

DOCKETED

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December 19, 2022

Via Email

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**Application for Confidential Designation for Provider Application for 2022
Code Cycle
Docket No. 22-HERS-01**

Dear Jennifer Brazell:

The California Energy Commission (CEC) has received CalCERTS Inc's (applicant) Applications for Confidentiality docketed October 21, 2022, (TN 246739) and October 28, 2022, (TN 247078), covering the following data:

Application Docketed October 21, 2022, (TN 246739)

- Exhibit C1a(v2) - Residential Alterations HERS Manual
- Exhibit C1b(v2) - Residential Alterations Fundamentals Training Slides Chapter 1-6; Exhibit C1b(v2) - Residential Alterations Fundamentals Training Slides Chapter 7-11
- Exhibit C2a(v2) - Residential New Construction HERS Manual
- Exhibit C2b(v2) - Residential Newly Constructed Buildings Training Slides Chapters 1-4
- Exhibit C2b(v2) - Residential Newly Constructed Buildings Training Slides Chapters 5-9
- Exhibit C3a(v2) - Nonresidential Training Manual;
- Exhibit C3b(v2) - Nonresidential HERS Training Slides
- Exhibit C4(v2) - 2022 Update Training

Application Docketed October 28, 2022, (TN 247078)

- Revised Exhibit O – Registry Certification and Overview

The applicant states that the data constitutes commercially sensitive trade secrets and should be designated confidential for a minimum of 10 years or two code cycles. Application TN 246739 cites Government Code section 6254, and Code of Regulations section 2505(a)(3)(A) as the basis for confidentiality.

Application TN 247078 cites Government Code section 6254 and California Code of Regulations section 2505(a)(3)(4), Repeated Application, as the basis for confidentiality.

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.

Repeated Application

California Code of Regulations, title 20, section 2505(a)(4) provides:

Repeated Applications for Confidential Designation. If an applicant is seeking a confidential designation for information that is substantially similar to information that was previously deemed confidential by the CEC pursuant to section 2508, or for which an application for confidential designation was granted by the executive director pursuant to section 2505 (a)(3)(A), the new application need contain only a certification, executed under penalty of perjury, stating that the information submitted is substantially similar to the previously submitted information and that all the facts and circumstances

relevant to confidentiality remain unchanged. An application meeting these criteria will be approved.

Discussion of Application Docketed October 21, 2022 (TN 246739)

This application addresses the four elements necessary to establish a trade secret claim (Cal. Code Regs., tit. 20, § 2505(a)(1)(D)) for the accompanying exhibits as follows:

- 1) *The specific nature of the advantage* – A competitor could use this information to compete with CalCERTS as a *HERS Provider*.
- 2) *How the advantage would be lost* – If the documents were to be disclosed to the public, the information could be copied without spending the same time, money, and effort in developing and preparing CalCERTS HERS training program.
- 3) *The value of the information to the applicant* – CalCERTS has invested heavily into creating these processes, programs, and documents to conduct its training program.
- 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. The information is only disclosed to CalCERTS students.

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

Therefore, the CEC designates the above-described information as confidential for six years, or two code cycles.

Discussion of Application Docketed October 28, 2022, (TN 247078)

Applicant cited California Code of Regulations, title 20, section 2505(a)(4). This section states that if an applicant seeks confidentiality for information for material that is substantially similar to information previously designated as confidential, and if the facts or circumstances have not changed, they need only submit a certification, signed under penalty of perjury, that the information is substantially similar to the previous information. If these requirements are met, the application will be approved.

The applicant wishes to designate the information as confidential for a minimum of 10 years, or two additional code cycles.

The document submitted as Exhibit O is substantially similar to information for which confidentiality was previously granted on December 5, 2022 (TN 247909).

Because the document submitted on October 28, 2022, (TN 247078) is substantially similar to information previously designated as confidential, the CEC

designates the application as confidential for the requested term of two code cycles, or six years.

Executive Director's Determination

For the reasons stated, the confidentiality is granted as to the exhibits in applications TN 246739 and TN 247078.

The approved confidential exhibits will be confidential for six years, or an additional two code cycles.

Be advised that under California Code of Regulations, title 20, section 2506, one may petition to inspect or copy records that the CEC has designated as confidential. The CEC's chief counsel issues a decision on a petition to inspect or copy records. 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. The CEC may hold a hearing to determine the confidentiality of its records on its own motion or a motion by CEC staff. The procedures and criteria for disclosing or releasing, filing, reviewing, and acting upon such petitions or motions are outlined in the California Code of Regulations, title 20, sections 2506-2508.

If you have any procedural questions regarding these applications, please email Tanner Kelsey, attorney, at tanner.kelsey@energy.ca.gov.

Sincerely,



Drew Bohan
Executive Director