

File: 2200-B-2024-03



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

INTELLIGENCE COMMISSIONER
DECISION AND REASONS

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

JULY 9, 2024

TABLE OF CONTENTS

I.	OVERVIEW	1
II.	CONTEXT	2
III.	STANDARD OF REVIEW	4
IV.	ANALYSIS	5
	A. Subsection 34(1) of the CSE Act – Determining whether the activities are reasonable and proportionate	7
	i. <i>The meaning of reasonable and proportionate</i>	7
	ii. <i>Reviewing the Minister’s conclusions that the activities are reasonable</i>	7
	iii. <i>Reviewing the Minister’s conclusions that the activities are proportionate</i>	8
	B. Subsection 34(2) of the CSE Act – Conditions for issuing an authorization	9
	i. <i>Any information acquired under the authorization could not reasonably be acquired by other means (s 34(2)(a))</i>	10
	ii. <i>Any information acquired under the authorization will be retained for no longer than is reasonably necessary (s 34(2)(a))</i>	10
	iii. <i>Any unselected information acquired under the authorization could not reasonably be acquired by other means (s 34(2)(b))</i>	11
	iv. <i>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))</i>	12
V.	REMARKS	14
	A. Retention of metadata	14
	B. Additional details on CII and essentiality rationales	16
	C. SORAF.....	16
VI.	CONCLUSIONS	17
ANNEX A		

I. OVERVIEW

1. This is a decision reviewing the conclusions of the Minister of National Defence (Minister) in relation to a Foreign Intelligence Authorization for [...] (Authorization) issued pursuant to the *Communications Security Establishment Act*, SC 2019, c 13, s 76 (*CSE Act*).
2. The Communications Security Establishment (CSE) is the Government of Canada's (GC) signals intelligence (SIGINT) and cryptologic agency. As part of its mandate, CSE collects information with foreign intelligence value.
3. This information is collected from or through the global information infrastructure (GII) – essentially the Internet and telecommunications networks, links and devices. The collected information is then used, analysed and disseminated for the purpose of providing foreign intelligence to the GC in accordance with its intelligence priorities.
4. To be effective, CSE's foreign intelligence activities may have to contravene Canadian laws or infringe on the privacy interests of Canadians and persons in Canada. In those circumstances, CSE must first obtain an authorization issued by the Minister. The Intelligence Commissioner must then approve the activities or classes of activities set out in the ministerial authorization if satisfied that the Minister's conclusions supporting the authorization are reasonable (*Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*)). The ministerial authorization is valid for up to one year following the Intelligence Commissioner's approval.
5. On July 18, 2023, I partially approved a ministerial authorization for foreign intelligence (Decision 2200-B-2023-03). I did not approve one of the classes of activities set out in the authorization on the basis that the Minister's conclusions did not exhibit a sufficiently clear understanding of them. More specifically, the class of activities replicated the broad wording found in paragraph 26(2)(e) of the *CSE Act*, which states that an authorization may permit CSE to 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."

Further, the description of the class indicated that if CSE conducted activities that fell outside the scope of the other authorized activities, CSE would notify the Minister. I concluded that the Minister was effectively issuing a blanket authorization for activities that fall “outside the scope” of the other activities explicitly set out in the authorization. Being notified after the fact meant that the Minister would not be sufficiently aware of the nature of the activity before CSE carried it out. Further, if the activity in question is “outside the scope” of the authorized activities, approval from the Intelligence Commissioner – who plays an integral part of the authorization process – would not have been obtained.

6. On June 11, 2024, pursuant to subsection 26(1) of the *CSE Act*, the Minister issued the Authorization. This is the sixth authorization for these types of activities since the coming into force of the *CSE Act* in August 2019.
7. On June 12, 2024, the Office of the Intelligence Commissioner received the Authorization for my review and approval under the *IC Act*.
8. Based on my review and for the reasons that follow, 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 58 and 59 of the Authorization are reasonable.
9. Consequently, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the Authorization for [REDACTED].

II. CONTEXT

10. Foreign intelligence is one of the five aspects that make up CSE’s mandate (s 15, *CSE Act*). A detailed legislative context of CSE’s collection of foreign intelligence on or through the GII is set out in past decisions.
11. In summary, CSE may acquire, covertly or otherwise, information from or through the GII that provides intelligence about foreign targets located outside of Canada (s 16, *CSE Act*). The information is acquired based on CSE foreign intelligence priorities or for technical or operational reasons that support its foreign intelligence mandate.

12. Foreign intelligence constitutes information about the capabilities, intentions or activities of foreign targets in relation to international affairs, defence or security, including cybersecurity (s 2, *CSE Act*). As defined by CSE, a target is “a specific foreign entity whose activities are of interest to the GC, such as foreign individual, state, organization, or terrorist group.”
13. Where CSE’s foreign intelligence collection activities may contravene laws of Canada, or lead to the incidental acquisition of information that infringes on the reasonable expectation of privacy of a Canadian or a person in Canada, CSE must obtain a ministerial authorization (s 26, *CSE Act*). Incidental acquisition 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*).
14. The Minister must, among other conditions, conclude that the proposed activities are necessary (s 33(2), *CSE Act*), reasonable and proportionate, and that measures are in place to protect the privacy of Canadians (s 34, *CSE Act*). The ministerial authorization is only valid once approved by the Intelligence Commissioner (s 28(1), *CSE Act*).
15. Even with an authorization, CSE is prohibited from directing its activities at a Canadian or any person in Canada and infringing a right guaranteed by the *Canadian Charter of Rights and Freedoms (Charter)* (s 22(1), *CSE Act*). Further, CSE is required by the *CSE Act* to have measures in place to protect the privacy of Canadians and persons in Canada (s 24, *CSE Act*).
16. In accordance with section 23 of the *IC Act*, the Minister confirmed in his cover letter that he provided me with all information that was before him when issuing the Authorization. The record is therefore composed of:
 - a) The Authorization dated June 11, 2024;
 - b) Briefing Note from the Chief of CSE to the Minister dated May 31, 2024;
 - c) The Chief of CSE’s Application dated May 31, 2024, including seven annexes:
 - i) Ministerial Directive – Government of Canada Intelligence Priorities for 2023-2025;
 - ii) National SIGINT Priorities List;
 - iii) Outcomes Report of activities 2023;

- iv) SIGINT Operations Risk Acceptance Form (SORAF);
 - v) Mission Policy Suite – Foreign Intelligence approved February 18, 2021 (MPS FI);
 - vi) Summary of CSE’s Measures to Protect the Privacy of Canadians; and
 - vii) Ministerial Order – Designations for the purpose of section 43, *CSE Act*.
- d) Briefing Deck – Overview of the Activities; and
- e) Deck presentation to the Intelligence Commissioner and staff in relation to SORAFs.

III. STANDARD OF REVIEW

17. Pursuant to section 12 of the *IC Act*, the Intelligence Commissioner conducts 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.
18. The Intelligence Commissioner’s jurisprudence establishes that the reasonableness standard, as applied to judicial reviews of administrative action, applies to my review.
19. As indicated by the Supreme Court of Canada, when conducting a reasonableness review, a reviewing court is to start its analysis by examining the reasons of the administrative decision maker (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, para 79). In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 99, the Court 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.
20. Relevant factual and legal constraints can 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*.

21. A review of the *IC Act* and the *CSE Act*, in addition to legislative debates, show that Parliament created the role of the Intelligence Commissioner as an independent mechanism to ensure that government action taken for the purpose of national security and intelligence was properly balanced with respect for 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. While reviewing the Minister's conclusions, I am to carefully examine whether the important privacy and other interests of Canadians and persons in Canada were appropriately considered and weighed as well as to ensure that the rule of law is fully respected.
22. When the Intelligence Commissioner is satisfied (*convaincu* in French) 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*).

IV. ANALYSIS

23. On May 31, 2024, the Chief of CSE (Chief) submitted a written Application for a Foreign Intelligence Authorization for [...] (Application) to the Minister. The Application sets out the foreign intelligence activities that could be conducted by CSE to [...]. These activities could contravene Canadian laws or interfere with the reasonable expectation of privacy of Canadians or persons in Canada.
24. Based on the facts presented in the Application submitted by the Chief, the Minister concluded, in accordance with subsection 33(2) of the *CSE Act*, that there are reasonable grounds to believe that the Authorization is necessary and that the conditions of subsections 34(1) and (2) of the *CSE Act* were met.
25. A description of the activities included in the Authorization 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 otherwise would only be available in the record.

26. The activities set out at paragraphs 58 and 59 of the Authorization are the same as those approved last year, except that CSE did not include the class of activities I did not approve, outlined in the Overview section of this decision. CSE clarified that in the upcoming Authorization period, no activities are proposed or planned to be conducted under that specific class of activities.
27. Although the activities set out in the Authorization are the same as those approved last year, this year's Authorization groups the activities into three classes of activities as opposed to four. As explained by CSE, two classes of activities use [...] and may be conducted under the same operational plan and risk assessment. They were therefore integrated into a single class. The three classes of activities are included in the same authorization because they involve similar approaches to [...] as well as similar legal, policy, reputational, partnership, and operational risks. These activities may also result in similar contraventions of Acts of Parliament and interferences with privacy interests.
28. I am satisfied that the current record addresses most comments made last year and in my recent decision on foreign intelligence rendered on April 4, 2024 (2200-B-2024-01). This Authorization includes more details in the Outcomes Report on Canadian Identifying Information (CII) included in intelligence reports, as well as on reports shared with international partners. It also provides some additional details with respect to one of the classes of activities.
29. As set out in section 13 of the *IC Act* relating to the issuance of a foreign intelligence authorization, I must review whether the Minister's conclusions made under subsections 34(1) and (2) of the *CSE Act*, 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

30. In addition to finding that a foreign intelligence authorization is necessary, the Minister must conclude that “there are reasonable grounds to believe that any activity (*activité en cause* in French) 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” (s 34(1), CSE Act). The Minister must arrive at his conclusions by applying his understanding of what those thresholds entail. Determining whether an activity is reasonable and proportionate is a contextual exercise and the Minister may consider a number of factors.

31. Nevertheless, I am of the view that the understanding of both thresholds must minimally reflect certain fundamental elements. A reasonable activity must be authorized by a reasonable interpretation of the legislation and have a rational connection with its objectives. As for the notion of “proportionate”, it entails conducting a balancing of the interests at play.

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

32. The Minister concluded, at paragraph 3 of the Authorization, that he had reasonable grounds to believe that the activities 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.”

33. The Minister explains that CSE acquires information only to the extent needed to respond effectively to the GC’s intelligence priorities. The activities in question are [REDACTED]. Indeed, last year’s activities enabled CSE to produce various reports linked to the intelligence priorities.

34. While some of the activities enable CSE to [REDACTED] acquire information of foreign intelligence value, others support furthering the foreign intelligence collection activities. 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. The Minister effectively relies on the Chief’s explanation that “these activities represent a fair, sound, logical, and well-founded means to achieve the objective of acquiring information from the GII”.

35. I find the Minister's conclusions reasonable. It demonstrates that he understands the nature of the activities to be conducted. The classes of activities are also sufficiently specific for CSE employees to understand the activities that they may lawfully carry out. There is a rational connection between the activities and the objective of collecting foreign intelligence from or through the GII for the purpose of providing intelligence to the GC based on its intelligence priorities. The record shows that the specific activities contribute to CSE's foreign intelligence mandate. The Minister understood and explains how the activities set out in the Authorization are necessary for foreign intelligence collection.

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

36. The Minister also concluded at paragraph 3 of the Authorization that he had reasonable grounds to believe the activities authorized are proportionate.

37. I am again satisfied that the Minister's conclusions in this regard are reasonable. The Minister explains that the activities "are subject to measures and controls that limit CSE's acquisition of information to that which is relevant to the fulfillment of its foreign intelligence mandate." The measures and controls include the MPS FI – CSE's policies governing foreign intelligence activities – as well as an internal compliance program that monitors whether the activities comply with the measures specified in the Authorization and CSE policies.

38. The Minister explains that a further control in place is that all activities, regardless of duration, are conducted by CSE under an approved and tailored operational plan and risk assessment included in the SORAF. As clarified by CSE during a briefing provided to me and my staff in January 2024 pursuant to section 25 of the *IC Act*, the SORAF is a document that supports the operational process, but focuses exclusively on risk. The SORAF is the main vehicle of the operational approval process. It is valid for a period of one year following its approval and is used to assess risk, identify mitigation measures, and designate a risk authority. If the associated operation is still required after the one-year period, the risks must be re-assessed, and re-approved by the appropriate authority level.

39. In addition to only acquiring information to the extent needed to respond to the GC's intelligence priorities, the nature of the activities set out in the Authorization is such that they are directed at specific foreign targets. As a result, both the total volume of information collected, as well as the possibility of collecting information that is Canadian-related, is lower than if the targets were broader.
40. The Minister was also aware of the privacy interests at issue and laid out the measures in place to protect them. Consequently, he came to the conclusion that the proposed activities justify any potential impairment of Canadian privacy interests.
41. I am satisfied that the Minister conducted a balancing exercise taking into account the objective and nature of the activities. He identifies what he considers are important interests, namely the acquisition of information and the protection of privacy, and explains how the activities sought to achieve a reasonable balance between them. I am satisfied that the interests considered and the balancing conducted is reasonable.
42. With regard to rule of law, I also find that the Minister considered the effects of CSE's activities. The record describes the Acts of Parliament, including, but not limited to the *Criminal Code* and the relevant provisions, that have the potential to be contravened. As explained by the Minister, CSE will carry out its activities in a way that will limit the potential offences and the acquisition of information such as the interception of private communications where the originator has a reasonable expectation of privacy. CSE's [...] activities are planned and aimed at very specific foreign targets, therefore limiting the potential offences and their impact on Canadians and persons in Canada. As a result, I am satisfied that when an Act of Parliament is breached, the impact of the breach will be limited.

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

43. When the Minister finds that the activities are reasonable and proportionate pursuant to subsection 34(1) of the *CSE Act*, the Minister may issue an authorization for foreign intelligence activities only if he also concludes that there are reasonable grounds to believe that the conditions set out at subsection 34(2) of the *CSE Act* are met, namely:

- i. any information acquired under the authorization could not reasonably be acquired by other means;
- ii. any information acquired under the authorization will be retained for no longer than is reasonably necessary;
- iii. 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
- iv. 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))*

44. The Minister explains that the activities set out in the Authorization require high level of technical capabilities and expertise. [...].

45. As a result, I find reasonable the Minister's conclusions that without the Authorization, the information that would be acquired pursuant to the Authorization could not be reasonably acquired by other means.

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

46. As described in the Authorization, information assessed for the purposes of foreign intelligence is subject to limited access by CSE employees authorized to operate under that aspect of the mandate. The information is retained pursuant to section 18.10 of the MPS FI, which contains a retention schedule for the different categories of information that may be collected. It is also retained in compliance with the requirements of the *Privacy Act*, RCS, 1985, c P-21, and the *Library and Archives of Canada Act*, SC 2004, c 11. For operational reasons, information may be deleted earlier than the maximum retention period.

47. As indicated by the Minister, in some cases there are technical and operational reasons for the retention of certain types of information for a longer period, and even indefinitely. In this year's Authorization, the retention period set out by the Minister for a particular type of information has been [...]. The rationale for [...] is straightforward: [...], its usefulness for foreign intelligence purposes goes [...]. I accept the Minister's rationale.

48. I find that the Minister's conclusion establishes a connection between the types of information and their retention period and explains why the different retention periods are reasonably necessary for operational reasons. In my view, the Minister's conclusions that any information acquired under the Authorization will be retained for no longer than is reasonably necessary are reasonable.

49. I note section 18.10 of the MPS FI indicates that Canadian-related information that has been assessed as essential can be retained "as long as is operationally relevant." The Chief's Application indicates that information related to a Canadian or a person in Canada will be deleted when "no longer operationally required." CSE employees giving effect to CSE policies must have a clear understanding of the applicable thresholds. As a result, as similarly noted in Decision 2200-B-2024-01 on Foreign Intelligence, future authorizations would benefit from ensuring consistency in the use and description of applicable thresholds. Any modifications to the MPS FI should be clearly identified in future authorizations to facilitate its review.

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

50. When conducting foreign intelligence activities, CSE may acquire selected or unselected information. Selected information refers to information that is identified as being of foreign intelligence interest at the point of acquisition or from a larger pool of unselected information. The information is identified using specific terms or criteria such as [...]. In contrast, unselected information, pursuant to section 2 of the *CSE Act*, is information acquired without the use of terms or criteria to identify foreign intelligence interest.

51. When acquiring unselected information, all of the information, including any information that could contain Canadian privacy interests, is captured. Consequently, the *CSE Act* requires that particular attention be given to unselected information that is acquired through foreign intelligence activities.

52. As previously explained, the activities in the Authorization would allow CSE to acquire information that it could not otherwise collect. This applies also to unselected information.

53. Further, the value of some of the activities set out in the Authorization depends on acquiring unselected information. As explained by the Minister, CSE uses unselected information to [...]. Unselected information also allows CSE to [...]. Once acquired, CSE may apply selection criteria in order to select any information that may be of foreign intelligence interest. In his conclusion, the Minister also provides examples showing the need for CSE to acquire a range of unselected information for technical and operational use.

54. For these reasons, I am satisfied that the Minister has reasonable grounds to believe that unselected information could not reasonably be acquired by other means with respect to activities set out in the Authorization.

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))

55. The Minister's conclusions describe the measures in place to protect the privacy interests of Canadians and persons in Canada when the foreign intelligence activities result in the incidental acquisition of their personal information. As set out at section 17 of the MPS FI, information relating to a Canadian or a person in Canada can only be used, analysed or retained if it is assessed as essential to international affairs, defence or security interests, including cybersecurity.

56. The record indicates that CSE considers information related to Canadians or persons in Canada to be essential to international affairs, defence or security, including cybersecurity, if it is required to understand the meaning or import of the foreign intelligence being used, analysed, or retained. For example, the information may be retained to ensure that Canadians, their devices, and their activities are appropriately protected. Moreover, information is considered to be essential, if without it, CSE would be unable to provide foreign intelligence to the GC, including by understanding a foreign entity's identity, location, behavioural patterns, capabilities, intentions or activities, or is necessary for the comprehension of that information in its proper context. Section 17 of the MPS FI outlines the essentiality requirements for information relating to Canadians and persons in Canada. Further, the Chief

explains that the GC intelligence priorities help provide an understanding of what is relevant to international affairs, defence, or security interests. If information is required to understand the foreign intelligence, and the foreign intelligence supports the GC's intelligence priorities, the information becomes essential.

57. Although it would have been preferable for the Minister to articulate this rationale in his own conclusions – and I expect that it will be the case in future authorizations – I accept that he has adopted the rationale and I am satisfied that CSE's definition of "essential" is reasonable. As indicated by the Minister, on a quarterly basis, operational managers must review the retained information and revalidate whether it is still essential. Information that is no longer essential must be deleted. In addition, CSE also has a compliance program which monitors that its operations are carried out in accordance with its policies and the conditions of the Authorization.

58. CSE also applies privacy protection measures to information with a Canadian privacy interest that is used and disclosed outside of CSE to other government departments or partners. As explained in the Authorization, releasable foreign intelligence products must meet certain criteria prior to disclosure. The most common privacy protection measure applied by CSE is to suppress releasable CII by replacing it with a generic term such as "named Canadian", unless the information is necessary to understand the foreign intelligence. Other measures include restricted dissemination, handling conditions or caveats. To disclose information that could be used to identify Canadians or persons in Canada, two conditions must be met: 1) the recipient or class of recipients have been designated by Ministerial Order, and 2) the disclosure is essential to international affairs, defence, security or cybersecurity, pursuant to section 43 of the *CSE Act*. I return to the issue of CII in my remarks.

59. Information that is deemed essential is stored in repositories controlled and limited to employees who are properly accredited to conduct foreign intelligence activities and have received training on CSE's authorities, policies, and information handling procedures.

60. I am of the view the Minister's conclusions are reasonable that there are appropriate measures in place to protect the privacy of Canadians. Further, Canadian-related information

will only be retained, analysed and used if it is essential to international affairs, defence or security, including cybersecurity.

V. REMARKS

61. I would like to make three additional remarks to assist in the consideration and drafting of future of ministerial authorizations, which do not alter my findings regarding the reasonableness of the Minister's conclusions.
62. In the Chief's Briefing Note to the Minister, she indicates that two elements of remarks I have made with respect to solicitor-client privilege "have yet to be explicitly addressed." The first is whether solicitor-client privilege can be pierced for reasons of international affairs. I understand that this is a matter for which the Federal Court has heard submissions and for which CSE is awaiting a decision. The second element relates to the Minister of National Defence being responsible for determining whether CSE may use, analyse, retain, or disclose solicitor-client communications. The Chief writes that my remark "appear[s] to be inspired in part by the fact that CSIS must seek direction from the Federal Court (i.e., a judicial officer) to retain solicitor-client communications that are acquired pursuant to a CSIS warrant." I wish to be clear that the concern raised in my remark stems from the nature of solicitor client privilege as a principle of fundamental justice and the applicable principles extracted from jurisprudence. As noted by the Chief, it is a complex issue and CSE continues to work with the Department of Justice to consider this remark. I look forward to receiving the results of CSE's analyses.

A. Retention of metadata

63. In Decision 2200-B-2023-01 relating to Foreign Intelligence, I made a remark with respect to the retention period for metadata. The remark had two components. First, I wrote that it would be helpful in future applications to provide additional details to better understand the rationale for the specific retention period. Second, I highlighted that pursuant to the authorization, if a query of metadata returned information identified as relating to a Canadian or a person in Canada, CSE could keep the results of the query if they satisfied the essentiality test. If the query results were not deemed essential, CSE would delete them,

although CSE would not delete the metadata itself. Rather, the metadata would be returned to the metadata repository on the basis that it could be deemed essential to satisfy other foreign intelligence purposes. I suggested that additional clarification, or an example, would be helpful with respect to this second component.

64. The foreign intelligence authorizations since that decision have included operational examples to demonstrate the value of retaining the metadata – responding to the first component of my remark. Nevertheless, with respect to the second component of my remark, I remain of the view that future applications would benefit from more detailed conclusions on why metadata identified as non essential Canadian-related information in the course of a query would nevertheless be retained – especially in light of the Supreme Court’s decision in *R v Bykovets*, 2024 SCC 6 (*Bykovets*). In that decision, the majority found that in the circumstances of that case, there was a reasonable expectation of privacy in an IP address – which CSE classifies as metadata. In particular, the record should be clearer with respect to how Canadian-related metadata in query results that has been determined not to be essential could nevertheless be essential at a later time.
65. In addition, CSE should provide the Minister and myself with the results of any analysis it has conducted to determine whether *Bykovets* impacts what constitutes a reasonable retention period for metadata that could contain Canadian-related information. I raise this issue because reviewing the MPS FI and taking into consideration the information in the record, at least part of the rationale for a longer retention period with respect to metadata seems to be two-fold: first, metadata does not contain the content of communication, which CSE refers to as the substance of a communication. As a result, any privacy interests in metadata would presumptively not be as high as in information that included “content”. Second, the usefulness of metadata for foreign intelligence purposes may not exist or be apparent at the time of collection. The record does not reflect whether CSE has considered any effect that *Bykovets* may have. I am of the view that consideration should be reflected in a future application given that *Bykovets* recognizes an elevated privacy interest in a type of metadata.
66. More generally, if developments in case law may be relevant to policies or practices within CSE, it should be reflected in the record before the Minister and myself – even if there is

ultimately no change to those practices. It could be relevant to the reasonableness of the Minister's conclusions.

B. Additional details on CII and essentiality rationales

67. In response to my remark made in my last foreign intelligence decision rendered on April 4, 2024, (2200-B-2024-01), CSE provided examples of the types of CII included in intelligence reports. These include, for example, identified and partially identified Canadians, Canadian telephone numbers. I appreciate this additional information. Section 27.7 of the MPS FI as well as the record explain that CSE may release suppressed CII to persons or classes of persons designated to receive it under a Ministerial Order, if the disclosure of the information is essential to international affairs, defence, security or cybersecurity. I note for the improvement of future authorizations that the manner in which the information is presented in the Outcomes Report could benefit from additional clarity with respect to whether the CII in the intelligence reports is suppressed or unsuppressed (and if so, a summary of the outcomes of CII disclosure requests) – the Section 52 end of authorization report presents the information clearly – and how many reports with CII were shared with international partners.

68. I am also of the view that providing contextual information with respect to how the policies that apply to the retention and disclosure of CII would be beneficial for the Minister and myself. I have found that the Minister's conclusions in relation to the privacy protection measures for Canadian-related information are reasonable. Similarly, I have found reasonable CSE's operationalization of the essentiality requirement. Additional specificity of the rationales, or examples of rationales, for the retention and disclosure of CII would allow for a more concrete and practical understanding of why the different types of CII are retained and disclosed, which would strengthen the oversight roles played by the Minister and myself.

C. SORAF

69. In last year's decision (2200-B-2023-03) I made a remark that it would be useful to obtain a better understanding of the information included in a SORAF. CSE provided me and my staff with a briefing pursuant to section 25 of the *IC Act* on the SORAF. Based on that briefing, I

am of the view that the process leading to the internal approval of an activity where a SORAF has been completed is robust and involves decision makers at a high level within CSE.

70. That being said, the record could benefit from tangible examples of how privacy interests are taken into account during the internal risk assessment process. As with the CII, I am of the view that the Minister's and the Intelligence Commissioner's oversight function would be strengthened.

VI. CONCLUSIONS

71. Based on my review of the record, 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 58 and 59 of the Authorization are reasonable.

72. I therefore approve the Authorization pursuant to paragraph 20(1)(a) of the *IC Act*.

73. 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.

74. 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 9, 2024

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner