

DOCKETED

Docket Number:	22-HERS-01
Project Title:	2022 HERS Provider Applications for the 2022 Building Energy Efficiency Standards
TN #:	244366
Document Title:	CEC Response Letter Regarding CHEER'S Application for Confidentiality docketed 6-22-22
Description:	N/A
Filer:	Patty Paul
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	8/8/2022 3:29:08 PM
Docketed Date:	8/8/2022



August 8, 2022

Via Email

Jim Hodgson
CHEERS
1610 R Street, Suite 200
Sacramento, California 95811
application@cheers.org

**Application for Confidential Designation: HERS Provider Application
Docket Number 22-HERS-01**

Dear Jim Hodgson:

The California Energy Commission (CEC) has received CHEERS' application for confidential designation, docketed June 22, 2022. The application seeks a confidential designation for the following documents related to CHEERS' Home Energy Rating System (HERS) Provider Application for Recertification for the 2022 Code Cycle.

CHEERS 2022 HERS Provider Application and supporting exhibits:

- HERS Provider Application
- a. Data Registry Application
- b. EDDS Applications
- c. Quality Assurance Program
- d. Agreements
- e. Training Materials
- f. Example Output Documents

Applicant states that these documents should be kept confidential in their entirety for a minimum of 10 years or a longer period consistent with prior confidentiality approvals provided to HERS Provider applicants.

Applicant notes the documents are part of their HERS Provider and Data Registry recertification application and contain proprietary information and trade secrets. The applicant notes that information for which confidential designation is sought is maintained as confidential by the applicant and has only been disclosed to CHEERS staff and CHEERS 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.)

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.)

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.

Discussion

The application addresses the four elements in California Code of Regulations, title 20, section 2505(a)(1)(D) for the exhibits in CHEERS’ HERS Provider Application by stating:

- 1) *The specific nature of the advantage* – The application states that the material at issue contains methods, techniques, processes, procedures, and training programs that have been developed by CHEERS.
- 2) *How the advantage would be lost* – The application states that public disclosure of these materials would cause loss of competitive advantage and financial harm to CHEERS.
- 3) *The value of the information to the applicant* – The application states that CHEERS developed the methods, techniques, processes, procedures, and training programs contained in their HERS Provider program.
- 4) *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The application also states that given the minimal number of HERS Provider applications submitted, even if masked or aggregated, disclosure of the materials would “still likely reveal unique proprietary information.” The materials have not been disclosed to a person other than CHEERS staff and CHEERS Raters.

CHEERS has not made a reasonable claim that the CHEERS 2022 Provider Application and Supporting Exhibits are exempt from disclosure as business proprietary or trade secrets. The application has not identified how the advantage would be lost if the material were to be disclosed.

Executive Director’s Determination

For the reasons stated, confidentiality is denied as to the CHEERS 2022 Provider Application and Supporting Exhibits, referenced above.

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

Jim Hodgson
August 8, 2022
Page 4

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 about this application for confidential designation, please contact Tanner Kelsey, attorney, at tanner.kelsey@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