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INTELLIGENCE COMMISSIONER

DECISION AND REASONS

IN RELATION TO THE DETERMINATON OF A CLASS OF CANADIAN DATASETS PURSUANT SECTION 11.03 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT* AND SECTION 16 OF THE *INTELLIGENCE COMMISSIONER ACT*

JUNE 1, 2023

Canada

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I. OVERVIEW

1. The Canadian Security Intelligence Service (CSIS) is in the business of keeping Canada and Canadians safe from threats. When conducting investigations relating to suspected threats to the security of Canada and reporting them to the Government of Canada, the law allows CSIS to collect and use large volumes of electronic data related to those threats.

2. But the law also allows CSIS – under certain conditions and with the appropriate approvals – to collect and use electronic records that are *not related* to a suspected threat, and further, to collect and use non threat-related records *related to Canadians or to persons in Canada*.

3. This framework in the *Canadian Security Intelligence Service Act* (*CSIS Act*) – the dataset regime – is complex. At its foundation is the definition of a dataset, which is a collection of information stored as an electronic record and characterized by a common subject matter. Given its broad definition, a dataset can be composed of a vast amount of personal information.

4. The dataset regime incorporates a number of safeguards when the personal information in a dataset relates to Canadians and non-Canadians within Canada in order to take into account privacy interests as well as rights protected by the *Canadian Charter of Rights and Freedoms* (*Charter*). One of the safeguards is the process for its use. A Canadian dataset can only be collected if it falls within a category of an "approved class" authorized by the Minister of Public Safety (the Minister) and subsequently approved by the Intelligence Commissioner. Then, to retain and therefore make use of the information in a Canadian dataset, judicial authorization from the Federal Court of Canada is required.

5. On March 17, 2023, the Director of CSIS sought the Minister's determination of a new class of Canadian datasets known as "Class 2023-1".

6. On May 4, 2023, pursuant to subsection 11.03(1) of the *CSIS Act*, the Minister determined, by order, Class 2023-1, for which collection is authorized (the Determination).

7. On May 10, 2023, the Office of the Intelligence Commissioner received the Determination for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).

8. Having completed my review, I am satisfied that the Minister's conclusions of the new class of Canadian datasets Class 2023-1 are reasonable. Consequently, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the ministerial Determination of Class 2023-1.

II. BACKGROUND

9. On December 22, 2022, the Director of CSIS submitted by Memorandum to the Minister an Application for the determination of four classes of Canadian datasets. On the same date, CSIS collected a Canadian dataset under one of the four classes that had been approved by the previous Intelligence Commissioner on January 25, 2022 and was still in effect.

10. On January 12, 2023, the Minister determined the four classes of Canadian datasets.

11. On February 15, 2023, I, as Intelligence Commissioner, rendered a decision on the ministerial determination of the four classes of Canadian datasets. I was not satisfied that the Minister's conclusions were reasonable and did not approve the four classes. The four classes that had been approved the prior year by the previous Intelligence Commissioner expired on [redacted] As a result of my decision, CSIS no longer had any approved classes of Canadian datasets in effect.

12. With no approved class in effect, the assigned designated employee at CSIS could not confirm that the Canadian dataset collected by CSIS in [redacted] belonged to an approved class (as required by legislation). The designated employee could therefore not obtain the Minister's approval to make an application for a judicial authorization to the Federal Court to retain the Canadian dataset.

13. As a result, pursuant to section 11.08 of the *CSIS Act*, CSIS was faced with the choice of destroying the dataset, or making a request to the Minister for the determination of a new class to which the dataset would belong. CSIS chose the latter and on May 4, 2023, the Minister determined Class 2023-1, which is now subject to my review and approval.

III. LEGISLATIVE CONTEXT

14. When *An Act respecting national security matters* (referred to as the *National Security Act, 2017*, SC 2019, c 13) came into force in June 2019 and established the Intelligence Commissioner, amendments were also made to the *CSIS Act* to establish the dataset regime which enables CSIS to conduct data analysis to assist its investigations.

15. 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 as defined in section 3 of the *Privacy Act*, RSC, 1985, c P-21, 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 under sections 12 to 16 (section 11.05 of the *CSIS Act*). The query (a specific search in relation to a person or entity) and exploitation (computational analysis) of Canadian datasets enable CSIS to make connections, notice patterns and trends that would not otherwise be apparent with traditional means of investigation.

16. In my decision of February 15, 2023,[1] I outlined in detail the four main accountability steps required to enable the collection, retention and use of Canadian datasets: 1) the determination of the classes of Canadian datasets by the Minister of Public Safety; 2) the approval of the classes following quasi-judicial review of the Minister's conclusions by the Intelligence Commissioner; 3) the evaluation of the Canadian dataset collected by designated CSIS employee; and 4) the authorization to retain a Canadian dataset granted by a designated judge of the Federal Court.

[1] *Intelligence Commissioner – Decision and Reasons*, February 15, 2023, File: 2200-A-2023-01, pages 7-13.

17. For the purpose of this review, I will only highlight the role of the Minister and my role of Intelligence Commissioner as established in both the *CSIS* and *IC Acts*.

i) ***Determination of Classes of Canadian Datasets – Minister of Public Safety***

18. CSIS may only collect Canadian datasets that belong to an approved class. The first level of accountability is a ministerial determination of the classes of Canadian datasets. Pursuant to subsection 11.03(1) of the *CSIS Act*, at least once every year, the Minister shall determine classes of Canadian datasets for which collection is authorized.

19. In making his determination, the Minister must conclude, in accordance with subsection 11.03(2) of the *CSIS Act*, that the querying or exploitation of any dataset in the class could lead to results that are relevant to the performance of CSIS' duties and functions as set out in sections 12 (collection, analysis and retention), 12.1 (measures to reduce threats to the security of Canada) and 16 (collection of information concerning foreign states and persons in Canada).

20. Once the Minister determines the classes of Canadian datasets, the Intelligence Commissioner is notified for the purposes of his review and approval under the *IC Act* (subsection 11.03(3) of the *CSIS Act*).

ii) ***Approval of Classes following Quasi-Judicial Review of the Minister's Conclusions – Intelligence Commissioner***

21. Pursuant to section 12 of the *IC Act*, the role of the Intelligence Commissioner is to conduct a quasi-judicial review of the Minister's conclusions, on the basis of which a determination – in this case a determination of a class of Canadian datasets – is made to decide whether they are reasonable.

22. Section 16 of the *IC Act*, relating to the determination of classes of Canadian datasets, states that the Intelligence Commissioner must review whether the conclusions of the Minister made under subsection 11.03(2) of the *CSIS Act* and on the basis of which a class of Canadian datasets is determined under subsection 11.03(1) of the *CSIS Act* are reasonable.

23. To allow for a proper review by the Intelligence Commissioner, the Minister is required by law (section 23 of the *IC Act*) to provide all information that was before him, as the decision maker, in making his determination. As established by the Intelligence Commissioner's jurisprudence, this also includes any verbal information reduced to writing, including ministerial briefings.[2] The Intelligence Commissioner is not entitled to Cabinet confidences (section 26 of the *IC Act*).

24. The determination of classes of Canadian datasets is only valid once it is approved by the Intelligence Commissioner in a written decision. This creates a further level of accountability regarding the types of Canadian datasets CSIS is authorized to collect under the dataset regime.

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

    a) The ministerial Determination dated May 4, 2023;
    b) Memorandum from the Deputy Minister of Public Safety to the Minister dated March 21, 2023;
    c) Memorandum from the Director of CSIS to the Minister dated March 17, 2023;
    d) The Application which includes five annexes dated March 17, 2023; and
    e) Separate copies of key documents, included in a binder for the Minister's weekly briefing session May 3, 2023.

26. I note that there are no distinct minutes or records of discussion in the record relating to the Minister's briefing sessions of May 3, 2023. I take that to mean that no substantive questions or new issues were raised that would show the Minister turned his mind to a particular issue.

[2] *Intelligence Commissioner – Decision and Reasons*, July 27, 2022, File 2200-A-2022-02, page 10.

IV. STANDARD OF REVIEW

27. The *IC Act* instructs that the Intelligence Commissioner must review whether the Minister's conclusions are reasonable. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard, as applies to judicial reviews of administrative action, applies to my review.

28. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], 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.

29. 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*.

30. A review of the *IC Act* and the *CSIS Act*, as well as legislative debates surrounding the *National Security Act, 2017*, show that Parliament created the role of the Intelligence Commissioner as an independent mechanism by which to ensure that governmental action taken for the purpose of national security was properly balanced with the respect of 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 and as an overseer of ministerial determinations.

31. This means that 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 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 determination of a class of Canadian datasets.

32. When the Intelligence Commissioner is satisfied the Minister's conclusions at issue are reasonable, he "must approve" the authorization (para 20(1)(a) of the *IC Act*). Conversely, where unreasonable, the Intelligence Commissioner "must not approve" the authorization (para 20(1)(b) of the *IC Act*).

33. The Intelligence Commissioner's decision may be reviewable by the Federal Court of Canada on an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

V. ANALYSIS

34. Section 16 of the *IC Act* requires that I review the Minister's conclusions made under subsection 11.03(2) of the *CSIS Act* and on the basis of which the Determination was made to conclude whether they are reasonable.

i) ***Are the Minister's conclusions reasonable?***

a) The conditions for an approved class of Canadian datasets

35. In my February 2023 decision of classes of Canadian datasets, I found that the Minister's conclusions with respect to the four proposed classes were unreasonable on two grounds. First, the breadth of the four classes was excessive. The classes lacked specificity and did not provide sufficient parameters to understand whether a dataset would not be included in a given class. I cited a Federal Court decision, *Canadian Security Intelligence Service Act (CA) (Re)*, 2022 FC 645 [*FC Canadian Dataset Decision*], in which CSIS requested a judicial authorization to retain two Canadian datasets that fell within the approved classes at that

time. Justice Mosley commented that the classes "are exceptionally broad in scope […] Indeed, it is difficult to see how any collection of personal information might be excluded given the breadth of their scope."

36. I agreed with CSIS that the "classes must be both specific and sufficiently broad to guide Service dataset collection efforts," but was of the view that this statement was not reflected in the record.

37. Second, the record lacked details on any existing measures to protect the privacy rights of Canadians and to meet the legislative requirements of the dataset regime. Although there were statements to the effect that the relevant legislative provisions would be complied with to ensure the respect of privacy interests in Canadian information, the record was silent as to any specific measures that would be undertaken.

38. These two concerns are directly addressed to my satisfaction in the record before me.

i. Balancing the Objectives of Broadness and Specificity

39. The overbreadth concern raised in my February 2023 decision speaks directly to my gatekeeper role as Intelligence Commissioner.

40. The *IC Act* sets out that I am to conduct a reasonableness review of the Minister's conclusions made under subsection 11.03(2). The criterion set out in subsection 11.03(2) is clear: whether "querying or exploitation of any dataset in the class could lead to results that are relevant to the performance of the Service's duties and functions set out under sections 12, 12.1 and 16."

41. However, evaluating the Minister's conclusions with respect to the above criterion is not a mechanical exercise. The factual and legal constraints that relate to the conclusions guide my review.

42. More specifically, determining classes of Canadian datasets is the initial step that can eventually lead to CSIS retaining information on Canadians and persons in Canada that is not threat-related. Its impact on privacy interests of Canadians and persons in Canada have the potential to be enormous and egregious. It is crucial to ensure that this broad power is exercised responsibly. My gatekeeper role therefore means that I must conduct my reasonableness review and evaluate the Minister's conclusions relating to the criteria set out in subsection 11.03(2) keeping in mind the role of the Intelligence Commissioner and the impact of the decision on privacy interests of Canadians and persons in Canada. This will ensure that classes of Canadian datasets are not broader than what is prescribed and intended by the legislation.

43. The record reveals that since my February 2023 decision, CSIS has undertaken considerable analysis and given much thought into developing a principled, workable framework for the determination of Canadian classes of datasets. CSIS is hoping that my review of the proposed class in this application may provide further guidance in how classes of Canadian datasets may be determined by the Minister in the future.

44. A comparison with the classes that were proposed in the Application before me in February 2023 is instructive. The proposed classes had three criteria – broader than the criteria of the proposed class now before me. Cumulatively they created an exponentially broad class. For example, to fall within the proposed [redacted] class, a Canadian dataset would have had to contain information from the following three criteria:

a) [redacted]
b) [redacted]; and
c) [redacted] – which is when CSIS reasonably believes the contents of the dataset could [redacted]

45. Cumulatively, that proposed class would include datasets containing [redacted] on Canadians compiled by [redacted] Although it may not be overly difficult to determine whether a dataset would have fallen in this proposed class, as noted by Justice Mosley in *FC Canadian Dataset Decision*, it is more difficult to conceptualize, given the breath of scope of the class, how a Canadian dataset would not fall in this class as long as it was [redacted]

46. In this new proposed class of Canadian datasets before me, CSIS addresses the broadness concerns by including the following three criteria, which provides more specificity to the class:

    a) The Service reasonably believes that the dataset is [redacted]

    b) [redacted]

    c) [redacted]

47. I am of the view that while each criterion, on its own, is broad, it is nevertheless characterized by an internal limit: the dataset originates [redacted]

[redacted]

The internal limit means that each criterion is a subset of a larger category. Cumulatively, the application of the criteria leads to useful specificity.

48. I note that having a criterion defined as a small subset of a larger category is not a requirement for a class of Canadian datasets to be reasonable, but it may make it easier to understand the relevance to CSIS's duties and functions.

49. The greater the number of criteria defining a class of datasets, the more specificity the class will have. However, the number of criteria is not determinative. When evaluating whether a class is unreasonably broad, what matters is the cumulative effect of the criteria. Further, a class of Canadian datasets that will be approved is likely to be understood not only by the information that could be collected, but also by the information that would not be included in the datasets that would fall within the class.

50. Tangible examples of datasets that would be included and excluded from the class also helps allay concerns of broadness. They additionally provide the Minister with compelling and illustrative facts demonstrating how the datasets are relevant to CSIS' duties and functions. The record before me contains a number of such examples. In addition, the diagram found at Annex II of the record is a very useful tool. It provides specific examples for all three criteria of the class while illustrating that CSIS could only collect a dataset when all three criteria are met.

51. Finally, as indicated in the Intelligence Commissioner's jurisprudence, the examples of datasets that would fall within a class must be coherent with the title of the class and its description.

ii. Protecting the Privacy Rights of Canadians

52. As mentioned in my decision of February 2023,[3] CSIS generally knows or should know how it intends to protect the privacy interests of Canadians, and this information should be included in the Application to the Minister. For the purpose of identifying and organizing a Canadian dataset, a designated CSIS employee must, pursuant to paragraph 11.07(5)(d) of the *CSIS Act*, carry out "the application of privacy protection techniques." It is helpful for CSIS to identify specific measures such as privacy protection techniques, procedures and internal framework explaining how privacy rights of Canadians will be protected. The Minister should also ensure that proper safeguards consistent with the *Charter* are taken into consideration.

53. The record before me shows that CSIS has addressed my recommendations on privacy rights by preparing a document titled *Measures and Authorities Related to Canadian Datasets Collected under the Dataset Regime that Protect the Privacy Rights of Canadians* (*Document on Measures and Authorities*). This document provides information and an explanation about the legislation as well as policy and procedural steps taken to protect the privacy rights of Canadians and persons in Canada.

54. I note that prior to preparing this document, CSIS consulted with the Communications Security Establishment to better understand the types of information it includes in relation to privacy considerations in ministerial authorizations reviewed and approved the Intelligence Commissioner. I appreciate being informed of, and commend, the collaboration between the two Canadian national security agencies. As has been noted by court decisions and national security and intelligence review bodies, in the national security and intelligence environment, it is important for agencies and departments not to work in silos – which relates not only to sharing substantive intelligence, but also processes, procedures and best practices.

55. In addition to the *Document on Measures and Authorities*, CSIS included Ministerial Directions and relevant portions of their operational policies and guidelines governing the

[3] *Supra*, note 1, pages 10 and 21.

collection, retention and use of section 11 datasets (dataset regime). These documents provide assistance in identifying the types of datasets collected by CSIS and their associated requirements and considerations. It also provides direction to employees on the collection, retention, querying and exploitation of the datasets. They explain why only designated CSIS employees can evaluate and use Canadian datasets, which speaks to privacy interests. CSIS updates and refines these policies on a regular basis, and where needed, develops new or complimentary policy instruments. All these documents are extremely helpful in my review of Minister's conclusions.

56. Finally, my review of the record shows that the Director of CSIS Memorandum to the Minister and the Minister's conclusions provide specific details on the measures that will be undertaken by CSIS to protect the privacy of Canadians. They also show how collected and retained Canadian datasets must be stored and managed separately from all other data collected and retained by CSIS, ensuring proper safeguards consistent with the *Charter*.

b) The application of the threshold

57. To determine a class of Canadian datasets, the Minister must conclude that the "querying or exploitation of any dataset could lead to results that are relevant to the performance of the Service's duties and functions set out under section 12, 12.1 and 16." (emphasis added) This is the threshold set out in the record before me.

58. However, I note that the French version of subsection 11.03 of the *CSIS Act* provides the following:

> Le ministre peut déterminer une catégorie d'ensembles de données canadiens dont la collecte est autorisée s'il conclut que l'exploitation ou l'interrogation d'ensembles de données visées par cette catégorie permettra de générer des résultats pertinents en ce qui a trait à l'exercice des fonctions qui lui sont conférées en vertu des articles 12, 12.1 et 16. (emphasis added)

59. While the English version defines the threshold in the conditional tense ("could lead to results"), the French version uses the more direct future tense ("*permettra de générer des*

résultats"), which could be understood as "will lead to results." This potential discrepancy between the English and French wording of the provision is neither addressed in the record, nor in my decision of February 2023.[4] It has also not been raised in past decisions of the Intelligence Commissioner dealing with classes of Canadian datasets. This particular issue may be considered at the upcoming legislative review of the *National Security Act, 2017*.

60. To the extent that the French and English versions could be interpreted differently, I see two possible interpretations: i) a narrow interpretation, whereby a dataset that falls within the approved class *will necessarily* lead to results that are relevant ("*permettra*"); and ii) a broad interpretation, whereby a Canadian datasets only needs to potentially lead to results that are relevant ("could lead to").

61. When dealing with matters of statutory interpretation in conducting a reasonableness review, my role is to determine whether the interpretation given by the Minister is reasonable (*Vavilov*, at paragraph 123). In order to inform this reasonableness analysis, I am of the view that it is useful in these circumstances to take into account principles of bilingual statutory interpretation. Indeed, despite the deference owed to the Minister, the interpretation used by the Minister's must be consistent with the text, context and purpose of the provision.

62. When interpreting divergent provisions in a bilingual statute, a two-step analysis is undertaken (*R v Daoust*, 2004 SCC 6 [*Daoust*]). The first step is to determine whether there is a discordance between the French and English versions of the provisions at issue. Within this first step, it is necessary to then determine whether one or both versions of the statute are ambiguous, that is whether they "are reasonably capable of more than one meaning". If neither version is ambiguous, the common meaning is normally the narrower version (*Daoust*, at paragraph 28).

63. The second step is to determine whether the common meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent (*Daoust*, at paragraph 30).

[4] *Supra*, note 1.

64. In my view, it would be reasonable for the Minister to interpret a discordance as between the French and English version, a narrow and a broad interpretation, and for neither version to be ambiguous. Should the narrow interpretation as the common interpretation be adopted, to collect a dataset, CSIS would require prior knowledge of the results of querying or exploiting of the dataset. However, CSIS is not aware of the vast majority of the information of a dataset at the time of collection.

65. The purpose of the dataset regime is for CSIS to have access to non threat-related information that could nevertheless be useful to its mandate. Applying the narrow interpretation to subsection 11.03(2) of the *CSIS Act* would simply render inapplicable the whole legislative concept of classes of datasets. It is therefore reasonable for the Minister to have used the broad interpretation, which is in line with the spirit and intent of the establishment of the dataset regime.

66. The proposed class exhibits links to results that are relevant to the performance of CSIS' duties and functions found in section 12, 12.1 and 16 of the *CSIS Act*. While the *CSIS Act* does not define the term "relevant" ("*résultats pertinents*" in the French version at subsection 11.03(2)), the record includes the policy document [redacted] According to the policy, [redacted] (emphasis added)

67. Subsection 11.03(2) is not the only provision in the dataset regime subject to the "relevant to the performance of the Service's duties and functions" threshold. The threshold is also one of the requirements for the collection of a dataset in subsection 11.05(1) of the *CSIS Act*:

> Subject to subsection (2), the Service may collect a dataset if it is satisfied that the dataset is relevant to the performance of its duties and functions under section 12 to 16. (emphasis added)

68. The French version of subsection 11.05(1) of the "relevant to the performance of its duties and functions" threshold is "*utile dans l'exercice des fonctions*".

69. Paragraph 11.07(6)(a) of the *CSIS Act* also requires a designated employee, during the evaluation period, to delete personal information that in the opinion of the Service is not relevant to the performance of its duties and functions. (emphasis added) The French version states "*ne sont pas pertinents dans le cadre de l'exercice de ses fonctions*".

70. I note that Parliament legislated a differently worded threshold for the retention of datasets at sections 11.13 (Canadian datasets requiring Judicial authorisation) and 11.17 (Foreign datasets requiring authorization from the Minister and approval by the Intelligence Commissioner), namely whether the retention is "likely to assist the Service in the performance of its duties and functions." In French: "*il est probable que la conservation de l'ensemble de données aidera le Service dans l'exercice des fonctions*".

71. The relevance threshold in law is not high. I am of the view that examining how relevance is understood in other contexts is helpful to understand how it applies here. With respect to evidence, the Supreme Court of Canada has explained that "[r]elevance involves an inquiry into the logical relationship between the proposed evidence and the fact that it is tendered to establish…In other words, the question is whether a piece of evidence makes a fact more or less likely to be true" (*R v Calnen*, 2019 SCC 6 at para 108). With respect to disclosure in the civil context, being relevant "means being useful for the conduct of an action" (*Glegg v Smith & Nephew Inc*, 2005 SCC 31 at para 23, citing *Westinghouse Canada Inc v Arkwright Boston Manufacturers Mutual Insurance* Co, 1993 CanLII 4242 (QC CA)). Here, the relevance criterion is related to CSIS' duties and functions set out under sections 12, 12.1 and 16 of the *CSIS Act*. That means that the subject matter of the datasets that could fall within the class should exhibit a nexus to those duties and functions.

72. Concretely, I am of the view that CSIS must provide the Minister with compelling and specific information allowing him to make that conclusion.

73. In my view, the Minister has been provided with these facts. The subject matter of the class of Canadian datasets, specifically that it relates [redacted] means that datasets that fall within this class could logically lead to results relevant to CSIS's duties and functions. Indeed, given that sections 12, 12.1 of the *CSIS Act* relate to the threat to national security and section 16 of the *CSIS Act* relates to collecting foreign intelligence, a dataset with information relating to [redacted] is aligned with the requirement that results are relevant to CSIS' duties and functions set out under those sections.

74. Further, given [redacted] it is logical that they would hold or collect information that is also relevant to CSIS' mandate. Finally, the Minister explains [redacted]

75. The record also provides a number of examples of how information from datasets that fall within the proposed class could lead to relevant results for CSIS. More specifically, the Minister describes a main purpose of querying or exploiting a database, [redacted] and how it could lead to results relevant to section 12, 12.1 and 16 duties and functions.

76. In my view, the record and the Minister's conclusions provide sufficient reasons on how the threshold has been met. Specifically in his conclusions, the Minister sets out the three criteria for the proposed class. The Minister understood, I understand – and importantly, designated CSIS employees will understand – that only specific and limited datasets will fall within this class of Canadian datasets. He also explains how querying or exploiting datasets in the class could lead to results that are relevant to the performance of CSIS' duties and functions set out under sections 12, 12.1 and 16 of the *CSIS Act.*

77. I have noticed a slight discrepancy between the wording used by the Minister in a section of his conclusions when defining the limits of the class. This could lead to confusion as to

where the dataset "originates" from and what it "relates to", which are essential criteria of the class.

78. When describing the class and providing his reasons, the Minister's conclusions indicate that the information collected must [redacted] This wording is consistent with the Application prepared by CSIS.

79. However, when providing further explanation on the limits of the class, the Minister then indicates that [redacted] The inverted use of the terms "originate" and "relate" change the meaning of these two criteria of the proposed class and misaligns part of the Minister's conclusions with the remainder of the record. That said, I am of the view that the singular inverted use of the terms does not represent the Minister's understanding and intent, and was rather a drafting oversight.

80. Indeed, the record, as well as the remainder of the Minister's conclusions, show that the Minister understood the specific limits of the class to be in line with the title of the class.

81. Consequently, I am satisfied that the Minister's conclusions are reasonable. Pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the Minister's Determination of Class 2023-1 as a class of Canadian datasets.

VI. REMARKS

82. As indicated in the Memorandum provided by the Director of CSIS to the Minister, in my decision of February 2023 I made three remarks to assist in the consideration and drafting of future of ministerial determinations. The first one pertained to the two Canadian datasets approved for retention by the Federal Court. CSIS has indicated that it will endeavour to address the operational utility of these Canadian datasets in a future submission on classes.

As for the second remark on the *Ministerial Direction on Accountability*, I am pleased to know that when amending or issuing a new version of the document, consideration will be given to the role of the Intelligence Commissioner in the accountability framework. Finally, I look forward to a briefing with my staff, that is not directly related to a specific review, and that will assist in the exercise of my powers as well as the performance of my duties and functions.

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

i) ***Access to Cabinet Confidences***

84. As mentioned previously, while the Minister has a statutory obligation to provide all information that was before him when making his Determination of Class 2023-1 of Canadian datasets, the Intelligence Commissioner is not entitled to have access to documents that are classified Cabinet confidences.

85. The record indicates that the [redacted] document provided to the Minister was not given to me and I appreciate being informed.

86. While I recognize that I am not statutorily entitled to a document approved by Cabinet, to the extent that such information is considered by the Minister and is germane to his conclusions, in accordance with administrative law principles, thought should be given to deciding whether any relevant information, or the most relevant parts of the information, could be included in the record before the Intelligence Commissioner. Indeed, it is possible to be provided with a redacted or an unclassified copy of a privileged document. An example is the *Ministerial Directive to the Canadian Security Intelligence Service on the Government of Canada Intelligence Priorities for 2021-2023* approved on June 28, 2021 by Cabinet and found in record. This document was relied upon by the Minister when making his Determination of Class 2023-1. It provides me with a better understanding of the Government of Canada Intelligence Priorities and the requirements imposed on CSIS to

undertake operational activities to implement them. It also reinforces the Minister's conclusions that the querying or exploitation of datasets included in Class 2023-1 could lead to results that are relevant the performance of CSIS' duties and functions.

ii) ***Biometric Information***

87. The approved Class 2023-1 requires that [redacted] I want to be clear that pursuant to the record before me, and my understanding of that record, [redacted] is distinct from biometric information, which are biological measurements that can be used to identify individuals, such as retinal scans and fingerprints. Class 2023-1 pertains only to [redacted] Should CSIS want to include biometric information datasets in the class, it will be required to obtain the Minister's determination of a new class and my subsequent approval.

iii) ***Retention of Canadian Dataset***

88. To lawfully retain a Canadian dataset that was collected, CSIS must obtain a judicial authorization from the Federal Court of Canada (section 11.13 of the *CSIS Act*).

89. The designated judge may authorize the retention of a Canadian dataset if satisfied that its retention is likely to assist CSIS in the performance of its duties and functions under sections 12, 12.1 and 16 of the *CSIS Act* and that CSIS has complied with its continuing obligations under section 11.1 which are to: (a) 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 (b) delete any information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries. When a Canadian dataset has been created by extracting it from another dataset, I note that it may be more difficult for CSIS, the Minister and the Court to keep track of whether section 11.1 obligations have been fulfilled.

90. Further, when decisions are rendered by the Federal Court with respect to retention of Canadian datasets, it would be useful for the Intelligence Commissioner to be provided with a copy given that they may offer guidance relating to the interpretation of the dataset regime.

VII. CONCLUSIONS

91. Based on my review of the record submitted, I am satisfied that the Minister's conclusions are reasonable with regard to the Determination of a New Class of Canadian Datasets labelled Class 2023-1, pursuant to section 11.03 of the *CSIS* Act.

92. Therefore, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the Minister's Determination of Class 2023-1 dated May 4, 2023.

93. As indicated by the Minister, and pursuant to section 11.03 of the *CSIS Act*, this Determination expires one year from the day of my approval.

94. 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 1, 2023

(Original signed)
The Honourable Simon Noël, K.C.
Intelligence Commissioner