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File: 2200-B-2024-01

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# 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*

APRIL 4, 2024

Canada

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## I. OVERVIEW

1. This is a decision reviewing the conclusions of the Minister of National Defence (Minister) in relation to a foreign intelligence authorization issued pursuant to the *Communications Security Establishment Act*, SC 2019, c 13, s 76 (*CSE Act*).

2. As part of its mandate, the Communications Security Establishment (CSE) collects information that can be used and analysed to provide foreign intelligence to the Government of Canada in accordance with its intelligence priorities. Pursuant to a foreign intelligence authorization, CSE may collect foreign intelligence through the "global information infrastructure" (GII) – essentially the Internet and telecommunications networks, links and devices – in a manner that contravenes certain Canadian laws and laws of foreign states or infringes on the privacy interests of Canadians and persons in Canada.

3. To carry out foreign intelligence activities through the GII that fall outside the boundaries of the law, CSE must obtain an authorization issued by the Minister. Pursuant to the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*), the Intelligence Commissioner approves the activities or classes of activities set in the ministerial authorization if satisfied that the Minister's conclusions supporting the authorization are reasonable. The ministerial authorization is valid for up to one year following the Intelligence Commissioner's approval.

4. On April 21, 2023, I partially approved the authorization, and therefore only certain foreign intelligence activities that had been authorized by the Minister (File 2200-B-2023-01). I did not approve two classes of activities. The first was not approved on the grounds that it fell outside the scope of the *CSE Act* and the Minister did not have the statutory authority to include them in the authorization. I did not approve the second class of activities as it was too broad to fit into the permitted categories set out in the *CSE Act*. I noted that to avoid classes of activities that are unreasonably broad, CSE must provide the Minister with the amount of detail needed to develop a clear understanding of the types of activities that fall under the provision. That authorization expires on April 20, 2024.

5. On March 6, 2024, pursuant to subsection 26(1) of the *CSE Act*, the Minister issued a Foreign Intelligence Authorization for [...] (Authorization).

6. On March 7, 2024, the Office of the Intelligence Commissioner received the Authorization for my review and approval under the *IC Act*.

7. 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 59 (a), (b), (c), (d) and 60 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 activities and classes of activities enumerated at paragraph 59 (e) of the Authorization.

8. Consequently, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the ministerial Authorization for […], except for the activities listed at paragraph 59 (e) of the Authorization in accordance with paragraph 20(1)(b) of the *IC Act*.

## II. CONTEXT

9. CSE is the national signals intelligence agency for foreign intelligence and the technical authority for cybersecurity and information assurance (s 15(1), *CSE Act*). Its mandate has five aspects, one of which is foreign intelligence. A detailed legislative context of CSE's collection of foreign intelligence from portions of the GII transiting through Canadian or foreign territory is set out in past decisions.

10. In summary, CSE collects information from or through the GII that provides intelligence about foreign targets located outside of Canada (s 16, *CSE Act*). Foreign intelligence constitutes information about the capabilities, intentions or activities of foreign targets (i.e., individuals, states, organizations or terrorist groups) in relation to international affairs, defence or security, including cybersecurity (s 2, *CSE Act*).

11. When 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*).

12. 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. To issue the authorization, the Minister must, among other conditions, conclude that the proposed activities are reasonable and proportionate, and that measures are in place to protect the privacy of Canadians (s 34, *CSE Act*).

13. 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.

14. Even with a foreign intelligence 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*).

15. 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 March 6, 2024;
    b) Briefing Note from the Chief of CSE to the Minister dated March 5, 2024;
    c) The Chief of CSE's Application dated March 4, 2024, including seven annexes:
        i) Ministerial Directive – Government of Canada Intelligence Priorities for 2023-2025;
        ii) National SIGINT Priorities List;
        iii) Outcomes of activities 2023;
        iv) Deck presentation to the Intelligence Commissioner and staff in relation to research activities;
        v) Mission Policy Suite – Foreign Intelligence approved February 18, 2021,
        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.

## III. STANDARD OF REVIEW

16. 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.

17. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard, as applied to judicial reviews of administrative action, applies to my review.

18. 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.

19. Relevant factual and legal constraints can include the governing statutory scheme, the impact of the decision and 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*.

20. A review of the *IC Act* and the *CSE Act*, as well as 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.

21. 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*).

22. 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).

## IV. ANALYSIS

23. On March 4, 2024, the Chief of CSE submitted a written Application for a Foreign Intelligence Authorization for […] (Application) to the Minister. The Application sets out the foreign intelligence activities that could contravene a Canadian law or interfere with the reasonable expectation of privacy of Canadians or persons in Canada that CSE wishes to carry out.

24. 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 otherwise would only be available in the record.

25. The activities that I approved in my decision last year are again at paragraphs 59 (a), (b), (d) and 60 of this Authorization. In addition to those activities, the Minister seeks my approval for a new class of activities that would be carried out in support of the activities approved last year as indicated in paragraph 59 (e) of the Authorization. The activities set out at paragraph 59 (c) were not included last year, but they describe how existing activities can be conducted on or through the GII rather than constitute entirely new activities.

26. As established by the jurisprudence of the Intelligence Commissioner and reiterated recently in my decision rendered in a matter relating to the Canadian Security Intelligence Service (File 2200-A-2024-01), past approval by the Intelligence Commissioner does not entail that the same activities will automatically be approved again. Indeed, every ministerial authorization is distinct and is reviewed on its own record. A number of considerations could have changed between authorizations. For example, contextual information may have changed from one year to the next; there could be developments in jurisprudence that have an impact on the Intelligence Commissioner's analysis; or there could be an issue where the Minister's or the Intelligence Commissioner's understanding has evolved.

27. Further, it is important for information in the authorization, as well as supporting materials, to be updated to reflect the current operational activities undertaken by CSE. The Minister must be provided with the best available information when determining whether to authorize activities. Also, from one year to the next, the Intelligence Commissioner may consider how the Minister has addressed past remarks when determining the reasonableness of his conclusions, and this should be reflected in the record.

28. In sum, the fact that the some of the same activities have been approved in the past does not change the legal requirements that have to be satisfied for the Intelligence Commissioner to find the Minister's conclusions reasonable. The record should reflect the fact that it is a new and distinct authorization.

29. I would also like to note that although the record before me 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*). One of the presentations was an introduction to research activities, discussed further.

30. I am satisfied that, when compared to the record received last year, the current record does in fact reflect that this is a new and distinct authorization. Updates have been provided and authorization is sought for a new class of activities, an example of which is enabling research activities.

31. The record explains that the enabling activities are those undertaken to support existing operational activities and to develop new capabilities. CSE seeks authorization for research activities that require […].

32. CSE is required to seek the Minister's authorization, and the Intelligence Commissioner's approval is necessary, as some information in […] may contain information in which Canadians or persons in Canada have a reasonable expectation of privacy, or the acquisition of […] may contravene an Act of Parliament.

33. The Minister explains that the acquisition of […] is not directed at Canadians or persons in Canada, or directed at a specific target or individuals. However, this acquisition may result in the incidental acquisition of information that is later identified as relating to Canadians or persons in Canada. The Minister writes that "[t]his information will only be retained if it is essential to international affairs, defence, or security interests, including cybersecurity" (para 52).

34. The essentiality test will be applied to […] in the same way as it is applied to information acquired by the operational programs. Pursuant to CSE policy and practice, information is considered essential if it is required to understand the foreign intelligence, or if without it, it would not be possible to provide foreign intelligence that supports the Government of Canada's intelligence priorities. As set out by the Chief in the Application, information is essential if:

> […] without that information, CSE would be unable to provide foreign intelligence to the [Government of Canada], 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. […] The [Government of Canada's] intelligence priorities help provide an understanding of Cabinet's view on what is of relevance to international affairs, defence, or security interests, 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 the Government of Canada's intelligence priorities, then the information by extension becomes essential to international affairs,

defence, or security interests, including cybersecurity (footnote 34, pp 41-42 of Application).

35. According to the Minister, the information in […] acquired for enabling research purposes will be subject to the same privacy measures and retention limits as those for the operational programs. The Minister explains that all information acquired will be retained in accordance with the Mission Policy Suite Foreign Intelligence (MPS) noting that the MPS "will be updated to reflect enabling research activities." The record does not advise the Minister when the February 2021 MPS will be updated, the sections to be modified and no draft of the proposed amendments is included.

36. However, the Minister notes one difference with respect to how […] will be treated: rather than being held in an operational repository, […] will be retained in a separate repository and access will be limited to employees designated by the Research Directorate who must have the proper accreditations and completed training on CSE's authorities, operational policies, and conditions for handling information with a privacy interest.

37. Based on the facts presented in the Application submitted by the Chief of CSE and generally in the record, 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.

38. 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*

39. To issue a foreign intelligence authorization, 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*).

40. The Minister must conclude that any activity that would be authorized by the Authorization is reasonable and proportionate 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. 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 and proportionate*

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

42. With respect to the specific activities described at paragraphs 59 (a), (b), (c) (d) and 60 of the Authorization, I find that the Minister's conclusions are reasonable. The Minister's conclusions demonstrate that there is a rational connection between those activities and the objective of collecting foreign intelligence from or through the GII. 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.

43. The Minister also concluded at paragraph 3 of the Authorization that he had reasonable grounds to believe the activities authorized are "proportionate given the manner in which they are conducted."

44. I am again satisfied that the Minister's conclusions in this regard is reasonable with respect to the authorized activities described at paragraphs 59 (a), (b), (c), (d) and 60 of the Authorization. The Minister identifies the reasons for which the activities are necessary and

useful, notably for acquiring information to create intelligence reporting, as well as for supporting other CSE activities. He recognizes that the activities can lead to acquiring large volumes of information. For that reason, the Minister explains that CSE […]. Further, collection is targeted to limit any incidental acquisition of Canadian-related information. 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.

45. I also find that the Minister considered the effects of the activities on the rule of law. The Minister identifies the Acts of Parliament that have the potential to be contravened, and specifically the provisions at issue of the Acts. The Minister explains that CSE will carry out its activities in a way that will limit the potential offences. I agree that potential offences are limited in number and in impact on Canadians and persons in Canada. I am satisfied that when an Act of Parliament is breached, the impact of the breach will be limited.

46. 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.

47. However, I am of the view that the Minister's conclusions are not reasonable relating to the acquisition of […] listed at paragraph 59 (e) of the Authorization. While I recognize the importance of research for CSE to develop tools and capabilities in support of its mandate, the conclusions are unreasonable for the following reasons: a) contradictions in the record lead to uncertainty in the Minister's conclusions about how Canadian-related information will be treated; b) the Minister's conclusions do not explain how Canadian-related information in […] could meet the essentiality test; and c) the Minister's conclusions do not demonstrate that he sufficiently understands the nature of the activities that fall within the class given the broadness the class.

a) Contradictions in the record lead to uncertainty in the Minister's conclusions about how Canadian-related information will be treated

48. Relying only on the Minister's statements relating to […], the presumption is that any information related to Canadians or persons in Canada will be deleted from any […] acquired for research purposes, unless it is found to be essential. Indeed, these are the "existing privacy protection measures" and is the procedure outlined in the MPS with respect to information related to Canadians or persons in Canada.

49. The procedure outlined in the MPS requires determining if the information related to a Canadian or a person in Canada is essential. This means CSE must conduct an evaluation regarding the essentiality of the information when it finds incidentally acquired Canadian-related information. By conducting an evaluation, there is the possibility of finding that incidentally acquired Canadian-related information is not essential.

50. However, the presumption that Canadian-related information will be deleted from the […] if determined not to be essential is not clearly reflected in the record. Reviewing the Minister's conclusions, I am not certain whether CSE will undertake an evaluation to determine whether information related to Canadians or persons in Canada that may be in the […] is essential and possibly deleted, or if CSE's intent is to use the […] for research purposes without removing the Canadian-related information.

51. At paragraph 4 of the Authorization, the Minister states:

> To enable […], enabling research activities require the acquisition of […] for operational purposes. In order to ensure that the […] are operationally relevant, CSE must acquire […]. (emphasis added)

52. The Minister highlights the importance of acquiring […] for them to be useful in helping to […]. If it is necessary to acquire […] for them to be useful, the logical conclusion is that any […] that would include Canadian-related information must remain […] when it is being used to ensure its utility. In any event, there is no information in the record to suggest otherwise.

53. Similarly, paragraph 126 of the Chief's Application states the following:

> In order to […]

54. Again, if the acquisition and use of […] is necessary, the Chief is effectively stating that CSE has no intention of removing any information related to Canadians that may be in […]. This contradicts the Minister's conclusions that information related to Canadians or persons in Canada will be deleted unless determined to be essential. This contradiction is all the more glaring given the Chief's statement that […].

55. The Minister's conclusions also effectively recognize that Canadian-related information will be retained and used when he states the following at paragraph 64(h) of the Authorization:

> […]. Privacy protection measures to protect the privacy of Canadians or persons in Canada will be applied to […] disclosed outside CSE for the purposes of research advancement and collaboration. For example, […] and will no longer contain recognized information relating to a Canadian or person in Canada. (emphasis added)

56. In stating that privacy protection measures would be applied to information when disclosed outside CSE, the Minister appears to implicitly recognize that the privacy protection measures will not be applied to the […] when used within CSE. As a result, the Minister also appears to implicitly recognize that Canadian-related information in […] will, with certainty, be retained and used. Indeed, when referring to Canadian-related information, there is no indication that the Minister means that it is only Canadian-related information that could potentially be determined to be essential. The certainty that Canadian-related information will be retained suggests either that CSE will not undertake an essentiality determination with respect to the Canadian-related information, or that the Canadian-related information is necessarily deemed essential. In either scenario, there appears to be no possibility that the Canadian-related information would be deleted.

57. This conclusion again contradicts, or at least raises doubt about, assertions by the Minister that the information related to Canadians in […] will be treated according to existing policies.

b) The Minister's conclusions do not explain how Canadian-related information in […] could meet the essentiality test

58. If CSE wishes to use […] without removing the Canadian-related information – which appears to be the case – I am of the view that the Minister's conclusions also do not explain how the use and retention of this information could meet the essentiality test.

59. The application of the essentiality test is how CSE aims to satisfy the legislative requirement set out at paragraph 34(2)(c) of the *CSE Act* that information 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."

60. I have set out above how CSE defines information that is "essential". The Minister's conclusions do not reflect – nor it is apparent to me – how information related to Canadians and persons in Canada in […] acquired for research purposes could meet the existing essentiality test. This test applies to operational information having foreign intelligence value. The information in the […] is not acquired for its foreign intelligence value. The Minister's conclusions are not clear how the information in the […] could be required to understand foreign intelligence, or if without that information, CSE would be unable to provide foreign intelligence to the Government of Canada.

61. Further, if CSE intends to delete the Canadian-related information that is not essential – which is unclear from the record – the Minister does not explain how this will be done, or whether it can in fact be practically done. The Minister relies on future amendments of the MPS when stating that Canadian-related information that is not essential will be deleted. However, […] could contain a vast quantity of […]. There is no information in the record on how CSE would identify which […] – if any – may be related to Canadians or persons in Canada.

62. For the sake of comparison, […]. Rather, I only wish to highlight that manipulating […] can be complex and that decision makers authorizing their retention should have a solid understanding of how any Canadian-related information is being treated.

63. I note for the sake of completeness that one of the annexes in the record contains the deck concerning research activities presented to me during a briefing provided pursuant to section 25 of the *CSE Act* earlier this year. This presentation was one among others. While informative, the presentation described in general terms the structure of the Research Directorate and its objectives. The topic of […] that risk interfering with the reasonable expectation of privacy of Canadians was not raised, nor was the application of the essentiality test in the context of information acquired for research purposes. I do not consider it to be the Intelligence Commissioner's role to foresee what contextual information could be useful in the review of future ministerial authorizations. Rather, CSE has the responsibility of determining what topics will provide me and my staff with information that may aid our understanding of the national security and intelligence environment.

64. In sum, although certain statements by the Minister clearly state that Canadian-related information will be deleted if not essential, others state that it will be kept "as is", and […], this Canadian-related information will be removed. Such contradictions do not help in understanding what will be the applicable policies for such an important topic.

65. I am therefore left trying to decipher whether the Minister understood the true fate of Canadian-related information when authorizing the acquisition of […]. The record is unclear whether CSE is requesting authorization to retain all Canadian-related information that may be included in […], and if so, how this Canadian-related information satisfies the essentiality test; or whether CSE intends to delete Canadian-related information that is not essential, and if so, how it will do so (and also determine that some information meets the essentiality test).

66. A reasonable decision depends on the justification, clarity and intelligibility it conveys, and requires an internally coherent reasoning. Reading the Minister's conclusions in conjunction with the record does "not make it possible to understand [the Minister's] reasoning on a

critical point", namely how Canadian-related information will be treated (*Vavilov* at para 102-103).

67. Further, as I have stated in past decisions, the governing statutory scheme entails that a reasonable conclusion requires the Minister to show that he understands the activities that are being authorized (*Vavilov* at para 108-109). Indeed, the statutory scheme is premised on the Minister being accountable when authorizing activities outside the boundaries of the law. Accountability, in turn, is only possible if the Minister shows he understands the nature of the activities he is authorizing. Neither the Minister's conclusions nor the record show that he sufficiently understood what CSE will do with information related to Canadians or persons in Canada that may be included in […]. On these bases, I must find the Minister's conclusions unreasonable that the acquisition of […] is reasonable.

c) <u>The Minister's conclusions do not demonstrate that he sufficiently understands the nature of the activities that fall within paragraph 59 (e) given the broadness the class</u>

68. I am of the view that the Minister's conclusions with respect to the class of activities set out at paragraph 59 (e) of the Authorization are unreasonable for an additional but related reason: given the broadness of the class, the Minister's conclusions do not reflect a sufficient understanding of the activities that could be included.

69. My conclusion follows similar conclusions I made before in three decisions rendered last year respecting foreign intelligence authorizations (Files 2200-B-2023-01; 2023-03 and 2023-04).

70. In Decision 2023-01, I found that the following class of activities set out in the authorization was unreasonable: "facilitating any other activities authorized by another valid authorization issued by [the Minister]." This class of activities was too broad to fit into any of the activities that are listed in subsection 26(2) of the *CSE Act*. Further, I found that the Minister had interpreted subsection 26(2) as an exhaustive list, which meant that the activities in the authorization had to fall within the scope of this list to be reasonable. As a result, this class of activities could not be authorized. I noted that paragraph 26(2)(e) of the *CSE Act* sets out a

broad class of activities, and that if CSE requested that the Minister authorize activities that fell within this broad class, the Minister would be "provided with some details and have a solid understanding of the types of activities" that would fall within the class.

71. In an attempt to respond to the requirement that the Minister must be aware of and understand the activities being authorized, the other two authorizations issued by the Minister in 2023 authorized a class of activities that reproduced paragraph 26(2)(e) of the *CSE Act*. To that class, the Minister added a requirement to be notified, after the fact, when CSE carried out an activity that fell within this class. The class of activities set out the following:

> [C]arrying 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 paragraphs 42(a)-(e) above, CSE will notify me.

72. In reviewing both authorizations (Decisions 2023-03 and 2023-04), I found that the Minister's conclusions were unreasonable with respect to this particular class of activities. In my view, reproducing the statutory language as a "catch-all" clause in an authorization did not provide the Minister with sufficient information about the nature of the activities that would fall within this class. Further, I found that notifying the Minister after the fact meant that the Minister would have been unaware of the nature of the activity before CSE carried it out. It also entailed that the Intelligence Commissioner could not have approved the activity as the Minister's conclusions did not provide insight into what this activity could be.

73. In the Authorization before me, the class of activities set out at paragraph 59 (e) of the Authorization again mirrors the broad statutory language of paragraph 26(2)(e) of the *CSE Act*. To this, the Authorization adds that the activities can be used to enable the other activities set out in the Authorization. It sets out the acquisition of […], and […] as an example of enabling activities:

> [C]arrying 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. These activities can be used to enable activities outlined in paragraph 59 (a) to (d). For example, […] enabling activities such as research

and development carried out by personnel designated by CSE's Research Directorate requiring the acquisition of […], and […].

74. As in the past authorizations, this class of activities is very broad given that it repeats the statutory language set out at paragraph 26(2)(e). The Authorization sets out one example of activities that would fall within this class, namely acquiring […]. By setting out one example, there are necessarily other examples that can fall within "any other activity." Indeed, the broadness of what constitutes "any other activity" is not limited in any way. The Minister's conclusions provide information on a single type of activity that falls in this class, but provide no details about any of the "other activity" that could be reasonable in the circumstances.

75. If the activities in this class were limited solely to activities related to acquiring […], my earlier concerns relating to ensuring the Minister understands the activities being authorized could have been satisfied. However, the Authorization does not state this. It does not state that the only "other activity" in this category is acquiring […], or provide the nature of the other activities or class of activities (*catégories d'activités* in French) that make up this class. It is worth reiterating that understanding the nature of activities is important because the Authorization allows CSE to carry out activities outside of the boundaries of the law. As stated above, the governing statutory scheme requires that the Minister understand which otherwise unauthorized activities will be carried out.

76. As in my past decisions highlighted above, simply replicating the statutory language without providing information on the nature of the activities that would fall within this category is not reasonable. Although there is information about one example of activities, the Minister's conclusions do not sufficiently delineate the class of activities.

d) Reviewing the Minister's conclusions that the activities set out at paragraph 59 (e) are proportionate

77. In addition to finding unreasonable the Minister's conclusions that acquiring […] reasonable, I also find unreasonable his conclusions that this activity is proportionate.

78. The Authorization allows CSE to obtain […] without taking into account the nature or the volume the Canadian-related information it may contain. In fact, the Authorization could allow the acquisition of […] containing only Canadian-related information in which there is a high expectation of privacy.

79. Indeed, the Minister explains that […] will be acquired from […], ensuring validation of the data acquired, and will not be acquired based on specific search terms or criteria related to foreign intelligence. These are the only parameters set out with respect to acquiring […].

80. The treatment of Canadian-related information is central to the *CSE Act*. Canadians cannot be targeted and Canadian-related information can only be incidentally collected. If collected, it can only be retained if essential. The statements in the record that the […] must be collected and used […] suggest that CSE intends to retain Canadian-related information – or at least some of this information – in […]. At a minimum, the record states that acquiring information "may risk" interfering with the reasonable expectation of privacy of Canadians and persons in Canada, as well as stating that "there is a risk" the acquisition may interfere with this privacy expectation (para 14 and 15, Application).

81. However, there is no analysis in the Minister's conclusions on whether CSE considers obtaining […] that do not contain any Canadian-related information or that contain as little of such information as possible. There is also no analysis on considering the nature of the information and the privacy considerations it could raise. If CSE is not able to obtain details on whether […] will contain Canadian-related information, or the volume or nature of this information, this is also not reflected in the record.

82. Further, neither the Authorization, nor the remainder of the record including the MPS provide any parameters or guiding principles that could limit the acquisition of Canadian-related information. The Minister does not turn his mind to this issue in his conclusions. The record does not provide any indication of what constitutes a […] or the nature and volume of Canadian-related information CSE believes could be found in the […].

83. It is also unclear from the record what kind of […] would be collected. The example provided in relation to […] does not clarify the type information nor the approximate amount of information that would be related to Canadians and persons in Canada versus foreign individuals.

84. Given the absence of any proportionality analysis with respect to the acquisition of […], I find the Minister's conclusions in relation to paragraph 59 (e) of the Authorization is not reasonable.

85. I am not closing the door that a ministerial authorization allowing the acquisition of […] containing a large volume of information in which Canadians have a high reasonable expectation of privacy could be proportionate. The acquisition would need to be supported by appropriate ministerial conclusions taking into account the objectives of CSE's research and development and having regard to how CSE acquires […]. My conclusion is based on the absence of consideration of the proportionality requirement.

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

86. 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 three conditions set out at subsection 34(2) of the *CSE Act* 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.

87. Given that I have already found that that the Minister's conclusions respecting the activities set out at paragraph 59 (e) of the Authorization are unreasonable under subsection 34(1), my

analysis relating to subsection 34(2) will deal with the other activities for which I have found the Minister's conclusions reasonable. Nevertheless, I make a few comments relating to the paragraph 59 (e) activities that could be useful for CSE's consideration if it decides to seek ministerial authorization for those activities in the future.

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

88. The Minister explains that the activities set out in the Authorization are […]. The Authorization would […] and therefore allow CSE to acquire information that would otherwise not be available to CSE. Further, the activities set out in the Authorization allow for the collection of information that is useful and valuable due to method of acquisition.

89. As a result, I find reasonable the Minister's conclusions that without the Authorization, the information that would be acquired pursuant to paragraphs 59 (a), (b), (c), (d) and 60 of the Authorization could not be reasonably acquired by other means.

90. With regard to the information that would be acquired pursuant to paragraph 59 (e), any future authorization would benefit from greater clarity respecting the provenance and sources of the information.

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

91. The Minister explains that information will only retained to further the foreign intelligence aspect of CSE's mandate. The information is retained in accordance with requirements set in in CSE policies and governed by a retention schedule. He also explains that the requirements set out in CSE policies comply with the *Privacy Act*, RCS, 1985, c P-21 and the *Library and Archives of Canada Act*, SC 2004, c 11.

92. The Minister's rationale establishes a connection between the types of information and their retention period and explains why the different retention periods are 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 for paragraphs 59 (a), (b), (c), (d) and 60 of the Authorization.

93. With respect to information that would be acquired pursuant to paragraph 59 (e) activities, I note that the record indicates that the [...] would be retained "until no longer

operationally useful", while the MPS uses the "as long as is operationally relevant" criterion. Any future authorization should ensure that discrepancies in the application of criteria, if any, are explained.

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

94. The Authorization explicitly provides that unselected information could be acquired to help CSE to better understand the GII and find targets on the GII in the furtherance of its foreign intelligence mandate.

95. 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. Therefore, when acquiring unselected information, all of the information, including any information that could contain Canadian privacy interests, is captured. For that reason, the *CSE Act* requires that particular attention be given to unselected information that is acquired through the activities.

96. In his conclusion, the Minister explains how CSE must acquire unselected information for a number of technical and operational reasons and provides examples supporting his rationale. Indeed, the value of the activities depends on acquiring unselected information. In turn, the activities are necessary to acquire the unselected information. I am therefore 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 paragraphs 59 (a), (b), (c), (d) and 60 of 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))*

97. The Minister's conclusions describe the measures in place to protect the privacy interests of Canadians and persons in Canada and to ensure 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 interests, including cybersecurity.

98. The adequacy of the privacy measures, and therefore the reasonableness of the Minister's conclusions, rests on the strength of the policies and the robustness of their application by CSE. The MPS sets out the measures that must be applied by CSE for the retention, use and disclosure of information related to Canadians or persons in Canada.

99. I am satisfied that CSE's definition of "essential" is reasonable. 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 comply with the MPS as well as the conditions of the Authorization under which they are carried out.

100. 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, the most common privacy protection measure is to suppress releasable Canadian identifying information by replacing it 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 is essential to international affairs, defence, security or cybersecurity, pursuant to section 43 of the *CSE Act*.

101. Information acquired pursuant to operational activities and information acquired pursuant to the enabling research activities are stored in separate repositories. CSE limits access to its information repositories to those who are properly accredited to conduct foreign intelligence or research activities and have received training on information handling procedures.

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

will only be retained, analysed and used if it is essential to international affairs, defence or security, including cybersecurity – in relation to activities set out in paragraphs 59 (a), (b), (c), (d) and 60 of the Authorization.

103. With respect to information that would be acquired under paragraph 59 (e) of the Authorization, any future authorization would benefit from additional clarity about the extent to which information from […] can be identified in the […] once they are implemented in an operational capacity.

## V. REMARKS

104. 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.

### A. Research and development activities

105. My conclusion with respect to the reasonableness of the Minister's conclusions concerning the acquisition of […] is not a reflection of the importance of research and development activities. If acquiring […] with Canadian-related information is necessary for CSE to effectively conduct research and development activities in support of its operations, the Minister's conclusions and the record should be factually and legally clear on this issue.

106. I also want to add that my conclusion does not entail that paragraph 26(2)(e) of the *CSE Act* could not allow the acquisition of […] containing Canadian-related information for research purposes. I recognize that there is no specific legislative provision authorizing the […] containing Canadian-related information for research purposes. CSE and the Minister have identified paragraph 26(2)(e) of the *CSE Act* as a statutory authority for doing so. Whether the acquisition of […] can fall within this provision will depend on the reasonableness of future ministerial conclusions.

### B. Outcomes – reports sent outside of CSE

107. The report on outcomes of activities 2023 sets out the results of last year's Authorization and provides a better understanding of the information acquired pursuant to the authorized activities. CSE has provided information on the type of Canadian-related information that is retained. The report indicates that CSE issued a number of intelligence reports based on the acquired information, some of which contained Canadian identifying information that were viewed by different Government of Canada departments. An additional element that may interest the Minister in future reviews is whether reports resulting from information acquired pursuant to the Authorization was shared with international partners.

### C. Solicitor-client privilege

108. In last year's decision with respect to these activities, I have made two remarks on the handling of incidentally intercepted solicitor-client communications. The first concerned limiting access, as much as possible, to these communications during the process of determining whether they may be essential to international affairs, defence, or security interests including cybersecurity. Since then CSE has explained in subsequent authorizations, their internal process in greater detail and I am satisfied that the process minimizes the number of individuals who may have access to these communications.

109. CSE has also made some changes to its internal process. The Intelligence Commissioner will now be informed when the Minister directs the Chief to use, analyse, retain or disclose a solicitor-client communication. Also, where a solicitor-client communication is used to address an imminent danger of death or serious bodily harm, the Chief will inform the Minister in writing and subsequently inform the Intelligence Commissioner. Finally, when submitting an application for the renewal of an existing authorization, CSE provides the Minister a report with the number of solicitor-client communications which were collected and destroyed. I am of the view that these are all positive developments.

110. It is also worth noting that over the course of last year's authorization, CSE assesses that no solicitor-client communications were incidentally acquired. CSE's 90-day reports on the outcomes of activities carried under past authorizations also show that it has not used,

analyzed, retained or disclosed any recognized solicitor-client communications from foreign intelligence authorizations.

111. That said, I have not seen any indication in authorizations I have reviewed since my decision last year that the Minister or CSE has given consideration to the second issue related to solicitor-client privilege that I raised in last year's decision. The issue is that pursuant to existing policy, the Minister is responsible for determining whether solicitor-client privileged information should be used and retained. As a result, the Minister, who is not acting as an independent judicial officer, is placed in the difficult – and potentially conflicting – position of acting as neutral arbitrator when balancing the breach of a principle of fundamental justice (disclosure of a solicitor-client communication) with foreign intelligence objectives.

112. Given this issue is of public and legal importance, I am of the view that if the Minister and CSE should include a response to this issue in a future authorization.

## VI. CONCLUSIONS

113. 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 59 (a), (b), (c), (d) and 60 of the Authorization are reasonable.

114. I am not satisfied that the conclusions made under subsections 34(1) and (2) of the *CSE Act* in relation to the class of activities enumerated at paragraph 59 (e) of the Authorization are reasonable.

115. I therefore approve the Authorization pursuant to paragraph 20(1)(a) of the *IC Act*, except for the class of activities described at paragraph 59 (e) of the Authorization.

116. 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.

117. 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.

April 4, 2024

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner