

DOCKETED	
Docket Number:	22-HERS-01
Project Title:	2022 HERS Provider Applications for the 2022 Building Energy Efficiency Standards
TN #:	256567
Document Title:	CEC Response Letter to CHEERS re Confidentiality Application, dated April 5, 2024
Description:	N/A
Filer:	Ngoc Tran
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	5/28/2024 2:53:32 PM
Docketed Date:	5/28/2024



May 28, 2024

Via Email

Rod Tamayo
CHEERS, Inc.
1610 R Street, Suite 200
Sacramento, CA 95811
rtamayo@cheers.org

**Application for Confidential Designation: CEC 2023 Data Request
Docket No. 22-HERS-01**

Dear Rod Tamayo:

The California Energy Commission (CEC) has received CHEERS, Inc.'s (applicant) Application for Confidentiality, dated April 5, 2024 (TN 255559) covering the following documents:

- CHEERS Complaints Summary 2023
- CHEERS Quality Assurance List 2023
- Rater Certification List 2023
- 2023 CF1R, CF2R, CF3R, NRCV Compliance Files

The applicant states that the documents should be kept confidential in their entirety for a minimum of 10 years. The applicant states the time designation is consistent with the CEC's prior approval of confidentiality for HERS providers. The applicant previously filed a request for confidentiality for similar documents in March 2023, covering the CHEERS Rater List 2022, CHEERS Quality Assurance 2022, and CHEERS Complaints 2022 (TN 249530). In a response letter dated April 26, 2023, the CEC denied the applicant's request for confidentiality for the CHEERS Quality Assurance 2022 and CHEERS Complaints 2022, as the applicant failed to make a reasonable claim those documents are exempt from disclosure as business proprietary or trade secrets. The CEC granted confidentiality for the names, home addresses, telephone numbers, and email addresses in the 2022 CHEERS Rater List, which is consistent with its previous decision for the 2021 CHEERS Rater List.¹

Confidentiality Claims

The applicant argues the following provisions apply: California Code of Regulations, title 20, sections 1674(b), 2505, and 2025; California Government Code sections 6254 and

¹CHEERS' Application for Confidentiality for the 2021 CHEERS Rater List, 2021 CHEERS QA, and 2021 CHEERS Complaints were also denied confidentiality, except for the names, home addresses, telephone numbers, and email address in the 2021 CHEERS Rater List. [Response Letter TN 243605](#).

7927.700. The applicant states the information to be protected contains proprietary business information, trade secrets and personnel information and would otherwise cause a loss of competitive advantage.

A properly filed application for confidentiality shall be granted under 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 [California Energy] Commission to keep the record confidential."

A trade secret may include, but is not limited to, any process, compound, production data, or compilation of data that meet the following requirements: "(1) it is not patented, (2) it is known to only certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value, and (3) it gives its user an opportunity to obtain a business advantage over competitors who do not know or use it." (Gov. Code, § 7924.510(f)).

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.

Personnel Information

Government Code section 7927.700 does not require disclosure of personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

Discussion

The 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 states it has invested a substantial amount of time, money, and resources into collecting, managing, and maintaining these programs and data.
2. *How the advantage would be lost* – The applicant states disclosure of this information would furnish valuable insights to any present or prospective competitor, enabling them to sidestep or minimize the significant investment required.
3. *The value of the information to the applicant* – The applicant states it has spent years and many hundreds of thousands of dollars developing, collecting, managing, and maintaining these programs and data.
4. *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – Per the applicant, acquiring or duplicating the data legitimately would present a significant challenge, requiring considerable time and financial investment for others.

Discussion by Document Description

CHEERS Complaints Summary 2023

California Code of Regulations, title 20, section 1673(i) requires HERS providers to establish a complaint process for quality assurance purposes and to incorporate specific requirements identified in the regulations. The CHEERS complaint report identifies very general information related to each complaint and does not include the name of the complaining party, the name of the HERS rater, or the address of the house.

CHEERS has not made a reasonable claim that this information is exempt from disclosure as business proprietary or trade secrets given the general nature of the information and the public's interest in complaints related to HERS raters.

CHEERS Quality Assurance List 2023

HERS providers are required under California Code of Regulations, title 20, section 1673(i)(4)(C) to enter the results of the quality assurance verifications into the Provider's database, summarize the results of these quality assurance verifications, and submit them to the CEC on an annual basis. CHEERS' assurance log is anonymized containing only the date of review, type of measure, and home type.

In addition, California Code of Regulations, title 20, section 1673(i)(3)(C) requires public disclosure of the quality assurance verification on CHEERS' website. If CHEERS determines that the rater's results did not meet the criteria for truth, accuracy, or completeness of these regulations, then CHEERS is required to report the quality assurance failure on the Rater registry and Building Performance Contractor registry websites for a period of six months.

CHEERS has not made a reasonable claim that the Quality Assurance 2023 log is exempt from disclosure as business proprietary or trade secrets given the anonymized categories of information and the public's interest in quality assurance for the HERS program.

Rater Certification List 2023

HERS providers are required under California Code of Regulations, title 20, section 1673(d) to create and maintain a registry of all raters. The registry contains the rater's name, status, home address, contact information, employer, and the types of rating services they are certified to perform. CHEERS has made a reasonable claim that the list of names, home addresses, personal phone numbers and email addresses are confidential personnel information under Government Code section 7927.700.

2023 CF1R, CF2R, CF3R, NRCV Compliance Files

The applicant did not submit this document with their application.

Executive Director's Determination

For the reasons stated, confidentiality is granted for the names, home addresses, telephone numbers, and email address in the 2023 CHEERS Rater List. Confidentiality is denied for CHEERS Complaints 2023 and CHEERS Quality Assurance 2023.

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 persons may petition to inspect or copy records that have been designated as confidential, 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 the records on its own motion or on a motion by CEC staff. The procedures and criteria for disclosing or releasing, filing, reviewing, and acting upon such petitions or motions are set forth in the California Code of Regulations, title 20, sections 2506 through 2508.

If you have questions, please email confidentialityapplication@energy.ca.gov.

Sincerely,



Drew Bohan
Executive Director