

DOCKETED

Docket Number:	16-HERS-01
Project Title:	HERS Providers' Application for the 2016 Standards
TN #:	212469
Document Title:	Response to Application for Confidentiality - CalCERTS
Description:	N/A
Filer:	Sabrina Savala
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	7/26/2016 1:40:23 PM
Docketed Date:	7/26/2016

CALIFORNIA ENERGY COMMISSION1516 NINTH STREET
SACRAMENTO, CA 95814-5512

July 25, 2016

Michael Bachand
CEO
CalCERTS, Inc.
31 Natoma Street, Suite 120
Folsom, CA 95630

RE: **Application for Confidential Designation for CalCERTS
2016 HERS Provider Application
Docket No. 16-HERS-01**

Dear Mr. Bachand:

The California Energy Commission is in receipt of an Application for Confidentiality submitted on behalf of CalCERTS, Inc. (Applicant). The application seeks confidential designation for the following documents (Confidential Records):

- 1) *Exhibit B – Training Materials;*
- 2) *Exhibit C – Subscriber Agreement;*
- 3) *Exhibit D – Rater Agreement;*
- 4) *Exhibit E – Rater Code of Ethics;*
- 5) *Exhibit F – Certification of Facts of Michael E. Bachand;*
- 6) *Exhibit G – Quality Assurance Policy;*
- 7) *Exhibit H – Corporate Documents;*
- 8) *Exhibit I – HERS Requirements 1674;*
- 9) *Exhibit J – Registry User Manual;*
- 10) *Exhibit K – FV/DT Compliance Rater Field House Exam;*
- 11) *Exhibit L – Rater Written Exam Policies; and*
- 12) *Exhibit M – Training Program Overview.*

The application states that confidentiality is sought for proprietary information and trade secrets contained in Applicant's 2016 HERS Provider Application. Applicant states that there is no feasible method aggregating the Confidential Documents to protect the value of the materials and that the Confidential Documents have not previously been disclosed publicly.

Michael Bachand
July 25, 2016
Page 2

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 for Exhibits B, C, D, I, J, L, and M: 1) the specified application materials contain proprietary information pertaining to Applicant's HERS Provider curriculum; 2) public disclosure of the documents would allow competitors to access and duplicate Applicant's proprietary materials; 3) Applicant expended significant resources to ensure the proprietary documents submitted to the California Energy Commission were comprehensive and effective; and 4) unless posted publicly, the materials cannot be legitimately acquired or duplicated by others.

Government Code section 6254(g) exempts from disclosure under the California Public Records Act "test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination" In this case, the training materials and exam questions contained in Exhibits B and L are supplied to the California Energy Commission as part of Applicant's HERS Provider application.

For Exhibits B, C, D, I, J, L, and M, the application is clear that confidentiality is being sought for trade secret information related to Applicant's recertification as a HERS Provider. Therefore, Applicant has made a reasonable claim that the law allows the California Energy Commission to keep Exhibits B, C, D, I, J, L, and M from public disclosure.

Michael Bachand
July 25, 2016
Page 3

Applicant requests that the information be kept confidential for ten years. Ten years allows for the passage of two additional code cycles before disclosure of the confidential information. After two code cycles, Exhibits B, C, D, I, J, L, and M will be outdated and disclosure of the information will pose less of a competitive disadvantage to Applicant. Therefore, it is appropriate to grant confidential designation for ten years, or an additional two code cycles.

As Applicant acknowledged in correspondence with California Energy Commission Staff Council, Exhibits E, F, G, H, and K do not meet the threshold for confidential designation, because the documents do not contain proprietary material or have previously been disclosed to the public. These identified exhibits are not subject to protection from public access and may be made available, as needed.

For the reasons stated above, the request for confidential designation for the Exhibits B, C, D, I, J, L, and M is granted for ten years. Confidential designation is not granted for Exhibits E, F, G, H, and K, and these identified exhibits are not subject to protection from public disclosure by the California Energy Commission.

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

cc: Docket Unit, California Energy Commission
William Dietrich, California Energy Commission, Existing buildings and
Compliance Office