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VIA EMAIL

November 4, 2019

Kathleen Kokensparger, Public Records Manager
Public Disclosure Unit
Nebraska Department of Criminal Services
P.O. Box 94661
Lincoln, NE 68509
DCS.PublicRecords@nebraska.gov

Dear Ms. Kokensparger:

This letter constitutes a request under Nebraska Freedom of Information Act, Neb. Rev. Stat. § 84-712 et seq., and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Nebraska Department of Criminal Services.

EPIC seeks records relating to evidence-based risk assessment tools used by the state including policies, guidelines, source codes, validation studies, and correspondences.

Documents Requested

1. All validation studies for risk assessment tools considered for use in pre-trial sentencing, sentencing, and prison management;

2. All correspondence, inquiries, guidelines, schedules and memoranda regarding the need for validation studies or the effectiveness or propriety of risk assessment tools used by Nebraska Department of Criminal Services;

3. An accounting of risk assessment tools including their source codes used by Nebraska including but not limited to the Federal Pre-trial Risk Assessment ("PTRA") Pilot Testing[1];

4. Purchase and sales contracts between risk-assessment tool companies or software development contractors and the Nebraska Department of Criminal Services.

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[1] Christopher T. Lowenkamp & Jay Whetzel, *Implementing Risk Assessment in the Federal Pretrial Services System*, 73 Federal Probation 2 (2015), https://www.uscourts.gov/sites/default/files/73_2_3_0.pdf.

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 factor considered in determining sentencing.[2] 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.[3] 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.[4] Director Wroblewski expressed reservations about components of pending sentencing reform legislation[5] that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic information."[6] The Department of Justice confirmed, through EPIC's lawsuit *EPIC v. DOJ,* that the Sentencing Commission report was never generated.[7] Accordingly, the public continues to be left in the dark regarding government use of algorithms throughout the criminal justice system.

In 2018, the Probation and Pretrial Services released a research summary re their Pretrial Risk Assessment Instrument.[8] While the summary provided valuable statistical analysis regarding some use of the federal pretrial risk assessment tool, it still failed to detail which jurisdictions use algorithmic tools. 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

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[2] 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 (Sep. 2018), https://www.uscourts.gov/sites/default/files/82_2_3_0.pdf.

[3] 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.

[4] 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

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

[6] Letter from Jonathan Wroblewski, *supra* note 4.

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

[8] Cohen, Lowenkamp, & Hicks *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary* supra note 2.

the risk assessments in their cases and provide additional information that may affect their sentencing.

In May 2019, the United States and 41 other countries signed onto the Organisation 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."[9] One of these five principles designed to guide policy decisions regarding AI is that "there should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them."[10] The endorsement of the guidelines by the United States government signifies a commitment to use algorithms that comport with these principles. While the federal government has shown a commitment to these AI principles, not all states have shown the same level of commitment when using algorithms in pre-trial risk assessments.

Namely, Nebraska's use of algorithms in the criminal justice system is highly opaque and contradicts the OECD AI Principles. District 12 Senator Steve Lathrop introduced a bill earlier this year to "examine risk assessment tools for pretrial release, post-conviction custody, and supervision status determinations."[11] On September 13, 2019, Nebraska lawmakers heard testimony on how cash bail is "criminaliz[ing] poverty," considering among other factors how pre-trial risk assessments may exacerbate or minimize negative impacts.[12]

Nebraska's lack of transparency and public information regarding the use of pre-trial risk assessments differs from states across the country. Several states including New York, Vermont, and Alabama have passed legislation to study and publish state level use of automated decision systems.[13] This year, Idaho passed the first bill requiring transparency in algorithmic pretrial risk assessments that are used to make bail and parole decisions.[14]

Although Nebraska has decidedly used pre-trial risk assessments to help streamline its bail decisions[15], the state does not offer a public accounting of the risk assessment tools used nor information regarding regular validation of these systems to evaluate effectiveness and bias. This places defendants, defense counsel, and the public at a disadvantage when approaching their pre-trial hearings. Furthermore, it prevents public input and statistical testing that would maximize the strength and effectiveness of algorithms used at such critical points. The release of the information

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

[10] *Id*.

[11] Neb. Leg. B.206 (Neb. 2019), https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=39687.

[12] Becca Costello, *Lawmakers Hear Testimony on How Cash Bail 'Criminalizes Poverty'*, NET News Nebraska (Sep. 13, 2019), http://netnebraska.org/article/news/1189655/lawmakers-hear-testimony-how-cash-bail-criminalizes-poverty.

[13] *See* NYC Local Law 49, Int No. 1696-A §1(b)(2) (2017), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3137815&GUID=437A6A6D-62E1-47E2-9C42-461253F9C6D0; NY Senate 3971-B (February 22, 2019), https://www.nysenate.gov/legislation/bills/2019/s3971; VT. H. 378 (May 21, 2018), https://legislature.vermont.gov/bill/status/2018/H.378 ; AL. SJR71 (May 15, 2019), http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2019RS/PrintFiles/SJR71-int.pdf

[14] ID. House Bill No. 118 (2019), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118E1.pdf.

[15] Lowenkamp & Whetzel, *Implementing Risk Assessment in the Federal Pretrial Services System*, supra note 1.

requested would significantly inform the public of Nebraska's use of opaque automated systems in criminal sentencing.

Duplication Fee Waiver

EPIC requests a waiver of any fees connected with this request. EPIC is an independent non-profit research center in Washington, DC working to protect privacy, open government, and civil liberties. EPIC pursues a wide range of program activities including public education, litigation, and advocacy. EPIC is recognized as a "representative of the news media,"[16] and has no commercial interest in the records requested.[17] If EPIC's request cannot be sent without cost, then prior to any copying, please notify EPIC with the reasons for the denial and estimated costs involved.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your response on its request within four business days. Neb. Rev. Stat. § 84-712(4). For questions regarding this request please contact Ben Winters at 202-483-1140 x126 or winters@epic.org, 'cc FOIA@epic.org.

Respectfully submitted,

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

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

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EPIC Open Government Counsel

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[16] *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).
[17] EPIC, *About EPIC*, https://epic.org/epic/about.html.