VIA EMAIL

June 25, 2021

Robert Warren
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Dear Mr. Warren:

This letter constitutes a request under the D.C. Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531-539, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the D.C. Department of Human Services ("DHS").

EPIC seeks documents related to DHS's use of applicant screening services, eligibility compliance screening services, fraud detection services, or other automated decision-making systems from third-party contractors including, but not limited to, Liberty Healthcare[1] and FEI Systems[2] as well as third-party vendors using InterRAI-Home Care ("InterRAI HC") and D.C. Access System ("DCAS").

Documents Requested

1. Contracts, requests for proposals, and bids between Liberty Healthcare and FEI Systems, as well as any other third-party contractors that provide screening or eligibility assessments, and DHS.[3]

2. Contracts, requests for proposals, and bids between vendors using InterRAI-HC or DCAS, and DHS.

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[1] Liberty Healthcare, libertyhealthcare.com.
[2] FEI Systems, feisystems.com.
[3] District of Columbia Department of Health Care Finance, Committee on Health Council of the District of Columbia, *Responses to Fiscal Year 2018-2019 Performance Oversight Questions* 131, https://dccouncil.us/wp-content/uploads/2019/04/dhcf.pdf.

3. Contracts, request for proposals, and bids between Pondera Solutions ("Pondera"), as well as any other third-party contractors that provide fraud detection and analytics services, and DHS.[4]

4. All correspondences, memoranda, policies, and other records relating to the use of applicant screening tools or automated decision-making systems by DHS for the administration of Temporary Assistance for Needy Families ("TANF"), the Program on Work Employment and Responsibility ("POWER"), the Supplemental Nutrition Assistance ("SNAP"), Medicaid, and DC Health Care Alliance ("Alliance"), and Long Term Care Services and Supports ("LTSS"). This includes but is not limited to policies, face-to-face interview guides, training documents, and decision matrices to screen applicants.

5. All correspondences, memoranda, policies, and other records relating to the use of the electronic-Comprehensive Adult Student Assessment System ("eCASAS"), TANF Preliminary Assessment, TANF Comprehensive Assessment ("TCA"), and Online Work Readiness Assessment ("OWRA"). This includes but is not limited to policies, face-to-face interview guides, training documents, and decision matrices to screen applicants.

6. Any validation studies or records analyzing or assessing the quality and accuracy of eligibility screening assessments, lists of data sources used in applicant screening, and reports of inaccuracies. This includes, but is not limited to, any validation studies comparing the performance of InterRAI-HC to the previous assessment tool.

Background

Automated screening tools are increasingly used to make eligibility and fraud determinations for public benefit programs like Medicaid, cash assistance payments, and the Supplemental Nutrition Assistance Program ("SNAP"). These tools use statistical analysis and artificial intelligence ("AI") systems to help automate decisions related to the type and extent of care for which individuals and families are eligible.[5] While AI integration can increase efficiency for necessary public sector services, it can also worsen inequality by functioning as a cost-benefit analysis system prone to error and bias.[6]

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[4] Pondera Solutions, ponderasolutions.com; Council of the District of Columbia, Committee on Human Services, *2021 Performance Oversight Department of Human Services* 49, https://dccouncil.us/wp-content/uploads/2021/02/DHS_2021-Performance-Oversight-Pre-Hearing-Responses.pdf.
[5] Eliza Strickland, *Racial Bias Found in Algorithms That Determine Health Care for Millions of Patients*, IEEE Spectrum (Oct. 24, 2019), https://spectrum.ieee.org/the-human-os/biomedical/ethics/racial-bias-found-in-algorithms-that-determine-health-care-for-millions-of-patients.
[6] Rashida Richardson, Jason M. Schultz & Vincent M. Southerland, *Litigating Algorithms 2019 US Report: New Challenges to Government Use of Algorithmic Decision Systems*, AI Now Institute (September 2019), https://ainowinstitute.org/litigatingalgorithms-2019-us.pdf.

The use of automated screening tools for benefits and fraud determination can erode procedural due process protections and lead to inconsistent results.[7] First, algorithmic eligibility and fraud determination systems often fail to provide any or adequate notice to individuals before depriving them of a public benefit.[8] A lack of transparency regarding the data underlying algorithmic design makes the logic behind each decision opaque and difficult to review.[9] This lack of transparency is particularly concerning given the fact that disproportionate outcomes in model performance have been shown to negatively affect marginalized communities.[10] Second, variability in fraud detection and eligibility determinations can lead to outcomes that lack predictive equality and do not meet the financial and/or medical needs of public benefit recipients.[11] Such inconsistencies are often related to issues in model design, training data, sampling, and the unintended biases of individual programmers.[12]

One screening tool used within D.C. is InterRAI-HC, a standardized, observation- and interview-based assessment developed by a nonprofit group of health researchers and administrators.[13] InterRAI-HC uses a multi-track decision tree structure to evaluate individual social, cognition, medical, and functional capabilities.[14] With InterRAI-HC, observed behavior is correlated to numerical values that indicate whether an assessor should engage in further evaluation of a certain capability or move on to other screening areas.[15] Prior to using InterRAI-HC, D.C. used a "homegrown tool" to determine patient level of care needs.[16] According to DHCF testimony, the

[7] Lydia X. Z. Brown, Michelle Richardson, Ridhi Shetty, Andrew Crawford & Timothy Hoagland, Center for Democracy and Technology, *Challenging the Use of Algorithm-Driven Decision-Making in Benefits Determinations Affecting People with Disabilities* 8 (Oct. 2020), https://cdt.org/wp-content/uploads/2020/10/2020-10-21-Challenging-the-Use-of-Algorithm-driven-Decision-making-in-Benefits-Determinations-Affecting-People-with-Disabilities.pdf.

[8] Danielle Keats Citron, *Technological Due Process*, 85 Wash. U. L. Rev. 1249, 1282 (2008) (recounting how automated decision systems can fail to provide any pre-deprivation notice and, alternatively, fail to provide adequate notice by not clarifying the reasoning behind a decision).

[9] Brown et al., *supra* note 7 at 13.

[10] Jessica K. Paulus & David M. Kent, *Predictably Unequal: Understanding and Addressing Concerns that Algorithmic Clinical Prediction May Increase Health Disparities*, 3 npj Digital Medicine 99, 99 (July 2020), https://doi.org/10.1038/s41746-020-0304-9.

[11] *Id.*

[12] Hannah Fry, *Don't Believe the Algorithm*, Wall St. J. (Sept. 5, 2018), https://www.wsj.com/articles/dont-believe-the-algorithm-1536157620; *see also* Paulus & Kent, *supra* note 10 at 88.

[13] interRai, interrai.org.

[14] John N. Morris, interRAI, *interRAI Clinical Assessment Protocols (CAPs) for use with Community and Long-Term Care Assessment Instruments*, xi, 6 (9.1.2 2010), https://catalog.interrai.org/content/interrai-clinical-assessment-protocols-caps-use-community-and-long-term-care-assessment.

[15] *Id.*

[16] Wayne Turnage, *Written Testimony of Wayne Turnage, Director, Department of Health Care Finance*, Council of the District of Columbia Fiscal Year 2018-2019 Performance Oversight Hearing at 15 (Feb. 6, 2019),

former tool allowed for greater assessor subjectivity that led to improper recommendations that fell outside of DHCF's programs.[17] After D.C. switched to InterRAI-HC to analyze Personal Care Aide ("PCA") claims in 2018, 36.5% of individuals received reductions in their approved hours of PCA services.[18] According to testimony by the Legal Aid Society of the District of Columbia in 2021, some of the most drastic reductions in client access to public benefits occurred because the InterRAI-HC assessment is only designed to assess hands-on assistance and thus fails to adequately capture the needs of those who do not need hands-on assistance, but need other PCA services due to their mental or cognitive conditions.[19] Moreover, RN assessors that administer the InterRAI-HC assessment are not able to adjust the hour calculation if an observed medical need is not captured by the tool itself within the three day "look-back" period for functional assessment.[20] In response to the Legal Aid Society's testimony, the Department of Health Care Finance ("DCHF") asserted that the three day period was sufficient.[21] Three day look-back periods, however, often lead to inaccurate assessments and directly contradict D.C. regulations requiring a seven day look-back period.[22]

D.C. contracts with Liberty HealthCare to conduct Personal Care Aide assessments using InterRAI-HC. Several other states contract with Liberty HealthCare to provide Medicaid and other public benefits assessments—including North Carolina, where a 2015 change in assessment guidelines for Liberty HealthCare led to a significant decline in approval rates.[23] Liberty HealthCare has also been the subject of several law suits for allegedly violating individual procedural due process rights and Section 504 of the Rehabilitation Act of 1973.[24] After D.C. transitioned to the InterRAI-HC tool, FEI Systems provided training to Liberty HealthCare assessors. DHS also

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https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/release_content/attachments/DHCF%20FY2020%20Oversight%20Testimony.pdf.

[17] *Id.*

[18] District of Columbia Department of Health Care Finance, *supra* note 3 at 134.

[19] Aida Fitzgerald, *Written Testimony of Aida Fitzgerald, Senior Staff Attorney, Public Benefits Law Unit Legal Aid Society of the District of Columbia*, Committee on Health Council of the District of Columbia Performance Oversight Hearing Regarding the Department of Health Care Finance at 3 (March 4, 2021), https://www.legalaiddc.org/wp-content/uploads/2021/03/Legal-Aid-DHCF-Oversight-Testimony-FY20-21YTD-EPD-Waiver-FINAL.pdf.

[20] *Id.*

[21] Department of Health Care Finance, *Notice of Second Emergency and Proposed* Rulemaking, 67 District of Columbia Register, 010822 (Sept. 4, 2020), https://dhcf.dc.gov/sites/default/files/dc/sites/dhcf/publication/attachments/Long%20Term%20Care%20Services%20and%20Supports%20Assessment%20Process%20Notice%20of%20Second%20Emergency%20and%20Proposed%20Rulemaking.pdf.

[22] *See* 29 D.C.M.R. § 989.11; *see also* David Machledt, National Health Law Program, *Evaluating Functional Assessments for Older Adults: Resource Allocation* 6 (June 13, 2017), https://healthlaw.org/wp-content/uploads/2017/06/NHeLP_Functional-Assessment-for-publication_FINAL.pdf.

[23] Michael Gebelein, *Denial Rate for Medicaid Program Applicants Surges After 2015 State Memo*, Carolina Public Press (Sept. 28, 2016), https://carolinapublicpress.org/25947/denial-rate-medicaid-program-applicants-surges-2015-state-memo/.

[24] *See Schmidt v. Mize*, No. 18-cv-00725-BAS-PCL, 2018 WL 2411750 at 2 (S.D. Cal. May 29, 2018); *Cox ex rel. Dermitt v. Liberty Healthcare Corp.,* 622 F. Supp. 2d 487, 499 (E.D. Ky. 2008).

contracts with Pondera to provide Fraud Data Analytics and Fraud Case Management services to the agency's Office of Program Review, Monitoring, and Investigation ("OPRMI"), a division of DHS dedicated to fraud investigation and agency risk management.[25] In 2020, Pondera was acquired by Thomson Reuters. Thomson Reuter's legal investigation software program, which includes a healthcare fraud detection service, is currently the subject of a class action suit for allegedly selling individual data without consent to private companies and U.S. Immigration and Customs Enforcement.[26]

DHS also utilizes the DCAS, a software program that provides an integrated eligibility and case management system for all health and human services in D.C.[27] DCAS incorporated D.C.'s prior eligibility system, the Automated Client Eligibility Determination System ("ACEDS"), into its public benefits eligibility analysis. The system has a history of discrepancies and high error rates: in 2019 the system had a payment error rate above 10% within the District of Columbia.[28] According to Legal Aid Society testimony, DHS's DCAS system has also provided inaccurate notices of termination, failed to process applications in a timely manner, and erroneously denied TANF recipients public assistance after mistakenly finding they committed TANF fraud.[29] Concerningly, DHS's Economic Security Administration Policy Manual does not clarify whether recipients affected by DCAS determinations receive notice explaining why their assessment determined their benefits would be reduced.[30]

Because automated eligibility and fraud assessment tools are inconsistent, yet increasingly relied upon, the requested documents are crucial to increase public understanding of how individual's access to key public benefits is being determined. Public disclosure and transparency are critical for facilitating public understanding of how DHS uses assessment tools to determine access to public benefits and whether these tools have undergone proper validation studies for accuracy and reliability.

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[25] Council of the District of Columbia, *supra* note 4.

[26] *Brooks v. Thomson Reuters Corp.*, No. 4:21-CV-01418 (N.D. Cal. filed Feb. 26, 2021).

[27] Department of Health Care Finance, Public Notice for *DHCF Hiring Event for DCAS Administration*, (April 13, 2018), https://dhcf.dc.gov/release/public-notice-dhcf-hiring-event-dcas-administration.

[28] District of Columbia Department of Human Services, 2019 Performance Oversight, *Responses to Pre-Hearing Questions* 44, https://dccouncil.us/wp-content/uploads/2020/01/1-FY19-20-DHS-Performance-Oversight-Pre-Hearing-Responses_Delivered-to-Council.pdf.

[29] Carolyn Rumer, *Written Testimony of Carolyn Rumer, Staff Attorney, Public Benefits Law Unit Legal Aid Society of the District of Columbia*, Committee on Human Services Council of the District of Columbia Performance Oversight Hearing Regarding the Department of Human Services at 3 (Jan. 29, 2020), https://www.legalaiddc.org/wp-content/uploads/2020/02/Legal-Aid-DHS-Oversight-Testimony-FY19-FY20YTD-ESA-FINAL.pdf.

[30] *See* District of Columbia Department of Human Services, *Economic Security Administration Policy Manual,* § 3.4 (2019), https://dhs.dc.gov/sites/default/files/dc/sites/dhs/publication/attachments/ESA-Policy-Manual-Combined-Revised-2.pdf.

EPIC requests a waiver of fees, pursuant to D.C. Code § 2-532(b), as the records benefit the public interest. Automated decision-making systems influence public benefits eligibility and fraud determinations, yet the underlying logic of these systems is largely hidden from the public. The information contained in the requested records is necessary to ensure that public benefits applicants and recipients understand how their information is used by algorithm-driven decision-making systems in order to determine their public benefits' eligibility. Releasing the requested documents will allow the public to know whether or not adequate validation studies have been conducted on InterRAI-HC and DCAS, whether assessors have been properly trained on the assessment systems, and what roles Liberty Healthcare, FEI Systems, and other third-party vendors play in relation to individual public benefits eligibility determinations.

Additionally, the release of these documents will ensure that there is transparency and oversight in D.C. fraud detection and determination processes. In August 2020, after two DHS employees were convicted of defrauding $1.8 million from the SNAP and TANF programs, the District of Columbia Office of the Inspector General assessed DHS's fraud monitoring system and made 23 recommendations to strengthen DHS's internal fraud control system.[31] Included in these recommendations was a suggestion to aggregate data sets related to Emergency SNAP applications, usage reports, and Social Security Numbers to create a comprehensive risk assessment process for the SNAP and TANF programs.[32] In response to the recommendation, DHS stated that it would continue to expand OPRMI's fraud detection analytics capacity.[33] Releasing the requested documents will enable the public to understand what role Pondera plays in OPRMI's fraud detection efforts and provide clarity on how DHS intends to use, collect, and analyze public benefit recipient data as this comprehensive risk assessment is developed.

EPIC is a non-profit organization committed to privacy, open government, and civil liberties that consistently discloses documents obtained through public records requests on its website, EPIC.org, and its online newsletter, the *EPIC Alert*.[34] EPIC has no commercial interest in the requested records.

For these reasons, a fee waiver should be granted.

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[31] District of Columbia Office of the Inspector General, 20-I-07-JA, *Department of Human Services: Inadequate Internal Controls Within the Economic Security Administration May Have Contributed to the Loss of $1.8 Million* 33–34 (Aug. 2020), http://app.oig.dc.gov/news/view2.asp?url=release10%2FOIG+No%2E+20%2DI%2D07JA+%2D%2D+Final+Report+on+the+Evaluation+of+DHS%27+Economic+Security+Administration%2Epdf&mode=release&archived=0&month=00000&agency=61.

[32] *Id.* at 16.

[33] *Id.*

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

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within fifteen business days. D.C. Code § 2-532 (c)(1). For questions regarding this request contact Enid Zhou, 202-483-1140 x104; zhou@epic.org, cc:FOIA@epic.org.

Respectfully submitted,

/s/ *Alexa Daugherty*
Alexa Daugherty
EPIC Clerk

/s/ *Enid Zhou*
Enid Zhou
EPIC Counsel