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

File: 2200-B-2023-01

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

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

APRIL 21, 2023

Canada

TABLE OF CONTENTS

I. OVERVIEW

1. As part of its mandate, the Communications Security Establishment (CSE) collects foreign intelligence through what is known as the "global information infrastructure" (GII) – essentially the Internet and telecommunications networks, links and devices. CSE uses, analyses and disseminates the collected information for the purpose of providing foreign intelligence to the Government of Canada in accordance with its intelligence priorities.

2. To effectively carry out foreign intelligence activities, it may be necessary for CSE to contravene certain Canadian laws or infringe on the privacy interests of Canadians and persons in Canada. Faced with the need to acquire foreign intelligence to further Canada's national interests and security on the one hand, and the potential breach of laws and of privacy interests on the other, Parliament created a regime that seeks to establish a balance between these interests.

3. Specifically, this regime allows CSE to contravene any Act of Parliament or of any foreign state while conducting activities to collect foreign intelligence through the global information infrastructure. It also allows CSE to acquire, use, analyse, retain and disseminate information related to Canadians and persons in Canada – but only if a number of conditions are met and specific steps are fulfilled.

4. The Authorization process starts with a written application by the Chief of CSE (Chief) to the Minister of National Defence (Minister) for a foreign intelligence authorization that sets out, among other things, the grounds for which it is necessary as well as the activities or classes of activities that would be authorized for CSE to carry out. The Minister may issue the foreign intelligence authorization if, among other conditions, the Minister concludes the proposed activities are reasonable and proportionate.

5. A Foreign Intelligence Authorization becomes valid only after approved by the Intelligence Commissioner who must determine whether the Minister's conclusions on the basis of which the Foreign Intelligence Authorization was issued are reasonable.

6. On March 27, 2023, pursuant to subsection 26(1) of the *Communication Security Establishments Act*, SC 2019, c 13, s 76 (*CSE Act*), the Minister issued a Foreign Intelligence Authorization for [redacted] (Authorization).

7. On the same date, the Office of the Intelligence Commissioner received the Authorization for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).

8. Based on my review and for the reasons that follow, I am satisfied that the Minister's conclusions made under subsection 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraphs 50(a), 50(b), 50(c) and 51 of the Authorization are reasonable. As explained in my decision, I am not satisfied of the reasonableness of the Minister's same conclusions in relation to activities and classes of activities enumerated at paragraphs 50(d) and 50(e) of the Authorization.

9. Consequently, pursuant to paragraph 20(1)(a) of the *IC Act*, I approve the ministerial Authorization for [redacted], except for the activities listed at paragraphs 50(d) and (e) of the Authorization.

II. LEGISLATIVE CONTEXT

A. Communications Security Establishment Act

10. In June 2019, *An Act respecting national security matters* (referred to as the *National Security Act, 2017,* SC 2019, c 13) came into force and reshaped Canada's national security framework. To assess and review certain ministerial decisions regarding intelligence gathering and cyber security activities, it created a new quasi-judicial role in the realm of national security and intelligence accountability – the Intelligence Commissioner – a position to be held by a retired judge of a superior court.

11. The *National Security Act, 2017* expanded CSE's authorities and duties through its own legislation. The *CSE Act* came into force in August 2019. Previously, CSE's mandate was found in the *National Defence Act,* RSC 1985, c N-5.

12. As described in subsection 15(1) of the *CSE Act*, CSE is the national signals intelligence agency for foreign intelligence and the technical authority for cybersecurity and information assurance.

13. CSE's mandate has five aspects, one of them being foreign intelligence. As set out in section 16 of the *CSE Act* that describes the foreign intelligence aspect of the mandate, CSE may acquire, covertly or otherwise, information from or through the GII, including by engaging or interacting with foreign entities located outside Canada or by using any other method of acquiring information. It may also use, analyse and disseminate the information for the purpose of providing foreign intelligence, in accordance with the Government of Canada's intelligence priorities.

14. As per its mandate, CSE collects information from GII that provides intelligence against foreign targets located outside of Canada. Foreign intelligence constitutes information about the capabilities, intentions or activities of foreign targets in relation to international affairs, defence and security.

15. Limitations and conditions are imposed on CSE when conducting foreign intelligence activities. Of significance, CSE's activities must not be directed at a Canadian or any persons in Canada. Also, pursuant to subsection 22(1) of the *CSE Act* the activities must not infringe the *Canadian Charter of Rights and Freedoms* (the *Charter*).

16. Furthermore, CSE's activities must not contravene any other Act of Parliament or involve the acquisition of information from or through the GII that interferes with the reasonable expectation of privacy of a Canadian or a person in Canada (subsection 22(3) of the *CSE Act*) – unless, as described below, they are carried out under a foreign intelligence authorization.

Pursuant to section 24 of the *CSE Act*, CSE is required to have measures in place to protect the privacy of Canadians and of persons in Canada.

17. When conducting foreign intelligence activities, there is the possibility that CSE will contravene an Act of Parliament, such as Part VI of the *Criminal Code*, RSC 1985, c C-46, in relation to the interception of private communications. CSE may also obtain, use and retain information in an incidental manner that is later identified as relating to a Canadian or a person in Canada and interfere with this individual's reasonable expectation of privacy. As defined in subsection 23(5) of the *CSE Act*, incidentally 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."

18. In both instances, CSE may request that the Minister issue a foreign intelligence authorization in accordance with subsections 22(3) and 26(1) of the *CSE Act* that would authorize CSE to lawfully carry out such activities or classes of activities. More specifically, subsection 26(1) provides that the Minister may issue a foreign intelligence authorization to CSE that authorizes it, despite any other Act of Parliament or of any foreign state, to carry out, on or through the GII, any activity specified in the authorization in the furtherance of the foreign intelligence aspect of its mandate. Subsection 26(2) of the *CSE Act* enumerates activities that may be included in an authorization.

19. While section 33 of the *CSE Act* describes the requirements for CSE to apply for a ministerial authorization, subsections 34(1) and (2) of the *CSE Act* define the conditions under which the Minister may authorize CSE's activities. The Minister issues an authorization when satisfied that the statutory conditions have been met. This will be discussed further in the Analysis section of this decision.

20. The ministerial authorization is only valid once approved by the Intelligence Commissioner (subsection 28(1) of the *CSE Act*). It is only then that CSE may carry out the authorized activities specified in the authorization.

B. Intelligence Commissioner Act

21. Pursuant to section 12 of the *IC Act*, the role of the Intelligence Commissioner is to conduct 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.

22. Section 13 of the *IC Act* relating to the issuance of a foreign intelligence authorization states that the Intelligence Commissioner must review whether the conclusions of the Minister made under subsections 34(1) and (2) of the *CSE Act*, on the basis of which the authorization was issued, are reasonable.

23. The Minister is required by law to provide to the Intelligence Commissioner all information that was before her as the decision maker (section 23(1) of the *IC Act*). As established by the Intelligence Commissioner's jurisprudence, this also includes any verbal information reduced to writing, including ministerial briefings. The Intelligence Commissioner is not entitled to Cabinet confidences (section 26 of the *IC Act*).

24. In accordance with section 23 of the *IC Act*, the Minister confirmed in her cover letter that all materials that were before her to arrive at her decision have been provided to me. Thus, the record before me is composed of:

    a) The Authorization dated March 27, 2023;
    b) Briefing Note from the Chief of CSE to the Minister dated March 6, 2023;
    c) The Chief's Application which includes six annexes dated March 6, 2023;
    d) Summary – Activities Overview 2023–24; and
    e) Briefing Deck – Overview of the Activities.

III. STANDARD OF REVIEW

25. The *IC Act* instructs that the Intelligence Commissioner must review whether the Minister's conclusions are reasonable.

26. As established by the Intelligence Commissioner's jurisprudence, when Parliament used the term 'reasonable' in the context of a quasi-judicial review of administrative decisions, it intended to give to that term the meaning it has been given in administrative law jurisprudence. As such, I will apply the standard of reasonableness to my review, which requires that I take into consideration the objectives set out in the *IC* and *CSE Acts*.

27. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 99, 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.

28. Relevant factual and legal constraints include the governing statutory scheme, the impact of the decision and principles of statutory interpretation. Indeed, to understand what is reasonable, it is necessary to take into consideration the context in which the decision under review was made as well as the context in which it is being reviewed. It is therefore necessary to understand the role of the Intelligence Commissioner, which is an integral part of the statutory scheme set out in the *IC* and *CSE Acts*.

29. A review of the *IC Act* and the *CSE Act*, as well as legislative debates, shows that Parliament created the role of the Intelligence Commissioner as an independent mechanism by which to ensure that governmental action taken for the purpose of national security was properly balanced with the respect of 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 and as an overseer of ministerial authorizations.

30. This means that a quasi-judicial review by the Intelligence Commissioner must take into consideration the objectives of the statutory scheme as well as the roles of the Minister and

the Intelligence Commissioner. I am to carefully consider and weigh the important privacy and other interests of Canadians and persons in Canada that may be reflected by the authorization under review.

31. When the Intelligence Commissioner is satisfied the Minister's conclusions at issue are reasonable, he "must approve" the authorization (para 20(1)(a) of the *IC Act*). Conversely, where unreasonable, the Intelligence Commissioner "must not approve" the authorization (para 20(1)(b) of the *IC Act*).

32. In the context of a foreign intelligence authorization issued pursuant to section 26 of the *CSE Act* – which is the case before me – the Intelligence Commissioner's jurisprudence has established that the Intelligence Commissioner can "partially" approve an authorization.[1] The former Intelligence Commissioner relied on an analysis of subsections 26(1) and 34(1) of the *CSE* Act as well as paragraph 20(1)(a) of the *IC Act*.

33. Specifically, subsection 26(1) of the *CSE Act* states that Minister may issue a foreign intelligence authorization that allows CSE to carry out <u>any activity specified</u> in the authorization. As for subsection 34(1) of the *CSE Act*, it provides that the Minister may issue an authorization if he or she concludes that there are reasonable grounds to believe that <u>any activity</u> that would be authorized by it is reasonable and proportionate.

34. It was the former Intelligence Commissioner's view that 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) <u>must apply to each activity that would be authorized</u>. In the same manner that the Minister must determine whether she can conclude that each and every activity is reasonable and proportionate, the Intelligence Commissioner must, pursuant to paragraph 20(1)(a) of the *IC Act*, approve the authorization if he is satisfied that the conclusions at issue are reasonable.

[1] *Intelligence Commissioner – Decision and Reasons,* July 20, 2021, File: 2200-B-2021-02, pages 7–10.

35. The former Intelligence Commissioner was also of the view at page 9 of his decision 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."

36. I adopt this view and analysis.

37. The Intelligence Commissioner's decision may be reviewable by the Federal Court of Canada on an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

IV. ANALYSIS

38. On March 6, 2023, the Chief submitted a written Application for a Foreign Intelligence Authorization for [redacted] (the Application) in furtherance of its mandate (subsection 33(1) of the *CSE Act*). The Application describes the activities that can be used by CSE to acquire foreign information and maintain covertness while carrying out the activities. A description of the activities included in the Application can be found in the classified annex to this decision (Annex A). I have decided to include this description in a classified annex for two reasons. First, it will render the eventual public version of this decision easier to read. Second, it will ensure that the decision includes the nature of the facts that were before me, which otherwise would only be available in the record.

39. The Application also explains how CSE's activities fulfill the objective of collecting foreign intelligence in accordance with the Government of Canada's 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. Further, the Application indicates how the Chief proposes CSE will use, analyse, retain, and disclose the acquired information.

40. Based on the facts presented in the Application, and generally in the record, the Minister concluded, in accordance with subsection 33(2) of the *CSE Act*, that there are reasonable grounds to believe that the Authorization is necessary and that the conditions of subsections 34(1) and (2) of the *CSE Act* were met.

41. In accordance with section 13 of the *IC Act*, I must review whether the Minister's conclusions – made under subsections 34(1) and (2) of the *CSE Act* and 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

i. The meaning of reasonable and proportionate

42. Pursuant to subsection 34(1) of the *CSE Act*, for the Minister to issue a foreign intelligence authorization, she must conclude that "there are reasonable grounds to believe that any activity that would be authorized is reasonable and proportionate, having regard to the nature of the objective to be achieved and the nature of the activities."

43. Determining whether an activity is "reasonable" under subsection 34(1) is part of the Minister's obligation and is distinct from the "reasonableness" review conducted by the Intelligence Commissioner. The Minister concludes that any activity that would be authorized by the Authorization is reasonable by applying her understanding of what the term means. The Intelligence Commissioner determines whether the Minister's conclusions are reasonable by conducting a quasi-judicial review and applying the reasonableness standard of review, explained previously.

44. Determining whether an activity is reasonable and proportionate under subsection 34(1) is also a contextual exercise. The Minister may be of the view that the context calls for a number of factors to be considered. Nevertheless, for the Minister's conclusions to be reasonable, I am of the view that her understanding of the meaning of these terms must at least reflect the following underlying considerations.

45. The Intelligence Commissioner's jurisprudence has stated that the notion of "reasonable" pursuant to subsection 34(1) includes an activity that is fair, sound, logical, well-founded and well-grounded having regard to the objectives to be achieved. I add that the notion entails that the activity must be legal in the sense that it must be permissible under the statute. The Intelligence Commissioner's role is limited to reviewing the reasonableness of the ministerial conclusions concerning the requirements laid out at subsections 34(1) and (2) of the *CSE Act*. If a foreign intelligence authorization included activities that the statute does not allow the Minister to include, I am of the view that such a conclusion would be reviewable under the "reasonable" criterion.

46. In essence, a reasonable activity is one that is authorized by the *CSE Act* and that has a rational connection with its objectives. The objectives of the activity must align with the legislative objectives. In the context of this Authorization, this means that the objectives of the activities that would be authorized must contribute to the furtherance CSE's foreign intelligence mandate.

47. As for the notion of "proportionate", it entails a balancing of the interests at play. A useful comparison is the balancing conducted in a reasonableness review where *Charter* rights are at issue. In that context, a decision maker must balance *Charter* rights with the statutory objectives by asking how those rights will be best protected in light of those objectives (see for example *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55-58). It is not sufficient to simply balance the protections with the statutory objectives. A reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives (*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 80-82).

48. Adopted to our context, it requires that the Minister perform the balancing exercise and finds that the activities that would be permissible under the Authorization be minimally impairing on the privacy interests of Canadians and persons in Canada. It is also important that the acquisition and use of foreign intelligence is not outweighed by the impact of any potential

breaches to the Acts of Parliament. If necessary to achieve these purposes, measures should be in place to restrict the acquisition, retention and use of that information.

ii. Reviewing the Minister's conclusion that the activities that would be authorized by the Authorization are reasonable

49. The Minister concluded, at paragraph 3 of the Authorization that she had reasonable grounds to believe "that the activities authorized in this Authorization are reasonable given the objective of acquiring information from the GII for the purpose of providing foreign intelligence in accordance with the GC's intelligence priorities."

50. With respect to the specific [redacted] at paragraph 51 of the Authorization that would be authorized, I find that the Minister's conclusion is reasonable. There is a clear rational connection between those activities and their objective – collection of foreign intelligence. It is evident in the record that the specific [redacted] contribute to CSE's foreign intelligence mandate.

51. Similarly, I find the Minister's conclusion reasonable with respect to the activities listed at paragraphs 50(a), (b) and (c) of the Authorization. The Minister understood and explains how those activities are necessary to give effect to [redacted]

52. However, as described in paragraphs 58 to 82 below, I am of the view that the Minister's conclusion is not reasonable relating to the activities listed at paragraphs 50(d) and (e) of the Authorization.

iii. Reviewing the Minister's conclusion that the activities that would be authorized by the Authorization are proportionate

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

54. I am satisfied that the Minister's conclusion is reasonable that the authorized activities would be proportionate. The record clearly reveals that the Minister considered that CSE policies and practices sought a balance between acquisition of foreign intelligence and privacy protection, showing that she conducted the balancing exercise.

55. I find that the Minister's balancing exercise is reasonable. The Acts of Parliament that have the potential to be contravened, and specifically the provisions at issue of the Acts, are limited in number and in impact on the Canadian public. That is not to say that the potential offences are not serious. Rather, CSE proposes to carry out its activities in a way that will limit the potential offences. As such, I am satisfied that when an Act of Parliament is breached, the impact of the breach will be limited.

56. For example, CSE will seek to collect information where there is no, or as little Canadian related information as possible. Further, if private communications are intercepted involving a Canadian, these will only be retained pursuant to the limited exceptions in the *CSE Act*.

57. The Minister was also clearly aware of the privacy interests at issue and laid out the measures in place to protect them. Consequently, she came to the conclusion that the proposed activities justify any potential impairment of Canadian privacy interests.

iv. The Minister's conclusions relating to certain activities in the Authorization are unreasonable because the activities fall outside the scope of subsection 26(2) the CSE Act

58. Subsection 26(2) of the *CSE Act* sets out the following:

> 26(2) Activities and classes of activities that a Foreign Intelligence Authorization may authorize the Establishment to carry out may include any of the following:
> (a) gaining access to a portion of the global information infrastructure;
> (b) acquiring information on or through the global information infrastructure, including unselected information;
> (c) installing, maintaining, copying, distributing, searching, modifying, disrupting, deleting or intercepting anything on or through the global information infrastructure;

(d) doing anything that is reasonably necessary to maintain the covert nature of the activity; and
(e) carrying out any other activity that is reasonable in the circumstances and reasonably necessary in aid of any other activity, or class of activity, authorized by the authorization.

59. At paragraphs 50 and 51 of the Authorization, the Minister stated the following:

> 50. I authorize CSE to carry out the following activities:
> a) [redacted]
> b) [redacted]
> c) [redacted]
> d) [redacted]
> e) [redacted]
>
> 51. I authorize CSE to carry out the following [redacted] in furtherance of its foreign intelligence mandate:
> [redacted]

60. For the following reasons, I am of the view that the Minister's conclusions relating to the activities and classes of activities found at paragraphs 50(d) and (e) of the Authorization are unreasonable.

a) *The activities are outside of the scope of subsection 26(2) of the CSE Act*

61. For the Minister's conclusions to be reasonable with respect to the activities and classes of activities set out in the Authorization, the Minister must have the statutory authority to include them in the Authorization.

62. Paragraph 50(d) of the Authorization defines the class very broadly [redacted] and relates to [redacted] In contrast, paragraph 26(2)(e) of the *CSE Act* – [redacted] – limits the basket of activities that can be authorized: an activity must be "reasonable in the circumstances", "reasonably necessary in aid of", and the activities to which they relate must be "authorized by the authorization", which I understand to be this specific authorization.

63. The much broader class of activities at paragraph 50(d) cannot reasonably fit into the more limited class found in the statute.

64. Similarly, subsection 26(2) does not include an activity or a class of activities within which can fall paragraph 50(e) of the Authorization, [redacted] The record also does not show how [redacted] could constitute an activity CSE can carry out in accordance with the text of subsection 26(2).

65. As a result, the activities described at paragraph 50(e) of the Authorization are outside of the scope of subsection 26(2) of the *CSE Act*.

b) Subsection 26(2) of the CSE Act constitutes an exhaustive list of activities

66. My conclusion that the classes of activities included at paragraphs 50(d) and (e) are outside of the scope of the list at subsection 26(2) of the *CSE Act* does not end the analysis of whether the Minister's conclusions with respect to those activities are reasonable. Instead, it raises a further question: Does subsection 26(2) constitute an exhaustive list of activities, or simply an illustrative list of activities to which the Minister can add?

67. In conducting a reasonableness review, I must show deference to the Minister in the interpretation of the *CSE Act*. This means that if the Minister interpreted subsection 26(2) as an illustrative list and that her interpretation was reasonable taking into account principles of statutory interpretation, the Minister would have the statutory authority to include the

activities at issue in the Authorization (subject of course to the Minister being satisfied that the other conditions were met).

68. In the Chief's Application to the Minister (paragraphs 6 and 7), paragraph 50(d) was worded differently and the class of activities listed at paragraph 50(e) of the Authorization was not included. Contrary to the Minister's list of activities included in the Authorization, the Chief's list for which she sought ministerial authorization mirrors the language in the statute.

69. Ultimately, the activities for which a ministerial authorization is sought are the activities for which the Chief seeks authorization in the Application. I do not interpret the *CSE Act* as restricting the Minister from amending or modifying the activities that will conclusively be included in the ministerial authorization. However, those situations and the grounds for doing so would have to be reflected in the record.

70. There is nothing in the Minister's conclusions, or in the record, to suggest that she turned her mind to the interpretation of subsection 26(2) of the *CSE Act*. On the contrary, the record reveals that the intention of the Minister was for the activities set out in the Authorization to reflect the list of activities presented by the Chief and enumerated at subsection 26(2) of the *CSE Act*, and not to go beyond it.

71. Even with deference shown to the Minister, given the importance of justification in a reasonableness review, I cannot conclude that the Minister interpreted subsection 26(2) as a non-exhaustive list. I cannot attribute to the Minister an analysis that is not reflected in the record. As a result, for purposes of my review, I must consider that subsection 26(2) of the *CSE Act* constitutes an exhaustive list of activities that can be authorized by the Minister.

72. I therefore find that the Minister's conclusions are unreasonable in relation to the activities described at paragraphs 50(d) and (e) of the Authorization because the activities do not meet the "reasonable" criterion set out at subsection 34(1) of the *CSE Act*. Their inclusion in the Authorization is not justified by intelligible reasons showing the Minister had the required statutory authority to include them.

73. Had I found that the Minister's conclusions demonstrated that she had interpreted subsection 26(2) as a non-exhaustive list, I am not convinced that such an interpretation would be reasonable – although it is not a matter that must be decided at this time.

c) There are no effects on CSE's activities under the Authorization

74. In the circumstances, I think it is useful to explain the effects of having concluded that the Minister's conclusions in relation to the activities set out at paragraphs 50(d) and (e) of the Authorization are unreasonable. My objective is to distill any uncertainty that could arise from my conclusion.

75. Having reviewed the record, I am of the view that the activities that will be undertaken by CSE pursuant to the Authorization will not be restricted by me not approving the activities set out at paragraphs 50(d) and (e) of the Authorization.

76. In relation to paragraph 50(d) – [redacted] pursuant to the Authorization.

77. The text of paragraph 50(d) of the Authorization entails that [redacted] The intent is understandable and even laudable: if the [redacted] CSE and the Minister want to have the authority to facilitate those activities, and further, wish to be transparent about it.

78. However, the legislation has been drafted so that CSE activities that may contravene an Act of Parliament must be authorized by the Minister and subsequently by the Intelligence Commissioner. It means that the Minister – and myself as Intelligence Commissioner when the ministerial authorizations are made pursuant to sections 26 and 27 of the *CSE Act* – must have a solid understanding of the activities that will be undertaken pursuant to an

authorization. [redacted] may circumvent the legal requirement that the decision maker in the [redacted] understands the activities he or she is authorizing and how they will be conducted.

79. Paragraph 26(2)(e) of the *CSE Act* specifically provides that if any other activity is necessary to give effect to the main activities of a foreign intelligence authorization, these can be authorized by the Minister in that specific foreign intelligence authorization. If another ministerial authorization required the [redacted] it should be specified in that [redacted]

80. I add that paragraph 26(2)(e) of the *CSE Act* is broadly worded. I would expect that a Minister being asked to include activities that would be covered by paragraph 26(2)(e) would be provided with some details and have a solid understanding of the types of activities in question.

81. With respect to the activities set out at paragraph 50(e) [redacted] – I am similarly of the view that my conclusion does not affect the activities that CSE may carry out. [redacted] As a result, CSE must ensure that [redacted] As Intelligence Commissioner, it is outside my purview to authorize or review [redacted] I simply underline that [redacted]

82. That being said, I appreciate and commend that the Chief of CSE has explained that CSE's intent is to [redacted] Indeed, it is crucial factual information that the Minister and I need to be aware of when making our respective decisions. For example, for the Minister it may play a role in her analysis of whether the activities are reasonable and proportionate, or whether there are sufficient measures to protect information in which Canadians and persons in Canada have privacy interests. For me, it may be a factor in determining whether the Minister's conclusions are reasonable. Indeed, the Minister's assurance in the Authorization that [redacted] is an important consideration in weighing the impact on privacy interests of Canadians and persons in Canada and therefore the reasonableness of her conclusions.

B. Subsection 34(2) – Conditions for authorization – Foreign Intelligence

83. Subsection 34(2) of the *CSE Act* provides that the Minister may issue an authorization for foreign intelligence activities only if she concludes that there are reasonable grounds to believe that the three listed conditions are met, namely:

a) any information acquired under the authorization could not reasonably be acquired by other means and will be retained for no longer than is reasonably necessary;
b) any unselected information acquired under the authorization could not reasonably be acquired by other means, in the case of an authorization that authorizes the acquisition of unselected information; and
c) the measures referred to in section 24 will ensure that information acquired under the authorization that is identified as relating to a Canadian or a person in Canada will be used, analysed or retained only if the information is essential to international affairs, defence or security.

i. The information acquired under the Authorization could not be reasonably acquired by other means

84. The record before me contains information describing the activities and classes of activities sought to be authorized. Although the record stands on its own, my understanding of the activities has been bolstered by presentations provided to myself and my staff of the Office

of the Intelligence Commissioner by CSE pursuant to section 25 of the *IC Act* in a forum where questions, not directly related to this file, could be asked.

85. In the Authorization, the Minister explains that the [redacted] included are [redacted] The Authorization would [redacted]

86. Further, the activities set out in the Authorization allows for [redacted]

87. As a result, I find reasonable the Minister's conclusion that without the [redacted] the information proposed to be acquired pursuant to the Authorization would not reasonably be available to CSE.

ii. The information will not be retained for longer than is reasonably necessary

88. The Authorization describes how information assessed for the purpose of foreign intelligence is retained pursuant to CSE policy and in accordance with the *Library and Archives of Canada Act*, SC 2004, c 11. A retention schedule for the different categories of information that may be collected is included and the Minister concluded that the information will not be retained for longer than is necessary.

89. Essentially, I understand that CSE's objective is to assess collected information without significant delay and to retain information only as long as it is useful. For the most part, the Minister explains how certain retention periods have been chosen. Further, the Minister explains the basis for which certain types of information can be retained for longer than [redacted] and that automated systems delete the information at the end of any expiration period.

90. As a whole, I find that the Minister's conclusions with respect to retention of information no longer than is reasonably necessary are clear and rationally connected to the retention period.

91. Of note, if the content of information has a recognized Canadian privacy interest and is assessed as essential to international affairs, defence or security, it is retained for "as long as is operationally relevant." Although I agree that the Minister's conclusion with respect to this retention period is reasonable, it rests on the premise that the "as long as is operationally relevant" criterion necessarily entails that periodic reviews of the information are conducted. Otherwise, the retention period would be indefinite. While paragraph 159 of the Chief's Application makes allusion to a review, I raise an issue related to this in my remarks.

iii. Any unselected information acquired under the Authorization could not reasonably be acquired by other means

92. When conducting activities for the purpose of collecting foreign intelligence, the *CSE Act* requires that particular attention be taken to unselected information that is collected. As defined in section 2 of the *CSE Act*, unselected information is information collected without the use of terms or criteria to identify foreign intelligence interest. When collecting unselected information, all of the information, including any information that could contain Canadian privacy interests, is captured.

93. The unselected information to be acquired pursuant to the Authorisation requires [redacted] pursuant to the Authorization. It provides CSE a better understanding of the [redacted] It also allows CSE to [redacted] I am therefore of the view that the Minister had reasonable grounds to believe that unselected information could not be reasonably acquired by other means.

iv. Measures to protect privacy ensure that information identified as relating to a Canadian or a person in Canada will be used, analysed or retained only if the information is essential to international affairs, defence or security

94. The Minister's conclusions describe the measures in place to protect the privacy interests of Canadians and persons in Canada, which consist of CSE policies related to the retention, use and disclosure of information. As a result, the adequacy of the measures, and therefore the

reasonableness of the Minister's conclusions, rests on the strength of the policies and the robustness of their application.

95. The record describes that information relating to a Canadian or a person in Canada can only be retained if it is assessed to be essential to international affairs, defence or security, including cybersecurity.

96. The term "essential" is not defined in the *CSE Act*. At paragraph 56(d) of the Authorization, the Minister explains the following:

> I consider information related to a Canadian or a person in Canada acquired pursuant to this Authorization to be essential to international affairs, defense [*sic*], or security, including cybersecurity, if the information is required to understand the meaning or import of the foreign intelligence being used, analysed, or retained. This may also include information that is retained in order to prevent inadvertent acquisition of information related to Canadians or persons in Canada (i.e. the information is retained in order to ensure that Canadians, their devices and activities are appropriately protected).

97. The Authorization explains that it is an analyst who conducts the "essentiality" test. Even though it is not specified in the record, I infer that an analyst will conduct his or her analysis using the same definition of what constitutes "essential".

98. I am of the view that the Minister's definition of "essential" is reasonable. Indeed, the Minister's interpretation of paragraph 34(2)(c) falls within a range of interpretations that could be reasonable given the purpose of the provision. Further, she provides a rational justification for her definition.

99. There are no statutory definitions of international affairs, defence or security. The record does not provide any definition either. I do not find that this lack of formal definition affects the reasonableness of the Minister's conclusions. I am of the view that the Minister and CSE have the operational expertise to determine the content of those terms.

100. In addition to describing when information with a Canadian privacy interest is retained, the record provides significant information concerning when it is used and disclosed. Canadian identifying information will be suppressed, meaning that it is anonymized, unless the information is necessary to understand the foreign intelligence. Further, unsuppressed information may only be disclosed if the recipient or class of recipients have been designated by Ministerial Order, and the disclosure is essential to international affairs, defence or security, including cybersecurity, pursuant to section 43 of the *CSE Act*.

101. CSE also limits access to its information repositories to those who are properly accredited to conduct foreign intelligence activities and have received the training on information handling procedures.

102. I am of the view that the record reveals that CSE policy and practices take seriously the retention, analysis and use of information relating to a Canadian or a person in Canada. I am also satisfied that the Minister's conclusions are reasonable that such information will only be retained, analysed and used if it is essential to international affairs, defence and security, including cybersecurity.

C. Partially approving the Authorization

103. Except for the conclusions associated with activities listed in paragraphs 50(d) and (e) of the Authorization, I have found that the Minister's conclusions made under subsections 34(1) and (2) of the *CSE Act* are reasonable. As previously mentioned, I must approve only the activities or classes of activities in the Authorization for which the Minister's conclusions are reasonable. As a result, I approve the Authorization except for the activities listed in paragraphs 50(d) and (e) of the Authorization.

104. I note that a Foreign Intelligence Authorization including an identical list of activities was approved by my predecessor on June 29, 2022. I do not consider this as an impediment to my own conclusions as that decision was based on its own, different record.

V. REMARKS

105. I would like to recognize CSE's effort to integrate some remarks I made in my latest decision dealing with a Cybersecurity Authorization for Activities on Non-Federal Infrastructure. Specifically, the explanation of CSE's retention timelines have been helpful in my review of the file. Furthermore, I appreciate CSE's commitment to notify me in the event of a contravention of an Act of Parliament that is not listed in the ministerial authorization as well as when solicitor-client communications have been used in a situation where there was imminent danger of death or serious bodily harm.

106. I would like to make five additional remarks to assist in the consideration and drafting of future of ministerial authorizations. These remarks do not alter my findings regarding the reasonableness of the Minister's conclusions.

i. Notification to the Intelligence Commissioner [redacted]

107. As explained in the Authorization, a key addition to this year's [redacted] The Chief has informed the Minister that she will be notified should a specific operation of this nature materialize.

108. The Minister was satisfied that the Chief's Application, as it existed, was necessary and reasonable to issue the Authorization. I was satisfied that the Minister's conclusions, for the most part, were reasonable. I do not foresee that information relating to [redacted] as anticipated, would change those conclusions. Nevertheless, if the operations take place, I would encourage the Chief or the Minister to also inform me to ensure completeness of the record. Indeed, had the information existed, it would have been included in the record currently before me.

ii. Retention period for metadata

109. My second remark relates to the [redacted] retention period for metadata. It is unclear in the record why CSE has adopted [redacted] as the retention period given the potential of the metadata to include information identified as relating to a Canadian or a person in Canada. Given the type of information that metadata could reveal as explained in the Authorization, I found reasonable the Minister's conclusion that it is reasonably necessary that metadata should be retained for a relatively long period. It would be helpful in any future application to better understand what could be achieved with the information in [redacted] that could not be achieved in a shorter time period.

110. Additionally, the record reveals that a query of metadata could return information identified as relating to a Canadian or person in Canada. In such an instance, the results of the query can be kept if they are deemed essential to international affairs, defence or security. If not, the Authorization explains that the query results are deleted, but the metadata itself is not as [redacted] Further clarification, or an example, would be helpful.

iii. Definition of "essential"

111. My third remark relates to the definition of the term "essential". It constitutes a crucial term in the operation of the legislation and the way it is put into practice is an important component of the Minister's conclusions that have to be reviewed by the Intelligence Commissioner. I found that the Minister's stated definition of the term was reasonable. Nonetheless, any future authorization would benefit from greater clarity with respect to how the term is applied in practice in relation to the [redacted] to which it relates.

112. I would add that a greater understanding of the operational definitions of what constitutes international affairs, defence and security, including cybersecurity, would also be beneficial.

iv. Solicitor-client information

113. My fourth remark relates to solicitor-client information. The Authorization describes the steps that will be followed when, in the course of conducting activities pursuant to the Authorization, information that may be protected by solicitor-client privilege is obtained. These steps can broadly be defined as i) identifying the information as being privileged; ii) assessing the privileged information to determine whether the Chief of CSE has reasonable grounds to believe the communication is essential to international affairs, defence and security, including cybersecurity; iii) should the Chief determine that the solicitor-client communication is essential, the Chief will advise the Minister and seek her direction regarding its use, analysis, retention, and disclosure.

114. In cases where the Chief has reasonable grounds to believe that the privileged information raises concern that an individual or group is in imminent danger of death or serious bodily harm, the Chief is permitted to use, analyse, retain, or disclose the communication to the extent necessary to address the imminent threat. If such a situation arises, the Chief will advise the Minister no later than [redacted] after such a determination is made, as well as inform the Intelligence Commissioner.

115. In my decision in relation to Cybersecurity Authorization for Activities on Non-Federal Infrastructures (2200-B-2022-05), I underlined the importance of solicitor-client privilege as a principle of fundamental justice. A component of solicitor-client privilege as a principle of fundamental justice is that whenever it must be pierced, the privilege is impaired in as minimal a way as possible. Indeed, as stated by the Supreme Court in *Canada (Attorney General) v Chambre des notaires du Quebec*, 2016 SCC 20, "[b]ecause of its importance, the Court has often stated that professional secrecy should not be interfered with unless absolutely necessary given that it must remain as close to absolute as possible."[2]

[2] At para 28. See also for example *Re Unnamed person*, 2020 FC 1190 at paras 44–65.

116. In the context of warrants issued pursuant to the *Canadian Security Intelligence Service Act*, Chief Justice Lutfy of the Federal Court of Canada was similarly of the view that any breach of solicitor-client privilege should be limited as much as possible:

> [60] Despite its importance, solicitor-client privilege is not absolute. The case law relied upon by the named persons to buttress the importance of the solicitor-client privilege does not exclude its possible breach for reasons of necessity.
>
> [61] Avoiding injury to national security, which can include the risks of inadvertent disclosure, may constitute a necessity that warrants piercing the privilege in as minimal a way as the circumstances dictate. This should not be decided in a vacuum.[3] [References omitted.]

117. The steps described in the Authorization clearly have the intent of respecting solicitor-client privilege. However, it is unclear from the record how these steps are given effect. More specifically, the record does not reveal how many CSE employees are involved in each step and thus privy to the potentially solicitor-client information and if retained, what conditions, if any, are imposed on sharing and accessing that information. Even if there are national security grounds for sidelining solicitor-client privilege, access to the privileged information should be restricted as much as possible.

118. I am aware, from receiving the report on the outcome of activities carried out under past authorizations pursuant to subsection 52(2) of the *CSE Act*, that CSE has not used, analyzed, retained or disclosed any recognized solicitor-client communications from foreign intelligence authorizations. With that in mind, I trust that if CSE undertakes steps to deal with potentially solicitor-client privileged information in the future, the process will be undertaken with a view to minimize as much as possible the impairment of the privilege by limiting the access to the information.

119. In addition to limiting any breach of solicitor-client privilege as much as possible, there are two further elements I wish to underline for consideration by the Minister and the Chief. First, the Supreme Court of Canada teaches us that solicitor-client privilege should only be

[3] *Almrei (Re)*, 2008 FC 1216.

breached when absolutely necessary. It has also recognized that solicitor-client privilege could be pierced for reasons of public safety (*Smith v Jones*, [1999] 1 SCR 455 [*Smith*]) and there exists case law to support the position that solicitor-client privilege could be pierced for reasons of "national security" (see for example *Smith* at para 53; *Almrei (Re)* at para 61). It is less clear that there exists judicial support for piercing the privilege and retaining the information for reasons of "international affairs" or even "defence". This is complex area of the law where the factual context may play an important role. It may be an element to consider in the upcoming legislative review of the *National Security Act, 2017*.

120. The second element is that the process to deal with potentially solicitor-client privileged information consists of an internal process that remains with CSE and the Minister. In a situation where there is an imminent threat and time is of the essence, it may understandably be necessary for the determination and authorization to use or disclose solicitor-client information to be entirely internal. However, when time is not of the essence, the current process places the Minister in an extremely difficult position of acting as a neutral arbitrator in balancing the breach of a principle of fundamental justice with foreign intelligence objectives.

121. I would add that the decision of whether incidentally collected solicitor-client privilege should be pierced to the extent of being retained may be more appropriately made by a judicial officer, which is the case in at least some contexts (see for example *Smith*). I note that in a Federal Court decision concerning CSIS warrants where it was anticipated that communications containing solicitor-client privilege may incidentally be intercepted, Justice Brown approved the warrant condition that had been before him that required CSIS to seek directions from the Court with respect to retaining incidentally collected solicitor-client privileged information:

> No communication and no oral communication may be intercepted and no information may be obtained at the office or residence of a solicitor or at any other place ordinarily used by solicitors for the purpose of consultation with clients.
>
> Any solicitor-client communication intercepted or obtained shall be destroyed unless the Deputy Director of Operations or his designate has reasonable grounds to believe the

> communication relates to a threat in relation to which a warrant issued pursuant to section 21 of the *Act* is in force, in which case an application shall be brought to the Court for directions before the Service can use, retain or disclose the communication.
>
> However, where the Deputy Director of Operations or his designate determines that there is information that raises real concerns that an individual or group is in imminent danger of death or serious bodily harm, the Deputy Director Operations or his designate may use, retain or disclose the communication to the extent strictly necessary to address that danger. The Service shall advise the Court, in writing, within 48 hours of such determination and shall seek direction from the Court for further retention or disclosure of the communication.[4]

122. In light of these comments, the Minister and the Chief may wish to consider reviewing CSE policy dealing with solicitor-client privilege.

v. The retention criterion of "as long as is operationally relevant"

123. My last remark relates to the retention schedule of information that has a recognized Canadian privacy interest and is assessed as essential to international affairs, defence or security. I was satisfied that the Minister's conclusions that retaining this information for "as long as is operationally relevant" was reasonable because that criterion necessarily entailed that periodic reviews of what is "operationally relevant" are conducted.

124. Paragraph 159 of the Chief's Application refers to "procedures in place" to review the use of information and delete any information that is no longer "operationally required". However, the Authorization does not describe the procedures that are currently in place and how often the periodic reviews occur.

125. Additional information relating to procedures in place and how often information is reviewed to determine that it remains operationally relevant would be helpful for me to be fully satisfied that CSE is retaining information that has a recognized privacy interest in accordance with the stated criteria.

[4] *Re Unnamed person*, 2020 FC 1190 at para 33.

VI. CONCLUSIONS

126. Based on my review of the record submitted, I am satisfied that the Minister's conclusions made under subsection 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraphs 50(a), 50(b), 50(c) and 51 of the Authorization are reasonable. I am not satisfied that the conclusions made under subsection 34(1) and (2) of the *CSE Act* in relation to activities and classes of activities enumerated at paragraphs 50(d) and 50(e) of the Authorization are reasonable.

127. I therefore approve the Minister's Foreign Intelligence Authorization for [redacted] dated March 27, 2023, pursuant to paragraph 20(1)(a) of the *IC Act*, except for the activities listed at paragraphs 50(d) and (e) of the Authorization.

128. 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.

129. As prescribed in section 21 of the *IC Act*, a copy of this decision will be provided to the National Security and Intelligence Review Agency for the purpose of assisting the Agency in fulfilling its mandate under paragraphs 8(1)(a) to (c) of the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2.

April 21, 2023

(Original signed)
The Honourable Simon Noël, K.C.
Intelligence Commissioner