From:	McCarten, Timothy
Sent time:	Monday, March 17, 2008 6:07:28 PM
To:	Roberts, Larry
Cc:	andrew.bosse@gmail.com; jrh3r@virginia.edu; tmccarten@virginia.edu
Subject:	FOIA Project
Attachments:	FOIA_Memo.doc

Larry,

Ryan and I (in a very quiet office) finished work today on a draft of the memo regarding FOIA and the Governor's calendar. I am attaching the completed draft.

We also found a new case that changed our analysis of FOIA's working papers exemption. The following is our short answer to your question presented:

> We looked at Virginia and federal cases in which the issue was litigated. Courts will probably undertake a fact-specific inquiry to determine whether calendars used by high-level state officials are "public records," which are potentially subject to FOIA disclosure. From federal case law, it appears that such an inquiry may depend on several factors, including the following: whether the calendars were widely accessible; whether the calendars were used exclusively for a government purpose; and whether the calendars were controlled by the state official.
>
> Even if the calendars are considered "public records," they may nevertheless be protected from disclosure. There are two possible modes of invoking an exemption in the present context. First, the Governor's Office can argue that compelled disclosure would impair the Governor's ability to perform his constitutionally required duties; nondisclosure would thus be supported by separation of powers principles. Second, the executive can argue that the calendars fall within FOIA's working papers exemption if they were prepared for "personal or deliberative use." Because the Virginia Supreme Court accepted the former justification in an analogous context (protecting the Governor's long-distance telephone records from compelled disclosure), that argument is most likely to succeed in a Virginia court.

Andrew will be in the office on Friday if you would like us to continue work on this project. In the meantime, please let me know if you have any questions.

Best,

Tim

Timothy H. McCarten
Governor's Legal Fellow 2007-08

Cell: 703.395.3239
tmccarten@virginia.edu

CONFIDENTIAL
GOVERNOR'S WORKING PAPERS

MEMORANDUM

TO: Lawrence Roberts

Counselor to the Governor

FROM: Andrew Bosse
J. Ryan Harvey
Timothy H. McCarten

Governor's Legal Fellows

RE: Disclosure of Calendars Under FOIA

DATE: March 17, 2008

Question Presented

Does the Freedom of Information Act ("FOIA") apply to the calendars (including appointment books) of cabinet-level officials and the Governor?

Short Answer

We looked at Virginia and federal cases in which the issue was litigated. Courts will probably undertake a fact-specific inquiry to determine whether calendars used by high-level state officials are "public records," which are potentially subject to FOIA disclosure. From federal case law, it appears that such an inquiry may depend on several factors, including the following: whether the calendars were widely accessible; whether the calendars were used exclusively for a government purpose; and whether the calendars were controlled by the state official.

Even if the calendars are considered "public records," they may nevertheless be protected from disclosure. There are two possible modes of invoking an exemption in the present context. First, the Governor's Office can argue that compelled disclosure would

impair the Governor's ability to perform his constitutionally required duties; nondisclosure would thus be supported by separation of powers principles. Second, the executive can argue that the calendars fall within FOIA's working papers exemption if they were prepared for "personal or deliberative use." Because the Virginia Supreme Court accepted the former justification in an analogous context (protecting the Governor's long-distance telephone records from compelled disclosure), that argument is most likely to succeed in a Virginia court.

Discussion

Both the federal Freedom of Information Act, 5 U.S.C. § 552, and the Virginia state Freedom of Information Act, Va. Code §§ 2.2-3700–3714, apply in the Commonwealth of Virginia. The federal FOIA applies to federal agencies and other executive departments; thus, its applicability to state cabinet-level officials appears limited. This memo deals with the Virginia statute, but will also discuss federal case law where the reasoning in federal FOIA decisions could bear on the interpretation of the Virginia law.

Three sections of the Virginia FOIA statute merit attention. First, the operative words of the statute appear in § 2.2-3704(A): "Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth. " Second, the crucial phrase "public records" is defined at § 2.2-3701 as meaning "all writings and recordings that consist of letters, words or numbers, or their equivalent, . . . prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business." Third, the Act excludes

certain items connected to the Office of the Governor from disclosure, specifically "[w]orking papers and correspondence." § 2.2-3705.7(2). Also, the phrase "Office of the Governor" applies to the Cabinet Secretaries along with the Governor (as well as to the chief of staff, counsel, director of policy, and several other individuals to whom executive authority has been delegated). Id. Thus, there is no need to undertake a separate FOIA analysis for the Governor and any cabinet-level secretary. It should be noted, though, that in litigation a court probably would be more likely to extend greater deference to the Governor than to an individual cabinet secretary.

In deciding whether the FOIA will apply to documents in the control of the Governor or a cabinet secretary, two inquiries must be made. The first is definitional: are the documents being sought "public records"? The statute itself provides little guidance, and on its face defines "public records" broadly. Any document not relating to the "transaction of public business" is not a "public record." If the document is determined to be a "public record," a second question arises: can the document be described as "working papers and correspondence," where working papers means "those records prepared by or for [an applicable official in the Office of the Governor] for his personal or deliberate use"? If not, then it must be disclosed on request. If documents are not disclosed, a citizen can file a petition for mandamus or an injunction in state court. § 2.2-3713. Willful and knowing violations of FOIA are penalized with monetary damages under § 2.2-3714.

I. "Public Records"

The meaning of "public records" in the context of FOIA has not been litigated extensively in Virginia.[1] In The Globe Newspaper Co. v. Commonwealth, the state Supreme Court held that biological material recovered from a rape victim was not a public record subject to FOIA. 264 Va. 622, 631 (2002). The case was an obvious one, and the court did not perform any legal analysis in arriving at its conclusion. In Beck v. Shelton, the Court was asked to decide whether the exchange of e-mails between local government bodies might constitute a "meeting" under FOIA. 267 Va. 482 (2004). The Court held that the exchange of e-mails did not create a "meeting," but noted that e-mails fall within the definition of "public records." Id. at 490. No cases we located delved into the legal meaning of "transaction of public business."

Thus, no Virginia case is entirely on point. Numerous other states and the federal government, though, have dealt with the calendar / appointments issue and the division between "personal records" and "agency" or "public" records. Courts have come out on either side of the calendar / appointments issue, but their decisions hinged on different substantive law and so no "tallying" of cases that might show a trend one way or another can be made. In looking at cases outside Virginia's jurisdiction, though, several predictive observations can be made. The FOIA inquiry will be fact-specific. It will probably turn on a number of factors that commonly recur in cases making the "personal" versus "public" decision. These factors will be outlined below.

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[1] Several cases discuss the meaning of "public record" under the Virginia Public Records Act, Va. Code § 42.1-75 et seq., but that Act's definition of "public record" differs from the FOIA definition. See § 42.1-77 ("'Public record' means recorded information that documents a transaction or activity by or with any public officer . . ."); see also, e.g., Hall v. Commonwealth, 2000 WL 385532 (2000) (finding, in a forgery case, that a confirmation of insurance document was a public record).

A. Federal Cases:

In an early and important federal FOIA case, the U.S. Court of Appeals (D.C.) held that while daily agendas circulated to an agency staff were "agency records," other appointment materials were not "agency records" within the meaning of FOIA. Bureau of Nat'l Affairs, Inc., v. U.S. Dept. of Justice, et al., 742 F.2d 1484 (1984). Their inquiry "focus[ed] on a variety of factors surrounding the creation, possession, control, and use" of several documents, including appointment books kept by officials. Id. at 1490. The court listed several issues applicable to an agency document / personal document decision: whether other employees had access to the documents; whether the documents were integrated into official files or records; whether the document was prepared or used by an official in connection with his duties. The two major criteria were "control" of the document by the agency, and what "use" was made of the document. Id. at 1492. "Daily agendas" that were publicly circulated within the staff of one government employee, and were maintained by his secretary, were found to be "agency records," because "[t]hey were created for the express purpose of facilitating the daily activities" of the division. Id. at 1495. Appointment calendars created for personal convenience, though, were found not to be agency records. Id. They were not distributed to other employees, and were created for personal convenience; also, the agency had no control over the calendars. The presence of personal as well as business information strengthened the conclusion. Id. at 1496.

A more recent D.C. Circuit decision, though, found that some electronic calendars of agency officials were "agency records" subject to disclosure. Consumer Federation of America v. Dept. of Agriculture, 455 F.3d 283 (2006). The court relied on Bureau of

Nat'l Affairs in distinguishing between the calendars at issue: because some agency officials "shared" their calendars to coordinate schedules, those calendars were used by the agency. The calendar that was unshared was found to be personal. While the objective "use" test was dispositive, the court also noted that electronic calendars should be considered to be in "control" of the agency. Id. at 290–91. Subjective intent in creating a document is irrelevant to the question of whether it was a "personal" or "agency" document. Id. at 294 (Henderson, J., concurring) (citing U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989)).

B. State cases:

Other state courts have dealt with the applicability of FOIA to the Governor's calendar. These cases rely on state law and thus have only moderately persuasive or analogous authority. The states are not in agreement, and the analysis often hinged on state law and the specific facts of the case.

In International Union v. Voinovich, the Court of Appeals of Ohio found that the governor's personal calendars and appointment books were not "public records" subject to disclosure under the Ohio public records statute (100 Ohio App.3d 372, 654 N.E.2d 139 (1995)).

In Times Mirror Co. v. Superior Court, the California court denied disclosure of Governor's appointment calendars and schedules because, under California law, they were within catchall "public interest" exemption, considering considerable deliberative process and security interests involved (53 Cal.3d 1325, 813 P.2d 240 (1991)).

In Office of the Governor v. Wash. Post Co., the Court of Appeals of Maryland found that the Governor's scheduling records were generally not exempt from disclosure under the Public Information Act, except for those items that included wholly personal meetings and family engagements (360 Md. 520, 759 A.2d 249 (2000)).

In Herald Association v. Dean, the Supreme Court of Vermont the Governor was required to disclose those portions of his daily calendar reflecting meetings and events related to his running for President of the United States. Governor Dean was, however, permitted a remand to the lower court to make prima facie showing of common law executive privilege as to portions of his daily schedule covering meetings or events related to his deliberations and policy making (174 Vt. 350, 816 A.2d 469 (2002)).

II. Exemptions From FOIA

Even if the calendars are considered "public records" under FOIA, they may still be exempt from compelled disclosure. In Taylor v. Worrell Enterprises, Justices on the Virginia Supreme Court accepted two (arguably consistent) rationales that would support such an exemption for state officials' calendars. The first approach, grounded in constitutional principles of separation of powers, exempts from FOIA any data that would impair the executive's ability to perform his constitutional responsibilities. The second rationale relies upon FOIA's statutory exemption for working papers, and applies if such documents were prepared for "personal or deliberative use."

A. Constitutional Grounds for Exemption

In Taylor v. Worrell Enterprises, a majority of the Virginia Supreme Court found that the telephone records from the Governor's Office fell within FOIA's exemption for "[m]emoranda, working papers and correspondence held … by the office of the Governor." 409 S.E.2d 136 (Va. 1991) (invoking the then-applicable exemption under Va. Code § 2.1-342(B)(4)). In that case, the Governor's Office refused to produce the records upon request of *The Daily Progress*, choosing instead to invoke the FOIA exemption. The telephone bills identified individual calls made and received by the Governor's Office, and included the telephone number charged for the call, the city and number called, and the city and number from which the call was placed. The bills also identified the number of minutes of each conversation and the charge for each call.[2]

The Taylor Court applied two rationales in concluding that the telephone bills were exempt from FOIA, neither of which commanded a majority of justices. A three-justice plurality, led by Justice Lacy, concluded that compelled disclosure would violate the constitution's separation of powers. Id. at 140. Applying interpretive canons of constitutional avoidance, those justices found that the General Assembly, in enacting FOIA, could not have intended to require the Governor's Office to disclose its long-distance telephone bills. Id. at 137, 140. This is because compelled disclosure of such records "could have a chilling effect on the Governor's use of the telephone for conducting the Commonwealth's business." Id. at 138.

[2] The Governor's Office agreed to provide the newspaper with the bill's cover page, which showed the aggregate charges. Id. at 137. Although this potentially could give rise to arguments that, in doing so, the Governor's Office had waived its privilege, the Taylor Court did not place any significance on this partial disclosure.

The plurality found it significant that disclosure would have a chilling effect not only on the Governor, but also on individuals with whom he chose to consult over the phone. Id. The justices also rejected the newspaper's arguments that data from the telephone bills was devoid of substantive information (and therefore unprotected). Rather, the plurality found it significant that such data "could provide a basis for public speculation," and could thereby "subject recipients of such calls to inquiries regarding the calls and their content." Id. at 138.Because disclosure might engender a lack of candor or an increased unwillingness to participate in the decisionmaking process, it would impair "the ability of the executive to perform his constitutionally required duties." Id. at 139. Since such a disruption outweighs any legislative interest in governmental transparency, the Taylor plurality concluded that the telephone bills fell within FOIA's statutory exemption. The plurality found this to be consistent with the General Assembly's intention in creating the working papers exemption, in which it recognized the "constitutional limits on its ability to invade the confidentiality of the Governor's communications." Id.

Applying the Taylor decision to the present context, it appears that a Virginia court would be persuaded by arguments that demonstrate the similarities between calendars and itemized telephone bills. Although any such analysis in the present context would require more concrete facts, state officials' calendars possess some characteristics that are inherently similar to those that the Taylor plurality found to be relevant. For example, if the calendars disclosed information about meeting attendees or meeting locations, the Governor could argue that the disclosure of such data would have a chilling effect on both the Governor and attendees, which would impair the executive's

decisionmaking processes. The chilling-effect justification could also operate to prevent the disclosure of other calendar items, but any such arguments would require more facts.

B. Statutory Grounds for Exemption

Although the Taylor plurality found the itemized telephone bills to fall within the working papers exemption, those justices applied a largely constitutional methodology to arrive at that result. In contrast, Chief Justice Carrico's brief concurring opinion relied solely on the FOIA statute's text to conclude that those records were exempt. Id. at 140.[3] Ostensibly applying a "plain meaning" analysis to the statute, he concluded that "the monthly billings at issue here are '[m]emoranda held … by the office of the Governor' and thus exempt from disclosure under Code § 2.1-342(B)(4).'" Id. The Chief Justice's analysis treats the issue as though the outcome were obvious, however, and it does not provide much insight into how he reached his conclusion. For that reason, his concurrence sheds scant light on the present inquiry other than the fact that a Virginia court might apply a "plain meaning" analysis to determine whether executive documents fit within the FOIA exemption.[4]

In its present incarnation, FOIA's exemption for material from the Governor's Office includes "working papers and correspondence of the Office of the Governor." Va.

[3] Chief Justice Carrico did not believe that the issues of separation of powers and executive privilege were properly raised for appellate review. Id. at 140. As such, he did not openly reject Justice Lacy's constitutional analysis, but rather sought an alternative route to the same conclusion.

[4] Because Virginia's FOIA statute has been revised since Taylor, Chief Justice Carrico's opinion is perhaps no longer directly relevant. Specifically, the statute in its present form exempts "[w]orking papers and correspondence of the Office of the Governor," and no longer specifically includes a categorical exemption for "memoranda." Va. Code § 2.2-3705.7(2) (2008). Although this fact could be used to argue that Justice Carrico's concurrence no longer applies to FOIA cases, the present statute's broad definition of "working papers" arguably encompasses the former "memoranda" category. "Working papers" is presently defined as "those records prepared by or for [an official in the Governor's Office] for his personal or deliberative use." Va. Code § 2.2-3705.7(2) (2008).

Code § 2.2-3705.7(2) (2008). As mentioned above, "Office of the Governor" is defined in a manner that is sufficiently broad to encompass both the Governor and cabinet-level officials. Id. The term "working papers" is also defined under the statute, and includes "those records prepared by or for [the Governor or a cabinet-level official] for his personal or deliberative use." Id. Under a purely statutory analysis, therefore, a court's inquiry in the context of calendars will probably hinge on the term "personal or deliberative use."

As an initial matter, it is unclear how much work is actually done by the "personal use" exemption. This is because the court must have made an initial determination that the record was "public" in order for the "working papers" exemption to apply. It therefore seems that this term merely restates the "public record" requirement, and actually exempts little or nothing from FOIA's disclosure requirements. The "deliberative use" exemption is therefore more likely to apply in the present context. Unfortunately, no state or federal cases have defined this term or analyzed its scope.

If the court were to apply a plain meaning analysis to that term, it would probably look to the dictionary's definition. See, e.g., Taylor, 409 S.E.2d at 143 (Hassell, J., dissenting) (defining "memorandum," as used in FOIA, using *Black's Law Dictionary*). Although *Black's Law Dictionary* does not define the term "deliberative" on its own, it defines the "deliberative-process privilege" as a "privilege permitting the government to withhold documents relating to policy formulation to encourage open and independent discussion among those who develop government policy." As a matter of first impression, therefore, a Virginia court could exempt all records that relate to policy formulation, or which engender open and independent discussion among policymakers.