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INTELLIGENCE COMMISSIONER

DECISION AND REASONS

IN RELATION TO AN AUTHORIZATION FOR
THE CANADIAN SECURITY INTELLIGENCE SERVICE
TO RETAIN THE FOREIGN DATASET



PURSUANT TO SECTION 11.17 OF
THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT* AND
SECTION 17 OF THE *INTELLIGENCE COMMISSIONER ACT*

MAY 28, 2024

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I. OVERVIEW

1. This is a decision reviewing the conclusions of the Director of the Canadian Security Intelligence Service (CSIS or Service) authorizing CSIS to retain the [...] (Foreign Dataset) pursuant to subsection 11.17(1) of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*).
2. The dataset regime set out in the *CSIS Act* provides CSIS with the ability to collect, retain and analyse personal information that is not directly and immediately related to activities that represent a threat to the security of Canada, but that is nevertheless relevant to the performance of its duties and functions.
3. CSIS may collect a foreign dataset if it is satisfied that the dataset – information stored as an electronic record and characterized by a common subject matter (s 2, *CSIS Act*) – is relevant to the performance of its duties and functions under sections 12 to 16, and reasonably believes that the information predominantly relates to non-Canadians who are outside Canada.
4. Following collection by CSIS, the Minister, or his designate, must authorize its retention, which must subsequently be approved by the Intelligence Commissioner. The Director was designated by the Minister on September 11, 2019, to authorize the retention of foreign datasets.
5. The Foreign Dataset was deemed collected by CSIS on [...]. On [...] CSIS requested that the Director issue an authorization for its retention. On April 30, 2024, the Director issued the authorization (Authorization).
6. On May 2, 2024, the Office of the Intelligence Commissioner received the Authorization for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).
7. Having completed my review, I am satisfied that the Director's conclusions relating to the retention of the Foreign Dataset are reasonable. Consequently, I approve the Authorization to retain the Foreign Dataset pursuant to paragraph 20(2)(a) of the *IC Act*.

II. CONTEXT

8. The Foreign Dataset contains [...]. It was acquired by CSIS [...]. Additional information on the Foreign Dataset, including its origin, a description of its contents, and the steps taken during its evaluation, can be found in the classified annex to this decision (Annex A). I am including this information in a classified annex for two reasons. First, it will prevent the redaction of a significant portion of text of this decision thereby rendering its public version easier to read. Second, it will ensure that the nature of the facts that were before me, which otherwise would only be available in the record, are included in the decision.
9. Since the coming into force of a legislative amendment to the *CSIS Act* in 2019, the dataset regime set out in sections 11.01 to 11.25 provides CSIS with the authority to retain a foreign dataset that contains personal information as defined in section 3 of the *Privacy Act*, RSC, 1985, c P-21. While this information is not directly and immediately related to a threat to the security of Canada, it must nevertheless be relevant to the performance of CSIS' duties and functions under sections 12 to 16 (s 11.05, *CSIS Act*).
10. Pursuant to subsection 11.17(1) of the *CSIS Act*, the Director, as the designated person, may authorize CSIS to retain a foreign dataset when he concludes that a) the dataset meets the definition of a foreign dataset – contains personal information predominantly related to non-Canadians who are outside of Canada or to non-Canadian companies; b) its retention is likely to assist CSIS in the performance of its duties and functions under sections 12 (investigation of suspected threats), 12.1 (measures to reduce threats), 15 (investigations for security assessments or advice to ministers) and 16 (collection of information concerning foreign persons and states in Canada); and c) CSIS has complied with its obligations set out in section 11.1 of the *CSIS Act*. These obligations are that CSIS must delete any information in respect of which there is a reasonable expectation of privacy that relates to the physical or mental health of an individual, and must also remove any information from the dataset that by its nature or attributes relates to a Canadian or a person in Canada.
11. The authorization to retain a foreign dataset is only valid once approved by the Intelligence Commissioner in a written decision. Following this approval, designated CSIS employees

can query or exploit the foreign dataset – and retain the results – for purposes of sections 12, 12.1, and 15 to the extent that it is strictly necessary, and for purposes of section 16 if required to assist the Minister of National Defence or the Minister of Foreign Affairs. The query and exploitation of the dataset allows CSIS to make connections, notice patterns and trends that would not otherwise be apparent with traditional means of investigation.

12. In accordance with section 23 of the *IC Act*, the Director confirmed in his cover letter that he provided me with all information that was before him when issuing the Authorization. The record is therefore composed of:

- a) The Director's Authorization dated April 30, 2024;
- b) Memorandum to the Director from CSIS, dated [...] requesting that the Director issue an Authorization to retain a Foreign Dataset;
- c) A description of the dataset;
- d) Designation of the Director by the Minister pursuant to section 11.16(1) of the *CSIS Act*, dated September 11, 2019; and
- e) The Intelligence Requirements Charts pursuant to the 2023–2025 Canadian Intelligence Priorities and Outcomes.

III. STANDARD OF REVIEW

13. Pursuant to section 12 of the *IC Act*, the Intelligence Commissioner conducts a quasi-judicial review of the Minister's conclusions, or those of their designate, on the basis of which a ministerial authorization is made to decide whether they are reasonable.

14. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard, as applied to judicial reviews of administrative action, applies to my review.

15. As indicated by the Supreme Court of Canada, when conducting a reasonableness review, a reviewing court is to start its analysis by examining the reasons of the administrative decision maker (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 79 [*Mason*]). In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 99 [*Vavilov*], the Court succinctly describes what constitutes a reasonable decision:

A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

16. Relevant factual and legal constraints can include the governing statutory scheme, the impact of the decision and principles of statutory interpretation. Indeed, to understand what is reasonable, it is necessary to take into consideration the context in which the decision under review was made as well as the legislative environment in which it is being reviewed. It is therefore necessary to understand the role of the Intelligence Commissioner, which is an integral part of the statutory scheme set out in the *IC* and *CSIS Acts*.
17. A review of the *IC Act* and the *CSIS Act*, as well as legislative debates, show that Parliament created the role of the Intelligence Commissioner as an independent mechanism to ensure that government action taken for the purpose of national security and intelligence was properly balanced with respect for the rule of law and the rights and freedoms of Canadians. To maintain that balance, I consider that Parliament created my role as a gatekeeper. While reviewing the Minister's conclusions, I am to carefully examine whether the important privacy and other interests of Canadians and persons in Canada were appropriately considered and weighed as well as to ensure that the rule of law is fully respected.
18. With respect to an authorization to retain a foreign dataset, when the Intelligence Commissioner is satisfied (*convaincu* in French) that the Minister's conclusions at issue are reasonable, he "must approve" the authorization (s 20(2)(a), *IC Act*). Conversely, where unreasonable, the Intelligence Commissioner "must not approve" the authorization (s 20(2)(c), *IC Act*). The Intelligence Commissioner can also approve the retention of a foreign dataset with conditions if satisfied that the conclusions would be reasonable once the conditions are attached (s 20(2)(b), *IC Act*).

IV. ANALYSIS

19. Section 17 of the *IC Act* requires that I review the Director's conclusions made under subsection 11.17(1) of the *CSIS Act* and on the basis of which the Authorization was made to conclude whether they are reasonable. Subsection 11.17(1) sets out three mandatory criteria that the Director must be satisfied have been met:

- a) the dataset is a foreign dataset;
- b) the retention of the dataset is likely to assist the Service in the performance of its duties and functions under sections 12, 12.1, 15 and 16; and
- c) the Service has complied with its obligations under section 11.1 to delete information relating to physical or mental health of an individual and remove Canadian-related information.

A. Are the Director's conclusions reasonable?

i. The dataset is a foreign dataset

20. To be defined as a foreign dataset, the dataset must predominantly relate to individuals who are not Canadians and who are outside Canada, or corporations that were not incorporated or continued under the laws of Canada and who are outside Canada (ss 11.01 and 11.07(1)(c), *CSIS Act*).

21. As explained in the jurisprudence of the Intelligence Commissioner (Decision 2200-A-2023-04), after the collection of a dataset and during the 90-day evaluation period, designated CSIS employees have the responsibility to confirm whether it "predominately" relates to non-Canadians. In most cases given the number of records in a dataset, the evaluation within the 90-day period will not allow a review of the entirety of the personal information collected. Indeed, that is not the purpose of the evaluation. Rather, the purpose is for the evaluation to be able to confidently confirm whether or not it is a dataset for which retention can be requested on the basis that the legislative requirements for retention are met.

22. On [REDACTED], two designated CSIS employees began the evaluation of the Foreign Dataset. They noted that the contents of the dataset were well structured in a data table. The content included [REDACTED]. For example, information in one [REDACTED] appeared to be linked to [REDACTED] and almost

all of one type of information [...] were distinct. Most of the dataset is [...] during the 90-day evaluation period. [...] to verify some of the information found in various [...]. Following the evaluation, CSIS brought the Foreign Dataset to the Director's attention (s 11.09(2), *CSIS Act*) and requested that he authorize its retention.

23. The Director relies on three facts to justify his conclusion that the dataset is a foreign dataset:
- i) the data elements are derived from [...] relates to nationals of, and non-Canadians in, that country [...]; ii) the dataset contains no information that, on its face, is Canadian-related.

24. Based on the description of the evaluation process undertaken by designated CSIS employees, I find the Director's reliance on the results of the evaluation justified. Further, I am satisfied that the record justifies the Director's conclusion that the dataset predominantly relates to non-Canadians and persons outside Canada, and therefore find this conclusion reasonable.

ii. The retention of the dataset is likely to assist CSIS

25. The *CSIS Act* establishes different thresholds for the collection and retention of a foreign dataset. To collect a foreign dataset, CSIS must reasonably believe that it is "relevant" to the performance of its duties and functions and reasonably believe that the dataset predominantly relates to non-Canadians who are outside of Canada (s 11.05(1), *CSIS Act*). The legislation does not require prior approvals to collect a foreign dataset. This is in contrast to the collection of Canadian datasets where the Minister must determine a class of datasets – which must be approved by the Intelligence Commissioner – prior to CSIS being able to collect a dataset that falls within that class.
26. To retain a foreign dataset, the Director must be satisfied that it is "likely to assist" CSIS in its respective duties and functions set out in section 12, 12.1, 15 and 16 (s 11.17(1), *CSIS Act*). The "likely to assist" threshold is higher and requires more specificity than the relevance threshold applicable to the collection. Indeed, logically, the collection threshold is wider than the retention threshold. CSIS is provided greater latitude at the collection stage because it may not know what information is contained in the dataset prior to its collection.

The retention threshold – which is applied after the evaluation – is narrower, but should not allow CSIS to retain information unless the nexus to its duties is sufficient. The “likely to assist” threshold is particular to the *CSIS Act*, but the principle of “likely to” is well-known in law as a “reasonable probability” (see for example *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at paras 184, 201-203). When the Director determines whether the retention of a foreign dataset should be authorized, he should be satisfied that the “relevant” threshold was met when the dataset was collected by CSIS.

27. The record before me does not include CSIS’ interpretation of the threshold of “likely to assist” in the performance of its duties and functions. While not necessary to formally define the threshold in the Authorization, I must be able to determine whether the Director’s application of the threshold is reasonable by examining his reasoning process (*Mason* at para 79 and *Vavilov* at para 99). Determining whether the retention of a foreign dataset is likely to assist CSIS requires a contextual analysis. By examining his reasoning, I need to understand the Director’s rationale, including which factors justify his conclusions.
28. To provide the foundation of the usefulness of the Foreign Dataset, the Director explains how certain activities undertaken [...] constitute a threat to the security of Canada and relate to the Government of Canada’s Intelligence Priorities for 2023–2025. Indeed, [description of activities].
29. In addition, [description of activity].
30. Relying on the request presented to him by CSIS, the Director explains that the Foreign Dataset is likely to assist with [...]. Given the subject matter of the data records, this conclusion is reasonable. The Director also explains that assisting with the [...] is likely to assist CSIS in the performance of its duties and functions under sections 12, 12.1, 15 and 16, namely by: [description of how the dataset will likely assist CSIS].
31. The Director does not state or discuss whether he is satisfied that CSIS had grounds to believe that the Foreign Dataset was relevant when it was collected. However, the context in which it was collected and the nature of the information in the dataset makes it clear that the

Director had no concerns about how CSIS had exercised its collection authority. I take no issue with his conclusions in this respect.

32. The Director's conclusions establish a nexus between a threat to the security of Canada, the Government's intelligence priorities and the information in the Foreign Dataset. They also make evident how the nature of the information in the Foreign Dataset can assist CSIS in the performance of its duties and functions. My fulsome review of the reasons given by the Director leads me to find that his conclusions that the retention of the Foreign Dataset is likely to assist the Service are supported by his reasoning and the record, and as such, are reasonable.

iii. CSIS has complied with its continuing obligations under section 11.1 of the CSIS Act

33. Pursuant to subsection 11.1(1) of the *CSIS Act*, CSIS has two continuing obligations in respect of a foreign dataset. First, it must delete any information where there is a reasonable expectation of privacy that relates to the physical or mental health of an individual. Second, it must remove any information from the dataset that by its nature or attributes relates to a Canadian or a person in Canada.

a) Obligation to delete any information related to physical and mental health – paragraph 11.1(1)(a)

34. CSIS conducted an assessment of [...] taking into consideration the [...] the dataset to determine if they contained information related to physical and mental health of individuals. CSIS assessed that the dataset was structured with [...] and corresponding data. [...] it was highly unlikely that the approximate [...] would contain physical or mental health information subject to a reasonable expectation of privacy.
35. Given the [...] and corresponding data, the designated CSIS employees did not proceed with a search of the entire dataset using specific health-related terms. The employees assessed that this type of search would result in false positives and therefore not produce reliable results. Thus, no health-related information was deleted from the dataset.

36. Pursuant to its obligations under subsection 11.07(6) of the *CSIS Act*, the designated CSIS employees also conducted a review of the dataset to delete personal information (as defined in section 3 of the *Privacy Act*) that in the opinion of CSIS is not relevant to the performance of its duties and functions and may be deleted without affecting the integrity of the dataset. [...].
37. In his conclusions, the Director states that he is satisfied that CSIS complied with its obligations set out in paragraph 11.1(1)(a) of the *CSIS Act* and confirms that it did not identify any information related to the physical or mental health of an individual in respect of which there is a reasonable expectation of privacy. The Director acknowledges the continuing nature of CSIS' obligations to delete any information related to the mental or physical health of an individual from the Foreign Dataset.
38. Taking into account the nature of the information contained in the dataset and given the process explained in the record, I am of the view that the Director's conclusions that CSIS has met its obligations under paragraph 11.1(1)(a) of the *CSIS Act*, and will continue to do so, is reasonable.
- b) Obligation to remove any information that by its nature relates to a Canadian or a person in Canada – paragraph 11.1(1)(c)
39. As defined in section 2 of the *CSIS Act*, a "Canadian" in respect of a foreign dataset means a Canadian citizen, a permanent resident or corporation incorporated or continued under the laws of Canada or of a province.
40. In terms of process, CSIS [description of the evaluation process]. Considering the volume of data records in the Foreign Dataset, designated CSIS employees used an [...] followed by a [...] review of searches to identify any Canadian-related information in the Foreign Dataset.
41. With respect to one type of information that was found in [...], two distinct searches were conducted using different search parameters. The first search identified [...] potential Canadian-related results. Of those, [...] had other information in the [...] that linked the results [to a country other than Canada]. A review of the other [...] potential results led to inconclusive results as to whether they could be Canadian-related. This number represents

0.0007% of the total records in the dataset. These data records were kept as [...] and there was no additional information in the data records indicating that they could be Canadian-related.

42. For the second search, the designated CSIS employees modified the search parameter. The search resulted in [...] matches of potential Canadian-related information. [...] of matches had other information [...] that linked the results [to a country other than Canada]. The remaining [...] unique matches could not be verified. This represents 0.2% of data records in the Foreign Dataset. As with the first search, these data records were kept as [...] and there was no additional information in the data records indicating that they could be Canadian-related.
43. Designated CSIS employees identified [...] as potentially containing personal information related to Canadians or persons in Canada. A search was conducted using search terms associated with Canada in both English and the language of the dataset. This resulted in [...] data records being identified. A [...] review revealed that the results did not constitute information related to a Canadian or a person in Canada. CSIS had not expected to identify Canadian-related information [...] given the nature of the Foreign Dataset.
44. A further type of personal information was identified in the dataset. However, the record explains that no search parameters could provide the necessary information to determine whether [this information] Canadian-related.
45. As a result of all the searches completed, CSIS did not identify any records related to Canadians that it assessed were required to be removed.
46. In his conclusion, the Director confirms that he is satisfied that CSIS complied with its obligations to delete information in the dataset that by its nature or attributes relates to a Canadian or a person in Canada by engaging in the process described above. He again acknowledges the continuing nature of CSIS' obligations to remove any information that by its nature is related to a Canadian or a person in Canada.

47. The Director's conclusions reflect the fact that the evaluation of the Foreign Dataset did not lead to absolute certainty that there was no Canadian-related information. Rather, taking into account the nature of the information in the dataset, CSIS determined that inconclusive results were unlikely Canadian-related. Considering the nature of the information in the Foreign Dataset, I find that this is a reasonable approach. My finding is supported by the continuing nature of the obligation to remove Canadian-related information. Therefore, considering the steps taken to identify Canadian-related information, and taking into account the nature of the information in the dataset as well as the other information it contains, I find that the Director's conclusions relating to CSIS' obligation to remove Canadian-related information reasonable.

iv. The update provisions are reasonable

48. As explained in past decisions related to the retention of foreign datasets, although the *CSIS Act* does not explicitly state that the Director's conclusions concerning how a foreign dataset could be updated is subject to the Intelligence Commissioner's review, it nevertheless forms part of the reasonableness review. The *CSIS Act* requires the authorization to retain a foreign dataset to specify the manner in which CSIS may update it. However, there cannot be *carte blanche* to modify and update a dataset after its authorization has been approved. Reviewing the reasonableness of the conclusions related to proposed update provisions ensures that these will not change the nature of the authorized dataset and that the updates will satisfy the threshold of likely to assist CSIS in the performance of its duties and functions.

49. The Director approved two types of updates. Both are not substantial. Type 1 updates would be administrative in nature and ensure data integrity and completeness of the dataset. CSIS would, for example, be permitted to correct errors (i.e., typographical errors) or add supplementary data to the existing dataset if it pertains to an existing column heading.

50. Type 2 updates would allow CSIS to update the dataset using new data columns headings that relate to existing data columns. CSIS would be able to add new data elements under new data column headings as long as the new columns are related to existing data columns. CSIS

would also be able to add data records (rows) where information would fall under new data column headings. Any data element in the new columns would need to be categorized as one of the following three types of information: [...].

51. In his conclusions, the Director explains that the nature of the update provisions means that the updates would likely assist the Service in its duties and functions consistent with the rationale found in Authorization. Updates that do not satisfy the criteria would constitute a distinct dataset for which a new authorization would be required.
52. In my view, the Director's conclusions show his understanding of the proposed update provisions. Indeed, he considered that they would only allow for new information that was closely related to the existing information, which would also ensure that the new information meets the "likely to assist" threshold. As such, they would not alter the nature of the dataset. As a result, I find the Director's conclusions with respect to the update provisions reasonable.

V. REMARKS

53. I would like to make the following two remarks which do not alter my findings regarding the reasonableness of the Director's conclusions.

A. Specific reference to documents

54. On a number of occasions, the record refers to the *Intelligence Priorities Charts*, a 19 page document, with no references to the specific pages and sections. To better assist the Director and myself in our respective oversight roles, I would appreciate if specific references – where appropriate – were included in future authorizations.

B. Approval of the Memorandum to the Director

55. Once the designated CSIS employee confirms the dataset is a foreign dataset and CSIS wishes to retain it, CSIS "shall ensure that the dataset is brought to the attention of the Minister or the designated person" (s 11.09(2), *CSIS Act*). CSIS must request the Minister or the designated person to authorize the retention of the dataset (s 11.17(1), *CSIS Act*). CSIS uses the Memorandum to the Director to bring the dataset to his attention and make that request.

56. The ministerial authorization that the Director, as the Minister's designate, issues is based on this memorandum. As a result, it plays an important role in the authorization process and constitutes part of the justification and accountability framework established by Parliament. I note that the Memorandum to the Director dated [...] was not signed. The record nevertheless includes a transmittal slip identifying the sender – the Deputy Director Operations (DDO) – as well as the drafting officer – an analyst – of the document. It appears from my review of the transmittal slip that the DDO has checked off that she concurs with the memorandum. I recognize that the information on the transmittal slip may have been entirely clear for the Director, especially given that the memorandum originates within his own organization.
57. I also recognize that the *CSIS Act* does not require that CSIS provide a memorandum to the Minister or the Minister's designate, or that when bringing a foreign dataset to their attention, a particular document has to be signed, must be signed by a particular person, or that it must otherwise be clear that the procedure has been reviewed by senior CSIS officials. I am nevertheless of the view that when exercising a ministerial power, a decision maker will want to have clarity with respect to the genesis of the advice being provided. Indeed, the decision maker may be relying on the advice specifically as a result of the internal approval process through which it has gone. Further, whether the provision of advice followed the internal approval process may be a factor in considering whether a decision relying on that advice is reasonable.
58. To avoid any uncertainty with respect to the internal approval process that was followed, I would suggest that CSIS ensures that it is clearly reflected in the paper record – because it is what will ultimately be reviewed – including at what level documents intended to guide the Minister or the Minister's designate have been approved.

VI. CONCLUSIONS

59. Pursuant to section 17 of the *IC Act*, I am satisfied that the Director's conclusions made pursuant to subsection 11.17(1) of the *CSIS Act* and on the basis of which the retention of the Foreign Dataset was authorized are reasonable.

60. Therefore, pursuant to paragraph 20(2)(a) of the *IC Act*, I approve the Director's authorization to retain the Foreign Dataset.
61. As indicated in the authorization, and pursuant to subsection 11.17(3) of the *CSIS Act*, this authorization expires five years from the day of my approval.
62. As prescribed in section 21 of the *IC Act*, a copy of this decision will be provided to the National Security and Intelligence Review Agency for the purpose of assisting the Agency in fulfilling its mandate under paragraphs 8(1)(a) to (c) of the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2.

May 28, 2024

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner