STATE OF MICHIGAN

COURT OF APPEALS

PRACTICAL POLITICAL CONSULTING, INC.,	FOR PUBLICATION March 9, 2010 9:05 a.m.
Plaintiff-Appellee,	
v	No. 291176 Ingham Circuit Court LC No. 08-000706-CZ
SECRETARY OF STATE, MICHIGAN DEPARTMENT OF STATE OFFICE OF THE SECRETARY OF STATE,	
Defendants-Appellants.	Advance Sheets Version

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

WHITBECK, J.

This appeal concerns the provisions of the Freedom of Information Act (FOIA) relating to public records.[1] But the central question here is not the availability of public records. Rather it is whether the disclosure, or concealment, of these records will lead to, or detract from, the public's ability to hold its elected and appointed public officials accountable for carrying out the law. The Secretary of State (the Secretary) and her office would have us hold that these records are statutorily exempt from disclosure and that they are of such a "personal nature" that their public disclosure would constitute a "clearly unwarranted invasion" of an individual's privacy. We cannot, and do not, agree.

The records here relate to the 2008 presidential primary election, in which there was to be a "separate record" kept containing the printed name, address, and qualified voter file number of each elector and the "participating political party" ballot selected by that elector. The main "participating" political parties were the Democratic Party and the Republican Party. The 2008 presidential primary in Michigan was conducted amid a swirl of controversy, charges, and counter-charges. Ultimately, a federal court found the act that authorized that primary to be unconstitutional on equal protection grounds. But these complexities should not cloud the basic issue. That issue here is whether we should shield from public disclosure the "separate records" that contain information as to which *ballot*—not which *candidate*—each voter selected in the 2008 presidential primary. We do not view FOIA and the cases interpreting it as providing such a shield. We therefore affirm the decision of the trial court.

[1] MCL 15.231 *et seq.*

I. BASIC FACTS AND PROCEDURAL HISTORY
A. THE VARIOUS PRESIDENTIAL PRIMARY SYSTEMS

The law relating to recent presidential primary elections in Michigan falls into three categories:

- First, by statute from 1988 to 1995, Michigan had a "closed" presidential primary system, with certain requirements regarding eligibility to vote in party presidential primaries.

- Second, by statute from 1995 to 2007, Michigan had an "open" presidential primary system that allowed voting in party primaries without the eligibility requirements that the former election law imposed.

- Third, by statute in 2008, Michigan had what might reasonably be called a "semi-open" presidential primary, with certain requirements—less onerous than those that the law imposed in 1988 to 1995—regarding eligibility to vote in a party's presidential primary.

More specifically, the law in these three categories contained the following provisions:

1988-1995 Closed Presidential Primary System: Declaration of Party Preference By Elector	A "registration affidavit" kept at the township, city, or village level was required to contain a space in a presidential primary election for the "elector to declare a party preference or that the elector has no party preference."[2] Even if currently registered to vote, an elector would not be eligible to vote in a presidential primary election unless the elector "declare[d] in writing . . . a party preference at least 30 days before the presidential primary election."[3] Thus, only those electors who declared a party preference 30 days before the presidential primary election could vote for the candidates in any of the parties' respective presidential primaries.
1995-2007 Open Presidential Primary System: No Declaration of Party Preference By Elector	The "registration affidavit" was no longer required to contain the space for an elector to declare a party preference 30 days (or any other period) before the presidential primary election.[4] Thus, any elector, who had otherwise completed a valid registration affidavit could vote for the candidates in any of the parties' respective presidential primaries.

[2] MCL 168.495(1)(k), as amended by 1988 PA 275.

[3] MCL 168.495(2)(c), as amended by 1998 PA 275; MCL 168.523(3), as amended by 1988 PA 275.

[4] MCL 168.495, as amended by 1995 PA 87.

2008 Semi-Open Presidential Primary: Indication of Which Party Ballot Elector Wished to Vote	In order to vote in a presidential primary, an elector was required to "indicate in writing, on a form prescribed by the secretary of state, which participating political party ballot he or she wishes to vote when appearing to vote at a presidential primary."[5] Thus, only the electors who indicated, at the time they appeared to vote, which participating political party ballot "he or she wishes to vote" could vote for the candidates in any of the parties' respective presidential primaries.

There is a significant difference between the three categories. Under the 1988-1995 closed primary system, an elector had to "*declare*" a "party preference" 30 days in advance in order to vote in a presidential primary. Under the 1995-2007 open primary system, by contrast, there were no requirements regarding party preference or ballot selection, by declaration or otherwise, and any qualified elector could vote in any of the parties' respective presidential primaries. In 2008, an elector was not required to "*declare*" a "party preference" but rather that elector was required to "*indicate*" which "participating political party ballot he or she wish[ed] to vote . . . ." And the elector could indicate his or her choice of ballot when he or she appeared at the polling place to vote in the presidential primary, rather than 30 days in advance.

B. RECORD-KEEPING REQUIREMENTS

The three categories also had significantly different record-keeping requirements. In summary, the law in these three categories contained the following provisions:

1988-1995 Closed Presidential Primary System: Declaration of Party Preference By Elector	The clerk of each township, city, and village was required to provide blank forms, designated as "registration cards," to be used in the registration of electors. These "registration cards" were to include an affidavit designated as a "registration affidavit" to be executed by the registrant.[6] This "registration affidavit" was to contain: ▪ the name of the elector; ▪ the residence address, street and number or rural route and box number, if any, of the elector; ▪ the birthplace and birth date of the elector; ▪ the driver's license or state identification card number of the elector, if available; ▪ a statement that the elector was a citizen of the United States; ▪ a statement that the elector at the time of completing the affidavit, or on the date of the next election, was not less than 18 years of age; ▪ a statement that the elector has or will have lived in the state not less than 30 days before the election; ▪ a statement that the elector has or will have established his or

[5] MCL 168.615c(1), as added by 2007 PA 52.

[6] MCL 168.493, as amended by 1989 PA 142.

	her residence in the township, city, or village in which the elector is applying for registration not less than 30 days before the next election; ▪ a statement that the elector is or will be a qualified elector of the township, city, or village on the date of the next election; ▪ a space in which the elector shall state the place of the elector's last registration; and, as mentioned above, ▪ a space for the elector to declare a party preference or that the elector has no party preference.[7] In addition, if authorized by the election commission of the city, village, or township, the clerk of a city, village, or township was to create a "registration list," alphabetically arranged and containing the name, address, date of birth of the elector and, "for the purpose of voting in a presidential primary election, the party preference or declaration of no party preference of the elector, if any."[8]
1995-2007 Open Presidential Primary System: No Declaration of Party Preference By Elector	As noted above, the "registration affidavit" no longer contained the requirement that an elector declare a party preference 30 days (or any other period) before the presidential primary election.[9] In 2005, the Legislature repealed MCL 168.501a, relating to registration lists.[10] The other record-keeping requirements remained the same.
2008 Semi-Open Presidential Primary: Indication of Which Party Ballot Elector Wished to Vote	The Secretary of State was required to "develop a procedure for city and township clerks to use when keeping a separate record at a presidential primary that contains the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the presidential primary."[11]

Thus, from 1988 to 1995, under the closed presidential primary system, the registration affidavits contained extensive information about electors, including an elector's declaration of party preference (or no preference) for the purpose of voting in a presidential primary. But from

[7] MCL 168.495(1)(a)-(k), as amended by 1988 PA 275.

[8] MCL 168.501a, as amended by 1988 PA 275.

[9] MCL 168.495, as amended by 1995 PA 87.

[10] 2005 PA 71, enacting § 1.

[11] MCL 168.615c(3), as added by 2007 PA 52.

1995 to 2007, under the open presidential primary system, the elector's declaration of party preference was no longer kept in the registration affidavits. In 2008, however, there was to be a "separate record" in the semi-open presidential primary that contained the printed name, address, and qualified voter file number of each elector and the selection of the participating political party ballot by that elector.

C. DISCLOSURE RESTRICTIONS

The law in these three categories also contained significantly different restrictions upon disclosure. In summary, the law in these three categories contained the following provisions:

1988-1995 Closed Presidential Primary System: Declaration of Party Preference By Elector	There were no explicit restrictions on the disclosure of the public records required to be kept.
1995-2007 Open Presidential Primary System: No Declaration of Party Preference By Elector	In 1995, the Legislature adopted two explicit restrictions with respect to the disclosure of public records required to be kept (the 1995 FOIA provision). First, in amended § 495a(1), the Legislature provided: > If an elector declared a party preference or no party preference as previously provided under this act for the purpose of voting in a statewide presidential primary election, a clerk or authorized assistant to the clerk may remove that declaration from the precinct registration file and the master registration file of that elector and the precinct registration list, if applicable.[12] Second, in amended § 495a(2), the Legislature provided: > Beginning on the effective date of the amendatory act that added this sentence [November 29, 1995], a person making a request under the freedom of information act . . . is not entitled to receive a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. Beginning on the [same date], a clerk or any other person shall not release a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector.[13]

[12] MCL 168.495a(1), as amended by 1995 PA 213.

[13] MCL 168.495a(2), as amended by 1995 PA 213.

2008 Semi-Open Presidential Primary: Indication of Which Party Ballot Elector Wished to Vote	In 2007, the Legislature repealed the 1995 FOIA provision relating to the disclosure of public records required to be kept.[14] The Legislature then provided: "Except as otherwise provided in this section, the information acquired or in the possession of a public body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the freedom of information act . . . and shall not be disclosed to any person for any reason."[15] The exception to this restriction was the requirement that the Secretary "provide to the chairperson of each participating political party a file of the records for each participating political party described under subsection (3)."[16] This "subsection (3)" file contained the "printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the presidential primary."[17]

As noted, the changes to the election law that the Legislature adopted in 2007 for the 2008 presidential primary repealed the 1995 FOIA provision and substituted an exemption from disclosure for the information acquired or in the possession of a public body that indicated which participating political party ballot an elector selected at a presidential primary. However, after the 2008 primary, a federal court declared § 615c of 2007 PA 52 unconstitutional on equal protection grounds.[18] 2007 PA 52 contained a nonseverability clause.[19] Thus, 2007 PA 52 became null and void in its entirety.[20] And, accordingly, the repealer of the 1995 FOIA provision was also struck down. As the parties agree, following this federal court decision, Michigan election law, including the 1995 FOIA provision, reverted back to the position that it was in before the Legislature enacted 2007 PA 52. Thus, § 495a(1), as amended by 1995 PA 213, and § 495a(2), as amended by 1995 PA 213, came back into effect.

[14] 2007 PA 52, enacting § 2.

[15] MCL 168.615c(4), as added by 2007 PA 52.

[16] MCL 168.615c(6), as added by 2007 PA 52.

[17] MCL 168.615c(3), as added by 2007 PA 52.

[18] *Green Party of Mich v Mich Secretary of State*, 541 F Supp 2d 912, 924 (ED Mich, 2008).

[19] 2007 PA 52, enacting § 1.

[20] See *John Spry Lumber Co v Sault Savings Bank Loan & Trust Co*, 77 Mich 199, 200-202; 43 NW 778 (1889).

D. PRACTICAL POLITICAL CONSULTING'S FOIA REQUEST AND THE SECRETARY'S DENIAL

On March 26, 2008, plaintiff, Practical Political Consulting, Inc., through Jon Hansen, faxed a handwritten request to officials of the Secretary's department requesting "a copy of all vote history of the 1/15/08 presidential primary including which ballots each voter selected (D or R)." Practical Political Consulting, again through Jon Hansen, then sent a confirming e-mail requesting "all voter history pertaining to that (the January 15, 2008 presidential primary) election including which ballot, D or R, each voter selected." Although the language of these two requests is somewhat different, the substance is essentially the same. Collectively, therefore, they constitute the March 26, 2008 FOIA request.

On April 17, 2008, the Secretary, through FOIA Coordinator Melissa Malerman, denied Practical Political Consulting's request. The Secretary set forth three grounds for this denial. First, she asserted that the "party preference information collected during the primary" was not a public record as defined by FOIA. Second, the Secretary asserted that the "party preference data" was exempt from disclosure under § 13(1)(a) of FOIA, the privacy exemption.[21] Third, the Secretary asserted that the "voter preference information" was exempt from disclosure under § 13(1)(d) of FOIA, the statutory exemption.[22]

Importantly, the Secretary then went on to offer the release of the names and addresses of those who voted in the January 15, 2008, primary. She stated:

> Although the nature of the Department's duties have changed as described above, and under the present circumstances the information you seek does not meet the definition of a public record under the FOIA, the Department does have in its possession the names and addresses of those who voted on January 15, 2008. Despite the denial of your request, in the spirit of cooperation, the Department wishes to extend to you the opportunity to obtain this information. By extending this opportunity, the Department does not waive any legal positions that could be asserted in the event of litigation.

E. THE FOIA LITIGATION

Practical Political Consulting then brought suit against the Secretary, as allowed by FOIA.[23] The Secretary moved for summary disposition, but the trial court denied her motion and entered a judgment against her as well as granted a request for injunctive relief enjoining her from violating FOIA by "claiming that the records sought in this case are not public records, or claiming exemptions to the production of the records sought in this case under §13(1)(a) and/or

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[21] MCL 15.243(1)(a).

[22] MCL 15.243(1)(d).

[23] MCL 15.240(1)(b).

§ 13(1)(d) of the FOIA." However, the trial court granted the Secretary's request for a stay pending appeal. The Secretary then appealed, asserting that the "records requested by" Practical Political Consulting were exempt under § 13(1)(a) of FOIA, the privacy exemption, and § 13(1)(d) of FOIA, the statutory exemption. Significantly, the Secretary dropped her assertion that the records Practical Political Consulting requested were not public records.

II. THE STATUTORY EXEMPTIONS TO DISCLOSURE UNDER FOIA

A. STATUTORY PROVISIONS

Section 13(1)(d)[24] of FOIA sets out the "statutory exemption" to disclosure under FOIA as follows:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> * * *
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> (d) Records or information specifically described and exempted from disclosure by statute.

The specific statutory exemption at issue here, the 1995 FOIA provision, is contained in amended § 495a of the Michigan Election Law relating to restrictions on disclosure.[25] As noted above, the 1995 FOIA provision contained two new subsections. The first, amended § 495a(1),[26] is backward looking in that it pertains to declarations of party preferences "as previously provided under this act . . . ." This subsection is therefore not at issue here.

The second subsection, amended § 495a(2), of the 1995 FOIA provision is, however, forward looking and directly relevant. This subsection states:

> Beginning on the effective date of the amendatory act that added this sentence [November 29, 1995], a person making a request under the freedom of information act . . . is not entitled to receive a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector. Beginning on the [same date], a clerk or any other person shall not release a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector.[27]

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[24] MCL 15.243(1)(d).

[25] MCL 168.495a, as amended by 1995 PA 213.

[26] MCL 168.495a(1), as amended by 1995 PA 213.

[27] MCL 168.495a(2), as amended by 1995 PA 213 (citation omitted).

As noted above, 2007 PA 52 repealed the 1995 FOIA provision. But a federal court later found § 615c of 2007 PA 52 to be unconstitutional. Because 2007 PA 52 contained a nonseverability clause, the entire act, including the repealer, was null and void. Therefore, the 1995 FOIA provision, including amended § 495a(2), is now back in effect. Under that subsection, the question before us is twofold. First, was the March 26, 2008, FOIA request a request for a copy of an identifiable public record specifically described and exempted from disclosure under amended § 495a(2)? Second, even if the March 26, 2008, FOIA request was not a request for a copy of an identifiable public *record* specifically described and exempted from disclosure under amended § 495a(2), was the *information* in that public record specifically described and exempted from disclosure under amended § 495a(2)?

B. THE "SEPARATE RECORD" AND AMENDED § 495A(2)

Section 1(1) of FOIA[28] titles it the "'freedom of information act,'" and it has been referred to in that fashion since its enactment. However, in at least some respects, it could more accurately be described as the "access to public records act." Indeed, § 3(1) of FOIA, its basic enabling section, states:

> Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a *public record* sufficiently to enable the public body to find the *public record*, a person has the right to inspect, copy, or receive copies of the requested *public record* of the public body.[29]

Here, the public records in question are the "separate record[s]" created under § 615c(3) of 2007 PA 52[30] for the 2008 presidential primary that contain the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary. The Secretary apparently now concedes that these "separate record[s]" are public records and it is fairly clear, although Practical Political Consulting's request was informally worded and not overly precise, that these "separate record[s]" were also the public records that Practical Political Consulting sought in its March 26, 2008, FOIA request.

But it is also equally clear that these "separate record[s]" are *not* specifically described and exempted from disclosure under amended § 495a(2). That subsection refers to "voter registration record[s]." Presumably, these "voter registration record[s]" include "registration affidavits," along with considerable other information, declarations of party preference by

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[28] MCL 15.231(1).

[29] MCL 15.233(1) (emphasis added).

[30] MCL 168.615c(3), as added by 2007 PA 52.

electors[31] and, if applicable, "registration list[s]"[32] that also include, along with other information, declarations of party preference by electors.

The "voter registration record[s]" that amended § 495a(2) exempts from disclosure are completely distinct from the "separate record[s]" kept under § 615c(3) of 2007 PA 52. And there is simply no way of reasonably construing the statutory exemption from disclosure for "voter registration record[s]" under amended § 495a(2) as specifically describing and exempting the "separate record[s]" kept under § 615c(3) of 2007 PA 52. These "separate record[s]" are not "voter registration record[s]" at all. Rather, they are records of the participating political party ballots—along with the printed name, address, and qualified voter file number of each elector—that electors selected at their polling places in order to vote in the 2008 presidential primary.

As such, these "separate record[s]" have nothing whatever to do with voter registration. Again, they are simply the names, addresses, and the qualified voter file number of electors voting in the 2008 presidential primary along with the participating political party ballot selected by such electors in that presidential primary. Because they are not "voter registration record[s]," they are not exempt from disclosure under amended § 495a(2).

C. THE "INFORMATION" KEPT UNDER § 615C(3) OF 2007 PA 52

There is, however, a more subtle point to be explored. Section 13(1)(d) of FOIA, the provision that contains the statutory exemption,[33] refers not only to *records* but also to *information*, and there is an "or" between these two words. Arguably, the *information* is a term to be interpreted separately and distinctly from the term *records.* Thus, it could be argued—and the dissent does argue—that amended § 495a(2)[34] of the 1995 FOIA provision prohibits the disclosure of all party preference *information* in the future.

Section 13(1)(d) of FOIA clearly refers not only to "[r]ecords" but also to "information." But the "information" kept under § 615c(3) of 2007 PA 52 is not an elector's "*declaration* of party preference" (or no preference). And it is *only* such *declarations* of party preference that amended § 495a(2)[35] exempts from disclosure. On its face, the only "information" kept under § 615c(3) of 2007 PA 52 is "information" regarding the participating political party ballots—along with the printed name, address, and qualified voter file number of each elector—that electors selected in order to vote in the 2008 presidential primary. Such *selections* by electors are manifestly not *declarations* of party preference.

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[31] See MCL 168.495(1)(a)-(k), as amended by 1988 PA 275.

[32] See MCL 168.501a, as amended by 1987 PA 37.

[33] MCL 15.243(1)(d).

[34] MCL 168.495a(2), as amended by 1995 PA 213.

[35] *Id.*

Perhaps the best way of illustrating this rather technical linguistic distinction is by example. Under the 1988-1995 closed presidential primary system, in order to vote in a presidential primary an elector had to *declare* a party preference (or that the elector had no party preference).[36] Thus, in effect, the elector was required to declare that he or she was a Democrat, a Republican, or a member of another party. Alternatively, the elector could declare no party preference. Only those electors who declared a party preference 30 days before the presidential primary election could vote for the candidates in any of the parties' respective presidential primaries. Thus, without a previous declaration, a Democrat, for example, could not vote in the Democratic Party's presidential primary. The declaration of party preference, therefore, had real meaning. It effectively excluded those persons who were unwilling to make such a declaration at least 30 days in advance from voting in their respective political parties' presidential primaries.

By contrast, the "information" kept under § 615c(3) of 2007 PA 52 is "information" regarding the participating political party ballots—along with the printed name, address, and qualified voter file number of each elector—that electors selected in order to vote in the 2008 presidential primary. Such "information" is not the "*declaration* of party preference" (or no party preference) that amended § 495a(2)[37] exempts from disclosure.

To illustrate, again by way of example, in 2008, a Democrat, knowing that the Democratic Party candidates were choosing not to campaign in the presidential primary in Michigan, could have selected the ballot for and voted in the Republican Party's presidential primary. That Democrat was not making a "declaration" of party preference. Rather, he or she was simply choosing to vote in the Republican Party's 2008 presidential primary. This choice—a ticket to ride obtained at the polling place, good for that day only and not applicable to any other trains (in the form of future presidential primaries) that might leave the station—is not voter *registration* information and it certainly is not a *declaration* of party preference. Thus, amended § 495a(2)[38] does not exempt from disclosure the "information" regarding party preference contained in the "separate record[s]" kept under § 615c(3) of 2007 PA 52 because that information is not a "declaration of party preference" (or no preference). It follows, therefore, that § 13(1)(d) of FOIA does not apply to that "information," because no statutory exemption covers it.

The dissent concedes that the voter registration records protected under amended § 495a(2) are not the "exact same records" as the separate records kept under § 615c(3) of 2007 PA 52.[39] But the dissent contends that the information contained in these records is nevertheless the same.[40] This can be so only if a declaration by an elector of a party preference—30 days in

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[36] MCL 168.495(1)(k), as amended by 1988 PA 275.

[37] MCL 168.495a(2), as amended by 1995 PA 213.

[38] *Id.*

[39] *Post* at 9.

[40] *Post* at 9.

advance of a presidential primary—is the same as a selection by an elector—on the day of the presidential primary—of a participating political party ballot on which that elector wishes to cast his or her vote. If we are to assume—and we do—that words have meaning, and if we are required to operate under the presumption—and we are certainly so required—that the Legislature chooses the words it uses both purposefully and precisely, then a declaration of a party preference under amended § 495a(2) is *not* the same as a selection of a ballot under § 615c(3) of 2007 PA 52.

The fact that eligibility to vote was "conditioned"[41] upon both a declaration of party preference, on the one hand, and the selection of a ballot, on the other, does not make the information collected under amended § 495a(2) and § 615c(3) of 2007 PA 52 the same, or even similar, information. The distinction in the terms that the Legislature used is one *with* a difference. Accordingly, the phrase "declaration of party preference" does *not* "plainly and unambiguously encompass[] an elector's selection of a party's ballot."[42] These are two separate and distinct acts and, the dissent to the contrary, the information relating to them is similarly separate and distinct.

III. THE PRIVACY EXEMPTION TO DISCLOSURE UNDER FOIA

A. STATUTORY PROVISIONS

Section 13(1)(a) of FOIA sets out the "privacy exemption" to disclosure under FOIA as follows:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
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> (a) Information of a personal nature if public disclosure of the information would constitute a *clearly unwarranted* invasion of an individual's privacy.[43]

B. OVERVIEW

It is well at the outset to be clear about exactly what information is at issue here. First, the information at issue is *not* the names and addresses of the persons who voted in the 2008 presidential primary. As the Secretary concedes, she has released the names and addresses of registered voters in the past. And there is ample precedent, in a number of different contexts, for the release of names and addresses.[44]

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[41] *Post* at 9.

[42] *Post* at 9.

[43] MCL 15.243(1)(a) (emphasis added).

[44] See, for example, *Int'l Union, United Plant Guard Workers of America v Dep't of State Police*, 422 Mich 432; 373 NW2d 713 (1985) (list containing names and home addresses of individuals employed by private security guard agencies was not so personal and private that it should not be

Second, the information at issue is *not* simply the listing of the number of votes cast in any of the political parties' 2008 presidential primaries, with names and addresses redacted. Self-evidently, this information is available to any interested citizen who cares to inspect the publicly published results of the 2008 presidential primaries. Indeed, that same citizen could quickly learn how many votes were cast for each *candidate* of the respective parties in each of the 2008 presidential primaries by inspecting the same publicly available results.

Rather, it is the names and addresses of the persons who voted in the 2008 presidential primary *coupled with* the party preference that those persons indicated in order to obtain a ballot relating to one of the participating political parties. It is this information that the Secretary asserts is exempt from disclosure under the privacy exemption of FOIA.

We are to engage in a two-pronged inquiry to ascertain whether the privacy exemption is applicable. First, we must determine whether the information is "'of a personal nature.'" Second, we must determine whether the "public disclosure of that information 'would constitute a clearly unwarranted invasion of an individual's privacy.'"[45]

In interpreting statutes, our goal is to ascertain the Legislature's intent.[46] And in so doing, our first step is to look at the language that the Legislature used.[47] This is so because "[t]he words of a statute provide 'the most reliable evidence of [the Legislature's] intent . . . .'"[48] But, here, the Secretary implies that we should go beyond the words of the statute and consider "a sampling of public outrage expressed during the 1992 closed presidential election." She then quotes at length from newspaper articles, editorials, and letters to the editor concerning the 1992 primary and suggests, without any supporting authority, that we can take judicial notice of these articles, editorials, and letters to the editors. We decline to do so. Our inquiry here is, and must be, limited to the words of the statute.

The dissent similarly relies on the deus ex machina of public outcry to underpin its analysis of the enactment of the 1995 FOIA provision.[49] The dissent states that, "A Senate Fiscal Agency Bill Analysis cited 'public outrage' as a reason for changing the primary election system

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disclosed); *Tobin v Civil Serv Comm*, 416 Mich 661; 331 NW2d 184 (1982) (FOIA does not prohibit disclosure of names and addresses of classified civil service employees to public employee labor organizations); *Mich State Employees Ass'n v Dep't of Mgt & Budget*, 135 Mich App 248; 353 NW2d 496 (1984) (employees' home addresses do not fall under privacy exemption of FOIA).

[45] *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 675; 753 NW2d 28 (2008).

[46] *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004).

[47] *Id.* at 549.

[48] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

[49] See *post* at 2, n 1.

from a closed system to an open one."[50] The Legislature did no such thing. One legislative analyst reached that conclusion. That analyst's views reflected the analyst's own opinion, nothing more. Those views may not have been the views of a single legislator, much less of the entire Legislature at the moment it voted upon the legislation in question.[51]

Upon this highly suspect basis, the dissent piles a goodly number of imaginary horribles that it anticipates may occur if the Secretary releases the names and addresses of the persons who voted in the 2008 presidential primary coupled with the party preference that those persons ostensibly indicated. The dissent asserts that disclosure "could subject electors to unwanted or unwarranted attention from peers, colleagues, and neighbors and could result in serious discomfort amongst family members."[52] And, the dissent states, "[I]n some instances, disclosure could subject electors to harassment or ridicule from those same groups and could impact a person's professional career, especially if that person is employed in a political profession, such as a public officer or an employee of a nonprofit political organization."[53]

We can only emphasize that this is pure speculation, with not a speck of evidence—other than the alleged "public outcry" over disclosure of party declaration information taken whole cloth from a single legislative analysis by an unknown author—to support it.

Moreover, the future use of the information is irrelevant to determining whether the privacy exemption applies.[54] And, as the Michigan Supreme Court has recently proclaimed, only the circumstances known to the public body at the time of the request are relevant to whether an exemption precludes disclosure.[55] Because Practical Political Consulting did not reveal the purposes for its March 26, 2008, FOIA request, the Secretary could not have known those purposes at the time of her denial. And no matter what use Practical Political Consulting may make of the requested information—even if Practical Political Consulting intends to send unwanted mass mailings or a deluge of junk mail or make telephone solicitations or personal visits[56]—such future use is irrelevant.

We also note the dissent's reliance[57] on the "explicit" provision of 2007 PA 52 that exempts "information acquired or in the possession of a public body indicating which

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[50] *Post* at 2, n 1.

[51] *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 n 7; 624 NW2d 180 (2001).

[52] *Post* at 11.

[53] *Post* at 12.

[54] *State Employees Ass'n v Dep't of Mgt & Budget*, 428 Mich 104, 121; 404 NW2d 606 (1987).

[55] *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008).

[56] See *post* at 19.

[57] See *post* at 14.

participating political party ballot an elector selected at a presidential primary" from disclosure under FOIA.[58] We agree that such an exemption from disclosure under FOIA existed in 2007 PA 52. But we note that 2007 PA 52 also contained an *explicit* nonseverability provision.[59] Therefore, while it is clear that the Legislature intended to exempt from disclosure information regarding which participating political party ballot an elector selected in the 2008 presidential primary, it is also clear that the Legislature intended that if any provision of 2007 PA 52 were to be found invalid, the remainder of the statute would likewise be "invalid, inoperable, and without effect."[60] And, of course, that is exactly what happened.

In essence, then, in 2007 PA 52, the Legislature created a structure that was whole and complete unto itself. But the Legislature also provided that if any component of that structure were to be removed, the entire edifice would crumble. Therefore, the exemption from disclosure under the FOIA provision of 2007 PA 52, like all other provisions of the statute, would fall of its own weight and would henceforth be "invalid, inoperable, and without effect." Under such circumstances, there can no other conclusion but that the Legislature clearly intended that the situation would revert to the *status quo ante* and that amended § 495a(2)[61] would be once again of full force and effect. Thus, of necessity, we are left with the language of amended § 495a(2) as it existed *before* the Legislature enacted 2007 PA 52, with the language of the FOIA privacy exemption itself, and with the cases interpreting or relevant to that language. And that is where we should start our analysis and where we should end it.

C. INFORMATION OF A PERSONAL NATURE

Although the Secretary and the dissent discount its importance, the decision in *Ferency v Secretary of State*[62] is of direct relevance to whether the names and addresses of the persons who voted in the 2008 presidential primary coupled with the party preference that those persons indicated is information of a personal nature. In deciding a similar—although admittedly not exactly the same—question, this Court in *Ferency* stated:

> This [the disclosure of party affiliation] does not violate the secrecy of the ballot, *because there is no legitimate interest by the voter to shield his affiliation from a party where that voter decides to participate in the party activities and where the ballot remains secret once the voter gets in the primary election booth*.[63]

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[58] MCL 168.615c(4), as added by 2007 PA 52.

[59] 2007 PA 52, enacting § 1.

[60] *Id.*

[61] MCL 168.495a(2), as amended by 1995 PA 213.

[62] *Ferency v Secretary of State*, 190 Mich App 398; 476 NW 2d 417 (1991).

[63] *Id.* at 418 (emphasis added).

It is helpful to break this quotation down in order to understand it fully. The disclosure of party affiliation in question was the declaration of party preference that, under the 1988-1995 closed primary system, an elector had to make 30 days in advance in order to vote in a party's presidential primary. As noted, in effect, the elector was then declaring that he or she was a Democrat, a Republican, or a member of another party.

By contrast, in 2008, an elector was not making a declaration of a party preference. Rather, that elector was simply indicating the ballot—Democratic, Republican, or a third party—that he or she wished to vote. Certainly, the indication of a ballot that an elector wished to vote in the 2008 presidential primary is information of a less personal nature than is a declaration of a party preference that an elector was required to make, if he or she wished to vote in a presidential primary, between 1988 and 1995.

It is possible to distinguish *Ferency* on the ground that it relates to information that was to be given to a political *party* rather than, as is the case here, information that is available to *the general public*. This is certainly relevant to the party's interest in conducting its presidential primaries. But we do not understand how a wider distribution to the general public, as would be the case here, as contrasted to a more limited distribution to the political parties, as was the case between 1988 and 1995, makes the information in question here any more personal in nature than it would otherwise be.

Last, and perhaps most fundamentally, the whole thrust of the sacrosanct concept of ballot secrecy[64] is to protect from disclosure the identity of the *candidates* for which an elector voted. This is, after all, why we vote in secret. But, the dissent to the contrary,[65] the disclosure of the *ballot*—Republican, Democrat, or other—that an elector voted in the 2008 presidential primary is obviously *not* the disclosure of the *candidate* for which that elector voted. As this Court said in *Ferency:*

> The requirement that a voter publicly register as being affiliated with one party or the other in order to be eligible to vote in the presidential primary does not itself directly affect the secrecy of the voter's ballot. That is, the voter is not required to disclose which individual candidate he is voting for, but is merely required to disclose from which group of candidates he is making his selection (i.e., which party primary he is voting in).[66]

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[64] See Const 1963, art 2, § 4.

[65] See *post* at 11: "Disclosure would reveal that a person voted for particular types of candidates *and an inference could be drawn as to whom an individual voted for on the basis of the makeup of the ballot*." (Emphasis added). We fail to see how, for example, the disclosure that an individual selected the Republican ballot as the one on which he or she preferred to vote in the 2008 presidential primary would permit an inference that the individual voted for John McCain rather than Mitt Romney.

[66] *Ferency*, 190 Mich App at 414.

We therefore conclude that the indication of a ballot that an elector wished to vote in the 2008 presidential primary is not information of a personal nature.

D. CLEARLY UNWARRANTED INVASION OF AN INDIVIDUAL'S PRIVACY

Even if the disclosure of information regarding the ballots that electors voted in the 2008 presidential primary is the disclosure of personal information, this is not enough to exempt this information from disclosure. Such disclosure must also constitute a "clearly unwarranted" invasion of an individual's privacy.[67] This inquiry requires us to

> balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect[.] . . . [T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.[68]

In Michigan, from 1988 to 1995, there was no restriction upon the release not only of electors' names and addresses but also upon their declarations of party preference. This disclosure of the names and addresses was a warranted invasion of personal privacy because that disclosure was necessary to inform the general public whether voters were properly registered and whether they were voting in the proper precinct. Disclosure of such information, if requested, was necessary to hold government accountable for the integrity and purity of this state's elections.

This is the core purpose of FOIA. That purpose is to provide the people of this state with full and complete information regarding the government's affairs and the official actions of governmental officials and employees.[69] As this Court said in *State News v Mich State Univ*:[70]

> Central to both the broad policy and the implementing mechanisms of FOIA is the concept of accountability. FOIA, through its disclosure provisions, allows the citizens of Michigan to hold public officials accountable for the decisions that those officials make on their behalf. By shifting the balance away from restricted access to open access in all but a limited number of instances, the Legislature necessarily determined that, except in those limited instances, disclosure facilitates the process of governing because it incorporates the concept of accountability.

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[67] MCL 15.243(1)(a); *Mich Federation of Teachers*, 481 Mich at 675.

[68] *Mich Federation of Teachers*, 481 Mich at 673 (quotation marks and citations omitted).

[69] MCL 15.231(2); *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006).

[70] *State News v Mich State Univ*, 274 Mich App 558, 567-568; 735 NW2d 649 (2007), rev'd in part on other grounds 481 Mich 692 (2008).

The Secretary clearly recognizes the concept of accountability. But she turns away from that concept when she argues that, assuming the public has an interest in knowing how public officials performed their tasks associated with the 2008 presidential primary, "the linking of party preference information with voter name, address, and qualified voter number, does nothing to inform the public about how local clerks of the Secretary . . . are performing their statutory and public duties with regard to elections." To the contrary, we conclude that disclosure of such information *would* inform the public to what extent the Secretary and the various local clerks carried out the requirements of 2007 PA 52. Indeed, there is no other way by which these individuals can be held accountable for their implementation of a then-valid statute. And, we emphasize, there is no doubt that the public has a strong and ongoing interest in knowing how public officials perform the tasks that the law assigns to them.

Thus, there is a strong—not a "virtually nonexistent"[71]—public interest in disclosure. And, conversely, in order to avoid disclosure, a party must show a "clearly unwarranted" invasion of an individual's privacy.[72] In a manner of speaking, the Legislature when enacting, and courts when interpreting, the privacy exemption of FOIA have weighted the scales heavily in favor of disclosure: the balance to be struck is between the public's ongoing interest in governmental accountability, on the one hand, and *clearly unwarranted* invasions of privacy on the other. Under this exemption, the scales are not balanced equally at the outset, and for good reason. In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's, or a group of individuals', expectation of privacy. As Louis D. Brandeis stated so many years ago, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[73]

And, we emphasize, if there ever was an area in which that disinfectant is the most needed, it is in the conducting of elections. Elections constitute the bedrock of democracy and the public's interest in the purity of such elections is of paramount importance. If we cannot hold our election officials accountable for the way in which they conduct our elections, then we risk the franchise itself. And we cannot hold our election officials accountable if we do not have the information upon which to evaluate their actions. We therefore conclude that, even if the indication of a ballot that an elector wished to vote in the 2008 presidential primary were to be viewed as being of a personal nature, its disclosure would not be a clearly unwarranted invasion of that elector's privacy.

IV. CONCLUSION

FOIA is a pro disclosure statute that we are to interpret broadly to allow public access. Conversely, we are to interpret its exemptions narrowly so that we do not undermine its

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[71] *Post* at 19.

[72] MCL 15.243(1)(a); *Mich Federation of Teachers*, 481 Mich at 675.

[73] Louis D. Brandeis, *Other People's Money – and How the Bankers Use It* 92 (Fredericks A. Stokes Co, 1914).

disclosure provisions.[74] Simply put, the core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials.[75] Here, there is no question that the "separate record[s]" created under § 615c(3) of 2007 PA 52[76] for the 2008 presidential primary that contain the printed name, address, and qualified voter file number of each elector and the participating political party ballot selected by that elector at the 2008 presidential primary are public records. And there is no question that these "separate record[s]" were also the public records that Practical Political Consulting sought in its March 26, 2008, FOIA request.

As we have outlined above, these "separate record[s]" are *not* specifically described and exempted from disclosure under amended § 495a(2). The "voter registration record[s]" that amended § 495a(2) exempts from disclosure are completely distinct from the "separate record[s]" kept under § 615c(3) of 2007 PA 52. Further, "information" kept under § 615c(3) of 2007 PA 52 is not an elector's "declaration of party preference" (or no preference). And it is *only* such *declarations* of party preference that amended § 495a(2) exempts from disclosure. With this in mind, we conclude that the statutory exemption to disclosure under FOIA applies neither to these "separate record[s]," nor to the information contained therein.

Moreover, the disclosure of information regarding the ballots that electors voted in the 2008 presidential primary is not the disclosure of personal information. But even if it were, such disclosure would not constitute a "clearly unwarranted" invasion of an individual's privacy. Thus, we conclude that the privacy exemption to disclosure under FOIA also does not apply to these "separate record[s]" or to the information contained in them.

Affirmed. No costs, a public question being involved.

/s/ William C. Whitbeck
/s/ Stephen L. Borrello

BORRELLO, P.J., concurred.

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[74] *State News*, 274 Mich App at 567.

[75] *Id.*

[76] MCL 168.615c(3), as added by 2007 PA 52.