# STATE OF MICHIGAN

# COURT OF APPEALS

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

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

K. F. KELLY, J. (*dissenting*).

I respectfully dissent from my distinguished colleagues' conclusion that the requested records are not exempt from disclosure under the statutory and privacy exemptions of the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* In my view, the information collected during the 2008 presidential primary is information protected by statute and its disclosure would constitute a "clearly unwarranted invasion" of an individual's privacy, and thus is exempt from disclosure under the FOIA.

## I. HISTORICAL BACKGROUND AND PROCEDURAL HISTORY

Michigan's election law governs the selection of public officials to public office and is meant to ensure the purity and integrity of elections. 1954 PA 116, enacting MCL 168.1 *et seq.*; *Taylor v Currie*, 277 Mich App 85, 96; 743 NW2d 571 (2007). A particular set of rules applies to presidential primary elections, by which voters of political parties determine which nominees will run in the general presidential election. See *O'Hara v Wayne Co Clerk*, 238 Mich App 611, 614-615; 607 NW2d 380 (1999). The presidential primary election rules control the selection of nominees for each party, the choice of delegates, and voting requirements for individuals voting in the primary. Michigan Department of State, Bureau of Elections, *Michigan Presidential Primary Facts & Statistics* (October 16, 2006). Historically, Michigan has employed either a "closed" or an "open" primary election system; generally, the former system requires voters to disclose their political party preference before they are eligible to vote in the election, while the latter allows electors to vote in the primary without disclosing any party preference beforehand. Because an overview of Michigan's primary election system informs my viewpoint, I briefly discuss the relevant history below.

## A. MICHIGAN'S 1988 PRIMARY ELECTION LAW

In 1988, Michigan used a closed primary system. MCL 168.495(1)(k), as amended by 1988 PA 275 (1988 election law). In order to vote in the primary, individuals were required to declare their party preference on their registration record at least 30 days before the primary. MCL 168.523(3), as amended by 1988 PA 275. An individual who properly declared himself or herself as a Republican, for example, would be eligible to vote only for Republican candidates, as well as nonpartisan candidates. The converse would be true for a Democrat. Voters who did not declare a preference were not eligible to vote in the presidential primaries. For voters who did submit a declaration, the information regarding the voters' party preference was captured, recorded, and maintained on their registration files with the Secretary of State. MCL 168.495a, as added by 1988 PA 275. The 1988 election law did not address whether this information, including voters' identifying information and party preference information, was disclosable to the general public or whether this information could be deleted from a voter's file.

## B. MICHIGAN'S PRIMARY ELECTION LAW BETWEEN 1995 AND 2003

The requirement that voters declare a political preference, and the lack of protection as to that information, caused a public outcry.[1] In response to the public's concern over the privacy of their political preferences, the Legislature amended the election law to require open primaries. MCL 168.495, as amended by 1995 PA 87. Under this system, it was no longer necessary for electors to disclose their party preferences in order to vote in the primary. Rather, voters arriving at the polls on the day of the primary election were given access to both parties' ballots. The

---

[1] A Senate Fiscal Agency Bill Analysis cited "public outrage" as a reason for changing the primary election system from a closed system to an open one. Specifically, it reasoned:

> It has become clear that while some voters will register their party preference before voting, many feel that it is an intrusion on their right to a secret ballot, and simply will not divulge that information in order to be allowed to vote. . . . While [changes to party rules allowing undeclared voters to vote] made it less likely that a registered voter would be turned away at the polls, the fact remained that an examination of voting records would reveal [the] party's primary in which the person voted. What the voters of Michigan want is a return to the time-honored tradition of the secret ballot. The bill, by re-establishing an open primary, would fulfill that desire. [Senate Fiscal Agency Bill Analysis, HB 4435, May 30, 1995.]

While Legislative history is not relevant in construing the meaning of a statute, amendments to legislation *are* relevant in the context of the FOIA's privacy exemption. When FOIA exemptions are at issue, Legislative enactments may be considered as some evidence of the community's mores and values. See *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 677 n 59; 753 NW2d 28 (2008) (noting recent legislative changes as indicative of a community's customs).

voter would then, in the privacy of the election booth, select the party primary in which he or she wanted to participate. The ballot the voter selected was not recorded by voting officials and no reference whatsoever to a voter's selection was created, or maintained, in a voter's registration file. Nonetheless, for voters who previously voted in a closed primary, their prior political declarations remained on file as a public record.

Also in 1995, the Legislature further amended the election law to provide that voters' declarations of party preferences are not disclosable through the FOIA. MCL 168.495a, as amended by 1995 PA 213 (the 1995 FOIA provision). Specifically, that provision provided:

> (1) 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.
>
> (2) Beginning on [November 29, 1995], a person making a request under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, 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 effective date of the amendatory act that added this sentence, 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. [MCL 168.495a, as amended by 1995 PA 213.]

In other words, as of 1995, Michigan employed an open primary system that did not require a declaration of, and did not record, electors' political preferences, and which also prohibited the disclosure through the FOIA of voter registration records containing any such political preference. Between 1995 and 2007, a number of additional amendments were made to Michigan's presidential primary election law, the last in 2003, but none of these affected the election system's status as an open primary system that prohibited disclosure of voter registration records containing political preferences. See 1999 PA 72; 2003 PA 13.

## C. MICHIGAN'S 2007 PRIMARY ELECTION LAW

Before the 2008 presidential primary, the Legislature again amended Michigan's election law to employ a semi-closed primary process. See MCL 168.615c, as added by 2007 PA 52 (2007 election statute). Under this new amendatory act,[2] there was no requirement that a voter declare a party preference 30 days ahead of time in order to vote in the presidential primary. Rather, voters arriving at the polls were required to indicate in writing on a form provided by the

[2] The 2007 election law amended seven provisions of the existing election law, added three new sections, and contained two enactments.

Secretary of State's office which ballot they preferred, Democratic or Republican. MCL 168.615c(1). When the voter selected his or her ballot, city or township clerks were required to capture this information in a separate record, which contained the printed name, address, qualified voter file number of each voter, and the political party ballot the voter had selected. MCL 168.615c(3).

Significantly, the 2007 election statute also included a nonseverability clause. 2007 PA 52, enacting § 1. That provision provided:

> If any portion of this amendatory act or the application of this amendatory act to any person or circumstances is found invalid by a court, it is the intent of the legislature that the provisions of this amendatory act are nonseverable and that the remainder of the amendatory act shall be invalid, inoperable, and without effect.

In addition, the 2007 election statute repealed certain sections of Michigan's election law, including the 1995 FOIA provision, MCL 168.495a. 2007 PA 52, enacting § 2 (the repealer). In its place, the 2007 election law provided its own FOIA provision, which provided:

> (4) Except as otherwise provided in this section, the information acquired or in the possession of a pubic body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the [FOIA], and shall not be disclosed to any person for any reason. [MCL 168.615c(4), as added by 2007 PA 52.]

The 2007 election statute went into effect on September 4, 2007.

## D. THE 2008 PRESIDENTIAL PRIMARY

The 2008 primary election was carried out according to the 2007 election statute. However, shortly after the 2008 primary, a federal district court declared § 615c of the 2007 election statute unconstitutional as a violation of the United States Constitution's Equal Protection Clause in *Green Party of Mich v Mich Secretary of State*, 541 F Supp 2d 912, 924 (ED Mich, 2008). Accordingly, because of the 2007 election law's non-severability clause, the entire amendatory act fell together and it became null and void. See, e.g., *John Spry Lumber Co v Sault Savings Bank Loan & Trust Co*, 77 Mich 199, 200-202; 43 NW 778 (1889) (concluding that all provisions of a nonseverable unconstitutional statute fall together, leaving the prior law intact); *M & S Builders v Dearborn*, 344 Mich 17, 19-20; 73 NW2d 283 (1955) (finding that a repeal became invalid with the rest of an amendment that was declared invalid, thus reviving the prior law). Thus, the repealer was struck down, as was the 2007 election law's FOIA provision. As a result, and as the parties agree, Michigan's prior election law, as it stood in 2003, applies to this matter.

## E. PLAINTIFF'S FOIA REQUEST

On March 26, 2008, the same day the federal court announced its decision, plaintiff, Practical Political Consulting, Inc., submitted a FOIA request to defendants. Specifically, plaintiff requested "all voter history [of the 2008 presidential primary election] including which

ballot, [Democratic or Republican], each voter selected." This information was the information collected pursuant to the 2007 election statute.

On April 17, 2008, defendants denied the FOIA request, reasoning that the requested documents were not public records and were exempt from disclosure under the statutory exemption of the FOIA, MCL 15.243(1)(d), which provides:

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

Defendants also reasoned that the party preference information was exempt under the FOIA's privacy exemption, which states:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. [MCL 15.243(1)(a).]

More specifically, defendants posited that the information was protected from disclosure under either the 2007 election statute's FOIA provision or its predecessor provision, the 1995 FOIA provision, MCL 168.495a; and, further, that the records contained information of a personal nature, the disclosure of which would not provide meaningful insight into the workings of the government, and would be a clearly unwarranted invasion of individuals' privacy.

As a result of defendants' denial, plaintiff sought a judgment in the trial court declaring defendants to be in violation of the FOIA. On the parties' cross-motions for summary disposition, the trial court ruled in plaintiff's favor. It found that the records created were public records and that neither exemption applied.

Defendants appeal as of right, asserting that the records, and the information contained therein, are exempt under the FOIA.[3] Disclosure of the requested records was stayed pending the outcome of this appeal.

## II. STANDARDS OF REVIEW

[3] On appeal, defendants no longer contend that the records are not "public records."

Whether a public record is exempt from disclosure pursuant to the FOIA is a question of law reviewed de novo. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006). In addition, review of the trial court's decision on the parties' motions for summary disposition is also de novo.[4] *Campbell v Dep't of Human Servs*, 286 Mich App 230, 234-235; 780 NW2d 586 (2009). Further, to the extent that this Court must engage in statutory construction, review is, again, de novo. *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008). The goal in interpreting a statute is to ascertain the Legislature's intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The first step in doing so is looking to the language used. *Id*. at 549. Effect must be given to each word, reading provisions as a whole, and in the context of the entire statute. *Green v Ziegelman*, 282 Mich App 292, 301-302; 767 NW2d 660 (2009). If the language is clear and unambiguous, the statute must be applied as written. *Beattie v Mickalich*, 284 Mich App 564, 570; 773 NW2d 748 (2009). In such instances, judicial construction is neither necessary nor permitted. *Id*. Further, because the FOIA is a prodisclosure statute, "its disclosure provisions [are interpreted] broadly to allow public access, and . . . its exceptions [are interpreted] narrowly so that . . . its disclosure provisions [are not undermined]." *State News v Mich State Univ*, 274 Mich App 558, 567; 735 NW2d 649 (2007) (*State News I*), rev'd in part on other grounds 481 Mich 692 (2008).

## III. THE FOIA

The purpose of Michigan's FOIA statute is to provide the people of Michigan full and complete information regarding the government's affairs and the official actions of governmental officials and employees. MCL 15.231(2); *Taylor v Lansing Bd of Water & Light*, 272 Mich App 200, 204; 725 NW2d 84 (2006). Disclosure of this information is designed to promote governmental accountability and is imperative to a democracy; full disclosure of governmental activity informs the citizenry so that they may fully participate in the democratic process. See MCL 15.231(2); *State News I*, *supra* at 567-568. Stated differently, the FOIA functions to allow the citizenry to hold public officials accountable for the decisions they make on behalf of those citizens. See, e.g., *Detroit Free Press, Inc v City of Warren*, 250 Mich App 164, 168-169; 645 NW2d 71 (2002) ("Under . . . FOIA, citizens are entitled to obtain information regarding the manner in which public employees are fulfilling their public responsibilities."); *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999) (noting that the FOIA is a manifestation of the state's public policy recognizing the need that public officials be held accountable for their official actions and citizens be informed); *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002) (explaining that the FOIA was enacted "recognizing the need for citizens to be informed so that they may fully participate in the democratic process and thereby hold public officials accountable for the manner in which they discharge their duties"). Accordingly, Michigan's FOIA statute requires a public body to disclose public records to individuals who

---

[4] Because the trial court considered information outside the pleadings, I consider the court's decision to be based on MCR 2.116(C)(10). A motion under this subrule is properly granted if there is no genuine issue of material fact and judgment is proper as a matter of law. *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43-44; 742 NW2d 624 (2007).

request to inspect, copy, or receive copies of its public records. MCL 15.233; *Scharret v City of Berkley*, 249 Mich App 405, 411-412; 642 NW2d 685 (2002).

However, certain public records need not be disclosed if they are exempt from disclosure under one of the exemptions articulated in MCL 15.243. If the requested public records fall within one of these exceptions, it is within the public body's discretion whether to release the information. *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997). In determining whether an exemption applies, the identity of the requester is irrelevant, as is the initial and the future use of the information. *State Employees Ass'n v Dep't of Mgt & Budget*, 428 Mich 104, 121; 404 NW2d 606 (1987) (opinion by CAVANAGH, J.). Moreover, only the circumstances known to the public body at the time of the request are relevant to whether an exemption precludes disclosure. *State News v Mich State Univ*, 481 Mich 692, 703; 753 NW2d 20 (2008) (*State News II*). Further, because the FOIA's core purpose is the disclosure of public records, the courts of this state have narrowly construed the FOIA's exemptions in favor of disclosure. *State News I*, *supra* at 567.

## IV. MCL 15.243(1)(d): THE FOIA'S STATUTORY EXEMPTION

On appeal, defendants first argue that the trial court erred by determining that the information collected at the 2008 primary election was not exempt from disclosure under the FOIA's statutory exemption. I would agree.

The FOIA's statutory exemption provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (d) Records *or information specifically described* and exempted from disclosure by statute. [MCL 15.243(1)(d) (emphasis added).]

By its terms, this exemption incorporates statutes that specifically exempt certain records or information from disclosure through the FOIA. Accordingly, there must be a statute specifically exempting the "[r]ecords or information specifically described" in order for this exemption to apply. Significantly, the provision uses the conjunction "or" between the words "[r]ecords" and "information." The term "or" is to be interpreted literally unless it renders a statute dubious; the word "or" denotes a choice or alternative. *Random House Webster's College Dictionary* (1997); see *Amerisure Ins Co v Plumb*, 282 Mich App 417, 429; 766 NW2d 878 (2009). Thus, a statute may specifically describe records that are exempt from disclosure or may specifically describe information that is exempt from disclosure. The term "record" means information preserved in writing or some other documentary medium, whereas "information" denotes knowledge communicated or received. *Random House Webster's College Dictionary* (1997). Accordingly, the FOIA's statutory exemption, MCL 15.243(1)(d), protects from disclosure records that are specifically described by statute *or* information that is specifically described by statute.

Here, the relevant statutory provision, the 1995 FOIA provision, states:

> (1) 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.
>
> (2) *Beginning on [November 29, 1995]*, a person making a request under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, 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 effective date of the amendatory act that added this sentence, 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. [MCL 168.495a, as amended by 1995 PA 213 (emphasis added).]

It is plaintiff's contention that when these subsections are read together, subsection (2) only applies to voter registration records created before the 1995 FOIA provision. I disagree. Subsection (1) of this provision permits a clerk or other authorized person to remove, in his or her discretion, "a party preference or no party preference *as previously provided under this act* for the purpose of voting in a statewide presidential primary election . . . ." This subsection specifically references removal of party preference information that was previously captured and recorded pursuant to previous versions of the election law.

Comparatively, subsection (2) prohibits disclosure through the FOIA of "a copy of a portion of a voter registration record that contains a declaration of party preference or no party preference of an elector" from November 29, 1995, on and forward. Importantly, subsection (2), unlike subsection (1), makes no reference whatsoever to whether the party preference information was collected under the previous election law; it merely forbids disclosure of "a copy of a portion of a voter registration record that contains a declaration of party preference," effective November 29, 1995. The phrase "as previously provided under this act," or other limiting language on how party preference information was obtained, is specifically absent from subsection (2).

Given the plain language of these two provisions, it is my view that the Legislature intended to accomplish two things through the 1995 FOIA provision. First, under subsection (1), it permits the removal of all party preference information previously captured. Clearly, this position does not diverge from the majority's view on this point. Second, it prohibits the disclosure of party preference information in the future. The Legislature did not intend to limit subsection (2)'s terms to political preference information collected under the prior law because the Legislature explicitly chose not to use the phrase "as previously provided under this act," or other similar limiting language. See cf. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 151; 662 NW2d 758 (2003) (explaining doctrine of *expressio unius est exclusio alterius*). Thus, contrary to plaintiff's argument, the protection from disclosure provided by subsection (2) applies to all portions of voter registration records containing a party declaration, including those records created in the future. It is in the application of this provision to the present matter that my viewpoint diverges from the majority's opinion.

The majority agrees with plaintiff that § 495a(2) does not apply to the records created in the 2008 primary because neither the records nor the information specifically described is the same as that protected by the 1995 FOIA provision, § 495a(2). While it may be true that the "voter registration record[s]" protected by § 495a(2) are not the exact same records in form that are specifically described, the substance, or the information specifically described by § 495a(2) and contained in those records, is the same.

Section 495a(2), the 1995 FOIA provision, specifically protects from disclosure through the FOIA an elector's "declaration of party preference . . . ." A "declaration" is a "proclamation," an "announcement," or an "act of declaring" something. *Random House Webster's College Dictionary* (1997). "Preference" is defined as "something preferred [or given priority]; choice; [or] selection." *Random House Webster's College Dictionary* (1997). Clearly, an elector arriving at the polls for the 2008 primary had to proclaim which party he or she preferred to vote for in order to vote, just as voters who voted in previous closed primaries had to declare which party they wished to vote for in order to vote. In both instances, eligibility to vote was conditioned upon a party preference declaration. In my view, this information is specifically described and protected by the 1995 FOIA provision, § 495a(2).

The majority, however, like plaintiff, attempts to draw a distinction between a voter's "declaration of party preference" in the closed primaries and a voter's selection of a party ballot in the semi-closed primary of 2008, to conclude that the information described is not protected by the 1995 FOIA provision, § 495a(2). Stated more succinctly, the majority posits that the selection of a party ballot is not synonymous with a declaration of party preference. This is an exercise in semantics and, in my view, the "distinction" created is one without a difference. Whether the information was collected during the closed primaries of 1988-1995 or during the 2008 primary election is immaterial. In each instance, the information captured, although collected by a different procedure, is the same: an elector wishing to vote in the primary was required to "proclaim" the party's primary he or she "preferred" to vote in. In both instances, voters made a "declaration" of party preference. Further, I would point out that the Legislature deliberately chose to use the phrase "declaration of party preference" without any conditional limiting language, such as "declaration of party preference made 30 days before the primary election." The majority's reading of the 1995 FOIA provision, § 495a(2), equates its language with the latter. In my view, such a reading is inapposite to our judicial role. The Legislature chose to use the broad phrase, "declaration of party preference," which plainly and unambiguously encompasses an elector's selection of a party's ballot. Accordingly, I would conclude that the requested information is protected from disclosure by MCL 168.495a(2), as amended by 1995 PA 213, and is therefore exempt under the FOIA's statutory exemption. MCL 15.243(1)(d).

## V. MCL 15.243(1)(a): THE FOIA'S PRIVACY EXEMPTION

I would also conclude, contrary to the majority's position, that the requested records are exempt under the FOIA's privacy provision. That exemption excludes from disclosure public records that would result in an unwarranted invasion of an individual's privacy. MCL 15.243(1)(a) states:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:

(a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

In *Mich Federation of Teachers*, *supra* at 675, the Michigan Supreme Court articulated the applicable test under this provision as a two-pronged inquiry. To satisfy the test, (1) the information must be "of a personal nature" and (2) "it must be the case that the public disclosure of that information would constitute a clearly unwarranted invasion of an individual's privacy." *Id*. (quotation marks omitted).

Before engaging in this analysis, I note that this notion of the right to privacy embodied by MCL 15.243(1)(a) is not defined by the Legislature. In recognition of the nebulous nature of that term,[5] our Supreme Court has indicated that the courts of this state may "look to the common law and constitutional law to guide [them] in determining whether disclosure of the requested information would violate any privacy rights under the FOIA." *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 547; 475 NW2d 304 (1991); see also *Bradley*, *supra* at 294. In doing so, "[t]he contours and limits [of privacy under MCL 15.243(1)(a)] are . . . to be determined by the court, as the trier of fact, on a case-by-case basis in the tradition of the common law." *State Employees Ass'n*, *supra* at 123 (opinion by CAVANAGH, Jr.). Further, in applying this provision, the courts of this state have looked to federal law for guidance. *Mager v Dep't of State Police*, 460 Mich 134, 144; 595 NW2d 142 (1999).[6] Thus, in my view, the test articulated in *Mich Federation of Teachers* must be applied to the facts of the present matter consistently with these overarching principles.

A. PERSONAL NATURE

As already stated, the first prong of the test is satisfied if the requested information is of a "personal nature." Information is of a personal nature if it is "intimate, embarrassing, private, or confidential . . . ." *Mich Federation of Teachers*, *supra* at 676 (emphasis omitted). The inquiry must be guided by, and evaluated in light of, "the customs, mores, or ordinary views of the

[5] Indeed, after over a century since Samuel D. Warren and future Supreme Court Justice Louis D. Brandeis recognized the individual's common-law claim to a right of privacy, see Warren & Brandeis, *The right to privacy*, 4 Harv L R 193 (1890), the concept remains problematic and unwieldy. The concept is often equated with personal autonomy, e.g., the right to be free from unwarranted searches and seizures and the right to reproductive freedom, and courts have struggled to define its contours with exactness.

[6] The federal FOIA privacy exemption is worded differently than Michigan's sister provision. It states that the federal FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 USC 552(b)(6). The only significant distinction between the federal statute and the Michigan statute, is the federal provision's use of the terms, "personnel and medical files and similar files." The Michigan statute simply uses the phrase "personal nature." Despite this difference, the second part of the analysis requiring a balancing of the public's interest against individuals' privacy interests is largely the same.

community . . . ." *Herald Co v Bay City*, 463 Mich 111, 123-124; 614 NW2d 873 (2000) (quotation marks and citations omitted). In considering the information in this context, it is important to recognize that simply because the information may be disclosed in one public sphere, does not necessarily mean that the information is not of a personal nature. *Mich Federation of Teachers*, *supra* at 680. Moreover, an individual's ability to control the dissemination of the information, for example, by choosing to withhold it from disclosure despite the fact that it may be available elsewhere, is indicative of whether the information is of a personal nature. *Id*.

Oddly, in determining whether the subject information is of a personal nature, the majority ignores this well-established jurisprudence and relies entirely on the language of the 1995 FOIA provision, § 495a(2), and a single case interpreting that provision in an unrelated context. I cannot make sense of, let alone agree with, such a myopic application of the law. In any event, an application of these well-established rules dictates the conclusion that the information is of a personal nature. Specifically, the information requested implicates two separate privacy interests—an individual's privacy interest in his or her political convictions and an individual's privacy interest in his or her personal identifying information—each of which is discussed separately.

i. PRIVACY INTEREST IN POLITICAL CONVICTIONS

Here, the party preference information, if disclosed, would reveal to the general public that an individual voted on a strictly Republican, or strictly Democratic, ballot in the 2008 presidential primary election. 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. It is not difficult to see why an elector might consider this information "intimate, . . . private, or confidential" and would want to keep this information confidential. Envision a situation, for example, where an elector votes inconsistently with his or her normal political preference.[7] Obviously, some voters would not wish to disclose this fact to third parties. In such instances, public disclosure of party preference information could subject electors to unwanted or unwarranted attention from peers, colleagues, and neighbors and could result in serious discomfort amongst family members. Many electors would undoubtedly avoid disclosing which primary they voted in to avoid these same unpleasant ramifications.[8] Further,

---

[7] Electors cross political boundaries for any number of reasons, not limited to: voting for a friend, voting for a preferred candidate, or voting for a weak rival candidate.

[8] I note in passing that the release of this information could also have a chilling effect on some voters' decisions to cross political boundaries and vote for a candidate not associated with the voters' typical political party choices. This is precisely because the release of the information would tend to erode the protections guaranteed by the right to a secret ballot in all elections. Const 1963, art 2, § 4; *Belcher v Ann Arbor Mayor*, 402 Mich 132, 134; 262 NW2d 1 (1978). Electors' votes would no longer be fully cloaked by the shroud of secrecy. A voter's ability to vote his or her conscience without fear of reprisal or retaliation is imperative to a well-functioning democracy. *McIntyre v Ohio Elections Comm*, 514 US 334, 343; 115 S Ct 1511; 131 L Ed 2d 426 (1995). Disclosure of the records in this case would denigrate the protections

in 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. It is not difficult to imagine that some individuals may interpret a particular elector's vote as a personal affront or a betrayal.

Having listed these possible ramifications as reasons why a person may consider their political preference to be private, I must object to the majority's accusation that such concerns are based on pure speculation, are "imaginary horribles," and are invented out of "whole cloth." First, these concerns are based on plain and simple common sense. It is not surprising, given this nation's political history, that politics, political speech, and support for or opposition to a particular candidate can create arguments and result in heated debates. The majority's refusal to recognize these commonsense concerns and the historical and social context in which a FOIA privacy analysis must be undertaken is baffling.

Second, the newspaper articles, editorials, and letters to the editor referred to in defendants' reply brief on appeal reinforce my position. These articles show that a great deal of discussion was generated regarding the revealing of electors' political preferences during the 1992 presidential primary election. A sampling of these articles include:

- Simon, *State primary law an invasion of political privacy*, Detroit News (March 24, 1992) ("The ACLU offices were besieged on primary day with calls from voters complaining about . . . having their political party affiliation made a permanent and publicly accessible part of their voting record.").

- Roelofs and Brandt, *Closed primary shaping up to get a vote of no confidence*, Grand Rapids Press (November 18, 1991) (citing opinions of constituents complaining that closed primary system constituted an "infringement of my privacy").

- *Keep it open primary preference a private decision*, Lansing State Journal (January 12, 1992) (characterizing system as "traumatic" because it requires a declaration of party preference "for all the world—most particularly friends, neighbors, and political hacks—to hawk and herald").

- Mitzelfeld, *Requirement to list party angers, turns away voters*, Detroit News (March 18, 1992) ("Voters were so angry Tuesday over Michigan's new party declaration requirement that many stormed out of polling places and refused to cast ballots.").

---

that the right to a secret ballot is meant to protect and could subject voters to reprisal. As Chief Justice Burger recognized in *Buckley v Valeo*, 424 US 1, 237; 96 S Ct 612; 46 L Ed 2d 659 (1976) (Burger, C.J., concurring in part and dissenting in part), the advent of the secret ballot as a universal practice was one of our nation's greatest political reforms, because privacy with regard to one's political preference is fundamental to a free society.

- Weeks, *March 17 primary turns off voters who don't want to find their names on either party's list*, Detroit News (January 23, 1992) ("State law has the outrageous requirement that the declaration be made 30 days before the election.").

- Waldmeir, *Unless something's done soon, state's closed primary could be the most embarrassing ever*, Detroit News (February 9, 1992) ("Voters are rebelling at being forced to announce to the world—30 days before an election, yet—exactly where they stand . . . .").

While it would not be appropriate for this Court to take judicial notice of these articles for the *truth* of the matters asserted therein, see *People v McKinney*, 258 Mich App 157, 161 n 4; 670 NW2d 254 (2003), I would take judicial notice of the *fact* that a plethora of articles were published and that strong sentiments were in *fact* expressed. The clear conclusion to be drawn is that the public was, indeed, concerned about the privacy of their political convictions and that their concerns were very real. This evidence discredits the majority's contention that no evidence exists to support the public's concern over the privacy of their political information.

But further, these articles are not the only evidentiary measure by which to determine whether the information requested is of a personal nature. Legislative changes are also indicative of the customs, mores, and ordinary views of the community. See *Mich Federation of Teachers*, *supra* at 677 n 59. It is not difficult to understand why the caselaw has adopted consideration of legislative changes as an indicator of what a community considers to be important: it is a basic principle of the separation of powers doctrine that the people speak through their elected representatives, not through the courts.

Here, a review of relevant legislative changes lends additional credence to my view, and is additional evidence, that an individual's party preference information is of a personal nature. Michigan's election law has protected this particular information from disclosure for nearly 15 years, since the 1995 FOIA provision was added to the statute. See MCL 168.495a, as amended by 1995 PA 213; MCL 168.615c(4), as added by 2007 PA 52. Equally significant is the fact that the Legislature amended the election law in 1995 from a closed primary system to an open primary system in response to the public's concern regarding the privacy of their political convictions. MCL 168.495, as amended by 1995 PA 87; see also Senate Fiscal Agency Bill Analysis, HB 4435, May 30, 1995. And, just a few months later, the Legislature added the 1995 FOIA provision in order to protect from disclosure party preference information, previously collected or collected in the future. MCL 168.495a, as amended by 1995 PA 213. The 1995 FOIA provision remained the law until the 2007 election statute repealed it and replaced it with its own version that *continued* to protect party preference information from disclosure through the FOIA. The 2007 election statute provided:

> Except as otherwise provided in this section, the information acquired or in the possession of a pubic body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the [FOIA], and shall not be disclosed to any person for any reason. [MCL 168.615c(4), as added by 2007 PA 52.]

Given these unequivocal legislative amendments and the Legislature's *explicit* decision to continue protecting from disclosure party preference information, there can be no clearer signal that the customs, mores, and ordinary views of the community regard party preference as information of a "personal nature." See *Mich Federation of Teachers*, *supra* at 677 n 59 (noting recent legislative changes as indicative of a community's mores).

As I have pointed out, the majority's opinion largely ignores this analysis and asserts that I have wrongly considered a 1995 Senate Fiscal Agency Bill Analysis in support of my conclusion that the Legislature changed the law in reaction to the public's outrage. However, the majority overlooks, or chooses to ignore, the fact that this analysis is not one of statutory interpretation, where the traditional rules of construction would apply, and would generally preclude the consideration of a legislative bill analysis, but rather is an analysis whether certain information should be considered *of a personal nature* under the FOIA's privacy exemption. And, our Supreme Court has directed that this inquiry be undertaken with the mores, values, and ordinary customs of the community in mind, which may include a consideration of legislative changes. Thus, in my view, the legislative changes, the legislative bill analysis, and the various news articles, are some evidence of the community's values and mores, and are indicative of its ordinary customs.

I must emphasize that the majority has taken a "hear no evil, see no evil" approach to this matter by ignoring the social and historical context in which these legislative changes were made. It is true that a Senate Fiscal Agency Analysis reflects the opinion of one legislative analyst, not the Legislature. However, it does not logically follow that the Legislature had deaf ears to the ongoing discussion occurring in the public and that it simply amended the election law randomly. Rather, the clear inference is that the Legislature's amendment at that particular time, amidst the public debate, was in reaction to the public's concerns. The majority displays its opinion in a vacuum. I would conclude, on the basis of the foregoing, that an individual's political preference information is of a personal nature.

ii. PRIVACY INTEREST IN PERSONAL IDENTIFYING INFORMATION

The second privacy interest implicated in this matter is the individual's interest in protecting his or her personal identifying information. Of initial importance is the fact that information regarding a voter's political preference would be coupled with a voter's name and home address. In *Mich Federation of Teachers*, our Supreme Court, noting the "checkered history" of conflicting jurisprudence on the issue whether home addresses and telephone numbers are of a personal nature, held that personal identifying information, including "home addresses and telephone numbers[,] constitute private information about individuals." *Mich Federation of Teachers*, *supra* at 677 n 58. The Court stated, "The potential abuses of an individual's identifying information, including his home address and telephone number, are legion." *Id*. at 677. As examples, the Court cited unwelcome masses of junk mail and telephone solicitations. *Id*. On the basis of this reasoning, the Court determined that university employees' addresses and phone numbers was information of a personal nature, even though employees had voluntarily provided the university that information, and that that information was not disclosable to the general public through the FOIA. *Id*. at 682-683.

Similarly, in *United States Dep't of Defense v Fed Labor Relations Auth*, 510 US 487, 500-501; 114 S Ct 1006; 127 L Ed 2d 325 (1994), the United States Supreme Court considered

the names and home addresses of nonunion employees to be private information of which the employees had "*some* nontrivial privacy interest in [its] nondisclosure. . . ." In that case, several unions were seeking the names and home addresses of nonunion employees through the federal FOIA statute. *Id*. at 489-490. The Court noted the innumerous and unwanted intrusions into the home that disclosure would result in, including unwanted mail and possibly visits, and reasoned that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Id*. at 501. Ultimately, the Court did not release the records in light of the public's nonexistent interest in the records. *Id*. at 502.

The same concerns are at play in the instant case. Disclosure of electors' names, party preferences, and home addresses would subject many individuals to unwanted mass mailings and a deluge of junk mail. Anyone in the general public, including commercial vendors and other special interest groups, would be able to access the information and would be able to solicit electors through the mail or in person by going door-to-door. Many individuals would find this intrusion into their homes to be an unwanted annoyance and a hassle. It is also not difficult to see, as I have already discussed, how the party preference information in particular could subject some individuals to unwanted attention, discomfort, harassment, or retaliation. Given the foregoing, and the Court's decision in *Mich Federation of Teachers* as well as the Supreme Court's decision in *United States Dep't of Defense*, I would hold that voters' names and home addresses, *when coupled with their party preferences* in the 2008 primary election, is personal information that is intimate and private, and is undoubtedly of a "personal nature."

iii. *FERENCY v SECRETARY OF STATE*

I also disagree with the majority's conclusion, relying on dicta from *Ferency v Secretary of State*, 190 Mich App 398; 476 NW2d 417 (1991), that the requested information is not of a personal nature because an individual has no privacy expectation in his or her party affiliation voluntarily disclosed in a primary election. I respectfully submit that the majority's reliance on *Ferency* is misplaced.

In *Ferency*, the plaintiff sued alleging that Michigan's 1988 election law violated several provisions of Michigan's Constitution. Relevant to this appeal was the plaintiff's argument that the 1988 election law violated the secrecy of the ballot, Const 1963, art 2, § 4, because the 1988 election law required voters to declare their party preference in order to vote in the primary. *Ferency*, *supra* at 413. The *Ferency* Court disagreed. It reasoned that electors' exact votes could not be ascertained by knowledge of an elector's party preference declaration and therefore there was no violation of the right to a secret ballot. *Id.* at 414. It further stated, in passing:

> [P]rimaries remain primarily party functions and thus *there is a legitimate state interest in restricting access by voters to the primary elections* and, more to the point, *in requiring voters to publicly identify their party affiliation in order to be eligible to vote in a primary election*. That is, because primary elections are primarily party functions, it is not unreasonable to expect the voter *to be willing* to disclose his party affiliation in order to participate in that party's internal operations, such as the selection of its nominee for a particular office. This 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. [*Id.* at 418 (emphasis added).]

The *Ferency* Court's statements, while largely dicta, indicate that electors have no privacy interest in their party preference when they *voluntarily* decide to disclose it to their party. These statements further suggest that the individual's privacy interest must be balanced against a party's legitimate interest in restricting voter access to its primary elections, e.g., by preventing nonparty members from hijacking the party by voting for the weaker party candidate. *Id*. This latter concern implicates political parties' freedom of association in the context of primary elections and balances that interest against electors' interest in the secrecy of the ballot. See, e.g., *California Democratic Party v Jones*, 530 US 567, 583-585; 120 S Ct 2402; 147 L Ed 2d 502 (2000).[9] It is important to note, however, that *Ferency*'s statements are not central to its holding regarding the secrecy of the ballot.

I have no quarrel with the proposition that *Ferency* stands for. However, *Ferency* does not address Michigan's FOIA statute. Instead, it addresses entirely different claims and concepts

---

[9] *California Democratic Party*, which plaintiff also relies on, was a First Amendment case that applied an analysis similar to *Ferency*. In that case, several Californian political parties brought suit alleging that California's "blanket" primary system violated their right to freedom of association under the First Amendment. *California Democratic Party*, *supra* at 571. This system, adopted by initiative Proposition 198, allowed all Californian voters to vote on a ballot containing all the primary candidates from all the political parties. *Id*. at 570. On certiorari to the United States Supreme Court, the Court found that Proposition 198 violated political parties' freedom of association by forcing association with unaffiliated voters and was unconstitutional unless it was narrowly tailored to advance a compelling state interest. *Id*. at 584-585. The state of California asserted voters' right to privacy as a compelling interest in an attempt to justify Proposition 198. *Id*. at 584. The Supreme Court, however, concluded that voters' privacy interests in their party affiliations when voting in a primary is not a compelling interest that would justify California's "blanket" primary system. *Id*. at 584-585. In determining that voters' privacy did not constitute such a compelling interest, the Court stated:

> As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices. [*Id.* at 585.]

Thus, like the *Ferency* case, *California Democratic Party* considers electors' privacy interests in primary elections, but only through the lens of the First Amendment.

than those advanced in this case. *Ferency* addressed whether Michigan's 1988 election law violated the secrecy of the ballot protected by the Michigan Constitution. It is true that voters' "privacy" interests were implicated; however, it arose as an issue ancillary to the main thrust of the litigants' claims and it was viewed in the context of, and balanced against, political parties' right to freedom of association. As such, how privacy conceptually relates to the underlying claims in *Ferency* is entirely different from how that concept relates to the claim in this case. This is because the interests at stake in *Ferency* are not at stake in the instant matter; political parties' interests in controlling who votes in their primaries are not implicated under the FOIA. Thus, *Ferency* is simply not instructive on whether an elector has a legitimate privacy interest in shielding political party preference information from the *general public at large* and is not indicative, under a FOIA analysis, whether such information is of a personal nature. Thus, it is my view that *Ferency* is not controlling in the present matter and is largely irrelevant.

However, to the limited extent that *Ferency* is instructive, its rationale does not support a conclusion that voters have no privacy interest in their political preferences declared for purposes of voting in a primary. *Ferency* balanced voters' privacy interests against *political parties' interests* in controlling the type of voters who vote in their primaries. It also indicated that voters have no privacy interest when they *consent* to disclosure of their political party preferences *to their parties*. Let me be clear that I agree with this statement; certainly, a voter's name, home address, and party preference is not of a private nature when the voter *consents* to its disclosure to his or her party of choice. However, this does not translate to mean that a voter has no legitimate privacy interest in preventing the disclosure of that same information to others or *to the general public*. Here, it is the *public's* right to know the information and to hold the government accountable for its actions that must be balanced against individuals' privacy interests. A voter may, understandably, refuse to disclose that information to an employer, a friend, or even a family member. "The disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance." *Mich Federation of Teachers*, *supra* at 680; see also *United States Dep't of Defense*, *supra* at 500 ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."). This nuance is one that the majority has overlooked. I would conclude that the information requested is of a personal nature.

## B. UNWARRANTED INVASION OF PRIVACY

But simply because the information sought is of a personal nature does not necessarily compel the conclusion that its disclosure is prohibited. Rather, it is the second prong of the test announced in *Mich Federation of Teachers* that must be considered: whether public disclosure of the party preference information coupled with voters' names and addresses would constitute a "clearly unwarranted invasion" of an individual's privacy. *Mich Federation of Teachers*, *supra* at 675. This inquiry requires "balanc[ing] the public['s] 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." *Id*. at 673 quoting *Mager*, *supra* at 145, quoting *United States Dep't of Defense*, *supra* at 495 (quotation marks omitted). Under the

circumstances of this case, special emphasis must be placed on the fact that it is the *public's interest* that is to be weighed against individuals' privacy interests—the special interests of the requester puts it in no better position than a member of the general public. See *United States Dep't of Defense*, *supra* at 499-500. In other words, the *identity of the requester and the requester's interest in the information is irrelevant*, as is the requestor's initial and future use of that information. *State Employees Ass'n*, *supra* at 121 (opinion by CAVANAGH, J.).

Here, defendants concede that the Secretary of State's office has released the names and addresses of registered voters. And, although this information is of a personal nature, see *Mich Federation of Teachers*, *supra* at 677 n 58, it is clear that disclosure of these names and addresses alone is a warranted invasion of personal privacy. Namely, disclosure of that information is necessary to inform the general public whether voters are properly registered and whether they are voting in the proper local precinct. Disclosure of such information, if requested, is necessary to hold the government accountable for the integrity and purity of this state's elections.

However, the public's interest in the disclosure of voters' names and addresses coupled with their party preference information is negligible. Contrary to the majority's conclusion, I simply fail to see how disclosure of this information in this form is necessary to shed light on the government's operations. Indeed, disclosure would reveal whether the Secretary of State's office actually performed the task required of it under 2007 PA 52. This result, however, could just as easily be obtained by releasing redacted versions of the records, i.e., by redacting voter's names and addresses and releasing the ballot selections alone.[10] Given the foregoing, it is likely that plaintiff is not asking for the records to find out "what the government is up to" but to obtain the names and addresses of individuals affiliated with particular political parties for its business purposes. The requester's identity and special interests are completely irrelevant to a FOIA analysis. *State Employees Ass'n*, *supra* at 121. Further, "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct [would not advance the core purpose of FOIA]." *Mager*, *supra* at 145

---

[10] The majority asserts that disclosure of the requested information "*would* inform the public to what extent the Secretary and the various local clerks carried out the requirements of 2007 PA 52." It then states, "[T]here is *no other way by which* these individuals can be held accountable for their implementation of a then-valid statute." (Emphasis added.) This position is simply wrong. Logistically, the same goal can be accomplished without intruding on individual's privacy. The Secretary of State's office has already released the names and addresses of those individuals who voted in the 2008 primary. This information allows the general public to make certain that the state ensured that individuals voted in the proper precinct, but it would not show, for example, whether the number of voting Democrats matches the number reported, and vice versa for Republicans. However, the release of the same records, containing redacted names and addresses but showing the party ballot selected, would have the result of showing that the correct, or incorrect, numbers voted in each primary. Ultimately, the same goal is reached without violating individuals' privacy—the general public would be able to know whether election officials properly carried out their task under 2007 PA 52. Nothing additional would be gained by releasing the information in the form requested.

(quotation marks and citation omitted). And, in the absence of any compelling public interest in the information in the form requested, "supplying lists of voters to private parties . . . [smacks of] an abuse of the elective franchise." *Grebner v Michigan*, 480 Mich 939, 944 (2007) (CAVANAGH, J., dissenting).

Finally, weighing this virtually nonexistent public interest in disclosure against electors' interests in controlling their personal information dictates the conclusion that disclosure would be an unwarranted invasion of voters' privacy. Because the public's interest in the information is small, even a very slight privacy interest would suffice to outweigh the public's interest in the records. Thus, it is not necessary to quantify the privacy interest involved. However, I would go so far as to surmise that the interest involved is, at the very least, a moderate to strong one. As I have already discussed, electors have an interest in avoiding harassment, reprisal, or retaliation that may result from public disclosure of such information. Obviously, some electors will have a more heightened interest in keeping this information private than others. For example, disclosure could potentially be particularly damaging to a public official or to an employee of a nonprofit political organization. Moreover, many voters may wish to avoid the perceived annoyance and hassle of receiving large amounts of junk mail and solicitations that would result from the disclosure of their particular political convictions. Indeed, the privacy interest implicated here is far from insubstantial in consideration of the fact that the information would be accessible to all members of the public, including commercial advertisers and other solicitors. I would follow the lead of the United States Supreme Court and avoid a decision that would disparage the privacy of the home. *United States Dep't of Defense*, *supra* at 501. Accordingly, I would conclude that the public's interest is outweighed by the privacy interest the Legislature intended to protect under MCL 15.243(1)(a).

I would reverse.

/s/ Kirsten Frank Kelly