

DOCKETED

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May 16, 2022

Via Email

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Application for Confidential Designation: Annual Quality Assurance Report
Docket 19-HERS-01

Dear Jennifer Brazell:

The California Energy Commission (CEC) has received CalCERTS' application for confidential designation, dated February 9, 2022, with supplemental information provided by CalCERTS on March 9, 2022. The application seeks a confidential designation for the following documents related to CalCERTS' quality assurance program:

1. CalCERTS 2021 Quality Assurance Report
2. CalCERTS 2021 Complaint Report
3. CalCERTS 2021 Quality Assurance Log
4. CalCERTS 2021 1673(d) Rater Registry
5. CalCERTS 2021 1673(f) Report
6. 2021 List of Raters and Performance Level

CalCERTS states that these six documents should be kept confidential in their entirety for a minimum of 10 years. Masked and aggregated data may be publicly disclosed. CalCERTS identifies proprietary business information, trade secrets, and personal information as the basis for confidentiality.

CalCERTS notes the documents are required as part of their Home Energy Rating System (HERS) provider operation obligations and contain specific proprietary processes and trade secrets. The documents include information on active raters, field reviews, and complaint reports. The complaint reports further include the names and addresses of those providing complaints. The applications note that

information for which confidential designation is sought is maintained as confidential by the applicant and only provided to relevant raters.

Confidentiality Claims

Proprietary Business Information and Trade Secrets

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’s 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 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, §§ 6254(k), 6276, 6276.44; Civ. Code, § 3426.1; Evid. Code, § 1060). 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, § 3426.1(d); *See also* Gov. Code, §§ 6254(k), 6276, 6276.44; Evid. Code, § 1061(a); *Uribe v. Howie* (1971) 19 Cal.App.3d 194, 207.)

Personnel Information

Government Code section 6254(c) allows an agency to withhold personnel, medical or similar files the disclosure of which would constitute an unwarranted invasion of privacy.

Discussion by Document Description

1. CalCERTS 2021 Quality Assurance Report

California Code of Regulations, title 20, section 1673(i) requires HERS providers to establish a quality assurance program that incorporates the specific requirements identified in the regulations. The CalCERTS 2021 Quality Assurance Report describes the program and how it meets the regulatory requirements. The quality assurance report describes CalCERTS' transparency efforts which include the production of two videos for all stakeholders with information about how CalCERTS trains and monitors HERS raters.

The report also contains data about the number of active raters, number of jobs reviewed, and desktop vs. field reviews to demonstrate compliance with the CEC's HERS program.

CalCERTS has not made a reasonable claim that the Quality Assurance Report is exempt from disclosure as business proprietary or trade secrets. All HERS providers are required to submit a quality assurance report with standard sets of data and to test a certain percentage of raters' work. CalCERTS has not identified the independent economic value of the Quality Assurance Report and how disclosure of the report would cause a loss of competitive advantage given the report's content is set forth in regulation. In addition, the public videos explaining CalCERTS' quality assurance process makes public some of the information in the Quality Assurance Report.

2. CalCERTS 2021 Complaint Report

California Code of Regulations, title 20, section 1673(i) requires HERS providers to establish a complaint process for quality assurance purposes and to incorporate specific requirements identified in the regulations. The CalCERTS complaint report identifies information related to each complaint such as who made the complaint, the home address of the house subject to the HERS rating, the rater involved, and the disposition of the complaint.

CalCERTS has not made a reasonable claim that the Complaint Report is exempt from disclosure as business proprietary or trade secrets. All HERS providers are required to establish a complaint process and submit an annual report. CalCERTS has not identified the independent economic value of the Complaint Report and how disclosure of the required information contained in the report would cause a loss of competitive advantage.

To the extent that the Complaint Report contains the name of the homeowner and home address, such information can be designated as confidential as personal information under Government Code section 6254(c). The remaining information contained in the Complaint Report is public.

3. CalCERTS 2021 Quality Assurance Log

California Code of Regulations, title 20, section 1673(i)(4)(C) requires HERS providers to enter the results of the quality assurance verifications into the Provider's database, summarize the results of these quality assurance verifications, and submit them to the CEC on an annual basis. CalCERTS' assurance log contains the home address, the types of inspections performed, the name of the rater, the last name of the reviewer, the type of review performed, and the results.

In addition, California Code of Regulations, title 20, section 1673(i)(3)(C) requires public disclosure on CalCERTS' website. If CalCERTS determines that the rater's results did not meet the criteria for truth, accuracy, or completeness of these regulations, then CalCERTS is required to report the quality assurance failure on the Rater registry and Building Performance Contractor registry websites for a period of six months.

CalCERTS has not made a reasonable claim that the Quality Assurance Log is exempt from disclosure as business proprietary or trade secrets. All HERS providers are required to submit such a log with standard information from the verifications. CalCERTS has not identified the independent economic value of the Quality Assurance Log and how disclosure of the log would cause a loss of a competitive advantage given the standard categories of information.

The log does not contain the name of the homeowner but only addresses. To the extent the log does not disclose any personal information in a manner that would link the information disclosed to the individual homeowner, CalCERTS has not made a reasonable claim that the Quality Assurance Log is confidential under Government Code section 6254(c). The name of the rater and the company the

rater is employed by appears to be the type of information that is already in the public domain either on the company website or the rater's webpage or social media, if self-employed, and is not the type of information in which one has an expectation of privacy.

4. CalCERTS 2021 1673(d) Rater Registry

California Code of Regulations, title 20, section 1673(d) requires HERS providers to create and maintain a registry of all raters. The registry contains the rater's name, status, home address, contact information, employer, and the types of rating services they are certified to perform. CalCERTS has made a reasonable claim that the registry is confidential under Government Code section 6254(c) and that the list of names, status, home addresses, personal phone numbers, and emails represent personal information and are not subject to public disclosure.

5. CalCERTS 2021 1673(f) Report

California Code of Regulations, title 20, section 1673(f) requires HERS providers to maintain a database of the information specified in section 1673(e)(2) for a minimum 10 percent random sample of the homes field verified and diagnostically tested annually, or 500 such homes annually, whichever is less. Each HERS provider is required to provide this information annually in electronic form to the CEC for evaluating the effectiveness of field verification and diagnostic testing. The regulations also note that if the CEC makes this information public, it will be in aggregated form only.

The report contains a summary of CalCERTS rater testing results for new and remodel projects with little detail. The data is anonymized and does not contain the project address or the names of any raters. The data appears to be in aggregated form with only a "lot" identification number. CalCERTS has not made a reasonable claim that the report is exempt from disclosure as business proprietary or trade secrets. All HERS providers are required to maintain such a report with standard information from the verifications. CalCERTS has not identified the independent economic value of the report and how disclosure of the data fields would cause a loss of a competitive advantage given the standard categories of information.

6. 2021 List of Raters and Performance Level

This document contains the name of the HERS rater, a numerical performance level score and the employer of the HERS rater. The public nature of this information is set forth in California Code of Regulations, title 20, section 1673(i)(3)(C) which states:

These evaluations by the Provider's Quality Assurance personnel shall be documented in the Provider's database and include the results of all testing performed by the Provider's Quality Assurance personnel. If the Provider's Quality Assurance personnel determine that the Rater's results did not meet the criteria for truth, accuracy, or completeness of these regulations, then the Provider shall report the quality assurance failure on the Provider's Rater registry and Building Performance Contractor registry websites for a period of six months.

CalCERTS has not made a reasonable claim that the list of raters and their performance levels are exempt from disclosure as business proprietary or trade secrets. All HERS providers are required to maintain such a report with standard information from the verifications. CalCERTS has not identified the independent economic value of the report and how disclosure of the data fields would cause a loss of a competitive advantage given the standard categories of information. In addition, this information is required to be posted on the CalCERTS website.

Executive Director's Determination

For the reasons stated, confidentiality is granted as to the name, address, telephone, and email of any homeowner and the home address, phone number, and email address of any rater contained in the six documents. For all other information confidentiality is denied. Please docket redacted versions of the documents within 14 days of receipt of this letter.

Under California Code of Regulations, title 20, section 2507(g)(3), the executive director may release records previously designated as confidential if notice is provided to the submitter. The 2019 and 2020 quality assurance documents were previously designated as confidential in response to applications for confidential designation. The applications and the quality assurance documents submitted in 2019 and 2020 are nearly identical to the 2021 application and quality assurance documents. Based on the analysis and conclusions set forth in this letter, the name, address, telephone, and email of any homeowner and the home address, phone number, and email address of any rater contained in the

quality assurance documents will continue to be confidential. All other information will no longer be confidential.

You may request that the CEC determine the confidentiality of records for which 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 the California Code of Regulations, title 20, section 2508.

Be advised that under the California Code of Regulations, title 20, section 2506, one may petition to inspect or copy records that the CEC has designated as confidential. A decision on a petition to inspect or copy records is issued by the CEC's chief counsel. Under the California Code of Regulations, title 20, section 2507, 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 for acting on a petition and criteria for disclosing or releasing records previously designated as confidential are set in the California Code of Regulations, title 20, sections 2506-2507.

If you have any procedural questions regarding this application for confidential designation, please contact Jared Babula, senior attorney, at jared.babula@energy.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Drew Bohan', with a stylized flourish at the end.

Drew Bohan
Executive Director