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INTRODUCTION

Disclosure of the 9th Grade Semester Exams sought by Relator Paul Perrea will compromise the integrity of a student grading mechanism, the effectiveness of which depends upon its contents remaining confidential. The Semester Exams at issue are protected both as trade secrets and copyrighted materials. As such, they are exempt from disclosure under the Public Records Act. This Court should not require Respondent Cincinnati Public Schools (“CPS”) to release the tests to Relator.

The Semester Exams are administered at the end of each semester for specific courses – math, science, history and English. The exams are designed to monitor progress in a particular subject for the specific semester. Each test’s questions are aligned with the curriculum for the course, and the exams are re-used each year without changing their contents.¹ Time and lack of resources make the development of new tests and new test questions every year impossible. If members of the public, including students, are given access to the questions on a Semester Exam, students could simply memorize the correct responses in lieu of learning the course material.

It is critical to recognize what this case is not about. This mandamus proceeding is not about whether the Semester Exams at issue are subject to measurement error or whether the tests are accurate and reliable. This Court is not charged with determining whether the subjective components of the Semester Exams aid or inhibit the educational process or whether the test questions are clear. The only issue before this Court is whether the 9th Grade Semester Exams administered in January 2007 are public records exempt from disclosure under one or more of the exemptions set forth in the Ohio Public Records Act. Relator’s voluminous brief is filled with his own speculation, assumptions, personal opinion and unsupported criticisms of the

¹ Some minor adjustments may be made based on curriculum changes (i.e., when a particular concept is taught during the school year).

Semester Exams, all of which are irrelevant and none of which assist the Court in its task of determining whether the tests are exempt from disclosure.

For the reasons stated below, CPS submits that the 9th Grade Semester Exams sought by Perrea are exempt from disclosure and respectfully requests that this Court deny Relator's action for a writ of mandamus.

STATEMENT OF FACTS

A. Respondent Cincinnati Public Schools Developed Semester Exams For Math, English, Science And History.

In January 2007, CPS administered Semester Exams to students in the 9th Grade² in math, science, English and history. (Perrea Aff. ¶ 19) The same tests given in 2007 were administered in 2008 and are expected to be administered in 2009 and forward. (Holtzapple Aff. 7) Semester Exams count for 25% of a student's grade, leaving the majority of a student's overall evaluation to be determined by the student's satisfaction of other course requirements. (Id., ¶ 6) The test questions directly relate to the materials taught in the curriculum for the class in which each test is administered. (CPS 037-038) In short, a Semester Exam takes the place of dozens of widely differing course examinations prepared by dozens of individual teachers within the Cincinnati Public School district. (Holtzapple Aff. ¶¶ 11-12)

CPS developed the Semester Exams to a) bring consistency to grading within CPS schools; b) align the curriculum in the subject areas across the schools in the school district; c) ensure that students receive instruction on subjects that likely will be tested for graduation purposes; and d) prepare students for post-secondary education. (Holtzapple Aff. ¶ 5) The Semester Exams are not diagnostic tests designed to indicate a need for prevention or classroom

² Semester Exams are currently given in the same four subject areas (math, English, science and history) to students in the 10th and 11th grades.

intervention; they are summative and count toward a student's grade. Moreover, the Semester Exams are not required to be given by any state or federal statute and do not fulfill the same purpose as the state-wide proficiency tests to which Perrea wrongly compares them.

Each Semester Exam contains 45 multiple choice questions and four constructed response items, except for English which contains 40 multiple choice questions and four longer constructed response prompts. (Holtzapple Aff. ¶ 6) There is no bank of multiple choice questions from which CPS may draw. For example, every year the Semester Exam given to 9th Grade Algebra I students is the same as the year before. (Id., ¶ 7) Only if a question is determined by CPS to be flawed is it removed and replaced with a newly-developed question. (Id.)

B. CPS Contracted With WestEd To Develop The Semester Exams.

During academic year 2006-2007, CPS contracted with WestEd, a non-profit research and development service agency with a long history of serving the assessment and accountability needs of clients nationwide. CPS contracted with WestEd for the development of the end-of-semester tests referred to as Semester Exams for 9th Grade English, history, math and science. (Holtzapple Aff. ¶ 3; CPS 035-036) WestEd developed one test for each semester of each class in alignment with the district-wide curriculum for the class. (CPS 035) The cost to CPS for the development of the tests was \$257,800.³ (Id.) All tests developed by WestEd were designed specifically to match the subject matter determined by the District to be covered during the applicable academic semester. (Id.) WestEd's contract with CPS expressly provided that:

All pre-existing WestEd data and materials provided to Cincinnati by WestEd to assist in the performance of this Contract shall remain WestEd's property. Upon expiration or termination of the

³ The following year, additional tests for 10th Grade classes were developed, and existing test forms were rearranged and reformatted for a cost of approximately \$276,000. (CPS 040-041)

Contract for any reason, Cincinnati shall request instructions from WestEd regarding whether Cincinnati should: (1) erase or destroy the data/materials files maintained by Cincinnati, or (2) return the data/materials to WestEd. Copyright for all passages and images shall be retained by the copyright holder. WestEd shall serve as an agent for Cincinnati in securing permissions and/or reproduction rights of copyrighted passages and images. This provision shall survive termination of this Contract. (CPS 041)

In June 2008, CPS requested an additional quote from WestEd for the cost to develop Semester Exams for the 11th grade from scratch and to replace half of the exam questions on the 9th and 10th Grade Semester Exams. (Holtzapple Aff. ¶ 9; CPS 048) The cost to provide these services would be \$547,034. (Id.) The cost to CPS to revise half of the questions for the Semester Exams for all of the courses in which it currently administers such tests would be \$405,000 per year. (Holtzapple Aff. ¶ 10)⁴

C. CPS Instituted Reasonable Security Measures To Protect The Confidentiality Of The Semester Exams.

Maintaining the confidentiality of the questions on each Semester Exam is critical to the success of the educational process and to the test's continuing usefulness as a measure of student learning. (Holtzapple Aff. ¶ 8) CPS has developed security measures to ensure that the questions on the Semester Exams (which do not change from year to year) remain unknown. (Id. ¶ 13; CPS 017-018) All Semester Exams are kept in a secure area at a single location until the test is administered. (Holtzapple Aff. ¶ 13) Immediately prior to the prescheduled examination date, teachers are provided with a fixed number of test booklets. (CPS 017) Booklets are not distributed to a teacher even one day before the scheduled exam date unless that teacher has a secure, locked cabinet in which to store the booklets. (CPS 017, 023) Instructions are provided to teachers in multiple mediums, warning them that Semester Exams are considered

⁴ Of course, if CPS were required to create completely new Semester Exams each year, the cost would be much greater.

secure tests and that appropriate security measures are to be taken. (CPS 016-018, 020-021, 023-025) Teachers and staff are prohibited from retaining a test booklet and may not make copies of an examination under any circumstance. (CPS 017) All booklets must be returned by a fixed date, and the return of booklets is monitored. (CPS 017-018) Further, the delivery and return of booklets is conducted by designated CPS staff only. (CPS 017-018) During the 2 ½ hours in which a Semester Exam is administered, students are not permitted to make copies; nor are they permitted to have cell phones, cameras or other devices that could be used to electronically record or transmit a test's contents. (Holtzapple Aff. ¶ 13; CPS 021) Teachers are regularly reminded through news bulletins, such as the Principal's Newsletter, of the importance of keeping the Semester Exams confidential. (CPS 021, 023-025)

ARGUMENT

A. The Records Requested By Relator Are Trade Secrets That Are Exempt From Disclosure.

The January 2007 9th Grade Semester Exams Perrea seeks pursuant to Ohio Rev. Code § 149.43 are trade secrets that are exempt from disclosure under the Ohio Public Records Act. Ohio Rev. Code § 149.43 (A)(1)(v); Besser v. Ohio State University (2000), 87 Ohio St.3d 535, 540, 721 N.E.2d 1044, 1049 (state institution may have its own trade secrets); Carr v. City of Akron (2006), 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948 (scored promotional examination was a trade secret and exempt from disclosure). As such, the records are not subject to disclosure and this Court should deny Relator's request for a writ of mandamus.

1. The Semester Exams Are Trade Secrets.

The Public Records Act prohibits disclosure of public records where such disclosure would violate state or federal law. Ohio Rev. Code § 149.43 (A)(1)(v). The Semester Exams are trade secrets protected under federal law and therefore fall within the "state or federal law"

exemption contained within the Public Records Act. Id. A trade secret, as defined in Ohio Rev. Code § 1333.61(D), is any 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.

Ohio Rev. Code § 1333.61(D). This Court has adopted the following factors for determining whether a record constitutes a trade secret:

- (1) the extent to which the information is known outside the business;
- (2) the extent to which it is known to those inside the business, i.e., by the employees;
- (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;
- (4) the savings effected and the value to the holder in having the information as against competitors;
- (5) the amount of effort or money expended in obtaining and developing the information; and
- (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Besser v. Ohio State Univ. (2000), 89 Ohio St.3d 396, 732 N.E.2d 373.

Application of these factors requires a finding that the Semester Exams are trade secrets. First, the contents of the tests are not known "outside of the business" -- that is, outside CPS. The tests are administered by CPS personnel only to CPS students and only to those students enrolled in the class for which the particular test was developed. (CPS 016-018, 021)

The questions contained in the Semester Exams are not generally known inside the school district either. For example, only 9th Grade Algebra I teachers administer the 9th Grade Semester Exam for Algebra I. CPS Algebra I students have only 2 ½ hours to take the examination and are not permitted to have with them any device that could be used to photograph or copy the exam questions. (Holtzapple Aff. ¶ 13; CPS 021) Precautions also have been taken to safeguard the confidentiality of the examinations. (Holtzapple Aff. ¶ 13) Teachers are prohibited from retaining test booklets and may not copy test questions. (Id.) Test booklets are kept under lock and key, and the distribution and return of the booklets are closely monitored. (Id.) The pages of speculation in Relator's merit brief as to the probable test questions for the various subject areas demonstrates that the test questions have successfully been kept confidential from teachers and others within the district. (Merit Br. Of Rel. at pp. 8-11)

Perrea asserts, incorrectly, that the answers to the Semester Exams are posted on the internet, and therefore, the examinations are in effect available to the public. The grading rubrics to which Perrea refers are only for the essay portion of the exams. They do not restate the extended response questions but act as a scoring tool, listing the points that must be covered by the student in an "ideal" answer. No questions are disclosed. Moreover, the scoring rubrics identified by Perrea are contained on CPS's intranet, and internet users would need to know the

web address for the intranet page to access the information. Perrea has now disclosed this address in his brief, which he knew only because he is a CPS teacher.

The value to CPS in keeping the tests confidential is significant. The usefulness of the tests will be compromised by their disclosure, and the development of new tests will cost CPS at least \$405,000 per year. (Holtzapple Aff. ¶ 10) Moreover, the nearly quarter-million dollars spent by the district to develop the 9th Grade Semester Exams at issue would be lost entirely by granting public access; the tests would be rendered unusable. (*Id.*) And, if the 9th Grade Semester Exams become public, so will the 10th and 11th Grade Semester Exams. This would cause an additional \$500,000 development loss for CPS.

2. The Semester Exams Have Not Lost Their Status As Trade Secrets And Are Exempt From Disclosure.

The Semester Exams are protected trade secrets and cannot be obtained through a public records request. Ten years ago, this Court had the opportunity to consider a request for copies of the state-wide 12th Grade Proficiency tests that the Ohio Department of Education was statutorily required to develop and administer. Rea v. Ohio Department of Education (1998), 81 Ohio St.3d 527, 692 N.E.2d 596. In a four-three split decision, the majority in Rea required the Ohio Department of Education to disclose previously administered 12th Grade Proficiency examinations. *Id.* at 533-34. However, the Rea majority did not determine whether the tests were exempt from disclosure as trade secrets because it found that it was questionable whether a public entity could have a trade secret. *Id.* at 532. That question was answered definitively two years later in Besser v. Ohio State University, when this Court held that a public entity can have trade secrets and that such records are exempt from disclosure under the Public Records Act. Besser v. Ohio State Univ. (2000), 87 Ohio St.3d 535, 540. In holding that disclosure was required, the Rea Court focused its analysis on whether the Ohio Department of Education

publicly disseminated the 12th Grade Proficiency Test by sharing it with individuals outside of the Department's employ when the test was administered in schools throughout the State. Id. at 532-34. The Court concluded that by sharing the test with unaffiliated third parties, the Ohio Department of Education waived any protection the tests may have had. Id.

In a vigorous dissent, Justice Lundberg Stratton, joined by Chief Justice Moyer and Justice Cook, noted that reasonable efforts had been taken to maintain the secrecy of the test items. These efforts included, as here, keeping the tests in locked storage and prohibiting the reproduction of test materials. Id. at 537. The dissenting Justices disagreed with the conclusion reached by the majority -- that the test had been released into the public domain when they were administered to students -- stating that "the [test] continued to maintain its trade secret status until the majority granted this writ of mandamus, which permits unrestricted access and copying of the OCAP." Id. (emphasis added).

Rea is not controlling in this case. First, it was decided before this Court definitively held that a public entity, such as CPS, can have trade secrets. Second, the Court in Rea found that the test was publicly disseminated because it was distributed to individuals who were not employed or otherwise under the control of the Ohio Department of Education. The Court also based its holding, in part, on its finding that the 12th Grade Proficiency Tests were created and administered as the direct result of a legislative mandate. The Ohio Department of Education also maintained an extensive bank from which to draw test questions.

Here, CPS has spent a significant amount of district resources on the development of the Semester Exams through its contract with a third party, WestEd. The tests were not developed to satisfy a statute. CPS has not distributed the Semester Exams to anyone outside of the district and only a limited number of teachers have access to the exams themselves. The teachers who

administer the Semester Exams at CPS are employees of the school district. Whereas in Rea, the Ohio Department of Education did not employ or exercise authority over the teachers and staff who administered the proficiency exam at issue. In Rea, the majority rejected the respondent's argument that "cheating" would be promoted by the disclosure of the proficiency tests because the test questions varied from year to year as new questions were added from an existing pool of test questions. Rea, 81 Ohio St.3d at 531. The Semester Exams at issue here, however, are the same every year. (Holtzapple Aff. ¶ 8) There is no pool of test questions from which to draw, and CPS cannot afford to create one. (Id. ¶¶ 8, 10) The potential for cheating if disclosure is compelled in this case is tremendous.

In 2006, this Court once again had the opportunity to consider whether an examination was exempt from disclosure. By this time, the law was clear that a public entity could have its own trade secrets. In Carr v. City of Akron, the Court denied a request for the disclosure of records related to the city of Akron's fire-captain promotional examination, including a copy of the test itself, under the trade secret exception contained in the Public Records Act. Carr v. City of Akron (2006), 112 Ohio St.3d 351, 89 N.E.2d 948. In Carr, the city contracted with an outside testing consultant, which after considerable research and expense, designed a test specifically for use by the city of Akron to score a promotional candidate's level of knowledge. Id. at 352-53. The testing materials derived independent economic value from *not* being generally known to or readily ascertainable by other persons who could obtain economic value from its disclosure or use. Id. at 359.

Unlike Rea, the Court in Carr concluded that the mere administration of the promotion examination did not constitute public dissemination. The promotional exams, as here, were administered by city personnel to city employees. The test was not shared with other cities, nor

was it created to satisfy a legislative mandate. The Court also noted that the city took reasonable security measures to prevent public disclosure of the records, including prohibiting the removal or copying of the exam's contents and storing the examinations in a locked facility. Id. at 359. This Court held that the test materials were protected under the "trade secret" exemption found in § 149.43(A)(1)(v) and denied mandamus relief. Id. at 358-59.

Disclosure of the 9th Grade Semester Exams in this case should not be compelled for the same reasons the promotional examination in Carr was found exempt from disclosure by this Court. In Carr, the examination measured the test taker's knowledge of subjects that were determined to be relevant and necessary to the fire-captain position. Here, Respondent CPS worked with WestEd to develop tests for use within the district to measure a student's comprehension and understanding of the materials covered in a specific grade and in a specific course -- math, English, history and science. (Holtzapple Aff. ¶¶ 2-3) In both instances, the tests were not given for diagnostic purposes, but for a grade. Also, the Semester Exams **do not change** from year to year and there is **no pool** of questions from which CPS can draw to change or vary an examination. (Id. at ¶¶ 6, 7)

Further, like the city of Akron in Carr, CPS has not shared its tests with individuals or entities outside of its control. Only CPS personnel administer the Semester Exams only to CPS students. CPS also instituted measures to safeguard the confidentiality of the Semester Exams. Students are prohibited from removing the tests or otherwise copying their contents. (Holtzapple Aff. ¶ 13) Teachers and staff are also prohibited from retaining test booklets or copying the whole or any part of an examination. (Id.) Teachers are not even permitted to have the test in advance of the testing date, unless a locked cabinet is available to protect the Semester Exams from disclosure or theft. (CPS 017) Distribution and return of the tests are closely monitored.

(Id.) Although teachers were not required to sign confidentiality agreements, as professional educators, it is assumed that they will not disclose test questions or answers to the students they are charged to educate, and CPS can discipline teachers who breach the confidentiality of the exams.

Perrea asserts that he will not use the test for personal gain. His purported personal use is beside the point. Once the Semester Exams are identified as public records subject to disclosure, they may be accessed by other test developers and used for commercial gain. An order granting mandamus relief to Perrea would also effectively end the administration of Semester Exams at CPS. The time and expense to develop new tests each year -- at least \$405,000 -- is clearly prohibitive.

The Semester Exams are protected trade secrets. This protection has not been waived by the administration of the tests by CPS personnel to CPS students. The Semester Exams retain their protection under federal law and, therefore, they are exempt from disclosure under the Ohio Public Records Act.

B. The Semester Exams Are Entitled To Copyright Protection And Are Exempt From Disclosure Under The Public Records Act.

This Court need not reach the issue of whether the Semester Exams are protected under federal copyright laws because the tests are exempt from disclosure as trade secrets. See Carr, 112 Ohio St.3d at 359 (no need to address alternate argument because it was rendered moot). If the Court decides to reach this issue, however, it should not compel the production of the Semester Exams for the separate and independent reason that the tests are entitled to copyright protection under federal law and, therefore, are exempt from disclosure under the Ohio Public Records Act. Ohio Rev. Code § 149.43(A)(1)(v). Copyrights generally subsist in original works of authorship fixed in a tangible medium of expression. 17 U.S.C. § 102(a). Courts have held

that examination questions and answers are protectable within the confines of copyrights. National Conference of Bar Examiners v. Multistate Legal Studies, Inc. (2006), 2006 WL 2460903 (E.D. Pa.).

Here, aside from CPS's strong copyright interest in the Semester Exams, the contracts between CPS and WestEd establish that the tests provided to CPS contain copyrighted materials, and states that:

All pre-existing WestEd data and materials provided to Cincinnati by WestEd to assist in the performance of this Contract shall remain WestEd's property. Upon expiration or termination of the Contract for any reason, Cincinnati shall request instructions from WestEd regarding whether Cincinnati should: (1) erase or destroy the data/materials files maintained by Cincinnati, or (2) return the data/materials to WestEd. ***Copyright for all passages and images shall be retained by the copyright holder. WestEd shall serve as an agent for Cincinnati in securing permissions and/or reproduction rights of copyrighted passages and images.*** This provision shall survive termination of this Contract. (CPS 041, 054)

As this provision indicates, WestEd is the owner of the underlying materials and methods from which the Semester Exams were developed. The agreement between CPS and WestEd also establishes that the Semester Exams contained materials for which other entities hold copyrights. (Holtzapple 14) These passages and images were included in the exams only after permission was obtained by WestEd from the copyright holders. Public dissemination of the Semester Exams, therefore, could expose CPS to allegations of breach of contract and/or copyright infringement.

Perrea suggests, incorrectly, that the Semester Exams should be disclosed to him, despite their copyright protection, because his proposed use falls within the "fair use" exception found in the federal copyright law. Perrea is wrong. The Semester Exams do not lose their protection merely because he claims he will use them only for non-commercial purposes.

Materials protected by federal copyright laws may not be released to the public unless the release constitutes a fair use. Section 107 of Title 17 of the U.S. Code provides four factors for determining a fair use:

- a. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- b. the nature of the copyrighted work;
- c. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d. the effect of the use upon the potential market or value of the copyrighted work.

17 U.S.C. § 107. All but one of these factors weighs against Perrea's purported fair use exception. WestEd is the owner of the underlying materials and methods that it used to develop the Semester Exams for CPS. (CPS 041, 054) Other commercial entities similarly are holders of copyrights on materials and images that are contained in the Semester Exams. (Id.; Holtzapple Aff. 14) Before inserting these materials and images into the Semester Exams, WestEd was required to obtain permission from those entities to use the copyrighted materials. (Id.) The purpose and character of the copyrighted materials, which are inseparable from the Semester Exams, therefore are for commercial use -- selling examination preparation services. The nature of the Semester Exams is proprietary and includes carefully crafted and arranged questions created using WestEd's (and others') research and experience. Moreover, CPS has its own copyright interest in the content of the exams. The nature of Perrea's request is that the entire examination be released, rather than an isolated question or two. His intended use is immaterial. If the documents are public records subject to disclosure, they will be open to all without respect to Perrea's intended non-commercial use.

The release of the examination to the public would substantially harm those who hold copyrights on the materials contained in and underlying the development of the Semester Exams. Further, the release of the tests would disclose proprietary testing methodology and techniques. If released, the Semester Exams would quickly become less about determining a student's comprehension of the materials taught in class and more about the student's ability to recall the questions and answers from previously studied public records. This is not "fair use" and should not result in the compelled release of the Semester Exams.

In Rea, the majority held that the 12th Grade Proficiency tests at issue were not protected from disclosure under federal copyright law. Unlike Rea, here it is clear that copying and disseminating the Semester Exams would not merely decrease their economic value, but instead would make the test questions virtually worthless. In addition, the amount and substantiality of the portion used in relation to the copyrighted work as a whole also weigh in CPS's favor. Perrea is seeking the unmarked assessment booklets, unmarked test instructions, and questions from previously administered examinations. This constitutes all of the confidential test materials. Further, allowing a fair-use exception to the federal copyright law would effectively cripple CPS's ability use the test materials. The value of the copyrighted work (the Semester Exams) should be measured by the effect such a public dissemination will have on CPS's ability to develop and administer standardized tests for its students. See Rea, 81 Ohio St.3d at 539-40 (dissenting opinion).

Underpinning its interpretation of copyright law, the dissent in Rea quoted those who enacted the fair use exception, noting that it was not their intent to include tests and examinations within its bounds:

"Secure tests are particularly vulnerable to having their utility obliterated by unauthorized disclosure. *The courts have,*

accordingly, been particularly solicitous in protecting these works. Indeed, so far as we are aware, the courts have never upheld a fair use claim advanced by any private entity with regard to copying of secure tests or test questions.”

* * *

“[T]he act [the fair-use statute] is not intended ‘to reduce the protection of secure tests, whose utility is especially vulnerable to unauthorized disclosure.’ * * * [T]his bill essentially incorporates the view courts have had with respect to this issue. * * * [C]ourts have recognized the special character of secure tests by rejecting fair use claims.”

Rea, 81 Ohio St.3d at 540 (internal citations omitted).

That Perrea purports to use the Semester Exams for a non-commercial purpose does not outweigh the harm done to the copyright holders from the tests’ dissemination. The fair-use exception found in Section 107 of Title 17 of the U.S. Code does not apply here and the release of the Semester Exams should not be compelled by this Court.

C. Perrea’s Remaining Arguments Lack Merit.

Perrea’s brief is replete with misstatements, unsupported assertions and speculation, none of which provide support for his contention that the Semester Exams should not be exempt from disclosure. First, Perrea incorrectly compares the development of the Semester Exams by CPS to the Ohio Department of Education’s development of statewide 12th Grade Proficiency Tests. In Rea, this Court found that the 12th Grade Proficiency Tests were “disseminated” because they were created pursuant to a statutory mandate. Rea, 81 Ohio St.3d 529, 531-32 (citing Ohio Rev. Code § 3301.0710). There is no similar mandate here. The Ohio legislature has not ordered CPS to create the Semester Exams at issue. Rather, these tests were created to bring uniformity to teaching and testing for particular classes and to grade a student’s knowledge of the materials taught in that specific class during a specific semester. (Holtzapple Aff. ¶ 5) Perrea strains the meaning of a legislative mandate to include a “strategic plan” developed by a school district in

an unsuccessful effort to compare the Semester Exams to the 12th Grade Proficiency Tests considered in Rea. His opinion that the two tests are of the same ilk (a proposition which is unsupported by legal citation) does not make the Semester Exams (even if they were created to support the school district's strategic plan) the equivalent of 12th Grade Proficiency Tests administered statewide by the Ohio Department of Education. The two tests are "apples and oranges." The purposes underlying the Semester Exams (e.g. testing and grading the comprehension level of a specific student in a specific class) are not comparable to the public policy underlying the statutory mandate to create statewide proficiency tests to assess the general knowledge of students for graduation and conferral of a high school diploma.

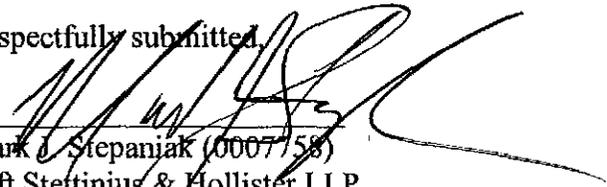
Perrea's public policy argument -- that Ohio favors test validation -- is not relevant to the issue before this Court. Whether the Semester Exams have been validated in a manner Perrea would approve of does not alter the tests' status as trade secrets. Nor do Perrea's personal opinions regarding the potential for error in standardized tests override the fact that the Semester Exams contain copyrighted materials protected by federal law.

CONCLUSION

Disclosure today will negatively impact education within CPS. Students will need only to memorize the correct answer as a strategy for success on the test. This is not the public policy of Ohio -- to allow students to circumvent the educational process. Nor is it the goal of the Public Records Act to prevent school districts from bringing consistency to classrooms across the district through uniform testing mechanisms like the Semester Exams.

For each and all of the foregoing reasons, Respondent Cincinnati Public Schools respectfully submits that the Semester Exams are exempt from disclosure and requests that this Court dismiss this action.

Respectfully submitted,



Mark J. Stepaniak (0007758)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
(513) 381-2838
(513) 381-0205 fax
Stepaniak@taftlaw.com

Counsel of Record for Respondent
Cincinnati Public Schools

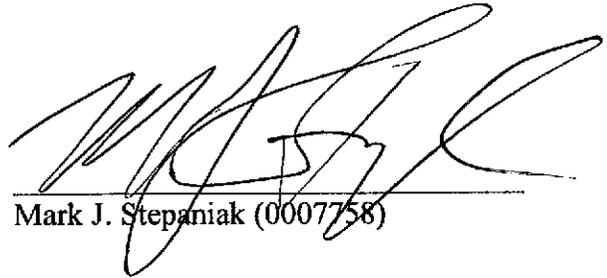
APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response Brief of Respondent Cincinnati Public Schools has been served upon the following via Regular U.S. Mail, postage prepaid, this 4th day of December, 2008:

Ted L. Wills
414 Walnut Street, Suite 707
Cincinnati, Ohio 45202



Mark J. Stepaniak (0007758)

Westlaw.

R.C. § 149.43

Page 1



Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

Chapter 149. Documents, Reports, and Records (Refs & Annos)

Records Commissions

149. 43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

(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 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 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 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 3107.52 of the Revised Code;

(g) Trial preparation records;

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- (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 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 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 to 307.629 of the Revised Code, other than the report prepared pursuant to section 307.626 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 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 ad-

ministrator 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 of the Revised Code;

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

(z) Records listed in section 5101.29 of the Revised Code.

(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, 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, 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;

(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) [FN1] 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) [FN2] 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 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 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 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 (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 be-

fore 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 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 com-

mercial 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.

CREDIT(S)

(2008 H 214, eff. 5-14-08; 2006 H 9, eff. 9-29-07; 2006 H 141, eff. 3-30-07; 2004 H 303, eff. 10-29-05; 2004 H 431, eff. 7-1-05; 2004 S 222, eff. 4-27-05; 2003 H 6, eff. 2-12-04; 2002 S 258, eff. 4-9-03; 2002 H 490, eff. 1-1-04; 2002 S 180, eff. 4-9-03; 2001 H 196, eff. 11-20-01; 2000 S 180, eff. 3-22-01; 2000 H 448, eff. 10-5-00; 2000 H 640, eff. 9-14-00; 2000 H 539, eff. 6-21-00; 1999 H 471, eff. 7-1-00; 1999 S 78, eff. 12-16-99; 1999 S 55, eff. 10-26-99; 1998 H 421, eff. 5-6-98; 1997 H 352, eff. 1-1-98; 1996 S 277, § 6, eff. 7-1-97; 1996 S 277, § 1, eff. 3-31-97; 1996 H 438, eff. 7-1-97; 1996 S 269, eff. 7-1-96; 1996 H 353, eff. 9-17-96; 1996 H 419, eff. 9-18-96; 1995 H 5, eff. 8-30-95; 1993 H 152, eff. 7-1-93; 1987 S 275; 1985 H 319, H 238; 1984 H 84; 1979 S 62; 130 v H 187)

[FN1] So in original; should this read "(B)(9)"?

[FN2] So in original; should this read "(B)(9)"?

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C

Baldwin's Ohio Revised Code Annotated Currentness
Title XIII. Commercial Transactions (Refs & Annos)
Chapter 1333. Trade Practices (Refs & Annos)
Uniform Trade Secrets Act (Refs & Annos)

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 tele-

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phone 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.

CREDIT(S)

(1994 H 320, eff. 7-20-94)

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C

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Title XXXIII. Education--Libraries

Chapter 3301. Department of Education (Refs & Annos)

State Board of Education

3301.0710 Statewide achievement 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 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;
- (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.

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(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, 3313.612, 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 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 twenty-fourth day of April.

(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 twenty-fourth day of April;

(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 and twelfth grade students and in the case of tests administered to students pursuant to division (C)(2) of section 3301.0711 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 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 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 over a period of two weeks.

CREDIT(S)

(2007 H 190, eff. 11-14-07; 2006 H 276, eff. 3-30-07; 2005 H 66, eff. 7-1-06; 2004 S 2, eff. 6-9-04; 2003 H 3, eff. 8-15-03; 2003 H 95, eff. 9-26-03; 2001 S 1, eff. 9-11-01; 2000 S 237, eff. 6-21-00; 1997 S 55, eff. 7-1-98; 1995 H 223, eff. 11-15-95; 1992 H 55, eff. 6-30-92; 1987 H 231)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 11/24/08, and filed with the Secretary of State by 11/24/08.

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Effective:[See Text Amendments]

United States Code Annotated Currentness

Title 17. Copyrights (Refs & Annos)

Chapter 1. Subject Matter and Scope of Copyright (Refs & Annos)

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2544; Pub.L. 101-650, Title VII, § 703, Dec. 1, 1990, 104 Stat. 5133.)

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C**Effective:[See Text Amendments]**

United States Code Annotated Currentness

Title 17. Copyrights (Refs & Annos)

Chapter 1. Subject Matter and Scope of Copyright (Refs & Annos)

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2546; Pub.L. 101-650, Title VI, § 607, Dec. 1, 1990, 104 Stat. 5132; Pub.L. 102-492, Oct. 24, 1992, 106 Stat. 3145.)

Current through P.L. 110-449 approved 11-21-08

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