



VIA FAX
June 15, 2016

Attorney General
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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.

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.¹ 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.² 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 Commission³ 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 Congress⁴ 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

¹ 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/>

² 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>.

³ 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>.

⁴ 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,⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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

⁵ 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/>.

⁶ 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>.

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

⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁹ § 552(a)(4)(A)(iii).

the individual understanding of the requester.¹⁰

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

¹⁰ 28 CFR Part 35 § 16.10(k)(2)(iii)