

VIA FACSIMILE

January 14, 2020

Jeanne West
FOIA Officer
Court Services & Offender Supervision Agency
Office of the General Counsel
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Washington, DC 20002
Fax: (202) 442-1963
ATTN: FOIA Officer

Dear Ms. West:

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 Court Services and Offender Supervision Agency (“CSOSA”) for the District of Columbia’s Pretrial Services Agency (“PSA”).

EPIC seeks documents related to evidence-based risk assessment tools and other automated decision systems used by the Pretrial Services Agency, including but not limited to policies, guidelines, source codes, validation studies, and correspondences.

Documents Requested

1. All validation studies for risk assessment tools used in pre-trial, parole and sentencing, including but not limited to the DC Pretrial Services Agency Risk Assessment Instrument introduced in 2013.¹
2. All correspondences, memoranda, and records relating to the use of validation studies on risk assessment tools used by the PSA or CSOSA.
3. All records concerning risk assessment tools, including but not limited to source codes, interview guides, training documents, and risk-based recommendations matrixes to support judicial decision making used by the PSA or CSOSA.
4. Purchase and sales contracts, request for proposals, and bids between evidence-based risk-assessment tool companies or software development contractors and the PSA or CSOSA.

¹ Spurgeon Kennedy, Laura House, & Michael Williams, *Using Research to Improve Pretrial Justice and Public Safety: Results from PSA’s Risk Assessment Validation Project*, 77 Fed. Probation 28 (2013), https://www.uscourts.gov/sites/default/files/fed_probation_june_2013.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 a factor 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 legislation⁵ 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 The public continues to be left in the dark regarding government use of algorithms throughout the criminal justice system.

In 2018, the U.S. Probation and Pretrial Services released a research summary about their Pretrial Risk Assessment Instrument.⁸ While the summary provided valuable statistical analysis regarding some use of the federal pretrial risk assessment tool, the summary 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

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 (Sept. 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.

used by defendants to rebut 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 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."⁹ 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."¹⁰ The endorsement of the guidelines by the United States government signifies a commitment to use algorithms that comport with these principles.

Despite a 2013 publication in "Validation of PSA's new Risk Assessment Validation Project,"¹¹ information about the use, administration, and other critical aspects of risk assessments and any validation studies remains opaque. PSA notes that before making recommendations to the court for defendants, "Pretrial Services Officers rely on sophisticated information technology to gather and compile local and national criminal justice information. Defendant attributes, prior criminal history, current charge(s), and criminal justice status are considered when assessing potential public safety and/or appearance risks."¹²

The public is unaware of what specific information is collected for risk assessments; how this information is collected, stored and shared; how Pretrial Services Officers are trained to get this information reliably and truthfully without the introduction of unintended bias; the logic of the sophisticated information technology. Moreover, the source code and decision matrixes of this technology are all important aspects of this powerful technology used on countless DC residents that remain private. While the PSA has performed a validation study,¹³ information about other ongoing validation studies that assess the efficacy of the risk assessment tools actually used on the DC population have not been made public.

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the CSOSA's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 802.8(a). Under CSOSA's FOIA regulation, a FOIA request should be granted expedited processing when a requester demonstrates a "compelling need." 28 C.F.R. § 802.8(a)(1). A compelling need can be proven by demonstrating that (1) the requester is "primarily engaged in disseminating information" and (2) "the urgency to inform the public concerning actual or alleged Federal Government activity is a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity." 28 C.F.R. § 802.8(a)(1)(i)(B). EPIC's request satisfies both of these requirements.

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 Kennedy, House, & Williams, *supra* note 1.

¹² *PSA Programs and Services: Recommendations to the Court*, Pretrial Services Agency for the District of Columbia, https://www.psa.gov/?q=programs/court_support.

¹³ *See* Kennedy, House, & Williams, *supra* note 1.

First, 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*.¹⁴

Second, there is urgency to inform the public concerning actual or alleged Federal Government activity. CSOSA’s use of risk assessments and other information technology processes to compile information about defendants and recommend criminal sentencing procedures is an “actual . . . Federal Government activity.” 28 C.F.R. § 802.8(a)(1)(B). CSOSA, in its agency capacity, collects, retains, maintains, computes and shares massive swaths of sensitive data.

There is an urgency to release these documents because systems similar to the PSA’s risk assessment tools have accountability and bias concerns.¹⁵ 28 C.F.R. § 802.8(a)(1)(B)(ii). There is insufficient public information about the operation of the tools. The public cannot evaluate the tools’ efficacy and propriety, as well as understand how these tools affect their criminal disposition. In its Strategic Plan 2018-2022, the PSA planned to “re-validate the existing risk assessment during the first 12 months of the strategic period to ensure that it has maintained its predictive validity and accuracy” as well as “revise the current PSR to more effectively inform judicial officer decisions” and “implement risk-based recommendations matrix to support judicial decision making.”¹⁶ The PSA’s published its only known validation study in 2009. Since then, the PSA is still using automated tools that effect the disposition of a defendant accused of a crime without an updated validation study. For instance, in 2019 the PSA processed a total of 15,516 criminal cases in the District of Columbia. All 15,516 of these cases used secretive risk assessment tools that had serious impact on these sentencing outcomes. The effects of these PSA systems continue to have enormous power over many DC residents in their sentencing proceedings and it is urgent that the PSA release this information quickly.

In submitting this request for expedited processing, “[EPIC] declare[s] under penalty of perjury that the foregoing is true and correct to the best of [its] knowledge and belief. Executed on January 10, 2020.” 28 U.S.C. § 1746; 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. § 802.8(b).

Request for “News Media” Fee Status and Fee Waiver

¹⁴ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

¹⁵ 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>

¹⁶ Pretrial Services Agency for the District of Columbia, *Strategic Plan: Fiscal Years 2018-22 9*, https://www.psa.gov/sites/default/files/PSA%20Strategic%20Plan%20FY2018-2022-FINAL_0.pdf.

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 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. § 802.10(d)(3)

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. § 802.10(f)(1). EPIC’s request satisfies this standard based on the Department of Justice’s (“DOJ”) three factor fee waiver guidance for granting a fee waiver, which the CSOSA follows. 28 C.F.R. § 802.10(f)(1); *see* 28 C.F.R. § 16.10(k)(2).

The DOJ considers the following three factors in its fee waiver analysis: that (1) 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, the administration of risk assessments by Pretrial Services Agency of the District of Columbia, a federal agency,¹⁷ is a “direct and clear...identifiable operation...of the Federal Government.”

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 agency uses numerous risk assessment instruments when “recommend[ing]... release conditions to the court” and “assessing risk.”¹⁸ The operations of these programs are largely hidden from the public. Individuals facing determinations by these systems and their communities remain unaware of what factors contribute to their determination of release or bail circumstance. Training materials, scoresheets, source codes, bench cards, and information about validation studies 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, information about validation studies and plans for regular validation studies will contribute to public trust in a system that is regularly tested to ensure efficacy. 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,¹⁹ “will satisfy this consideration.” 28 C.F.R. § 16.10(k)(2)(ii)(B).

¹⁷ *See Id.*

¹⁸ *Id.*

¹⁹ *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003).

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 Alert*.²⁰ 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, a fee waiver should be granted.

Conclusion

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). For questions regarding this request 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/ Enid Zhou

Enid Zhou
EPIC Open Government Counsel

²⁰ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.