

VIA EMAIL

March 26, 2020

Laura Montenegro
Informational Representative, Office of Public Information
New Hampshire Department of Corrections
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Concord, NH 03302
Email: laura.montenegro@doc.nh.gov

Dear Ms. Montenegro:

This letter constitutes a request under New Hampshire Right to Know Law, R.S.A. Ch. 91-A et seq., and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the New Hampshire 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 records concerning risk assessment tools, like the Presentence Investigation Reports (“PSIs”) performed by the New Hampshire Department of Corrections¹, including but not limited to the source codes, operating manuals and training documents used in pre-trial or post-conviction by the state of New Hampshire;
2. All minutes, correspondence, inquiries, guidelines, and memoranda from the juvenile justice subcommittee of the Criminal and Juvenile Justice Council meetings regarding pre-trial risk assessments and bail-reform;²
3. All validation studies for pre-trial and post-trial sentencing and prison management throughout New Hampshire;
4. All records, including but not limited to correspondences, inquiries, guidelines, schedules, and memoranda, about current and proposed validation studies for assessment tools considered for pre-trial sentencing, sentencing, and prison management throughout New

¹ *Frequently Asked Questions*, New Hampshire Dep’t. of Corrections, <https://www.nh.gov/nhd/doc/faq.html>.

² Alyssa Dandrea, *Bail Reform Effort Seeks to Standardize Pretrial Risk Assessment in N.H.*, Concord Monitor (Mar. 3, 2018), <https://www.concordmonitor.com/Council-meeting-bail-reform-risk-assessment-18919702>.

Hampshire;

5. Purchase and sales contracts between risk-assessment tool companies and software development contractors and the state of New Hampshire.

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) 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.³ 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.⁴ 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.⁵ The Department of Justice confirmed, through EPIC's lawsuit *EPIC v. DOJ*, that the Sentencing Commission report was never generated.⁶ However, in a memo to the President in 2014, the DOJ detailed various predictive analytics systems that were tested by all levels of government, stressing that the use of these tools in law enforcement implicates "individual liberty."⁷ The DOJ emphasized that these tools must be tested because these tools "are more accurate and, at least arguably, more objective, than human decision-makers who currently make assessments like probation or parole determinations based on their individual judgment."⁸ But, little information has been released about these tools. The public is still left in the dark regarding government use of algorithms throughout the criminal justice system

³ 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.

⁴ 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>.

⁵ 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>

⁶ Joint Status Report at 2, *EPIC v. Dep't of Justice*, 320 F.Supp.3d 110 (2018) (No. 17-410).

⁷ U.S. Dep't of Justice, *Predictive Analytics In Law Enforcement: A Report By The Department Of Justice* 23 (Nov. 2014), available at <https://epic.org/foia/doj/criminal-justice-algorithms/EPIC-16-06-15-DOJ-FOIA-20200319-Settlement-Production-pt1.pdf>.

⁸ *Id.* at 24.

In 2018, the U.S. Probation and Pretrial Services released a research summary about its Pretrial Risk Assessment Instrument.⁹ While the summary provided valuable statistical analysis regarding some uses of the federal pretrial risk assessment tool, the summary failed to detail which jurisdictions use algorithmic tools. Because these controversial risk assessments are being increasingly relied upon in sentencing, the non-public documents are needed to increase public understanding of how a defendant's risk is determined, and what steps need to be taken to ensure that the criminal justice system produces equitable outcomes. The information requested may be 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."¹⁰ One of these five principles designed to guide policy decisions regarding AI is that "there should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them."¹¹ 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.¹² Recently, Idaho passed the first bill requiring transparency in algorithmic pretrial risk assessments that are used to make bail and parole decisions.¹³ Unlike a number of states across the country, New Hampshire has not passed legislation to study automated decision systems in the criminal justice context or have been transparent about the state's use of pre-trial risk assessments. Little public information is available about New Hampshire's use of pre-trial risk assessment tools.

It is unclear if New Hampshire pre-trial risk assessments to help streamline its bail decisions. New Hampshire allows courts to,

in its discretion, order a presentence investigation for a defendant convicted of a felony or a misdemeanor; provided that, upon the recommendation of the prosecution, the court shall order a presentence investigation report where the felony or misdemeanor was violent and

⁹ Cohen, Lowenkamp, & Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRAI): A Research Summary*, supra note 2.

¹⁰ Organisation for Economic Co-Operation and Development, *OECD Principles on AI* (May 2019), <https://www.oecd.org/going-digital/ai/principles/>.

¹¹ *Id.*

¹² 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>

¹³ ID. House Bill No. 118 (2019), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118E1.pdf>.

the court has reason to believe that the defendant committed a similar act within the past year. The report shall include a recommendation as to disposition, together with reference to such material disclosed by the investigation as supports such recommendation.¹⁴

The New Hampshire Department of Corrections uses Pre-sentence Investigation Reports (PSI's),¹⁵ but has not publicly released any of these reports, or critical information about them. EPIC seeks information about Pre-sentence Investigation Reports and any other risk assessment tools used by the state of New Hampshire.

The state has not released publicly detailed information about the types risk assessment tools used or information regarding validation of these systems to evaluate effectiveness and bias. Disparate impacts based on race, gender, age, and ethnicity have been shown in some of these types of risk assessment tools. Accordingly, EPIC seeks information about New Hampshire courts, prisons, or police systems's use of risk assessments tools.

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,"¹⁶ and has no commercial interest in the records requested.¹⁷

A lack of public information on these pre-trial risk assessment tools places defendants, defense counsel, and the public at a disadvantage when approaching pre-trial hearings. The lack of transparency regarding the use of algorithms limits valuable statistical testing by outside researchers. This statistical testing maximizes the strength and effectiveness of algorithms used at critical stages of sentencing, which increases public accountability. The opaque use of this tool amplifies the need for public knowledge about what data New Hampshire is using and how the state is using it. The release of the information requested would significantly inform the public about New Hampshire's use of opaque automated systems in criminal sentencing.

For these reasons, EPIC respectfully requests that a waiver of fees associated with the request be granted, and if any fees are assessed that they be approved by EPIC prior to rendering the services charged for.

Conclusion

¹⁴ NH Rev Stat § 651:4 (1996 through Reg Sess.).

¹⁵ *Frequently Asked Questions*, New Hampshire Dep't. of Corrections, <https://www.nh.gov/nhdoc/faq.html>.

¹⁶ *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

¹⁷ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

Thank you for your consideration of this request. EPIC anticipates agency acknowledgment within 5 working days. RSA § 91-A:1. For questions regarding this request, please contact Ben Winters at 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