# Another OA Mandate: The Federal Research Public Access Act of 2006

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Earlier today, Senators John Cornyn (R-TX) and Joe Lieberman (D-CT) introduced the Federal Research Public Access Act of 2006 (FRPAA) in the US Senate. This is giant step forward for OA, even bigger than the CURES Act that Senator Lieberman introduced in December 2005.

Like CURES, FRPAA will mandate OA and limit embargoes to six months. Unlike CURES, it will not be limited to medical research and will not mandate deposit in a central repository. It will apply to all federal funding agencies above a certain size. It instructs each agency to develop its own policy, under certain guidelines laid down in the bill. Some of those agencies might choose to launch central repositories but others might choose to mandate deposit (for example) in the author's institutional repository. Finally, while CURES was mostly about translating fundamental medical research into therapies, with a small but important provision on OA, FRPAA is all about OA. Here are some details, citing the bill by section number in parentheses.

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FRPAA applies to all federal funding agencies that spend more than $100 million/year on research grants to non-employees ("extramural" research) (Section 4.a). At the moment, 11 agencies fall into this category: the Environmental Protection Agency (EPA), National Aeronautics and Space Administration (NASA), National Science Foundation (NSF), and the cabinet-level Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, and Transportation.

While the breadth of disciplines doesn't extend to the humanities or social sciences (beyond economics), it's much wider than medicine alone. Also note that by covering the Department of Health and Human Services, FRPAA covers the NIH.

Remember that in George Bush's state of the union address on January 31, 2006, he proposed spending an additional $146 billion on science over the next 10 years, including $50 billion to double the budgets of the NSF, the Department of Energy's Office of Science, and the Department of Commerce's National Institute of Standards and Technology. If Congress adopts these budget increases, they will directly expand the size of the federal commitment to OA—assuming that Congress also adopts the FRPAA.

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Agencies will have one year from the adoption of the bill to develop their OA policies (4.a).

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Agencies may host their own OA repositories (4.b.6.A), the way NIH hosts PMC, or they may ask grantees to deposit their work in any OA repository meeting the agency's conditions of open access, interoperability, and long-term preservation (4.b.6.B).

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FRPAA applies to the final version of the author's peer-reviewed manuscript (4.b.1), which must incorporate all changes introduced by the peer-review process (4.b.2). Publishers will have the option to replace the author's manuscript with the final published version (4.b.3.A), at least when the agency decides that the published version advances the agency's "goals … for functionality and interoperability" (4.b.3.B).

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FRPAA applies to manuscripts arising from "research supported, in whole or in part from funding by the Federal Government" (4.b.1). Hence it applies to projects with multiple sources of funding, provided that at least one is covered by FRPAA. It applies to manuscripts with multiple authors, provided that at least one is covered by FRPAA.

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Agencies must insure free online access to these manuscripts "as soon as practicable, but not later than 6 months after publication in peer-reviewed journals" (4.b.4).

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Agency policies must apply to agency employees as well as agency grantees (4.c.1). In the former case, the resulting articles will be in the public domain from birth, labeled as such, and released to the public immediately upon publication (4.c.2).

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The OA mandate does not apply to lab notes, preliminary data analyses, personal notes, phone logs (4.d.1), classified research, revenue-producing publications like books, patentable discoveries (4.d.2), or work not submitted to journals or not accepted for publication (4.d.3).

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Agencies will maintain OA bibliographies of publications resulting from their funded research, with active links from citations to OA editions (4.b.5).

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Nothing in the bill modifies patent or copyright law (4.e).

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Instead of (or perhaps simply before) relying on copyright-holder consent as the legal basis for disseminating copies of the articles, the agencies must "make effective use of any law or guidance relating to the creation and reservation of a Government license that provides for the reproduction, publication, release, or other uses of a final manuscript for Federal purposes" (4.c.3).

This section does not give agencies a license but asks them to use existing statutory or regulatory licenses as fully as possible. It's relevant, then, that there are two such licenses on which agencies may rely: 2 CFR 215.36(a) and 45 CFR 74.36(a).

Don't let the technical detail of this section disguise its importance. The NIH recognized the existence of a government license to provide OA to NIH-funded research, but deliberately decided not to use it. Instead, it relied on publisher consent, with the effect that it accommodated, if not invited, publisher resistance. By relying on government licenses instead, FRPAA makes publisher dissent irrelevant.

The 2 CFR 215.36(a) government license.

https://www.law.cornell.edu/cfr/text/2/215.36

The 45 CFR 74.36(a) government license.

https://www.law.cornell.edu/cfr/text/45/74.36

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Here's how the bill describes its rationale: "Congress finds that the Federal Government funds basic and applied research with the expectation that new ideas and discoveries that result from the research, if shared and effectively disseminated, will advance science and improve the lives and welfare of people of the United States and around the world" (2.1). Moreover, "the Internet makes it possible for this information to be promptly available to every scientist, physician, educator, and citizen at home, in school, or in a library" (2.2).

The FRPAA is certainly the strongest OA policy proposed to date in the US. It's comparable in strength to the draft RCUK policy (June 2005), though different in several details. I'd be delighted if it passed. But for completeness, let me point out three ways in which it could be even stronger.

(1) FRPAA contains no provision to let grantees use grant money to pay processing fees charged by OA journals. This is regrettable. Funders should support OA journals as well as OA archiving. Long-term, we will need both, especially if subscription-based journals decline. The CURES bill has the same regrettable omission.
(2) FRPAA is silent on the timing of deposit, as opposed to the timing of OA release. By contrast, CURES requires deposit at the time an article is accepted by a journal. CURES has the advantage on this score, and we can hope that FRPAA will adopt its approach before much longer. If authors deposit their articles upon acceptance, then repositories can release the metadata immediately (to jumpstart awareness,

discoverability, and impact), and release the full text after the author-requested embargo, or six months, whichever comes first.

(3) FRPAA is silent on the consequences of non-compliance. The CURES bill, by contrast, explicitly says that non-compliance may be a ground for the funding agency to refuse future funding. Again, CURES has the advantage here.

However, the fact that FRPAA doesn't address these issues doesn't mean that the resulting OA policies won't address them. The covered agencies are free under the guidelines to let grantees use grant funds to pay OA journal processing fees, to require deposit at the time of publication, and to impose a sanction on non-compliance. But because the agencies are also free to go the other way, we'll have to lobby each agency separately and probably settle for a mix in which some policies are better than others.

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While the FRPAA covers many agencies, if we focus on its consequences for the NIH, then we have to see it as the *fifth* recent sign that the NIH's weak request may become a strong requirement. On November 15, 2005, the agency's own Public Access Working Group (PAWG) recommended that the request for public access be upgraded to a requirement and that the permissible delay be shortened from 12 months to 6 months. On December 7, 2005, Senator Lieberman introduced the CURES Act, which would have the same effect. On February 8, 2006, the NLM Board of Regents endorsed the November 2005 PAWG recommendations in a letter to NIH Director Elias Zerhouni. On April 4, 2006, Zerhouni told the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies that "it seems the voluntary policy is just not enough" to achieve the agency's goals […]. And now FRPAA.

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This is a superb bill. It's informed by the arguments for OA and the shortcomings of the NIH policy. It's one more sign that legislators, in the US and abroad, are not treating the NIH policy as a precedent but taking every opportunity to improve upon it: going beyond a request to a requirement, beyond long or indefinite embargoes to firm deadlines, beyond biomedicine to all disciplines, beyond publisher consent to a federal purpose license that does not accommodate publisher resistance, and at least possibly, beyond central to distributed archiving. FRPAA strengthens the NIH policy and extends the strong new policy to all the major research-funding agencies in the federal government. […] It will give taxpayers access to the non-classified research they fund with their taxes. It will make a very large and useful body of research even more useful than it already is by sharing it with all who can apply or build upon it. In both respects it will increase the return on the taxpayers' enormous investment in this research.

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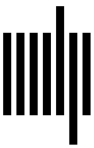

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