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VIA EMAIL

April 7, 2020

Monica Potter-Johnson
Office of Justice Programs
Office of the General Counsel
Attention: FOIA Staff
810 7th Street, NW
Room 5400
Washington, DC 20531
202-307-6235
Email: FOIAOJP@usdoj.gov

Dear Ms. Potter-Johnson:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the U.S. Department of Justice's ("DOJ") Office of Justice Programs ("OJP").

EPIC seeks documents related to studies of predictive analytics in law enforcement funded and performed by the National Institute of Justice ("NIJ") between 2014 and present. EPIC also seeks records about the Bureau of Justice Assistance's ("BJA") Crime Analysis on Demand program.[1]

Documents Requested

1. All records concerning all of the "more than a dozen law enforcement agencies, researchers, and other entities" that the National Institute of Justice funded in order "to develop and implement advanced place-based techniques."[2] This includes, but is not limited to, contracts and correspondences about development, efficacy, or propriety of the techniques.

2. Evaluation of the five-city study resulting from the $500,000 NIJ grant to Rutgers University to study the efficacy of Risk Terrain Modeling in those jurisdictions. This study was expected to be completed in late 2015-early 2016.[3]

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[1] U.S. Dep't of Justice, *Predictive Analytics in Law Enforcement: A Report by the Department of Justice* 4 (Nov. 2014), *I literal* https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-16-06-15-DOJ-FOIA-20200319-Settlement-Production-pt1.pdf.
[2] *Id.*
[3] *Id.* at 4.

Privacy is a Fundamental Right.

3. Evaluation of the New York Police Department study of Risk Terrain Modeling funded by the NIJ, expected to be completed in 2017.[4]

4. The survey disseminated to more than 900 state and local agencies nationwide by the Bureau of Justice Statistics on their use of predictive techniques in geospatial mapping.[5]

5. All records about the use of Bureau of Justice Assistance's Crime Analysis on Demand in state and local police departments.

6. Contracts, correspondence, and other memoranda between the Bureau of Justice Assistance and Strategies for Policing Innovation.

Background

Evidence-based assessments are designed to predict future behavior by analyzing statistical data. In the criminal justice system, risk-assessment algorithms use data about defendants including their criminal history (e.g. previous offenses, failure to appear in court, violent offenses, etc.) or socio-demographic characteristics (e.g. age, sex, employment status, drug history) to then predict the person's risk of recidivism or risk of failing to appear when on bail. Such predictions are based on average recidivism rates for the group of offenders that share the defendant's characteristics. The recidivism calculation has been used by judges in pretrial release hearings, parole and probationary hearings, and are increasingly being used as a factor in determining sentencing.[6] Other evidence-based assessments are used in policing, referred to as Predictive Policing, to use historical data in order to try to predict where crime will occur in order to inform police resourcing decisions. However, many have questioned the underlying data, the reliability of the outcomes, as well as defendants' lack of opportunity to challenge the results.

In 2014, then U.S. Attorney General Eric Holder called for the U.S. Sentencing Commission to study the use of algorithms in courts because he was concerned that the sentencing scores may be a source of bias.[7] In the same year, Jonathan Wroblewski, Director of the Office of Policy and Legislation in the Justice Department, sent a letter to the U.S. Sentencing Commission asking the commission to study how data analysis was being used in sentencing, and to issue recommendations on how such analysis should be used.[8] Director Wroblewski expressed reservations about components of pending sentencing reform legislation[9] that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic

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[4] *Id.*

[5] *Id.* at 6.

[6] Thomas H. Cohen, Christopher T. Lowenkamp, & William E. Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary,* Administrative Office of the U.S. Courts (Sept. 2018), https://www.uscourts.gov/sites/default/files/82_2_3_0.pdf.

[7] Eric Holder, Speech Presented at the National Association of Criminal Defense Lawyers 57th Annual Meeting, 27 Fed. Sentencing Reporter 252 (April 2015), http://fsr.ucpress.edu/content/27/4/252.full.pdf+html.

[8] Letter from Jonathan Wroblewski, Dir. of the Office of Policy Legislation, Dep't of Justice, to Patti Saris, Chair of U.S. Sentencing Comm'n (July 29 2014). https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf

[9] Recidivism Reduction and Public Safety Act, S.1675, 113th Cong. (2014); Public Safety Enhancement Act, H.R.2656, 113th Cong. (2013).

information."[10] The Department of Justice confirmed, through EPIC's lawsuit *EPIC v. DOJ,* that the Sentencing Commission report was never generated.[11] The public continues to be left in the dark regarding government use of algorithms throughout the criminal justice system.

A different 2014 report released through *EPIC v. DOJ* detailed a number of DOJ-funded predictive policing and risk assessment pilots, many of which were supposed to publish studies between 2014–2017. Specifically, the DOJ pursued the following projects with estimated evaluations that were expected between 2014–2017:

- A RAND Corporation evaluation of a $620,000 NIJ award to the Shreveport, Louisiana Police Department that "concluded that additional research should be done";
- Results from a study that was "expected in late 2015 or early 2016" of researchers at Temple Funding that used NIJ funding to develop a "near-repeat calculator" for law enforcement agencies to use, in addition to similar projects funded by a $400,000 NIJ grant to Redlands, California and Baltimore, Maryland;
- Evaluation of NIJ-funded projects on Risk Terrain Modeling: (1) a study expected in late 2015 or early 2016 from a "$500,000 [grant] to Rutgers University to study the efficacy of RTM in five cities—Chicago; Colorado Springs; Newark; Kansas City, Missouri; and Glendale, Arizona", and (2) a study expected in 2017 of a study funded by NIJ for the New York City Police Department to "study the development of RTM models, including a **focus on how risk factors used in models should be chosen**" (emphasis added); and
- The survey that the "NIJ [was] working with DOJ's Bureau of Justice Statistics" on that "will be disseminated to more than 900 state and Local Agencies nationwide" that summarized findings from evidence-based law enforcement techniques around the country.[12]

In this 2014 report, the DOJ highlighted the risks of the evidence-based law enforcement. Specifically, the agency states that relying on immutable characteristics such as "a defendant's education level, socioeconomic status, or neighborhood of residence . . . may unintentionally exacerbate unjust disparities in our criminal justice system." The DOJ recognized that liberty should not be impacted "simply because a statistical analysis has suggested that *other* offenders with similar demographic profiles will likely commit a future crime. Instead, equal justice demands that sentencing determinations be based primarily on the defendant's own conduct and criminal history."[13] However, many risk assessments rely on these factors.[14]

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[10] Letter from Jonathan Wroblewski, *supra* note 8.

[11] Joint Status Report at 2, *EPIC v. Dep't of Justice*, 320 F.Supp.3d 110 (2018) (No. 17-410).

[12] *Predictive Analytics in Law Enforcement: A Report by the Department of Justice*, supra note 1 at 3–6.

[13] *Predictive Analytics in Law Enforcement: A Report by the Department of Justice*, supra note 1 at 23.

[14] *See*, e.g., *Memo of Factors Used By DC Pretrial Services Agency in Response to EPIC FOIA Request*, DC Pretrial Services Agency (February 21, 2020), *available at* https://epic.org/EPIC-20-01-08-DC-FOIA-20200308-DCPSA-Factors-Change-2015-2019.pdf; *Idaho LSI-R Annotated Scoresheet*, Idaho Department of Corrections (2019), *available at* https://epic.org/EPIC-19-11-21-ID-FOIA-20191206-ID-lsi-paper-scoresheet-tips-and-hints.pdf.

The 2014 report also detailed "Crime Analysis on Demand," a program that the Bureau of Justice Assistance offers law enforcement agencies resources to incorporate data analysis into strategic decisions about preventing and responding to crime. However, the report offered very little detail about what type of services were given. Strategies for Policing innovation is a "BJA–sponsored initiative that supports law enforcement agencies in building evidence-based, data-driven law enforcement tactics and strategies that are effective, efficient, and economical," however, operates as a private organization despite influencing the DOJ directly.

In May 2019, the United States and 41 other countries signed onto the Organization for Economic Co-Operation and Development's AI Principles ("OECD AI Principles"). The principles "promote AI that is innovating and trustworthy and that respects human rights and democratic values."[15] There are five OECD AI Principles designed to guide policy decisions. One of these principles is that "there should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them."[16] The endorsement of the guidelines by the United States government signifies a commitment to use algorithms that comport with these principles. Because these controversial risk assessments are being increasingly relied upon in sentencing, the non-public documents are needed to increase public understanding of how a defendant's risk is determined, and what steps need to be taken to ensure that the criminal justice system produces equitable outcomes. The information requested may be used by defendants to rebut the risk assessments in their cases and provide additional information that may affect their sentencing.

In 2014, the DOJ detailed in a report to the White House that there were a number of DOJ-funded studies being done across the country to pilot and test the efficacy of Predictive Policing and Risk Assessment tools. Six years later, these studies, as well as a larger analysis of the use of these tools across the country, were never made publicly available. However, these tools continue to be used without transparency, adequate regulation, or meaningful evaluation. EPIC requests these records in order to make public the studies done in accordance with these DOJ-funded piloted programs that change the way individual liberties are protected.

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the DOJ's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1). Under the DOJ's FOIA regulation, a FOIA request should be granted expedited processing when (1) there is "an urgency to inform the public about an actual or alleged Federal Government Activity," and (2) the request is "made by a person who is primarily engaged in disseminating information." 28 C.F.R. § 16.5(e)(1)(ii). EPIC's request satisfies both of these requirements.

First, there is "urgency to inform the public concerning actual or alleged Federal Government activity." The "actual . . . Federal Government activity" are studies performed by government

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[15] Organisation for Economic Co-Operation and Development, *OECD Principles on AI* (May 2019), https://www.oecd.org/going-digital/ai/principles/.
[16] *Id*.

entities using grants from the Department of Justice for the purpose of guiding future law enforcement action. 28 C.F.R. § 16.5(e)(1)(ii).

There is "clear urgency" to release the requested information because the evaluation of unregulated and unknown technologies that impact policing and individual liberty is sparse. There is a strong public interest in understanding both the efficacy of these tools and its potential bias impact. In 2020, nearly every state in the country uses a pre-trial or sentencing risk assessment, most of which are opaque.[17] These tools have been proven to have accountability and bias concerns.[18] As the 2014 DOJ report detailed, there are dozens of different examples of different predictive policing and other statistical analysis used in all stages of sentencing. In 2019, there were at least 50 known law enforcement departments to use a form of the Predictive Policing detailed in the DOJ report, but none of those questioned had evaluated effectiveness in a meaningful way.[19] Despite findings of bias and error these tools continue to be deployed widely without accountability or transparency. The publication of these reports would allow researchers and the general public to evaluate what actual experiences have yielded.

Second, EPIC is an organization "primarily engaged in disseminating information." As the Court explained in *EPIC v. DOD,* "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC is a non-profit organization committed to privacy, open government, and civil liberties that consistently discloses documents obtained through FOIA on its website, EPIC.org, and its online newsletter, the *EPIC Alert*.[20]

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. § 16.5(e)(3).

Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester, EPIC is

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[17] EPIC, Algorithms in the Criminal Justice System: Pre-Trial Risk Assessment Tools https://epic.org/algorithmic-transparency/crim-justice/.

[18] *See e.g.* EPIC, Algorithms in the Criminal Justice System: Pre-Trial Risk Assessment Tools https://epic.org/algorithmic-transparency/crim-justice/; Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM L. REV. 1553 (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251763; Megan T. Stevenson, Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, Washington University Law Review, Vol. 96, 2018; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225350; Julia Angwin, Jeff Larson, Surya Mattu, and Lauren Kirchner, *Machine Bias*, ProPublica (May 23, 2016) https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.w

[19] Beryl Lipton, *"It's PredPol, and it's going to reduce crime": Agencies take algorithmic effectiveness on faith, with few checks in place*, MuckRock (Nov. 05, 2019) https://www.muckrock.com/news/archives/2019/nov/05/predictive-policing-lacks-accuracy-tests/.

[20] EPIC, *About EPIC*, https://epic.org/epic/about.html

entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.10(c).

Further, any duplication fees should also be waived because disclosure is (1) "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and (2) "not primarily in the commercial interest of" EPIC, the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(1). EPIC's request satisfies this standard based on the DOJ's three factor fee waiver guidance for granting a fee waiver. 28 C.F.R. § 16.10(k)(2).

The DOJ considers the following three factors in its fee waiver analysis: (i) the "subject matter of the request" concerns "identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated;" (ii) disclosure "would be likely to contribute significantly to public understanding of those operations or activities;" and (iii) that "disclosure must not be primarily in the commercial interest of the requester." 28 C.F.R. 16.10(k)(2)(i)–(iii)

First, studies performed by governments using Department of Justice government grants with the purpose of guiding future government law enforcement action is a "direct and clear . . . identifiable operation . . . of the Federal Government." 28 C.F.R. 16.10(k)(2)(i).

Second, disclosure is "likely to contribute significantly to public understanding of those operations or activities." 28 C.F.R. § 16.10(k)(2)(ii)(A)–(B). Disclosure would "be meaningfully informative about government operations or activities" because the studies would illuminate the extent to which certain evidence-based law enforcement tools are being used and the effectiveness of these tools. The operations of these programs are largely hidden from the public. Individuals facing determinations by these systems remain unaware of what factors contribute to their determination of release or bail circumstance. Information about these tools will assist the public in awareness of systems that could have an impact on their criminal records and freedom. The publication of these documents will also empower the public to study the risk assessment tools and work to ensure they are accountable and have limited bias effects. Additionally, the release of these studies will contribute to public trust in a system that is regularly tested to ensure efficacy, and help the public understand what tools are used by law enforcement. 28 C.F.R. § 16.10(k)(2)(ii)(A).

Furthermore, disclosure of this nature will "contribute to the understanding of a reasonably broad audience of persons interested in that subject," because, it "shall be presumed that a representative of the news media," of which EPIC has been held to be,[21] "will satisfy this consideration." 28 C.F.R. § 16.10(k)(2)(ii)(B).

Third, disclosure of the requested information is "not primarily in the commercial interest" of EPIC. 28 C.F.R. § 16.10(k)(2)(iii)(A)–(B). EPIC has no "commercial interest . . . that would be furthered by the requested disclosure." 28 C.F.R. § 16.10(k)(2)(ii)(A). EPIC is a non-profit organization committed to privacy, open government, and civil liberties that consistently discloses documents obtained through FOIA on its website, EPIC.org, and its online newsletter, the *EPIC*

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[21] *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003).

Alert.[22] Further, DOJ "components ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester." 28 C.F.R. § 16.10(k)(2)(iii)(B). As previously cited, EPIC has been deemed a news media requester and thus satisfies the standard required in paragraphs (k)(2)(i) and (ii) as required by 28 C.F.R. § 16.10(k)(2).

For these reasons, EPIC's request for a fee waiver should be granted.

<u>Conclusion</u>

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4). For questions regarding this request contact Ben Winters at winters@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s/ Ben Winters
Ben Winters
EPIC Equal Justice Works Fellow

/s/ Enid Zhou
Enid Zhou
EPIC Open Government Counsel

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[22] EPIC, *About EPIC*, https://epic.org/epic/about.html.