

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHITMAN

ELSEVIER, INC., a foreign corporation,

Plaintiffs,

v₁

WASHINGTON STATE UNIVERSITY

Defendants.

No.

DECLARATION OF JAMES TONNA IN
SUPPORT OF MOTION FOR
PRELIMINARY AND/OR PERMANENT
INJUNCTION

JAMES TONNA declares:

1. I am employed by Elsevier, Inc., as Vice President of Sales and Marketing. I make this declaration of personal knowledge as to matters as to which I am competent to be a witness.

2. My responsibilities include supervising sales and marketing efforts for Elsevier's Academic and Government customers throughout the United States. I have 11 years experience in sales and marketing of health and medical information to medical, scientific and other users. I am familiar with marketing conditions and sales efforts of my employer and its competitors. I am also familiar with the contracts (and related documentation) entered into with defendant Washington State University ("WSU") which

DECLARATION OF JAMES TONNA IN SUPPORT OF
MOTION FOR PERMANENT INJUNCTION - 1

OLE MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
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1 are the subject of the Request for disclosure under the Washington Public Records Act at
2 issue in this litigation.

3 3. Elsevier, Inc., does sales and marketing for its affiliated corporation, Elsevier,
4 B.V., which is based in The Netherlands. These related companies (collectively referred to
5 as "Elsevier") have a 124 year history and operate worldwide. Elsevier employs 8,000
6 people in 24 countries and is the world's leading publisher of science and health information.
7 It serves more than 30 million scientists, students, and health and information professionals
8 worldwide.

9 4. Elsevier's primary business is providing information and services to scientific,
10 technical, and medical professionals, and others. It has accumulated, working with 7,000
11 journal editors, 70,000 editorial board members, 300,000 reviewers, and 600,000 authors
12 publishing 2,000 journals, 19,000 books, and 2000-plus books each year, a vast library of
13 medical and health information.

14 5. While Elsevier has a leading market position, it also faces substantial
15 alternative vendors in a competitive marketplace. Elsevier has achieved its preeminent
16 market success, in significant part, by developing proprietary pricing methods and formulae.

17 6. Elsevier publishes list prices for access to hundreds of medical journals and
18 other periodical/research sources. However, Elsevier does not follow a "one size fits all"
19 marketing strategy. Rather, it has over its long history developed pricing formulae and
20 methods that allow it to flexibly meet the specific requirements of customers small and large,
21 including the largest users such as major universities, including Washington State
22 University.

23 7. Elsevier's worldwide sales force consists of over 200 representatives. They
24 are trained to negotiate with each customer and to tailor pricing and related terms and
25 conditions to the particular customer's requirements. Contracts typically are for an annual

26 DECLARATION OF JAMES TONNA IN SUPPORT OF
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1 (or other) period in which electronic and other access will be provided to a library that fits the
2 user's needs. In so negotiating, representatives are often called upon to negotiate pricing
3 adjustments, and to provide for modification to pricing terms during the term of the contract,
4 in various circumstances (e.g., the cancellation, addition or substitution of access to specific
5 journals or sources).

6 8. In such negotiations, Elsevier representatives apply pricing formulae and
7 methods which are not generally known (to our competitors or potential customers), which
8 proprietary information reflects Elsevier's pricing/business methods and constitutes data
9 unique to its products and services. Such information is an outgrowth of Elsevier's long
10 experience developing and marketing its offerings and represents the valuable efforts of
11 thousands of its employees over many decades.

12 9. Elsevier has in substantial part achieved and is able to maintain its position
13 as one of the world's largest providers of medical and scientific information because its
14 pricing methods and formulae, and their manifestation in the customer-specific pricing
15 contained in individually negotiated contracts, are not generally known to its competitors,
16 reflecting Elsevier's continuing efforts to maintain the confidentiality and secrecy of such
17 valuable commercial information.

18 10. If Elsevier's pricing formulae and customer-specific pricing became a matter
19 of public record, the result could be harm to both Elsevier and its customers, particularly
20 larger customers such as WSU who typically have more complex and extensive
21 requirements. Such disclosure could disadvantage Elsevier in that, if its pricing to customer
22 X was known to customers Y and Z, the latter could demand the same pricing, without fully
23 appreciating the unique circumstances that may apply and/or perhaps other commitments
24 made by such customer that led to such pricing terms. In such circumstances, Elsevier

1 would be under substantial competitive pressure to adopt a "one size/price fits all"
2 marketing/sales approach.

3 11. That is, Elsevier's ability to particularize pricing to meet individual customers'
4 needs and circumstances would be diminished. The flip-side would be likely damage to
5 large customers, such as WSU, whose access to individually negotiated and advantageous
6 pricing, that may be appropriate in view of greater use of a broader library and other specific
7 needs and circumstances, could be curtailed.

8 12. On May 7, 2009, Elsevier received notice from WSU of a Public Records Act
9 Request by Dr. Theodore Bergstrom. A true and correct copy of that Request is attached as
10 Exhibit A to this Declaration. The Request seeks disclosure of Elsevier-WSU contracts and
11 related documentation. Disclosure of that material, in un-redacted form, would cause
12 substantial and irreparable harm to Elsevier because it would reveal customer-specific
13 pricing information and Elsevier's proprietary pricing formulae and methods, leading to
14 private gain to Elsevier's competitors, and to public loss to WSU and other large (typically
15 public) users, for reasons discussed in prior paragraphs.

16 13. Elsevier has communicated with the requester, Dr. Bergstrom, offering to
17 produce all requested materials in un-redacted form, subject to only proper confidentiality
18 provisions. A true and correct copy of that letter is attached as Exhibit B. Elsevier believes
19 that this approach could facilitate Dr. Bergstrom's contemplated research project, while
20 protecting Elsevier's proprietary pricing formula and methods.

21 14. Dr. Bergstrom, however, rejected Elsevier's proposal on June 8, 2009.

22 15. Elsevier therefore has started this action. Elsevier has no objection to
23 release of the Elsevier-WSU contracts and related documentation, including total contract
24 pricing and list prices, but seeks to redact confidential and protected pricing terms. A copy
25
26

1 of the requested materials, in a properly redacted form, is attached as Exhibit 1 to the
2 proposed forms of order submitted to the Court with this motion.

3 16. This declaration is made under penalty of perjury and in accordance with the
4 laws of the State of Washington.

5 Signed at _____, this ____ day of _____,
6 2009.

7 James Tonna
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DECLARATION OF JAMES TONNA IN SUPPORT OF
MOTION FOR PERMANENT INJUNCTION - 5

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From: Linda Nelson [mailto:nelsonl@wsu.edu]
Sent: Thursday, May 07, 2009 5:07 PM
To: Chiaino, Adam (ELS-NYC)
Subject: Notice re Public Records Request 09-137 Disclosure

May 7, 2009

Via email only a.chiaino@elsevier.com

Mr. Adam Chiaino
Elsevier Regional Sales Director
P.O. Box 945
New York, NY 10159-0945

Via US Mail

Elsevier BV c/o Regional Sales Office
360 Park Avenue S.
New York, NY 10010-1710

Re: Notice -- Public Records Request 09-137

Dear Mr. Chiaino and Elsevier BV:

The purpose of this letter is to notify you of an upcoming disclosure under provisions of the Public Records Act (RCW 42.56). Washington State University is in receipt of a Public Records Request from Dr. Theodore C. Bergstrom, Department of Economics, University of California Santa Barbara, Santa Barbara, CA 93106 seeking:

1. A copy of the current and immediate past contract, if it exists, for bundled site licenses with Elsevier and Emerald; and (if not found in the records requested under No. 1 above) 2. Any existing WSU record(s) which may contain: (a) the total amount paid the publisher in the first year of the contract, (b) what prices are built into the contract for subsequent years, (c) to which journals does it give access, (d) can subscriptions be canceled and, if so, what the formula for determining the amount of money saved by cancellation, (e) what happens to rights of access to back issues if contract not renewed, (f) does the contract allow other benefits such as free posting of publisher's pdfs of the work of authors from consortium institutions, and (g) with what

other institutions, if any, does WSU share each of its subscriptions.

The responsive records include documents that identify you and Elsevier by name and contain information about you and Elsevier. Specifically, several agreements, amendments, license agreements, etc.

WSU intends to provide copies of the responsive records to the requester on May 26, 2009.

As a person and entity identified by name in the records to be released, you may contact the requester to seek a revision to the request and/or you may seek an injunction from the Whitman County Superior Court. If the Superior Court finds that examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions, the Court may issue an injunction preventing disclosure. If you submit such a request to the Superior Court seeking to prevent disclosure, you might consider naming the requester as a party to the action in addition to WSU.

Please contact Linda Nelson at 509-335-3928, if you have any questions. Thank you.

Sincerely,

Linda Nelson for

Ralph Jenks
Public Records Officer

**Linda Nelson
Public Records Coordinator
Office of Procedures, Records, and Forms
P.O. Box 641225
Pullman, WA 99164-1225
509 335 3928
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nelsonl@wsu.edu**

EXHIBIT A
Page 1 of 2 Pages



By Email & Facsimile

June 4, 2009

Theodore C. Bergstrom
Department of Economics
University of California Santa Barbara
Santa Barbara, CA 93106

Re: Public Record Act requests for Elsevier materials

Dear Professor Bergstrom:

Thank you for taking the time last week to discuss with me and my colleagues your request to Washington State University under the Washington State Public Records Act for a copy of the university's current and immediate past License Agreements with Elsevier. We were made aware of your request by the Public Records Coordinator, who also advised that we had a right to object to disclosure and encouraged us to contact you as the requester to discuss any concerns we might have and to determine whether a mutually agreeable disclosure could be arranged. Toward that end, we agreed to propose a compromise to you and are doing so by way of this communication.

As we discussed during the call, Elsevier does not object to disclosure to you of the whole of the Washington State contract documents. Elsevier is concerned rather with the potential disclosure to competitors of the specific negotiated pricing terms in the contract, which is confidential commercial information entitled to legal protection. We hope you appreciate that the disclosure of such specific customer pricing terms is sensitive and subject to potentially harmful use by competitors seeking an unfair advantage in negotiations with a customer. In addition, disclosure of pricing terms can in fact inhibit the parties' ability to develop flexible, tailored solutions suitable for a particular customer's needs and may be detrimental to the customer's negotiations with other publishers.

Elsevier also understands, however, that your prior research in the area of journal pricing was limited to the use of published list prices and not the actual negotiated prices paid by customers. For that reason, Elsevier is willing to explore whether we can agree to a compromise that will provide you the requested pricing information for your research while protecting Elsevier's confidentiality requirements. It appears from a reading of your specific requests that this may be possible.

Elsevier is therefore offering to voluntarily provide the contractual information you requested without redaction and additional non-confidential explanatory information

Professor Bergstrom

June 4, 2009

Page 2 of 2

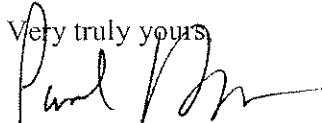
about its pricing models, provided that (i) you will agree not to reveal the specific pricing information to Elsevier's competitors or any third parties that could make it accessible to Elsevier's competitors and (ii) you will limit the use of the data to a discussion or presentation of anonymous aggregated data or to discussion or presentation of the information without reference to Elsevier or the specific institution to which the information applies. Specifically,

1. Elsevier will provide a copy of the requested Washington State University contract documents under an agreement that protects the pricing information as outlined above;
2. Elsevier will provide certain additional information about its pricing models, examples of the models, and the types of specific negotiated flexible provisions that are possible under the pricing models;
3. Elsevier will arrange for an Elsevier business representative to meet with you and your colleagues to discuss the documents provided and to address specific questions you may have about them.

If Elsevier can reach agreement with you on voluntary, adequately protected, disclosure of its specific pricing information and this additional information, Elsevier will directly produce to you the documents requested from Washington State University and would be willing to make similar disclosures in the other states to which you have submitted requests, on the same terms.

As you know, the Records Coordinator has extended the date of disclosure to allow us to discuss a potential amicable resolution to your request and we hope to do so and avoid the necessity of filing suit to enjoin the disclosure of Elsevier's confidential information. We therefore are available at your convenience and perhaps can schedule another call on Monday June 7, to discuss this proposal with you. We hope that you will take the opportunity to speak with us and, in any event, must respectfully request a response by Tuesday, June 8.

We look forward to hearing from you.

Very truly yours


Paul F. Doda
Deputy General Counsel