

Relator, Paul Perrea, hereby files a motion for the Court to issue an order for supplemental filings after oral argument, pursuant to S. Ct. R. IX, § 9. The purpose of the supplemental filing would be to show that on April 9, 2009, the day after oral argument in the case, Respondent, Cincinnati Public Schools (CPS) disabled access to a crucial internet website with grading guidelines for the CPS Semester Exams. (Third Affidavit of Paul Perrea, attached hereto.) Because of the timing of CPS's action and the importance of the website, this Court may draw an adverse inference against CPS. *Banks v. Canton Hardware*, 156 Ohio St. 453, 461, 103 N.E.2d 568 (1952). That adverse inference is that the answer guidelines to the Semester Exams were readily accessible on the internet until CPS disabled the website the day after oral argument.

MEMORANDUM

The Ohio Rules Practice Rules provide that an "application for an order or other relief shall be made by a motion for the order or relief." S. Ct. R. XIV § 4(A). The Rules also provide that, after oral argument, the Court may issue an order for supplemental filings. S. Ct. R. IX, § 9. In this case, the Court held oral argument on April 9, 2009. Relator, Perrea, hereby moves for the Court to order supplemental filings after oral argument.

On April 21, 2008, Perrea, filed this mandamus action against CPS, in which he asked the Court to order CPS to provide Semester Exams based on the Ohio Public Records Act, Ohio Rev. Code § 149.43. (Complaint with Affidavit of Relator at ¶¶ 45-48.) One of the issues in the case was whether CPS could prevent disclosure of the Semester Exams on the grounds that they were trade secrets. (Respondent Cincinnati Public Schools' Response in Opposition to Merit Brief of Relator at 8-11.)

Perrea argued that the Semester Exams were not trade secrets, among other reasons, because

CPS had posted answer guidelines to portions of the Semester Exams on the internet. (Relator Merit Brief at 7-11.) CPS posted those answer guidelines on the website, <http://staffnet.cps-k12.org/Staffnet/RET/scoringsemexam.html>. (Relator Merit brief at 8.) Courts that have considered similar issues, have determined that disclosing information on the internet destroys the trade secret status. *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal 1995). Because of that, Perrea argued that CPS had destroyed any trade secret status of the Semester Exams. (Relator Brief at 7-11.)

On April 8, 2008, during oral argument, the Justices asked numerous questions regarding the CPS Semester Exam answer guidelines on the website. One Justice asked Perrea's counsel whether the website with the answer guidelines was password protected. (Supreme Court Video Archive, Case No. 08-0748, *State ex rel. Paul Perrea v. Cincinnati Public Schools*, at 0:10:20.) Perrea's counsel answered that the Semester Exams were not password protected. (Video at 0:10:25.) Another Justice followed up asking again if the answer guidelines were on the internet. (Video at 0:11:45.)

Another Justice asked CPS's counsel whether the answers were on the internet or intranet. (Video at 0:22:00.) A Justice asked if the rubric for answering the Semester Exam questions was on the website. (Video at 0:23:40.) Another asked if any student could find the answer guidelines on the website. (Video at 0:24:00.) CPS's counsel told the Court that the internet address was so complicated that it was even more secure than if there was a password. (Video at 0:24:30.) Another Justice asked if the answer guidelines would come up on a Google search. (Video at 0:24:14.) CPS's counsel assured the Court that there was "no way." (Video at 0:24:15.)

On Perrea's rebuttal, the Justices again asked whether the answer rubric was on the internet.

(Video at 0:33:55.) One Justice asked again about whether the website would come up on a Google search or by typing in the website address. (Video at 0:34:21.) Another Justice asked if Court typed in the website whether the answer guidelines would come up. (Video at 0:35:00.) Another Justice asked if the matrix for the guidelines was on the internet or intranet. (Video at 0:35:40.)

Based on all those questions, it seemed likely that the Court would want to know whether the Semester Exams answer guidelines were currently available on the internet. Despite the importance of this issue, the very next day after oral argument, CPS disabled all public access to the website. (Third Perrea Affidavit at ¶ 7, attached hereto.)

When a party destroys or alters evidence, that shows a “total disregard for the law and the rights” of the opposing party. *Moskovitz v. Mt Sinai Medical Center*, 69 Ohio St. 3d 638, 652, 635 N.E.2d 331, 343 (1994). A party may intentionally alter, falsify, or destroy evidence in an effort “to avoid liability.” *Id.* at 653, 635 N.E.2d at 344. In that circumstance, one may infer that the party altered the evidence to “in an effort to conceal” that party’s liability on the underlying merits of the case. *Id.* at 652, 343-44. Ohio even recognizes a tort for spoliation of evidence and/or tortious interference with prospective civil litigation. *Smith v. Howard Johnson Company, Inc.*, 67 Ohio St. 3d 28, 615 N.E.2d 1037 (1993). When a party destroys access to documents, “the utmost inference logically possible should favor the party aggrieved.” *Banks*, 156 Ohio St. at 461, 103 N.E.2d 568. Because of that, “the contents of the documents destroyed should be presumed to be what the party aggrieved so alleges them.” *Id.*, citations.

Here is how the scenario played out in this case. In June 2008, during the briefing of this case, Perrea printed pages of the website with the Semester Exam Scoring guidelines, <http://staffnet.cps-k12.org/Staffnet/RET/scoringsemexam.html>. (Second Perrea Affidavit, ¶ 21.)

He printed off the main menu page. (Second Perrea Affidavit, 000058.) That page included an option for Semester Exams. (Second Perrea Affidavit, 000058.)



[Home](#) [Departments](#) [Email](#) [CPS Web Site](#) [Support](#) [Mayerston](#)

Testing and Assessment

- [Home Page](#)
- [Testing Coordinator Info](#)
- [CPS Testing Calendar](#)
- [OAT](#)
- [Benchmarks](#)
- [Semester Exams](#)
- [OIELA Testing](#)
- [Alternate Assessments](#)
- [SCEP Test Schedule](#)
- [TermNova Gr 2 and 8](#)
- [Testing Accommodations](#)
- [Dashboard](#)
- [CPS Test Scheduler](#)
- [Cognos Reports](#)
- [CPS Online - Testing](#)
- [Contacts](#)
- [Dashboard/MS Manuals](#)
- [PSAT/PLAN or ACT/SAT](#)
- [Gifted Testing](#)
- [Report Test Item Problem](#)
- [Q&A K-1 and 2, State and District Assessments](#)
- [Alternative Pathway to Graduation](#)
- [OGT Practice Scoring](#)

Semester Examinations - Scoring Guidelines Semester 1

- [English 9 - 1209](#)
- [Integrated Mathematics I/Algebra I - 2209](#)
- [Physical Science - 3209](#)
- [Modern World History - 4209](#)
- [English 10 - 1210](#)
- [Integrated Mathematics II/Geometry - 2210](#)
- [Biology - 3210](#)
- [U.S. History - 4210](#)

Check out these sites!

- * [State Assessment and Testing Home Page](#)
Follow this link to state testing information.
[Click here to see the state website.](#)
- * [State IMS](#)
[Click here](#)
- * [State OAT Document Archive](#)
[Click here](#)
- * [OAT Success](#)
[Click here](#)
- * [K-3 State Diagnostic](#)
[Click here](#)
- * [State OGT Workbooks](#)
[Click here](#)
- * [OGT Success](#)
[Click here](#)
- * [State OGT Website for Students](#)
[Click here](#)
- * [State NAEP News](#)
[Click here](#)
- * [Paterson's StudentEdge](#)
Online Courses for PSAT, SAT, ACT
[Click here](#)
- * [AP Central](#)
[Click here](#)
- * [OAT - Released Test Materials](#)
[Click here](#)
- * [OGT - Released Test Materials](#)
[Click here](#)
- * [Always Keep Your Acrobat Reader Updated!](#)
[Click here](#)



[Contact Us](#)

000058

He also printed examples of the grading guidelines. (Second Perrea Affidavit, ¶ 21, 000062.)

Integrated Mathematics I / Algebra I Semester Exam

Question: A

Points	Scoring Guideline
2	The response identifies the correct slope of the line and a correct equation that describes the line. The supporting work and/or explanation are clear and complete. One approach is to compute the slope and determine the equation symbolically. Another approach is to graph the two points and use the graph to determine the slope and the equation for the line.
1	The response provides evidence of a partially correct answer and/or solution process. The response shows understanding of some key elements of the task, but contains gaps or flaws. For example, the response may: Correctly identify either the slope or an equation for the line, but not both. OR Correctly identify both the slope and the equation, but inadequate or no work is shown to support the answers.
0	The response does not meet the criteria required to earn one point. The response indicates inadequate or no understanding of the task or the idea or concept needed to answer the item, or both. It may only repeat information given in the test item. The response may provide an incorrect solution or response, and the supportive information provided may be totally irrelevant to the item. The student may have written on a different topic or written, "I don't know."
B	Student response is blank.

Exemplar:

The student uses the formula for determining the slope (as shown below), or possibly draws a coordinate graph and plots the points.

$$m = \frac{9-6}{7-3} \quad \text{OR} \quad m = \frac{6-9}{3-7}$$
$$= \frac{3}{4}$$

The student uses the slope and one of the points in the slope-intercept formula to determine an equation for the line.

$$m = \frac{3}{4} \text{ and } (3, 6)$$

$$6 = \frac{3}{4}(3) + b$$

$$6 = \frac{9}{4} + b$$

$$\frac{15}{4} = b$$

$$y = \frac{3}{4}x + \frac{15}{4}$$

$$\text{OR} \quad (y-6) = \frac{3}{4}(x-3) \quad \text{OR} \quad 3x - 4y = -15$$

In addition, Perrea included about thirty-five more pages of the grading guidelines. (Second Perrea Affidavit ¶ 21, 000059-94.) Those are the pages Perrea cited in his brief. (Perrea Merit Brief at 7-11.) Those also are the pages that the Justices asked about during oral argument on April 8, 2009. (Video at 0:10:20; 0:10:25; 0:11:45; 0:22:00; 0:23:40; 0:24:00; 0:24:30; 0:24:14; 0:24:15; 0:33:55; 0:34:21; 0:35:00; 0:35:40.)

On April 8, 2009, after oral argument, when Perrea got back home, he double checked the internet site to make sure that the scoring guidelines were still publicly available. (Third Perrea Affidavit at ¶ 2.) At about 4:30 p.m., Perrea checked the main menu page. (Third Perrea Affidavit at ¶ 3, 000058.) He also checked the same pages that showed the grading guidelines. (Third Perrea Affidavit at ¶ 4, 000059-94.) At 4:30 p.m. on April 8, 2009, all of those pages were still available. (Third Perrea Affidavit at ¶ 6.)

Then, the next day after oral argument, April 9, 2009, Perrea checked that website again. (Third Perrea Affidavit at ¶ 6.) He checked the same CPS websites with the menu options for Semester Exams. <http://staffnet.cps-k12.org/staffnet/RET/scoringsemexam.html>. (Third Perrea Affidavit at ¶ 6.) He also checked the pages for the grading guidelines. (Third Perrea Affidavit at ¶ 6.)

What he found was that on April 9, 2009, CPS had blocked access to all the information about the Semester Exams. (Third Perrea Affidavit at ¶ 7.) That meant that if the Court wanted to determine whether the Semester Exam guidelines were really on the internet, they would have found a website stating: “**The page cannot be found.**” (Third Perrea Affidavit at ¶ 8, 000099, emphasis added.)

Here is the page showing that on April 9, 2009, CPS blocked all access to the Semester Exam web pages. (Third Perrea Affidavit ¶ 21, 000099.)

The page cannot be found

Page 1 of 1

The page cannot be found

The page you are looking for might have been removed, had its name changed, or is temporarily unavailable.

Please try the following:

- Make sure that the Web site address displayed in the address bar of your browser is spelled and formatted correctly.
- If you reached this page by clicking a link, contact the Web site administrator to alert them that the link is incorrectly formatted.
- Click the Back button to try another link.

HTTP Error 404 - File or directory not found.
Internet Information Services (IIS)

Technical Information (for support personnel)

- Go to [Microsoft Product Support Services](#) and perform a title search for the words **HTTP** and **404**.
- Open **IIS Help**, which is accessible in IIS Manager (inetmgr), and search for topics titled **Web Site Setup**, **Common Administrative Tasks**, and **About Custom Error Messages**.

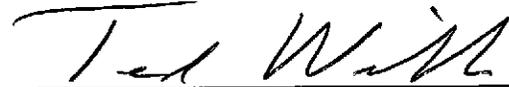
000099

<http://staffnet.cps-k12.org/staffnet/RET/scoringsemexam.html>

4/9/2009

Based on these facts, therefore, Perrea asks this Court to permit a supplemental filing. S. Ct. R. XIV § 4(A); S. Ct. R. IX, § 9. The purpose would be to establish that CPS had altered, concealed, and/or destroyed access to evidence that is crucial for the determination of the merits of this case. Because of that, this Court may draw the inference favorable to Perrea. *Banks*, 156 Ohio St. at 461, 103 N.E.2d 568. That inference is that the grading guidelines were readily accessible on the internet until CPS disabled the website the day after oral argument.

Respectfully submitted,



TED L. WILLS (Ohio Bar No. 0059473)
414 Walnut Street, Suite 707
Cincinnati, Ohio 45202
Telephone (513) 721-5707
Facsimile (513) 621-8430
E-Mail TedLWills@aol.com
Attorney for Relator, Paul Perrea

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 10th day of April, 2009.



Ted L. Wills (0059473)

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

Now comes Affiant, Paul Perrea, who being duly cautioned and sworn upon his oath, states as follows:

1. My name is Paul Perrea. I am the Relator in the above-captioned matter.
2. On April 8, 2009, after oral argument, when I got back home, I double checked the internet site to make sure that the scoring guidelines were still publicly available.
3. At about 4:30 p.m., I checked the main menu page that I had previously attached to my Second Affidavit of Relator Paul Perrea, 000058.
4. I also checked the pages that showed the grading guidelines that I also had attached to Second Perrea Affidavit, 000059-94.
5. At 4:30 p.m. on April 8, 2009, all of those pages were still available on the internet.
6. The next day after oral argument, April 9, 2009, I checked that website again. I checked the same CPS websites with the menus options for Semester Exams. <http://staffnet.cps-k12.org/staffnet/RET/scoringsemexam.html>. I also checked the pages for the grading guidelines.
7. When I checked, I found that on April 9, 2009, CPS had blocked access to all the information about the Semester Exams.
8. That meant that if the Court wanted to determine whether the Semester Exam guidelines were really on the internet, they would have found a website stating: "The page cannot be found. (Document 000099, attached hereto.)"

FURTHER AFFINED SAITH NOT.

Paul A Perrea
Paul Perrea

Subscribed and sworn to me, a Notary Public, this 10 day of April, 2009.

Marissa L. Godby
Notary Public



MARISSA L. GODBY
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Has No Expiration
Date. Section 147.03 O.R.C.

The page cannot be found

The page you are looking for might have been removed, had its name changed, or is temporarily unavailable.

Please try the following:

- Make sure that the Web site address displayed in the address bar of your browser is spelled and formatted correctly.
- If you reached this page by clicking a link, contact the Web site administrator to alert them that the link is incorrectly formatted.
- Click the [Back](#) button to try another link.

HTTP Error 404 - File or directory not found.
Internet Information Services (IIS)

Technical Information (for support personnel)

- Go to [Microsoft Product Support Services](#) and perform a title search for the words **HTTP** and **404**.
- Open **IIS Help**, which is accessible in IIS Manager (inetmgr), and search for topics titled **Web Site Setup**, **Common Administrative Tasks**, and **About Custom Error Messages**.

000099