

<b>DOCKETED</b>	
<b>Docket Number:</b>	22-HERS-01
<b>Project Title:</b>	2022 HERS Provider Applications for the 2022 Building Energy Efficiency Standards
<b>TN #:</b>	251068
<b>Document Title:</b>	CEC's response letter to CalCERTS' June 7 and June 19, 2023 applications for confidentiality
<b>Description:</b>	N/A
<b>Filer:</b>	Ngoc Tran
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	7/17/2023 3:48:05 PM
<b>Docketed Date:</b>	7/17/2023



July 17, 2023

**Via Email**

Jennifer Brazell  
CalCERTS, Inc.  
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**Application for Confidential Designation: HERS Provider Application  
Docket Number 22-HERS-01**

Dear Jennifer Brazell:

The California Energy Commission (CEC) received CalCERTS' (applicant) applications for confidential designation docketed June 7, 2023, (TN 250543) and June 19, 2023, (TN 250670) covering the following data:

Application TN 250543:

- Exhibit A - Cover Letter for Low-rise Multifamily (LRMF) Data Registry Applications
- Exhibit D - Registry Certification & Overview
- Exhibit E - Registry Testing LRMF
- Exhibit F - Application Checklist

Application TN 250670:

- Revised Exhibit D – Registry Overview; Revision of CalCERTS LRMF Registry

In each application, the applicant requests that the above-referenced documents be kept confidential for a period of 10 years or two code cycles. The applicant notes the documents are part of their Home Energy Rating System (HERS) Provider application and contain proprietary information and trade secrets. The applicant notes that information for which confidential designation is sought is maintained as confidential by the applicant and has only been disclosed to CalCERTS staff prior to submittal to the CEC.

**Confidentiality Claims**

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, §§ 7927.705(k), 7930.005, 7930.205; 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, §§ 7927.705, 7930.005, 7930.205; 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**

### **Applications TN 250543 and TN 250670:**

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

- 1) *The specific nature of the advantage* – The applicant has invested heavily for several years in developing its registry, processes, industry, and programming expertise.
- 2) *How the advantage would be lost* – If the information were to be made public others could become HERS Providers without investing a similar amount of time and money.
- 3) *The value of the information to the applicant* – No specific dollar amount but the information is required to become a HERS Provider.
- 4) *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – The information can only be accessed by employees of the applicant.

The applicant has made a reasonable claim that the Exhibits D, E, and Revised Exhibit D are exempt from disclosure as business proprietary or trade secrets.

The materials are confidential for a period of six years, or two additional code cycles. This period is appropriate because it ensures that the applicant's provider application and testing and other information will be confidential while in use. After two additional code cycles, the risk of harm from these documents being publicly available is diminished since the applicant will have submitted two new applications to be certified as a HERS provider.

The applicant has not made a reasonable claim that Exhibit A and F are exempt from disclosure as business proprietary or trade secrets. Exhibit A is a cover letter for applicant's HERS application and exhibit F is a checklist containing application requirements from title 24, CEC staff recommendations, and a list of corresponding exhibits in applicant's HERS application. The cover letter lists the exhibits contained within the application and references the regulations under which the applicant may be certified as a HERS Provider.

#### **Executive Director's Determination**

For the reasons stated, confidentiality is approved for Exhibits D, E and Revised Exhibit D for six years or a period of two additional code cycles.

For the reasons stated, confidentiality is denied for Exhibits A and F.

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

Jennifer Brazell  
July 17, 2023  
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If you have questions, please email [confidentialityapplication@energy.ca.gov](mailto:confidentialityapplication@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