

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-26-91

JOHN D. CLOPPER,

Appellant,

v.

MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Appellee.

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

REPLY BRIEF OF APPELLANT JOHN D. CLOPPER

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ARGUMENT

I. The State's introduction mischaracterizes the record and Clopper's argument.

The State's brief begins with an introduction that deserves comment in three key respects. **First**, the State declares, as if it were an established fact, that "MainePERS needs private investment information from investment managers and others in order to evaluate [its] investments, and *if it discloses such information it will not be invited to make such investments or will not receive the information necessary to make such investments.*" Red Br. 5 (emphasis added). That is indeed the position MainePERS has taken. But no evidence in the record supports it.

Clopper pointed out in his opening brief that while MainePERS submitted an affidavit by its Chief Investment Officer James Bennett 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'" (Blue Br. 33, quoting Malavazzi, emphasis added), the affidavit Paine Schwartz itself submitted makes no such claim. All that could be said by Paine Schwartz's General Counsel Renata Malavazzi—who, unlike the MainePERS affiant, is in a position to know what Paine Schwartz would or would not do—was that disclosure of the materials Clopper requested "could have a chilling effect" on the information it would provide to investors like MainePERS going forward. Blue Br. 32. Not that Paine

Schwartz has ever actually declined to provide information to a potential investor due to concerns about public records laws, or that it would do so in the future if Clopper were to receive the documents he requested—just that it “could” have a “chilling effect.” The State offers no response to Clopper’s observation that if Paine Schwartz and Malavazzi could have done more than speculate about theoretically possible harms, they presumably would have done so. *See* Red Br. 26–27 (discussing Malavazzi’s affidavit and repeating the points the State made in the trial court, without addressing Clopper’s critique of Malavazzi’s affidavit); Red Br. 30 (the State writes that “MainePERS’ decision to redact [the] documents is substantiated by the Bennett Affidavit and the Malavazzi Affirmation,” but without addressing Clopper’s critique of the Bennett Affidavit and the Malavazzi Affirmation). *cf. MaineToday Media, Inc. v. State of Maine*, 2013 ME 100, ¶ 29, n.19, 82 A.3d 104, 115 (“speculative harms are not the types of harm that FOAA seeks to prevent”). Later in its brief the State insists that “disclosing private investment information *would result* in private market investment managers withholding this crucial information from MainePERS or being unwilling to work with MainePERS” (Red Br. 31, cleaned up)—but (again) this is based on nothing more than Bennett’s conclusory say-so. There is no actual evidence in the record to support the State’s assertions about impending harm.

Second, the State declares that Clopper’s brief “raises the narrow[] legal claim that the private investment information exception applies only to future and current investments.” Red Br. 6. Clopper’s brief does include an observation that the “actual or potential private market investments” language in 5 M.R.S. § 17057(4)(A) does not extend to investments MainePERS held in the past. Blue Br. 18 (“On its face, Section 17057 does not cover information about *past* investments.”). The State then devotes five pages of its brief to Clopper’s three-sentence argument.¹ Red Br. 16–20. Determining the precise meaning of the word “actual” is not essential to Clopper’s appeal because the appeal turns on the fact that this particular past investment is not one that needs to be shrouded in secrecy given that the company in question has gone out of business. The Court should reject the State’s suggestion that a passing point about statutory construction constitutes the heart of Clopper’s appeal.

Third, the suggestion that the Court does not have to think about whether MainePERS demonstrated just and proper cause for its redactions, but may limit its review to scanning for clear error, is misplaced. Red Br. 7. The parties stipulated to

¹ The claim that the argument is unpreserved is baseless: by making the argument to the trial court in its reply brief, Clopper did more than enough to “alert the [trial] court and any opposing party to the existence of that issue.” *Dep’t of Hum. Servs. ex rel. Hampson v. Hager*, 2000 ME 140, ¶ 20 n. 4, 756 A.2d 489, 493. If the trial court missed the fact that Clopper made this argument (see Red Br. at 17), that does not mean Clopper failed to alert the trial court to its existence. See Plaintiff’s Reply Brief at 3. Preservation requires that an issue be fairly presented, not that the trial court address it in its decision.

the facts in the trial court, so there is no occasion for clear error review of factual findings. *See MaineToday Media*, 2013 ME 100, ¶ 7, 82 A.3d at 108 (where “the parties filed an agreed-to statement of facts, we review any *additional* findings made by the Superior Court for clear error”) (emphasis added). The facts having been stipulated, the question for the trial court was whether the stipulated facts supported the legal conclusion that the redactions MainePERS made were warranted under section 17057. Under that section the redactions were warranted if MainePERS did not abuse its discretion in determining that there was just and proper cause for making them—so the trial court’s legal determination that MainePERS did not abuse its discretion in so concluding is reviewed *de novo*.² *See MaineToday Media*, 2013 ME 100, ¶ 7, 82 A.3d at 108 (“Although the parties filed an agreed-to statement of facts, we review any additional findings made by the Superior Court for clear error, and consider its legal conclusions, including the interpretation of the relevant statutory provisions, *de novo*.”).

² This somewhat convoluted situation is created by the fact that the legal standard section 17057 establishes—the *law* to be applied—expressly incorporates the concept of agency discretion. *See* 5 M.R.S. § 17057(4)(A) (creating an exception to the FOAA “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”).

II. It matters that Prima Wawona is defunct because it is not plausible that everything MainePERS redacted reveals sensitive information about Paine Schwartz.

In response to Clopper's argument that the Prima Wawona bankruptcy eliminates any confidentiality issues, the State expresses concern that the redacted materials "reflect confidential and proprietary business information, including: Paine Schwartz's proprietary investment strategies [and] internal analyses regarding the investment opportunity, relevant market, and competitive landscape[;] detailed financial statements, operational and strategic updates, and financial projections and forecasts[;] and McKinsey's proprietary analyses regarding the relevant market, consumption trends, supply dynamics, and production economics." Red Br. 32-33 (quotation marks omitted). Again, examining documents B-8, B-13, B-24, and B-28 should be instructive: these documents could not plausibly reveal Paine Schwartz's "proprietary investment strategies" or anything even in the ballpark thereof. As Clopper stated repeatedly in his opening brief, if the requested documents include information about Paine Schwartz's or McKinsey's proprietary investment strategies, analyses, projections and forecasts, MainePERS may (if the statutory standard is met) redact that material. It is not plausible, however, that nearly everything MainePERS redacted in the 41 documents would reveal proprietary information belonging to Paine Schwartz or McKinsey (it is unclear how McKinsey could have a material interest

in keeping secret information in a report it generated almost a decade ago). Common sense would indicate that much of what is in these documents is information *about Prima Wawona* that can be made public without injuring anyone. The State is correct that the Prima Wawona bankruptcy does not mean that *everything* in the requested materials should be made public without further inquiry. But given the bankruptcy, it is not plausible that next to nothing in the materials can be opened to public examination without creating one of the harms the statute aims to prevent.

The State’s responses on “[t]he documents Mr. Clopper highlights” (Red Br. 33) are unconvincing. On document B-8, the Wawona-Maverick Co-Investment Fund Capital Demand Notices dated December 14, 2022, requesting more than \$22,000 from MainePERS, the State says “[t]he redacted portion reflects the total amounts of capital called from all investors, the purposes of the calls, and banking details” Red Br. 33. Disclosing why Paine Schwartz was asking for more money from Maine—that is, the “purpose” of the capital call—would not reveal strategy or analysis that needs to be kept secret. MainePERS had already made payment on the entirety of its commitment—so why was Paine Schwartz asking for a new infusion of cash just as the company’s reported value was dropping to zero? On B-24 and B-25 (Wawona/Maverick Co-Investment Fund annual and quarterly reports and financial statements), where the State says “[t]he detailed

financial statements and discussion are redacted” (Red Br. 33), we know that the investment was worthless by the start of 2024 because the company was in a bankruptcy liquidation process; subsequently financial statements will simply confirm what was disclosed in the bankruptcy. As for B-13 and B-28 (Paine Schwartz notice of bankruptcy filing to Fund IV and Prima Wawona Co-Investment Limited Partners dated October 13, 2023 and notice of the end of the bankruptcy dated April 16, 2024), where the State says MainePERS redacted “steps taken by Paine Schwartz in advance of the bankruptcy proceeding and valuation of the firm” (Red Br. 33), what led up to the bankruptcy was made public in the bankruptcy court, as was the valuation of the firm (\$0). Under different circumstances MainePERS might have an interest in protecting “confidential and proprietary financial and operational information” (Red Br. 34) to preserve its relationship with Paine Schwartz, but in the context of the Prima Wawona bankruptcy it does not, given the detailed public disclosures in the bankruptcy proceeding as to what precipitated the filing and the absence of a buyer for Prima Wawona in the bankruptcy. It is notable that the State is unable to tie the generalized concerns it expresses about the “chilling effect” it claims disclosure of materials MainePERS received from Paine Schwartz could have on the exchange of information to the specific documents at issue in this proceeding.

Persisting in its practice of making sweeping statements about everything in the documents that would seemingly have to apply to only certain portions of them, the State declares:

The redacted information in these documents is confidential and proprietary financial and operational information. Disclosing how Paine Schwartz runs a company in which it takes a controlling stake, even if that company has since gone bankrupt, still deprives Paine Schwartz of that value.

Red Br. 34. It is possible that the disclosure of certain specific information about “how Paine Schwartz runs a company” could “deprive[] Paine Schwartz of . . . value,” and so could in theory be subject to withholding if the statutory standard is met. But the trial court did not find (and it would be an abuse of discretion to say on this record) that every last word in this large set of redacted documents is confidential and proprietary financial and operational information that would, if disclosed, reveal so much non-public information about how Paine Schwartz operates its portfolio companies that disclosure would plausibly deprive Paine Schwartz of competitive value.³ A careful review of the documents MainePERS produced to see if the redactions it made are supported by the statute is therefore warranted.

³ Here again we are advised that “[t]he Bennett Affidavit and the Malavazzi Affirmation detail the harms that could follow such disclosure.” Red Br. 34. As explained in section I *supra*, Bennett’s statement on this point is conclusory, and Malavazzi’s is notable for saying, not that the harms the State speculates about would in fact occur, or have occurred previously (something she would be in a position to know as Paine Schwartz’s General Counsel), but only that their occurrence is a theoretical possibility.

The State is correct that “[n]one of the *documents* redacted by MainePERS were among the documents made public in Prima Wawona bankruptcy.” Red Br. 11 (emphasis added). Clopper’s point, however, is that the *information* these documents contain about the bankruptcy and its causes was made public in the bankruptcy. See Blue Br. 8 (discussing the lengthy disclosure statement filed with the bankruptcy). To the extent that this already public information was redacted here, it should not have been. Because bankruptcy filings and proceedings are a matter of public record, it is inconceivable that everything redacted in B-13 (about Chapter 11 petition) and B-28 (about the conclusion of the bankruptcy) is non-public information.

The State dismisses the federal cases Clopper cites for the proposition that information that was once confidential may lose its protected status with the passage of time. Blue Br. 18–19. Of course these cases “do not stand for a general rule that information about a bankrupt entity, or stale information, is *never* confidential under FOIA.” Red Br. 35 (emphasis added). But Clopper made no such claim: he cited the cases in support of his argument, on the facts of this case, that it is not plausible that private equity firms “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.” Blue Br. 19. The State has no response to this argument.

III. What other states disclose is significant.

According to the State, “[t]he fact that other jurisdictions disclosed other documents and still invest in private equity does not mean that MainePERS was unreasonable in deciding to redact the private investment information it received.” Red Br. 36. But rather than address Clopper’s evidence that other states have disclosed materials of this nature with no adverse consequences, the State changes the subject to the statute’s legislative history, declaring that “general partners of [private equity] funds have prohibited public investors, subject to broad FOIA provisions, from being investors” Red Br. 37 (quotation marks omitted). The problem with this is that we know from the materials Clopper submitted that Paine Schwartz does in fact do business with states that disclose Paine Schwartz materials like the ones at issue here in response to freedom of access requests. This is actual evidence in the record that takes precedence over unsupported comments in the legislative history and “the experiences of California, Michigan, and Texas” (Red Br. 37) with different investors disclosing different materials.

IV. The redactions are arbitrary and excessive on their face.

MainePERS’s own production demonstrates that the relevant materials are not categorically confidential. MainePERS reviewed the documents and disclosed some information and withheld other information. The question is therefore not

whether the documents contain confidential information, but whether the record justifies withholding the specific information that remains redacted.

In response to Clopper’s argument that many of the MainePERS redactions are arbitrary because it is not plausible that the thousands of redacted pages do not include a great deal of material that is comparable to material MainePERS disclosed (Blue Br. 39–40), the State does not explain why Clopper’s reasoning is wrong, but just asserts that “it simply does not follow” Red Br. 38. That is not a substantive response to Clopper’s argument.

The decision to release some of what is in the documents is a concession by MainePERS that not everything in them is exempt from disclosure under the FOAA. Because he has not seen the documents, Clopper cannot say with certainty what they contain, but he is confident that the Court’s review will reveal that he is correct on this point. MainePERS has seen the documents, and it is notable that it does not say that Clopper is wrong, but only that his reasoning “does not follow.” The reasoning is sound, and the Court can see for itself whether the inference it points to is right.

The State also fails to offer a substantive response to Clopper’s argument that the redactions must be excessive because the trial court did not say that *everything* in the solicitation materials would cause substantial harm if disclosed, but just that “‘there is *substantial information contained within* the documents’”

that is protected from disclosure. Blue Br. 40 (quoting the trial court, emphasis added). The State’s response to this argument is again just to assert that Clopper’s reasoning is wrong (“Neither does it follow . . .”) (Red Br. 38), without explaining why it is wrong. The State then declares: “In fact, the trial court found that MainePERS demonstrated just and proper cause for each and every redaction” Red Br. 39. That is indeed what the trial court found—but Clopper is arguing that the trial court’s determination cannot logically be correct. Again, the State offers no substantive response to what Clopper is arguing. The position the State advances, that the presence of some confidential information—even “substantial” confidential information—warrants categorical withholding of non-confidential information in the same document, or even in an entire group of related documents, would diverge from the usual approach to FOAA responses in Maine. The Court should reject the State’s position, especially where the information pertains to the loss of tens of millions of dollars in public employee retirement funds. Because FOAA exemptions are construed narrowly and disclosure is the rule, the Court should not approve wholesale withholding just because some exempt information may be contained within a document.

MainePERS is correct that Clopper cites “cases where documents were ordered disclosed under FOAA with only discrete confidential information redacted.” Red Br. 39. Clopper understands that proper redactions in this case “will

not be limited to a line or two” here and there. *Id.* But the State does not explain why, if (as it claims) “the assembly as a whole is confidential” (Red Br. 40), MainePERS decided to leave a seemingly arbitrary selection of passages unredacted. Having not in fact acted as if “the assembly as a whole [were] confidential,” MainePERS should be required to be consistent in what it does and does not redact.

MainePERS cites *Anastos v. Town of Brunswick*, 2011 ME 41, 15 A.3d 1279, as a case where an “entire report was confidential because it reflected proprietary analysis” and “cannot be dissected into sensitive and nonsensitive information” because it was “a single, integrated work product” (Red Br. 41, quotation marks omitted). Here, however, it cannot be that the entire set of documents is confidential, given that MainePERS was able to disclose some of what they contain. The statute does not relieve MainePERS of the burden to redact and release just because it would take some time to do so. *See MaineToday Media*, 2013 ME 100, ¶ 15 n.11, 82 A.3d at 110 (rejecting the State’s argument that redaction should not be required because it was too burdensome on the grounds that there was no statute containing an “exception to disclosure based on the onerousness of the task”). The Court’s review will reveal that MainePERS redacted far more than the statute permits.

CONCLUSION

For the foregoing reasons, and the reasons given in the opening brief, the Court should remand with instructions that the documents Clopper requested be released without redactions, or that MainePERS redo its redactions to limit them only to what it can specifically justify under section 17057.

Dated: June 17, 2026

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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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