An Open Access Mandate for the NIH

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http://dash.harvard.edu/handle/1/4322583

The day after Christmas, President Bush signed an omnibus spending bill containing a provision requiring the US National Institutes of Health (NIH) to mandate open access for NIH-funded research.

Here's the language that just became law:

> The Director of the National Institutes of Health shall require that all investigators funded by the NIH submit or have submitted for them to the National Library of Medicine's PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law.

This is a momentous victory, despite the 12 month embargo. Measured by the ferocity of opposition overcome and the volume of literature liberated, it's the largest victory in the history of the OA movement. It's only a plateau, not a summit, but it's an immense success. Researchers, OA advocates, and everyone concerned to advance medical knowledge, are justified in feeling joy and relief.

It's big for at least five reasons:

(1) It's the first OA mandate for a major public funding agency in the US. It's also the first OA mandate for any government funding agency worldwide adopted by the national legislature rather than directly by the agency. (This explains, BTW, why publishing lobbyists have been able to delay it for three years.)

(2) It comes after a long struggle. Congress asked for an OA mandate at NIH in 2004 but in 2005 the agency adopted a policy to request rather than require OA. OA proponents have worked tirelessly to persuade Congress to strengthen it ever since. OA opponents

have worked just as hard on their side, first to keep the policy weak and then to make the weak policy succeed in order to head off momentum for a mandate.

For a timeline of the saga, with links, see SOAN for August 2007.

http://www.earlham.edu/~peters/fos/newsletter/08-02-07.htm#nih

But for a one-paragraph encapsulation, see SOAN for November 2007:

http://www.earlham.edu/~peters/fos/newsletter/11-02-07.htm#nih

> In September 2004, the House of Representatives appropriations report demanded an OA mandate at the NIH. The report language was not binding, and the NIH drafted a weaker policy requesting OA but not requiring it. The Senate appropriations bill remained silent on the issue, and the conference committee reconciling the House and Senate appropriations bills adopted the NIH's watered down version of the policy. In May 2005, the NIH policy took effect as a request. In November 2005, the NIH's own Public Access Working Group recommended that the policy be strengthened to a requirement. In February 2006, the National Library of Medicine Board of Regents affirmed the recommendation that the policy be strengthened to a requirement. The same month, the NIH released data showing that grantee compliance with its request was below 4%. In April 2006, NIH Director Elias Zerhouni told a House subcommittee that "the voluntary policy is just not enough" to achieve the agency's goals. In June 2006, the House Appropriations Committee again demanded an OA mandate at the NIH, this time as part of the binding appropriations bill. Again, the Senate was silent on the issue. But this time, before the conference committee could reconcile the bills, the Democrats took control of both the House and the Senate. Party bickering and budgetary delays forced Congress to turn to a continuing resolution to fund the government, dropping the House appropriations bill, canceling the vote on the Senate counterpart, and forcing us to start all over again the following year. In March 2007, Dr. Zerhouni testified again that the agency needed an OA mandate. In July 2007, once again, the House of Representatives adopted an appropriations bill demanding an OA mandate at the NIH. This time, in October 2007, finally, the Senate adopted the same language.

If NIH had adopted an OA mandate in 2004 when Congress originally asked it to do so, it would have been the first anywhere. Now it will be the 21st.

(3) It sets a precedent, breaks the ice, or cuts the shackles—pick your metaphor. Other US agencies no longer have to worry that a strong OA policy would antagonize Congress or the White House. This is a green light for agencies that have been waiting for a green light. Some agencies will act on their own and some will wait to see how the NIH policy fares in court.

(4) It's big because the NIH is big. The NIH is the world's largest funder of scientific research (not counting classified military research). Its budget last year, $28 billion, was larger than the gross domestic product of 142 nations. As my colleague Ray English points out, it's more than five times larger than all seven of the Research Councils UK combined. NIH-funded research results in 65,000 peer-reviewed articles every year or 178

every day. The NIH is the one funder that could do the most for OA. Its OA mandate will not only free up an unprecedented quantity of high-quality medical research. It will also make a giant step toward cultivating new expectations—among researchers, funders, governments, and voters—that publicly-funded research should be OA.

(5) Finally, the policy is strong. (Or: The policy is strong, finally!) The mandatory deposit policy will drive compliance toward 100%. The bill requires deposit immediately upon acceptance in a peer reviewed journal. That's much better than requiring deposit during or after the 12-month embargo period. Immediate deposit allows immediate release of metadata, enhancing the article's visibility, and allows the NIH to switch the article from closed to open access, automatically, as soon as the embargo runs. Agency staffers won't have to hunt down the author and beg for a copy of an old manuscript. In short, Congress is instructing the NIH to implement what I call the dual deposit/release strategy or what Stevan Harnad calls immediate deposit / optional access.

The policy does permit a 12 month embargo, which I think is too long. But here's what I said about that in August [2007]:

> I wish the bill had shortened the embargo. Any embargo is a compromise with the public interest, and longer embargoes are more harmful in medicine than in other fields. But I'd much rather have a mandate than a shortened embargo, if we had to choose. The reason is simply that a short embargo without a mandate isn't really short, since there would be no enforceable deadline for ending the embargo and providing OA. Moreover, we don't have to choose. Shortening the embargo can be our next goal. … The bill is … a significant, unmistakable gain on the most important front—the mandate—and [since the current embargo is 12 months] it's not a loss or retreat on any front. …

[…]

Last month I predicted a publisher lawsuit to prevent the NIH from implementing an OA mandate or at least to delay it as long as possible.

http://www.earlham.edu/~peters/fos/newsletter/12-02-07.htm#predictions

If publishers do sue, the NIH will defend vigorously—and of course will only benefit from the fact that Congress and the President ordered it to adopt an OA mandate. Since the bill itself requires the NIH to implement the mandate "in a manner consistent with copyright law," it would be premature for publishers to sue on copyright grounds before they see the final shape of the policy. In SOAN for August 2007, I outlined three ways in which NIH could implement an OA mandate without infringing copyrights.

http://www.earlham.edu/~peters/fos/newsletter/08-02-07.htm#nih

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In the short time since President Bush signed the omnibus spending bill, I've seen journalists and bloggers make a range of mistakes in understanding what has taken place.

Among the misunderstandings: that the NIH now has a mandate in place (rather than instructions to adopt one); that the mandate is to publish in OA journals (rather than to deposit in OA repositories); that the mandate is to bypass journals and peer review (rather than provide OA to articles already published in peer-reviewed journals); that the mandate applies to the published versions of articles (rather than the final versions of the authors' peer-reviewed manuscripts); that the mandate will direct deposits to PubMed (rather than PubMed Central); that the new NIH budget is $29 million (rather than $29 billion); that the mandate will only last for one year (rather than indefinitely); that the OA mandate requires violation of copyright law (rather than compliance with it). The misunderstandings no longer function as impediments to legislation, but they could well function as impediments to implementation. As you see them crop up, please do what you can to correct them.

Many individuals and organizations deserve our thanks for this long-awaited and hard-won victory. Thanks to all supporters of OA in Congress, members and staffers alike. Thanks to all supporters of OA in the Executive branch, including the NIH itself. Thanks to SPARC and the Alliance for Taxpayer Access for their energetic and effective work with policy-makers. Thanks to Heather Joseph for her masterful and untiring leadership of both organizations. Thanks to all of you who wrote to your Representatives and Senators to support public access for publicly-funded research. And thanks to Santa!

The Consolidated Appropriations Act of 2008, containing the provision mandating OA at the NIH

http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02764:

(The final colon is part of the URL.)

For more detail on the 2007 progress toward this victory, and my evaluation of the bill that is now law, see my newsletter articles from August, November, and December.

http://www.earlham.edu/~peters/fos/newsletter/08-02-07.htm#nih

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