

DOCKETED

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CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

August 1, 2016

Bohdan Fedyk
National Environmental Balancing Bureau
8575 Grovemont Circle
Gaithersburg, MD 20877

RE: **Application for Confidential Designation for NEBB Acceptance
Test Curriculum and Exam Materials
Docket No. 13-ATTCP-01**

Dear Mr. Fedyk:

The California Energy Commission is in receipt of an Application for Confidentiality submitted on behalf of National Environmental Balancing Bureau (Applicant). The application seeks confidential designation for training and exam materials (Confidential Records), provided to the California Energy Commission for Applicant's 2016 Acceptance Test Technician Certification Provider (ATTCP) update report. The complete list of documents was submitted as an attachment to the application.

The Applicant notes that it is not feasible to aggregate or mask the information contained in the Confidential Records without substantial harm. The Confidential Records are provided to applicants of the Acceptance Test Technician and Employer programs once they have paid the costs associated with training and testing. However, the information is not otherwise disclosed to the public.

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 copyrighted and constitute works for sale; 2) public disclosure would eliminate Applicant's competitive advantage over competing ATTCP's; 3) the curriculum was developed with considerable effort from volunteers currently engaged in mechanical acceptance testing in California, and the content was converted into an on-line/on-demand format at considerable expense to Applicant; and 4) the Confidential Records are not readily available on the marketplace, are kept on a secured server in Applicant's office, are only shared with vendors (exam proctors, etc.) under the protection of a confidentiality agreement, and are only shared with applicants once they have paid associated costs and have signed a confidentiality agreement.

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 acceptance test curriculum materials and test questions which are being supplied to the Energy Commission as part of Applicant's 2016 update report for the ATTCP program.

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

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 ATTCP 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 until the end of the certification program.

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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
Joe Loyer, California Energy Commission, Standards Implementation Office,
Senior Mechanical Engineer