

DOCKETED

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CALIFORNIA ENERGY COMMISSION1516 NINTH STREET
SACRAMENTO, CA 95814-5512

June 14, 2016

David Bernett
National Energy Management Institute Committee
8403 Arlington Blvd., Suite 100
Fairfax, VA 22031

RE: **Application for Confidential Designation for Update to Nonresidential Mechanical Acceptance Test Training and Certification Materials**
Docket No. 13-ATTCP-01

Dear Mr. Bernett:

The California Energy Commission is in receipt of an Application for Confidentiality submitted on behalf of National Energy Management Institute Committee (NEMIC) (Applicant), an approved Mechanical Acceptance Test Technician Certification Provider. The application seeks confidential designation for the following documents (Confidential Records):

- 1) *California 2016 Title 24 Acceptance Testing Employers Certification Exam Questions; and*
- 2) *California 2016 Title 24 Acceptance Testing Technicians Certification Exam Questions.*

The application states that confidentiality is sought for testing materials submitted under California Code of Regulations, title 24, part 1, section 10-103.2(d), requiring an Acceptance Test Technician Certification Provider to provide regular reports. Applicant notes that, except for the Confidential Records, all other materials submitted to the Energy Commission as part of the 2016 report may be disclosed to the public. The Confidential Records have not been disclosed publicly.

A properly filed Application for Confidentiality 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 [Energy] Commission to keep the record confidential." The California Public Records Act allows for the non-disclosure of trade secrets. (Gov. Code, § 6254(k); Evid. Code, § 1060.)

California courts have traditionally used the following definition of trade secret:

a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . .

(*Uribe v. Howe* (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, § 757, comments b, p.5.)

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, or its disclosure would otherwise cause loss of a competitive advantage, an application shall state: 1) the specific nature of the advantage; 2) how the advantage would be lost; 3) the value of the information to an applicant; and 4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

The application addresses these four elements: 1) the Confidential Records are of a technical nature, which provide a competitive business advantage over parties without access to the information, particularly other entities applying to become acceptance technician certification providers; 2) Applicant spent time and resources compiling the information within the Confidential Records, and the value of the information would be significantly impaired if disclosed to the public; 3) the Confidential Records are valuable because of the time and resources expended to compile the information, the efforts to maintain the confidentiality of the information, and the use of the information to facilitate ongoing business activities; and 4) the Confidential Records are not readily available on the marketplace and can only be obtained with significant investments of time and money.

Additionally, Government Code section 6254(g) exempts from disclosure under the California Public Records Act "[t]est questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination. . . ." In this case, the Confidential Records are examination materials supplied to the Energy Commission as part of regular reporting requirements for Acceptance Test Technician Certification Providers.

The application is clear that confidentiality is being sought for trade secret information related to the certification of Acceptance Test Technicians. Therefore, Applicant has made a reasonable claim that the law allows the Energy Commission to keep the Confidential Records from public disclosure.

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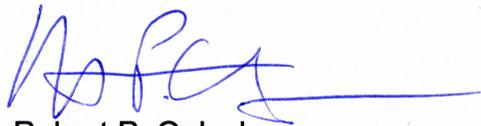
Applicant requests that the information be kept confidential indefinitely to protect the integrity of the certification testing process and to protect Applicant's trade secrets. The trade secret information has value as long as the Acceptance Test Technician Certification Provider Program is in place; therefore, it is appropriate to grant confidentiality indefinitely until the end of the certification program.

For the reasons stated above, the request for confidential designation for the Confidential Record is granted. The information will remain confidential indefinitely until the end of the certification program.

Be advised that persons may petition to inspect or copy records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, section 2506.

If you have any questions concerning this matter, please contact Michelle Chester, Staff Counsel, at (916) 651-2935.

Sincerely,



Robert P. Oglesby
Executive Director

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