

**Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic
Institutions (the Commission)**

SUBMISSION REGARDING NATIONAL SECURITY CONFIDENTIALITY

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I. PROCEDURAL HISTORY

1. Pursuant to clause (a)(i)(D) of its Terms of Reference, the Commission has been directed to:

(D) conduct public hearings at the outset of the Commissioner's mandate to identify the challenges, limitations and potential adverse impacts associated with the disclosure of classified national security information and intelligence to the public, for the purposes of fostering transparency and enhancing public awareness and understanding, during which hearings the Commissioner should seek to hear from a range of stakeholders, including senior federal public service officials from the legal and national security and intelligence community, academic and legal experts and other stakeholders, as deemed appropriate by the Commissioner, 2

2. In its consultation paper entitled "Meeting the Challenges: Consultation with Participants regarding the Disclosure of Information Derived from National Security Intelligence and Information" shared with Participants on January 8th 2024, the Commission stated that:

"The Commission intends to conduct its work in such a way as to maximize the public disclosure of the information it will obtain, while ensuring compliance with applicable laws and the requirements of national security. This may be a difficult balance to strike, but the Commission intends to do its utmost to achieve it, as it considers both these objectives to be critical."

3. In its consultation paper, the Commission invited Participants to provide submissions on several broad topics including:

“How techniques such as document redaction, document summaries, statements of fact, and summaries of *in camera* proceedings might most usefully be employed in the context of the Commission’s work and the tight timelines in which it must be completed.”

4. The Human Rights Coalition (the Coalition) provided a written submission in response to this request on January 17th 2024.
5. The Commission held public hearings (the NSC Hearings) from January 29th to February 2nd, 2024 to receive information and views on this aspect of the Commission's mandate to help guide the Commission’s work in “rendering public as much of the information it receives as is reasonably possible.” The Coalition participated in these hearings with its counsel attending in person.
6. At the NSC hearings, Commission counsel clarified that the Commission will work to maximize transparency with the public in its work by making representations to the Government regarding the classified information that it shared and whether and/or how this information can be made public.¹

¹ Transcript, Commission Counsel oral submissions, Gordon Cameron (29 January 2024), at 63.

7. Participants were invited to provide written submissions following the conclusion of the hearings to the Commission by February 9th 2024.

II. RELEVANT LAW

8. The Commission wishes to maximize transparency by making representations to the Government as to the public disclosure of classified information, keeping in mind legislative restrictions. Although there maybe complexity to these legislative restrictions, the restrictions that the Commission and government are dealing with are not absolute - in fact there are important exceptions for the Commission to keep in mind when it comes to its representations to the Government.
9. Several legislative exceptions may apply to classified information about transnational repression and foreign interference experienced by diaspora.
10. For example, the Communications Security Establishment may disclose information relating to a Canadian or a person in Canada to any appropriate person if its disclosure may help prevent death or serious bodily harm under section 46(2) of the Communication Security Establishment Act.² Ms. Tayyeb explained that, based on her experience, the risk of bodily harm is also considered in a decision to disclose information if the person at risk is located outside of the country and that although not explicitly mentioned in the Act, the risk of serious mental harm would also be a factor considered.³

² *Communications Security Establishment Act*, SC 2019, c 13, s 76, s 46(1)-(2) [CSE Act].

³ Transcript, Cross examination, Alia Tayyeb, (1 February 2024), at 120-121.

11. Under section 19(2) of the CSIS Act, information obtained in the performance of the Service's duties and functions can be disclosed for the purposes of the performances of its functions, one of which is to take measures within or outside Canada to reduce a threat to the security of Canada.⁴ The Act notes that threats to the security of Canada include foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person.⁵ The Coalition submits that information the Commission comes across in its work with the government related to transnational repression and foreign interference targeting diaspora communities in Canada may fall within this category.
12. Under section 19(2)(b) of the CSIS Act, information obtained in the performance of the Service's duties and functions can be disclosed where the information relates to the conduct of the international affairs of Canada, to a person designated by the Minister of Foreign Affairs for the purpose. Mr. Vigneault confirmed that transnational repression related to the conduct of the international affairs of Canada.⁶
13. It was noted during the NSC Hearings that it is possible to share previously classified information publicly without identifying human sources or methods of intelligence collection

⁴ *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 12.1(1) [CSIS Act].

⁵ *Ibid*, s 2(b).

⁶ *Ibid*, s 19(2)(b); Transcript, Cross examination, David Vigneault, (1 February 2024), at 127.

or information from which these could be inferred, which is information kept secret under various relevant legislative schemes.⁷

14. It was also noted during the NSC hearings that temporality may have an impact on whether classified information with national security implications may be publicly disclosed – meaning that, in some circumstances, the older the information is the more likely it can be disclosed.⁸ The Coalition encourages the Commission to keep this in mind particularly with regard to information it may come across in its work with the Government that identifies patterns in transnational repression and foreign interference aimed at vulnerable diasporas.

15. In sum, despite statutory limitations, there is leeway for the Commission and the government to work with. In some cases, disclosure can even fortify national security particularly when it comes to the experiences of targeted communities and cybersecurity risks.⁹

III. COALITION REQUESTS

16. The Coalition makes three requests as to the Commission’s representations to the Government and the process established by the Commission regarding the public disclosure of information shared by the Government. The Coalition requests that the Commission:

⁷ Transcript, Expert panel, Leah West (30 January 2024), at 108. See for example, CSIS Act, *supra* note 4, s 18(1); CSE Act, *supra* note 2, s 55(1).

⁸ Transcript, Direct examination, David Vigneault, (1 February 2024), at 71.

⁹ Transcript, Expert panel, Leah West (30 January 2024), at 107-108.

a. In its representations to Government, urge the Government to make public information that speaks to patterns of threatening conduct by foreign entities against targeted communities, including pressure on their associations abroad to participate in this conduct, and information that would alert diaspora in Canada that their community is a target or alert them to the nature of the danger they face, to the extent possible

i. in its original form with redactions to such information lifted or with redactions only to the extent necessary to ensure national security concerns are addressed;

ii. in public summaries that include detail to the extent possible as to the threats faced by diaspora communities or, if necessary, provide higher level descriptions while preserving the nature of threat activities; or

iii. in the Commissioner's interim and final reports to a similar level of detail.

1. The Coalition also note that foreign interference does not always take the same form. The Coalition asks the Commission to be alert to the variations in the forms of foreign interference that exist among communities and repressive foreign governments, in its efforts to prioritize with government disclosing information necessary to give diaspora communities the ability to take precautions.

- b. If it determines it would assist it in its work, communicate with affected diaspora communities to get their perspectives as to how access to the kind of classified information at issue in the Inquiry's work would affect them.

- c. When information that it urges the Government to disclose cannot be disclosed publicly, request that the Government to provide a justification when it determines that information related to the topics included above cannot be disclosed.

IV. JUSTIFICATION

17. There is a balance to strike between national security concerns and the public interest in disclosure.¹⁰ In accordance with its Guiding Principles, "the Commission's proceedings and processes must be as open and available to the public as is reasonably possible, consistent with the requirements of national and personal security and other applicable confidences and privileges."¹¹
18. The Coalition submits that the personal security interests of diaspora communities targeted by foreign governments and entities, as well as their ability to take precautions to protect themselves, must be treated as an essential aspect of the public interest in disclosure and therefore an essential aspect of the required balance to be struck by the Commission and the Government between maximizing transparency and protecting national security concerns. At

¹⁰ Transcript, Commission Counsel oral submissions, Natalia Rodriguez, (29 January 2024), at 47.

¹¹ Transcript, Commission Counsel oral submissions, Natalia Rodriguez, (29 January 2024), at 46

section (a)(i)(C)(II) of the Commission's Terms of Reference the protection of members of diaspora especially vulnerable to foreign interference is clearly made a priority.¹²

19. The effects of foreign interference and transnational repression on targeted members of diaspora communities are often severe. The methods used by foreign entities that target diaspora in Canada have been known to result in serious mental and physical harm, up to and including death, not only to individual targets but their loved ones living in Canada and abroad as well.
20. Many targeted diaspora groups have been subjected to transnational repression and foreign interference activities for many years in Canada. Patterns in foreign interference activities against targeted diaspora can be discerned from information about the strategies used by a particular country on one or various groups targeted by that country. Information related to such patterns sheds light on the nature of the threats faced by targeted communities in the past and what they may be able to expect in the near future.
21. Having the information they need to determine whether their community is in danger of being targeted by foreign actors or the nature of the threat they face is essential to the ability of targeted communities to take precautions to adequately protect themselves, the people they love, work with, or whose identity or beliefs they share, whether in Canada or abroad.
22. As Minister LeBlanc explained:

¹² See Transcript, Expert panel, Michael Nesbitt (30 January 2024), at 85, where Prof. Nesbitt encourages the Commission to turn to its Terms of Reference to determine the principles that should underly its understanding of the public interest in disclosure.

“...for the diaspora communities that are targeted by some of this foreign interference, the more information that they can appropriately have, the better they’ll be able to detect and deter or disrupt the foreign interference.”¹³

23. The Coalition notes that it has been the practice of Canadian intelligence agencies to disclose information related to transnational repression or in circumstances where the serious risk of bodily harm or death is imminent in the past. Ms. Tayyeb explained that information gathered by the Communications Security Establishment has been disclosed in the past when bodily harm and death a possibility.¹⁴ Mr. Vigneault explained that information has been disclosed in relation to “transnational repression that runs from absolutely there is a risk of bodily harm up to and including...for raising awareness and for building resilience.”¹⁵

24. The Coalition also notes that the tendency to ‘overclassify’ information¹⁶ may be particularly harmful to the personal security interests of targeted diaspora and therefore the public interest. This impacts the group’s ability to take adequate precautions.

25. In addition, when transnational repression or foreign interference activities carried out against vulnerable communities go unnoticed or misunderstood by the Canadian public, affected groups may become more vulnerable to the actions of malicious foreign entities as

¹³ Transcript, Cross examination, Minister Dominic LeBlanc (2 February 2024), at 65.

¹⁴ Transcript, Cross examination, Alia Tayyeb, (1 February 2024), at 120-121.

¹⁵ Transcript, Cross examination, David Vigneault, (1 February 2024), at 122.

¹⁶ Transcript, Expert panel, John Forster, (31 January 2024) at 16.

their claims are easily disregarded by the public or authorities. Greater access to information about the threats diaspora communities face would help to remedy this.

26. By emphasizing the personal security interests of targeted diaspora communities in its representations, the Commission would be effectively doing its part to find the proper balance between ensuring national security and protecting the public's interest in disclosure, including the personal security interests of affected diaspora, as it works through its mandate.
27. Furthermore, the Commission has a role to play in making sure diaspora communities, as well as the Canadian public more broadly, understand the foreign interference threats they may face in order to build resilience. As Expert Leah West explained:

“...there is a role not just for national security agencies, but the Commission in making sure the public understands broadly how foreign states seek to influence the public or a subset of the Canadian population in order to build resilience. I think that's part of the job our security agencies are taking more and more...but also...the public education aspect of it, of this is the type of threats Canadians and Canadian communities are facing from foreign actors and this is the impact it can have on our democratic institutions...are appropriate findings for the Commission to be making and definitely part of the public interest...I think you can make findings of that sort without revealing how our security agencies have come to know the details of that.”¹⁷

¹⁷ Transcript, Expert panel, Leah West (30 January 2024), at 108. See also Transcript, Expert panel, Pierre Trudel (30 January 2024), at 108.

28. The Coalition submits that the Commission has an opportunity to contribute to greater awareness, resilience and safety among diaspora communities targeted by foreign interference and transnational repression. The Commission can do this by urging the Government to make public information in its possession that helps targeted communities understand the foreign interference threats they face so they can properly protect themselves.

29. The Coalition asserts that it may be important for the Commission to communicate with affected diaspora communities to get their perspectives on how access to the kind of classified information at issue in the Inquiry's work would affect them. Mr. Fadden asserted that this is crucial:

“...to be blunt, I think if you don't develop an interest in diaspora points of view, I think you will be missing an important component of your mandate...the threats to...diaspora communities for the purpose of advancing...foreign state objectives I think it becoming increasingly clear...I would very much urge the point of view that the Commission should have an active outreach program, and possible one that provides them with confidentiality because people are scared. I'm generalizing. Not everybody is, but...members of some diasporas are just plain scared.”¹⁸

30. The Coalition reiterates that every targeted community's experience of transnational repression is different. For example, the Eritrean community in Canada experience what they fear is interference in events purported to be “cultural events” across the country that

¹⁸ Transcript, Expert panel, Richard Fadden, (31 January 2024), at 61-62.

manifests in intimidation against those who speak out against the Eritrea regime while members of the Falun Gong community have tended to be the targets of online harassment campaigns carried out by proxies, albeit physical assault and direct forms of sabotage are also common. Due to the diversity in their experiences, each would present a unique perspective as to how access to the kind of classified information at issue in the Inquiry's work would benefit them.

31. When information that the Commission urges the Government to disclose cannot be disclosed publicly, reasons should be provided justifying the Government's decision. Professor Michael Nesbitt confirmed that, when information is not disclosed for reasons of national security,

“Transparency requires reason-giving, and reason-giving impels an articulation and a justification of the principles on which agencies act in support of our national security, and more fundamentally our democracy.”¹⁹

¹⁹ Transcript, Expert panel, Michael Nesbitt (30 January 2024), at 31-32.