

**SUPREME COURT OF OHIO**

**STATE EX REL., PAUL PERREA**  
**412 Wood Avenue**  
**Cincinnati, Ohio 45220**

**Relator,**

**-vs-**

**CINCINNATI PUBLIC SCHOOLS**  
**2651 Burnet Avenue**  
**Cincinnati, Ohio 45219**

**Respondent.**

**MANDAMUS PROCEEDING**

**CASE NO. 2008-0748**

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**MERIT BRIEF OF RELATOR, PAUL PERREA**

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**I. TABLE OF CONTENTS**

II. Table of Authorities ..... ii

III. Statement of Facts ..... 1

IV. Argument ..... 3

Proposition of Law I: Cincinnati Public School Semester Exams are Public Records within the meaning of Ohio Rev. Code § 149.43. .... 3

V. Conclusion ..... 21

VI. Appendix ..... 22

**II. TABLE OF AUTHORITIES**

**STATE AND FEDERAL CASES**

*Board of Education of Jefferson Local School District v. Board of Education of Columbus City School District*, 173 Ohio St. 130, 180 N.E.2d 578 (1962). . . . . 6

*In Re Proposed Annexation by the Columbus City School District v. State Board of Education*, 45 Ohio St. 2d 120, 341 N.E.2d 592 (1976) . . . . . 6

*Minshall v. State ex rel*, 124 Ohio St. 61, 176 N.E. 888 (1931) . . . . . 6

*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995) . . . . . 7, 11

*State ex Rel. Besser v. Ohio State University*, 89 Ohio St. 3d 396, 732 N.E.2d 373, (2000) . . . . . 4, 5, 14

*State Ex. Rel Consumer News Services, Inc. v. Worthington City Board of Education*, 97 Ohio St. 3d 65, 776 N.E.2d 89 (2002) . . . . . 4

*State ex Rel. Physicians Committee for Responsible Medicine v. Board of Trustees of Ohio State University*, 108 Ohio St. 3d 295, 843 N.E.2d 181 (2006) . . . . . 11, 16

*State ex Rel. The Miami Student v. Miami University*, 79 Ohio St. 3d 168, 680 N.E.2d 959 (1997) . . . . . 4

*State ex rel. Rea v. Ohio Department of Education*, 81 Ohio St. 3d 527, 530, 692 N.E.2d 596, 600 (1998) . . . . . 3, 5, 15, 16, 17, 20, 21

**STATE STATUTES AND REGULATIONS**

Ohio Admin. Code § 3301-13-07. . . . . 18

Ohio Rev. Code § 149.011 . . . . . 3, 4

Ohio Rev. Code § 149.43 . . . . . 1, 3, 4, 5, 16

Ohio Rev. Code § 1333.61 . . . . . 5

Ohio Rev. Code § 2744.01 . . . . . 6

Ohio Rev. Code § 3301.079 .....	17, 19
Ohio Rev. Code § 3301.0710 .....	17
Ohio Rev. Code § 3301.0711 .....	18
Ohio Rev. Code § 3313.6012 .....	6

### III. STATEMENT OF FACTS

This is a mandamus action in which Relator, Paul Perrea, asks this Court to order Respondent, Cincinnati Public Schools, to comply with a public document request, pursuant to Ohio Rev. Code § 149.43. Perrea, is an Ohio citizen, who has requested public documents from Respondent Cincinnati, Public Schools. (Affidavit of Relator, Paul Perrea (Perrea Affidavit), at ¶¶ 1, 19-35.) Respondent, Cincinnati Public Schools (CPS) is an Ohio public-school district in Hamilton County, Ohio. (Perrea Affidavit ¶ 2, Exhibit A, 000001-000002.) Perrea is a CPS high school teacher at Hughes High School. (Perrea Affidavit ¶ 1.)

Some of the CPS administrators involved in this case are Rosa Blackwell, superintendent of CPS; Laura Mitchell, deputy superintendent; Janet L. Walsh, chief officer of public affairs Department at CPS; and Elizabeth Holtzapple, Ph.D., director of research, evaluation, and test administration. (Perrea Affidavit ¶¶ 3-6, 27, 29, 31, 33-34, 36.)

From the period February 8, 2007, to July 14, 2008, Perrea made requests for public documents. (Perrea Affidavit ¶¶ 19-35.) The documents that Perrea requested were copies of "Semester Exams." (Perrea Affidavit ¶¶ 19-35, Exhibit G, 000052.) Perrea made those requests to Blackwell, Mitchell, Walsh, and Holtzapple. (Perrea Affidavit ¶¶ 3-6, 27, 29, 31, 33-34, 36.)

At CPS, Semester Exams are a form of standardized testing. (Perrea Affidavit ¶ 1.) As a general matter, standardized tests are designed to be administered and scored in a consistent manner. (Perrea Affidavit ¶ 8, Exhibit B, 000003-000008.) The tests are based on recall of isolated facts and narrow test-taking skills. *Id.* The tests often are in the form of multiple choice or true and false questions. *Id.* Standardized tests sometimes use writing portions. *Id.*

Mr. Perrea has been alerted to problems regarding standardized tests. (Perrea Affidavit ¶ 9.) Some of those problems are related to subjective aspects of the construction of the tests. (Perrea

Affidavit ¶ 9, Exhibit C, 000009-000010.) Those subjective aspects include the items included in the test, the working and content of the items, the administration of the test, and the determination of the correct answer. *Id.*

Mr. Perrea also learned that all standardized tests have a measurement error. (Perrea Affidavit ¶ 10, Exhibit D, 000011-000014.) In this context a measurement error means that a test-taker's score may vary due to the conditions of the testing or the mental and emotional state of the individual. *Id.* Certain measures can be implemented to improve the accuracy and reliability of standardized tests. *Id.* For instance, it is possible to test population samples to determine whether the tests actually measure what the designers intended. (Perrea Affidavit ¶ 11, Exhibit D, 000012.)

In this case, on or about October 2006, CPS announced that it was going to start of series of standardized tests called Semester Exams. (Perrea Affidavit ¶ 15, Exhibit F, 000028-000032.) CPS developed those Semester Exams for ninth grade students. *Id.* CPS planned to administer those exams and the end of each semester. *Id.* The exams would be in core subjects: Modern World History, Integrated Mathematics 1, Algebra 1, Physical Science, and Ninth Grade English. *Id.* All students taking those courses would take the exams. *Id.*

The exams included multiple choice and constructed response items. (Perrea Affidavit ¶ 16, Exhibit F, 000028.) CPS planned on teachers scoring the constructed response items and recording the scores on student scan sheets. *Id.* The exams were planned to take up to two hours each. (Perrea Affidavit ¶ 17, Exhibit F, 000028.) The exams counted as twenty-five percent of each student's grade. *Id.*

Mr. Perrea wanted to learn about the exams. He was concerned about the design, implementation, and scoring of the tests. (Perrea Affidavit ¶ 18.) For those reasons, Perrea made

public records request for the Semester Exams. (Perrea Affidavit ¶¶ 3-6, 27, 29, 31, 33-34, 36.) Perrea explained that he would pay the cost of copying. (Perrea Affidavit ¶ 35, Exhibit G, 000054.) He also stated that he did not intend to use the copies for any commercial purpose. *Id.* He would only use the copies for criticism, research, comments, and/or education. *Id.*

CPS, however, refused to provide copies of the documents. The reasons that CPS stated were that the materials were protected by copyright and they were secure testing material, not subject to release as a public record. (Perrea Affidavit ¶¶ 34, 36, Exhibit G, 000053, 000055.)

Based on the CPS refusal to provide these documents, Perrea filed the above-captioned mandamus action.

#### IV. ARGUMENT

**Proposition of Law I: Cincinnati Public School Semester Exams are Public Records within the meaning of Ohio Rev. Code § 149.43.**

##### A. *Ohio Public Records Act*

The Ohio Public Records Act provides that all “public records” must be made available for inspection upon request. Ohio Rev. Code § 149.43(B)(1). According to the statute, “public records” are “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units.” Ohio Rev. Code § 149.43(A)(1). Public records include any “document, device, or item” that documents “the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” Ohio Rev. Code § 149.011(G). Mandamus is the procedure by which a citizen compels the production of public records. Ohio Rev. Code § 149.43 (C)(1).

In a similar case regarding exams from public schools, the Ohio Supreme Court has already

held that twelfth-grade proficiency test and vocational competency assessment tests are public records. *State ex rel. Rea v. Ohio Department of Education*, 81 Ohio St. 3d 527, 530, 692 N.E.2d 596, 600 (1998). Based *Rea* alone, this Court may determine that the CPS Semester Exams are public records. Ohio Rev. Code § 149.011(G).

Besides that, CPS is a “public office.” Ohio Rev. Code § 149.011(A). A “public office” is any “state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of the state for the exercise of any function of government.” Ohio Rev. Code § 149.011(A). Because CPS is a public office, the Semester Exams are “public records.” Ohio Rev. Code § 149.43(A)(1).

Furthermore, CPS is part of a public “school district unit.” Ohio Rev. Code § 149.43 (A)(1). The Ohio Public Records act requires “school district units,” to comply with public document requests. Ohio Rev. Code § 149.43 (A)(1). The Ohio Supreme Court has previously held that a public school board of education and superintendent are “public offices and officials for the purposes of the Public Records Act.” *State Ex. Rel Consumer News Services, Inc. v. Worthington City Board of Education*, 97 Ohio St. 3d 58, 65, 776 N.E.2d 82, 89 (2002). Based on these facts, CPS is part of a “school district unit.” As such, the documents in this request are “public records” within the meaning of Ohio Rev. Code § 149.43(A)(1).

Based on all these authorities related to the Ohio Public Records Act, the CPS Semester Exams are public records within the meaning of Ohio Rev. Code § 149.43(A)(1).

**B. *CPS Has Not Met its Burden of Establishing an Exception to Public Records Act***

As a general matter, courts are instructed to “strictly construe exemptions from disclosure under R.C. 149.43 and to resolve any doubts in favor of disclosure of public records.” *State ex Rel.*

*Besser v. Ohio State University*, 89 Ohio St. 3d 396, 398, 732 N.E.2d 373, 376-77 (2000), citing *State ex Rel. The Miami Student v. Miami University*, 79 Ohio St. 3d 168, 171 680 N.E.2d 956, 959 (1997). That is because, “the inherent, fundamental policy of R.C. 149.43 is to promote open government, not restrict it.” *Besser* at 405, 732 N.E.2d at 381.

**1. Semester Exams are not Trade Secrets**

The Public Records Act does not contain an exemption for trade secrets. Ohio Rev. Code § 149.43(A)(1)(a)-(y). And, the Trade Secret Act does not contain an exemption from disclosure under the Public Records Act. Ohio Rev. Code § 1333.61. The Ohio Supreme Court, however, has held, based on its precedents, that trade secrets are exempt from disclosure under the Public Records Act. *Besser*, 87 Ohio St. 3d at 538, 721 N.E.2d at 1047. Trade secrets consist of any information that: (1) “derives independent economic value, actual or potential, from not being generally known”; and (2) “is subject to efforts that are reasonable under the circumstances to maintain secrecy.” Ohio Rev. Code § 1333.61(D)(1)-(2).

**a. CPS Disclosure of Semester Exams: Public Purpose**

There is, however, no blanket exemption for trade secrets. That is because, once “material is publicly disclosed, it loses any status it ever had as a trade secret.” *Rea*, 81 Ohio St. 3d at 532, 692 N.E.2d at 601. The Supreme Court has held that the “placement and use” of certain assessment tests “within the public educational domain is sufficient to constitute public release.” *Id.* at 533, 692 N.E.2d at 602. The Supreme Court has also held that when a public school develops examination materials “for the public purpose of evaluating school students pursuant to state and federal requirements, the test was effectively disseminated into the public domain.” *Id.* at 532, 692 N.E.2d at 601.

It is important, then, to determine if the CPS created the Semester Exams for the public purpose of evaluating students. Based the Ohio Constitution, school districts, such as CPS, have broad constitutional authority. Ohio Const. Art. II, § 26. For instance, school districts have the right to “determine whether in a given situation [student] transportation to a high school is advisable and practicable.” *Minshall v. State ex rel*, 124 Ohio St. 61, 63, 176 N.E. 888 (1931).

Similarly, when a city annexes additional territory, the board of education has the power to determine if the new territory shall become part of the city’s existing school district. *Board of Education of Jefferson Local School District v. Board of Education of Columbus City School District*, 173 Ohio St. 130, 132, 180 N.E.2d 576, 578 (1962). Even though this determination regarding school district territory is a “legislative act,” the board of education has that constitutional power under Art. II, § 26. *In Re Proposed Annexation by the Columbus City School District v. State Board of Education*, 45 Ohio St. 2d 117, 120, 341 N.E.2d 589, 592 (1976).

Boards of education also have the power to “adopt a policy governing the conduct of academic prevention/intervention services for all grades and all schools throughout the district.” Ohio Rev. Code § 3313.6012(A). The boards have the authority to develop a “plan for the design of classroom-based intervention services to meet the instructional needs of individual students as determined by the results of diagnostic assessments.” Ohio Rev. Code § 3313.6012(A)(2).

The legislature has determined that the “provision of a system of public education” is a governmental function. Ohio Rev. Code § 2744.01(C)(2)(c).

All of these legal authorities establish the framework in which CPS created the Semester Exams for the public purpose of evaluating students. The Semester Exam project really started on April 24, 2006, when CPS adopted a Building Futures Strategic Plan 2006-2001. (Perrea Affidavit

at ¶ 12, Exhibit E, 000015-000027.) As part of that strategic plan, CPS established certain strategies for the purpose of meeting high academic standards. *Id.* As part of that strategy, CPS determined that it would assess students frequently on their progress toward meeting their performance standards. *Id.* To do that, CPS would provide teachers with common benchmarks assessments for each grade and for each subject. (Perrea Affidavit ¶ 12, Exhibit E, 000019.) CPS further directed teachers to use classroom-based assessments to monitor students' progress toward standards. (Perrea Affidavit ¶ 14, Exhibit E, 000019.) CPS also directed teachers to differentiate instruction based on assessment results. *Id.* Students were to be grouped based on the assessment results. *Id.* Based on that Building Futures Strategic Plan, CPS created the Semester Exams. (Perrea Affidavit ¶ 15, Exhibit F, 000028.) CPS uses the same test over and over each year. (Evidence Submitted by Respondent, Cincinnati Public Schools, Affidavit of Dr. Elizabeth Holtzapple, at ¶ 7 (Holtzapple Affidavit).)

In this case, therefore, CPS created the Semester Exams pursuant for the “public purpose of evaluating school students pursuant to state . . . requirements.” *State ex Rel. Rea*, 81 Ohio St. 3d at 532, 692 N.E.2d at 601. The tests were, accordingly, “disseminated into the public domain.” *Id.* at 532, 692 N.E.2d at 601. Because the tests were disseminated into the public domain, there are not trade secrets. *Id.* at 533, 692 N.E.2d at 602.

**b. CPS Disclosure: Internet**

Besides being created for a public purpose, the Semester Exams were disclosed to so many persons that CPS has waived any trade secret arguments. The rule is that “once material has been publicly disclosed, it loses any status it ever had as a trade secret.” *Id.* at 532, 692 N.E.2d at 601. More specifically, when information is posted on the Internet, the materials become “generally

known, are lose their status as trade secrets. *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995).

In this case, CPS has disclosed the answers to the constructed response question on the Internet. CPS posted those answers on a non-restricted website, <http://staffnet.cps-k12.org/Staffnet/RET/scoringsemexam.html>. (Second Perrea Affidavit, ¶ 21.) These guidelines deal with extended response questions from the Semester Exams. *Id.* As of June 9, 2008, those online guidelines were on a website that did not have restricted access. *Id.* Perrea has included paper copies of those guidelines as documents numbered 000056-000094. *Id.* Based on the writing guidelines that CPS posted on the Internet, it is possible to reconstruct the most likely questions on the constructed response portion of the Semester Exams. *Id.* Here are the reconstructed questions.

For English 9, there are four questions, A, B, C, and D. (Second Perrea Affidavit ¶ 22.) Question A would be: "What is the symbolism of the Mint Snowball" in the narrator's life? Give detailed examples from the text. *Id.*; bates 0000059. Question B, would be: "How is hard water changed to soft water? *Id.* Use the passage provide supporting details." *Id.*, bates 000060. Question C would be: "In Stanza 2 of the poem what does the poet mean by the usage of the metaphor of the "ox"? Give an example of how this metaphor is fitting." *Id.*, bates 000061.

For Integrated Mathematics/Algebra I, there are also four questions, A, B, C, and D. Those questions would be: A. "Determine the slope of the line given the coordinates (7,9) and (3,6). Write the equation of the line in the slope intercept formula"; B. "Graph the line of a skydiver who parachutes to earth from a height of 1200 feet in 10 seconds, label the axes and apply the correct scale"; C. "Given the pattern of the number of dots in the figure, write an equation and determine the next elements of the pattern for the 5<sup>th</sup> and 20<sup>th</sup> figure. How many dots are in the 20<sup>th</sup> figure?

How many dots are added to each additional figure?"; D. "Solve the equation for  $3x+2=-5(x-2)$  for  $x$ , or graph the two equations to determine the intersection." (Second Perrea Affidavit, ¶ 23, (A, bates 000062); (B, bates 000063); (C, bates 000064); (D, bates 000066).)

For Physical Science, the questions would be: A. "Explain why metal is a good conductor of electricity. Is plastic a good conductor of electricity?"; B. "Two molecules of iron oxide are produced in this reaction. The charge on the oxygen ion is  $2+$ . During the reaction, iron loses three electrons to become  $3+$  and oxygen gains 2 electrons to become  $2-$ . After this chemical reaction the product has what charged ions?"; C. "Sr-90 is an unstable element that will decay over time. As the element decays, harmful particles are released which can damage human DNA and/or cells (cause cancer.) What is the harm of Strontium-90 isotope being eaten or absorbed by the human body?"; D. "List four each advantages and disadvantages of nuclear fission power generation." (Second Perrea Affidavit at ¶ 24, (A, bates 000067); (B, bates 000068); (C, bates 000069); D, bates 000070).)

In Modern World History Semester Exam, the questions would be: A. "Discuss two actions the French people took that helped topple the monarchy in the French Revolution. Part 1) Define the term "imperialism." Part 2) Give an example of how a European country practiced imperialism. Part 3) Give two examples of the way that imperialism affected the overseas country in which it was imposed"; B. "Discuss two causes that contributed to the start of World War I"; C. "Compare the accompanying photographs to determine the difference"; D. "Discuss the removal of the political personage and the effect such removal from the photograph has on the reliability of historical sources." (Second Perrea Affidavit at ¶ 25 (A, bates 000071); (B, bates 000072); (C, bates 000074); (D, bates 000075).)

For English 10, the questions would be: A. "Describe the relationship between the speaker

to the character Flick and provide one example of the knowledge of the character Flick from the poem”; B. “Based on the reading passage, discuss the reasons a river can be selected to be a national river. Give an example from the passage to support your view”; C. “Discuss a plausible explanation of how memories bring about a change in the narrator’s attitude about the walk. Support your explanation with information from the passage.” (Second Perrea Affidavit at ¶ 26 (A, bates 000076); (Question B, bates 000077); (Question C, bates 000078).)

For Integrated Mathematics II/Geometry Semester Exam, the questions would be: A. “Determine the arc measurements from the two separate arcs. Explain your answer or show your work”; B. “Determine the equation of the line that is perpendicular to the line  $y=4/3x-2$ . Graph the perpendicular line to the line  $y=4/3x-2$ . Show your work”; C. “Given the accompanying diagramed parallelogram determine the interior angle measures for angles B, C, and D”; D. “Determine the length of the hypotenuse of the accompanying triangle. A right triangle with two legs both of length 5.” (Second Perrea Affidavit at ¶ 27 (A, bates 000082); (B, bates 000083); (C, bates 000084); (Question D, bates 000086).)

For the Biology Semester Exam, the questions would be: A. “Given the two accompanying diagrams of two cells (both contain a nucleus) and identify the different types of the two cells as to whether they are prokaryotic or eukaryotic”; B. “Identify the four stages of mitosis and describe the process which differentiates each stage”; C. “Describe the role decomposers play in the breaking down of organic matter”; D. “Identify one industrial process which releases Carbon Dioxide. Describe two alternatives to the process and explain how one of the alternative process could provide the same products or resources as the original process.” (Second Perrea Affidavit at ¶ 28 (A, bates 000087); (B, bates 000088); (C, bates 000089); (D, bates 000090).)

For United States History Semester Exam, the questions would be: A. "Identify a stereo type in the advertisement and explain why the stereotype is used in the advertisement"; B. "Identify two ways that progressives reformed politics in turn of the century American politics. Explain how each of those two say helped reduce government corruption"; C. "Describe one reason why immigrants often settled into like ethnic neighborhoods. Describe one effect that ethnic neighborhoods had in cities"; D. "Describe one way the accompanying news headlines are examples of "yellow journalism." How did Yellow Journalism contributed to the start of the Spanish-American War?" (Second Perrea Affidavit at ¶ 29 (A, bates 000091); (B, bates 000092); (C, bates 000093); (D, bates 000094).)

Any Cincinnati Public School student with an Internet connection could gain access to these guidelines and reconstruct the answers as Perrea has illustrated above. (Second Perrea Affidavit at ¶ 30.) Because CPS has disclosed these answers on the Internet, they have waived any trade secret exemption to the public records act. *State ex Rel. Rea*, 81 Ohio St. 3d at 533, 692 N.E.2d at 602 (disclosure generally); *Religious Technology*, 923 F. Supp. at 1256 (disclosure Internet).

**c. CPS Disclosure: Thousand of Students/Hundreds of Teachers**

In addition, the Supreme Court has held that when a proficiency test has been "disclosed to thousands of public school students, teachers and administrators" it does not have trade secret status. *State ex rel. Physicians Committee for Responsible Medicine v. Board of Trustees of Ohio State University*, 108 Ohio St. 3d 288, 295, 843 N.E.2d 174, 181 (2006).

In this case, CPS uses the same Semester Exams over and over each year. (Hotzapple Affidavit at ¶ 7.) Each time CPS administers the exams, it discloses the contents to thousands of students and hundreds of teachers. In this case, CPS has approximately 34,790 students, and about

2676 ninth graders. (Perrea Affidavit ¶ 20, Exhibit A, 000001.) Based on CPS literature, it administered the Semester Exams to the ninth graders taking core courses. (Perrea Affidavit ¶ 20, Exhibit F, 000028.)

CPS also has approximately 2550 classroom teaching staff, 196 of which would be ninth grade teachers. (Perrea Affidavit ¶ 21, Exhibit A, 000002.) Based on CPS literature, all ninth grade teachers had access to the Semester Exams. (Perrea Affidavit ¶ 22, Exhibit F, 000031.)

Prior to the time that the students' even take the tests, CPS required teachers to "predict the performance of each student on each examination." (Perrea Affidavit ¶ 22, Exhibit F, 000031.) The teachers were supposed to do that based on what they "already know about a student's performance/skill level." *Id.*

After the students take the exams, CPS required teachers to score the tests and record the scores. (Perrea Affidavit ¶ 23, Exhibit F, 000028.) CPS would then post the results on a website to which the principal and teachers had access. *Id.* The tests would count as 25% of the students' final grades. *Id.*

CPS claims that it has "security measures to ensure that the Semester Exams are not disclosed." (Holtzapple Affidavit at ¶ 13.) The only thing those security measures really amount to is a prohibition against students or teachers making "copies of the exams." *Id.* The document that CPS provides to teachers states: "Teachers or other staff may not keep copies nor make copies of the examinations." (Holtzapple Affidavit at ¶ 15, CPS 017.) CPS did not require the teachers to sign a confidentiality form. (Perrea Affidavit ¶ 25.) And, it did require the students to sign a confidentiality form. *Id.* The "security measures" that CPS has propounded do not prohibit teachers from discussing the Semester Exams among themselves. (Holtzapple Affidavit at ¶ 13, ¶ 15, CPS

017.) The security measures also do not prohibit teachers from incorporating the questions from the Semester Exams into their day-to-day teaching curriculum. (Holtzapple Affidavit at ¶ 15, CPS 017.)

Moreover, as part of the Semester Exam procedure, CPS teachers are required to grade certain portions of the tests. (Perrea Affidavit at ¶ 23.) The teachers who have participated in the grading over several years, become more familiar with the contents of the Semester Exams. (Second Perrea Affidavit at ¶ 34.) In fact, CPS Holtzapple has encouraged CPS teachers to conform their classroom teaching to the Semester Exams. (Second Perrea Affidavit at ¶ 33, 0000097.) One teacher complained to Holtzapple that the CPS teachers received their “new books and support materials” for their regular classroom teaching materials late. *Id.* That made it difficult for the teachers to teach all the material “that may be covered” on the Semester Exams. *Id.* Holtzapple informed the teacher that the Semester Exams are “aligned to indicators that should have been taught.” *Id.* Holtzapple explained that the teachers’ instruction “should not be dependent” on the late materials. *Id.*

The CPS teacher also expressed her concern as to whether the Semester Exam had “been modified from last year to reflect the new books/material?” *Id.* The CPS teacher also was concerned that the “pacing” for teaching was not coordinated with the questions on the Semester Exams. *Id.* at ¶ 33, 0000098. The teacher wanted to know if classroom materials from the first and second semester would be covered in the “1<sup>st</sup> or 2<sup>nd</sup> semester” exam. *Id.* The only advice that Holtzapple could offer to this teachers concerns was to be “involved in the process.” *Id.*

In fact, approximately 60 CPS teachers have signed a petition to get copies of the Semester Exams. (Second Perrea Affidavit at ¶ 32, 000095-000096.) The reason the teachers asked for copies of the exams was to have the exams evaluated to ensure the “fairness, accuracy, and validity of the

exams.” *Id.*

One of the problems with the CPS approach is that CPS uses the same test over and over each year. (Hotzapple Affidavit at ¶ 7.) And, CPS encourages, actually requires, the teaches to incorporate the materials from the test in their regular teaching. (Second Perrea Affidavit at ¶ 33, 000097-000098.) The teachers face a dilemma, however, because CPS does not allow them to have copies and the Semester Exams are not “paced” with the classroom teaching materials. *Id.*

Before each test, CPS asks the teachers to “predict the performance of each student on each examination.” (Perrea Affidavit ¶ 22, Exhibit F, 000031.) The teachers were supposed to do that based on what they “already know about a student’s performance/skill level.” *Id.* The more experienced teachers are more familiar with the tests. (Second Perrea Affidavit at ¶ 34.) And, CPS requires the teachers to incorporate questions from the exams in their daily classroom teaching. (Second Perrea Affidavit at ¶ 33, 000097-000098.) So, the more experienced teachers — either consciously or unconsciously — are able to instruct their particular students so that they will be more successful on the Semester Exams. (Second Perrea Affidavit at ¶ 34.) The result is that students of more experienced teachers have an advantage over students of less experienced teachers. *Id.*

Based on all of these points, one can understand how important it is to have this Court to “strictly construe” the purported trade secret exemption and “ resolve any doubts in favor of disclosure” of the Semester Exams. *Besser*, 89 Ohio St. 3d at 398, 732 N.E.2d at 376-77. This is a good example of the benefits of “the inherent, fundamental policy . . . to promote open government, not restrict it.” *Id.* at 405, 732 N.E.2d at 381.

## **2. *Copyright is not a Trade Secret Exception***

CPS next argues that the Semester Exams are exempt from disclosure because they contain

copyrighted material. (Perrea Affidavit at ¶ 34, Exhibit G, 000053.) The holding from a 1998 Ohio Supreme Court case controls this issue. *Rea*, 81 Ohio St. 3d 527, 692 N.E.2d 596. In *Rea*, the Court considered the issue of whether previously administered Ohio Proficiency Tests (OPT) and Ohio Vocational Competency Assessment (OVCA) tests were public records. *Id.*, at 528, 692 N.E.2d at 599. In that case, respondents argued that federal copyright laws prohibits the release of the tests. *Id.* at 532, 692 N.E.2d at 601-02. The Supreme Court held that the Ohio “[e]xceptions to public records requests do not include the copyright defense where public records fall under the ‘fair use’ exception.” *Id.*

In that case, the Court noted that the Relators had “no intention of copying these materials for commercial resale purposes.” *Id.* The Court also noted that the copyright “fair-use exception allows reproduction and copies without infringement of a copyright where the material will be used for purposes such as criticism, research, comment, and for other educational or non profit purposes that are not commercial in nature.” *Id.*

In this case, Perrea informed CPS that he “did not intend to use the copies for any commercial purpose.” (Perrea Affidavit ¶ 35, Exhibit G, 000054.) He further assured CPS that he would “only use the copies for criticism, research, comments, and/or education.” *Id.*

Based on these facts, therefore, the purported copyright exception by CPS does not apply to Perrea’s public records request.

### **3. CPS Semester Exams Are Not Intellectual Property**

CPS finally argues that it does not have to produce the documents because they are “secure testing documents.” (Perrea Affidavit ¶ 27, Exhibit G, 000034.) The exception from the public records statute that most closely relates to CPS’s “secure test” argument is the exception for

“intellectual property records.” *Rea*, 81 Ohio St. 3d at 533, 692 N.E.2d at 602., citing Ohio Rev. Code § 149.43(A)(5). The statute defines intellectual property records as a record of educational study or research “that has not been publicly released, published, or patented.” *Rea*, 81 Ohio St. 3d at 533, 692 N.E.2d at 602.

Based on that definition, the Supreme Court noted that the OCAP test is an assessment tool “utilized to evaluate public school students.” *Id.* By construing the public records statute liberally, the Court found that “the placement and use of the test within the public educational domain is sufficient to constitute public release under the statute.” *Id.* The Court held that the public records statute was “not designed to inhibit the release of materials used to further the state’s educational goals.” *Id.*

As recently as 2006, the Supreme Court confirmed the holding of *Rea* in the case, *Physicians Committee for Responsible Medicine*, 108 Ohio St. 3d 288, 843 N.E.2d 174. In that case, the Court also considered the intellectual property exception to the public records statute. *Id.* at 843 N.E.2d at 179-80. In that case, the Court stated once again that the intellectual property exemption “did not cover previously administered Ohio 12<sup>th</sup>-grade proficiency tests and vocational examinations because those records had been publicly released.” *Id.*

The holdings of *Rea* and *Physicians Committee* both establish that the argument by CPS — that the Semester Exams are “secure documents” — does not provide an exemption under the public records act.

#### **B. Ohio Policy Demands Public Disclosure of Public Education Tests**

In a situation that is closely related to these Semester Exams, the general assembly has required the state board of education to develop achievement tests for each subject area and grade

level. Ohio Rev. Code § 3301.079 (C). The board then provides those tests to all Ohio school districts. *Id.* The local school districts are required to administer the achievement tests. *Id.*

The tests are to measure comprehension of content and mastery of related skills Ohio Rev. Code § 3301.079(D)(1). The Ohio Department of Education is required to consult with “parents of students in kindergarten through twelfth grade and active Ohio classroom teachers, other school personnel, and administrators with expertise in the appropriate subject area. *Id.* The general assembly does not allow any question to “promote or inquire as to individual moral or social values or beliefs.” Ohio Rev. Code § 3301.079(F). For these tests, the general assembly has established: “Blank copies of diagnostic tests shall be public records.” Ohio Rev. Code § 3301.079(D)(1).

The Ohio Revised Code also requires the board of education to adopt a testing program for potential high school graduates. Ohio Rev. Code § 3301.0710. These tests are known as “Ohio graduation tests.” Ohio Rev. Code § 3301.710(B). The tests are “designed to ensure that students who receive a high school diploma demonstrate at least high school levels of achievement in reading, writing, mathematics, science, and social studies.” Ohio Rev. Code § 3301.0710.

The Ohio Supreme Court considered whether the graduation tests were public records. *Rea*, 81 Ohio St. 3d at 530, 692 N.E.2d at 600. The Court referred to the tests as “Twelfth Grade OPT” examinations. *Id.* at 529, 692 N.E.2d at 599. The Court reasoned that by the “ODE is required to develop the proficiency tests.” *Id.* at 530, 692 N.E.2d at 600. The Supreme Court held that public disclosure of these graduation tests was important to given “the magnitude and significance attributed to these tests.” *Rea*, 81 Ohio St. 3d at 531, 692 N.E.2d at 601. Ohio recognizes that “education of its citizenry is one of the most important functions of the state.” *Id.* Because of that, the legislature has made it clear its intent that parents, students, and citizens have access to these

tests.” *Id.* The reason is to “foster scrutiny an comment on them free from restraint.” *Id.* And, the ODE “owns” and “maintains” the OPT. *Id.* For those reasons, and others, the Court held that the exams “are considered public records under R.C. 149.43.” *Id.*

In addition to public scrutiny and comment, Ohio has a public policy of validation studies. Ohio Rev. Code § 3301.0711(N)(2). For Ohio graduation studies, the legislature provided that the department of education may “field test proposed test questions with samples of students to determine the validity, reliability or appropriateness of test questions.” *Id.*

The Ohio Administrative Code sets out a system to validate standardized tests. Ohio Admin. Code § 3301-13-07. The Admin Code sets up a “fairness sensitivity review committee.” *Id.* at (B) That committee consists of educators and/or parents of hearing impaired students, visually impaired students, students with limited English proficiency, students with disabilities, and gifted students. *Id.* at (C)(1)-(6). The committee also consists of members to represent culturally diversity and a balance of gender and ethnicity. *Id.* at (C)(7) and (10).

That committee then reviews each question based on certain criteria. Ohio Admin. Code § 3301-13-07(E)(1)-(10). For example, the committee must ensure that questions do not: (1) promote or inquire moral or social values or beliefs; (2) disadvantage students based on race, ethnicity, gender, or disability; (3) offend stereotypes of student groups; (6) contain materials understood only by specific cultural groups, use language that is interpreted differently by different groups; (7) use language that is offensive to a group of students; (9) contain directions or scoring guidelines that credit responses more typical of one group; (10) and use guidelines that assign the highest possible score to students who provide more information than actually requested by the question. *Id.*

In this case, one of the reasons that Perrea asked for copies of the Semester Exams was to

have the exams evaluated by “an independent, qualified psychometrician – as to the fairness, accuracy, an validity of the exams.” (Perrea Affidavit at ¶ 30, 000040.) Besides Perrea, more than 60 CPS teachers signed a petition asking for copies of the exams. (Second Perrea Affidavit at ¶ 32, 000095-96.)

Based on his own experience grading the exams, Perrea is able to recall many of the questions from the exams. (Second Perrea Affidavit at ¶¶ 2-20.) Based on his recollection, Perrea has also been able to identify many misleading aspects of the questions. *Id.* The misleading aspects include questions that: ask students to identify one inaccurate response out of four choices, when all four are potentially correct, (Second Perrea Affidavit at ¶ 3); ask students to pick one correct answer out of four, when there really are two or three are correct answers, (Second Perrea Affidavit at ¶¶ 4, 5, 8, 17, and 19); ask questions that include diagrams that not appropriate to the questions; (Second Perrea Affidavit at ¶¶ 6 and 11); ask students in a science portion of the test to answer vocabulary or history questions that to not test science knowledge, (Second Perrea Affidavit at ¶¶ 7, 13, 14, 18); ask questions that are not covered in the classroom setting, (Second Perrea Affidavit at ¶ 9); ask questions that are excessively verbose and poorly written, (Second Perrea Affidavit at ¶ 10); ask questions that are confusing because of common experiences that create ambiguity in the answers (Second Perrea Affidavit at ¶¶ 12, 15, 16); and ask questions that include undefined, imprecise terms (Second Perrea Affidavit at ¶¶ 12, 15, 16).

In this case, CPS claims that it developed the Semester Exams in conjunction with West Ed, a well-respected nonprofit testing agency that professionally develops assessment tools for clients across the country. (Holtzapple Affidavit at ¶ 3.) By making this point, CPS is implying that the Semester Exams are high-quality assessment tools for students at CPS.

Given the strong public policy for public scrutiny and validation studies, one would expect CPS to have some evidence to support its claim. With that in mind, during the discovery portion of this mandamus action, Perrea submitted a set of interrogatories and request for documents to CPS. (Submission of Evidence by Relator, Paul Perrea, Responses and Objections to Relator Paul Perrea's First Set of Interrogatories and First Request for Production of Documents of Respondent Cincinnati Public Schools (CPS Discovery Responses).

In that request, Perrea asked CPS to produce copies of all "documents that show the validation, reliability, development, norms, and/or administration of the Semester Exams that are subject of this lawsuit. (CPS Discovery Responses at ¶¶ 2 and 3.) In response, CPS was unable to produce any documents that supported the validation, reliability, or development of the exams. (CPS Discovery Responses at ¶ 3, MAN 00001-MAN 00010.)

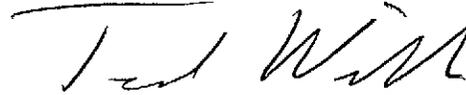
Based on these facts, therefore, it is apparent that there is a strong public policy in favor of making the Semester Exams public records. The Supreme Court has reasoned that public education is "is one of the most important functions of the state." *Rea*, 81 Ohio St. 3d at 531, 692 N.E.2d at 601. Just as with the Ohio achievement tests, by making the Semester Exams public records, CPS will encourage consultations with "parents of students [in addition to] active Ohio classroom teachers, other school personnel, and administrators with expertise in the appropriate subject area." Ohio Rev. Code § 3301.079(D)(1). And, just as in OPT and OVCA tests, making the Semester Exams public records will "foster scrutiny and comment on them free from restraint." *Rea*, 81 Ohio St. 3d at 531, 692 N.E.2d at 601.

## V. CONCLUSION

For all these reasons, Relator, Paul Perrea, respectfully requests that this Court issue an Order

in Mandamus requiring Respondent, Cincinnati Public Schools, to produce the records he has requested in this case.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above document was served by regular United States Mail on Mark Stepaniak, Taft Stettinius & Hollister, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202-3957, this 14<sup>th</sup> day of November, 2008.



Ted L. Wills (0059473)

**VI. APPENDIX**

Ohio Admin. Code § 3301-13-07. ....	000001
Ohio Rev. Code § 149.011 .....	000003
Ohio Rev. Code § 149.43 .....	000005
Ohio Rev. Code § 1333.61 .....	000014
Ohio Rev. Code § 2744.01 .....	000016
Ohio Rev. Code § 3301.079 .....	000021
Ohio Rev. Code § 3301.0710 .....	000023
Ohio Rev. Code § 3301.0711 .....	000026
Ohio Rev. Code § 3313.6012 .....	000032

c:/tlw/perrea.paul/lpleading/PRR.merit brief

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2008 \*

3301 Department of Education - Administration and Director  
Chapter 3301-13 Proficiency Tests

OAC Ann. 3301-13-07 (2008)

3301-13-07. Establishing the provisions and decision procedures for the fairness sensitivity review committee.

(A) The fairness sensitivity review committee shall review all questions for tests prescribed under *section 3301.0710 of the Revised Code* pursuant to the requirements of division (F) of *section 3301.079 of the Revised Code*.

(B) Membership of the fairness sensitivity review committee shall consist of not less than twenty and not greater than thirty-five members of each in four grade level bands of tests: grades kindergarten through two, grades three through five, grades six through eight, and grades nine through twelve.

(C) Membership of each fairness sensitivity review committee shall represent specific groups of educators, parents, and community members as follows:

- (1) Educators and/or parents of hearing impaired students; at least one and not more than two members;
- (2) Educators and/or parents of visually impaired students; at least one and not more than two members;
- (3) Educators and/or parents of limited English proficient (LEP) students; at least one and not more than two members;
- (4) Educators and/or parents of other students with disabilities; at least one and not more than three members;
- (5) Educators and/or parents of gifted students; at least one and not more than two members;
- (6) Parents of students in each grade band; at least two and not more than five members;
- (7) Community members who represent various groups that ensure a culturally diverse representation; at least three and not more than five;
- (8) Educators and/or parents who that represent all types of schools in Ohio; public, community schools, and nonpublic schools for that grade band;
- (9) All regions of the state of Ohio are represented; and
- (10) A balance of gender, and ethnicity is represented in the overall committee membership.

(D) The length of membership for each committee member shall be limited to three years.

(E) The review shall include, for each question reviewed, an evaluation of all of the following criteria listed in paragraph (E) of this rule. The review shall ensure that:

- (1) Test questions do not promote or inquire as to individual moral or social values or beliefs;

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- (2) Test questions do not disadvantage groups of students because of their race, ethnicity, gender or disability;
- (3) Diverse cultures are represented in assessments and that material used neither offends nor stereotypes any student group;
- (4) Test questions do not reflect an improper balance among gender, racial or ethnic groups;
- (5) Test illustrations do not reflect an imbalance of physical types and avoid evidence of physical disability;
- (6) Test questions do not contain materials understood only by specific cultural groups;
- (7) Test questions do not use language that is interpreted differently by members of different groups of students;
- (8) Test questions are not offensive or emotionally disturbing to a group of students;
- (9) Test questions do not contain directions or scoring guidelines that assist or credit responses more typical of one group of students than another; and
- (10) Test question scoring guidelines do not assign the highest possible score to those students who provide more information than actually requested by said test question.

(F) Each fairness sensitivity review committee shall review test questions, material, and illustrations only in light of the criteria under paragraphs (E) (1) to (E)(10) of this rule.

(G) Each fairness sensitivity review committee may not judge, rate, or reject test questions on the basis of academic content alignment with Ohio's academic content standards.

(H) Each fairness sensitivity review committee shall review test questions in accordance with paragraphs (E) (1) to (E)(10) of this rule and shall judge test questions to be:

- (1) Approved for use with no revisions or only minor revisions;
- (2) Revised and return to the committee for further review and consideration;
- (3) Rejected from use on tests. If items, test material, or illustrations are rejected, the committee must specifically note which of the specific criteria under paragraphs (E)(1) to (E)(10) of this rule are the basis of this rejection; and
- (4) The judgment of each fairness sensitivity committee on any test question that is based upon criteria in paragraphs (E)(1) to E (10) of this rule shall be final.

History:Effective: 12/21/2007.

R.C. 119.032 review dates: 12/21/2012.

Promulgated Under: 119.03.

Statutory Authority: 3301.07, 3301.0710, 3301.0711, 3301.079.

Rule Amplifies: 3301.0710, 3301.0711, 3301.079.

000002

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY  
AND FILED WITH THE SECRETARY OF STATE THROUGH APRIL 18, 2007 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2007 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 18, 2007 \*\*\*

TITLE 1. STATE GOVERNMENT  
CHAPTER 149. DOCUMENTS, REPORTS, AND RECORDS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 149.011 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 149.011. Definitions

As used in this chapter:

(A) "Public office" includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

(B) "State agency" includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including any state-supported institution of higher education, the general assembly, any legislative agency, any court or judicial agency, or any political subdivision or agency of a political subdivision.

(C) "Public money" includes all money received or collected by or due a public official, whether in accordance with or under authority of any law, ordinance, resolution, or order, under color of office, or otherwise. It also includes any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.

(D) "Public official" includes all officers, employees, or duly authorized representatives or agents of a public office.

(E) "Color of office" includes any act purported or alleged to be done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority.

(F) "Archive" includes any public record that is transferred to the state archives or other designated archival institutions because of the historical information contained on it.

(G) "Records" includes any document, device, or item, regardless of physical form or characteristic, including

000003

an electronic record as defined in *section 1306.01 of the Revised Code*, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

HISTORY:

141 v H 238. Eff 7-1-85; 150 v H 95, § 1, eff. 9-26-03.

000004

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY  
AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 24, APPROVED 7/19/2007 \*\*\*  
\*\*\* WITH THE EXCEPTION OF FILE 15 (HB 119) \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 4/1/07 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH 6/11/07 \*\*\*

TITLE 1. STATE GOVERNMENT  
CHAPTER 149. DOCUMENTS, REPORTS, AND RECORDS  
RECORDS COMMISSIONS

Go to the Ohio Code Archive Directory

ORC Ann. 149.43 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 149.43. Availability of public records

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for profit entity operating the alternative school pursuant to *section 3313.533 [3313.53.3] of the Revised Code*. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of *section 2919.121 [2919.12.1] of the Revised Code* and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under *section 3705.12 of the Revised Code*;

(e) Information in a record contained in the putative father registry established by *section 3107.062 [3107.06.2] of the Revised Code*, regardless of whether the information is held by the department of job and family services or, pursuant to *section 3111.69 of the Revised Code*, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of *section 3107.42 of the Revised Code* or specified in division (A) of *section*

000005

3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under *section 2710.03* or *4112.05* of the Revised Code;

(j) DNA records stored in the DNA database pursuant to *section 109.573 [109.57.3]* of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of *section 5120.21* of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to *section 5139.05* of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to *section 3121.894 [3121.89.4]* of the Revised Code;

(p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in *section 1333.61* of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under *sections 307.621 [307.62.1]* to *307.629 [307.62.9]* of the Revised Code, other than the report prepared pursuant to *section 307.626 [307.62.6]* of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to *section 5153.171 [5153.17.1]* of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under *section 4751.04* of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under *section 150.01* of the Revised Code;

(x) Information reported and evaluations conducted pursuant to *section 3701.072 [3701.07.2]* of the Revised Code.

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or

000006

the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT:

(a) The address of the actual personal residence of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT, except for the state or political subdivision in which the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

000007

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in *section 109.71 of the Revised Code* and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in *section 4765.01 of the Revised Code*.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of

000008

allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in *section 2929.01 of the Revised Code*.

(10) "Post-release control sanction" has the same meaning as in *section 2967.01 of the Revised Code*.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in *section 149.011 [149.01.1] of the Revised Code*.

(12) "Designee" and "elected official" have the same meanings as in *section 109.43 of the Revised Code*.

(B) (1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for

public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request shall include the journalist's name and title and

000010

the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in this division, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C) (1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under *Section 2 of Article IV, Ohio Constitution*, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under *Section 3 of Article IV, Ohio Constitution*.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2) (a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division

000011

(C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E) (1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in *section 109.43 of the Revised Code*. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under *section 109.43 of the Revised Code*. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the

000012

public office in the manual or handbook.

(F) (1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

#### HISTORY:

130 v 155 (Eff 9-27-63); 138 v S 62 (Eff 1-18-80); 140 v H 84 (Eff 3-19-85); 141 v H 238 (Eff 7-1-85); 141 v H 319 (Eff 3-24-86); 142 v S 275 (Eff 10-15-87); 145 v H 152 (Eff 7-1-93); 146 v H 5 (Eff 8-30-95); 146 v S 269 (Eff 7-1-96); 146 v H 353 (Eff 9-17-96); 146 v H 419 (Eff 9-18-96); 146 v S 277, § 1 (Eff 3-31-97); 146 v H 438, § 3 (Eff 7-1-97); 146 v S 277, § 6 (Eff 7-1-97); 147 v H 352 (Eff 1-1-98); 147 v H 421 (Eff 5-6-98); 148 v S 55 (Eff 10-26-99); 148 v S 78 (Eff 12-16-99); 148 v H 471 (Eff 7-1-2000); 148 v H 539 (Eff 6-21-2000); 148 v H 640 (Eff 9-14-2000); 148 v H 448 (Eff 10-5-2000); 148 v S 180 (Eff 3-22-2001); 149 v H 196 (Eff 11-20-2001); 149 v S 180 (Eff 4-9-2003); 149 v S 258 (Eff 4-9-2003); 149 v H 490, § 1, eff. 1-1-04; 150 v H 6, § 1, eff. 2-12-04; 150 v H 431, § 1, eff. 7-1-05; 150 v H 303, § 1, eff. 10-29-05; 151 v H 141, § eff. 3-30-07; 151 v H 9, § 1, eff. 9-29-07.

000013

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY  
AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 24, APPROVED 7/19/2007 \*\*\*  
\*\*\* WITH THE EXCEPTION OF FILE 15 (HB 119) \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 4/1/07 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH 6/11/07 \*\*\*

TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE  
CHAPTER 1333. TRADE PRACTICES  
UNIFORM TRADE SECRETS ACT

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ORC Ann. 1333.61 (2007)

§ 1333.61. Definitions

As used in *sections 1333.61 to 1333.69 of the Revised Code*, unless the context requires otherwise:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(C) "Person" has the same meaning as in division (C) of *section 1.59 of the Revised Code* and includes governmental entities.

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

HISTORY:

145 v H 320. Eff 7-20-94.

000015

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY  
AND FILED WITH THE SECRETARY OF STATE THROUGH MAY 28, 2007 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH THROUGH MAY 28, 2007 \*\*\*

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES  
CHAPTER 2744. POLITICAL SUBDIVISION TORT LIABILITY

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ORC Ann. 2744.01 (2007)

§ 2744.01. Definitions

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated on full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to *section 3319.301 [3319.30.1] of the Revised Code*. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to *section 2951.02 of the Revised Code* or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to *section 2152.19 or 2152.20 of the Revised Code* to perform community service or community work in a political subdivision.

(C) (1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

000016

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in *section 3750.01 of the Revised Code*; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in *section 2921.01 of the Revised Code*;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in *section 3734.01 of the Revised Code*, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under *section 3734.12 of the Revised Code*, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to,

000017

inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under *section 140.06 of the Revised Code*;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in *section 4519.01 of the Revised Code*, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w) (i) At any time before regulations prescribed pursuant to *49 U.S.C.A 20153* become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to *49 U.S.C.A. 20153*, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in *49 U.S.C.A 20153*, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state;

000018

provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in *section 4511.01 of the Revised Code*.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under *section 339.14 of the Revised Code*, board of hospital commissioners appointed for a municipal hospital under *section 749.04 of the Revised Code*, board of hospital trustees appointed for a municipal hospital under *section 749.22 of the Revised Code*, regional planning commission created pursuant to *section 713.21 of the Revised Code*, county planning commission created pursuant to *section 713.22 of the Revised Code*, joint planning council created pursuant to *section 713.231 [713.23.1] of the Revised Code*, interstate regional planning commission created pursuant to *section 713.30 of the Revised Code*, port authority created pursuant to *section 4582.02 or 4582.26 of the Revised Code* or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under *section 3750.03 of the Revised Code*, joint emergency medical services district created pursuant to *section 307.052 [307.05.2] of the Revised Code*, fire and ambulance district created pursuant to *section 505.375 [505.37.5] of the Revised Code*, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under *section 343.01 or 343.012 [343.01.2] of the Revised Code*, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under *sections 2301.51 to 2301.58 of the Revised Code*, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G) (1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political

subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

#### HISTORY:

141 v H 176 (Eff 11-20-85); 141 v H 205, § 1 (Eff 6-7-86); 141 v H 205, § 3 (Eff 1-1-87); 142 v H 295 (Eff 6-10-87); 142 v H 815 (Eff 12-12-88); 142 v S 367 (Eff 12-14-88); 143 v H 656 (Eff 4-18-90); 144 v H 210 (Eff 5-1-92); 144 v H 723 (Eff 4-16-93); 145 v H 152 (Eff 7-1-93); 145 v H 384 (Eff 11-11-94); 146 v H 192 (Eff 11-21-95); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 148 v H 205 (Eff 9-24-99); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 24, § 1 (Eff 10-26-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v S 108, § 2.03 (Eff 1-1-2002); 149 v S 24, § 3 (Eff 1-1-2002); 149 v S 106. Eff 4-9-2003; 150 v S 222, § 1, eff. 4-27-05; 151 v H 162, § 1, eff. 10-12-06.

000020

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY  
AND FILED WITH THE SECRETARY OF STATE THROUGH OCTOBER 24, 2007 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JULY 1, 2007 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2007 \*\*\*

TITLE 33. EDUCATION -- LIBRARIES  
CHAPTER 3301. DEPARTMENT OF EDUCATION  
STATE BOARD OF EDUCATION

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ORC Ann. 3301.079 (2007)

§ 3301.079. Academic standards for K-12; model curriculum; achievement tests; diagnostic assessment; persons to be consulted; fairness sensitivity review committee

(A) (1) Not later than December 31, 2001, the state board of education shall adopt statewide academic standards for each of grades kindergarten through twelve in reading, writing, and mathematics. Not later than December 31, 2002, the state board shall adopt statewide academic standards for each of grades kindergarten through twelve in science and social studies. The standards shall specify the academic content and skills that students are expected to know and be able to do at each grade level.

(2) When academic standards have been completed for any subject area required by this division, the state board shall inform all school districts of the content of those standards.

(B) Not later than eighteen months after the completion of academic standards for any subject area required by division (A) of this section, the state board shall adopt a model curriculum for instruction in that subject area for each of grades kindergarten through twelve that is sufficient to meet the needs of students in every community. The model curriculum shall be aligned with the standards to ensure that the academic content and skills specified for each grade level are taught to students. When any model curriculum has been completed, the state board shall inform all school districts of the content of that model curriculum.

All school districts may utilize the state standards and the model curriculum established by the state board, together with other relevant resources, examples, or models to ensure that students have the opportunity to attain the academic standards. Upon request, the department of education shall provide technical assistance to any district in implementing the model curriculum.

Nothing in this section requires any school district to utilize all or any part of a model curriculum developed under this division.

(C) The state board shall develop achievement tests aligned with the academic standards and model curriculum for each of the subject areas and grade levels required by *section 3301.0710 [3301.07.10] of the Revised Code.*

000021

When any achievement test has been completed, the state board shall inform all school districts of its completion, and the department of education shall make the achievement test available to the districts. School districts shall administer the achievement test beginning in the school year indicated in *section 3301.0712 [3301.07.12] of the Revised Code*.

(D) (1) The state board shall adopt a diagnostic assessment aligned with the academic standards and model curriculum for each of grades kindergarten through two in reading, writing, and mathematics and for grade three in writing. The diagnostic assessment shall be designed to measure student comprehension of academic content and mastery of related skills for the relevant subject area and grade level. Any diagnostic assessment shall not include components to identify gifted students. Blank copies of diagnostic tests shall be public records.

(2) When each diagnostic assessment has been completed, the state board shall inform all school districts of its completion and the department of education shall make the diagnostic assessment available to the districts at no cost to the district. School districts shall administer the diagnostic assessment pursuant to *section 3301.0715 [3301.07.15] of the Revised Code* beginning the first school year following the development of the assessment.

(E) Whenever the state board or the department of education consults with persons for the purpose of drafting or reviewing any standards, diagnostic assessments, achievement tests, or model curriculum required under this section, the state board or the department shall first consult with parents of students in kindergarten through twelfth grade and with active Ohio classroom teachers, other school personnel, and administrators with expertise in the appropriate subject area. Whenever practicable, the state board and department shall consult with teachers recognized as outstanding in their fields.

If the department contracts with more than one outside entity for the development of the achievement tests required by this section, the department shall ensure the interchangeability of those tests.

(F) The fairness sensitivity review committee, established by rule of the state board of education, shall not allow any question on any achievement test or diagnostic assessment developed under this section or any proficiency test prescribed by former *section 3301.0710 [3301.07.10] of the Revised Code*, as it existed prior to September 11, 2001, to include, be written to promote, or inquire as to individual moral or social values or beliefs. The decision of the committee shall be final. This section does not create a private cause of action.

#### HISTORY:

149 v S 1, Eff 9-11-2001; 150 v H 3, § 1, eff. 8-15-03; 150 v S 2, § 1, eff. 6-9-04; 151 v H 66, § 101.01, eff. 9-29-05.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY  
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TITLE 33. EDUCATION -- LIBRARIES  
CHAPTER 3301. DEPARTMENT OF EDUCATION  
STATE BOARD OF EDUCATION

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ORC Ann. 3301.0710 (2007)

§ 3301.0710. Statewide program to test student achievement; graduation tests

The state board of education shall adopt rules establishing a statewide program to test student achievement. The state board shall ensure that all tests administered under the testing program are aligned with the academic standards and model curricula adopted by the state board and are created with input from Ohio parents, Ohio classroom teachers, Ohio school administrators, and other Ohio school personnel pursuant to *section 3301.079 [3301.07.9] of the Revised Code*.

The testing program shall be designed to ensure that students who receive a high school diploma demonstrate at least high school levels of achievement in reading, writing, mathematics, science, and social studies.

(A) (1) The state board shall prescribe all of the following:

(a) Two statewide achievement tests, one each designed to measure the level of reading and mathematics skill expected at the end of third grade;

(b) Three statewide achievement tests, one each designed to measure the level of reading, writing, and mathematics skill expected at the end of fourth grade;

(c) Four statewide achievement tests, one each designed to measure the level of reading, mathematics, science, and social studies skill expected at the end of fifth grade;

(d) Two statewide achievement tests, one each designed to measure the level of reading and mathematics skill expected at the end of sixth grade;

(e) Three statewide achievement tests, one each designed to measure the level of reading, writing, and mathematics skill expected at the end of seventh grade;

000023

(f) Four statewide achievement tests, one each designed to measure the level of reading, mathematics, science, and social studies skill expected at the end of eighth grade.

(2) The state board shall determine and designate at least five ranges of scores on each of the achievement tests described in divisions (A)(1) and (B) of this section. Each range of scores shall be deemed to demonstrate a level of achievement so that any student attaining a score within such range has achieved one of the following:

- (a) An advanced level of skill;
- (b) An accelerated level of skill;
- (c) A proficient level of skill;
- (d) A basic level of skill;
- (e) A limited level of skill.

(B) The tests prescribed under this division shall collectively be known as the Ohio graduation tests. The state board shall prescribe five statewide high school achievement tests, one each designed to measure the level of reading, writing, mathematics, science, and social studies skill expected at the end of tenth grade. The state board shall designate a score in at least the range designated under division (A)(2)(c) of this section on each such test that shall be deemed to be a passing score on the test as a condition toward granting high school diplomas under *sections 3313.61, 3313.611 [3313.61.1], 3313.612 [3313.61.2], and 3325.08 of the Revised Code.*

The state board may enter into a reciprocal agreement with the appropriate body or agency of any other state that has similar statewide achievement testing requirements for receiving high school diplomas, under which any student who has met an achievement testing requirement of one state is recognized as having met the similar achievement testing requirement of the other state for purposes of receiving a high school diploma. For purposes of this section and *sections 3301.0711 [3301.07.11] and 3313.61 of the Revised Code*, any student enrolled in any public high school in this state who has met an achievement testing requirement specified in a reciprocal agreement entered into under this division shall be deemed to have attained at least the applicable score designated under this division on each test required by this division that is specified in the agreement.

(C) Except as provided in division (H) of this section, the state board shall annually designate as follows the dates on which the tests prescribed under this section shall be administered:

(1) For the reading test prescribed under division (A)(1)(a) of this section, as follows:

- (a) One date prior to the thirty-first day of December each school year;
- (b) At least one date of each school year that is not earlier than Monday of the week containing the first day of May.

(2) For the mathematics test prescribed under division (A)(1)(a) of this section and the tests prescribed under divisions (A)(1)(b), (c), (d), (e), and (f) of this section, at least one date of each school year that is not earlier than Monday of the week containing the first day of May;

(3) For the tests prescribed under division (B) of this section, at least one date in each school year that is not earlier than Monday of the week containing the fifteenth day of March for all tenth grade students and at least one date prior to the thirty-first day of December and at least one date subsequent to that date but prior to the thirty-first day of March of each school year for eleventh and twelfth grade students.

(D) In prescribing test dates pursuant to division (C)(3) of this section, the state board shall, to the greatest extent practicable, provide options to school districts in the case of tests administered under that division to eleventh

000024

and twelfth grade students and in the case of tests administered to students pursuant to division (C)(2) of *section 3301.0711 [3301.07.11] of the Revised Code*. Such options shall include at least an opportunity for school districts to give such tests outside of regular school hours.

(E) In prescribing test dates pursuant to this section, the state board of education shall designate the dates in such a way as to allow a reasonable length of time between the administration of tests prescribed under this section and any administration of the National Assessment of Education Progress Test given to students in the same grade level pursuant to *section 3301.27 of the Revised Code* or federal law.

(F) The state board shall prescribe a practice version of each Ohio graduation test described in division (B) of this section that is of comparable length to the actual test.

(G) Any committee established by the department of education for the purpose of making recommendations to the state board regarding the state board's designation of scores on the tests described by this section shall inform the state board of the probable percentage of students who would score in each of the ranges established under division (A)(2) of this section on the tests if the committee's recommendations are adopted by the state board. To the extent possible, these percentages shall be disaggregated by gender, major racial and ethnic groups, limited English proficient students, economically disadvantaged students, students with disabilities, and migrant students.

If the state board intends to make any change to the committee's recommendations, the state board shall explain the intended change to the Ohio accountability task force established by *section 3302.021 [3302.02.1] of the Revised Code*. The task force shall recommend whether the state board should proceed to adopt the intended change. Nothing in this division shall require the state board to designate test scores based upon the recommendations of the task force.

(H) (1) The state board shall require any alternate assessment administered to a student under division (C)(1) of *section 3301.0711 [3301.07.11] of the Revised Code* to be completed and submitted to the entity with which the department contracts for the scoring of the test not later than the first day of April of the school year in which the test is administered.

(2) For any test prescribed by this section, the state board may designate a date one week earlier than the applicable date designated under division (C) of this section for the administration of the test to limited English proficient students.

(3) In designating days for the administration of the tests prescribed by division (A) of this section, the state board shall require the tests for each grade level to be administered on consecutive days.

#### HISTORY:

142 v H 231 (Eff 10-5-87); 144 v H 55 (Eff 6-30-92); 146 v H 223 (Eff 11-15-95); 147 v S 55 (Eff 7-1-98); 148 v S 237 (Eff 6-21-2000); 149 v S 1. Eff 9-11-2001; 150 v H 3, § 1, eff. 8-15-03; 150 v H 95, § 1, eff. 9-26-03; 150 v S 2, § 1, eff. 6-9-04; 151 v H 66, § 101.01, eff. 7-1-06; 151 v H 276, § 1, eff. 3-30-07.

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TITLE 33. EDUCATION -- LIBRARIES  
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STATE BOARD OF EDUCATION

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ORC Ann. 3301.0711 (2007)

Legislative Alert:

LEXSEE 2007 Ohio HB 119 -- See section 101.01.

LEXSEE 2007 Ohio HB 119 -- See section 101.02

§ 3301.0711. Administration and grading of tests; use of results; intervention services

(A) The department of education shall:

(1) Annually furnish to, grade, and score all tests required by *section 3301.0710 [3301.07.10] of the Revised Code* to be administered by city, local, exempted village, and joint vocational school districts, except that each district shall score any test administered pursuant to division (B)(10) of this section. Each test so furnished shall include the data verification code of the student to whom the test will be administered, as assigned pursuant to division (D)(2) of *section 3301.0714 [3301.07.14] of the Revised Code*. In furnishing the practice versions of Ohio graduation tests prescribed by division (F) of *section 3301.0710 [3301.07.10] of the Revised Code*, the department shall make the tests available on its web site for reproduction by districts. In awarding contracts for grading tests, the department shall give preference to Ohio-based entities employing Ohio residents.

(2) Adopt rules for the ethical use of tests and prescribing the manner in which the tests prescribed by *section 3301.0710 [3301.07.10] of the Revised Code* shall be administered to students.

(B) Except as provided in divisions (C) and (J) of this section, the board of education of each city, local, and exempted village school district shall, in accordance with rules adopted under division (A) of this section:

(1) Administer the reading test prescribed under division (A)(1)(a) of *section 3301.0710 [3301.07.10] of the Revised Code* twice annually to all students in the third grade who have not attained the score designated for that test under division (A)(2)(c) of *section 3301.0710 [3301.07.10] of the Revised Code*.

000026

(2) Administer the mathematics test prescribed under division (A)(1)(a) of *section 3301.0710 [3301.07.10] of the Revised Code* at least once annually to all students in the third grade.

(3) Administer the tests prescribed under division (A)(1)(b) of *section 3301.0710 [3301.07.10] of the Revised Code* at least once annually to all students in the fourth grade.

(4) Administer the tests prescribed under division (A)(1)(c) of *section 3301.0710 [3301.07.10] of the Revised Code* at least once annually to all students in the fifth grade.

(5) Administer the tests prescribed under division (A)(1)(d) of *section 3301.0710 [3301.07.10] of the Revised Code* at least once annually to all students in the sixth grade.

(6) Administer the tests prescribed under division (A)(1)(e) of *section 3301.0710 [3301.07.10] of the Revised Code* at least once annually to all students in the seventh grade.

(7) Administer the tests prescribed under division (A)(1)(f) of *section 3301.0710 [3301.07.10] of the Revised Code* at least once annually to all students in the eighth grade.

(8) Except as provided in division (B)(9) of this section, administer any test prescribed under division (B) of *section 3301.0710 [3301.07.10] of the Revised Code* as follows:

(a) At least once annually to all tenth grade students and at least twice annually to all students in eleventh or twelfth grade who have not yet attained the score on that test designated under that division;

(b) To any person who has successfully completed the curriculum in any high school or the individualized education program developed for the person by any high school pursuant to *section 3323.08 of the Revised Code* but has not received a high school diploma and who requests to take such test, at any time such test is administered in the district.

(9) In lieu of the board of education of any city, local, or exempted village school district in which the student is also enrolled, the board of a joint vocational school district shall administer any test prescribed under division (B) of *section 3301.0710 [3301.07.10] of the Revised Code* at least twice annually to any student enrolled in the joint vocational school district who has not yet attained the score on that test designated under that division. A board of a joint vocational school district may also administer such a test to any student described in division (B)(8)(b) of this section.

(10) If the district has been declared to be under an academic watch or in a state of academic emergency pursuant to *section 3302.03 of the Revised Code* or has a three-year average graduation rate of not more than seventy-five per cent, administer each test prescribed by division (F) of *section 3301.0710 [3301.07.10] of the Revised Code* in September to all ninth grade students, beginning in the school year that starts July 1, 2005.

(C) (1) (a) Any student receiving special education services under Chapter 3323. of the Revised Code may be excused from taking any particular test required to be administered under this section if the individualized education program developed for the student pursuant to *section 3323.08 of the Revised Code* excuses the student from taking that test and instead specifies an alternate assessment method approved by the department of education as conforming to requirements of federal law for receipt of federal funds for disadvantaged pupils. To the extent possible, the individualized education program shall not excuse the student from taking a test unless no reasonable accommodation can be made to enable the student to take the test.

(b) Any alternate assessment approved by the department for a student under this division shall produce measurable results comparable to those produced by the tests which the alternate assessments are replacing in order to allow for the student's assessment results to be included in the data compiled for a school district or building under *section 3302.03 of the Revised Code*.

000027

(c) Any student enrolled in a chartered nonpublic school who has been identified, based on an evaluation conducted in accordance with *section 3323.03 of the Revised Code* or section 504 of the "Rehabilitation Act of 1973," 87 Stat. 355, 29 U.S.C.A. 794, as amended, as a child with a disability shall be excused from taking any particular test required to be administered under this section if a plan developed for the student pursuant to rules adopted by the state board excuses the student from taking that test. In the case of any student so excused from taking a test, the chartered nonpublic school shall not prohibit the student from taking the test.

(2) A district board may, for medical reasons or other good cause, excuse a student from taking a test administered under this section on the date scheduled, but any such test shall be administered to such excused student not later than nine days following the scheduled date. The board shall annually report the number of students who have not taken one or more of the tests required by this section to the state board of education not later than the thirtieth day of June.

(3) As used in this division, "limited English proficient student" has the same meaning as in *20 U.S.C. 7801*.

No school district board shall excuse any limited English proficient student from taking any particular test required to be administered under this section, except that any limited English proficient student who has been enrolled in United States schools for less than one full school year shall not be required to take any such reading or writing test. However, no board shall prohibit a limited English proficient student who is not required to take a test under this division from taking the test. A board may permit any limited English proficient student to take any test required to be administered under this section with appropriate accommodations, as determined by the department. For each limited English proficient student, each school district shall annually assess that student's progress in learning English, in accordance with procedures approved by the department.

The governing authority of a chartered nonpublic school may excuse a limited English proficient student from taking any test administered under this section. However, no governing authority shall prohibit a limited English proficient student from taking the test.

(D) (1) In the school year next succeeding the school year in which the tests prescribed by division (A)(1) or (B) of *section 3301.0710 [3301.07.10] of the Revised Code* or former division (A)(1), (A)(2), or (B) of *section 3301.0710 [3301.07.10] of the Revised Code* as it existed prior to September 11, 2001, are administered to any student, the board of education of any school district in which the student is enrolled in that year shall provide to the student intervention services commensurate with the student's test performance, including any intensive intervention required under *section 3313.608 [3313.60.8] of the Revised Code*, in any skill in which the student failed to demonstrate at least a score at the proficient level on the test.

(2) Following any administration of the tests prescribed by division (F) of *section 3301.0710 [3301.07.10] of the Revised Code* to ninth grade students, each school district that has a three-year average graduation rate of not more than seventy-five per cent shall determine for each high school in the district whether the school shall be required to provide intervention services to any students who took the tests. In determining which high schools shall provide intervention services based on the resources available, the district shall consider each school's graduation rate and scores on the practice tests. The district also shall consider the scores received by ninth grade students on the reading and mathematics tests prescribed under division (A)(1)(f) of *section 3301.0710 [3301.07.10] of the Revised Code* in the eighth grade in determining which high schools shall provide intervention services.

Each high school selected to provide intervention services under this division shall provide intervention services to any student whose test results indicate that the student is failing to make satisfactory progress toward being able to attain scores at the proficient level on the Ohio graduation tests. Intervention services shall be provided in any skill in which a student demonstrates unsatisfactory progress and shall be commensurate with the student's test performance. Schools shall provide the intervention services prior to the end of the school year, during the summer following the ninth grade, in the next succeeding school year, or at any combination of those times.

(E) Except as provided in *section 3313.608 [3313.60.8] of the Revised Code* and division (M) of this section, no school district board of education shall utilize any student's failure to attain a specified score on any test

administered under this section as a factor in any decision to deny the student promotion to a higher grade level. However, a district board may choose not to promote to the next grade level any student who does not take any test administered under this section or make up such test as provided by division (C)(2) of this section and who is not exempt from the requirement to take the test under division (C)(3) of this section.

(F) No person shall be charged a fee for taking any test administered under this section.

(G) (1) Each school district board shall submit the tests administered in the spring under division (B)(1) of this section and the tests administered under divisions (B)(2) to (7) of this section to the entity with which the department contracts for the scoring of the tests not later than the Friday after the tests are administered, except that any such test that a student takes during the make-up period described in division (C)(2) of this section shall be submitted not later than the Friday following the day the student takes the test.

(2) The department or an entity with which the department contracts for the scoring of the test shall send to each school district board a list of the individual test scores of all persons taking any test prescribed by division (A)(1) or (B) of *section 3301.0710 [3301.07.10] of the Revised Code* within sixty days after its administration, but in no case shall the scores be returned later than the fifteenth day of June following the administration. For any tests administered under this section by a joint vocational school district, the department or entity shall also send to each city, local, or exempted village school district a list of the individual test scores of any students of such city, local, or exempted village school district who are attending school in the joint vocational school district.

(H) Individual test scores on any tests administered under this section shall be released by a district board only in accordance with *section 3319.321 [3319.32.1] of the Revised Code* and the rules adopted under division (A) of this section. No district board or its employees shall utilize individual or aggregate test results in any manner that conflicts with rules for the ethical use of tests adopted pursuant to division (A) of this section.

(I) Except as provided in division (G) of this section, the department or an entity with which the department contracts for the scoring of the test shall not release any individual test scores on any test administered under this section. The state board of education shall adopt rules to ensure the protection of student confidentiality at all times. The rules may require the use of the data verification codes assigned to students pursuant to division (D)(2) of *section 3301.0714 [3301.07.14] of the Revised Code* to protect the confidentiality of student test scores.

(J) Notwithstanding division (D) of *section 3311.52 of the Revised Code*, this section does not apply to the board of education of any cooperative education school district except as provided under rules adopted pursuant to this division.

(1) In accordance with rules that the state board of education shall adopt, the board of education of any city, exempted village, or local school district with territory in a cooperative education school district established pursuant to divisions (A) to (C) of *section 3311.52 of the Revised Code* may enter into an agreement with the board of education of the cooperative education school district for administering any test prescribed under this section to students of the city, exempted village, or local school district who are attending school in the cooperative education school district.

(2) In accordance with rules that the state board of education shall adopt, the board of education of any city, exempted village, or local school district with territory in a cooperative education school district established pursuant to *section 3311.521 [3311.52.1] of the Revised Code* shall enter into an agreement with the cooperative district that provides for the administration of any test prescribed under this section to both of the following:

(a) Students who are attending school in the cooperative district and who, if the cooperative district were not established, would be entitled to attend school in the city, local, or exempted village school district pursuant to *section 3313.64 or 3313.65 of the Revised Code*;

(b) Persons described in division (B)(8)(b) of this section.

Any testing of students pursuant to such an agreement shall be in lieu of any testing of such students or persons pursuant to this section.

(K) (1) Any chartered nonpublic school may participate in the testing program by administering any of the tests prescribed by *section 3301.0710 [3301.07.10]* or *3301.0712 [3301.07.12]* of the Revised Code if the chief administrator of the school specifies which tests the school wishes to administer. Such specification shall be made in writing to the superintendent of public instruction prior to the first day of August of any school year in which tests are administered and shall include a pledge that the nonpublic school will administer the specified tests in the same manner as public schools are required to do under this section and rules adopted by the department.

(2) The department of education shall furnish the tests prescribed by *section 3301.0710 [3301.07.10]* or *3301.0712 [3301.07.12]* of the Revised Code to any chartered nonpublic school electing to participate under this division.

(L) (1) The superintendent of the state school for the blind and the superintendent of the state school for the deaf shall administer the tests described by *section 3301.0710 [3301.07.10]* of the Revised Code. Each superintendent shall administer the tests in the same manner as district boards are required to do under this section and rules adopted by the department of education and in conformity with division (C)(1)(a) of this section.

(2) The department of education shall furnish the tests described by *section 3301.0710 [3301.07.10]* of the Revised Code to each superintendent.

(M) Notwithstanding division (E) of this section, a school district may use a student's failure to attain a score in at least the basic range on the mathematics test described by division (A)(1)(a) of *section 3301.0710 [3301.07.10]* of the Revised Code or on any of the tests described by division (A)(1)(b), (c), (d), (e), or (f) of *section 3301.0710 [3301.07.10]* of the Revised Code as a factor in retaining that student in the current grade level.

(N) (1) In the manner specified in divisions (N)(3) to (5) of this section, the tests required by *section 3301.0710 [3301.07.10]* of the Revised Code shall become public records pursuant to *section 149.43* of the Revised Code on the first day of July following the school year that the test was administered.

(2) The department may field test proposed test questions with samples of students to determine the validity, reliability, or appropriateness of test questions for possible inclusion in a future year's test. The department also may use anchor questions on tests to ensure that different versions of the same test are of comparable difficulty.

Field test questions and anchor questions shall not be considered in computing test scores for individual students. Field test questions and anchor questions may be included as part of the administration of any test required by *section 3301.0710 [3301.07.10]* of the Revised Code.

(3) Any field test question or anchor question administered under division (N)(2) of this section shall not be a public record. Such field test questions and anchor questions shall be redacted from any tests which are released as a public record pursuant to division (N)(1) of this section.

(4) This division applies to the tests prescribed by division (A) of *section 3301.0710 [3301.07.10]* of the Revised Code.

(a) The first administration of each test, as specified in *section 3301.0712 [3301.07.12]* of the Revised Code, shall be a public record.

(b) For subsequent administrations of each test, not less than forty per cent of the questions on the test that are used to compute a student's score shall be a public record. The department shall determine which questions will be needed for reuse on a future test and those questions shall not be public records and shall be redacted from the test prior to its release as a public record.

(5) Each test prescribed by division (B) of *section 3301.0710 [3301.07.10] of the Revised Code* that is administered in the spring shall be a public record. Each test prescribed by that division that is administered in the fall or summer shall not be a public record.

(O) As used in this section:

(1) "Three-year average" means the average of the most recent consecutive three school years of data.

(2) "Dropout" means a student who withdraws from school before completing course requirements for graduation and who is not enrolled in an education program approved by the state board of education or an education program outside the state. "Dropout" does not include a student who has departed the country.

(3) "Graduation rate" means the ratio of students receiving a diploma to the number of students who entered ninth grade four years earlier. Students who transfer into the district are added to the calculation. Students who transfer out of the district for reasons other than dropout are subtracted from the calculation. If a student who was a dropout in any previous year returns to the same school district, that student shall be entered into the calculation as if the student had entered ninth grade four years before the graduation year of the graduating class that the student joins.

#### HISTORY:

142 v H 231 (Eff 10-5-87); 142 v H 708 (Eff 4-19-88); 144 v H 55 (Eff 6-30-92); 144 v H 639 (Eff 6-30-92); 144 v S 195 (Eff 4-16-93); 145 v H 152 (Eff 7-1-93); 145 v H 715 (7-22-94); 147 v S 96 (Eff 6-11-97); 147 v H 215 (Eff 6-30-97); 147 v S 55 (Eff 7-1-98); 147 v H 770 (Eff 7-1-98); 148 v H 282 (Eff 9-28-99); 148 v S 237 (Eff 6-21-2000); 149 v S 1 (Eff 9-11-2001); 150 v H 3, § 1, eff. 8-15-03; 150 v H 95, eff. 9-26-2003; 150 v S 2, § 1, eff. 6-9-04; 150 v H 106, § 1, eff. 9-16-04; 150 v H 493, § 1, eff. 5-18-05; 151 v H 66, § 101.01, eff. 3-30-06, 6-30-05, 7-1-06; 151 v H 276, § 1, eff. 3-30-07.

PAGE'S OHIO REVISED CODE ANNOTATED

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND  
FILED WITH THE SECRETARY OF STATE THROUGH NOVEMBER 8, 2007 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2007 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 4, 2007 \*\*\*

TITLE 33. EDUCATION -- LIBRARIES  
CHAPTER 3313. BOARDS OF EDUCATION  
GRADED COURSES OF STUDY; DIPLOMA

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ORC Ann. 3313.6012 (2007)

§ 3313.6012. Policy governing academic prevention/intervention services

(A) The board of education of each city, exempted village, and local school district shall adopt a policy governing the conduct of academic prevention/intervention services for all grades and all schools throughout the district. The board shall update the policy annually. The policy shall include, but not be limited to, all of the following:

(1) Procedures for using diagnostic assessments to measure student progress toward the attainment of academic standards and to identify students who may not attain the academic standards in accordance with *section 3301.0715 [3301.07.15] of the Revised Code*;

(2) A plan for the design of classroom-based intervention services to meet the instructional needs of individual students as determined by the results of diagnostic assessments;

(3) Procedures for the regular collection of student performance data;

(4) Procedures for using student performance data to evaluate the effectiveness of intervention services and, if necessary, to modify such services.

The policy shall include any prevention/intervention services required under *sections 3301.0711, 3301.0715, and 3313.608 [3301.07.11, 3301.07.15, and 3313.60.8] of the Revised Code*.

(B) In accordance with the policy adopted under division (A) of this section, each school district shall provide prevention/intervention services in pertinent subject areas to students who score below the proficient level on a reading, writing, mathematics, social studies, or science proficiency or achievement test or who do not demonstrate academic performance at their grade level based on the results of a diagnostic assessment.

HISTORY:

=9; *149 v S 1*. Eff 9-11-2001; =10; *150 v H 3*, § 1, eff. 8-15-03.

NOTES:

000032

Section Notes

See provisions of § 12, H.B. 3 (150 v --), following *RC § 3301.0711*.

EFFECT OF AMENDMENTS

H.B. 3, Acts 2003, effective August 15, 2003, added "in accordance with *section 3301.0715 of the Revised Code*" to the end of (A)(1); and, in (B), inserted "or achievement", and deleted "administered in the fourth, sixth or ninth grade or below the basic level on any achievement test" following "or achievement test."