Department of Energy
Washington, DC 20585

MAY 15 2009

Alexander Cohen
Senior Researcher
Public Citizen's Congress Watch
215 Pennsylvania Ave., SE
Washington, DC 20003

RE: FOIA-2009-000073

Dear Mr. Cohen:

This is in final response to the request for information that you sent to the Department of Energy under the Freedom of Information Act (FOIA), 5 U.S.C. 552. You asked for: (1) all ethics agreements for current presidential nominees for positions requiring Senate confirmation and (2) documents submitted by PAS nominees pertaining to their past employment and compensation for said employment. Your request was forwarded to the Office of the General Counsel where documents responsive to your request are generally kept.

In an effort to clarify the terms of your FOIA request, I have left several voice mail messages for you, but you have not returned my calls. Accordingly, in the absence of further clarification, we are interpreting your request to mean individuals who were nominated by President Obama to serve in Department of Energy positions that require Senate confirmation, even if the individual has already been confirmed by the Senate.

As of when the search was conducted, the President has nominated one individual to a Senate confirmed position at the Department of Energy, Secretary Steven Chu. A search of the files of this office was conducted. The search identified four documents as responsive to the request. Two of those documents, a January 6 letter from Steven Chu to me and a copy of the Secretary's recusal dated January 21, 2009, are provided to you in their entirety. For your information the Secretary signed a new recusal in April. That recusal is available on the Department's webpage at http://management.energy.gov/FOIA/freq_req_docs.htm.

The remaining two documents are a draft of the Secretary's Executive Branch Personnel Public Financial Disclosure Report (SF 278) and the final version of that Report. These reports are mandated by the Ethics in Government Act of 1978, as amended. Section 105 of that Act provides that it is unlawful to obtain or use these reports for certain enumerated purposes. The Attorney General may bring a civil action against any person who obtains or uses such information for any prohibited purpose.

Pursuant to the Ethics in Government Act of 1978, each agency must make SF 278s available for inspection or furnish a copy of the report to any person who makes a written application as provided by agency procedures. DOE utilizes the Office of Government Ethics Form 201,

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Request to Inspect or Receive Copies of SF 278 Executive Branch Personnel Public Financial Disclosure Reports or Other Covered Records, for such applications. I have enclosed a copy of that form for your use, if you so desire. Please return the completed form with original signature to me if you would like a copy of the Secretary's SF 278.

For the following reasons I am denying your FOIA request with respect to the draft and final version of the Secretary's SF 278. The final version of this document is available under another statutory scheme, the Ethics in Government Act of 1978. This denial is based on exemption 3 of the FOIA, which provides in part that the FOIA does not apply to matters that are specifically exempted from disclosure by statute, provided that such statute establishes particular criteria for withholding or refers to particular types of matters to be withheld. The provisions of the Ethics in Government Act of 1978 specifically provide that each agency must make public financial disclosure reports available to the public, under certain restrictions. The draft of the SF 278 is also being withheld as a draft document pursuant to exemption 5 of the FOIA, and both the draft and final are being withheld since they contain personal privacy information under exemption 6 of the FOIA. Exemption 5 protects "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 6 protects from disclosure personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(6). Both the draft and final version of the SF 278 contain personal privacy information regarding personal assets and earnings and therefore are not subject to disclosure.

To the extent permitted by law, DOE, pursuant to 10 CFR 1004.1, will make available records that it is authorized to withhold under the FOIA when it determines that such disclosure is in the public interest. Disclosure of the information exempt pursuant to Exemptions 5 and 6 would not be in the public interest because the public interest in disclosure does not outweigh the adverse impact that will occur in releasing draft financial information.

Pursuant to 10 CFR 1004.7(b)(2), I am responsible for the determination to withhold the information requested.

You may appeal this determination to withhold information or the adequacy of the search by submitting a written appeal to the Director, Office of Hearings and Appeals, HG-1, L'Enfant Plaza Building, U.S. Department of Energy, 1000 Independence Avenue., SW, Washington, DC 20585-1615. You should submit the appeal within 30 calendar days of receipt of this determination. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. The appeal must contain all the elements required by 10 CFR 1004.8. Judicial review will thereafter be available (1) in the District of Columbia; (2) in the district where you reside; (3) in the district where you have your principal place of business; or (4) in the district where the DOE records are located. The above reference number has been assigned to your request and you should refer to it in correspondence to DOE concerning this matter.

I appreciate the opportunity to assist with this matter. If you have any questions about this correspondence, please contact me at (202) 586-1522.

Sincerely,

Susan F. Beard
Assistant General Counsel for
General Law

Enclosed – January 6, 2009 letter from Steven Chu
Recusal
OGE Form 201

cc: Shelia Jeter