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File: 2200-B-2022-04

**IN THE MATTER OF AN APPLICATION BY THE
COMMUNICATIONS SECURITY ESTABLISHMENT TO THE MINISTER OF
NATIONAL DEFENCE FOR A FOREIGN INTELLIGENCE AUTHORIZATION FOR
[REDACTED] ACTIVITIES PURSUANT TO SUBSECTION 26(1)
OF THE *COMMUNICATIONS SECURITY ESTABLISHMENT ACT***

**INTELLIGENCE COMMISSIONER
DECISION AND REASONS**

August 4, 2022

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I. Overview

On July 6, 2022, pursuant to subsection 26(1) of the *Communications Security Establishment Act*¹ (CSE Act), the Minister of National Defence (the Minister) issued a Foreign Intelligence Authorization for [REDACTED] Activities. On July 11, 2022, the Office of the Intelligence Commissioner received the Minister's authorization for my review and approval under the *Intelligence Commissioner Act*² (IC Act). In addition, the record received contained a cover letter from the Minister dated July 6, 2022, indicating that the following listed documents were all the materials before her when issuing the authorization: (1) *Authorization* – Foreign Intelligence Authorization for [REDACTED] Activities; (2) *Application* – Foreign Intelligence Authorization for [REDACTED] Activities; (i) Annex I – SIGINT Operations Risk Assessment Form Template; (ii) Annex II – MD to CSE Government of Canada Intelligence Priorities – 2021–2023; (iii) Annex III – National SIGINT Priority List (NSPL – November 2021); (iv) Annex IV – Outcomes from the Last MA Period; (v) Annex V – MPS Foreign Intelligence Retention Schedule; (vi) Annex VI – Summary of CSE's measures to Protect the Privacy of CDN and PiC; (vii) Annex VII – Ministerial Order Designating Recipients of Canadian Identity Information Obtained, Used, Analyzed Under a Foreign Intelligence MA (signed); (3) Briefing Note to the Minister of National Defence – [REDACTED] Activities – Foreign Intelligence; (4) Foreign Intelligence Authorizations – Overview Placemat; (5) Summary – FI – [REDACTED] Activities; and (6) Record of Discussion with CSE Officials.

Based on the written application provided by the Chief of CSE pursuant to subsection 33(1) of the CSE Act, the Minister concluded, pursuant to subsection 33(2) of the CSE Act, that she had reasonable grounds to believe the Foreign Intelligence Authorization for [REDACTED] [REDACTED] was necessary, and that the conditions set out in section 34 of the CSE Act for issuing it were met. The Minister issued conclusions demonstrating she had reasonable grounds to believe that the proposed foreign intelligence activities are reasonable and proportionate, having regard to the nature of the objective and the nature of the activities, pursuant to subsection 34(1) of the CSE Act. The Minister also considered and concluded that she had reasonable grounds to believe the conditions set out in subsection 34(2) of the CSE Act were met.

Based on my review of the information provided, I am satisfied that the conclusions at issue are Reasonable. Consequently, I must approve the Foreign Intelligence Authorization for [REDACTED] [REDACTED] pursuant to paragraph 20(1)(a) of the IC Act.

II. Legislation

A. Role of the Minister

The CSE Act describes the five aspects of CSE's mandate, one of them being the foreign intelligence aspect, set out in section 16 of the CSE Act.

¹ S.C. 2019, c. 13, s. 76.

² S.C. 2019, c. 13, s. 50.

The Minister may, pursuant to subsection 26(1) of the CSE Act, issue a Foreign Intelligence Authorization for [REDACTED] to CSE authorizing it to carry out, on or through the global information infrastructure, the activities specified in the authorization in furtherance of its foreign intelligence mandate. In order to do so, the Minister must first receive a written application from the Chief of CSE.

In order to issue a Foreign Intelligence Authorization for [REDACTED] the Minister must therefore have reasonable grounds to believe, based on the facts presented in the written application of the Chief of CSE, that the authorization is necessary and that the conditions for issuing it are met (subsection 33(2) of the CSE Act).

The Minister must also conclude, in accordance with subsection 34(1) of the CSE Act, that there are reasonable grounds to believe that any proposed activity to be authorized is reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the activities, and that the conditions of subsection 34(3) of the CSE Act have been met. In doing so, the Minister must explain her reasons for arriving at the decision that any proposed activity is reasonable and proportionate in this regard.

B. Role of the Intelligence Commissioner

Pursuant to section 12 of the IC Act, the Intelligence Commissioner is responsible, as set out in sections 13 to 15, for reviewing the conclusions on the basis of which certain authorizations are issued under the CSE Act and, if those conclusions are reasonable, approving those authorizations. In this instance, pursuant to section 13 of the IC Act, the Intelligence Commissioner must review whether the conclusions — made under subsections 34(1) and 34(2) of the CSE Act and on the basis of which a Foreign Intelligence Authorization was issued by the Minister under subsection 26(1) of that Act — are reasonable.

This quasi-judicial review of the Intelligence Commissioner must be performed on the basis of all the information, or record, which was before the Minister. Subsection 23(1) of the IC Act requires that the person whose conclusions are being reviewed, the Minister of National Defence in this instance, must provide to the Intelligence Commissioner all the information that was before her when issuing the authorization.

It is noteworthy that it is the conclusions or reasons of the Minister that must be reviewed by the Intelligence Commissioner. The quasi-judicial review regime of the IC Act aims to ensure that the Intelligence Commissioner is satisfied that the conclusions of the Minister, on the basis of which the authorization was issued, are reasonable.

i. The Applicable Concept of Reasonableness

Pursuant to sections 12 and 13 of the IC Act, the Intelligence Commissioner must review whether the Minister's conclusions are reasonable. I will refer to this as the concept of reasonableness.

The term “reasonable” is not defined in either the IC Act or the CSE Act. It is a term, however, that has been associated in jurisprudence with the process of judicial review of administrative decisions. The review by the Intelligence Commissioner is not, as such, a judicial review – the Intelligence Commissioner not being a court of law – even though he or she has to be a “retired judge of a superior court” (subsection 4(1) of the IC Act). Rather, the Intelligence Commissioner is responsible for performing a quasi-judicial review of the Minister’s conclusions.

However, I accept that when Parliament used the term “reasonable” in the context of a quasi-judicial review of administrative decisions by a retired judge of a superior court, it intended to give to that term the meaning it has been given in administrative law jurisprudence. In that regard, the Intelligence Commissioner must be satisfied that the Minister’s conclusions bear the essential elements of reasonableness: justification, transparency, intelligibility, and whether they are justified in relation to the relevant factual and legal contexts.³

Moreover, the concept of deference towards the decision-maker must be taken into account. In that regard, the legitimacy and authority of administrative decision-makers must be recognized and an appropriate posture of respect is to be adopted.⁴

III. Analysis

A. The Reasonableness of the Minister's Conclusions

The Chief of CSE submitted a written application for a foreign intelligence authorization for [REDACTED] activities. According to the application, [REDACTED]

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The application describes [REDACTED] notably by explaining how CSE acquires information, how it aims to maintain the covert nature of the activities and by describing their limits. The application also states how [REDACTED]

³ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 99 [Vavilov] (citing *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paragraphs 47 and 74; *Catalyst Paper Corp. v North Cowichan (District)*, [2012] 1 SCR 5 at paragraph 13).

⁴ *Ibid* at paragraph 14.

⁵ *Application to the Minister of National Defence for Foreign Intelligence Authorization* – dated June 28, 2022, at paragraph 3, p. 1.

██████████ fulfill the objective of collecting foreign intelligence in accordance with the Government of Canada intelligence priorities, as described in the *Ministerial Directive to CSE on the Government of Canada Intelligence Priorities for 2021-2023*⁶ and the *National SIGINT Priority List* (NSPL).⁷ It also establishes how the Chief of CSE proposes to use, analyze, retain and disclose the acquired information.

Based on the facts presented in this application, the Minister reached conclusions on the basis of which she issued an authorization, as well as terms, conditions and restrictions, for ██████████ ██████████ activities.

I note that the Minister concluded she had reasonable grounds to believe, based on the credible and compelling information found in the application and generally in the record, that the Foreign Intelligence Authorization for ██████████ was necessary, and that the conditions for issuing it were met. I am satisfied that the Minister's conclusions are reasonable in determining that the described activities are reasonable and proportionate, having regard to the nature of CSE's objective in collecting foreign intelligence in accordance with the Government of Canada intelligence priorities, which inform the NSPL, and the nature of those ██████████ ██████████ activities. The conclusions of the Minister serve as a basis for the authorization that she issued, and they are justified, transparent and intelligible.

When assessing whether the activities are reasonable and proportionate, I am of the view that the notion of reasonableness includes an activity that is fair, sound, logical, well-founded and well-grounded having regard to the objective. The notion of proportionality requires that the activity be rationally connected to the objective and minimally impairing on the rights and freedoms of third parties, ██████████. Also, if necessary to achieve this purpose, measures should be in place to restrict the acquisition and/or the retention of information. In other words, it is a proper balance of the activities having regard to the "proportionate" aspects described in this paragraph.

The Minister's conclusions demonstrate that she understood these notions. In paragraphs 2 to 44 of her conclusions,⁸ the Minister demonstrates how the ██████████ activities are reasonable and proportionate. The Minister essentially explained that these activities are reasonable and proportionate, mainly because they are subject to controls and limits that are applied on an ongoing basis and aimed at targets or platforms where those targets are active.

Based on my review of the record submitted, I am satisfied that the Minister's conclusions are reasonable with respect to the proposed ██████████

⁶ Annex II to the *Application to the Minister of National Defence for Foreign Intelligence Authorization* – ██████████ dated June 28, 2022

⁷ Annex III to the *Application to the Minister of National Defence for Foreign Intelligence Authorization* – ██████████ dated June 28, 2022.

⁸ *Foreign Intelligence Authorization for ██████████ Activities* dated July 6, 2022, pp. 1–9.

B. Response to Remarks Made in the 2021 Intelligence Commissioner Decision

In my 2021 decision, I made two remarks with respect to the record received. The first one pertained to “Achieved Outcomes”⁹ and the second one to “Other Acts of Parliament”.¹⁰ I note that this year’s record responds to those remarks.

IV. Conclusion

Based on my review of the record submitted, I am satisfied that the ministerial conclusions are reasonable, I therefore must approve the Minister’s Foreign Intelligence Authorization for [REDACTED] Activities, dated July 6, 2022, pursuant to paragraph 20(1)(a) of the *Intelligence Commissioner Act*.

(Original signed)

The Honourable Jean-Pierre Plouffe, C.D.
Intelligence Commissioner

August 4, 2022

Date

⁹ *Intelligence Commissioner – Decision and Reasons*, dated September 8, 2021, File: 2200-B-2021-04, pp.6–8.

¹⁰ *Ibid* at pp.8–9.