

DOCKETED

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January 3, 2024

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

Dear Jennifer Brazell:

The California Energy Commission (CEC) has received CalCERTS' (applicant) applications for confidential designation identified below:

- 1) Application TN 252860, docketed October 31, 2023: Revised Exhibit E - Registry Testing LRMF v2; 7/12/2023; CalCERTS Registry Testing
- 2) Application TN 252861, docketed October 31, 2023: Revised Exhibit E - Registry Testing LRMF v3; 7/17/2023; CalCERTS Registry Testing
- 3) Application TN 252862, docketed October 31, 2023: Revised Exhibit E - Registry Testing LRMF v4; 10/20/2023; CalCERTS Registry Testing
- 4) Application TN 252863, docketed October 31, 2023: Revised Exhibit E - Registry Testing LRMF v5; 10/26/2023; CalCERTS Registry Testing
- 5) Application TN 252958, docketed November 6, 2023: Revised Exhibit E - Registry Testing LRMF v6; 11/03/2023; CalCERTS Registry Testing
- 6) Application TN 253536, docketed December 6, 2023: Repeated Application – Supplemental Exhibit E - Registry Testing LRMF

These applications seek confidential designation of documents related to the applicant's testing of its proprietary system that were submitted to CEC staff through the Amazon Web Services (AWS) portal. However, these applications contained incomplete or ambiguous references to the confidentiality regulations in title 20, California Code of Regulations, or had other errors that have been discussed with the applicant.

Subsequently, the applicant submitted an application on December 19, 2023 (TN 253673) that supersedes the applications listed above. In the December 19, 2023, application, confidential designation is requested for:

06/07/2023 – via 22-HERS-01 - Exhibit E - Registry Testing LRMF

- Project Tracking Excel Document

06/07/2023 – via AWS - Exhibit E-Supplement - Registry Testing LRMF Documents

- Project Tracking PDF Document
- All Project Testing Files

07/12/2023 – via AWS – LRMF Registry Testing Round 2.zip

- Project Tracking Excel and PDF Document
- All Project Testing Files

07/17/2023 – via AWS – LRMF Registry Testing Round3.zip

- Project Tracking Excel and PDF Document
- All Project Testing Files

10/20/2023 – via AWS – LRMF Oct 2023 Round 1.zip

- Project Tracking PDF Document
- All Project Testing Files

10/26/2023 – via AWS – LRMF Oct 2023 Round 2.zip

- Project Tracking PDF Document
- All Project Testing Files

11/03/2023 – via AWS – LRMF Nov 2023 Round 3 and 4.zip

- Project Tracking PDF Documents
- All Project Testing Files

The December 19, 2023, application clarifies that the applicant is seeking confidentiality for a portion of the above-referenced documents (project tracking Excel and PDF documents listed by date above) as a repeated application based on California Code of Regulations, title 20, section 2505(a)(4). The remainder of the documents (project testing files listed by date above) have not been the subject of a previous application for confidentiality, so the requirements of California Code of Regulations, title 20, section 2505(a)(1) are presented to designate those documents confidential.

The applicant requests that the documents above be kept confidential for 10 years or two code cycles. The applicant notes that the documents are part of its Home Energy Rating System (HERS) Provider application and contain proprietary processes and trade secrets. The applicant asserts that these documents have only been disclosed to the applicant's staff.

Confidentiality Claims and Discussion:

1) Request for confidentiality for all project tracking Excel and PDF documents, as a repeated application.

California Code of Regulations, title 20, section 2505(a)(4) states, "If an applicant is seeking a confidential designation for information that is substantially similar to information that was previously deemed confidential by the Commission pursuant to Section 2508, or for which an application for confidential designation was granted by the executive director pursuant to subdivision (a)(3)(A) of this section, 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."

On July 17, 2023, CEC granted confidential designation for Exhibit E, a project tracking Excel document (TN 251068), submitted by the applicant based on California Code of Regulations, title 20, section 2505(a)(3)(A). In its December 19, 2023, application, the applicant confirms under penalty of perjury that the Excel and PDF documents submitted are substantially similar to the document designated as confidential on July 17, 2023, and that the facts and circumstances regarding the documents have not changed since the earlier designation. The CEC reviewed the previous applications and agrees that the information submitted in the December 19, 2023, application is substantially similar to the previously submitted information. On that basis, all project tracking Excel and PDF documents listed by date above are approved for confidential designation under California Code Regulations, title 20, section 2505(a)(4).

2) Request for confidentiality for all project testing files.

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.

The December 19, 2023, application addresses 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 years in designing and 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 to strategically organize and create an application process.
- 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 all project testing files are exempt from disclosure as business proprietary or trade secrets.

Consistent with prior grants of confidentiality, the materials are confidential for six years or two additional code cycles. This period 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.

Executive Director's Determination

For the reasons stated, confidentiality is approved for the project tracking Excel, project tracking PDF documents, and project testing files listed above for six years or two additional 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 designated as confidential in certain circumstances, and the CEC may hold a hearing to determine the confidentiality of its records on its motion or 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 questions, please email confidentialityapplication@energy.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to be 'Drew Bohan', written in a cursive style.

Drew Bohan
Executive Director