

CORRIDORS OF THE FUTURE  
DEVELOPMENT AGREEMENT  
BETWEEN  
THE UNITED STATES DEPARTMENT OF TRANSPORTATION  
AND  
MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION,  
ILLINOIS DEPARTMENT OF TRANSPORTATION,  
INDIANA DEPARTMENT OF TRANSPORTATION, AND  
OHIO DEPARTMENT OF TRANSPORTATION  
FOR THE  
INTERSTATE 70 DEDICATED TRUCK LANES PROJECT

This Development Agreement promotes a partnership between the United States Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590 (“USDOT”) and the State of Missouri, acting by and through the Missouri Highways and Transportation Commission, 105 West Capitol Avenue, Jefferson City, MO 65102, the State of Illinois, acting by and through the Illinois Department of Transportation, 2300 South Dirksen Parkway, Springfield, IL 62764, the State of Indiana, acting by and through the Indiana Department of Transportation, 100 North Senate Avenue, Indianapolis, IN 46204, and the State of Ohio, acting by and through the Ohio Department of Transportation, 1980 West Broad Street, Columbus, OH 43223, (“Signatory States”) (hereinafter collectively referred to as the “Parties”) for the development of the I-70 Dedicated Truck Lanes (“Corridor” or “Project”) under the Corridors of the Future Program (“CFP”), which is authorized or provided under the authority of 49 U.S.C. § 101.

WHEREAS, the CFP is specifically designed to serve as a model for the development of nationally and regionally significant corridors through a coordinated, multi-State corridor approach to planning, developing, financing, construction, operating, and maintaining these corridors.

WHEREAS, the primary objectives of the CFP are to encourage States to leverage public and private resources to develop innovative national and regional approaches to reducing congestion, increase freight system reliability, and enhance the quality of life for U.S. citizens.

WHEREAS, on September 5, 2006, USDOT published a Notice, in the *Federal Register* at 71 FR 52364, seeking applications from States, or private sector entities working with States, interested in developing national and regional corridors to alleviate congestion on highways, rail, or waterways. This Notice established a two-phase process through which USDOT would evaluate these applications and select transportation corridors in need of investment.

WHEREAS, on May 24, 2007, the Signatory States submitted an application under the CFP for the I-70 Dedicated Truck Lanes from Kansas City, Missouri to the Ohio–West Virginia border. The Signatory States propose to determine the feasibility of dedicated truck lanes along the 800-mile corridor. Each State may respectively elect to

continue to participate in the development of the Corridor and this Development Agreement contingent upon the conclusion and results of a feasibility study to be conducted in Fiscal Years 2009 to 2010.

WHEREAS, the Corridor is a major growth corridor for providing services and transporting freight to support regional, national and global markets, and thus necessitates long-term investment to alleviate congestion, enhance freight mobility, improve system performance and reliability, and improve safety.

WHEREAS, the USDOT and the Signatory States agree to work together to implement strategies to reduce congestion and improve freight mobility along the Corridor.

NOW THEREFORE, the USDOT and the Signatory States express their mutual understandings and respective commitments to the development and management of the Corridor as follows:

## **1. Objectives**

(a) The objectives of the CFP are as follows:

- i. Promote cutting edge national and regional approaches to congestion mitigation.
- ii. Address major transportation investment needs.
- iii. Pursue innovative strategies to financing and operating interstate corridors.
- iv. Promote a more efficient environmental review and project development process.
- v. Develop corridors that will increase freight system reliability and enhance the quality of life for all U.S. citizens, realizing the original intent of our interstate system – a free flowing and efficient transportation network.
- vi. Demonstrate the viability of a transportation investment model based on sound economics and market principles.
- vii. Utilize procurement approaches that minimize taxpayer risk and provide contractor incentives.

(b) The Signatory States agree these objectives will serve as the guiding principles in the planning, development, financing, construction, operation and maintenance of any dedicated truck lanes developed along the I-70 Corridor.

## **2. Vision for the Corridor**

The Corridor will be a next generation transportation system which will support regional, national and global supply chains. The primary focus is the efficient, reliable, safe and secure movement of goods, commodities and services to support the economy. Innovative solutions, which incorporate state-of-the-art infrastructure design, leading-edge technologies and best-financing solutions for users and taxpayers, will be the hallmark for the Corridor. As such it will reduce congestion, enhance mobility/improve reliability, improve safety, facilitate multimodal integration, enhance economic development, minimize impacts to the environment, communities and public health, and improve security.

## **3. Multi-State Organization to Develop and Manage the Corridor**

(a) In order to facilitate a corridor approach to the development and management of the Corridor, the Signatory States commit to work cooperatively to advance the Corridor and will establish a multi-State corridor approach to planning, developing, financing, constructing, operating and maintaining the Corridor. Projects and programs under this approach are those directed to corridor-wide capacity expansion, mobility improvement, and/or operational enhancement. It is not the intent of this approach to extend to routine maintenance or rehabilitation projects or dictate internal State planning processes.

(b) Each Signatory State agrees to reasonably collaborate, cooperate, and mutually support the others on all activities necessary to plan, develop, finance, construct, operate and maintain the Corridor, subject to all requirements of law. Such collaboration shall be reflected in a Memorandum of Understanding (“MOU”) between the States and with the USDOT in a concurring role that sets forth how the States will accomplish the objectives of the CFP. The Signatory States agree to use their respective best efforts to execute the MOU within 120 days of the execution of this Development Agreement. The Signatory States further agree that they shall at all times utilize reasonable efforts in executing this Project, including all reasonable efforts to mutually cooperate and share information, technology, and non-monetary resources wherever appropriate under applicable law. If the Signatory States mutually agree that the Corridor should be a tolled facility, then they will evaluate managing the financial receipts in a holistic manner for Corridor projects, as determined and prioritized by the Signatory States, regardless of State jurisdiction.

(c) The Signatory States agree to establish a Steering Committee that can represent, interact with, and negotiate on behalf of them with the USDOT. The Steering Committee shall be responsible for coordinating all Corridor implementation activities. The MOU shall include the name and contact information for each member of the Steering Committee.

(d) In the event a determination is made in good faith by the Steering Committee that a Signatory State cannot commit the necessary resources for the development of the Corridor, or otherwise fulfill the Commitments of this agreement, the Steering Committee shall advise the USDOT within thirty (30) days of the finding and provide a written assessment of the impact to the development and management of the Corridor.

#### **4. Development and Operation of the Corridor**

Should the Signatory States agree to proceed with the proposed Corridor after the feasibility study, the development of the Corridor will occur in sequenced phases, with multiple projects in various phases potentially being in parallel development. The Signatory States shall commit to collaboratively develop a process by which each project will be subject, as applicable, to specific development goals to ensure coordinated planning, development, financing, construction, operation, maintenance and performance of the Corridor.

(a) The Signatory States agree to work together at a corridor level to solve operational problems, improve system performance and safety, and routinely coordinate with one another and the USDOT. Each Signatory State will work with their respective partners to ensure the appropriate planning actions are taken to promote the development and management of the Corridor, including development and adoption of compatible operational policies and procedures (e.g., incident management, weather response and treatment, work zone planning) that are proactive and continuously collaborative with one another to ensure seamless operation of the corridor. The policies and procedures will be incorporated into each specific segment of the Corridor.

(b) The Signatory States will adopt a multi-State integration of the Corridor into each of their planning processes. This is to ensure reasonable consistency in the planning and development of the Corridor; going beyond projects located in their State by taking into account the Corridor needs and effect of improvements.

(c) The Signatory States agree to develop an outreach strategy to jointly inform and engage key stakeholders (e.g., employers, shippers, carriers, developers, and communities) about the proposed Corridor and how these stakeholders can and should assist in the development and operation of the Corridor.

(d) The Signatory States shall cooperatively develop and adopt consistent performance measures for the Corridor. Non-performance factors, i.e., signage, markings, cross section, commercial motor vehicle size and weight dimensions, pavement design, intelligent transportation systems, information management, and other Corridor components, will be consistent across the Corridor, as reasonable. Certain performance features may vary due to geography, costs, and other factors, but reasonable attempts for all features to be consistent will be the preferred method of development.

(e) The Signatory States shall advise in a timely manner and coordinate with one another any major planned projects in the Corridor that will impact traffic in an adjoining State.

(f) The Signatory States, for each construction project undertaken along the Corridor, shall utilize, as feasible, techniques to minimize construction time, such as design-build, cost plus time (A+B) bidding, lane rental, or other techniques that incentivize timely project

completion. The Signatory States agree to implement efficient traffic management for projects carried out in a Transportation Management Area.

(g) The Signatory States shall endeavor to incorporate asset management principles in the planning and delivery of construction, operation, maintenance, and preservation of the Corridor.

(h) The USDOT, to the extent requested and available, will support the development of this Corridor with financial resources, regulatory flexibility, and dedicated expertise and personnel.

## **5. Environmental Stewardship**

(a) The Signatory States shall endeavor to incorporate innovative methods for completing the environmental review process effectively and shall work cooperatively to identify and implement any measures for avoiding or mitigating project impacts along the Corridor.

(b) In accordance with the Corridor's Prioritization Schedule established pursuant to Section 7(a), the USDOT will advance, as expeditiously as possible, projects along the Corridor to the Secretary's list of high priority transportation infrastructure projects under Executive Order 13274, "Environmental Stewardship and Transportation Infrastructure Project Review."

(c) USDOT will empower its field staff where appropriate to work with other Federal resource agencies to overcome project level issues efficiently and effectively.

## **6. Innovations in Project Delivery and Finance**

(a) To the extent permissible under Federal and respective State laws and consistent with the scope and vision of the Corridor, the Signatory States agree to thoroughly evaluate the flexible use of any and all, current and future, applicable innovative project delivery and financing methods, including, but not limited to: public-private partnerships; open-road tolling; and congestion pricing in the development of the Corridor. All financing solutions and procurement approaches will seek to maximize taxpayer value and minimize taxpayer risk.

(b) The Signatory States agree to use their best efforts to consider the appropriate legislative changes needed to accommodate the use of non-traditional project delivery, finance and operation mechanisms for the Corridor.

(c) A Signatory State's intent to request tolling authority from FHWA, through the submission of an Expression of Interest, should be received by the USDOT within thirty (30) days of the decision to proceed with a dedicated truck lane corridor.

(d) When requested by the Signatory States and in accordance with the Corridor's Prioritization Schedule, the USDOT shall commit to take the following actions to assist with the financing of the Corridor:

(i) Subject to an approved application for Transportation Infrastructure Finance Innovation Act (TIFIA) credit assistance (23 U.S.C. §§ 601-609), expedite the commitment process for the TIFIA credit assistance.

(ii) Subject to the project meeting the criteria for a Qualified Highway or Surface Freight Transfer Facility under 26 U.S.C. § 142(m), and the submission of a successful application for Private Activity Bond ("PAB") authority, conditionally allocate a portion of the \$15 billion PAB limitation to the Project.

(iii) Tolling authority applications submitted to the USDOT, relating to the Expressions of Interest under Section 6(c) above, will be granted priority under the limited toll programs contained in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA, Pub. L. 102-240, 105 Stat. 1914 (1991)), Transportation Equity Act for the 21<sup>st</sup> Century (Pub. L. 105-178, 112 Stat. 1107 (1998)), and Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59, 119 Stat. 1144 (2005)), consistent with the statutory requirements of those authorizing statutes. In addition, the USDOT may consider using its experimental authority under Special Experimental Project No. 15 ("SEP-15"), or any other experimental programs that may apply, to grant flexibility with respect to tolling.

(iv) Carefully examine existing title 23 requirements for impediments to developing congestion-reducing projects in congested areas and consider using Special Experimental Project No. 14 ("SEP 14") and SEP-15 initiatives to address these impediments, consistent with applicable law.

(v) Use an expedited process to review any SEP-14 or SEP-15 applications that meet the eligibility criteria for those programs and are received from the Signatory States on a programmatic, rather than on a project, basis, in order to test a different way of constructing, operating or managing the Corridor.

(vi) Support the Signatory States in their outreach efforts with respect to the Corridor.

(vii) Work with the Signatory States to identify other possible discretionary funding sources and highlight applications submitted by the Signatory States for those funds. Any Federal funds provided for the Corridor, or projects carried out along the Corridor, shall be subject to the requirements of the program under which the funds are granted or awarded.

(viii) Foster creative solutions for managing congestion and avoiding the environmental and social impacts of projects through the approval of prudent design deviations.

(ix) Subject to the Signatory States constructing the Corridor, support the application of innovative solutions to problems associated with maintaining, repairing, rehabilitating and reconstructing the Corridor.

(x) The USDOT will assign a “champion” to coordinate the implementation of this Development Agreement. The champion will help guide projects along the Corridor through any required processes, will conduct regularly scheduled conference calls on the progress of key projects along the Corridor, and will serve as the primary point of contact to coordinate Departmental support.

(e) The Signatory States shall develop within their respective State transportation departments the expertise necessary to advance innovative public financing of transportation.

(f) The Signatory States will explore the potential of sharing toll credits earned in accordance with 23 U.S.C. § 120(j) for use on the Corridor under SEP-15.

## **7. Project Prioritization and Deliverables**

(a) Should the Signatory States agree to proceed with a dedicated truck lane corridor after the feasibility study,

(i) the Signatory States agree to work cooperatively to prioritize the projects to be undertaken to accomplish the Vision for the Corridor.

(ii) the Signatory States agree to develop a proposed method and schedule for prioritizing the projects (“Prioritization Schedule”) to be carried out along the Corridor.

(iii) in establishing a Prioritization Schedule consideration will be given, but not limited, to the following factors:

A. Compatibility with the strategic vision for the Corridor;

B. Identified key choke points or operation problems;

C. Ability to achieve defined performance measures;

D. Benefit and cost of feature or project;

E. Probability or pace of implementation (speed of return on investment);

F. Minimize impact to the environment, to include but not limited to reduction in greenhouse gas emissions;

G. Capacity to maximize all modal options; and

H. Aggregating of individual projects, such that their combined benefit is greater than each project's independent utility.

(iv) the Prioritization Schedule shall include the following:

A. Detailed description of the projects;

B. Identification of activities to be carried out to deliver the projects;

C. Timing and source of funding for the projects;

D. Identification of the entity responsible for each project; and

E. Cost of the projects.

(v) the Prioritization Schedule shall be submitted to the USDOT within 120 days of the decision to proceed with a dedicated truck lane corridor and shall be attached hereto and incorporated herein as Exhibit A, as amended from time to time.

(b) Each Signatory State shall identify specific deliverables with target completion dates it will undertake to advance the Corridor within its State. The "Statement of Deliverables" for each Signatory State shall be attached hereto and incorporated herein as Exhibit B, as amended from time to time.

(c) Each Signatory State commits to use its best efforts at all times to zealously pursue the achievement of the activities identified in its "Statement of Deliverables" by the stated target dates to the extent feasible and permissible under any Federal or State statute, regulation, or policy.

## **8. Performance Objectives and Measures**

(a) The Signatory States agree to work with the USDOT to collaboratively develop performance objectives for the Corridor in conjunction with the environmental review process to be carried out pursuant to the National Environmental Policy Act (42 U.S.C. §§ 4321-4347).

(b) The Signatory States agree to collaboratively develop a performance plan that meets the performance objectives developed pursuant to Section 8(a) no later than ninety (90) days after the completion of the feasibility study. The plan shall include (i) operations and

management performance goals and expectations, and (ii) methods to measure travel time and reliability.

(c) The USDOT, to the extent requested, will provide guidance, technical assistance, and training to advance the state-of-the-practice of system performance measurement.

## **9. Reporting**

Beginning one year after the effective date of the MOU and annually thereafter, the Signatory States agree to provide an annual report on the performance of the Corridor. The annual report shall be submitted in accordance with the "Form of Annual Report" attached hereto and incorporated herein as Exhibit C.

## **10. Access to Documents**

The Signatory States may furnish or make available for review and comment to the USDOT confidential or proprietary information relating to the development of the Corridor. Any records that a Signatory State does not want to be made publicly available shall be reviewed by the USDOT in accordance with the procedures outlined in the January 26, 2005, memorandum concerning "Pre-submission Evaluation of Information under the Freedom of Information Act," attached as Exhibit D. The confidentiality of any records obtained by the USDOT shall be determined in accordance with 49 C.F.R. Part 7.

## **11. Limitations**

(a) Nothing in this Development Agreement will be construed as affecting the authorities of the Parties or as binding beyond their respective authorities or to require any of the participants to obligate or expend funds in excess of available appropriations.

(b) Nothing in this Development Agreement constitutes the approval by the USDOT of a request for funding or is a commitment to provide future Federal funds for the development of the Corridor.

(c) Nothing contained in this Development Agreement shall be construed as a defense against any future statutory or regulatory requirement.

(d) The Signatory States have entered into this Development Agreement as sovereign States and not as principal and agent or as a joint venture. Nothing herein shall be construed as consent by any State to suit in the courts of the other States, or waiver of that State's sovereign immunity or rights under the Eleventh Article of Amendment to the Constitution of the United States. This Development Agreement does not grant any rights to anyone, except the Parties. Nothing in this Development Agreement shall be deemed to create or give rise to any right of action in, or any liability to, any third party claiming to have suffered a loss, damage or injury by virtue of any alleged failure by a party hereto to comply with the terms of this Development Agreement.

## **12. Termination**

(a) Together the Signatory States may terminate their involvement in this Development Agreement unilaterally by giving thirty (30) days notice in writing to the USDOT. The notice shall identify any outstanding obligations and set forth a plan to mitigate any materially adverse impacts to the development or management of the Corridor.

(b) The Signatory States will establish in the MOU the procedures by which an individual State can withdraw from the Development Agreement. Should an individual Signatory State withdraw from the Development Agreement, the remaining Signatory States will report in writing to the USDOT the impact this action will have and how the remaining Signatory States will mitigate it.

(c) The USDOT may unilaterally terminate this Development Agreement by giving thirty (30) days notice in writing to the Signatory States if it determines in good faith the Signatory States cannot satisfy the objectives of the CFP.

(d) The Signatory States and the USDOT may terminate this Development Agreement by mutual written agreement.

## **13. Addition of Signatory States**

(a) If determined necessary for the development of the Corridor, the Signatory States shall work together to encourage non-Signatory States to become Signatory States and shall welcome expressions of interest from non-Signatory States with a goal to expand the geographic development of the Corridor.

(b) A non-Signatory State may become a Signatory State by agreement of the Signatory States and the USDOT as reflected in an amendment to this Development Agreement.

## **14. Amendments**

This Development Agreement may be amended at any time by written agreement of the USDOT and the Signatory States.

## **15. Authority to Enter Development Agreement**

By signing the Development Agreement on behalf of the participating Parties, the signer represents that they have the authority to commit the appropriate resources of the participating Party for which they sign.

## **16. Successors and Assigns**

This Development Agreement shall apply to the Parties and their respective successors and assigns.

**17. Announcement of Development Agreement**

No pronouncement or public release regarding this Development Agreement shall be issued until all signed Parties have signed this Development Agreement.

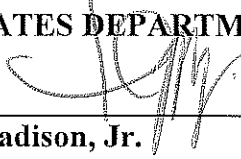
**18. Original Copies**

This Development Agreement shall be prepared in duplicate original copies so that each signatory has an original copy.

**SIGNATURE PAGE FOLLOWS**

IN WITNESS THEREOF, the Parties hereto have caused this Development Agreement to be duly executed in duplicate as of the day and year last written below, either on one original document or via multiple counterparts through facsimile, which, when taken together, shall constitute one and the same instrument.

**UNITED STATES DEPARTMENT OF TRANSPORTATION**

By:   
Thomas J. Madison, Jr.  
Administrator

Date: 1/7/09

STATE OF MISSOURI

Missouri Highways and Transportation Commission

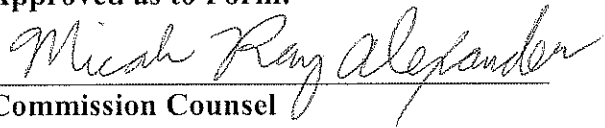
By:   
Pete K. Rahn  
Director

Date: 12-16-08

ATTEST:

  
Secretary to the Commission

Approved as to Form:

  
Commission Counsel

Date: December 15, 2008

STATE OF ILLINOIS

Illinois Department of Transportation

By: 


Milton R. Sees, P.E.

Secretary of Transportation

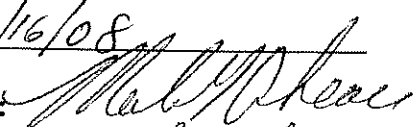
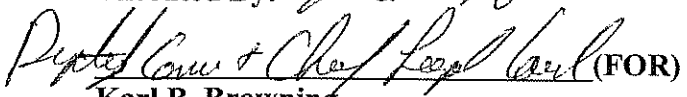
Date: Signed on 12/19/08 rts

Indiana Department of Transportation

Recommended for Approval:


  
\_\_\_\_\_  
Robert D. Cales, Director  
Contract Administration

Date: 12/16/08

Executed By:   
 (FOR)  
Karl B. Browning  
Commissioner

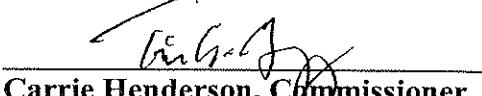
Date: 12/18/08

Office of Management and Budget

  
\_\_\_\_\_  
Christopher A. Ruhl, Director

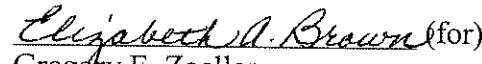
Date: 1/7/09

Department of Administration

  
\_\_\_\_\_  
Carrie Henderson, Commissioner

Date: 1/29/08

Approved as to form and legality:

 (for)  
Gregory F. Zoeller  
Attorney General  
Date 1-15-09

This is an exact and true copy of the original document. The original is on file with the Federal Highway Administration Headquarters Office of Freight Management and Operations.

**STATE OF OHIO**

**Ohio Department of Transportation**

By: James G. Beasley  
James G. Beasley  
Director

Date: 1/15/09

**EXHIBIT A**

**[PRIORITIZATION SCHEDULE]**

**EXHIBIT B**

**[STATEMENT OF DELIVERABLES]**

**CORRIDOR**

<u>Description</u>	<u>Date</u>
Establish Steering Committee	CDA Execution Date + 60 days
Finalize Memorandum of Understanding	CDA Execution Date + 120 days
Establish performance objectives	TBD – pends feasibility study results
Submit Annual Report	TBD – pends feasibility study results
Outreach Strategy	TBD – pends feasibility study results

**OHIO**

Establish innovative financing capacity	
Prepare Expression of Interest for Tolling	TBD – pends feasibility study results

**INDIANA**

Establish innovative financing capacity	
Prepare Expression of Interest for Tolling	TBD – pends feasibility study results

**ILLINOIS**

Establish innovative financing capacity	
Prepare Expression of Interest for Tolling	TBD – pends feasibility study results

**MISSOURI**

Establish innovative financing capacity	
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## EXHIBIT C

### [FORM OF ANNUAL REPORT]

#### Corridor Metrics and Status (i.e. dashboard for the corridor)

<u>Goal Area</u>	<u>Measure</u>	<u>Target</u>	<u>Status</u>	<u>Comment</u>
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		<u>(year)</u>	<u>(year)</u>	<u>(projected results, strategies, etc)</u>
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#### Institutional Roadblocks

Issue

Impact on Coalition Objectives

*By State*

#### Coalition Action Items

Horizon

Action

State(s)

Target Date

Desired Outcome

Short

Medium

Long

#### Corridor Coalition Projects

Priority Project

Status Issues

Project Funding

Strategy to

Description

Needs

Meet Need

#### Status of Coalition (Organizational Issues)

#### Summary of Corridor Condition and Operation (System Performance)

**EXHIBIT D**

**[PRE-SUBMISSION EVALUATION OF INFORMATION UNDER THE FREEDOM  
OF INFORMATION ACT]**



U.S. Department  
of Transportation

Federal Highway  
Administration

# Memorandum

Subject: Pre-submission Evaluation of Information  
under the Freedom of Information Act

Date: January 26, 2005

From: Chief Counsel

Reply to

Attn. of: HCC-40

To: Assistant Chief Counsels

A proposal for a public-private partnership submitted under the Federal Highway Administration's (FHWA) Special Experimental Program No. 15 (SEP-15) may include proprietary information that might be exempt from public disclosure under the Freedom of Information Act (FOIA). Even though the private sponsor recognizes the importance of submitting the information to the Federal government, a submitter of information wishes to have a high degree of confidence, before submitting the information to FHWA, that the information will not be disclosed by the Department of Transportation (DOT) if requested under FOIA.<sup>1</sup> The uncertainty of whether the information would be subject to release under FOIA, serves as a disincentive to private sponsors to propose innovative ideas. To address this impediment to the use of PPPs on Federal-aid highway projects, the following procedure shall be made available to PPP project partners prior to the submission of a formal PPP proposal.

1. A representative of FHWA and an attorney from the Office of Chief Counsel (HCC) will examine the records at a place not under the control of any Federal agency (such as a private office).
2. The FHWA representative and HCC attorney will identify those records for which they are confident of DOT's authority to withhold them if requested under FOIA.
3. FHWA will not take any of the records with us when we leave the place of examination.
4. The submitter may then submit to FHWA the records in item 2, above.

The attachment to this memorandum is a direct quotation from the Department of Justice's *Freedom of Information Act Guide* on the threshold question of what records are subject to FOIA. The procedure that we have used follows closely the four-part test set forth there, as follows:

1. The intent of the record's creator to retain or relinquish control over the records. The very use of this procedure is strong evidence of this element.
2. The ability of the agency to use and dispose of the record as it sees fit. Since neither the FHWA representative nor HCC attorney will take any of the records, they will lack the ability to use or

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<sup>1</sup> DOT regulations implementing FOIA require that, before any element of DOT may issue a final denial of a FOIA request, the DOT General Counsel's Office must concur. See 49 CFR Part 7. Hence, any commitment by an element of DOT not to disclose information under FOIA must also have the concurrence of the General Counsel's Office.

dispose of them. Examining them at a place not under the control of any Federal agency denies FHWA the "control" required by the Supreme Court.

3. The extent to which agency personnel have read or relied upon the record. Although FHWA will have examined the records enough to come to judgments about DOT's ability to withhold them if requested under FOIA, FHWA will not be among those who work on whatever records the submitter elects to submit, so the records will not be relied upon.

4. The degree to which the record was integrated into the agency's recordkeeping system or files. None of the records that FHWA examines will become part of a DOT recordkeeping system unless and until the submitter submits them.

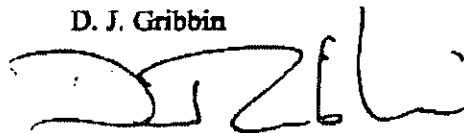
As to any records for which we give assurance and that are submitted to FHWA, DOT will provide the following commitments in writing:

1. The information will be treated as confidential by DOT.
2. DOT will withhold the information if it is sought under FOIA.
3. If taken to court on our decision to withhold the information under FOIA, DOT will forcefully argue to the Department of Justice the validity of that decision and urge it to defend that decision by all appropriate means.

We cannot, of course, commit the Department of Justice to any particular litigation position, nor can we bind a court to a decision in our favor.

If you have any questions about these procedures, please contact attorney Robin Fields, Administrative and Technology Law Division, at 202-366-1355.

D. J. Gribbin



Attachment

## Attachment

From the Department of Justice *Freedom of Information Act Guide* (May 2002)

"The Supreme Court has articulated a basic, two-part test for determining what constitutes "agency records" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.<sup>1</sup> Inasmuch as the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record,<sup>2</sup> courts have identified four relevant factors for an agency to consider when making such a determination: the intent of the record's creator to retain or relinquish control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the record; and the degree to which the record was integrated into the agency's recordkeeping system or files.<sup>3</sup>

"1. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records).

"2. See, e.g., Int'l Bhd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that submission of gummed-label mailing list as required by court order not sufficient to give "control" over record to agency); McErlean v. United States Dep't of Justice, No. 97-7831, 1999 WL 791680, at \*11 (S.D.N.Y. Sept. 30, 1999) (finding that agency had no "control" over requested records because it assented to dissemination and use restrictions requested by confidential source who provided them); KDKA v. Thornburgh, No. 90-1536, 1992 U.S. Dist. LEXIS 22438, at \*\*16-17 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of air crash, although possessed by National Transportation Safety Board, is not under agency "control," because of restrictions imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "legitimate conduct of its official duties" are agency records notwithstanding FDA's pre-submission review regulation allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)); Rush v. Dep't of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were agency records of Department of State as it exercised control over them); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,194, at 80,494 (D.D.C. July 28, 1980) (concluding that reports transmitted to agency by state regulatory authorities were agency records because "it is questionable whether [state authorities] retained control" over them); see also FOIA Update, Vol. XIII, No. 3, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

"3. See Tax Analysts v. United States Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (citing Lindsey v. Bureau of Prisons, 736 F.2d 1462, 1465 (11th Cir. 1984)), aff'd, 492 U.S. 136 (1989); see, e.g., Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any agency); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report

an agency record); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (following Wash. Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), to find that transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not an agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not an agency record); see also Holy Spirit Ass'n v. CIA, 636 F.2d 838, 841 (D.C. Cir. 1980) (warning that non-"agency record" status "can be lost" if record is "not designated" as such prior to agency's receipt of FOIA request); cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act); Baizer v. United States Dep't of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions, used for reference purposes or as research tool, is not an agency record); Waters v. Pan. Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (finding that Internal Revenue Code is not an agency record).