

DOCKETED

Docket Number:	13-ATTCP-01
Project Title:	Acceptance and Training Certification
TN #:	230692
Document Title:	Letter to Tiffany Suite re Application for Confidential Designation
Description:	Letter
Filer:	Darlene Burgess
Organization:	California Energy Commission
Submitter Role:	Commission Staff
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Docketed Date:	11/14/2019



November 14, 2019

Tiffany Suite
National Environmental Balancing Bureau
8575 Grovemont Circle
Gaithersburg, MD 20877

RE: Application for Confidential Designation for Updated Training and Examination Materials, Docket No. 13-ATTCP-01

Dear Ms. Suite:

The California Energy Commission (CEC) received your Application for Confidentiality (Application) that you filed on October 29, 2019, on behalf of National Environmental Balancing Bureau (Applicant). You seek confidential designation for the following documents submitted comprising updated training and study materials (Documents):

- 1) *Changes from 2016 to 2019 - 33 Pages*
- 2) *2019 NRCA-MCH-04a-A PPT - 47 Pages*
- 3) *2019 NRCA-MCH-04b-A PPT - 41 Pages*
- 4) *2019 NRCA-MCH-19-A PPT - 21 Pages*
- 5) *ATT Entrance Exam for 04a-A - 4 Pages*
- 6) *ATT Entrance Exam for 04b-A - 4 Pages*
- 7) *ATT Entrance Exam for 19A - 5 Pages*

In a separate email, you clarified that you do not seek confidentiality for the Brownson Letter. You requested confidential designation of each of the Documents in their entirety, pursuant to California Code of Regulations, title 20, section 2505 on the grounds that they include copyrighted works for sale, are proprietary trade secret information, and are distributed only to your applicants and vendors under agreement of confidentiality. Your Application requested that the Documents remain confidential indefinitely, but in a separate email, you agreed and confirmed that it would be sufficient to designate the Documents as confidential only until the Acceptance Test Technician Certification Program ends.

A properly filed Application for Confidentiality shall be granted under the California Code of Regulations, title 20, section 2505(a)(3)(A), "if the applicant

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makes a reasonable claim that the Public Records Act or other provision of law authorizes the [CEC] to keep the record confidential.” The California Public Records Act allows for the non-disclosure of corporate proprietary information including trade secrets. (Gov. Code, §§ 6254(k), 6276.44; see also Evid. Code, § 1060; Civ. Code, § 3426.1.)

California courts have traditionally used the following definition of trade secret:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

(*Uribe v. Howe* (1971) 19 Cal. App. 3d 194, 207-208, from the Restatement of Torts, vol. 4, § 757, comment b, p. 5.)

California Code of Regulations, title 20, section 2505(a)(1)(D), states that if an applicant for confidential designation believes that the record should not be disclosed because it contains trade secrets, or its disclosure would otherwise cause loss of a competitive advantage, an application shall state: (1) the specific nature of the advantage; 2) how the advantage would be lost; 3) the value of the information to an applicant; and 4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

Your Application states the Documents include proprietary training and trade information, which volunteers developed with considerable effort, and which NEBB converted to an on-line/on-demand format at considerable expense. The Applicant stores the Documents on a secured server at the Applicant’s office. The Applicant only provides the materials under confidentiality agreements to its vendors and its applicants upon paying costs associated with training and testing. Your Application states that making the Documents public would allow the public free access to the Applicant’s proprietary materials, and even if aggregated or masked, it “would likely provide the end-viewer with insight as to the nature of the exam questions and format of the training materials.”

Beyond the bases you identified, it also appears that if the materials were made public, it would allow prospective students to cheat by obtaining testing materials which would diminish the effectiveness of the entire program. The Public Records Act specifically allows for the non-disclosure of test questions, scoring keys, and other examination data used to administer various types of examinations. (Gov. Code § 6254(g).)

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You have made a reasonable claim that the law allows the CEC to grant your Application. The Applicant developed the training and study materials in the Documents for its members and contractors for training, which contain information that is not public. There is no information to suggest that release of the information would serve a greater public benefit than its protection.

Based on the discussion above, the Applicant's confidentiality application is granted. The information subject to this confidentiality designation will be kept confidential until the Acceptance Test Technician Certification Program ends.

Be advised that persons may petition to inspect or copy records that the CEC has designated as confidential, the Executive Director may disclose or release records previously designated as confidential in certain circumstances, and the CEC may hold a hearing to determine the confidentiality of its records on its own motion or on a motion by CEC staff. The procedures and criteria for disclosing or releasing, or raising, reviewing, and acting upon such petitions or motions are set forth in the California Code of Regulations, title 20, sections 2506-2508.

In the future, you may request confidentiality for similar documents without submitting an application by following the procedures set forth in California Code of Regulations, title 20, section 2505(a)(4).

If you have any questions concerning this matter, please contact Ralph Lee, staff counsel, at ralph.lee@energy.ca.gov or (916) 645-3953.

Sincerely,

/S/ DREW BOHAN

Drew Bohan
Executive Director