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Hon. William VanRegenmorter – Chairman
Michigan House of Representatives – Judiciary Committee
N1093 House Office Building
P.O. Box 30014
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Ref: Review of "*Garrity*" Legislation, **SB 647 (S-3)**

Dear Chairman VanRegenmorter:

On behalf of the Michigan Lodge of the Fraternal Order of Police, which we are proud to represent on these matters, thank you for permitting us to appear before your Committee on December 6th. I am forwarding to your committee a quick review of the "*Garrity*" rule, and reasons that the proposed legislation is so important to all members of law enforcement – command, line personnel, and investigative agencies combined.

[1] What is the "*Garrity*" Rule and why is it so important to law enforcement?

Garrity – v – New Jersey came before the U.S. Supreme Court in 1967, and brought to the Court's attention the classic law enforcement dilemma when conducting internal investigations. A Police Chief in New Jersey had been accused of a crime by the New Jersey Attorney General's office, and he was given a choice by the investigator – what the Court called choosing between "the rock and whirlpool:"

-- He could exercise the rights of all U.S. citizens, and choose to remain silent. if he did, however, he would be discharged.

-- He could surrender his right to remain silent, and give a statement, which could then be used against him a criminal trial. He did – it was – and he was convicted by his own involuntary statement.

The U.S. Supreme Court reversed the conviction, stating unequivocally that:

> Where the choice is between the rock and whirlpool, duress is inherent, in deciding whether to "waive" one of the other. It is always in the interest of a party to choose the lesser of two evils. But the fact that a choice was made according to [self]-interest does not exclude duress. It is the characteristic of duress ..." [1]

[1] *Garrity – v – New Jersey*, 385 US 493, at pg-498; 87 S Ct 616 (1967)

[2] Did the *Garrity* Rule Handcuff Police Administrators during internal investigations?

NO. The U.S. Supreme Court has also made this part of the rule very clear:

> ... the [U.S. Supreme] Court has provided for effectuation of the important public trust in securing from public employees an accounting of their public trust. Public employees may be constitutionally discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity. [2]

The *Garrity* rule permits law enforcement command officers to order employees – under penalty of economic punishment – to truthfully answer questions that will be used to conduct an internal investigation on behalf of the department.

But because the order directly and intentionally must violate the Constitutional right to remain silent, the statement and its derivative evidence is not to be used in any criminal trial later brought against the declarant-officer.

Garrity is the *Miranda* warnings "in reverse." There is **NO** right for a law enforcement officer to remain silent, once the *Garrity* warning is given. The *quid pro quo*, however, is that the Courts recognize that such a statement inherently violates the right to silence, and cannot be used in a criminal trial against the officer.

[3] When is the *Garrity* rule used by law enforcement departments?

It is used on a fairly frequent basis to investigate allegations against officers, where the department is not sure if the allegations contain elements of criminal law violations. The timing of the interview will vary on a case-by-case basis. If a criminal investigation has been launched against the officer, most law enforcement departments will wait until after the criminal investigation has been reviewed by the appropriate prosecuting attorney or agency.

Such a review can be lengthy, however. This past summer, our law firm represented an officer in the Metro Detroit area who was accused of excessive force while trying to subdue the driver of a stolen vehicle. While the arrested driver's case went to a preliminary examination within 14-days, the investigation against the officer was not concluded and reviewed until 4-months later – when he was cleared of all criminal allegations.

Because of these possible delays, there are times when a law enforcement department must quickly decide whether to remove an accused officer from service – irrespective of the grounds for the removal: administrative – criminal – or both. {See footnote #3, below}

This proposed legislation would harmonize and clarify the procedural guidelines as to the ownership, release, and uses, and protections afforded by *Garrity* statements. It also affirms, in **Sect-3** of the Bill, the Federal Constitutional Rule of *Garrity* as the law of Michigan – that the *Garrity* statements cannot be used against the declarant-officer in a criminal proceeding.

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[2] *Gardner – v – Broderick*, 392 US 273, at pg-278-279; 88 S Ct 1913 (1968)

This legislation would apply **only** to the **actual *Garrity* statement** – not to the remaining administrative files of a department's internal investigation. The access to those files would continue to be defined by existing statutory law and court decisions.

[4] Why is this legislation required?

There has been increasing confusion and debate among and between the communities of law enforcement and prosecuting agencies – as well as the news media – concerning how *Garrity* statements should be acquired by outside agencies and news media. These specific problems have proved especially troubling:

[4-a] Who "*OWNS*" the *Garrity* statement?

Our State Court of Appeals has issued two contrary opinions as to this question. One Court has stated that for criminal investigations, **the officer making the statement** "owns" it, and the department cannot intervene to prevent its release to an outside prosecuting agency. [3]

A separate State Court of Appeals, however, has ruled that the department that employs the officer "owns" the statement, for purposes of requests under the Freedom of Information Act, **MCL 15.231 *et seq.*** [4] The legislation would clarify this issue for the benefit of all parties. It would also harmonize existing statutes which already limit unfettered access to public employee personnel files. For example:

[4a-1] A prosecuting agency – although barred from using *Garrity* statements at a criminal trial, could still obtain them by showing probable cause through the use of investigative subpoenas. **MCL 767A.4**. All evidence gained pursuant to that statute, however, is already exempt from the Freedom of Information Act. **MCL 767A.8**.

[4a-2] The Freedom of Information Act exempts from disclosure those law enforcement records that would "deprive a person of the right to a fair trial or impartial administrative hearing." **MCL 15.243(b)(ii)**

[4a-3] All employers are currently prohibited from disclosing "information which communicates the results or analysis of an employee's or applicant's polygraph examination, or the fact that an employee or applicant for employment refused to submit to a polygraph examination." **MCL 37.205**.

[4a-4] ALL personnel records of the employees of the State Corrections Department and the forensic hospital are already exempt from the Freedom of Information

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[3] *In re Homicide of Lance Morton* 258 Mich App 407 (2003). This case involved the fatal wounding a suspect in a fire fight that followed the ambush of a Garden City Police Dept officer by Lance Morton. The ambushed officer was wounded numerous times, but survived the attack. Three officers – nearly the entire afternoon shift of the department – were involved in the subsequent fire fight, and the Police Chief was concerned about the time delay and costs involved, should the officers be arbitrarily taken out of service for an extended time.

[4] *Herald News Co – v – Kent County Sheriff*, 261 Mich App 32, at pgs 39-40 (2004).

Act, because of the concern that they will be used to exact revenge or otherwise wreak havoc with their private lives. **MCL 791.230a**. The current, proposed legislation is much more narrow its scope, but vitally important to law enforcement personnel of all ranks.

[4a-5] ALL records of employee work-related injuries, treatments, benefits and diagnostic records within the Worker Disability Compensation Act. are exempt from the FOIA **MCL 418.230(b)**.

[4-b] Who will still gain access to the *Garrity* statement under the proposed Bill?

[4b-1] As cited above, prosecuting agencies can gain access to the statement as they would any other evidence – by a subpoena based upon probable cause. Because subpoenas issued pursuant to **MCL 767A.4** are confidential, the Bill clarifies that the *Garrity* statement cannot be released through an "indirect" FOIA request to the prosecuting agency, unless the declarant-officer agrees to its release. This current statutory protection is restated and clarified in **Section-5(b)** of **SB 647**.

[4b-2] Members of the news media could gain access to the *Garrity* statement with the consent of the declarant-officer. If the officer – who owns the statement – declines to release it, the *Garrity* statement would be in the same category as other personnel records that are exempt from FOIA, as cited at **MCL 15.243(d)**.
It is important to note, however, that only the *Garrity* statement itself is protected by this statute – not the internal investigation report itself. The access to that report – subject to the other requirements of the FOIA – remains unchanged.

[4b-3] The officers and legal counsel of the employee's department; as well as the employee's representative, have total access to the *Garrity* statement for administrative and/or legal proceedings whether or not the declarant/officer agrees to its surrender. This ensures that the fastest, and most efficient review of the officer's duty status remains undisturbed by this legislation.

[4b-4] In civil/tort litigation where the *Garrity* statement is thought to be an issue, **SB-647(S-3)** requires the trial court to preserve the confidentiality of the statement during the discovery period by reasonable means. The trial court has the discretion to issue protective orders; hold *in camera* reviews of the statement; and, may order any person connected with the litigation not to disclose the *Garrity* statement without the prior approval of the court. This amendment permits appropriate access to the statement by the attorneys of record in the case, but prevents inflammatory releases of the *Garrity* statement to the public by way of the news media.

[5] Is this Legislation an effort to "cover up bad cops?"

NO. The opposition to **SB 647(S-3)** is very limited, but very shrill. The private interest groups who have attacked the Bill never disclose personnel records of their own employees. Yet they advance four arguments to obscure the true intent of the Bill. These hyperactive claims include the following:

[5-a] "Michigan is over-run by corrupt, law-breaking law enforcement officers, who should be exposed and subject to public condemnation for all accusations – *proven or not*."

Through the efforts of this Legislature and administrative agencies such as MCOLES, Michigan now has the highest-educated, highest-trained group of law enforcement officers in its history. Recent legislation has mandated the de-certification of law enforcement officers who are convicted of a felony – or who placed false statements on their employment applications. **MCL 28.609(b)(1)**.

In addition, the administrative responsibilities and oversight of each department remain unchanged. Many law enforcement departments now turn over criminal allegations made against their officers to an outside agency for investigation. Those agencies, in turn, will use probable cause to obtain subpoenas for relevant evidence – all of which are exempted from the FOIA during the investigation. **MCL 15.243(b)**.

[5a-1] Once the investigation is closed and reviewed, one of two events will occur: an arrest warrant will issue for the accused officer – or the officer will be cleared. If the officer is charged, the pre-trial publicity of cherry-picked statements from a *Garrity* interview not only contaminate the jury pool – they also broadcast statements that by their very nature are banned from the Courts of jurisdiction. Can the public possibly be served by such casual disregard of the concerns for a fair trial?

[5a-2] If the officer is cleared, the entire investigation file – save for those sections exempted from FOIA – will be available to the public. The public release of the *Garrity* statement – which must be obtained in direct conflict to the officer's rights as a citizen – is a reasonable compromise to prevent the damage that could be done to an officer's standing in the community by "cherry-picking" bits and pieces of the interview for sensational headlines.

[5-b] "The Bill allows law enforcement officers to 'cover-up' each other's offenses."

FALSE. The information gained from *Garrity* statements cannot be used against the officer who makes them – if that officer is criminally charged with the alleged offense. The statements CAN be used, however, to gather information against anyone else who is implicated by the *Garrity* statement – and that information CAN be used in a court of law.

It should also be noted that in the Garden City Police Department case, cited above in Footnote-3, the prosecutor's office subpoenaed the involved officers pursuant to **MCL 767.5**, and took recorded depositions of each officer. Pursuant to the statute, each officer had immunity for his own statement – but information which concerned the other two officers was not immunized. All transcripts, however, were exempt from the FOIA, pursuant to **MCL 767A.8**.

A prosecuting agency certainly has more ability to get to the truth of a matter under investigation by way of the Code of Criminal Procedure, than does a privately-owned and operated news media outlet.

[5-c] "The Courts have already decided that *Garrity* statements available by FOIA."

FALSE. Our State Courts have literally been tied in knots over FOIA litigation during the past 10-years – much of it generated by news media outlets looking for quick and salacious stories. The two most prominent cases involved media demands for voluminous files from the Lansing Police Department; [5] and the media's demands for personnel records of an officer of the Kent County Sheriff's Department who was arrested off-duty. [6]

The frustration of the State's Courts in trying to weigh the balancing interests of protecting law enforcement records and the public demand for unlimited access was summed up in this "guide" contained within the *City of Lansing* case by the Michigan Supreme Court:

> However, we emphasize that these records are merely exemptible and not exempt, and that exemption is not automatic. [at pg-109].

In the Kent County case, litigation went from Circuit Court, which redacted certain documents, to the Court of Appeals, which reversed the Circuit Court, and prompted an appeal to the Michigan Supreme Court. The Supreme Court, without hearing the matter, reversed the Court of Appeals – leaving the case still up in the air as to which documents could, or could not, be exempted from FOIA.

It is certainly clear that this confusion on the part of the Courts results in expensive, time-consuming, and very costly litigation. While **SB 647(S-3)** does not claim to address all of the issues raised by balancing law enforcement records to the FOIA, it does make clear that at least one record – taken by necessity in opposition to a fundamental right of all citizens – is exempt.

[5-d] "A *Garrity* statement is no different than any work-related statement that is demanded by any private sector employer (including newspapers)."

FALSE. First, and most important: the direct order by a law enforcement agency to override a fundamental Constitutional right that is held by all citizens is a direct governmental action against an individual – whether or not that individual is an employee.

Second, it is well established that private sector employers are legally restrained in their scopes of inquiry into the private lives of their employees. [7]

Not so with law enforcement departments, who routinely investigate all manner of off-duty allegations lodged against the employees covered by **SB-647(S-3)**. I have represented numerous officers, from various departments at the local and State levels, who have been investigated for allegations of "Conduct Unbecoming an Officer," and which were not related to on-duty activities. These complaints are often filed against officers during times of separation and divorce. They also include neighbor complaints and off-duty vehicle accidents. None of these

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[5] *Federated Publications, Inc – v – City of Lansing* 467 Mich 98, 649 NW2d 383 (2002)

[6] *Herald News Corp – v – Kent County Sheriff,* 261 Mich App 32 (2004)

[7] A recent example is *Kaul v Raina*, No 244045, at pg-4; 2004 Mich App LEXIS 663 (Mar 4, 2004) (unpublished)

events would normally involve the standard of a "legitimate employer interest" that our Courts have adopted as a guide to restrict investigations into the private lives of employees.

[6] The impact of the Internet and altered *Garrity* statements sent around the world

Within the last few years, the impact of the Internet and its users – some of whom are interested only in publishing damaging accusations – adds a new emphasis to this legislation.

It is not unusual for a *Garrity* interview to be conducted during the late hours of a midnight shift, during the tour of duty of the officer under investigation. Very rarely are attorneys present – most often, it is simply the command staff and the officer, with the officer's association representative.

That interview – taken in the quiet conference room of a law enforcement department – now has the very real possibility of being cut, pasted, and attached to all manner of nefarious internet postings by "bloggers," then sent literally around the world within seconds.

The media outlet that gains access to the *Garrity* statement will edit, chop, and pick out the most damaging language possible. That, in turn, will be posted on the web pages of the media outlet – which in turn can be cut, pasted, and rearranged to any way that is desired by bloggers and their websites.

Careers and reputations can be destroyed within a matter of seconds. For that reason, the protection all citizens against the use of statements given under duress – legitimate or not – must be protected by statute.

Thank you for permitting the Fraternal Order of Police to present these concerns to your Committee. I will be happy to respond to any and all questions that the Committee may wish to present at the December 6th hearing.

Sincerely,

Mark A. Porter

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Attorney for the FOP

cc: J. Buczek, FOP Director
Sandy Lewis, MHSA