

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HON. JOSEPH E. SCHMITZ
5502 Parkston Road
Bethesda, Maryland 20816

Plaintiff,

v.

U.S. DEPARTMENT OF DEFENSE
OFFICE OF INSPECTOR GENERAL
4800 Mark Center Drive
Alexandria, Virginia 22350

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Hon. Joseph E. Schmitz brings this action against Defendant Department of Defense Office of Inspector General (“DoD OIG”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, et seq., as amended. Plaintiff hereby alleges as follows:

PARTIES

1. Plaintiff The Honorable Joseph E. Schmitz served as the fifth Senate-confirmed Inspector General of the Department of Defense from April 2002 to September 2005. For his service as Inspector General, Plaintiff was awarded the Department of Defense Medal for Distinguished Public Service, the highest honorary award presented by the Secretary of Defense to non-career federal employees.

2. Defendant DoD OIG is an agency within the meaning of 5 U.S.C. § 552(f), and is in possession, custody, and control of the record requested by Plaintiff that is the subject of this action.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over Defendants pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(A) and 28 U.S.C. § 1331.

4. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

RELEVANT FACTS

5. This FOIA action seeks the production of information in the possession of Defendant DoD OIG related to the conduct of Sally B. Donnelly, the former Senior Advisor to Secretary of Defense James Mattis.

6. Until January 2017, through her firm SBD Advisors, Donnelly was an Amazon government cloud sales consultant, who used her connections and access to various government officials on behalf of Amazon to help sell Amazon's cloud services around the world.

7. In January 2017, Donnelly joined the Department of Defense as Senior Advisor to Secretary Mattis working within the Office of the Secretary of Defense. As a condition of her government service, Donnelly was required to (a) divest her ownership interest in SBD Advisors prior to entering the DoD (b) disclose her financial relationships and (c) recuse from matters that could commercially benefit her former clients, including Amazon.

8. The robust system of financial disclosure and recusal obligations for government officials exist to ensure that this basic ethical bedrock for public service – the absence of financial conflicts of interest – is maintained.

9. Whether a public servant has fully, accurately, and reliably divested, disclosed, and recused is definitionally a matter of public record, given that serving in government is a privileged position of public trust.

10. Publicly available evidence, including DoD emails provided to Plaintiff through FOIA, show that Donnelly did not recuse herself from Amazon matters while at DoD. In fact, Donnelly repeatedly used her official position and influence for the benefit of her former client, Amazon.

11. Prompted by multiple Congressional inquiries, complaints from industry participants, and media scrutiny, DoD OIG conducted a review of the allegations of substantial conflicts of interest and corruption by various senior DoD officials in connection with the JEDI procurement. On April 13, 2020, DoD OIG released a 317-page unsigned “Report on the Joint Enterprise Defense Infrastructure (JEDI) Cloud Procurement,” Report No. DODIG-2020-079 (“DoD OIG Report”), of its findings and conclusions.

12. Whether and how Donnelly divested from SBD Advisors is the subject of the document sought by this suit. DoD OIG, following its investigation into allegations of conflicted conduct by Donnelly, is in possession of a centrally relevant document that it refuses to produce in violation of its statutory obligations under FOIA.

I. Sally Donnelly’s Commercial Relationships Prior to Serving as Senior Advisor to Secretary of Defense James Mattis.

13. From at least 2015 to January 2017, through her firm SBD Advisors, Donnelly worked as an AWS government cloud sales consultant, who used her connections and access to various government officials on behalf of AWS.¹ SBD Advisors also helped Amazon “craft its messaging and marketing strategies for potential Defense Department cloud-computing

¹ The Capitol Forum, Vol. 6 No. 225, June 8, 2018, “JEDI: Secretive, Influential Consulting Firm’s Close Ties to Amazon Web Services and DoD Raise Additional Questions Around JEDI Contract;” <http://www.gdnonline.com/Details/28827/Premier-hails-US-Uk-ties>

contracts.”² Donnelly’s new entrant Office of Government Ethics (“OGE”) financial disclosure report lists AWS as a client.

14. As part of its effort to sell cloud computing to various foreign governments in the Middle East and Africa, Amazon works closely with the European venture capital firm C5 Capital, Ltd. (“C5”).³ C5 is based in London and has significant operations in the Middle East. Teresa Carlson (AWS’s former Vice President, Worldwide Public Sector Sales) publicly touted Amazon’s partnership with C5: *“We’ve been partnering with C5 around the world for a long time.”*⁴

15. Carlson is now married to C5’s founder and Managing Partner, Andre Pienaar.

16. Donnelly also has deep commercial ties to Andre Pienaar and C5. In fact, C5 and SBD Advisors appear to have historically commingled business operations, including substantial financial influence and board participation. Donnelly’s new entrant Office of Government Ethics (“OGE”) financial disclosure report also lists C5 as a client.

II. Donnelly’s Supposed Divestment from SBD Advisors in January 2017.

17. Donnelly and her counsel have repeatedly reaffirmed that Donnelly divested from SBD Advisors prior to joining DoD as Senior Advisor to Secretary Mattis.

18. Counsel for Ms. Donnelly has publicly claimed that Donnelly “sold her entire stake in SBD Advisors before setting foot in the Pentagon on January 21, 2017. From that moment forward, she had absolutely no financial or other interest in SBD Advisors or its clients.”⁵

² <https://www.bloomberg.com/news/articles/2018-10-29/ex-pentagon-officials-start-a-new-consulting-firm-in-washington>

³ *See generally* <https://www.c5capital.com>

⁴ <https://www.vanityfair.com/news/2018/08/has-bezos-become-more-powerful-in-dc-than-trump>

⁵ <https://dailycaller.com/2018/08/08/sally-donnelly-defense-department-jedi-cloud-amazon/>

19. Donnelly told DoD OIG investigators, under oath, “before I walked in the Department of Defense, I sold SBD.” Donnelly reiterated “...my entire financial interest was sold before I walked into the Department of Defense....”⁶

III. Competing Narratives Regarding the supposed January 2017 Purchaser of SBD Advisors

20. Three different narratives regarding the sale of SBD Advisors have emerged, each from parties with access to first-hand knowledge of the transaction: (1) findings by the DoD OIG investigation; (2) sworn statements by Donnelly herself; and (3) public statements issued by SBD Advisors.

21. These divergent narratives are concerning for two independent reasons: *First*, these three stories are irreconcilable with each other. *Second*, no matter which narrative you credit, Amazon commercial partner Andre Pienaar is centrally involved, making the facts regarding Donnelly’s supposed divestment of material public interest.

A. DoD OIG Statements Regarding the Sale of SBD Advisors

22. DoD OIG provides pieces of evidence throughout its report regarding its review and investigation of JEDI regarding the sale of SBD Advisors.

23. DoD OIG claims to have reviewed “a Purchase and Sale Agreement,” which “described” Donnelly’s sale of SBD Advisors referring to a single “purchaser” of Donnelly’s 80 percent ownership stake in SBD Advisors for \$1.56 million in “two equal installments of \$780,000”:

⁶ Donnelly DoD OIG transcript, available at <https://media.defense.gov/2021/Sep/01/2002845046/-1/-1/1/DODOIG-2020-001050%201ST%20INTERIM%20RESPONSE%20RECORDS.PDF>

b. Ms. Donnelly's Financial Disclosures and Ethics Advice

We reviewed a "Purchase and Sale Agreement," dated January 19, 2017, which described Ms. Donnelly's sale of SBD Advisors. The Agreement quantified Ms. Donnelly's ownership of SBD Advisors in terms of "membership units." According to the Agreement, Ms. Donnelly owned 80 percent of all SBD Advisors membership units. On January 19, 2017, Ms. Donnelly sold all of her membership units to the purchaser for a total sale price of \$1,560,000. The Agreement stipulated that Ms. Donnelly would be paid for her sold membership units in two equal installments of \$780,000. According to Ms. Donnelly, she received an initial payment of \$390,000 from the purchaser before entering on duty with the DoD as Secretary Mattis' Senior Advisor. We present additional detail about the remaining three payments later in this subsection.

24. Earlier in the OIG report, in a section unrelated to Donnelly's conduct, DoD OIG observed, as if it were a matter of fact, that Pienaar already "co-owned SBD Advisors" and that "she sold her share of ownership of SBD Advisors to Mr. Pienaar in January 2017, prior to entering DoD":

¹⁴⁴ Ms. Donnelly and Mr. Pienaar co-owned SBD Advisors. Ms. Donnelly sold her share of ownership of SBD Advisors to Mr. Pienaar in January 2017, prior to entering on duty with the DoD. We discuss Ms. Donnelly, her former ownership of SBD Advisors, and her business relationship as a consultant to Amazon Web Services later in this report. The Defence and National Rehabilitation Centre (DNRC) was an idea of the Duke of Westminster.

25. DoD OIG's straightforward reference to the sale concludes that Pienaar was the sole purchaser of Donnelly's ownership share of SBD Advisors in January 2017.

26. Setting aside whether or not DoD OIG's description is accurate, it is beyond argument that the OIG Report provided detailed information regarding the commercial terms of this alleged transaction, including the identity of the purchaser, the purchase price, payment terms, and payment schedule. This includes summarizing the "Purchase and Sale Agreement."

B. Donnelly’s Statements Regarding the Sale of SBD Advisors

27. In Donnelly’s initial financial disclosures dated May 17, 2017, she disclosed \$390,000 of income from the “partial sale” of SBD Advisors:

Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e)					
Filer's Information					
DONNELLY, SALLY					
Senior Advisor to Secretary of Defense, OSD, Office of the Secretary of Defense					
Date of Appointment: 01/21/2017					
Electronic Signature - I certify that the statements I have made in this form are true, complete and correct to the best of my knowledge.					
eSigned in FDM by:					
SALLY DONNELLY					
User ID: 760E3EC284BE6251					
05/17/2017					
2. Filer's Employment Assets and Income					
#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	Time Warner Employee Savings Plan(401K)	N/A	\$50,001 - \$100,000		None (or less than \$201)
1.1	Time Warner Inc. Common Stock	No	\$1,001 - \$15,000	Dividends	\$201 - \$1,000
1.2	Time Warner Large Cap Value Fund	No	\$1,001 - \$15,000		None (or less than \$201)
1.3	Time Warner Growth Fund	No	\$15,001 - \$50,000		None (or less than \$201)
1.4	Capital Preservation Fund	No	\$1,001 - \$15,000		None (or less than \$201)
2	SBD Advisors LLC	N/A	\$1,000,001 - \$5,000,000	Partial sale/SBD	\$390,000

28. On August 27, 2017, in response to an inquiry from the Standards of Conduct Office (“SOCO”) regarding the “Partial Sale/SBD,” Donnelly stated directly to a SOCO attorney that “she sold her membership units in the company . . . and had no financial interest in the company.” Significantly, Donnelly further stated “she derived no income from SBD Advisors.”⁷

29. Relying on Donnelly’s representations, on August 30, 2017, SOCO memorialized its communications with Donnelly and SBD Advisors: “Confirmed that this asset actually has \$0 value to filer as she no longer has any stake in the company. . . . ***Filer confirmed this was total sale of filer’s partial interest.***”

Comments of Reviewing Officials (public annotations):		
PART #	REFERENCE	
2.	2	SBD Advisors LLC

⁷ Rep. at 192.

COMMENT

(08/30/17, GERLACH, KURT T.): Confirmed that this asset actually has \$ 0 value to filer as she no longer has any stake in the company.
 ADAEO Clarification: Filer confirmed this was total sale of filer's partial interest.

30. Donnelly was asked by OIG Investigators who purchased SBD Advisors in January 2017. Here is their question and her response: “Q: And who did you sell SBD Advisors to? A: Andre Pienaar was the *organizer* of the sale of SBD.” (emphasis added).

31. *Donnelly did not identify Mr. Pienaar as the purchaser of SBD Advisors.*

C. Statements by SBD Advisors Regarding the Supposed January 2017 Sale

32. In August 2018, SBD Advisors Principal and Spokesman, Price Floyd, stated on the record to the media that “SBD Advisors was sold to a group of investors led by Win Sheridan in January 2017[.]”⁸

33. According to Floyd, “[t]he purchaser paid Sally over time.” “The first payment was \$390,000. Remaining payments were \$1.17 [million] for a total sale price of \$1.56 [million]”⁹ Oddly, Sheridan’s name appears nowhere in the DoD OIG report and Donnelly does not mention him.

34. Setting aside the conflicting content presented by these differing statements, there can be no dispute that DoD OIG, SBD Advisors the firm, and Donnelly herself all made public statements regarding the identity of the purchaser of SBD Advisors and the commercial terms of the sale.

⁸ <https://dailycaller.com/2018/08/08/sally-donnelly-defense-department-jedi-cloud-amazon/>

⁹ *Id.*

IV. DoD OIG Refuses to Produce Information in Its Possession Relating to the Sale of SBD Advisors

35. As noted supra, the DoD OIG Report paraphrases the supposed “Purchase and Sales Agreement” for the January 2017 sale of SBD Advisors.

36. DoD OIG’s own “Fact Book” of exhibits to the Report, available on the DoD OIG website, confirms that DoD OIG has this document in its investigative files.

37. On May 18, 2022, Plaintiff submitted a FOIA Request to DoD OIG for this Purchase and Sales Agreement. DoD OIG assigned number DODOIG-2022-000913 to this request.

38. On May 25, 2022 DoD OIG produced the requested Purchase and Sales Agreement with substantial redactions, a copy of which is attached hereto as Exhibit A.

39. DoD OIG redacted information based on the claim that it was subject to one of three FOIA exemptions (language from the DOD OIG transmittal letter quoted below):

- a. “(b)(4), which protects trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential”;
- b. “(b)(6), when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy”;
- c. “(b)(7)(C), which protects personal information in law enforcement records.”

40. The produced copy of the Purchase and Sales Agreement bears markings corresponding to one of these exemptions. For example, in the section of the document describing the “Purchase and Sale” DoD OIG has asserted Exemption (b)(4) over entire paragraphs:

PURCHASE AND SALE: Subject to the terms and conditions set forth in this Agreement and in reliance on the representations, warranties and covenants contained herein, Purchaser hereby agrees to purchase from Seller, and Seller hereby agrees to sell, transfer and convey to the Purchaser eighty (80) percent of the membership units of the Company (the “Units”) currently owned by Seller, in two installments (“Purchase and Sale”).

1. **PURCHASE PRICE:** The total purchase price for the Units sold by Seller shall be US\$1,560,000.00 to be paid to the Purchaser in two installments: (a) US\$780,000.00 within two (2) weeks of execution of this Agreement, and (b) US\$780,000.00 within six (6) months of the first payment on a mutually agreed date.

2. **CLOSING PROCEDURES:** The conveyance of the ownership of and title in and to the Units shall occur automatically upon the execution of this Agreement by the Parties.

3. (b) (4) 

4. (b) (4) 

5. **REPRESENTATIONS AND WARRANTIES OF THE PARTIES:** Seller and Purchaser, as applicable, hereby warrant and represent that:

41. Commercial or financial information qualifies as confidential only “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (quoting *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879–880 (D.C. Cir. 1992) (en banc)).

42. The Supreme Court recently articulated “two conditions” for courts to consider when analyzing whether documents contain confidential commercial or financial information subject to FOIA Exemption 4. *Id.* at 2363. First, the Court explained that “information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it.” *Id.* Second, “information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.” *Id.*

43. Following the Court’s ruling in *Food Marketing Institute v. Argus Leader Media*, the Department of Justice has concluded that “agencies should as a matter of sound administrative practice consider *both conditions* in the process of determining whether to invoke Exemption 4’s protection for ‘confidential’ commercial or financial information.” DOJ Guidance (Oct 4, 2019) (emphasis added).¹⁰ A review of the DOJ guidance, and the case law it embraces, demonstrates that these documents must be produced.

44. As to the first condition, the Supreme Court has made clear that “it is hard to see how information could be deemed confidential if its owner shares it freely.” *Argus Leader Media*, 139 S. Ct. at 2363.

45. As stated, federal law required Ms. Donnelly to (1) divest her ownership interest in SBD Advisors as a prerequisite to her government service at the Department of Defense and (2) file publicly available financial disclosures as a condition of her federal employment. Information related to the sale of SBD Advisors can obviously not be considered “private” when federal law requires its public disclosure as a condition of employment. The only circumstance where Ms. Donnelly would be able to expect confidentiality is if she declined federal employment. Ms. Donnelly submitted *public* financial disclosure forms – Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) – that provided specific information about the sale of her firm and the payments that she received. The Form 278e dictates the disclosure and, in this case, the “source” of the funds mandated by the 278e and the “Purchaser” named in the Purchase Agreement at issue has to be the same individual or entity. Thus, it is hard to imagine how the

¹⁰ Available at <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>.

purchaser in the Agreement can now be viewed as FOIA exempt when its disclosure is mandated by Federal law.

46. Moreover, as detailed above, apart from Donnelly's federally mandated (and public) disclosure documents, Ms. Donnelly, SBD Advisors, and DoD OIG all independently made public statements describing the commercial terms of this alleged divestment.

47. There is simply no defensible claim to be made that the commercial terms of this *more than five-year-old* sales agreement, which have been publicly and repeatedly disclosed by the principals and the government, can continue to contain "confidential financial information."

48. There is no evidence that DoD OIG provided any "assurance" to Ms. Donnelly or anyone else that information regarding the sale of SBD Advisors "will remain secret." *Argus Leader Media*, 139 S. Ct. at 2363. In fact, the opposite is true because the OIG itself released the commercial terms of the sale of SBD Advisors to the public – repeatedly citing this exact document in its own Report.

49. The public must be allowed to review this important, public information bearing on whether Donnelly satisfied her ethical obligations.

V. Updated DOJ Guidance Regarding FOIA Redactions

50. On March 15, 2022, the Attorney General issued updated FOIA guidelines to all heads of executive departments and agencies of the Federal government that bear directly on the facts of this case. The Guidelines are notably in several respects.

51. *First*, as a threshold matter, they reflect the Attorney General's renewed commitment to the presumption of openness that agencies must have to ensure that the crucial aim of FOIA is achieved, namely that citizens and taxpayers are informed and can hold their government accountable.

52. **Second**, the Guidelines (a) specifically restate the straightforward requirement that withholding of information under one of FOIA’s statutory exemptions must be based on the existence of a foreseeable harm to the interest protected by the statute and (b) directs agencies to “confirm in response letters to FOIA requesters that they have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.”

53. DoD OIG made no reference to the foreseeable harm standard in its correspondence to Plaintiff, let alone did Defendant attempt to explain how commercial terms in (a) a five-year-old sales contract (b) for a statutorily mandated divestment (c) bearing affirmative disclosure obligations, (d) previously revealed principals and the DoD could possibly cause any harm.

54. **Third**, the Attorney General put teeth behind his reaffirmance of the only proper basis on which to withhold information from the public under FOIA: “In determining whether to defend an agency's nondisclosure decision, the Justice Department will apply the presumption of openness described above. ***The Justice Department will not defend nondisclosure decisions that are inconsistent with FOIA or with these guidelines.***”

55. This refreshing commitment to open and transparent compliance with FOIA is applicable here because Defendant’s redactions in the Purchase and Sales Agreement are indefensible.

56. Indeed, FOIA exists for exactly this case. “Congress enacted FOIA to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Wilson v. U.S. Dep’t of Justice*, 192 F. Supp. 3d 122, 125 (D.D.C. 2016). As the Supreme Court reminds us, “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to

the governed.”¹¹ FOIA “encourages accountability through transparency.”¹² The temptation for Government agencies to shield embarrassing or incriminating documents from public view proves FOIA’s pivotal role in rooting out corruption and bringing the cleansing light to Government affairs, whether the participants are eager to receive it or not. This is especially true where—as is the case here—a plaintiff is “investigating very serious allegations of corruption” and “there ha[d] been additional public attention on the issue . . . which brought to light new allegations of widespread corruption” *Clemente v. Fed. Bureau of Investigation*, 71 F. Supp. 3d 262, 268 (D.D.C. 2014).

57. Judicial intervention is necessary to vindicate the lawful access to these documents that the public enjoys and that Defendants DoD and DoD OIG have so far frustrated.

COUNT ONE: VIOLATION OF FOIA

58. Plaintiff hereby incorporates the preceding paragraphs by reference.

59. By letter dated May 18, 2022, Plaintiff submitted to Defendant a FOIA request for records. DoD assigned Plaintiff’s FOIA request case number DODOIG-2022-000913.

60. By letter dated May 25, 2022, DoD OIG produced a document bearing redactions, and thus withheld information.

61. By letter dated June 1, 2022, Plaintiff appealed the decision of DoD OIG to withhold from release information contained in the produced document.

62. Defendant failed either to address Plaintiff’s appeal or produce the information previously withheld, in accordance with FOIA, including the requirements set forth in 5 U.S.C. §§ 552(a)(6)(A)(ii).

¹¹ See *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

¹² *Id.*

63. Defendant's failure to comply with its legal obligations under FOIA frustrates the very purpose of FOIA by withholding information from public scrutiny to which Plaintiff is legally entitled.

64. Defendant's violation of FOIA has harmed and will continue to harm Plaintiff—and the public—until DoD OIG complies with FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff The Hon. Joseph E. Schmitz prays that this Court:

A. Declare unlawful Defendants' failure to make available to Plaintiff the information requested by Plaintiff's FOIA request dated May 18, 2022;

B. Order Defendants to immediately provide Plaintiff with an unredacted copy of the Purchase and Sale Agreement previously produced in response to Plaintiff's request;

C. Award reasonable costs and attorney's fees as provided in 5 U.S.C. § 552 (a)(4)(E) and/or 28 U.S.C. § 2412 (d);

D. Fully expedite this action pursuant to 28 U.S.C. § 1657(a); and

E. Grant such other relief as the Court may deem just and proper.

Date: July 7, 2022

Respectfully submitted,



Philip O'Beirne (DC Bar No. 1003436)
Stein Mitchell Beato & Missner LLP
901 15th Street, NW Suite 700
Washington, DC
Tel: (202) 661-0959
Fax: (202) 296-8312
Email: pobeirne@steinmitchell.com

Counsel for the Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 7, 2022 a true copy of the foregoing document was sent by certified USPS Mail to the following:

U.S. Department of Defense, Office of Inspector General 4800 Mark Center Drive Alexandria, VA 22350	US Attorney for the District of Columbia 555 4 th St NW Washington, DC 20001-2733
--------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------

/s/ Philip O'Beirne
Philip O'Beirne