

Communications Security Establishment Canada

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Your File Votre référence

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March 11, 2008

Ms. Joanne Weeks
Executive Director
Office of the Communications Security Establishment Commissioner
90 Sparks Street, Suite 730
Ottawa, Ontario
P.O. Box 1984, Station "B"
K1P 5R5

Dear Ms. Weeks,

OCSEC Discussion Paper Concerning CSEC's
Use of Parts (a) and (c) of its Mandate

On behalf of the Communications Security Establishment Canada (CSEC), I would like to thank you for forwarding your office's discussion paper for our consideration and comment. I welcome the opportunity to state CSEC's position on the points that the paper raises.

CSEC notes that while the paper uses contact chaining as a starting point, it deals with the interpretation of parts (a) and (c) of CSEC's mandate in the broader context. In particular, the paper suggests that parts (a) and (c) are not independent authorities, as CSEC maintains, but "complementary", if not "merged". The paper also suggests that CSEC's interpretation of part (c) of its mandate hinders CSEC's assistance to CSIS and Law Enforcement Agencies (LEAs). CSEC hopes that its comments below will clarify CSEC's position and the underlying reasoning.

CSEC remains firmly of the view that parts (a) and (c) of its mandate are indeed separate, given:

- the legislated definition of "foreign intelligence" in the *National Defence Act* (NDA)
- the rationale for the inclusion of part (c) of the mandate in subsection 273.64(1) of the NDA, and
- Department of Justice (DoJ) legal advice.

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Paragraph 273.64(1)(a) of the NDA mandates CSEC to provide "foreign intelligence in accordance with Government of Canada intelligence priorities", and subsection 273.61 of the Act defines "foreign intelligence" as "information or intelligence about the capabilities, intentions, or activities of a foreign individual, state, organization or terrorist group, as they relate to international affairs, defence, or security". Consistent with this, the National SIGINT Priorities List (NSPL) includes threats to the security of Canada as a Government of Canada (GC) foreign intelligence requirement. Security-related CSEC reporting based on the NSPL is of interest to a range of GC clients, including, but not restricted to, CSIS, given its mandate to investigate threats to the security of Canada.

In light of the above, CSEC wishes to address the paper's central assumption that the provision of foreign intelligence to CSIS and LEAs is linked with, if not reliant on, part (c) of its mandate. In fact, CSEC does not need part (c) of its mandate to provide foreign intelligence to CSIS and LEAs as part (a) already provides CSEC with ample authority to do so. CSEC can, and does — under part (a) — provide foreign intelligence to CSIS with respect to terrorism,

the condition that the information or intelligence produced is about the capabilities, intentions, and activities of foreign entities as they relate to international affairs, defence, or security.

A point related to this is the rationale for the creation of part (c) of CSEC's mandate. Part (c) was not created to address a perceived gap in CSEC's ability to fulfill its foreign intelligence mandate, but rather to provide a basis in legislation for a category of support which recognized that CSEC's unique capabilities and expertise could assist CSIS and LEAs in ways other than the provision of foreign intelligence (the drafters of the legislation clearly envisaged two separate functions, otherwise they would not have created distinct parts to the mandate). This separate category of support consists of collection, processing, and other technical (e.g., decryption

or operational (e.g., IRRELEVANT **IRRELEVANT** support to CSIS and LEAs' operations. The need to formalize this type of support in the NDA was primarily due to the burgeoning challenges posed by rapidly evolving and increasingly complex communications technologies that CSIS and LEAs were encountering in the course of their investigations, and as an alternative to replicating the same capabilities across all agencies at great cost. Part (c) of the mandate. therefore, concerns the provision of "services" rather than the provision of "information" (i.e., foreign intelligence as defined in the NDA). Although these technical or operational services may rely on capabilities and expertise developed under part (a) of CSEC's mandate, their provision to CSIS and LEAs is not in furtherance of CSEC's foreign intelligence mandate; rather, they are provided in those cases as a means to support the fulfillment of the requesting agency's lawful mandate and are subject to any limitations imposed by law on that agency.

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It is important to note that capabilities and expertise derived from part (b) of CSEC's mandate (IT Security) can also be used to assist CSIS and LEAs under part (c). Therefore, part (c) of the mandate should not be viewed as synonymous with tools or capabilities derived from, or carried out solely by, SIGINT. When CSEC's IT Security operational areas provide assistance under part (c), "SIGINT-derived" assistance would be unlikely to come into play.

I should additionally note that the Department of Justice (DoJ) has also looked at the
mandate issue. Solicitor-Client Privilege
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In line with this, CSEC will continue to conduct its activities in a manner consistent
with the legal advice provided by the DoJ Solicitor-Client Privilege
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I would now like to respond to a number of the paper's comments about the nature of CSEC support to CSIS and LEAs:

 CSEC strongly believes that the statement (page 1, paragraph 3) that it is reluctant "to recognize and directly address legitimate requests for assistance from CSIS/LEAs under [part (c) of CSEC's] mandate" is unfounded. This implies that CSEC treats requests from CSIS/LEAs without due consideration. On the contrary, CSEC reviews each request thoroughly and in keeping with established procedures that are familiar to both CSEC and CSIS/LEAs.

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- The paper asserts (page 2, two bullets at page bottom) that CSEC's use of part (a) of its mandate fails to recognize CSIS/LEA expectations of source protection and limited end product distribution when these agencies provide information to CSEC. We wish to state categorically that these claims do not reflect the manner in which CSEC conducts its operational relations with CSIS/LEAs. CSEC consults the providing agency to discuss sensitivities and distribution of end products, and does not act in a way that places CSIS/LEA sources at risk. In short, there is no "trade-off" between CSEC's provision of foreign intelligence and protection of CSIS/LEA sources. CSEC therefore finds that the question at the top of page 3 ("Are CSIS/LEAs being put in a position of having to choose whether it is more important to attempt to obtain FI in support of their investigations or to potentially jeopardize their sources") to be without foundation.
- The second bullet at the bottom of page 2 also intimates shortcomings in CSEC dissemination of foreign intelligence to CSIS and LEAs, specifically, that SIGINT clients at these agencies must search through end-product reporting that is available to other clients to find information that is of interest to them. However, this bullet is based on a misunderstanding of SIGINT dissemination. SIGINT is disseminated on a "need-to-know" basis in accordance with client requirements (i.e., clients do not receive all SIGINT end-product, but only that which matches their specific needs). Therefore, clients at CSIS and LEAs, like other clients, should not have to "wade through" SIGINT reporting they do not find relevant. Furthermore, CSEC alerts clients (at CSIS and elsewhere) to SIGINT reports that are of high-interest to them, especially those of a time sensitive nature, as soon as such reports are issued. CSEC relies on various dissemination vehicles (e.g., Client Relations Officers, etc.) to deliver SIGINT directly to clients.
- The paper's statement that "CSE seems to be under the impression that all lawful intelligence investigations require a warrant" is not correct. In point of fact, CSEC is well aware that CSIS Act section 12 investigations commence with powers that do not require warrants. However, when providing support under part (c) of its mandate, CSEC cannot exceed the section 12 (CSIS Act) authorities under which the Service operates. Clarity from the DoJ on the Blanchard Decision, and/or changes to legislation, are required to settle the issue of extraterritoriality (note, however, that extraterritoriality is not at issue when CSEC provides foreign intelligence to CSIS under part (a) of CSEC's mandate).

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• The final paragraph of the discussion paper does not accurately reflect CSEC's position. As noted above, CSEC does not need part (c) of its mandate to provide foreign intelligence to CSIS and LEAs. Secondly, CSEC is not automatically allowed to use the information obtained from a client under part (c) of its mandate for purposes under part (a) of its mandate. Such information must be lawfully disclosed to CSEC on a case-by-case basis for CSEC to be able to use the information under part (a). For example, in order to retain and use metadata IRRELEVANT

IRRELEVANT in support of activities under part (a) of CSEC's mandate, CSEC must obtain explicit approval from CSIS.

with a description of the purpose of obtaining foreign intelligence related to foreign entities abroad (i.e., under part (a) of its mandate). CSIS-supplied identifiers in these cases are essentially no different than information provided by other clients

that help CSEC develop foreign intelligence targets abroad — that is, in furtherance of the execution of part (a) of the mandate. Although CSIS and LEA-supplied information may focus on Canadians, the analysis related to the potential for foreign intelligence is derived primarily from SIGINT reporting and research on foreign targets and groups located outside Canada. In certain cases, following development activities, if no other avenue exists and there is a justified expectation that foreign intelligence will result, CSEC may generate its own internal request to initiate a selector. Relatively few requests have actually been authorized.

Finally, CSEC wishes to address the paper's claim (page 1, paragraph 3) about CSEC's legal compliance with the NDA:

"CSE's reluctance to recognize and directly address legitimate requests for assistance from CSIS/LEAs under CSE's (c) mandate could be considered a failure to fulfill CSE's (c) mandate and therefore could constitute non-compliance with the NDA [emphasis added]."

CSEC takes most seriously any suggestion that it does not comply with the law.

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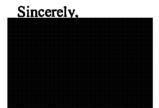
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CSEC responds to requests for assistance under part (c) of its mandate (as indeed to any request under its other mandated activities) in accordance with appropriate legal and policy authorities, as well as its resource capacity and priorities (both of which can have considerable bearing on CSEC's ability to meet a given requirement). A decision not to respond to a levied requirement owing to resource limitations and competing priorities is an operational

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issue and does not constitute non-compliance or unlawfulness. In this respect, CSEC is no different than any other government organization. For example, although CSIS is mandated to investigate threats to the security of Canada and the RCMP investigate criminal activity, they also must prioritize their activities and allocate resources as feasible.

I trust that the above information clarifies CSEC's position and the underlying reasoning.



A/Director General, Policy and Communications

cc: David Akman, Director, Legal Services