

SUPREME COURT OF OHIO

ORIGINAL

STATE EX REL., PAUL PERREA	:	
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Relator,	:	MANDAMUS PROCEEDING
	:	
-vs.-	:	
	:	
CINCINNATI PUBLIC SCHOOLS	:	CASE NO. 2008-0748
	:	
Respondent.	:	
	:	

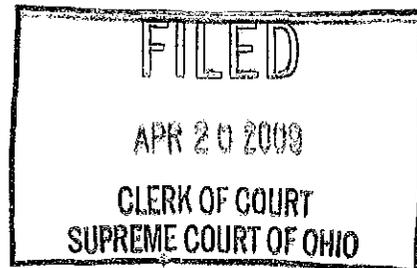
**RESPONDENT CINCINNATI PUBLIC SCHOOLS'
 RESPONSE IN OPPOSITION TO RELATOR'S
 MOTION FOR ORDER FOR SUPPLEMENTAL FILING
 WITH AFFIDAVIT OF JERRY MOORE**

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Attorneys for Respondent
Cincinnati Public Schools



I. INTRODUCTION

Relator Paul Perrea's ("Relator") most recent motion in this case is both inappropriate under the Court's rules of practice and the facts. His charge that Respondent Cincinnati Public Schools ("CPS") "destroyed evidence" by deactivating the URL <http://staffnet.cps-k12.org/Staffnet/RET/scoringsemexam.html> on April 9, 2009, is (at best) disingenuous. CPS unpublished the teacher scoring guidelines – which are not relevant to whether the materials Relator seeks are trade secrets under Ohio law because they contain no test questions and nothing pertaining to the multiple choice portion of the exams – as a reasonable security measure to ensure students could not access scoring guidelines prepared for faculty **after Relator's attorney disclosed the URL required to access the materials to a reporter for the *Cincinnati Enquirer***. The reporter then published the URL in an article about this case. District officials chose to remove the relevant materials so that students (who could now be reasonably expected to locate and view the teacher web page after Relator's disclosure) would not have access to scoring guidelines prepared for faculty.

This manufactured "controversy" – caused by the conduct of Relator's attorney – is designed to distract the Court from the issue of whether the test questions requested by Relator must be disclosed under R.C. 149.43. Counsel for CPS specifically stated during oral argument that students could access the scoring guide if they had the specific URL for the relevant "staffnet" web page. (Supreme Court Video Archive, Case No. 08-0748, at 0:24:05) By causing this URL to be published in the *Enquirer*, Relator's attorney made it likely that students may try to access the page. CPS's conduct in removing the teacher scoring guidelines under these circumstances only supports the fact that CPS takes reasonable security measures to uphold the integrity of the Semester Exams.

CPS “destroyed” no evidence. Relator’s inappropriate motion for a supplemental filing should be denied and stricken from the record.

II. ARGUMENT

A. Relator’s Motion Is Improper Under The Court’s Rules Of Practice.

Article IX, Section 9 of this Court’s practice rules provides that “[u]nless ordered by the Supreme Court, the parties shall not tender for filing and the Clerk shall not file any additional briefs or other materials relating to the merits of the case after the case has been orally argued. If a relevant authority is issued after oral argument, a party may file a citation to the relevant authority but shall not file additional argument.” Relator’s latest motion is not proper under this rule because it attempts to offer substantive arguments on the merits (such as Relator’s flawed request for adverse inferences) under the guise of a request for a “supplemental filing.”

The “supplemental filing” rule does not apply in this case. It is merely the closest rule Relator could find to bring his meritless, last-ditch arguments to the Court’s attention. Thus, although Relator’s contentions are unsupportable (as explained below), his motion is improper and should be stricken from the record.

B. CPS Did Not Destroy Evidence And No Adverse Inferences Should Be Drawn.

1. CPS Unpublished The Teacher Scoring Guidelines Due To The Conduct Of Relator’s Attorney.

On April 8, 2009, Relator’s attorney gave an interview to a reporter from the *Cincinnati Enquirer* (the “Enquirer”) in which he disclosed the “staffnet” web address containing the teacher scoring guidelines for the Semester Exams. This address was then published in the April 9, 2009, edition of the Enquirer. (Moore Aff. ¶ 2; Exhibit A)

Before the Enquirer published the URL for the teacher scoring guidelines, it was not realistic that anyone other than CPS teachers would access the information because such individuals would have to know the specific URL for the relevant materials. (Moore Aff. ¶ 3) After the URL was published in the Enquirer, CPS officials took the teacher scoring guidelines off the “staffnet” page as a reasonable security measure to ensure that students did not access scoring guidelines meant for faculty. (Moore Aff. ¶ 4)

2. **The District’s Actions Are Unrelated To The Merits Of This Case.**

CPS did not make the decision to remove the teacher scoring guidelines because it believed they were relevant to the issue before the Court of whether the Semester Exam questions Relator seeks are public records. To the contrary, Semester Exam questions have never been posted or otherwise published anywhere. (Moore Aff. ¶ 5)

3. **Relator’s Entire Argument Is Based On A Fundamental Misconstruction Of The Issues.**

Relator’s entire motion is based on the faulty premise the CPS has claimed that no individual could access the teacher scoring guidelines with or without the URL address containing the relevant materials. In his motion, Relator makes the following argument:

What [Relator] 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)

(Relator’s Motion for Order for Supplemental Filing, p. 7) (emphasis added) But from the beginning of this case, CPS stated that “internet users would need to know the web address for the intranet page to access” the teacher scoring guidelines. (Respondent’s Merit Brief, p. 11) Additionally, Counsel for CPS stated during oral argument that individuals could access the web

page only if they knew the specific URL for relevant materials (which, CPS argued, was similar to or even more effective than a password). (Supreme Court Video Archive, Case No. 08-0748, at 0:24:05)

CPS also correctly argued that the tests were not publicly available via an internet search engine. This is because CPS instituted an internet command called “robot.txt” in 2006 (*before* the District administered the Semester Exams and *before* Relator’s lawsuit) to block internet “web crawlers,” which find and index internet content, from reaching materials related to the Semester Exams, including the teacher scoring guidelines.¹ (Moore Aff. ¶ 3)

Despite Relator’s attempt to create a new issue for the Court, none exists here. It is undisputed that Semester Exam test questions have never been disclosed and that the teacher scoring guidelines were not available via internet search or without knowing the specific URL for the materials.

4. The “Authority” On Which Relator Relies Is Inapposite.

The meritless nature of Relator’s allegations is illustrated by the inapposite cases on which he relies. In *Banks v. Canton Hardware Co.* (1952), 156 Ohio St. 453, 103 N.E.2d 568, a salesman brought suit against his former employer for commissions he was allegedly owed. To make his case, the plaintiff had to rely on materials documenting his sales prior to his termination. But the employer destroyed many of these documents before the plaintiff could inspect them because “defendant had expected trouble with plaintiff.” *Id.* at 458. In *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331, a physician charged with medical malpractice was found to have (1) destroyed the plaintiff’s original medical record, (2)

¹ If the teacher scoring guidelines were available via an internet search engine, the web address would still have appeared after the “staffnet” page had been taken down through the search engine’s “cache” function. The only difference would be that the link provided would take users to a message indicating that the requested page was no longer available.

produced a copy of the medical record in which the physician deleted medical notations damaging to his case and added new notations to aid his defense, and (3) repeatedly lied in his deposition based on the forged documents.

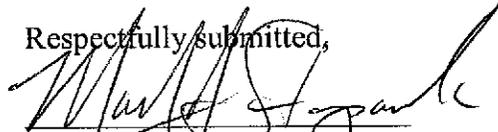
These cases illustrate the frivolous nature of Relator's motion. Unlike the precedent on which Relator relies, there is absolutely *no evidence to hide* in this case. CPS already stated in its brief and in oral argument that internet users would need to know the complete web address for the intranet page to access the information. (Respondent's Merit Brief, p. 11) It was therefore not reasonable to conclude that anyone other than teachers (who were given the necessary information) would access the relevant materials. The District's decision to unpublish the teacher scoring guidelines was forced by the conduct of Relator's attorney, who disclosed the URL address to the Enquirer. Additionally, the record in this case is already complete, and oral argument has concluded. The relevant materials still exist and are available to the Court in the record. (Perrea Doc. 000059-000094) Finally, as stated above, the teacher scoring guidelines are not relevant to the issue of whether the Semester Exam questions Relator seeks are public records.

CPS has not altered or destroyed evidence to avoid liability in this case. In his records request, Relator has not sought the teacher scoring guidelines, which were unavailable without a lengthy and specific URL address. Moreover, it is undisputed that actual Semester Exam questions have never been disclosed (on the internet, intranet or any other forum). Relator's motion is frivolous and unsupported by law or fact.

III. CONCLUSION

For each and all of the foregoing reasons, Respondent Cincinnati Public Schools respectfully requests that the Court deny and strike Relator's Motion For Order For Supplemental Filing in its entirety.

Respectfully submitted,



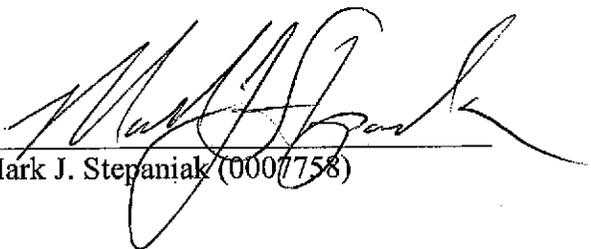
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Counsel of Record for Respondent
Cincinnati Public Schools

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Relator's Motion For Order For Supplemental Filing has been served upon the following via Regular U.S. Mail, postage prepaid, this 20th day of April, 2009:

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



Mark J. Stepaniak (0007758)

SUPREME COURT OF OHIO

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Relator,	:	MANDAMUS PROCEEDING
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-vs.-	:	
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CINCINNATI PUBLIC SCHOOLS	:	CASE NO. 2008-0748
	:	
Respondent.	:	
	:	

AFFIDAVIT OF JERRY MOORE

State of Ohio)
) SS:
County of Hamilton)

Jerry Moore, being first duly cautioned and sworn, states of his personal knowledge as follows:

1. My name is Jerry Moore. I am currently employed by Cincinnati Public Schools (“CPS”) in the position of Test Manager. As part of my duties, I oversee much of the administration of the Semester Examinations at issue in this matter, including the maintenance of the URL <http://staffnet.cps-k12.org/Staffnet/RET/scoringsemexam.html>, which contained scoring guidelines used by teachers when grading the constructed response (essay) portion of the tests. I also have personal knowledge regarding the measures CPS takes to ensure that CPS “staffnet” web pages are not available via commonly used internet search engines. I was also personally involved in unpublishing this URL on April 9, 2009.

2. On April 9, 2009, I read an article published in the *Cincinnati Enquirer* (“Enquirer”) related to this case. The article contained statements from Ted Wills, Paul Perrea’s

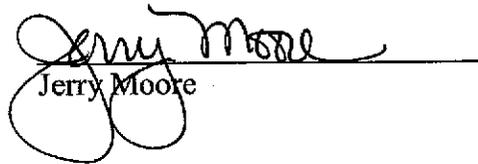
attorney in this matter, regarding the Semester Examinations. The article also published the "staffnet" URL for the teacher scoring guidelines. A true and accurate copy of this article printed from the Enquirer's website is attached as Exhibit A.

3. Before the Enquirer published the URL for the teacher scoring guidelines, it was not realistic that anyone other than CPS teachers would access the information because such individuals would have to either (1) know the specific and lengthy URL for the web page containing the materials or (2) get a CPS teacher to instruct them exactly how to find the guidelines. This is because the teacher scoring guidelines could not be accessed via commonly used internet search engines or via the CPS homepage. In 2006, CPS instituted an internet command called "robot.txt" to alert internet web crawlers *not* to index "staffnet" pages including those related to the Semester Examinations and teacher scoring guidelines.

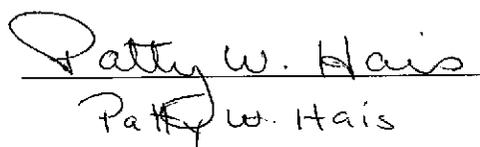
4. After the URL was published in the Enquirer, I instructed my staff to take the teacher scoring guidelines off the "staffnet" page as a reasonable security measure to ensure that students did not access scoring guidelines meant for faculty.

5. Semester Examination questions have never been posted or otherwise published anywhere.

Further affiant sayeth naught.


Jerry Moore

Sworn to and subscribed before me this 16th day of April, 2009.


Patty W. Hais

PATTY W. HAIS
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 05-21-10



April 9, 2009

Court asked to open CPS test

By Jon Craig
jcraig@enquirer.com

COLUMBUS - A Cincinnati high school teacher doesn't want teachers "teaching to the test" - or students cheating - so he took his campaign to the state's highest court Wednesday.

Cincinnati Public Schools posts scoring guides and sample answers to semester exams on the Internet. Physical sciences teacher Paul Perrea sued CPS to get the district to release the actual questions on the tests.

CPS says those tests are private, even though sample questions and essay topics are posted.

The Ohio Supreme Court heard arguments Wednesday.

Cincinnati reuses identical test questions year after year, Perrea said. So students who go online - or teachers who prep students using the online guides and "exemplar" answers - can gain an unfair advantage.

To make his point, Perrea sued the superintendent and other school district officials to release copies of semester exams after they are given - they make up 25 percent of a student's final grade - to assess their validity. He is not seeking individual students' tests.

Perrea, a teacher at Hughes High School, has asked the state's highest court to order CPS to make the city-owned exams public.

"We're just trying to get tests (and) determine whether these are good tests," Perrea's attorney, Ted L. Wills, said Wednesday. "We're only asking for (tests) already taken year after year after year."

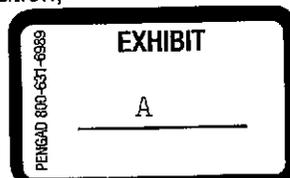
Wills said the tests are "judged by something that's a big secret."

Mark J. Stepaniak, a lawyer for the school district, told Supreme Court justices that because the tests owned by the district contain trade secrets, they are exempt from the state's Public Records Act. "These are not public records," he said.

Teachers in the district and a private company develop the questions, Stepaniak said; teachers can be disciplined for breaching confidentiality.

In his written brief and before the court, Wills cited the school district's Web site where sample questions and suggestions on how to score answers are detailed. Wills challenged the justices to look up the site for themselves at <http://staffnet.cps-k12.org/Staffnet/RET> (click on "Semester Exams Scoring".)

A petition signed by Perrea and about 60 Cincinnati teachers said they want details on the "creation, administration and grading" of CPS semester examinations so they could get an outside expert assessment of the "fairness, accuracy and validity of the exams."



In 1998, a 4-3 Supreme Court ruled that contents of Ohio's 12th Grade Proficiency Test are public records. In that case, *Rea v. Ohio Department of Education*, the court majority rejected claims by the state that test questions qualify as "trade secrets" or are exempt from disclosure as copyrighted material.

Additional Facts

On the Internet

An attorney for high school teacher Paul Perrea said that Cincinnati Public Schools posts a semester exam scoring guide and sample essay questions on the Internet, giving teachers who "teach to the test" or savvy students an unfair advantage.

The scoring guide can be found at <http://staffnet.cps-k12.org/Staffnet/RET> . (Click on the "Semester Exams Scoring" link in the left column.)
