Legislative Analysis

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INVOLUNTARY STATEMENTS BY LAW ENFORCEMENT OFFICERS

Senate Bill 647 as passed by the Senate
Sponsor: Sen. Alan Sanborn
House Committee: Judiciary
Senate Committee: Judiciary

First Analysis (12-7-06)

BRIEF SUMMARY: The bill would prohibit the use of an involuntary statement made by a law enforcement officer in a criminal investigation, and restrict the release of those statements by the employing law enforcement agency.

FISCAL IMPACT: The bill would have no fiscal impact on state or local units of government.

THE APPARENT PROBLEM:

Many experienced police officers or deputy sheriffs have been faced with the unsettling prospect of being interviewed as a part of an internal affairs investigation. In most departments, three principles appear well settled, in instances in which an officer has been protected from criminal charges: an officer can be ordered to participate in the investigation; an officer can be required to give a statement--oral or written and at times recorded, transcribed and sworn; and, whatever statements are made may be used against the officer in later disciplinary proceedings, but without the fear of criminal charges.

The rules governing police conduct in these matters developed under a case known as *Garrity* v *New Jersey*, 385 US 493 (1967). In that case the U.S. Supreme Court faced the issue of how the Fifth Amendment's protections against compulsory self-incrimination applied in a public employee disciplinary setting. In *Garrity*, police officers were questioned during the course of a state investigation concerning alleged ticket fixing. The officers were ordered to respond to the investigator's questions, and were informed that a refusal to respond to the questions would result in their discharge from employment. The officers answered the questions, and their answers were later used to convict them of criminal charges. The Supreme Court ruled that the use of the officers' statements in criminal proceedings violated the Fifth Amendment's guarantee that citizens cannot be compelled to be witnesses against themselves. (See Background Information.)

Generally, officers know that as a condition of employment they can be required to answer questions about fellow officers and submit reports to investigating officers or risk disciplinary action for refusal to obey. Many do not know that what they say can be released without their knowledge to third parties outside the investigation; for example, to news reporters. To prevent the release of their statements without their written approval, legislation has been introduced.

THE CONTENT OF THE BILL:

The bill would create a new act to restrict the use and disclosure of "involuntary statements" by law enforcement officers. The bill would apply to a person who was trained and certified under the Commission on Law Enforcement Standards Act, a local corrections officer, or an emergency dispatch worker and who was employed by 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.

An "involuntary statement" would be defined as 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 employed the officer.

Under the bill:

- An involuntary statement made by a law enforcement officer, and any information derived directly or indirectly from it, could not be used against the officer in a criminal proceeding.

- An involuntary statement made by an officer would be a confidential communication not open for public inspection. The statement could be disclosed by the agency only as follows

    - With the written consent of the officer who made the statement.
    - To a prosecuting attorney or the attorney general under a search warrant, subpoena or court order (including an investigative subpoena issued under Chapter VIIA of the Code of Criminal Procedure), and in such an instance, the prosecuting attorney or attorney general could 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 or, as constitutionally required, to the defendant in a criminal case.
    - To officers of, or legal counsel for, the agency or a collective bargaining representative of the law enforcement officer for use in an administrative or legal proceeding regarding the officer's employment status or to defend the agency or law enforcement officer in a criminal action. In this last case, the involuntary statement could not be disclosed for any reason not allowed under this provision and could not be made available for public inspection without the written consent of the officer who made the statement.
    - To legal counsel for an individual or employing agency for use in a <u>civil</u> action against the employing agency or the law enforcement officer. Until the close of discovery in that action, the court would have to preserve, by reasonable means, the confidentiality of the involuntary statement. This could include granting protective orders in connection with discovery proceedings, holding in camera hearings (in the judge's chambers), or ordering any person involved in the litigation not to disclose the involuntary statement without prior court approval.

BACKGROUND INFORMATION:

In *Garrity* v *New Jersey* the U.S. Supreme Court ruled that the use of the officers' statements in criminal proceedings violated the Fifth Amendment's guarantee that citizens cannot be compelled to be witnesses against themselves. The court held that "the choice imposed on the officers was one between self-incrimination or job forfeiture," a choice the court termed "coercion." In particularly strong language, the court held that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights," and ruled that statements which a law enforcement officer is compelled to make under threat of possible forfeiture of his or her job could not subsequently be used against the officer in a criminal prosecution.

ARGUMENTS:

For:

The U.S. Supreme Court has already established that involuntary statements made by law enforcement officers during internal investigations cannot be used against the officers in a criminal prosecution. Concerning this matter, the bill would simply codify the federal court ruling.

The main thrust of the bill would be to establish ownership of the involuntary statements and thus restrict to whom and in what situations an employing agency could release the involuntary statements without the officer's written consent. These statements are transcriptions or summaries of interviews conducted by a police department's internal affairs investigators, undertaken in order to learn about the possibility of wrongdoing by police officers. Generally, the statements are required by police management, and they are given by the officers in confidence and often given under duress.

Law enforcement officials report that they occasionally receive subpoena and/or discovery requests by third parties to review police officers' so-called "Garrity" statements. In one incident in southeastern Michigan, however, reporters from the press requested information under the Freedom of Information Act about an internal investigation of police brutality; statements made by officers during the internal affairs investigation were released as part of the FOIA request and subsequently printed in the newspaper. Both police officers and police management officials fear that such public release of these sensitive statements to third parties will limit officers' willingness to cooperate with internal affairs investigations.

In addition, there are concerns that though “Garrity” statements are not admissible as evidence in a criminal proceeding against the officer who made the statement, a jury pool could be tainted if the statement had been widely reported in the media. Public disclosure of Garrity statements could also unfairly impact civil actions, especially if portions of text were taken out of context and/or circulated widely in the media or in Internet blogs. This bill would ensure that "Garrity" statements would not be disclosed to third parties unless an officer had given his written consent.

Moreover, it is important to note that the bill only pertains to Garrity statements. It would not apply to voluntary statements made by a law enforcement officer, nor would it apply to the internal investigation report itself (the report could be accessed subject to the provisions of the Freedom of Information Act), statements of police officers or witnesses who were not

suspects in the criminal activity, and information and statements from various sources (e.g., results of police disciplinary proceedings, police reports of criminal conduct by a police officer, citizen complaints against police officers) to the extent that the information is currently available under existing law.

Against:

The Freedom of Information Act guarantees that the business of government, including the business of police departments, is conducted in the open and subject to the scrutiny of the press. This freedom of access to official documents should not be abridged.

In addition, though the bill in its present form would still allow access to the investigation report, such a report presents the conclusion of an investigation and not the evidence gathered that led to the conclusion. A representative of the Michigan Press Association once likened this to a trial in which the public was only allowed to hear the closing arguments and the verdict. In order to judge the validity or appropriateness of a verdict, however, it is necessary to hear the evidence used to reach that verdict. In effect, the bill would deny public access to evidence and the ability to judge if the proper conclusion had been reached. Opponents of attempts to restrict access to Garrity statements argue that it is this access to information that keeps abuses in check.

Response:

The legislature has previously recognized the sensitive nature of similar types of information. That is why personnel matters are not released under Freedom of Information requests, unless an employee agrees to the release of his or her records.

POSITIONS:

A representative of the Fraternal Order of Police testified in support of the bill. (12-6-06)

Representatives of the following organizations indicated support for the bill (12-6-06):

The Deputy Sheriffs Association of Michigan

The Police Officers Association of Michigan (POAM)

The Michigan State Police Troopers Association

The Michigan Association of Police Organizations

The Michigan Press Association indicated opposition to the bill. (12-6-06)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.