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INTELLIGENCE COMMISSIONER

DECISION AND REASONS

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

JULY 9, 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 for […] Activities (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 effectively fulfill the foreign intelligence aspect of its mandate, CSE's proposed activities may have to contravene Canadian laws or infringe on the privacy interests of Canadians and persons in Canada. To conduct such activities, CSE must first obtain a ministerial 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. This is the sixth authorization for these types of activities since the coming into force of the *CSE Act* in August 2019. In last year's decision, I partially approved the ministerial authorization (2200-B-2023-04). I did not approve one of the classes of activities – set out in paragraph 42(f) of that authorization – on the basis that the Minister's conclusions did not exhibit a sufficiently clear understanding of them. I was of the view that simply replicating the wording of paragraph 26(2)(e) of the *CSE Act* as a "catch-all" class of activities in an authorization did not provide the Minister with enough information to understand the

activities that would fall within the class. I found, given the wording of paragraph 42(f), 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 and therefore found the related conclusions unreasonable.

6. On June 11, 2024, pursuant to subsection 26(1) of the *CSE Act*, the Minister issued the Authorization.

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 paragraph 45 of the Authorization are reasonable.

9. Consequently, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the Authorization for […] Activities.

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 a foreign individual, state, organization, or terrorist group

[and is] believed to be of foreign intelligence interest or who has access to information of foreign intelligence interest."

13. Where CSE's foreign intelligence collection activities may contravene the 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*). The authorization allows CSE to engage or interact with the targets in a covert […] in order to provide foreign intelligence to the GC. 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. 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*).

15. When issuing an authorization, 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 authorization is only valid once approved by the Intelligence Commissioner (s 28(1), *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 the 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 30, 2024;
    c) The Chief of CSE's Application dated May 29, 2024, including seven annexes:
        i) SIGINT Operations Risk Acceptance Form (SORAF);
        ii) Ministerial Directive – Government of Canada Intelligence Priorities for 2023-2025;
        iii) National SIGINT Priorities List;

iv) Outcomes Report of Activities 2023;

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 targeting.

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 29, 2024, the Chief of CSE (Chief) submitted a written Application for a Foreign Intelligence Authorization for […] Activities (Application) to the Minister. The Application sets out the foreign intelligence activities that could be conducted by CSE to covertly collect information on or through the GII. 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). The information contained in the annex renders the eventual public version of this decision easier to read. It also 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 class of activities that I did not approve last year that is not included in this Authorization. As for the activities set out at paragraph 45 of this Authorization, they are the same as those approved last year, albeit with some changes in the language used to describe the activities. Namely, the description of some of the activities replicates paragraphs 26(2)(a), (b) and (c) of the *CSE Act*, and expressly authorizes CSE's use of […]. The changes in the language used in this Authorization does not, in my view, change the activities for which authorization is sought. However, as I have stated in the past, replicating the statutory language – which is general – is, in itself, not sufficient for the Minister to demonstrate an understanding of the nature of the activities set out in an authorization. The description of the activities and the Minister's conclusions must offer additional details – which has been done in the Authorization.

27. This Authorization also addresses some of my remarks made in other foreign intelligence authorizations. It includes updated outcomes of the previous authorization; added information […]; and a clarification of the requirement to consult the Minister prior to conducting one of the activities […].

28. 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

29. 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.

30. 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

31. The Minister concluded, at paragraph 12 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."

32. To conduct my analysis in last year's decision, I grouped the activities set out in the authorization into three categories, which mirror the activities authorized in subsection 26(2) of the *CSE Act*: 1) acquiring information of foreign intelligence interest; 2) maintaining covertness of the activities; and 3) supporting the acquisition of information that may contravene Acts of Parliament.

33. Grouping the activities into categories was a helpful way to highlight that pursuant to subsection 34(1) of the *CSE Act* the Minister must conclude that there are reasonable grounds to believe that any activity that would be authorized must be "reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the activities." This means that given the varying objectives and nature of the activities, the Minister's consideration may differ when evaluating different types, or categories, of activities.

34. In support of the Authorization, the Minister explains that the activities provide CSE with unique access to information of foreign intelligence interest to the GC necessary [...].

The information is collected only to the extent needed to respond effectively to the GC's intelligence priorities.

35. The priorities are further set out in the Ministerial Directive to CSE on the GC Intelligence Priorities for 2023-2025. The Directive provides direction to CSE on the implementation of the priorities and is used to develop the National SIGINT Priorities List. The list operationalizes the intelligence priorities in relation to CSE's foreign intelligence mandated activities by highlighting specific entities, regions or other areas of interest identified by GC departments.

36. With regard to the activities conducted to acquire foreign intelligence, the Minister's conclusions set out a rational link between (i) the intelligence priorities as set by Cabinet and operationalized by CSE; (ii) the intelligence acquisition activities; and (iii) the nature of the foreign intelligence CSE anticipates it will acquire. I am of the view that the intelligence acquisition activities are set out with sufficient specificity to provide guidance to CSE employees with respect to the activities that they may lawfully carry out.

37. In relation to activities aiming to maintain the covert nature of CSE's conduct, they must meet the "reasonably necessary" threshold set out at paragraph 26(2)(d) of the *CSE Act*. The record reflects what types of activities could fall in this class – [...] The Minister's conclusions show that he understands the nature of the activities. I find these activities reasonable because they are sufficiently specific for CSE employees to carry them out as described by the Minister. It is also clear how the activities in the class are connected to the goal of acquiring foreign intelligence. Additionally, I find that, given the objective of these activities, the Minister's conclusions show that there are no reasonable alternatives to carrying them out.

38. With respect to activities in support of other activities in the authorization, they must be "reasonable in the circumstances" and "reasonably necessary" in aid of other activities pursuant to paragraph 26(2)(e) of the *CSE Act*. I remain of the view in this year's decision that the "reasonably necessary" threshold requires a rational link between the activity and its objective, specifically to maintain covertness (s 26(2)(d), *CSE Act*) and to aid any other activity (s 26(2)(e), *CSE Act*). The threshold also requires that there be no reasonable

alternatives to carrying out the activity to attain the stated objective. Determining what is "reasonably necessary" requires a contextual analysis. In addition, the threshold that the activity "is reasonable in the circumstances" requires a thorough examination and understanding of the context to determine whether carrying out the activity is justified.

39. I note that in the Briefing Deck – Overview of the Activities, CSE indicates that it removed the class of activities under paragraph 26(2)(e) on the basis that none are proposed or planned to be conducted during this authorization period. However, as outlined in the Overview of this decision, except for the activity specified at paragraph 42(f) of last year's authorization, the other activities falling within paragraph 26(2)(e) were approved in last year's decision – and are again set out in this Authorization (in paragraphs 45(b) and (c)). The information in the Briefing Deck does not affect the reasonableness of the Minister's conclusion.

40. In my recently rendered foreign intelligence decision (2200-B-2024-01), I did not approve the class of activities that fell under paragraph 26(2)(e) of the *CSE Act* because it was too broad. Although the Minister's conclusions provided a single example of an activity that would have fallen within the class, the conclusions did not otherwise delineate the class of activities.

41. The activities falling under paragraph 26(2)(e) in this Authorization do not lack this delineation. Indeed, CSE may not be able to list every specific activity that may support the foreign intelligence acquisition activities when requesting the Minister's authorization. Nevertheless, I am of the view that the description of the activities in the Minister's conclusions, such as [...], shows that he understands the nature of the activities as well as which activities could be carried out in support of other activities in the authorization. The specific activities that CSE knows are reasonable in the circumstances and reasonably necessary in support of foreign intelligence acquisition are set out in the Authorization. As a result, the Minister's conclusions go beyond solely describing the broad purpose of the class of activities. Indeed, the conclusions show that the Minister has a solid understanding of the circumstances in which they will be carried out. I am satisfied that the Minister's conclusions reflect that the statutory thresholds of "reasonable in the circumstances" and "reasonably necessary" and have been met.

42. In light of the above, I find reasonable the Minister's conclusions that the activities set out in the Authorization are reasonable.

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

43. The Minister also concludes at paragraph 13 of the Authorization that he had reasonable grounds to believe the activities authorized are proportionate. He explains that the activities "are subject to measures and controls that limit CSE's acquisition of information to that which is relevant in the fulfillment of the foreign intelligence aspect of its 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.

44. Similar to last year, the Minister addresses the impact of the activities on Canadian privacy interests and the rule of law by providing four main reasons that led him to conclude that they are proportionate.

45. First, the potential value of information acquired from the GII is high and the risk of acquiring Canadian-related information is low. Reasonable steps are taken to ensure that the activities or classes of activities specified in the Authorization […]. Also, to minimize the risk of incidentally acquiring Canadian-related information, an internal limit is imposed. Indeed, CSE must, prior to carrying out the activities, have reasonable grounds to believe that foreign entities being targeted are located outside of Canada (s 11.2, MPS FI).

46. Second, given the nature of the activities, operations begin with extensive operational planning that considers the risks, objectives, resources, expected outcomes, and contingency plans. As part of the risk assessment framework, the SORAF sets out the elements that must be considered. The higher the risk, the higher the approval authority required for the activity. For complex operations, […]. Further, only CSE employees who have completed the required training are allowed to engage in the activities.

47. Third, when the activities would constitute certain offences, a SORAF will be completed to ensure that […]. This internal threshold imposed by the Minister refers […]. With this

threshold, the Minister recognizes the need for limits and ensures that CSE has adequate checks and balances in place when engaging in activities that would be unlawful without the Authorization. I am satisfied that this threshold is sufficiently clear for the CSE employees to apply it: CSE's activities that contravene an Act of Parliament cannot […].

48. Fourth, even though the legislative framework (s 3, *CSE Act*) allows for Acts of Parliament to be contravened, the Minister sets out certain limitations – a red line – that CSE employees cannot cross when carrying out activities such as causing, intentionally or by criminal negligence, death or bodily harm to an individual or willfully attempting to obstruct, pervert or defeat the course of justice or democracy. As stated in my decision last year:

> Public trust is enhanced by a regime that relies on clear boundaries rather than on an expectation or promise that CSE will act responsibly. Specificity allows all parties involved – CSE, the Minister and myself as Intelligence Commissioner – to tell the Canadian public that the balance between the need for CSE to acquire foreign intelligence and breaching laws and privacy interests has been set with a clear line that does not grant sole discretion to CSE.

49. In sum, the Minister imposes an internal threshold as well as internal limits necessary for the activities to be proportionate that go beyond the limits set out in the *CSE Act*. Importantly, I am of the view that these limits are sufficiently clearly defined. When otherwise unlawful activities are legally authorized, it is essential that the limits of these activities are clearly delineated.

50. The Minister concludes that the proposed activities justify any potential impairment of Canadian privacy interests and respect the rule of law. 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 privacy interests considered and the balancing conducted is reasonable. For these reasons, I find reasonable the Minister's conclusions that the authorized activities are proportionate.

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

51. 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))

52. The Minister explains that the activities set out in the Authorization provide a reasonable way for CSE to collect information of foreign intelligence value from the GII […]. Acquiring the information in a different manner would not achieve this objective.

53. The activities in question provide access to information that would otherwise not be available. Indeed, the specific activities allow CSE […].

54. As a result, I find reasonable the Minister's conclusions that without the Authorization, the information that would be acquired 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))

55. Access to information assessed for the purposes of foreign intelligence is limited to 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.

56. As indicated by the Minister, in some cases there are technical and operational reasons to retain certain types of information for a longer period, and even indefinitely. The Minister explains the rationale for longer retention periods. I find these rationales well-supported and reasonable.

57. Information that has a recognized Canadian privacy interest and is assessed as essential to international affairs, defence, or security, including cybersecurity, can be retained for "as long as is reasonably necessary." On a quarterly basis, operational managers must review all recognized information related to Canadians or persons in Canada retained in a CSE central repository to revalidate whether it is still essential to international affairs, defence, or security, including cybersecurity. Information that is no longer essential must be deleted.

58. I find that the Minister's conclusions establish a connection between the types of information and their retention periods and explain 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.

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

59. 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 [redacted]. In contrast, unselected information, pursuant to section 2 of the *CSE Act*, is information acquired without the use of terms or criteria to identify information of foreign intelligence interest.

60. 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.

61. The Minister explains that the activities specified in the Authorization allow CSE to acquire unselected information that it could not otherwise collect. Further, the value of some of the activities set out in the Authorization depends on acquiring unselected information. For example, the use of the information allows CSE to […]. Unselected information provides CSE […]. Once acquired, CSE may use specific criteria in order to select any information that may be of foreign intelligence interest.

62. 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 the activities set out 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))

63. CSE is prohibited from directing its activities at Canadians and persons in Canada (s 22, *CSE Act*). As stated by the Minister, an authorization is required for any activity that may involve the acquisition of information that interferes with a reasonable expectation of privacy. While the activities specified in the Authorization are not directed at Canadians or persons in Canada, they may result in the incidental acquisition of information that is later identified as being related to Canadians or persons in Canada.

64. The Minister's conclusions describe the measures in place to protect the privacy interests of Canadians and persons in Canada. 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.

65. 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.

66. 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.

67. Given the importance of the essentiality criterion in relation to the use of information related to Canadians or persons in Canada, I reiterate a comment made in my recent decision (2200-B-2024-03) regarding the Minister's conclusions. Although, it would have been preferable for the Minister to articulate his rationale respecting the definition of "essential" – and I expect this will be the case in future authorizations – I accept that he has adopted the Chief's rationale and I am satisfied that it is reasonable.

68. The record provides further clarity on the measures in place to protect the privacy of Canadians and persons in Canada in the retention and disclosure of information deemed essential. Retained essential information is revalidated on a quarterly basis and deleted when deemed no longer essential. Releasable foreign intelligence products containing information with a Canadian privacy interest must meet certain criteria prior to disclosure. The most common privacy protection measure applied by CSE is to suppress releasable Canadian identifying information (CII) by replacing it with a generic term such as "named Canadian", unless the information is necessary to understand the foreign intelligence.

69. 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*.

70. 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.

71. I am of the view that the Minister's conclusions that there are appropriate measures in place to protect the privacy of Canadians are reasonable. 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

72. I would like to make two 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. Threshold for determining whether a target is not a Canadian or a person in Canada

73. In last year's decision, I made a remark with respect to the Minister's conclusions that CSE requires "reasonable grounds to believe" that a target is not a Canadian or a person in Canada to carry out authorized activities. I wrote that a higher threshold may be more appropriate given the legislative prohibition for CSE to target Canadians. CSE provided a briefing to me and my staff pursuant to section 25 of the *IC Act* on the process CSE follows to identify a target, which included a description of how analysts assess whether a target is a Canadian or in Canada. The briefing was helpful by providing additional information on the targeting process.

74. Section 25 briefings must be about information that is not directly related to a specific review. As a result, a briefing is not a substitute for the Minister's conclusions. I expect future records to better explain why the Minister believes that the "reasonable grounds to believe" standard, as it is applied, sufficiently protects Canadians from becoming targets of CSE's activities.

B. Provision of Additional Information

75. I have written in past decisions that contextual information surrounding CSE's activities can help the Minister and me in our decision making process when reviewing an application or an authorization, respectively. The manner in which approved activities are carried out and their results can improve our understanding of them and in turn allow us to more effectively fulfill our oversight roles.

76. The end of authorization reports prepared under section 52 of the *CSE Act* (Section 52 Reports), as well as the outcomes reports included in the record of the authorization, constitute tools that provide contextual information. Below, I identify categories of information for which additional details could be included in reports on outcomes to support the Minister and the Intelligence Commissioner in their respective roles.

i. Acts of Parliament

77. In the Authorization, the Minister acknowledges that there is a possibility that offences not listed in the Application may be committed or that Acts of Parliament not listed in the Application may be contravened depending on the circumstances of the activity or operation undertaken. In instances where CSE knows beforehand that activities will result in a contravention of an Act of Parliament not listed, the Chief will seek approval from the Minister before proceeding and subsequently inform the Intelligence Commissioner. In situations where CSE does not have prior knowledge of a contravention, the Chief will notify the Minister and the Intelligence Commissioner at the earliest available opportunity.

78. While the Authorization sets out offences that may be breached when committing the authorized activities, the Section 52 Reports and outcomes reports do not currently provide

information on these breaches. The record does not describe the framework or the process in place for CSE to monitor these breaches. I recognize that it may not be feasible, or useful, to track all of the information on the contraventions to Acts of Parliament, such as the timing or frequency over the course of the authorization period. However, given that the Minister is allowing CSE to conduct activities that would otherwise be unlawful, it would be appropriate for a reader of the outcomes reports to have some understanding of the breaches that occurred during an authorization period – especially whether unanticipated Acts of Parliament were contravened for which the Minister and the Intelligence Commissioner must be informed.

ii. *[…]*

79. As indicated by the Chief in her Application, […] CSE will consult the Minister and seek his approval to manage this risk.

80. I am of the view that authorized activities requiring additional ministerial approval – such as […] – should be reflected in the Section 52 Report provided to the Minister and myself. Indeed, the requirement to obtain additional ministerial approval is indicative that it is a significant activity and that it should appropriately be included in the report that summarizes the outcomes of the authorization.

VI. CONCLUSIONS

81. 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 paragraph 45 of the Authorization are reasonable.

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

83. 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.

84. 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