

## Current Issues: Questions and Answers

- Q: Has the Commissioner examined CSEC's metadata activity referred to in the January 30, 2014, CBC story?
- Q. What access does the Commissioner have to the Communications Security Establishment Canada (CSEC) to be able to conduct his reviews effectively?
- Q. How can an agency the size of the Commissioner's office effectively review the activities of an organization the size of CSEC?
- Q. Does the Commissioner challenge the intelligence priorities of CSEC?
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- Q. Is the Commissioner independent?
- Q. What happens to reports written after conducting reviews of an intelligence agency's activities?
- Q. Can the minister or the intelligence agency remove embarrassing information or influence the contents of a report of the review body?
- Q. What impact has review had on CSEC?

### Q: Has the Commissioner examined CSEC's metadata activity referred to in the January 30, 2014, CBC story?

A: The Commissioner's office has been briefed by CSEC about the metadata activity referred to in the CBC story. We questioned CSEC employees involved in the activity and who prepared the presentation, and we examined results of the activity.

This activity is used by CSEC to understand global communications networks. We concluded that this CSEC activity does *not* involve "mass surveillance" or tracking of Canadians or persons in Canada; no CSEC activity was directed at Canadians or persons in Canada.

We are also satisfied that the details and explanation that the Chief of CSEC provided on February 3, 2014, before the Senate Committee on National Security and Defence are accurate.

If CSEC were tracking the movements, on-line or other activities of persons at a Canadian airport, that would be illegal.

In addition to many reviews we conduct that involve some aspect of metadata activities, the Commissioner's office is currently conducting another in-depth review focused exclusively on metadata.

Commissioner Plouffe's statement of January 31 provides additional information on this subject.

### Q. What access does the Commissioner have to the Communications Security Establishment Canada (CSEC) to be able to conduct his reviews effectively?

A. The *National Defence Act* grants the Commissioner all the powers of a Commissioner under Part II of the *Inquiries Act* for the purposes of an investigation, including the power of subpoena to compel individuals to answer questions, to enter any facilities, to examine any records or systems, and to question any CSEC personnel.

Additionally, Parliament legislated the review model such that the principal intelligence review bodies in Canada – the CSE Commissioner and the Security Intelligence Review Committee (SIRC) – are within the “security fence”. That means the review personnel hold security clearances to allow full access to the classified holdings, facilities and personnel of the intelligence agency being reviewed. This also allows review personnel to acquire expertise about CSEC activities. This review model was the explicit intention of legislators when the *Canadian Security Intelligence Service Act* was passed in 1984, creating the Canadian Security Intelligence Service (CSIS) and its review agency SIRC. This was following recommendations of a royal commission that examined illegal activities of the Security Service of the Royal Canadian Mounted Police (antecedent to CSIS). The same model was used when the CSE Commissioner’s office was established in 1996 by order in council and then formalized in the *National Defence Act* in December 2001.

When given this access, the review body is under the legal obligation to protect the information in its possession. The *Security of Information Act* and government security policies bind all individuals handling classified information.

## Q. How can an agency the size of the Commissioner’s office effectively review the activities of an organization the size of CSEC?

A. Effective and rigorous review of CSEC’s activities is possible for the following reasons:

- the Commissioner’s mandate is clear – it is focused solely on CSEC and whether its operational activities comply with the law and include sufficient measures to protect the privacy of Canadians;
- as CSEC has grown, so has the Commissioner’s office, doubling its budget and increasing review staff capacity by more than a third over the past seven years;
- not all 2100 CSEC employees conduct operations (many perform corporate and administrative functions) – those who conduct operations are split between foreign signals intelligence (SIGINT) and information technology (IT) security activities;
- a process of risk analysis helps determine review priorities by identifying CSEC activities that present higher risks to non-compliance or to privacy;
- the focus of CSEC’s signals intelligence collection is foreign entities located outside Canada, and each year the Commissioner reviews a sample of these activities. The number of communications with a Canadian end (a “private communication”) that are unintentionally intercepted, and used or retained by CSEC under SIGINT ministerial authorizations, is small; the number is small enough that the Commissioner is reviewing all of these private communications;
- CSEC’s processes are increasingly automated, with privacy protections being built into them. Although this diminishes the possibilities of error or privacy violations, the Commissioner’s office nevertheless examines and verifies CSEC’s use of technology, making recommendations where appropriate to strengthen compliance and privacy protection;
- the size of the Commissioner’s office relative to CSEC is similar to the other principal intelligence review body in Canada, SIRC, and has a much higher ratio of reviewers to staff in the reviewed organization than some comparable bodies in other countries. For example, the Inspector General of Intelligence and Security (IGIS) in Australia has a staff of similar size to the CSE Commissioner’s office but the Australian IGIS is responsible for reviewing six intelligence agencies, including the Australian Signals Directorate, the CSEC equivalent in that country; and in the United Kingdom, the Interception of Communications Commissioner, who is a former high court judge supported by a staff of eight, reviews ten agencies that use powers of interception.

## **Q. Does the Commissioner challenge the intelligence priorities of CSEC?**

A. No. Establishing intelligence priorities is a prerogative of the executive arm of government. The *National Defence Act* requires CSEC to collect foreign intelligence "in accordance with the Government of Canada intelligence priorities." The Commissioner reviews CSEC's foreign intelligence collection activities to verify that they are indeed in accordance with the government's intelligence priorities.

## **Q. Is the Commissioner's mandate appropriate?**

A. This is ultimately a question for Parliament to determine. If the mandate were changed, the Commissioner would have to re-assess whether his resources were adequate.

## **Q. Is the Commissioner independent?**

A. Yes. As with similar review bodies, the Commissioner is independent of the government and of the intelligence agency being reviewed, and his office is independently funded by its own budgetary appropriation from Parliament. As an independent statutory officer, the Commissioner does not take direction from any minister of the crown or from CSEC.

An additional point is that the *National Defence Act* requires the CSE Commissioner to be a retired or supernumerary judge of a superior court. A fundamental tenet of our democracy is the independence of the judiciary. A judge's career is based on independence and impartiality, with a practice of determining conclusions based on facts and tough probing questions.

## **Q. What happens to reports written after conducting reviews of an intelligence agency's activities?**

A. Reporting by the independent review bodies is done through the minister responsible for the intelligence agency, a basic principle of our form of government. Classified reports resulting from reviews of CSEC activities are forwarded to the Minister of National Defence. These reports may contain recommendations. Since the Minister is responsible for CSEC, he can order CSEC to implement recommendations from the Commissioner; the Minister has done this in the past when CSEC initially rejected a recommendation.

Unclassified summaries of the classified review reports are included in a public annual report sent to the responsible minister who must table the report in Parliament within a specified time, as required by law.

## **Q. Can the minister or the intelligence agency remove embarrassing information or influence the contents of a report of the review body?**

A. No – not for classified review reports and not for public annual reports.

The Commissioner bases his review reports on facts and draws conclusions from those facts. He would not permit any interference in that process, if any were attempted, which to date has never been the case. As is standard and accepted practice in audit or review processes in Canada, the agency being audited or reviewed has the opportunity to comment on a draft report for its factual accuracy. If the facts were not substantiated, any findings, conclusions or recommendations based on those facts would not be credible.

A draft of the public annual report is provided to the agency being reviewed for comment *only* as to security, guided by the *Security of Information Act*. Subsequently, the responsible minister must table the report in Parliament, as required by legislation.

## Q. What impact has review had on CSEC?

A. Review has had a significant impact on CSEC. Since the creation of the Office of the CSE Commissioner in 1996, over 90 percent of Commissioners' recommendations have been accepted, resulting in, for example:

- new and changed policies, procedures and practices to strengthen compliance with the law and privacy protection;
- the reporting by CSEC of additional information relating to privacy to support the Minister of National Defence in his responsibility for CSEC; and
- clarifying the authority under which certain CSEC activities are conducted.

Most recently, a Commissioner's recommendation resulted in the Federal Court of Canada receiving additional evidence about certain CSIS warrants to intercept foreign telecommunications and the nature and extent of CSEC's assistance to CSIS under those warrants.

<http://cas-ncr-nter03.cas-satj.gc.ca/rss/Bulletin%20warrant%20dec-20-2013%20ENG> (summary) and

<http://cas-ncr-nter03.cas-satj.gc.ca/rss/CSIS-30-08%20redacted%20reasons%20ENG%20dec-20-2013> (redacted amended further reasons for order)

Commissioners' reviews and questions have resulted in CSEC stopping certain activities, a decision not taken lightly. The Commissioner's review process also encourages CSEC to be proactively transparent. For example, there has been an instance when CSEC decided to suspend activities of its own accord while it conducted an internal review and made improvements to certain activities. The Commissioner was kept informed throughout the process.

Commissioners have found a lack of clarity in certain information exchanges between CSEC and CSIS. In one instance, due to the lack of clarity, a Commissioner was unable to reach a definitive conclusion about compliance or non-compliance with the law and therefore made recommendations to correct this situation. A follow-up review was undertaken. Also related to this instance, questions relating to CSIS were raised in the Commissioner's review. The Commissioner referred these questions to SIRC, who has the mandate to review CSIS, and therefore could follow-up on these questions as it deemed appropriate. This is an example of how review bodies can co-operate under existing legislation.

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