

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In re Application for a Judgment under Article 78 of
the Civil Practice Law and Rules by

MARTHA RAYNER

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION

Respondent.

Index No.: 908549-22

VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner Martha Rayner, by and through her undersigned counsel, respectfully alleges as follows:

INTRODUCTION

1. Petitioner, Fordham Law School Professor Martha Rayner, brings this proceeding under CPLR Article 78 and the Freedom of Information Law (“FOIL”), Pub. Off. Law § 84 *et seq.* to challenge the denial of a FOIL request by Respondent New York State Department of Corrections and Community Supervision (“Department”). Professor Rayner’s FOIL request seeks basic information about the operation and reliability of a computer algorithm the New York State Board of Parole is required by law to rely on for each parole decision it makes. The algorithm is part of a risk assessment tool called Correctional Offender Management Profiling for Alternative Sanctions (“COMPAS”) Re-entry.

2. COMPAS and similar risk assessment tools used to predict an offender's likelihood of recidivism have long been controversial. COMPAS is embedded within a parole system critics say is broken and perpetuates racial disparities in criminal punishment.

3. The Department denied Professor Rayner's request in part as overbroad and unclear after misconstruing its plain language. The Department denied the rest of the request purportedly to protect the copyright and business interests of the private, for-profit corporation that developed the COMPAS tool, Northpointe, Inc. The Department did so without providing a particularized justification for why any of its claimed exemptions apply, and despite ample evidence that they do not. Its failure to produce the requested records violates FOIL.

4. The Department's denial exemplifies a troubling trend of agencies outsourcing their core functions to private corporations and thereby preventing the public from understanding or overseeing their decisions. Nowhere is that opacity more problematic than in the criminal justice system. The public is entitled to a meaningful explanation of the basis for the state's decisions to grant or withhold parole. The Court should order the Department to produce the records that will help inform the public on this important issue.

PARTIES, JURISDICTION, AND VENUE

5. Petitioner Martha Rayner is Clinical Associate Professor of Law at Fordham Law School, where she co-directs its Criminal Defense Clinic, a law student clinic that defends clients at the trial level, represents incarcerated persons in clemency, parole, and other post-conviction proceedings, and challenges the civil consequences of arrests. Through her writing and litigation work, Professor Rayner has extensive experience with COMPAS Re-entry.

6. Respondent New York State Department of Corrections and Community Supervision is an “agency” within the meaning of Pub. Off. Law § 86(3), with its place of business located at 1220 Washington Ave #9, Albany, NY 12226.

7. Respondent’s actions are final in nature and cannot be reviewed adequately by another court, entity, or officer. This Court thus has jurisdiction over this matter under Pub. Off. Law § 89(4)(b), Article 78 of the CPLR, and CPLR § 3001.

8. Pursuant to CPLR §§ 7804(b) and 506(b), venue in this proceeding lies in Albany County, the judicial district in which Respondent’s principal office is located.

FACTS

Mandatory Risk and Needs Assessment and New York’s Adoption of COMPAS Re-entry

9. Tens of thousands of people incarcerated in New York state prisons are currently serving indeterminate sentences. After they serve their minimum sentence length, their release depends entirely on decisions by the Parole Board.

10. The NYS Parole Board, a division of the Department, is legally required to consider the COMPAS Re-entry risk assessment in every one of its parole decisions.

11. State law mandates that the Parole Board use “procedures [that] shall incorporate risk and needs principles to . . . assist members of the state board of parole in determining which incarcerated individuals may be released.” Exec. Law § 259-c(4).

12. These procedures include considering an “inmate’s risk and needs scores as generated by a periodically-validated risk assessment instrument” prepared by the Department. 9 NYCRR § 8002.2(a).

13. To comply with these statutory and regulatory mandates, the Parole Board has adopted COMPAS Re-entry, a tool developed by Northpointe, Inc.

14. The Parole Board almost always defers to COMPAS Re-entry's predictions of high risk.

15. Northpointe, Inc. is a private, for-profit corporation that sells similar COMPAS products in other states.

16. Since winning a bid with the NYS Division of Probation and Corrections Alternatives ("DPCA") (now the Office of Probation and Correction Alternatives) in 1998, Northpointe has sold various COMPAS products in New York.

17. Northpointe's 2014 contract with the State of New York states that the DPCA "worked[] extensively with [Northpointe] to customize the COMPAS software product."

18. On information and belief, since the 1998 bid, Northpointe has sold COMPAS products in New York without undergoing a competitive procurement process.

19. Risk assessment tools used to predict an offender's likelihood of recidivism on release, including COMPAS, have faced intense public scrutiny and debate. They have been criticized for being inaccurate, racially discriminatory, and rigged against the poor.

20. COMPAS has also faced criticism for depriving the offender and the public of the ability to understand the basis of a parole decision—the subject of ongoing litigation against the Parole Board by a class of "juvenile lifers," adults who were sentenced to indeterminate life sentences as juveniles. *Flores v. Stanford*, No. 18 CV 2468 (VB), 2019 WL 4572703, at *4 (S.D.N.Y. Sept. 20, 2019).

21. The *Flores* plaintiffs assert that because COMPAS is sold by a private company, "comprising 'secret algorithms' unknown to the Parole Board," it is a "black box" that Parole Board commissioners do not understand. *Id.* The plaintiffs argue that this reliance on a poorly

understood algorithm deprives them of the individualized parole hearings to which they are entitled. *Id.*

The COMPAS Re-entry Risk Assessment Tool

22. The COMPAS Re-entry assessment collects 74 pieces of data through a questionnaire. The questionnaire is publicly accessible.

23. On information and belief, the COMPAS Re-entry tool used by the Parole Board is customized for New York.

24. COMPAS Re-entry combines that data to generate scores for three risk areas (felony violence, arrest, and absconding), three criminal involvement areas (general, history of violence, and prison misconduct), and several needs areas (for example, substance use and family support).

25. For each risk, criminal involvement, or needs area, the score assigns offenders to one of ten groups, called “deciles,” which correspond to the offender’s risk level as predicted by the algorithm: low, medium, or high.

26. The range of scores COMPAS Re-entry associates with each decile—each decile’s “cut point”—is based on historical recidivism rates of a comparison class of individuals called the “Norm Core Data Group,” divided into its own deciles based on its members’ scores.

27. The algorithm can therefore accurately predict New York offenders’ risk levels only to the extent the Norm Core Data Group resembles them in relevant ways.

28. This basic process is about all that’s publicly known about COMPAS Re-entry in New York. The public does not know (1) how COMPAS Re-entry combines the questionnaire answers to generate the risk and needs scores, (2) each decile’s cut point (*i.e.*, what score is required to be assigned to each decile), (3) how deciles are assigned to the qualitative “low,”

“medium,” and “high” risk levels, and (4) the Norm Core Data Group used to generate the scores associated with each decile.

29. On information and belief, there are no published studies validating the predictive accuracy of COMPAS Re-entry in New York.

30. Northpointe and state agencies have published validation studies of other COMPAS instruments. They have also published records, for other COMPAS instruments, indicating how deciles are assigned to qualitative risk levels.

Professor Rayner’s FOIL Request and the Department’s Unexplained Denial

31. On January 4, 2022, Professor Rayner filed a FOIL request with the Department, seeking (1) any and all documents providing the formulas for calculating the risk and needs scales used in New York’s COMPAS instrument; (2) all documents indicating the decile cut-points for Risk Score and Criminogenic Needs Scales; (3) all documents indicating how deciles are assigned to the qualitative values for each Risk and Needs Scale; (4) the Norm Core data group against which New York is scoring individual COMPAS assessments, and (5) all validation studies of the New York COMPAS instrument. A true and correct copy the request is attached as Exhibit A.

32. On January 5, 2022, the Department acknowledged receipt of the request. A true and correct copy of the Department’s January 5, 2022 letter is attached as Exhibit B.

33. On January 31, 2022, having not yet received a response, Professor Rayner inquired about the status of her request. A true and correct copy of her email is attached as Exhibit C.

34. The Department then embarked on a pattern of unilaterally extending its response deadline without meaningful justification, repeatedly stating that it was “conducting a diligent

search for responsive records” while giving itself until March 21, then May 3, then June 16, 2022 to respond. Professor Rayner administratively appealed the first two extensions as constructive denials of the request. The Department summarily denied these appeals. True and correct copies of these extension letters, administrative appeals, and appeal denials are attached as Exhibits D, E, F, G, H, I, and J.

35. Finally, on June 13, 2022, the Department denied the request in full. A true and correct copy of the Department’s June 13, 2022 denial letter is attached as Exhibit K.

36. The Department denied Item 1 on the purported ground that it purportedly was overly broad and did not reasonably describe the records sought.

37. The Department denied the rest of the request, “to the extent we were able to identify responsive records,” under Pub. Off. Law § 87(2)(a), which exempts records “specifically exempted from disclosure by state or federal statute.” The Department cited section 106 of the federal Copyright Act of 1976 as the relevant statute.

38. The Department did not identify any copyrighted material in the withheld records or explain why the Copyright Act purportedly qualifies as a non-disclosure statute under Pub. Off. Law § 87(2)(a). It did not acknowledge or dispute that its disclosure of the records to Professor Rayner would constitute fair use.

39. On information and belief, Northpointe has not registered a copyright for some or all of the responsive records.

40. The Department also denied the request under Pub. Off. Law § 87(2)(d), claiming that the records are exempt trade secrets “or” confidential commercial information whose disclosure would cause substantial competitive injury to a commercial enterprise (it did not say which).

41. The Department did not identify any actual competitors of Northpointe with respect to COMPAS Re-entry, describe the substantial competitive injury Northpointe would purportedly face from disclosure of the responsive records, or provide reason to believe Northpointe reasonably expects confidentiality in them.

42. The Department also provided no explanation for its contention that any or all of the withheld records are Northpointe's trade secrets, nor did it address the possibility that any trade secret protections are overcome by the public interest in understanding the Parole Board's decision-making process.

43. Professor Rayner timely appealed the Department's denial on July 7, 2022. A true and correct copy of the July 7, 2022 appeal letter is attached as Exhibit L.

44. Exactly two weeks later, the Department denied the administrative appeal in full. A true and correct copy of the Department's July 21, 2022 appeal denial is attached as Exhibit M.

45. In this final response, the Department upheld its denial of Item 1 as not reasonably described and overbroad, after construing it to seek not only what it actually requested—documents “providing the formulas for calculating the risk and needs scales used in” the COMPAS instrument, but also “all records related to the COMPAS instrument.”

46. The Department upheld the rest of its denial under the same exemptions, again without providing any explanation.

47. Professor Rayner's FOIL request was reasonably specific, and the Department did not justify the applicability of the exemptions it cited.

48. The Department's failure to produce all documents responsive to the request has caused, and continues to cause, immediate and irreparable harm to the rights guaranteed to Professor Rayner and the public under FOIL.

49. Professor Rayner has no adequate remedy other than this proceeding, and no previous application for the relief requested herein has been made.

50. Having exhausted her administrative remedies, Professor Rayner thus files this Article 78 proceeding seeking immediate production of responsive documents.

FIRST CLAIM

VIOLATION OF FOIL: UNLAWFUL DENIAL UNDER PUB. OFF. LAW § 89(3)(a)

51. Professor Rayner hereby repeats and re-alleges paragraphs 1 through 50 as if fully set forth herein.

52. The Department's denial of the request under Pub. Off. Law § 89(3)(a) was unlawful because Professor Rayner's request reasonably describes the records sought and is not overly broad.

53. By its actions, the Department has refused to perform a duty enjoined upon it by FOIL, erred as a matter of law, and otherwise acted arbitrarily and capriciously.

SECOND CLAIM

VIOLATION OF FOIL: UNLAWFUL DENIAL UNDER PUB. OFF. LAW § 87(2)(a)

54. Professor Rayner hereby repeats and re-alleges paragraphs 1 through 53 as if fully set forth herein.

55. The Department's denial of the request under Pub. Off. Law § 87(2)(a) was unlawful because the records Professor Rayner requested are not exempt from disclosure by state or federal statute.

56. Moreover, in denying Professor Rayner's FOIL request under Pub. Off. Law § 87(2)(a), the Department failed to provide a specific and particularized justification for withholding any of the responsive records.

57. By its actions, the Department has refused to perform a duty enjoined upon it by FOIL, erred as a matter of law, and otherwise acted arbitrarily and capriciously.

THIRD CLAIM

VIOLATION OF FOIL: UNLAWFUL DENIAL UNDER PUB. OFF. LAW § 87(2)(d)

58. Professor Rayner hereby repeats and re-alleges paragraphs 1 through 57 as if fully set forth herein.

59. The Department's denial of the request under Pub. Off. Law § 87(2)(d) was unlawful because the records Professor Rayner requested are neither trade secrets nor confidential commercial information whose disclosure would cause substantial injury to the competitive position a commercial enterprise.

60. Moreover, in denying Professor Rayner's FOIL request under Pub. Off. Law § 87(2)(d), the Department failed to provide a specific and particularized justification for withholding any of the responsive records.

61. By its actions, the Department has refused to perform a duty enjoined upon it by FOIL, erred as a matter of law, and otherwise acted arbitrarily and capriciously.

REQUESTS FOR RELIEF

WHEREFORE, Professor Rayner respectfully requests this Court to grant judgment:

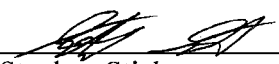
A. Declaring that the Department has acted unlawfully by denying Professor Rayner's request under Pub. Off. Law § 89(3)(a);

B. Declaring that the Department has acted unlawfully by denying Professor Rayner's request under Pub. Off. Law § 87(2)(a);

- C. Declaring that the Department has acted unlawfully by denying Professor Rayner's request under Pub. Off. Law § 87(2)(d);
- D. Ordering the Department to provide Professor Rayner with copies of all responsive records within ten business days;
- E. Awarding Professor Rayner her costs and attorneys' fees under Pub. Off. Law § 89(4)(c); and
- F. Awarding Professor Rayner such other and further relief as the Court deems just and proper.

Dated: November 14, 2022

Respectfully submitted,



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¹ This Verified Petition does not purport to represent the institutional views of Yale Law School, if any.

VERIFICATION

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MARTHA RAYNER, being duly sworn, deposes and says:

That I am the petitioner in this proceeding; that I have read the foregoing petition and know the contents thereof; that the same are true to my own knowledge, except as to those matters stated therein to be alleged on information and belief; and that as to those matters, I believe them to be true.


(Martha Rayner)

Dated: N.Y., New York
Nov. 14, 2022

Sworn to before me this
14th day of November, 2022


NOTARY PUBLIC

Ron Lazebnik
Notary Public State of NY
New York County
LIC. # 02LA6273640
Comm. Exp. 12/17/2024