

COMMONWEALTH OF VIRGINIA

HOUSE OF DELEGATES



SAMUEL A. NIXON, JR.
MEMBER

TWENTY-SEVENTH DISTRICT

COMMITTEE ASSIGNMENTS:
COMMERCE & LABOR
HEALTH, WELFARE &
INSTITUTIONS (Vice-Chairman)
SCIENCE & TECHNOLOGY

June 9, 2009

Mr. James F. McGuirk, II
Chairman, Information Technology Investment Board
AKLM Consulting Inc.
18341 Buccaneer Terrace
Leesburg, VA 20176

Dear Mr. McGuirk,

I am sending this letter concerning the emergency meeting of the Information Technology Investment Board that has been called for Wednesday, June 10 at 3:30 p.m.

The agenda indicates that a substantial portion of the meeting will be conducted in closed session, as has occurred at other recent meetings of the Board. As you are well aware, the Board is reaching a pivotal point in its IT infrastructure partnership with Northrop Grumman. I wanted to take this opportunity to remind you that the partnership, the Commonwealth's investment of well over \$200 million of public funds each year, and the health of the Commonwealth's IT infrastructure as a whole are all matters of great public concern. I would urge you to consider the importance of keeping these matters in the sunlight, and open to the public, as you contemplate entering into closed session at Wednesday's meeting, and at future meetings.

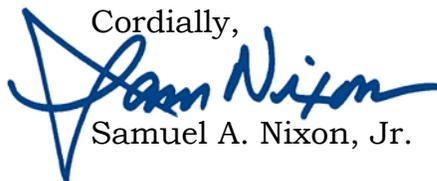
The General Assembly has long espoused the premise that the business of public bodies should be conducted in open meetings. Certainly, there are particular situations that may be appropriately discussed behind closed doors, and the General Assembly has acknowledged these particular situations through the adoption of discretionary closed meeting exemptions in the Virginia Freedom of Information Act. It is important to note that the Code of Virginia specifically states, at § 2.2-3700, that these exemptions must be narrowly construed. The exemptions are specifically tailored to meet particular goals, such as protecting an individual's privacy or protecting proprietary or sensitive information held by a government entity; the exemptions are not designed to serve as an umbrella simply to allow difficult or uncomfortable conversations to be held out of the public eye.

Given the current issues being addressed by the Board, it is apparent that contract performance and contract management is likely a topic that has been, and will continue to be, ripe for discussion. However, in my opinion, it would be inappropriate to go into closed meeting to discuss these issues. The Freedom of Information Act does allow for the

discussion of the award of a public contract involving the expenditure of public funds where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body (Subdivision A 29 of § 2.2-3711 of the Code of Virginia). However, the Virginia Supreme Court has made clear that this exemption does not allow a public body to close a meeting in order to discuss the application or enforcement of the scope or terms of a previously awarded public contract. (*White Dog Publishing v. Culpepper Bd. of Sup.*, 272 Va. 377 (2006)). Furthermore, while issues of contract performance may lead to questions about potential legal action, the Attorney General of Virginia has previously opined that subdivision A 7 of § 2.2-3711, which allows for consultation with legal counsel regarding actual or probable litigation, is not to be used as a "catch-all" to discuss anything remotely related to a legal issue in closed session, nor may it be used to justify closed meetings involving general issues, even if those issues may eventually have legal consequences. (1986-87 Op. Atty. Gen. Va 31, 1992 Op. Atty. Gen. Va. 1).

I hope that as you weigh the decision as to whether or not to go into closed session at Wednesday's meeting, you will consider the need to construe the exemptions narrowly and the importance of keeping as much of the meeting in the public eye as possible. Of course there may be topics of discussion that may rightfully and appropriately held behind closed doors, and I am not advocating never exercising a Freedom of Information Act exemption.

I am keenly aware that you and the Board are facing difficult discussions and decisions. However, I hope that you chose to use the Freedom of Information Act exemptions sparingly, and only when it is in the best interest of the citizens of the Commonwealth to keep the meeting closed -- and not just when it might be easier or more convenient to have discussions behind closed doors.

Cordially,

Samuel A. Nixon, Jr.

cc: The Honorable William J. Howell
The Honorable Joe T. May
The Honorable Kathy J. Byron
The Honorable Walter A. Stosch
The Honorable Mamie E. Locke
The Honorable Leonard M. Pomata
Marcella Williamson
John Westrick