

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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Law Court Docket No. Ken-26-91

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**JOHN D. CLOPPER,**

Appellant,

v.

**MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM,**

Appellee.

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On Appeal from the Superior Court, Kennebec County  
Docket No. AUGSC-CV-2025-29

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**BRIEF OF APPELLANT JOHN D. CLOPPER**

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## INTRODUCTION

The Maine Public Employees Retirement System (“MainePERS”) lost tens of millions of dollars of public retirement funds in a direct investment in a stone fruit company solicited by the Paine Schwartz private equity firm. MainePERS then evaded public scrutiny of how this happened by responding to a public records request under Maine’s Freedom of Access Act (“FOAA”) with documents that have been made illegible by the near-total redaction of their content. MainePERS contends that it can keep nearly everything about its ill-fated investment secret based on a statutory exception to the FOAA for information about actual or prospective investments that would, if released, impair its ability to obtain information about private equity investments in the future or cause substantial harm to its competitive position or that of Paine Schwartz. But even if the Court determines that some of the redactions are defensible, what MainePERS has done goes too far. We know that because the stone fruit company has ceased to exist, having been liquidated in bankruptcy, which means the company has no interest in keeping any secrets it may once have held. Indeed, MainePERS itself has acknowledged that only some of what is in the documents qualifies for the statutory exceptions. Yet just about everything in them has been redacted. Because MainePERS has not met its burden under the FOAA to demonstrate that its redactions are justified, the Court should order that the documents be produced in

unredacted form, or direct MainePERS or the trial court to eliminate the improper and unnecessary redactions.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

MainePERS provides retirement benefits for public employees in Maine. A. 45, ¶ 1. It invests some of the money it holds for this public purpose in private equity funds. A. 45, ¶ 2. MainePERS also sometimes makes co-investments in individual companies alongside of private equity funds in which the retirement system has already invested. A. 45, ¶ 3.

The MainePERS co-investment program was first approved in 2013 and then expanded in 2015, 2017, and 2022. A. 46, ¶ 5. For these investments MainePERS typically becomes a limited partner in a partnership that in turn holds an interest in the individual company. A. 45, ¶ 3. These investments are known as “co-investments,” as MainePERS is investing alongside a private equity fund that is also investing. *Id.* When MainePERS makes a co-investment, it invests in the same company twice: once as a private equity fund participant, and once as a co-investor. *Id.* MainePERS has invested over \$1 billion in 99 co-investments as of May 2025. A. 46, ¶ 6. While MainePERS policies require that the Board of Trustees decide whether to invest in a private equity fund, MainePERS staff have the power (within certain guidelines) to make co-investments. A. 46, ¶ 4.

A private equity firm MainePERS does business with is Paine Schwartz Partners, LLC (“Paine Schwartz”), a firm specializing in the food and agribusiness sector. A. 46, ¶¶ 7–8. One investment vehicle Paine Schwartz offered was Paine Schwartz Food Chain Fund IV, L.P. (f/k/a Paine & Partners Capital Fund IV, L.P.) (“Fund IV”), a fund started in July 2014 with \$867 million in capital committed and invested over the next five years. A. 46, ¶ 9.

In 2014 Paine Schwartz solicited MainePERS to invest in Fund IV. A. 46, ¶ 10. MainePERS committed \$60 million to Fund IV. A. 44, ¶ 11. In 2017, Fund IV acquired a controlling interest in Wawona Packing Co., a California stone fruit producer. A. 46, ¶ 12. Paine Schwartz also solicited MainePERS to make a co-investment in Wawona Packing Co. A. 47, ¶ 13. To that end, in 2017 MainePERS made a \$15 million co-investment in a limited partnership that invested in Wawona Packing Co.; this was identified in public reports as an investment in Wawona Co-Investment Fund I (“Wawona”). A. 47, ¶ 14.

In 2019, Wawona Packing Co. merged with Gerawan Farming Inc. to create MVK FarmCo LLC d/b/a Prima Wawona (“Prima Wawona”). A. 47, ¶ 16. In connection with the merger Paine Schwartz sought another co-investment from MainePERS. A. 47, ¶ 17. In 2019, MainePERS invested a further \$7,238,015, which was identified in public reports as an investment in PSP Maverick Co-Invest

(“Maverick”).<sup>1</sup> A. 47, ¶ 18. Decisions about the co-investments in Wawona and Maverick were made by MainePERS staff. A. 47, ¶ 22. Prior to the 2017 and 2019 co-investments in Prima Wawona, Paine Schwartz gave MainePERS solicitation materials encouraging its staff to make the \$15 co-investment in the stone fruit farm in 2017 and the \$7.2 million co-investment in 2019. A. 48, ¶ 23.

Prima Wawona filed for bankruptcy in 2023 (*In re MVK FarmCo LLC*, et al., No. 23-11721 (Bankr. D. Del.)). A lengthy disclosure statement filed in the bankruptcy explains that the company had \$679 million in debt. Ex. 18 to Joint Stipulated Facts (“Joint Stip.”) at 21. The statement explains what caused the bankruptcy. In the fall of 2022, it became apparent that there were “near-term liquidity challenges.” *Id.* at 28. Nevertheless, at the same time the company leased 3,250 additional acres (the “SunWest Lease”), expanding its acreage by 20 percent. *Id.* at 27-28. The SunWest Lease “significantly increased working capital needs” because it imposed “additional farming and operating costs” due to the expanded acreage. *Id.* at 28. It was the simultaneous combination of “liquidity challenges” and “significantly increased working capital needs” that sunk the company, resulting in the 2023 bankruptcy filing, where the company promptly moved to reject the SunWest Lease. *Id.* at 28. This is public information.

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<sup>1</sup> MainePERS also invested in Paine Schwartz Food Chain Fund V, L.P. (“Fund V”) after receiving solicitations from Paine Schwartz that were similar to the solicitations for Fund IV. A. 48, ¶ 24. Maine committed \$45 million to Fund V in 2018. *Id.*

Paine Schwartz notified MainePERS of the filing and conclusion of the bankruptcy. A. 47, ¶ 20. The company's assets have been liquidated, and the company no longer exists. A. 47, ¶ 21. The current total value of MainePERS' co-investments in Prima Wawona (one via Wawona Co-Investment Fund I, the other via PSP Maverick Co-Invest) is zero. A. 47, ¶¶ 15, 19.

The FOAA request at issue in this case was made by John D. Clopper, a lawyer who represents Daniel Gerawan, the former chief executive and 25% owner of Prima Wawona. A. 53, ¶ 49. The request seeks information about the materials received by MainePERS staff that convinced its staff to invest tens of millions of dollars in Wawona and Maverick, and updates on the investments that MainePERS received. A. 48, ¶ 25. The request was for three categories of materials:

(1) solicitation or offering materials Paine Schwartz<sup>2</sup> provided to MainePERS; (2) financial or business updates Paine Schwartz provided to MainePERS; and (3) materials submitted by McKinsey & Company to MainePERS in connection with the solicitation for funds. *Id.* After some back-and-forth over the scope of the request and its cost, in January 2025 MainePERS produced certain heavily redacted records and stated:

As previously noted, within the scope of your request is information that is non-public because it consists of "trade secrets or commercial

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<sup>2</sup> Plaintiff requested records related to Paine Schwartz LLC, Paine Partners LLC, and The Paine and Schwartz PE company, because these are related entities and some records may have used different names or names may have changed over time. A. 49, ¶ 26.

or financial information that relates to actual or potential private market investments of the retirement system,” the disclosure of which “may . . . [i]mpair the retirement system’s ability to obtain such material, data or information in the future” or “[c]ause substantial harm to the competitive position of the retirement system or of the person or entity from whom the information was obtained.” 5 M.R.S. § 17057(4). To the extent that your request seeks such information, it is denied pursuant to 1 M.R.S. §§ 402(3)(A), 402(3)(B), 408-A and 5 M.R.S. § 17057(4). Information that is non-public has been redacted from the documents included in our response.

A. 49, ¶ 28.

What MainePERS produced was thousands of pages—3,947 to be precise—of blacked-out documents that reveal essentially nothing, because more than 99% of the text has been redacted. A. 50, ¶ 30 (“The records MainePERS produced to Clopper were heavily redacted.”). But not everything in the documents was redacted: the unredacted less-than-one-percent of the materials Clopper received included (*inter alia*) Paine Schwartz’s description of Wawona Packing Company; a table displaying information about Wawona’s senior management team; headings from what appears to be a Paine Schwartz PowerPoint; pieces of a summary of a report that was “Prepared Exclusively for Paine & Partners”; a description of a Fresno peach business; images and text from the cover of another PowerPoint; a letter about the Prima Wawona bankruptcy; and information about Paine Schwartz events that MainePERS did not redact despite the words “CONFIDENTIAL AND PROPRIETARY—FOR USE OF INTENDED RECIPIENT ONLY” appearing on the document. *See* redacted records produced by MainePERS.

Other states and municipalities have publicly disclosed solicitation materials, consultant recommendations, financial reports, and other information related to investments in Paine Schwartz funds. A. 51–52, ¶¶ 38-45. And massive amounts of information about the now dissolved Prima Wawona was made public in the bankruptcy proceeding and reported in the media. A. 53, ¶¶ 47–48.

Believing that the documents should have been produced without redactions, or at a minimum that the redactions MainePERS made were excessive, Clopper appealed to the superior court. In the course of the briefing Clopper narrowed the scope of the documents he was requesting as indicated on the marked-up version of the index of documents MainePERS produced that is attached as Exhibit A to Clopper’s trial court brief (at 25); MainePERS then produced a revised version of the index that reflects the narrowed scope of Clopper’s request. A. 58–60. There are 41 documents in dispute.

The appeal was unsuccessful: the court ruled that “MainePERS had just and proper cause to redact the responsive documents in the way that it did pursuant to its broad discretionary authority under § 17057(a)(A).” A. 18. The trial court did not say that *everything* MainePERS redacted was confidential under section 17057, but instead that “there is *substantial information contained within* the documents” that the court believed was protected, and that “*many of the documents* contain

sensitive strategic information.” A. 15, 18 (emphasis added). The documents were nevertheless almost entirely redacted. Clopper appealed.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Did the trial court err when it determined that there was just and proper cause for the redactions MainePERS made, despite the fact that the investments were made several years ago and the company that is the focus of the FOAA request is now defunct?

2. Did the trial court err when it rejected the argument that MainePERS redacted the documents it released excessively and arbitrarily?

### **ARGUMENT**

“The burden of proof is on the agency . . . to establish just and proper cause for the denial of a FOAA request.” *Anastos v. Town of Brunswick*, 2011 ME 41, ¶ 5, 15 A.3d 1279, 1282 (quotation marks omitted). “In reviewing whether a government entity complied with FOAA,” this Court will “review the trial court’s factual findings for clear error and its interpretation of FOAA de novo.” *Fairfield v. Maine State Police*, 2023 ME 12, ¶ 9, 288 A.3d 1220, 1224, as revised (Apr. 6, 2023). MainePERS’ determination as to whether disclosure may “(1) Impair the retirement system’s ability to obtain such material, data or information in the future; [or] (2) Cause substantial harm to the competitive position of the retirement

system or of the person or entity from whom the information was obtained” is reviewed for abuse of discretion. 5 M.R.S. § 17057(4)(A).

In his trial court brief, Clopper anticipated that MainePERS might take the position, based on the reference in section 17057(4)(A) to the “*sole* discretion of the retirement system,” that its determination was not subject to judicial review, and explained why that would be wrong. *See* Plaintiff’s Brief at 21–25; *id.* at 22 (“If Section 17057 had left how to respond to FOAA requests to MainePERS’ *absolute and unreviewable* discretion, that would perhaps preclude judicial review. But ‘sole discretion’ should not be read to mean absolute and unreviewable discretion. The discretion may belong to MainePERS alone, but that does not mean it cannot be abused.”); *Perez Perez v. Wolf*, 943 F.3d 853, 863 (9th Cir. 2019) (“[A]n agency’s sole discretionary authority is not inconsistent with judicial review of the agency’s exercise of that discretion.”). The State, however, conceded in its brief that the court “should review MainePERS’s decision whether there may be impairment or substantial harm from disclosure under the abuse of discretion standard.” Defendants’ Response at 9. For that reason, Clopper does not repeat his argument on the “sole discretion” language here.

## **I. The Freedom of Access Act.**

The FOAA provides that any person has the right to inspect and copy any public record. 1 M.R.S. § 408-A. The Legislature has directed that the FOAA be

“liberally construed and applied to promote its underlying purposes and policies,” which are to ensure that public records and proceedings are “open to public inspection.” 1 M.R.S. § 401. To that end, this Court has said “[w]e strictly construe statutory exceptions to FOAA . . . .” *Blue Sky W., LLC v. Maine Revenue Servs.*, 2019 ME 137, ¶ 23, 215 A.3d 812, 821; *see also Medical Mutual Ins. Co. of Maine v. Bureau of Ins.*, 2005 ME 12, ¶ 5, 866 A.2d 117, 120 (because the FOAA’s purpose is “to open to the public the conduct of public proceedings and the records of public activities,” courts should “strictly interpret any statutory exceptions to the FOAA.”). “The burden of proof is on the agency . . . to establish just and proper cause for the denial of a FOAA request.” *MaineToday Media, Inc. v. State of Maine*, 2013 ME 100, ¶ 9, 82 A.3d 104 (cleaned up).

“Cases decided pursuant to FOIA [the federal Freedom of Information Act] inform our analysis of Maine’s FOAA.” *Blethen Maine Newspapers, Inc. v. State*, 2005 ME 56, ¶ 13, 871 A.2d 523, 529. Under the FOIA, as with the FOAA, “the agency bears the burden of proving that the asserted exemption justifies the redactions and withholdings,” *Pub. Emps. for Env’t Resp. v. Off. of Sci. & Tech. Pol’y*, 825 F. Supp. 2d 104, 107 (D.D.C. 2011). “To satisfy that burden, the agency ‘must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’” *Id.* “The burden

cannot be satisfied,” as MainePERS does here, “by the sweeping and conclusory citation of an exemption plus submission of disputed material for in camera inspection.” *Id.* (quotation marks omitted); *see also Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) “(Upon remand the Government should undertake to justify in much less conclusory terms its assertion of exemption . . . .”).

Of central importance here, responding to a FOAA request is not an all-or-nothing proposition. Instead, “Maine courts can require redaction of records in connection with FOAA requests.” *Blethen Maine Newspapers*, 2005 ME 56, ¶ 38, 871 A.2d at 535; *see also Anctil v. Dep’t of Corr.*, 2017 ME 233, ¶ 6, 175 A.3d 660, 662 (“When a public record contains information that is not subject to disclosure under FOAA, the information may be redacted to prevent disclosure.”). That does not mean records may be redacted wholesale; instead, redactions must be limited to specific material that the state establishes is protected from disclosure by statute. *See, e.g., South Portland Police Patrolman’s Ass’n v. City of S. Portland*, No. AP-05-026, 2005 WL 3338723, at \*2 (Me. Super. Sept. 30, 2005) (“[T]he court has redacted *those portions of the Report that are confidential under FOAA.*”) (emphasis added); *Cyr v. Madawaska Sch. Dep’t*, 2007 ME 28, ¶ 11, 916 A.2d 967, 970–71 (portions of a public record that “relate to the ‘personal history, general character or conduct’ of employees of the Madawaska School District” were confidential, but the “Recommendations to the Madawaska School Board”

section could not be redacted); *Guy Gannett Pub. Co. v. Univ. of Maine*, 555 A.2d 470, 473 (Me. 1989) (requiring that public record be disclosed but with sentence containing protected medical information redacted).

A record may be withheld in full (or released with all information redacted) if it “contain[s] *only* protected information.” See *Springfield Terminal Ry. Co. v. Dep’t of Transp.*, 2000 ME 126, ¶ 11 n. 4, 754 A.2d 353, 357 (emphasis added). A record may not be withheld or redacted in its entirety, however, based on the mere inconvenience of “[t]he degree of ‘cutting and pasting’ required to redact” it, “unless it is demonstrated to be truly impractical or onerous.” *Blethen Maine Newspapers*, 2005 ME 56, ¶ 39 (“The records at issue consist of eighty-two pages, and the elimination of the names and all identifying information . . . associated with the persons named . . . is neither impractical nor onerous.”). The fact that targeted redaction would be time-consuming does not mean blanket redaction is acceptable. *MaineToday Media*, 2013 ME 100, ¶ 15 n. 11.

**II. The information MainePERS is concealing has no current value and its disclosure could not cause the harms the statute aims to prevent.**

Section 17057(4)(A) creates a special exception to the FOAA’s general rule of disclosure for certain documents held by MainePERS, exempting from disclosure (as potentially relevant here):

Documentary material, data or information . . . that consists of trade secrets or commercial or financial information that relates to actual or

potential private market investments . . . if, in the sole discretion of the retirement system, the disclosure of the material, data or information may:

(1) Impair the retirement system’s ability to obtain such material, data or information in the future; [or]

(2) Cause substantial harm to the competitive position of the retirement system or of the person or entity from whom the information was obtained . . . .

5 M.R.S. § 17057(4)(A). The question is whether the near-total redaction of the thousands of pages of documents Clopper requested was limited to material that fits the statutory description.

This case poses a narrow and specific question: does section 17057 exempt from disclosure information about investments MainePERS made five to ten years ago (in 2017 and 2019) in a California stone fruit company that has since gone bankrupt and ceased to exist (A. 47, ¶¶ 20–21), with extensive financial information about the company having been made public in the bankruptcy (A. 53, ¶ 47 & Exs. 15 & 16 to Joint Stip)?<sup>3</sup> Or, to frame the question in the statute’s

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<sup>3</sup> Clopper does not object to MainePERS redacting information about companies other than Prima Wawona. The concern expressed in the affidavit of Paine Schwartz’s Renata Malavazzi that “much of the withheld information concerns companies that do not relate to the at-issue investments,” and “disclosure of this information would allow Plaintiff and other members of the public to access sensitive business information concerning private companies that appear to have no connection with MainePERS or the relevant investments” (A. 43, ¶ 14), is therefore misplaced. As is the assertion that Paine Schwartz’s “potential investors and business partners . . . may be deterred from working with PSP and its affiliates if they believe there is a risk that their confidential information could be subject to public disclosure through its dealings with PSP and its affiliates.” A. 43, ¶ 15. Again, there is an easy fix for the problem Paine Schwartz identifies: redact confidential information of third parties the materials may contain and release the remainder.

terms, is it plausible that disclosure of this information about a former investment would impair MainePERS’ ability to obtain such information in the future or cause substantial harm to its competitive position or that of Paine Schwartz? Neither MainePERS nor the trial court has explained what interest MainePERS has in keeping information related to its investment in a now-liquidated business confidential, or how any such interest could outweigh the FOAA’s objective of providing access to public records.<sup>4</sup> The statutory language does not extend to past investments in dissolved companies, focusing as it does on information that “relates to *actual or potential* private market investments of the retirement system . . . .” 5 M.R.S. § 17057(4)(A). “Potential” investments are possible future investments; “actual” investments are current investments “existing or occurring at the time.” [www.merriam-webster.com/dictionary/actual](http://www.merriam-webster.com/dictionary/actual). On its face, Section 17057 does not cover information about *past* investments.

Even if it did, decisions under the federal FOIA have held that information that was once confidential loses its protected status with the passage of time. *See*

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<sup>4</sup> The trial court appears not to have given this argument, and Clopper’s argument about what other states have made public, the attention they deserve. Near the end of the decision the trial court wrote: “The court briefly address two other arguments Mr. Clopper raises.” A. 17. One of these is the argument that “the documents at issue have no current value due to Prima Wawona’s 2023 bankruptcy”; the other is that “because documents like those sought by [Clopper] have been disclosed by several other states with which Paine Schwartz partners, MainePERS could not have reasonably concluded the documents contained protected material.” *Id.* These are not just “other arguments” to be addressed in passing at the end of an opinion; they are key arguments Clopper advanced in the trial court, and advances now on appeal.

*Ctr. for Auto Safety v. U.S. Dep’t of Treasury*, 133 F. Supp. 3d 109, 134 (D.D.C. 2015) (ordering release of information about corporate bankruptcies because “[t]he defendants have not submitted any evidence to support their view that five-year old information would still be relevant and useful to competitors.”); *Forest Cnty. Potawatomi Cmty. v. Zinke*, 278 F. Supp. 3d 181, 206 (D.D.C. 2017) (“*Center for Auto Safety’s* analysis rested in meaningful part on the facts that (1) the companies involved had undergone significant bankruptcy restructuring and (2) companies in the industry rarely planned more than five years ahead.”); *see also Biles v. Dep’t of Health & Hum. Servs.*, 931 F. Supp. 2d 211, 227 (D.D.C. 2013) (ordering information released because “the data [wa]s too stale to cause a likelihood of commercial harm.”). “Cases decided pursuant to FOIA inform our analysis of Maine’s FOAA.” *Blethen Maine Newspapers*, 2005 ME 56, ¶ 13. It is not plausible that other companies would be deterred from taking MainePERS’ money for fear that if their business were to fail MainePERS might make their now-valueless historical information public. Nor is it plausible that Paine Schwartz would turn MainePERS away as a future investor because it had once disclosed stale information about an old, failed investment several years after the fact.

Under the FOAA, a relevant consideration is the timeliness of the information with respect to the interest that a limitation on access aims to protect. *See MaineToday Media*, 2013 ME 100, ¶ 29 (“Although the State contends that . . .

the investigation remains ongoing, it did not identify any particular investigation yet to be completed . . . or how those portions of the investigation could be affected by the availability of the Pak E-9-1-1 transcripts.”). This Court has explained:

The United States Supreme Court has rejected . . . ‘universal’ approaches that ask the court to “presume that virtually every [record] is confidential” and render these rebuttable presumptions “in practice all but irrebuttable.” The Supreme Court instead interpreted FOIA to require a “more particularized approach” based on the circumstances surrounding each record at issue, which is an approach that more closely aligns with the purposes and language of the statute.

*Id.* ¶ 30 (quoting *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 175, 180 (1993)); *see also id.* ¶ 31 (“[T]he Attorney General did not present any particularized possibility of harm.”). Here, as the information is several years old and concerns a defunct business, there is no “particularized possibility of harm” that justifies secrecy. *Id.* On the contrary, the fact that the Prima Wawona investment was so bad heightens the public interest in understanding how MainePERS made these decisions in the first place. *See Pinkham v. Dep’t of Transp.*, 2016 ME 74, ¶ 9, 139 A.3d 904, 908 (exceptions to FOAA’s rule of disclosure are narrowly construed).

The trial court cited legislative history suggesting that private equity funds “have a strong preference for institutional investors who are willing and able to keep their trade secrets and sensitive private financial information confidential and therefore exclude MainePERS due to the current [FOAA laws].” A. 13. The trial court noted that “a MainePERS consultant” had “highlighted a specific risk

regarding the disclosure of confidential information consisting of ‘trade secrets of emerging companies regarding their products, services and business practices; sensitive financial information of private companies; and, competitive secrets such as strategic plans.’” A. 14. But the legislative history does not alter the statutory text or the overarching principle that disclosure under the FOAA is favored. See *Dubois v. Dep’t of Agric., Conservation & Forestry*, 2018 ME 68, ¶ 16, 185 A.3d 743, 749 (“We liberally construe and apply FOAA but strictly construe statutory exceptions to FOAA to promote [FOAA’s] underlying policies and purposes.”) (quotation marks omitted). In any event, there are no “trade secrets of emerging companies” to be protected given that Prima Wawona has filed for bankruptcy and ceased operations. Nor can financial information about Prima Wawona be deemed to be “sensitive” given that we are dealing with a defunct business. The same goes for “competitive secrets such as strategic plans”—Prima Wawona no longer exists and has no secrets or plans to conceal.

The example in the legislative history the trial court quoted seals the point:

a venture capital backed technology company lost a major new client when a competitor disclosed sensitive financial information of the venture backed company (accessed from confidential reports of the venture capital firm to its investors) to challenge the perception of the company’s financial stability.

A. 57. Again, because Prima Wawona has gone out of business, it has no “financial stability” to be challenged or “sensitive financial information” to safeguard.

Making public the information MainePERS is inexplicably determined to protect would not cause the harms the statute aims to prevent.

A key redacted document that illustrates the general point is the October 13, 2023 letter Kevin Schwartz and Angelos Dassios of Paine Schwartz sent to MainePERS on the day of the bankruptcy filing (item B-13 on the revised index (A. 59)):



PAINE  
SCHWARTZ  
PARTNERS

October 13, 2023

Re: Bankruptcy Filing by Prima Wawona

Dear Fund IV and Prima Wawona Co-Investment Limited Partners:

Earlier today, MVK FarmCo, LLC, doing business as Prima Wawona, filed a Chapter 11 petition for bankruptcy protection in Delaware.

[REDACTED]

It is difficult to predict how long the bankruptcy process will last, but we will continue to update you as the situation develops. Should you have any questions, please let us know. We thank you for your continued support.

Very truly yours,

Kevin M. Schwartz  
Chief Executive Officer  
Managing Partner

Angelos J. Dassios  
Chief Investment Officer  
Managing Partner

It is clear from what is not redacted that the letter informs MainePERS and the other direct and indirect investors of the Chapter 11 filing, but the heart of the letter is redacted. Given the extensive public filings in the bankruptcy, it is hard to believe there is any actual confidential information in the two redacted paragraphs. In those paragraphs Paine Schwartz presumably explained, as had been made

public in the bankruptcy filing, why the company had gone under and that the invested funds had been lost. Ex. 18 to Joint Stip. at 21, 27–28. A similar document is the April 16, 2024 letter, also substantially redacted by MainePERS, informing investors of the conclusion of the bankruptcy (No. 40 on the revised index). The trial court does not explain how these redactions could be justified. Other documents of particular interest to Clopper for which the bankruptcy should have mooted any confidentiality concerns are items B-8 (“Capital Demand Notices” (Paine Schwartz asked for more money) from December 2022, the month Paine Schwartz wrote down the investment to zero), and B-24 (annual report for Wawona/Maverick Co-Investment Fund I for 2023, the year of the bankruptcy).

**III. To the extent the documents contain any non-public sensitive information about Paine Schwartz, the redactions are excessive.**

Because Prima Wawona has ceased to exist, that leaves confidential information about Paine Schwartz itself as the potential ground for secrecy. But even if some such information could be found here and there in the redacted materials, it is not plausible that secret sensitive information about Paine Schwartz is found throughout the documents, as the redactions imply.

Indeed, the trial court did not find that all of the redactions were necessary to protect confidential information about Paine Schwartz. With respect to the solicitation materials, the trial court cited concern about protecting Paine Schwartz’s secrets as the justification for the massive redactions:

The court finds [the solicitation] materials contain information encouraging investment by MainePERS in various funds and companies controlled by the funds. The court further finds there is *substantial* information *contained within* the documents that pertains to Paine Schwartz’s investment strategy and philosophy as well as the past and prospective financial performance of some of its portfolio companies.

A. 15 (emphasis added). Notice first what the trial court did *not* say: it did not say that *everything* in the documents pertains to Paine Schwartz’s secret investment strategy and philosophy, but instead that “contained within” them is a “substantial” amount of information that does. Sensitive “information contained within the documents” may be redacted—although before this Court accepts the trial court’s determination that “Paine Schwartz’s investment strategy and philosophy” (A. 15) is confidential, it should review the “Annual Sustainability Report,” available on the Paine Schwartz website, one of many places where the firm’s “Approach to Investing” is publicly described. A. 53, Joint Stip. ¶ 50 & Ex. 17 to Joint Stip.

The trial court’s “contained in” formulation is consistent with how Paine Schwartz itself characterized the documents in the affidavit MainePERS submitted, where Renata Malavazzi declared that Paine Schwartz “provided . . . materials to MainePERS based on the understanding that *the sensitive information within* the materials would not be disclosed to the public.” A. 38, ¶ 6 (emphasis added). Again, just because there is “sensitive information within” the documents does not mean *everything* in them is sensitive. Malavazzi goes on to declare that “the

withheld information *reflects* confidential and proprietary business information” (A. 42, ¶ 10, emphasis added), and “*captures* significant confidential and proprietary business information” (A. 41, ¶ 9, emphasis added). But whatever it may mean for information to “reflect” or “capture” confidential business information, the phrasing is hard to square with the trial court’s conclusion that basically everything in the documents is confidential. Malavazzi notably does not say that everything that was redacted in the documents is confidential or proprietary business information. That suggests that the near-total MainePERS redactions go beyond what is necessary to avoid the statutorily enumerated harms.

The law does not permit blanket redaction just because a document may “reflect” or “capture” confidential information. If there is confidential information in a document, that information may be redacted, but the rest must be released. *See South Portland Police*, 2005 WL 3338723, at \*2 (redacting “those portions of the Report that are confidential under FOAA.”); *Cyr*, 2007 ME 28, ¶ 11 (limiting redactions to confidential material); *Guy Gannett*, 555 A.2d at 473 (same). *See also Fairfield v. Maine State Police*, 2023 ME 12, ¶ 22, 288 A.3d 1220, 1227 (“The [Maine State Police] went through painstaking efforts to create an exceptions log detailing the various reasons for each [document’s] confidentiality.”).

The trial court correctly noted that “MainePERS’ internal evaluations or the fund’s financial or strategic considerations” are not among the categories of

information the statute requires MainePERS to disclose. A. 14. But internal evaluations and financial or strategic considerations are not what was requested. What was requested were statements made to MainePERS to solicit \$22 million in investments and explanations given to MainePERS as to how that money was lost.

A. 22. It is not plausible that almost everything in the redacted materials is MainePERS' internal evaluations or Paine Schwartz's financial or strategic considerations. The trial court's order seems to admit as much: after stating its view that "MainePERS could have reasonably concluded that disclosure of the information given to it by a private equity partner about a company in which it invested . . . could impair its ability to obtain similar commercial information from other sources (or Paine Schwartz) in the future," it adds that "MainePERS could reasonably have concluded that disclosure of those documents would cause substantial harm to either its own or Paine Schwartz's competitive position, as *many of the documents* contain sensitive strategic information." A. 17–18 (emphasis added). Even if the trial court is right that "many of the documents" contain sensitive strategic information, it follows that other documents do not. Those documents should be released without redactions. The trial court erred in letting MainePERS redact just about everything, rather than limiting its redactions to material that is entitled to statutory protection.

If the legislature wished to make everything MainePERS received from private equity firms like Paine Schwartz confidential it could have done so. Instead, it limited confidentiality to material that meets specific conditions. To give meaning to section 17057(4)(A)(1&2) requires a more nuanced response to Clopper's FOAA request than the undifferentiated redactions—the practical equivalent of MainePERS producing nothing—he received.

**IV. What other states have disclosed demonstrates that much of the requested information is not confidential or sensitive.**

The trial court brushed aside evidence that other states produce, without redaction, the same or very similar documents as those MainePERS has massively redacted. In the trial court's view, "[w]hat another state's retirement system opts to disclose under that state's disclosure laws does not impact this court's duty to apply § 17057(4) to the documents at issue in this case, nor does it restrict the broad discretion that statute grants to MainePERS . . . ." A. 17. It is true that different states may exercise their discretion in different ways, and could reach different conclusions about similar materials. But what other states have done is relevant to assessing both what is actually secret and how Paine Schwartz may be expected to react to disclosures made by Maine.

Clopper requested three categories of materials: (1) solicitation or offering materials Paine Schwartz provided to MainePERS in connection with Fund IV, Fund V, Wawona and Maverick; (2) financial or business updates Paine Schwartz

provided to MainePERS on those investments, including updates on the bankruptcy; and (3) materials submitted by McKinsey & Company to MainePERS at the time of the solicitation. Other states have released comparable materials.

**Solicitation or offering materials.** Clopper requested “[a]ny records relating to any solicitation or offering of any investment opportunity . . . made to MainePERS by or on behalf of” Paine Schwartz. A. 48, ¶ 25. Documents that appear responsive, but that MainePERS has blacked out, are numbered—in the revised index MainePERS produced that incorporates the narrowing of the original request in Clopper’s trial court brief—A1 (“Private placement memorandum”), A2 (“Paine & Partners (P&P) Overview dated May 2014” and “Food and Agribusiness and Fund IV Opportunity w/ Appendix”), A3 (“P&P Partner Update dated August 11, 2012”), A8 (“Offering Memorandum dated February 8, 2018”), and A9-A19 (Wawona and Maverick solicitation materials). A. 58–59.

The notion that these redactions are necessary for MainePERS to obtain such materials in the future and avoid damage to its competitive position is undermined by the fact that other states publicly disclose solicitation materials they receive from Paine Schwartz with no apparent adverse effects. *See* A. 51, ¶ 38 & Exs. 2 & 3 to Joint Stip. (Rhode Island); Affidavit of Samuel D. Zurier & Ex. C thereto (Connecticut). Minnesota discloses summaries of Paine Schwartz private placement memoranda. A. 52, ¶ 43 & Ex. 10 to Joint Stip. Of special interest to

Clopper are items A-15 and A-19 in the revised index, solicitation materials of the type other states have disclosed. A. 59. If other states can disclose Paine Schwartz solicitation materials without subjecting themselves to the adverse consequences MainePERS professes to fear, Maine can disclose them too.

MainePERS also subjected to blanket redaction recommendations by the investment firm Cliffwater. *See* A. 58, documents A4, A6, A13. Rhode Island publicly discloses consultant reports from Cliffwater and recommendations on private fund opportunities, including recommendations on Paine Schwartz funds. A. 51, ¶ 39 & Exs. 4, 5 & 7 to Joint Stip. The City of El Paso too publicly discloses consultant reports and recommendations on private fund opportunities, including recommendations on Paine Schwartz funds. A. 52, ¶ 45, Exs. 11, 12 & 13 to Joint Stip. Maine has similar materials from Cliffwater that are responsive to the FOAA requests, but that Maine has heavily redacted. A. 58, documents A4, A6, A13. Rhode Island has also disclosed internal staff recommendations on whether to invest in Paine Schwartz funds. A. 51, ¶ 40 & Ex. 6 to Joint Stip. Connecticut has done the same. *See* Ex. 9 to Joint Stip. (“Full Due Diligence Report [/] Chief Investment Officer Recommendation” on Paine Schwartz Fund VI). Again, if other public entities can disclose these materials, so can Maine.

Support for this conclusion is found in the “Transparency in Government Agreement” between Paine Schwartz and Rhode Island, A. 52, ¶ 46 & Ex. 14 to

Joint Stip., where Rhode Island acknowledges that information Paine Schwartz provided would include “trade secrets” and “commercial or financial information that is privileged and confidential and accordingly not a public record . . . .” *Id.* In disclosing the materials it disclosed (see Joint Stip. Exs. 2–7) Rhode Island must have determined that they were not trade secrets or otherwise confidential.

**Financial or business updates.** Clopper requested “financial or business updates . . . provided to MainePERS or investors regarding” Paine Schwartz funds or the Wawona and Maverick co-investments. Documents that appear responsive, but were produced with massive redactions, are (in the revised index, A. 59–60) B6, B7, B8, B9, B11, B12, B13, B15, B16, B20, B22, B24, B25, B26 and B28.<sup>5</sup>

Rhode Island publicly discloses quarterly financial reports on its private investments, including investments in Paine Schwartz funds. A. 52, ¶ 41 & Ex. 8 to Joint Stip. If Rhode Island can disclose quarterly reports and updates from Paine Schwartz in unredacted form without subjecting the state to the adverse consequences MainePERS professes to fear, so too can Maine.

**McKinsey materials.** Clopper requested “[a]ny records submitted by McKinsey & Company to MainePERS relating to” Paine Schwartz funds or the Wawona and Maverick co-investments. MainePERS has one responsive document

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<sup>5</sup> While Fund IV and Fund V are ongoing, the Wawona and Maverick investments in Prima Wawona have run their course; there is nothing still confidential about these investments.

(C1 in the revised index), which it describes as “Progress Review updated November 18, 2016.” A. 60. This document was created before the Wawona co-investment was made in 2017, and was presumably part of the Paine Schwartz solicitation for that investment. Neither of the declarations MainePERS has submitted explains why advice given by a consulting firm to MainePERS on how to invest public pension funds should not be subject to disclosure under the FOAA. Or why MainePERS cannot make materials provided by McKinsey public when Rhode Island and El Paso make materials provided by the consulting firms Cliffwater and Meketa public. Or how anyone could be harmed by the disclosure in 2025 of a consultant’s analysis of what the state of the stone fruit industry was a decade earlier. The trial court ruled that this document “contains significant strategic information” (A. 16), but does not explain why the strategic information could not have been redacted and the rest of the document disclosed.

The trial court declined to consider this evidence on the ground that “[w]hat another state’s retirement system opts to disclose under that state’s disclosure laws does not impact this court’s duty to apply § 17057(4) to the documents at issue in this case, nor does it restrict the broad discretion that statute grants to MainePERS as discussed above.” A. 17. But what other states have done with similar materials is relevant to assessing the reasonableness of MainePERS’ professed concern about how Paine Schwartz would react if it disclosed the documents Clopper

requested with fewer redactions. The fact that information about how Paine Schwartz does what it does is already public, while not necessarily dispositive, is relevant and instructive in evaluating how the company would react to a further disclosure of the same information. If information is already public, what would be the point of trying to prevent it from being redisclosed?

While MainePERS appears to believe heightened secrecy is essential to good investment returns, Connecticut and Rhode Island, which are much more transparent than Maine, had better returns—11.5% for Connecticut, 10.5% for Rhode Island, 8% for Maine—in the year ending June 30, 2024. *See* Plaintiff’s Brief at 20 n. 3 (citing sources). Those states are doing just fine, and there is no evidence that their disclosures have given Paine Schwartz pause about doing business with them. Again, what other states do is not dispositive, but it is relevant to the question of whether the information sought is confidential and whether disclosure by Maine could cause harm. The trial court erred in dismissing this evidence out of hand.

Paine Schwartz argues (via Malavazzi) that disclosure of the materials Clopper requested “could have a chilling effect” on the information it and like entities provide to potential investors going forward, “particularly when dealing with entities, like MainePERS, that are subject to public record requests and similar public disclosure requirements.” A. 43, ¶ 16. MainePERS (via Bennett)

echoes this concern, speculating that “if MainePERS were not able to maintain” the material it redacted as confidential, “private market investment managers would withhold this crucial information from MainePERS or be unwilling to work with MainePERS.” A. 37, ¶ 8. But Malavazzi—who is General Counsel for Paine Schwartz, and thus in a position to know such things—does not say that Paine Schwartz has ever actually declined to provide information to a potential investor due to concerns about public records laws, only that it “could have a chilling effect.” When Clopper pointed this out in his trial court briefing MainePERS had no response. *See* Plaintiff’s Reply Brief at 6. Given that Connecticut, Rhode Island, Minnesota and El Paso disclose the types of materials MainePERS is redacting, it is instructive that Malavazzi can only speculate about potential chilling effects. If Paine Schwartz had a policy or practice of not providing information to states based on concerns about their public records laws, Malavazzi would have said so.

**V. MainePERS does not need permission from Paine Schwartz to comply with the FOAA.**

Rather than exercise its discretion to decide what materials to release, MainePERS appears to have outsourced its discretion to Paine Schwartz:

MainePERS conferred at length with representatives of Paine Schwartz, the owner of the requested information. Paine Schwartz declined permission for MainePERS to disclose its information.

A. 32 (MainePERS Statement of Position) at 6; *see also* Bennett Aff. ¶ 7 (A. 37)

(“MainePERS would need permission from the private market investment

managers to disclose their private information.”); *Malavazzi Aff.* ¶ 6 (A. 40) (Paine Schwartz “provided these materials to MainePERS based on the understanding that the sensitive information within the materials would not be disclosed to the public.”). Setting aside the dubious claim that Paine Schwartz remains “the owner” of information even after it has given that information to MainePERS in the course of soliciting or servicing its investments, MainePERS appears, instead of exercising its own discretion to decide what information to disclose and what to redact, not to have exercised its discretion at all, but simply to have taken instructions from Paine Schwartz. That is not something the statute allows. Clopper made this argument below and the trial court declined to address it.

There are three problems with allowing Paine Schwartz to dictate what is and is not confidential. First, MainePERS has not produced the documents that contain the confidentiality provisions it says prevent it from making the requested documents public. Declining to disclose public records based on confidentiality provisions that are themselves confidential is contrary to the objective of the FOAA “to open to the public the conduct of public proceedings and the records of public activities . . . .” *Medical Mutual*, 2005 ME 12, ¶ 5.

Second, a state agency is not permitted to contract away the public’s right to access public records. *See Guy Gannett*, 555 A.2d at 473 (affirming disclosure of settlement agreement between University of Maine and former employee despite

agreement's confidentiality provision); *Detroit Free Press Inc. v. City of Detroit*, 480 Mich. 1079, 1079, 744 N.W.2d 667 (2008) (“[A] public body may not contract away its obligations under the FOIA [Freedom of Information Act].”). If such agreements were enforceable, private parties who deal with the state would require confidentiality provisions that superseded the public access laws as a matter of course before sharing information with the state. MainePERS should not be permitted to agree with Paine Schwartz to give away the public's right to access information just because Paine Schwartz and MainePERS would prefer to keep that information confidential.

Third, even if the Court interprets Section 17057 to permit MainePERS to agree to keep certain information it receives from Paine Schwartz confidential if the statutory requirements for making an exception to the FOAA are met, that does not mean MainePERS can agree to blanket confidentiality for everything it receives from Paine Schwartz. Even Paine Schwartz's own affidavit does not contend that *everything* it gave MainePERS is confidential, but rather that Paine Schwartz “provided . . . materials to MainePERS based on the understanding that *the sensitive information within the materials* would not be disclosed to the public.” *Malavazzi Aff.* ¶ 6 (A. 40) (emphasis added). Again, if there is information within the documents Clopper requested that is somehow exempt from disclosure under Section 17057, despite the fact that Prima Wawona has gone out

of business with its financial history made public in the bankruptcy, MainePERS may redact that specific information. But the rest of it should be disclosed.

**VI. Even if the trial court’s analysis is otherwise correct the documents are still obviously over-redacted.**

It is notable that MainePERS does not appear to be taking the position that if a document is confidential in part, the entire document may be redacted. We know that because MainePERS released documents in redacted form, and although more than 99% of the content of the requested documents has been redacted, the unredacted portions, while few and far between, are not limited to the statutory exceptions listed in section 17057(4)(B).

For instance, MainePERS did not redact Paine Schwartz’s description of Wawona Packing Co.:



Or a table displaying information about the company’s senior management team:

### Wawona existing senior management team

| Name             | Title                         | Years with WPC | Background                                                                                                                                                                                                                                                                       |
|------------------|-------------------------------|----------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Tara Sondergaard | Controller                    | 17             | <ul style="list-style-type: none"> <li>Started working for Richard Mittry in 1993 as a controller</li> <li>Began working for WPC when Brent acquired the packing shed from Richard in 1999</li> </ul>                                                                            |
| Ernesto Ruiz     | Director of Field Ops / Labor | 17             | <ul style="list-style-type: none"> <li>Joined the company in 1999 through the acquisition of the Mittry operations</li> </ul>                                                                                                                                                    |
| Richard Mittry   | Director of Field Management  | 17             | <ul style="list-style-type: none"> <li>Began farming with his father and now has over 50 years of experience</li> <li>Prior to selling his packing line to WPC, he was a grower-packer with considerable stone fruit acreage in and around the Cutler area</li> </ul>            |
| Marco Rinaldi    | Director of Farming           | 17             | <ul style="list-style-type: none"> <li>Previously was an independent pest control advisor that worked with WPC part-time before joining WPC full-time</li> </ul>                                                                                                                 |
| Albert Reyes     | Pack House Plant Manager      | 16             | <ul style="list-style-type: none"> <li>Began in 2002 as a pallet tally and has worked his way through operations to become a pack line manager</li> <li>Prior to working at WPC, he worked with Gerawan Farming</li> </ul>                                                       |
| Mark Berlinger   | Stone Fruit Sales Manager     | 16             | <ul style="list-style-type: none"> <li>Has been WPC's sales manager every year since joining the Company in 2001</li> <li>Formerly worked for New Leaf Sales, where he was also in their sales department</li> <li>Has worked sales in the industry for over 40 years</li> </ul> |
| Ben Vived        | Citrus Sales Manager          | 7              | <ul style="list-style-type: none"> <li>Responsible for starting WPC's citrus program</li> <li>Previously was with Kingsburg Orchards, where he spent his career in sales</li> </ul>                                                                                              |
| Stacy Thompson   | Special Projects Manager      | 10             | <ul style="list-style-type: none"> <li>Joined WPC 10 years ago on a part-time basis</li> <li>Has over 20 years of programming experience and a degree in programming</li> </ul>                                                                                                  |



Or these headings from a Paine Schwartz PowerPoint:

- Gate A Update
- "Gotta Believes"
- **Valuations**
  - Scenarios and Assumptions
  - Model Outputs
  - Valuation Comps

Or these pieces of a summary of a report that was "Prepared Exclusively for Paine & Partners":

### EXECUTIVE SUMMARY

#### INTRODUCTION

[REDACTED] has been retained by Paine & Partners to provide an [REDACTED] in the Wawona Packing Company acquisition also known as Project [REDACTED]. The farms are located primarily in Tulare County with additional outlier properties in Fresno and Kings Counties, California. [REDACTED]

## PROJECT [REDACTED]

### Property Overview

Project [REDACTED] is comprised of 104 separate farms located primarily in central Tulare County except for three orchards in Fresno County and two orchards in Kings County. The portfolio consists of both owned and leased properties. The orchards are further delineated as certified organic, organic transition and conventional. Most surrounding properties are irrigated stone fruit and citrus.

The purpose of this study is to provide an [REDACTED] contemplated to be acquired by Paine & Partners as part of a larger acquisition of the Wawona Packing business and assets. [REDACTED] has been provided complete access to all orchards [REDACTED]

Or this description of a Fresno peach business:

[REDACTED]

**Fresno, CA**  
**Facility Assessment**

---

**Background**

The Paine and Schwartz PE company requested [REDACTED] in the Fresno, Ca area. These facilities are dedicated to packing whole peaches. Briefly, fruits are received, stored, washed, waxed, treated with fungicide, dried and packed and shipped to storage facility. [REDACTED]

Or these images and text from the cover of a PowerPoint:



Or this information about Paine Schwartz events that MainePERS did not redact despite the words “CONFIDENTIAL AND PROPRIETARY—FOR USE OF INTENDED RECIPIENT ONLY” appearing on the document:

## Upcoming Events

Save the date for these upcoming Paine Schwartz events



|                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>April 15-17, 2024<br/>New York</p> <p>Global AgInvesting (GAI) New York</p> <p>April 15 - 4:00pm: Kevin Schwartz moderating panel with LPs<br/>April 15 - 6:30pm: PSP hosting cocktails and dinner event</p> | <p>May 29-30, 2024<br/>The Ritz Carlton New York, NoMad</p> <p>Annual Meeting</p> <p>Wednesday May 29<br/>LP Sustainability Council<br/>Women's Event<br/>Cocktail Reception<br/>Dinner with Guest Speaker</p> <p>Thursday May 30<br/>AGM Main Session<br/>Advisory Board Meetings</p> <p>Dinner Guest Speaker<br/>Dr. Andy Galpin<br/>Expert in Human Health,<br/>Nutrition and Performance<br/>Optimization</p> |
| <p>September 25-26, 2024<br/>New York</p> <p>PSP Fall Offsite</p> <p>Agenda and additional details to follow</p>                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <p>September 27, 2024<br/>Governors Island, New York</p> <p>3rd Annual Hope for the Warriors<br/>"No Obstacles" Event</p> <p>Registration and sponsorship details to follow</p>                                 |                                                                                                                                                                                                                                                                                                                                                                                                                   |

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PAINE SCHWARTZ PARTNERS 12

Or the letter about the Wawona bankruptcy that is reproduced at page 22 *supra*.

None of this was required to be disclosed under Section 17057(4)(B), which mandates disclosure of “(1) The retirement system’s total commitment to the fund; (2) The date of the commitment . . . ; (3) Contributions and distributions made to or received from the fund; (4) The market value of the investment; (5) The name of the fund; and (6) The interim internal rate of return of the fund.” MainePERS must therefore have determined that disclosure of the portions of the documents it disclosed would not “(1) Impair the retirement system’s ability to obtain such material, data or information in the future; [or] (2) Cause substantial harm to the competitive position of the retirement system or of the person or entity from whom the information was obtained . . . .” Section 17057(4)(A). And that means there must be more in the redacted materials that would not have those effects.

Clopper has not seen the unredacted documents. But it is not plausible that the thousands of redacted pages do not include numerous passages that fall at or

below where the above items fall on the sensitivity scale. If MainePERS is not taking the position that any document related to the Prima Wawona investments that does not fall under one of the statutory exceptions is confidential in its entirety, it is hard to avoid the conclusion that the redactions are excessive and that the decision to redact certain passages was arbitrary. The Court should remand with instructions that MainePERS redo its redactions to ensure that only portions of the documents that are protected from disclosure by statute are redacted.

This is consistent with a key piece of the trial court’s reasoning. The trial court did not say that *everything* in the solicitation materials would cause substantial harm if disclosed, but that “there is *substantial information contained within* the documents that pertains to Paine Schwartz’s investment strategy and philosophy as well as the past and prospective financial performance of some of its portfolio companies.” A. 15 (emphasis added). If this Court agrees that there is protected information in the solicitation materials, it should require MainePERS to redact that information and disclose the rest. The same goes for the business updates, where the trial court wrote that “the calculations and analysis of the numbers” in the updates “is the type of information that, if disclosed, could impair MainePERS’ ability to obtain similar information in the future.” A. 16. Again, if this Court agrees with that assessment of the business updates, it should direct MainePERS to redact “the calculations and analysis of the numbers” contained in

them and disclose everything else. Likewise with the McKinsey document, which the trial court found “contains significant strategic information” that could harm MainePERS and Paine Schwartz (A. 16), the Court should order that any such information in the McKinsey document be redacted but the rest of the document disclosed. *See Cyr*, 2007 ME 28, ¶ 11; *Guy Gannett*, 555 A.2d at 473.

MainePERS may insist that it would be too much trouble to have to sort out which portions of the requested documents would cause substantial harm if disclosed. But a public record may not be withheld or redacted in its entirety based on “[t]he degree of ‘cutting and pasting’ required to redact” it, “unless it is demonstrated to be truly impractical or onerous.” *Blethen Maine Newspapers*, 2005 ME 56, ¶ 39. And the fact that targeted redaction would be time-consuming does not mean blanket redaction is acceptable, as there is “no exception to disclosure based on the onerousness of the task” of redaction. *MaineToday Media*, 2013 ME 100, ¶ 15 n. 11.

Again, as the intermittent glimpses of unredacted text make clear, MainePERS has not taken the position that everything in the documents must be kept secret. Clopper would of course have challenged that stance if MainePERS had taken it. But given the acknowledgement by MainePERS that there is material in the documents that would not cause substantial harm if disclosed, common sense would indicate that many of the redactions are unwarranted and excessive.

## **VII. Why this FOAA request matters.**

“Like its federal counterpart, the Freedom of Information Act (FOIA), FOAA’s basic purpose . . . is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *MaineToday Media*, 2013 ME 100, ¶ 8 (cleaned up). While MainePERS’ loss of \$22 million on the Prima Wawona investment is more likely the result of poor decision-making than corruption, the FOAA exists precisely to enable the people hold government accountable. Here, that means exposing to the light of day the history and circumstances of this bad investment decision made by the MainePERS staff.

The thousands of pages of material MainePERS subjected to near-blanket redaction almost certainly include substantial material that can be released without impairing the ability of MainePERS to receive similar information in the future or causing substantial competitive harm to anyone. It is not plausible that MainePERS or Paine Schwartz could be harmed by the release of information about a company that has ceased to exist after extensive public disclosure in the press and the bankruptcy court of the reasons why it failed. While it is understandable that MainePERS and Paine Schwartz would prefer to keep information about their \$22 million loss hidden, the FOAA and caselaw construing it say otherwise.

MainePERS suggests that secrecy is somehow essential to good investment returns, but Connecticut and Rhode Island, which are more transparent than Maine, have had better returns. *See supra* at 32. Their disclosures have not stopped Paine Schwartz from doing business with them, nor does Paine Schwartz aver that it will not take money from MainePERS again if disclosures are made. It is unclear why Maine resists the same openness, or believes secrecy about its billion-dollar co-investment program benefits MainePERS and its stakeholders. *See Hamdan v. U.S. Dep’t of Just.*, 797 F.3d 759, 769–70 (9th Cir. 2015) (“Government transparency is critical to maintaining a functional democratic polity, where the people have the information needed to check public corruption” and “hold government leaders accountable . . . .”); *see also* Adam Le, “CalPERS’ next decade could hinge on its co-investment programme,” *Private Equity International*, Sept. 20, 2024 (Exhibit B to Plaintiff’s Brief) (noting the risk of “adverse selection” when a private equity fund pushes co-investments, as a fund “will naturally want to invest as much of its own or own-managed capital as possible in a highly attractive deal,” and “[i]nviting co-investors into a transaction on a no-fee/no carry basis might suggest the asset isn’t as attractive as it could be.”).

The trial court wrote that MainePERS “significantly redact[ed]” the requested materials. A. 15. If the Court looks at the redacted materials MainePERS produced it will see that “significantly redacted” fails to capture the magnitude of

the sea of black that Clopper received. It is just not plausible that, as the trial court declared, “all redactions MainePERS made were appropriate.” A. 16. MainePERS should not be permitted to prevent the public from looking into how it lost tens of millions of dollars of public retirement funds in a failed stone fruit company investment with a private equity firm by blacking out just about every word in the documents that could shed some light on what happened. As the *Wall Street Journal* has noted in an article about this case, “[f]reedom of information advocates in the state say they are hopeful that a victory for [Clopper, representing] Gerawan would set a legal precedent that places public interest above the protections that private-fund managers enjoy under many state laws.” See Rod James, “Maine State Pension Lawsuit Highlights Private-Markets Disclosure Debate,” *Wall Street Journal* (April 16, 2025) (Exhibit C to Plaintiff’s Brief). The Court should decline the invitation to read Section 17057 to protect private equity fund managers and MainePERS staff at the expense of the public interest.

### **CONCLUSION**

For the foregoing reasons, the Court should remand with instructions that the documents Clopper requested be released without redactions, or that MainePERS redo its redactions to ensure that only portions of the documents that are protected from disclosure by statute are redacted.

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### **CERTIFICATE OF SERVICE**

I, Sigmund D. Schutz, attorney for Appellant John D. Clopper, certify that I have emailed a copy of this brief, and will upon notification of approval by the Court mail paper copies, to:

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