

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

April 11, 2018

Justice Robert Young
Dickinson Wright
215 W. Washington Square
Suite 200
Lansing, MI 48933-1816

Re: University Response to Department of Attorney General Investigation

Dear Justice Young:

I write to address a concern that I have related to the University's response to informational requests from the Department of Attorney General. On April 6, 2018, MSU produced a Privilege Log listing documents that have been redacted or withheld based on an assertion of the attorney-client and/or attorney work product privilege. Currently, the University's Privilege Log is twenty-six pages long and contains hundreds of entries. It is my understanding that this log is a work in progress and will be supplemented as additional documents are reviewed by MSU attorneys.

First, as a general matter, I find the Board of Trustees' assertion of privilege to be both inconsistent with its public representations and legally unsound. As you may recall, the Board sent a letter to Attorney General Schuette on January 19, 2018, requesting that this Office undertake a review "of the events surrounding the Larry Nassar matter" and explaining that the review was necessary in order "to answer the public's questions concerning MSU's handling of the Nassar situation." In its letter, the Board also pledged that they "stand ready to fully cooperate" in the Attorney General's review.

In addition to this public pledge, the Board's duty to fully cooperate with the Attorney General's review is mandated by law. The Board is a public corporation created under the Michigan Constitution. Const. 1963, art. 8, sec. 5. Its purpose is to carry out the will of the people and it cannot use its independence to thwart clearly established public policy. *Branum v State*, 5 Mich App 134, 138 (1966). Moreover, the Trustees have a fiduciary obligation to the people of the State. As fiduciaries, they have a duty to act in good faith and are barred from acting for their own benefit at the people's expense. *Prentis Family Foundation v Barbara Ann*

Karmanos Cancer Institute, 266 Mich App 39, 43-44 (2005). These important legal obligations have been recognized and enshrined in the University's Bylaws.¹ The Board's decision to assert the attorney-client privilege and the attorney work product privilege in response to requests for information from the Department of Attorney General clearly run afoul of these legal duties.

Second, beyond just wrongfully withholding information, the manner that the University has communicated its withholding impedes this Office's ability to fully evaluate the propriety of the University's assertions of privilege. As written, the Privilege Log fails to specifically identify those individuals on University communications who are attorneys rendering legal advice. Additionally, MSU has chosen to log emails by "chain" rather than by each individual communication which obfuscates our review. For example, the Privilege Log states that Document MSU-AG-0132987 has been withheld based on the "attorney-client privilege." The document is described as an "email chain requesting information to assist in rendering legal advice regarding Nassar litigation." The email chain is between Kathy Klagas and Tracy Leahy (dated December 13, 2016). While no job title has been provided for Ms. Leahy, her LinkedIn profile indicates that she has been the Senior Institutional Equity Investigator and Deputy ADA Coordinator for Grievances at Michigan State University since 2015. Based on her job title, it's unclear how Ms. Leahy could have rendered legal advice to Ms. Klagas in 2016. Moreover, the attorney-client privilege does not protect from release the facts underlying a person's communications with his or her attorney. *Upjohn Company v United States*, 449 US 383, 395 (1981). Thus, in this instance, the Privilege Log either lacks sufficient information to substantiate the assertion of privilege or the communication is not privileged and has been improperly withheld by the University.

These concerns are of critical import because the Privilege Log reflects that numerous emails involving key individuals in our investigation (for example, members of the Board of Trustees, former President Simon, Vice President Bill Beekman, Provost June Youatt, and Associate Provost Terry Curry) have been withheld.² The University's decision to withhold and redact information involving these key individuals substantially interferes with this Office's ability to conduct a complete and thorough investigation of the University's handling of the Nassar matter.

¹ See Preamble to the Michigan State University Bylaws which says that the University is "obligated to serve the best interest of the people who support it."

² In fact, it appears the University has even decided to assert privilege and withhold or redact emails sent to or from (convicted felon) Larry Nassar.

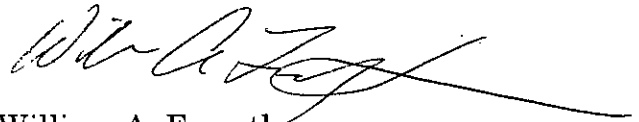
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Furthermore, it appears that emails involving the former Dean of the College of Osteopathic Medicine, William Strampel, have been withheld or redacted. As you know, this Office has recently filed both felony and misdemeanor criminal charges against former Dean Strampel. Our investigation into his conduct is on-going. By withholding communications involving the former Dean of the College of Osteopathic Medicine, the University is impeding our ability to investigate the full scope of Strampel's illegal conduct and clearly thwarts "the will of the people of the State."

In light of the foregoing, I am asking that the Board reconsider its decision to so liberally assert the attorney-client privilege and the attorney work product privilege in response to requests for information from this Office. If the Board will not reconsider its decision, then I am requesting that MSU agree to the appointment of a third-party to conduct a review of the communications that the University has asserted are protected by privilege so that the propriety of those assertions can be evaluated.

A response to my proposal by April 20, 2018, would be appreciated. In the interim, if you have any questions or concerns, please do not hesitate to contact me. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "William A. Forsyth", with a long, sweeping horizontal line extending to the right.

William A. Forsyth
Independent Special Counsel