

Policy on Implementing the Ministerial Direction to the CBSA on Information Sharing with Foreign Entities

Background and Scope

In September of 2011, the Minister of Public Safety issued a ministerial direction (MD) to the CBSA in regards to information sharing with foreign entities wherein the information in question may be linked to a substantial risk of mistreatment, or in other words, human rights abuses. The purpose of this Policy is to implement the 2011 MD, and replace the October 2011 Interim Policy.

The procedures in this Policy are subject to all applicable legislation governing the use and sharing of information and must be read in conjunction other CBSA and Government of Canada policies on information collection, use and disclosure. These procedures and the MD do not change existing legal authorities for sharing information with foreign entities.

Definitions

1. "Mistreatment" means torture or other cruel, inhuman, or degrading treatment or punishment.
2. "Link to mistreatment" means that mistreatment may be associated with the production, disclosure, request, or use of the information.
3. "Substantial risk" is a personal, present, and foreseeable risk of mistreatment.
 - a) In order to be "substantial," the risk must be real and must be based on something more than mere theory or speculation.
 - b) In most cases, the test of a substantial risk of mistreatment will be satisfied when it is more likely than not that there will be mistreatment. However, the "more likely than not" test should not be applied rigidly because in some cases, particularly where the risk is of severe harm, the "substantial risk" standard may be satisfied at a lower level of probability.

The following definitions are intended for these procedures only:

4. "Foreign entity" refers primarily to foreign government agencies and militaries, and it may also refer to military coalitions, alliances, and international organizations.
5. "Use" refers to the treatment of information as a resource and includes sharing information.

6. "Sharing" refers to both the collection and disclosure of information.
7. "Information" is intended to refer primarily to personal information, but may refer to other types of information associated with a substantial risk of mistreatment.
8. "Officer" is intended to refer generally but not exclusively to Liaison Officers, Intelligence Officers and Inland Enforcement Officers.
9. "CBSA headquarters" refers to the Unit or Division within headquarters that provides operational or program guidance for a particular officer's line of business.

Policy Statement

10. The CBSA must assess the accuracy and reliability of information being shared with foreign entities, and properly characterize this information in any further use. It will take reasonable and appropriate measures to identify information that is likely to result in mistreatment and in normal circumstances not disclose such information with the foreign entity in question.
11. In exceptional circumstances, when there is a serious threat of loss of life, injury, or substantial damage or destruction of property, the CBSA will make the protection of life and property its priority. If, in these exceptional circumstances, the CBSA needs to share information with appropriate foreign authorities in order to mitigate a serious threat, and that information is linked to a substantial risk of mistreatment, the matter will be referred to the President for decision, which shall be made only in accordance with the MD and with Canada's legal obligations.
12. The CBSA must also take all reasonable measures to eliminate the risk that any action on its part might promote or condone the use of mistreatment. Measures must be taken to ensure that the information which may have been derived through mistreatment is accurately described, its reliability is properly characterized, and in normal circumstances, not used to administer or enforce program legislation, or as evidence in legal proceedings.
13. Caveats should be imposed on information shared with both domestic and foreign recipients to restrict their use of information, as appropriate. Standard caveats can be found at the end of the CBSA Enforcement Manual Part 7, Chapter 3: Information Sharing Policy for the Enforcement Manual.

Characterizing information

14. Information must be evaluated to ensure to the point of due diligence that information shared with foreign governments, institutions or agencies is not obtained through the mistreatment of individuals or other criminal/illegal acts.

15. Where it is known that information if disclosed, or requested, may result in the substantial risk of mistreatment, this knowledge should be attached to the information, or put towards ensuring to the point of due diligence that disclosures of or requests for such information are not made. The attachment should precede the information, and be highly conspicuous manner, such as a coversheet or bolded designation similar to a security clearance.

Identifying Substantial Risk of Mistreatment Prior to Sharing Information

16. When an officer, in the course of regular duties, forms an opinion that there may be a substantial risk of mistreatment associated with an information sharing activity, no sharing should occur until the following procedures have been applied.

17. The officer should endeavour to provide a clear and complete articulation of the substantial risk of mistreatment and discuss next steps with their immediate manager or supervisor prior to any referral of the matter to headquarters. The following elements should be considered:

- a) the rationale for believing that there is a substantial risk that sharing the information would lead to the mistreatment of an individual, or that the information about to be shared may have been obtained through the mistreatment of an individual.
- b) any proposed measures to mitigate the risk, and the likelihood that these measures will be successful (including, for example, the foreign entity's record in complying with past assurances, and the capacity of those officials to fulfil the proposed assurance, or evidence to support that substantial risk of mistreatment was more likely not to have occurred);

18. If after an assessment of the above, local management is of the opinion that:

- a) a substantial risk of mistreatment is present; and
- b) the benefits of the information sharing activity can be clearly demonstrated to outweigh the substantial risk of mistreatment in terms of a serious threat
 - 1) against life or
 - 2) of serious injury or
 - 3) of substantial damage to property or
 - 4) of substantial destruction of property, then

local management shall route the matter up through their management structure to CBSA headquarters.

19. CBSA headquarters will consider the following;

- a) The risk and mitigation assessment made by the officer and local management or supervisors.
 - b) The necessity of consultations with other headquarters areas such as Legal Services, Information Sharing, International and Partnerships, and any Programs Branch or Operations Branch counterparts as applicable.
 - c) the threat to Canada's national security or other interests, and the nature and imminence of that threat;
 - d) the importance of sharing the information, having regard to Canada's national security or other interests;
 - e) the status of the relationship with the foreign entity with which the information is to be shared, and an assessment of the human rights record of the foreign entity;
 - f) the views of the Department of Foreign Affairs and International Trade (DFAIT); and
 - g) the views of other departments and agencies, as appropriate, as well as any other relevant facts that may arise in the circumstances.
20. CBSA headquarters should ensure that all the data elements and any additional relevant information are presented objectively and completely in a format suitable for referring to the President.
21. CBSA headquarters should consider any possible jeopardy to any current or future investigative or judicial proceedings by the use of information associated with mistreatment.
22. CBSA headquarters may present options and make recommendations to the President regarding the sharing of the information, or may recommend referral to the minister for decision. All options and recommendations made must be in accordance with Canada's legal and international obligations and in accordance with the MD to which this policy refers.

Identifying Substantial Risk of Mistreatment during Information Sharing.

23. When a substantial risk of mistreatment or actual mistreatment is identified during the collection or disclosure of information, the collection or disclosure must cease as soon as practicable.
24. If further information would have been shared notwithstanding the cessation, the procedures in this policy under "Identifying Substantial Risk of Mistreatment Prior to Sharing Information" should be followed.

25. Any information already shared should be dealt with according to the procedures in this policy under "Identifying Substantial Risk of Mistreatment after Sharing Information."

Identifying Substantial Risk of Mistreatment after Sharing Information.

Collection

26. If, after collecting information an officer becomes concerned that the information is linked to a substantial risk of mistreatment, the link must be clearly articulated and kept with the information. Further, the information should be kept in a special file that will clearly identify it as linked with substantial risk of mistreatment. Local management or supervisors should then be informed.
27. The information should neither be used nor shared unless the procedures under "Identifying Substantial Risk of Mistreatment Prior to Sharing Information" are followed.

Disclosure

28. If, after disclosing information, an officer becomes concerned that the information is linked to a substantial risk of mistreatment, the officer should immediately attempt to halt the use and further disclosure of that information at the earliest opportunity. Local management and CBSA headquarters should be informed as soon as possible.
29. CBSA headquarters, in conjunction with local management, should employ as many mitigating actions as possible and consider obtaining the assistance of other government departments. Every effort should be made to obtain assurances from the recipients of such information that the information will not be further used or disclosed, and the information be destroyed or returned to the discloser to be dealt with in accordance with policy and legal obligations.

Use of Information Linked to a Substantial Risk of Mistreatment

30. If, due to a serious threat, the President of the CBSA or the Minister of Public Safety allow the use of information that may have been obtained through, or may result in mistreatment, the following applies.
31. A clear rationale for and record of the decision should be kept by all parties to the sharing, indicating the decision is made only in accordance with the MD, and with Canada's legal obligations.
32. The CBSA will subsequently take all reasonable measures to reduce the risk that any use of information on its part might promote, condone the use of, or result in mistreatment. Such measures may include but are not limited to:

- a) sanitizing the information;
- b) progressive sharing over time;
- c) limitation of recipients;
- d) using more secure media;
- e) using one-time procedures;
- f) monitoring use of information;
- g) use of caveats; or
- h) obtaining or securing assurances through DFAIT.

Proactive Disclosure to Prevent Mistreatment

33. Where an area of the CBSA is in control of information that is likely to prevent mistreatment if disclosed or requested, it shall endeavour to disclose or request such information as soon as possible and within the confines of policy and law, and also inform via the appropriate channels the Vice President of the Branch under which that particular area's management structure resides.