

DOCKETED

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April 26, 2023

Via Email

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**Application for Confidential Designation: CEC 2022 Provider Data Request
Docket No.: 19-HERS-01**

Dear Rod Tamayo:

The California Energy Commission (CEC) received CHEERS's application for confidential designation docketed April 3, 2023 (TN 249530), covering the following documents:

- CHEERS Rater/Registry List 2022
- CHEERS Quality Assurance 2022
- CHEERS Complaints 2022

CHEERS states that the documents should be kept confidential in their entirety for a minimum of 10 years. CHEERS identifies proprietary business information and trade secrets as the basis for confidentiality. CHEERS states that the documents have not been disclosed to any person other than CHEERS staff and CHEERS Raters for quality assurance purposes.

Confidentiality Claims

Proprietary Business Information and Trade Secrets

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, 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) as follows:

1. *The specific nature of the advantage* – CHEERS has invested a substantial amount of time and resources into these programs and this data.
2. *How the advantage would be lost* – The disclosure of this information would provide valuable information to any existing or future competitor.
3. *The value of the information to the applicant* – No specific dollar amount indicated, CHEERS notes that it has invested a substantial amount of time and resources into these programs and data.
4. *The ease or difficulty with which the information could be legitimately acquired or duplicated by others* – CHEERS states that the documents have not been disclosed to any person other than CHEERS staff and Raters, for quality assurance purposes.

Discussion by Document Description

CHEERS Rater List 2022

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.

CHEERS Quality Assurance 2022

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 2022 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.

CHEERS Complaints 2022

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.

Executive Director's Determination

For the reasons stated, confidentiality is granted for the names, home addresses, telephone numbers, and email address in the 2022 CHEERS Rater List.

Rod Tamayo
April 26, 2023
Page 4

Confidentiality is denied for CHEERS Complaints 2022 and CHEERS Quality Assurance 2022.¹

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 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 previously designated as confidential in certain circumstances, and the CEC may hold a hearing to determine the confidentiality of its records on its own motion or on 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,



Drew Bohan
Executive Director

¹ CHEERS' 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](#).