

The Final Version of the NIH Public-Access Policy

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<http://dash.harvard.edu/handle/1/4552041>

The day after I mailed last month's issue of SOAN [February 2005], the NIH released the final version of its public-access policy. My comments in the February issue focused on new concessions to publishers that weakened the policy. I was hoping that by the time the final version of the policy was announced, these concessions would be rolled back, but it was not to be. Hence, I stand by the assessment I wrote last month.

However, many aspects of the policy and its public roll-out deserve some public attention.

The policy was published in three parts: Background (Section I), Public Comments and NIH Responses (Section II), and Text of Final Policy Statement (Section III). While the third section is the most important for NIH-funded authors and their publishers, Section II is definitely worth a close read. It's the longest section of the document and carefully answers the major objections raised against the policy during the comment period.

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The policy will take effect on May 2 [2005]. (Section III.) It will apparently apply to all outstanding NIH grants as of May 2, not just to new grants made on or after May 2. That means that we can expect to see some articles based on NIH-funded research show up in PubMed Central (PMC) fairly soon after May 2, even if the rate of deposit is initially slow. If the policy only applied to new grants, then we'd have to wait for newly funded research to be completed, written up, published, and deposited.

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The policy has three official purposes. "The policy is intended to: 1) create a stable archive of peer-reviewed research publications resulting from NIH-funded research to

ensure the permanent preservation of these vital published research findings; 2) secure a searchable compendium of these peer-reviewed research publications that NIH and its awardees can use to manage more efficiently and to understand better their research portfolios, monitor scientific productivity, and ultimately, help set research priorities; and 3) make published results of NIH-funded research more readily accessible to the public, health care providers, educators, and scientists.” (Section I.)

Later in the document, NIH elaborates on the third purpose. “We believe that improved access through PMC to peer-reviewed, final manuscripts of NIH-supported investigators will facilitate scientific progress because it will enable NIH to manage better its research portfolio and funding choices. The NIH encourages the sharing of ideas, data, and research findings to help accomplish its important public mission to uncover new knowledge that will lead to better health for everyone.” (Section II.E.)

From the standpoint of research and researchers, the third purpose is the most important. The overriding benefit of free online access to research literature is the way it accelerates research, shares knowledge, and enhances the productivity of everyone using the literature. By advancing research, it advances all the benefits of research, from economic prosperity to public health.

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NIH is asking authors to deposit “an electronic version of the author's final manuscript upon acceptance for publication, resulting from research supported, in whole or in part, with direct costs from NIH. The author's final manuscript is defined as the final version accepted for journal publication, and includes all modifications from the publishing peer review process.” (Section III.) It's not clear whether authors may enhance this edition with changes introduced by a journal's copy editing process. But at least PMC will accept “corrections and other necessary revisions of the author's final manuscripts” (Section II.D.)

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The recent good news and bad news are closely yoked together. The bad: the permissible delay after publication has been extended beyond six months. The good: NIH will exhort authors to choose the shortest possible delay. Here's how the policy phrases this key provision: “At the time of submission, the author will specify the timing of the posting of his or her final manuscript for public accessibility through PMC. Posting for public accessibility through PMC is requested and strongly encouraged as soon as possible (and within twelve months of the publisher's official date of final publication).” (Section III.)

In the new FAQ on the policy, the NIH goes beyond exhorting grantees to authorize early release by suggesting language for authors to include in their copyright transfer agreements with publishers (Question 26): “Journal acknowledges that Author retains the right to provide a copy of the final manuscript to NIH upon acceptance for Journal publication or thereafter, for public archiving in PubMed Central as soon as possible after publication by Journal.”

<http://web.archive.org/web/20050331181102/http://www.nih.gov/about/publicaccess/022405QA.pdf>

If taxpayers can't simply mandate deposit as a condition of public funding, then "strong encouragement" and suggested contract language are just about second best. We'll see how well it works in practice, especially if some publishers refuse to sign the new contract language and strongly encourage authors to take the opposite course and either deposit as late as possible or never deposit at all.

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Is publisher permission needed for author deposits in PMC? This simple question is harder than it looks. First note that the suggested contract language (above) asks journals to acknowledge that authors have permission to deposit their work in PMC. But is this strictly necessary or simply a prudent way to guarantee what is already permissible?

The NIH says that it has two independent and separately sufficient legal grounds to disseminate the research articles of its grantees: one is copyright-holder consent and the other is a government-purpose license long since codified in the Code of Federal Regulations (45 C.F.R. 74.36). The NIH has decided to rely on the former and to hold the latter in readiness in case it is ever needed. (Section II.P.2.)

So the answer to the question seems to be: no, publisher permission is not needed but NIH has decided to seek it anyway. One day we may hear the story on why it is taking this position.

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In the teleconference announcing the new policy, Elias Zerhouni made a good point that is often obscured in the press. The policy has not replaced a firm six month maximum embargo with a firm 12 month maximum embargo. It has replaced a firm six month maximum embargo with a flexible period whose duration depends on the author's discretion.

We could say that the new embargo is "zero to 12 months" but that does not reflect the reality that deposit is "voluntary" (Section III) and needn't occur at all. The policy encourages authors to deposit as soon as possible within 12 months. But we have to understand that 12 months is not a deadline but just another part of the NIH encouragement.

If there's a contradiction in suggesting a deadline (with the "12 month" language) and suggesting that there is no deadline (with the "voluntary" language), then the final version of the policy and the accompanying commentary do nothing to dispel it.

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There will be no penalties for non-deposit. (Section II.O.) It's not clear whether this is new. When the "requirement" was reduced to a "request" in the September 3 draft released for public comment, there were vague but ominous suggestions that

non-compliance might jeopardize a grantee's future funding. Now it's clear that it won't. But perhaps it never would have; we'll never know.

Publishers who dislike the policy are saying that any "request" from a funding agency, especially one accompanied by "strong encouragement," is intrinsically coercive even without formal penalties. Perhaps. But I wonder whether it's any more coercive than a request from a journal, especially one accompanied by strong encouragement, to delay PMC deposit. The two requests seem roughly equal in power to me, whether we call them both coercive or neither coercive. And that is what worries me: there is dangerous potential in this policy to create painful and career-jeopardizing dilemmas for researchers who will have to choose between snubbing their funder and snubbing their publisher. A simple mandate would not only deliver more OA content to the public, but spare authors this dilemma.

Some publishers are already on record as willing to accommodate any decision made by their NIH-funded authors. That's excellent and I hope that others follow suit.

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The good news is that authors can take steps to avoid the painful funder-publisher dilemma. One simple way is to submit their work to an OA journal. Another is to submit their work to one of the non-OA journals that has publicly stated its willingness to accommodate any author decision on PMC timing. But the simplest way of all may be for authors to self-archive their work, and to do so as soon as possible after publication.

Authors who experience the funder-publisher dilemma once needn't experience it twice by taking any one of these three remedies. Conversely, journals that refuse permission for postprint archiving and play tug of war with the NIH, using authors as rope, will only hurt themselves in the long run by deterring submissions.

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The NIH explains that extending the six month delay up to 12 months or even beyond will provide greater "flexibility" (II.A, II.F, II.J) and therefore should assure greater "participation" (II.J). But if you look closely, NIH is clear that this is flexibility for publishers, not authors. For example: "NIH has made modifications to the proposed policy to provide greater flexibility to accommodate the range of business models represented by large commercial publishing houses through the smaller specialized journals of learned societies." (Section II.F)

It's true that this extension will give publishers greater flexibility and it's true that publishers were asking for greater flexibility. But the central request in the policy is directed to authors, not publishers. Greater flexibility for publishers would only assure different decisions by authors if author decisions are controlled or influenced by publishers. Are they? We don't know yet. But if they are, then publisher influence is more likely to pull against author participation and early release than in favor of them.

In the teleconference announcing the policy, Elias Zerhouni succinctly justified the new concession to publishers on the ground that it provides "maximum flexibility for

maximum participation.” But if the NIH really wanted maximum participation, then it should require participation.

The kind of flexibility now built into the policy doesn’t ensure full participation. It makes participation discretionary and ensures that some authors will participate and some won’t. The NIH can’t have it both ways. If public access through PMC is voluntary, there won’t be maximum participation. If it wants maximum participation, then it should ignore publisher preferences and bind authors with an OA condition on their research grants.

Maximum participation is the right goal—for the NIH, for taxpayers, for health care, and for science. Hence, NIH should adopt the most effective means to that goal (a participation requirement), not endanger the goal in order to fit the most politically expedient means (request plus discretion plus exhortation). If it’s true that NIH’s government-purpose license is a sufficient legal basis for the public-access policy, and that publisher permission is unnecessary, then compromises designed to give publishers flexibility and solicit their permission are also unnecessary.

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While the request for PMC deposit is directed at authors, consenting publishers may improve upon the author’s decision in two ways. “The publisher may choose to furnish PMC with the publisher’s final version, which will supersede the author’s final version. Also, if the publisher agrees, public access to the publisher’s final version in PMC can occur sooner than the timing originally specified by the author for the author’s final version.” (Section III.)

Publishers who worry about the version control problem (one version on PMC and another version at their own site) should take advantage of the first option. It will not only address their worry. It will make their branding visible in their own chosen way and provide exactly the links they want back to their own site. As long as authors are complying with the NIH request, publishers have everything to gain and nothing to lose by replacing the authors’ versions with their own.

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Note that there are now *three* publication-related requests in the overall NIH grants process. (1) Grantees are “expected” to publish the results of their research rather than not to publish them. (2) Grantees are “required” to turn in copies of any publications based on funded research at end of grant period as part of their review. These copies will not necessarily be deposited in PMC for public access. (3) Grantees are “requested” but not required to deposit their publications in PMC as soon as possible within 12 months after publication. Acceding to this third request will also satisfy the second, which is another incentive for authors to deposit their work.

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NIH continues to allow OA journal processing fees, as well as color and page charges at TA journals, to be “allowable charges” to NIH research grants. (Section II.H.)

In fact, NIH spends about \$30 million/year on “direct costs for publication expenses, including page and color charges and reprints.” (Sections II.F, II.L.) Compare that with the estimated \$2 to \$4 million/year that the public-access program will cost. (Section II.L.) The public-access budget is a pittance of the journal-subsidy budget for subscription-based journals. Publishers of subscription journals who object the NIH program is diverting money from research on cures should relinquish their taxpayer-funded subsidies if they want to make the argument with clean hands.

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The NIH will create an “NIH Public Access Advisory Working Group of the NLM Board of Regents” to advise it “on implementation and assess progress in meeting the goals” of the policy. (Section II.F.) This sounds like a good idea, but I worry. If the advisory group is not balanced, it will be criticized. If it is balanced, it could be paralyzed.

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The “final” version of the policy is not really final. “Once the system is operational, modifications and enhancements will be made as needed with the Working Group, or a permanent subcommittee of the Board, providing ongoing advice on improvements.” (Section II.F.) “This Policy is subject to periodic review based upon lessons learned in the course of its implementation. Issuance of this Policy is the beginning of a process that will include refinement as experience develops, outcomes are evaluated, and public dialogue among all the stakeholders is continued.” (Section II.O).

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Dr. Zerhouni told the Chronicle of Higher Education on January 7 that public comments on the six-month version of the policy were “overwhelmingly supportive.”

<http://web.archive.org/web/20070405232406/http://chronicle.com/prm/weekly/v51/i18/18a02801.htm>

<http://legacy.earlham.edu/~peters/fos/2005/01/more-on-nih-plan.html>

So has the NIH left its moorings by changing a central element of the policy after the public comment period closed? All it says about this in the new document is that the “final Policy reflects consideration of public comments received. ... ” (Section I.)

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One of the only obscure sentences in the new NIH document raises intriguing possibilities: “Finally, authors can indicate what copyright restrictions, if any, apply to their manuscripts when submitting them to PMC and can choose an appropriate PMC submission agreement that recognizes those rights.” (Section II.P.2.) Does this simply accommodate the difference between government-funded scientists, whose work is copyrightable, and government-employed scientists, whose work is not? Or does it accommodate authors who are copyright holders at the time of deposit and wish to waive some of their rights and allow PMC users to exceed fair use in

copying and sharing their work? Is NIH offering flexibility similar to the Creative Commons?

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Free online PMC content will be free to everyone with an Internet connection, not just to U.S. taxpayers. During the comment period, some critics not only observed that this goes beyond the taxpayer argument for open access, but somehow “disadvantages American scientists.” It’s hard to decide which would be more commendable in a responsible public agency, ignoring absurd objections like this or answering them. NIH decided to answer this one and did it well: “We believe that American scientists and global health will benefit from greater access to research publications leading to increased collaborative efforts worldwide. In an increasingly interdependent world, the United States and nations around the globe not only share the risk of diseases, but also the challenge to respond. This can best be accomplished in an environment in which rapid communication is possible, wherein scientific knowledge is readily available to all, and where research is conducted based on partnership.” (Section II.N.)

If you're curious just how far the taxpayer argument alone can go in answering this objection, then see my discussion of Canada’s attempt to offer some publicly funded research free online only to Canadians (from SOAN for 9/03),

<http://legacy.earlham.edu/~peters/fos/newsletter/09-04-03.htm#taxpayer>
(Scroll to Section 4.)

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In January, Dr. Zerhouni told the Washington Fax that “[t]he fundamental breakthrough of this policy is ... not the timing, it's the fact that we're creating for the first time the precedent and the right for a federal agency to have a venue or pathway for its scientists to publish and give access to the public.”

<http://legacy.earlham.edu/~peters/fos/2005/01/why-nih-weakened-its-policy.html>

This is a good point. I don’t want to shift attention away from the unjustified weakening of the policy. But I do want to acknowledge that, despite the weakening, the policy does establish a significant new precedent. U.S. federal funding agencies can provide free online access to the results of publicly-funded research, even when the research was not performed by government employees.

The trick will be to get other funding agencies to take the right lesson from this precedent. Which leads to the final question:

Where do we go from here? Here are the main steps:

- (1) Let’s strengthen the NIH policy. First, make the request a requirement. Taxpayer access to publicly-funded medical research should be guaranteed. Second, reduce the permissible delay to six months.

The House of Representatives originally recommended both of these provisions and it hasn't forgotten. I've been visiting the offices of members of both parties in both Houses of Congress and detect bipartisan support for strengthening the policy. Revising the policy won't be easy or quick, since there are also members who side with publishers or don't care. But there are real grounds for hope.

U.S. citizens, and U.S. institutions like universities and libraries, can write to their members of Congress to let them know how they feel.

<http://www.congressmerge.com/onlinedb/powersearch.htm>

U.S.-based institutions and organizations can join the Alliance for Taxpayer Access, which is very active and effective in this cause.

<http://www.taxpayeraccess.org>

Stakeholders can also write directly to the NIH.

PublicAccess@nih.gov

- (2) Get Congress to monitor compliance. What percentage of NIH grantees deposit their work in PMC within 12 months? Of those that do, what is the average delay after publication authorized by the author? If the compliance rate is low, or if the average delay is long, then the urgency of revising the policy will increase.
- (3) Get other funding agencies—inside and outside the U.S.—to adopt the best parts of the NIH policy and avoid worst. Do provide free online access to publicly-funded research, but don't make it discretionary and don't delay the public release more than six months.
- (4) Encourage NIH-funded researchers to deposit all their eligible publications and to authorize public release immediately upon publication.

At the same time, encourage them to self-archive all their research articles, including those based on NIH-funded research. If they do, they'll get—and give—the benefits of OA for all their work. If they do it for their NIH-funded work, then the compromises in the new policy will not matter at all. The NIH welcomes its grantees to deposit their articles in other, fully OA repositories in addition to PMC.

- (5) Encourage all biomedical journals to let their NIH-funded authors follow the NIH's "strong encouragement" to authorize immediate public release. Don't make authors choose between their funder and their publisher. If you belong to a scientific society that publishes journals in biomedicine, then let the society know that this is how you feel. If you edit or referee for a journal in biomedicine, then let the journal know that this is how you feel.

I'd like to hear about any journals that pressure their authors not to comply with the NIH request or that refuse to accept articles by NIH-funded authors. If you write to me

in confidence, I will respect your confidence. If you authorize me to do so, I will post your message to the SPARC Open Access Forum.

Policy on Enhancing Public Access to Archived Publications Resulting from NIH-Funded Research (the text of the new policy, February 3, 2005)

<http://grants.nih.gov/grants/guide/notice-files/NOT-OD-05-022.html>

<http://legacy.earlham.edu/~peters/fos/2005/02/nih-public-access-policy-finally.html>

NIH press release on the final version of the policy, February 3, 2005

<http://www.nih.gov/news/pr/feb2005/od-03.htm>

NIH policy implementation plan

http://www.nih.gov/about/publicaccess/publicaccess_imp.pdf

<http://legacy.earlham.edu/~peters/fos/2005/02/nih-policy-implementation-plan.html>

NIH public-access policy home page (many related documents)

<http://web.archive.org/web/20050211033606/http://www.nih.gov/about/publicaccess/index.htm>

NIH policy FAQ (enlarged, updated, and improved)

<http://web.archive.org/web/20050331181102/http://www.nih.gov/about/publicaccess/022405QA.pdf>

My comments from last month on the weakening of the NIH policy

<http://legacy.earlham.edu/~peters/fos/newsletter/02-02-05.htm#nih>

[...] [Here omitting some news stories and press releases on the NIH policy from the previous month.]

