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September 12, 2024

Report on Michigan State University/Larry Nassar Document Review and Investigation

Introduction

This report summarizes our findings following the release and review of documents that Michigan State University had, for years, withheld from our investigation into its handling of Larry Nassar and his abuse. The MSU Board of Trustees' (Board) decision to finally release the documents was a long-awaited step in the direction of transparency. Our review of those documents, however, has left us wondering why that step was not taken several years ago, and has provided us with no new basis on which to continue our investigation.

MSU has repeatedly justified withholding the documents because they contained information that was allegedly protected by the attorney-client privilege. Our review has revealed that this justification was not always appropriate. A significant number, if not a majority, of the documents did not appear to us to be covered by the privilege. Accordingly, there was no justifiable reason to withhold those documents for any period of time, let alone an extended period. Further, the documents that contained, or at least arguably contained, privileged information did not offer any new insight into MSU's handling of Nassar's abuse or who knew what about it and when. Indeed, most of the privileged information was not even related to those issues, but instead to tangential issues such as public relations, insurance, and funding.

Because our review revealed no new, relevant, information, we must close this investigation. While this closure is in keeping with the parameters of our investigatory duties, we recognize that it does not provide the type of closure sought by the survivors of Nassar's abuse. There is still no fulfilling answer to the question of how Nassar was able to perpetrate his abuse on so many, for so long—without MSU or anyone else putting a stop to it.

Background

In January 2018, former Attorney General Bill Schuette formally announced an independent investigation into MSU's handling of the Larry Nassar matter.

Notably, that investigation was requested by the Board with a promise of full cooperation.

During the course of that investigation, a team of attorneys reviewed approximately 105,000 documents, consisting of almost 500,000 pages. But despite our numerous requests for documents, and despite a judicially authorized search warrant, MSU continued to withhold thousands of documents on the basis that they were allegedly protected by the attorney-client privilege—a privilege that MSU could have waived at any time to allow for release of the documents.¹

Undeterred by MSU's repeated refusals to waive the privilege, Attorney General Nessel continued to fight for the release of the documents until March 2021, when the Department was forced to close the investigation because of MSU's lack of cooperation.

In April 2023, in light of new leadership at MSU, Attorney General Nessel once again renewed her request for the full release of the thousands of documents that continued to be withheld. Unfortunately, MSU's new leadership perpetuated its former position by refusing to even vote on the request.

Finally, in December 2023, the Board voted to release the documents to the Attorney General. Appreciating the Board's decision and the opportunity to review the documents, Attorney General Nessel vowed to "reopen and expedite our investigation as soon as they are received." In March 2024, the Department received the first of four batches of the previously withheld documents, with the final batch having been received on April 16, 2024. In all, the batches contained 6,014 documents.

Review of the Documents

In anticipation of receiving the documents, the Department assembled a team of attorneys who were involved in the 2018 investigation. As was true of the prior investigation, the team's core mission was to review the documents to determine whether anyone at MSU knew or should have known about Nassar's abuse and could have put a stop to it prior to 2016.

¹ A December 21, 2018 Status Report on the prior investigation can be found at: https://www.michigan.gov/ag/-/media/Project/Websites/AG/investigations/msu/MSU_Investigation_Status_Update_finalredacted_JOB_644663_7.pdf?rev=832e825d994e4a8cbb433647e6fe208b&hash=4D38D77EC68E0D1752FA8B761509B98C

As mentioned, MSU's primary basis for its refusals to withhold these documents from our review was that the documents allegedly fell within the scope and protection of the attorney-client privilege. For proper context, it is important to briefly describe the attorney-client privilege. The privilege is actually quite narrow; it attaches only to (1) confidential communications (2) between a client and the client's attorney (3) made for the purpose of obtaining or providing legal advice. In other words, not every document shared between an attorney and that attorney's client is privileged. There must be a request for legal advice from a client to that client's attorney or the providing of legal advice from an attorney to that attorney's client. Further, only those portions of a document that contain the request or the advice are protected by the privilege. This means that a document, such as an email or email chain, need not always be withheld in its entirety. Rather, a document that contains both privileged and nonprivileged information should be redacted, or blacked, to cover the privileged information and then released.

We have no reason to believe that MSU's Office of General Counsel (OGC) provided inappropriate advice as to the nature and scope of the privilege. From the documents we reviewed, when the issue arose, the OGC correctly cited the standard and how it should be applied.

That said, the application of the privilege did not always appear to be correct. For example, the documents included numerous communications solely between non-attorneys. They also included instances where a non-attorney sent a communication to another non-attorney and merely sent a courtesy copy to, or "cc'd," an attorney, even though there was no request for legal advice. Other documents involved communications that, although sent directly to or from an attorney, consisted merely of links to news articles, meeting and calendar notices, and random discussions that seemingly had nothing to do with legal advice. These types of communications obviously do not fall within the nature and scope of the attorney-client privilege.

In addition, even when the privilege was correctly applied, that application did not always appear to justify withholding the entire document. In particular, there were numerous, lengthy, email chains in which some part(s) of the conversation were arguably privileged, but nothing in the rest of the chain appeared to be privileged. For such communications, MSU should have redacted the privilege portion(s) of the email chain and released the remainder. And while some documents we reviewed were redacted, the redactions were occasionally inconsistent. For example, there were situations where one copy of a document was provided with a redaction of a student name on the basis of student privacy, but another copy of the same document was provided without the redaction. Such inconsistencies defeat the protections that the attorney-client privilege affords and call into question MSU's quality control procedures.

While we are not in a position to determine the reason for the apparent misapplication of the privilege and do not wish to suggest any nefarious motives to any misapplication or decision to withhold a document, there were some documents that could have been seen by MSU as concerning or embarrassing. For example, there was one email suggesting that, up to that point, at least one MSU administrator considered text messages to be equivalent to oral communications such that they were regularly deleted. There were also emails that appeared to be sent or received by Board members using personal email addresses. In addition, some communications showed internal friction regarding particular issues, and others contained comments about individuals and entities both inside and outside MSU that could be viewed as less than flattering.

Summary and Conclusion

Our review of the previously unreleased documents has left us with both positive and negative takeaways. On the positive side, MSU's eventual release of the documents provided a measure of transparency that had previously been lacking. OGC also gave appropriate general advice regarding the nature of the attorney/client privilege. Based on that advice, some documents were properly withheld on the basis of that privilege, and we noted no evidence of a concerted effort to cover up MSU's knowledge of Nassar's conduct. On the negative side, it took years for MSU to offer this measure of transparency. And once the documents were obtained, a significant number of them were not, in our opinion, properly withheld as privileged, and few of them pertained to who knew what about Nassar and when they knew it. As it relates to our investigation, the documents that did pertain to such knowledge did not reveal anything of significance that was not previously known.

From our perspective, the negatives outweigh the positives—not only because of the impact this elongated process has had on our investigation, but also because of its impact on the survivors, the public, and MSU. We have had countless conversations with numerous survivors who shared with us their own anticipation and hope that these documents would provide answers as to how Nassar's abuse was able to go on for so long. We shared that anticipation and hope—and rightly so, since MSU's long and hard fight to keep these documents protected seemed to suggest important content that might shed light on shared accountability for Nassar's actions. That anticipation and hope has ended with disappointment and frustration, which, in our view, could have been avoided.

All things considered, this review does not give us reason to revise our prior statements that MSU “circled the wagons” and “stonewalled” when it came to providing us with the promised full cooperation in our investigation—an investigation that MSU itself requested. To the contrary, this review has provided

additional support for those statements and created a sense of bewilderment as to why MSU withheld these documents for so long. While the decision to finally release the documents is commendable, the interim decisions that delayed their release are unqualifiedly *not* commendable. They resulted in years of delay, only for us to see documents that should have been released sooner and that ultimately provided no additional useful insight.

Sadly, this epic document saga does not end with light shining on new answers or new investigative paths to follow, but rather with a fade to black and the keen recognition that MSU could have acted more responsibly to avoid further angst for the victims, its own University community, and the public at large.