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File: 2200-A-2023-06

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

**IN THE MATTER OF A REQUEST BY THE
CANADIAN SECURITY INTELLIGENCE SERVICE
TO THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE
SERVICE FOR AN AUTHORIZATION TO RETAIN A FOREIGN DATASET
FOR THE [REDACTED]
PURSUANT TO SECTION 11.17 OF
THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT***

JUNE 22, 2023

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ANNEX A

I. OVERVIEW

1. This is a decision reviewing the reasonableness of the conclusions of the Director of the Canadian Security Intelligence Service (CSIS or Service) authorizing CSIS to retain the [REDACTED] (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 sections 11.01 to 11.25 of 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 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 collected on [REDACTED]. On [REDACTED], CSIS requested that the Director issue an authorization for its retention. On May 15, 2023, the Director issued the authorization (Authorization).
6. On May 16, 2023, the Office of the Intelligence Commissioner (ICO) 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 [REDACTED]
[REDACTED]
9. 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, is included in the decision.
10. This Authorization is the last of three authorizations for the retention of foreign datasets received by the ICO on May 16, 2023. These are my first decisions as Intelligence Commissioner dealing with the retention of foreign datasets. For that reason, in the first decision rendered – File 2200-A-2023-04 [*IC Foreign Dataset Decision*] – I provide information on the legislative context of the dataset regime as well as additional analysis explaining the interpretation of the legal threshold to be applied to the retention of a foreign dataset. For ease of reading, this information is not included in the other two decisions, including this one.
11. Given the already existing number of files for review at the ICO, pursuant to paragraph 20(3)(b) of the *IC Act*, the Director proposed that rather than rendering my decision within the normal 30-day period, an additional 30 days be provided to me to render my decision in this matter, which I accepted.

12. In accordance with section 23 of the *IC Act*, the Director confirmed in his cover letter that all materials that were before him to arrive at his Authorization have been provided to me. Thus, the record before me is composed of the following:

- a) The Director's Authorization;
- b) Memorandum to the Director from CSIS, dated [REDACTED] requesting that the Director issue an Authorization to retain a Foreign Dataset;
- c) Briefing Note to the Director describing how CSIS manages and maintains dataset for backup and recovery purposes, dated [REDACTED]
- d) Designation of the Director by the Minister pursuant to section 11.16(1) of the *CSIS Act*, dated September 11, 2019;
- e) [REDACTED]
- f) [REDACTED]
- g) Presentation deck on ministerial authorization of foreign datasets;
- h) The Ministerial Directive to CSIS on the Government of Canada Intelligence Priorities (2021-2023), dated September 8, 2021;
- i) Summary of meeting with the Director, dated [REDACTED]

III. STANDARD OF REVIEW

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

14. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 99, 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.

15. Relevant factual and legal constraints can include, for example, 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 context 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*.

16. A quasi-judicial review by the Intelligence Commissioner will be informed by the objectives of the statutory scheme as well as the roles of the Minister, or his designate, and the Intelligence Commissioner. I am to carefully consider and weigh the important privacy and other interests of Canadians and persons in Canada that may be reflected by the determination under review – in this case, the authorization to retain a foreign dataset.

IV. ANALYSIS

17. 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 exclude information relating to physical or mental health of an individual and Canadian-related information.

i) Are the Director's conclusions reasonable?

a) The dataset is a foreign dataset

18. Pursuant to section 11.01 and paragraph 11.07(c) of the *CSIS Act*, a foreign dataset is defined as a dataset that predominantly relates to individuals who are not Canadians and who are outside Canada, or to corporations that were not incorporated or continued under the laws of Canada and who are outside Canada.

19. The Director relies on five facts to justify his conclusion that the dataset is a foreign dataset:

- i) [REDACTED] a category of individuals centered outside Canada; ii) [REDACTED] iii) [REDACTED] in a language other than French or English;
- iv) [REDACTED] not located in Canada; and; v) the [REDACTED] associated with another foreign dataset the retention of which has been approved.

20. 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.

b) The retention of the dataset is likely to assist CSIS

21. Determining whether the retention of a dataset is likely to assist CSIS in the performance of its duties and functions requires a contextual analysis.

22. To provide the foundation of the usefulness of the Foreign Dataset, the Director explains that certain activities of a particular foreign state constitute a threat to the security of Canada, [REDACTED] and are related to the Government of Canada's Intelligence Priorities for 2021-2023. Relying on the request presented to him by CSIS, the Director explains that the information in the Foreign Dataset is likely to assist CSIS in responding to the threat posed by those activities. Citing examples, he concludes that the Foreign Dataset is likely to assist CSIS in the performance of its duties and functions in relation to the activities of that foreign state for each of the sections 12, 12.1, 15 and 16 of the *CSIS Act*.

23. As described in the record and in the Director's conclusions, the manner in which the Foreign Dataset can be of assistance to CSIS is in helping to [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

24. The Director is of the view that although this dataset can be valuable on its own, its usefulness is bolstered when used in conjunction with another foreign dataset retained by CSIS. I agree and I am of the view that this factor supports the reasonableness of the Director's conclusion that the Foreign Dataset is likely to assist the Service.
25. 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 can assist CSIS in the performance of its duties and functions. As a result, I find that the conclusions of the Director 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.

c) CSIS has complied with its continuing obligations under section 11.1 of the *CSIS Act*

26. Pursuant to subsection 11.1(1) of the *CSIS Act*, CSIS must delete any information where there is a reasonable expectation of privacy that relates to the physical or mental health of an individual and must remove any information from the dataset that by its nature or attributes relates to a Canadian or a person in Canada.

- i. Obligation to delete any information related to physical and mental health – paragraph 11.1(1)(a) of the *CSIS Act*

27. CSIS conducted a manual review of a [REDACTED] from the Foreign Dataset to identify information related to physical or mental health of an individual. CSIS determined that this sample size was sufficiently small to facilitate manual review and sufficiently large to be representative of [REDACTED]

28. Designated employees did not identify any health-related information in the sample that would be subject to deletion pursuant to CSIS' statutory obligation. CSIS extrapolated the results and determined that the Foreign Dataset contained no information related to the physical or mental health of an individual.
29. CSIS 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, pursuant to CSIS's obligations under subsection 11.07(6) of the *CSIS Act*. To do so, [REDACTED]
[REDACTED]
[REDACTED]
30. The Director concludes that the manual review [REDACTED] allowed CSIS to comply with its obligations set out in paragraph 11.1(1)(a) of the *CSIS Act*. He notes [REDACTED]
[REDACTED]
[REDACTED] He also 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.
31. Given [REDACTED]
[REDACTED] I am of the view that the Director's conclusions with respect to the process undertaken by CSIS to be reasonable.
- ii. Obligation to remove any information that by its nature related to a Canadian or a person in Canada – paragraph 11.1(1)(c) of the *CSIS Act*
32. Designated CSIS employees conducted a manual review of the same sample [REDACTED]
[REDACTED] to identify any Canadian-related information. The employees did not identify any information that by their nature or attributes related to a Canadian or a person in Canada. The evaluators did not [REDACTED]

33. In accordance with the *CSIS Act*, CSIS cannot query or exploit a dataset during the evaluation period. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

34. The Director is again satisfied by CSIS' process and acknowledges the continuing nature of CSIS' obligations to delete any information that by its nature is related to a Canadian or a person in Canada.

35. For the same reasons as those provided regarding the obligation to delete health-related information, I find that the Director's conclusions relating to CSIS' obligation to remove Canadian-related information reasonable.

d) The update provisions are reasonable

36. In my *IC Foreign Dataset Decision*, I outlined the Intelligence Commissioner's jurisdiction to review the Director's conclusions with respect to the proposed update provisions to determine whether they are reasonable. I wrote that conclusions related to updating a foreign dataset can be reasonable if the record reflects that the update will not change the nature of the authorized dataset, and that the update is likely to assist CSIS in the performance of its duties. A helpful question to consider is whether, when the Director authorizes the retention of a foreign dataset, his understanding of the nature of the dataset could include the proposed updates.

37. The proposed two types of updates to the Foreign Dataset 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 [REDACTED] or add the same type of data to the Foreign Dataset. Type 2 updates, as I understand them, would

allow for the addition of new information related to existing information. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For both types of updates,

any new information would have to originate from [REDACTED]

38. In his conclusions, the Director notes that the update provisions would be likely to assist the Service in the same manner as the original information in the Foreign Dataset. He also specifically notes that any updates would have to originate from [REDACTED] and relate to pre-defined categories of information. In my view, the Director's conclusions show that he considered that the proposed update provisions would only allow for the 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. REMARK

i) Specificity of update provisions

39. I would like to make the following general remark regarding update provisions of foreign datasets.

40. In my *IC Foreign Dataset Decision*, I shared Justice Mosley's general concern expressed in *Canadian Security Intelligence Service Act (CA) (Re)*, 2022 FC 645, that update provisions should not provide CSIS free rein to modify a dataset.

41. Related to this broadness concern is ensuring specificity in how update provisions are to be applied. I am of the view that it is important for CSIS to clearly delineate the types of updates in order to guide the designated employees who have the task of determining which information can be added, deleted or replaced in the foreign dataset. If update provisions

apply to different types of information, clear definitions would be helpful. Further, providing examples of potential updates that would fall under the update provisions would assist the Director and the Intelligence Commissioner to better understand the scope of these provisions.

VI. CONCLUSIONS

42. Considering my findings that the Director's conclusions are reasonable with respect to the mandatory criteria set out at subsection 11.17(1) and to the update provisions, 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.
43. Therefore, pursuant to paragraph 20(2)(a) of the *IC Act*, I approve the Director's authorization to retain the Foreign Dataset.
44. 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.
45. 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.

June 22, 2023

Original signed

The Honourable Simon Noël, K.C.
Intelligence Commissioner