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U.S. Court of Appeals for the D.C. Circuit

GOVERNMENT INFORMATION

CONFIDENTIALITY

Agency met standard for implied promise of confidentiality to informants under Privacy Act by showing that such was policy and agents followed the policy.

LONDRIGAN v. FEDERAL BUREAU OF INVESTIGATION, U.S.App.D.C. No. 83-1101, December 13, 1983. *Affirmed* per Ruth Bader Ginsburg, J. (Harry T. Edwards and George E. MacKinnon, JJ. concur). *Marc Johnston* with *J. Paul McGrath, Stanley S. Harris, Leonard Schaitman* and *John C. Hoyle* for appellant. *William A. Dobrovir* with *Joseph D. Gebhardt* for appellee. Trial Court—Aubrey E. Robinson, Jr., C.J.

GINSBURG, J.: We revisit in this appeal a matter in the court first inspected in *Londrigan v. Federal Bureau of Investigation*, 670 F.2d 1164 (D.C. Cir. 1981) (*Londrigan I*). The issue before us for a second look concerns the application of Exemption 5 of the Privacy Act of 1974, 5 U.S.C. §552a(k)(5) (1982), to pre-Act Federal Bureau of Investigation (FBI or Bureau) background investigations of prospective federal appointees or employees. Specifically, Privacy Act requester Joseph P. Londrigan sought a court order directing the FBI to disclose the identities of persons who provided information about him to the Bureau in the course of a 1961 background investigation.

Initially, the district court granted summary judgment for the FBI. We found the Bureau's first-round presentation thin and out of accord with the statutory design. We therefore reversed and remanded. After further proceedings, the district court granted summary judgment for Londrigan. That *volte-face*, we hold, was unwarranted.

On remand from *Londrigan I*, the FBI documented the Bureau's routine instructions, operative in 1961, prohibiting agents from disclosing information they gathered. Then, through the submission of affidavits of agents who participated in the Londrigan background investigation, the FBI did all a court could reasonably demand of the Bureau to show the existence of an implied promise that sources' names would be held in confidence. We therefore hold that Exemption 5 secures against disclosure the names Londrigan requests from the FBI; we reverse the judgment for Londrigan, remand the case, and instruct the district court to grant the FBI's motion for summary judgment.

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It is the main rule under the Privacy Act that an individual shall have access to federal agency records pertaining to him or her. *See* 5 U.S.C. §552a(d). Congress excepted, *inter alia*,

> investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the

(Cont'd. on p. 201 - Confidentiality)

D.C. Court of Appeals

CRIMINAL LAW & PROCEDURE

JURY POLL

Response of juror upon being polled of "Guilty, I guess" does not demonstrate uncertainty about defendant's guilt and no plain error occurs where there is no reaction from court or counsel.

JOHNSON v. UNITED STATES, D.C.App. No. 83-165, December 15, 1983. *Affirmed* per John M. Ferren, J. (William C. Pryor, J. and Gerald D. Reilly, C.J. (Retired) concur). *Thomas K. Clancy*, appointed by this court for appellant. *Sharon M. Collins* with *Stanley S. Harris, Michael W. Farrell* and *Kathleen E. Voelker* for appellee. Trial Court—Joseph M.F. Ryan, Jr.

FERREN, J.: A jury convicted appellant of armed robbery D.C. Code §§22-2901, -3202 (1981). On appeal, he contends that (1) the trial court abused its discretion in refusing to ask one of defense counsel's proposed questions during the *voir dire* of prospective jurors; (2) the court erred in rejecting appellant's motion to suppress in-court identification testimony; and (3) a remark by one of the jurors during the jury poll indicates the verdict of guilty was not unanimous. We affirm.

I.

On the evening of February 12, 1982, Ralph Breidenthal drove his wife's automobile into a parking lot adjacent to a fast food restaurant and parked the car at the edge of the lot. As Breidenthal began to walk through the lot, two men approached him. When they were "within touching distance" of Breidenthal and face to face with him, one of the men produced a gun and ordered Breidenthal to lie face down beside his wife's car. Briedenthal was pushed to the ground; the man with the gun climbed on his back and put the gun to Breidenthal's ear.

The gunman's accomplice demanded that Breidenthal turn over his car keys and, after Breidenthal complied with this demand, the man with the gun took Breidenthal's money and began searching his pockets for valuables. During the course of this search, the man with the gun repeatedly struck Breidenthal in the head with the gun, causing considerable bleeding. When his accomplice was unable to get the car started, the man with the gun allowed Breidenthal to get up from the ground and to assist in starting the car. The two men then ordered Breidenthal to walk to the front of the car while they backed the car out of the parking space and drove off. The total length of the encounter was between five and ten minutes.

Immediately after the robbery, Officer David Lee of the Metropolitan Police Department interviewed Breidenthal, who described the man with the gun as "a black male, 25 years, 5'10", approximately 165 pounds, medium complexion, and having a light brown jacket."

On the day after the robbery, two Montgomery County Police Officers arrested appellant sitting in the driver's seat of Breidenthal's wife's car in

(Cont'd. on p. 202 - Poll)

D.C. Court of Appeals

LANDLORD AND TENANT

RIGHT OF REFUSAL

After notice by landlord, tenant submitted binding contract and under right of refusal in lease was entitled to purchase property.

BEAVERS SERVICE, INC., ET AL. v. NORRIS, D.C.App. No. 82-1636, December 14, 1983. *Reversed and remanded* per Theodore R. Newman, Jr., C.J. (Julia Cooper Mack and John A. Terry, JJ. concur). *Michael P. Bentzen* with *David S. Klontz* for appellant. *Christopher Sanger* for cross-appellants. *Ernest F. Henry* for appellee. Trial Court—Shellie F. Bowers, J.

NEWMAN, C.J.: This appeal involves a dispute over the sale of commercial real property owned by George M. Norris and located in the District of Columbia. Both Norris' tenant, Beavers Service Inc. ("Beavers"), and a third party, 880 Eye St., N.W. Associates Ltd. Partnership ("Associates") sought to purchase the property. Norris ultimately refused to sell to either party. In the various suits that followed, Judge Bowers granted summary judgment in favor of Norris, finding that Norris had reserved the right to refuse to sell his property to either party. The issues presented on appeal are: (1) whether the trial court erred when it found that Beavers submitted a binding contract to Norris for the same price and terms as the contract executed and submitted by Associates; (2) whether the trial court erred in deciding that under paragraph 16(a) of the Beavers lease, Norris could unilaterally terminate and reject both contracts; and (3) whether the trial court erred when it failed to order Norris to convey the property under dispute to Beavers. Finding that Beavers submitted a binding contract to Norris, we reverse and remand with an order to enter judgment for Beavers.

Around April 2, 1979, Norris and Beavers entered into a lease agreement for commercial property located in the District of Columbia. Paragraph 16(a) of the lease provides:

> In the event Lessor [Norris] receives from a non-governmental agency an offer acceptable to him for the purchase of the demised premises during the effective period of this lease, Lessee [Beavers] shall have the right to receive a written notice from Lessor, stating the price and terms of such offer and Lessee shall have the right to purchase the same for the same price and terms of said offer provided Lessee tenders to Lessor a binding contract to

(Cont'd. on p. 200 - Refusal)

TABLE OF CASES

AR

I, Gary M. Eiserman, Vice President & Controller of the above named bank do hereby declare that this Report of Condition is true and correct to the best of my knowledge and belief.

/s/ Gary M. Eiserman
January 10, 1984

We, the undersigned directors, attest to the correctness of this statement of resources and liabilities. We declare that it has been examined by us, and to the best of our knowledge and belief has been prepared in conformance with the instructions and is true and correct.

Francis G. Addison, III
Lucius D. Battle
Justin D. Bowersock
Wiliam T. Brawner
Charles D. Daniel
H. Lowell Davis
Daniel M. Gribbon
George E. Hamilton, Jr.
Karl G. Harr, Jr.
Frank N. Ikard
Marsh S. Marshall
A. Wallace Moore, Jr.
Flaxie M. Pinkett
C. Jackson Ritchie, Jr.
Robert G. Stevens
Martin S. Thaler

Directors

from the Associates contract in two respects: (1) Beavers was substituted as purchaser and the paragraph acknowledging Beavers' right of first refusal was deleted; and (2) two paragraphs in the Associates contract which called for payment to Associates' agent were deleted. In every other respect the two contracts were identical. Both contracts contained a provision giving the purchaser 30 days to decide, after making economic studies of the property, whether to proceed with the purchase.

After Norris received the Beavers contract, he sent a copy to Associates. Associates first took the position that the Beavers contract had not been submitted on time. On July 28, 1980, fearing that Associates would file suit against him if he accepted the Beavers contract, Norris notified Beavers that he was "rejecting" its contract. A few days later, Norris also "rejected" the Associates contract. Norris based both rejections on paragraph 16(a) of the Beavers lease.

Following the rejection of its contract, Beavers filed suit against Norris and Associates. Beavers sought an order from the court declaring: (1) that it properly exercised its right of first refusal under the lease with Norris; (2) that Norris had legally barred himself from removing his real property from the market by binding himself to sell the property pursuant to the Associates contract; and (3) that Beavers is entitled to purchase Norris' property pursuant to the contract tendered to Norris on July 3, 1980. In an amended complaint, Beavers also sought damages from defendant Associates for wrongful interference with contractual rights. In a cross-claim against Norris, Associates sought specific performance of its contract with Norris.

Norris filed motions to dismiss both the initial complaint and the first amended complaint.

On February 18, 1981, the trial court denied the first motion to dismiss. No action was taken by the trial court with respect to the second motion to dismiss.

Thereafter, each of the parties filed motions for summary judgment. On November 1, 1982, the trial court ruled: (1) that the contract submitted by Beavers to Norris was a binding contract and was for the same price and terms as the Associates contract; (2) that as between Beavers and Associates, Beavers had the superior right to purchase Norris' property; and (3) after first holding that Norris was obligated to sell either to Beavers or to Associates, that Norris was entitled to reject both the Beavers and the Associates contracts and that he had done so. The court thereupon entered summary judgment in Norris' favor against Beavers on its claim and against Associates on its cross-claim for specific performance of its contract. The court also entered judgment in Associates' favor against Beavers. This appeal of the summary judgment followed.

The trial court did not err when it found that Beavers submitted to Norris a binding contract with terms virtually identical to those in the Associates contract. A review of the two contracts reveals that they are identical in all material respects. Associates contends that Beavers' contract is not binding because it contained a provision allowing Beavers 30 days in which to make an economic feasibility study and permitting its withdrawal if the study yielded unsatisfactory results. In Associates view, such a condition allowed Beavers to unilaterally withdraw, making its promise illusory. However, this condition is analogous both to engineering and architectural feasibility studies and to approval clauses upheld in this court and elsewhere. *See Edmund J. Flynn Company v. Schlosser*, 265 A.2d 599 (D.C. 1970); *Mattei v. Hopper*, 330 P.2d 625 (Cal. 1958); *Omni Group, Inc. v. Seattle-First National Bank*, 645 P.2d 727 (Wash. 1982). That the condition might require the exercise of good faith does not render the contract in which the condition is found illusory. Therefore, the trial court did not err when it ruled that Beavers submitted a contract identical to Associates' and binding upon Beavers.

However, the trial court did err by ruling that paragraph 16(a) of Beavers' lease permitted Norris to unilaterally withdraw from both contracts. It is plain from the language of paragraph 16(a), that the parties contemplated a distinction between *offers* and executed, binding *contracts*. Norris was free to reject any and all *offers* until he actually executed a binding *contract*. Once he executed a contract, however, he was obliged to sell. In this case Norris executed a binding contract with Associates. At that point he could no longer refuse to sell the property.

Further, the trial court erred when it failed to order Norris to convey the property under dispute to Beavers. Under the terms of the lease held by Beavers there were three conditions obligating Norris to sell his property to Beavers: (1) Norris must receive an offer acceptable to him and communicate it to Beavers; (2) Beavers must submit a binding contract at the same price and upon the same terms within 30 days of the notification; and (3) Norris must execute a binding contract to sell. All three of these conditions were met in this case. Thus, the trial court erred when it failed to order the property conveyed to Beavers.

Reversed and remanded.

CONFIDENTIALITY

(Cont'd. from p. 197)

> extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Id. §552a(k)(5). This exception, shielding informants' identities, is tightly contained for post-Act investigation. With the main rule on the books, and thus guiding agency conduct, Congress directed that only an express promise of confidentiality would warrant exemption from the disclosure requirement. The exception is less strict for investigations antedating the Act. Adverting to expectations and understandings engendered in the past, Congress permitted nondisclosure based on an agency's implied promise of confidentiality. Our task is to determine whether the FBI, after our remand, demonstrated that requisite implied promise.

It is not enough, we held in *Londrigan I*, to show that the information supplied was "of a personal nature" or that "the FBI conducted the investigation." 670 F.2d at 1174. The Bureau has now made a stronger demonstration. It has submitted official directives indicating that it was the FBI's standard operating policy in 1961 to require Bureau employees "to keep strictly confidential all information secured in their official capac[ities]." * * * Further, it showed through the affidavits of the very agents who performed the check on Londrigan that those agents conducted all interviews in accordance with the confidentiality policy stated in FBI directives. Of particular importance, the agents confirmed that whenever an interviewee raised a question or exhibited doubt as to confidentiality, an express assurance would follow.

Londrigan argues that this showing still lacks the requisite strength. To shield any source, he maintains, the Bureau must prove that the interviewing agent actually conveyed to the person in question a confidentiality guarantee. The statutory text precludes the contention that only an express guarantee will do, but Londrigan insists that the implication the statute permits must rest on particularized, source-by-source proof. No name may be withheld, according to Londrigan, unless it is demonstrated that in the particular instance the individual expected and understood that his or her identity would be shielded.

Language in the *Londrigan I* opinion, and in a district court opinion *Londrigan I* cites with approval, may bear this interpretation. In both decisions, however, the courts faced agency claims of virtually automatic exemption based on general allegations concerning "policy." Because of the agency's stance, neither court had to come to grips with the reality now brought home to us by the FBI. The Bureau points to its proof, not mere allegation, of confidentiality commands conveyed to agents who performed background investigations in 1961. It then relies on sworn statements of the agents involved in Londrigan's background investigation, not merely the averments of a headquarters officer, as to the manner in which those agents routinely carried out the Bureau's confidentiality directives. Its argument concludes:

> If the Congressional intent embodied in exemption 5 is to be honored, this evidence must be deemed sufficient to establish an implied promise of confidentiality. The government can not be expected to present more. The interviews at issue were conducted over 20 years ago pursuant to the policies and general practices in effect at that time. To hold this evidence insufficient, as this district court did, is for all practical purposes to read out of the statute the provision allowing the government to establish that the promise of confidentiality for interviews conducted prior to the effective date of the Privacy Act may be impliedly rather than expressly given.

Brief for Appellant at 15. We agree.

The FBI asserts it has conducted over 800,000 background investigations of the kind at issue here, dating back to 1924. *Id.* at 21. To recall today details of particular interviews conducted decades before the effective date of the Privacy Act, agents would have to possess superhuman memories. In view of this practical consideration, we cannot rate the FBI's current submissions inadequate to support application of the claimed exemption. Were we to read into the statute the source-by-source proof requirement appellee Londrigan presses, we would reduce to the vanishing point the implied promise exemption Congress stipulated for pre-Act investigations.

We do not depart from *Londrigan I* and adopt an automatic exemption for background interviews conducted by the FBI prior to the effective date of the Privacy Act. We do add to what was said in that opinion, based upon the augmented record we now have. We hold that where, as shown here, the FBI has pursued a policy of confidentiality, and demonstrates that the agents involved were alert to that policy, conformed their conduct to it, and routinely assured confidentiality to interviewees who exhibited any doubt, then, absent contrary indicators, the inference should be drawn that the interviewees were impliedly promised confidentiality.

As to interviews conducted today, Congress has established a rule that agencies can and must follow—sources are not shielded unless they are expressly promised that their identities will not be divulged. During the 1960's period in question, however, Congress had set no such rule. We conclude that, through the 1974 Act implied promise exception, Congress sought to accommodate once prevailing, lawful agency practices. We therefore decline to attribute to Congress an intent to erect a standard that the FBI rarely, if ever, could meet. Because the FBI has now demonstrated with respect to Londrigan's background investigation all that we could reasonably expect it to show to establish an implied promise [This decision has been considered and approved by the full court, and thus constitutes the law of the circuit. *See Irons* v. *Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981)], we reverse the district court's judgment. Further, we direct the district court, on remand, to enter judgment for the FBI.

It is so ordered.

POLL

(Cont'd. from p. 197)

Rockville, Maryland. The Metropolitan Police called Breidenthal, told him that his car had been recovered, and asked if police officers could come to his home to show him a set of photographs. When the officers arrived at Breidenthal's home, they spread out eight sets of photographs and asked Breidenthal whether he could identify the persons who robbed him from the photos. Breidenthal picked out a photograph of appellant as the man who had beaten him with a gun and stolen his money and car, stating that he "was 80 to 90 percent certain" and that "when I saw the picture it was immediately clear that it was him."

Four months later, Breidenthal saw appellant in a Montgomery County court proceeding and again identified him as the man who had robbed him at gunpoint. Breidenthal stated that he was even "more certain" of his identification of appellant after seeing him in person.

II.

Appellant's case came to trial on the morning of November 23, 1982, two days before Thanksgiving. During the course of the *voir dire* of prospective jurors, the court asked an extensive series of questions in an effort to determine whether any member of the venire had general or particular biases that might compromise objectivity toward appellant's case. At the conclusion of this questioning, the court asked whether any member of the panel knew "of any reason whatsoever why he or she cannot sit as a juror in this case and render a fair and impartial verdict based solely on the law and the evidence as you shall hear it?"

At that point, appellant's counsel requested that the court ask the panel members "[w]hether or not there is anything that would prevent them from giving full time and attention to the case," asserting that holiday visiting might preclude some jurors from focusing on the case. The court denied this request, stating that appellant's trial would be completed before Thanksgiving Day and that the last question posed to the panel provided prospective jurors with sufficient opportunity to raise any holiday-related reason for their inability to serve on the jury. The trial judge concluded that the proposed question "would be productive of more mischief than it would solve."

Appellant argues that the trial court committed reversible error by refusing to question the jury regarding their Thanksgiving holiday plans. The decision as to what questions should be asked during the *voir dire* of the jury rests within the sound discretion of the trial judge, subject only to "the essential demands of fairness." *Davis v. United States*, 315 A.2d 157, 160 (D.C. 1974) (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)). The trial court here conducted a careful *voir dire* focusing on whether the prospective jurors were free from bias or prejudice and providing them with an opportunity to make known any reason they might have to be excused. The record demonstrates no ground for concluding that the trial judge transgressed "the essential demands of fairness" or otherwise erred.

III.

During the course of appellant's trial, evidence was admitted with respect to three separate identifications of appellant by Breidenthal: (1) Breidenthal testified that he selected appellant's picture from a photo array two days after the robbery; (2) he also testified regarding his in-person identification of appellant four months after the robbery; and (3) Breidenthal identified appellant in court, stating that he recognized appellant as the man who held him at gunpoint during the robbery. Defense counsel argued to the trial court that, because the initial photo array procedure conducted by the police was unduly suggestive, evidence regarding all three of these identifications should be suppressed. According to counsel, the suggestive procedure not only resulted in a possible misidentification by Breidenthal from the photo array but also tainted the subsequent identifications. The trial court found that the photo array presented to Breidenthal two days after the robbery was not suggestive and, accordingly, rejected appellant's objections to the identification testimony.

On appeal, appellant challenges only the admission of Breidenthal's in-court identification of appellant, arguing that the in-court identification was tainted by the earlier photo array iden-