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VIA EMAIL

November 21, 2019

Idaho Department of Corrections
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(208) 658-2000
publicrecord@idoc.idaho.gov

Dear Public Records Custodian:

This letter constitutes a request under Idaho Public Records Act, Idaho Code § 74-102 et seq., and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Idaho Department of Corrections.

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

Documents Requested

1. All correspondence, inquiries, guidelines, policies, operating manuals and memoranda regarding transparency requirements for pre-trial risk assessments set forth in Idaho Code § 19-1910(1).[1]

2. All validation studies of risk assessment tools used by the Idaho Department of Corrections as well as correspondence, inquiries, guidelines, schedules, and memoranda regarding the validation;

3. All records, including but not limited to sources codes, interview guides, training documents, and decision matrixes, about evidence-based risk assessments used by the Idaho Department of Corrections;[2]

4. Purchase and sales contracts, request for proposals, and bids between evidence-based risk-assessment tool companies or software development contractors and the Idaho Department of Corrections.[3]

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[1] Idaho Code § 19-1910(1).

[2] "[D]ocuments, data, records, and information used to build or validate evidence-based risk assessments used by the state and ongoing documents, data, records information, and policies surrounding the usage of" risk assessments are open to public inspection under Idaho Code §19-1910(1)(a). *Id.*

[3] This includes, but not limited to, any contracts with Allvest Information Services Inc., d/b/a Vant4ge, which has formerly been known as Allvest Information Services Inc., d/b/a Assessments.com. *See e.g.,*

<u>Background</u>

Evidence-based assessments are designed to predict future behavior by analyzing statistical data. In the criminal justice system, risk-assessment algorithms use data about defendants including their criminal history (e.g. previous offenses, failure to appear in court, violent offenses, etc.) or socio-demographic characteristics (e.g. age, sex, employment status, drug history) to then predict the person's risk of recidivism or risk of failing to appear when on bail. Such predictions are based on average recidivism rates for the group of offenders that share the defendant's characteristics. The recidivism calculation has been used by judges in pretrial release hearings, parole and probationary hearings, and are increasingly being used as a factor considered in determining sentencing.[4] However, many have questioned the underlying data, the reliability of the outcomes, as well as defendants' lack of opportunity to challenge the results.

In 2014, then U.S. Attorney General Eric Holder called for the U.S. Sentencing Commission to study the use of algorithms in courts because he was concerned that the sentencing scores may be a source of bias.[5] In the same year, Jonathan Wroblewski, Director of the Office of Policy and Legislation in the Justice Department, sent a letter to the U.S. Sentencing Commission asking the commission to study how data analysis was being used in sentencing, and to issue recommendations on how such analysis should be used.[6] Director Wroblewski expressed reservations about components of pending sentencing reform legislation[7] that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic information."[8] The Department of Justice confirmed, through EPIC's lawsuit *EPIC v. DOJ,* that the Sentencing Commission report was never generated.[9] The public continues to be left in the dark regarding government use of algorithms throughout the criminal justice system.

In 2018, the U.S. Probation and Pretrial Services released a research summary about their Pretrial Risk Assessment Instrument.[10] While the summary provided valuable statistical analysis regarding some use of the federal pretrial risk assessment tool, the summary still failed to detail which jurisdictions use algorithmic tools. Because these controversial risk assessments are being increasingly relied upon in sentencing, the non-public documents are needed to increase public understanding of how a defendant's risk is determined, and what steps need to be taken to ensure

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Assessments.Com, Response to RFP 82500-O3 from Nebraska Dept. of Correctional Services (Oct. 25, 2015), *available at* https://epic.org/EPIC-19-11-08-NE-DCS-FOIA-20191112-Vant4ge-Bid.pdf.

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

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

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

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

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

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

[10] Cohen, Lowenkamp, & Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary*, supra note 4.

that the criminal justice system produces equitable outcomes. The information requested may be used by defendants to rebut the risk assessments in their cases and provide additional information that may affect their sentencing.

In May 2019, the United States and 41 other countries signed onto the Organisation for Economic Co-Operation and Development's AI Principles ("OECD AI Principles"). The principles "promote AI that is innovating and trustworthy and that respects human rights and democratic values."[11] There are five OECD AI Principles designed to guide policy decisions. One of these principles is that "there should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them."[12] The endorsement of the guidelines by the United States government signifies a commitment to use algorithms that comport with these principles.

While the federal government has shown a commitment to these AI principles, not all states have shown the same level of commitment when using algorithms in pre-trial risk assessments. Idaho's legislature took action about the lack of transparency and public information regarding the use of pre-trial risk assessments. This year House Bill No. 118 was passed unanimously.[13] This bill requires transparency in algorithmic pretrial risk assessments used to make bail and parole decisions.[14] Additionally, several states including New York, Vermont, and Alabama have passed legislation to study and publish state level use of automated decision systems.[15]

Although Idaho uses pre-trial risk assessments to help streamline its bail decisions,[16] the state has not meaningfully released information about the types risk assessment tools used or the validation of these systems to evaluate effectiveness and bias. Rep. Greg Chaney, author of House Bill No. 118, stated that the bill "brings needed sunshine and transparency so that criminal defendants, judges, prosecutors and the general public are able to scrutinize the tool and the recommendations it makes."[17] While the bill requires the public disclosure of the use of pretrial risk

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

[12] *Id.*

[13] *House Bill 118 (2019)*, Idaho Legislature, https://legislature.idaho.gov/sessioninfo/2019/legislation/h0118/.

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

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

[16] "[Representative Greg] Chaney estimated that 33 of the 41 counties in Idaho currently use a form of pretrial risk assessment but with little transparency. None, he said, use Northpointe's COMPAS assessment, a proprietary tool which a 2016 ProPublica investigation said inflated risk for African-Americans and underestimated Caucasian risk rates." Beryl Lipton, *Idaho Transparency Bill Would Increase Public Access to Pretrial Risk Tools*, MuckRock (Mar. 5. 2019), https://www.muckrock.com/news/archives/2019/mar/05/algorithms-idaho-legislation/.

[17] Greg Chaney, Idaho House of Representatives, *Guest Opinion: Idaho Must Eliminate Computerized Discrimination in Its Criminal Justice System*, Idaho Press (Feb. 6, 2019), https://www.idahopress.com/opinion/guest_opinions/guest-opinion-idaho-must-eliminate-computerized-discrimination-in-its-criminal/article_42bdb850-d1c4-592b-b2aa-dba23baa4a16.html.

assessment algorithms, some of these documents are not publicly available. For instance, there is a "Presentence Investigation addendum" on the Idaho Department of Corrections website that suggests the Department of Corrections uses Level of Service Inventory-Revised ("LSI-R"), a risk assessment tool. The Presentence Investigation document[18] or any other relevant documents, required by law,[19] are not publicly available. The lack of transparency regarding the use of algorithms limits valuable statistical testing by outside researchers. This testing maximizes the strength and effectiveness of algorithms used at critical stages of sentencing, increasing public accountability. The release of the information requested would significantly inform the public about Idaho's use of opaque automated systems in criminal sentencing as well as allow the Department of Corrections to comply with Idaho Code § 19-1910.

Duplication Fee Waiver

EPIC requests a waiver of any fees connected with this request. EPIC is an independent non-profit research center in Washington, D.C. working to protect privacy, open government, and civil liberties. EPIC pursues a wide range of program activities including public education, litigation, and advocacy. EPIC is recognized as a "representative of the news media,"[20] and has no commercial interest in the records requested.[21] If EPIC's request cannot be sent without cost, then prior to any copying, please notify EPIC with the reasons for the denial and estimated costs involved.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your response on its request within three business days, as Idaho Public Records Act requires. Idaho Code § 74-103. For questions regarding this request please contact Ben Winters at 202-483-1140 x126 or winters@epic.org, 'cc FOIA@epic.org.

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Respectfully submitted,

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

/s/ Enid Zhou
Enid Zhou
EPIC Open Government Counsel

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[18] Idaho Department of Corrections, Addendum to Presentence Investigation Form, http://forms.idoc.idaho.gov/WebLink/Browse.aspx?startid=99295&dbid=0 (Click "Forms" and select .docx entries entitled "Addendum to Presentence Investigation" and "Addendum to Presentence Investigation Cover Sheet").
[19] Idaho Code § 19-1910(1).
[20] *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).
[21] EPIC, *About EPIC*, https://epic.org/epic/about.html.