



Office of  
the Intelligence  
Commissioner

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

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

**INTELLIGENCE COMMISSIONER  
DECISION AND REASONS**

**September 1, 2021**

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## I. Overview

On August 13, 2021, pursuant to subsection 26(1) of the *Communications Security Establishment Act*<sup>1</sup> (CSE Act), the Minister of National Defence (the Minister) issued a Foreign Intelligence Authorization for [REDACTED]. On August 16, 2021, the Office of the Intelligence Commissioner received the Minister's authorization for my review and approval under the *Intelligence Commissioner Act*<sup>2</sup> (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 seven annexes, a presentation deck entitled Foreign Intelligence Authorization Overview – [REDACTED], a record of discussion between the Minister and CSE officials concerning CSE's application for this authorization, and the Ministerial Directive to CSE on the Government of Canada Intelligence Priorities for 2021-2023 (MD 2021-2023). The Minister confirmed that all of the materials before him when issuing this authorization were provided to me for my review. The Minister also indicated that the MD 2021-2023 was approved by the Minister after the Chief of CSE had provided him with her application.

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 issued conclusions demonstrating 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. Consequently, I must approve the Foreign Intelligence Authorization for [REDACTED] pursuant to paragraph 20(1)(a) 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.

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, 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.

<sup>1</sup> S.C. 2019, c. 13, s. 76.

<sup>2</sup> S.C. 2019, c. 13, s. 50.

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, 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 the decision that any proposed activity is reasonable and proportionate in this regard.

## **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 or reasons of the Minister that must be reviewed by the Intelligence Commissioner. 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 they are justified in relation to the relevant factual and legal contexts.<sup>3</sup>

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.<sup>4</sup>

### 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]. According to the application, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>5</sup> CSE conducts [REDACTED]  
[REDACTED]  
[REDACTED]

The application describes the [REDACTED], including how CSE acquires information and maintains covertness while undertaking these activities. The application also states how these [REDACTED] 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*<sup>7</sup> and the *National SIGINT Priorities List (NSPL)*,<sup>8</sup> as well

<sup>3</sup> *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).

<sup>4</sup> *Ibid* at paragraph 14.

<sup>5</sup> *Application to the Minister of National Defence for Foreign Intelligence Authorization for [REDACTED]* dated August 11, 2021, at paragraph 3, pages 1-2.

<sup>6</sup> The [REDACTED] is classified as Exceptionally Controlled Information (ECI).

<sup>7</sup> Annex I to the *Application to the Minister of National Defence for Foreign Intelligence Authorization for [REDACTED]* dated August 11, 2021.

<sup>8</sup> Annex II to the *Application to the Minister of National Defence for Foreign Intelligence Authorization for [REDACTED]* dated August 11, 2021.

as how the Chief of CSE proposes to use, analyze, retain and disclose the acquired information. The application also describes [REDACTED] in a separate annex.<sup>9</sup>

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

I note that the Minister concluded he had reasonable grounds to believe, based on the 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. I am satisfied that the Minister's conclusions are reasonable in determining that the described activities are reasonable and proportionate, having regard to the nature of CSE's objective of collecting foreign intelligence in accordance with the Government of Canada intelligence priorities, which inform the NSPL, and the nature of those [REDACTED]  
[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.

When assessing whether the activities are reasonable and proportionate, I am of the view that the notion of reasonableness includes an activity that is fair, sound, logical, well-founded and well-grounded having regard to the objective. The notion of proportionality requires that the activity be rationally connected to the objective and minimally impairing on the rights and freedoms of third parties, as well as on their equipment and infrastructures. Also, if necessary to achieve this purpose, measures should be in place to restrict the acquisition 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 demonstrate that he understood these notions. In paragraphs 4 to 25 of his conclusions,<sup>10</sup> the Minister demonstrates how the [REDACTED] are reasonable and proportionate. The Minister essentially explained that [REDACTED]  
[REDACTED] are reasonable and proportionate, mainly because they are subject to inherent operational limitations based on the very nature of the activities themselves.

Based on my review of the record submitted, I am satisfied that the Minister's conclusions are reasonable with respect to the proposed [REDACTED].

#### IV. Remarks

Although I am satisfied that the Minister's conclusions are reasonable, I would like to express my opinion on some aspects of CSE's application, as well as the Minister's conclusions and authorization, to inform them in the future.

<sup>9</sup> Annex V to the *Application to the Minister of National Defence for Foreign Intelligence Authorization for* [REDACTED] [REDACTED] dated August 11, 2021.

<sup>10</sup> *Foreign Intelligence Authorization for* [REDACTED] [REDACTED] dated August 13, 2021, pages 2-6.

## A. Achieved Outcomes

In last year's decision, I expressed my opinion on the topic of achieved outcomes. Hereunder is what I stated, in part:

*The application also mentions that the conduct of [REDACTED] are critical to CSE's ability to fulfill the foreign intelligence aspect of its mandate. Although this arguably speaks to the necessity, reasonableness and proportionality of the activities, the information provided is minimal. There are no examples of achieved outcomes given in the application, nor any explanation of the value of CSE's foreign intelligence reporting based on real facts.*

...  
*Therefore, if the Chief of CSE does not provide current, comprehensive information on achieved outcomes in future applications, the Minister will not have up-to-date information for considering these outcomes when determining, in his conclusions, whether the foreign intelligence acquisition activities are necessary, reasonable and proportionate.<sup>11</sup>*  
 (emphasis added)

This year's application contains a good number of contextual examples related to some achieved outcomes.<sup>12</sup> I commend the Chief for having provided these examples. Although the Minister has not referred specifically to these examples in his conclusions contained in the authorization<sup>13</sup>, they have, undoubtedly, provided some supporting background information for the Minister's consideration in determining the conclusions as to whether the foreign intelligence acquisition activities are necessary, reasonable and proportionate.

However, in my view, these examples focus on specific authorized activities and techniques in the context of specific circumstances. And although they serve their purpose and future applications should continue to identify them, these examples do not provide the type of comprehensive overview of achieved outcomes as it was done, for example, in another file in 2019.<sup>14</sup>

Such comprehensive and current information on achieved outcomes, under the last ministerial authorization period, would bolster the Minister's consideration in determining in his conclusions whether the foreign intelligence acquisition activities are necessary, reasonable and proportionate.

<sup>11</sup> *Intelligence Commissioner – Decision and Reasons*, September 23, 2020, 2200-B-2020-03, pages 7 and 8.

<sup>12</sup> *Supra* note 5, pages 9-20.

<sup>13</sup> *Supra* note 10, pages 2-11.

<sup>14</sup> Annex I to the *Application to the Minister of National Defence for Cybersecurity Authorization for Activities on Federal Infrastructures* dated July 26, 2019, 2200-B-2019-002.

**B. Other Acts of Parliament**

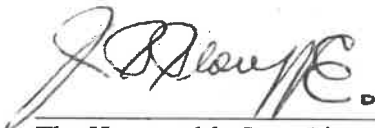
I remarked in some of my previous decisions on the absence of a ministerial condition requiring that the Minister be notified in the event that another Act of Parliament, one not listed in the application, be contravened.<sup>15</sup> I noted that subsequently to my initial remark on this issue that the Minister's authorization did in fact include such a condition.<sup>16</sup>

In the current application, the Chief undertakes to notify the Minister if another Act of Parliament, including a provision of the *Criminal Code*, not listed in the application, is contravened in the course of exercising the authorities sought under this authorization.<sup>17</sup>

Despite this undertaking by the Chief, the Minister does not impose such a condition in this authorization. This may simply be an oversight. I am still of the view, however, that in such a case the Minister should include a specific condition that he be notified if there is a contravention by CSE to other Acts of Parliament, including a provision of the *Criminal Code*, not listed in the application.

**V. Conclusion**

Based on my review of the record submitted, I am satisfied that the ministerial conclusions are reasonable. I therefore must approve the Minister's Foreign Intelligence Authorization for [REDACTED], dated August 13, 2021, pursuant to paragraph 20(1)(a) of the *Intelligence Commissioner Act*.



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

September 1, 2021.  
Date

<sup>15</sup> *Intelligence Commissioner – Decision and Reasons*, July 30, 2020, 2200-B-2020-01, page 10; *Intelligence Commissioner – Decision and Reasons*, July 20, 2021, 2200-B-2021-02, page 12.

<sup>16</sup> *Intelligence Commissioner – Decision and Reasons*, July 13, 2021, 2200-B-2021-01, page 8.

<sup>17</sup> *Supra* note 5, paragraph 118, page 29.