



Office of
the Intelligence
Commissioner

Bureau du
commissaire
au renseignement

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

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

File: 2200-B-2021-02

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

**INTELLIGENCE COMMISSIONER
DECISION AND REASONS**

July 20, 2021

TABLE OF CONTENTS

- I. Overview 3
- II. Legislation..... 3
 - A. Role of the Minister 3
 - B. Role of the Intelligence Commissioner..... 5
 - i. *The Applicable Concept of Reasonableness* 5
- III. Analysis 6
 - A. The Reasonableness of the Minister’s Conclusions..... 6
 - i. ██████████ 7
 - B. Response to Remarks Made in the 2020 Intelligence Commissioner Decision 10
- IV. Remarks 10
 - A. ██████████ 11
 - B. Other Acts of Parliament 12
 - C. Document Not Listed in the Minister’s Cover Letter 12
- V. Conclusion 13

I. Overview

On June 18, 2021, pursuant to subsection 26(1) of the *Communications Security Establishment Act*¹ (CSE Act), the Minister of National Defence (the Minister) issued a Foreign Intelligence Authorization for [REDACTED]. On June 21, 2021, the Office of the Intelligence Commissioner received the Minister's authorization for my review and approval under the *Intelligence Commissioner Act*² (IC Act). In addition, the record received contained a cover letter from the Minister, a written application from the Chief of the Communications Security Establishment (CSE), which included five annexes, and a record of discussion between the Minister and CSE officials concerning CSE's application for this authorization. The Minister confirmed that all of the materials before him when issuing this authorization were provided to me for my review. However, the materials provided to me also included a document, which was not listed in the cover letter, entitled "Foreign Intelligence Authorization Application Overview for the Intelligence Commissioner — [REDACTED]". I will discuss that document later.

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

Based on my review of the information provided, I am satisfied that the conclusions at issue are reasonable, with the exception of the conclusions relating to the acquisition of [REDACTED] for which I am not satisfied that they are reasonable.

Consequently, I must approve the Foreign Intelligence Authorization for [REDACTED] pursuant to paragraph 20(1)(a) of the IC Act, save for one activity. I do not approve the part of the Foreign Intelligence Authorization for [REDACTED] relating to the acquisition of [REDACTED], falling under [REDACTED] in the Authorization, pursuant to paragraph 20(1)(b) of the IC Act.

II. Legislation

A. Role of the Minister

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

¹ S.C. 2019, c. 13, s. 76.

² S.C. 2019, c. 13, s. 50.

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

The Minister must also be able to draw conclusions on the following:

Conditions for authorizations

34 (1) *The Minister may issue an authorization under subsection 26(1), 27(1) or (2), 29(1) or 30(1) only if he or she concludes that there are reasonable grounds to believe that any activity that would be authorized by it is reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the activities. (emphasis added)*

Conditions for authorizations – foreign intelligence

- (2)** *The Minister may issue an authorization under subsection 26(1) only if he or she concludes that there are reasonable grounds to believe — in addition to the matters referred to in subsection (1) — that*
- (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.*

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

The Minister must also conclude, in accordance with subsection 34(1) of the CSE Act, that there are reasonable grounds to believe that any proposed activity to be authorized is reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the

activities, and that the conditions of subsection 34(2) of the CSE Act have been met. In doing so, the Minister must explain his reasons for arriving at his decision.

B. Role of the Intelligence Commissioner

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

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

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

i. The Applicable Concept of Reasonableness

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

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

However, I accept that when Parliament used the term "reasonable" in the context of a quasi-judicial review of administrative decisions by a retired judge of a superior court, it intended to give to that term the meaning it has been given in administrative law jurisprudence. In that regard, the Intelligence Commissioner must be satisfied that the Minister's conclusions bear the

essential elements of reasonableness: justification, transparency, intelligibility, and whether it is justified in relation to the relevant factual and legal contexts.³

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

III. Analysis

A. The Reasonableness of the Minister's Conclusions

The Chief of CSE submitted a written application for a Foreign Intelligence Authorization for [REDACTED] indicating that:

... the foreign intelligence aspect of CSE's mandate is to acquire, covertly or otherwise, information from or through the global information infrastructure (GII), including by engaging or interacting with foreign entities located outside Canada or by using any other method of acquiring information, and to use, analyse, and disseminate the information for the purpose of providing intelligence, in accordance with Government of Canada (GC) intelligence priorities. One way that CSE obtains foreign intelligence is through its [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As such, CSE has [REDACTED]

[REDACTED]

The application describes the [REDACTED] including how CSE acquires information and maintains covertness while undertaking these programs. The application also states how these activities fulfill the objective of collecting foreign intelligence in accordance with the Government of Canada intelligence priorities, as described in the Ministerial Directive to CSE on the Government of Canada Intelligence Priorities for 2019–2021 and the National Signals Intelligence Priorities List (NSPL), as well as how the Chief of CSE proposes to use, analyze, retain and disclose the acquired information.

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

⁴ *Vavilov* at paragraph 14.

⁵ Application to the Minister of National Defence for a Foreign Intelligence Authorization for [REDACTED] [REDACTED] dated June 17, 2021, at paragraph 2, p.1.

Based on the facts presented in this application, and generally in the record, the Minister reached conclusions on the basis of which he issued an authorization, as well as terms, conditions and restrictions, for [REDACTED].

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

In assessing whether the activities are reasonable and proportionate, I am of the view that the notion of "reasonable" includes an activity that is fair, sound, logical, well-founded and well-grounded having regard to the objective. The notion of "proportionate" requires that the activity be rationally connected to the objective, minimally impairing on the rights and freedoms of third parties as well as their equipment and infrastructures. More importantly, it entails not outweighing the objective of the collection of information and, if necessary, having measures to restrict the collection and/or the retention of information. In other words, it is a proper balance of the activities having regard to the "proportionate" aspects described in this paragraph.

The Minister's conclusions show that the Minister understood these notions, and applied them properly. Furthermore, the Minister based his conclusions on the facts of the application which were also clear in that regard. In paragraphs 3 to 15 of his conclusions,⁶ the Minister demonstrates how [REDACTED] are reasonable and proportionate. It has therefore been established to my satisfaction that the conclusions of the Minister are reasonable with respect to the [REDACTED] considering the nature of the objective to be achieved and the nature of the activities, with the exception of his conclusions on the basis of which he issued an authorization for [REDACTED] [REDACTED].

i. [REDACTED]

As discussed above, the Chief's written application contains [REDACTED] [REDACTED] to be authorized by the Minister: [REDACTED] [REDACTED]

⁶ Foreign Intelligence Authorization for [REDACTED] dated June 18, 2021.

Under the heading [REDACTED], the Chief requested the Minister's approval to acquire [REDACTED] from the GII for technical or operational reasons to support the foreign intelligence mandate of CSE.⁷

I note that the application refers to [REDACTED]. This acquisition of [REDACTED] is discussed at paragraphs 54 to 56 of the application, under the heading Part VI: [REDACTED]. The application states that the acquisition of this type of information is not the result of [REDACTED].⁸

In subparagraph 20c) of the Minister's conclusions, the acquisition of [REDACTED] is part of a paragraph falling under the heading of [REDACTED].⁹

The location of this request in the application and in the conclusions is important because the authorization does not specifically provide for the acquisition of [REDACTED]. That said, the Minister does authorize CSE to carry out the activities of [REDACTED].¹⁰ In light of this, I am of the view that the acquisition of [REDACTED] has been authorized by the Minister under [REDACTED] in the authorization.

However, the application does not contain supporting information explaining how, and through which specific activities the acquisition of [REDACTED] would take place. The application does describe that CSE would be acquiring this information from the GII by [REDACTED].

[REDACTED] That being said, the application offers no additional explanation as to how CSE plans to approach this method of acquiring information, including what activities are contemplated. There is also a lack of information that would support the fact that any such activity would be reasonable and proportionate.

In the Minister's conclusions there is a lack of information as to the nature of the activities to be used to acquire [REDACTED] and a lack of information as to how such activities would be reasonable and proportionate. The Minister's conclusions do not bear the essential elements of reasonableness: justification, transparency, intelligibility, and whether the authorized activity is justified in relation to the relevant factual and legal contexts.¹² Of note, as mentioned earlier, the Minister placed this specific activity under the heading of the [REDACTED] in his conclusions.¹³

⁷ *Supra*, note 5, paragraphs 54 and 56, pp.12 and 13.

⁸ *Ibid.*

⁹ *Supra*, note 6, subparagraph 20c), p.6.

¹⁰ *Ibid.*, subparagraph 46c), p.12.

¹¹ *Supra*, note 5, paragraph 56, p.13.

¹² *Supra*, note 3.

¹³ *Supra*, note 9.

As a result, and based on a review of the information provided to me, I am not satisfied that the Minister's conclusions in this regard are reasonable with respect to the statutory condition appearing at subsection 34(1) of the CSE Act given the lack of information with respect to the exact nature of these activities, as well as how such activities would be reasonable and proportionate.

Having determined that I am not satisfied that the Minister's conclusions in respect of the acquisition of [REDACTED] are reasonable, paragraph 20(1)(b) of the IC Act provides that I must not approve the authorization and set out my reasons for doing so. I have already provided my reasons above.

The point at issue is whether my decision affects the authorization as a whole, or solely the portion of the ministerial authorization with respect to the acquisition of [REDACTED]. I am of the opinion that the latter applies.

The authorization can be comprised of more than one activity, and it is usually the case. Subsection 26(1) of the CSE Act states that the Minister may issue an authorization that authorizes CSE to carry out any specified activity in the authorization. The French version states "à mener toute activité précisée dans l'autorisation." (emphasis added)

Subsection 34(1) of the CSE Act provides that the Minister may issue an authorization if he or she concludes that there are reasonable grounds to believe that any activity that would be authorized by it is reasonable and proportionate. The French version indicates "s'il conclut qu'il y a des motifs raisonnables de croire que l'activité en cause est raisonnable et proportionnelle." (emphasis added)

Therefore, not only can the authorization pursuant to subsection 26(1) of the CSE Act cover more than one activity, the test that must be exercised by the Minister under subsection 34(1) must apply to each activity to be authorized.

Paragraph 20(1)(a) of the IC Act provides that after his review, the Intelligence Commissioner must approve the authorization if he is satisfied that the conclusions at issue are reasonable. The French version states "s'il est convaincu que les conclusions en cause sont raisonnables." Paragraph 20(1)(b) covers those situations where the Intelligence Commissioner is not so satisfied. (emphasis added)

The analysis of the above provisions from both the IC Act and the CSE Act leads me to conclude that the Intelligence Commissioner must determine whether the conclusions at issue for each and every activity that is being requested by the applicant are reasonable, in the same manner that the Minister must determine whether he can conclude that each and every activity is reasonable and proportionate.

I am also of the view that Parliament could not have intended, for the legislative scheme in question, to support the untenable position that the authorization as a whole, covering a number

of activities, should not be approved when the conclusions concerning a particular activity are found to not be reasonable.

Based on my analysis, I am of the view that in my role of having to ultimately determine whether to approve or not approve the authorization, I am legally entitled to determine that I am not satisfied that the ministerial conclusions at issue, on the basis of which the acquisition of [REDACTED] was authorized, are reasonable.¹⁴ Consequently, I do not approve the authorization regarding the acquisition of [REDACTED].

B. Response to Remarks Made in the 2020 Intelligence Commissioner Decision

Last year, I made comments regarding the 2020 record concerning the Foreign Intelligence Authorization to the Communications Security Establishment for [REDACTED]. I note that this year CSE's application and the Minister's authorization respond to these comments.

Of note, I stated that [REDACTED] lacked information and clarity, in contrast with the details contained in the application for [REDACTED], and that it was uncertain whether CSE was undertaking these activities. I found that the conclusions and the authorization should reflect and be supported by comprehensive and clear facts coming from the application, which was not the case. I also stated that if CSE was currently conducting or planning to conduct [REDACTED], the Minister should be fully informed of such. This would enable the Minister to analyze and determine whether [REDACTED] should continue to be authorized.

This year, the Chief took the clear position that CSE currently only conducts [REDACTED] and that she would seek the approval of the Minister before pursuing any such [REDACTED]. I trust that she meant in accordance with subsection 26(1) of the Act. Although the Chief took that undertaking, the Minister could have made it a condition in his authorization.

IV. Remarks

I am satisfied that the Minister's conclusions are reasonable, with the exception of those relating to the acquisition of [REDACTED].

However, in order to inform future applications, conclusions and authorizations, I would like to express my opinion on the following aspects of CSE's application, as well as the Minister's conclusions and authorization, regarding the following: [REDACTED]; (b) Other Acts of Parliament; and, (c) Document Not Listed in the Minister's Cover Letter.

¹⁴ *Supra*, note 3.

A. [REDACTED]

The application refers to various CSE activities under the [REDACTED]. For instance, the application specifies that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]¹⁵ (emphasis added)

The application provides examples of [REDACTED] that have led to CSE acquiring foreign intelligence, including [REDACTED] [REDACTED] [REDACTED]¹⁸ The application does not specify whether these [REDACTED] [REDACTED]

The application also indicates that “[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] the application states the following:

[REDACTED]

¹⁵ *Supra*, note 5, paragraph 44, p.10.
¹⁶ *Ibid*, paragraph 48, p.11.
¹⁷ *Ibid*, paragraph 49, p.11.
¹⁸ *Ibid*, paragraph 50, p.12.
¹⁹ *Ibid*, paragraph 62, p.14.
²⁰ *Ibid*, subparagraph 62c), p.14.

Looking at the whole of the Minister's conclusions and authorization, as well as the application, I can only conclude that the Minister has approved, at subparagraph 46c) of the authorization,²¹ all activities described in the application that falls within the [REDACTED]

[REDACTED] However, the Minister's conclusions at subparagraph 20c) only refers to [REDACTED]

²²

However, I am of the view that administrative law principles allow me to consider the record as a whole in order to infer information missing from the Minister's conclusions.²³ The record in this matter sheds light on the Minister's reasons for his decision and accordingly allows me to find that the Minister's conclusions meet the requisite standard of justification, transparency and intelligibility.

However, I remind the Minister of the requirement that ministerial conclusions be provided with respect to each and every activity being sought and authorized by him.

B. Other Acts of Parliament

The application explains that CSE may contravene other Acts of Parliament while conducting the activities under this authorization.²⁴ The Chief specifies that she will notify the Minister should CSE contravene other Acts of Parliament which are not listed. I note that in the authorization the Minister did not impose a condition requiring to be notified should such a contravention occur. I am of the view that a standard condition should be included in all authorizations that the Minister be advised if CSE contravenes other Acts of Parliament.

C. Document Not Listed in the Minister's Cover Letter

For ease of reference, I will reiterate the same point that I made previously at pages 10 and 11 of my July 13, 2021 decision regarding the Cybersecurity Authorization for Activities on Federal Infrastructures.²⁵ Both the Cybersecurity Authorization and the present authorization were provided to my office on the same day.

Subsection 23(1) of the IC Act states that "the person whose conclusions are being reviewed by the Commissioner under any of sections 13 to 19 must, for the purposes of the Commissioner's review, provide the Commissioner with all information that was before the person in issuing ... the authorization ...".

The cover letter accompanying the record that was provided to the IC by the Minister listed eight documents that were before him, but did not list the document or deck entitled "Foreign Intelligence Authorization Application Overview for the Intelligence Commissioner – [REDACTED]"

²¹ *Supra*, note 6.

²² *Supra*, note 9.

²³ *Supra*, note 3, *Vavilov* at paragraphs 98 and 137.

²⁴ *Supra*, note 5, paragraphs 93-98, pp.23-24.

²⁵ File: 2200-B-2021-01


██████████” Based on the cover letter received, it would appear that the deck was not provided to the Minister and as such could not be considered as part of the information before the Minister. That being said, in reviewing the document entitled “Record of Discussion with CSE Officials”, listed as item 8 of the record, I note that it indicates the following:

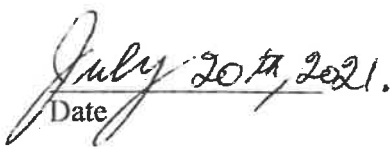
DC SIGINT provided an update to the Minister on this year's application in line with the provided deck, specifically noting the similarity to the previous year's application, outlining CSE's changes relating to comments raised by the Intelligence Commissioner.
(emphasis added)

Although the deck was not specifically listed in the Minister's cover letter, it would appear that it was part of the materials before him as there is a reference to it in the “Record of Discussion with CSE Officials” as referred to above. The words “provided deck” and the contents specifically noted above refer to the contents of the deck. To avoid any confusion in the future and to fulfil his statutory obligation under subsection 23(1) of the IC Act, it is imperative for the Minister to list in his cover letter all the material that was before him.

V. Conclusion

Based on my review of the record submitted, I am satisfied that the ministerial conclusions, with the exception of those with respect to the acquisition of ██████████, are reasonable. Consequently, I must approve the Foreign Intelligence Authorization for ██████████ pursuant to paragraph 20(1)(a) of the IC Act, save for one activity. I do not approve the part of the Foreign Intelligence Authorization for ██████████ in the Authorization, pursuant to paragraph 20(1)(b) of the IC Act.


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


Date