



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 22, 2015

PUBLIC ACCESS OPINION 15-008
(Request for Review 2015 PAC 35747)

FREEDOM OF INFORMATION ACT:
Disclosure of the Governor's Calendar

Mr. Bruce Rushton
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Ms. Christina McClernon
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Dear Mr. Rushton and Ms. McClernon:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons discussed below, this office concludes that the Office of the Governor (Governor's Office) violated the requirements of FOIA by improperly redacting information responsive to Mr. Bruce Rushton's FOIA request.

BACKGROUND

On May 15, 2015, Mr. Rushton, on behalf of the *Illinois Times*, submitted a FOIA request to the Governor's Office seeking documents showing "Gov. Bruce Rauner's appointments from April 1, 2015 to May 14, 2015. The records * * * should include the times and dates of any and all meetings and functions attended by the governor as well as, in the event of meetings, the

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names and titles of meeting attendees."¹ On June 1, 2015, the Governor's Office provided Mr. Rushton with a copy of the Governor's April calendar but redacted therefrom certain information citing sections 7(1)(f) and 7(1)(m) of FOIA (5 ILCS 140/7(1)(f), (m) (West 2014)).² The e-mail, to which the records were attached, stated that the May calendar would take additional days to produce.³ On June 11, 2015, this office received Mr. Rushton's Request for Review in which he contested the basis for redacting the names of meeting attendees and the completeness of the Governor's Office's response with respect to the May calendar.⁴

On June 16, 2015, this office sent a copy of Mr. Rushton's Request for Review to the Governor's Office and asked it to provide unredacted copies of the responsive records for our confidential review, together with detailed information concerning how the Governor's calendar is maintained and used. We also asked the Governor's Office to provide a detailed explanation for the asserted exemptions and to address the allegation that it did not provide a complete response within the statutorily prescribed time periods.⁵ On July 15, 2015, the Governor's Office provided Mr. Rushton with a redacted copy of the Governor's calendar covering the May 1 to May 14, 2015, time period.⁶ The Governor's Office provided this office with redacted copies of all of the responsive records that had been produced to Mr. Rushton, together with its written response.⁷ A copy of the Governor's Office's response was forwarded to Mr. Rushton on July 16, 2015; this office received Mr. Rushton's reply to the Governor's Office's response on July 17,

¹E-mail from Bruce Rushton, Staff Writer, *Illinois Times*, to Custodian of Records, Governor's Office (May 15, 2015).

²Letter from Donovan Borvan, Associate General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Bruce Rushton (June 1, 2015).

³E-mail from Donovan Borvan, Associate General Counsel, Office of Governor Bruce Rauner, to Bruce Rushton (June 1, 2015).

⁴E-mail from Bruce Rushton, Staff Writer, *Illinois Times*, to Public Access (June 11, 2015).

⁵Letter from Josh Jones, Supervising Attorney, Public Access Bureau, to Donovan Borvan, FOIA Officer, Office of the Governor (June 16, 2015).

⁶Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Bruce Rushton (July 15, 2015).

⁷Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Josh Jones, Supervising Attorney, Public Access Bureau (July 15, 2015).

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2015.⁸ On July 20, 2015, the Governor's Office provided this office with unredacted copies of the responsive records.⁹

On August 6, 2015, this office properly extended the time in which to issue a binding opinion by 30 business days, to September 22, 2015, pursuant to section 9.5(f) of FOIA.

ANALYSIS

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2014). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2014). When denying any portion of a request pursuant to an exemption in section 7 of FOIA (5 ILCS 140/7 (West 2014), as amended by Public Act 99-298, effective August 6, 2015), a public body "shall specify the exemption claimed to authorize the denial and the *specific reasons for the denial, including a detailed factual basis* and a citation to supporting legal authority." (Emphasis added.) 5 ILCS 140/9 (West 2014).

Timeliness of Response

Pursuant to section 3(d) of FOIA (5 ILCS 140/3(d) (West 2014)), "[e]ach public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section." Section 3(e) (5 ILCS 140/3(e) (West 2014)) enumerates seven circumstances in which a public body may extend the response period by an additional five business days, and further provides: "The person making a request and the public body may agree in writing to extend the time for compliance for a period to be determined by the parties."

In responding to this office, the Governor's Office did not dispute that it completed its response to Mr. Rushton's May 15, 2015, FOIA request on July 15, 2015. There is no allegation that the Governor's Office and Mr. Rushton reached a written agreement to extend the time for compliance with the request. Accordingly, the Governor's Office's response did not comply with FOIA's statutorily required time for response.

⁸E-mail from Bruce Rushton, Staff Writer, *Illinois Times*, to Public Access (June 17, 2015).

⁹E-mail from Christina M. McClernon, Assistant General Counsel/FOIA Officer, Office of Governor Bruce Rauner, to Joshua Jones (July 20, 2015).

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Public Records

Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2014)) defines "public records" to include:

all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

The Governor's Office initially argues that the redacted calendars it "produced in response to [Mr. Rushton's] request are not 'public records' for purposes of FOIA."¹⁰ In support of this argument, the Governor's Office has cited five Federal cases and two cases from other states. The Governor's Office has not, however, cited any Illinois cases. Consequently, we will address the issue first under the recognized principles of statutory construction.

Records pertaining to the affairs of government, the acts of public officials, and the expenditures of public funds are public records which are to be made available to any person who submits a request to inspect them. *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 204 (1st Dist. 1997). In *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶38, 992 N.E.2d 629, 638 (2013), the appellate court stated that "to qualify as a 'public record' under [section 2(c) of] FOIA, a communication must (1) 'pertain[] to the transaction of public business' and have either been (2) prepared by, (3) prepared for, (4) used by (5) received by, (6) possessed by, or (7) controlled by a public body." Accordingly, "to qualify as a public record a communication must first pertain to 'business or community interests as opposed to private affairs.'" *City of Champaign*, 2013 IL App (4th) 120662, ¶31, 992 N.E.2d at 637 (quoting Merriam-Webster's Collegiate Dictionary 941 (10th ed. 2000)).

The Governor's Office argues that the Governor's calendar is not a public record because:

¹⁰Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Josh Jones, Supervising Attorney, Public Access Bureau (July 15, 2015), at 2.

[T]he Governor's calendar is maintained by his personal assistant and is used solely for his [the Governor's] convenience in managing his schedule. Only senior staff members have access to Governor Rauner's calendar. This includes the Governor's chief of staff, his deputy chief of staff, his general counsel, and senior members of his Communications team. The Governor's personal assistant, Holly Griff, also has access to his calendar. She prepares and maintains the calendar, and she is the only person who can add, edit, or delete entries on his calendar. Ms. Griff is on the State payroll[.] * * * The calendar is not provided or distributed to senior staff. They can access the calendar via the State's Microsoft Outlook email system; although they can view entries on the calendar, they cannot edit the entries. The calendar is not circulated within the Governor's Office.

* * * The calendars are used to organize the Governor's time and facilitate scheduling. The Governor can view his calendar for reminders of upcoming meetings. This is meant as a personal aid for the Governor and, to a limited extent, for senior staff members, who only use the calendar to determine the Governor's availability.

* * *

When there are events on the Governor's calendar that pertain to a press conference, speech, or other public engagement where the Governor will appear, the Communications team will separately prepare a more public calendar of these events, which they make available to staff upon request. No other records are kept for staff to keep track of the Governor's schedule. ^[11]

This explanation from the Governor's Office indicates that the calendar is prepared and maintained by a State employee, accessible to senior staff of the Governor's Office through the State's email system, and used to organize the Governor's time, facilitate scheduling and allow senior staff to determine his availability. Based on this description, it is undisputed that the Governor's calendar was prepared by, prepared for, used by, possessed by, and controlled by the Governor's Office. Although the Governor's Office argues that the Governor's

¹¹Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Josh Jones, Supervising Attorney, Public Access Bureau (July 15, 2015), at 3-4.

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calendar is maintained solely for his convenience, the description that the Governor's office provided makes clear that the calendar is also "used to * * * facilitate scheduling" and "to a limited extent, [to allow] senior staff members * * * to determine the Governor's availability." The Governor's Office further states that, except for separate calendars that the Communications team may prepare for certain public engagements, "[n]o other records are kept for staff to keep track of the Governor's schedule." This information provided by the Governor's Office demonstrates that the calendar is used to conduct public business by facilitating the day-to-day operations of the Governor's Office. Consistent with that explanation, this office's review of the redacted entries indicates that they all appear to pertain to the business of the State, rather than the personal affairs or private business interests of the Governor. Because the Governor's calendar was prepared and is maintained by the Governor's Office and pertains to public business, it is a public record of the Governor's Office for purposes of the Illinois FOIA.

While this determination that the Governor's calendar is a public record under Illinois's FOIA is dispositive of the issue for purposes of this review, we note that the Supreme Court of Vermont reached the same conclusion concerning its governor's scheduling records in highly analogous circumstances. In *Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 816 A.2d 469 (Vt. 2002), a media requester sought Vermont Governor Howard Dean's daily schedules, which "include[d] a variety of public and private events, including conferences, meetings, and descriptive information relating to the events, often including a description of the policy question or issue to be discussed at a particular meeting." *Herald Ass'n*, 174 Vt. at 352, 816 A.2d at 472. Much like Governor Rauner's calendar, Governor Dean's daily calendar was an integral and essential part of the daily function of the Governor's office. It facilitated the business of the Governor's Office by structuring Governor Dean's schedule and allowing staff to plan accordingly. *Herald Ass'n*, 174 Vt. at 352-3, 816 A.2d at 472. Under section 317(b) of Vermont's Access to Public Records Act (Vt. Stat. Ann. tit. 1, § 317(b) (West 2002)), a record "produced or acquired in the course of agency business" is a public record. Because the requested appointment records facilitated the day-to-day functioning of the Vermont Governor's office, the Vermont Supreme Court held that they were public records subject to disclosure. *Herald Ass'n*, 174 Vt. at 354, 816 A.2d at 473.

Moreover, the Governor's calendar would also be considered a public record under the reasoning of the Federal court decisions cited by the Governor's Office. In *Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984), the Department of Justice (DOJ) denied a request for records of appointments and meetings involving William Baxter, Assistant Attorney General for Antitrust, asserting that they were not "agency records" subject to disclosure under the Federal FOIA. *Bureau of National Affairs*, 742 F.2d at 1487. Mr. Baxter had two types of appointment records: desk appointment calendars that he and his secretary maintained, which "included personal appointments wholly unrelated to the business of the Antitrust Division and did not always reflect changes in appointments or

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cancellations of meetings[,]" and daily agendas that were "distributed to top staff within the Antitrust Division so that they would know his schedule on a given day." *Bureau of National Affairs*, 742 F.2d at 1487. The court analyzed the "creation, maintenance, and use" of both sets of documents to determine whether they were attributable to DOJ and thus constituted "agency records," or, conversely, whether they were an "employee's record[s] that happen[ed] to be located physically within an agency."¹² *Bureau of National Affairs*, 742 F.2d at 1492-93. The court held that the daily agendas were agency records because: "[t]hey were created for the express purpose of facilitating the daily activities of the Antitrust Division"; "they were circulated to the staff for a business purpose"; and they "were not created for Mr. Baxter's personal convenience, but for the convenience of his staff in their conduct of official business." *Bureau of National Affairs*, 742 F.2d at 1495. In contrast, the court held that the desk appointment calendars were not agency records. The court summarized its reasoning as follows:

First, [the desk appointment calendars] were not *distributed* to other employees, but were retained solely for the convenience of the individual officials. Second, the daily agendas were created by Mr. Baxter's secretary *for the express purpose* of informing other staff of Mr. Baxter's whereabouts during the course of a business day so that they could determine Mr. Baxter's availability for meetings. Thus the daily agendas were created for the purpose of conducting agency business. In contrast, the [desk] appointment calendars were created for the personal convenience of individual officials so that they could organize both their personal and business appointments. (Emphasis in original.) *Bureau of National Affairs*, 742 F.2d at 1496.

The Governor's Office has also relied on *Bloomberg, L.P. v. United States Securities & Exchange Comm'n*, 357 F. Supp. 2d 156 (D.D.C. 2004). In *Bloomberg*, the

¹²This office notes that because the Federal FOIA does not define "agency records," Federal courts use a "totality of the circumstances" analysis to determine whether records are subject to the requirements of the Federal FOIA. See, e.g., *ExxonMobil Corp. v. Department of Commerce*, 828 F. Supp. 2d 97, 106 (D.D.C. 2011) (quoting *Burka v. U.S. Department of Health and Human Services*, 87 F. 3d 508, 515 (D.C. Cir. 1996)):

To determine whether an agency exercises sufficient control over a document to render it an "agency record," four factors must be balanced under a totality of the circumstances test: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files."

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not distributed to senior staff and secretaries "but instead simply made available on the recipients' computers." *Consumer Federation*, 455 F.3d at 291-92. The court rejected the suggested distinction, stating:

[T]here does not appear to be any practical difference between the former practice of distributing information in printed form on hard copies and the modern practice of allowing others access through network computers. In any meaningful sense, the USDA calendars were electronically "distributed" to the listed recipients and were used by them to schedule agency meetings and prevent conflicts. *Consumer Federation*, 455 F.3d at 292.

Additionally, the court contrasted the USDA officials' calendars with the desk appointment calendar at issue in *Bureau of National Affairs*:

[T]he fact that access to Baxter's desk calendars required obtaining entry into Baxter's or his secretary's personal areas (the desks on which the calendars sat), and that such access was only episodic, reinforced the conclusion that Baxter retained tight control over the calendars and that their principal use was personal. Allowing others to have routine computer access to a calendar, however, is more like distributing hard copies than it is like permitting occasional glances at a document on a desk. In allowing computer access, the official surrenders personal control over the document and indicates that it will be used by others to plan their own workdays. *Consumer Federation*, 455 F.3d at 292 n.16.

Accordingly, the court held that the USDA failed to sustain its burden of demonstrating that the calendars were not agency records. *Consumer Federation*, 455 F.3d at 293.

The distribution analysis of *Consumer Federation* is directly applicable to the current circumstances. The Governor's Office has explained that the Governor and his personal assistant, chief of staff, deputy chief of staff, general counsel, and an unspecified number of senior members of his Communications team all have access to the calendar in the State's Microsoft Outlook e-mail system. The Governor's Office interprets *Consumer Federation* as "holding that calendars that were not distributed to other employees, among other factors, were not 'agency records' and thus were not subject to the Federal Freedom of Information Act[]."¹³

¹³Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Josh Jones, Supervising Attorney, Public Access Bureau (July 15, 2015), at 2-3.

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Although the court in *Consumer Federation* may have described the holding in *Bureau of National Affairs* concerning Mr. Baxter's desk appointment calendar in that manner, the court in *Consumer Federation* held that calendars that were "distributed" in the same manner that Governor Rauner's calendar is distributed were agency records.

The other Federal cases the Governor's Office cited do not compel a different conclusion. In *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2d Cir. 1999), the court did not hold that appointment calendars are not agency records; rather, the court discussed the "agency records" analysis in *Bureau of National Affairs* before vacating the district court's ruling that certain agency employees' notes did not constitute agency records and remanding the case for further development of the record. *Grand Central*, 166 F.3d at 480-81. Additionally, in *Judicial Watch, Inc. v. United States Department of Commerce*, 337 F. Supp. 2d 146 (D. D.C. 2004), the court, consistent with *Bureau of National Affairs*, held that the plaintiff was "not entitled to release of personal information contained within the Secretary's calendars and schedules." *Judicial Watch*, 337 F. Supp. 2d at 177. Notably, the court also ruled that "daily agendas or other schedules that do circulate[]" to other agency employees "are agency records." *Judicial Watch*, 337 F. Supp. 2d at 177.

With respect to the cases from other states, in *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456 (Pa. Commw. 2012), the Pennsylvania appellate court held that the calendars of Philadelphia's mayor and the members of the city council were exempt from disclosure under the "working papers" exception to Pennsylvania's Right-to-Know law (65 P.S. § 67.708(12) (West 2012)), which applies to "[n]otes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose." The court expressly relied on affidavits from the mayor and city council members stating that their calendars existed solely for their personal convenience. *Philadelphia Inquirer*, 52 A.3d at 461. Unlike Pennsylvania's Right-to-Know law, the Illinois FOIA does not contain a "working papers" exception. Further, based on the information provided by the Governor's Office, Governor Rauner's calendar does not exist solely for his personal convenience. Thus, *Philadelphia Inquirer* is inapposite. Moreover, *Office of Governor v. Scolforo*, 65 A.3d 1095 (Pa. Commw. 2013) constitutes more recent and relevant precedent from that court. There, the court held that the governor's office had failed to sustain its burden to justify redacting entries from the governor's calendar under the deliberative process exemption. *Scolforo*, 65 A.3d at 1104.

Lastly, in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Voinovich*, 100 Ohio App. 3d 372, 375, 654 N.E.2d 139, 141 (Ohio Ct. App. 1995), the relator sought a writ of *mandamus* compelling disclosure of the governor of Ohio's calendar and appointment books, which required the relator to demonstrate

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that the Governor was "under a clear legal duty" to disclose them. The relator failed to provide evidence "that the requested items serve to document either the organization, functions, policies, decisions, procedures, operations, or other activities of respondent's office" and did not assert "that other members of [the Governor's] office had access to or used his personal calendars or appointment books for any official purpose." *International Union*, 654 N.E.2d at 143, 100 Ohio App. 3d at 377. Thus, under the procedural posture of that case, the Ohio Court of Appeals was required to accept as true the Governor's assertions that his personal calendars and appointment books were maintained solely by him for his own personal convenience and did not serve to document the official functions or activities of the Governor's Office. *International Union*, 654 N.E.2d at 143, 100 Ohio App. 3d at 377-78.

Conversely, under the Illinois FOIA, the Governor's Office has the burden of demonstrating by clear and convincing evidence that the Governor's calendar does not constitute a public record. The facts in this record establish that the Governor's calendar is maintained by his personal assistant – who is a State employee – and is used for scheduling official meetings and other governmental events. Thus, the calendar pertains to the transaction of public business. Moreover, it is clear under the most recent precedent to which the Governor's Office cited (*Consumer Federation*) that the Governor's calendar is "circulated" within the Governor's Office. Accordingly, the Federal cases and other state cases cited by the Governor's Office do not compel a conclusion other than that the calendar is a public record.

Safety Concerns

Citing *Times Mirror Co. v. Superior Court of Sacramento County*, 53 Cal. 3d 1325, 813 P.2d 240, 283 Cal. Rptr. 893 (Cal. 1991), the Governor's Office asserts that disclosing details of the Governor's calendar constitutes a security concern that outweighs any public interest in the information.¹⁴ In that California Supreme Court case, the Governor's Office acknowledged that the Governor's schedule was a public record because it pertained to the transaction of public business, but claimed that disclosing it would pose a security risk. The court decided the case on the basis of the deliberative process exemption under California law, but noted that the Governor's schedules "set forth in exhaustive detail the particulars of the Governor's meetings and travel: time and location of arrivals and departures; traveling companions; hotel accommodations; and ground transportation" and stated that "it is plausible to believe that an individual intent on doing harm could use such information to discern activity patterns of the Governor and identify areas of particular vulnerability." *Times Mirror*, 53 Cal. 3d at 1346, 813 P.2d at 253, 283 Cal. Rptr. at 906.

¹⁴Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Josh Jones, Supervising Attorney, Public Access Bureau (July 15, 2015), at 4.

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Based on our review of the Governor's calendar, it does not contain the level of detail found in the calendar in *Times Mirror*. In *Times Mirror*, the Governor's calendar documented "whether and when family members and traveling companions will be with him, the particular aircraft or other means of transportation to be used, names of pilots and drivers, airport gate departures, specific hotel accommodations, [and] automobile and other ground arrangements." *Times Mirror*, 53 Cal. 3d at 1331, 813 P.2d at 242, 283 Cal. Rptr. at 895. Governor Rauner's calendar does not provide information concerning traveling companions, modes of transportation, or overnight accommodations. Thus, the calendar does not appear to contain information that could facilitate harm by ill-intentioned individuals. See *Herald Ass'n*, 174 Vt. at 354, 816 A.2d at 473 (concluding that there was no showing that disclosure of the requested information would pose a security risk in that it did not include "travel details and personal information included in the Governor's schedule that might impact the Governor's safety, such as airline flight information and hotel accommodations, and his personal family commitments.") The Governor's calendar predominantly consists of information regarding appointments: names of individuals and groups, and telephone numbers or meeting locations as applicable. The Governor's Office has not provided facts demonstrating that disclosing those names, telephone numbers, or meeting locations from past appointments would pose a security risk to the Governor. Therefore, the Governor's Office's has not met its burden to demonstrate that the security exemption is applicable to the redactions in the calendar.

Section 7(1)(f) of FOIA

Section 7(1)(f) of FOIA exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body." The section 7(1)(f) exemption applies to "inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247 (1st Dist. 2003). Section 7(1)(f) is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood*, 344 Ill. App. 3d at 248. Section 7(1)(f) does not exempt from disclosure purely factual material. See Ill. Att'y Gen. Pub. Acc. Op. No. 13-015, issued September 24, 2013, at 7. Rather, "[o]nly those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Kalven v. City of Chicago*, 2013 IL App (1st) 121846, ¶24, 7 N.E.3d 741, 748 (2013) (quoting *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)). Further, a public body that asserts the deliberative process exemption "has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir 1980).

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As a threshold matter, the Governor's Office did not provide facts that would support the argument that disclosure of the redacted entries would reveal predecisional deliberative material. Section 9 of FOIA unequivocally requires a public body to provide a detailed factual basis in order to sustain its burden of demonstrating by clear and convincing evidence that information is exempt from disclosure. The Governor's Office has not identified any deliberative processes associated with the calendar or established that disclosure of the redacted information could expose any such process. Under similar circumstances in *Herald Ass'n*, the court found that Governor Dean's claim that disclosure of his schedules would interfere with his deliberative processes "lack[ed] the specificity necessary to determine whether the * * * calendar entries are exempt from public disclosure." *Herald Ass'n*, 174 Vt. at 358, 816 A.2d at 476; *see also Scolforo*, 65 A.3d at 1103-04 (because the governor's office did not provide sufficient facts for a reviewing body "to ascertain how disclosure of the [redacted] entries would reflect the internal deliberations on those subjects[.]" the governor's office was required to disclose those entries). Likewise, here, in the absence of a detailed factual basis for the applicability of the exemption, this office unable to conclude that the Governor's Office has sustained its burden to withhold information pursuant to section 7(1)(f) of FOIA.

To support the assertion of the section 7(1)(f) exemption, the Governor's Office relies on the *Times Mirror* court's analysis of a prior version of the deliberative process exemption found in the Federal FOIA. Exemption 5 of the Federal FOIA (5 U.S.C. § 552(b)(5) (West 1998)), commonly recognized as addressing the deliberative process privilege, permitted an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Governor's Office argued that:

The court in *Times Mirror* explained "[d]isclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." [Citation.] This reality is clear by examining Governor Rauner's calendar. Its entries reveal the identities of people with whom he has met and consulted and thus can be read to determine the substance and direction of his judgment and mental processes.^[15]

¹⁵Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Josh Jones, Supervising Attorney, Public Access Bureau (July 15, 2015), at 4-5.

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However, *Times Mirror* is distinguishable in several key respects. First, the *Times Mirror* court discussed the Federal deliberative process exemption in the process of identifying relevant public interests as part of its overall analysis of a provision of the California Public Records Act (Cal. Gov. Code, § 6255 (West 1998)). The California law provision at issue provided a "catchall" exemption that permits the government agency to withhold a record if it can demonstrate that [citation] 'on the facts of a particular case *the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.*' (Emphasis in original.) *Times Mirror*, 53 Cal. 3d at 1338, 813 P.2d at 247-48, 283 Cal. Rptr. at 901. The Illinois FOIA does not contain such a "catchall exemption." To the contrary, "as long as the particular request is not barred under the Act's exemptions, the purpose of the requestor in making his request is irrelevant." *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d at 204 (1st Dist. 1997). Additionally, unlike Governor Rauner's calendar, the calendar at issue in *Times Mirror* contained an "exhaustive" level of detail. *Times Mirror*, 53 Cal. 3d at 1330, 813 P.2d at 242, 283 Cal. Rptr. at 895. Moreover, the size of the request in *Times Mirror*, which sought five years of calendars and schedules, was crucial to the court's holding that the "catchall exemption" applied. *Times Mirror*, 53 Cal. 3d at 1345, 813 P.2d at 252, 283 Cal. Rptr. at 905 ("[W]hatever merit disclosure might otherwise warrant in principle is simply crushed under the massive weight of the Times's request in this case[.] * * * We are not persuaded that any identifiable public interest supports such a *wholesale* production of documents." (Emphasis added.)) The court expressly clarified that a narrower request could necessitate disclosure of appointment records under that state's Public Records Act:

Lest there be any misunderstanding, however, we caution that our holding does not render inviolate the Governor's calendars and schedules or other records of the Governor's office. There may be cases where the public interest in certain specific information contained in one or more of the Governor's calendars is more compelling, the specific request more focused, and the extent of the requested disclosure more limited; then, the court might properly conclude that the public interest in nondisclosure does not clearly outweigh the public interest in disclosure, whatever the incidental impact on the deliberative process. *Times Mirror*, 53 Cal. 3d at 1345, 813 P.2d at 253, 283 Cal. Rptr. at 906.

Thus, *Times Mirror* does not support the conclusion that the deliberative process exemption automatically exempts calendar entries from disclosure. Rather, the case suggests that in the presence of state statutory language similar to that found in California's "catch-all" exemption, a determination must be undertaken regarding whether the disclosure of records, or information contained therein, would expose an officer's or agency's decision making process so as to discourage candid internal discussions, thereby undermining the officer or agency's ability

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to perform its governmental function (*Times Mirror*, 53 Cal. 3d at 1342, 813 P.2d at 250, 283 Cal. Rptr. at 903). Further, the public body's interest in nondisclosure must be weighed against the public interest in disclosure. As previously discussed, the Illinois FOIA does not contain statutory language similar to that found in the California's "catch-all exemption." Accordingly, *Times Mirror* involved both a different legal standard and dissimilar facts.

Because the Governor's Office did not provide a detailed factual basis for its redaction of information from the Governor's calendar, the Governor's Office's reliance on *Times Mirror* fails to sustain its burden to withhold information pursuant to section 7(1)(f).

Section 7(1)(m) of FOIA

Section 7(1)(m) of FOIA exempts from disclosure:

Communications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body[.]

Section 7(1)(m) exempts from disclosure, among other things, communications protected by the attorney-client privilege. *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). Under Illinois law, a party asserting that a communication to an attorney is protected by the attorney-client privilege must show that: "(1) a statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential." *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228 (2nd Dist. 2006); see also *People v. Radojic*, 2013 IL 114197, ¶40, 998 N.E.2d 1212, 1221-22 (2013) ("[T]he modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client."). A public body that withholds records under section 7(1)(m) "can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances." (Emphasis in original.) *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003).

In support of its reliance on section 7(1)(m), the Governor's Office argued that: "Many of [the] entries that the Governor's Office redacted included meetings attended by the Governor's legal counsel. In the same manner that revealing the identity of persons with whom

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the Governor has met would also reveal his judgment and mental process, it would also reveal his legal strategies."¹⁶

Under Illinois law, however, the mere presence of an attorney in a meeting is insufficient to justify the assertion of section 7(1)(m). A public body that asserts section 7(1)(m) to withhold information must provide objective indicia establishing that the disclosure of the information would reveal a communication that involved seeking or obtaining legal advice and that remained confidential; in other words, the Governor's Office was required to demonstrate that the redacted information "could reveal the substance of confidential attorney-client discussions." *Ulrich*, 294 Ill. App. 3d at 201. The Governor's Office did not provide this objective indicia, and therefore has not met its burden of demonstrating that section 7(1)(m) applies. Based on our review, disclosure of the redacted entries would not reveal that privileged communications were involved or, more specifically, the substance of any confidential attorney-client discussions. Accordingly, the Governor's Office has not met its burden to redact the information from the Governor's calendar pursuant to section 7(1)(m).

For the reasons discussed above, we direct the Governor's Office to provide Mr. Rushton with unredacted copies of the responsive calendar sections, subject only to the redaction of home or personal telephone numbers pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2014)).

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On May 15, 2015, Mr. Bruce Rushton, on behalf of *Illinois Times*, submitted a FOIA request to the Governor's Office seeking documents showing Governor Bruce Rauner's appointments from April 1, 2015, to May 14, 2015, including the times and dates of all meetings and functions he attended and the names and titles of meeting attendees.

2) On June 1, 2015, the Governor's Office provided Mr. Rushton with a copy of the April calendar but redacted information concerning meeting attendees citing as its basis sections 7(1)(f) and 7(1)(m) of FOIA.

¹⁶Letter from Christina McClernon, Assistant General Counsel/Freedom of Information Act Officer, Office of Governor Bruce Rauner, to Josh Jones, Supervising Attorney, Public Access Bureau (July 15, 2015), at 5.

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3) On June 11, 2015, Mr. Rushton submitted a Request for Review disputing the partial denial of his request. The Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2014)).

4) On June 16, 2015, the Public Access Bureau sent a copy of Mr. Rushton's Request for Review to the Governor's Office and asked it to provide unredacted copies of the responsive records for this office's confidential review, together with detailed information concerning how the Governor's calendar is maintained and used. We also asked the Governor's Office to provide a detailed explanation for redacting information and to address the allegation that it did not provide a complete response within the requisite response time.

5) On July 15, 2015, the Governor's Office provided Mr. Rushton with the May calendar entries but redacted certain information citing sections 7(1)(f) and 7(1)(m) of FOIA and provided this office with copies of the redacted records. The Governor's Office also provided this office with a written response arguing that its redactions were proper and that the Governor's calendar is not a public record subject to the requirements of FOIA. On July 20, 2015, the Governor's Office provided this office with unredacted copies of the responsive records.

6) On August 6, 2015, the Public Access Bureau properly extended the time in which to issue a binding opinion by 30 business days, to September 22, 2015, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) The Governor's Office did not dispute that it failed to issue a complete response to Mr. Rushton's May 15, 2015, request until July 15, 2015. Accordingly, the Governor's Office's delayed response to the request violated section 3(d) of FOIA.

8) To qualify as a "public record" under section 2(c) of FOIA, a communication must (1) pertain[] to the transaction of public business and have either been (2) prepared by, (3) prepared for, (4) used by (5) received by, (6) possessed by, or (7) controlled by a public body. The Governor's calendar was prepared by, prepared for, used by, and is in the possession and control of the Governor's Office and is used to facilitate public business. Therefore, the Governor's calendar is a public record for purposes of FOIA. All of the redacted entries appear to pertain to public business, as opposed to private affairs or private business interests.

9) The Governor's Office failed to demonstrate by clear and convincing evidence that any portion of the responsive records is exempt from disclosure under either section 7(1)(f) or section 7(1)(m) of FOIA.

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Therefore, it is the opinion of the Attorney General that the Governor's Office has improperly denied, in part, Mr. Rushton's Freedom of Information Act request in violation of the requirements of the Act. Accordingly, the Governor's Office is directed to take immediate and appropriate action to comply with this opinion by disclosing the requested records to Mr. Rushton, subject only to the redaction of home or personal telephone numbers pursuant to section 7(1)(b) of FOIA.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2014). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Bruce Rushton as defendants. *See* 5 ILCS 140/11.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 

Michael J. Luke
Counsel to the Attorney General