Consumer Watchdog

California Privacy Protection Agency
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Dear Agency members,

Consumer Watchdog writes to the new rules subcommittee on the topic of profiling and disclosure related to automated decision-making.

Algorithms are increasingly ubiquitous. The Equal Employment Opportunity Commission said in 2022 that 80 percent of businesses are using automated decision-making. However, 85 percent of algorithms throughout this decade will provide false analysis because of bias, according to the American Civil Liberties Union. Taking these two figures into account presents a frightening scenario of a society prioritizing cost and speed over fairness. The results are often a racist or classicist algorithm, a sort of digital redlining that occurs instantaneously and out of view.

The CCPA directs the Agency to issue regulations "governing access and opt-out rights with respect to businesses' use of automated decision-making technology, including profiling and requiring businesses' response to access requests to include meaningful information about the logic involved in those decision-making processes, as well as a description of the likely outcome of the process with respect to the consumer." The plain language of the law requires the agency to let Californians know how they are being profiled, and their right to opt out of automated decision-making. That was the intent of voters when they passed Proposition 24, which endowed Californians with unprecedented control over the use of personal data.

We address the agency's questions regarding the proliferation of algorithmic discrimination of protected classes and beyond, prevailing European data privacy caselaw, and what consumers should know about algorithmic logic.

More evidence is emerging that discrimination is borne out when people seek a mortgage, apply for a job, credit, school, or government benefits. And it's usually low-income individuals, people of color, females, religious groups, or those with disabilities who suffer the most as a result of automated decisions. In 2019, home mortgage lenders gave out loans 40%-80% more times to white people than people of color in scenarios where both groups had similar financial characteristics, according to *The Markup*. In addition, high-earning Black applicants with less debt were denied loans more than high-earning White applicants with more debt[1]. In 2019, Facebook agreed to enter into a

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[1] "The Secret Bias Hidden in Mortgage-Approval Algorithms," The Markup, Emmanuel Martinez and Lauren Kircher, August 25, 2021.

settlement with the ACLU for deploying an algorithm that targeted men and excluded women from the audience for traditionally male job openings, like truck drivers[2].

But we are only beginning to flag the discriminatory flaws of algorithms. As we've seen in Europe and stateside, algorithms stand to categorize and rank people in many ways.

As a guide we reference the General Data Protection Regulation (GDPR), and how the courts and Data Protection Authorities in Europe applied the law. And we see they have come down in favor of college applicants, job seekers and gig economy workers regarding profiling and disclosing logic in automated decision-making.

How Rules Should Be Drawn and What Should be Disclosed

Consumer Watchdog recommends the privacy agency align automated decision-making rules closer to GDPR by writing regulations stating that any right to opt out of automated decision-making should apply to, "a decision based on fully or partially automated processing, including profiling, which produces legal or significant effects concerning the consumer."

"Legal effects" would occur when someone's legal rights are affected, such as the cancellation of a contract.

"Significant effects" would be a decision that impacted a person's circumstances or behavior, such as decisions that affect someone's financial situation, denies employment or access to education.

For example, the Amsterdam District Court ruled that automated decisions which imposed fines or reduce fares for drivers based on the performance data it collected on them "significantly" affected the driver, and therefore the automated decision was illegal. [3]

A Finnish data regulator enforcing GDPR found that a financial credit reporting company could not use age as an automatically excluding factor from having a credit application analyzed.[4] CNIL, the data protection authority in France, looked at how French universities automatically ranked applications based on residence, the order of their wishes, and their family situation. Based on that ranking, the schools automatically made an offer.[5] And it found this sort of automated ranking of prospective students by university admissions was illegal. This ruling was possible because automated decision-making that legally or significantly effects people was enshrined in the law.

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[2] "Facebook Agrees to Sweeping Reforms to Curb Discriminatory Ad Targeting Practices," ACLU settlement, March 19, 2019.

[3] Rechtbank Amsterdam, Case C/13/689705/HA RK 20-258, March 11, 2021.

[4] "Automated Decision-making Under the GDPR," Future of Privacy Forum, Sebastião Barros Vale and Gabriela Zanfir-Fortuna, May 2022.

[5] "Automated Decision-making Under the GDPR," Future of Privacy Forum, Sebastião Barros Vale and Gabriela Zanfir-Fortuna, May 2022.

In another case, a job application assessment used by a German government entity automatically assessed and ranked job applicants according to predetermined criteria. Applicants' names, addresses, gender and severe disabilities were among the personal data used for the assessment, which was the only way applicants would be invited for interviews. A court concluded that there was profiling and automated decision-making, because the decisions made lacked meaningful human intervention and significantly affected applicants' rights.[6] Under new regulations, this should be considered profiling and consumers should know about it and be able to stop it.

"Significant effects" generally would not encompass marketing, however, it depends on other factors such as intrusiveness, how people are tracked via other websites, and an individual's situation. For example, advertising could significantly affect someone in a difficult financial situation when that person is targeted with advertisements for high-interest loans because of their debts, signs up for the offer and incurs further debt. This sort of targeted, behavioral advertising, which is the main driver of our modern surveillance economy, should be considered automated decision-making because it significantly affects a person's finances. And consumers should know with specificity why they are seeing an ad that could have legal or significant effects and be given the choice to opt-out of such automated decision-making.

Similar "significant effects" can also be triggered by people other than the individual. For example, GDPR regulations state people should know when other people's personal data is used to make a decision about themselves. For example, a credit card company might lower the credit line for a person, based not on that person's own repayment history, but based on other customers living in the same area who shop at the same stores. This could result in people being deprived of opportunities based on the actions of others. People can be given credit lines who cannot afford it. This logic should be disclosed and allow for users to opt out of this sort of automated decision-making.

Every day uses that are also automated decision-making technology, such as GPS, spam filters, spellcheck, social media feeds, and other lower-risk, widely used tools, would not be subject to the opt out right under the "legal or significant effects" standard.

In Amsterdam, a fraud probability score created by rideshare company Ola was considered profiling, and had to be disclosed to drivers, even if an automated decision was not made based on that score. This was the ruling by the Amsterdam District Court in 2021 after drivers requested information about their fraud probability scores, earning profile, and assigned rides and fines. Regarding the fraud probability score, the court ruled that it was profiling under GDPR because, "through the automated processing of personal data of [applicants], a risk profile is drawn up with which a prediction is made about their behavior and reliability.[7]" The court did not determine automated decisions were made from this, but ruled, "This does not alter the fact that Ola must provide access to the personal data of [applicants] that it used to draw up the risk profile and provide information about the segments into which [applicants] have been classified." New CCPA regulations should state a data subject has a right to be informed by the controller about, as well as have a right to object to profiling, regardless of whether automated decision-making based on profiling takes place.

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[6] "Automated Decision-making Under the GDPR," Future of Privacy Forum, Sebastião Barros Vale and Gabriela Zanfir-Fortuna, May 2022.

[7] Rechtbank Amsterdam, Case C/13/689705/HA RK 20-258, March 11, 2021.

The Italian Supreme Court in 2021, finding it violated GDPR's transparency obligations,[8] ruled businesses cannot confuse a consumer uploading personal information as permission to score the consumer based on that data. The business in question, which assigned a "reputational rating" to people, still had a duty to disclose the logic of such a score. This distinction should be clear in the new CCPA regulations.

Many legal researchers believe a fundamental duty to explain automated decision-making exists instead of providing abstract information in favor of data controller secrecy[9]. If people are given a bunch of metadata they can't understand, then the regulation is useless. Consumers deserve not just meaningful information, but meaningful *explanation*. A consumer should know the personal data that was processed, the automated decision's consequences for the subject, the factors used to formulate a decision, and what impact on the decision each factor has. Disclosure should be in clear, explanatory terms before the decision happens. Such information is crucial for consumers to understand their situation and be empowered with the appropriate information if they choose to opt out.

Sincerely,

Justin Kloczko, Consumer Watchdog

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[8] Corte Suprema de Cassazione, Civile Ord. Sez. 1 Num. 14381, May 25, 2021,

[9] "The General Data Protection Regulation and Automated Decision-making: Will it deliver?" Bertelsmann Stiftung, Stephan Dreyer and Wolfgang Schulz, January 2019.