

TOP SECRET/COMINT/Canadian Eyes Only

Report to the CSE Commissioner on

CSE Support to CSIS

Phase I: CSE Mandate (a)

January 16, 2008

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A-2011-00967--0001

TOP SECRET/COMINT/CEO

s.15(1)

I. AUTHORITY

This report was prepared on behalf of the Communications Security Establishment (CSE) Commissioner under his general authority articulated in Part V.1, paragraph 273.63(2)(a) of the *National Defence Act (NDA)*.

II. INTRODUCTION

The purpose of this review was to examine and assess the lawfulness of CSE's activities as they relate to the provision of support to the Canadian Security Intelligence Service (CSIS) under subsection 273.64(1) of the *NDA*, and in particular paragraph 273.64(1)(a).

CSE collects foreign signals intelligence in support of the Government of Canada's (GoC) annual intelligence priorities, under the authority of paragraph 273.64(1)(a) of the *NDA* (referred to hereafter as the (a) mandate):

- (a) *to acquire and use information from the global information infrastructure for the purpose of providing foreign intelligence, in accordance with Government of Canada intelligence priorities;*

As part of its (a) mandate, CSE provides regular foreign intelligence reporting to its clients, including CSIS, most of which addresses general areas of interest that complement and support CSIS's own mandated responsibilities.

CSE also receives and responds to specific CSIS requests for intelligence-related information (also referred to as RFIs), provided that the requirement is consistent with documented Government of Canada Requirements (GCRs) and

III. PERIOD OF REVIEW

The following report presents our findings as they relate to CSE's (a) mandate activities in support of CSIS for the period April 01, 2004 to March 31, 2005. During the review we agreed to a suggestion by CSE to also look at RFIs actioned in the period November to December 2006. Where practices have changed subsequently, this will be noted.

We began this study in August 2005. The delays in finalizing the report were caused, in part, by other operational commitments of the OCSEC analyst conducting the review.

However, the report was also delayed because we did not receive requested documentation from CSE in a timely manner. CSE representatives have acknowledged that this was in part due to _____ during the period under review.

IV. OBJECTIVE

The objective of this review was to assess the lawfulness of CSE's activities under its (a) mandate, in support of CSIS.

V. LINES OF INQUIRY

The review pursued the following lines of inquiry:

- Identify and describe the nature of the CSE–CSIS relationship and the forms of assistance provided under the authority of CSE's mandate.
- Identify and examine all related authorities that govern CSE–CSIS activities conducted pursuant to CSE's mandate, and for the purposes of this review its (a) mandate, including:
 - ministerial directives;
 - memoranda of understanding;
 - legal advice and opinions; and
 - policies and procedures.
- Examine CSE's process for reviewing and accepting/denying requests for assistance made by CSIS under the authority of the (a) mandate, and identify and understand how CSE tracks and accounts for the assistance it provides CSIS.
- Identify and examine any related records, files, correspondence, and any other material such as CSE internal audits or reviews conducted in respect of CSE's assistance to CSIS.
- Examine, review and report on any other issue that may arise during the course of this study and that may impact on CSE's ability to conduct its activities lawfully and safeguard the privacy of Canadians.

VI. METHODOLOGY

To begin this review we requested and received a general briefing pertaining to the support CSE provides to CSIS. In addition, we submitted a series of written questions pertaining to support provided to CSIS by CSE under its (a), (b) and (c) mandates. In the interest of time, we advised CSE on September 6, 2006 that we would focus specifically on CSE's support to CSIS under its (a) mandate. A reassessment of the focus and time frames of support to CSIS under CSE's other mandates (b) and (c), as outlined in our original Scope Statement, will be done at a later date. We also conducted three onsite interview/information sessions with individuals working in the areas involved. During the course of this review we were advised that CSE had not conducted any internal audits or reviews specific to its support to CSIS. CSE has since advised us that various elements of SIGINT support to CSIS may have been captured in audits or evaluations pertaining to the

We obtained a list of the CSIS Requests for Information (RFIs) during the period under review. This list requests for intelligence-related information, which were from the

In December 2006 we received a listing RFIs and the related material for these this constituted approximately half of the originally chosen. CSE was unable to provide the documentation for the we had originally requested in a reasonable time frame; therefore, in the interest of avoiding any further delays, we agreed to continue the review with what CSE was able to provide.

We completed the analysis and then a draft of this report in September 2007, after which we reiterated our request for the remaining RFIs. We received them, along with most of the related documentation, on November 29, 2007. We have included the analysis of these RFIs in an annex to this report, and results have been referred to in the conclusions.

Since RFIs we actually received were from we arranged to meet with representatives of CSE to determine the best way to proceed and complete this review. After our initial meeting, we decided that we would, in the interest of time, choose and review a small sampling from RFIs CSE provided. In addition, CSE also suggested reviewing RFIs received in the latter part of 2006 in order to see how the process had changed from the original review period. As a result, we reviewed RFIs from the original review period of April 2004 to March 2005, and received between November 16 and December 16, 2006 that CSE randomly picked.

In addition, CSE had advised us that during the review period a total of Therefore, we requested the related documentation

and then reviewed
were the total for the review period.

which we were advised

The findings of the above-noted review areas are described in the following section.

VII. REVIEW FINDINGS

Overall, this review found that CSE's support to CSIS under its (a) mandate during the review period was within the law, as interpreted by the Department of Justice, and followed CSE policies, as they existed during the review period. However, we did identify a number of issues, some of which we have addressed with recommendations.

It should be noted that two previous classified reports submitted to the Minister had findings and recommendations applicable to this review. These reports were *CSE Support to Law Enforcement: Royal Canadian Mounted Police (RCMP) Phase II: CSE Mandate (a)*,¹ and *Role of the CSE's Client Relations Officers and the Operational Policy Section*.² We will not repeat findings that have already been highlighted, discussed and analyzed quite extensively in the two aforementioned reports, but simply note where they apply to this review as well. The findings of the two previous reports, as they relate to CSE's mandates (a) and (c), are the subject of ongoing discussions. This report will inform those discussions as well.

(a) Authorities

In addition to its legislated authority as identified above, CSE's foreign signals intelligence support to CSIS is guided by several supporting instruments, including:

- Three ministerial directives dated June 19, 2001:
 - *CSE Support to Law Enforcement and National Security Agencies*;
 - *Accountability Framework*; and
 - *Privacy of Canadians*.
- The CSIS–CSE Memorandum of Understanding (MOU), effective November 1, 1990,
- Operational policies and procedures in force for the review period, including:
 - *OPS-1 Protecting the Privacy of Canadians and Ensuring Legal Compliance in the Conduct of CSE Activities*;

¹ Submitted June 16, 2006

² Submitted March 30, 2007

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- OPS-1-1 .
 - OPS-1-7 *SIGINT*
 - OPS-4-2 *Procedures for Assisting CSIS Section 12 Activities*; and
 - OPS-5-9 .

The CSE personnel we interviewed have a clear understanding that their activities must respect the laws of Canada—not only the *National Defence Act*, but also the *Criminal Code*, the *Charter*, and the *Privacy Act*.

Observation no. 1

Ministerial directives issued to CSE and dated June 19, 2001 preceded the passage of Part V.1 of the National Defence Act and should be reviewed to ensure they are in keeping with the mandated authorities articulated in the legislation.

In response to the same observation in previous reviews by this office, CSE has indicated that this task will be undertaken when the legislation has been amended. More specifically, CSE responded to a similar recommendation contained in the *RCMP Phase 1* review in January 2005 as follows:

“Accepted and Active. - It is integral to CSE’s plan to revisit all three of the original MDs that pre-date legislation. This work was initiated during the first quarter of FY 05/06, and the revised MDs will be ready for signature by our Minister on completion of the *Anti-Terrorism Act* review.”

This matter remains outstanding as of the date of this report.

(b) Corporate Records:

(c) Acquisition of Foreign Intelligence

When CSIS requests foreign intelligence from CSE, the RFI

We have been advised that CSE assesses all information provided by CSIS, and seeks clarification if there are any questions or concerns.

Observation no. 2

Recommendation no. 1:

(d) Mandate (a) vs. Mandate (c)

When CSE receives an RFI from CSIS or any other GoC client department, we were advised that it assesses whether the request falls under mandate (a) by asking:

³ OPS-4-2, *Procedure for Assisting CSIS Section 12 Activities*, dated July 25, 2001.

then CSE proceeds under mandate (a) and in accordance with CSE operational policies.

Observation no. 3

CSIS requests for information that may relate to a specific investigation or warranted activity under section 12 of the CSIS Act,

As was indicated in the report on CSE support to the RCMP dated June 2006, and the review of the *Ministerial Directive*,

should be able to assess its activities

CSE

Whereas section 16 of the *CSIS Act* expressly states that CSIS may collect foreign intelligence *in Canada* at the request of either the Minister of National Defence or the Minister of Foreign Affairs, section 12 does not preclude CSIS from collecting this information overseas. The section 12 mandate reads:

“The Service shall collect, by investigation or *otherwise*, to the extent that is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.”

In order to meet this mandate, CSIS can request that

⁴ Mandate (c) (*NDI*, Part V.1, paragraph 273.64(1)(c)) authorizes CSE to “provide technical and operational assistance to federal law enforcement and security agencies in the performance of their lawful duties.”

The scope and intent of section 12 of the *CSIS Act* has been explained by current and former Directors of CSIS before parliamentary committees and in other public forums. Indeed, a former Solicitor General said during debate on the bill in 1984 that resulted in the *CSIS Act*, "There is no statutory requirement that the entire activities of the Security Intelligence Service be performed in Canada. I think that would be unduly inhibiting." As a former Director of CSIS has observed: "...the legislation authorizes us to conduct operations abroad. It wasn't in hindsight that some loophole has been discovered. The Act was designed that way in the first place to protect Canada from threats to its security."

In addition, by including additional questions in its criteria for determining whether an activity should be conducted under mandate (a) or (c)

This issue is further described below in the context of CSE's treatment of the RFIs we selected for detailed review.

Recommendation no. 2:

⁵ *RCMP Phase II*, submitted to the Minister of National Defence, June 16, 2006.

(e) Treatment of Requests for Information (RFIs)

We were advised that CSIS information and/or requests are provided to the relevant

Following our selection of RFIs for review, we arranged an initial meeting with representatives of CSE's

Evolution of the RFI Process

The RFI becomes simply a starting point for the production of foreign intelligence for GoC clients and partners generally. The assigned production unit reviews the information contained in the RFI

We then inquired how CSE would respond to the original CSIS RFI.

CSIS receives any and all foreign intelligence information that relates to the mandated requirements it has provided to CSE, as do all other GoC departments to which CSE provides reporting.

Recommendation no. 3:

⁹ CSIS-CSE MOU dated November 1, 1990 – Appendix C, Section A, #5(a) & (b), Section D - #14(a) & (b).

s.15(1)

s.21(1)(a)

s.21(1)(b)

s.23

For these reasons, mandate (c) may be
the more appropriate authority under these conditions.

Observation no. 4

s.15(1)
s.21(1)(a)
s.21(1)(b)
s.23

RFIs Reviewed By OCSEC

As previously noted, we chose _____ of the _____ RFIs provided to us by CSE, In addition, some had related _____

CSE representatives _____ described to us the process CSE would follow in dealing with the above-noted RFIs. The first RFI we dealt with had been processed by the project leader _____ we were meeting with, and therefore the CSE process was very easily explained and found to be in order.

The other RFIs were not so straightforward, as the employee who was helping us could only second-guess in some areas what approach the analyst who had handled the RFI would have taken.

Observation no. 5

(f) CSE Requirement Tracking Forms

We observed that the information contained in CSE's Requirement Tracking Forms for the period under review _____

Observation no. 6

It was not always possible to draw a line from the authorities and requirements of legislation and policy,

All RFIs we reviewed were written requests/e-mails from CSIS. Some of the RFIs were very detailed, whereas others were more general in what they requested. In keeping with CSE policy (OPS-4-2), we would expect to see consistency in the amount of information required and provided before CSE actions any request.

(g) Requests for

As previously noted, CSE advised us that during the period under review CSIS had requested and received contained in foreign intelligence reporting. We received copies of

After reviewing each of these requests and subsequent releases we determined that

These inconsistencies or omissions of detail occurred most notably in sections:

This supports similar findings contained in a recent review, *Role of the CSE's Client Relations Officers and the Operational Policy Section*

The policy governing this (OPS-1-1,⁸ requires that the client be explicit with respect to the requirement for We expected that completion of this field would be mandatory and that it would be incumbent upon those processing these forms in to ensure they contained all the required information; if not, we would have expected the form to be returned to the client for proper completion.

Observation no. 7

CSE policy also refers to legislative authorities such as the *Privacy Act* when dealing with Both the RCMP Phase II reviews included a discussion of the issue of the

⁷ Submitted to Minister of National Defence March 30, 2007.

⁸ *Ops-1-1*,
February 2003; last modified 3 January 2006.

effective date 11

s.15(1)

s.21(1)(a)

s.21(1)(b)

s.23

However, we did meet with a representative of Operational Policy Branch to ask questions related to a sampling of some forms that contained the above-noted issues. It was explained that since the time of this review CSE has implemented new procedures whereby

VIII. CONCLUSION

This review was conducted by OCSEC pursuant to the Department of Justice legal opinions and its interpretation of the legislation. Overall, we agreed that CSE was within its mandate to conduct the activities it had undertaken, and we also agreed with the relevant advice and guidance provided by Department of Justice counsel to CSE.

We discussed this matter with CSE in November 2007, subsequent to requesting their comments as to the factual accuracy of a draft report of this review, as is our practice.

We agreed with CSE on the importance of examining each request on a case-by-case basis. We also found it helpful during discussions that CSE agreed on the importance of

terminology and its consistent use.

This is consistent with a recommendation made in the OCSEC report on CSE's Support to Law Enforcement: RCMP Phase II in June 2006.

Included in Annex A to this report is a summary of information obtained from the additional RFIs we initially requested in September 2006, but which were not available to us until November 2007. In reviewing the additional RFIs we have drawn the same conclusions as noted above. Although we have not reached a common agreement or interpretation in this matter with CSE at the time of concluding this report, we have in the interim prepared a discussion paper on the subject of that has been forwarded to CSE for review. We anticipate having further discussions on this matter in the near future.

s.15(1)

☾ s.21(1)(a)

s.21(1)(b)

SUMMARY OF RECOMMENDATIONS

Recommendation no. 1:

Recommendation no. 2:

Recommendation no. 3:

⁹ *RCMP Phase II*, submitted to Minister of National Defence, June 16, 2006

s.15(1)
s.21(1)(a)
s.21(1)(b)
s.23

Annex A

On November 29, 2007, we received the : RFI and resulting reporting associated with each RFI, which were outstanding at the time we completed the draft of this report. These RFIs corresponded to the original review period of April 1, 2004 to March 31, 2005.