



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS



Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 584 (as enacted)
Sponsor: Senator Randy Richardville
Senate Committee: Local Government and Elections
House Committee: Redistricting and Elections

PUBLIC ACT 163 of 2011

Date Completed: 3-2-12

CONTENT**The bill amended the Michigan Election Law to do the following:**

- **Require the Secretary of State (SOS) to make several lists of presidential primary candidates available to the public online.**
- **Revise provisions related to the SOS's listing of presidential primary candidates' names on the ballot.**
- **Require an elector to indicate which political party ballot he or she wishes to vote at a presidential primary election, and require the SOS to make this information available to the public.**
- **Require the SOS to prescribe procedures for contacting absent uniformed services voters and overseas voters to offer them the opportunity to select a political party ballot for a presidential primary election.**

The bill also repealed a section of the Law authorizing a clerk to remove an elector's declaration of party preference from the person's registration file and exempting the declaration from disclosure under the Freedom of Information Act.

The bill provides that its provisions are severable, if any portion is invalidated by a court.

The bill took effect on October 4, 2011.

Presidential Primary Candidate Lists

Under the Law, by 4 p.m. of the second Friday in November of the year before the presidential election, the SOS must issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held. By 4 p.m. of the Tuesday following that Friday, the State chairperson of each political party for which a presidential primary election will be held must file with the SOS a list of individuals whom he or she considers to be potential presidential candidates for that party. The SOS then must notify each potential candidate on the lists of the Law's provisions relating to the presidential primary election.

The bill requires the SOS to make both of these lists available to the public on an internet website maintained by the Department of State.

The Law requires the SOS to have the name of a notified presidential candidate printed on the primary ballot. A notified candidate may file with the SOS an affidavit indicating his or her party preference, if different than the party preference contained in the notification, and the SOS must have the candidate's name printed on the ballot. Previously, the candidate's name had to be printed on the ballot under the appropriate political party heading. Under the bill, instead, the candidate's name must be

printed on the appropriate primary ballot for that political party. The bill made similar revisions to language regarding a person who is not listed as a potential presidential candidate but files a nominating petition.

Also, under the bill, if a presidential candidate's affidavit indicates that he or she has no political party preference, or indicates a preference for a party other than a party for which a presidential primary election will be held, the SOS may not have that candidate's name printed on a ballot for the primary election.

Previously, the names of the presidential candidates had to be rotated under each political party heading on the ballot. Under the bill, the names on each political party ballot must be rotated on the ballot by precinct.

Record of Party Ballot Choice

The bill repealed Section 495a. Under that section, if an elector declared a party preference or no party preference for the purpose of voting in a statewide presidential primary election, a clerk or authorized assistant could remove that declaration from the precinct registration file and the master registration file of that elector and the precinct registration list, if applicable. A person making a request under the Freedom of Information Act (FOIA) was not entitled to receive a copy of a portion of a voter registration record that contained an elector's declaration, and a clerk or any other person was prohibited from releasing a copy of that portion of the record. (Section 495a originally was repealed by Public Act 52 of 2007; however, that Act was invalidated as a result of litigation. The legislation and the lawsuit are described below, under **BACKGROUND**.)

Under the bill, in order to vote at a presidential primary election, an elector must indicate in writing, on a form prescribed by the SOS, which political party ballot he or she wishes to vote when appearing at the election.

The bill requires the SOS to develop a procedure for city and township clerks to use when keeping a separate record at a presidential primary election that contains the printed name, address, and qualified

voter file number of each elector and his or her political party ballot selection.

The bill provides that information acquired or in the possession of a public body indicating an elector's presidential primary party ballot selection is not exempt from disclosure under FOIA.

The bill requires the SOS, within 71 days after the presidential primary election, to make available to the public in an electronic format a file of the ballot selection records for each political party. The SOS must set a schedule for county, city, and township clerks to submit required data and documents for this purpose. The SOS and clerks must destroy the information indicating which political party ballot each elector selected immediately after the 22-month Federal election records retention period expires.

The bill also requires the SOS to revise the absent voter ballot application form or provide a separate form to require that a presidential primary elector indicate a political party ballot selection when requesting an absent voter ballot.

The Law allows an absent uniformed services voter or an overseas voter to apply for an absent voter ballot. Under the bill, for a presidential primary election, the SOS must prescribe procedures for contacting an elector who is an absent uniformed services or overseas voter, and who is eligible to receive or who applies for an absent voter ballot, offering the elector the opportunity to select a political party ballot for that primary election.

("Absent uniformed services member" means any of the following:

- A member of a uniformed service on active duty who, by reason of being on active duty, is absent from the place of residence where he or she is otherwise qualified to vote.
- A member of the Merchant Marine who, by reason of service in the Merchant Marine, is absent from the place of residence where he or she is otherwise qualified to vote.

"Overseas voter" means any of the following:

- An absent uniformed services voter who, by reason of active duty or service, is absent from the U.S. on the date of an election.
- A person who resides outside of the U.S. and is qualified to vote in the last place where he or she was domiciled before leaving the U.S.
- A person who resides outside of the U.S. and who, but for such residence, would be qualified to vote in the last place where he or she was domiciled before leaving the U.S.)

Severability

The bill states, "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 severable and that the remainder of the amendatory act shall be valid, operable, and in effect."

MCL 168.613a et al.

BACKGROUND

Public Act 52 of 2007

Candidates for U.S. President are nominated by delegates to a political party's national convention. Delegates are selected within each state and support a particular candidate. The way delegates are chosen is typically a matter dealt with in state election law, but national party rules take precedence when they conflict with state law. Before 2008, Republicans selected their delegates in the Michigan presidential primary, which under previous statute was an "open" primary (one in which any elector may vote). Democrats used a caucus system to select delegates, as an open primary is contrary to national Democratic Party rules.

Under the Michigan Election Law, a statewide presidential primary election is required to be held on the fourth Tuesday in February of each presidential election year. This meant that a statewide presidential primary had been scheduled for February 26, 2008. Among other things, Public Act 52 of 2007 moved the 2008 presidential primary to January 15. (Both the Republican and Democratic Party rules,

however, prohibit Michigan from holding a primary that early in the year. Therefore, no Michigan delegates were seated at the 2008 Democratic National Convention, and Michigan Republicans were denied half of their Convention delegates.)

Public Act 52 also enacted Section 615c, which required an elector to indicate in writing which participating political party ballot he or she wished to vote when appearing to vote at a presidential primary. The SOS had to prescribe procedures intended to protect or safeguard the confidentiality of the participating political party ballot selected by an elector. Except as otherwise provided, the information acquired or in the possession of a public body indicating which participating political party primary ballot an elector selected was confidential and exempt from disclosure under FOIA, and could not be disclosed to any person for any reason.

To ensure compliance with the State and national political party rules of each participating political party and with these provisions, Section 615c also required the SOS to provide to the chairperson of each "participating political party" a file of these records, within 71 days after the presidential primary. (Under Public Act 52, a political party was authorized to participate in the presidential primary election if that party had received at least 20% of the total vote cast in Michigan for the office of President in the last presidential election. For the 2008 primary, only the Republican and Democratic Parties met this threshold.)

Except as described below, a participating political party could not use the information indicating which presidential primary ballot each elector selected for any purpose, including a commercial purpose, and could not release the information to any other person, organization, or vendor.

A participating political party could use the information transmitted under these provisions only to support political party activities by that party, including support for or opposition to candidates and ballot proposals. The party also could release the information to another person, organization, or vendor for these purposes.

Public Act 52 made it a misdemeanor for any person to use the information indicating

which participating political party primary ballot an elector selected for an unauthorized purpose. The penalty was a fine of \$1,000 for each voter record that was improperly used, or imprisonment for up to 93 days, or both.

Green Party of Michigan et al. v Terri Lynn Land

The Green, Libertarian, and Reform Parties of Michigan, as well as Metro Times, Inc. and David Forsmark of Winning Strategies, brought a lawsuit against the SOS challenging the constitutionality of the requirement under Section 615c of Public Act (PA) 52 that the SOS give the chairpersons of participating political parties, but no one else, a file containing the party preference declarations of all 2008 presidential primary voters. The U.S. District Court for the Eastern District of Michigan decided in favor of the plaintiffs in March 2008.

The Green, Libertarian, and Reform Parties did not qualify as "participating political parties" under the Election Law, and thus were not granted access to the party preference information. According to the plaintiffs, the statute violated the Equal Protection Clause of the Fourteenth Amendment. The SOS argued that the plaintiffs were not similarly situated to the Republican and Democratic Parties because they did not meet the Election Law's 20% threshold to be considered participating political parties. The Court disagreed, stating, "Defendant's proposed approach to the Equal Protection Clause would strip the clause of all meaning. Any statute could avoid running afoul of the clause simply by creating an arbitrary classification to divide those whom the statute intends to protect from those it does not." Furthermore, as the Court pointed out, while political parties do not compete with each other in a primary election, they do compete directly in a general election, and thus have the same interest in access to a resource such as party preference data, regardless of qualification as a "participating political party". The Court concluded that the Third Parties were similarly situated to the two major parties for purposes of Equal Protection analysis.

The Court also determined that the statute unduly burdened the plaintiffs' First

Amendment right to association by providing the voter preference information only to the participating political parties, and denied the plaintiffs an equal opportunity to win votes. The Court rejected the SOS's contention that the 20% threshold in the statute was neutral and did not limit access to and use of the voter preference information to the major parties, in light of the fact that only those two parties met the threshold when PA 52 was enacted.

The SOS asserted that several State interests justified the burdens imposed on the plaintiffs by PA 52, including that the release of the party preference information to the two major political parties satisfied them that the primary had actually occurred, and ensured compliance with party rules. The Court pointed out that providing the information to the plaintiffs would not undercut the goal of establishing that the primary had taken place. Additionally, the Court noted that only the Democratic Party's rules limited participation in the delegate selection process to people who declared their party affiliation publicly, so Section 615c did nothing to ensure compliance with the rules of the Republican Party. Again, the Court determined that also giving the plaintiffs access to the party preference information would not affect the purpose of rule compliance. Furthermore, PA 52 moved the primary from the fourth Tuesday in February to January 15, 2008, in violation of both Democratic and Republican National Committee rules; thus, the Court rejected the argument that PA 52 ensured compliance.

The SOS also contended that the State's interest in protecting voter privacy justified limiting release of the party preference records to the participating political parties. The Court responded that PA 52 did not actually serve this interest, as it explicitly authorized those parties to release the information to another person, organization, or vendor. In addition, the Court disagreed with the SOS's arguments that releasing the information only to the participating parties would prevent fraud and corruption and promote the stability of the State's political systems, reasoning that the release of the information *after* the primary election would not affect the election itself, and that transparency would be enhanced through a wider, rather than restricted, dissemination of the records.

On these grounds, the Court determined that Section 615c of PA 52 did violate the Equal Protection Clause of the Fourteenth Amendment, and granted the plaintiffs' motion for summary judgment.

Public Act 52 stated, "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." Therefore, the Court decision invalidated all of the amendments enacted by PA 52. Public Act 52 had repealed Section 495a, which prohibited disclosure of voter party preference information to anyone. In the wake of the Act's invalidation, however, Section 495a remained in effect. As a result, the SOS did not release the information to any entity.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Public Act 63 of 2011, which made State government appropriations for fiscal year 2011-12, appropriated \$10.0 million to cover the State's costs associated with a presidential primary in 2012. According to the Secretary of State, the administrative costs associated with this bill have been paid from previous-year appropriations. The SOS indicated that all programming costs and filing and recording costs were established and paid for from the funding provided for the 2008 presidential primary. Any further costs for the 2012 primary were to be paid from the \$10.0 million appropriation in Public Act 63.

Any local costs associated with keeping and submitting presidential primary records to the SOS also will be paid from the \$10.0 million appropriation in Public Act 63 of 2011.

Fiscal Analyst: Joe Carrasco

S1112\s584es.

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.