

DOCKETED

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November 10, 2015

California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Application for Confidential Designation
California State Pipe Trades Title 24 Submission
Application for Acceptance Test Technician Provider for Non-Residential
Mechanical Acceptance Test Technician and Employer

To Whom It May Concern:

The California State Pipe Trades (“CSPT”) has submitted a written application to the California Energy Commission (“CEC”) to become an Acceptance Test Technician Certification Provider (“ATTCP”) pursuant Title 24, Part 1, § 10-103B of the California Building Standards Code (“ATTCP Application”). The CSPT hereby submits the enclosed confidential documents (the “Confidential Documents”) in support of its application. The CSPT has submitted the non-confidential portions of its application in a separate filing with the CEC.

For the reasons set forth below, the CSPT requests that the entirety of the Confidential Documents be permanently maintained as confidential by the CEC. In support of its request, the CSPT provides the following responses to the CEC’s questionnaire regarding applications for confidential designation:

1(a). Title, date and description (including number of pages) of the information or data for which you request confidential designation.

The UA requests confidential designation of the following documents:

- a. **CSPT Title 24 ATT Training Curriculum and Exam** (May 30, 2015; 357 Pages (“Training Curriculum” and “Training Exam”): The educational curriculum and final exam that will be used to train Acceptance Test Technicians (“ATT’s”) in compliance with the 2013 Building Energy Efficiency Standards, California Code of Regulations (CCR), Title 24 (“Energy Standards”). The Training Curriculum and Training Exam were created for the CSPT by the International Training Fund (“ITF”), a Taft-Hartley trust jointly administered by the United Association (“UA”) and contractors signed to collective bargaining agreements with the UA and its affiliate local unions.
- b. **Certification Handbook For: Contractors Technicians** (Undated; 24 Pages) (“Certification Handbook”): A guide created by the National Inspection Testing and Certification Corporation (“NITC”) outlining quality assurance and accountability for ATT’s and Acceptance Test Technician Employers, as required by the Energy Standards. The NITC is

- a third-party provider of certification services to the piping industry, and has worked with the CSTP to develop materials for its ATTCP Application.
- c. **Mechanical Acceptance Test Technician Employer Training Program and Exam** (Undated; 67 Pages) (“Employer Training” and “Employer Exam”): Training course materials, including final exam, created for the CSPT by the ITF to train employers as required by the Energy Standards.

1(b). Specify the part(s) of the information or data for which you request confidential designation.

The CSPT requests that the entirety of each of the Confidential Documents be maintained as confidential.

2. State and justify the length of time the Energy Commission should keep the information or data confidential.

The CSPT requests that the Confidential Documents be kept confidential indefinitely to protect the trade secrets, confidential commercial information, and exam materials enclosed therein.

3(a). State the provision(s) of the Public Records Act (Gov. Code, § 6250 et seq.) or other law that allows the Energy Commission to keep the information or data confidential, and explain why the provision(s) apply to that material.

The CSPT submits that there are three independent bases for finding that the Confidential Documents are confidential and exempt from disclosure under the California Public Records Act: (1) Cal. Gov’t Code § 6254(k) (trade secrets); (2) the federal Freedom of Information Act, 5 U.S.C. § 552(b)(4) (confidential commercial information); and (3) Cal. Gov’t Code § 6254(g) (test questions and examination data).

i. The Enclosed Documents are Confidential Under Cal. Gov’t Code § 6254(k) as Trade Secrets

The CSPT requests that all of the Confidential Documents be designated confidential pursuant to Cal. Gov’t Code § 6254(k). § 6254(k) permits the Commission to keep confidential the following types of documents:

- (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

The California Evidence Code contains a privilege for trade secrets. Cal. Evid. Code § 1060. Under California law, 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. Howie, 19 Cal. App. 3d 194, 206-07 (1971). To determine whether information is a trade secret, one must evaluate whether the matter sought to be protected is information 1) which is valuable because it is unknown to others, and 2) which the owner has attempted to keep secret. *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002).

The Confidential Documents represent a valuable compilation of confidential information that will be used by the CSPT and its affiliated training programs to train, educate, and certify heating, ventilation, air conditioning and refrigeration ("HVACR") professionals in accordance with the Energy Standards. The Confidential Documents will be utilized to train HVACR professionals and their employers in the latest technologies and skills relevant to performing mechanical Acceptance Testing.

The Confidential Documents are valuable because they give the CSPT an advantage over industry competitors who are not ATTCP's. Moreover, the Confidential Documents give CSPT members who seek to become ATT's an advantage over other HVACR professionals who are not certified to perform acceptance testing. If the Confidential Documents are disclosed, the CSPT's competitive advantage in training HVACR industry professionals would be substantially impaired.

The CSPT has kept the Confidential Documents confidential. The Confidential Documents have only been viewed by certain employees of the CSPT, UA and ITF, and by NITC employees who have worked to develop materials for the CSPT's ATTCP Application. Moreover, if the CSPT's ATTCP Application is approved, the Confidential Documents will only be made available to individuals training to become Acceptance Test Technicians and their employers.

ii. The Confidential Documents are Confidential Commercial Information Under FOIA Exemption 4, 5 U.S.C. § 552(b)(4).

The CSPT asserts that the Confidential Documents are exempt from disclosure under the federal Freedom of Information Act, 5 U.S.C. § 552(b)(4) ("FOIA"). Exemption 4 of the FOIA protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential. *See GC Mirco Corp v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (1994). For purposes of Exemption 4, information is "commercial" if it relates to a business or trade, or if it pertains to or deals with commerce. *See Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 176 (C.D. Cal. 2002). Information is "confidential" if disclosure is likely to either impair the Government's ability to obtain necessary information in the future, or cause substantial harm to the competitive position of the person from whom the information was obtained. *GC Mirco Corp*, 33 F.3d at 1112.

The Confidential Documents relate to the business of the CSPT and to the mechanical heating, ventilation, air conditioning, and refrigeration trades. The CSPT, through its affiliated local unions and training programs, will offer training and certification programs so that its members can become certified Acceptance Test Technicians pursuant to the requirements of the

Energy Standards. Moreover, disclosure of the Confidential Documents would cause substantial harm to the competitive position of the CSPT. The CSPT is able to attract and retain members in large part because of the breadth and quality of its training and certification programs. If the Confidential Documents are disclosed, the CSPT's competitive advantage in training HVACR industry professionals would be substantially impaired. Accordingly, the Confidential Documents are exempt from disclosure under 5 U.S.C. § 552(b)(4).

iii. Certain Documents are Exempt from Disclosure under Cal. Gov't Code § 6254(g)

The Training Exam and Employer Exam are exempt from disclosure under Cal. Gov't Code § 6254(g), which exempts from disclosure

Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination.

The Training Exam contains test questions that will be given to individuals training to become ATT's pursuant to the requirements of the Energy Standards. Individuals will be required to complete this exam before gaining employment as ATT's. In addition, the Employer Exam contains test questions that will be administered to employers such that they can become certified Acceptance Test Technician Employers as defined by the Energy Standards § 10-102. Accordingly, these materials are exempt from disclosure under § 6254(g).

3(b). *Discuss the public interest in nondisclosure of the material submitted for a confidential designation. If the material contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, please state how it would be lost, the value of the information to the applicant and the ease or difficulty with which the information could be legitimately acquired or duplicated by others.*

As described above, the UA asserts that all of the Confidential Documents are confidential under Cal. Gov. Code § 6254(k) as trade secrets. Under the Commission's regulations, when an applicant requests confidential treatment of documents containing trade secrets, or if the documents' disclosure would otherwise cause loss of a competitive disadvantage to the applicant, an application must provide: 1) the specific nature of that advantage and how it would be lost; 2) the value of the information to the applicant; and 3) the ease or difficulty with which the information could be legitimately acquired or duplicated by others. 20 CCR § 2505(a)(1)(D). Accordingly, the UA attests to the following:

i) The specific nature of the advantage and how it would be lost: The Confidential Documents represent a valuable compilation of confidential information relating to the training, education and certification of HVACR professionals. The Confidential Documents were created in order for the CSPT to become an approved ATTCP under Title 24, Part 1, § 10-103-B of the Energy Standards. The CSPT developed these materials, in part, to attract individuals desiring to become ATT's to join its organization and to improve the employment qualifications of its existing members.

Significant time and resources have been spent developing the Confidential Documents. The value of the information could be significantly impaired if made available to the public or competitors in the industry without a commensurate investment of time and resources.

ii) The value of the information to the CSPT: The Confidential Documents are valuable because of the time and resources expended to develop and create the Confidential Documents, the CSPT's efforts to maintain the confidentiality of the Confidential Documents, and the use of the information to facilitate the CSPT's ongoing business activities, including growing its membership and maintaining its relationships with employers in the plumbing, pipefitting and HVACR industry.

iii) The ease or difficulty with which the information could be legitimately acquired or duplicated by others: As described above, the CSPT has dedicated significant time and resources in developing the Confidential Documents. The information contained in the Confidential Documents is not readily available on the marketplace and cannot easily be duplicated without significant time and resources.

iv) Public Interest: The CSPT further contends that it is in the public interest for the CEC to withhold the Confidential Documents from public disclosure. The CEC should encourage organizations to become Acceptance Test Technician Certification Providers. ATTCPs train and certify individuals to conduct energy efficiency tests that are required by the CEC.

Organizations considering becoming ATTCPs will be discouraged from seeking certification in the first instance if required to publicly disclose their specially-developed training curricula. It takes significant time and resources to develop training materials such as the Confidential Documents. The CSPT developed the Confidential Documents over the course of many months using substantial resources in order to provide HVACR professionals with comprehensive, state-of-the-art instruction in acceptance testing. The value of the information could be significantly impaired if made available to the public or competitors in the industry without a commensurate investment of time and resources. Requiring the disclosure of training materials would discourage organizations from seeking to become ATTCPs.

4. *State whether the information or data can be disclosed if it is aggregated with other information or masked to conceal certain portions (including but not limited to the identity of the applicant). State the degree of aggregation or masking required. If the data cannot be disclosed even if aggregated or masked, explain why.*

The CSPT requests that the Confidential Documents not be disclosed even if aggregated or masked. The Confidential Documents contain curricula and exams for training HVACR professionals and employers. The Confidential Documents have been developed by the CSPT using significant time and resources. If the Confidential Documents are disclosed, even in an aggregated or masked form, the competitive advantage that the CSPT has gained by developing these state-of-the art training programs will be impaired.

5. *State how the material is kept confidential by the applicant and whether it has been disclosed to a person other than an employee of the applicant. If it has, explain the circumstances under which disclosure has occurred.*

The CSPT has only disclosed the Confidential Documents to certain employees and to certain employees of the UA and ITF who have developed the CSPT's ATTCP Application. Moreover, the Confidential Documents have been disclosed to the NITC, the CSPT's third-party certification services provider that has developed some materials for the CSPT's ATTCP Application.

If the CSPT's ATTCP Application is approved by the Energy Commission, the CSPT will continue to maintain the enclosed documents' confidentiality. After the CSPT's ATTCP Application is accepted, The Confidential Documents will only be disclosed to CSPT members training to become certified ATT's and to their employers.

Summary of Basis for Confidentiality Request

According to CEC's regulations, an application for confidential designation "shall be granted 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." 20 CCR § 2505(a)(3)(A). The CSPT believes this letter establishes a reasonable claim for confidentiality of all the Confidential Documents based on the applicability of either Cal. Gov't Code § 6254(k) or the Freedom Of Information Act, 5 U.S.C. 552(b)(4). Moreover, the CSPT believes that this letter establishes a reasonable claim for confidentiality for the Training Exam and Employer Exam under Cal. Gov't Code § 6254(g).

The CSPT requests that the entirety of the Confidential Documents be kept confidential indefinitely to protect the trade secret, confidential commercial information, and exam materials contained therein. The CSPT further requests that the Confidential Documents not be disclosed even if aggregated with other information or redacted to conceal certain information.

I certify under penalty of perjury under the laws of the State of California that the information contained in this application for confidential designation is true, correct, and complete to the best of my knowledge and that I am authorized to make the application and certification on behalf of the applicant.

Dated: _____

Signed: _____

Name: _____

Title: _____

Representing: _____