

TRANSPORTATION BORDER CONGESTION RELIEF
DEVELOPMENT AGREEMENT
BETWEEN
THE UNITED STATES DEPARTMENT OF TRANSPORTATION
AND
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
FOR THE
CASCADE GATEWAY EXPANDED CROSS-BORDER
ADVANCED TRAVELER INFORMATION SYSTEM

This Development Agreement promotes a partnership between the United States Department of Transportation (hereinafter "USDOT"), 1200 New Jersey Avenue, S.E., Washington, D.C. 20590 and the Washington Department of Transportation (hereinafter "WSDOT"), Transportation Building, 210 Maple Park Avenue SE, P.O. Box 47300, Olympia, WA 98504-7300, (hereinafter the "Parties") for the development of Cascade Gateway Expanded Cross-border Advanced Traveler Information System ("Cascade Gateway" or "Project") under the Transportation Border Congestion Relief ("TBCR") Program, which is authorized or provided under the authority of 49 U.S.C. § 101.

WHEREAS, on May 30, 2008, USDOT published a Notice, in the *Federal Register* at 73 FR 31183, seeking applications from international land border States, bridge and tunnel operators, and private entities to participate in the TBCR Program. This notice established evaluation criteria through which USDOT would evaluate these applications and select two or more surface transportation projects, with a minimum of one on the United States/Mexico border and one on the United States/Canada border; and

WHEREAS, the TBCR Program is specifically designed to facilitate and accelerate transportation-related capacity and operational improvements at international land border crossings; and

WHEREAS, the primary objective of the TBCR Program is to identify and assist international land border States with implementing innovative solutions to help address land border travel time delay and facilitate trade and travel without compromising the vital mission of securing America's borders; and

WHEREAS, on June 30, 2008, WSDOT submitted an application under the TBCR Program for the Project, located in the vicinity of Whatcom County (Blaine-Lynden-Sumas), Washington and the Province of British Columbia, Canada; and

WHEREAS, on September 18, 2008, USDOT selected the Project for the TBCR Program; and

WHEREAS, WSDOT intends to explore the use of bi-national partnerships, public-private partnerships, and innovative technologies to provide congestion relief for

the current and forecasted congestion at the U.S. border with British Columbia, Canada, in the Whatcom County area of Washington; and

WHEREAS, the Project has been identified by Federal, State and local governments in both the United States and Canada as having the potential to alleviate existing congestion and accommodate future growth in bi-national trade and traffic in the Washington-British Columbia border region; and

WHEREAS, USDOT and WSDOT agree to work together to implement innovative project delivery and financing strategies to improve cross-border travel times and advance the objective of a more efficient and reliable transportation system.

NOW, THEREFORE, USDOT and WSDOT express their mutual understandings and respective efforts for the development and operation of the Project as follows:

1. Objectives

(a) The objectives of the Project are to:

(i) Reduce border travel time delays by promoting non-traditional transportation project delivery and operational approaches at or near the Cascade Gateway international land border crossings.

(ii) Illustrate the benefits, and highlight the drawbacks as they become apparent, of alternative financial models pursuing innovative strategies to financing and operating border related infrastructure.

(iii) Promote and support a more efficient environmental review and project development coordination process among the various Federal and local agencies that have an interest in our Nation's land borders.

(iv) Improve system connectivity to facilitate trade and the safe, legitimate, movement of people and goods across the United States border by decreasing border travel times without compromising the vital mission of securing America's borders.

(v) Demonstrate the viability of developing land border crossing projects using an investment model based on sound economics and market principles.

(vi) Use procurement approaches that minimize taxpayer risk and provide contractor incentives.

(b) WSDOT will use these objectives as the guiding principles in the planning, development, financing, construction, operation and maintenance of the Project.

2. Vision for the Cascade Gateway Expanded Cross-border Advanced Traveler Information System Project

The vision for the Cascade Gateway Project is to manage four (4) western border crossings as a single border crossing system and provide real-time traveler information system as travelers approach the border crossings. The overall object is to maximize the use of the transportation system and the border security resources.

The proposed Project consists of three main elements:

- (a) Implement expansion of the Cascade Gateway Cross-border Advanced Traveler Information System;
- (b) Pursue public-private partnerships to develop a fiber optic backbone stretching approximately 80 miles along the I-5 cross-border corridor; and
- (c) Foster regional bi-national partnerships and explore other opportunities for innovative financing as allowable under Federal and state law to construct priority projects within the Cascade Gateway cross-border corridor.

3. Development and Operation of the Project

(a) WSDOT agrees to develop and submit to the USDOT a Project Schedule within 120 days of the execution of this Development Agreement which shall be attached hereto and incorporated herein as Exhibit A, as amended from time to time.

(b) WSDOT recognizes that the Project needs to be carried out in an environmentally sensitive manner, using a comprehensive planning process that includes the public and considers land use, development, safety, and security. WSDOT agrees that it will work cooperatively with the Whatcom Council of Governments (“WCOG”) to ensure the Project is carried out in conformity with applicable planning requirements and is consistent with WCOG’s Transportation Improvement Program and the Long-Range Transportation Plan.

(c) USDOT intends to take the following actions to assist WSDOT with the development of the Project.

(i) USDOT will establish a Federal Transportation Border Congestion Relief Project Team comprised of representatives from the Federal stakeholders in an effort to streamline Federal approvals and advance the planning and implementation of the project.

(ii) USDOT will provide technical assistance and coordination regarding planning and environmental processes applicable to the development of the Project.

(d) USDOT intends, to the extent requested and available, to support the development of the Project with financial resources, regulatory flexibility, and dedicated expertise and personnel.

4. Innovations in Project Delivery and Finance

(a) To the extent permissible under Federal and State laws, and consistent with the scope and vision of the Project, WSDOT intends to explore and endeavor to use any and all applicable innovative project delivery and alternative financing methods, including Public Private Partnerships.

(b) USDOT shall commit to take the following actions to assist with arranging for the financing of the Project:

(i) Subject to an approved application for Transportation Infrastructure Finance Innovation Act credit assistance (23 U.S.C. §§ 601- 609), USDOT will expedite the commitment process for providing such funding assistance if it is applicable.

(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, the USDOT will conditionally allocate a portion of the \$15 billion PAB limitation to the project.

(iii) Tolling authority applications submitted to the USDOT, pursuant to this Development Agreement, 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 21st 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.

(iv) Support the application of innovative financing solutions to problems associated with maintaining, repairing, rehabilitating and reconstructing border projects; as well as foster creative solutions for managing congestion and avoiding the environmental and social impacts of projects through the approval of prudent design deviations.

(v) Work with WSDOT to carefully examine title 23 for impediments to utilizing innovative project and finance delivery techniques for the Project and will consider using Special Experimental Project (SEP) No. 14, SEP-15, and other initiatives to address these impediments, consistent with applicable law. USDOT will use an expedited process to review any SEP-14 or SEP-15 applications that are received from WSDOT for the Project. USDOT may consider requests to use

SEP-14 or SEP-15, or any other experimental programs that may apply, to grant flexibility with respect to tolling.

(vi) Work with WSDOT to identify other possible discretionary funding sources and assist WSDOT in understanding application requirements for these programs, and to the extent possible, assist in expediting funding under any such funding program if it is pursued. Any Federal funds provided for the Project shall be subject to the requirements of the program under which the funds are granted or awarded and USDOT stands willing to assist WSDOT with complying with any such requirements.

5. Environmental Stewardship

WSDOT 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.

6. Performance Objectives and Measures

(a) WSDOT intends to work with the USDOT to collaboratively develop performance objectives for operation of the Project.

(b) WSDOT intends to develop a performance plan that meets the performance objectives developed pursuant to 6(a). The plan may include (i) operation performance goals and expectations and standards, and (ii) methods to measure travel time and reliability.

(c) The timeline for the development of the performance plan shall be included in the Project Schedule.

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

7. Reporting

WSDOT agrees to provide USDOT an annual report on the activities identified in the Project Schedule developed pursuant to 3(a) beginning one (1) year after the execution of this Development Agreement and continuing through the fifth (5th) year following the implementation of the last activity identified in the Project Schedule.

8. Points of Contact

(a) WSDOT designates the Northwest Region/Mount Baker Area Planning Office as the point of contact for the Project. This office will coordinate with the WSDOT Headquarters Transportation Planning Office, WCOG, and the International Mobility and Trade Corridor project, and others as may be appropriate.

(b) USDOT designates the Federal Highway Administration Office of Interstate and Border Planning as the point of contact for the Project. This office will coordinate USDOT support, help guide the Project through any required processes, and conduct regularly scheduled conference calls on the progress of the Project.

9. Access to Documents

WSDOT may furnish or make available for review and comment to the USDOT confidential or proprietary information relating to the development of the Project. Any records that WSDOT 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 B) The confidentiality of any records obtained by the USDOT shall be determined in accordance with 49 C.F.R. Part 7.

10. Limitations

(a) Nothing in this Development Agreement will be construed as affecting the legal authorities of the Parties with respect to their undertakings hereunder, as binding beyond their respective authorities, or to require any of the Parties to obligate or expend any funds.

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

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

11. Termination

(a) WSDOT and USDOT may terminate this Development Agreement by mutual written agreement.

(b) If USDOT determines in good faith that WSDOT is not satisfying the objectives of the TBCR Program, USDOT shall provide WSDOT with notice of USDOT's concerns. After providing such notice, USDOT shall allow WSDOT a reasonable period of time to address and resolve USDOT's concerns. After providing for such a reasonable period of time, USDOT may unilaterally terminate, in writing, this Development Agreement if it continues to determine in good faith that WSDOT cannot, satisfy the objectives of the TBCR Program

(c) WSDOT may terminate its involvement in this Development Agreement unilaterally by giving thirty (30) days notice in writing to the USDOT. The notice shall identify any outstanding Project obligations and set forth a plan to mitigate any materially adverse impacts to the development or operation of the Project.

12. Amendments

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

13. Announcement of Development Agreement

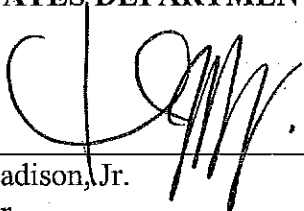
No pronouncement or public release regarding this Development Agreement shall be issued until all Parties have signed this Development Agreement. Each party is then free to issue pronouncements and public releases on the content of this Development Agreement.

14. Original Copies

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

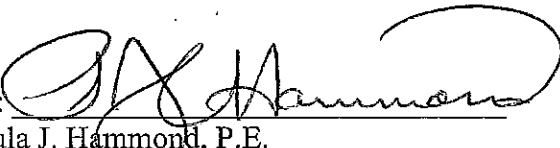
IN WITNESS WHEREFORE, the Parties hereto have caused this Development Agreement to be duly executed in duplicate as of the day and year last written below either on one original document or via multiple counterparts through facsimile, which, when taken together, shall constitute one and the same instrument.

UNITED STATES DEPARTMENT OF TRANSPORTATION

By: 
Thomas J. Madison, Jr.
Administrator
Federal Highway Administration

Date: 1/12/09

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

By: 
Paula J. Hammond, P.E.
Secretary of Transportation
Washington State Department of Transportation

Date: 1/14/09

EXHIBIT A

**CASCADE GATEWAY EXPANDED CROSS-BORDER ADVANCED
TRAVELER INFORMATION SYSTEM**

PROJECT SCHEDULE

EXHIBIT B

**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.¹ 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

¹ 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.

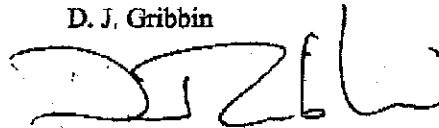
As to any records for which we give assurance and that are submitted to FHWA, DOT will provide the following commitments in writing:

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.¹ Inasmuch as the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record,² 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.³

"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 Dept 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).