

IN THE SUPREME COURT OF OHIO

**THE STATE OF OHIO, ex rel.
JOHN DAMSCHRODER**

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CASE NO.

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RELATOR

Original Action in Mandamus

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-vs-

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**OHIO PUBLIC EMPLOYEES
RETIREMENT SYSTEM, et al.**

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RESPONDENTS

MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT MANDAMUS

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INTRODUCTION

Ohio created its five public pension plans to provide health and retirement benefits to its hundreds of thousands of public employees. The largest of these pension plans – the Ohio Public Employees Retirement System (“OPERS”) – serves over one million past and present public employees. Currently, OPERS manages nearly \$100 billion in assets that are invested in a variety of markets.

Although OPERS’s investments seem large, most analysts agree that Ohio, like many states in the country, needs to greatly increase funding to meet future pension obligations. According to a study by the Mercatus Center at George Mason University, Ohio’s public pension plans – including OPERS – are severely underfunded. In fact, projections indicate that OPERS has only a 50% chance of fulfilling its obligations in 2045 without additional funding. Johnson, Ohio’s Public-employee Pensions Face Cutbacks, (June 12, 2017) <https://www.dispatch.com/news/20170612/ohios-public-employee-pensions-face-cutbacks>, (accessed January 27, 2019).

One asset type in which OPERS and Ohio’s other state pension plans invest heavily is hedge funds.¹ Usually thought of as an investment vehicle for the very wealthy, hedge funds have become mainstays in public pension investing. As of December 31, 2017, OPERS held hedge fund positions of nearly \$8 billion.

Hedge funds are inherently riskier than other types of investments because they use more aggressive investment strategies. However, in return for this higher risk, these funds are intended to pay correspondingly higher returns. They can invest in a myriad of assets, from traditional

¹ A general description of hedge funds can be at <https://www.investopedia.com/terms/h/hedgefund.asp>

stocks and bonds to real estate, derivatives, currency, commodities, and even start-up companies.

Inherently, hedge funds are neither good nor bad, but they are complex. Despite that complexity, these investments are relatively unregulated compared to traditional investment markets. And they carry a heavy price tag. The Toledo Blade has reported that “hedge-fund managers charged [the State of Ohio] \$1.1 billion in fees – 63 cents for every dollar of net return compared to 5 cents for the rest of [Ohio’s pension fund] portfolios.” Pro Vance, Ohio Pension Funds Lost Out On \$1.6B Extra (Oct. 25, 2016) <https://www.toledoblade.com/news/state/2016/10/25/Ohio-pension-funds-lost-out-on-1-6B-extra/stories/20161024289> (accessed January 19, 2019). In other words, the cost of investing in hedge funds is nearly 12 times greater than the cost of investing in traditional investments. Yet, one study found that since the Great Recession, Ohio’s three largest public pension funds received \$1.6 billion *less* from their hedge fund investments than had the monies been placed in traditional investments. *Id.* In the world of investing, high costs and low returns is a sure recipe for failure. Not surprisingly, the combination of high risk and high fees makes public pension hedge fund investing controversial.

Recently, concerns have been raised about the potential for corruption in the process for choosing which funds are entrusted with Ohio tax dollars. In December 2018, the Securities and Exchange Commission imposed a \$100,000 fine on an Ohio fund manager for violations of the SEC’s “pay-to-play” rules. The Commission noted that persons associated with the fund had made campaign contributions of nearly \$50,000 to Ohio’s Governor, Treasurer, and candidates for governor. The SEC Order also noted that the Governor and Treasurer were involved in the decision-making process for the investment of Ohio public pension monies. In the Matter of: Ancora Advisors, LLC, SEC File No. 3-18937, Order Instituting Administrative And

Cease-And-Desist Proceedings Pursuant To Sections 03(E) And 203(K) Of The Investment Advisers Act Of 1940, Making Findings, And Imposing Remedial Sanctions And A Cease-And-Desist Order (accessed on January 19, 2019 at www.sec.gov/litigation/admin/2018/ia-5077.pdf).

With this general background, one can easily grasp why the public would be interested in understanding more about the State's pension fund investments. Not only are tax dollars at stake, but so are the financial futures of the State's employees. The need for transparency in such public matters is self-evident. And Ohio's Public Records Act provides an invaluable tool to ensure that transparency.

FACTS

Relator, John Damschroder, is a life-long Ohio resident. He is also columnist who has written extensively about Ohio's public pension plans. To gain a better understanding of Ohio's pension fund investment in hedge-funds, on June 14, 2018 Mr. Damschroder issued a simple Public Records Act request to OPERS which stated: "I write under the provisions of the Ohio Public Records Act ORC-149.43 seeking a copy of the contract between the Ohio Public Employees Retirement System and each hedge fund, private equity fund, real estate fund and or property manager." The request also sought "a list of the investment holdings for Ohio for each contractor, the acquisition price and the estimated current value of the investment or the liquidation date and price for the holding."

In response, OPERS sent Mr. Damschroder numerous contract documents from the alternative investment funds managing its money. With few exceptions, the documents included significant redactions. Those funds that produced redacted records also provided a letter from the

respective fund manager that explained those redactions. All the letters were similar, and each stated that the redacted information was not subject to disclosure under the Public Records Act because it included information protected by R.C. 1333.61, et seq. – the Uniform Trade Secrets Act.

Glouston Capital Partners, LLC was one such fund manager. OPERS has invested hundreds of millions of dollars in nine separate funds created and managed by Glouston. The records OPERS produced regarding Glouston funds were heavily redacted. And the Glouston cover letter makes it clear that all the redactions were made to protect trade secrets. A copy of the letter is attached as Exhibit A.

A careful review of Glouston's August 24, 2018 letter is telling. The letter was prepared in response to a notification OPERS sent to Glouston regarding Damschroder's request. Apparently, in its notification OPERS "proposed producing" to Damschroder contract documents, but none of the requested financial records. Glouston seemingly agreed and asserted that all redacted information in the contracts and all the requested financial information are exempt from disclosure:

We are hereby submitting this letter to provide an explanation as to why Glouston believes that certain information contained in the Agreements identified as responsive to part (i) of the Request, as well as any and all information responsive to part (ii) of the Request, are exempt from disclosure (collectively, the "Exempt Material"). Glouston provides herewith copies of the Agreements with Exempt Material redacted. If STRS Ohio [sic] identifies any additional documents that may be responsive to the Request, please notify Glouston.

The letter then explains why Glouston believes much of the information in the requested records is exempt under Ohio's Public Records Act.

The Exempt Material constitutes a "trade secret" as defined in the Trade Secret Act because it consists of information with respect to which Glouston (i) derives actual and potential independent economic value from the information's not being

known by its competitors, who would obtain economic value from such knowledge, and (ii) uses efforts that are reasonable and standard in the private investment fund industry to maintain in secrecy.

Glouston expounded that it “competes for investors with other firms in the private investment fund industry when it raises new funds. Glouston also competes with other private investment firms for access to the best investment opportunities.” Yet, despite its desire to keep the “best investment opportunities” to itself, Glouston specifically lists on its website the companies the Ohio Midwest Funds are invested in. See Exhibit B.

The redactions in the contract documents are extensive. By way of example, the following are notable points from just one of the Limited Partnership Agreements – Ohio Midwest III:

1. **Table of Contents** – Glouston redacted 27 section titles, including the titles of seven attachments to the Agreement. It is unclear how a section title could convey a trade secret.
2. **Preamble** – The name and role of a party to the agreement has been redacted.
3. **Section 1** – Thirty defined terms are totally or partially redacted. As with section titles, it is unclear how something as mundane as a definition could encapsulate a valuable trade secret.
4. **Schedules and Appendices** – The schedule and appendices attached to the Agreement are fully redacted. These redactions cover 20 pages, including Appendices A and F, discussed below. The entire Agreement is 97 pages long. Therefore, these 20 pages, by themselves, represent more than 20% of the Agreement.
5. **Body of Contract** – In addition to the 30 redactions in the Definitions section, Glouston redacted in full or in part 132 different substantive paragraphs of the Agreement. Some notable sections redacted relate to (a) OPERS’s obligation to pay its capital contributions into the fund (Section 3); (b) fund distributions to OPERS and Glouston (Section 4); (c) Glouston’s duties and obligations in managing the fund (Section 5); (d) OPERS’s liability for partnership debts (Section 6); (e) OPERS’s liability for the fund’s operating expenses (Section 8); and (f) financial performance reports to which

OPERS is entitled (Section 9).

6. **Appendix A** – Although redacted in the Table of Contents and on the appendix itself, Sections 2.3 and 5.1 identify Appendix A as a “Statement of Investment Objectives and Policies.” Given that Ohio Midwest III is a single-investor fund, one could reasonably conclude that the investment objectives of the fund should be the investment objectives of OPERS itself, and thus should not belong to the fund manager. Additionally, Glouston’s website devoted to the Ohio Midwest Funds has two pages which describe both the investment objectives and investment criteria for the funds. See Exhibits C and D.

7. **Appendix F** – Appendix F is fully redacted. However, Section 12.1(q)(iv) of the Agreement states: “The General Partnership acknowledges that, notwithstanding anything to the contrary in this Agreement, *the Limited Partner may publicly disclose the information contained in Appendix F.*” (emphasis added) Given that the contents of Appendix F were expressly intended to be shared with the public, its redaction cannot be in good faith. Section 12.1(q) of the Agreement addresses fees paid to outside agents involved in soliciting OPERS’s investment in the fund.

8. **Other Items** – Interestingly, despite Glouston’s claims that the information in the Agreement constitutes trade secrets, the Agreement does not appear to include a confidentiality provision. Neither does the Agreement seem to address the topic of Glouston’s fees, unless, of course, those provisions are among the redactions. Perhaps that information can be found in Section 7 of the Agreement, which is redacted in its entirety.

The Ohio Midwest III Agreement is attached as Exhibit E.

It is important to note that while Glouston has asserted that the requested records contain trade secrets, OPERS has not raised its own objection to Damschroder’s request. It has been silent about its position on whether the information sought is exempt under R.C. 149.43. It simply passed on Glouston’s letter to Damschroder without comment. And Glouston has taken no steps other than its letter to prevent OPERS from disclosing the requested records.

Although OPERS and Glouston provided redacted copies of the contract documents

requested, none of the specific financial information was produced. Therefore, on November 15, 2018, Damschroder sent OPERS a follow-up email, against asking for specific financial information about the Glouston funds:

Therefore, I would like to resubmit my request for financial documents relating to each Glouston fund in which OPERS has invested. For each partnership, these financial records would include the following:

- (i) balance sheets;
- (ii) income statements;
- (iii) cash flow statements;
- (iv) statements of changes in net assets of the partnership;
- (v) detailed statements concerning the contributions, distributions, earnings, and charges to the capital account of each partner;
- (vi) accountings of all amounts deposited into and withdrawn from any reserve;
- (vii) statements of operations showing the profit or loss of the partnership;
- (viii) schedules of the investments of the partnership showing the estimated value and a narrative description of the current status of the partnership's investments.
- (ix) Internal Revenue Service Schedule K-1s (Partner's Share of Income, Credits, Deductions, Etc.)
- (x) any other documents provided to OPERS by the funds or which OPERS had the right to review.

To date, Damschroder has received no response to his follow-up request.

OHIO PUBLIC RECORDS ACT

Under the Public Records Act, R.C. 149.43, public offices must release public records upon request. A public record is defined as "any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units." R.C. 149.43(A)(1). The policy underlying the Act is that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. "[O]ne of the salutary purposes of the Public Records Law is to ensure

accountability of government to those being governed." *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997). For this reason, R.C. 149.43 "is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records." *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004, ¶ 7, (quoting *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St.3d 374, 376, 662 N.E.2d 334). Mandamus is the appropriate remedy to seek compliance with Ohio's Public Records Act. *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004, ¶ 4.

GLOUSTON IS SUBJECT TO THE PUBLIC RECORDS ACT

In some instances, a private entity may qualify as a "public institution" under R.C. 149.011(A), and thus, a "public office," for purposes of R.C. 149.43. "[W]here (1) a private entity prepares records in order to carry out a public office's responsibilities, (2) the public office is able to monitor the private entity's performance, and (3) the public office has access to the records for this purpose, a relator in an R.C. 149.43(C) mandamus action is entitled to relief" ordering production of the records. *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 39, 550 N.E.2d 464, (1990); *see also, State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Krings*, 93 Ohio St.3d 654, 657, 758 N.E.2d 1135 (2001).

This Court addressed this issue in *State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers' Comp.*, 106 Ohio St.3d 113, 832 N.E.2d 711, 2005-Ohio-6549 (2005). In that case, which involved the political scandal dubbed "Coingate," the Toledo Blade sought financial information from two single investor private investment funds that had invested BWC assets in rare coins. The BWC and the two funds fought disclosure of records detailing the coin transactions because the requested information constituted trade secrets.

This Court granted a peremptory writ requiring disclosure of the financial records by the two funds. *Id.*, ¶ 23. It noted that the funds were carrying out a function of the BWC – investing the Bureau’s money for the benefit of the workers’ compensation system. *Id.*, ¶ 21. It further noted that the BWC was entitled to monitor the funds’ performance and inspect fund records for that purpose. *Id.*

Similarly, by statute, OPERS’s chief investment officer is charged to monitor all investments of OPERS funds. *See*, R.C. 145.094. And the agreements between OPERS and Glouston specifically provide that OPERS receive detailed annual financial reports from Glouston. *Ohio Midwest I Agreement*, Sec. 8.4; *Ohio Midwest II Agreement*, Sec. 9.4; *Ohio Midwest III Agreement*, Sec. 9.4; *Equity Opportunities Agreement*, Sec. 13.3. Thus, the requirements of *Ferguson*, *supra*, are satisfied in this instance.

The only difference between this case and *Toledo Blade* is that in this instance Glouston claims that it has taken steps to prevent disclosure of the requested information. But in its August 24, 2018 letter, Glouston states that the only step it has taken to prevent disclosure is to include a confidentiality provision in its contracts. But that assertion contradicts the terms of the Ohio Midwest Funds’ contracts. Only one of those agreements contains a confidentiality provision, unless those provisions are themselves redacted. Of course, such a redaction would seem to be self-defeating.

The Equity Opportunities agreement and the Ohio Midwest I agreement, on the other hand, do contain confidentiality provisions. *See*, *Ohio Midwest I*, Sec. 8.6; *Equity Opportunities Agreement*, Sec. 13.3(e). But this Court has stated that a confidentiality provision in a contract does not transform a public record into a record exempt from disclosure under the Act. *State ex*

rel. Gannett Satellite Information Network v. Shirey, 78 Ohio St.3d 400, 403, 678 N.E.2d 557, 1997-Ohio-206 (1997); *see also, State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 384, 18 OBR 437, 439, 481 N.E.2d 632, 634 (contractual provision between city and employees cannot alter duty of city to provide access to public records under R.C. 149.43); *see State ex rel. Sun Newspapers v. Westlake Bd. of Edn.* (1991), 76 Ohio App.3d 170, 173, 601 N.E.2d 173, 175 (public entity cannot enter into enforceable promises of confidentiality with respect to public records).

Additionally, Glouston's protestations of confidentiality conflict with its actions. For example, in the Ohio Midwest III agreement, Glouston redacted Appendix F, which the agreement specifically acknowledges may be disclosed by OPERS. It also redacted Appendix A, which addresses the investment objectives of the fund, even though Glouston's own website advertises those very objectives. Similarly, Glouston's claim that it needs to protect the identity of its investments is belied by its advertisement of that very information on the Ohio Midwest Funds' website.

The sheer volume of the redactions in the produced records raises serious questions about Glouston's motives. This is especially true because the Ohio Midwest funds were established solely for OPERS. Per Glouston's website, those funds sought to achieve the dual objectives of making money for OPERS and driving economic development in Ohio. In such an unusual fund, as with the coin fund at BWC, the proprietary information is not Glouston's; it belongs to OPERS.

CONCLUSION

Relator seeks information that every Ohioan should be interested in – how tax-payer

dollars are being spent. Perhaps more importantly, the request seeks to learn what, exactly, is being purchased with those dollars. The public has an unquestioned financial interest in a state agency's investment of public funds. *State ex rel Toledo Blade v. Bur. Workers' Comp.*, *supra*, at ¶ 24. Any exemption from that overriding public interest must be carefully examined, and any doubt should be resolved in favor of disclosure, for that is the purpose of Ohio's Public Records Act.

For the foregoing reasons, Relator John Damschroder prays that his request for relief be granted.

Respectfully submitted,

/s/ Marc E. Dann

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