

COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE OPEN RECORDS POLICY RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

SECTION I. PURPOSE

The Colorado High Performance Transportation Enterprise (“HPTE”) and the Department are committed to transparency and open government. The purpose of this Policy is to provide guidance on HPTE’s mechanisms for ensuring transparency in the development, procurement and implementation of Public-Private Partnerships (“P3”), and to clarify how the Colorado Open Records Act applies to P3 projects procured by HPTE. This Policy is intended to balance the need for transparency against the need to protect the integrity of the procurement process in order to complete P3 projects in as efficient and orderly method as possible, and in the best interest of the state.

This Policy will give direction to ensure that HPTE and all parties to which this Policy applies comply in all respects with the Colorado Open Records Act, the Freedom of Information Act and the “Funding Advancement for Surface Transportation and Economic Recovery Act” (“FASTER”). It is intended that by complying with this Policy, all parties meet the constitutional and statutory duties regarding P3s that HPTE owes to the People of Colorado in a transparent, orderly and expeditious manner.

SECTION II. AUTHORITY

§§ 24-72-201, *et seq.*, C.R.S. (Colorado Open Records Act of “CORA”)

§§ 43-4-801, *et seq.*, C.R.S. (or “Funding Advancement for Surface Transportation and Economic Recovery Act” or “FASTER”), specifically § 43-4-809(2)(b), C.R.S.

Governor Hickenlooper’s Executive Order D 2014-010, issued June 4, 2014

HPTE Transparency Policy Relating to Public-Private Partnerships, as amended.

CDOT Colorado Open Records Act Procedure and Fee Schedule, Procedural Directive 25.1

Colorado High Performance Transportation Enterprise Project Proposal Guidelines

The Colorado Procurement Code (§§ 24-101-101, *et seq.*, C.R.S.) does not apply to Public-Private Partnerships pursuant to § 24-101-105(1)(a)(I), C.R.S. except to the extent specified.

SECTION III. APPLICABILITY

This Policy applies to the HPTE Board, the Office of the HPTE, the Colorado Department of Transportation employees who work with the HPTE Office on P3

projects, and all Proposers and Private Partners doing business or seeking to do business with the HPTE.

SECTION IV. DEFINITIONS

“Board” shall mean the board of directors of the High Performance Transportation Enterprise. § 43-4-803(25), C.R.S.

“Commercial Close” shall mean the effective date of a Public-Private Partnership agreements executed by the Private Partner and HPTE.

“CORA” shall mean the Colorado Open Records Act, § 24-72-201 through § 24-72-206, C.R.S. and, where referenced in this Policy, shall include “FOIA” requests.

“CORA Exempt Materials” shall mean documents or sections of documents which are exempt from disclosure under CORA and/or under the common law, as determined by the HPTE Director and legal counsel.

“CORA Officer” shall have the meaning given to it in Procedural Directive 25.1.

“Department” shall mean the Colorado Department of Transportation created pursuant to § 43-1-101, C.R.S., including the Bridge Enterprise created pursuant to § 43-4-805, C.R.S.

“Financial Close” shall mean the date on which the conditions precedent to the provision of financing to fund the project have been met. These conditions may include, but are not limited to, execution of the finance documents, delivery of the Base Case Financial Model, delivery of requisite legal opinions, and confirmation that the requisite equity investment by the shareholders of the Private Partner have been or will be made.

“High Performance Transportation Enterprise” or “HPTE” shall mean the High Performance Transportation Enterprise created pursuant to § 43-4-806(2)(a)(I), C.R.S.

“HPTE Board” shall mean the High Performance Transportation Enterprise Board created pursuant to § 43-4-806(2)(a)(I), C.R.S.

“HPTE Director” shall mean the Director of the High Performance Transportation Enterprise office pursuant to § 43-4-806(2), C.R.S.

“HPTE Office” shall mean the High Performance Transportation Enterprise office created pursuant to § 43-4-806(2)(a)(I), C.R.S.

“Person” shall mean any individual, sole proprietorship, corporation, partnership, co-partnership, joint venture, limited liability company, unincorporated association, association, business entity, consortium of business entities, firm or joint stock

company, or public entity, their lessees, trustees, assignees, receivers as appointed by any court, their successors and permitted transferees and their assigns.

“Private Partner” shall mean a Person that has entered into an agreement with the HPTE for a Public-Private Partnership.

“Proposal Submission” shall mean a statement of qualifications, proposal, or any other submission provided by a Proposer with the purpose of participating in an ongoing procurement for a Public-Private Partnership.

“Proposer” shall mean a Person that has submitted (or, as the case may be, is intending to submit) a Proposal Submission in order to participate in an ongoing procurement for a Public-Private Partnership.

“Public-Private Partnership” or “P3” shall mean an agreement between the HPTE and one or more private entities by which the HPTE transfers responsibility to a private entity to design, build, finance, operate and maintain a Surface Transportation Infrastructure Project, or by which the HPTE transfers responsibility to a private entity to design, build and finance a Surface Transportation Infrastructure Project, in return (in either case) for the right to receive all or a portion of the User Fees generated by the Surface Transportation Infrastructure Project and/or other public monies. The use of the word “partnership” to describe such an arrangement does not confer on the relationship formed any of the attributes or incidents of a partnership under § 7-60-106, C.R.S. of the Colorado Revised Statutes or the common law. *See* § 43-1-1204(4), C.R.S.

“Public Records” are defined in § 24-72-202(6)(a), C.R.S., except as those writings are otherwise defined not to be Public Records under the CORA.

“Request for Proposals” or “RFP” shall mean a request for a submittal from a Person for a Public-Private Partnership.

“Request for Qualifications” or “RFQ” shall mean a request for a submittal from a Person of a description of that person’s experience, competence, and capability to enter into and implement a Public-Private Partnership.

“Requester” shall mean an individual or entity requesting Public Records from the HPTE.

“Short-Listed Proposer” shall mean a Proposer that is approved through a procurement evaluation process following the issuance of a RFQ or a Proposer that is part of a pool of eligible Private Partners for certain specific tasks assigned by the HPTE.

“Unsolicited Proposal” shall mean a written proposal for a public-private initiative that is submitted by a private entity for the purpose of entering into an agreement with the

HPTE but that is not in response to a formal solicitation or request issued by the HPTE. § 43-1-1201(6), C.R.S.

SECTION V. GENERAL CORA REQUIREMENTS

A. HPTE CORA Procedures

1. Documents generated or maintained by HPTE in relation to P3 projects are presumptively Public Records and therefore will presumptively be made available for inspection, unless designated as CORA Exempt Materials, or unless the HPTE determines that making the documents available to the public at a later date is necessary to protect the integrity of the procurement process and is in the best interest of the state.
2. CDOT's Procedural Directive 25.1 "CDOT's Open Records Act Procedure" and the Colorado High Performance Transportation Enterprise Project Proposal Guidelines are incorporated herein by this reference and shall apply to all CORA requests specifically involving the HPTE and P3 projects.
3. Upon receiving a CORA request, the HPTE and the Department shall work with the CDOT CORA Officer, and legal counsel as necessary, to timely respond to the Requestor.
4. The HPTE and the Department will work with HPTE staff members, Proposers, and Private Partners to obtain all documents responsive to a CORA request and provide them to the CDOT CORA Officer.
5. The HPTE Director and legal counsel shall make the ultimate determination whether a record constitutes CORA Exempt Material and if so, whether the exemption is permanent or ends on a date certain in order to protect the integrity of the procurement process.

B. Proposers and Private Partners' Requirements

1. This Policy is directly binding on Private Partners and Proposers.
2. Proposers and Private Partners involved in the HPTE P3 process shall be familiar with the requirements of the CORA and any amendments thereto.
3. The Proposer or Private Partner has the burden of proof to establish:
 - a) What information in a document constitutes CORA Exempt Material; and
 - b) The specific basis upon which such information is protected under Colorado law.
4. In order to assert that a document should be designated as CORA Exempt Material, the Proposers and Private Partners must:

- a) Clearly identify the information in any submissions prior to or contemporaneously with the delivery of the record, using a privilege log format (name of document, pages, clearly marked sections of document, basis for confidentiality and legal citation).
 - b) State whether the confidentiality is for a certain period only, or is asserted on a permanent basis.
5. The Proposer or Private Partner's failure to follow this procedure prior to or contemporaneously with the delivery of a record may subject the record to disclosure under the CORA.
6. In the event that the HPTE Director and legal counsel determine to disclose the documents requested pursuant to CORA, the HPTE will provide the Proposer or Private Partner with notice of its intent to disclose; however, the notice shall not toll the time limitations of compliance with the CORA.
7. All Proposal Submissions submitted to the HPTE and the Department become the property of the HPTE and the Department and are subject to disclosure under the CORA.
8. In the event the P3 project or solicitation is terminated, suspended, or otherwise cancelled, the HPTE Director and legal counsel will make the determination whether the documents should be disclosed, particularly where a procurement could be re-initiated.

C. Determination of Confidentiality

- 1. A Proposer or Private Partner's designation of a document or section of document as CORA Exempt Material shall not be dispositive of its exemption from CORA. The HPTE Director and legal counsel shall make the determination whether a document constitutes CORA Exempt Material and, if so, whether the exemption is permanent or expires on a date certain.
- 2. HPTE may request that the Proposer or Private Partner make an oral presentation or provide further documentation to substantiate the requested exemption from disclosure.
- 3. HPTE will provide written notification to the Proposer or Private Partner of its rejection of any requested exemption and will maintain a file including the written notification.

SECTION VI. MILESTONES IN THE P3 PROCESS WITH REGARD TO PUBLIC RECORDS

The following phases provide guidance on the P3 process, specifically with regard to whether a document constitutes a Public Record under the CORA or constitutes CORA Exempt Material, and, if so, whether the exemption is permanent or expires on a date certain. The milestones are intended to provide clarity to participants in the P3 process, as well as interested members of the

public. The HPTE and the Department have developed these milestones, and the schedule for regular disclosure of certain documents created over the course of a P3 procurement process set forth in Appendix “A,” as a roadmap to balance the need for transparency against the need to protect the integrity of the procurement process in order to complete the project in as efficient and orderly method as possible, and in the best interest of the state. The milestones outlined below are indicative of a typical P3 project. If a different process is determined to be followed (for example, regarding an Unsolicited Proposal), the HPTE and the Department will apply the principles underlying this policy to that process.

As the P3 project moves forward, key documents will be posted on the CDOT website specific to the project.

A. Phase One: Visioning (Project Identification and Screening)

The Visioning (Project Identification and Screening) Phase includes the identification of projects that may be suitable for P3, considering CDOT’s Statewide Plan and other documents. In this Phase, the HPTE and the Department determine the desirability and feasibility of delivering transportation projects utilizing the P3 method. It includes the assessment of the suitability of candidate projects for P3 delivery. Save to the extent that any such documents constitute CORA Exempt Materials, the documents in the Project Identification and Screening Phase are Public Records. Phase One may include Solicited and Unsolicited Proposals in which case the process set forth herein regarding confidentiality applies.

B. Phase Two: Project Development

The Project Development Phase typically begins with the identification of a project as suitable for a P3, and ends with the issuance of the RFQ. In the Project Development Phase, the HPTE and Department take necessary steps to prepare the P3 project for the Procurement Phase. Save to the extent that any such documents constitute CORA Exempt Materials, the documents in the Project Development Phase are Public Records.

C. Phase Three: Project Procurement

The Project Procurement Phase typically begins with the issuance of the RFQ inviting potential Proposers to submit a Proposal Submission in response thereto, and ends with Financial Close. In the Project Procurement Phase, the HPTE conducts the P3 competitive procurement process. This phase is typically comprised of three stages:

1. The first stage begins with the issuance of a RFQ and ends with the selection of Short-Listed Proposers qualified to respond to a RFP and the expiry of a subsequent protest period;
2. The second stage begins with the issuance of a draft RFP and ends with the selection of a preferred Short-Listed Proposer to enter into a P3 agreement and the expiry of a subsequent protest period; and

3. The third stage begins with the selection of a preferred Short-Listed Proposer and ends with the Financial Close.

This three- stage process, while typical for P3, is not mandatory and may change depending on certain factors. For example, the third stage could end on Commercial Close if the project is not externally financed with private debt.

Please see Appendix “A” for more specifics.

D. Phase Four: Project Implementation Phase

The Project Implementation Phase begins when all the project and financing agreements have been signed and all the required conditions contained in the agreements have been met. In Phase Four, information concerning the P3 process becomes Public Record save to the extent it constitutes CORA Exempt Material.

The HPTE shall post on the HPTE webpage a summary of the essential terms of the Public-Private Partnership Agreement, which are easily understandable by the public, after entering into the agreement, as well as the full agreement, save to the extent that it contains any CORA Exempt Material.

F. Unsolicited Proposals

Unsolicited Proposals are presumed Public Records except to the extent HPTE and legal counsel determine a record constitutes CORA Exempt Material and if so, whether the exemption is permanent, or ends on a date certain in the event HPTE determines to consider and further evaluate the Unsolicited Proposal. To the extent practicable, determinations as to whether specific materials contained in an Unsolicited Proposal constitute Public Records will be made consistent with determinations for other Proposal Submissions as set forth in Appendix A.

SECTION VII. DOCUMENTS REFERENCED IN THIS POLICY

CDOT Procedural Directive 25.1 “CDOT Open Records Act and Procedure”

HPTE Transparency Policy Relating to Public-Private Partnerships, as amended.

Colorado High Performance Transportation Enterprise Project Proposal Guidelines

SECTION VII. EFFECTIVE DATE

This Policy shall be effective as of August 19, 2015, and shall remain in effect until amended or superseded by subsequent resolution of the HPTE Board.

Appendix “A”

Documents Associated with P3 Milestones

The HPTE and the Department are committed to conducting a transparent P3 process. The schedule in this Appendix A is intended to provide general guidance to participants in the P3 process and members of the public regarding the schedule for the release of certain common documents created during the course of a P3 project procurement. This Appendix is intended to balance the public interest in providing transparency with the public interest in protecting the integrity of the procurement process. As noted herein, this will apply to most P3 projects, but projects may vary. Key documents will be posted on the website specific to each project. Documents referenced below may contain sections that are designated as CORA Exempt Materials, in which case they may be exempt from disclosure during a certain period or exempt from disclosure with no time limitation.

The following documents will be posted on the Project Website as such documents is completed, except as otherwise indicated:

Phase One: Visioning (Project Identification and Screening)

Document/Information
Summary of the Initial Value for Money Analysis which evaluates the feasibility of pursuing a P3 project compared to a conventional public sector approach.
Environmental Studies
Traffic and Revenue Studies
Engineering Designs

Phase Two: Project Development

Document/Information
Traffic and Revenue Studies
Engineering Designs
Environmental Studies
Summary of the Updated Value for Money Analysis.
Frequently Asked Questions

Phase Three: Project Procurement

Document/Information	When Disclosed
Stage One	
Initial RFQ, Addenda to RFQ, Final RFQ	At the same time as issued to Proposers
RFQ Comments submitted by Proposers and HPTE responses	At the same time as responses are issued to Proposers, other than CORA Exempt Materials
SOQs	After the later of (i) expiry of the protest period following announcement of Short-Listed Proposers and (ii) resolution of any protest, except for CORA Exempt Materials
Evaluation Materials	After the later of (i) expiry of the protest period following announcement of Short-Listed Proposers and (ii) resolution of any protest, except for CORA Exempt Materials
Identity of Short-Listed Proposers, included scores and ranking of all Proposers	Upon announcement of selection of Short-Listed Proposers
Stage Two	
Initial RFP (Request for Proposal Submissions)	At the same time as RFP is issued to Proposers
Final RFP	At the same time as RFP is issued to Proposers
Documents resulting from discussions, interviews, and one-on-one meetings	
Best and final offers	
Computer software and methodology for the financial model	Presumed CORA Exempt Material
Proposers' financial statements	Presumed CORA Exempt Material
Documents related to the Commercial Close	

Phase Four: Project Implementation

Unless identified as CORA Exempt Materials, all documents will become Public Records in Phase Four.

Appendix “B”

Procedural Directive 25.1, Colorado Department of Transportation

Colorado Open Records Act Procedure and Fee Schedule

If any terms in this Procedural Directive 25.1 conflict with the HPTE CORA Policy, the latter shall apply.