

# Legislative Analysis



## INVOLUNTARY STATEMENTS BY LAW ENFORCEMENT OFFICERS

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**House Bill 5394 (Substitute H-1)**  
**Sponsor: Rep. Larry Julian**  
**Committee: Judiciary**

### First Analysis (2-25-04)

**BRIEF SUMMARY:** The bill would restrict the use and disclosure of “involuntary statements” by law enforcement officers.

### **FISCAL IMPACT:**

The bill would have no significant fiscal impact on the 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 prosecutions. 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.

An “involuntary statement” would be defined as a statement made by a law enforcement officer in response to a question by the agency by which he or she was employed, if both 1) the officer was explicitly ordered to answer under threat of dismissal or threat of employment sanction; and 2) by complying with the order, the officer was being required to waive his or her constitutional privilege against self-incrimination.

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 1) with the written consent of the officer who made the statement; 2) to a prosecuting attorney under a subpoena or court order in a pending criminal proceeding, and in such an instance, the prosecuting attorney could not disclose the contents of the statement except as ordered by the court or as constitutionally required to the defendant in a criminal case; or 3) 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 civil action. In this last case, the involuntary statement could not be disclosed for any reason not allowed in the new act and could not be made available for public inspection without the written consent of the officer who made the statement.
- An involuntary statement would not be subject to discovery in a civil action except as allowed in the new act.

## ***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:***

Law enforcement officials report that they occasionally receive subpoena and/or discovery requests by third parties to review police officers' so-called "Garrity" statements. The statements are transcriptions or summaries of interviews conducted by 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. 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, and the statements made by officers during the internal affairs investigation were released and printed in the newspaper. Both police officers and police management officials fear that public release of these sensitive statements to third parties will limit officers' willingness to cooperate with internal affairs investigations.

Some people are also concerned 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. This bill would ensure that "Garrity" statements would not be disclosed to third parties unless an officer had given his written consent.

#### ***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 committee substitute 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 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 the bill argue that it is this access to information that keeps abuses in check.

#### ***Response:***

The legislature has previously recognized the sensitive nature of this type 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:***

Representatives of the following organizations indicated support for the bill (2-24-04):

The Detroit Police Officers Association

The Warren Police Officers Association

The Detroit Police Lieutenants and Sergeants

The Michigan State Police Troopers Association

The Michigan Association of Police Organizations

The Fraternal Order of Police

A representative of the Michigan Press Association testified in opposition to the bill. (2-24-04)

A representative of the Detroit Coalition Against Police Brutality testified in opposition to the bill. (2-24-04)

A representative of the Michigan Association of Broadcasters indicated opposition to the bill. (2-24-04)

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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.