

DOCKETED

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August 11, 2022

Via CEC Docket 22-HERS-01

Mr. Drew Bohan
Executive Director
California Energy Commission
1516 Ninth Street, MS-39
Sacramento, CA 95814
Drew.bohan@energy.ca.gov

**RE: Supplemental Request for Confidential Designation for CalCERTS, Inc.'s
HERS Provider Application**

CalCERTS, Inc. is currently applying for recertification as a Home Energy Rating System (HERS) Provider, pursuant to Chapter 4, Article 8, Sections 1670-1675 of Title 20 of the California Code of Regulations, (hereinafter referred to as "HERS Regulations"). CalCERTS is presently a certified HERS Provider, receiving approval from the California Energy Commission (Commission) for applications submitted in 2003, 2009, 2013, 2016 and 2019. With each application, CalCERTS has requested and received a designation that proprietary application materials be maintained as confidential pursuant to section 1674(b) of the HERS Regulations. This letter serves as CalCERTS' formal request for a Confidential Designation for its HERS Provider Application.

For previous Confidential Designations CalCERTS has submitted pursuant to section 2505 of Title 20 of the California Code of Regulations and section 6254 of the California Government Code, CalCERTS is permitted to request a Confidential Designation for each application submitted to the Commission. Further, repeat requests for Confidential Designations are automatically granted if the facts and circumstances relevant to confidentiality remain unchanged from the prior application. (See 20 CCR 2505(a)(4).) The circumstances relevant to confidentiality remain the same as previous years our HERS Provider Applications are trade secrets and business proprietary information, and personnel information. CalCERTS has received a renewed confidential designation for its application materials for all code cycles dating back to its initial application in 2003. (See **Attachment A**). A declaration has been provided in our

Application **Exhibit K** attesting the fact the applications are substantially similar. (See 20 CCR 2505(a)(4), see CalCERTS Certification of Facts, Exhibit K, section 6.

The Commission has requested additional information regarding the legitimacy of the confidential nature of the following documents:

- Exhibit A: Cover Letter for HERS Provider Data Registry Applications
- Exhibit G: Rater Agreement
- Exhibit H: Subscriber Agreement
- Exhibit I: Quality Assurance Program
- Exhibit J: Quality Assurance Qualifications
- Exhibit K: Certification of Facts
- Exhibit M: Statement of Explanation §1674
- Exhibit R: Application Checklist
- Exhibit S: Rater Code of Ethics

Each of these documents were submitted with a Confidential Designation. The following information is supplemental to the original Confidential Designation.

Exhibits A, G, H, I, K, M, and R cited trade secrets as its reason for confidentiality. The elements in which the Commission requested additional information are:

- (1) the specific nature of the advantage

CalCERTS' HERS Provider application documents are essential for business operations and for approval by the Commission under 20 CCR 1670 et seq. Our investment into our application process and materials is an essential component of our ability to be approved as a HERS Provider. If our application documents are distributed without protection, we will lose our investments. CalCERTS has spent resources developing these processes, programs, and documents. Specifically, how we apply and how we show proof that we qualify as a HERS Provider under 20 CCR 1670 is a trade secret. We have to create a process that demonstrated to the Commission we satisfy the requirements. The process did not exist prior to us creating it and it should be protected.

Exhibits A, K, M and R relate directly to the explanation, accuracy and clarity of CalCERTS HERS Provider Application. CalCERTS has invested time and resources into its application process and documents since 2003. CalCERTS has not distributed or provided these documents to anyone outside of CalCERTS employees.

Exhibits G, H and S relate to CalCERTS Raters and Subscribers. CalCERTS has invested time and resources into these agreements and codes. These are CalCERTS business practices that have been developed overtime. These documents are only available to CalCERTS clients. These clients are required to sign an agreement/contract to keep the information protected for any further distribution or duplication. CalCERTS does not allow anyone other than private clients access to these documents. These documents have been deemed confidential by the Commission consistently dating back to 2003.

Exhibit I and J relate to CalCERTS' Quality Assurance Program. CalCERTS has invested significant time and resources into this program. Specialized experts have been retained to create and refine this program. This program includes some internal processes that are not available or distributed to the public. Although the application materials on our QA process include some information disclosed to the public, the program compiled as a whole, for how it satisfies 20 CCR 1670 et seq is proprietary. Communication to the public is part of those requirements, but the program as a whole designed to satisfy the HERS Regulations is something CalCERTS has created on its own and has tested with the Commission and in the marketplace to ensure efficacy. This entirety of the program as presented to the Commission to demonstrate compliance should be protected as proprietary trade secret.

(2) how the advantage would be lost

If the materials were to become public, these processes, programs, and documents could be replicated by competitors without the resource cost. This would cause CalCERTS to lose its competitive advantage. CalCERTS controls who has access to these documents, and requires anyone who has access to sign an agreement to keep the information from public distribution.

Exhibits A, K, M and R relate directly to the explanation, accuracy and clarity of CalCERTS HERS Provider Application. CalCERTS has an excellent Certification track record with no decertification's since its establishment in 2003. CalCERTS HERS Provider Application processes and documents contribute to that track record. Significant resources have been invested into these processes. If these processes are not protected, anyone wanting to compete

with CalCERTS as a HERS Provider would be able to enter the marketplace with a significant advantage since they would be able to bypass the investment needed to strategically organize and create an application process.

Exhibits G, H and S relate to CalCERTS Raters and Subscribers. These agreements and rules took expertise to develop and refine to align with the CalCERTS vision as well as reviewed by counsel. If these codes and agreements are not protected, anyone wanting to compete with CalCERTS as a HERS Provider would be able to enter the marketplace with a significant advantage since they would be able to bypass the investment needed to develop these documents.

Exhibit I, and J relate to CalCERTS Quality Assurance Program. If the materials were to become public, CalCERTS would lose the advantage from the time and funds invested into training employees who conduct and maintain the Quality Assurance Program. CalCERTS controls who has access to this program. If our program is not protected, anyone wanting to compete with CalCERTS as a HERS Provider would be able to enter the marketplace with a significant advantage since they would be able to bypass the investment needed for all Quality Assurance Program requirements.

(3) the value of the information to the applicant

CalCERTS has invested many years into creating these processes, programs, and documents since its establishment in 2003, as well as invested in equipment, property and its employees in order to conduct and maintain them. Over the course of operations, CalCERTS has invested millions of dollars into these processes, programs and documents.

(4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

These processes, programs, and documents require expertise in business practices and the HERS Industry, and time to develop, maintain and put into practice. CalCERTS has invested heavily in developing industry expertise, and has been developing this expertise since 2003. If distributed to the public generally, anyone wanting to compete with CalCERTS could use tools to plagiarize, and copy this proprietary information. It would be highly prejudicial to CalCERTS for the Commission to distribute its work product to potential competitors.

Exhibit J also cited personnel information as its reason for confidentiality. The personal information of staff should not be released to protect the privacy of CalCERTS staff.

Sincerely,



Jennifer Brazell
Project Management Specialist

 (916) 805-5243  www.calcerts.com
 jennifer@calcerts.com  31 Natoma, Suite 120
Folsom, CA 95630

Attachment A

July 30, 2003 - RE: Application for Confidential
Designation of HERS Provider Application



CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

July 30, 2003

Michael E. Bachand
CalCERTS
200 Crestridge Lane
Folsom, CA 95630

RE: Application for Confidential Designation of HERS Provider Application

Dear Mr. Bachand:

On July 10, 2003, the California Energy Commission (Energy Commission) received your application for confidential designation of your Home Energy Rating System (HERS) application, including the CalCERTS™ Rater Training Manual. Your HERS application includes:

- Personal Profile and Conflict of Interest Affidavit;
- Subscriber & Rater Agreement and Rater Affidavit;
- Miscellaneous Supporting Documents;
- Quality Assurance Program; and
- 3-Day Lesson Plan for Rater Training Program.

Your request for confidentiality states, in part:

Calcerts™ . . . applies for . . . non-disclosure of all **Confidential Information, Trade Secrets** or proprietary business information that would provide an unfair business advantage to a competitor that is required for the application and approval process of CalCERTS™ as a provider. ¶ . . . ¶ **Confidential Information and Trade Secrets** include without limitation: Calcerts™ Rater Training Program Manual and amended pages as required by Title 24 code or the Energy Commission[,] . . . Calcerts™ HERS Provider Application [and] Calcerts™ Lesson Plans . . . ¶ **The Confidential Information** has been developed or obtained by Calcerts™ by the investment of significant time, effort and expense, and the **Confidential Information** is a valuable, special and unique asset of Calcerts™, which provides Calcerts™ with a significant competitive advantage, and needs to be protected from improper disclosure. ¶ . . . ¶ Therefore [,] the requested term of perpetuity for the secrecy and the confidentiality of the **Confidential Information** under this Designation is required to preserve the investment of significant time, effort and expense by Calcerts™ and to maintain the competitive advantage and livelihood of Calcerts™ investors and employees.

Michael E. Bachand
July 30, 2003
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A properly filed application for confidentiality shall be granted under the California Code of Regulations, title 20, section 2505(a)(3)(A), "unless the applicant has failed to make any reasonable claim that the Public Records Act or other provision of law authorizes the [Energy] Commission to keep the record confidential." The California Public Records Act allows for the non-disclosure of trade secrets. (Gov. Code, sec. 6254(k); Evid. Code, sec. 1040.) The California courts have traditionally used the following definition of trade secret:

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. . . .

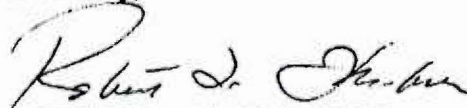
(*Uribe v. Howie* (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, sec. 757, comments b, p. 5.)

Non-disclosure of trade secret or business proprietary information, such as the information that you have submitted in parts of your HERS application and Training Manual, is expressly confidential pursuant to the Public Records Act. Accordingly, the following sections of your HERS application are granted confidentiality in their entirety for five years from the date of award: Subscriber & Rater Agreement and Rater Affidavit; Miscellaneous Supporting Documents; Quality Assurance Program; and 3-Day Lesson Plan for Rater Training Program.

The section of your HERS application entitled "Personal Profile and Conflict of Interest Affidavit" is not granted confidential status. Moreover, your request to have your grant of confidentiality established in perpetuity has not been demonstrated.

Finally, persons may petition to inspect or copy those records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Energy Commission's regulations at California Code of Regulations, title 20, section 2506. If you have any further questions concerning this matter, please call Fernando De Leon at (916) 654-4873.

Sincerely,



ROBERT L. THERKELSEN
Executive Director

cc: Bill Pennington, MS-28
Bryan Alcorn, MS-28