

DOCKETED

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December 21, 2022

Via Email

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Application for Confidential Designation: Home Energy Rating System (HERS)
Recertification
Docket No. 19-HERS-01; 22-HERS-01

Dear Jennifer Brazell:

The California Energy Commission (CEC) has received CalCERTS' applications for confidential designation docketed as follows: August 15, 2022 (TNs. 245039, 245044), and August 19, 2022 (TN 245568).

These three applications seek confidential designation for documents related to CalCERTS' application for recertification as a HERS provider for the 2022 California Energy Code cycle. The applications refer to the following exhibits:

August 15, 2022, Applications: (TNs 245039, 245044)
CalCERTS, Inc.'s Revised 2021 Quality Assurance Report
CalCERTS, Inc.'s 2021 Title 20, Sections 1673(d), 1673 (f) - Attachment A, Revised Rater Registry

August 19, 2022, Application: (TN 245568)
Exhibit T - CalCERTS Response to CEC Feedback on CalCERTS HERS Provider Application

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 applications:

August 15, 2022, Application: (TN 245039)
CalCERTS, Inc.’s Revised 2021 Quality Assurance Report

Application (TN 245039), docketed August 15, 2022, requests confidentiality for CalCERTS, Inc.’s Revised 2021 Quality Assurance Report, asserting that the report contains proprietary trade secrets.

The original report was denied confidentiality in TN 243095, located in the 19-HERS-01 docket, because CalCERTS did not identify the independent economic value of the Quality Assurance Report and how disclosure of the report would cause a loss of competitive advantage. In addition, the public videos explaining CalCERTS’ quality assurance process make public some of the information in the Quality Assurance Report.

The revised 2021 report does not contain discernable information that would constitute a trade secret. Further, the public has an interest in quality assurance

for the HERS program. The quality assurance program itself may be confidential but not the information reported pursuant to the methods employed by the quality assurance program.

Accordingly, the Revised 2021 Quality Assurance Report is denied confidentiality.

August 15, 2022, Application: (TN 245044)
CalCERTS, Inc.'s 2021, Revised Rater Registry, California Code of Regulations, title 20, sections 1673(d), 1673 (f)

Application (TN 245044), docketed August 15, 2022, requests confidentiality for CalCERTS' Revised Rater Registry filed in response to HERS provider requirements set forth in California Code of Regulations, title 20, section 1673 (d) and 1673 (f). Section (d) requires HERS providers to create and maintain a registry of all raters. This registry contains the rater's name and the type(s) of rating services they are certified to perform. Section (f) requires HERS providers to maintain a database of the information specified in section 1673(e)(2) for a minimum 10 percent random sample of the homes field verified and diagnostically tested annually, or 500 such homes annually, whichever is less. Each Provider shall provide this information annually in electronic form to the CEC for evaluating the effectiveness of field verification and diagnostic testing. If the CEC makes this information public, it will be in aggregated form only.

CalCERTS notes that for this application, the underlying material was previously granted confidentiality, as evidenced by CEC Response Letter TN 243095, located in the 19-HERS-01 docket.

The CEC's Response Letter: (TN 243095), granted confidentiality based on Government Code section 6254(c), providing that the list of names, statuses, home addresses, personal phone numbers, and emails are personal information not subject to public disclosure.

CalCERTS is requesting that the underlying documents submitted with TN 245044 be confidential based on California Code of Regulations, title 20, section 2505(a)(4) (Repeated Application) and Government Code section 6254 (Proprietary Trade Secret).

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. The information submitted with TN 245044 differs from the previous filing in that the personal information of the raters has been redacted, leaving only the rater's name and the type(s) of rating services they are certified to perform. As such, this exhibit does not contain information that is confidential based on Government Code section 6254(c), personnel information. Further, California Code of Regulations section 1673(d) requires HERS providers to make

the registry available in written or electronic form upon written request. Therefore, the rater registry is not granted confidentiality.

Regarding the following application:

August 19, 2022, Application: (TN 245568)
Exhibit T - CalCERTS Response to CEC Feedback on CalCERTS HERS
Provider Application

The Application (TN 245568) 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 exhibit referenced above is 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, for application (TN 245039), confidentiality is denied for the Revised 2021 Quality Assurance Report.

For application (TN 245044), confidentiality is denied for the Revised Rater Registry.

For application (TN 245568), confidentiality is granted as to the CalCERTS response to CEC Feedback on the provider application. The HERS Provider Application and clarifying contents will be maintained as confidential for six 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.

If you have any procedural questions regarding this application for confidential designation, please email Tanner Kelsey, attorney, at tanner.kelsey@energy.ca.gov.

Sincerely,



Drew Bohan
Executive Director