

DOCKETED

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June 20, 2022

Via Email

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

Dear Rod Tamayo:

The California Energy Commission (CEC) has received CHEERS' application for confidential designation, dated February 18, 2022, with supplemental information provided by CHEERS on March 8, 2022. The application seeks a confidential designation for the following documents related to CHEERS' quality assurance program:

1. CHEERS 2021 Complaints
2. CHEERS 2021 Quality Assurance Log
3. CHEERS 2021 Registry List

CHEERS states that these three documents should be kept confidential in their entirety for a minimum of 10 years. CHEERS identifies proprietary business information and trade secrets, as the basis for confidentiality.

CHEERS notes the listed information is akin to customer information and that a competitive group could use the filed information to solicit customers and draw them away from CHEERS. In addition, CHEERS notes that information such as dates and measures related to the quality assurance program gives those familiar with the industry insight into proprietary methods of collecting that information. CHEERS concludes that these methods represent a competitive advantage and their being made public would undercut the value of that advantage.

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.)

Discussion by Document Description

1. CHEERS 2021 Complaints

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 CHEERS complaint report identifies very general information related to each complaint and

does not include the name of the complaining party, the name of the HERS rater, or the address of the house.

CHEERS has not made a reasonable claim that the 2021 Complaints 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. CHEERS has not identified the independent economic value of the 2021 Complaints and how disclosure of the required information contained in the report would cause a loss of competitive advantage.

2. CHEERS 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. CHEERS' assurance log is anonymized containing only the date of review, type of measure, and home type.

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

CHEERS 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. CHEERS 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 anonymized categories of information.

3. CHEERS 2021 Registry List

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. CHEERS 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.

Executive Director's Determination

For the reasons stated, confidentiality is granted for the 2021 Registry List. For all other information, confidentiality is denied. Please docket the Complaint and Quality Assurance Log 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 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,



Drew Bohan
Executive Director