

DOCKETED

Docket Number:	22-HERS-01
Project Title:	2022 HERS Provider Applications for the 2022 Building Energy Efficiency Standards
TN #:	246464
Document Title:	CEC Response Letter to CHEERS Supplemental Application for Confidentiality - 8-17-22
Description:	N/A
Filer:	Patty Paul
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	10/11/2022 2:21:59 PM
Docketed Date:	10/11/2022



October 11, 2022

Via Email

Jim Hodgson
CHEERS
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application@cheers.org

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

Dear Jim Hodgson:

The California Energy Commission (CEC) received CHEERS' application for confidential designation docketed June 22, 2022. [TN 243638] The application seeks a confidential designation for documents related to CHEERS' Home Energy Rating System (HERS) Provider Application for Recertification for the 2022 Code Cycle. The original application sought confidentiality on the basis of "proprietary information and trade secrets that derive value from not generally being known to the public." On August 8, 2022, the CEC denied the application on grounds that applicant did not provide sufficient information to establish their claim.

Applicant filed two supplemental applications for confidentiality docketed August 17, 2022. [TN 245154, TN 245155] The supplemental applications provided additional information in an effort to substantiate a claim of trade secrets.

The first supplemental application [TN 245155] covers the HERS Provider Recertification Application itself. This supplement refers to the following exhibits:

- A. HERS Provider Application
- B. Data Registry Application
- C. Energuy (BOSS) EDDS Applications
- D. Archon (Compass) EDDS Application
- F. Quality Assurance Program and QA Team Qualifications
- G. Rater Agreement and Building Performance Contractor Agreement
- K. Whole House Energy Rating Certificate and Report Examples

The second supplemental application [TN 245154] covers the training and education materials filed along with the HERS Provider Recertification Application. This supplement refers to exhibits:

- H. FVDT Training Overview, Materials, and Exam Questions
- I. Whole House Training Materials and Exam Questions

In their supplemental applications, CHEERS states that the above-referenced documents should be kept confidential in their entirety for a minimum of 10 years or a longer period consistent with previous grants of confidentiality to HERS Providers. CHEERS 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 in the case of training and education materials, CHEERS' staff and Rater Candidates.

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

First Supplemental Application:

The application addresses the four elements in California Code of Regulations, title 20, section 2505(a)(1)(D) for the exhibits A, B, C, D, F, G, and K by stating:

- 1) *The specific nature of the advantage* – CHEERS has expended substantial time and money to create the content required to be certified as a HERS Provider. Creating these materials requires the ongoing efforts of multiple experts, HERS trainers, software engineers, field technicians, program managers, and many other industry professionals.
- 2) *How the advantage would be lost* – Disclosure of these materials would allow an entity to recreate similar materials with minimal effort, undercutting the original investment made by CHEERS.
- 3) *The value of the information to the applicant* – CHEERS estimates it has invested millions of dollars over multiple code cycles creating and revising the processes, programs, procedures, and guidelines outlined in CHEERS' HERS Provider Application.
- 4) *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The information has only been disclosed to CHEERS staff. The information cannot be legitimately acquired or duplicated otherwise.

CHEERS has made a reasonable claim that exhibits A, B, C, D, F, G, and K are exempt from disclosure as business proprietary or trade secrets.

The materials are confidential for a period of 6 years, or two additional code cycles. This period is appropriate because it ensures that CHEERS' provider application and testing and educational materials will be confidential while in use by CHEERS. After two additional code cycles, the risk of harm from these documents being publicly available is diminished since CHEERS will have submitted two new applications to be certified as a HERS provider and refined or altered their testing/education material.

Second Supplemental Application:

The application addresses the four elements in California Code of Regulations, title 20, section 2505(a)(1)(D) for the exhibits H and I by stating:

- 1) *The specific nature of the advantage* – CHEERS has expended substantial time and money to create the training and education content it provides to the building industry. Creating these materials requires the ongoing efforts of multiple experts, HERS trainers, software engineers, field technicians, program managers, and many other industry professionals.
- 2) *How the advantage would be lost* – Disclosure of these materials would allow an entity to recreate similar materials with minimal effort, undercutting the original investment made by CHEERS.
- 3) *The value of the information to the applicant* – CHEERS estimates it has invested in the high hundreds of thousands of dollars creating and revising its training and education programs.
- 4) *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The information has only been disclosed to CHEERS' staff or CHEERS Rater Candidates. The information cannot be legitimately acquired or duplicated otherwise.

CHEERS has made a reasonable claim that exhibits H and I are exempt from disclosure as business proprietary or trade secrets.

The materials are confidential for a period of 6 years or two additional code cycles. This period is appropriate because it ensures that CHEERS' provider application, testing, and educational materials will be confidential while in use by

CHEERS. After two additional code cycles, the risk of harm from these documents being publicly available is diminished since CHEERS will have submitted two new applications to be certified as a HERS provider and refined or altered their testing/education materials.

Executive Director's Determination

For the reasons stated, confidentiality is approved as to the CHEERS 2022 Provider Application and education and training materials, referenced above, for 6 years or a period of two additional code cycles.

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

Sincerely,



Drew Bohan
Executive Director