

DOCKETED	
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December 12, 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 CalCERTS' applications for confidential designation, docketed as follows: October 5, 2022 (TN 246370), and October 11, 2022 (TN 246427).

The applications seek confidential designation for documents related to CalCERTS' HERS Provider Application for Recertification 2022 Code Cycle. The applications refer to the following exhibits:

October 5, 2022 Application: (TN 246370)
Exhibit P - Registry Testing – New Construction

October 11, 2022 Application: (TN 246427)
Exhibit I, Part 1 - CalCERTS HERS Provider Application for 2022 Code Cycle Quality Assurance Program
Exhibit I, Part 2 - RE: CalCERTS Response to 2022 HERS Provider Application: Areas of Noncompliance

CalCERTS asserts that the above-referenced documents should be kept confidential in their entirety for a minimum of 10 years, or two additional code cycles. CalCERTS states the documents are part of their HERS Provider and Data Registry recertification application, that the documents contain proprietary trade secrets, and that the documents should be confidential as a repeated application. The applications assert that the information cannot be easily duplicated or aggregated and is only disclosed to CalCERTS' employees.

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

Regarding the following:

October 5, 2022 Application (TN 246370)

Revised Exhibit P2 - Registry Testing – New Construction

October 11, 2022 Application (TN 246427)

Exhibit I (Part 1) - CalCERTS HERS Provider Application for 2022 Code Cycle Quality Assurance Program

Exhibit I (Part 2) - CalCERTS Response to 2022 HERS Provider Application: Areas of Noncompliance

Each application listed asserts that the underlying documents should be confidential because they contain proprietary trade secrets, and each application contains substantially similar claims for each element of the trade secret analysis.

The applications address the four elements in California Code of Regulations, title 20, section 2505(a)(1)(D) as follows:

1. *The specific nature of the advantage* – The documents submitted are part of CalCERTS' application for recertification as a HERS provider, these documents have been developed based on years of industry and programming expertise.
2. *How the advantage would be lost* – If the application 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 application process and program materials.
4. *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The information for which confidential designation is sought is maintained as confidential by CalCERTS and has not been disclosed to a person other than an employee of CalCERTS.

CalCERTS has made a reasonable claim that the exhibits referenced above are exempt from disclosure as business proprietary or trade secrets.

The documents will be confidential for six years or two additional code cycles.

Executive Director's Determination

For the reasons stated, confidentiality is granted as to exhibits in applications TN 246370 and 246427.

The approved confidential items will be confidential for six years, or an additional two 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 forth in the California Code of Regulations, title 20, sections 2506-2507.

Jennifer Brazell
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If you have any procedural questions regarding this application for confidential designation, please email 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 stroke extending to the right.

Drew Bohan
Executive Director