

October 8, 2015

Mr. Michael Hershman
President and CEO
Fairfax Group
6830 Elm Street, Suite 500
McLean, Virginia 22101-3874

Dear Chairman Hershman:

I am writing to transmit the final report and recommendations of the Independent Oversight and Investigations Subcommittee of the Fairfax County Ad Hoc Police Practices Review Commission.

We believe that our report provides the full Commission and Board of Supervisors with an excellent framework of recommendations which we trust will be seriously considered and adopted. Our recommendations are forwarded with unanimous consent from the committee.

It is also important to note our strong belief that this should continue to be a "work in progress" and that the Board of Supervisors should consider this to be the first in a series of reviews aimed at ensuring that we continue to adopt evolving law enforcement "best practices." In that regard, we recommend that Fairfax County should establish an Ad Hoc Police Practices Review Commission every five (5) years to review and, as needed, make recommendations concerning FCPD policies and practices and those of the Independent Police Auditor and the Civilian Review Panel.

We also recommend that the charter for the Independent Oversight and Investigations Subcommittee be extended beyond the completion of the Ad Hoc Commission's report and presentation to the Board of Supervisors to follow up on open issues that may remain going forward and to support and assist implementation of any of the recommendations for which IOI Subcommittee participation would be beneficial.

I include in this letter below an overview of our recommendations and reasoning. The full report and recommendations are attached.

Investigations and Prosecutions

It is of critical importance to building and maintaining public trust and confidence in a community's police department that the criminal and administrative investigations of officer involved shootings (OIS's) in which an individual is fatally or seriously injured are perceived to be and are in fact thorough, accurate, objective and impartial. In most jurisdictions, these investigations are conducted by members of the police department in which the officer involved in the shooting is a member. In Fairfax County, the Major Crimes Division (MCD) of the FCPD Criminal Investigations Bureau (CIB) conducts the criminal investigations of OIS's involving FCPD officers while the FCPD Internal Affairs Bureau (IAB) conducts the corresponding administrative investigations.

The Commonwealth's Attorney for Fairfax County makes the decision to charge in an OIS and oversees any prosecution that may arise from the OIS. Both the FCPD and the Commonwealth's Attorney indicate that they will recuse themselves if there is a conflict of

interest, or perceived conflict of interest, and will refer the OIS investigation and prosecution to the police department and Commonwealth's Attorney in a neighboring jurisdiction.

Some question whether investigators who are members of the same police department as the officer being investigated can objectively and fairly investigate "one of their own". Those expressing such concerns do not generally question the integrity or professionalism of the investigators. Rather, they see a potential inherent subjective bias that may well color the outcome of a given investigation. In like fashion, others question whether a prosecutor who has a close and often long term relationship with a police department and who works on a daily basis with the department can objectively and fairly make a determination to bring criminal charges against an officer who is involved in a shooting which has led to the death of or serious injury to an individual. In reality, across the nation at other major law enforcement agencies up to and including the US Department of Justice, the investigations are in fact conducted internally and in many instances are successfully prosecuted by Justice Department organizations that have long standing relationships with those law enforcement organizations.

Some jurisdictions have addressed these concerns by arranging for the criminal investigations of OIS's involving their police officers to be conducted by investigators from a neighboring jurisdiction on either an ad hoc or permanent basis. Others have considered the establishment of a regional task force of criminal investigators which would investigate OIS's, with the task force investigator(s) from the involved police department recused. Similar arrangements between prosecutors have been proposed or adopted. These arrangements provide for the decision to charge and the prosecution of OIS's to be undertaken by a prosecutor from a neighboring jurisdiction.

Our Subcommittee carefully considered these various alternatives and arrangements. We heard from MCD and IAB concerning their investigations of OIS's, and the Commonwealth's Attorney for Fairfax County, Raymond Morrogh, concerning his prosecution of OIS's. We also reviewed documents from past investigations of OIS's (including the 2013 John Geer fatal shooting) conducted by MCD and spoke with individuals familiar with those investigations. After considering the information obtained and reviewing practices in other jurisdictions (such as the recently reported investigation and prosecution agreements between Montgomery and Howard Counties in Maryland), we determined that the current investigative practices should continue. Mr. Morrogh indicated that he has never had a complaint about the criminal investigations conducted by MCD and noted that any questions or requests for further investigation have been promptly resolved. In addition, Fairfax County's criminal investigative resources are among the best, if not the best in Virginia, and the MCD investigators are very experienced.

As for prosecutions, Mr. Morrogh expressed his view that, absent a conflict of interest, he believed that the Commonwealth's Attorney should make the decision to charge and prosecute OIS's that occur in Fairfax County since that is the duty which the Commonwealth's Attorney is elected and legislatively mandated to perform. He believes that it is the Commonwealth's Attorney's responsibility to make the often difficult decisions that arise in OIS's and that the electorate of Fairfax County can and should hold him responsible for in his prosecutorial decisions. Both Mr. Morrogh and his predecessor, Mr. Robert Horan, cited a multitude of instances where they had charged and successfully prosecuted Fairfax County Police officers for a variety of criminal incidents over the years. During those internal police investigations and subsequent prosecutions, Messrs. Morrogh and Horan advised that the performance of the Fairfax County Police Department and Internal Affairs Bureau was complete, thorough and above reproach.

While we have recommended that the current investigative and prosecutorial practices continue, we have included in our recommendations language which proposes that the Chief of Police and the Commonwealth's Attorney consider whether an OIS the criminal investigation and/or the decision to charge and prosecute should be conducted by criminal investigators and/or the Commonwealth's Attorney of a neighboring jurisdiction, respectively. By doing so, a measure of protection against the concerns raised relating to actual or perceived bias will become part of the process in each OIS.

In addition to recommending that the FCPD and Commonwealth's Attorney affirmatively consider the referral of each OIS, we are recommending that two independent experienced investigators be added to the Commonwealth's Attorney's staff. These investigators would report directly to, and be used at the discretion of, the Commonwealth's Attorney in connection with criminal investigations of OIS's. By participating in OIS investigations, the two Commonwealth's Attorney investigators will provide an independent view of the OIS's and help ensure that the MCD investigation is timely, comprehensive, and addresses any questions or leads that the Commonwealth's Attorney believes need to be resolved.

We also addressed several procedural aspects of OIS investigations.

First, a concern was raised that IAB investigations are not initiated until the MCD criminal investigation is completed and a decision to charge made by the Commonwealth's Attorney. We learned that IAB keeps informed of the progress of criminal OIS investigations and effectively conducts a parallel investigation of the MCD investigation. IAB is, however, limited in its ability to interview the officer(s) involved by the U.S. Supreme Court decision in *Garrity v. New Jersey* in order to protect the officer's Constitutional rights. IAB cannot therefore take a compelled interview of the officer until the criminal process is complete. Given those considerations, we have recommended that an IAB OIS investigation be conducted concurrently with the criminal investigation to the extent practicable, provided that the Constitutional and statutory rights of any potential subject of the criminal investigation are fully protected.

Second, we heard that the MCD interviews of the officer(s) involved in an OIS were being delayed by an informal "waiting period" of up to 48 hours. The purpose for any such delay was reported to us to be that experience and certain studies have shown that more complete and accurate information is obtained if interviews are delayed until after a person who is involved in or witnesses an event, such as an OIS, has had one or two sleep cycles. In recognition of that input, but with concerns about the perception of differing treatment of police officers and third parties involved in an OIS (including the subject), we recommend that the right of FCPD officers under the Virginia Law Enforcement Officers Procedural Guarantee Act to be "questioned at a reasonable time and place" should continue to be preserved. However, in all cases the questioning should commence as soon as reasonable, as determined by the Commonwealth's Attorney in consultation with the Chief of the FCPD.

Third, given that there may be a delay in the questioning of the officer(s) involved in or witnessing an OIS, and to ensure the integrity of the investigation, we have recommended that the current FCPD practice of issuing what is call a "confidentiality order" be formally adopted. Such an order requires all involved officers to abstain from speaking to other officers involved in or witnessing any conduct subject to a MCD or IAB investigation of an OIS, or to any third parties involved in or witnessing such conduct, until advised by MCD or IAB that they may do so.

Finally, in order to provide the public with an understanding of the investigative process, the time-lines of the investigation, and the basis for the Commonwealth's Attorney's decision, we have recommended that the Commonwealth's Attorney issue timely and comprehensive public reports on the criminal investigations of OIS's when no criminal charges are filed. We recommend that the reports describe the investigation conducted by the FCPD, any additional investigation or consultation undertaken by the Commonwealth's Attorney, and the basis for the conclusions reached by the Commonwealth's Attorney. We learned that the Commonwealth's Attorney for the City of Alexandria currently issues such reports, and we believe that similar reports by the Commonwealth's Attorney on future OIS's in Fairfax County would greatly enhance the public's understanding of, as well as confidence and trust in, the investigative and prosecutorial processes and the decisions reached.

Independent Review

In addition to the recommendations outlined above, and for the same reasons of building and maintaining public trust in FCPD and its officers in a period of general loss of public confidence in many institutions, our Subcommittee also recommends the creation of an Office of Independent Police Auditor, and a Civilian Review Panel, appointed by the Board of Supervisors.

The Independent Police Auditor would report directly to the Board of Supervisors and would provide oversight in cases of police use of force that lead to serious injury or death, including officer involved shootings. The Civilian Review Panel would respond to community concerns or complaints about alleged incidents of abuse of authority by FCPD.

While the Subcommittee finds no evidence that there are serious or widespread issues of FCPD personnel abusing their authority in use of force incidents, we did hear from individuals who felt that their complaints about abuse of authority were not taken seriously. "Some form of civilian oversight of law enforcement is important in order to strengthen trust with the community," according to the President's Task Force on 21st Century Policing (May 2005 http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf). "Every community should define the appropriate form and structure of civilian oversight to meet the needs of that community."

While the Subcommittee has set forth proposed time periods for the issuance of reports on a case, it is not the intention of the Subcommittee to unnecessarily prolong investigations and review. Accordingly, it would be appropriate to study and coordinate the timing of review and reports by the Office of the Independent Police Auditor and by the Civilian Review Panel during implementation. This research should include review of policies and practices on coordination of investigation, review and discipline in other jurisdictions that have implemented independent review, and could be an appropriate task under the recommended extended charter of this Subcommittee.

We believe that the Auditor's involvement in and review of IAB's investigations, together with mandatory public reporting, will ensure that the investigations are thorough, accurate, objective and impartial, and that the public can have confidence in the results of IAB's investigations. In order to ensure that the Auditor can fully fulfill his/her responsibilities, we have recommended that the Auditor should have full access to both the MCD criminal investigative files as well as the complete IAB files. We also recommend that the Auditor have the authority to interview any Fairfax County employee (including FCPD personnel) and receive any documents or other materials in the possession of the FCPD or other Fairfax County offices and departments in

carrying out his/her responsibilities. Based on our interviews with National Association for Civilian Oversight of Law Enforcement representatives, this authority is critical to the effective functioning of an independent police auditor.

To ensure the independence of the Auditor, in both perception and reality, we recommend that the person selected shall have relevant experience but shall not have been a Fairfax County employee. The Auditor's office should be both administratively and physically apart from the office of the FCPD.

Civilian Review Panel

With the recommendation for an Independent Police Auditor to review and assess FCPD investigations of OIS and use of force incidents that involve serious injury or death, we recommend that Fairfax County should also establish a Civilian Review Panel to respond to community concerns or complaints about alleged FCPD incidents of abuse of authority. The review of the various resource materials which the Subcommittee undertook established that some form civilian review is a national best practice. The list of the largest police departments in the country which Christian Klossner of the National Association for Civilian Oversight of Law Enforcement (NACOLE) prepared for us showed that all but a handful have some sort of independent review, with many of those involving civilian review.

Civilian review panels offer a method of public involvement in accountability that is external to the department. This independence from the agency or the sworn chain of command that it seeks to hold accountable allows it to address a wide range of concerns without any actual or perceived bias, and to ensure that policing is responsive to the needs of the community. The experiences from other communities with civilian oversight have shown that strong, independent oversight builds legitimacy and public trust through increased police transparency and accountability to the public served. Oversight provides a meaningful voice or forum for the public and forms a crucial bridge between the public and the police. Increased transparency, trust, and communication between the police and the public can lead to greater community cooperation in achieving the ultimate goal of decreased crime and increased public safety.

This Subcommittee recommends establishing a Civilian Review Panel to review the FCPD's investigations of alleged FCPD misconduct. The Board of Supervisors would appoint seven panel members to three year terms, with the ability to serve two consecutive terms. We recommend that the Panel be authorized to retain a criminal investigative consultant.

Our recommendations allow for any individual to file a request for the Panel to review the FCPD's investigation of an alleged "abuse of authority" or "serious misconduct" by a Fairfax County police officer, but the panel would not review the investigations of serious use of force incidents being reviewed by the Independent Police Auditor. The Panel will define "Abuse of authority" and "serious misconduct" and may include the use of abusive, racial, ethnic or sexual language; harassment or discrimination based on race, ethnicity, gender, sexual orientation or other bases; the reckless endangerment of a detainee or person in custody; and violations of Fairfax County or FCPD policies or procedures.

The Subcommittee recognizes that a number of the public perception issues related to OIS and other use of force investigations being conducted by the FCPD are the result of current county communication policies that are being evaluated and modified by another subcommittee. Throughout the course of the Independent Oversight and Investigation Subcommittee's work, there have been several issues that have "crossed over" into other subcommittees, and we

have coordinated and worked diligently to avoid both gaps and overlaps in our respective recommendations.

The Panel will issue a public report at the end of its review of each FCPD investigation. The Panel would meet with the Auditor periodically at the Panel's request concerning the findings and conclusions of the Auditor as to serious use of force cases so that the Panel can provide its views to the Board of Supervisors and the Chief of Police as to policy and practices changes that may be warranted. The panel could also hold periodic public forums around the county to gather information and suggestions about the FCPD, public perceptions and recommendations for policy and procedure, involving other police advisory committees and members of the Board of Supervisors as appropriate.

In closing, the Subcommittee wishes to thank Chairman Bulova and Commission Chairman Hershman for the opportunity to support such an important endeavor for the citizens of Fairfax County. While we came from divergent backgrounds, our ultimate goal was to form of consensus that was fair, balanced and justified. This balance also included a concern as to the message that we would be sending to the outstanding men and women who comprise the law enforcement community of Fairfax County. We are in complete recognition of their brave and dedicated service over the years that has enabled Fairfax County residents to have the enviable quality of life that we enjoy. Our fervent hope is that these recommendations will continue to improve and enhance the relationships between the law enforcement and citizen community of Fairfax County.

Sincerely,

Jack L. Johnson
Chairman
Independent Oversight and Investigations Subcommittee