

VIA EMAIL

November 25, 2019

Andrea Barnes
Public Records Officer: Legal Division
Mississippi Department of Corrections
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Jackson, MS 39225
barnes@mdoc.state.ms.us

Dear Ms. Barnes:

This letter constitutes a request under the Mississippi Public Records Act, Miss. Code Ann. § 25-61-1 et seq, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Mississippi 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 validation studies for evidence-based risk assessment tools considered and/or used for pre-trial sentencing, sentencing, and prison management throughout Mississippi;
2. All correspondence, inquiries, guidelines, schedules and memoranda regarding validation studies of evidence-based risk assessments used by the Mississippi Department of Corrections;
3. All correspondence, inquiries, guidelines, policies, operating manuals and memoranda regarding the implementation of risk and needs assessment regulations required by Miss. House Bill 1352.¹ This includes, but is not limited to, the required data collection plan referenced in Miss. Code § 9-27-7(2)(b)(vii);
4. Any record concerning risk assessment tools, including but not limited to source codes, interview guides, training documents, and decision matrixes used by the Mississippi Department of Corrections;

¹ H.B. 1352, 2019 Leg., Reg. Sess. (Miss. 2019), *available at* <http://billstatus.ls.state.ms.us/documents/2019/html/HB/1300-1399/HB1352PS.htm>.

5. Purchase and sales contracts, request for proposals, and bids between evidence-based risk-assessment tool companies or software development contractors and the Mississippi Department of Corrections.

Background

Evidence-based assessments are designed to predict future behavior by analyzing statistical data. In the criminal justice system, risk-assessment algorithms use data about defendants including their criminal history (e.g. previous offenses, failure to appear in court, violent offenses, etc.) or socio-demographic characteristics (e.g. age, sex, employment status, drug history) to then predict the person's risk of recidivism or risk of failing to appear when on bail. Such predictions are based on average recidivism rates for the group of offenders that share the defendant's characteristics. The recidivism calculation has been used by judges in pretrial release hearings, parole and probationary hearings, and are increasingly being used as a factor considered in determining sentencing.² However, many have questioned the underlying data, the reliability of the outcomes, as well as defendants' lack of opportunity to challenge the results.

In 2014, then U.S. Attorney General Eric Holder called for the U.S. Sentencing Commission to study the use of algorithms in courts because he was concerned that the sentencing scores may be a source of bias.³ In the same year, Jonathan Wroblewski, Director of the Office of Policy and Legislation in the Justice Department, sent a letter to the U.S. Sentencing Commission asking the commission to study how data analysis was being used in sentencing, and to issue recommendations on how such analysis should be used.⁴ Director Wroblewski expressed reservations about components of pending sentencing reform legislation⁵ that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic information."⁶ The Department of Justice confirmed, through EPIC's lawsuit *EPIC v. DOJ*, that the Sentencing Commission report was never generated.⁷ The public continues to be left in the dark regarding government use of algorithms throughout the criminal justice system.

In 2018, the U.S. Probation and Pretrial Services released a research summary about their Pretrial Risk Assessment Instrument.⁸ While the summary provided valuable statistical analysis regarding some use of the federal pretrial risk assessment tool, the summary still failed to detail which jurisdictions use algorithmic tools. Because these controversial risk assessments are being

² Thomas H. Cohen, Christopher T. Lowenkamp, & William E. Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary*, Administrative Office of the U.S. Courts (Sep. 2018), https://www.uscourts.gov/sites/default/files/82_2_3_0.pdf.

³ Eric Holder, Speech Presented at the National Association of Criminal Defense Lawyers 57th Annual Meeting, 27 Fed. Sentencing Reporter 252 (April 2015), <http://fsr.ucpress.edu/content/27/4/252.full.pdf+html>.

⁴ Letter from Jonathan Wroblewski, Dir. of the Office of Policy Legislation, Dep't of Justice, to Patti Saris, Chair of U.S. Sentencing Comm'n (July 29 2014). <https://www.justice.gov/sites/default/files/criminal/legacy/2014/08/01/2014annual-letter-final-072814.pdf>

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

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

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

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

increasingly relied upon in sentencing, the non-public documents are needed to increase public understanding of how a defendant's risk is determined, and what steps need to be taken to ensure that the criminal justice system produces equitable outcomes. The information requested may be used by defendants to rebut the risk assessments in their cases and provide additional information that may affect their sentencing.

In May 2019, the United States and 41 other countries signed onto the Organisation for Economic Co-Operation and Development's AI Principles ("OECD AI Principles"). The principles "promote AI that is innovating and trustworthy and that respects human rights and democratic values."⁹ There are five OECD AI Principles designed to guide policy decisions. One of these principles is that "there should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them."¹⁰ The endorsement of the guidelines by the United States government signifies a commitment to use algorithms that comport with these principles.

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. Several states including New York, Vermont, and Alabama have passed legislation to study and publish state level use of automated decision systems.¹¹ This year, Idaho passed the first bill requiring transparency in algorithmic pretrial risk assessments used to make bail and parole decisions.¹² In comparison, however, Mississippi's use of evidence based risk assessment is largely opaque.

The Mississippi Criminal Justice Reform Act, passed in April 2019, regulates the use of risk and needs assessment.¹³ The bill provides for the use of risk and needs assessments, adherence to standards developed for those assessments, and a data collection plan that collects the results of initial risk and needs assessment and/or other clinical assessments.¹⁴ However, the state has not released detailed information about the types risk assessment tools used or information regarding validation of these systems to evaluate effectiveness and bias. This places defendants, defense counsel, and the public at a disadvantage when approaching pre-trial hearings. Outside researchers cannot conduct valuable statistical testing because they are limited by the lack of transparency

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

¹⁰ *Id.*

¹¹ See NYC Local Law 49, Int No. 1696-A §1(b)(2) (2017), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3137815&GUID=437A6A6D-62E1-47E2-9C42-461253F9C6D0>; NY Senate 3971-B (February 22, 2019),

<https://www.nysenate.gov/legislation/bills/2019/s3971>; VT. H. 378 (May 21, 2018),

<https://legislature.vermont.gov/bill/status/2018/H.378> ; AL. SJR71 (May 15, 2019),

<http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2019RS/PrintFiles/SJR71-int.pdf>

¹² ID. House Bill No. 118 (2019), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118E1.pdf>.

¹³ Risk and needs assessment is defined as "the use of an actuarial assessment tool validated on a Mississippi corrections population to determine a person's risk to reoffend and the characteristics that, if addressed, reduce the risk to reoffend." Miss. House Bill 1352(e) (2019),

<http://billstatus.ls.state.ms.us/documents/2019/html/HB/1300-1399/HB1352PS.htm>.

¹⁴ *Id.* at §18(2)(b)(vii).

regarding the use of algorithms. Statistical testing evaluates the strength and effectiveness of algorithms used at critical stages of sentencing, thereby increasing public accountability. The public is left in the dark about Mississippi's use of these risk assessment tools. Public disclosure and transparency are crucial to increasing public understanding as the government's use of these types of tools increases. By codifying this data collection plan, Mississippi is committed to collect criminal justice data. The release of the information requested would significantly inform the public about Mississippi's use of opaque automated systems in criminal sentencing and carry out the intent of the Criminal Justice Reform Act.

Duplication Fee Waiver

EPIC requests a waiver of any fees connected with this request. EPIC is an independent non-profit research center in Washington, DC working to protect privacy, open government, and civil liberties. EPIC pursues a wide range of program activities including public education, litigation, and advocacy. EPIC is recognized as a "representative of the news media,"¹⁵ and has no commercial interest in the records requested.¹⁶ 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 fourteen business days. Miss. Code Ann. § 25-61-1. For questions regarding this request please contact Ben Winters at 202-483-1140 x126 or winters@epic.org, 'cc FOIA@epic.org.

Respectfully submitted,

/s/ Ben Winters

Ben Winters
EPIC Equal Justice Works Fellow

/s/ Enid Zhou

Enid Zhou
EPIC Open Government Counsel

¹⁵ *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

¹⁶ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.