

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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DANA NESSEL
ATTORNEY GENERAL

March 15, 2021

Senator Jim Runestad
P.O. Box 30036
Lansing, MI 48909-7536

Re: February 23, 2021—Request for Investigation

Dear Senator Runestad:

Thank you for the opportunity to review the concerns you and seven of your colleagues raised in your February 23, 2021 request for an investigation. When COVID-19 first reached the United States in 2020, there was no national strategy in place to contain it. State and local officials, healthcare professionals, and other front-line workers were left to coordinate their own responses to the virus based on incomplete and ever-changing information, and with scarce resources.

It has been just over one year since the first confirmed case of COVID-19 here in Michigan. Even now, we are learning more about this virus every day. But one thing was clear early on: COVID-19 posed a particularly severe threat to our elderly and other vulnerable populations, and protecting them would require swift action. The threat of COVID-19 is far from over, but so far Michigan has risen to the challenge. Our COVID-19 case rate is well below the national average,¹ and a recent study by the University of Michigan School of Public Health found that the State's aggressive response to the virus likely saved thousands of lives.²

Regardless, as elected leaders in Michigan, I agree it is appropriate to reflect and think critically about the tactics that could be employed to reduce the impact of COVID-19 in our state, and especially for our seniors. And it is appropriate to use every tool available to hold nursing homes accountable when they do not comply with state and federal safety mandates. However, your letter asks me to do something else entirely: open an investigation into Governor Whitmer's handling of COVID-19

¹ Centers for Disease Control and Prevention, *COVID Data Tracker: COVID-19 Case Rate in the US Reported to the CDC, by State/Territory (cases per 100,000)*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k.

² University of Michigan, *Strict Public Health Measures During Holidays Likely Saved Lives in Michigan, U-M Researchers Say*, Jan. 28, 2021, <https://news.umich.edu/strict-public-health-measures-during-holidays-likely-saved-lives-in-michigan-u-m-researchers-say/>.

in our state's nursing homes. Specifically, your letter requests that I investigate four points:

1. The processes and policies that may have contributed to the spread of the virus among our most vulnerable nursing home residents across the state;
2. The accuracy of the data reported by Gov. Whitmer's administration, taking into consideration the discrepancies in facility reporting policies as identified in your letter, to include failure of some nursing homes to cite cases when a positive result comes back after a transfer to a hospital;
3. Compliance with all Center for Disease Control (CDC) guidelines and reporting requirements; and
4. Compliance with Michigan's Freedom of Information Act.

I will address each in turn.

1. COVID-19 Processes and Policies For Nursing Homes

As an initial matter, I see no evidence in your letter or elsewhere to suggest that Governor Whitmer's efforts to contain COVID-19 in Michigan's nursing homes resulted in increased deaths. To the contrary, a recent report by the Center for Health and Research Transformation at the University of Michigan concluded that, overall, Michigan's strategy to contain COVID-19 nursing homes "performed well."³ The study noted that "Michigan's nursing home residents constituted a smaller proportion of overall COVID-19 deaths than the U.S. average."⁴

In any event, bad policy alone would not be grounds for an investigation by my office. As the governors of each state grappled with an unprecedented public health emergency, they were forced to make quick decisions with imperfect information to protect residents of long-term care facilities. States took similar but varying approaches to address this issue and it is likely that as epidemiologists and other experts study the pandemic, they will find variability in efficacy from state-to-state. The suggestion that these public health policy decisions, by themselves, should be investigated because different approaches *could* have resulted in fewer deaths is

³ Center for Health and Research Transformation, *CHRT Report Evaluates Michigan's COVID-19 Nursing Home Strategy and Provides Recommendations for Future Approaches*, Sep. 8, 2020, <https://chrt.org/publication/chrt-releases-report-evaluating-michigans-nursing-home-strategy-and-providing-recommendations-for-future-approaches/>.

⁴ *Id.*

inappropriate and violates well-established ethical guidelines for investigations by law enforcement agencies.⁵

2. Accuracy of COVID-19 Reporting Data

You also raise concerns regarding the accuracy of data reported by the Governor's administration, but again have provided no specific allegations of wrongdoing. The bulk of your accusations are anecdotal references to differences in reporting by individual (and unidentified) long-term care facilities. You claim that those differences exist in part because the State has not required nursing homes to report COVID-19 deaths of patients who are transferred to a hospital before they pass away. That is not correct. For example, MDHHS reporting guidelines for skilled nursing facilities issued on October 21, 2020 incorporate federal guidelines that instruct facilities to "include residents who died in another location, such as a hospital," when reporting COVID-19 deaths.⁶

More fundamentally, though, your letter does not articulate how or why these reporting differences may be evidence of conduct warranting investigation. Indeed, there is no information in your letter to distinguish your observations from anything more than good faith reporting errors—if errors at all. If reporting guidance from the state or federal governments has been confusing or incomplete, an investigation by the state's top law enforcement official is not the appropriate remedial mechanism to improve policy in this regard.

You also reference the August 26, 2020 request to the Governor from the U.S. Department of Justice. Your letter comes as New York's governor faces serious allegations that, in response to a similar request from the DOJ, his administration falsified data to downplay the number of COVID-19 deaths in nursing homes. Reports allege that his staff doctored the numbers to avoid a potential federal investigation. That conduct very well could merit criminal charges, and New York Attorney General Letitia James appropriately launched an investigation.

But the situation here is completely different. I am aware that Governor Whitmer's office complied with the DOJ information request and have no reason to doubt the accuracy of that response—much less suspect intentional misrepresentations within that response.

⁵ ABA Standards for Criminal Justice: Prosecutorial Investigations (3d ed), Standard 2.1.

⁶ MDHHS, *COVID-19 Reporting: Data Collection Instructions for Skilled Nursing Facilities*, Oct. 21, 2020, https://www.michigan.gov/documents/mdhhs/MDHHS_SNF_COVID-19_Data_Collection_Instructions_691456_7.pdf.

3. Compliance with CDC Guidelines

Your letter also requests that I investigate compliance with all CDC guidelines and reporting requirements. Again, you do not specify what CDC guidelines and/or reporting requirements you are concerned about, nor how you believe they have been violated. Even if behavior contrary to CDC guidance is identified, there is no criminal penalty under Michigan law for such a violation. Thus, an investigation by my office is not the appropriate mechanism for an inquiry of the nature you have described in your letter.

4. Compliance with the Freedom of Information Act

Finally, you request an investigation into compliance with the Michigan Freedom of Information Act (FOIA), but your letter again makes no mention of any specific violation. Your letter does not even identify a specific FOIA request that has been sent, which would be the bare minimum to initiate any sort of action under FOIA. Even if it did, FOIA provides for a civil fine and other remedies that may be enforced by a court—not the Attorney General.⁷ Accordingly, this does not provide a justification for opening an investigation in my office.

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To be sure, I will not hesitate to investigate state officials—including the Governor—when justified. After reviewing your prior request to investigate the Governor and her staff regarding allegations surrounding a state contract for COVID-19 contact tracing services, I assigned multiple career prosecutors and Special Agents to investigate. After the team interviewed 17 witnesses and reviewed thousands of documents, I released a 29-page report outlining the work and explaining how criminal charges were unfounded under Michigan law.⁸

Though I will not hesitate to act when justified, I also will not abuse the investigatory powers of this Department to launch a political attack on any state official, regardless of party or beliefs. Law enforcement officials have an ethical duty to “resist political pressure intended to influence the conduct, focus, duration or outcome of a criminal investigation,” and to “limit the political impact” of an investigation “without regard to the official’s personal political beliefs or affiliations.”⁹ I appreciate that you and your colleagues have policy disagreements with Governor Whitmer’s response to COVID-19. But an investigation by my office

⁷ See MCL 15.240b.

⁸ Michigan Department of Attorney General, *Investigation into the Matter of the Procurement of Every Action VAN for COVID-19 Contact Tracing Services*, Dec. 28, 2020, https://www.michigan.gov/documents/ag/Report.In.re.Contact.Tracing_711555_7.pdf.

⁹ ABA Standards for Criminal Justice: Prosecutorial Investigations (3d ed), Standards 3.6(a),(c).

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is not the mechanism to resolve those disagreements. You have provided insufficient indicia that any law has been violated and thus no investigation is warranted at this time.

Sincerely,

Dana Nessel
Attorney General