# Improving Contract Negotiations for Library Collections through Open Records Requests

John Eye

Open records requests can be an important tool in obtaining valuable information to use in negotiations with content providers. This paper examines the opportunities libraries have in requesting public information through open records requests to better support their purchasing decisions. The case is made for investing time up front to better understand contract terms and pricing already secured by public entities, using that knowledge to improve their position in the negotiating process.

## Introduction

For a long time, publicly funded libraries have been negotiating contracts with publishers and aggregators, trying to acquire the best possible deals. But with the proliferation of electronic resources over the last few decades, these agreements are more important in maximizing how far collection budgets can stretch. They outline the terms for each party, including price, access, and other various expectations including beginning and ending service dates. Maximizing the outcome of these provisions is crucial in providing access to information within the financial realities of today; likewise, ignoring the significance of the negotiation process leaves open the likelihood that the terms of these deals will not be as favorable as they could be. Taking a proactive, assertive approach to contract negotiations will likely improve the chances that library spending will yield the highest possible value to users.

It is well established and goes without saying that libraries should take measures to increase the benefit negotiated contract terms will bring. But very little has been written specifically about how open records requests can be used to improve the leverage state-funded libraries have in the negotiating process, especially when so many agreements include confidentiality clauses, limiting the public disclosure of terms. This paper will explore the process of how libraries can use open records requests to shine a light on other libraries' contract agreements and use that information to better determine how to proceed through negotiations more strategically.

## Literature Review

### *Transparency and Open Records*

The Freedom of Information Act (FOIA) of 1966 was the continuation of previous federal efforts to improve government transparency and a transformation of how information was made available to the public.[1] Under FOIA, individual citizens can request and receive public records

*John Eye is Dean of University Libraries at the University of Southern Mississippi; john.eye@usm.edu. 

regardless of use, based on the nature of the record.[2] Exceptions were built into the law and subsequent revisions have added further restrictions,[3] but essentially the statute authorizes extensive access to the public for information gathering and discovery of federal public records. At the state level, influenced significantly by FOIA after its enactment,[4] laws have emerged that mandate similar disclosures to hold state agencies accountable and reinforce public confidence in the judgments and decisions of state employees.[5] Under these statutes public records requests can be submitted to receive copies of vendor contracts to better understand what other libraries are paying for access to specific resources.

The use of open records to gather information on library contracts for negotiating purposes is nearly absent from the literature,[6] but there are accounts of using open records to better understand pricing.[7] Taylor and McMenemy have used open records to collect data on censorship issues in libraries,[8] and Oltmann et al. studied how record requests from two states yielded varied results due to differing state laws.[9] Moore and Duggan addressed the lack of transparency between librarians and content providers and how it can "undermine the relationships both entities have been cultivating throughout the years."[10] They also note that "it is not unheard of for a publisher to use the Freedom of Information Act to obtain information about their customers, including to whom their money is going and how much, in an effort to gain an information advantage within the marketplace."[11] Dygert and Barrett write that "it would be helpful to know what kinds of deals other institutions or consortia are getting from the publisher. However, getting specific information may be difficult due to confidentiality clauses in license agreements. Some information can nevertheless be gleaned from sources such as public records requests for public institutions and literature reviews."[12]

Professional organizations representing library interests have also weighed in on the importance of accessing contractual information. In 2021, The Association of Research Libraries (ARL) issued a press release calling for greater transparency among libraries. In part the statement reads, "transparency and sharing of prices and contract terms must be a core operating principle in order to realize our objectives."[13] It reaffirms a previous position established in 2009 that encouraged libraries to resist signing nondisclosure agreements with publishers that keep pricing details from being available to other libraries.[14] The primary objective is to improve transparency so library negotiators can make better decisions about pricing and other contract terms and, in doing so, will likely advance the institution's efforts toward accountability for how public funding is spent.[15]

Publishers, on the other hand, often see it differently. They argue that the disclosure of pricing can be detrimental to the customer's ability to receive customized offers or can interfere with their ability to negotiate effectively with other publishers. Some publisher representatives have claimed that small, poorly funded libraries could lose out if a deeply discounted agreement was publicly disclosed, that is, publishers would be more wary of making individual concessions in these circumstances for fear that other libraries would demand equivalent pricing. As shown in appendix A, publishers may argue simply that a release of pricing information would create competitive harm and negatively affect their business interests.

In addition to the ARL, the Scholarly Publishing and Academic Resources Coalition (SPARC) is another organization advocating for libraries to share information that helps in their negotiations with publishers. Not limited to pricing, SPARC offers resources that include data, statistics, and instructions to help libraries make better decisions and develop more sustainable ways to provide access to content.[16] Libraries are encouraged to participate in this effort by sharing the prices and terms of their contracts.

### *The Art of Negotiating*

Negotiation is part of everyone's life.[17] For librarians, however, it is "one of the most important skills" they can have.[18] But effective negotiations usually do not emerge without careful planning and intentional execution. Sound negotiating principles can be learned and folded into one's professional toolbox to build a skillset poised to advance the goals and interests of their library. Although most library schools do not include training in negotiations as part of their degree programs,[19] "there is no shortage" of resources on the fundamentals of how to effectively bargain with a content provider.[20] Many professional organizations provide workshops on how to negotiate effectively for library products. This is especially important since "vendors spend huge amounts on training and educating their sales staffs on negotiating skills."[21]

There is much written on the best techniques and strategies to negotiate effectively.[22] For libraries, it is often a matter of working toward a deal that best represents the needs of its users while staying within a limited budget. The goal is usually to find agreement between the two parties where the price and terms are acceptable.[23] Bazerman and Neale, however, make the point that sometimes *not* making an agreement is the best course of action.[24] Negotiators should not be hesitant to walk away when the terms do not satisfy their needs.[25] If library authorities do not invest adequate time and effort into careful consideration of all the options available, they may be paying too much or missing out on a better option, effectively squandering financial resources.

## Method

The purpose of this analysis is to call attention to the prospect of using open records to improve negotiations with content providers. By connecting the process of open records requests to the collection development efforts of libraries, a framework can be developed to gather public information and use it to advance the purchasing power of the library. The focus of this paper is to take the reader through the process of an open records request and examine potential benefits and pitfalls. Examples will provide context for further development of this model.

The first step in preparing to negotiate is to determine the problem to be solved.[26] If the problem cannot be clearly defined, then the outcome will largely be left to chance. Library negotiators should have a clear understanding of what a satisfactory deal looks like and how it can be articulated. Is the goal to renew an existing subscription database at a lower price? Is more content needed? Is there an opportunity to cut costs by investing in a less expensive product? It will be necessary to look at the requirements of the library to establish what are "must haves." Of course, vendors will likely recommend many options, but it should be library representatives who ultimately decide how best to serve its users. Determining the needs of the library is a key part of establishing a favorable position to begin negotiations.

In addition to defining the problem, there are other considerations before negotiations begin. What other competing products are available? How important is the product to existing collection development goals? Are there similar libraries that find the product valuable? Is the timing right to purchase the product? Is the vendor motivated to strike a reasonable deal? These are just some of the questions libraries need to contemplate when entering negotiations. The answers will help shape how the best arguments can be applied to support the strongest position.

## *Requesting Open Records to Improve Negotiations*

Some of the most valuable pieces of information are the contract details from state-funded libraries that have already entered into agreements for products under consideration. But there are often limitations on what can be shared about these arrangements because of terms that prohibit or limit disclosure. More and more, libraries are negotiating these confidentiality clauses *out* of their agreements and making the terms available online.[27] But it is also possible to acquire copies of contracts from many public institutions through open records requests, despite confidentiality clauses. All states have sunshine laws that compel government institutions to disclose certain public documents on request.[28] Contracts that publicly funded libraries have with vendors are often public documents and can frequently be obtained through an open record request, usually submitted to the institution's legal affairs office. Taking the time to ask for this information can help increase leverage and justify arguments for more favorable prices and terms.

The rules for making an open records request vary by state and local guidelines.[29] Policies are normally in place to provide a process that complies with state law, fitting the structure and nature of the institution. It is usually necessary to provide contact information and a specific description of the information or record when submitting a request. Some jurisdictions may require a reason for the request, and most agencies have websites directing the user to the person responsible for handling the inquiry. If not, the chief administrator and the institution's legal authority are likely prospects for getting the request to the right person. Appendix B shows an example request form including the information needed to fulfill the request.[30] Other institutions are less specific, directing the patron to submit a signed request either in person or via electronic mail. Of particular importance, however, is that some states have mandates requiring requests to receive responses within a defined period, often 5 to 10 days. A response, however, does not necessarily mean a release of documents. Sometimes an institution will notify the requester that more time is needed to collect the information desired, and the law usually allows a reasonable amount of time for the full disclosure of the requested documents.

When public information is requested through an open records request, the government entity can comply completely, provide a redacted response including some or all the related documents, deny the request, or ignore it.[31] A decision to provide redacted documents, deny, or ignore the request can be appealed as prescribed in the law. If the open records request involves outside entities, some states, like Texas, invite the submission of arguments to challenge the release of the records (see appendix C), especially if they relate to documents that may include proprietary information. If there is no response, or at least no compelling legal objection, the government entity generally moves forward with the decision, possibly releasing the information. If a challenge is submitted, the government entity weighs the arguments within the context of the law and decides. Sometimes these findings occur at the state attorney general's level of authority. Appendixes A, C, and D show supporting documents for an open records request involving Proquest and Ebsco pricing from the University of Texas System. The correspondence reveals the University working with the office of the attorney general of Texas to solicit responses from Proquest and Ebsco associated with the request. Appendix E indicates a ruling from the attorney general giving the University guidance on how to proceed.

### *Difficulties in Obtaining Open Records*

An example of a dispute over access to contracts for library materials involved a professor doing research on publisher pricing. Dr. Theodore Bergstrom, an economist from the University of California, Santa Barbara, led a study using state open records laws to access copies of contracts containing rates for bundled subscriptions of scholarly publications.[32] The supporting court documents show the resistance publishers employed to avoid disclosing prices negotiated with their customers at public universities.[33] The publishers claimed their pricing mechanisms and structures should be considered trade secrets and therefore confidential. In a letter from the legal representative of Elsevier B. V. (Elsevier) to Dr. Bergstrom involving a request for records from Washington State University in 2009, the reasons for nondisclosure are spelled out:

> 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.[34]

In this case, Elsevier was not successful in forcing Washington State University to redact pricing information from public records. But in a records request by the author for prices of online databases purchased by a Utah state entity, the invoice was received but everything was redacted except for contact information and column headings (see appendix F). Directions were provided for an appeal.

Receiving public records hinges on whether the request falls within state law and institutional policy. Each state has its own version of statutory framework;[35] some are more transparent than others. For example, Alabama, Arkansas, Delaware, Missouri, New Hampshire, New Jersey, Tennessee, and Virginia have laws that limit public records access to residents only.[36] This restriction was challenged in Virginia and upheld by the United States Supreme Court in McBurney vs. Young.[37] The Court reasoned, in part, that non-residents were not substantially burdened by this provision, since much of the information is online. But perhaps more significantly, the Court established that access to public information is not a constitutional right.[38] Therefore, it seems likely that states may continue to develop more protective statutory and administrative structures that make access to public records challenging.

Some institutions purchase materials using funding sources outside state allocations such as gifts, endowments, or private grants. Depending on state laws and policies, these expenditures may fall beyond the scope of the state open records statutes. For example, a request by the author for an invoice from a Delaware public institution was refused because the resource was not purchased with public funds.[39]

Another barrier to tracking down pricing through open records requests is that sometimes it is difficult to identify the actual fiscal agent of a resource. If a library lists a database or journal package on its website, it may be provided through a consortia agreement or another entity in the system; tracking down where the actual invoice resides can be challenging. In those cases, however, administrative staff are often helpful in identifying the appropriate source.

Fees charged to locate and process open records can also serve as a deterrent for people to access public information. Most state laws include provisions to allow government entities to financially recover at least part of the time, effort, and materials needed to respond to a request. But often the charges only kick in when the request goes beyond a few basic documents. There have been occasions, however, where government entities have used fees in ways that appear to discourage access.[40]

## Discussion

### *The Value of Open Records to Improve Negotiations*

It should not be a surprise that collecting information about all aspects of a transaction will improve the chances of a successful negotiation. Finding information to solve problems is solidly in the wheelhouse of most librarians. Collecting, synthesizing, analyzing, and understanding this information is important to building confidence and establishing leverage to support contractual objectives. Carter writes that "Expert negotiators know that their greatest source of strength in negotiation is not bluster but *knowledge*."[41] Learning as much as possible about the things that influence a deal will help clarify what aspects of the negotiation can be emphasized and which should be avoided. In other words, information that shines a light on the factors involved in a negotiation can create additional leverage to strengthen the bargaining position. The better the bargaining position the more likely a satisfactory outcome will be reached.

The author has used open records requests for several years to concentrate on larger, six figure agreements where the savings add up dramatically, especially for multiyear deals. The process is normally very simple, and with the proliferation of confidentiality clauses the information is not easily obtained any other way.[42] By making several open records requests to similar institutions, it has been possible to use that information to push back on vendors for better pricing and terms. One example is where a vendor was holding firm on a significant price increase for a product that would have been difficult to do without. Using the pricing obtained through open records requests, and being completely honest about how the information was obtained, a case was made to make the cost more comparable to other libraries similar in size and scope. After more deliberation, the license was adjusted several thousand dollars lower on a multiyear contract.

## Conclusion and Recommendations

By recognizing the value and practical application of acquiring public records from other libraries to inform procurement decisions, public institutions can be a source of information that help establish stronger negotiating positions with publishers and other content providers. By knowing more about the agreements other libraries have made, better decisions can be developed to support strategies that are more cost effective and financially sustainable. As key players in teaching users how to find relevant information, library personnel should take a page from their own playbook and reach out to their counterparts, either by virtue of contracts without confidentiality clauses or through open records requests, and secure contract information that will benefit their own collection development efforts.

# Appendix A

ProQuest.

Via U.S. Mail and Fedex

March 5, 2018

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

Re: ProQuest LLC Notice of Opposition Against Permitting Release of Proprietary Information Pursuant to John Eye – The University of Southern Mississippi's Open Records Request to The University of Texas at San Antonio ("the University") for ProQuest's Unredacted Ebook Contracts, Including Any Schedules, Addenda, or Appendixes, received by the University on February 9, 2018 ("Public Information Request from John Eye to the University of Texas at San Antonio -- OGC# 180485" UTSA File No.: W003303-020918).

To Whom It May Concern:

ProQuest LLC received notice of the above referenced Open Records Request from Aaron Faris, Senior Legal Coordinator at The University of Texas at San Antonio, in a letter dated February 23, 2018, received by ProQuest LLC on March 1, 2018. This letter shall serve as notice that ProQuest LLC is opposed to release of any contracts, information and/or proposals provided by ProQuest LLC, pursuant to the above referenced Open Records Request.

As you are aware, the Texas Supreme Court concluded third parties may assert that their information is exempt from disclosure pursuant to Texas Government Code Section 552.104. *See Boeing Co. v. Paxton*, No.12-1007, 2015 WL 385424 at *9 (Tex. June 19, 2015). ProQuest has concluded that Sections 552.110 and 552.104 are applicable exceptions to the release of any product, pricing, or term information and/or other information contained in any and all contracts or solicitation responses between ProQuest LLC and the University of Texas at San Antonio under the aforementioned Open Records Request.

ProQuest specifically requests that the following portions be withheld: (1) pricing information, including pricing breakdowns per product; (2) any and all financial statements supplied by ProQuest to the University as part of their procurement process; and (3) any personally identifiable information about individuals that may be contained in the applicable records. Each of the above-named elements are protected under Sections

789 E. Eisenhower Parkway • P.O. Box 1346 • Ann Arbor, MI 48106-1346 • U.S.A. • Tel: 734.761.4700 • Toll-free: 800.521.0600 www.proquest.com

552.110 and 552.104 as applicable exceptions. As previously mentioned, the disclosure of said pricing and financial information would give a competitor an unfair advantage (see Section 552.104 of the Government Code) and as such, are a protected exception and release of any of the denoted information would cause substantial competitive harm to ProQuest (see Section 552.110 of the Government Code).

Confidential commercial and financial information exists within the requested records in the following forms, including but not limited to, a response to an RFP, a contract, a proposal, an order form, or a renewal form. In addition, this includes ProQuest's technical specifications as to our platform and products, which we deem confidential and if released would then be available to our competitor(s) causing irreparable harm. Release of any of the above would cause substantial competitive harm to the person (ProQuest) from whom the information was obtained (see Section 552.110 of the Government Code). Additionally, ProQuest believes that portions of the above referenced records contain information that, if released, would give a competitor an unfair advantage (see Section 552.104 of the Government Code).

As a privately held company, ProQuest is entitled to safeguard its goodwill and customer and publisher relationships. As the corpus of documents subject to the public information request was not furnished, ProQuest respectfully reserves the right to amend this objection letter in the event the parties fully identify the documents.

For the reasons explained above, disclosure of said documents in compliance with the above referenced Open Records Request, should be denied with respect to the portions identified by ProQuest LLC as reasonably necessary to protect its legitimate business interests.

Very truly yours,

Janet C. Driver
Assistant General Counsel
ProQuest LLC

cc: Aaron Faris, Senior Legal Coordinator, The University of Texas at San Antonio
Ana Vieira Ayala, Assistant General Counsel, The University of Texas System
John Eye, Requestor

# Appendix B. Sample Open Records Request Form

## The University of Mississippi Request for Public Records

Person Requesting: ______________________________

Representing: ______________________________

Street/Mailing Address: ______________________________

City, State, Zip: ______________________________

Telephone: ______________ Date of Request: ______________

Email: ______________________________

Documents Requested (Please be as clear and concise as possible):

______________________________

______________________________

______________________________

______________________________

Review Requested: ________ Personally Inspect ________ Copy of Material

Further Instructions:______________________________

______________________________

Requester's Signature: ______________________________

Please submit this request via:
By U.S. Mail, By Facsimile, By Email
Office of Registrar (662) 915-5640 publicrecords@olemiss.edu
Attn: Charlotte Fant Pegues
104 Martindale
University, MS 38677

**Note**: The actual costs of gathering and reproducing the requested documents will be the responsibility of the requesting agent.

Please direct any questions regarding your request to the University of Mississippi's Office of General Counsel at 662-915-7014.

# Appendix C

UTSA The University of Texas at San Antonio™
Office of Legal Affairs – Open Records

February 23, 2018

Re: Request for Information under the Texas Public Information Act
Requestor: John Eye
Request received: February 9, 2018
UTSA File No.: W003303-020918

To Whom It May Concern:

The University of Texas at San Antonio (UTSA) has received a formal Texas Public Information Act (TPIA) (the "Act") request to inspect or copy some of our files. A copy of the request for information is enclosed. The requested files include records we received from you or from your company. The Office of the Attorney General (OAG) is reviewing this matter and they will issue a decision on whether Texas law requires us to release your records. Generally, the Public Information Act (the "Act") requires the release of requested information, but there are exceptions. As described below, you have the right to object to the release of your records by submitting written arguments to the attorney general that one or more exceptions apply to your records. You are not required to submit arguments to the Attorney General, but if you decide not to submit arguments, the Office of the Attorney General will presume that you have no interest in withholding your records from disclosure. In other words, if you fail to take timely action, the attorney general will more than likely rule that your records must be released to the public. If you decide to submit arguments, **you must do so no later than the tenth business day after the date you receive this notice.**

If you submit briefing to the attorney general, you must:

a) identify the legal exceptions that apply,

b) identify the specific parts of each document that are covered by each exception, and

c) explain why each exception applies.

Gov't Code § 552.305(d). A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436 (1974). You may contact this office to review the information at issue in order to make your arguments. We will provide the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act. The attorney general is generally required to issue a decision within 45 business days.

Please send your written comments to the Office of the Attorney General at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

If you wish to submit your written comments electronically, you may only do so via the Office of the Attorney General's eFiling System. An administrative convenience charge will be assessed for use of the eFiling System. No other method of electronic submission is available. Please visit the attorney general's website at http://www.texasattorneygeneral.gov for more information.

One UTSA Circle | San Antonio, Texas 78249 | 210.458.7500 | Fax: 210.458.7791

February 23, 2018
Page 2

**In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General.** Gov't Code § 552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Gov't Code § 552.305(e).

**Commonly Raised Exceptions**

In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

**Section 552.101: Information Made Confidential by Law**

Open Records Decision No. 652 (1997).

**Section 552.104: Confidentiality of Information Relating to Competition**

*Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *9 (Tex. June 19, 2015)

**Section 552.110: Trade Secrets and Commercial or Financial Information**

<u>Trade Secrets:</u>
*In re Bass,* 113 S.W.3d 735 (Tex. 2003).
*Hyde Corp. v. Huffines,* 314 S.W.2d 763, 776 (Tex.), *cert. denied,* 358 U.S. 898 (1958).
Open Records Decision No. 552 (1990).

<u>Commercial or Financial Information:</u>
*Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. filed) (construing previous version of section 552.110), *abrogated by In re Bass*, 113 S.W.3rd 735 (Tex. 2003).
Open Records Decision No. 639 (1996).
Open Records Decision No. 661 (1999).

**Section 552.113: Geological or Geophysical Information**

Open Records Decision No. 627 (1994).

**Section 552.131: Economic Development Negotiation Information**

If you have questions about this notice or release of information under the Act, please refer to the Public Information Handbook published by the Office of the Attorney General, or contact the Attorney General's Open Government Hotline at 512-478-OPEN (6736) or toll-free at (877)-673-6839 (877-OPEN TEX). To access the Public Information Handbook or Attorney General Opinions, including those listed above, please visit the attorney general's website at http://www.texasattorneygeneral.gov.

February 23, 2018
Page 3

Sincerely,

Aaron Faris

Aaron Faris
Senior Legal Coordinator

Enclosure: Copy of request for information

cc: Requestor
(*w/o enclosure*)

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548
(*w/o enclosure*)

# Appendix D

THE UNIVERSITY *of* TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Office of General Counsel
210 West 7th Street
Austin, Texas 78701-2901
512-499-4462 | Fax: 512-499-4523
WWW.UTSYSTEM.EDU

**Ana Vieira Ayala**
***Assistant General Counsel & Public Information Coordinator***

February 23, 2018

Justin Gordon
Division Chief
Open Records Division
Price Daniel Building
209 W. 14th Street, 6th Floor
Austin, Texas 78701

**Re: Public Information Request from John Eye to The University of Texas at San Antonio -- OGC# 180485**

Dear Mr. Gordon:

On February 9, 2018, The University of Texas at San Antonio ("University") received a request for information from John Eye ("Requestor") (**TAB 2**). The University subsequently sent the request to The University of Texas System ("UT System") for handling with your office.

In accordance with section 552.301 of the Texas Government Code, we now send this request for decision within ten business days from the date the request was received. UT System has copied the Requestor on this letter brief in accordance with section 552.301(d).

The Requestor seeks access to the following information:

> *I am requesting un-redacted copies of the most recent e-book contracts from ProQuest and Ebsco, including any schedules, addenda, or appendixes.*

The University takes no position on the release of the requested information but notifies you of possible third party concerns. The University has notified the affected third parties of the request and sent notice to advise them of their opportunity to object to the release of their documents (**TAB 3**). The third parties have not agreed to the release of the information at issue (**TAB 4**).

Responsive information may be excepted from disclosure under certain provisions in the Texas Government Code. Specifically, sections 552.101, 552.104, 552.110, 552.113, and 552.131 may apply if the requested information reveals company trade secrets, financial and commercial/competitive information including, but not limited to, the pricing structure and details of the services provided by the third parties. Therefore, the University will withhold this information pending a decision from your office.

In summary, the University requests your opinion to afford the affected third parties the opportunity to object to the release of their information in accordance with section 552.305 of the Texas Government Code.

All interested parties are listed below. If you need additional information, please do not hesitate to contact me at 512-499-4563.

Sincerely,

Ana Vieira Ayala

cc: **Third Parties:**

Attention: General Counsel
ProQuest LLC
789 East Eisenhower Parkway
Ann Arbor, Ml 48016

Ebsco Publishing, Inc.
Clint Rumble
10 Estes Street
Ipswich, MA 01938
clintr@ebsco.com

cc: Requestor: (w/o Enclosures)

John Eye
The University of Southern Mississippi
123 J Ed Turner Drive
Hattiesburg, MS 39402
john.eye@usm.edu

# Appendix E

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 1, 2018

Ms. Ana Vieira Ayala
Assistant General Counsel & Public Information Coordinator
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

OR2018-10255

Dear Ms. Ayala:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 706451 (OGC# 180485).

The University of Texas at San Antonio (the "university") received a request for specified contracts. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Ebsco Publishing, Inc. ("Ebsco") and ProQuest LLC ("ProQuest"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from ProQuest. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Ebsco explaining why the submitted information should not be released. Therefore, we have no basis to conclude Ebsco has a protected proprietary interest in the

Post Office Box 12548, Austin, Texas 78711-2548 • (512) 463-2100 • www.texasattorneygeneral.gov submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interest Ebsco may have in it.

Next, we note ProQuest seeks to withhold information you have not submitted to this office. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the university, this ruling does not address this information and is limited to the information submitted as responsive by the university.[1]

Next, we note the submitted information is subject to section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

> (a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:
>
> > (1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]
>
> (b) A state agency monthly may post contracts described by Subsection (a) that are valued less than $15,000.

*Id.* § 2261.253(a)(1), (b). The contract at issue is valued at more than $15,000, is between the university, which is a state agency, and a private vendor for the purchase of goods or services, and the contract is not expired or completed. *See id.* §§ 2261.002(2) ("state agency" has meaning assigned by Gov't Code § 2151.002), 2151.002(3) ("state agency" includes university system or institution of higher education as defined by Educ. Code § 61.003). Although ProQuest seeks to withhold portions of the submitted information under sections 552.104 and 552.110 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the university may not withhold any portion of the submitted information under section 552.104 or

---

[1]As we are able to make this determination, we need not address the arguments against disclosure of this information.

Ms. Ana Vieira Ayala - Page 3

section 552.110 of the Government Code. Consequently, the university must release the submitted information in its entirety pursuant to section 2261.253 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Tim Neal
Assistant Attorney General
Open Records Division

TN/mo

Ref: ID# 706451

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Party
(w/o enclosures)

# Appendix F

## Invoice

EBSCO

Billing Inquiries: Accounts Receivable (855) 258-6988 cwilliams4@ebsco.com
Technical Support: 800-758-5995 support@ebsco.com

| | |
|---|---|
| Invoice Number: | 1000 12627-1 |
| Invoice Date: | 04-Oct-2019 |
| Invoice Amount: | [redacted] |
| Currency: | USD |
| Terms: | Due upon receipt |
| Account Number: | LA65276-75 |
| Order ID: | 1722262 |
| Purchase Order: | s4459386 |
| Customer ID: | [redacted] |
| Page Number: | 1 of 3 |

**Billing Address**
UTAH EDUCATION TELEHEALTH NETWORK
UTAH'S ONLINE LIBRARY
101 WASATCH DRIVE, ROOM 215
SALT LAKE CITY, UT 84112-1792

**Service Address**
UTAH EDUCATION TELEHEALTH NETWORK
UTAH'S ONLINE LIBRARY
101 WASATCH DRIVE, ROOM 215
SALT LAKE CITY, UT 84112-1792

| Description | Quantity | Unit Price | Extended Price | Tax | Amount Due |
|---|---|---|---|---|---|
| EBSCO Package | 1 | [redacted] | [redacted] | | [redacted] |
| [redacted] | | | | | |

**Payment Method: ACH or Wire**
[redacted]

**Checks Payable To:**
EBSCO Information Services
Attn: Payment Processing Center
PO Box 204661
Dallas, TX 75320-4661

EBSCO assesses a finance charge of 1% per month on unpaid balances

**Federal Tax ID: 63-6014186**

## Notes

1. Lotte E. Feinberg, "FOIA, Federal Information Policy, and Information Availability in a Post-9/11 World," *Government Information Quarterly* 21, no. 4 (January 2004): 439–60, https://doi.org/10.1016/j.giq.2004.08.004.
2. Feinberg.
3. Ibid.
4. Christina Koningisor, "Transparency Deserts," *Northwestern University Law Review* 114 (2020): 1461.
5. Michael K. McLendon and James C. Hearn, "Mandated Openness in Public Higher Education: A Field Study of State Sunshine Laws and Institutional Governance," *Journal of Higher Education* 77, no. 4 (August 7, 2006): 645–83.
6. Shannon M. Oltmann et al., "Using Open Records Laws for Research Purposes," *Library & Information Science Research* 37, no. 4 (October 2015): 323–28, https://doi.org/10.1016/j.lisr.2015.11.006.
7. Theodore C. Bergstrom et al., "Evaluating Big Deal Journal Bundles," *Proceedings of the National Academy of Sciences* 111, no. 26 (July 1, 2014): 9,425–30, https://doi.org/10.1073/pnas.1403006111.
8. Kelly Taylor and David McMenemy, "Censorship Challenges to Books in Scottish Public Libraries," *Journal of Librarianship and Information Science* 45, no. 2 (June 2013): 153–67, https://doi.org/10.1177/0961000611435254.
9. Oltmann et al., "Using Open Records Laws for Research Purposes."
10. Kate Moore and Lori Duggan, "Transparency and Publisher Pricing Models," *The Serials Librarian* 60, no. 1–4 (April 11, 2011): 105, https://doi.org/10.1080/0361526X.2011.556446.
11. Moore and Duggan, 105.
12. Claire Dygert and Heather Barrett, "Building Your Licensing and Negotiation Skills Toolkit," *The Serials Librarian* 70, no. 1–4 (May 18, 2016): 339, https://doi.org/10.1080/0361526X.2016.1157008.
13. Association of Research Libraries, "ARL Board Affirms Transparency as Core Operating Principle of Licensing," August 23, 2021, https://www.arl.org/news/arl-board-affirms-transparency-as-core-operating-principle-of-licensing/.
14. Moore and Duggan, "Transparency and Publisher Pricing Models.," 105.
15. David Dulaney, "Where's the Harm? Release Unit Prices in Awarded Contracts under the Freedom of Information Act," *The Army Lawyer* 37 (2010): 39.
16. Scholarly Publishing and Academic Resources Coalition, "Data Analysis for Negotiation," SPARC, 2021, https://sparcopen.org/our-work/negotiation-resources/data-analysis/.
17. Gavin Kennedy, *Everything Is Negotiable : How to Get a Better Deal*, Rev. American ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1983); Max H. Bazerman and Margaret Ann Neale, *Negotiating Rationally* (New York: Free Press, 1992), http://catdir.loc.gov/catdir/enhancements/fy0645/91034205-s.html; G. Richard. Shell, *Bargaining for Advantage : Negotiation Strategies for Reasonable People.*, Penguin Business/Management (London: Penguin, 2001); Alan Scott Rau, Edward F. Sherman, and Scott R. Peppet, *Negotiation*, Third edition., University Casebook Series (New York, NY: Foundation Press, 2006); Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement without Giving In*, New edition (London: Random House Business, 2012).
18. Beth Ashmore, Jill E. Grogg, and Jeff Weddle, *The Librarian's Guide to Negotiation: Winning Strategies for the Digital Age* (Medford, New Jersey: Information Today, Inc., 2012), 21.
19. Ashmore, Grogg, and Weddle, *The Librarian's Guide to Negotiation : Winning Strategies for the Digital Age*; Moore and Duggan, "Transparency and Publisher Pricing Models," 105
20. Ashmore, Grogg, and Weddle, The Librarian's Guide to Negotiation.
21. Matt Dunie, "Negotiating with Content Vendors: An Art or a Science?," *Library Technology Reports* 51, no. 8 (2015): 28.
22. Ashmore, Grogg, and Weddle, The Librarian's Guide to Negotiation.
23. Bazerman and Neale.
24. Bazerman and Neale.
25. Roy J. Lewicki, Alexander Hiam, and Karen Olander, *Think before You Speak : The Complete Guide to Strategic Negotiation* (New York: J. Wiley, 1996), http://catdir.loc.gov/catdir/toc/onix02/95045411.html.
26. Alexandra Carter, *Ask for More: 10 Questions to Negotiate Anything* (New York: Simon & Schuster, 2020).
27. "Contracts Library," SPARC, accessed December 7, 2020, https://sparcopen.org/our-work/big-deal-knowledge-base/contracts-library/; Ashmore, Grogg, and Weddle, *The Librarian's Guide to Negotiation*.
28. McLendon and Hearn, "Mandated Openness in Public Higher Education."
29. Oltmann et al., "Using Open Records Laws for Research Purposes."
30. "Office of General Counsel | Public Records Request Form," accessed December 15, 2020, https://legal.olemiss.edu/index/public-records-request-form/.

31. Zach Greenbert, "The Chilling Effect of Sunlight," *George Mason University Civil Rights Law Journal* 29 (Spring 2019): 26.
32. Bergstrom et al., "Evaluating Big Deal Journal Bundles."
33. Ted Bergstrom, "Bundle Contract Project," accessed February 3, 2021, https://econ.ucsb.edu/~tedb/Journals/BundleContracts.html.
34. Paul Doda, "Letter to Theodore Bergstrom," June 4, 2009, https://www.econ.ucsb.edu/%7Etedb/Journals/WSUCourtCase/ElsevierStatementbySalesChief.pdf.
35. Timothy D. Letzring, "The Impact on Institutional Research of Open Meeting and Open Records Laws in Higher Education," *New Directions for Institutional Research* 1997, no. 96 (1997): 27–35, https://doi.org/10.1002/ir.9603; McLendon and Hearn, "Mandated Openness in Public Higher Education."
36. Chad Marzen, "A Constitutional Right to Public Information," *Boston University Public Interest Law Journal* 29 (Summer 2020): 24.
37. "The Court Rules That States Can Limit Public Records Requests to Their Own Residents," *Supreme Court Debates* 16, no. 6 (September 2013): 9–10.
38. Marzen, "A Constitutional Right to Public Information."
39. Jen Becnel-Guzzo, "Freedom of Information Act Response," December 6, 2019.
40. Jay Bender, "Can the Freedom of Information Act Be Improved?," *South Carolina Lawyer* 29 (May 2018): 8.
41. Carter, *Ask for More*, 3.
42. Oltmann et al., "Using Open Records Laws for Research Purposes."