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Subject: Submission of the Office of the Intelligence Commissioner in response to the public consultation on modernizing Canada's toolkit to counter foreign interference

The following are the Office of the Intelligence Commissioner's (ICO) observations provided to Public Safety Canada in response to the public consultation on modernizing Canada's toolkit to counter foreign interference. Specifically, the observations relate to the consultation paper *Enhancing measures to counter foreign interference: Whether to amend the Canadian Security Intelligence Service Act (CSIS Act).*

Office of the Intelligence Commissioner – who we are

The ICO is a separate agency of the federal government that supports the fulfillment of the Intelligence Commissioner's (IC) mandate. The IC's mandate, as set out in the *Intelligence Commissioner Act*, is to approve — or not approve — certain national security and intelligence activities planned by the Communications Security Establishment (CSE) and the Canadian Security Intelligence Service (CSIS).

In the interest of national security and intelligence collection, these agencies may sometimes engage in activities that could involve breaking the laws of Canada or another country, or interfere with the privacy interests of Canadians. Any activities of this kind must first be authorized in writing by the federal minister responsible for the agency involved (Minister of Public Safety or Minister of National Defence) or, in some cases, by the Director of CSIS. The ministerial authorization must include the conclusions – effectively the reasons – supporting the activities that are being authorized.

The IC then reviews the conclusions given for authorizing the activities to determine whether they meet the test of "reasonableness" as recognized by Canadian courts. If reasonable, the IC approves the ministerial authorization, and the agency can proceed with the planned activities. The activities cannot take place without approval from the IC.

In conducting independent oversight of governmental decisions, the IC plays a central role in assuring effective governance of national security and intelligence activities in Canada — the IC holds the government accountable by ensuring that the respective Minister or Director appropriately balance national security and intelligence objectives with the respect of the rule of law and privacy interests. The IC's decisions are published on the ICO's website.

Why the ICO is providing observations

Issue 4 of the public consultation paper is: *Whether to amend the CSIS Act to enhance CSIS' capacity to capitalize on data analytics to investigate threats in a modern era*.

The IC's role is central in the dataset regime set out in the CSIS Act. The following CSIS activities related to the dataset regime require approval by the IC:

i) Determination by the Minister of classes of Canadian datasets: A class of Canadian datasets is a category or type of dataset — described and defined in the ministerial authorization — that contain personal information of Canadians or persons in Canada. To collect a Canadian dataset, CSIS must have reasonable grounds to believe that it falls within one of the classes that has been authorized by the Minister and approved by the IC. CSIS must also be satisfied that even if the information in the dataset is not immediately and directly related to a threat, it is still relevant to its duties and functions.

ii) Retention of foreign datasets: A foreign dataset is a dataset that contains personal information predominantly related to non-Canadians who are outside of Canada or to non-Canadian companies. With authorization from the Director of CSIS, CSIS may retain and use personal information about non-Canadians and persons not in Canada, even if that information is not immediately and directly related to activities that represent a threat to the security of Canada.

iii) Querying a Canadian or foreign dataset in exigent circumstances: Normally, CSIS may query a dataset only after it has obtained approval to retain the dataset from the Federal Court of Canada (for a Canadian dataset) or the IC (for a foreign dataset). The Director's authorization and the IC's approval to query a dataset in exigent circumstances allows CSIS to conduct this type of search in situations where there is an urgent need for information.

The ICO wishes to share certain observations gathered from the IC's experience reviewing CSIS authorizations relating to the dataset regime to contribute to the public consultation.

Observations:

1) Oversight of CSIS' activities in relation to collection and retention of large volumes of data has concrete impacts

The ICO's experience accumulated in reviewing authorizations coming before the IC shows that the dataset regime could benefit from amendments that take into account the principles of usefulness, efficiency and the protection of privacy rights of Canadians.

The ICO's experience also shows that independent oversight in the dataset regime concretely contributes to these principles and to the balance between national security interests on the one hand, and respect for the rule of law and privacy interests on the other.

The IC's oversight role contributes to CSIS exercising its powers reasonably and responsibly. For example, in 2023, the IC issued two decisions in relation to the determination of Classes of Canadian Datasets. In his first decision (File: 2200-A-2023-01), the Minister had determined four classes of Canadian datasets. The IC did not approve the classes because he found that the Minister's conclusions were not reasonable for the following grounds:

i) The scope of the four classes of Canadian datasets were overbroad. The classes lacked specificity and did not provide parameters that would allow CSIS employees to determine which datasets would be excluded from the classes.
ii) There was insufficient detail concerning measures that CSIS would undertake to protect the privacy rights of Canadians.

Following this decision, CSIS submitted a new request for the determination of a single class of Canadian datasets. In his second decision (File: 2200-A-2023-03), the IC found that the Minister's conclusions had addressed the two concerns from the previous application by narrowing the class and providing details on the measures to protect privacy interests. As a result, the IC approved the determination.

The ICO is of the view that the tangible impact of oversight should not be overlooked in any modifications to the dataset regime.

2) The process to collect and retain large volumes of data could benefit from additional details

a) Ensuring that the dataset regime's objectives are respected

The IC plays a role only when datasets are collected under the dataset regime set out in s 11 of the CSIS Act. Collection of datasets under a different statutory authority is not subject to the same oversight. The ICO is of the view that amendments to the dataset regime should ensure that other statutory authorities used by CSIS to collect datasets do not circumvent the objectives of the dataset regime.

b) Evaluating a dataset is a complex and multifaceted process – a period longer than 90 days could be beneficial

The ICO's experience reviewing ministerial authorizations to retain foreign datasets shows that the nature of the datasets — both in volume and in content —can be complex and multifaceted. As a result, the evaluation that must be completed by designated CSIS employees — which can include decrypting, ingesting the data in a way that allows for the evaluation to occur, translating certain elements of the dataset, attempting to identify information that relates to a Canadian — is a multi-step process that requires many resources. During the 90-day period, the application to the Federal Court (Canadian dataset) or to the Director (foreign dataset) must also be prepared. Although the IC's decisions show that he has been satisfied with the evaluation of foreign datasets done by designated CSIS employees, the ICO is of the view that an evaluation period longer than 90 days could be beneficial to ensure a thorough evaluation and a fulsome application to be prepared, especially in situations where the nature of the dataset raises complexities for the evaluation process.

c) There is currently no timeline for the Director (as the person designated by the Minister) to authorize the retention of a foreign dataset

Although the CSIS Act specifies that a foreign dataset must be brought to the Director's attention within the 90-day period, there is no legislated timeframe in which the Director must authorize the retention of the foreign dataset and notify the IC of the authorization for the IC's review. This was noted in the IC's Decision 2200-A-2023-05 in 2023 (public version not yet published), where the IC noted a significant delay between CSIS requesting the Director to authorize the retention of a foreign dataset, and the Director's eventual authorization.

Given that the legislation specifies a time period during which the evaluation must be completed – which is a necessary step for a dataset to eventually be retained by CSIS – the ICO notes that it may have been an omission to allow – at least in theory – an indefinite period for the Director to authorize the retention of a foreign dataset after it has already been evaluated by CSIS employees.

The IC remarked that the passage of time from the collection of the information in the foreign dataset until the authorization of its retention could, in particular circumstances, have a determinative effect on the reasonableness of the Director's conclusions, namely by affecting the "likely to assist" threshold which must be met. Simply put, the value of the information could change over time, and could vary from when CSIS presented the request to the Director to when the Director authorizes the retention of the foreign dataset.

d) Some provisions of the CSIS Act relating to the dataset regime could currently be interpreted differently in French and in English

In reviewing authorizations, the IC has noted a discrepancy in the French and English versions of the following sections of the CSIS Act:

i) s 11.03(1): shall/*peut*

The IC notes that the English version states that the Minister "shall" determine classes of Canadian datasets at least once every year. The French version states that the Minister "*peut"*. The ICO notes that these terms could be interpreted differently.

ii) s 11.03(2): could lead to/*permettra*

The IC noted in Decision 2200-A-2023-03 that the English version uses the conditional tense "could lead to results that are relevant*"* and French uses future tense "*permettra de générer des résultats*", which could be understood in English as "will lead to results". The IC noted that the French and English versions could be interpreted differently.

3) CSIS' ongoing obligations in relation to removing Canadian-related information from datasets should continue if shared with partners

CSIS has an ongoing obligation to remove Canadian-related information from foreign datasets (s 11.1(1) CSIS Act). This is an ongoing obligation, which means that if Canadian-related information was originally missed during the evaluation and is later discovered, CSIS must

remove it from the foreign dataset. The ICO notes that to protect the privacy interests of Canadians, the ongoing nature of the obligation should continue to apply to information that would be shared with partners.

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