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BILL ANALYSIS

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Senate Bill 647 (as enrolled) **PUBLIC ACT 563 of 2006**
Sponsor: Senator Alan Sanborn
Senate Committee: Judiciary
House Committee: Judiciary

Date Completed: 2-20-07

## RATIONALE

Since 1967, law enforcement officers compelled to make statements under threat of dismissal have been protected from self-incrimination for purposes of criminal prosecution pursuant to the U.S. Supreme Court's decision in *Garrity* v *New Jersey* (385 U.S. 493). In that case, police officers in New Jersey were questioned during the course of a state investigation concerning alleged ticket fixing. The officers were ordered to respond to investigators' questions, and were informed that failure or refusal to do so would result in their discharge from employment. The officers answered the questions, and their answers later were used to convict them of criminal charges. The Court ruled that the use of the officers' statements in criminal proceedings violated the constitutional guarantee that citizens cannot be compelled to be witnesses against themselves. Under *Garrity*, then, police officers throughout the country may be compelled to make incriminating statements in the course of an internal investigation, but those statements may not be used against the officers in a criminal matter. It was suggested that this protection against self-incrimination be codified in Michigan law and that officers' compelled statements also be protected from public disclosure. (Please see **BACKGROUND** for more information on the *Garrity* case.)

## CONTENT

**The bill created a new act to do all of the following:**

**-- Prohibit the use of a law enforcement officer's "involuntary statement" against him or her in a criminal proceeding.**
**-- Provide that a law enforcement officer's involuntary statement is confidential and not open to public inspection.**
**-- Allow a law enforcement agency to disclose an officer's involuntary statement under limited circumstances.**

The bill took effect on December 29, 2006.

"Involuntary statement" means information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the officer.

An involuntary statement made by a law enforcement officer, and any information derived from that statement, may not be used against the officer in a criminal proceeding.

An involuntary statement made by a law enforcement officer is confidential communication that is not open to public inspection. The statement may be disclosed by the law enforcement agency only under one or more of the following circumstances:

-- With the officer's written consent.
-- To a prosecuting attorney or the Attorney General pursuant to a search warrant, subpoena, or court order, including an investigative subpoena (issued by a prosecuting attorney with a judge's authorization).

-- To officers of, or legal counsel for, the law enforcement agency or the officer's collective bargaining representative, or both, for use in an administrative or legal proceeding involving a law enforcement officer's employment status with the agency or to defend the agency or officer in a criminal action.
-- To legal counsel for an individual or employing agency for use in a civil action against the employing agency or the law enforcement officer.

If a prosecuting attorney or the Attorney General obtains an involuntary statement pursuant to a search warrant, subpoena, or court order, he or she may not disclose the contents of the statement except to a law enforcement agency working with the prosecuting attorney or Attorney General or as ordered by the court having jurisdiction over the criminal matter or, as constitutionally required, to the defendant in a criminal case.

If an officer of, or legal counsel for, a law enforcement agency or the collective bargaining representative of the officer receives an involuntary statement for use in an administrative or legal proceeding involving the officer's employment status, or to defend the agency or officer in a criminal action, he or she may not disclose the statement for any other reason, or make it available for public inspection, without the written consent of the officer who made the statement.

Until the close of discovery in a civil action against the employing agency or law enforcement officer, the court must preserve, by reasonable means, the confidentiality of a law enforcement officer's involuntary statement. This may include granting protective orders in connection with discovery proceedings, holding in camera hearings (i.e., in the judge's private chambers or in the courtroom with all spectators excluded), or ordering any person involved in the litigation not to disclose the involuntary statement without prior court approval.

"Law enforcement agency" means the Department of State Police, the Department of Natural Resources, or a law enforcement agency of a county, township, city, village, airport authority, community college, or university, that is responsible for the prevention and detection of crime and enforcement of Michigan's criminal laws.

"Law enforcement officer" means any of the following:

-- A person who is trained and certified under the Commission on Law Enforcement Standards Act.
-- A local corrections officer.
-- An emergency dispatch worker employed by a law enforcement agency.

MCL 15.391-15.395

**BACKGROUND**

*Garrity* v *New Jersey*

New Jersey's supreme court ordered the state attorney general to investigate irregularities in the handling of cases in municipal courts. Police officers of certain New Jersey boroughs were questioned about alleged fixing of traffic tickets. Before being questioned, each officer was warned that anything he said might be used against him in a criminal proceeding; that he could refuse to answer if disclosure would tend to incriminate him; and that, if the officer refused to answer, he would be subject to removal from office.

The officers answered the questions and, over their objections, some of those answers were used to prosecute them for obstructing the administration of traffic laws. The officers were convicted and their convictions were upheld on appeal in the New Jersey state court system, despite officers' protests that the statements were coerced because, if they had refused to answer the investigators' questions, they could have lost their jobs.

The U.S. Supreme Court reasoned that, "The [police officers'] option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." Quoting the well known *Miranda* decision (*Miranda* v *Arizona*, 384 U.S. 436), the *Garrity* Court stated, "That practice...'is likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary...". In reversing the

New Jersey police officers' convictions, the Court stated, "We hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office...".

Constitutional Protection Against Self-Incrimination

The Fifth Amendment to the U.S. Constitution includes the protection against self-incrimination. It states, in part, "No person…shall be compelled in any criminal case to be a witness against himself…". The Fourteenth Amendment extends to the states the U.S. Constitution's restrictions on government actions. It states, in part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## ARGUMENTS

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### Supporting Argument

In 1967, the U.S. Supreme Court's *Garrity* decision held that compelled statements by a police officer about his or her actions on the job, under threat of dismissal, could not be used as evidence against the officer in a criminal prosecution. In 1977, Michigan courts recognized the applicability of *Garrity*, when the Court of Appeals held, "[I]f a public employee refuses to answer questions specifically, directly, and narrowly relating to the performance of his or her official duties, *without* being required to waive the protection afforded by *Garrity*…the privilege against self-incrimination does not bar his or her dismissal [emphasis added]" (*Local 502-M, National Union of Police Officers, AFL-CIO* v *Wayne County Sheriff*, 79 Mich App 445). It is well settled law in Michigan, then, that a law enforcement officer's statements, coerced by the threat losing his or her job, may not be used to incriminate the officer in a criminal prosecution.

That long-standing protection was brought into question, however, by a 2003 Michigan Court of Appeals case. In *In re Morton* (258 Mich App 507), the Court upheld the trial court's decision to authorize the Wayne County prosecutor to issue an investigative subpoena for *Garrity* statements made by Garden City police officers regarding a shooting death. According to written testimony on Senate Bill 647 submitted to the Senate Judiciary Committee on behalf of the Deputy Sheriffs Association of Michigan, the Wayne County sheriff, and airport police officers, "The Morton decision for the first time allowed a third party…to have access to Garrity statements and to use those Garrity statements in it's [sic] determination to prosecute a police officer." There also was a concern that this precedent for the release of *Garrity* statements to a third party could result in the press having access to those statements and publicizing them.

By providing that an involuntary statement made by a law enforcement officer, and any information derived from it, may not be used against the officer in a criminal proceeding, the bill effectively codifies *Garrity* protections in Michigan statutory law. While those protections have long been enjoyed by law enforcement officers pursuant to the 1967 U.S. Supreme Court decision and the 1977 *Local 502-M* Michigan Court of Appeals holding, they had been specified only in case law and, as such, were susceptible to subsequent court interpretations, such as in the 2003 *In re Morton* decision. In order to assure that law enforcement officers continue to be protected against having their compelled statements used against them, the bill appropriately enacted *Garrity* protections into statute.

**Response:** Although the *In re Morton* decision did grant prosecutors access to Garden City police officers' *Garrity* statements, the Michigan Court of Appeals, citing that U.S. Supreme Court decision, also stated, "[E]ach officer who made a statement under threat of discipline automatically received immunity from the use of the statement in any subsequent criminal prosecution against the officer, so Garden City fails to show how the statements could incriminate the officers in violation of the Fifth Amendment...Because *this case deals only with the production of the statements and not their improper use in a criminal proceeding* against the officers, the Fifth Amendment has no application here." (Emphasis added.) The decision

does not weaken the *Garrity* protections or affect public access to *Garrity* statements.

Furthermore, the bill specifically permits a law enforcement agency to disclose an officer's involuntary statement to a prosecuting attorney pursuant to an investigative subpoena, which was the activity allowed by *Morton*.

**Supporting Argument**

In addition to codifying *Garrity*, the bill effectively grants ownership and control of *Garrity* statements to the officers making those statements. By strictly limiting the disclosure of a law enforcement officer's involuntary statement, the bill will prevent the public availability of an officer's compelled statements without his or her consent and thereby will protect his or her public image from unreasonable scrutiny by the press. Court actions like the *In re Morton* decision make officers' compelled statements susceptible to release to third parties under the Freedom of Information Act (FOIA). Since *Garrity* protects law enforcement officers from self-incrimination, their involuntary statements should be confidential and free from public disclosure.

**Response:** The bill interferes with the public's right to know about the activities of public servants. Openness about public employees' activities, not secrecy, should be of paramount concern. As a *Lansing State Journal* editorial opposing the bill put it, "[T]he default position of government must be transparency" but the bill "...sets secrecy as the default position, allowing disclosure only after legal standards are met" ("Police bill: Measure to seal statements works against transparency", 12-21-06). A similar editorial that appeared in the *Macomb Daily* stated, "Essentially, the bill would allow an employee paid by the public to hide potential illegal acts from the public and make their agency--including police departments--complicit in such cover-ups" ("Bill interferes with public's right to know", 11-26-06). The *Macomb Daily* editorial concluded, "The public's right to know should never be dissipated, especially when it comes to knowledge about the people we trust to uphold and enforce the law."

Moreover, the *In re Morton* decision should not encourage FOIA disclosure of confidential police personnel records, because the case did not involve the use of FOIA requests. The Court dismissed Garden City's argument that FOIA's exemption of law enforcement agencies' personnel records should have prevented enforcement of the prosecutor's subpoena, stating, "We would not advance the act's public policy by misapplying it to a situation where one governmental entity charged with enforcing the law withholds information from another governmental entity with the same role."

**Opposing Argument**

Since law enforcement officers' compelled statements already were protected against use in a criminal proceeding, pursuant to *Garrity*, the bill gives officers no further protection against prosecution. The bill does, however, seal off information that a police officer may have violated his or her duty and oath even to the extent of committing criminal activity. While *Garrity* guarantees law enforcement officers' constitutional right against self-incrimination, it does not protect their admissions from public disclosure. In Michigan, that issue has been governed by FOIA.

Through FOIA, the State provides for the openness of public records, but also recognizes the competing right to privacy of public employees. A public body may decide not to release certain information, including a law enforcement agency's personnel records, unless the public interest in disclosure outweighs the public interest in nondisclosure in a particular instance (MCL 15.243(1)(s)(ix)). In a 2002 case dealing with a newspaper's FOIA request for information about a police department's internal investigations, the Michigan Supreme Court established a standard of review for the disclosure of such records. In *Federated Publications, Inc.* v *City of Lansing* (467 Mich 98), the Court held, "In applying the public interest balancing test..., the circuit court should consider the fact that the records have been designated as exemptible by the Legislature." The public disclosure of police personnel records, including *Garrity* statements, then, is not easily granted. This limited right of access strikes the appropriate balance between the officer's rights to privacy and the public's right to know about its public servants. The bill disrupts that balance.

**Opposing Argument**

The public has a right to be protected from rogue police officers, and it should be able to

request information about an officer's *Garrity* statement from the employing law enforcement agency and/or petition a court for access to that information. Under this legislation, police officers' illegal acts might never be made public. Even a victim of alleged police abuse might not be allowed to view an implicated officer's statement about the incident. Also, an officer whose involuntary statement about his or her illegal activities is insulated from public scrutiny might be hired by another law enforcement agency that has no information about the officer's possible involvement in police abuse or an illegal act.

**Response:** The bill deals only with law enforcement officers' involuntary statements. The fact that an officer has received disciplinary sanctions or was the subject of an internal investigation is not protected. Also, the bill specifically allows disclosure to legal counsel for an individual for use in a civil action against the officer or employing agency, so an alleged victim of abuse will have access to the officer's involuntary statement. In addition, according to testimony before the Senate Judiciary Committee, when an officer seeks employment with another agency, he or she typically must sign a waiver with the prospective employer allowing the release of his or her entire employment file, including *Garrity* statements, and an officer may be decertified by the State if it is determined that he or she provided false information. The bill does not affect this process, which prevents bad cops from covering their trail from job to job.

Legislative Analyst: Patrick Affholter

## FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Bruce Baker

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