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Public Access to Data

Mark S. Frankel

Late last year, Congress amended the FY 1999 Omnibus Spending Bill (Public Law 105-277), instructing the Office of Management and Budget (OMB) to revise Circular A-110. The revisions will "require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act" (FOIA). At the time, the legislation went unnoticed by the scientific community. No longer. The measure has brought howls of protest from scientists, their institutions, and the federal agencies that fund scientific research. The clamor has reached Capitol Hill, where Representative George Brown (D-Calif.), ranking minority member on the House Science Committee, has introduced a bill (HR 88) to repeal the requirement.

What is all the fuss about? It's certainly not about the well-intentioned objective of giving the public the opportunity to examine the basis on which scientific insights are derived or policy established. But the devil is in the details. On 4 February 1999, OMB issued its proposed revision to the circular, indicating how it intends to implement the legislation.* The concerns raised by the scientific community regarding the scope, timing, and costs associated with providing "all data produced" are addressed in the revision by defining data as information "used by the federal government in developing policy or rules." Does that phrase truly narrow its scope? When policy and science are often inextricably linked, which research done today will be needed for tomorrow's policy? How long will scientists have to retain their data? On the issue of when data must be made publicly accessible, the proposed revision refers to "data related to published research findings" but gives no indication of what will be considered a published finding under the law. With respect to costs, federal agencies receiving such FOIA requests "may charge the requestor a reasonable fee [that] should reflect costs incurred" by the agency and grantees. But how will these costs be determined and apportioned among funders, researchers, and their institutions?

The OMB proposal is conspicuously silent on several other concerns. Will scientists be required to hand over their lab notebooks, tissue cultures, and field notes as "data"? Does the privacy exemption under FOIA adequately protect the interests of research subjects? How will intellectual property rights be accommodated by the new requirement? Under U.S. law, scientists have a year from the date of publication to file a patent application. Will allowing data to be publicly available through FOIA threaten a scientist's foreign patent rights? How will the revision affect university-industry partnerships, if such collaborations involve a commingling of private and public monies? Will ambiguities in determining which data would be subjected to a FOIA request make industry reluctant to pursue such collaborations? Finally, there is concern that the requirement would be exploited by groups such as animal rights organizations or businesses that feel threatened by particular research or the policies based on it.

Fortunately, OMB recognizes the complexity of these matters and encourages comments, which must be received by 5 April 1999. Scientists and their institutions ought to comment so that the spirit of the legislation can be realized without impeding promising research. Here are some things to recommend to OMB and to members of Congress: The definition of data should be determined through negotiations between the funding agencies and the institutions covered by Circular A-110. Any reference to published research findings should state that "publication" is acknowledged to mean "in a scientific journal after formal peer review." Whether to charge a fee for complying with the requirement should not be at the discretion of an agency; instead, the revision should include a cost-recovery provision for grantees. Finally, the scientific community should urge Congress to hold hearings on HR 88 so that there can be open discussion on how to balance the public's right to have access to data and the benefits of scientific research.

The author is the director of the AAAS Program on Scientific Freedom, Responsibility and Law.

*Federal Register 64, 5684 (1999).

The AAAS and Federal Focus, Inc., will cosponsor a briefing on the proposed revision at the AAAS in Washington, DC, on 26 February 1999. Representatives from OMB, federal agencies, Congress, the university research community, and industry will be on hand to address the concerns of scientists.

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