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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 174-1997
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INQUIRY RE: A decision by the Greater Vancouver Regional District to withhold a List of Certificates maintained under section 59(5) of the *Municipal Act*

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on May 6, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Greater Vancouver Regional District (GVRD) to withhold a List of Non-resident Property Elector Certificates under section 22 of the Act. Section 59(5) of the *Municipal Act* requires the Chief Electoral Officer to maintain a list of all certificates issued to non-resident property electors (NRPE) for a municipal election. The applicant in this inquiry is seeking a declaration that this list ought to have been released during the election process in November 1996. He represents the Bowen Island Improvement Association (BIIA) and three candidates in the municipal election held on November 16, 1996. Section 58 of the Act does not permit me to make a declaration. I must apply the provisions of the Act to the record in dispute and make an Order.

2. Documentation of the inquiry process

On November 4, 1996 the applicant wrote to the Greater Vancouver Regional District requesting the list of persons to whom non-resident property elector certificates had been issued under section 59 of the *Municipal Act.* On November 6, 1996 the Chief Electoral Officer denied access to the list stating that it was not a voters list and was protected by the Act. The applicant took no further action on this request.

On December 2, 1996 the applicant made a formal request under the Act to the GVRD seeking the "list" required to be maintained under section 59(5) of the *Municipal Act* and for the list of address labels used by the GVRD to mail out non-resident property elector applications. The GVRD responded on January 6, 1997 by releasing a list of mailing labels but denying access to the list of certificates issued to non-resident property electors in accordance with sections 22(1), 22(2)(f), 22(3)(j) (formerly section 22(3)(i)), and 32(a) of the Act.

On February 5, 1997 the applicant wrote to my Office requesting a review of the GVRD's response to his request for records. He requested a review of the response of the GVRD with respect to the disclosure of the list of address labels he received, as well as the decision of the GVRD to withhold the record requested. The issue of the address labels was resolved in mediation.

3. Issue under review at the inquiry and the burden of proof

The issue in this review is whether the GVRD has properly withheld records under section 22(3)(j) of the Act, which reads as follows:

Disclosure harmful to personal privacy

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(j) the personal information consists of the third party's name, address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(c) an enactment of British Columbia or Canada authorizes the disclosure,

....

4. The record in dispute

The record in dispute is a list of the names, mailing addresses, and property addresses on Bowen Island of all non-resident property electors who were issued a Non-resident Certificate to vote. The record in dispute is 10 pages long and contains 105 names. These are the persons that the applicants wished to solicit for votes for the elections to the Islands Trust in the fall of 1996.

5. The applicant's case

The Chief Electoral Officer (CEO) denied the applicant access to the list of individuals who had applied for and been issued certificates under the *Municipal Act* entitling them to vote in the election for Electoral Area C [Bowen Island and other islands and bits of unorganized territory] of the GVRD as "Non-Resident Property Electors (NRPE)." The CEO is required to maintain this list under section 59(5) of the *Municipal Act* for the purpose of facilitating elections under the *Elections Act*. (Submission of the Applicant, p. 4)

> The applicant's position is that such refusal by the CEO frustrates or impedes the electoral process which legitimately involves the solicitation of electors and that the CEO, by choosing to use the FOI [Act] as the justification for denial of access to the record, was asserting an unwarranted claim of invasion of privacy. (Submission of Applicant, p. 1)

The applicant's position is that "the unilateral action of the CEO" prevented the non-resident electors from being solicited by the candidates in the election that they applied to participate in. (Submission of the Applicant, p. 5) His position is that this inquiry should go forward so that the CEO cannot repeat her mistake at the next election. (Submission of the Applicant, p. 6)

6. The Greater Vancouver Regional District's case

The GVRD had entered into an agreement with the Islands Trust to conduct the election in Electoral Area C. The next such election under the *Municipal Act* will be in 1999. On July 26, 1996, pursuant to section 55 of the *Municipal Act*, the GVRD passed By-law No. 841, 1996, which provides that electors "who wished to vote at the general election were required to register at the time of voting, thereby abrogating the requirement under section 62 of the *Municipal Act* for the maintenance of a register of electors." This meant that there was no list of electors available to candidates for public office on Bowen Island. (Submission of the GVRD, p. 1)

Section 52 of the *Municipal Act* provides that an individual can qualify as a non-resident property elector if he or she makes an application to the Chief Electoral Officer and satisfies the necessary requirements to obtain a certificate. Section 59(5) of the *Municipal Act* requires that a record be maintained of all certificates so issued. (Submission of GVRD, p. 1)

The basic position of the GVRD is that candidates for election have no right of access to the records in dispute where there is no statutory provision permitting the disclosure of the information. (Reply Submission of the GVRD, p. 1) In its view, the problem can only be solved by an amendment to the *Municipal Act*. (Reply Submission of the GVRD, p. 2) "The GVRD holds that providing the records in dispute to the

applicant would be an unreasonable invasion of the Non-Resident Electors' personal privacy." (Reply Submission of the Applicant, pp. 4, 5)

I have discussed below the specific aspects of section 22 of the Act that the GVRD relied on to refuse access to the list of electors.

7. The Union of British Columbia Municipalities' (UBCM) Submission as an Intervenor

UBCM agrees with the GVRD that there are no provisions within the *Municipal Act* which provide for public access to the list of certificates issued for non-resident property electors:

> We emphasize the distinction between the regular electors list which contains the names of all potential voters, as opposed to this list of certificates, which is a self-selected list of non-resident property owners which have indicated their intention to vote, and can only do so by applying for a certificate.

UBCM submits that if there is no explicit authority in the *Municipal Act* for disclosure of this specialized list, "there can be no legal action taken under the statute." In its view, this means that authority defaults to the *Freedom of Information and Protection of Privacy Act*, especially section 22(3)(j).

UBCM states that it is working with the Ministry of Municipal Affairs and Housing for a multi-year review of the *Municipal Act*: "It had not previously come to our attention that the *Municipal Act* was silent with respect to access to the document in question. It would be our preference that the Act be more specific with respect to the list of non-resident electors certificates, and we will raise the matter with the Ministry in the course of this review."

8. Discussion

The rationale for the disclosure of the records in dispute

I agree with the submission of the applicant that there was "a valid electoral purpose in the solicitation by candidates of votes from persons who had applied for and obtained voter registration Certificates." (Submission of the Applicant, p. 2) Under normal circumstances in this province, candidates for municipal office are able to use the local voters' list for this purpose, but there is no requirement to keep one for Electoral Area C of the GVRD, because of a by-law in force at the time of the election. The only way in which a legitimate candidate could reasonably solicit this particular group of 105 voters living in 10 locales was by access to the list maintained by the CEO, because it gives both the Bowen Island address and other address of the person who has taken all steps necessary to register to vote in Electoral Area C as a non-resident elector. The

applicant submits that these NRPE persons constitute somewhere between 1/3 to 1/2 of the electorate in Electoral Area C. (Submission of the Applicant, p. 5) However, since there are 105 NRPE names on the list out of approximately 700 non-resident property owners, and the total electorate is apparently close to 5,000, I conclude that the number of self-selected NRPEs constitute about 2 percent of the electorate. However, I do not agree with the CEO that this list is not a voter's list and that her refusal to grant access to it did not impede the election process. (Reply Submission of the GVRD, p. 2)

The applicant argues that the electors whose records are in dispute would not have registered to vote in such a cumbersome manner without an expectation that their recorded information would be disclosed for electoral purposes. (Submission of the Applicant, p. 4) I think that is a reasonable inference to make, since all those who choose to register to vote in the province have a reasonable expectation that their information can be used to solicit their votes, as the *Municipal Act* customarily provides.

I agree with the applicant's position that disclosure of the records in dispute "during the course of an election is and should be fundamental to the democratic process." (Submission of the Applicant, p. 7; see also Reply Submission, p. 1) This is especially so for Electoral Area C, since the election for Islands Trust there was decided by a margin of 11 votes on a voter turnout of approximately 70 percent. (Submission of the Applicant,
p. 7)

In my view, the GVRD is misleading in its suggestion that its approach to the issue in dispute in this inquiry protects the privacy rights of the non-resident electors "while still leaving it up to their discretion as to whether they wish to be solicited by the Candidates. They have available to them the means of gathering or seeking information with respect to all candidates' positions and can easily provide any candidates with the information if they wish to be solicited directly. Consequently, the extent of their involvement remains a personal decision to be made by each of them and not to be made by the CEO on their behalf." (Reply Submission of the GVRD, p. 2) With respect, this submission turns the natural process of elections on its head. Voters expect to be solicited, not to have to ask to be solicited. The reality is, moreover, that these particular 105 voters lived in 10 different places in this province, most of them in the Lower Mainland; it would be an almost impossible task for candidates to reach them individually at their diverse locations, unless their identities are known by disclosure of their names and addresses.

I do not know whether NRPE data was made available elsewhere in the province. Since most municipalities have a register of electors that shows both resident and non-resident electors, there are not many which have no list of electors AND a large number of NRPEs (Bowen Island/Area C may be the only one).

Section 36(1) of the Municipal Act

This section reads: "To the extent of any inconsistency or conflict with the *Freedom of Information and Protection of Privacy Act*, Parts 2 and 3 of this Act apply despite that Act." The GVRD submits that since the *Municipal Act* "is silent with respect to the use that may be made of the List," section 36.1 does not apply to this inquiry. (Submission, p. 5) This means that the use of the List should be governed by the *Freedom of Information and Protection of Privacy Act* itself. The applicant submits that section 36.1 "is a signal from the legislature that disclosure for electoral purposes should be made notwithstanding what the FOI Act provides. The words of the section are 'despite that (the FOI) Act.'" (Reply Submission of the Applicant, p. 2) In my view, the *Freedom of Information and Protection of Privacy Act* is determinative in this inquiry.

Section 59(5) of the Municipal Act

Since the Legislature has required the CEO to keep the list of non-resident property electors, the applicant's position, with which I have considerable sympathy, is that "it is appropriate to ascribe a purpose, not to say there is no purpose .... Clearly, ... the statute has a positive social purpose, to facilitate the holding of elections and the duty of the CEO should be to assist that purpose unless the statute gives a specific discretion or direction to the CEO to do otherwise." (Submission of the Applicant, p. 6) According to the applicant:

> ... it is more than fair to find that the legislation provides that the list be kept so that candidates could become aware of who had qualified to vote from the dispersed individuals who form the base of the NRPE electorate. (Submission of the Applicant, p. 6)

The GVRD sets great store on the fact that there is no provision in the *Municipal Act* requiring disclosure of the information contained in the list of electors; in its view, this means that it must apply the mandatory exception under section 22 of the Act. (Submission of the GVRD, p. 2)

Section 63 of the Municipal Act

Section 63 requires that a list of registered electors must be provided to all candidates for use in an election. According to the GVRD:

> Section 63 is inapplicable in this inquiry because there is no advance registration available in the Electoral Area due to the By-law and consequently no electors' list prepared under this section. Nonetheless, subsections 10 and 11 of section 62 specifically provide for the protection of personal privacy, which is indicative of the legislators' concern for the protection of electors' personal privacy. (Submission of the GVRD, p. 5)

For purposes of this inquiry, the most important point to be derived from this section of the *Municipal Act* is that the customary practice is for lists of registered electors to be

provided to all candidates for use in an election. In my view, it would be reasonable to regard the records in dispute in this inquiry as falling into this category for all practical purposes, despite the fact that voter registration only takes place on voting day under the GVRD's By-Law.

The GVRD relies on section 63 in this inquiry because it contains the most specific subsections permitting the withholding of electors' information. Although it acknowledges that this does not govern the records in dispute in this inquiry, it proceeds to argue that "disclosure of the electors' list under section 63 is even less intrusive to the electors' personal privacy rights than the List [in dispute] as it deals with all electors in an electoral area and not a specific segment of the electorate as in this case (i.e. only the Non-Resident Electors.)" (Submission of the GVRD, pp. 6, 7) Regardless, the current situation is access to NRPE lists which is not dealt with in the *Municipal Act*. Accordingly, the issue is whether access must be denied by the GVRD under section 22 of the Act.

Section 150 of the Municipal Act

This section deals with the retention and destruction of election materials. Section 150(3) provides that any copies of the list of registered electors used for the purposes of "voting proceedings" must be maintained for public inspection up to thirty days after the declaration of the election results. The GVRD submits that "the only reasonable conclusion is that 'voting proceedings' is limited to acts that take place at the voting site." (Submission of the GVRD, p. 5) The applicant does not agree that the certificate is not a voting proceeding. (Reply Submission of the Applicant, p. 2) The issue seems irrelevant in any event to the matter before me in this inquiry.

Order No. 69-1995: The Squamish Voters' List decision

The GVRD raised the issue of my decision in this particular Order as upholding its view that the *Municipal Act* only took precedence over the Act if there is an inconsistency or conflict between the two pieces of legislation. It also relies on my decision in that case to uphold the decision of a public body not to disclose the addresses of certain electors on the basis of section 63(1) of the *Municipal Act* and section 22(1) of the Act. (Submission of the GVRD, pp. 5, 6)

Section 22(2): Relevant circumstances for determining an unreasonable invasion of privacy

The applicant submits that there were no circumstances under section 22(2) that would justify the CEO in refusing to disclose the records in dispute, since "it is clear that the information was not supplied to the CEO in confidence nor would its release expose the electors to financial or other harm." (Submission to the Applicant, p. 4)

Section 22(2)(f): Personal information has been supplied in confidence

The GVRD refers to this section in support of non-disclosure of the records in dispute. (Reply Submission of the GVRD, p. 4) The applicant responds that the "argument that the application for a Certificate was 'in confidence' is not supported by any facts, least of all by any claim of the affected electors." (Reply Submission of the Applicant, p. 2) I agree with the applicant, and note that the GVRD submitted no evidence on this point.

Section 22(3)(j): Mailing lists

The GVRD submits that disclosure of the records in dispute "would amount to an unreasonable invasion of the Non-Resident Electors' personal privacy because it contains their names and addresses and is to be used for mailing lists or solicitation by telephone or other means." (Submission of the GVRD, p. 4)

This section of the Act was cited in Order No. 69-1995, December 13, 1995, but has not been discussed in any Orders. In general, I find that it is meant to apply to the use of personal information, in the form of names, addresses, and telephone numbers, that is intended to be used for mailing lists or other forms of solicitation. The implication of this statement, in my view, is that the prohibited activity would be what is normally referred to as direct marketing activities, such as those undertaken by the members of the Canadian Direct Marketing Association. Such activities are normally undertaken on a repetitive basis in the sense that a client of such a company rents an existing list for a particular purpose. That is not my sense of what is at stake in this particular inquiry.

The GVRD submits, essentially, that all solicitation is prohibited under this section: "There is no distinction set out in the Act with respect to the purpose of the solicitation. Therefore, there is no difference between solicitation for electoral purposes and any other form of solicitation." (Submission of the GVRD, p. 4) With respect, I disagree. Some solicitation on the basis of records created under the Act bears such an intimate and direct relationship with the purpose of creating the record in the first place that it can reasonably be inferred that the identifiable person involved must have known that some solicitation was possible. Voters' lists have always been used for purposes of solicitation in elections. I view the use of this list in dispute for electoral purposes as a use consistent with the purpose for which the record was created, a perspective set out in section 32(a) of the Act. By way of contrast, entering a hospital as a patient does not automatically mean that you have consented to be a target of fundraising.

I agree with the applicant that the attempt to assert that there is no difference between solicitation for electoral purposes and any other form of solicitation is not sustainable: "Central to any inquiry, if one has to be made at all, as to whether an 'invasion of privacy' is reasonable, is the purpose of the solicitation." (Reply Submission of the Applicant, p. 2)

If a record exists in the custody or under the control of a public body that has a direct relevance to a municipal election, such as in the current inquiry, and if the intended use of the records is limited to that legitimate activity, I do not find that section 22(3)(j) can be relied on to prevent disclosure of identifiable personal information to legitimate candidates in this electoral process. When the Legislature approved this section of the Act, I think it highly unlikely that it intended to prohibit "solicitations" for the specialized purposes of a municipal election. The applicant specifically "disclaims any other purpose than solicitation for electoral purposes." (Submission of the Applicant, p. 4)

Section 22(4): Disclosures of personal information that are not unreasonable invasions of privacy

The applicant submits that section 22(4)(c) may apply since the electoral provisions in the *Municipal Act* "by their nature authorized" the release of the records in dispute, "but it is conceded that there are no express words in the *Municipal Act* which state that the record in question is to be disclosed." (Submission of the Applicant, p. 4) I therefore find that section 22(4) does not apply to the record under review.

Burden of proof

The GVRD submits that the applicant has failed to meet his burden of proof on the application of section 22 of the Act, which means that it is required to refuse access. (Submission of the GVRD, p. 7) I do not agree. In my view, the applicant has proved that disclosure of the information would not, during the election process, be an unreasonable invasion of the third parties' personal privacy.

Procedural matters: the use of fact reports

The applicant raised as a procedural objection the inclusion of a Portfolio Officer's fact report in the case summary provided to me. He indicated that he did not agree with the facts as stated in the fact report and did not agree that the Portfolio Officer should determine the facts or the issues.

Portfolio Officers in my Office have the delegated authority to try to settle matters in dispute through mediation. They do not determine the issues, although they may offer, as part of their mediation efforts, opinions about such matters as the likely outcome of an inquiry. However, as I make my decisions in each inquiry on the basis of the materials before me, I do not know, and do not want to know, any such specific opinions. Indeed, the parties to an inquiry are advised that their submissions should not include information about the mediation process. See, in general, section D.8 of my Office's Policies and Procedures.

Fact reports are intended to summarize salient information, especially as to relevant dates and issues, for my use and for the use of the parties to an inquiry. Fact

reports can be amended, but the contents are not binding on me or on the parties, who are entitled to raise any objections they might have, as the applicant did in this matter.

8. Order

I find that the Greater Vancouver Regional District was not required under section 22 of the Act to refuse access to the record in dispute during the election period. In my view, the GVRD ought to have provided the list requested by the applicant at the time he requested it in early November 1996. However, as acknowledged by the applicant, the record has little value after the November 16, 1996 election is over and at this stage, the GVRD is required to refuse access, since solicitation after the election process would constitute an unreasonable invasion of the third parties' privacy. Under section 58(2)(c) of the Act, I require the head of the GVRD to refuse access to the record in dispute.

I urge the Ministry of Municipal Affairs and Housing to amend the *Municipal Act* so as to provide clarification of the issue of candidates' access to NRPE lists in the province before the November 1999 elections.

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David H. Flaherty July 14, 1997
Commissioner