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File: 2200-B-2022-02

**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**

June 29, 2022

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I. Overview

On June 1, 2022, 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 2, 2022, 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 indicating that the following listed documents were all the materials before her when issuing the authorization: (1) *Authorization* – Foreign Intelligence Authorization for [REDACTED]; (2) *Application* – Foreign Intelligence Authorization for [REDACTED] (i) Annex I – MD to CSE Government of Canada Intelligence Priorities 2021-2023; (ii) Annex II – National SIGINT Priority List (NSPL, November 2021); (iii) Annex III – Outcomes from the Last MA Period; (iv) Annex IV – Relevant Sections of MPS FI; (v) Annex V – Summary of CSE's measures to protect the privacy of Cdn and PiC; (vi) Annex VI – MO – Ministerial Order Designating Recipients of Canadian Identity Information Obtained, Used, Analyzed Under a Foreign Intelligence MA (signed); (3) Briefing Note to the Minister of National Defence – [REDACTED] – Foreign Intelligence; (4) [REDACTED] Authorizations – Overview Placemat; (5) Summary – [REDACTED] – Foreign Intelligence; and (6) Record of Discussion with CSE Officials.

Based on the written application provided by the Chief of the Communications Security Establishment (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 she 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 she 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 she 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.

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, pursuant to section 34 of the CSE Act, must 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 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(3) of the CSE Act have been met. In doing so, the Minister must explain her reasons for issuing the authorization. This is done in her conclusions.

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 satisfied that 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 her 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, who is acting as an administrative decision-maker.

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.³

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).

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.”⁵

CSE’s [REDACTED] which is one way that CSE obtains foreign intelligence, is comprised of the following: [REDACTED]
[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 2021-2023 and the National SIGINT Priority List (NSPL), as well as how the Chief of CSE proposes to use, analyze, retain and disclose the acquired information.

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

I am satisfied that the Minister’s conclusions demonstrate that she 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, 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

⁴ Vavilov at paragraph 14.

⁵ Application to the Minister of National Defence for a Foreign Intelligence Authorization for [REDACTED] dated May 26, 2022, at paragraph 2, p.l.

Minister serve as a basis for the authorization that she 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 “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 [REDACTED] More importantly, it entails that the acquisition of information does not outweigh the objective of the collection of information. 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 show that the Minister understood these notions, and applied them properly. Furthermore, the Minister based her conclusions on the facts of the application and generally of the record, which were also clear in that regard. In her conclusions,⁶ the Minister demonstrates how the [REDACTED] are reasonable and proportionate considering the nature of the objective to be achieved and the nature of the activities. It has therefore been established to my satisfaction that the conclusions of the Minister are reasonable with respect to the [REDACTED]

B. Response to Remarks Made in the 2021 Intelligence Commissioner Decision

In my 2021 decision, I made remarks with respect to the record received.⁷ I note that this year’s record responds to those remarks.

IV. 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 June 1, 2022, pursuant to paragraph 20(1)(a) of the *Intelligence Commissioner Act*.

(Original signed)
The Honourable Jean-Pierre Plouffe, C.D.
Intelligence Commissioner

June 29, 2022
Date

⁶ Foreign Intelligence Authorization for [REDACTED] dated June 1, 2022, paragraphs 3–15, pp. 2–4.

⁷ *Intelligence Commissioner Decision and Reasons*, “In the Matter of an Application by the Communications Security Establishment to the Minister of National Defence for [REDACTED] Pursuant to Subsection 26(1) of the *Communications Security Establishment Act*,” dated July 20, 2021, File: 2200-B-2021-02, pp. 10–13.