

ORAL ARGUMENT NOT YET SCHEDULED

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No. 18-5307

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

\_\_\_\_\_  
ELECTRONIC PRIVACY INFORMATION CENTER,  
*Plaintiff-Appellant,*

v.

UNITED STATES DEPARTMENT OF JUSTICE,  
*Defendant-Appellee.*

\_\_\_\_\_  
**On Appeal from an Order of the  
U.S. District Court for the District of Columbia  
Case No. 17-cv-410-TNM**

\_\_\_\_\_  
**JOINT APPENDIX**

\_\_\_\_\_  
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**U.S. District Court  
District of Columbia (Washington, DC)  
CIVIL DOCKET FOR CASE #: 1:17-cv-00410-TNM**

ELECTRONIC PRIVACY INFORMATION CENTER v. UNITED STATES DEPARTMENT OF JUSTICE  
Assigned to: Judge Trevor N. McFadden  
Case in other court: USCA, 18-05307  
Cause: 05:552 Freedom of Information Act

Date Filed: 03/07/2017  
Date Terminated: 08/16/2018  
Jury Demand: None  
Nature of Suit: 895 Freedom of Information Act  
Jurisdiction: U.S. Government Defendant

**Plaintiff**

**ELECTRONIC PRIVACY  
INFORMATION CENTER**

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TERMINATED: 07/23/2018

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
03/07/2017	<a href="#">1</a> <b>R</b>	COMPLAINT against UNITED STATES DEPARTMENT OF JUSTICE ( Filing fee \$ 400 receipt number 0090-4868185) filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <a href="#">1</a> Civil Cover Sheet, # <a href="#">2</a> <b>R</b> Summons Attorney General of the United States, # <a href="#">3</a> Summons United States Department of Justice, # <a href="#">4</a> Summons U.S. Attorney for the District of Columbia)(Butler, Alan) (Entered: 03/07/2017)
03/07/2017	<a href="#">2</a>	Corporate Disclosure Statement by ELECTRONIC PRIVACY INFORMATION CENTER. (Butler, Alan) (Entered: 03/07/2017)
03/07/2017	<a href="#">3</a>	NOTICE of Appearance by Marc Rotenberg on behalf of ELECTRONIC PRIVACY INFORMATION CENTER (Rotenberg, Marc) (Entered: 03/07/2017)
03/09/2017		Case Assigned to Judge Ketanji Brown Jackson. (zsb) (Entered: 03/09/2017)
03/09/2017	<a href="#">4</a>	SUMMONS (3) Issued Electronically as to UNITED STATES DEPARTMENT OF JUSTICE, U.S. Attorney and U.S. Attorney General (Attachment: # <a href="#">1</a> Consent Form) (zsb) (Entered: 03/09/2017)
03/14/2017	<a href="#">5</a>	GENERAL ORDER AND GUIDELINES FOR CIVIL CASES BEFORE JUDGE KETANJI BROWN JACKSON. The Court will hold the parties and counsel responsible for following these directives, and parties and counsel should pay particular attention to the Courts instructions for briefing motions and filing exhibits. Failure to adhere to this Order may, when appropriate, result the imposition of sanctions and/or sua sponte denial of non-conforming motions. Signed by Judge Ketanji Brown Jackson on 3/14/2017. (lckbj1) (Entered: 03/14/2017)
03/30/2017	<a href="#">6</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 3/28/2017. Answer due for ALL FEDERAL DEFENDANTS by 4/27/2017. (Butler, Alan) (Entered: 03/30/2017)
03/30/2017	<a href="#">7</a> <b>R</b>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 03/28/2017. (Butler, Alan) Modified date served on 3/31/2017 (td). (Entered: 03/30/2017)
03/30/2017	<a href="#">8</a>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES DEPARTMENT OF JUSTICE served on 3/28/2017 (Butler, Alan) (Entered: 03/30/2017)
04/18/2017	<a href="#">9</a>	NOTICE of Appearance by Alexander Daniel Shoaibi on behalf of UNITED STATES DEPARTMENT OF JUSTICE (Shoaibi, Alexander) (Entered: 04/18/2017)

04/18/2017	<a href="#">10</a> <b>R</b>	First MOTION for Extension of Time to Respond to Complaint by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Text of Proposed Order)(Shoaibi, Alexander) (Entered: 04/18/2017)
04/24/2017		MINUTE ORDER granting, for good cause shown, <a href="#">10</a> <b>R</b> Motion for Extension of Time to Answer, nunc pro tunc. It is hereby ORDERED that Defendant shall answer or otherwise respond to the complaint on or before 5/22/2017. Signed by Judge Ketanji Brown Jackson on 04/24/2017. (lckbj1) (Entered: 04/24/2017)
05/19/2017	<a href="#">11</a>	ANSWER to Complaint by UNITED STATES DEPARTMENT OF JUSTICE.(Shoaibi, Alexander) (Entered: 05/19/2017)
07/07/2017	<a href="#">12</a> <b>R</b>	Joint STATUS REPORT and Motion to Adopt a Schedule for Further Proceedings by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <a href="#">1</a> <b>R</b> Text of Proposed Order)(Butler, Alan) (Entered: 07/07/2017)
07/07/2017	13	MOTION for Scheduling Order by ELECTRONIC PRIVACY INFORMATION CENTER. (See Docket Entry <a href="#">12</a> <b>R</b> to view document). (znmw) (Entered: 07/10/2017)
07/11/2017		MINUTE ORDER. Upon consideration of the parties' <a href="#">12</a> <b>R</b> Joint Status Report and Motion to Adopt a Schedule for Further Proceedings, it is hereby ORDERED that the motion is GRANTED and the parties' proposed schedule is ADOPTED. Accordingly, this case will proceed according to the following schedule: (1) The DOJ shall produce all non-exempt records responsive to categories 4 and 5 of Plaintiff's FOIA request, or otherwise respond to that portion of Plaintiff's request, on or before August 16, 2017; (2) the DOJ shall produce all remaining non-exempt records responsive Plaintiff's FOIA request, or otherwise respond to that portion of Plaintiff's request, on or before September 15, 2017; and (3) the parties shall file a joint status report on or before September 29, 2017, which shall contain a proposed schedule for further proceedings if litigation is going to be necessary. Signed by Judge Ketanji Brown Jackson on 07/11/2017. (lckbj1) (Entered: 07/11/2017)
09/01/2017	<a href="#">14</a> <b>R</b>	Consent MOTION for Extension of Time to Produce Documents by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Text of Proposed Order)(Shoaibi, Alexander) (Entered: 09/01/2017)
09/01/2017		MINUTE ORDER granting, for good cause shown, <a href="#">14</a> <b>R</b> Consent Motion for Extension of Time to Produce Documents. IT is hereby ORDERED that DOJ shall produce all remaining non-exempt records responsive Plaintiff's FOIA request, or otherwise respond to that portion of Plaintiff's request, on or before 10/15/2017; and that the parties shall file a joint status report on or before 10/27/2017, which shall contain a proposed schedule for further proceedings if litigation is going to be necessary. Signed by Judge Ketanji Brown Jackson on 09/01/2017. (lckbj1) (Entered: 09/01/2017)
10/12/2017	<a href="#">15</a> <b>R</b>	Consent MOTION for Extension of Time to Produce Documents by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Text of Proposed Order)(Shoaibi, Alexander) (Entered: 10/12/2017)
10/25/2017		MINUTE ORDER granting, for good cause shown, <a href="#">15</a> <b>R</b> Consent Motion for Extension of Time to Produce Remaining Responsive Records, nunc pro tunc. It is hereby ORDERED that Defendant shall produce all remaining non-exempt records that are responsive to Plaintiff's FOIA request on or before 10/31/2017. Signed by Judge Ketanji Brown Jackson on 10/25/2017. (lckbj1) (Entered: 10/25/2017)
11/02/2017		Case directly reassigned to Judge Trevor N. McFadden. Judge Ketanji Brown Jackson is no longer assigned to the case. (ztnr) (Entered: 11/02/2017)

11/15/2017		NOTICE OF HEARING:The parties shall take notice that a Status Conference is scheduled for December 5, 2017, at 10:00 AM, in Courtroom 2 before Judge Trevor N. McFadden. (hmc) (Entered: 11/15/2017)
11/15/2017	<a href="#">16</a> <b>R</b>	Joint STATUS REPORT and Motion to Adopt a Schedule for Further Proceedings by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <a href="#">1</a> <b>R</b> Text of Proposed Order)(Butler, Alan) (Entered: 11/15/2017)
11/15/2017		MINUTE ORDER: The parties shall file a Joint Status Report on or before December 1, 2017, advising the Court of a proposed schedule for further proceedings in this matter and advising whether the currently scheduled status conference will be useful. SO ORDERED. Signed by Judge Trevor N. McFadden on 11/15/2017. (lctnm1) (Entered: 11/15/2017)
11/15/2017	17	Joint MOTION for Scheduling Order by ELECTRONIC PRIVACY INFORMATION CENTER, UNITED STATES DEPARTMENT OF JUSTICE (See Docket Entry <a href="#">16</a> <b>R</b> to view document). (znmw) (Entered: 11/16/2017)
11/16/2017		Set/Reset Deadlines: Joint Status Report due on or before 12/1/2017. (hmc) (Entered: 11/16/2017)
12/01/2017	<a href="#">18</a> <b>R</b>	Joint STATUS REPORT by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <a href="#">1</a> Text of Proposed Order)(Butler, Alan) (Entered: 12/01/2017)
12/01/2017		MINUTE ORDER: In light of the parties' <a href="#">18</a> <b>R</b> Joint Status Report, the Status Conference scheduled for December 5, 2017, is hereby VACATED. The parties are ORDERED to file a Joint Status Report on or before December 14, 2017, advising the Court of a proposed schedule for further proceedings in this matter. Signed by Judge Trevor N. McFadden on 12/1/17. (lctnm1) (Entered: 12/01/2017)
12/01/2017		Set/Reset Deadlines: Joint Status Report due by 12/14/2017. (hmc) (Entered: 12/01/2017)
12/01/2017	19	Joint MOTION for Scheduling Order by ELECTRONIC PRIVACY INFORMATION CENTER, UNITED STATES DEPARTMENT OF JUSTICE(See Docket Entry <a href="#">18</a> <b>R</b> to view document). (znmw) (Entered: 12/04/2017)
12/14/2017	<a href="#">20</a> <b>R</b>	Joint STATUS REPORT by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <a href="#">1</a> Text of Proposed Order)(Butler, Alan) (Entered: 12/14/2017)
12/14/2017	21	Joint MOTION for Scheduling Order by ELECTRONIC PRIVACY INFORMATION CENTER, UNITED STATES DEPARTMENT OF JUSTICE(See Docket Entry <a href="#">20</a> <b>R</b> to view document). (znmw) (Entered: 12/15/2017)
12/15/2017		MINUTE ORDER: Upon consideration of the parties' <a href="#">20</a> <b>R</b> Joint Status Report and 21 Joint Motion for Scheduling Order, the parties' Joint Motion for Scheduling Order is GRANTED. The Defendant's Motion for Summary Judgment shall be filed by February 14, 2018; the Plaintiff's Opposition and Cross-Motion for Summary Judgment shall be filed by March 16, 2018; the Defendant's Reply in support of its own Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment shall be filed by April 5, 2018; and Plaintiff's Reply in Support of its Cross Motion for Summary Judgment shall be filed by April 16, 2018. Signed by Judge Trevor N. McFadden on 12/15/2017. (lctnm1) (Entered: 12/15/2017)
12/15/2017		Set/Reset Deadlines: Defendant's Motion for Summary Judgment due by 2/14/2018. Plaintiff's opposition to Defendant's Motion for Summary Judgment and Cross-Motion due by 3/16/2018. Defendant's reply in support of its Motion for Summary Judgment and opposition to Plaintiff's Cross-Motion due by 4/5/2018. Plaintiff's reply in support of its Cross-Motion due by 4/16/2018. (hmc) (Entered: 12/15/2017)

02/14/2018	<a href="#">22</a> <b>R</b>	Unopposed MOTION for Extension of Time to File Motion for Summary Judgment by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Text of Proposed Order)(Shoaibi, Alexander) (Entered: 02/14/2018)
02/14/2018		MINUTE ORDER granting the Department of Justice's <a href="#">22</a> <b>R</b> Unopposed Motion for Extension of Time. The Department of Justice's Motion for Summary Judgment shall now be filed by February 15, 2018. SO ORDERED. Signed by Judge Trevor N. McFadden on 2/14/18. (lctnm1) (Entered: 02/14/2018)
02/15/2018		Set/Reset Deadlines: Defendant's Motion for Summary Judgment due by 2/15/2018. (hmc) (Entered: 02/15/2018)
02/15/2018	<a href="#">23</a>	MOTION for Summary Judgment by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Declaration (Declaration of Vanessa R. Brinkman), # <a href="#">2</a> Text of Proposed Order)(Shoaibi, Alexander) (Entered: 02/15/2018)
03/16/2018	<a href="#">24</a>	Memorandum in opposition to re <a href="#">23</a> MOTION for Summary Judgment filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Attachments: # <a href="#">1</a> Memorandum in Support, # <a href="#">2</a> Statement of Facts, # <a href="#">3</a> Exhibit Exhibits A-H, # <a href="#">4</a> Text of Proposed Order)(Butler, Alan) (Entered: 03/16/2018)
03/16/2018	<a href="#">25</a>	Cross MOTION for Summary Judgment by ELECTRONIC PRIVACY INFORMATION CENTER (Attachments: # <a href="#">1</a> Memorandum in Support, # <a href="#">2</a> Statement of Facts, # <a href="#">3</a> Exhibit Exhibits A-H, # <a href="#">4</a> Text of Proposed Order)(Butler, Alan) (Entered: 03/16/2018)
04/03/2018	<a href="#">26</a> <b>R</b>	Consent MOTION for Extension of Time to File Reply in Support of Motion for Summary Judgment and Opposition to Cross-Motion for Summary Judgment by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Text of Proposed Order)(Shoaibi, Alexander) (Entered: 04/03/2018)
04/03/2018		MINUTE ORDER granting Defendant's <a href="#">26</a> <b>R</b> Consent Motion for Extension of Time. Defendant shall now file its reply in support of its motion for summary judgment and opposition to Plaintiff's cross-motion for summary judgment by April 12, 2018. Plaintiff shall file its reply in supports of its cross-motion for summary judgment by April 23, 2018. SO ORDERED. Signed by Judge Trevor N. McFadden on 4/3/18. (lctnm1) (Entered: 04/03/2018)
04/04/2018		Set/Reset Deadlines: Defendant's reply in support of its motion for summary judgment and opposition to Plaintiff's cross-motion due by 4/12/2018. Plaintiff's reply in support of its cross-motion due by 4/23/2018. (hmc) (Entered: 04/04/2018)
04/12/2018	<a href="#">27</a> <b>R</b>	Second MOTION for Extension of Time to File Reply and Opposition by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Text of Proposed Order) (Shoaibi, Alexander) (Entered: 04/12/2018)
04/13/2018		MINUTE ORDER: Upon consideration of Defendant's <a href="#">27</a> <b>R</b> Motion for Extension of Time to File, Defendant's reply in support of its motion for summary judgments and its opposition to the Plaintiff's cross-motion for summary judgment shall be filed on or before April 19, 2018, and Plaintiff's reply in support of its cross-motion for summary judgment shall be filed on or before April 30, 2018. The Court advises Defendant that further requests for an extension of time for this filing will be disfavored. SO ORDERED. Signed by Judge Trevor N. McFadden on 4/13/18. (lctnm1) (Entered: 04/13/2018)
04/13/2018		Set/Reset Deadlines: Defendant's reply in support of its motion for summary judgment and opposition to Plaintiff's cross-motion due by 4/19/2018. Plaintiff's reply in support of its cross-motion due by 4/30/2018. (hmc) (Entered: 04/13/2018)

04/19/2018	<a href="#">28</a> <b>R</b>	Third MOTION for Extension of Time to File Reply and Opposition by UNITED STATES DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Text of Proposed Order) (Shoaibi, Alexander) (Entered: 04/19/2018)
04/19/2018	<a href="#">29</a> <b>R</b>	Memorandum in opposition to re <a href="#">28</a> <b>R</b> Third MOTION for Extension of Time to File Reply and Opposition filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Rotenberg, Marc) (Entered: 04/19/2018)
04/19/2018		MINUTE ORDER denying Defendant's <a href="#">28</a> <b>R</b> Motion for Third Extension of Time as the motion is in violation of the <a href="#">5</a> General Order's requirement that "counsel seeking an extension of a deadline shall file a written motion at least two (2) business days prior to expiration of the deadline," the current deadline is of the Defendant's own choosing, two extensions of time for this filing have already been granted, and Defendant was warned that further extensions of this deadline would be disfavored. Signed by Judge Trevor N. McFadden on 4/19/18. (lctnm1) (Entered: 04/19/2018)
04/19/2018	<a href="#">30</a>	REPLY to opposition to motion re <a href="#">23</a> MOTION for Summary Judgment filed by UNITED STATES DEPARTMENT OF JUSTICE. (Shoaibi, Alexander) (Entered: 04/19/2018)
04/19/2018	<a href="#">31</a>	Memorandum in opposition to re <a href="#">25</a> Cross MOTION for Summary Judgment filed by UNITED STATES DEPARTMENT OF JUSTICE. (Attachments: # <a href="#">1</a> Text of Proposed Order)(Shoaibi, Alexander) (Entered: 04/19/2018)
04/20/2018	<a href="#">32</a>	STANDING ORDER Establishing Procedures for Cases Before Judge Trevor N. McFadden. The parties are hereby ORDERED to read and comply with the directives in the attached standing order. Signed by Judge Trevor N. McFadden on 4/20/18. (lctnm1) (Entered: 04/20/2018)
04/30/2018	<a href="#">33</a>	REPLY to opposition to motion re <a href="#">25</a> Cross MOTION for Summary Judgment filed by ELECTRONIC PRIVACY INFORMATION CENTER. (Rotenberg, Marc) (Entered: 04/30/2018)
07/23/2018	<a href="#">34</a> <b>R</b>	NOTICE OF SUBSTITUTION OF COUNSEL by Jeremy S. Simon on behalf of UNITED STATES DEPARTMENT OF JUSTICE Substituting for attorney Alexander Shoaibi (Simon, Jeremy) (Entered: 07/23/2018)
08/15/2018	<a href="#">35</a> <b>R</b>	MEMORANDUM AND OPINION re Defendant's <a href="#">23</a> Motion for Summary Judgment and Plaintiff's <a href="#">25</a> Cross-Motion for Summary Judgment. Signed by Judge Trevor N. McFadden on 8/15/18. (lctnm1) (Entered: 08/15/2018)
08/15/2018	<a href="#">36</a> <b>R</b>	ORDER granting Defendant's <a href="#">23</a> Motion for Summary Judgment and denying Plaintiff's <a href="#">25</a> Cross-Motion for Summary Judgment. See attached Order for details. Signed by Judge Trevor N. McFadden on 8/15/18. (lctnm1) (Entered: 08/15/2018)
10/12/2018	<a href="#">37</a> <b>R</b>	NOTICE OF APPEAL TO DC CIRCUIT COURT as to <a href="#">36</a> <b>R</b> Order by ELECTRONIC PRIVACY INFORMATION CENTER. Filing fee \$ 505, receipt number 0090-5736259. Fee Status: Fee Paid. Parties have been notified. (Rotenberg, Marc) (Entered: 10/12/2018)
10/16/2018	<a href="#">38</a>	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re <a href="#">37</a> <b>R</b> Notice of Appeal to DC Circuit Court. (tth) (Entered: 10/16/2018)
10/18/2018		USCA Case Number 18-5307 for <a href="#">37</a> <b>R</b> Notice of Appeal to DC Circuit Court filed by ELECTRONIC PRIVACY INFORMATION CENTER. (zrdj) (Entered: 10/18/2018)

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<b>Billable Pages:</b>	5	<b>Cost:</b>	0.50

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**ELECTRONIC PRIVACY  
INFORMATION CENTER,**

Plaintiff,

v.

**DEPARTMENT OF JUSTICE,**

Defendant.

Case No. 1:17-cv-00410 (TNM)

**MEMORANDUM OPINION**

The Electronic Privacy Information Center, or EPIC, claims a right under the Freedom of Information Act to records from the Department of Justice about evidence-based assessment tools that seek to predict the statistical probability of an individual's recidivism. The Department has identified relevant records in its possession but has withheld many records in whole or in part, either as private personal information or as information protected by the presidential communications and deliberative process privileges. Because the Department has justified each of the withholdings that EPIC challenges, the Department's Motion for Summary Judgment will be granted and EPIC's Cross-Motion for Summary Judgment will be denied.

**I. BACKGROUND**

EPIC's Freedom of Information Act, or FOIA, request seeks five categories of records related to evidence-based assessment tools, which can also be described as risk assessment tools:

1. All validation studies for risk assessment tools considered for use in sentencing, including but not limited to, COMPAS, LSI-R, and PCRA.<sup>1</sup>
2. All documents pertaining to inquiries for the need of validation studies or general follow up regarding the predictive success of risk assessment tools.

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<sup>1</sup> These are commercial risk assessment tools currently in use in criminal cases. Compl. ¶ 9.

3. All documents, including but not limited to, policies, guidelines, and memos pertaining to the use of evidence-based sentencing.
4. Purchase/sales contracts between risk-assessment tool companies, included [sic] but not limited to, LSI-R and the federal government.
5. Source codes for risk assessment tools used by the federal government in pre-trial, parole, and sentencing, from PCRA, COMPAS, LSI-R, and any other tools used.

Compl. ¶ 14.

The Department of Justice identified and produced 359 pages of records, with some redactions on 128 of those pages to protect privileged information under FOIA Exemption 5 and private personal information under FOIA Exemption 6. Decl. of Vanessa R. Brinkmann ISO Def.’s Mot. Summary J. (Brinkmann Decl.) ¶¶ 8, 14. The Department withheld 2,363 pages in full under Exemption 5, claiming that the records enjoy the presidential communications privilege and the deliberative process privilege. *Id.* ¶ 14. One of the key withholdings is a document that the Department describes as a Predictive Analytics Report prepared for submission to the White House. *Id.* ¶ 12. This report was prepared “at the direction of the White House” after a 2014 White House report that tasked President Barack Obama’s senior advisors with leading a comprehensive review of the effect of big data technologies, including the use of predictive analytics in law enforcement. *Id.* ¶¶ 10-11. The Department also withheld drafts, research, briefing material, and emails related to the Report. *Id.* ¶ 15. EPIC sued to challenge several of these withholdings.<sup>2</sup> Now before the Court are Cross-Motions for Summary Judgment.<sup>3</sup>

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<sup>2</sup> This Court has subject matter jurisdiction over EPIC’s claims under 28 U.S.C. § 1331 because they arise under federal law. *See also* 5 U.S.C. § 552(a)(4)(B) and (a)(6)(c)(i) (granting the United States District Court for the District of Columbia jurisdiction over FOIA claims).

<sup>3</sup> EPIC does not dispute the adequacy of the Department’s search for responsive records or the permissibility of the Department’s Exemption 6 withholdings. It does contest the withholding of the Predictive Analytics Report, the related research and briefing material, and two emails.

## II. LEGAL STANDARD

To prevail on a motion for summary judgment, a movant must show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). FOIA requires federal agencies to “disclose information to the public upon reasonable request unless the records at issue fall within specifically delineated exemptions.” *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 365-66 (D.C. Cir. 2008); *see also* 5 U.S.C. § 552(a)(3)(A) (records sought must be “reasonably describe[d]”). Thus, a FOIA defendant is entitled to summary judgment if it shows that there is no genuine dispute about whether “each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act’s inspection requirements.” *See Weisberg v. Dep’t of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

To show that any unproduced documents are exempt from FOIA, an agency may file “affidavits describing the material withheld and the manner in which it falls within the exemption claimed.” *King v. Dep’t of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). An agency affidavit that addresses these points with “reasonably specific detail” provides sufficient grounds for summary judgment unless it is “controverted by either contrary evidence in the record [or] by evidence of agency bad faith.” *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *see also SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (giving agency declarations “a presumption of good faith, which cannot be rebutted by purely speculative claims”). Courts review the applicability of FOIA exemptions *de novo*. *King*, 830 F.2d at 217. Courts decide the “vast majority” of FOIA cases on motions for summary

judgment. *See Brayton v. Office of United States Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011).

### III. ANALYSIS

FOIA Exemption 5 protects “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.” 5 U.S.C. § 552(b)(5). Exemption 5 has been interpreted to include materials subject to the presidential communications privilege as well as materials subject to the deliberative process privilege. *Judicial Watch v. Dep’t of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004).

#### A. The Presidential Communications Privilege Protects the Department’s Predictive Analytics Report

*In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), is the leading case in this Circuit on the metes and bounds of the presidential communications privilege. That case held that the privilege protects “documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential.” *Id.* at 744. It is broad in that it “applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.” *Id.* at 745. And it reaches beyond communications to which the President is a party. *Id.* at 750. But it does not reach past “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” *Id.* This is because the scope of the privilege must “be construed as narrowly as is consistent with ensuring that the confidentiality of the President’s decisionmaking process is adequately protected.” *Id.* at 752.

Narrow construction of the privilege helps to balance “the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President’s ability to obtain candid, informed advice.” *Judicial Watch v. Dep’t of Justice*, 365 F.3d at 1112.

The Department of Justice relies on the presidential communications privilege to withhold the Predictive Analytics Report in full.<sup>4</sup> It explains that the White House “solicited and received” the Report from the Department. Brinkmann Decl. ¶ 43. More specifically, after the 2014 White House report that tasked the President’s senior advisors with a comprehensive review of the effect of big data technologies, a senior White House advisor wrote a memorandum to the Attorney General providing action steps related to the review. *Id.* ¶ 42. At the direction of the White House, the Department’s Office of Legal Policy prepared the Predictive Analytics Report. *Id.* And the Principle Deputy Assistant Attorney General of the Office of Legal Policy submitted the Report to the White House Counsel’s Office. *Id.*; *see also* Pl.’s Cross-Mot. Summary J. 23 (noting that the Department submitted the Predictive Analytics Report to then-Associate White House Counsel Kate Heinzelman). I agree with the Department of Justice that this the Report enjoys protection from disclosure as a communication “solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” *See In re Sealed Case*, 121 F.3d at 750.

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<sup>4</sup> The Department also argues that the deliberative process privilege applies to the Report but concedes that, “[a]bsent the presidential communications privilege, the Report could be segregated.” Def.’s Reply ISO Mot. Summary J. 5. Because I conclude that the presidential communications privilege applies to the document in its entirety, I need not decide whether the deliberative process privilege applies to the document in part.

But EPIC challenges this withholding on three grounds. *First*, EPIC argues that the Department lacks the authority to invoke the presidential communications privilege unilaterally. In the context of discovery, Circuit precedent has not resolved “whether the privilege must be invoked by the President as opposed to a member of his staff.” *In re Sealed Case*, 121 F.3d at 744 n.16. Even if a member of the President’s staff could invoke the privilege in discovery, the Department of Justice is an agency and not a presidential staff member.

But the question at hand is not whether an agency can invoke the privilege in discovery but whether an agency can invoke the privilege under FOIA Exemption 5. Although the Circuit has cited cases from the discovery context to suggest that there may be narrow limits on who can invoke the privilege, it has expressly declined to decide what limits apply in the FOIA context. *Judicial Watch*, 365 F.3d at 1114. And the Supreme Court has made clear that “discovery rules can only be applied under Exemption 5 by way of rough analogies.” *EPA v. Mink*, 410 U.S. 73, 86 (1973), *superseded by statute on other grounds*, Pub. L. No. 93-502 § 2, 88 Stat. 1561, *as recognized in Ray v. Turner*, 587 F.2d 1187, 1190-91 (D.C. Cir. 1978).

In *FTC v. Grolier, Inc.*, the Supreme Court determined that Exemption 5 protected documents from disclosure under FOIA even though a court had ordered the FTC to disclose those same documents in discovery. 462 U.S. 19, 27-28 (1983). The Supreme Court explained that discovery allows a more nuanced consideration of case-specific facts than FOIA and that Exemption 5 must be interpreted as “a categorical rule” to effectuate FOIA’s goal of “expediting disclosure by means of workable rules.” *Id.* at 28. So any limitation on who may invoke the presidential communications privilege in discovery “does not automatically carry over into the Exemption 5 analysis.” *Lardner v. Dep’t of Justice*, 2005 WL 758267 at \*7 (D.D.C. 2005).

Without Circuit authority to decide the question, the Court is persuaded by earlier decisions from this District that an agency has authority to invoke the presidential communications privilege when making FOIA Exemption 5 withholdings. *See, e.g., Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 80 (D.D.C. 2008) (holding that the Department of Justice could invoke the presidential communications privilege under FOIA). In keeping with the Supreme Court's direction to apply Exemption 5 as a categorical rule, Judge Bates has refused to adopt an "analysis that yields a different outcome depending on the way in which a particular document is invoked." *Lardner*, 2005 WL 758267 at \*8. When an agency invokes the deliberative process privilege as grounds for withholding a document under Exemption 5, courts do not require that a high-level agency official invoke the privilege, even though they do require a high-level agency official to invoke the privilege in discovery. *Id.* at \*8. This is because a categorical approach to the deliberative process privilege depends only "on the factual content and purpose of the requested document." *See Dow Jones & Co., Inc. v. DOJ*, 917 F.2d 571 (D.C. Cir. 1990). Similarly, a categorical approach to the presidential communications privilege depends on the nature of the document and not on how the privilege is invoked. *Lardner*, 2005 WL 758267 at \*6-10.<sup>5</sup> Thus, the Court concludes that the Department has adequately invoked the privilege without any action by the President or his staff.

*Second*, EPIC argues that it is not clear which President can invoke the privilege to protect communications made during a prior administration. Memo. ISO Cross-Mot. Summary

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<sup>5</sup> Requiring the White House to invoke the presidential communications privilege in FOIA cases would effectively burden it—and arguably the President himself—with the responsibility of reviewing voluminous FOIA requests even though Congress exempted the White House from FOIA obligations. *See id.* at \*9-10; *see also* 5 U.S.C. § 552(a) (placing disclosure obligations on each federal "agency," a term that does not include the White House under the definition in 5 U.S.C. § 551(1)). This also militates against EPIC's proposed approach. *Lardner*, 2005 WL 758267 at \*9-10.

J. 22. EPIC appears to view this as an alternative argument that could defeat summary judgment “even if the [Department] could invoke the privilege on behalf of the President without any apparent White House involvement.” *Id.* But the Court has already determined that the limitations on who can invoke the privilege do not apply in the FOIA context and that the Department may invoke the privilege unilaterally based on the nature of the document in question. Because Exemption 5 is a categorical rule that focuses on the document at issue rather than the way that privilege is invoked, EPIC’s second argument also fails.

*Third*, EPIC argues that the Department has failed to show that then-President Obama or any of his immediate White House advisers received the Predictive Analytics Report. *Id.* at 22-23. According to EPIC, the privilege does not extend to communications with an Associate White House Counsel. *Id.* at 23. But the case on which EPIC relies noted that even documents created by a legal extern at the request of two Associate White House Counsel enjoyed the protection of the presidential communications privilege. *Judicial Watch*, 365 F.3d at 1117 (quoting *In re Sealed Case*, 121 F.3d at 758). Although EPIC claims that the privilege applies only to communications to which the President or his immediate advisers are parties, it can also apply to communications involving “members of an immediate White House adviser’s staff.” *In re Sealed Case*, 121 F.3d at 752. Whether or not an Associate White House Counsel is “an immediate White House adviser,” she is a member of the staff of the White House Counsel, who is certainly himself an immediate White House adviser. So this argument also fails, and the Department may withhold the Predictive Analytics Report.

#### **B. The Deliberative Process Privilege Applies to the Other Challenged Withholdings**

To fall within the scope of the deliberative process privilege, a document must be “both predecisional and deliberative.” *Judicial Watch v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A

court considers a document “predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process.” *Id.* But “agencies must disclose those portions of predecisional and deliberative documents that contain factual information that does not inevitably reveal the government’s deliberations.” *Public Citizen, Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010).

The Department of Justice invokes the deliberative process privilege to withhold under Exemption 5 research and briefing materials prepared by its own employees and by outside consultants. Memo. ISO Pl.’s Mot. Summary J. 10-12. The Department explains that the research materials are predecisional because they informed the Department’s drafting decisions and decisions about what source materials to consult. Brinkmann Decl. ¶ 27. It also explains that these materials are deliberative because “they reflect the thought processes and judgment of [the Department’s Office of Legal Policy] staff as they canvass and cull from a spectrum of available source materials, analyze the material, and distill it down for other [Office of Legal Policy] staff working on the study and report and as such, show the internal development of the Department’s decisions.” *Id.* ¶ 28. The Department’s affidavit states that it cannot segregate the factual content from the deliberative content in these materials because the selection of source material “is itself revelatory of the deliberative process.” *Id.* 30.

The Department also relies on the deliberative process privilege to withhold briefing materials that its staff used to prepare the Attorney General for a media interview and to inform internal Department staff about the Predictive Analytics Report in preparation for anticipated internal and external meetings. Brinkmann Decl. ¶¶ 31-32. The Department explains that these materials are predecisional because they inform decisions by the Department leaders who review them and deliberative because they convey the drafters’ opinions and analysis. *Id.* ¶ 33. In other

words, briefing materials contain the drafter's research and recommendations and reflect the drafter's assessment of what facts and issues are important and which do not matter. *Id.* ¶¶ 33, 35. The Department's affidavit states that it could not effectively segregate the factual and deliberative content in the briefing materials "[b]ecause the selection of facts and source material is itself a part of the deliberative process." *Id.* ¶ 35.

EPIC objects to the withholding of these materials on two grounds. First, EPIC objects that the research and briefing materials are factual and so are not deliberative. Memo. ISO Pl.'s Cross-Mot. Summary J. 13-16. Second, EPIC objects that the Department has not provided sufficient grounds for treating research prepared by outside consultants as intra-agency records subject to Exemption 5. *Id.* at 16-17. Neither objection prevents summary judgment for the Department.

**1. Disclosing the Factual Contents of the Withheld Documents Would Reveal the Department's Deliberative Process**

EPIC acknowledges that an agency can withhold factual information if its disclosure would inevitably reveal the government's deliberations but argues that the selection of source material is not revelatory of the deliberative process as a matter of law. *Id.* at 14-15. In support of this view, EPIC cites Circuit precedent that observes:

Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.

*Playboy Enters., Inc. v. DOJ*, 677 F.2d 931, 935 (D.C. Cir. 1982).

But the selection or organization of facts can be part of an agency's deliberative process and so exempt from FOIA. *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011). The deliberative process privilege protects a compilation of factual material

“assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action.” *Mapother v. DOJ*, 3 F.3d 1533, 1539 (D.C. Cir. 1993). This is because “[t]he work of the assistants in separating the wheat from the chaff is surely just as much part of the deliberative process as is the later milling by running the grist through the mind of the administrator.” *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974). A decisionmaker using an assistant to winnow relevant facts from irrelevant facts is “similar in many ways to a judge’s use of his law clerk to sift through the report of a special master or other lengthy materials in the record.” *Id.* at 78. It is part of the decisionmaker’s deliberative process and not subject to public disclosure. *Id.*

EPIC tries to distinguish *Montrose*, claiming that the sifting of information here is different because it is unrelated to any decision and involves facts that are not in the public record. Reply ISO Pl.’s Cross-Mot. Summary J. 7. But the research was prepared to influence the decisions that went into drafting the Predictive Analytics Report, and the briefing was prepared to influence decisions about the Report and about how to discuss it. And whether facts are in the public record makes no legal difference. *See Ancient Coin Collectors Guild*, 641 F.3d at 513 (“the legitimacy of withholding does not turn on whether the material . . . is already in the public domain”). The Department has submitted an affidavit stating that the research and briefing materials it seeks to withhold assemble relevant facts and disregard irrelevant facts, reflecting the judgment of Department employees and consultants who prepared the materials to help the Department decide what to report to the White House about evidence-based assessment tools. Brinkmann Decl. ¶¶ 26-35. This places the research and briefing materials within the scope of the deliberative process privilege absent contrary record evidence or evidence of agency bad faith. *See Military Audit Project*, 656 F.2d at 738.

EPIC attempts to show bad faith in two ways. First, it claims that “even if some of the factual material contained in the withheld pages were inextricably intertwined with deliberative material, it beggars belief that *not one single fact* in 345 pages could be disentangled and properly disclosed.” Memo. ISO Pl.’s Cross-Mot. Summary J. 15. But EPIC’s incredulity is not evidence and fails to prove that the Department has withheld reasonably segregable information. See 5 U.S.C. § 552(b)(9) (requiring agencies to release reasonably segregable portions of records after deleting information that falls within a FOIA exemption). Second, EPIC attempts to show bad faith by claiming that the Department’s redactions to two emails show that it has withheld information unjustifiably or, alternatively, that the Department can easily segregate factual and deliberative materials. Memo. ISO Pl.’s Cross-Mot. Summary J. 15-16. But this claim is also speculative and fails to overcome the presumption of agency good faith.<sup>6</sup>

Because EPIC has not overcome the presumption of good faith that the Department’s affidavit enjoys, the Department’s affidavit is enough to put the research and briefing materials within the scope of *Montrose* and *Mapother*. Because the materials fall within the scope of *Montrose* and *Mapother*, the factual content in the materials is intertwined with the Department’s deliberative process and properly withheld under Exemption 5. And this defeats EPIC’s objection that the Department should disclose the materials because they are simply factual.

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<sup>6</sup> More specifically, EPIC speculates that it is “unlikely” an email that says it contains “data points” could also contain a paragraph of “deliberations about how to respond to a particular news article” as the Department asserted in support of its redactions. *Id.* at 15; *see also id.* Ex. H; Vaughn Index 29. It also states that a different email’s description of an attachment “appear[s]” to be an exhaustive description of the email’s own contents, so that if the attachment contained “a review of the academics, their relevant articles, and what they say about their respective projects” then the email could not have contained a paragraph “reflecting advice and research.” Memo. ISO Pl.’s Cross-Mot. Summary J. 16; *see also id.* Ex. I; Vaughn Index 32.

## **2. Research by Outside Consultants Falls Within the Scope of the Consultant Corollary**

EPIC also argues that the Department's withholding of consultant research unjustifiably treats research prepared by outside consultants as intra-agency records subject to Exemption 5. *Id.* at 16-17. But under controlling Circuit precedent, "When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an intra-agency memorandum for purposes of determining the applicability of Exemption 5." *Nat'l Inst. Of Military Justice v. DOD*, 512 F.3d 677, 684 (D.C. Cir. 2008). The Department's affidavit states that every withheld consultant research record "reflect[s] advice solicited by [the Department's Office of Legal Policy] as part of the drafting and research process for the Predictive Analytics Report." Brinkmann Decl. ¶ 27.

EPIC notes that the so-called consultant corollary applies only to consultants who are not advocating their own interests. Memo. ISO Pl.'s Cross-Mot. Summary J. 16-17; *see also Competitive Enter. Inst. v. Office of Sci. & Tech. Policy ("CEI")*, 161 F. Supp. 3d 120, 133 (D.D.C. 2016). The Department represents that the consultants "were not advocating for a government benefit at the expense of others; rather they were simply responding to and cooperating with [the Office of Legal Policy's] request for assistance." Brinkmann Decl. ¶ 19. But EPIC says this is conclusory, like the agency representations in *CEI*. Memo. ISO Pl.'s Cross-Mot. Summary J. 17.

The difference is that in *CEI* there was affirmative evidence suggesting that the consultant had a professional, reputational, and financial interest in promoting her theory of climate change to the agency that consulted her, while here there is nothing to overcome the presumption of good faith that the agency's declaration enjoys. *See CEI*, 161 F. Supp. 3d at 133-

34. The other cases that EPIC notes in passing also involved affirmative evidence of self-interest that the agency declarations did not address adequately. *See COMPTTEL v. FCC*, 910 F. Supp. 2d 100, 119 (D.D.C. 2012) (requiring evidence to support FCC’s claim that a company it was investigating had given it disinterested advice); *Ctr. for Int’l Env’tl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 26 (D.D.C. 2002) (rejecting agency’s claim that Chile had given it disinterested advice about a trade agreement between Chile and the United States). EPIC has identified no evidence suggesting that the Department has withheld records submitted by alleged consultants who were advocating their own interests. So its second objection also fails. The Department is entitled to summary judgment on its withholding of internal and consultant research materials.

**C. EPIC Has Not Overcome the Presumption That the Department Disclosed Reasonably Segregable Information**

“Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavit states that the Department “conducted a line-by-line review of all of the records and released any portions thereof that were not protected by an applicable FOIA exemption, often redacting only portions of sentences or paragraphs . . . .” Brinkmann Decl. ¶ 46. EPIC’s efforts to overcome this presumption and the Department’s affidavit mirror the arguments about the applicability of Exemption 5 that I have already rejected. So the Court declines EPIC’s invitation to conduct an *in camera* inspection of the records the Department has withheld and instead rely on the Department’s affidavit and the unrebutted presumption that the Department disclosed all reasonably segregable materials. *Sussman*, 494 F.3d at 1117 (requiring evidence that the agency did not segregate to rebut presumption of regularity); *see also Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996) (noting

that *in camera* review burdens the courts, undermines the adversarial nature of FOIA litigation, and “should not be resorted to as a matter of course”).

#### **IV. CONCLUSION**

For the reasons stated above, the Department of Justice’s Motion for Summary Judgment will be granted and the Electronic Privacy Information Center’s Cross-Motion for Summary Judgment will be denied. A separate order will issue.

Dated: August 15, 2018

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TREVOR N. MCFADDEN, U.S.D.J.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**ELECTRONIC PRIVACY  
INFORMATION CENTER,**

Plaintiff,

v.

**DEPARTMENT OF JUSTICE,**

Defendant.

Case No. 1:17-cv-00410 (TNM)

**ORDER**

Upon consideration of the Department of Justice's Motion for Summary Judgment, the Electronic Privacy Information Center's Cross-Motion for Summary Judgment, the pleadings, relevant law, and related legal memoranda in opposition and in support, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that the Department of Justice's Motion for Summary Judgment is **GRANTED** and the Electronic Privacy Information Center's Cross-Motion for Summary Judgment is **DENIED**. The Clerk of Court is directed to close the case.

**SO ORDERED.**

This is a final, appealable Order.

Dated: August 15, 2018



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TREVOR N. MCFADDEN  
United States District Judge



### **Jurisdiction and Venue**

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 552(a)(4)(B) and (a)(6)(c)(i). This Court has personal jurisdiction over Defendant DOJ.

4. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

### **Parties**

5. Plaintiff EPIC is a nonprofit organization incorporated in Washington, D.C. and established in 1994 to focus public attention on emerging privacy and civil liberties issues. Central to EPIC's mission is oversight and analysis of government activities. EPIC's Advisory Board includes distinguished experts in law, technology, public policy, and cybersecurity. EPIC routinely disseminates information to the public through the EPIC website, the EPIC Alert, and various other news organizations. EPIC is a representative of the news media. *EPIC v. Dep't of Def.*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

6. Defendant DOJ is a federal agency within the meaning of the FOIA, 5 U.S.C. § 552(f)(1). Defendant DOJ is headquartered in Washington, D.C.

### **Facts**

#### **Criminal Justice Algorithms**

7. "Evidence-based assessment tools," or "risk assessments," are techniques that "try to predict recidivism—repeat offending or breaking the rules of probation or parole—using statistical probabilities based on factors such as age, employment history and prior criminal record."<sup>1</sup>

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<sup>1</sup> Anna Maria Barry-Jester et al., *The New Science of Sentencing*, The Marshall Project (Aug. 4, 2015), <https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing>.

8. Today, federal and state officials nationwide use evidence-based risk assessment tools to make decisions at all stages of criminal justice process.<sup>2</sup> These techniques are controversial: the reliability and fairness of “evidence-based” tools,<sup>3</sup> as well as the constitutional legitimacy, are rigorously contested.<sup>4</sup> Nonetheless, risk assessments are increasingly used to make sentencing and other significant decisions in the criminal justice system, and with many tools the product of private enterprise, risk assessment has become a competitive industry.<sup>5</sup> Transparency of these techniques is of the utmost importance and is necessary to secure fair outcomes, preserve the rights of individuals, and maintain accountability across the criminal justice system.

9. Commercial risk assessment tools are already in use in criminal cases across the country. The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) and the Level of Service Inventory Revised (LSI-R)<sup>6</sup> purport to assess individuals’ risk levels and criminogenic needs based on a wide range of personal factors.<sup>7</sup> COMPAS, for example, considers factors such as social isolation, criminal associations, and criminal personality, while LSI-R uses factors including leisure, accommodations, and attitudes or orientation.<sup>8</sup> The federal Post-Conviction Risk Assessment (PCRA) likewise uses information such as criminal history,

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<sup>2</sup> Nathan James, Cong. Research Serv., R44087, Risk and Needs Assessment in the Criminal Justice System 4-5 (2015).

<sup>3</sup> See generally Cathy O’Neil, *Weapons of Math Destruction* (2016).

<sup>4</sup> *State v. Loomis*, No. 2015AP157-CR (Wis. July 13, 2016).

<sup>5</sup> Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 Am. Crim. L. Rev. 231, 233 (2015).

<sup>6</sup> Memorandum from the Vera Inst. of Justice to the De. Justice Reinvestment Task Force (Oct. 12, 2011), <http://www.ma4jr.org/wp-content/uploads/2014/10/vera-institute-memo-on-risk-assessment-for-delaware-2011.pdf>.

<sup>7</sup> *Id.* at app. A.

<sup>8</sup> *Id.* at app. A.

education and employment, and social networks to reach a “final conclusion regarding risk level and criminogenic needs.”<sup>9</sup>

10. The DOJ, speaking through the National Institute of Corrections, has stated that the agency aims “to build a systemwide framework (arrest through final disposition and discharge)” of evidence based decision-making.<sup>10</sup>

11. Nonetheless, the DOJ itself has expressed reservations and concern about the use of criminal justice algorithms. The DOJ Criminal Division called assessments based on sociological and personal information rather than prior bad acts “dangerous” and constitutionally suspect,<sup>11</sup> citing the disparate impacts of risk assessments and the erosion of consistent sentencing.<sup>12</sup> Former U.S. Attorney General Eric Holder stated that “basing sentencing decisions on static factors and immutable characteristics . . . may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”<sup>13</sup>

12. For these reasons, there is a significant public interest in the release of the DOJ’s records relating to “evidence-based” practices in sentencing, including policies, guidelines, source codes, and validation studies. The disclosure of this information is necessary for the public to assess the merits of criminal justice algorithms, including their fairness and reliability, and to allow individuals the opportunity to challenge institutional decisions rendered against them.

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<sup>9</sup> Admin. Office of the U.S. Courts, Office of Prob, and Pretrial Servs., *An Overview of the Federal Post Conviction Risk Assessment* 9-10 (2011), [http://www.uscourts.gov/sites/default/files/pcra\\_sep\\_2011\\_0.pdf](http://www.uscourts.gov/sites/default/files/pcra_sep_2011_0.pdf).

<sup>10</sup> *National Institute of Corrections: Evidence-Based Decision Making*, <http://info.nicic.gov/ebdm/> (last visited Mar. 2, 2017).

<sup>11</sup> Letter from Jonathan J. Wroblewski, Dir., Office of Policy and Legislation., to the Honorable Patti Saris, Chair. Comm’n (July 29, 2014), <https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> Eric Holder, *Speech Presented at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference, Philadelphia, PA, 27 Fed. Sent’g Rep. 252* (2015).

## **EPIC's FOIA Request**

13. On June 15, 2016, EPIC submitted FOIA Requests to several DOJ subcomponents, including the Office of the U.S. Attorney General and the Office of Legal Policy.

14. EPIC's FOIA Request sought records related to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. Specifically, EPIC sought:

1. All validation studies for risk assessment tools considered for use in sentencing, including but not limited to, COMPAS, LSI-R, and PCRA.
2. All documents pertaining to inquiries for the need of validation studies or general follow up regarding the predictive success of risk assessment tools.
3. All documents, including but not limited to, policies, guidelines, and memos pertaining to the use of evidence-based sentencing.
4. Purchase/sales contracts between risk-assessment tool companies, included but not limited to, LSI-R and the federal government.
5. Source codes for risk assessment tools used by the federal government in pre-trial, parole, and sentencing, from PCRA, COMPAS, LSI-R, and any other tools used.

15. EPIC sought "news media" fee status under 5 U.S.C. § 552(4)(A)(ii)(II) and a waiver of all duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii).

16. In a letter dated August 9, 2016, Senior Government Information Specialist Sara B. Tennant acknowledged receipt of EPIC's FOIA request on behalf of the DOJ's Office of the Attorney General and the Office of Legal Policy. The letter also claimed that the request fell within "unusual circumstances" and that the agency would extend its time limit to respond beyond the ten additional days provided by statute. 5 U.S.C. 552 § (a)(6)(B)(i)-(iii).

### **EPIC's Constructive Exhaustion of Administrative Remedies**

17. Today is the 265th day since the DOJ received EPIC's FOIA Request.

18. The DOJ has failed to make a determination regarding EPIC's FOIA Request within the time period required by 5 U.S.C. § 552(a)(6)(B).

19. The DOJ's failure to make a determination within the statutory time limit violates the FOIA.

20. EPIC has constructively exhausted all administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

### **Count I**

#### **Violation of FOIA: Failure to Comply with Statutory Deadlines**

21. Plaintiff asserts and incorporates by reference paragraphs 1–20.

22. Defendant FBI has failed to make a determination regarding EPIC’s request for 265 days and has thus violated the deadline under 5 U.S.C. § 552(a)(6)(B).

23. Plaintiff has constructively exhausted all applicable administrative remedies with respect to EPIC’s FOIA Request under 5 U.S.C. § 552(a)(6)(C)(i).

### **Count II**

#### **Violation of FOIA: Unlawful Withholding of Agency Records**

24. Plaintiff asserts and incorporates by reference paragraphs 1–20.

25. Defendant has wrongfully withheld agency records requested by Plaintiff.

26. Plaintiff has constructively exhausted applicable administrative remedies with respect to Defendant’s withholding of the requested records. 5 U.S.C. § 552(a)(6)(C)(i).

27. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested records.

### **Requested Relief**

WHEREFORE, Plaintiff requests that this Court:

- A. Order Defendant to immediately conduct a reasonable search for all responsive records;
- B. Order Defendant to disclose to Plaintiff all responsive, non-exempt records;
- C. Order Defendant to produce the records sought without the assessment of search fees;
- D. Order Defendant to grant EPIC’s request for a fee waiver;

- E. Award EPIC costs and reasonable attorney's fees incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Respectfully Submitted,

/s/ Alan Butler

Alan Butler, D.C. Bar # 1012128  
EPIC Senior Counsel

Marc Rotenberg, D.C. Bar # 422825  
EPIC President and Executive Director

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Dated: March 7, 2017

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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ELECTRONIC PRIVACY INFORMATION		)	
CENTER,		)	
		)	
Plaintiff,		)	Civil No. 1:17-cv-00410
		)	
v.		)	
		)	
UNITED STATES DEPARTMENT		)	
OF JUSTICE,		)	
		)	
Defendant.		)	
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**DECLARATION OF VANESSA R. BRINKMANN**

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1. I am Senior Counsel in the Office of Information Policy (OIP), United States Department of Justice (DOJ or Department). In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by OIP. The Initial Request (IR) Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of the Department of Justice, specifically: the Offices of the Attorney General, the Deputy Attorney General, and the Associate Attorney General, and the Offices of Legislative Affairs, Legal Policy, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consult with personnel in the senior leadership offices and, when appropriate, with other components within the DOJ and/or other Executive Branch agencies.

2. I make the statements herein based on my personal knowledge, as well as on information that I acquired while performing my official duties.

**Plaintiff's Initial FOIA Request to OIP**

3. By letter dated June 15, 2016, Electronic Privacy Information Center (“EPIC” or “plaintiff”) submitted a FOIA request to DOJ seeking records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. A copy of plaintiff’s FOIA request is attached hereto as Exhibit A.

4. Specifically, plaintiff requested the following records:

- a. All validation studies for risk assessment tools considered for use in sentencing, including but not limited to, COMPAS, LSI-R, and PCRA.
- b. All documents pertaining to inquiries for the need of validation studies or general follow up regarding the predictive success of risk assessment tools.
- c. All documents, including but not limited to, policies, guidelines, and memos pertaining to the use of evidence-based sentencing.
- d. Purchase/sales contracts between risk-assessment tool companies, included but not limited to, LSI-R and the federal government.
- e. Source codes for risk assessment tools used by the federal government in pre-trial, parole, and sentencing, from PCRA, COMPAS, LSI-R, and any other tools used.

5. By letter dated August 9, 2016, OIP acknowledged receipt of plaintiff's FOIA request on behalf of the Offices of the Attorney General (OAG) and Legal Policy (OLP), and provided administrative tracking numbers DOJ-2016-003626 (AG) and DOJ-2016-003627 (OLP). A copy of OIP's acknowledgement letter to plaintiff dated August 9, 2016, is attached hereto as Exhibit B.

6. On March 7, 2017, plaintiff filed suit in connection with the above-referenced FOIA request. *See* ECF No. 1.

**OIP's Responses to Plaintiff's FOIA Request**

7. By letter dated August 16, 2017, OIP provided an interim response to plaintiff's FOIA request. OIP informed plaintiff that searches had been conducted in OAG and OLP pertaining to Parts (4) and (5) of plaintiff's request, and that no responsive records were located as a result of these searches. OIP further informed plaintiff that it was continuing to review and process material that was responsive to Parts (1), (2), and (3) of plaintiff's request and would respond only after consulting with the other entities who had equities in the responsive material. A copy of OIP's interim response, dated August 16, 2017, is attached hereto as Exhibit C.

8. By letter dated October 31, 2017, OIP provided its final response to plaintiff's FOIA request. Pursuant to this response, OIP provided 359 pages of material to plaintiff, some with excisions made pursuant to Exemptions 5 and 6 of the FOIA. Furthermore, OIP withheld 2,367 pages in full pursuant to Exemption 5 of the FOIA. A copy of OIP's final response letter to plaintiff, dated October 31, 2017, is attached hereto as Exhibit D.

**Adequacy of OIP's Records Searches**

9. As stated in the parties' December 14, 2017 Joint Status Report and Motion to Adopt a Schedule for Further Proceedings, plaintiff is not challenging the adequacy of OIP's records searches. *See* ECF No. 20. As such, OIP's records searches are not addressed herein.

**Overview of the Predictive Analytics Report**

10. In May 2014, the White House released a report entitled "Big Data: Seizing Opportunities, Preserving Values," ("the Big Data Report")<sup>1</sup> in which senior advisors in the White House were tasked with leading a comprehensive review of the impact that big data technologies are having and will have on a range of economic, social, and government activities. *See* "Big Data: Seizing Opportunities, Preserving Values" at 3, available at:

[https://obamawhitehouse.archives.gov/sites/default/files/docs/big\\_data\\_privacy\\_report\\_may\\_1\\_2014.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf).

11. Among the many findings and recommendations outlined in the Big Data Report, was the reference to the use of predictive analytics in law enforcement. *See id.* at 66.

12. After the issuance of the Big Data Report, at the direction of the White House, DOJ's Office of Legal Policy (OLP) led a Department review on the use of predictive analytics in law enforcement, and drafted a Predictive Analytics Report, as well as preliminary outlines of those reports, for submission to the White House. This process

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<sup>1</sup> The May 2014 White House report entitled, "Big Data: Seizing Opportunities, Preserving Values," was provided to the plaintiff in OIP's final response, dated October 31, 2017.

entailed both conducting internal research -- including coordination with other Executive Branch stakeholders -- and seeking advice from expert consultants outside of the Department, leading discussions about the progress of the research that had been undertaken, and drafting various iterations of the Predictive Analytics Report that compiled, distilled, presented, and analyzed the research that DOJ conducted.

13. Once the Predictive Analytics Report was finalized, it was submitted to the White House Counsel's Office (WHCO) on November 18, 2014. This report identified potential benefits and challenges in the use of predictive analytics in the law enforcement context, identified tentative next steps, and presented questions for further consideration.

**Explanation of Information Withheld by OIP Pursuant to FOIA Exemption 5**

14. Pursuant to the parties' December 14, 2017 Joint Status Report and Motion to Adopt a Schedule for Further Proceedings, plaintiff stated its intent to challenge OIP's assertion of Exemption 5 of the FOIA, and OIP's determination that no additional, reasonably segregable non-exempt information could be released from the records withheld by OIP. *See* ECF No. 20. OIP withheld a total of 2,363<sup>2</sup> pages in full, and 128 pages in part, pursuant to Exemption 5.<sup>3</sup> The application of FOIA Exemption 5 to these records is discussed in detail below.

15. This declaration is intended to be read in tandem with the corresponding Vaughn Index ("Index") prepared by OIP, filed contemporaneously, and attached hereto as

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<sup>2</sup> OIP's final response to plaintiff reflected a total page count of 2,495 pages. Upon further review of the records in connection with preparing this Index, four pages withheld in full via that response were entirely duplicative and thus have been removed from the final page count.

<sup>3</sup> Certain information within the records responsive to plaintiff's request was also protected pursuant to Exemption 6. However, because plaintiff is not challenging OIP's assertion of Exemption 6 (*see* ECF No. 20), the application of that exemption will not be addressed herein.

Exhibit E. This Index contains descriptions of records withheld in full and records withheld in part. For clarity of presentation and discussion, each fully- or partially-withheld record has been organized into a corresponding category. The designated record categories and applicable FOIA Exemption 5 privilege(s) for each record category are as follows:

Records Withheld in Full (2,363 pages):

- *Draft Predictive Analytics Report and Cover Letters* (1,934 pages): Exemption 5 (Deliberative Process Privilege)
- *Predictive Analytics Report Research* (14 pages): Exemption 5 (Deliberative Process Privilege)
- *Predictive Analytics Report Research—Consultant* (282 pages): Exemption 5 (Deliberative Process Privilege)
- *Draft Speech* (45 pages): Exemption 5 (Deliberative Process Privilege)
- *Briefing Material* (49 pages): Exemption 5 (Deliberative Process Privilege)
- *Presidential Communications Documents* (39 pages): Exemption 5 (Deliberative Process and Presidential Communications Privileges)

Records Withheld in Part (128 pages):

- *E-mails Discussing Predictive Analytics and the Draft Report* (63 pages): Exemption 5 (Deliberative Process Privilege)
- *E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech* (61 pages): Exemption 5 (Deliberative Process Privilege)
- *E-mails Discussing Research for Predictive Analytics Report* (2 pages): Exemption 5 (Deliberative Process Privilege)
- *E-mails with the White House* (2 pages): Exemption 5 (Deliberative Process and Presidential Communications Privileges)

Exemption 5

16. Exemption 5 of the FOIA exempts from mandatory disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). As discussed

in detail below, all of the information withheld by OIP pursuant to FOIA Exemption 5 is protected in full or in part pursuant to the deliberative process privilege. Moreover, thirty-nine of these pages are protected in full, and two pages in part, pursuant to the presidential communications privilege (in addition to the deliberative process privilege) of Exemption 5.

Exemption 5: Inter-/Intra-Agency Threshold

17. Inter- and/or intra-agency records may be withheld from release pursuant to Exemption 5 of the FOIA. In some instances, communications between an agency and “outside consultants,” as part of an agency’s decision-making process, may be withheld from disclosure pursuant to the “consultant corollary” of Exemption 5’s threshold requirements. *See, e.g., Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001); *Nat’l Inst. of Military Justice v. DOD*, 512 F.3d 677 (D.C. Cir. 2008).

18. Here, the majority of the information withheld from plaintiff pursuant to Exemption 5 consists of internal DOJ communications and internal Departmental working drafts, briefing materials, and research relating to its study of predictive analytics in law enforcement, and correlating DOJ communications with White House advisors regarding a matter of presidential concern – i.e., the White House’s solicitation and receipt of a DOJ report presenting the findings of the Department’s policy review on the use of data analytics in law enforcement. All of these records were generated by, exchanged within, and internal to the Executive Branch. As such, they are “inter-/intra-agency” records and satisfy the threshold of Exemption 5 of the FOIA.

19. In addition, the records included in the category “*Predictive Analytics Report Research—Consultant*,” which were withheld pursuant to Exemption 5, consist of

communications, and attachments thereto, sent between outside expert consultants and the Department. The Exemption 5 threshold expands when an agency requests and receives documents or advice from a party external to the government, who then functions as though they are an agency employee for the specific purpose of advising the government. In this case, during the course of conducting the Department's study on the use of predictive analytics, and in connection with drafting the Predictive Analytics Report, OLP staff reached out to academics with expertise and relevant research in the field. These experts were not advocating for a government benefit at the expense of others; rather, they were simply responding to and cooperating with OLP's request for assistance. The records protected in the "*Predictive Analytics Report Research—Consultant*" category consist of e-mails between OLP and these outside academic consultants, who in response to OLP's requests often provided comprehensive details on -- and copies of -- their academic research. OLP then used the information culled from these subject-matter experts in its internal deliberations related to the drafting of the Predictive Analytics Report for eventual submission to the WHCO. Because all of the "*Predictive Analytics Report Research—Consultant*" records were generated by and exchanged between the Department of Justice and these expert consultants, they are, effectively, "inter-/intra-agency" records and satisfy the threshold of Exemption 5 of the FOIA.

20. Inasmuch as all of the records withheld by OIP pursuant to Exemption 5 are either wholly internal to the Executive Branch, or were communications with outside consultants falling within the "consultant corollary" of Exemption 5's threshold requirements, these records are "inter-/intra-agency" records within the threshold of

FOIA Exemption 5.

Exemption 5: Deliberative Process Privilege

21. OIP has protected information within the following record categories pursuant to the deliberative process privilege: *Draft Predictive Analytics Report and Cover Letters; Predictive Analytics Report Research; Predictive Analytics Report Research—Consultant; Draft Speech; Briefing Material; Presidential Communications Documents; E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech; E-mails Discussing Predictive Analytics and the Draft Report; E-mails Discussing Research for Predictive Analytics Report; E-mails with the White House.*

22. The deliberative process privilege is intended to protect the decision-making processes of government agencies from public scrutiny in order to enhance the quality of agency decisions. To be protected by the deliberative process privilege, the information at issue must be both “pre-decisional” and “deliberative.” If pre-decisional, deliberative communications are routinely released to the public, Department employees will be much more cautious in their discussions with each other and in providing all pertinent information and viewpoints to agency or other Executive Branch decision-makers in a timely manner. This lack of candor would seriously impair the Department’s ability to foster the forthright, internal discussions necessary for efficient and proper Executive Branch decision-making.

*Withheld in Full: Drafts*

23. A significant aspect of the decision-making process consists of the creation of draft documents which are then reviewed, edited, and modified before they become final. Over the course of their creation, draft documents are transmitted back and forth,

continually changing as relevant staff make track changes, suggest edits, and contemplate strategies as they work toward a final document. The employees preparing such materials must feel free to create the most thorough and well-vetted document possible, which is only possible with the knowledge that their preliminary, nascent views and working drafts will not be disclosed.

24. Records in OIP's Vaughn Index categorized as "*Draft Predictive Analytics Report and Cover Letters*" are working drafts of the Department's Predictive Analytics Report and cover letters that include multiple revisions made by DOJ/OLP staff. Records categorized as "*Draft Speech*" consist of the draft version of a speech to be given (but as of the date of the draft, not yet given) by former Attorney General Eric Holder.<sup>4</sup>

25. The drafts that were withheld in full are pre-decisional because they precede the finalization and transmission to the White House of the final Predictive Analytics Report and cover letter, and precede the delivered speech delivered by Mr. Holder. These drafts are also deliberative inasmuch as they reflect successive versions of working drafts and as such, show the internal development of the Department's decisions. Disclosure of these drafts would undermine the ability of Department staff to freely engage in the candid "give and take" and forthright collaboration which is critical to the eventual development of well-reasoned and accurate final documents. DOJ deliberations on these working drafts cannot be effectively or reasonably segregated, because it is the content and evolution of the drafts themselves which reveal the authors' deliberative process. Accordingly, they are protected in full pursuant to the deliberative process privilege. To

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<sup>4</sup> The final version of this speech was produced to plaintiff in OIP's final production on October 31, 2017.

the extent that non-exempt, final versions of these drafts were identified, i.e. in the case of the draft speech, they have been provided to plaintiff.<sup>5</sup>

*Withheld in Full: Predictive Analytics Report Research &  
Predictive Analytics Report Research-Consultant*

26. As with draft documents, a significant aspect of the decision-making process consists of research, which is then reviewed, culled, distilled and analyzed prior to consideration of its inclusion in or influence on working drafts and, ultimately final documents. Department employees engaging in the drafting process must feel encouraged to cast a wide net in conducting their own research and exercising judgment in extracting what they deem to be pertinent information out of a mass of available resources. In this instance, OLP staff engaged in such a robust research process, including through the solicitation of advice and source material from outside consultants in the academic field. This process then fed into subsequent OLP staff deliberations and collaboration on the research and source materials in the context of drafting the Predictive Analytics Report for submission to the WHCO. During this key part of the drafting process, Department staff must feel free to consider the many facets of complex issues under their review. This is only possible if Department employees' working research -- including the selection of certain source materials (and by extension, the authors of those materials, i.e. the outside expert consultants) and the emphasis placed on selected materials -- during this deliberative drafting stage is not revealed.

27. Records in OIP's Vaughn Index categorized as "*Predictive Analytics Report Research—Consultant*" consist of communications sent between DOJ and third-party

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<sup>5</sup> The final version of the Predictive Analytics Report, and its cover letter, are independently protected by the presidential communications privilege in full, and the deliberative process privilege in part. These records are addressed in more detail below.

consultants, reflecting advice solicited by OLP from these outside, expert consultants, and related research regarding the work of those consultants, as part of the drafting and research process for the Predictive Analytics Report. A significant part of these communications is the inclusion by these outside consultants of their academic research, which is attached to and discussed in the expert consultants' communications with OLP. Records categorized as "*Predictive Analytics Report Research*" consist of internal OLP e-mails, bullet points, draft version of a source list, and research selected for and presented by and to OLP staff working on the draft Predictive Analytics Report. This internal working research conducted on data analytics in sentencing was prepared in order to inform the decision-making process attendant to the preliminary development of the Predictive Analytics Report for the WHCO.

28. The research materials that were withheld in full are pre-decisional because they precede the finalization of the Predictive Analytics Report, the drafting of which this research directly informed, and the decision as to what source material was relevant to the Report. These materials are also deliberative inasmuch as they reflect the thought processes and judgment of OLP staff as they canvass and cull from a spectrum of available source materials, analyze the material, and distill it down for other OLP staff working on the study and report and as such, show the internal development of the Department's decisions. Disclosure of this working research would undermine the ability of Department staff to freely engage in the candid "give and take" and forthright collaboration which is critical to the eventual development of well-reasoned and accurate final documents.

29. Working research materials such as those included in the “*Predictive Analytics Report Research*” and “*Predictive Analytics Report Research-Consultant*” categories, reflect Department staff’s preliminary thoughts and ideas about what source information is relevant to and/or should be included in the final product of a future work. Department staff tasked with conducting this research do so in order to inform their understanding of the topic, to brief others who are also working on the matter, and ultimately, to draft recommendations and final documents. Department employees rely on this research to ensure that their final work-product and decisions are well-informed, and take into account a variety of relevant sources and viewpoints. Revealing the inner-workings and preliminary thoughts of Department staff as they engage in research meant to facilitate a robust and comprehensive drafting process would prevent Department employees from fully engaging in research that is necessary to complete these critical tasks.

30. The deliberations revealed in these working research materials cannot be effectively segregated because, as explained in detail above, the selection of source material -- including the identification of relevant sources -- in the research process is itself revelatory of the deliberative process. Accordingly, these materials are protected in full pursuant to the deliberative process privilege.

*Withheld in Full: Briefing Material*

31. Another critical aspect of the decision-making process consists of the drafting and preparation of briefing materials created to aid in the development of Department positions and to prepare senior leadership officials to address various legal and policy points that may arise during the course of anticipated meetings, official travel, internal meetings, and engagement with Congress and the media.

32. In the records categorized as “*Briefing Material*” in OIP’s Vaughn Index, Departmental staff prepared materials in order to (1) brief and prepare former Attorney General Holder for an interview with the media; and (2) brief and prepare internal Departmental staff on the background of the White House Predictive Analytics Report. Specifically, these records consist of a briefing or “prep” paper prepared by Department staff to assist in the preparation of former Attorney General Holder for a media interview, and an internal briefing presentation prepared by Departmental employees to aid in briefing OLP staff on the predictive analytics review.

33. The briefing materials withheld by OIP are pre-decisional, inasmuch as they precede the events or actions for which Department leadership is being prepared and/or do not embody or reflect final agency decisions. These briefing materials are also deliberative because they reveal the drafters’ opinions and analyses on important newsworthy topics and focus on how best to convey and respond to questions on these topics from the Department’s perspective. Additionally, these briefing materials are meant to provide an overview of a specific topic and aid Department employees with understanding critical aspects of the predictive analytics policy review tasked to DOJ by the White House. The drafters of these briefing materials attempt to succinctly summarize particular events, identify important issues, and provide key background information in a concise summary format for ease of understanding and presentation. Throughout this process, the authors necessarily review the universe of facts and possible issues arising on the topic at hand, and then select those facts and issues that they deem most appropriate for briefing senior leadership and to provide the necessary background information to other Department employees. The decision to include or exclude certain

factual information in or from analytical documents is itself an important part of the deliberative process. Furthermore, the culling together of this factual information to assist Department employees in learning about a specific topic is, in and of itself, a necessary part of the deliberative and pre-decisional stage. The Department's most senior officials rely heavily on the creation of such briefing materials so that they will be fully informed on the substance of the many legal and policy issues being analyzed in the Department every day in individual offices and to gain understanding of a topic that might be entirely or partially unfamiliar to them.

34. Revealing such opinions and analyses would hinder Department staff's ability to provide candid evaluations on the topics of the day for Department leadership and by extension, Department leadership's ability to prepare for press events, and to provide informed and accurate representation of the Department's interests. If Executive Branch personnel who engage in the pre-decisional process of providing briefing and background materials discern that their recommendations and selection of information to be included in these materials could be released for public consumption, they may be more circumspect in expressing their views to decision-makers who utilize such briefing material.

35. Because the selection of facts and source material is itself a part of the deliberative process inherent to the preparation of briefing materials, which essentially amount to the drafter's own research into the topic or recommendations by the authors, the deliberations in these briefing materials cannot be effectively segregated. Accordingly, these materials are protected in full pursuant to the deliberative process privilege.

*Withheld in Part: E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech; E-mails Discussing Predictive Analytics and the Draft Report; E-mails Discussing Research for Predictive Analytics Report; E-mails Discussing Research for Predictive Analytics Report; E-mails with the White House*<sup>6</sup>

36. Records in OIP's Vaughn Index categorized as the following, were released to plaintiff, in part:

- *E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech* consist of intra-agency e-mails among DOJ staff containing deliberations about how to respond to a particular news article;
- *E-mails Discussing Predictive Analytics and the Draft Report* consist of internal, pre-decisional discussions among DOJ staff about the draft Predictive Analytics Report, which was not finalized at this time;
- *E-mails Discussing Research for Predictive Analytics Report* consist of e-mails among DOJ staff reflecting advice and research for the Predictive Analytics Report obtained through outside third-parties or consultants; and
- *E-mails with the White House* consist of (1) an e-mail from a White House advisor to senior leadership in the DOJ discussing advice for the Predictive Analytics report; and (2) an e-mail from DOJ staff to a White House advisor attaching and discussing the Predictive Analytics Report.

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<sup>6</sup> The presidential communications privilege (PCP) encompassed by FOIA Exemption 5 also applies to the records categorized as *E-mails with the White House*. The application of PCP is discussed below.

37. The e-mails in the above-listed categories are both internal discussions among Department staff, as well as e-mails between DOJ and the White House. The protected portions of these e-mails reflect deliberations regarding media inquiries, the draft language for an upcoming speech by former Attorney General Holder, and internal discussions about the research for and corresponding draft of the Predictive Analytics Report, and discussions with the White House relating to the Predictive Analytics Report.

38. All of these e-mails are pre-decisional because they are antecedent to the finalization of the report within DOJ, to a decision on how to respond regarding a news article, or are communications about the Predictive Analytics Report with the ultimate decision-maker on that report – i.e. the WHCO. They are deliberative because they contain evaluative discussion and preliminary assessments by attorneys and other staff regarding drafts and other matters in which they analyze, make recommendations, give advice, and work toward formulating strategies for final agency action and response. Department officials routinely e-mail each other as they engage in such discussions and develop preliminary assessments about matters on which no final agency decision has been made. All of the e-mails protected in part by OIP pursuant to the deliberative process privilege reflect this preliminary give-and-take of agency deliberations.

39. Disclosure of the e-mails at issue would severely hamper the efficient day-to-day workings of the Department as individuals would no longer feel free to discuss their ideas, strategies, and advice in e-mail messages, and Department employees would be much more circumspect in their discussions with each other and with other Executive Branch officials. This lack of candor would seriously impair the Department's ability to foster the forthright internal discussions necessary for efficient and proper decision-

making. Certainly, disclosure of such preliminary assessments and opinions would make officials contributing to pre-decisional deliberations much more cautious in providing their views. Agency decision-making is at its best when employees are able to focus on the substance of their views and not on whether their views may at some point be made publicly available. All reasonably segregable, non-exempt information was released from within these e-mails, and only the portions protected by the deliberative process privilege were withheld from plaintiff.

Exemption 5: Presidential Communications Documents

40. The records in OIP's Vaughn Index categorized as "*Presidential Communications Documents*" and "*E-mails with the White House*," consist of direct communications between DOJ and the WHCO, which are protected in full by the presidential communications privilege encompassed by FOIA Exemption 5, and in part by the deliberative process privilege. The application of each of these privileges to these record categories will be addressed in turn.

*Presidential Communications Privilege*

41. The presidential communications privilege protects communications or documents that relate to presidential decision-making, which involve the President or his senior advisors. More specifically, the privilege extends to communications among the President and his seniors advisors, and to documents solicited and received by the President and his immediate White House advisors. The presidential communications privilege is broader than the deliberative process privilege, in that it applies to documents in their entirety, and includes decisional and post-decisional records. *See, e.g., Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108 (D.C. Cir. 2004).

42. The records protected by OIP pursuant to the presidential communications privilege in the record categories “*Presidential Communications Documents*” and “*E-mails with the White House*” consist of White House senior advisor communications to the Attorney General soliciting a DOJ policy review and report on data analytics in law enforcement (i.e. the Predictive Analytics Report), the transmission of that report, and early outlines of it, to WHCO, and related communications between DOJ and WHCO about that report. Specifically, these records consist of (1) a White House Chief of Staff memorandum to selected Cabinet members -- including the Attorney General -- following-up on the White House Big Data Report, and tasking selected Departments and agencies with further work on specific areas addressed in the Big Data report, including solicitation of a DOJ review and reporting to WHCO on predictive analytics use in law enforcement; (2) a White House senior advisor’s memorandum to the Attorney General providing additional action steps for DOJ in further follow-up to specific areas addressed in the Big Data report; (3) preliminary, draft outlines of the Predictive Analytics Report drafted by DOJ at the direction of the White House, and transmitted to the WHCO by the Principal Deputy Assistant Attorney General (PDAAG) of OLP; (4) the Predictive Analytics Report and corresponding cover letter, drafted by DOJ at the direction of the White House, and transmitted to the WHCO by the PDAAG of OLP; and, (5) e-mails between White House senior advisors and DOJ staff discussing particulars of and attaching the Predictive Analytics Report.

43. The records withheld by OIP in the above-described records categories fall squarely within the presidential communications privilege. They are communications between senior White House staff and DOJ senior leadership (the Attorney General and

AAG of OLP) and documents solicited and received by the White House from DOJ (the Predictive Analytics Report and draft outlines thereof). As such they are protected in their entireties by the presidential communications privilege.<sup>7</sup>

*Deliberative Process Privilege*

44. Although wholly protected by the presidential communications privilege, the records protected by OIP in the “*Presidential Communications Documents*” and “*E-mails with the White House*” categories are also partially or fully protected by the deliberative process privilege. Specifically, the draft outlines of the Predictive Analytics Report are protected in full by the deliberative process privilege inasmuch as they are drafts. (*See, e.g., paras 23-25, supra*). The remaining communications between DOJ and the White House, including the Predictive Analytics Report, are partially protected by the deliberative process privilege to the extent that they reflect DOJ and White House officials’ internal, deliberative work and advice on matters of presidential concern and decision – in this instance, working discussions between the White House and DOJ as they engage in a decision-making process in follow up to the Big Data Report. These communications occur antecedent to any presidential decision on the matters discussed in and leading up to the submission of the Predictive Analytics Report from DOJ to the WHCO. The Report itself, and communications about the Report, reveal potential benefits and concerns, tentative next steps, questions for consideration, and similar deliberations regarding the use of predictive analytics in law enforcement. Lastly, none

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<sup>7</sup> As a matter of discretion and in order to provide context for the records processed by OIP in this case, OIP segregated the “*E-mails with the White House*” records – redacting only limited portions of these e-mails.

of the records withheld encompass or embody final decisions by the ultimate decision-maker in the matter at hand – i.e. the President and his senior staff.

45. Disclosure of this material protected pursuant to both the presidential communications and deliberative process privileges would inhibit the President’s ability to engage in effective communications and decision-making by interfering with the ability of the President to obtain candid information and written advice from senior leadership officials, who are relied upon and expected to give the President their best possible advice. As such, the reports, the e-mails, and the memoranda between senior DOJ leadership officials and the President’s senior advisors on this particular topic, through which senior leadership officials provide their thorough research and recommendations on matters relating to predictive analytics in law enforcement, fall entirely within the protections afforded by the presidential communications privilege – with overlapping protection by the deliberative process privilege – and are protected in full pursuant to FOIA Exemption 5. As such, there is no additional non-exempt information that may be segregated for release to plaintiff.

Segregation of Non-Exempt Information

46. As addressed in detail throughout this declaration, OIP thoroughly reviewed each of the records discussed above, and withheld from disclosure only that information which would reveal the Department’s pre-decisional decision-making process and/or would reveal the nature of communications with the White House on matters of presidential concern. OIP conducted a line-by-line review of all of the records and released any portions thereof that were not protected by an applicable FOIA exemption, often redacting only portions of sentences or paragraphs within the e-mails disclosed to

plaintiff. In other instances, such as with draft documents, research and briefing materials, these records were protected in full because the disclosure of any portion of these materials would undermine the core advice and analysis that the deliberative process privilege is meant to protect. Records protected in full by the presidential communications privilege, likewise, are not appropriate for segregation inasmuch as that privilege applies to records in their entireties. All reasonably segregable, non-exempt information from these records has been disclosed to plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.



Vanessa R. Brinkmann

Executed this 15th day of February 2018.

# EXHIBIT A

**ELECTRONIC PRIVACY INFORMATION CENTER**

1718 CONNECTICUT AVENUE NW, SUITE 200  
WASHINGTON, D.C. 20009  
202-483-1140  
FAX 202-483-1248

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**TO: ATTORNEY GENERAL -  
DOJ**

**FROM: NATASHA AMLANI**

COMPANY:

Electronic Privacy Information Center

DATE:

6/15/16

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RECIPIENT'S FAX NUMBER:

(202) 514-1009

SENDER'S EMAIL:

amlani@epic.org

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RECIPIENT'S TELEPHONE NUMBER:

(202) 514-FOIA

SENDER'S TELEPHONE NUMBER:

(202) 483-1140

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TOTAL NO. OF PAGES INCLUDING COVER:

5

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**COMMENTS:**

EPIC FOIA Request

# epic.org ELECTRONIC PRIVACY INFORMATION CENTER

VIA FAX  
June 15, 2016

**Attorney General**  
Laurie Day  
Chief, Initial Request Staff  
Office of Information Policy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, DC 20530-0001  
Fax: (202) 514-1009

Dear FOIA Officer:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Federal Communications Commission ("FCC").

EPIC seeks records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies.

### Documents Requested

1. All validation studies for risk assessment tools considered for use in sentencing, including but not limited to, COMPAS, LSI-R, and PCRA.
2. All documents pertaining to inquiries for the need of validation studies or general follow up regarding the predictive success of risk assessment tools.
3. All documents, including but not limited to, policies, guidelines, and memos pertaining to the use of evidence-based sentencing.
4. Purchase/sales contracts between risk-assessment tool companies, included but not limited to, LSI-R and the federal government.
5. Source codes for risk assessment tools used by the federal government in pre-trial, parole, and sentencing, from PCRA, COMPAS, LSI-R, and any other tools used.

EPIC FOIA Request

1

Evidence-based Practices

JA 000055

## Background

Evidence-based assessments 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 as well as parole and probationary hearings, and are increasingly being used as factor considered in determining sentencing. In addition, the Justice Department's National Institute of Corrections encourages the use of the assessments at every stage of the criminal justice process.<sup>1</sup> 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, concerned that the scores may be a source of bias.<sup>2</sup> In addition, Jonathan Wroblewski, Director of the Office of Policy and Legislation in the the Justice Department sent a letter to the U.S. Sentencing Commission<sup>3</sup> asking them to study how data analysis was being used in sentencing, and to issue recommendations on how such analysis should be used. The Justice Department expressed reservations about components of sentencing reform legislation pending in Congress<sup>4</sup> that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic information."

There are three main risk assessment tools that are used across the country. These are: Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), Public Safety Assessment (PSA) and Level of Service Inventory Revised (LSI-R). COMPAS, created by the for-profit company Northpointe, assesses variables under five main areas: criminal involvement, relationships/lifestyles, personality/attitudes, family, and social exclusion. The LSI-R, developed by Canadian company Multi-Health Systems, also pulls information from a wide set of factors, ranging from criminal history to personality patterns. Using a narrower set of

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<sup>1</sup> Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016)

<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>;  
Evidence-Based Decision Making, NATIONAL INSTITUTE OF CORRECTIONS,  
<http://info.nicic.gov/ebdm/>

<sup>2</sup> 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>.

<sup>3</sup> Letter from Jonathan Wroblewski, Director of the Office of Policy Legislation to Patti Saris, Chair of the Sentencing Commission (July 29 2014),  
<https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf>.

<sup>4</sup> Recidivism Reduction and Public Safety Act, S.1675, 113th Cong. (2014); Public Safety Enhancement Act, H.R.2656, 113th Cong. (2013).

parameters, The Public Safety Assessment, developed by the Laura and John Arnold Foundation,<sup>5</sup> only considers variables that relate to a defendant's age and criminal history.

In addition, the Post-Conviction Risk Assessment Instrument (PCRA) is an evidence-based tool specific to the federal system. The PCRA uses information from an offender's past to identify both the risk of reoffending and the needs to be addressed to lessen that risk.<sup>6</sup> Two previously proposed pieces of legislation discussed adopting the PCRA in sentencing.

Because risk assessments are controversial yet are being increasingly relied upon, 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. In addition, the documents are essential to give defendants the opportunity to rebut the risk assessments in their cases and provide additional information that may affect the sentence if necessary.

#### Request for "News Media" Fee Status and Fee Waiver

EPIC is a "representative of the news media" for fee classification purposes.<sup>7</sup> Based on EPIC's status as a "news media" requester, EPIC is thus entitled to receive the requested records without being assessed search or review fees, and the documents are not in the commercial interest of EPIC.<sup>8</sup>

In addition, because disclosure of the validity of the evidence-based practices will "contribute significantly to public understanding of the operations or activities of the government," all duplication fees should be waived.<sup>9</sup> The subject of the request, evidence-based practices, has a direct and clear connection to identifiable operations and activities of the federal government, namely policy reform, sentencing of federal criminals, and criminal justice generally. Since the algorithms and results of validation studies, if any, have not been released to the public, the disclosure of the requested records will be meaningfully informative about government operations and activities regarding government use, recommendations, and results of evidence-based practices and thus will be "likely to contribute" to an increased public understanding of those operations and activities. Lastly, since EPIC is a news media requester, it has presumptively satisfied the requirement that the disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to

<sup>5</sup> Press Release, More Than 20 Cities and States Adopt Risk Assessment Tools to Help Judges Decide Which Defendants to Detain Prior to Trial, LAURA AND JOHN ARNOLD FOUNDATION, June 26, 2015, <http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>.

<sup>6</sup> OFFICE OF PROB. AND PRETRIAL SERV.S, ADMIN. OFFICE OF THE U.S. COURTS, AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT (2011), <http://www.uscourts.gov/statistics-reports/publications/post-conviction-risk-assessment>.

<sup>7</sup> *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

<sup>8</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>9</sup> § 552(a)(4)(A)(iii).

the individual understanding of the requester.<sup>10</sup>

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request within ten business days. For questions regarding this request, John Tran can be contacted at 202-483-1140 x123 or FOIA@epic.org.

Respectfully Submitted,

Natasha Amlani  
EPIC IPIOP Clerk

John Tran  
EPIC FOIA Counsel

cc:

Office of Justice Programs - Bureau of Justice Statistics  
Attorney General  
Office of Legal Policy  
U.S. Parole Commission

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<sup>10</sup> 28 CFR Part 35 § 16.10(k)(2)(iii)

# EXHIBIT B



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

August 9, 2016

Ms. Natasha Amlani  
Electronic Privacy Information Center  
Suite 200  
1718 Connecticut Avenue, NW  
Washington, DC 20009  
[amlani@epic.org](mailto:amlani@epic.org)

Re: DOJ-2016-003626 (AG)  
DOJ-2016-003627 (OLP)  
DRH:SBT

Dear Ms. Amlani:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated and received in this Office on June 15, 2016, in which you requested records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. This response is made on behalf of the Offices of the Attorney General and Legal Policy.

The records you seek require searches in other Offices, and so your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. The time needed to complete our processing of your request will necessarily depend on the complexity of our records search and on the volume and complexity of any records located. For your information, this Office assigns incoming requests to one of three tracks: simple, complex, or expedited. Each request is then handled on a first-in, first-out basis in relation to other requests in the same track. Simple requests usually receive a response in about a month, whereas complex requests necessarily take longer. At this time, your request has been assigned to the complex track. In an effort to speed up our records search, you may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options. You may also contact the Office of Government Information Services (OGIS) of the National Archives and Records Administration to inquire into the FOIA meditation services that they provide. OGIS can be contacted at the following:

Office of Government Information Services  
National Archives and Records Administration  
Room 2510  
8601 Adelphi Road  
College Park, MD 20740-6001

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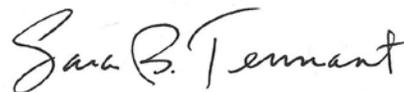
Telephone: (202) 741-5770  
Facsimile: (202) 741-5769  
Toll-Free: (877) 684-6448  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

Lastly, to the extent you are seeking purchase contracts for risk assessment tools utilized by the Department of Justice, and because the FOIA operation for the Department is decentralized, you may want to direct this portion of your request to the Justice Management Division (JMD), as the Department component most likely to maintain such records, to the extent that they exist. You may also want to direct your request to the U.S. Parole Commission (USPC), given Attorney General Holder's 2014 statement for USPC to study the use of risk assessment algorithms, as referenced in your letter. Contact information for both JMD and USPC can be found on [www.foia.gov](http://www.foia.gov).

I regret the necessity of this delay, but I assure you that your request will be processed as soon as possible. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact me by telephone at the above number or you may write to me at the Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Lastly, you may contact our FOIA Public Liaison at the telephone number listed above to discuss any aspect of your request.

Sincerely,

A handwritten signature in cursive script that reads "Sara B. Tennant".

Sara B. Tennant  
Senior Government Information Specialist

# EXHIBIT C



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

August 16, 2017

Ms. Natasha Amlani  
Electronic Privacy Information Center  
Suite 200  
1718 Connecticut Avenue, NW  
Washington, DC 20009  
[amlani@epic.org](mailto:amlani@epic.org)

Re: DOJ-2016-003626 (AG)  
DOJ-2016-003627 (OLP)  
D.D.C. No. 17-410  
DRC:ACS

Dear Ms. Amlani:

This is an interim response to your Freedom of Information Act (FOIA) request dated and received in this Office on June 15, 2016, in which you requested records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. This response is made on behalf of the Offices of the Attorney General and Legal Policy.

Please be advised that searches have been conducted in the Offices of the Attorney General and Legal Policy pertaining to Parts (4) and (5) of your request. No responsive records were located as a result of these searches. We are continuing to review and process material that is responsive to Parts (1), (2), and (3) of your request. As this material contains information of interest to other entities, we can respond only after consulting with them regarding their information. *See* 28 C.F.R. § 16.4(c)(1) (2017).

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2015) (amended 2016). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Alex Shoabi of the U.S. Attorney's Office for the District of Columbia, at 202-252-2511.

Sincerely,

A handwritten signature in black ink that reads "Daniel Castellano".

Daniel R. Castellano  
Senior Attorney

# EXHIBIT D



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

October 31, 2017

Ms. Natasha Amlani  
Electronic Privacy Information Center  
Suite 200  
1718 Connecticut Avenue, NW  
Washington, DC 20009  
[amlani@epic.org](mailto:amlani@epic.org)

Re: DOJ-2016-003626 (AG)  
DOJ-2016-003627 (OLP)  
D.D.C. No. 17-410  
VRB:ACS

Dear Ms. Amlani:

This is our final response to your Freedom of Information Act (FOIA) request dated and received in this Office on June 15, 2016, in which you requested records relating to evidence-based practices in sentencing, including policies, guidelines, source codes, and validation studies. This response is made on behalf of the Offices of the Attorney General (OAG) and Legal Policy (OLP).

By letter dated August 16, 2017, we provided you with an interim response and informed you that we were continuing to process records on behalf of OAG and OLP. Our work on your request is now complete.

Specifically, we have completed our processing of an additional 2,726 pages containing records responsive to your request. I have determined that 359 pages are appropriate for release with excisions made pursuant to Exemptions 5 and 6 of the FOIA, 5 U.S.C. § 552(b)(5) and (b)(6). Additionally, 2,367 pages are being withheld in full pursuant to Exemption 5. Exemption 5 of the FOIA pertains to certain inter- and intra-agency communications protected by the deliberative process and presidential communications privileges. Exemption 6 of the FOIA pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Portions of the records being withheld in full pursuant to Exemption 5 are also withheld pursuant to FOIA Exemption 6.

Furthermore, emails in the enclosed documents which use the account name "Lew Alcindor" denote emails to or from former Attorney General Eric Holder's official Department of Justice email account. Mr. Holder's official email account did not use his name, in order to protect his security and privacy and enable him to conduct Department business efficiently via email.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2015)

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(amended 2016). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Alex Shoaibi of the U.S. Attorney's Office for the District of Columbia, at 202-252-2511.

Sincerely,



Vanessa R. Brinkmann  
Senior Counsel

Enclosures

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# EXHIBIT E

*Electronic Privacy Information Center v. U.S. Department of Justice*  
D.D.C. No. 1:17-cv-00410

U.S. Department of Justice Office of Information Policy Vaughn Index

This Vaughn Index (Index) contains a description of the 2,491<sup>1</sup> pages of records protected, either in full or in part, by the Office of Information Policy (OIP), pursuant to Exemption 5 of the Freedom of Information Act (FOIA) (deliberative process and presidential communications privileges).<sup>2</sup> The descriptions of each document within this Vaughn Index are meant to be read in tandem with OIP’s declaration, filed contemporaneously, which provides a more fulsome explanation of the basis for withholding the information at issue. For ease of presentation and discussion in the declaration, the withheld material has been organized into document categories, which are also noted in this Index. The document categories are as follows:

Documents Withheld in Full (2,363 pages<sup>3</sup>):

- Draft Predictive Analytics Report and Draft Cover Letters* (1,934 pages): Exemption 5 (Deliberative Process Privilege)
- Predictive Analytics Report Research* (14 pages): Exemption 5 (Deliberative Process Privilege)
- Predictive Analytics Report Research – Consultant* (282 pages): Exemption 5 (Deliberative Process Privilege)
- Draft Speech* (45 pages): Exemption 5 (Deliberative Process Privilege)
- Briefing Material* (49 pages): Exemption 5 (Deliberative Process Privilege)
- Presidential Communications Documents* (39 pages): Exemption 5 (Deliberative Process and Presidential Communications Privileges)

Documents Withheld in Part (128 pages):

- E-mails Discussing the Draft Predictive Analytics Report* (63 pages): Exemption 5 (Deliberative Process Privilege)
- E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech* (61 pages): Exemption 5 (Deliberative Process Privilege)
- E-mails Discussing Research for Predictive Analytics Report* (2 pages): Exemption 5 (Deliberative Process Privilege)
- E-mails with the White House* (2 pages): Exemption 5 (Deliberative Process and Presidential Communications Privileges)

Component Acronyms:

DOJ: Department of Justice	JMD: Justice Management Division	DPP: Deliberative Process Privilege
OAAG: Office of the Associate Attorney General	OAG: Office of the Attorney General	ODAG: Office of the Deputy Attorney General
OJP: Office of Justice Programs	OLA: Office of Legislative Affairs	OLP: Office of Legal Policy
PAO/OPA: Office of Public Affairs	PCP: Presidential Communications Privilege	WHCO: White House Counsel’s Office

<sup>1</sup> Note: OIP’s final response to plaintiff reflected a total page count of 2,495 pages. Upon further review of the records in connection with preparing this Index, four pages withheld in full via that response were entirely duplicative and thus have been removed from the final page count.

<sup>2</sup> Note: portions of the pages that were released in part were protected pursuant to Exemption 6 (personal privacy) of the FOIA. Plaintiff is not challenging the Exemption 6 withholdings; accordingly, they are not addressed in either OIP’s declaration or OIP’s Vaughn Index.

<sup>3</sup> This withheld-in-full page count reflects the correction noted above – i.e., the removal of four duplicative pages.

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Doc ID	Date	From	To	CC	Number of Pages	Category	Exemption(s)	Description of Withheld Material
<b>Documents Withheld in Full</b>								
N/A	Date Range: September 4, 2014 – November 14, 2014	OLP Staff	Circulated among varied DOJ Staff <sup>4</sup>	N/A	1,934	Draft Predictive Analytics Report, Outlines, and Cover Letters	5: DPP	Working drafts of the Department’s predictive analytics report and cover letters that include multiple revisions made by DOJ staff. The drafts are pre-decisional because they pre-date the completion of the final report and cover letter, and are deliberative because the revisions reflect Departmental deliberations about the substance of the report and cover letter which had not yet been finalized or formalized. Further, they reflect successive versions of documents, thus showing the internal development of the Department’s decisions.

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<sup>4</sup> The e-mails attaching and circulating these drafts have been released to plaintiff.

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N/A	Date Range: September 10, 2014 – October 20, 2014	OLP Staff	OLP Staff	N/A	14	Predictive Analytics Report Research	5: DPP	Internal e-mails, bullet points, draft version of a source list, and research selected for and presented to OLP staff working on the draft Predictive Analytics Report. These materials embody the core of the OLP review and report drafting process and reflect Department staff’s preliminary thoughts as to what research may be useful in drafting the Predictive Analytics Report. All of this material pre-dates the report, which was not finalized at this time.
N/A	Date Range: October 6, 2014 – October 21, 2014	OLP Staff	OLP Staff and/or Consultant	OLP Staff	282	Predictive Analytics Report Research – Consultant	5: DPP	Communications and attachments sent between DOJ and third-party consultants, reflecting advice solicited by OLP from outside, expert consultants, and related research regarding the work of those consultants, as

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D.D.C. No. 1:17-cv-00410

								part of the drafting and research process for the predictive analytics review and report. The communications and corresponding attachments are pre-decisional and deliberative because they reflect ongoing discussions and research for the review and report, which had not yet been finalized.
N/A	Thursday, July 31, 2014	PAO Staff	Attorney General Holder	OAG/PAO Staff	45	Draft Speech	5: DPP	Draft version of a speech to be given by former Attorney General Eric Holder. The draft is pre-decisional and deliberative because it reflects Departmental deliberations regarding prepared remarks which had not yet been formalized for delivery at an event. This draft pre-dates the Attorney General's delivered remarks, and as such, it is pre-decisional.

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N/A	Thursday, May 28, 2015	OLP Staff	OLP Staff	OLP Staff	42	Briefing Material	5: DPP	Internal briefing presentation materials prepared by Departmental employees to aid in briefing OLP staff on the predictive analytics review. The presentation materials are pre-decisional, and are deliberative because they reflect the drafter's opinions and analysis on significant aspects of the predictive analytics review and report the White House. Revealing such opinions and analyses would hinder Department staff's ability to provide candid evaluations on their work product, and would reveal details regarding the nature of the Department's privileged recommendations and analysis as reflected in the Predictive Analytics Report. Because the selection
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*Electronic Privacy Information Center v. U.S. Department of Justice*

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								of facts and source material is itself a part of the deliberative process inherent to preparation of briefing materials, these documents are protected in full pursuant to FOIA Exemption 5.
N/A	Monday, July 28, 2014	PAO	Attorney General	N/A	7	Briefing Material	5: DPP	Briefing paper/"prep memo" prepared by Department staff to assist in the preparation of the Attorney General for a media interview. These briefing materials are not decisional and reflect the drafter's opinions and analysis on important topics and suggestions on how best to respond to questions on these topics from the Department's perspective. Revealing such opinions and analyses would hinder Department staff's ability to provide candid evaluations on

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								the topics of the day for Department leadership and by extension, Department leadership's ability to prepare for media events. Because the selection of facts and source material is itself a part of the deliberative process inherent to preparation of briefing materials, these documents are protected in full pursuant to FOIA Exemption 5.
N/A	Wednesday, November 19, 2014	OLP Staff	WHCO	OLP Staff	26	Presidential Communications Documents	5: DPP/PCP	Department of Justice report and cover letter regarding predictive analytics in law enforcement. This material is a presidential communication which was solicited by, prepared for, and submitted to the WHCO. This material is also pre-decisional and deliberative as it reflects Departmental staff's advice,

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								research, and recommendations to the White House on matters of presidential concern, i.e. the predictive analytics review and report tasked to the Department by the White House.
N/A	Monday, September 15, 2014	OLP Staff	WHCO	OLP Staff	3	Presidential Communications Documents	5: DPP/PCP	Preliminary, draft outline of the Predictive Analytics Report. This material is a presidential communication which was solicited by, prepared for, and submitted to the WHCO. This material is also pre-decisional and deliberative as it reflects Departmental staff's advice, research, and recommendations to the White House on matters of presidential concern, i.e. the predictive analytics review and report tasked to the Department by the White House..

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N/A	Wednesday, September 17, 2014	OLP Staff	WHCO	OLP Staff	4	Presidential Communications Documents	5: DPP/PCP	Preliminary, draft outline of the Predictive Analytics Report. This material is a presidential communication which was solicited by, prepared for, and submitted to the WHCO. This material is also pre-decisional and deliberative as it reflects Departmental staff's advice, research, and recommendations to the White House on matters of presidential concern, i.e. the predictive analytics review and report tasked to the Department by the White House..
N/A	Monday, July 28, 2014	White House Chief of Staff	Selected Cabinet Members, including the Attorney General	Selected Agency Heads	4	Presidential Communications Documents	5: DPP/PCP	White House Memorandum to heads of Departments and Agencies following-up on the White House/Podesta Big Data Report, and tasking selected Departments and Agencies, with

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								<p>further work on specific areas addressed in the Big Data report – including solicitation of a DOJ review and reporting back to WHCO on predictive analytics use in law enforcement. This material is a pre-decisional, deliberative presidential communication, soliciting DOJ action in furtherance of White House policy development efforts on matters of presidential concern, i.e. the predictive analytics report.</p>
N/A	Tuesday, October 21, 2014	WH Senior Advisor	Attorney General	DOJ Staff	2	Presidential Communications Documents	5: DPP/PCP	<p>White House Memorandum to the Attorney General providing further action steps for DOJ in further follow-up to specific areas addressed in the Big Data report. This material is a pre-decisional, deliberative presidential</p>

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								communication, soliciting DOJ action in furtherance of White House policy development efforts on matters of presidential concern, i.e. the predictive analytics report.
<b>Documents Withheld in Part<sup>5</sup></b>								
0.7.11378.29374	Thursday, September 4, 2014	Tyrangiel, Elana (OLP)	Jackson, Wykema C. (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23698	Tuesday, September 9, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP); Pazur, Shannon (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report

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<sup>5</sup> The envelope information provided for the “Documents Withheld in Part”, i.e. the “To/From/CC” fields, correlate to the first e-mail in each e-mail chain.

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								which was not finalized at this time.
0.7.11378.23707	Tuesday, September 9, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP)	N/A	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23690	Tuesday, September 9, 2014	Hecker, Elizabeth (OLP)	Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP); Pronley, Alyssa (JMD)	N/A	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23648	Thursday, September 11, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among

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								DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23735	Thursday, September 11, 2014	Krulic, Alexander (OLP)	Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Fried, Hannah (OLP); Pronley, Alyssa (JMD)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23660	Tuesday, September 16, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24341	Tuesday, September 16, 2014	Siger, Steven B. (OLP)	Tyrangiel, Elana (OLP)	Krulic, Alexander (OLP)	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because

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								they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.29631	Tuesday, September 16, 2014	Tyrangiel, Elana (OLP)	Lan, Iris (ODAG); Walsh, James (ODAG); Brown Lee, Erika (ODAG)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24346	Tuesday, September 16, 2014	Tyrangiel, Elana (OLP)	Lan, Iris (ODAG); Walsh, James (ODAG); Brown Lee, Erika (ODAG)	Krulic, Alexander (OLP); Siger, Steven B. (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.

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0.7.11378.23714	Monday, September 29, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP)	Pazur, Shannon (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23719	Thursday, October 2, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23722	Monday, October 6, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP); Pazur, Shannon (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive

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								analytics report which was not finalized at this time.
0.7.11378.24378	Thursday, October 16, 2014	Sigar, Steven B. (OLP)	Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)	N/A	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.23779	Friday, October 17, 2014	Fried, Hannah (OLP)	Krulic, Alexander (OLP); Hecker, Elizabeth (OLP)	Pazur, Shannon (OLP)	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24384	Sunday, October 19, 2014	Krulic, Alexander (OLP)	Tyrangiel, Elana (OLP)	Siger, Steven B. (OLP); Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Fried, Hannah (OLP);	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional

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				Pronley, Alyssa (JMD)				discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.29990	Thursday, October 23, 2014	Tyrangiel, Elana (OLP)	Kadzik, Peter J. (OLA)	N/A	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24411	Thursday, October 30, 2014	Hecker, Elizabeth (OLP)	Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24491	Friday, October 31, 2014	Siger, Steven B. (OLP)	Krulic, Alexander (OLP)	Tyrangiel, Elana (OLP)	2	E-Mails Discussing Predictive	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of

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						Analytics and the Draft Report		Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24495	Friday, October 31, 2014	Siger, Steven B. (OLP)	Krulic, Alexander (OLP)	Tyrangiel, Elana (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24206	Monday, November 3, 2014	Krulic, Alexander (OLP)	Hecker, Elizabeth (OLP)	Siger, Steven B. (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.

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0.7.11378.24195	Tuesday, November 4, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP); Pazur, Shannon (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24549	Tuesday, November 4, 2014	Krulic, Alexander (OLP)	Tyrangiel, Elana (OLP)	Siger, Steven B. (OLP); Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24205	Tuesday, November 4, 2014	Krulic, Alexander (OLP)	Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive

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								analytics report which was not finalized at this time.
0.7.11378.24266	Tuesday, November 4, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.27122	Wednesday, November 5, 2014	Siger, Steven B. (OLP)	Tyrangiel, Elana (OLP); Krulic, Alexander (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.27124	Wednesday, November 5, 2014	Pazur, Shannon (OLP)	Krulic, Alexander (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional

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								discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.27130	Wednesday, November 5, 2014	Tyrangiel, Elana (OLP)	Krulic, Alexander (OLP)	Siger, Steven B. (OLP)	3	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24567	Wednesday, November 5, 2014	Krulic, Alexander (OLP)	Tyrangiel, Elana (OLP); Siger, Steven B. (OLP)	Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.27143	Wednesday, November 5, 2014	Siger, Steven B. (OLP)	Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)	N/A	1	E-Mails Discussing Predictive	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of

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						Analytics and the Draft Report		Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.25233	Thursday, November 6, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.27375	Thursday, November 6, 2014	Siger, Steven B. (OLP)	Krulic, Alexander (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.

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0.7.11378.25235	Thursday, November 6, 2014	Krulic, Alexander (OLP)	Hecker, Elizabeth (OLP)	Siger, Steven B. (OLP); Pazur, Shannon (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.25243	Thursday, November 6, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24973	Thursday, November 6, 2014	Hecker, Elizabeth (OLP)	Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP)	N/A	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive

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								analytics report which was not finalized at this time.
0.7.11378.25262	Wednesday, November 12, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP); Siger, Steven B. (OLP)	Pazur, Shannon (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.28105	Wednesday, November 12, 2014	Tyrangiel, Elana (OLP)	Delery, Stuart F. (OAAG)	Cox, James C. (OAAG)	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.25264	Wednesday, November 12, 2014	Krulic, Alexander (OLP)	Pazur, Shannon (OLP); Hecker, Elizabeth (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional

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								discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.25266	Thursday, November 13, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP); Siger, Steven B. (OLP)	Pazur, Shannon (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.27581	Thursday, November 13, 2014	Brown Lee, Erika (ODAG)	Tyrangiel, Elana (OLP); Walsh, James (ODAG); Lan, Iris (ODAG)	Krulic, Alexander (OLP); Siger, Steven B. (OLP)	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.28134	Friday, November 14, 2014	Tyrangiel, Elana (OLP)	Kadzic, Peter J. (OLA)	N/A	1	E-Mails Discussing Predictive	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of

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						Analytics and the Draft Report		Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.28165	Friday, November 14, 2014	Tyrangiel, Elana (OLP)	Cheung, Denise (OAG)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.25161	Friday, November 14, 2014	Siger, Steven B. (OLP)	Krulic, Alexander (OLP)	Pazur, Shannon (OLP); Hecker, Elizabeth (OLP); Tyrangiel, Elana (OLP)	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.

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0.7.11378.27636	Friday, November 14, 2014	Siger, Steven B. (OLP)	Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)	N/A	2	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.25167	Friday, November 14, 2014	Hecker, Elizabeth (OLP)	Tyrangiel, Elana (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Pazur, Shannon (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive analytics report which was not finalized at this time.
0.7.11378.24085	Tuesday, October 21, 2014	Krulic, Alexander (OLP)	Hecker, Elizabeth (OLP); Pazur, Shannon (OLP)	N/A	1	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions among DOJ staff about the draft predictive

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								analytics report which was not finalized at this time.
0.7.11378.23547	Thursday, September 4, 2014	Fried, Hannah (OLP)	Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP); Krulic, Alexander (OLP); Tyrangiel, Elana (OLP)	N/A	4	E-Mails Discussing Predictive Analytics and the Draft Report	5: DPP	Parts of this e-mail chain are protected by the deliberative process privilege of Exemption 5 because they are internal, pre-decisional discussions regarding the Department's next steps for the predictive analytics report, which was not finalized at this time.
0.7.11378.11384	Thursday, July 31, 2014	Phillips, Channing D. (OAG)	Leary, Marylou; Werner, Sharon (OAG)	O'Donnell, Denise	7	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article. These discussions precede any final decisions or responses to the matters at hand and thus are pre-decisional.
0.7.11378.11381	Thursday, July 31, 2014	Phillips, Channing D. (OAG)	Wroblewski, Jonathan	Werner, Sharon (OAG)	7	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article. These discussions precede any final decisions or

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								responses to the matters at hand and thus are pre-decisional.
0.7.11378.11274	Thursday, July 31, 2014	Leary, Marylou	Fallon, Brian (OPA); Leary, Marylou; Phillips, Channing D. (OAG); Werner, Sharon (OAG)	O'Donnell, Denise	8	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article. These discussions precede any final decisions or responses to the matters at hand and thus are pre-decisional.
0.7.11378.11258	Thursday, July 31, 2014	Solomon, Amy	Fallon, Brian (OPA)	Mason, Karol V. (OJP); Werner, Sharon (OAG); O'Donnell, Denise	12	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article. These discussions precede any final decisions or responses to the matters at hand and thus are pre-decisional.
0.7.11378.11242	Thursday, July 31, 2014	Solomon, Amy	Fallon, Brian (OPA)	Mason, Karol V. (OJP); Werner, Sharon (OAG)	9	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article. These discussions precede any final decisions or

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								responses to the matters at hand and thus are pre-decisional. Additionally, this e-mail chain discusses the draft speech for an upcoming conference. Because the speech was not finalized at this time, these discussions concerning what facts should be included in the speech are pre-decisional.
0.7.11378.11230	Thursday, July 31, 2014	Mason, Karol V. (OJP)	Solomon, Amy	Leary, Marylou; Werner, Sharon (OAG); Mason, Karol V. (OJP)	10	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article. These discussions precede any final decisions or responses to the matters at hand and thus are pre-decisional.
0.7.11378.10259	Thursday, July 31, 2014	Solomon, Amy	Fallon, Brian (OPA)	Mason, Karol V. (OJP); Werner, Sharon (OAG); Leary, Marylou	3	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff containing deliberations about how to respond to a particular news article. These discussions precede any final decisions or

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								responses to the matters at hand and thus are pre-decisional. Additionally, this e-mail chain discusses the draft speech for an upcoming conference. Because the speech was not finalized at this time, these discussions concerning what facts should be included in the speech are pre-decisional.
0.7.11378.6236	Friday, August 1, 2014	Roberts, Riley (OPA)	Attorney General Holder; Maccoby, Jacob D. (OPA); Lewis, Kevin S. (OPA); Fallon, Brian (OPA); Bradley, Annie (OAG); Mosier, Jenny (OAG); Phillips, Channing D. (OAG)	Richardson, Margaret (OAG)	2	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff discussing the draft speech for an upcoming conference. Because the speech was not finalized at this time, these discussions concerning what facts should be included in the speech are pre-decisional.
0.7.11378.11166	Friday, August 1, 2014	Fallon, Brian (OPA)	Solomon, Amy	Mason, Karol V. (OJP); Werner, Sharon (OAG); Wroblewski, Jonathan; Leary, Marylou	3	E-mails Forwarding News Articles, with Commentary, and/or Discussing Drafts of a Speech	5: DPP	E-mail chain among DOJ staff discussing the draft speech for an upcoming conference. Because the speech was not finalized at this time, these discussions

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								concerning what facts should be included in the speech are pre-decisional.
0.7.11378.23749	Wednesday, September 10, 2014	Pronley, Alyssa (JMD)	Krulic, Alexander (OLP); Hecker, Elizabeth (OLP)	N/A	1	E-mails Discussing Research for Predictive Analytics Report	5: DPP	E-mail among DOJ staff reflecting advice and research for the predictive analytics report obtained through outside third parties or consultants. The communication is deliberative because it reflects discussions about research, obtained through consultants, for the report; which had not yet been finalized or formalized at that time.
0.7.11378.23870	Thursday, October 16, 2014	Hecker, Elizabeth (OLP)	Krulic, Alexander (OLP)	N/A	1	E-mails Discussing Research for Predictive Analytics Report	5: DPP	E-mail among DOJ staff reflecting advice and research for the predictive analytics report obtained through outside third parties or consultants. The communication is deliberative because it reflects discussions about research, obtained through consultants, for the report; which

JA 000099

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								had not yet been finalized or formalized at that time.
Page 286 of 359 in the Released Records	Tuesday, October 21, 2014	Podesta, John	Attorney General Holder	Cole, James (ODAG); Kadzik, Peter J. (OLA)	1	E-mails with the White House	5: DPP/PCP	E-mail from a White House advisor to senior leadership in the DOJ discussing advice for the predictive analytics report; which was drafted for the White House as a matter of presidential concern.
0.7.11378.27723	Wednesday, November 19, 2014	Tyrangiel, Elana (OLP)	Kate Heinzelman	Krulic, Alexander (OLP)	1	E-mails with the White House	5: DPP/PCP	E-mail from DOJ staff to a White House advisor attaching and discussing the predictive analytics report; which was created for the White House, was never released thereafter, and was a matter of presidential concern. Thus, it is inherently protected by the deliberative process and presidential communications privileges.

JA 000100

# Exhibit A

**Tyrangiel, Elana (OLP)**

---

**From:** Tyrangiel, Elana (OLP)  
**Sent:** Wednesday, November 19, 2014 4:03 PM  
**To:** kate\_e\_heinzelman@who.eop.gov  
**Cc:** Krulic, Alexander (OLP)  
**Subject:** Predictive Analytics  
**Attachments:** Predictive Analytics - FINAL.pdf; Predictive Analytics Cover Memo.pdf

Kate, attached please find a cover memo and a report on predictive analytics (b) (5)

Thanks,  
Elana

# Exhibit B

**Krulic, Alexander (OLP)**

---

**From:** Krulic, Alexander (OLP)  
**Sent:** Wednesday, November 19, 2014 4:46 PM  
**To:** Hecker, Elizabeth (OLP); Pazur, Shannon (OLP); Siger, Steven B. (OLP); Fried, Hannah (OLP)  
**Subject:** Predictive Analytics  
**Attachments:** Predictive Analytics - FINAL.pdf

Final copy of the Predictive Analytics paper attached! Elana just sent it to WHCO.

Thank you for all of your great work!

Alex

# Exhibit C

**Hecker, Elizabeth (OLP)**

---

**From:** Hecker, Elizabeth (OLP)  
**Sent:** Friday, October 24, 2014 5:40 PM  
**To:** Tyrangiel, Elana (OLP); Krulic, Alexander (OLP); Siger, Steven B. (OLP); Pazur, Shannon (OLP); Fried, Hannah (OLP)  
**Subject:** Predictive Analytics in Law Enforcement - DRAFT  
**Attachments:** Predictive Analytics - Draft 10.24.14.docx

Team

Attached is the most recent version of the Predictive Analytics in Law Enforcement draft. Alex has not yet reviewed some of the new sections, but we wanted to go ahead and send in case you would like to take a look at it over the weekend.

Beth

**Elizabeth Parr Hecker**

Senior Counsel  
Office of Legal Policy  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Room 4242  
Washington, D.C. 20530  
202-514-2160  
[Elizabeth.Hecker@usdoj.gov](mailto:Elizabeth.Hecker@usdoj.gov)

# Exhibit D

**Tyrangiel, Elana (OLP)**

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**From:** Tyrangiel, Elana (OLP)  
**Sent:** Friday, November 07, 2014 3:31 PM  
**To:** Cheung, Denise (OAG)  
**Subject:** predictive analytics  
**Attachments:** Predictive Analytics - Draft 11 07 14 CIRCULATION VERSION.docx

Denise, FYI, here's the version of the predictive analytics report that we're circulating to components today, with a COB Monday request for comments. We will recirculate for leadership clearance next week. If you have any questions, please feel free to call me. Thanks, and hope you're having a good trip.

# Exhibit E

**Brown Lee, Erika (ODAG)**

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**From:** Brown Lee, Erika (ODAG)  
**Sent:** Thursday, November 13, 2014 12:25 PM  
**To:** Tyrangiel, Elana (OLP); Walsh, James (ODAG); Lan, Iris (ODAG)  
**Cc:** Krulic, Alexander (OLP); Siger, Steven B. (OLP)  
**Subject:** RE: Predictive Analytics Paper  
**Attachments:** Predictive Analytics - Draft 11 07 14 CIRCULATION VERSION - EBL Edits.docx

Elana – Thanks for providing the opportunity to review the report, which is very well written. Attached for your consideration are proposed additions based on the materials we submitted in our Sept. 15 response to the WH.

Best regards,  
Erika

*Erika Brown Lee*  
*Chief Privacy and Civil Liberties Officer*  
Office of the Deputy Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530  
Tel: 202-307-0697  
[Erika.Brown.Lee@usdoj.gov](mailto:Erika.Brown.Lee@usdoj.gov)

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**From:** Tyrangiel, Elana (OLP)  
**Sent:** Wednesday, November 12, 2014 6:30 PM  
**To:** Walsh, James (ODAG); Lan, Iris (ODAG); Brown Lee, Erika (ODAG)  
**Cc:** Krulic, Alexander (OLP); Siger, Steven B. (OLP)  
**Subject:** Predictive Analytics Paper

Hi all –

Attached is a copy of the predictive analytics paper, which is ready for review and clearance. This version incorporates some light edits from components. I would love to chat tomorrow about next steps but wanted to be sure you had a copy of the paper asap. (b) (5)

(b) (5)

Thanks,  
Elana

<< File: Predictive Analytics 11 12 14 Clearance Copy.docx >>

# Exhibit F

**Tyrangiel, Elana (OLP)**

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**From:** Tyrangiel, Elana (OLP)  
**Sent:** Friday, November 14, 2014 3:53 PM  
**To:** Cheung, Denise (OAG)  
**Subject:** predictive analytics  
**Attachments:** Predictive Analytics - Draft Nov 13 at 530pm.docx

Denise, FYI, attached is a newer version of the paper I previously sent to you on predictive analytics. This version includ (b) (5) . We're sending this (once we do a final review for typos and formatting) up to the DAG today in order to hit the Monday deadline.

If you have any questions, please feel free to call!

Elana

# Exhibit G

**Krulic, Alexander (OLP)**

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**From:** Krulic, Alexander (OLP)  
**Sent:** Wednesday, November 12, 2014 11:30 PM  
**To:** Pazur, Shannon (OLP); Hecker, Elizabeth (OLP)  
**Subject:** Predictive Analytics Paper  
**Attachments:** Predictive Analytics 11 12 14 Clearance Copy.docx; ATT00001.htm

Beth and Shannon,

This is the copy that went to ODAG this evening.

Alex

Begin forwarded message:

**From:** "Tyrangiel, Elana (OLP)" <[etyrangiel@jmd.usdoj.gov](mailto:etyrangiel@jmd.usdoj.gov)>  
**Date:** November 12, 2014 at 6:29:55 PM EST  
**To:** "Walsh, James (ODAG)" <[jamwalsh@jmd.usdoj.gov](mailto:jamwalsh@jmd.usdoj.gov)>, "Lan, Iris (ODAG)" <[irlan@jmd.usdoj.gov](mailto:irlan@jmd.usdoj.gov)>, "Brown Lee, Erika (ODAG)" <[ebrownlee@jmd.usdoj.gov](mailto:ebrownlee@jmd.usdoj.gov)>  
**Cc:** "Krulic, Alexander (OLP)" <[akrulic@jmd.usdoj.gov](mailto:akrulic@jmd.usdoj.gov)>, "Siger, Steven B. (OLP)" <[ssiger@jmd.usdoj.gov](mailto:ssiger@jmd.usdoj.gov)>  
**Subject:** Predictive Analytics Paper

Hi all –

Attached is a copy of the predictive analytics paper, which is ready for review and clearance. This version incorporates some light edits from components. I would love to chat tomorrow about next steps but wanted to be sure you had a copy of the paper asap. (b) (5)

(b) (5)

Thanks,  
Elana

# Exhibit H

**From:** Solomon, Amy  
**Sent:** Thursday, July 31, 2014 4:13 PM  
**To:** Fallon, Brian (OPA)  
**Cc:** Mason, Karol V.; Werner, Sharon (OAG); O'Donnell, Denise  
**Subject:** RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

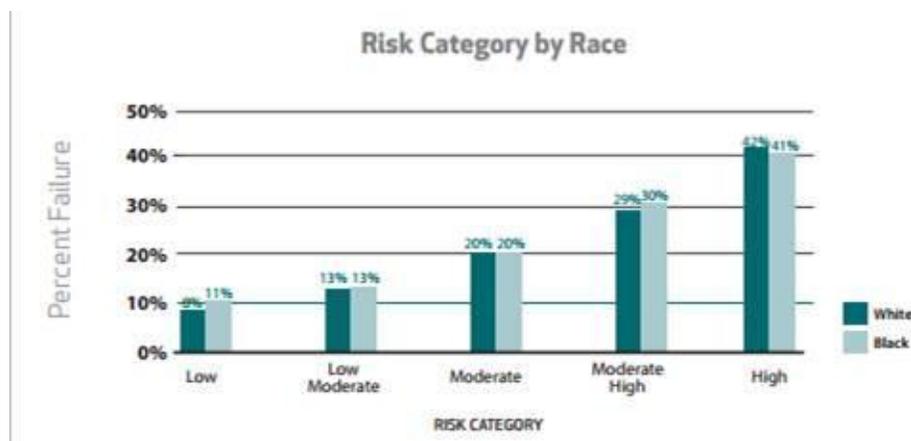
Thanks, Brian. We'll read thru this now. Is it possible to review relevant sections of the speech too?

Also, I just received key data points from BJA, below. It appears that the best risk instruments (even for use at pretrial and sentencing) can construct statistically sound and useful tools that do not exacerbate racial disparity.

Best practice in developing and validating risk assessment tools includes ensuring that they are race- and gender-neutral (among other categories). For example, Virginia has used risk-informed sentencing since the 1990s. An NIJ-funded evaluation of the Virginia Criminal Sentencing Commission's Risk Assessment Instrument noted that the developers of the instrument ensured it was race-neutral. See *Offender Risk Assessment in Virginia* (2002) at 27-28 & n.10, available at [http://www.vcsc.virginia.gov/risk\\_off\\_rpt.pdf](http://www.vcsc.virginia.gov/risk_off_rpt.pdf).

Pretrial instruments provide other helpful examples. Neither the Kentucky Public Safety Assessment (PSA)—Court nor the Virginia Pretrial Risk Assessment Instrument, to name two, use static predictors that strongly correlate with race, e.g., arrest. Instead, they use factors that do not correlate with race but that accurately predict new criminal activity.

This neutrality was confirmed in a recent summary report on the Kentucky PSA found that the tool categorizes defendants such that "black and white defendants at each risk level fail at virtually indistinguishable rates, which demonstrates that the PSA-Court is assessing risk equally well for both whites and blacks, and is not discriminating on the basis of race." See *Results from the First Six Months of the Public Safety Assessment – Court™ in Kentucky* (July 2014) at 4, available at <http://www.arnoldfoundation.org/sites/default/files/pdf/PSA-Court%20Kentucky%206-Month%20Report.pdf>. The chart below is copied from the report.



This is not to say that all risk assessments are created equal. Many fail this test of neutrality, and do result in overclassification of men of color, or women, or some other group. However, the examples above demonstrate that it is possible to construct statistically sound and useful tools that do not exacerbate racial disparity.

(b) (5)  
[Redacted]

Please let me know if I can provide any other information that would be helpful.

Best,

Julie

Julienne James  
Senior Policy Advisor  
Bureau of Justice Assistance  
U.S. Department of Justice  
Washington, D.C.  
W: 202-353-9248 | M (b) (6)

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**From:** Fallon, Brian (OPA) (JMD)  
**Sent:** Thursday, July 31, 2014 4:04 PM  
**To:** Solomon, Amy  
**Cc:** Mason, Karol V.; Werner, Sharon (OAG) (JMD)  
**Subject:** RE: Fwd: Time Magazine Interview w the AG: "Attorney General Eric Holder to Oppose Data-Driven Sentencing"

[See the report attached. CRM has already submitted it to the Commission.](#)

[Here is the relevant portion of the report that expresses concern about risk assessment tools in sentencing:](#)

While we are excited about the promise of using analytics in risk and needs assessments and otherwise in furtherance of effective reentry, we are troubled by another use of these tools in sentencing and corrections: the increasing role of risk assessment tools in the sentencing phase of criminal cases, specifically in determining how long an individual will be imprisoned for a criminal conviction. As we noted, risk assessments - through the Salient Factor Score - had a prominent place in the federal parole system in place prior to the Sentencing Reform Act and were a determinant of the amount of time a federal offender served in federal prison for an offense. The Sentencing Reform Act was enacted to reduce the role of such assessments and to base imprisonment terms largely, but not entirely, on the crime committed and proven in court. In recent years, states are increasingly adding risk assessments to the criminal sentencing process. Pennsylvania<sup>15</sup> and Tennessee,<sup>16</sup> for example, have enacted legislation mandating the use of risk assessments to inform sentencing decisions. Vermont<sup>17</sup> and Kentucky<sup>18</sup> use sex offense recidivism risk instruments in sentencing defendants convicted of sex crimes. For many years now, Virginia has mandated the use of an actuarial risk tool to identify low-risk offenders for diversion from prison for certain criminal convictions and high-risk sex offenders for an

# Exhibit I

**Pronley, Alyssa (JMD)**

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**From:** Pronley, Alyssa (JMD)  
**Sent:** Wednesday, September 10, 2014 3:19 PM  
**To:** Krulic, Alexander (OLP); Hecker, Elizabeth (OLP)  
**Subject:** Big Data: Review of Academics  
**Attachments:** Academics in Predictive Analytics\_Policing 2.docx

Hello,

Please find a review of the academics, their relevant articles, and what they say about their respective projects attached. I tried to only put bullet points for their own views on what their projects are, and I tried to keep it as to the point as possible. There was a lot of information though. Please let me know if you would like me to do some more research on a specific project or city.

(b) (5) [Redacted]

(b) (6) [Redacted]

Thanks,  
Alyssa