

DOCKETED	
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Document Title:	CEC's Response to CalCERTS Applications for Confidential Designation - June 16, 24, 29 & July 1 & Aug 11
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October 31, 2022

Via Email

Jennifer Brazell
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Application for Confidential Designation: Home Energy Rating System (HERS)
Recertification
Docket No.: 22-HERS-01

Dear Jennifer Brazell:

The California Energy Commission (CEC) has received 21 CalCERTS applications for confidential designation docketed as follows: June 16, 2022 [TN Nos. 243561, 243562, 243563, 243564, 243565, 243566, 243567, 243568, 243569], June 24, 2022 [TN Nos. 243704, 243705, 243706], June 29, 2022 [TN Nos. 243798, 243799, 243800, 243801], and July 1, 2022 [TN Nos. 243830, 243831, 243832]. CalCERTS is presently a certified HERS Provider. The applications seek confidential designation for documents related to CalCERTS' HERS Provider Application for Recertification 2022 Code Cycle on the bases of trade secrets and business proprietary information.

On August 11, 2022, the CEC received two supplemental applications for confidentiality that provided additional information to substantiate trade secret claims made in the prior June 16, 24, 29, and July 1, 2022 submissions.

The first August 11, 2022 supplement [TN 244550] covers the education and training materials provided as part of CalCERTS' HERS Provider Application for Recertification 2022 Code Cycle. This supplement refers to exhibits:

- Exhibit B: Training Overview
- Exhibit C.1a: Residential HERS Alterations Manual
- Exhibit C.1b: Residential Alterations Fundamentals Training Slides
- Exhibit C.2a: Residential New Construction HERS Manual
- Exhibit C.2b: Residential Newly Constructed Buildings Training Slides
- Exhibit C.3a: Nonresidential HERS Manual
- Exhibit C.3b: Nonresidential HERS Training Slides
- Exhibit C.4: 2022 Update Training

Exhibit D: Training Exams
Exhibit E: Field House Exams
Exhibit F: Challenge Exams

The second August 11, 2022 supplement [TN 244551] covers the Recertification Application itself, referring to exhibits:

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

CalCERTS states that the above-referenced documents should be kept confidential in their entirety for a minimum of 10 years, or two additional code cycles. CalCERTS notes that the documents are part of their HERS Provider and Data Registry recertification application and contain specific proprietary processes and trade secrets, test questions and scoring keys used for examinations, and personnel information. The applications assert that the information cannot be easily duplicated.

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.

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.

Test Questions and Scoring Keys

An agency may withhold test questions and scoring keys used to administer a licensing examination, examination for employment, or academic examination. (Gov. Code, § 6254(g).)

Discussion

First Supplemental Application [TN 244550]

The applications referenced in the first supplemental application filed on August 11, 2022, address the four elements necessary to establish a trade secret claim (Cal. Code Regs., tit. 20, § 2505(a)(1)(D)) for exhibits B, C.1a, C.2a, C.2b, C.3a, C.3b, C.4, D, E, and F as follows:

- 1) *The specific nature of the advantage* – training and educational materials are essential for business operations and are required to be approved by the CEC as a HERS provider.

- 2) *How the advantage would be lost* – If the training and education materials were to be disclosed to the public, the information could be copied without spending the same time, money, and effort in developing the education and training materials.
- 3) *The value of the information to the applicant* – CalCERTS has invested many years into creating its training and education material. CalCERTS has invested millions of dollars into this specialized HERS training.
- 4) *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – CalCERTS collects all test materials from students and limits the ability of students to capture online training materials. CalCERTS protects its information by requiring its HERS Raters to enter into an agreement that forbids distribution of these materials.

CalCERTS has made a reasonable claim that items B, C.1a, C.2a, C.2b, C.3a, C.3b, C.4, D, E, and F are exempt from disclosure as business proprietary or trade secrets.

The first supplemental application also claims that items D, E, and F should be confidential under Government Code section 6254(g) as they include test questions and scoring keys. Items D, E, and F qualify for confidentiality under 6254(g) and a trade secret claim.

Second Supplemental Application [TN 244551]

The applications referenced in the second supplemental application filed on August 11, 2022, address the four elements necessary to establish a trade secret claim (Cal. Code Regs., tit. 20, § 2505(a)(1)(D)) for exhibits A, G, H, I, K, M and R as follows:

- 1) *The specific nature of the advantage* - The application states that CalCERTS' investment in developing these processes, programs, and documents is an essential component of their ability to be approved as a HERS provider.
- 2) *How the advantage would be lost* – If the documents contained in the provider application were to be disclosed to the public, the information could be copied without spending the same time, money, and effort in developing and preparing the application for recertification.
- 3) *The value of the information to the applicant* – CalCERTS has invested many years and millions of dollars into creating these processes, programs, and documents to conduct and maintain status as a HERS provider.
- 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 cannot be easily duplicated.

CalCERTS has made a reasonable claim that exhibits A, G, H, I, K, M and R are exempt from disclosure as business proprietary or trade secrets.

The second supplemental application states that for exhibit J (Quality Assurance Qualifications), the document should be designated confidential under Government Code section 6254(c) as it contains personnel information. Item 16 contains resumes for CalCERTS personnel overseeing quality assurance and these resumes are part of a quality assurance program. There is a public interest in understanding the qualifications of those who are relied upon to ensure the quality of the program. Therefore, item 16 is denied confidentiality.

The second supplemental application does not state a basis for confidentiality of exhibit S (Rater Code of Ethics).

Executive Director's Determination

For the reasons stated, confidentiality is approved as to exhibits B, C.1a, C.2a, C.2b, C.3a, C.3b, C.4, D, E, F, A, G, H, I, K, M and R.

For the reasons stated, confidentiality is denied as to exhibit J. No basis for confidentiality was stated for exhibit S, therefore it is not confidential.

The approved confidential items will be confidential for 6 years, or an additional two code cycles.

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 forth in the California Code of Regulations, title 20, sections 2506-2507.

Jennifer Brazell
October 31, 2022
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If you have any procedural questions regarding 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 stylized flourish at the end.

Drew Bohan
Executive Director