From:	Cleland Welton <cbw3a@virginia.edu>
Sent time:	Monday, February 23, 2009 3:56:55 PM
To:	Roberts, Larry
Cc:	Bill Vigen <vigen@virginia.edu>
Subject:	FOIA Memo
Attachments:	FOIA Memo.doc

Larry,

Bill and I have prepared a brief memo on the FOIA issue you asked us to research. I've attached a copy, and have a paper copy for you as well.

Thanks,

Cleland

–

Cleland B. Welton, II

University of Virginia School of Law

Class of 2009

GOVERNOR'S CONFIDENTIAL WORKING PAPERS
PRIVILEGED & CONFIDENTIAL/ATTORNEY WORK PRODUCT

MEMORANDUM

To: Lawrence Roberts, Counselor to the Governor

From: Cleland Welton & Bill Vigen, Governor's Legal Fellows

Re: FOIA Requests for the Governor's Meeting Schedule

Date: February 23, 2009

The Virginia Freedom of Information Act ("FOIA"), Va. Code §§ 2.2-3700 et seq., requires disclosure of public records on request unless one of a number of exceptions applies to bar disclosure or to grant a record's custodian discretion whether to disclose it. You have asked our opinion whether the Governor's schedule falls under FOIA's disclosure requirements. We conclude that in the event a request for disclosure of his schedule is made, the Governor has at least two potential defenses.

First, *Taylor v. Worrell Enterprises, Inc.*, 409 S.E.2d 136 (Va. 1991) provides a constitutional ground for refusing such a request. Taylor concerned a newspaper's request for Governor Wilder's long-distance phone records. The Virginia Supreme Court held that the separation of powers doctrine embodied in Va. Const. Art. I, § 5 and Art. III, § 1 prevented the legislature from mandating, through FOIA, that the Governor disclose his telephone records. Citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977), the court stated a two-part test for considering separation of powers questions related to compelled disclosure of executive documents: If disclosure would create a "potential for disruption," it cannot be compelled without "'an overriding need to promote objectives' of the legislative branch." *Taylor*, 409 S.E.2d at 139.

As to the first prong of the test, the court rejected the newspaper's argument that disclosure of the fact of the phone calls (as opposed to their content) did not encroach on the separation of powers, arguing that the necessities of the deliberative process allow the Governor to keep his phone records secret. The court observed that "[a] lack of candor or an unwillingness to participate in the decision making process is as likely to flow from the compelled disclosure of the fact of consultation as from the disclosure of the content of the consultation." *Id*. It thus found a potential for disruption.

The court then found no overriding legislative objective. FOIA, it said, was designed to promote "openness in government," not to "provid[e] a means for conducting an investigation or prosecution of the executive branch." *Id*. Given the number of exemptions from disclosure authorized by FOIA, the court determined that the legislature's policy in enacting it reflected the fact that "the best interests of the Commonwealth may require that certain governmental records and activities not be subject to compelled disclosure." *Id*. The legislature's policy goals thus did not in its opinion override the disruptive potential of disclosure.

Both prongs of this reasoning are equally applicable to the Governor's meeting schedule. Compelled disclosure of when, where, and with whom he meets is just as likely (perhaps more likely) to infringe on the deliberative process as the disclosure of telephone records. As the *Taylor* court stated, "the data requested have an intrinsic significance apart from the content of the calls themselves. Compelled disclosure of that data impairs . . . the ability of the executive to perform his constitutionally required duties." *Id*. The potential for disruption from disclosure of the Governor's calendar is therefore quite significant. And because the legislature's "policy of openness" is no more weighty in this context than in the context of telephone records, separation of powers principles provide a sound justification for refusing to comply with a FOIA request for the Governor's schedule.

Even without consideration of constitutional separation-of-powers principles, the language of FOIA itself provides a rationale for denying a request for the governor's schedule. Va. Code § 2.2-3705.7(2) provides that "[w]orking papers and correspondence of the Office of the Governor" are excluded from FOIA's disclosure requirements. The statute defines "working paper" to mean "those records prepared by or for an above-named public official for his personal or deliberative use." Arguably, the Governor's schedule constitutes a "working paper" within this definition, and would therefore be exempted from FOIA's requirements.

Cases from other jurisdictions support the proposition that the Governor need not disclose his appointment schedules. The California Supreme Court construed that state's deliberative process privilege as protecting the Governor's schedules because "while the raw material in the Governor's appointment calendars and schedules is factual, its essence is deliberative." *Times Mirror Co. v. Superior Court*, 813 P.2d 240, 251-52 (Cal. 1991). Balancing the interest in the deliberative process against the public interest in disclosure, the California court found in favor of the Governor. Taking a different tack to the same result, the Ohio Court of Appeals went so far as to say that "personal notes, as well as telephone messages and daily appointment calendars, are not public records because, in general, they are created solely for the individual's convenience, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer's sole discretion." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Voinovich*, 654 N.E.2d 139, 143 (Ohio Ct. App. 1995). Finally, while the Maryland Court of Appeals in *Office of the Governor v. Washington Post Co.*, 759 A.2d 249 (Md. 2000) refused to extend a blanket executive privilege claim for scheduling records, the court remanded the case in order to allow the governor to claim privilege with regard to particular documents and records on a case-by-case basis.

In sum, the weight of authority, in Virginia and elsewhere, indicates that a governor's schedules and calendars are immune from mandatory disclosure under Virginia's Freedom of Information Act. The Governor may properly refuse such a request, citing both separation of powers principles and the plain language of FOIA itself.