~~TOP SECRET//SI//CEO~~

Office of the Intelligence Commissioner
Bureau du commissaire au renseignement

P.O. Box/C.P. 1474, Station/Succursale B
Ottawa, Ontario K1P 5P6
613-992-3044, Fax 613-992-4096

File: 2200-B-2023-03

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

IN RELATION TO A FOREIGN INTELLIGENCE AUTHORIZATION FOR [redacted]
PURSUANT TO SUBSECTION 26(1) OF THE *COMMUNICATIONS SECURITY ESTABLISHEMENT ACT* AND SECTION 13 OF THE *INTELLIGENCE COMMISSIONER ACT*

JULY 18, 2023

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I. OVERVIEW

1. This is a decision reviewing the reasonableness of the conclusions of the Minister of National Defence (Minister) authorizing the Communications Security Establishment (CSE) to carry out certain activities or classes of activities pursuant to subsection 26(1) of the *Communications Security Establishment Act*, SC 2019, c 13, s 76 (*CSE Act*).

2. The CSE is the Government of Canada's (GC) signals intelligence and cryptologic agency. As part of its mandate, CSE acquires foreign intelligence information on activities such as espionage and terrorism conducted by foreign entities who seek to undermine Canada's national prosperity, security and democracy.

3. CSE acquires foreign intelligence through signals intelligence (SIGINT) capabilities within specific limits and conditions from or through the global information infrastructure (GII) – essentially the Internet and telecommunications networks, links and devices. The acquired information is then used, analysed and disseminated for the purpose of providing foreign intelligence to the GC in accordance with its intelligence priorities.

4. CSE's foreign intelligence collection is undertaken within a specific legal framework. However, to effectively carry out its activities, it may be necessary for CSE to contravene certain Canadian laws or infringe on the privacy interests of Canadians and persons in Canada. The *CSE Act* allows CSE to acquire foreign intelligence to further Canada's national interests and security while potentially breaching laws and privacy interests by obtaining a foreign intelligence authorization from the Minister, which must be approved by the Intelligence Commissioner.

5. On June 21, 2023, pursuant to subsection 26(1) of the *CSE Act*, the Minister issued a Foreign Intelligence Authorization for [redacted] (Authorization).

6. On June 22, 2023, the Office of the Intelligence Commissioner received the Authorization for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).

7. Based on my review and for the reasons that follow, I am satisfied that the Minister's conclusions made under subsection 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraphs 56(a), (b), (c), (d) and 57 of the Authorization are reasonable. As explained in my decision, I am not satisfied of the reasonableness of the Minister's same conclusions in relation to the class of activities described at paragraph 56(e) of the Authorization.

8. Consequently, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the Authorization, except for the class of activities that it lists at paragraph 56(e).

II. LEGISLATIVE CONTEXT

A. *Communications Security Establishment Act*

9. In June 2019, *An Act respecting national security matters* (referred to as the *National Security Act, 2017*, SC 2019, c 13) came into force and established the Intelligence Commissioner. CSE's authorities and duties were also expanded through the creation of the *CSE Act*, which came into force in August 2019.

10. CSE's mandate has five aspects and foreign intelligence is one of them. Foreign intelligence means information or intelligence about the capabilities, intentions or activities of foreign individual, state, organization or terrorist group, as they relate to international affairs, defence or security (s 2, *CSE Act*).

11. As described in section 16 of the *CSE Act*, CSE may acquire, covertly or otherwise, information from or through the GII, including by engaging or interacting with foreign entities located outside Canada or by using any other method of acquiring information. It may also use, analyse and disseminate the information for the purpose of providing foreign intelligence, in accordance with the GC's intelligence priorities.

12. When undertaking these foreign intelligence activities, CSE is subject to limitations and conditions as set out in the *CSE Act*. Most importantly, the activities in question must not be

directed at a Canadian or at any persons in Canada and they must not infringe the *Canadian Charter of Rights and Freedoms* (*Charter*) (s 22(1), *CSE Act*).

13. Although CSE's activities are directed at foreign entities outside of Canada, CSE may acquire, use and retain information relating to a Canadian or a person in Canada that was obtained in an incidental manner. Incidental collection means "that the information acquired was not itself deliberately sought and that the information-acquisition activity was not directed at the Canadian or person in Canada" (s 23(5), *CSE Act*). Pursuant to section 24 of the *CSE Act*, CSE is required to have measures in place to protect the privacy of Canadians and persons in Canada. I note that incidental collection of Canadian information in past foreign intelligence authorizations authorizing the same activities has been minimal.

14. CSE must also not contravene any other Act of Parliament (pursuant to section 50 of the *CSE Act*, Part VI of the *Criminal Code* does not apply in relation to an interception of a communication under a foreign intelligence authorization) or acquire information from or through the GII that interferes with the reasonable expectation of privacy of a Canadian or a person in Canada (s 22(3), *CSE Act*) – unless such activities are approved by the Minister in a foreign intelligence authorization issued under section 26 of the *CSE Act*.

15. More specifically, subsection 26(1) provides that the Minister may issue a foreign intelligence authorization to CSE that authorizes it, despite any other Act of Parliament or of any foreign state, to carry out, on or through the GII, any activity specified in the authorization in the furtherance of the foreign intelligence aspect of its mandate. As for subsection 26(2), it enumerates the activities that may be included in an authorization.

16. Section 33 of the *CSE Act* describes the requirements for the Chief of CSE to apply for a ministerial authorization. The application must be in writing, it must set out the facts that would allow the Minister to conclude that there are reasonable grounds to believe that the authorization is necessary and that the conditions set out in subsections 34(1) and (2) of the *CSE Act* for issuing it are met.

17. The ministerial authorization provides the grounds for which the authorization is necessary as well as the activities or classes of activities that would be authorized for CSE to carry out. The Minister may issue the foreign intelligence authorization if, among other conditions, she concludes the proposed activities are reasonable and proportionate.

18. The ministerial authorization is only valid once approved by the Intelligence Commissioner (s 28(1), *CSE Act*). It is only then that CSE may carry out the authorized activities specified in the authorization.

B. *Intelligence Commissioner Act*

19. Pursuant to section 12 of the *IC Act*, the role of the Intelligence Commissioner is to conduct a quasi-judicial review of the Minister's conclusions on the basis of which certain authorizations, in this case a foreign intelligence authorization, are issued to determine whether they are reasonable.

20. Section 13 of the *IC Act* relating to the issuance of a foreign intelligence authorization states that the Intelligence Commissioner must review whether the conclusions of the Minister made under subsections 34(1) and (2) of the *CSE Act*, on the basis of which the authorization was issued, are reasonable.

21. The Minister is required by law to provide to the Intelligence Commissioner all information that was before her as the decision maker (s 23(1), *IC Act*). As established by the Intelligence Commissioner's jurisprudence, this also includes any verbal information reduced to writing, including ministerial briefings. The Intelligence Commissioner is not entitled to Cabinet confidences (s 26, *IC Act*).

22. In accordance with section 23 of the *IC Act*, the Minister confirmed in her cover letter that all materials that were before her when issuing the Authorization have been provided to me. Thus, the record before me is composed of:

    a. The Authorization dated June 21, 2023;
    b. The Chief's Application dated June 7, 2023, which includes seven annexes;
    c. Briefing Note to the Minister from the Chief of CSE dated June 7, 2023;

d. Summary – Activities Overview 2023–24; and
e. Presentation deck to the Intelligence Commissioner and staff.

III. STANDARD OF REVIEW

23. The *IC Act* requires the Intelligence Commissioner to review whether the Minister's conclusions are reasonable. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard that applies to judicial review of administrative action is the same standard that applies to reviews conducted by the Intelligence Commissioner.

24. 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.

25. Relevant factual and legal constraints include the governing statutory scheme, the impact of the decision and the 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 *CSE Acts*.

26. A review of the *IC Act* and the *CSE Act*, as well as legislative debates, shows that Parliament created the role of the Intelligence Commissioner as an independent mechanism to ensure that governmental action taken for the purposes 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.

27. When the Intelligence Commissioner is satisfied that the Minister's conclusions at issue are reasonable, he "must approve" the authorization (s 20(1)(a), *IC Act*). Conversely, where unreasonable, the Intelligence Commissioner "must not approve" the authorization (s 20(1)(b), *IC Act*).

28. In the context of a foreign authorization issued pursuant to section 26 of the *CSE Act* – which is the matter before me – the Intelligence Commissioner's jurisprudence has established that the Intelligence Commissioner can "partially" approve an authorization (File 2200-B-2022-01, pp 10-11).

29. 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, c F-7.

IV. ANALYSIS

30. On June 7, 2023, the Chief submitted an Application for a Foreign Intelligence Authorization for [redacted] (Application). The Application describes the activities and classes of activities that can be used by CSE to [redacted] The Application explains that such activities allow CSE to [redacted]

31. A description of the activities included in the Application can be found in the classified annex to this decision (Annex A). Including this information in a classified annex renders the eventual public version of this decision easier to read and ensures that the decision contains the nature of the facts that were before me, which would otherwise only be available in the record.

32. I would also like to note that although the record stands on its own, my understanding of the activities has been bolstered by presentations provided by CSE to myself and my staff in a forum where questions, not directly related to a specific file, can be asked (s 25, *IC Act*).

33. Based on the facts presented in the Application, and generally in the record, the Minister concluded that there are reasonable grounds to believe that this Authorization is necessary. She concluded that without the Authorization, CSE would be unable to conduct the activities and classes of activities that enable CSE to access the GII and acquire information that would otherwise not be available. Such information allows CSE to create intelligence reporting, conduct research, and develop new capabilities, which also benefits international partners who in return provide CSE with technology and capabilities. The Minister also concluded that the conditions laid out in subsections 34(1) and (2) of the *CSE Act* were met.

34. I must review whether the Minister's conclusions made under subsections 34(1) and (2) and on the basis of which the Authorization was issued under subsection 26(1) of the *CSE Act* – are reasonable.

A. Subsection 34(1) of the *CSE Act* – Determining whether the activities are reasonable and proportionate

i. The meaning of reasonable and proportionate

35. Pursuant to subsection 34(1) of the *CSE Act*, for the Minister to issue a foreign intelligence authorization, she must conclude that "there are reasonable grounds to believe that any activity that would be authorized by it is reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the activities."

36. Determining whether an activity is "reasonable" under subsection 34(1) is part of the Minister's obligation and is distinct from the "reasonableness" review conducted by the Intelligence Commissioner. The Minister concludes that any activity that would be authorized by the Authorization is reasonable by applying her understanding of what the term means. The Intelligence Commissioner determines whether the Minister's conclusions are reasonable by conducting a quasi-judicial review and applying the reasonableness standard of review, explained previously.

37. Determining whether an activity is reasonable and proportionate under subsection 34(1) is a contextual exercise. The Minister may be of the view that the context calls for a number of factors to be considered. Nevertheless, for the Minister's conclusions to be reasonable, I am of the view that her understanding of the meaning of the terms "reasonable" and "proportionate" must at least reflect the following underlying considerations.

38. The Intelligence Commissioner's jurisprudence has stated that the notion of "reasonable" pursuant to subsection 34(1) includes an activity that is fair, sound, logical, well-founded and well-grounded having regard to the objectives to be achieved. The notion also entails that the activity must be legal in the sense that it must be permissible under the statute. The Intelligence Commissioner's role is limited to reviewing the reasonableness of the ministerial conclusions. If a foreign intelligence authorization included activities that the statute does not allow the Minister to include, I am of the view that such a conclusion would be reviewable under the "reasonable" criterion.

39. In essence, a reasonable activity is one that is authorized by the *CSE Act* and that has a rational connection with its objectives. The objectives of the activity must align with the legislative objectives. In the context of this Authorization, this means that the objectives of the activities that would be authorized must contribute to the furtherance of CSE's foreign intelligence mandate.

40. As for the notion of "proportionate", it entails a balancing of the interests at play. A useful comparison is the balancing conducted in a reasonableness review where *Charter* rights are at issue. In that context, a decision maker must balance *Charter* rights with the statutory objectives by asking how those rights will be best protected in light of those objectives (see for example *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55-58). It is not sufficient to simply balance the protections with the statutory objectives. A reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 80-82).

41. Adopted to our context, it requires that the Minister perform the balancing exercise and finds that the activities that would be permissible under the Authorization be minimally impairing on the privacy interests of Canadians and persons in Canada. It is also important that the acquisition and use of foreign intelligence does not outweigh the impact of any potential breaches to Acts of Parliament. If necessary to achieve these purposes, measures should be in place to restrict the acquisition, retention and use of that information.

ii. Reviewing the Minister's conclusions that the activities are reasonable

42. The Application explains how CSE's activities fulfill the objective of acquiring foreign intelligence in accordance with the GC's intelligence priorities, as described in the *Ministerial Directive to CSE on the Government of Canada Intelligence Priorities for 2021–2023*, and the *National SIGINT Priority List*. Further, the Application indicates how the Chief proposes CSE will use, analyse, retain, and disclose the acquired information.

43. The Minister concluded in the Authorization that she had reasonable grounds to believe "that the activities authorized in this Authorization are reasonable given the objective of acquiring information from the GII for the purpose of providing foreign intelligence in accordance with the GC's intelligence priorities." The Minister explained that the activities in question are [redacted] Operational plans and risk assessments ensure that CSE's activities are conducted in ways that respond to the intelligence priorities of the GC.

44. In the context of this Authorization, [redacted], the Minister authorizes CSE to [redacted] The activities are [redacted] These activities may also result in similar contraventions of other Acts of Parliament and interferences with privacy interests.

45. While some of the activities and classes of activities enable CSE to acquire information, others support the acquisition of such information against foreign targets located outside Canada. Given the risks associated with some activities, CSE will only make use of them "when there is no other reasonable way to acquire the information."

46. With respect to the specific activities and classes of activities enumerated at paragraphs 56(a), (b), (c), and 57 of the Authorization, I find reasonable the Minister's conclusions that they are reasonable. The activities are described with specificity, showing the Minister understands how they will be conducted. In addition, there is a clear rational connection between the proposed activities and their objective – collection of foreign intelligence. It is evident in the record that the specific activities contribute to CSE's foreign intelligence mandate and are permissible under the statute.

47. My analysis with respect to the class of activities found at paragraph 56(d) of the Authorization is slightly different. This class of activities consists of "doing anything reasonably necessary to maintain the covert nature of the activities set out in the Application". This class falls within paragraph 26(2)(d) of the *CSE Act*, which contains similar wording. Although it is not as specific as the activities or classes of activities listed at paragraphs 56(a), (b) and (c) of the Authorization, I am of the view that the record reflects what types of activities could fall in this class – [redacted] The Minister's conclusions and the record show that she understands the nature of the activities to be conducted. Indeed, the class is sufficiently specific for CSE employees to understand the activities that they may lawfully carry out, as it is understood by the Minister. Consequently, the Minister's conclusion is reasonable that the class of activities described in paragraph 56(d) is reasonable.

48. However, I am of the view that the Minister's conclusion is not reasonable relating to the class of activities listed in paragraph 56(e) of the Authorization, which states the following:

> carrying out any other activity that is reasonable in the circumstances and reasonably necessary in aid of any other activity, or class of activity, authorized by this Authorization. In doing so, should CSE conduct activities that are outside the scope of what is described in paragraph 56(a)-(d) above, CSE will notify me.

49. I made the same determination in File 2200-B-2023-04 regarding the Minister's conclusions made in relation to the identical class of activity. I will not repeat my full reasons, but would nevertheless like to reiterate some salient elements that apply in this instance.

50. Paragraph 26(2)(e) of the *CSE Act* states that CSE may carry out "any other activity that is reasonable in the circumstances and reasonably necessary in aid of any other activity, or class of activity, authorized by the authorization" (emphasis added). This paragraph is similar to paragraph 56(e) of the Authorization except for the fact that the Minister adds that: "In doing so, should CSE conduct activities that are outside the scope of what is described in paragraphs 56(a)-(d) above [namely all of the authorized activities], CSE will notify me."

51. Paragraph 26(2)(e) of the *CSE Act* requires that the activity "is reasonable in the circumstances" and "is reasonably necessary". In my view, this requires a thorough examination of the context to determine whether the activity is justified.

52. For the issuance of an authorization, the legislation therefore requires that the Minister must conclude, pursuant to subsection 34(1), that there are reasonable grounds to believe the authorized activities are reasonable. For the Minister to have reasonable grounds to believe that the activities that fall within paragraph 26(2)(e) are reasonable, she must be satisfied that CSE will meet the respective provisions' threshold when carrying out the activities. If the Minister's conclusions reflect those elements, and I find the conclusions reasonable, the activities will be approved.

53. The purpose of obtaining ministerial authorization and approval from the Intelligence Commissioner for otherwise unlawful activities is to strike a proper balance between intelligence collection activities and the rights of Canadians and persons in Canada. Given that paragraph 26(2)(e) of the *CSE Act* allows for "any other activity" to be carried out in aid of any other authorized activity, it is especially important for the Minister to have a solid understanding of what the authorized activity consists of. As the decision maker, she has the statutory responsibility to understand what she authorizes. In my role as gatekeeper, I have the responsibility to ensure that the Minister understands the nature of the activities she is authorizing.

54. For this reason, in File 2200-B-2023-01 [*IC Foreign Intelligence Decision 2023-01*], I wrote at paragraph 80:

> I add that paragraph 26(2)(e) of the *CSE Act* is broadly worded. I would expect that a Minister being asked to include activities that would be covered by paragraph 26(2)(e) would be provided with some details and have a solid understanding of the types of activities in question.

55. In paragraph 56(e) of the Authorization, the Minister issues a blanket authorization for activities that are "reasonable in the circumstances", "reasonably necessary in aid of any other activity" and that fall "outside the scope" of the specific activities she has authorized. She also asks to be notified should they be conducted.

56. Notification after the fact means that the Minister would have been unaware of the nature of the activity prior to CSE carrying it out. Further, if the activity is "outside the scope" of the authorized activities, approval from the Intelligence Commissioner, which is an integral part of the authorization process for the acquisition of foreign intelligence, would not have been obtained.

57. I am of the view that the basket clause at paragraph 56(e) of the Authorization, as worded, does not allow the Minister to have sufficient understanding of unlawful activities that could be carried out under it. I am of the view that the Minister is delegating to CSE her statutory authority under subsection 34(1) of the *CSE Act* to determine whether the activities are reasonable. If the Minister in her role of decision maker does not know what the unlawful activities may be, she cannot logically authorize them.

58. Replicating the exact wording of paragraph 26(2)(e) of the *CSE Act* as a "catch-all" clause in the Authorization does not provide the Minister with sufficient specificity to understand the activities that would be "outside the scope" of the other activities in the Authorization. The Minister's conclusions do not provide insight into what these activities could be.

59. Further, a basket clause stating that any other activity that only CSE will determine to be reasonable in the circumstances and reasonably necessary does not help the Minister understand what kind of activities these may be.

60. The specific activities that CSE knows will be reasonably necessary and in support of the foreign intelligence acquisition activities are set out in the Authorization. CSE has been carrying out these activities pursuant to a foreign intelligence authorization since 2019. By this point in time, the record shows that CSE has a solid understanding of the types of activities that may be reasonable in the circumstances and reasonably necessary in support of the techniques outlined in the Authorization. While CSE may not be able to describe in detail every specific activity in aid of any other activity, or class of activity when applying for a foreign intelligence authorization, the Minister must at least be able to understand the types of activities that she is authorizing to adequately evaluate the impact on the rule of law and on the privacy interests of Canadians or persons in Canada.

61. Paragraph 56(e) of the Authorization does not allow for that and therefore, I find unreasonable the Minister's conclusions that this class of unknown activities is reasonable.

iii. Reviewing the Minister's conclusions that the activities are proportionate

62. The Minister concluded in the Authorization that she had reasonable grounds to believe the activities authorized are "proportionate given the manner in which they are conducted." The Minister explained that the activities are "subject to measures and controls that limit CSE's acquisition of information to those activities which are relevant in the fulfilment of its foreign intelligence mandate."

63. CSE activities are governed by its policies. They are also subject to an internal compliance program that verifies whether the activities comply with the Authorization and policies. Prior to conducting activities, CSE must reasonably believe the targets to be of foreign intelligence interest. Specific techniques are used to direct the activities at those targets, therefore limiting the possibility of acquiring information related to a Canadian or a person in Canada.

64. As indicated by the Minister, all activities, regardless of duration, are conducted under an approved and tailored operational plan and risk assessment included in the SIGINT Operations Risk Acceptance Form (SORAF). The SORAF's purpose is to describe the

elements of the proposed activity to be conducted by CSE to determine consistency with GC intelligence priorities and whether it is proportionate to the objectives to be achieved. The SORAF is also used to assess risks associated with an activity and to identify the appropriate level of approval authority.

65. The Acts of Parliament that may potentially be contravened, and in particular the specific provisions of those Acts, are limited in number. Further, I am of the view that any concrete impact on the Canadian public will be limited. That is not to say that the potential offences are not serious. Rather, CSE proposes to carry out its activities in a way that will minimize any potential offences. As such, I am satisfied that should an Act of Parliament be contravened, the impact of the breach will be narrow and proportional to the objectives to be achieved.

66. For example, CSE will seek to collect information where there is no, or as little Canadian related information as possible. Further, if private communications are intercepted involving a Canadian, they will only be retained pursuant to the limited exceptions in the *CSE Act*. Indeed the record provides some key outcomes resulting from the ministerial authorization approved in 2022. Considering the amount of communications that were acquired through CSE's activities, information relating to Canadians is minimal.

67. I am satisfied that the Minister's conclusions are reasonable that the authorized activities would be proportionate. The record clearly reveals that the Minister considered CSE policies and practices in place. She was clearly aware of the privacy interests at issue and laid out the measures in place to protect them. Consequently, she came to the conclusion that the proposed activities do not outweigh any potential impairment of Canadian privacy interests. That being said, it goes without saying that the class of unknown activities set out at paragraph 56(e) of the Authorization cannot be found to be proportionate given my earlier finding.

B. Subsection 34(2) of the *CSE Act* – Conditions for authorization

68. Subsection 34(2) of the *CSE Act* provides that the Minister may issue an authorization for foreign intelligence activities only if she concludes that there are reasonable grounds to believe that the three listed conditions are met, namely:

    a. any information acquired under the authorization could not reasonably be acquired by other means and will be retained for no longer than is reasonably necessary;
    b. any unselected information acquired under the authorization could not reasonably be acquired by other means, in the case of an authorization that authorizes the acquisition of unselected information; and
    c. the measures referred to in section 24 will ensure that information acquired under the authorization that is identified as relating to a Canadian or a person in Canada will be used, analysed or retained only if the information is essential to international affairs, defence or security.

i. Any information acquired under the authorization could not reasonably be acquired by other means (s 34(2)(a))

69. In the Authorization, the Minister explains that the activities included are highly technical in nature. [redacted].

70. Further, the activities set out in the Authorization allow for [redacted]

71. As a result, I find reasonable the Minister's conclusion that without the specified activities, the information proposed to be acquired pursuant to the Authorization would not reasonably be available to CSE.

ii. Any information acquired under the authorization will be retained for no longer than is reasonably necessary (s 34(2)(a))

72. The Authorization describes how information assessed for the purposes of foreign intelligence is subject to limited access and is retained pursuant to CSE policy and in accordance with the *Library and Archives of Canada Act*, SC 2004, c 11 (*LAC Act*). A retention schedule for the different categories of information that may be collected is included and the Minister concluded that the information will be retained for no longer than is necessary.

73. Essentially, I understand that CSE's objective is to assess collected information without significant delay and to retain information only as long as it is useful. For the most part, the Minister explains how certain retention periods have been chosen. Further, the Minister explains the basis for which certain types of information can be retained for longer than [redacted] She also indicates that CSE's systems are designated to automatically delete or overwrite the information at the end of any expiration period. For operational reasons, information may be deleted earlier than the maximum retention period.

74. As a whole, I find that the Minister's conclusions with respect to retention of information for no longer than is reasonably necessary are clear and rationally connected to the retention period.

75. Of note, if the content of information has a recognized Canadian privacy interest and is assessed as essential to international affairs, defence, or security, including cybersecurity, it can be retained for "as long as is reasonably necessary."

76. I made a remark in my decision in *IC Foreign Intelligence Decision 2023-01* to the effect that this criterion of "as long as is reasonably necessary" entails that periodic reviews of the information are conducted, but that the record did not explain how often they occurred. The Minister addressed my remark in this Authorization by indicating that:

> On a quarterly basis, operational managers must review all recognized information related to a Canadian or person in Canada retained in a CSE repository to revalidate whether the information is still essential to international affairs, defence, or security, including cybersecurity. Information that is no longer essential must be deleted.

iii. Any unselected information acquired under the authorization could not reasonably be acquired by other means (s 34(2)(b))

77. When conducting activities for the purpose of collecting foreign intelligence, the *CSE Act* requires that particular attention be given to unselected information that is acquired. As defined in section 2 of the *CSE Act*, unselected information is information acquired without the use of terms or criteria to identify foreign intelligence interest. CSE acquires unselected information for technical and operational reasons. However, some of the information acquired during the process may incidentally contain Canadian privacy interests.

78. [redacted]

79. I am therefore of the view that the Minister had reasonable grounds to believe that unselected information could not be reasonably acquired by other means.

iv. Measures to protect privacy will ensure that information acquired under the authorization identified as relating to a Canadian or a person in Canada will be used, analysed or retained only if the information is essential to international affairs, defence or security (s 34(2)(c))

80. The Minister's conclusions describe the measures in place to protect the privacy interests of Canadians and persons in Canada, which consist of CSE policies related to the retention, use and disclosure of information. As a result, the adequacy of the measures, and therefore the reasonableness of the Minister's conclusions, rests on the strength of the policies and the robustness of their application.

81. The record describes that information relating to a Canadian or a person in Canada can only be retained if it is assessed to be essential to international affairs, defence or security, including cybersecurity. The Authorization explains that information is essential:

> if without that information CSE would be unable to provide foreign intelligence to the GC, including by understanding a foreign entity's identity, location, behavioral

> patterns, capabilities, intentions, or activities, or is necessary for comprehension of that information in its proper context. This may also include information that is retained in order to prevent inadvertent selection of information related to Canadians or persons in Canada (i.e. the information is retained in order to ensure that Canadians, their devices and activities are appropriately protected).

82. In response to a remark made in my *IC Foreign Intelligence Decision 2023-01* that a greater understanding of the operational definitions of what constitutes international affairs, defence and security, including cybersecurity would be beneficial, CSE specifies that its definition of essential provided above is:

> an appropriate approach to operationalizing the threshold of essential to international affairs, defence and security, including cybersecurity, because the activities it conducts under the foreign intelligence aspect of its mandate are statutorily bound by section 16 of the *CSE Act* to the GC intelligence priorities. The GC intelligence priorities help provide an understanding of Cabinet's views on what is of relevance to international affairs, defence and security, including cybersecurity, by articulating their intelligence priorities within those spaces. Thus, if information is essential to understand the meaning or import of foreign intelligence, and that foreign intelligence supports GC intelligence priorities, then the information by extension becomes essential to international affairs and defence and security. This approach avoids the difficult task of CSE having to independently define the subjective, regularly-evolving, and context-specific bounds of the terms international affairs, defence and security, and ensures its approach does not result in inconsistencies with how Cabinet views those terms.

83. I am of the view that CSE's definition of "essential" and the explanation provided is reasonable. Although the Minister does not include this definition in her conclusions, which would have been preferable, I am satisfied that it falls within a range of interpretations that could be reasonable given the purpose of paragraph 34(2)(c) of the *CSE Act*.

84. In addition to describing when information with a Canadian privacy interest is retained, the record provides significant information as to when it is used and disclosed outside of CSE to other government departments and partners. Releasable Canadian identifying information will be suppressed, meaning that it is anonymized with a generic term such as "named Canadian", unless the information is necessary to understand the foreign intelligence. Further, unsuppressed information may only be disclosed if the recipient or class of

recipients have been designated by Ministerial Order, and the disclosure to foreign intelligence partners is essential to international affairs, defence, security or cybersecurity, pursuant to section 43 of the *CSE Act*.

85. CSE also limits access to its information repositories to those who are properly accredited to conduct foreign intelligence activities and have received training on information handling procedures.

86. I am of the view that the record reveals that CSE policies and practices take seriously the retention, analysis and use of information relating to a Canadian or a person in Canada. I am also satisfied that the Minister's conclusions are reasonable that such information will only be retained, analysed and used if it is essential to international affairs, defence or security, including cybersecurity.

V. REMARKS

87. I recognize CSE's effort to integrate remarks that I made in previous decisions, which has been helpful in my review of the file. I would like to make two additional remarks to assist in the consideration and drafting of future of ministerial authorizations. These two remarks do not alter my findings regarding the reasonableness of the Minister's conclusions.

A. Operational plans and risk assessments

88. From my review of the SORAF template found in the record as well as *CSE's Mission Policy Suite: Foreign Intelligence*, I understand that the SORAF is an important tool used by CSE to assess the overall risk of the activity to be conducted. In the section titled "Privacy protection" of the SORAF, CSE must justify why the activity is not expected to lead to the collection or sharing of any information about a Canadian or a person in Canada. CSE must also describe, if applicable, what relevant measures will be taken by CSE to protect Canadian privacy interests in the course of the activity.

89. Section 3 of the *CSE Act* recognizes that it is in the "public interest" for the law to allow CSE employees to commit acts that would otherwise constitute offences while carrying out

authorized activities. Section 49 of the *CSE Act* expressly provides civil and criminal immunity to a person, which includes an employee, "who acts in accordance with an authorization." The SORAF is used to internally approve activities that are authorized in the Authorization. The SORAF therefore guides the conduct of the activities. It is important that the activities be specifically delineated to protect CSE employees from liability when carrying out otherwise unlawful activities or activities that may infringe on Canadian privacy interests. It also ensures, in the public interest, that CSE is effectively carrying out its mandate in accordance with the rule of law.

90. I note that SORAFs are approved internally by CSE and by the Minister only for activities that are evaluated to carry a very high overall risk. I trust from the Minister's comments and the whole of the record that all SORAFs are thoroughly completed in order to provide CSE employees with sufficient detail to understand the expected beneficial outcome of conducting the activity, the risks of engaging, or not, in the activity, the relevant legal considerations and the measures taken to protect Canadian privacy interests. To support the Minister and myself in fulfilling our roles, it would be useful to obtain a better understanding of the information included in a SORAF. Past examples would be helpful.

B. Reports containing Canadian identifying information

91. The record provides some key outcomes resulting from the ministerial authorization approved in 2022. I understand that CSE produced a small number of reports containing Canadian identifying information and retained some private communications of Canadians or persons in Canada that were incidentally acquired.

92. To obtain a better understanding of the impact on Canadian privacy interest, I am of the view that it would be beneficial for the Minister and myself to obtain further details of the nature of this information, without including the actual identifying information of the individual or the Canadian entity. General examples of the types of information and CSE's rationales for retaining it would increase the awareness of the concrete impact on privacy interests of Canadians, which will help in fulfilling our respective roles.

VI. CONCLUSIONS

93. Based on my review of the record submitted, I am satisfied that the Minister's conclusions made under subsections 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraphs 56(a), (b), (c), (d) and 57 of the Authorization are reasonable.

94. I am not satisfied that the conclusions made under subsections 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraph 56(e) of the Authorization are reasonable.

95. I therefore approve the Minister's Foreign Intelligence Authorization for [redacted] dated June 21, 2023, pursuant to paragraph 20(1)(a) of the *IC Act*, except for the activities listed at paragraph 56(e) of the Authorization.

96. As indicated by the Minister, and pursuant to subsection 36(1) of the *CSE Act*, this Authorization expires one year from the day of my approval.

97. 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.

July 18, 2023

(Original signed)
The Honourable Simon Noël, K.C.
Intelligence Commissioner