

DOCKETED	
Docket Number:	22-HERS-01
Project Title:	2022 HERS Provider Applications for the 2022 Building Energy Efficiency Standards
TN #:	248223
Document Title:	Response Letter to CHEERS' November 7, 22 Application for Confidential Designation
Description:	N/A
Filer:	Ngoc Tran
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	12/23/2022 3:03:21 PM
Docketed Date:	12/23/2022



December 23, 2022

Via Email

CHEERS
1610 R Street, Suite 200
Sacramento, California 95811
application@cheers.org

**Application for Confidential Designation: HERS Provider Application
Docket No.: 22-HERS-01**

Dear Jim Hodgson:

The California Energy Commission (CEC) received CHEERS' application for confidential designation docketed November 7, 2022 (TN 247320). The application seeks a confidential designation for documents related to CHEERS' Home Energy Rating System (HERS) Provider Application materials. Applicant revised materials per CEC staff comments and requests the following exhibits be designated confidential:

- Exhibit C – CHEERS Request for Approval of EDDS Capabilities with The Energuy's BOSS Software
- Exhibit D – CHEERS Request for Approval of EDDS Capabilities with Archon Energy Solutions' Compass Software

CHEERS states that the documents should be kept confidential in their entirety for a minimum of six years or a longer period consistent with previous grants of confidentiality to HERS Providers. CHEERS cites section 2505(a)(3) and Government Code section 6254(k) as the basis for confidentiality of the exhibits referenced above. CHEERS also states that they have pursued reasonable efforts to maintain the secrecy of the submitted information, disclosing it only to CHEERS staff and CHEERS 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

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

1. *The specific nature of the advantage* – CHEERS has spent millions of dollars developing the processes, programs, and documents related to their HERS Provider application.
2. *How the advantage would be lost* – If these materials were freely disclosed, a competitor could replicate these materials at no cost, materially impacting CHEERS’ competitive advantage.
3. *The value of the information to the applicant* – CHEERS has spent millions of dollars and substantial resources to create these application materials.
4. *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The information cannot be legitimately acquired or duplicated by others, it is only disclosed to CHEERS staff and CHEERS Rater candidates.

CHEERS 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 approved as to the above-referenced exhibits for six years.

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 email Tanner Kelsey, staff 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