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**Criminal Division**

Date: March 11, 2014

To: John J. Choi  
Ramsey County Attorney

From: Richard Dusterhoft  
Criminal Division Director

*RD*

Re: County Attorney File 2127010  
SPPD CN 13-267-460

On May 5, 2009 a male, who was a juvenile at the time, was confirmed at the Cathedral of Saint Paul. The male later told his mother that, following the ceremony and while photographs were being taken, Archbishop John Nienstedt touched his buttocks. At some later date, the male's mother was having lunch with a friend, who happens to be a priest. The mother told the priest what her son told her. The priest reported the incident to the Archdiocese. The priest reported the matter to the police on December 16, 2013.

This memorandum is based on the reports and evidence presented to our office by the Saint Paul Police Department and relates only to the specific accusations made by the male against Archbishop Nienstedt.

When interviewed on December 18 and December 19, 2013, the male told police that the incident occurred following the confirmation ceremony and while he and other confirmands were lining up for a group photograph. The male said that the Archbishop had one hand on his crosier and the other on the male's shoulder. The male said the Archbishop's hand moved down his back to his buttocks. The male said that he thought it was "creepy" but did not feel violated. The male said that he was concerned about the attention the incident was receiving and did not believe the incident was significant. The male said he was not aware of any other incidents involving other people.

On December 17, 2013, Archbishop Nienstedt issued a public statement regarding the allegation and denied that any inappropriate touching happened.

Archbishop Nienstedt was interviewed by police on December 24, 2013. The Archbishop said he would not have touched the male's buttocks. He said that while he had no specific recollection of this particular confirmation or confirmand, he stands the same way for all such photographs: with one hand on his crosier and the other on his pallium. The Archbishop wondered if another confirmand could have touched the victim as a joke.

Police subsequently located a photograph of the male and his confirmation class with Archbishop Nienstedt. The Archbishop is directly behind the male and the Archbishop's right hand appears to be on the male's left shoulder. The Archbishop's left hand is on his crosier. There are eleven other people in the photograph (including a priest and a deacon) within a few feet of the male and the

Archbishop. The group is arranged on stairs and the Archbishop is standing one step higher than the male. It appears from the photograph that the Archbishop would have to bend to reach the male's buttocks and that any such action would have likely have been witnessed by others present.

Because the photograph appears to contradict what the Archbishop said regarding the placement of his hands in such photographs, police followed up and spoke with the Archbishop again on February 5, 2014. The Archbishop said that prior to being appointed Archbishop, he was a Bishop in New Ulm. There, he would also pose with confirmands and would stand with one hand on the confirmand's shoulder. Later, after becoming Archbishop and receiving a pallium, he would stand with one hand on the crosier and the other on the pallium. He was surprised to see his hand on the male's shoulder in the photograph.

Police identified and talked to every person who appears in the photograph. No one who appears in the photograph reported seeing anyone touched, touching anyone themselves as a joke or otherwise, having been touched, seeing anyone react in a startled manner as though something had happened, or talking later about anyone having been touched.

Minnesota Statute section 609.3451, subdivision 1(1) defines Criminal Sexual Conduct in the Fifth Degree as "nonconsensual sexual contact". That statute explicitly defines "sexual contact" to *exclude* the "intentional touching of the clothing covering the immediate area of the buttocks". The male claims he was touched on the buttocks over the clothing. Therefore, Minnesota Statute section 609.3451 cannot be charged.

Minnesota Statutes sections 609.343 and 609.344 (Criminal Sexual Conduct in the Second and Fourth Degree, respectively) do not specifically except touching of the buttocks over the clothing and, because the male in this case was under the age of 16 and the Archbishop was more than 48 months older than the male at the time, these statutes could apply if a) it could be proven beyond a reasonable doubt that the contact occurred, *and* b) that the contact was done with a sexual or aggressive intent.

Based upon the evidence presented and with regard to the element set forth above in a), there were no witnesses to the incident as described or to any conduct or discussion consistent with the incident having occurred as reported. The male did not discuss the incident with anyone else who was confirmed that day. It also seems unlikely that the Archbishop, if he were so inclined, would pick that moment to sexually touch a random boy openly in front of another clergy member, a deacon, and numerous other confirmands while the confirmands' family members were preparing to document the moment in photographs.

Based upon the evidence presented with regard to the element set forth above in b), the state cannot prove beyond a reasonable doubt that the touching, if it occurred, was intentional and done with sexual or aggressive intent. The male did not describe any squeezing or rubbing associated with the touch. Resting a hand on the buttocks, in the context of a group gathering to line up for photos, could be done in a thoughtless, unintentional or accidental manner, without the requisite sexual or aggressive intent required to be proven under the law.

This case was reviewed by an Assistant County Attorney with many years of experience prosecuting child sex abuse cases. It is that attorney's experienced and considered opinion that based upon the evidence as presented by police this case could not be proven beyond a reasonable doubt and should not be charged.

Assistant Director Jill Gerber and I have each reviewed the entire investigative file presented to us by the Saint Paul Police Department, and we agree with this conclusion.