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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 20, 2023

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I. OVERVIEW

1. There is a direct link between the Canadian Security Intelligence Service's (CSIS or Service) statutory authority to collect and retain information related to suspected threats and its mandate of keeping Canada and Canadians safe from these threats. As long as CSIS' collection activities are minimally invasive, they do not require additional authorization or approval.

2. Circumstances may call for CSIS to use information that is not directly related to a suspected threat or to foreign intelligence on activities of foreign groups. To that end, the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*) allows CSIS to collect and retain personal information in its records that could be searched when these circumstances arise, but only after obtaining the required authorization and approval.

3. This personal information is collected and retained in the form of a dataset, which is information stored as an electronic record and characterized by a common subject matter. Datasets that are not publicly available are categorized either as Canadian, meaning they predominantly contain information related to Canadians or to individuals within Canada, or foreign, meaning they mostly relate to non-Canadians outside Canada.

4. Le 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.

5. Following collection by CSIS, the Minister, or his designate, must authorize its retention which must subsequently be approved by the Intelligence Commissioner. The Director of CSIS (Director) was designated by the Minister on September 11, 2019, to authorize the retention of foreign datasets.

6. On [redacted] CSIS obtained a copy of the [redacted] (Foreign Dataset). Following the evaluation of the Foreign Dataset by designated

CSIS employees and pursuant to subsection 11.17(1) of the *CSIS Act*, on [redacted] CSIS requested that the Director authorize its retention.

7. The Director initially authorized the retention of the Foreign Dataset on [redacted] However, on [redacted], CSIS learned of a compliance issue regarding the removal health-related records, a requirement of paragraph 11. l(l)(a) of the *CSIS Act*, which appears to have delayed the transmittal of the Director's authorization to the Intelligence Commissioner for his review. As the record also reveals, my February 2023 decision with respect to classes of Canadian datasets (2200-A-2023-01) led to CSIS amending its request for the retention of the Foreign Dataset on March 23, 2023. Ultimately, the Director authorized CSIS' amended request for the retention of the Foreign Dataset on May 15, 2023, pursuant to subsection 11.17(1) of the *CSIS Act* (Authorization).

8. On May 16, 2023, the Office of the Intelligence Commissioner (ICO) received the Director's Authorization for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).

9. Having completed my review, I am satisfied that the Director's conclusions at issue relating to the retention of the Foreign Dataset are reasonable. Consequently, pursuant to paragraph 20(2)(a) of the *IC Act*, I approve the Director's Authorization to retain the Foreign Dataset.

10. This Authorization is one 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 and a decision will issue with respect to the review of each of the authorizations. However, this decision sets out in greater detail the existing legislative context, as well as the analytic framework to be applied to the Intelligence Commissioner's review of foreign dataset authorizations, that also apply in the other two decisions.

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 15 days be provided to me to render my decision in this matter, which I accepted.

12. 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 decided to include 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.

II. LEGISLATIVE CONTEXT

13. The dataset regime, which includes the authority to retain a foreign dataset, is the result of amendments made to the *CSIS Act* when *An Act respecting national security matters* (referred to as the *National Security Act*, 2017, SC 2019, c 13) came into force in 2019.

14. 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 (s 11.05, *CSIS Act*). The query (a specific search in relation to a person or entity) and exploitation (computational analysis) of datasets enable CSIS to make connections, notice patterns and trends that would not otherwise be apparent with traditional means of investigation.

i) The Director's authorization

15. Upon request by CSIS, the Director, as the designated person, may, pursuant to subsection 11.17(1) of the CSIS Act, authorize CSIS to retain a foreign dataset. The Director must conclude that: a) the dataset is a foreign dataset; b) its retention is likely to assist CSIS in the

performance of its duties and functions under sections 12 (investigation on suspected threats), 12.1 (threat-reduction measures), 15 (investigations for security assessments or advice to ministers) and 16 (assistance with respect to foreign intelligence); 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.

16. The CSIS Act also sets out requirements for different stages of the dataset cycle: collection, evaluation, retention, querying, exploitation and destruction. Following collection of a foreign dataset, CSIS has a 90-day evaluation period during which designated CSIS employees may consult the dataset to confirm whether the dataset in effect predominantly relates to non-Canadians outside Canada. During that 90-day period, CSIS must also bring the foreign dataset to the attention of the Director, as the Minister's designate, so as to enable him to make a determination to authorize its retention (s 11.09(2), *CSIS Act*). The *CSIS Act* does not impose a timeframe for the Director to make the determination with respect to authorizing the retention of the dataset after it has been brought to his attention. However, if CSIS does not take steps to bring the dataset to the Director's attention within the 90-day period, it shall be destroyed by the day on which the period ends (s 11.09(2), *CSIS Act*).

ii) The review and approval by the Intelligence Commissioner

17. Pursuant to section 12 of the *IC Act*, the role of the Intelligence Commissioner is to conduct a quasi-judicial review of the Director's conclusions, on the basis of which an authorization - in this case an authorization to retain a foreign dataset - is made to decide whether they are reasonable.

18. To allow for a proper review by the Intelligence Commissioner, the Director is required by law (s 23, *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 (2200-A-2022-02, p 10). The Intelligence Commissioner is not entitled to Cabinet confidences (s 26, *IC Act*).

19. The authorization to retain a foreign dataset is only valid once it is approved by the Intelligence Commissioner in a written decision.

20. 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 the 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, dated [redacted] as amended on [redacted], which includes five appendices with information on the contents of the dataset and the steps taken by CSIS during the evaluation period;
    c) Briefing Note to the Director describing how CSIS manages and maintains datasets for backup and recovery purposes, dated [redacted]
    d) Designation of the Director by the Minister, dated September 11, 2019;
    e) [redacted];
    f) [redacted];
    g) Presentation deck on ministerial authorization of foreign datasets;
    h) The Ministerial Direction on Intelligence Priorities (2021-2023), dated September 8, 2021;
    i) Briefing Note with respect to a compliance incident;
    j) An earlier draft of the Director's Authorization;
    k) Memorandum to the director, dated [redacted];
    l) Memorandum to the director regarding update provisions, dated [redacted]
    m) Summary of meeting with the Director, dated [redacted].

III. STANDARD OF REVIEW

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

22. 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.

23. 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*.

24. 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 authorizations.

25. 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 Director, as the Minister's 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 authorization under review - in this case, the authorization to retain a foreign dataset.

26. When the Intelligence Commissioner is satisfied the Director'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*). Unique among decisions rendered by the Intelligence Commissioner, an authorization to retain a foreign dataset can include conditions - with respect to the querying or exploitation of the dataset, its retention, or its destruction or destruction of a portion of it. If the Intelligence Commissioner is satisfied that the Director's conclusions are reasonable once the conditions are attached, he must approve the authorization (s 20(2)(b), *IC Act*).

27. 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, cF-7.

IV. ANALYSIS

28. 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.

i) Are the Director's conclusions made pursuant to subsection 11.17(1) reasonable?

29. To issue an authorization to retain a foreign dataset, the Director must conclude that the following three criteria set out in subsection 11.17(1) of the *CSIS Act* 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.

a) The dataset is a foreign dataset

30. After the collection of a dataset and during the evaluation period, designated CSIS employees have the responsibility to confirm whether it "predominately" 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.

31. In most cases, an evaluation of a dataset will not allow a review of the entirety of the personal information collected. 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.

32. With respect to the particularities of this dataset, CSIS recognizes that the time for evaluation was relatively limited. That being said, the Director of CSIS has not raised any concerns about the thoroughness and robustness of the evaluation. Based on the description of the process undertaken by designated employees, I find the Director's reliance on the results of the evaluation entirely justified.

33. The Director highlights three facts that justify his conclusion that the dataset is a foreign dataset: i) the nature of the information, which can be gleaned from the titles of the columns and the assessment of the information they contain; ii) the steps taken to identify and delete any Canadian related information additionally that show the dataset predominantly relates to foreign information; and iii) the indicators of the location from which the information originates.

34. I find the Director's rationale to be clear and supported by the record. To that, I would add that the source of the information – the entity that recorded the information – supports that the dataset is a foreign dataset.

35. I consequently find the Director's conclusion with respect to this requirement reasonable.

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

36. The record reveals that CSIS understands the "likely to assist" threshold as there being reasonable probability that the retention will assist the Service in any of its duties and functions under sections 12, 12.1, 15 or 16 of the *CSIS Act*. It is a threshold that is higher than a mere possibility, but lower than the standard of balance of probabilities.

37. In my June 2023 decision with respect to classes of Canadian datasets (2200-A-2023-03, p 8), I wrote that I was of the view that the "likely to assist" threshold was different than the "relevance" threshold found in other provisions of the *CSIS Act*. In my view, the "likely to assist" threshold is higher and requires more specificity than the relevance threshold. This interpretation is coherent with the scheme of the Act. For CSIS to collect a Canadian or a foreign dataset, it must reasonably believe that the dataset is "relevant" to the performance of its duties and functions. Then, once collected and evaluated, for a dataset to be retained, the Federal Court of Canada in relation to a Canadian dataset or the Director of CSIS in relation to a foreign dataset must be satisfied that it is "likely to assist" CSIS in its respective duties and functions.

38. It is logical for the collection threshold to be wider than the retention threshold. The scheme of the act works in steps: the first being the collection threshold (relevant), the middle being the retention threshold (likely to assist) and the top being the threshold for querying or exploitation and ingesting the result into CSIS operational databases (strictly necessary/required to assist). The context and additional details gathered at each step, when sufficient, allow CSIS to proceed.

39. Although the "likely to assist" threshold is particular to the CSIS Act, the principle of "likely to" is well-known in law and in line with CSIS' interpretation of there being a "reasonable probability" (see for example *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at paras 184, 201-203). Indeed, as stated by the Supreme Court in *Vavilov*, "where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard" (para 111).

40. I am of the view that CSIS' interpretation of the "likely to assist" threshold is higher and provides more specificity than a simple relevance threshold.

41. With respect to the application of the threshold, I am also of the view that it requires a contextual analysis. Depending on the context and the facts before him, the Director of CSIS may be satisfied that numerous factors, collectively, demonstrate how the foreign dataset will likely assist CSIS, just as he may be convinced in a different context that a single factor is sufficient to satisfy the threshold. In conducting my reasonableness review, I need to understand the Director's rationale, including which factors justify his conclusions.

42. In the record before me, the Director describes the threat posed by activities of the foreign state at issue, its agents and its co-optees. He explains that the retention of the Foreign Dataset will likely help [describing how the dataset will likely assist CSIS] [redacted] I understand the Director's rationale as being that certain Government of Canada intelligence priorities are related [information in the foreign dataset] [redacted]

43. There is an additional factor in the record that, in my view, makes a link between the information in the dataset and CSIS' duties and functions, namely the volume of the information. Indeed, in CSIS' Application to the Director, it explicitly states that the "Service assesses that due to its size [redacted] the [Foreign Dataset] is likely to assist the Service with [describing how the dataset will likely assist CSIS] [redacted] In the Authorization, the Director agrees with CSIS' assessment, which includes this factor.

44. The Foreign Dataset contains [description of the Dataset] [redacted]

45. I find that the Director's conclusions are clear, on point and justified. Considering the nature of the information, the fact that it relates to individuals in a country that poses a threat to Canada, and its volume, I find reasonable his conclusion that the retention of the Foreign Dataset is likely to assist CSIS. Indeed, given that the Foreign Dataset contains information on such a large volume of individuals in a country of concern to Canada means that it is reasonably likely that it contains information that will assist CSIS in the performance of its duties and functions.

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

46. Pursuant to subsection 11.1(1) of the *CSIS Act*, CSIS has two continuing obligations in respect of a foreign dataset. First, it shall delete any information where there is a reasonable expectation of privacy that relates to the physical or mental health of an individual. Second, it shall 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*

47. I understand from the record that CSIS and the Director of CSIS have understood their obligation with respect to a "reasonable expectation of privacy" to apply to any information relating to physical or mental health of an individual of a foreign state as well as a Canadian or a person in Canada. I am satisfied that this common sense approach constitutes a reasonable interpretation by the Director.

48. The record describes with extensive detail the process undertaken by CSIS to try to identify information related to physical or mental health. First, it was determined that [description of the evaluation process] [redacted] Second, search strings and terms were developed, taking into account the context. Search terms related to [redacted] were assessed to

be highly accurate whereas more general search terms related to [redacted] led to a high percentage of false positives. CSIS explains that it decided to also redact the false positives out of an abundance of caution given the limited amount of time to parse through them all and that they were assessed as having minimal impact on the utility of the information.

49. The search terms produced [redacted] hits. It was assessed that in most cases, the terms related to [redacted] As a result, CSIS explains that rather than simply deleting the information, it replaced the deleted information with a "REDACTED" placeholder to show there was redacted information while ensuring the integrity of the remaining information.

50. CSIS indicates in the record that it will continue to abide by its obligation with respect to any information related to physical and mental health that is discovered during any query or exploitation of the dataset. I am of the view that this is important given the nature of the dataset (namely that its information is in foreign language), the volume of the information in the dataset and the limited amount of time CSIS had to evaluate the dataset.

51. Given the process explained in the record, I am satisfied that the Director's conclusion that CSIS has met its obligations under paragraph 11.1(1)(a) of the *CSIS Act*, and will continue to do so, is reasonable.

ii. Obligation to delete any information that by its nature or attributes relates to a Canadian or a person in Canada – paragraph 11.1(1)(c) of the *CSIS Act*

52. In addition to deleting any information related to physical and mental health, CSIS also has the continuing obligation to remove any information from the dataset that by its nature or attributes relates to a Canadian or a person in Canada.

53. To that effect, the record details the steps taken by CSIS, which largely mirror the steps taken with respect to information relating to physical and mental health. The designated CSIS employees first identified [redacted] that could potentially reliably provide information on Canadians or persons in Canada [redacted]

[redacted] No Canadian content was identified. The employees then used search terms such as [redacted] A manual review determined that the [redacted] in identifying [information related to Canadians and persons in Canada] [redacted]

54. CSIS has indicated that the information relating to Canadians and persons in Canada was removed from the foreign dataset and was collected as a Canadian dataset pursuant to 11.05 of the *CSIS Act* (s 11.l(2)(b), *CSIS Act*).

55. The Service recognizes that its approach may have resulted in some non-Canadian data being misidentified as Canadian, and if discovered during its evaluation of the Canadian dataset, it will be returned to this Foreign Dataset.

56. Further, as is the case with its obligations regarding information related to physical and mental health, CSIS indicates that it will continue to comply with its obligations should any Canadian related information be discovered in the course of querying or exploiting the Foreign Dataset, should its retention be approved by the Intelligence Commissioner. The fact that the legislative provision calls for a "continuing" obligation, and requires that CSIS notify the National Security and Intelligence Review Agency when Canadian-related information is removed from the dataset, entails, in my mind, that the process should be serious, comprehensive and effective, but that it does not require perfect results.

57. Based on the details in the record, I am satisfied with the Director's conclusion that CSIS has met its obligations with respect to Canadian information is reasonable. Indeed, given the size of the dataset, the complexity for CSIS to effectively evaluate it [specific information about the dataset] [redacted] I find that the Director's conclusion is justified by the process described by CSIS in the record.

d) The update provisions are reasonable

58. As indicated previously, subsection 11.17(1) of the *CSIS Act* is the legislative provision that grants the Director of CSIS the statutory authority to authorize the retention of a foreign dataset. In turn, section 17 of the *IC Act* requires that the Intelligence Commissioner review the conclusions made by the Director under subsection 11.17(1) and on the basis of which the authorization is made. Subsection 11.17(2) of the *CSIS Act*, for its part, enumerates the elements that an authorization for a foreign dataset must include. The manner in which a foreign dataset can be updated is one of those elements.

59. My jurisdiction to review the Director's conclusions related to the elements listed at subsection 11.17(2) is not explicitly stated in the IC and CSIS Acts and has not been discussed in previous Intelligence Commissioner decisions. For these reasons, although not in doubt in the matter before me, I believe that it is useful to provide a general overview of my authority to review whether the update provisions contained in the authorization are reasonable.

60. When the Intelligence Commissioner reviews the conclusions made pursuant to subsection 11.17(1), the review does not only include the three mandatory criteria listed in the provision, namely whether the dataset is a foreign dataset; is likely to assist CSIS; and whether CSIS complies with its obligations under subsection 11.1(1). It also includes any other conclusion relied on by the Director to grant the authorization to retain the foreign dataset. This includes the manner in which the dataset may be updated. Indeed, if the Director does not agree with how the authorization sets out the manner in which CSIS may update the dataset, he would not authorize its retention.

61. I note that CSIS recognizes the Intelligence Commissioner's jurisdiction to review the conclusions related to update provisions. The record shows that following my February 2023 decision on Canadian datasets, CSIS re-evaluated the types of updates that it was proposing to the current Foreign Dataset. More specifically, a memorandum in the record explains that in light of my decision, CSIS was concerned that the third type of update it was proposing

was too broad and could lead to a finding that the Director's conclusions were not reasonable.

62. As a result, CSIS proposes two types of updates that it could make to the dataset. The first type is qualified in the record as an administrative update, which is intended to ensure data integrity and to ensure its completeness. It would allow for correcting errors, adding supplementary data to existing data elements, and adding new data records [redacted] For example, if the same information [redacted] was obtained, it could be added under this update provision.

63. The second type of update would allow CSIS to [specific steps to update the dataset] [redacted] Essentially, this update provision allows the inclusion of additional information about [information already in the dataset]

64. In my view, it would be inefficient and unnecessary for CSIS to require the Director's authorization, and the Intelligence Commissioner's approval, to correct errors, or add information that would have been included (and authorized) had it been available at the time of authorization.

65. Although in the context of an application for the retention of a Canadian, rather than a foreign dataset, in *Canadian Security Intelligence Service Act (CA) (Re)*, 2022 FC 645 [*FC Canadian Dataset Decision*], Justice Mosley was concerned that update provisions provided too much latitude to CSIS: "It appeared that the Service sought carte blanche to revise the database without further authorization from the Court" (para 40). Ultimately, he decided that CSIS would have to notify the Court of an update, other than an update to contact information, and that there would be a hold on the update should the Court require further information or submission on the proposed change (para 45).

66. Since he was writing his decision for public release, Justice Mosley could not explain in more detail the particular nature of the proposed updates or the specific concerns he had.

Further, concerns present in the Canadian dataset context may not be present in the context of a foreign dataset. Nevertheless, his general concern of providing CSIS free rein to update a dataset resonates with me.

67. I am of the view 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. In other words, it is useful to consider whether when the Director authorizes the retention of the foreign dataset, his understanding of the nature of the dataset could include the proposed updates. This will be specific to the context. For example, there may be foreign datasets for which the source of information is important, and the update provisions would have to reflect that. There may be foreign datasets with proposed updates where the new information is completely unrelated to the existing information, but its addition would have been foreseeable in the circumstances.

68. I am satisfied that the Director's conclusions with respect to the update provisions are reasonable. I am of the view that his conclusions reflect that the update provisions would not change the nature of the dataset and are likely to assist CSIS.

69. In light of the above, I find that the Director's conclusions made pursuant to subsection 11.17(1) reasonable.

V. REMARKS

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

i) Impact of non-compliance incident

71. In the Authorization, the Director raises a non-compliance incident regarding the retention of information in respect of which there is a reasonable expectation of privacy relating to [redacted] after he initially authorized the retention of the Foreign Dataset in [redacted]. More specifically, CSIS had retained a

copy of the original Foreign Dataset, which therefore included the health-related information that had been deleted in the copy that had been ingested onto its system. The copy was sealed and had not been assessed since ingestion onto the Service's system, and had been retained in the event of backup or other failure. [redacted], it proceeded with its destruction. The Director confirmed that the incident was internally reported for a compliance review to determine the circumstances surrounding this incident and ensure its effective remediation. The results of this review will be shared with the appropriate review bodies.

72. I am of the view that when a non-compliance incident is related to the Intelligence Commissioner's jurisdiction and could be relevant to the reasonableness review, I should be informed, and appreciate having been done so here. Based on the record, I was satisfied this was an isolated non-compliance incident that did not impact the reasonableness of Director's conclusions with respect to CSIS' continuing obligation pursuant to paragraph 11.l(l)(c) of the *CSIS Act*.

ii) Interpretation of the "likely to assist" threshold

73. The dataset regime is relatively new and it is therefore entirely understandable that there is nothing in the record about whether foreign datasets approved for retention have assisted CSIS in the performance of its duties and functions. Of course, the "likely to assist" threshold does not require that the foreign dataset will necessarily eventually assist CSIS. However, over time, the "likely to assist" threshold may take into account actual use and effectiveness of the dataset.

74. Indeed, the first time the Director seeks the retention of a particular foreign dataset, it has yet been queried or exploited by designated CSIS employees. Prior to retention, the employees are only authorized to access the foreign dataset for the purposes of evaluating it and preparing the application for retention. The Director, as decision maker, will have a general understanding of the nature of the information in the foreign dataset. The Director's

conclusions authorizing the retention of the foreign dataset are based on this general understanding.

75. Over the course of the period for which retention of the dataset is authorized, CSIS will acquire a better understanding of the foreign dataset's usefulness. If a new request for an authorization to retain the foreign dataset is made at the expiry of the initial retention period, I am of the view that the Director and the Intelligence Commissioner should be provided with at least an overview of this usefulness. If CSIS does not query or exploit the database, or any querying or exploitation does not lead to results that assist in the performance of its duties and functions, this will be important information to present to the Director and the Intelligence Commissioner. Even though the "likely to assist" threshold is forward looking, I am of the view that historical use – when it will be available – may be a factor to consider in its evaluation.

76. There is an additional element that could also impact the interpretation of the "likely to assist" threshold. The threshold applies not only to the retention of a foreign dataset, but also to the retention of a Canadian dataset, which must be approved by the Federal Court of Canada. A designated judge of the Federal Court applies the threshold to the Canadian dataset, whereas the Director applies the threshold to a foreign dataset, the conclusions of which are then reviewed by the Intelligence Commissioner.

77. Within a statute, the same words and phrases generally have the same meaning (see for example *R v Zeolkowski*, [1989] 1 SCR 1378 at 1387). In *FC Canadian Dataset Decision*, Justice Mosley did not provide written consideration or analysis on the meaning of the "likely to assist" threshold, simply stating that he was satisfied the threshold was met. That being said, the application of the threshold to the retention of a foreign dataset would likely take into account any future related judicial commentary.

iii) Five-years validity period of the Authorization

78. Subsection 11.17(3) of the CSIS Act provides that a foreign dataset authorization shall be valid for a period of "not more than five years" from the date on which the Intelligence Commissioner approves it. The Director has authorized the retention of the Foreign Dataset for a period of five years. For future authorizations, it would be helpful if the record included information explaining the rationale for the retention period.

VI. CONCLUSIONS

79. Based on my review of the record submitted, I am satisfied that the Director's conclusions made pursuant to subsection 11.17(1) of the *CSIS Act* are reasonable with regard to the retention of the Foreign Dataset.

80. Therefore, pursuant to paragraph 20(2)(a) of the *IC Act*, I approve the Director's Authorization to retain the Foreign Dataset.

81. 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.

82. 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 20, 2023

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner