

<b>DOCKETED</b>	
<b>Docket Number:</b>	01-AFC-07C
<b>Project Title:</b>	01-AFC-7C Russell City Energy Company
<b>TN #:</b>	241379
<b>Document Title:</b>	CEC Response Letter Russell City Energy Center Application for Confidential Designations dated Oct 22, Nov 23, and Dec 16, 2021
<b>Description:</b>	N/A
<b>Filer:</b>	Pam Fredieu
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	2/2/2022 12:44:10 PM
<b>Docketed Date:</b>	2/2/2022



February 2, 2022

VIA EMAIL

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APPLICATIONS FOR CONFIDENTIAL DESIGNATION:  
Russell City Energy Center Compliance Documents (01-AFC-07C)

Dear Samantha Neumyer:

The California Energy Commission (CEC) received Russell City Energy Company, LLC's (applicant) applications for confidential designation, dated October 22, 2021, November 23, 2021, and December 16, 2021. Collectively, the applications request confidential designation for information responsive to the CEC's inspection and investigation of the Russell City Energy Center (Russell City) following the May 27, 2021, explosion at the facility (May 27 event).

The October 22 application covers:

1. A preliminary draft summary of "Investigation Report: Calpine Russell City Steam Turbine/Generator Event," dated October 21, 2021.
2. The summary and recommendations that address the root cause analysis of event.

The November 23 application covers "Investigation Report: Calpine Russell City Steam Turbine/Generator Event," dated November 16, 2021.

The December 16 application covers two slides containing diagrams of pre-event operations at Russell City.

The applications contain similar bases for confidential designation. This letter addresses all three applications. Collectively, the applications request confidential designation for information related to the root cause analysis of the May 27 event.

An application for confidential designation shall be granted under the California

Code of Regulations, title 20, section 2505(a)(3)(A), “. . . if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential.” The executive director determination made in response to an application for confidential designation is subject to a reasonableness standard. It is the applicant’s burden to make a reasonable claim for confidentiality based on the California Public Records Act and other applicable laws.

The October 22 application identifies two bases for confidential designation: (1) trade secrets/proprietary information based on Government Code sections 6254.7(d) and 6254.15, and (2) Government Code section 6255(a), commonly referred to as “the balancing test.” The November 23 and December 16 applications additionally identify a third basis: (3) Government Code section 6254(ab) for critical infrastructure information or critical energy infrastructure information. The term of the confidential designation requested is for the life of the Russell City facility.

## **Confidentiality Claims**

### **Trade Secrets/Proprietary Information**

The California Public Records Act allows for the non-disclosure of trade secrets including, among others, those records exempt from disclosure under the Uniform Trade Secrets Act. (Gov. Code sections 6254(k), 6276, 6276.44; Evid. Code section 1061(a); Civ. Code section 3426.1(d).) 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, the application shall state: (1) the specific nature of the advantage, (2) how the advantage would be lost, (3) the value of the information to the applicant, and (4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

Civil Code section 3426.1(d) defines “trade secret” as:

“[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

(Civ. Code section 3426.1(d); *See also* Gov. Code sections 6254(k), 6276, 6276.44; Evid. Code section 1061(a); *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 207.)

Both the October 22 and December 16 applications claim that the records relate to the specific technologies and generating processes employed at the Russell City facility, including the design and location of certain facility components and other commercially valuable information related to the facility's operations and schematics. The applications also note that such information is used for "asset operations and protection purposes" and that the detailed information has independent economic value from not being known to the public or competitors. Finally, the applications state the documents are accessible only to the applicant's employees or consultants and have been disclosed only to agencies with regulatory oversight over the information or over Russell City.

In addition to the claims above, the November 23 application claims that the applicant purchases equipment and retains the services of consultants and contractors to conduct work at the Russell City facility, including work associated with the May 27 event. The application claims that the public disclosure of this information could place the applicant at a pricing disadvantage if the recommendations are made public and available to potential vendors of equipment and providers of services. The application also states that the confidential information has independent economic value from not being generally known to the public, including the applicant's competitors and vendors, who could obtain economic value from the disclosure or use of the confidential information.

The applicant requests confidentiality under Government Code sections 6254(k), 6254.7(d), and 6254.15. The last two provisions do not apply to the records submitted with the application because the records do not contain emissions data, do not contain building code violation information, and do not relate to retaining, locating, or expanding a facility in California. Therefore, we consider only the trade secret claim under section 6254(k), which exempts from disclosure those records that are exempted or prohibited from being disclosed pursuant to other laws, including federal or state law governing trade secrets.

**Preliminary Draft Summary.** The applicant has not made a reasonable claim that the draft summary of the root cause analysis is a trade secret as the application does not explain the specific nature of the competitive advantage, how the advantage would be lost, or the value of the information to the applicant. This document reflects a past event and does not indicate how the

applicant is operating or will operate in the future, or otherwise indicate what economic value is derived from its secrecy. Therefore, it is not a trade secret exempt from disclosure under the California Public Records Act.

**Restoration Recommendations.** The applicant has not made a reasonable claim that the restoration recommendations are a trade secret as the application does not explain the specific nature of the competitive advantage, how the advantage would be lost, or the value of the information to the applicant. This document reflects information about a past event and does not indicate how the applicant is currently operating or will operate in the future, or otherwise indicate what economic value is derived from its secrecy. Therefore, it is not a trade secret exempt from disclosure under the California Public Records Act.

**Investigation Report.** Some of the information contained in the report is similar to the slides described below and reveals specific technologies and processes that would provide the applicant a competitive advantage in the energy market from not being known to others. For this information, the applicant has made a reasonable claim that this information derives independent economic value from not being generally known to the public and is the subject of reasonable efforts to maintain its secrecy. This information has current economic value as Russell City continues to operate based on the facility design and operation shown in detail in these documents. However, a significant amount of the investigation report does not reveal the specific technologies or generating processes that would implicate a competitive advantage, and the applications do not indicate what economic value may be lost from the disclosure of this non-technology-specific information. Therefore, some, but not all, of the investigation report may be a trade secret exempt from disclosure under the California Public Records Act; other parts are not a trade secret.

The November 23 application claims that the public disclosure of the investigation report could place the applicant at a pricing disadvantage if the information is made public and available to potential vendors of equipment and providers of services. However, the application does not indicate that the applicant is engaged in any procurement process, the negotiations for which would be affected by the disclosure of this information. A grant of confidentiality would be appropriate for those records that the release of which the applicant can demonstrate could specifically affect ongoing procurement negotiations. If the applicant is able to demonstrate such a claim, confidentiality would be appropriate until such time as the procurement is complete.

**Slides.** The slides reveal specific technologies and processes that the application

claims would provide the applicant a competitive advantage in the energy market from not being known to others. The application makes a reasonable claim that this information derives independent economic value from not being generally known to the public and is the subject of reasonable efforts to maintain their secrecy. These records have economic value as Russell City operates based on the facility design and operation shown in detail in these documents. Therefore, these documents are exempt from disclosure as trade secrets under Government Code section 6254(k).

### **Public Interest in Disclosure section 6255(a)**

Government Code section 6255(a) allows an agency to withhold records from public disclosure where on the facts of the case the public interest served by not disclosing the record "clearly outweighs the public interest served by disclosure of the record." This is referred to as the "balancing test."

The applications assert that the public interest served by not disclosing the records clearly outweighs the public interest served by the disclosure of the records because not disclosing the records protects against the misuse of the information for illicit purposes, such as vandalism, tampering, or other third-party imposed damages. The applications note that attacks on energy infrastructure are a real and contemporary threat.

The October 22 application adds that the records include information that could be defined as CEII in that they contain details about the production and generation of energy and could be useful to a person planning an attack on critical infrastructure through the provision of engineering and potential vulnerability information. The application further notes that the records contain information not customarily in the public domain and are related to the security of critical infrastructure or protected systems, as those terms are defined in United States Code, title 6, section 131.

The balancing test can be used to support the non-disclosure of information related to public safety. However, mere claims of potential mischief are insufficient, and facts demonstrating that specific harm is likely to result to the public or specific individuals are required to justify withholding information. "The critical point is that a court applying section 6255(a) cannot allow '[v]ague safety concerns' to foreclose the public's right of access. (Citations omitted)" (*American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1046 [221 Cal.Rptr.3d 832, 843, 400 P.3d 432, 441].)

For example, the Court of Appeal rejected a claim by the County of Santa Clara that GIS information showing the location of easements for Hetch Hetchy water pipelines should be withheld despite the County's claim that doing so was necessary to minimize the threat of terrorist attack. The court noted that the claim was overbroad and additionally undermined by the fact that the County had released the information, albeit under a non-disclosure agreement. "While we are sensitive to the County's security concerns, we agree with the trial court that the County failed to support nondisclosure on this ground." (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1329 [89 Cal.Rptr.3d 374, 395], as modified (Feb. 27, 2009).)

The public has a strong interest in knowing what may have caused the May 27 event, what corrective actions the applicant will be implementing, and how it is managing Russell City as a result of the CEC's investigation and its own analysis. Russell City is in the City of Hayward, an urban area. In comments filed with the CEC, the City of Hayward noted that the explosion resulted in "shards of metal thousands of feet away," including a 15-pound piece of metal that fell through the City's Housing Navigation Center, which was fortunately unoccupied at the time.<sup>1</sup> This interest may be outweighed by other considerations, such as the threat and danger to Russell City and the safety of facility workers and the public from disclosing the exact configuration of facility systems that, if tampered or vandalized, could interfere, compromise, or incapacitate the facility.

**Preliminary Draft Summary.** The summary of the root cause analysis, which is also in the first chapter of the investigation report, does not contain any specific design and operation information that could be used to threaten the Russell City facility. This information, which includes information about past facility operation and recommendations for corrective actions, is not the type of information that could be used to tamper with or vandalize the facility. Moreover, the public has a strong interest in the disclosure of information explaining the root cause of the May 27 event and the recommended actions for addressing it to ensure against future public safety risks from the operation of the Russell City facility. As such, the applicant has not made a reasonable claim that the public interest served by not disclosing the summary of the root cause analysis clearly outweighs the public's interest in the disclosure of this record.

**Restoration Recommendations.** Like the summary of the root cause analysis, the restoration recommendations do not contain any specific design and operation information that could be used to threaten the Russell City facility. This information, which includes information about past facility operation and

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<sup>1</sup> Docket No. 01-AFC-07, TN 238635.

recommendations for corrective actions, is not the type of information that could be used to tamper with or vandalize the facility. Moreover, the public has a strong interest in the disclosure of information explaining the root cause of the May 27 event and the recommended actions for addressing it to ensure against future public safety risks from the operation of the facility. As such, the applicant has not made a reasonable claim that the public interest served by not disclosing the restoration recommendations clearly outweighs the public's interest in the disclosure of this record.

**Investigation Report.** The investigation report contains detailed information, including Russell City facility design details and schematics, that could provide sufficient information for someone to interfere with its proper functioning or strategically damage the facility. It is reasonable to conclude that knowledge regarding the configuration of a system and how a system can be shut down could threaten the entire facility. However, much of the information in the investigation report does not contain specific detail or site-specific information that would implicate a security threat. As such, the applicant has not made a reasonable claim that the public interest in the non-disclosure of the entire investigation report outweighs the public's interest in understanding the exact configuration of these systems. However, for some parts of the investigation report, which contains details regarding the facility's design and operation, the public's interest in non-disclosure to protect critical facility information clearly outweighs the public's interest in disclosure.

**Slides.** The Russell City facility schematics contained in the two slides provide detailed facility design information that could provide sufficient information for someone to interfere with the proper functioning of the facility or strategically damage it. The specific facility design before the May 27 event does not have a direct relationship to the public's interest in what may have caused the event or its interest in subsequent corrective actions. Therefore, the applicant has made a reasonable claim that the public's interest in the non-disclosure of these slides clearly outweighs the public's interest in disclosure.

### **Critical Energy Infrastructure Information**

The November 23 and December 16 applications identify Government Code section 6254(ab) and its protection against the release of critical infrastructure information (CII), the Department of Homeland Security (DHS) protection of CII, and Federal Energy Regulatory Commission's (FERC) protection of Critical Energy Infrastructure Information (CEII) in support of the requested confidential designation. The applications do not indicate whether either DHS or FERC has



designated the underlying records as CII or CEII, respectively, and we assume they have not. The information explaining why the records are similar to CII and CEII is relevant to the discussion above for the balancing test and provides a reasonable claim that the public's interest in the non-disclosure of the records clearly outweighs the public's interest in disclosure. However, no specific exemption under Government Code section 6254(ab) applies as the conditions in Government Code section 6254(ab) are not met.

At the state level, Government Code section 6254(ab) protects from public disclosure certain infrastructure information provided the following are met: (1) the information is CII, as defined in United States Code, title 6, section 131(3), and (2) the information is voluntarily submitted to the Office of Emergency Services for use by that office. Government Code section 6254(ab) expressly states that the subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

Similar to Government Code section 6254(ab), DHS and FERC have processes in place to designate information as protected CII or CEII, but the same limitations found in Government Code section 6254(ab) apply: The information must be voluntarily submitted to the federal agency for designation, and the designation does not cover data independently obtained by a state agency. The salient provision of federal law states in part, "nothing in this section shall be construed to limit or otherwise affect the ability of a State...agency...to obtain critical infrastructure information in a manner not covered by subsection (a), including any information lawfully and properly disclosed generally or broadly to the public and to use such information in any manner permitted by law." (See 6 U.S.C. section 673 and 18 CFR section 388.113.)

The applications do not state if DHS or FERC have weighed in on whether the information is considered CII or CEII, and we assume they have not. The applications also do not indicate if the records have been submitted to the Office of Emergency Services (OES). Thus, there has been no opportunity for DHS, FERC, or OES to consider whether the records warrant a designation of CII or CEII. As a result, the applicant has not made a reasonable claim that the records can be withheld as CII or CEII as the applications do not state whether the records at issue have been provided to the relevant federal or state agencies for designation or that the records in the possession of the CEC were obtained from DHS, FERC, or OES.

### **Executive Director's Determination**

**Preliminary Draft Summary.** The preliminary draft summary of the investigation report, which is nearly identical to the summary contained in the first chapter of the final investigation report, is not granted confidential designation as it is not a trade secret, the public's interest in the non-disclosure of the information does not clearly outweigh the public's interest in the disclosure of the information, and the information has not been designated CII or CEII.

**Restoration Recommendations.** The restoration recommendations are not granted confidential designation as they are not a trade secret. The public's interest in the non-disclosure of the information does not clearly outweigh the public's interest in the disclosure of the information, and the information has not been designated CII or CEII. To the extent that this record is the subject of ongoing procurement negotiations, the applicant may submit information within 14 days to the executive director demonstrating the applicant's engagement in, and the record's relevance to, those procurement negotiations.

**Investigation Report.** Parts of the investigation report contain detailed information about the design and operation of the Russell City facility; those parts are granted confidential designation as trade secret and under the balancing test for the life of the facility or until such time as they may be publicly released. However, many parts of the investigation report contain information that does not qualify as a trade secret, does not justify withholding under the balancing test, and has not been designated CII or CEII. The CEC intends to prepare a redacted version of the investigation report to remove confidential information and to disclose the redacted version. The CEC will consult with the applicant on the redactions to ensure that trade secret information is not revealed.

**Slides.** The two slides, which contain detailed information about the design and operation of the Russell City facility, are granted confidential designation as a trade secret under the balancing test for the life of the facility or until they may be publicly released.

You may request that the CEC determine the confidentiality of records that the executive director denied confidential designation. You have 14 days to request that the CEC determine the confidentiality of the record. If you make such a request, the CEC will conduct a proceeding pursuant to the provisions in California Code of Regulations, title 20, section 2508.

Be advised that under California Code of Regulations, title 20, section 2506, one may petition to inspect or copy records that the CEC has designated as

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confidential. A decision on a petition to inspect or copy confidential records is issued by the CEC's chief counsel. Under California Code of Regulations, title 20, section 2507, the executive director may disclose records, or release records previously designated as confidential, in certain circumstances. The procedures for acting on a petition and criteria for disclosing or releasing records previously designated as confidential are set forth in the California Code of Regulations, title 20, sections 2506-2508.

You may seek a confidential designation for information that is substantially similar to information for which an application for confidential designation was granted by the executive director 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 email Chief Counsel Linda Barrera at [linda.barrera@energy.ca.gov](mailto:linda.barrera@energy.ca.gov)

Sincerely,

A handwritten signature in black ink, appearing to read 'Drew Bohan', with a long horizontal flourish extending to the right.

Drew Bohan  
Executive Director