

From: [Ben Winters](#)
To: [AGO - Info](#)
Cc: foia@epic.org
Subject: Public Records Act Request - Pretrial Risk Assessments
Date: Monday, June 15, 2020 4:18:22 PM
Attachments: [EPIC-20-06-15-VT-PTRA-PRA-20200615.pdf](#)

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Dear Ms. Mishan,

Attached is a Public Records Act Request made on behalf of the Electronic Privacy Information Center (EPIC) to the Vermont Attorney General's Office seeking records related to Vermont's use of pre-trial risk assessments.

Please let me know if there is difficulty in opening the document. Thank you.

Best,
Ben Winters
Equal Justice Works Fellow
Electronic Privacy Information Center (EPIC)
winters@epic.org
202-483-1140 x126

VIA EMAIL

June 15, 2020

Jessica Mishaan
Vermont State Attorney General's Office
109 State Street
Montpelier, VT 05609
ago.info@vermont.gov
(802) 282-3171

Dear Ms. Mishaan,

This letter constitutes a request under the Vermont Public Records Act, 1 V.S.A. § 315, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Vermont Attorney General's Office.

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 and sentencing throughout Vermont;
2. All correspondence, inquiries, guidelines, schedules and memoranda regarding validation studies of evidence-based risk assessments used by the Vermont Attorney General's Office for pre-trial sentencing and sentencing;
3. Any record concerning risk assessment tools, including but not limited to source codes, interview guides, training documents, and decision matrixes used by the Vermont Attorney General's Office for pre-trial sentencing and sentencing;
4. Purchase and sales contracts, request for proposals, and bids between evidence-based risk-assessment tool companies or software development contractors and the Vermont Attorney General's Office.

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.¹ However, many have questioned the underlying data, the reliability of the outcomes, as well as defendants' lack of opportunity to access and 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.² 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.³ Director Wroblewski expressed reservations about components of pending sentencing reform legislation⁴ that would base prison sentences on factors such as "education level, employment history, family circumstances and demographic information."⁵ The Department of Justice confirmed, through EPIC's lawsuit *EPIC v. DOJ*, that the Sentencing Commission report was never generated.⁶ 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.⁷ 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 should be published 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

¹ 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.

² 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>.

³ 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>

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

⁵ Letter from Jonathan Wroblewski, *supra* note 4.

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

⁷ Cohen, Lowenkamp, & Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary*, *supra* note 2.

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."⁸ 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."⁹ The endorsement of the guidelines by the United States government signifies a commitment to use algorithms that comport with these principles.

Vermont is one of several states that has indicated a commitment to these AI principles. In 2018, Vermont passed Act No. 137, creating an Artificial Intelligence Task Force to investigate the field of artificial intelligence in Vermont.¹⁰ One of the responsibilities of the Task Force was to make recommendations on the use of artificial intelligence in State government.¹¹ On January 15, 2020, the Task Force published a final report that found that "there has been little use of artificial intelligence applications by law enforcement in Vermont," but did not provide any information on what that little use consisted of.¹² The report did not include any specific recommendations for state and law enforcement use of artificial intelligence going forward.

13 V.S.A § 7554c provides for the use of pretrial risks assessments and needs screenings. According to the statute, Vermont courts use pretrial risk assessments to provide information regarding the risk of an individual's nonappearance or risk of re-offense so that the court can "make an appropriate order concerning bail and conditions of pretrial release."¹³ Participation in risk assessment or needs screening is "voluntary."¹⁴ The Vermont Attorney General's Office is responsible for performing risk assessments, needs screenings, and pretrial monitoring serves.¹⁵ The Attorney General's Office is also required to report annually to the General Assembly on services provided and outcome indicators.¹⁶

Vermont has not released detailed information about the types of risk assessment tools used for pretrial risk assessment or information regarding validation of these systems to evaluate effectiveness and bias. A January 31, 2020 report from the Vermont Office of the Attorney General to the Vermont General Assembly referred to risk assessment as one of the "services provided" by

⁸ Organisation for Economic Co-Operation and Development, OECD Principles on AI (May 2019), <https://www.oecd.org/going-digital/ai/principles/>.

⁹ *Id.*

¹⁰ VT. Act No. 137 (May 21, 2018),

<https://legislature.vermont.gov/Documents/2018/Docs/ACTS/ACT137/ACT137%20As%20Enacted.pdf>.

¹¹ *Id.*

¹² Report, Artificial Intelligence Task Force (Jan. 15, 2020), *available at*

<https://legislature.vermont.gov/assets/Legislative-Reports/Artificial-Intelligence-Task-Force-Final-Report-1.15.2020.pdf>.

¹³ 13 V.S.A § 7554c (a)(1) (2019), <https://legislature.vermont.gov/statutes/section/13/229/07554c>.

¹⁴ § 7554c (b)(3).

¹⁵ § 7554c (f)(1).

¹⁶ § 7554c (f)(2).

the Attorney General's office, but included no further information on risk assessments.¹⁷ It did not include information on how risk assessments are conducted, how many are conducted, or the outcomes of pretrial risk assessments that the office has conducted.¹⁸ Previous requests for public records have resulted in the release of documents related to Vermont's use of risk assessment tools for post-conviction risk assessment,¹⁹ but there has been no corresponding information on Vermont's use of pretrial risk assessment tools. There has been no information released on the effectiveness of either pretrial or post-trial risk assessment tools.

This lack of information 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 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 Vermont'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. The release of the information requested would significantly inform the public about Vermont's use of risk assessment in criminal sentencing.

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,"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. 1 V.S.A. § 318(a)(1). For questions regarding this request please contact Ben Winters at 202-483-1140 x126 or winters@epic.org, 'cc FOIA@epic.org.

¹⁷ Memorandum from Willa Farrell, Court Diversion & Pretrial Services Director at State of Vermont Office of the Attorney General to the Vermont General Assembly, Re: Pretrial Services and Court Diversion Report pursuant to 13 V.S.A. § 7554c (f) and 3 V.S.A. § 164 (d) (Jan. 31, 2020), *available at* <https://legislature.vermont.gov/assets/Legislative-Reports/Pretrial-Services-Court-Diversion-Rpt-to-Leg-Jan-2020.pdf>.

¹⁸ *Id.*

¹⁹ See Letter from Charles Remnick, Records Management Specialist at Vermont Department of Corrections to Brian Waters, MuckRock News, Re: Record Request #32986 (Aug. 22, 2019), *available at* <https://www.muckrock.com/foi/vermont-80/risk-determination-policy-79099/>.

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>.

Respectfully submitted,

/s/ Tracy Zhang

Tracy Zhang
EPIC Clerk

/s/ Ben Winters

Ben Winters
EPIC Equal Justice Works Fellow