

# Commonwealth of Virginia

## COUNTY OF FAIRFAX

4110 CHAIN BRIDGE ROAD, ROOM 114  
FAIRFAX, VIRGINIA 22030-4047

**STEVE DESCANO**  
COMMONWEALTH'S ATTORNEY

February 13, 2020

*Via Electronic Mail*  
Eric S. Dreiband  
Assistant Attorney General  
Civil Rights Division  
United States Department of Justice  
601 D St. NW  
Washington, DC 20579

Dear Mr. Dreiband,

I write in response to your letter of February 6, 2020 regarding this Office's request of December 13, 2019 to have an FBI agent appear before a state grand jury. As you noted, I did not make a repeat request upon taking office. I did not do so because I was aware that the Department had not yet responded to this Office's request and I viewed it as duplicative to repeat the pending request. Regardless of the request's history, I thank you for communicating the Department's answer.

Your letter ably explained the Department's position and responsibility regarding federal officers facing state prosecution. Irrespective of the Department's position, my responsibility is to investigate this matter fully and take appropriate action. I intend to fulfill that responsibility.

I note that your letter indicates that the Department "cannot agree at this time to [this Office's] December 13 request." Should the Department determine that it is not in the interest of the United States to defend these individual officers in a civil suit or to support their immunity defenses, please let me know. In the meantime, I will continue to pursue this investigation as well as continue to request and expect the Department's future cooperation when necessary.

Sincerely,



Steve Descano  
Commonwealth's Attorney  
Fairfax County, VA



**U.S. Department of Justice**

**Civil Rights Division**

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*Washington, D.C. 20530*

*Via Electronic Mail*

Mr. Steve T. Descano  
Office of the Fairfax Commonwealth's Attorney  
4110 Chain Bridge Road, Suite 114  
Fairfax, Virginia 22030

February 6, 2020

Dear Mr. Descano,

I write in response to your December 13, 2019 request that an FBI agent who investigated the death of Mr. Bijan Ghaisar appear as a summary witness before a state grand jury in Fairfax County. As you know, the Department could not process that request in the very short period of time before the grand jury expired. Since the expiration of the grand jury, you did not—to my knowledge—renew that request or otherwise contact the Department regarding that request. Nevertheless, as a matter of courtesy and comity, I write to clarify the Department's position about your request.

After a lengthy and thorough investigation into Mr. Ghaisar's death, the Department of Justice declined to bring federal charges. At the outset of the investigation, the Department invited Fairfax County to participate in the Department's investigation. Fairfax declined to do so. When Fairfax County subsequently commenced its own investigation, the Department voluntarily shared its investigative files with the County. To be clear, your request contemplates having an FBI agent appear before the state grand jury, not as a fact witness but to summarize the evidence collected in the federal investigation. Nothing prevents Fairfax County from having its own detectives now review those same case files, conduct their own investigation, and testify before the Fairfax County grand jury. For the reasons set forth below, the Department cannot agree at this time to provide an FBI agent to appear before the state grand jury.

The U.S. Park Police is a component of the U.S. Department of the Interior. The Department of the Interior has requested that the Department of Justice provide legal representation to the U.S. Park Police officers in connection with pending civil litigation relating to Mr. Ghaisar's death. The Department of the Interior has also asked that the United States support the U.S. Park Police officers' anticipated assertion of immunity defenses, regardless of whether the Department of Justice ultimately represents the officers. The Department's Civil Division is currently evaluating those requests.

Should the Department undertake to represent the U.S. Park Police officers, it will be ethically bound to advocate zealously on their behalf, consistent with its longstanding guidelines and practices regarding the representation of federal agents by the Department. In view of the possibility that the Department may represent the officers, the Department is unable to authorize

Department employees, including FBI agents, to appear before a state grand jury in Fairfax County.

It is the longstanding position of the United States that a federal officer may not be prosecuted by a State for actions undertaken in the course of performing the officer's official duties, when the officer had an objectively reasonable basis to believe that the officer's actions were necessary to fulfill the officer's duties. *See, e.g., In re Neagle*, 135 U.S. 1, 75-76 (1890); *Wyoming v. Livingston*, 443 F.3d 1211, 1221 (10th Cir. 2006); *Kentucky v. Long*, 837 F.2d 727, 745 (6th Cir. 1988); *West Virginia v. Laing*, 133 F. 887, 890-91 (4th Cir. 1904); *see also* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195 (2003). In such cases, the Department may be obliged to participate in the litigation and assist the officers in asserting their immunity defense to the prosecution and otherwise take all appropriate measures to protect the interest of the United States.

For these reasons, the Department of Justice cannot agree at this time to your December 13 request that an FBI agent appear before the state grand jury.

Sincerely,

A handwritten signature in blue ink that reads "Eric S. Dreiband". The signature is written in a cursive style with a large initial "E".

Eric S. Dreiband  
Assistant Attorney General  
Civil Rights Division  
United States Department of Justice