IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DIANA ASTIZ, Plaintiff, v. STATE OF WEST VIRGINIA OFFICE OF THE GOVERNOR, Defendant.	Civil Action No. 23-P-218 Judge: Hon. Jennifer F. Bailey

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The Governor's Office is taking extraordinary steps to evade Plaintiff's entirely ordinary public records request. The records Plaintiff seeks—those containing "scheduled official meetings" involving Governor Justice and his senior staff—fall within the core of the West Virginia Freedom of Information Act's scope and purpose. The people have a right to "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." W. Va. Code § 29B-1-1. FOIA therefore requires the production of "*any* writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public's business," unless a specific statutory exemption applies. *Id.* §§ 29B-1-2(5), -1-3(a) (emphasis added). The exemptions must be "strictly construed" in favor of disclosure, Syl pt. 2, *Highland Min. Co. v. W. Va. Univ. Sch. Of Med.*, 235 W. Va. 370, 774 S.E.2d 36 (2015), and public bodies must prove their application with a detailed, document-by-document evidentiary showing, Syl. pt. 6, *Farley v. Worley*, 215 W. Va. 412, 599 S.E.2d 835 (2004).

The Governor's Office's Motion to Dismiss is irreconcilable with FOIA's express provisions and controlling precedent from the Supreme Court of Appeals. The Governor's Office professes confusion over the meaning of "the public's business." That confusing is disheartening. The plain meaning of the phrase, and the Supreme Court of Appeals' construction of it, undeniably covers records of official meetings. If Governor Justice and his senior staff were not doing "the public's business" in their official meetings, then whose business were they doing? The Governor's Office asks the Court to apply a judge-made, federal-law test instead of the statutory definition, but no West Virginia court has ever done so, and dismissal would be unwarranted under the federal-law test, too.

The Governor's Office alternatively argues that the requested records are exempt from disclosure under the "internal memoranda" exemption, which covers documents that are subject to the deliberative process privilege. Syl. pt. 4, *Daily Gazette Co. v. W. Va. Dev. Office*, 198 W. Va. 563, 482 S.E.2d 180 (1996). This exemption applies only to documents "*consisting of advice, opinions and recommendations* which reflect a public body's deliberative, decision-making process." *Id.* (emphasis added). Courts have consistently rejected the argument that it applies categorically to scheduling records like the ones Plaintiff seeks, and the Governor's Office makes no showing that *any* of the requested records, much less *all* of them, "consist[] of advice, opinions and recommendations" rather than names, dates, and general subject matter. *Id.*

The Court should therefore deny the Motion.

BACKGROUND

Plaintiff Diana Astiz issued a FOIA request to the Office of the Governor seeking public records regarding all "scheduled official meetings" involving Governor Jim Justice, the Governor's Chief of Staff Brian Abraham, the Governor's Deputy Chief of Staff Ann Urling, and

the Governor's General Counsel Berkeley Bentley, from January 2017 to the present. Compl. Ex. A. Plaintiff's FOIA Request asked that if any responsive records contain "purely personal meetings scheduled, private documents, or sensitive information," the Governor's Office should "provide records that are redacted as needed, and state the specific legal and factual grounds for withholding any portions of the records." *Id.*

The Governor's Office instead denied the Request in full. Compl. Ex. B. The Governor's Office's stated that it had located responsive documents in its custody but denied the request "to the extent it seeks records exempt from disclosure under West Virginia Code § 29B-1-4(a)(2) and (8)." *Id.* It stated that some records responsive to Plaintiff's FOIA request "are only in draft format, contain appointments that may or may not occur, are revised daily, are never corrected, and are not an accurate log of such meetings." *Id.* It also stated that any calendars or notes responsive to Plaintiff's FOIA request "are maintained exclusively for the personal convenience of those staff members to coordinate both personal and business appointments and are neither under the Office of the Governor's control nor integrated into the Office of the Governor's files." *Id.* The Governor's Office therefore did not produce a single record in response to Plaintiff's FOIA Request.

On May 22, 2023, Plaintiff filed this expedited action for declaratory and injunctive relief under FOIA. On July 14, 2023, the Governor's Office moved to dismiss.

LEGAL STANDARD

A court deciding a motion to dismiss "should view the motion to dismiss with disfavor, should presume all of the plaintiff's factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 520, 854 S.E.2d 870,

882 (2020). The Court may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. pt. 2, *Evans v. United Bank, Inc.*, 235 W. Va. 619, 775 S.E.2d 500 (2015) (quoting Syl., *Flowers v. City of Morgantown*, 166 W. Va. 92, 272 S.E.2d 664 (1980)); *see also Mountaineer Fire & Rescue*, 244 W. Va. at 521 n. 4, 854 S.E.2d at 883 n. 4 (holding that West Virginia "continue[s] to firmly abide by this standard" despite federal courts' departure from it). To avoid dismissal, a plaintiff "need only give general notice as to the nature of his or her claim." *Mountaineer Fire & Rescue*, 244 W. Va. at 521, 854 S.E.2d at 883. "[A] party is not required to establish a *prima facie* case at the pleading stage." *Id.* at 522, 854 S.E.2d at 884. Rather, "the burden is upon the moving party to prove that no legally cognizable claim for relief exists." *Id.* at 520, 854 S.E.2d at 882.

When, as here, a public body refuses to produce records requested under FOIA, "the burden is on the public body to sustain its action." W. Va. Code § 29B-1-5; *see also* Syl. pt. 7, *Queen v. W. Va. Univ. Hosps., Inc.*, 179 W. Va. 95, 365 S.E.2d 375 (1987) (holding that a body claiming an exemption from FOIA's disclosure requirements "has the burden of showing the express applicability of [a statutory] exemption to the material requested"). In this way, the defendant's justification is akin to an affirmative defense, so it may be adjudicated on a motion to dismiss only if (1) the factual basis for the justification is "definitively ascertainable from the allegations of the complaint," the exhibits to it, and judicially noticeable information, and (2) "the facts so gleaned . . . conclusively establish the affirmative defense." *Foshey v. Jackson*, 222 W. Va. 743, 746 n. 8, 671 S.E.2d 748, 751 n. 8 (2008). Adjudication of a FOIA claim on a motion to dismiss is therefore unusual: rather, "[s]ummary judgment is the preferred method of resolving cases brought under FOIA." *Highland Min. Co.*, 235 W. Va. at 380, 774 S.E.2d at 46 (quoting *Farley*, 215 W. Va. at 418, 599 S.E.2d at 841.

ARGUMENT

The records of official scheduled meetings that Plaintiff seeks are "public records" under FOIA's broad statutory definition, and they are not exempt from disclosure under the "internal memoranda" exemption. The Court should therefore deny the Motion.

I. Plaintiff seeks public records under West Virginia FOIA's broad definition.

Records of the Governor and his staff's official scheduled meetings are public records subject to FOIA. FOIA contains an exceptionally broad definition of "public record," providing that the term "includes *any writing* containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public's business." W. Va. Code § 29B-1-2(5) (emphasis added). The Governor's Office does not dispute that Plaintiff seeks "writing[s] containing information prepared or received by a public body," but it claims that records of official scheduled meetings of the Governor and his senior staff somehow do not relate to the conduct of the "public's business." Def.'s Mem. of Law Supp. Mot. to Dismiss ("Mot.") at 8. The Governor's Office is mistaken.

To make this argument, the Governor's Office professes uncertainty over the meaning of "the public's business." *Id.* at 5. But the Supreme Court of Appeals has held that FOIA's definition of "public record" is "free from ambiguity" despite the lack of an express definition of "the public's business." *Assoc. Press v. Canterbury*, 224 W. Va. 708, 716, 688 S.E.2d 317, 325 (2009). The Court explained that "the public's business" means "the business of the government" and covers "matters within the purview of the agency's duties, functions and jurisdiction." *Id.* at 716, 688 S.E.2d at 325 (internal quotation marks omitted). Thus, a writing is a public record if it "relates to the conduct of the public's business, *i.e.*, the official duties, responsibilities or obligations of a particular public body." *Id.*

The Governor's Office ignores this discussion from *Canterbury* and does not explain how records of the Governor's and his senior staff's official meetings could possibly fall outside of "the public business" as so construed. By virtue of being official meetings, such meetings necessarily would have concerned "matters within the purview of the [Governor's] duties, functions and jurisdiction" and would have involved the "business of government." *Id.* The Governor's Office does not point to anything in the Complaint that would justify the Court in concluding otherwise, and the allegations in the Complaint are all that the Court may consider in adjudicating the motion to dismiss.

Even aside from the Supreme Court of Appeals' gloss in *Canterbury*, the plain meaning of "the public's business" should be dispositive. Absent a statutory definition, the Court must apply the term's "common, ordinary and accepted meaning in the connection in which [it is] used." *Shepherdstown Observer, Inc. v. Maghan,* 226 W. Va. 353, 357, 700 S.E.2d 805, 809 (2010) (quoting Syl. pt. 1, *Miners in General Grp. v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds*, *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982)). And as a matter of "common, ordinary and accepted meaning," surely official meetings of the Governor and his staff involve "the public's business."

FOIA's purpose resolves any remaining doubt. In construing an undefined statutory term, the Court must "ascribe a meaning that accords with the spirit, purpose and object of the law in issue." *Shepherdstown Observer,* 226 W. Va. at 357, 700 S.E.2d at 809. And the spirit, purpose, and object of FOIA are to guarantee the people of West Virginia "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees," and to prevent public servants from deciding "what is good for the people to know and what is not good for them to know." *Id.* at 358, 700 S.E.2d at 810 (quoting W. Va.

Code § 29B-1-1 (1977)). Courts are expressly obligated to "liberally construe" FOIA's disclosure provisions to ensure that this purpose is carried out. *Id.* The Governor's Office's argument that the records of the Governor's and his staff's official meetings are not subject to FOIA at all is impossible to square with that legislative purpose.

The Governor's Office relies instead on a federal-law test that federal courts use to decide what records are "agency records" under federal FOIA. Mot. 5–8. In sharp contrast to West Virginia FOIA's broad statutory definition of "public records," federal FOIA requires the disclosure of "agency records" but does not define that term. *See* 5 U.S.C. § 552(a)(3); *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1488 (D.C. Cir. 1984). Federal courts therefore use a "totality of the circumstances" approach to deciding whether a given record is disclosable as an "agency record. *Bureau of Nat'l Affairs, Inc.*, 742 F.2d at 1492–93. All of the federal cases the Governor's Office cites in arguing that the requested records are not public records applied this federal test.

There is no basis for the Court to follow federal law's judge-made approach to defining "agency record" instead of applying West Virginia FOIA's express statutory "public record" definition and the West Virginia precedent construing it. The federal test focuses largely on the agency's *use* of the document. *See, e.g.*, *Consumer Fed'n of Am. v. Dep't of Ag.*, 455 F.3d 283, 288 (D.C. Cir. 2006). That consideration is entirely absent from West Virginia FOIA's definition, which turns on whether the "content *or* context" of the document "*relates to* the conduct of the public's business," W. Va. Code § 29B-2-(5) (emphasis added), not on whether an employee "used the document to conduct agency business," *Consumer Fed'n*, 455 F.3d at 291. The Governor's Office does not cite a single West Virginia case that has ever applied the federal "agency records" test, with its focus on use rather than content and context. And as the Maryland Court of Appeals

explained in exactly this context, federal "cases deciding whether governmental documents are 'agency records' within the meaning of the federal statute are not very pertinent in determining whether a governmental document is disclosable under" state statutes that contain broader "public records" definitions. *Off. of Governor v. Wash. Post Co.*, 360 Md. 520, 555, 725 A.2d 249, 268 (2000).

Unsurprisingly, the Supreme Court of Appeals has relied on federal decisions only "in construing our state FOIA's *parallel provisions*," not in construing aspects of West Virginia FOIA that differ from the federal Act. *Daily Gazette Co. v. W. Va. Dev. Off.*, 198 W. Va. 563, 571, 482 S.E.2d 180, 188 (1996) (emphasis added). In *Daily Gazette*, that meant construing West Virginia's "internal memorandum" exemption with reference to precedent addressing federal FOIA's textually similar "inter-agency or intra-agency memorandum" exemption. *Id.* at 571, 482 S.E.2d at 187. And in *Farley v. Worley*, 215 W. Va. 412, 420–21, 599 S.E.2d 834, 843–44 (2004), the Court relied on federal FOIA precedent in interpreting a general issue that did not turn on any particular statutory text—whether, when some responsive records are exempt from disclosure, a public body must still disclose any non-exempt records.

The Supreme Court of Appeals' decision in *Canterbury* is not to the contrary. In deciding whether the documents at issue were public records, *Canterbury* applied "the plain language of [West Virginia] FOIA's definition of 'public record,'" not the federal law approach. 224 W. Va. at 716, 688 S.E.2d at 325. *Canterbury* explained that "[u]nder that definition, . . . [a] writing is a public record *only if* it relates to the conduct of the public's business, *i.e.*, the official duties, responsibilities or obligations of a particular public body." *Id.* The Court therefore held that "[*u*]*nder the clear language of the 'public record' definition*, a personal e-mail communication . . . which does not relate to the conduct of the public's business, is not a public record subject to

disclosure under FOIA." *Id.* at 722, 688 S.E.2d at 331 (emphasis added). Only then did the Court look to federal cases, and then only to confirm that the Court's holding was "consistent with" their decisions. *Id.* Nowhere did *Canterbury* suggest that an agency's use of the record, as opposed to the record's content, is relevant under West Virginia's "public record" definition. Thus, nothing in *Canterbury* licenses the Governor's Office's effort to substitute federal law's usage-focused, judge-made approach for West Virginia FOIA's express "public records" definition. And *Canterbury*'s actual holding—that email messages *about personal topics* are not public records, *id.* at 721, 688 S.E.2d at 330—does nothing to suggest that records of the Governor's and his staff's *official* meetings somehow do not relate to the conduct of the public business.

Moreover, the Legislature amended the definition of "public record" after *Canterbury* specifically to broaden the definition and reverse the result in that case. In holding that personal email messages were not public records despite "legitimate public interest" in the records sought, *Canterbury* explained that "[i]f FOIA's definition of a public record is to include an examination of the record's context by virtue of the public's interest in the record, the Legislature must add such language to that definition." *Id.* at 721, 688 S.E.2d at 330. The Legislature soon did exactly that, amending FOIA to define "public record" as "any writing containing information prepared or received by a public body, *the content or context of which, judged either by content or context,* relates to the conduct of the public's business." W. Va. Code § 29B-1-2(5) (emphasis added).

The Legislature's adoption of this amendment reversed the result in *Canterbury* and renders even documents about *private* subjects disclosable as public records if the surrounding context makes them relevant to the conduct of the public business. Thus, even if the Governor's Office were somehow correct that records of official meetings are analogous to email messages about personal topics, the records sought would *still* be "public records" under the amended

definition because of the strong and legitimate public interest in their disclosure. The public has a clear and obvious interest in who the Governor and his senior staff hold official meetings with, and when. That is a central aspect of the "affairs of government and the official acts of those who represent" the West Virginia people, about which FOIA entitles the public to "full and complete information." W. Va. Code § 29B-1-1. No surprise, then, that when the Governor last released his official calendar, in 2019, it prompted significant public discussion, just as FOIA is intended to allow.[1]

Finally, even putting all of that to the side, the records Plaintiff seeks are public records even under the Governor's Office's preferred federal test. The federal "use" test is designed to weed out documents that may be created by a public official and physically located within an agency but are not actually used to conduct agency business, such as "a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child's report card stored in a desk drawer in a government employee's office." *Canterbury*, 224 W. Va. at 724 (citing *Griffis v. Pinal County*, 156 P.3d 418, 421 (Ariz. 2007)). Plaintiff "does not seek information about the [] officials' lunches with friends or trips to the dentist; [she] simply wants to know 'what the[ ] government is up to,' a goal that is in accord with the 'basic policy' of FOIA." *Consumer Fed'n*, 455 F.3d at 293 (quoting *Dep't of Just. v. Reps. Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)).

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[1] *See, e.g.,* Anthony Izaguirre, *Schedules show West Virginia governor largely absent in job*, AP NEWS (May 10, 2019), https://apnews.com/article/f080da8d7189476e91062c69483166a1; Anthony Izaguirre, *Schedules reveal West Virginia governor largely absent from work*, AP NEWS (May 17, 2019), https://leads.ap.org/best-of-the-states/west-virginia-governor-often-absent-from-job.

Federal courts applying the federal test have repeatedly held that official calendars *are* public records if they are relied upon by the official or the official's colleagues to "'facilitate[] the day-to-day operations'" of the agency, used to inform other staff (other than a personal secretary) about the official's whereabouts, or distributed to other agency employees. *See id*. at 291–92 (quoting *Bureau of Nat'l Affairs*, 742 F.2d at 1495). The Governor's Office argues in the Motion that *all* of its records of official scheduled meetings are "maintained exclusively for personal convenience and are not used or controlled by the agency to conduct agency business." Mot. 7. But the Court must decide the Motion based on the allegations of the Complaint, and Plaintiffs did not allege that the responsive records involve purely private calendars. To the contrary, Plaintiff alleges that the requested records were "created for the express purpose of facilitating the daily activities of the [government agency]," and were created "for the convenience of [the official's] staff in their conduct of official business." Compl. ¶ 21 (quoting *Bureau of Nat'l Affairs*, 742 F.2d at 1495). Even if the federal test applied, there would therefore be no basis for the Court to grant the Motion.

The requested records are therefore "public records of a public body" that are subject to FOIA, and that presumptively must be disclosed.[2]

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[2] In a footnote, the Governor's Office argues without elaboration that "principles of separation of powers preclude it from being a 'public body' subject to FOIA." Mot. 4 n. 1. The Governor's Office cites no legal authority for this argument, and there is none. The Supreme Court of Appeals has held that FOIA applies to Supreme Court Justices; there is no basis for including them but excluding the Governor. *See Assoc. Press v. Canterbury*, 224 W. Va. 708, 715, 688 S.E.2d 317, 324 (2009). Far from violating the separation of powers, FOIA's broad application reflects "the fundamental philosophy of the American constitutional form of government which holds to the principle that government is the servant of the people, and not the master of them." *Id.* at 714, 688 S.E.2d at 323 (quoting W. Va. Code § 29B-1-1). That public policy is entirely consistent with the West Virginia Constitution, which emphasizes that "[a]ll power is vested in, and consequently derived from, the people," and that "[m]agistrates are their trustees and servants, and at all times amenable to them." W. Va. Const. Art. III, § 3-2.

II. The internal memorandum exemption does not apply to the requested records.

The Governor's Office also argues that Plaintiff's Complaint should be dismissed because the "deliberative process or executive privilege" shields all requested documents from production. But the Governor's Office has the burden to prove that an exemption shields the requested records from production. *Highland Min. Co.*, 235 W. Va. at 381, 774 S.E.2d at 47 (citing W.V. Code § 29B-1-4). It is hard to imagine how the Governor's Office could meet that evidentiary burden on a motion to dismiss, and the motion filed by the Governor's Office does not come close to doing so.

West Virginia FOIA is clear: the "only" basis for withholding public records is if they fall into the Act's enumerated "categories of information which are specifically exempt from disclosure." W. Va. § 29B-1-4. The Governor's Office's argument relies on FOIA's exemption for "[i]nternal memoranda or letters received or prepared by a public body." W. Va. Code § 29B-1-4(a)(8). All of the Act's exemptions "are to be strictly construed," Syl pt. 2, *Highland Min. Co.*, 235 W. Va. 370, 774 S.E.2d 36, and the internal memoranda exemption in particular must be "construe[d] narrowly" because of "the strong policy favoring disclosure of public documents," *id*. at 385, 774 S.E.2d at 51.

The Supreme Court has therefore held that the exemption applies only to "written internal government communications *consisting of advice, opinions and recommendations* which reflect a public body's deliberative, decision-making process," along with similar documents sent between public bodies or provided to a public body by outside consultants or experts. Syl. pt. 4, *Daily Gazette Co.*, 198 W. Va. 563, 575, 482 S.E.2d 180, 192 (emphasis added). To invoke the exception, "the public body must show that in the context in which the materials are prepared or considered, the documents are both predecisional and deliberative to its decision-making process." Syl. pt. 5, *Highland Min. Co.*, 235 W. Va. 370, 774 S.E.2d 36. Predecisional materials are prepared to assist

a decisionmaker "in arriving at his or her decision," before the decision is made. *Id.* Deliberative materials must "reveal[] the manner in which the public body evaluates possible alternatives relevant to the decisionmaking process." *Id.*

In adjudicating the Governor's Office's motion to dismiss, the Court may consider "[o]nly matters contained in" the Complaint, Syl. pt. 4, *Mountaineer Fire & Res. Equip.*, 244 W. Va. 508, 854 S.E.2d 870, and must "construe the complaint in the light most favorable to the plaintiff, taking all allegations as true," *id.* at 515, 854 S.E.2d at 877. The Complaint alleges that "Plaintiff's requests for information about scheduled official meetings do not require disclosure of documents that are both predecisional and deliberative." Compl. ¶ 27. It further alleges that to the extent that some portions of the requested records are exempt from disclosure, the exempted portions can and must be redacted and the remaining records disclosed. *Id.* ¶ 28. Taking those allegations as true, as the Court must, the internal memoranda exemption provides no justification for the Governor's Office's withholding of documents, and therefore does not support dismissal.

West Virginia law rejects the Governor's Office's effort to invoke the internal memoranda exemption on a categorical basis without any supporting evidentiary record. Invocation requires "*evidence* that the information at issue would be subject to this exemption." *Charleston Gazette v. Smithers*, 232 W. Va. 449, 473, 752 S.E.2d 603, 627 (2013) (emphasis added). "Conclusory or general assertions on the part of the government agency do not satisfy [its] burden" to show that the exemption applies. *Daily Gazette Co.*, 198 W. Va. at 573, 482 S.E.2d 180, 190. The public body invoking the exemption must instead "set forth its specific claims of deliberative process privilege in a *Vaughn* index," *id.* at 573, 482 S.E.2d at 190—a document-by-document index providing a "relatively detailed justification as to why each document is exempt, specifically identifying reasons why [the exemption] is relevant and correlating the claimed exemption with

the particular part of [each] document to which the claimed exemption applies." *Id.* Syl. pt. 3. "The public body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt." *Id.* The Court, of course, has neither a *Vaughn* index nor an affidavit from the Governor's Office before it on this motion to dismiss, so there is no evidentiary basis for the Court to conclude that the internal memorandum exemption applies to the requested documents.

Moreover, courts have repeatedly held that the type of documents Plaintiff requested are not subject to the deliberative process privilege, at least without a detailed, document-by-document analysis. On this issue, unlike with respect to the definition "public records," consideration of federal precedent is appropriate, because the Supreme Court of Appeals has specifically held that West Virginia's "internal memoranda" exemption is parallel to and should be construed like its federal counterpart. *Daily Gazette Co.*, 198 W. Va. at 571, 482 S.E.2d at 188. And federal courts have held that calendar entries are *not* categorically exempt from disclosure under that exemption. In *Property of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 381 (D.D.C. 2018), the U.S. District Court for the District of Columbia held that calendar entries for the Director of the Office of Management and Budget were not exempt from disclosure. The court explained that "details about where a meeting was held, who scheduled a meeting, and who attended a meeting reveal, at most, insignificant or readily observable details about an agency's decisionmaking process," and revealing the "general topic of a meeting . . . would expose no suggestions, no recommendations, no proposals, and no other aspect of the agency communications." *Id.* at 382-83. Similarly, in *Am. Oversight v. USPS*, No. CV 20-2580 (RC), 2021 WL 4355401, at *8 (D.D.C. Sept. 23, 2021), the court similarly held that the defendant had not shown that the privilege covered the Postmaster General's calendar entries where there was no "identification of a specific deliberative process at

issue, how these calendar entries contributed to said deliberative process, or any explanation of who issued these calendar entries and their position in the chain of command." *Id*.

The cases the Governor's Office cites are not to the contrary. The Kentucky Court of Appeals' decision in *Courier-Journal v. Jones*, 895 S.W.2d 6, 7, 10 (Ky. 1995), turned on the Kentucky Open Records Act's exception for "preliminary drafts" and "notes." There is no similar exemption in West Virginia FOIA's exclusive list of exemptions. *See* W. Va. Code § 29B-1-4(a). *Courier-Journal* also reflects a judicial hostility to public records requests that has no place in West Virginia law. *Compare* 895 S.W.2d at 7 (assuming that "all these efforts are a fishing expedition upon which to base some speculative publication"), *with, e.g.*, *Charleston Gazette*, 232 W. Va. at 460, 752 S.E.2d at 614 (holding that "the Legislature, in enacting West Virginia's FOIA, intended to liberally allow the disclosure of public records" and that the Act must be liberally construed in favor of disclosure). The Supreme Court of Virginia's decision in *Taylor v. Worrell Enters., Inc.*, 242 Va. 219, 409 S.E.2d 136 (1991), construed Virginia's public records laws as exempting the governor to avoid a separation of powers concern. It did not construe the deliberative process privilege or any statutory exemption. West Virginia FOIA could not possibly be construed to exempt the Governor's Office—it applies to "*every* state officer, agency, department, including the executive, legislative and judicial departments." W. Va. Code § 29B-1-2(4). And both *Herald Association v. Dean*, 174 Vt. 350, 357–58, 816 A.2d 469, 475–77 (2002), and *Office of Governor v. Washington Post*, 360 Md. 520, 561–62 759 A.2d 249, 271–72 (2000), rejected categorical assertions of privilege like those the Governor's Office makes here.

That leaves the Supreme Court of California's decision in *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325, 813 P.2d 240 (1991). But that decision applied "a 'catchall' exemption" that existed in California law "that permits the government agency to withhold a record if it can

demonstrate that '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.'" *Id.* at 1338, 813 P.2d at 247 (emphasis omitted). There is no such catchall exception in West Virginia FOIA. *See* W. Va. Code § 29B-1-4; *see also Wash. Post*, 360 Md. at 554, 759 A.2d at 268 (distinguishing *Times Mirror* because "the Maryland Public Information Act does not contain a general 'catchall' public interest exemption"). And to the extent that *Times Mirror Co.* relied on deliberative process precedent in construing the catchall exception, more recent federal precedent decisively shows that the deliberative process privilege does not categorically protect appointment and calendar information. *E.g.*, *Property of the People, Inc.*, 330 F. Supp. 3d at 381; *Am. Oversight*, 2021 WL 4355401, at *8.

The internal memorandum exception therefore does not apply to the requested documents, and certainly does not apply to them categorically in the absence of any supporting evidence, as would be necessary for the Court to dismiss the Complaint.

CONCLUSION

For the reasons set forth above, the Court should deny Defendant's motion to dismiss.

July 26, 2023

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing **Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss** was served to the individuals listed below via First Class Mail on this 26th of July, 2023:

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