

Office of the
Communications Security
Establishment Commissioner



Bureau du
Commissaire du Centre de la
sécurité des télécommunications

TOP SECRET/COMINT/CEO
(with attachment)
10 January 2008

[REDACTED]
Associate Chief
Communications Security Establishment
Confederation Heights
719 Heron Road
Ottawa, Ontario
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Dear [REDACTED]

As I mentioned to you at our meeting before Christmas, OCSEC has drafted a discussion paper on CSE's use of its (a) and (c) mandates which Commissioner Gonthier reviewed this week. A copy of the paper is attached. In addition, an electronic copy has been forwarded to the Director of Corporate and Operational Policy, [REDACTED]

Once you have had an opportunity to consider the content, I suggest that we arrange for a meeting with our respective interested parties to discuss the matter.

In the meantime, if you have any questions, please call me.

Yours sincerely,

Happy New Year!

Joanne Weeks
Joanne Weeks
Executive Director

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Discussion Paper Concerning CSE's Use of its (a) and (c) Mandates**Issue**

OCSEC's draft reports concerning metadata and assistance to RCMP and to CSIS raise questions respecting whether CSE's authority to undertake contact chains at the request of CSIS/federal law enforcement agencies (LEAs) to identify links in support of an ongoing investigation in Canada should be authorized under par. 273.64(1)(a) [(a) mandate] or par. 273.64(1)(c) of the *NDA* [(c) mandate].

In response to OCSEC's questions, CSE indicated that "the default position is always mandate (a)"¹. CSE expressed the opinion that since the resultant information meets the criteria for foreign intelligence (FI) and is provided as such to the other [requesting] agencies, there is no need to consider whether it is a mandate (c) activity. CSE advised that the (c) mandate may not apply as it requires the use of the requesting agencies' authorities, and the agencies do not have the appropriate mandate [to collect FI themselves], as the agencies' warrants/authorizations may not apply extraterritorially². As a result, CSE believes that should it use its (c) mandate to provide information/intelligence to CSIS/LEAs, CSE would be unable to use the information provided for its own FI purposes under its (a) mandate (because of the limitations imposed by ss. 273.64(3) of the *NDA*). The use of the (a) mandate implies maintaining control over the information collected from chaining the identifiers provided by CSIS/LEAs. This control must be at least equal to that of the agency that provided the lead information, which entails accepting the responsibility to handle all the information (original lead information as well as the resultant information) appropriately and ensuring that measures to protect privacy are in place.

IRRELEVANT

¹ We understand that the phrase "the default position is always mandate (a)" is intended to mean that CSE always resorts to using the (a) mandate, and will only resort to the (c) mandate if the proposed activities can not be justified under the (a) mandate. The phrase could be interpreted to mean the opposite: that should the (c) mandate not be applicable, CSE would revert to using the (a) mandate (as a default).

² CSE "Comments on OCSEC 2nd Draft Review Report of the Ministerial Directive on the Collection and Use of Metadata", sent by e-mail to OCSEC Director of Operations on December 6, 2007.

CSE's (a) and (c) mandates - "Merged Authorities"

Question: Are CSE's (a) and (c) mandates truly independent (as suggested by CSE)?

In discussions, CSE has indicated that it uses its (c) mandate for three purposes:

1. to provide technical assistance to CSIS/LEAs;
2. to assist CSIS under s.16 of the *CSIS Act*; and
3. to assist CSIS/LEAs by *intercepting* the communications of a Canadian/person in Canada that is subject to a CSIS warrant (s.12 of the *CSIS Act*) or an LEA's authorization (under Part VI of the *Criminal Code*).

However, in OCSEC's opinion, this is a narrow interpretation of CSE's (c) mandate, as the (c) mandate also permits CSIS/LEAs to request that CSE use its (a) mandate for CSIS/LEAs' benefit, such as to provide FI relating to a Canadian identifier, which is in addition to the three purposes described above.

It can be argued that the purpose of CSE's (c) mandate is to provide an opportunity whereby CSE's and CSIS/LEAs' authorities can complement and support each other. In doing so, CSE's (a) and (c) mandates also complement each other. Such an interpretation would give full scope to the powers conferred on CSE by the *NDA* as a consequence of the (c) mandate.

Therefore, the (a) and (c) mandates should not be considered independent of each other; the (c) mandate supplements but does not contradict the (a) mandate. The (c) mandate affords CSE and the requesting agency an opportunity to optimize their respective lawful capabilities in an appropriate manner. In effect, by merging CSE's and CSIS/LEAs' authorities under CSE's (c) mandate, each authority becomes qualified by the other.

In addition, CSE's use of its (a) mandate (rather than its (c) mandate) appears inconsistent with CSIS/LEAs' purpose in providing information to CSE:

- it fails to recognize how CSIS/LEAs expect the information to be treated. Is CSE affording CSIS/LEAs the level of confidentiality owed to ongoing security intelligence/criminal investigations, e.g., to protect the agencies' sources? CSE may distribute to all clients and Second Party partners an EPR relating to or containing the information (although minimized) provided by the agencies;
- it fails to recognize CSIS/LEAs' expectations respecting the resultant reporting of information/intelligence, if any,

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?

FI and CSIS

CSE has also expressed the opinion that it may not be permitted to pass FI to CSIS because the agencies' warrants/authorizations may not apply extraterritorially. This view fails to take into account CSIS's s.12 mandate under the *CSIS Act* to collect, analyse and retain "information and intelligence that may on reasonable grounds be suspected of constituting a threat to the security of Canada". Section 12 of the Act imposes no geographic limitations on CSIS's activities. The phrase "in Canada" is not used in s.12; rather, the legislation uses the words "relating to" Canada. The effect of these words is that activities outside Canada are permitted.

CSE is applying its own interpretation to the mandate of CSIS. Whereas s.16 makes reference to "in Canada" (which is why it acquires foreign intelligence in Canada from CSE), s.12 imposes no such limitation. What is FI for CSE can very legitimately be security intelligence under s.12 for CSIS.

CSE seems to be under the impression that all lawful security intelligence investigations under s.12 require a warrant. This is not so. There are two levels of lawful investigation based on the level of intrusiveness that CSIS may use prior to obtaining or having to seek a warrant.

In addition, it is unclear why CSE believes that should it use its (c) mandate to provide information/intelligence to CSIS/LEAs, CSE would be unable to use the information provided for its own FI purposes under its (a) mandate, since CSE is currently doing so under s.16 of the *CSIS Act* (with the Memorandum of Understanding).