



October 19, 2017

Dear Chair Upthegrove and Members of the Budget and Fiscal Management Committee:

On behalf of the ACLU of Washington (“ACLU-WA”), I write to express our significant concerns regarding the acquisition by the King County Sheriff’s Office (“KCSO”) of a technology product known as Mark43. The ACLU of Washington is an organization of over 80,000 members dedicated to protecting civil liberties for all in our state. We have consistently advocated for transparency, accountability, and community engagement when local governments acquire technologies that may raise civil liberties concerns.

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As further detailed below, **we have both substantive and process concerns with the Mark43 acquisition.** Substantively, while Mark43 is being acquired by KCSO to replace aging records management systems (RMS), information in the public domain suggests the system may incorporate analytic capabilities that go far beyond those seen in traditional RMS technologies, and that raise at least the potential of civil liberties infringements. The process followed has also been non-transparent—while this project is in an advanced stage of implementation, details of the specific capabilities of the build of Mark43 being acquired by KCSO have not been available to the public.

**The ACLU-WA urges the Committee to halt the release of further funds for this project until questions about the tool’s capabilities are clarified.** While KCSO’s acquisition of Mark43 may well turn out to be innocuous, it is important that policymakers and the public have the chance to consider whether that is the case before this project moves forward, rather than simply to accept KCSO and vendor assurances.

### **Background: Data Now Significantly Impacts Our Civil Liberties**

We now live in a world where technology and data flows are seriously challenging our ability to recognize threats to and protect our civil liberties. **Data about individuals broadly impacts their lives in unforeseen and non-transparent ways.** Data may be collected through transactions with private companies, through surveillance by the government or by private parties, or through other channels. Without adequate protections, that data can be sold or otherwise disseminated to third parties such as data brokers, which may further sell them to private actors who will feed them into algorithms. Those algorithms play a greater and greater role in determining how we live our lives—how we are policed and sentenced, how likely we are to get housing or a job, what we pay for health insurance, and much more. As it turns out, those algorithms often incorporate many types of bias as well.<sup>1</sup>

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<sup>1</sup> See, for example, Crawford, K. *Artificial Intelligence—With Very Real Biases*, Wall St. Journal, October 17, 2017.

Because of the importance of data, **it is important for the Council to exercise oversight over any technology that might raise potential civil liberties concerns because it collects or analyzes data**, including considering what unintended consequences could flow from the capabilities of the technology. Unfortunately, in the case of Mark43, so little information has been divulged about the product’s capabilities that it is impossible for the public to determine its impact on civil liberties.

### **Mark43 Raises Potential Civil Liberties Concerns**

Based on publicly available information, these concerns are far from speculative. In multiple public presentations, Mark43 is described by corporate spokespersons as having capabilities that go beyond simple RMS—in fact, one of their taglines has been “RMS + Analysis + Sharing—One Integrated Platform.” Even more troubling is the fact that in multiple public presentations, **tracking and analyzing the behavior of “gang members” using data is described as a major purpose and selling point of the tool.**<sup>2</sup> Mark43’s website makes clear that the tool has many capabilities, some of which appear to stray into the realm of analytics.<sup>3</sup> If analytics are used, it is important to know the bases on which the underlying algorithms make decisions, and in particular whether they may disproportionately impact communities of color, as has been widely documented for various applications of big data-based policing.<sup>4</sup>

In addition to the tool’s analytics capabilities, **making various separate databases accessible in a single platform raises concerns and deserves the scrutiny of this Committee.** Even if currently separate databases can be searched manually and individually, making all of those databases accessible via a search with a single keyword may be problematic. As demonstrated by Portland Police Department’s recent purge of its gang database over bias concerns,<sup>5</sup> existing databases may contain data not associated with any criminal suspicion at all. Combining such databases could bring together many pieces of speculative data that cause disproportionate scrutiny of particular community members. And making this greater volume of speculative data available to analytic algorithms that purportedly identify gang members would heighten those concerns.

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<sup>2</sup> See, for example, Mark43 co-founder Scott Crouch’s presentation to the NewCities Summit in 2014, including extensive discussion of gang tracking. <https://www.youtube.com/watch?v=gfSJqGtcZFg&feature=youtu.be>.

<sup>3</sup> At Mark43.com, the tool’s functions are grouped into report writing, investigative cases, property and evidence, booking and jail, statistical reporting and crime analysis, and system administration. The gang member tracking is not mentioned by name, but the degree and role of analytics, including predictive analytics, in the tool remains unclear.

<sup>4</sup> For an accessible introduction to bias concerns in big data policing, see Ferguson, A., *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement* (NYU Press 2017).

<sup>5</sup> See, for example, Townes, C., *How Is This Man Not a Gang Member?*, Slate, June 5, 2017, showing significant racial bias in application of standards for inclusion of individuals in a gang database in Portland, leading to its purge. [http://www.slate.com/articles/news\\_and\\_politics/trials\\_and\\_error/2017/06/how\\_the\\_portland\\_police\\_s\\_racist\\_gang\\_database\\_missed\\_white\\_supremacist.html](http://www.slate.com/articles/news_and_politics/trials_and_error/2017/06/how_the_portland_police_s_racist_gang_database_missed_white_supremacist.html)

Finally, **the potential for information in that aggregated set of databases to be shared not only within KCSO but also with other agencies using the Mark43 product, raises additional concerns.** For example, Palantir, a Mark43 competitor, has implemented a system that makes it difficult for a local agency to control access to its data, putting confidential files at risk, and has also “locked in” agencies to their information-sharing environment, making it difficult for those agencies to leave.<sup>6</sup> This Committee should apply scrutiny to ensure neither of those results occurs in the case of KCSO’s adoption of Mark43, which has similarly touted its adoption by many law enforcement agencies as part of its sales pitch.

### **This Committee Should Ensure Transparency Around Mark43’s Capabilities**

It is important for this Committee to first determine the capabilities of the tool being purchased, so those capabilities can be subjected to public scrutiny. Such transparency, in turn, would help the Council determine whether or not to continue to fund the acquisition, and what civil liberties safeguards, if any, to place around it.

In particular, the Committee should ensure the following questions are answered:

#### *Overall Purpose*

- Is Mark43 intended to simply to replace the previous RMS systems with a new system of similar capabilities, or are entirely new capabilities are involved?

#### *Combination of Databases*

- What databases will be searchable across the Mark43 with a single keyword?
- Do some included databases have information unsupported by suspicion of criminal activity? If so, has KCSO considered the potential impact of facilitating searches of such databases?
- Are there some datasets being made searchable that need additional protection?

#### *Analytics*

- If the purpose of the tool is analysis in addition to RMS, what kind of analytics does it or could it incorporate?
- Are any analytics for tracking gangs, gang members, or other groups included?
- Is the decision-making basis for the analytics proprietary to Mark43?

#### *Information Sharing and Use by Third Parties*

- Will agencies other than King County be able to share information using this tool? If so, which ones? Is there a written agreement with those agencies?
- What protections exist in the contract to protect King County's data from being shared, analyze, or used for non-policing purposes by the vendor or by third parties?

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<sup>6</sup> See Harris, M., *How Peter Thiel’s Secretive Data Company Pushed Into Policing*, Wired, August 9, 2017. <https://www.wired.com/story/how-peter-thiels-secretive-data-company-pushed-into-policing/>

## **The Mark43 Acquisition Has Not Undergone Meaningful Public Scrutiny**

While the generic topic of the acquisition of a replacement RMS system has come before the Council before, it does not appear that the civil liberties concerns associated with the acquisition of Mark43 in particular have previously been raised. In addition, in response to ACLU-WA's recent public records request for further information about Mark43, KCSO cited ongoing litigation over a trade secret dispute between Mark43 and its competitor as a reason for being unable to currently release documents.

**King County's community members have the right to know and understand how potentially invasive analytic tools used by their law enforcement agencies and paid for with their taxes might impact their civil liberties.** This is true regardless of whether they are being implemented by the agency itself or by a vendor. And trade secret claims should not be used to evade public transparency around such tools. If the required level of scrutiny is impossible given the ongoing litigation, this Committee should halt the acquisition until such time as it is possible to conclusively and publicly answer the questions above.

**For all these reasons, ACLU-WA urges the Committee to take action to halt funding for the Mark43 acquisition at its hearing on October 25<sup>th</sup>.** In the future, as a condition of releasing that funding, the Committee should require that answers to the questions asked above be provided; should consider the impact of Mark43 on civil liberties based on those answers; and should put appropriate safeguards in place, including determining that some potential features of the tool should not be implemented.

Thank you for your consideration, and please feel free to contact me with questions or concerns.

Sincerely,

Shankar Narayan  
Technology and Liberty Project Director