	)
BARBARA TULLY,	)
	)
Appellee/Cross-Appellant.	)

BRIEF OF APPELLEE/CROSS-APPELLANT BARBARA TULLY

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Issue No. 1: Whether Administrative Rule 8 (42 IAC § 1-8-1(b)) or Ethics Rule 5 (42 IAC § 1-5-1), or the Inspector General's (IG) enabling statute, Ind. Code § 4-2-7-1, *et seq.,* permissibly exempts the IG's informal advisory opinion issued at Rokita's request from the transparency requirements imposed by the Indiana Access to Public Records Act ("APRA"), I. C. §§ 5-14-3-1, *et seq.*

Issue No. 2: Whether Rokita waived or is estopped from asserting any individual claim to confidentiality with respect to the informal advisory opinion issued at his request by the IG by publicly asserting that the opinion completely exonerated him of any breach of ethics requirements arising from his outside employment.

Issue No. 3: Whether APRA's deliberative materials exception in section 4(b)(6), I. C. § 5-14-3-4(b)(6), if it applies at all, exempts the IG's final opinions or only preliminary drafts.

Issue No. 4: Whether I. C. § 4-2-7-3(9) (effective July 1, 2023), enacted after the trial court entered final judgment in Tully's favor and while this case was pending on appeal before this Court, can, consistent with the separation of powers limitations in Art. 3, Sec. 1 of the Indiana Constitution, be applied retroactively and thereby void the trial court's final judgment.

Issue No. 5: Whether the enactment of the retroactive amendment to the IG's enabling statute violated the single-subject limitation of Art. 4, Sec. 19, of the Indiana Constitution.

ADDITIONAL ISSUES RAISED BY TULLY'S CROSS APPEAL

Whether the trial court erred by (a) permitting Rokita to redact without limitation the IG opinion after denying Rokita's cross-motion for summary judgment and ordering its disclosure under APRA, and (b) refusing to award Tully costs and attorneys' fees pursuant to I. C. § 5-14-3-9(i).

II. STATEMENT OF CASE

Rokita's Statement of Case is incomplete.

The following is pertinent to Tully's cross-appeal. On January 9, 2023,[1] Tully filed a motion asking the trial court to amend its January 3 summary judgment order in her favor by reconsidering that portion of the trial court's order that allowed Rokita to make unspecified and unlimited redactions to the IG opinion before producing it. Since the January 9 Order had not addressed the issue, Tully also sought clarification whether she was entitled to costs and attorney's fees. Appellant's App. Vol. II pp. 16-19. Rokita filed his opposition to that motion on February 1. Appellant's App. Vol II pp. 20-35.

[1] All dates hereafter are 2023 unless otherwise noted.

On February 27 the trial court issued its Final Order on Summary Judgment, denying, without explanation, Tully's request that the trial court only permit Rokita to make such mandatory redactions to the IG opinion as required by section 4(a) of APRA, I. C. § 5-14-3-4(a). The trial court also denied, also without explanation, Tully's request for costs and attorneys' fees. Appellant's App. Vol. II p. 39.

III. STATEMENT OF FACTS

Rokita's Statement of Facts is only partially complete, and inaccurate and/or argumentative in some respects.

Rokita correctly notes that the IG's duties are spelled out in I. C. §§ 4-2-7-2 and -3 and that, although not expressly among those statutory duties or specifically authorized by statute, the IG has historically issued informal advisory opinions to state employees and officials since that office was created in 2005. It was not until after the trial court's January 3 and February 27 summary judgment orders that I. C. § 4-2-7-3 was prospectively amended, effective July 1, to statutorily empower the IG, in new subparagraph (9), to issue confidential informal advisory opinions. Until then, those opinions had been authorized and made confidential solely by operation of an administrative regulation, 42 IAC § 1-8-1(b)(1) (Rule 8). State elected officials or employees are permitted to submit via the IG's website a request for an informal advisory opinion, which would remain confidential "unless

confidentiality is waived by the state employee." https://www.in.gov/ig/request-advice/informal-advisory-opinions/

In an article dated February 16, 2021, by Indianapolis Business Journal (IBJ) reporter Lindsey Erdody, "AG Rokita keeping private sector job while in elected office," a person identified as Rokita's spokesperson, Lauren Houck, volunteered to the IBJ that Rokita had "sought and received an opinion from the Indiana 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.'" Appellant's App. Vol. II pp. 50-53. Rokita had received this opinion on January 15, 2021, just days after he was sworn in as Indiana Attorney General. Appellant's App. Vol. II p. 46.

On or about February 25, 2021, Tully submitted a written APRA request to Rokita for that advisory opinion. Appellant's App. Vol. II p. 54. Although Rokita's office on March 1, 2021, acknowledged receiving Tully's APRA request, and she was entitled by I. C. § 5-14-3-3(b) to a response "within a reasonable time," Tully did not receive a formal denial of disclosure until several months later, on July 26, 2021. Appellant's App. Vol. II p. 57.

Tully filed a formal complaint with the Indiana Public Access Counselor ("PAC"). On April 29, 2021, the PAC, citing I. C. § 5-14-3-4(b)(6), opined that release of the IG report Tully had requested was deemed by an administrative rule

to be "deliberative material" containing expressions of opinion, the release of which was therefore discretionary to Rokita. The PAC did not discuss whether the IG's enabling statute gave the IG the authority to issue advisory opinions or the "specific authority" to declare its advisory opinions confidential by rule, as required by APRA, I. C. § 5-14-3-4(a)(2). However, the PAC also opined that the "reasonable time" APRA provided for Rokita to respond to Tully's request had by that time already elapsed. Appellant's App. Vol. II pp. 55-56.

IV. SUMMARY OF ARGUMENT

This is an appeal by Appellant Rokita from a summary judgment entered by the trial court in a suit under APRA filed by a citizen to require Rokita to produce for inspection and copying an informal advisory opinion issued, upon Rokita's request, by the IG a few days after he had been sworn in as Indiana attorney general. Rokita publicly claimed that the IG had determined in the opinion that his outside employment was "squarely within the boundaries of the law." Tully requested that she and the public be allowed to inspect and copy that opinion as permitted by APRA. APRA places the burden of proof for nondisclosure of a public record on the public official that would deny access to the record and not the person seeking to inspect and copy the record.

Despite APRA's requirement that he respond to Tully's request within a reasonable time after receiving Tully's request, Rokita did not respond until several

months later, refusing to produce it on the grounds that a rule previously issued by the IG gave Rokita discretion to withhold that opinion as deliberative material.

Tully then filed a formal complaint with the PAC, who advised that Rokita had failed to respond to Tully's request within a reasonable period of time but that in the PAC's non-binding opinion that the IG's opinion could be discretionarily withheld pursuant to a pre-existing rule issued by the IG's office at the time that office was created. Tully filed suit under APRA to compel the IG opinion's production. The trial court ordered Rokita to produce that opinion, not because as Tully had contended the IG lacked statutory authority to make IG advisory opinions exempt from production under the "deliberative materials" exception of APRA, but because Indiana statutes required Rokita to take his ethical concerns related to his outside employment to the Ethics Commission for a binding and fully transparent advisory opinion. Rokita appealed the trial court's adverse decision to this Court.

While this appeal was pending, before briefing had commenced, Rokita sought to legislatively moot the summary judgment the trial court had entered in Tully's favor. An independent journalist working for a nonpartisan organization later determined that language drafted by Rokita's office was inserted as an amendment into the biennial budget bill in the waning hour and minutes of the 2023 session of the General Assembly, without notice or opportunity for public

comment, which for the first time expressly gave the IG statutory authority to issue informal advisory opinions discretionarily exempt under APRA. That amendment was passed into law when the budget bill was signed into law by the governor. Though implicitly supporting Tully's arguments that APRA's requirements can be abridged only by statute and not by rule, Rokita claims that language moots Tully's APRA claims because the change was made retroactive to all previously-issued IG advisory opinions such as the one Rokita received from the IG. His arguments fail for several reasons.

First, by retroactively changing the law while this appeal was pending, the legislature usurped judicial prerogatives by interfering with a final judgment issued by a trial court. But the legislature is prohibited by the limitations imposed by the separation of powers clause of Art. 3, Sec. 1, of the Indiana Constitution from passing a law with retroactive effect that seeks to void a trial court's final judgment.

Second, the manner in which the amendment was enacted into law (inserting into a unrelated must-pass bill involving a different subject) offends the single-subject limitation imposed by Art. 4, Sec. 19 of the Constitution.

Third, apart from these constitutional flaws, the amendment does not address the issue enunciated by the trial court in support of its summary judgment ruling in favor of Tully and against Rokita, which is that Rokita was obligated by Indiana's

statutory ethics requirements for public officials and employees to take concerns about his outside employment to the Ethics Commission for a binding and fully-transparent advisory opinion.

Rokita waived any confidentiality inuring to his benefit by using a confidentiality privilege as both a sword and a shield, *i.e.,* to shield the IG's opinion from disclosure while at the same time using that opinion as a sword by publicly characterizing it as having completely exonerated him of any conflict of interest relating to his outside employment while serving as attorney general. Any statutory or common law privilege is waivable by its beneficiary. Tully self-servingly elected to disclose both the existence of the IG's opinion and its purported conclusions, and he thus waived any discretionary privilege. His continued efforts to shield that opinion from scrutiny by Tully and the public should be rejected by this Court.

Even if the IG, by an administrative rule instead of by statute, can shield an otherwise public record as "deliberative materials" and thus discretionarily privileged from disclosure pursuant to an APRA request, the opinion was drafted entirely for Rokita's personal benefit and not for the purpose of agency decision making by any public agency and thus would not be entitled to APRA's "deliberative materials" exception. Moreover, Tully's APRA request was for the IG's final opinion, not any preliminary drafts, and the purpose underlying APRA's

deliberative materials exception is to prevent injury to the quality of agency decisions. As this Court has observed, it is difficult to see how the quality of a decision is affected by the release of a decision after it has been finally reached, as long as prior communications and the details of the decision-making process are not disclosed.

In its final summary judgment order the trial court, despite having granted Tully's motion for summary judgment and denied Rokita's cross-motion, nevertheless refused to find Tully was entitled to fees and costs as the prevailing party even though fees and costs are required to be awarded to an APRA plaintiff who substantially prevails in her APRA is the trial court. Tully cross-appeals from that decision. She also cross-appeals from the trial court's final summary judgment order which, though requiring him to produce the final IG opinion to Tully, allowed him to make unspecified and unlimited redactions to the opinion before releasing it for inspection and copying.

This Court should affirm the lower court's judgment in favor of Tully and remand to the trial court to revisit its determination that Rokita can redact the IG opinion at his discretion consistent with the opinion of this Court, and so the lower court can determine the amount of attorney fees and costs to which Tully is entitled by virtue of her successful claim under APRA.

V. ARGUMENT

A. Standard of review

Although it reviews summary judgment rulings *de novo,* this Court may affirm the trial court's summary judgment rulings on any legal basis supported by the designated evidence in the record. *Ind. Dep't of Child Servs. v. Morgan,* 148 N.E.3d 1030, 1032 (Ind. Ct. App. 2020); *Magic Circle Corp. v. Crowe Horvath, LLP*, 72 N.E.3d 919, 926-27 (Ind. Ct. App. 2017). This Court will affirm if there is any legal ground supporting a trial court's summary judgment, even if the trial court provided a different or even an erroneous reason for its ruling. *Somerville Auto Transp. Serv. v. Auto. Fin. Corp.,* 12 N.E.3d 955, 961 (Ind. Ct. App. 2014); *Estate of Lee,* 876 N.E.2d 361, 367 (Ind. Ct. App. 2007).

The issues raised in Tully's cross-appeal--whether Tully substantially prevailed in her APRA claim and thus is entitled to costs and reasonable attorneys' fees, and whether Rokita should be permitted to make unlimited redactions to the IG opinion before releasing it—are matters of statutory interpretation which this Court reviews *de novo*, *Shepherd Props. Co. v. Int'l Union of Painters & Allied Trades*, 972 N.E.2d 845, 848 (Ind. 2012), since the trial court offered no explanations for those rulings.

At all times the burden of proof for non-disclosure of a public record falls on the public agency responsible for the denial. I. C. § 5-14-3-1.

B. Arguments with respect to the issues

1. *The trial court correctly ruled that after he self-identified a potential conflict of interest arising from his outside employment, Rokita was required to take his concerns to the Ethics Commission, whose advisory opinions are required to be transparent.*

In seeking to avoid disclosure of the IG's opinion despite its purported complete exoneration of him, Rokita consistently invoked in the trial court Administrative Rule 8, which authorizes the IG to issue confidential informal advisory opinions and permitted (but did not require him) to withhold that opinion at his sole discretion. Though Rule 8 was later given statutory sanction, because of the separation of powers concerns discussed *infra,* at pp. 27-34, this Court's decision should be based on the law as it existed at the time the trial court entered its final judgment in Tully's favor. Moreover, the post-final judgment amendment to the IG's enabling statute that retroactively made all IG informal opinions confidential does not excuse and cannot justify Rokita's decision to bypass the Ethics Commission's statutory role to issue binding advisory opinions when a state officer such as he self-identifies "a potential conflict of interest arising from a financial interest." I. C. § 4-2-6-9(a), (b), and (c).

In its January 3 summary judgment Order, the trial court rejected Rokita's reliance on Rule 8, instead concluding that Rule 5 (42 IAC § 1-5-1) was applicable, both because Rule 5 is mandatory, and because it rather than Rule 8

specifically addresses issues involving outside employment of state officials and employees, which the ethics and conflicts of interest statutes, I. C. § 4-2-6-1, *et seq.,* place squarely within the purview of the Commission.

Rather than taking his concerns to the Commission as the law requires, Rokita chose instead to request an informal advisory opinion from the IG regarding the ethical implications of his decision to continue receiving compensation from his outside employment after he became attorney general.[2] As the trial court reasoned in its January 3 Order on Summary Judgment, both a statute, I. C. § 4-2-6-5.5, and a regulation, 42 IAC § 1-5, *et seq.*, placed within the purview of the Commission the rendering of transparent advice concerning self-identified ethical issues arising from a state officer's outside employment.

The Commission was established by the Legislature to act as an advisory body. The 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, and it is authorized by I. C. § 4-2-6-4(b)(1) to issue advisory opinions on ethics issues. Ethics Rule 5, 42 IAC § 1-5-1, addresses in substantial detail the ethics standards and rules governing state officers who have a

[2] Although it's less than clear why Rokita did not request a formal and binding advisory opinion from the Commission, as was reported on December 30, 2020, it's noteworthy that he 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/

business relationship, as defined in I. C. § 4-2-6-1(a)(5), with an outside employer or entity. While Rule 8 recognizes the IG's general authority to issue confidential informal advisory opinions to state employees with generalized ethics concerns, Ethics Rule 5 specifically and expressly addresses ethical considerations arising from outside employment.[3] Moreover, while Rule 8 is merely "aspirational," Ethics Rule 5 (which lacks the confidentiality proviso of Rule 8) is "mandatory in character," to give the general public "confidence that the conduct of state business is always conducive to the public good [recognizing that] citizens [] are entitled to have complete confidence in the integrity of their government [and] to reassure the citizens of Indiana that the character and conduct of its officials…are above reproach," 42 IAC § 1-2-1(a) and (b).[4] Rule 5 reinforces the view that public office "not be used for private gain," including by requiring public officials to avoid "involvements…which have the potential to become a conflict of interest." *Id.* at (c) and (d). A "state officer" includes the attorney general. I. C. § 4-2-6-1(a)(19).[5]

[3] It is axiomatic that in construing both statutes and contracts that the specific controls the general. *Tubbs v. State,* 888 N.E.2d 814, 817 (Ind. Ct. App. 2008) (citing *Turner v. Bd. of Aviation Commissioners,* 743 N.E.2d 1153, 1167 (Ind. Ct. App. 2001)).

[4] These "mandatory" ethics rules mirror the public policy set forth in APRA's preamble, which declares that it a fundamental philosophy of our American constitutional form of representative government that "government is the servant of the people and not their master" and that the people are entitled to "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials." I.C. § 5-14-3-1.

The Commission's actions and proceedings are required by statute to be transparent and its records must be available for inspection and copying under APRA. I. C. § 4-2-6-4(c).

Indiana Code § 4-2-6-5.5 (a)(1) prohibits a current state officer or employee from knowingly "accept[ing] other employment involving compensation incompatible with the responsibilities of public office." Rokita was required by statute to bring his outside employment concerns to the Commission. As the trial court correctly observed in its January 3 Order on Summary Judgment (at p. 3), Rokita's reasoning would allow him and other state employees a choice between "request[ing] an informal advisory opinion under Rule 8, or be subject to a more public review by the Commission subject to APRA…and would allow the IG to promulgate rules which clearly exceeded the IG's statutory authority."

Apart from the constitutional separation of powers concerns discussed *infra*, the amendment to the IG's enabling statute making its informal advisory opinions retroactively confidential, enacted after the trial court had entered final judgment in favor of Tully and while Rokita's appeal was pending in this Court, does not moot Tully's judgment or require reversal.

Because Rokita's concern related to his outside employment, Rokita was obligated by I. C. § 4-2-6-9(b) to seek an advisory opinion from the Commission rather than an "informal" secret opinion from the IG. ("A state officer…who

identifies a potential conflict of interest *shall* …seek an advisory opinion from the commission") (emphasis added). Except for investigative records of the IG 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 open for public inspection after the Commission finds probable cause to exist. I. C. § 4-2-6-4 (b)(2)(D).

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 is not in violation of [I. C. § 4-2-6-5.5 (a)(1) or (a)(2).]" By seeking an informal opinion from the IG that is not binding on the Commission and discretionarily exempt from public inspection, Rokita deviated from existing statutory requirements and procedures. The trial court properly concluded that he may not shield the IG opinion from disclosure by invoking Rule 8. *Cf. In re Storms,* 2 N.E.3d 681, 682 (Ind. 2014) (noting that the respondent had properly requested an advisory opinion from the Commission pursuant to I. C. § 4-2-6-9 (b) regarding his ability to accept a position with a private employer). This Court should affirm that ruling. [6]

[6] Even if Rokita's invocation of Rule 8 justified his request from the IG for a secret advisory opinion regarding his continued outside employment, Rule 8 was promulgated contrary to section 4(b)(2) of APRA, I. C. § 5-14-3-4(b)(2), which prohibits an agency from disclosing public records "declared confidential *by rule* adopted by a public agency" absent "*specific authority* to classify public records as confidential granted to the public agency by statute." (emphasis added). Until the July 1, 2023, amendment, the IG's enabling statute was silent with respect to the IG's authority to issue "informal advisory opinions," much less to issue

2. *Rokita waived and/or is estopped from asserting any confidentiality with respect to the informal advisory opinion he requested and received from the IG by publicly asserting that it had completely exonerated him of breaching Indiana's ethical requirements related to his outside employment.*

Rokita lost any confidentiality privilege attached to the IG opinion by voluntarily disclosing its essential conclusions to the public, but later refusing to make that opinion available for Tully's inspection. Though the trial court did not address this issue because it granted summary judgment to Tully on other grounds, this Court may affirm the trial court's summary judgment rulings on any ground supported by the record and properly preserved. *City of South Bend v. Century Indemnity Co.,* 821 N.E.2d 5, 9 (Ind. Ct. App. 2005), *trans. denied.* The record leaves no doubt that Tully repeatedly advanced her waiver of privilege argument in her summary judgment briefings before the trial court. Appellant's App. Vol II pp. 137-140; 198, 206-209.

Even when supported by sound public policy, all privileges, statutory or common law, are waivable because they "are not lightly created nor expansively construed [and] are in derogation of the search for truth." *United States v. Nixon,* 418 U.S. 683, 710 (1974). Both caselaw, as well as Indiana Evidence Rule 501(b), provides that a privilege to shield selected information from disclosure can be

"confidential" opinions. Tully preserved this argument by raising it in the trial court. Appellant's App. Vol. II pp. 129-133, 199-203.

waived, such as when the holder of that privilege voluntarily discloses "any significant part of the privileged matter." This Court has expressly ruled that waiver as well as estoppel applies to discretionary privileges under section 4(b) of APRA, I. C. § 5-14-3-4(b). *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.,* 787 N.E.2d 893, 919 (Ind. Ct. App. 2003); *see also Purdue Univ. v. Wartell,* 5 N.E.3d 797, 802-03 (Ind. Ct. App. 2014) (finding both estoppel and waiver of attorney-client privilege in APRA suit).

In *Indianapolis Newspapers*, after observing that APRA is silent as to the question of waiver, this Court examined waiver cases decided under the federal analogue to APRA, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In doing so this Court concluded that, notwithstanding the absence of any express waiver language in APRA, public officials or agencies can act in ways that waive a discretionary privilege to withhold records from the public, citing FOIA cases such as *North Dakota ex rel. Olson v. Andrus,* 581 F.2d 177 (8th Cir. 1978) (privilege of confidentiality does not apply if records have been shared with third parties); and *Shell Oil Co. v. IRS,* 772 F. Supp. 202 (D. Del. 1991) (rejecting government's invocation of deliberative privilege exception based on waiver). Other states have held similarly. *See, e.g., Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J,* 952 P.2d 66, 68 n. 3 (Ore. Ct. App. 1996) (holding that waiver applies to requests for

otherwise exempt public records even absent express mention of waiver in Oregon's public records law).

The objective and non-judgmental summary found in *Indianapolis Newspapers* not to rise to the level of a waiver is a far cry from Rokita's self-serving announcement that the IG opinion had completely exonerated him of any financial conflict of interest arising from his continued outside employment after he had taken the oath as attorney general. In that sense, Rokita abused his discretion by thereafter refusing to allow Tully to inspect the IG opinion he claimed totally absolved him of any unethical conduct. Stated differently, his public pronouncement estops him from hiding behind a discretionary privilege. Waiver of a claimed privilege should be assessed in the context of the strong public policy of governmental transparency embodied in APRA. *Shepherd Properties Co. v. Int'l Union of Painters,* 972 N.E.2d at 852 (in light of APRA's purpose of insuring the public is provided "full and complete information about government affairs," courts must liberally construe APRA to implement this policy).

Like other privileges, APRA's deliberative privilege exception should be strictly construed and applied, not only because it is "in derogation of the search for truth," *In re C.P.,* 563 N.E.2d 1275, 1277 (Ind. 1990), but because APRA is remedial legislation whose exceptions this Court has held must therefore be strictly construed. *Sullivan v. National Election Defense Coalition,*182 N.E.3d 859, 868

(Ind. Ct. App. 2022). The liberal construction requirement means that whenever there is a reasonable doubt whether the public has the right to access a particular public record, courts must resolve any uncertainty in favor of the public's right to know and against secrecy.

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. 2010) (Sullivan, J., concurring); *see also Purdue Univ. v. Wartell,* 5 N.E.3d at 807 (statutory privileges that shield information from public disclosure "may not be wielded as swords at the will of a party"). For example, a party may not place his or her mental or physical condition at issue and then resist discovery of medical records by invoking the physician-patient privilege. *Watson v. State,* 745 N.E.2d 515, 520 (Ind. Ct. App. 2003) (citing *Collins v. Bair,* 256 Ind. 230, 268 N.E.2d 95, 99 (1971) (when a patient elects to publish the *substance* of otherwise privileged communications, the privilege's objective can no longer be legitimately accomplished and the privilege must be deemed waived.")) (emphasis added).

Through his office's spokesperson, Rokita voluntarily disclosed and touted the critical aspect of the IG opinion--that Rokita's outside employment was "squarely within the boundaries of the law" and did not conflict with his official duties. This voluntary disclosure went to the very essence of the opinion. He publicly asserted that the IG had purportedly fully exonerated him of breaching the

ethical standards applicable to Indiana governmental officials or employees. Had Rokita not made this voluntary public claim, it is highly unlikely Tully or members of the media would have known of the IG opinion's existence.

This Court should find that that Rokita waived any claim of confidentiality attached to the IG opinion because he publicly disclosed its substance and purported ultimate conclusion.

3. *APRA's deliberative materials exception in section 4(b)(6) applies only to preliminary drafts, not to final agency opinions.*

Rule 8 conflicts with APRA because it is inconsistent with the "deliberative materials" exception of section 4(b)(6), which is designed to "prevent injury to the quality of agency decisions." *Sullivan v. National Election Defense Coalition,* 182 N.E.3d at 870; *Newman v. Bernstein,* 766 N.E.2d 8, 12 (Ind. Ct. App. 2002) (holding only pre-decisional materials but not final agency decisions are exempt as deliberative materials, citing *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 151-52 (1975); *see also Unincorporated Operating Div. of Indianapolis Newspapers, Inc. v. Trs. of Indiana Univ.,* 787 N.E.2d at 909-10. As this Court observed in *Indianapolis Newspapers*, 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."

The IG routinely publishes its ethics advisory opinions. https://www.in.gov/ig/opinions/advisory-opinions-2022/. Especially with respect to the recipient of an advisory opinion, they are not "intra-agency or interagency deliberative material" discretionarily exempt under section 4(b)(6). Because they are specific to the person requesting the opinion, they are not by definition protected from public disclosure as intra- or interagency expressions of opinion communicated for the purpose of agency decision-making. They are opinions issued only at the request of and for the benefit of a particular public official or employee rather than for the purpose of governmental decision-making. And if the government is interested in preserving confidentiality of the requester, it can serve that purpose simply by redacting or, as appears to be its practice from an examination of the IG's website, not mentioning the name of the requesting employee to preserve his or her privacy.

Tully did not request earlier drafts or any information about the process itself, only the IG's final advisory opinion issued to Rokita whose contents he publicly called exculpatory. The release of that IG opinion pursuant to Tully's APRA request cannot conceivably harm the quality of the IG's unusually expedited response to Rokita's request. Moreover, that opinion was prepared at Rokita's request for his benefit, not for the purpose of governmental decision-

making.[7] No other ethics opinions are considered exempt as "deliberative," as they are routinely released and made available to the public.[8]

4. *The separation of powers clause, Art. 3, Sec. 1, does not permit a retroactive voiding of the trial court's summary judgment rulings in favor of Tully and against Rokita by virtue of the subsequent enactment of I. C. § 4-2-7-3(9) (effective July 1, 2023) made retroactive to all previously-issued IG opinions.*

In his Brief (at 15), Rokita argues that a statute enacted after the trial court's final judgment in this case "completely resolves" the question of the IG's authority to issue the public, the informal advisory opinion at issue in this case. However, the later enactment of that statute and its retroactivity with respect to all previously-issued advisory opinions, implicates significant separation of powers issues.

The language of that statute was included in the must-pass 2023 budget bill (HEA 1001) while this case was pending on Rokita's appeal. That measure added a new power to the IG's enabling statute:

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[7] Even if the IG opinion were to contain some exempt materials, I. C. § 5-14-3-6(a) would require this Court to redact non-disclosable information and to order the disclosure of any factual matters the record contains. *Indianapolis Newspapers, Inc. v. Trustees of Ind. Univ.,* 787 N.E.2d at 913-14. While privileged communications may enjoy some general protections, any facts contained therein are a different matter. *Price v. Chas. Brown Remainder Unitrust Trust,* 27 N.E.3d 1168, 1175 (Ind. Ct. App. 2015).

[8] *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, wherein the IG issued a publicly-disseminated report exonerating Governor Holcomb of violating the gift rule found in 42 IAC § 1-5-1.

> "(9) Provide informal advisory opinions to current, former, and prospective state employees, state officers, and special state appoints. 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.*" (emphasis added).

An investigative reporter with a non-partisan organization, *The Indiana Citizen,* was able to determine that this 56-word non-germane provision inserted late into the budget bill amending the IG's enabling statute was authored and shepherded through the legislative process by Rokita's office.[9] The language had originally been offered as an amendment to HEA 1256 by Sen. Ron Alting (R-W. Lafayette). Sen. Alting told *The Indiana Citizen* reporter that he was unaware of the judgment against Rokita in Tully's APRA lawsuit and that Rokita's office did not tell him that the retroactive provision in the amendment might upend a trial court's final judgment. Sen. Alting said "had no idea of…what the amendment did or [he] would never have offered it."

After the amendment passed by voice vote in the Senate, it returned to the House where the retroactivity language ran into a further legislative hurdle when it

[9] The subsequent passage of the amendment to the IG's enabling statute at the very least supports Tully's position that Rule 8's confidentiality proviso was unenforceable because it was not authorized by a specific provision of the IG's enabling statute as required by section 4(a)(2) of APRA, I. C. § 5-14-3-4(a)(2). "A fundamental rule of statutory construction is that an amendment changing a prior statute indicates a legislative intention that the meaning of the statute has changed." *State v. Boles,* 810 N.E.2d 1016, 1019 (Ind. 2004).

was stripped out in conference committee. However, in the waning minutes of the last day of the session, the amendment was re-inserted in conference committee into HEA 1001, the must-pass biennial budget bill. *See* Odendahl, Marilyn, "Attorney General's Office Authored Amendment That Seeks to End Lawsuit Against Rokita," *The Indiana Citizen* (May 5, 2023).[10]

There is direct and circumstantial evidence that the retroactivity language with respect to previously-issued informal advisory opinions was a clear attempt, engineered by Rokita and his confederates, to void the trial court's final judgment and thus represented an executive and legislative intrusion upon judicial authority in violation of the separation of powers limitation on legislative powers enshrined in Art. 3, Sec. 1 of the Indiana Constitution. However, because this legislative action occurred after the trial court had entered a final judgment on appeal to the Court, Tully was denied any opportunity to conduct discovery to seek out the extent of Rokita's involvement in the enactment of the amendment, or whether there were any similar APRA lawsuits pending that might be affected by this amendment.

By enacting and making retroactive this amendment to the IG's enabling statute while this case was pending on appeal, there is *prima facie* evidence that the

[10] Included at pp. 1-3 of Tully's Supplemental Appendix.

Legislature usurped judicial powers and prerogatives. The General Assembly does not have the authority to retrospectively void a final court judgment, as a final trial court judgment can only be divested only by an appellate court through the normal appellate processes. "It is not within the power of a legislature to take away rights [that] have been once vested by a judgment." *McCullough v. Virginia,* 175 U.S. 102, 123-24 (1898). Any legislative invalidation of Tully's vested interest in that final judgment violated the separation of powers between the co-equal branches of state government.

The separation of powers clause exists to protect the integrity of each branch of government by permitting each to serve as an effective check on the other two. The concept of an independent judiciary lies at the very bedrock of the separation of powers doctrine and was one of the central principles underlying the views of the framers of our Constitution. *State of Indiana v. Monfort,* 723 N.E.2d 407, 413 (Ind. 2000). Our supreme court has not hesitated to prevent a usurpation of its powers by the legislative branch through legislation which has the purpose and/or effect of voiding a lower court's final judgment. *Horner v. Curry,* 125 N.E.3d 584, 589 n.4 (Ind. 2019) (citing, *inter alia, Thorpe v. King,* 248 Ind. 283, 287, 227 N.E.2d 169, 171 (1967), holding that the legislature may not set aside a final judgment of an Indiana trial court); *Lemon v. Harris,* 949 N.E.2d 803, 814 (Ind. 2011), citing *Monfort,* 723 N.E.2d at 411 (same). The General Assembly may not

retroactively void the trial court's judgment in Tully's favor any more than, as *Monfort* teaches, it could simply legislate into oblivion a judicial position in the middle of a trial court judge's unexpired term.

The retroactive provision of the amendment slipped at the last minute of the 2023 session into the must-pass budget bill, bypassing regular legislative procedures such as committee hearings, and thereby avoiding public scrutiny and input, cannot and does not strip this Court of jurisdiction to decide the merits of this appeal based on pre-existing law.

The federal separation of powers cases Rokita cites in his Brief (at pp. 16-17), as well as the handful of Indiana cases he cites, are inapposite. As our Supreme Court categorically stated in *Bayh v. Sonnenburg,* 573 N.E.2d 398, 404 (1991), federal separation of powers cases do *not* determine the distribution of powers under Art. 3, Sect. 1 of the Indiana Constitution.

The Indiana cases Rokita cites (at pages 15-16) are also easily distinguishable. For instance, in *Gulzar [N.G.] v. State,* 148 N.E.3d 971 (Ind. 2020), our supreme court *sua sponte* determined, after oral argument had already taken place, that in light of the expungement statute's remedial purposes a subsequent amendment to that statute that benefited a particular litigant would be applied retroactively. That decision did not address the question under the constitutional separation of powers limitation of whether the legislative branch

may usurp judicial prerogatives by voiding a trial court's final judgment while it is on appeal. The 2023 budget bill is not "remedial" statute, and applying the amendment retroactively to Tully will cause her harm by stripping her of the benefits of the trial court's judgment. There was no immediately apparent reason to apply the amendment retroactively other than to usurp this Court's judicial powers.

An APRA case with a remarkably similar fact pattern was recently decided by the Marion Circuit Court and later affirmed by an equally-divided Supreme Court. In *Toomey v. Ind. Department of Correction,* 49C01-1501-PL-3142, the plaintiff, Ms. Toomey, had filed an APRA suit in January 2015 seeking records about the drugs used to carry out executions by lethal injection. In October 2016 the circuit court entered summary judgment in Toomey's favor. The following month the Department filed a notice of appeal. This Court in January 2017 dismissed the Department's appeal as premature, and the Supreme Court denied transfer in April of that same year.

On April 21, 2017, the last day of the General Assembly's session, an amendment was added to the 2017 biennial budget bill in a conference committee, without public notice or legislative hearings, that purported to exempt these drugs from disclosure under APRA and the amendment was expressly made retroactive. After the budget bill was passed with that amendment and signed into law, the Department moved the circuit court to modify its summary judgment based on the

new retroactive law, a motion Toomey for reasons that are obvious contested. Discovery ensued in the trial court, which disclosed that the clear purpose of the retroactive amendment was to moot the circuit court's summary judgment. Thereafter, Toomey responded to the Department's motion to modify in February, 2018.

On November 29, 2018, the circuit court issued its Order denying the Department's motion. The circuit court concluded, among non-constitutional reasons, that the retroactive law violated separation of powers by enacting a measure to void the circuit court's final judgment in Toomey's favor and thereby had interfered with judicial functions. The circuit court, again with the benefit of Toomey's discovery, also ruled that the retroactively effective amendment to the budget measure was special legislation in violation of Art. 4, Sec. 23 of the constitution. Lastly, the circuit court ruled that by being unreasonably combined with disparate subjects, the amendment to the budget bill also violated the constitution's single-subject limitation in Art. 4, Sec. 19 of the Constitution. Although this Court may take judicial notice, Evid. R. 201(b)(1), the circuit court's November 29, 2018, Order in the *Toomey v. DOC* litigation is included in Tully's Supplemental Appendix, at pp. 4-27.

The Supreme Court subsequently assumed jurisdiction under App. Rules 4(A)(1)(b) and 59(A) because the trial court had found the retroactively-effective

law to be unconstitutional. On February 25, 2021, the Supreme Court affirmed by an equally divided court pursuant to App. Rule 59(B). The Supreme Court's February 25, 2021, Order is included in Tully's Supplemental Appendix at p. 28.

This Court should decline Rokita's invitation to summarily reverse the trial court's judgment based on the retroactivity language in the amendment Rokita was able to have inserted at the last minute into the 2023 biennial budget bill. This type of gamesmanship by a member of the executive branch to involve the legislative branch in judicial branch affairs violates the constitutionally-mandated separation of powers. This Court should decide this appeal based on the facts and law as they existed when the trial court entered its final judgment in favor of Tully.

5. *The subsequent amendment to the IG's enabling statute also violated the single-subject rule of Art. 4, Sec. 19, of the Constitution.*

In addition to violating separation of powers, the inclusion of the provision in the 2023 budget bill that retroactively makes confidential all even previously-issued IG informal advisory opinions also violates Art. 4, Sec. 19 of the Indiana Constitution, which limits legislative acts to "one subject."[11]

Indiana's constitutional single-subject rule is not unique. As of 2011, forty-one state constitutions contained a single-subject rule. *A.B. v. State*, 949 N.E.2d

[11] In 1974, Section 19 was amended to its present form by the General Assembly to eliminate the previous requirement that all subjects be included in the title of a legislative act. However, that amendment expressly retained, and reasserted, the longstanding single-subject limitation.

1204, 1221 (Ind. 2011) (Dickson, J., concurring). The object all constitutional single-subject limitations is to address the unfortunately too-frequent legislative tactic known as "logrolling," whereby a bill that lacks sufficient support is combined with a wholly disparate subject so that the supporters of the former can combine with the supporters of latter to pass both in the same bill. *See* Report of the Debates and Proceedings of the Convention, vol. 2, at 1085. *A.B. v. State,* 949 N.E.2d at 1222 (Dickson, J., concurring).

As Justice Dickson observed in his concurring opinion in *A.B.*, our Supreme Court has been less than completely consistent in enforcing the single-subject rule depending on the degree of deference the court has determined at various times and in various historical eras to accord the General Assembly. *Stith Petroleum Co. v. Ind. Dept. of Audit & Control*, 211 Ind. 400, 5 N.E.2d 571 (Ind. 1937), is representative of the highly-deferential approach, while *Jackson v. State ex rel. South Bend Motor Bus Co*., 194 Ind. 248, 142 N.E. 423 (Ind. 1924) (bill pertaining to both inheritance taxes and motor vehicles determined to violate single-subject limitation), and *State ex rel. Pearcy v. Criminal Court of Marion County, Div. One,* 262 Ind. 9, 274 N.E.2d 519 (1971) (no rational unity between provisions relating to penal institution employees and provisions relating to the length of sentences), are illustrative of the stricter, less-deferential approach to enforcement of the single-subject limitation. Our Supreme Court now appears to use the deferential standard

of reasonableness. *A.B. v. State*, 949 N.E. 2d at 1225 (Dickson, J., concurring); 1226 (Sullivan, J., concurring).

The reasonableness standard, though deferential, is more demanding than the rational basis review used in federal equal protection cases, a standard of review which is not "toothless." *Matthews v. Lucas,* 427 U.S. 495, 510 (1976); *see also Riker v. Lemmon,* 798 F.2d. 546, 552 n.6 (7th Cir. 2015) (quoting *Thornburgh v. Abbott,* 490 U.S. 401, 414 (1987)). The reasonable standard, though highly deferential, is not tantamount to "*carte blanche* deference" to the legislative branch. *A.B. v. State,* 949 N.E.2d at 1227 (Sullivan, J., concurring). Gross abuses by the General Assembly in combining disparate subjects lacking any rational unity may be found to violate the single-subject limitation. *A.B. v. State,* 949 N.E.2d at 1229 (Sullivan J., concurring); *see also Loparex, LLC v. MPI Release Techs, Inc*., 964 N.E.2d 806, 814-15 (Ind. 2012) (there must be a reasonable basis for grouping together in one act various matters of the same nature to avoid deceiving the public).

The amendment to the budget bill making all previously-issued IG advisory opinions retroactively confidential was inserted in the budget bill without committee hearings, public testimony, or scrutiny. This type of manipulation of the legislative process at the very least should diminish the normal presumption of constitutionality. The apparent purpose of this amendment was to invalidate Tully's

judgment under APRA without bothering to comply with normal legislative formalities and should warrant heightened judicial scrutiny, and at the very least a remand to allow Tully to develop a factual record by post-judgment discovery.

There is no more rational unity between budgetary matters and retroactively making confidential and exempt from public disclosure previously-issued IG informal advisory opinions than there is between motor vehicles and inheritance taxes that resulted in judicial invalidation under the single-subject rule in *Jackson, supra.* Accordingly, the retroactivity language in the amendment to the budget measure also violated Art. 4, Sec. 19.

6. *The trial court erred in its February 27, 2023, final judgment when, after granting Tully's motion for summary judgment and denying Rokita's cross-motion, it permitted Rokita to redact without limitation the IG opinion before releasing it to Tully and refused to award her costs and attorney fees.*

The trial court in its January 3 summary judgment order incongruously invited Rokita to present a redacted copy of the IG opinion within 30 days for the trial court's consideration, after which the trial court said it would "issue a redacted copy of the informal advisory opinion." The trial court also said it would not award attorney's fees "at this time." On January 9 Tully filed a motion to amend and/or clarify whether the trial court's summary judgment order should be read to allow Rokita to make unlimited redactions to the IG opinion, and to clarify whether Tully would be entitled to costs and attorney fees. Tully noted that redaction of a

disclosable public record is permitted only if that record "contains disclosable and nondiscloseable information." I. C. § 5-14-3-6(a).

On February 27, the trial court, without explanation, said that it would permit Rokita to redact the IG opinion and would thereafter "issue a redacted copy of the informal advisory opinion." Because the trial court had rejected the only discretionary exemption Rokita had invoked, and Rokita never claimed it contained any materials required to be redacted by I. C. § 5-14-3-4 (a), the trial court erred by allowing Rokita to make redactions to the IG opinion before releasing it to Tully for her inspection.

The trial court also erred by refusing, also without explanation, to award Tully's costs and reasonable attorney's fees even though she had "substantially prevail[ed]" on her APRA claims and been granted summary judgment. APRA mandates an award of costs and fees to a plaintiff who "substantially prevails" so long as before filing suit she had sought an advisory opinion from the PAC, which Tully did. *Shepherd Props. Co. v. Int'l Union of Painters & Allied Trades, Dist. Council 91,* 972 N.E.2d at 852. This Court should reverse the trial court's order permitting Rokita to redact the IG opinion and denying Tully costs and fees.

VI. CONCLUSION

This Court should affirm the trial court's judgment that the IG opinion is not exempt from APRA's disclosure requirements, order Rokita to release the IG opinion to Tully without redactions, and remand to the trial court to determine the amount of attorney fees and costs to which Tully is entitled under Section 9(i) of APRA, I.C. § 5-14-3-9(i).

DATED this 23rd day of August, 2023.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

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CERTIFICATE OF SERVICE

I certify that on August 23, 2023, the foregoing document and all attachments thereto were filed using the Indiana E-filing System. I also hereby certify that on August 23, 2023, the foregoing was served, contemporaneously with this filing, via the IEFS, to the following attorneys for Appellant:

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