

CORRIDORS OF THE FUTURE  
DEVELOPMENT AGREEMENT  
BETWEEN  
THE UNITED STATES DEPARTMENT OF TRANSPORTATION  
AND  
THE FLORIDA DEPARTMENT OF TRANSPORTATION  
THE GEORGIA DEPARTMENT OF TRANSPORTATION  
THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION  
THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION  
THE VIRGINIA DEPARTMENT OF TRANSPORTATION  
FOR THE  
INTERSTATE 95 CORRIDOR OF THE FUTURE

This Development Agreement promotes a partnership between the United States Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590 (hereinafter "USDOT"); the Florida Department of Transportation, 605 Suwannee Street, Tallahassee, Florida; the Georgia Department of Department of Transportation, 2 Capitol Square, Atlanta, Georgia; the South Carolina Department of Transportation, 955 Park Street, Columbia, South Carolina; the North Carolina Department of Transportation, One South Wilmington Street, Raleigh, North Carolina; the Virginia Department of Transportation, 1401 East Broad Street, Richmond, Virginia (hereinafter the "Signatory States") for the development of the Interstate 95 Corridor within the boundaries of the Signatory States and all transportation facilities within reasonable proximity of that portion of Interstate 95 ("Corridor" or "I-95 Corridor") 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 regional approach to planning, developing, financing, constructing, 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 6, 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 cooperatively submitted an application under the CFP for the Corridor. The Signatory States propose to cooperate with each other to alleviate congestion and improve mobility. The Signatory States are interested in the reconstruction, expansion, and utilization of Intelligent Transportation System (“ITS”) technology to accommodate future demand and improve safety and reliability in the I-95 Corridor.

WHEREAS, the I-95 Corridor is a major growth corridor in need of long-term investments to alleviate congestion, improve mobility, and improve system performance to provide safe and reliable travel for people and freight.

WHEREAS, the USDOT and the Signatory States do not believe that gridlock is an inevitable fate and 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 overall objectives of the CFP, noted in the *Federal Register* Notice of February 7, 2007, are to alleviate congestion, encourage economic growth, and facilitate international trade.

(b) The specific objectives of the Signatory States, as noted in their May 24, 2007, application, are to reduce congestion, improve mobility, enhance economic development, increase user value, test innovations in financing and contract delivery, and exercise exceptional environmental stewardship.

(c) The Signatory States agree that the achievement of the overall objectives of the CFP, and the specific objectives noted above in 1(b), should serve as guiding considerations in the planning, development, financing, construction, operation and maintenance of the Corridor.

### **2. Vision for the I-95 Corridor**

A congestion-managed multi-modal, safe, reliable, and environmentally responsible corridor which increases value to the user, maintains and improves the asset, provides for economic opportunity, and improves the quality of life for all who use it and/or depend upon it.

### **3. Multi-State Organization to Develop and Manage the I-95 Corridor**

(a) In order to facilitate a corridor approach, the USDOT and the Signatory States commit to work cooperatively to improve the Corridor, as set forth in this Agreement.

(b) Such cooperation shall be reflected in a Memorandum of Understanding (“MOU”) among the Signatory States, with the USDOT in a concurring role, which sets forth how the Signatory States will accomplish the objectives of the CFP. The Signatory States agree to use their respective best efforts to execute the MOU within thirty (30) days of the execution of this Development Agreement. The Signatory States further agree to share information, technology, and resources wherever appropriate, subject to applicable law.

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

(d) In the event one, or more, of the Signatory States no longer wishes to participate in the joint effort, the Steering Committee shall advise the USDOT and provide a written assessment of the impact on the Corridor.

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

The Signatory States shall cooperatively establish development and operational goals to facilitate each Signatory State’s planning, development, financing, construction, operation, maintenance, and performance in the Corridor.

(a) The Signatory States agree to work together and with USDOT at a corridor level to address operational problems and to improve system performance and safety. Each of the Signatory States will work with each other to take appropriate action to promote the development and management of the Corridor, including development and adoption of operational policies and procedures (e.g., incident management, weather response and treatment, work zone planning) that are proactive and collaborative to promote seamless operation of the Corridor. The policies and procedures will be incorporated into each specific segment of the Corridor.

(b) The Signatory States will attempt to provide consistency in the development of the Corridor, including consistent intelligent transportation systems and coordinated evacuation activities.

(c) The Signatory States agree to jointly develop a strategy to inform and engage key stakeholders about the proposed improvements in the Corridor. To the extent possible, existing processes will be used.

(d) The Signatory States shall continue to use AASHTO Design Guidelines. Where specific guidelines do not exist, the Steering Committee, along with FHWA, will cooperatively develop and adopt uniform design guidelines using professional engineering judgment in the consideration of safety, operational requirements, level of service, policies, regulations and standard procedures for the geometric design of

highways, to include a review of life cycle costs, as well as size and weight requirements for any dedicated truck lanes that cross State lines. In addition and where appropriate given the specific parameters or constraints of projects within the Corridor that cross State lines, the Steering Committee may seek FHWA concurrence on exceptions to AASHTO Design Guidelines pursuant to 23 C.F.R. §625.3.

(e) The Steering Committee shall advise the individual Signatory States of any major planned projects in the Corridor that will impact traffic in an adjoining Signatory State.

(f) The Signatory States, for each construction project undertaken along the Corridor, shall consider, if feasible, the use of public-private partnerships and techniques to minimize construction time (i.e., design-build, cost plus time (A+B) bidding, lane rental, or other techniques) which will accelerate project completion, help control costs, and facilitate traffic management.

(g) The Signatory States shall endeavor to incorporate asset management principles in preserving and enhancing 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 quickly and effectively.

(b) In accordance with the Corridor's Implementation Schedule established pursuant to Section 7(b) and as requested by a Signatory State, the USDOT will advance, as expeditiously as possible, qualifying projects as identified by the Signatory States 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 employees with Federal lead responsibilities for CFP projects to actively engage partner Federal agencies to resolve environmental issues with Signatory States so as to expedite project delivery.

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

(a) The Vision of the Corridor as described in Section 2 of this Development Agreement is not likely to be realized without implementing some form of direct pricing of travel along the Corridor. Consequently, the Signatory States and USDOT will evaluate the merits of innovative financing mechanisms and project delivery mechanisms relative to traditional approaches. The Signatory States shall endeavor to incorporate asset management principles in the planning and delivery of capital improvements,

construction, operation, maintenance and preservation of the Corridor. The Signatory States will engage the private sector to examine ways of sharing risks between the public and private entities.

(b) To the extent permissible under Federal and respective State laws, and consistent with the scope and vision of the Corridor projects, each of the Signatory States agrees to incorporate the flexible use of innovative project delivery and financing methods, including public-private partnerships, open-road tolling, and congestion pricing in the development of the Corridor.

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

(d) When requested by the Signatory States and in accordance with the Corridor's Implementation Schedule, the USDOT shall commit to take the following actions to assist with the improvement of the Corridor, including Corridor improvements which facilitate movement of people and/or goods:

(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, from what is legally available, a portion of the PAB limitation to the project.

(iii) Tolling authority applications submitted to the USDOT will be granted priority under the 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) Examine existing title 23 requirements for impediments to projects identified by the Signatory States to determine if using Special Experimental Project No. 14 (SEP-14) and SEP-15 initiatives will appropriately 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.

(viii) When innovative financing is used to implement improvements in the Corridor, a State shall assure the acquisition of sufficient expertise to successfully advance the work. The USDOT shall provide access to its experts to assist with this.

(ix) Give the Signatory States priority consideration on any grant applications submitted for discretionary funds for projects on the Corridor. 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.

(x) USDOT will assign a “champion” for the I-95 Corridor to serve as a point of contact for the Signatory States. 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.

## **7. Project Implementation and Deliverables**

(a) The Signatory States agree to communicate with each other regarding the specific projects, and their schedules, that each proposes to be undertaken to accomplish the Vision for the Corridor.

(b) The Signatory States agree to develop a proposed method and schedule for implementing the projects to be carried out along the Corridor in accordance with this Section (the “Implementation Schedule”). The consensus of a majority of the States shall not be required for the development of the Implementation Schedule, it being understood that, even absent agreement by other Signatory States, any Signatory State shall be entitled to have its projects, activities and financing requirements included within the Implementation Schedule on a schedule and other terms acceptable to that Signatory State.

(c) In identifying and scheduling the projects, consideration will be given, but not limited, to the following factors:

- (i) Compatibility with the strategic vision for the Corridor;
- (ii) Identified capacity, safety, preservation, or operational problems;
- (iii) Ability to address problems;
- (iv) Benefits and costs of the project;
- (v) Probability or pace of implementation (speed of return on investment);
- (vi) Capacity to optimize all modal options;
- (vii) Aggregating of individual projects, such that their combined benefit is greater than each project's independent utility; and
- (viii) Coordination of bottleneck removal, evacuation plans, tolling and its enforcement, real time travel communication and other coordinating activities

(d) The Implementation Schedule shall be developed and submitted to the USDOT following the execution of the Development Agreement and the MOU, and no later than 90 days following execution of the MOU, and can be amended, as necessary. The Implementation Schedule shall be attached hereto and incorporated herein as Exhibit A, as amended from time to time.

(e) The Implementation Schedule shall include the following (the term "project" includes physical construction/maintenance, operational improvements, technology deployment, policy changes, and legislative/regulatory changes):

- (i) Detailed description of the projects;
- (ii) Identification of activities to be carried out to deliver the projects;
- (iii) Timing and source of funding for the projects;
- (iv) Identification of the entity responsible for each project; and
- (v) Estimated costs of the projects.

(f) 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.

(g) Each Signatory State commits to use its best efforts to 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 develop performance objectives for the entire Corridor.

(b) In furtherance of providing drivers a superior driving experience, the Signatory States agree to develop specific performance measures no later than one hundred eighty (180) days after the execution of this Development Agreement, to be used to define the success of the Corridor. The specific measures shall include, but are not limited to, travel speeds, pavement quality, and information systems.

(c) The Signatory States' Steering Committee agrees to develop a performance plan that pursues the performance objectives developed pursuant to Section 8(a). The plan shall include (i) operations and management performance goals and expectations, and (ii) methods to measure travel time and reliability.

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

(e) The goals and measures will be used by the Signatory States to identify areas for performance improvement and made publicly available to demonstrate success in achieving them.

## **9. Reporting**

The Signatory States agree to provide a short annual report on the performance of the Corridor and the implementation of the work in the Implementation Schedule, to USDOT, beginning one year after the effective date of the MOU and annually thereafter. The annual report shall be submitted in accordance with the "Form of Annual Report," jointly developed by USDOT and the Signatory States, and attached hereto and incorporated herein as Exhibit C.

## **10. Access to Documents**

The Signatory States may (but shall not be required to) 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 any of the Signatory States 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." (Exhibit C.) The confidentiality of any records obtained by the USDOT shall be determined in accordance with 49 C.F.R. Part 7 and each individual State's laws.



## **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 those provided specifically for this Corridor by the U.S. Congress or through discretion by USDOT. None of the Signatory States shall incur any liability to any of the other Signatory States or to the USDOT simply by reason of the failure of such Signatory State to satisfy any of the provisions of this Development Agreement, which is intended simply to provide a general framework for the cooperative implementation of improvements within the Corridor. Further, this Development Agreement shall not be construed to bind any of the Signatory States to any action that may be in contravention to its interests or applicable law or in excess of its authority. All commitments by a Signatory State pursuant to this Development Agreement are expressly subject to its obtaining all requisite approvals, authorizations, appropriation and allocations under applicable laws, policies, procedures and regulations.

(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) No third party beneficiaries. Except as specifically set forth or referred to herein, nothing expressed or implied in this Agreement is intended or shall be construed to confer any rights or remedies upon any person or entity other than the parties hereto and their successors or permitted assigns.

## **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 Corridor obligations and shall set forth a plan to mitigate any materially adverse impacts to the development or management of the Corridor.

(b) Any of the Signatory States may terminate its involvement in this Development Agreement unilaterally by giving thirty (30) days notice in writing to the other Signatory States and the USDOT. Should an individual Signatory State terminate its involvement, the remaining Signatory States will report in writing to the USDOT the impact this will have and how the States will mitigate any identified impact.

(c) The USDOT may unilaterally terminate this Development Agreement if it determines in good faith that 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.

(e) Termination of this Development Agreement shall not adversely affect any projects otherwise authorized as of the date of such termination.

### **13. Addition of Participating States**

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

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

### **14. Coordination with the I-95 Corridor Coalition Development Agreement for the I-95 Corridor**

The activities described in this Development Agreement shall be coordinated with the activities outlined in the Development Agreement between the USDOT and the I-95 Corridor Coalition.

### **15. Amendments**

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

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

By signing the Development Agreement on behalf of the participating Parties, the signer represents that he or she has the authority to execute and deliver this Development Agreement on behalf of such Party.

### **17. Successors and Assigns**

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

### **18. 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.

**19. Original Copies**

This Development Agreement shall be prepared in duplicate original copies so that each Signatory State and USDOT has an original copy. The Parties shall execute, deliver, and provide such additional agreements, documents, and instruments as reasonably required from time to time to effectuate the intent of this Development Agreement.

IN WITNESS WHEREFORE, 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 multiple original documents 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. Barrett**  
**Deputy Secretary**  
**United States Department of Transportation**

**Date:** \_\_\_\_\_

**THE FLORIDA DEPARTMENT OF TRANSPORTATION**

**By:** \_\_\_\_\_  
**Stephanie C. Kopelousos**  
**Secretary**  
**Florida Department of Transportation**

**Date:** \_\_\_\_\_

**THE GEORGIA DEPARTMENT OF TRANSPORTATION**

**By:** \_\_\_\_\_  
**Gena L. Evans, Ph.D.**  
**Commissioner**  
**Georgia Department of Transportation**

**Date:** \_\_\_\_\_

**THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION**

**By:** \_\_\_\_\_  
**H. B. Limehouse, Jr.**  
**Secretary**  
**South Carolina Department of Transportation**

**Date:** \_\_\_\_\_

**THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION**

**By:** \_\_\_\_\_  
**Lyndo Tippett**  
**Secretary**  
**North Carolina Department of Transportation**

**Date:** \_\_\_\_\_

**THE VIRGINIA DEPARTMENT OF TRANSPORTATION**

By: Pierce R. Homer  
**Pierce R. Homer**  
**Secretary**  
**Virginia Department of Transportation**

Date: 1/12/09



**EXHIBIT A**

**[IMPLEMENTATION SCHEDULE]**

**EXHIBIT B**

**STATEMENT OF DELIVERABLES**

<u>Section</u>	<u>Description</u>	<u>Date</u>
3(b)	Memorandum of Understanding	March 1, 2009
8(b)	Performance Objectives	June 30, 2009
9(a)	Reporting	June 2009 & annually thereafter

**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>(year)</u>	<u>Status</u> <u>(year)</u>	<u>Comment</u> <u>(projected results, strategies, etc)</u>
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**Institutional Roadblocks**

<u>Issue</u> <i>By State</i>	<u>Impact on Coalition Objectives</u>
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**Coalition Action Items**

<u>Horizon</u>	<u>Action</u>	<u>State(s)</u>	<u>Target Date</u>	<u>Desired Outcome</u>
Short				
Medium				
Long				

**Corridor Coalition Projects**

<u>Priority</u>	<u>Project</u> <u>Description</u>	<u>Status</u>	<u>Issues</u>	<u>Project Funding</u> <u>Needs</u>	<u>Strategy to</u> <u>Meet Need</u>
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**Status of Coalition (Organizational Issues)**

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

**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

To: Assistant Chief Counsels

Attn. of: HCC-40

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

<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.

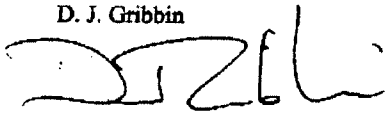
As to any records for which we give assurance and that are submitted to FHWA, DOT will provide the following commitments in writing:

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 aircrash, 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).

