

# Call to National Security, Privacy, and Surveillance Studies Scholars, Researchers, Journalists, and Activists

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## INTRODUCTION

The Communications Security Establishment (CSE) is Canada’s “national signals intelligence agency for foreign intelligence and the technical authority for cyber security and information assurance.”<sup>1</sup> Its mandate is established by the *Communications Security Establishment Act*, and relates to five aspects: (1) cyber security and information assurance, (2) foreign intelligence, (3) defensive cyber operations, (4) active cyber operations, and (5) technical and operational assistance.<sup>2</sup> The CSE’s mission is “to defend Canada’s national security”, including by keeping government information secure and “protect[ing] Canadians from cyber threats.”<sup>3</sup>

Despite ostensible commitments to openness, transparency, and accountability,<sup>4</sup> there is still much that remains unknown to the public about how the CSE operates. The British Columbia Civil Liberties Association (BCCLA) has recently released 284 individual documents comprising over 4,900 pages detailing the inner workings of the CSE. The BCCLA has made these documents available to provide academics, journalists, researchers, and activists greater insight into the activities of this secretive agency, and invites interested parties to download and analyze them.

## I. BACKGROUND

In 2013, following Edward Snowden’s release of documents detailing the US National Security Agency’s (NSA) bulk surveillance programs, the BCCLA brought claims against the CSE alleging that the CSE had bulk metadata surveillance programs of its own.<sup>5</sup>

The government, citing national security concerns, asked the court to conduct the litigation in closed court. The court granted the government’s request. Much of the court file was sealed and the documents produced at discovery were subject to an implied undertaking of confidentiality.<sup>6</sup>

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1. *Communications Security Establishment Act*, SC 2019, c 13, s 76, s 15(1).

2. *Ibid*, ss 15(2), 16-20.

3. Communications Security Establishment, “Mission”, online: <cse-cst.gc.ca/en/mission> (last modified 6 April 2023).

4. Communications Security Establishment, “Accountability”, online: <cse-cst.gc.ca/en/accountability> (last modified 13 July 2022).

5. *British Columbia Civil Liberties Association v Attorney General (Canada)*, 2021 FC 766 (CanLII) (Plaintiff’s Statement of Claim, Federal Court File T-2210-14, filed October 27, 2014), online: <bccla.org/wp-content/uploads/2014/12/20141027-CSEC-Statement-of-Claim.pdf>.

6. British Columbia Civil Liberties Association, Media Release, “Civil Liberties Watchdog Fights in Federal Court for Release of Documents on Illegal Spying On Canadians” (2 June 2016), online: <bccla.org/news/2016/06/media-release-civil-liberties-watchdog-fights-in-federal-court-for-release-of-documents-on-illegal-spying-on-canadians/>.

In 2017, the government introduced Bill C-59, which created a new statutory regime for national security intelligence in Canada, including the CSE's activities.<sup>7</sup> These changes made the BCCLA's litigation moot, and the action was discontinued in 2019.<sup>8</sup> Although the litigation was concluded, the documents produced in discovery remained subject to an implied undertaking of confidentiality.

This changed later in 2019, after independent researcher Bill Robinson made a request for the documents under the *Access to Information Act*.<sup>9</sup> The CSE initially refused to release the documents, claiming litigation privilege. Robinson made a formal complaint to the Information Commissioner, which the Commissioner upheld. Finally, the CSE agreed to release the documents with no additional redactions, and the government agreed to lift the implied undertaking of confidentiality, allowing the BCCLA to share these critical documents with the public.<sup>10</sup>

## II. PRELIMINARY FINDINGS

The documents were reviewed for the BCCLA by Greg McMullen and Bill Robinson. McMullen outlined preliminary findings in a blog post for the BCCLA,<sup>11</sup> where links to all of the documents can be found. Notably, these findings outline that during the period covered by the BCCLA litigation, the CSE:

1. Had expansive and expanding metadata surveillance programs in place.
2. Had the authority, under its cybersecurity mandate, to access Canadians' personal information that had been collected and stored by other government agencies.
3. Shared information relating to Canadians with other Canadian government agencies and foreign intelligence agencies, and developed a system to share bulk metadata collected by CSE with its Five Eyes partners – the signals intelligence agencies of the United States, United Kingdom, Australia, and New Zealand.
4. Exceeded its authority to collect and share metadata by failing to minimize Canadian information shared with Five Eyes partners between 2009 and 2014.<sup>12</sup>

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7. *National Security Act*, 2017, SC 2019, c 13.

8. *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2021 FC 766 (CanLII).

9. *Access to Information Act*, RSC, 1985, c A-1.

10. Bill Robinson, "BCCLA posts CSE documents" (17 March 2023), online (blog): *Lex Ex Umbra* <luxexumbra.blogspot.com/2023/03/bccla-posts-cse-documents.html>.

11. Greg McMullen, "Pulling Back the Curtain on Canada's Mass Surveillance Programs – Part Two: The CSE Secret Spying Archive" (16 March 2023), online (blog): *BCCLA* <bccla.org/2023/03/pulling-back-the-curtain-on-canadas-mass-surveillance-programs-part-two-the-cse-secret-spying-archive/>.

12. AGCo278 in AGC 0261\_0294, *infra* note 14 at 31.

5. Asked foreign intelligence agencies to provide the CSE with monthly reports on measures taken to protect the privacy of Canadians whose information was shared with them, but did not stop or limit information sharing with those foreign intelligence agencies for failing to report on or comply with those safeguards, because doing so would “have a significant negative effect on [the CSE]”.<sup>13</sup>

### III. DOCUMENT CONTENTS

The documents are available from the BCCLA in PDF format, collected into seven bundles based on the numbers assigned to them in the litigation (AGC####).<sup>14</sup>

The documents fall into three broad categories:

1. Ministerial Authorizations, Ministerial Directives, and Memoranda of Understanding

Ministerial Authorizations and Ministerial Directives are documents signed by the Minister of National Defence. Under the *National Defence Act* regime that was in place during the period covered by the documents, Ministerial Authorizations granted the CSE authority to conduct various classes of surveillance activities, while Ministerial Directives provided instruction on how to exercise those authorities.<sup>15</sup> The documents include:

- Ministerial Authorizations from 2010–2015;
- Ministerial Directives relating to:
  - the collection and use of metadata [AGC0017];
  - measures necessary to protect the privacy of Canadians [AGC0021]; and
  - sharing information with other governments that creates a “substantial risk of mistreatment” [AGC0081];
- Memoranda from the CSE Chief requesting the Ministerial Authorizations and Directives and providing rationales for granting them; and
- Memoranda of Understanding (“MOUs”) between the CSE and various government departments and agencies allowing the CSE to provide assistance with various matters, including computer network security, and often allowing the CSE to intercept that agency or body’s communications. MOUs were signed with:

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13. AGC0166 in AGC0151\_0182, *infra* note 14 at 12, fn 16.

14. AGC0001\_0035, online: <[bccla.org/wp-content/uploads/2023/02/AGC-0001\\_0035.pdf](https://bccla.org/wp-content/uploads/2023/02/AGC-0001_0035.pdf)>; AGC0036\_0100, online: <[bccla.org/wp-content/uploads/2023/02/AGC-0036\\_0100.pdf](https://bccla.org/wp-content/uploads/2023/02/AGC-0036_0100.pdf)>; AGC0101\_0150, online: <[bccla.org/wp-content/uploads/2023/02/AGC-0101\\_0150.pdf](https://bccla.org/wp-content/uploads/2023/02/AGC-0101_0150.pdf)>; AGC0151\_0182, online: <[bccla.org/wp-content/uploads/2023/02/AGC-0151\\_0182.pdf](https://bccla.org/wp-content/uploads/2023/02/AGC-0151_0182.pdf)>; AGC0183\_0225, online: <[bccla.org/wp-content/uploads/2023/02/AGC-0183\\_0225.pdf](https://bccla.org/wp-content/uploads/2023/02/AGC-0183_0225.pdf)>; AGC0226\_0260, online: <[bccla.org/wp-content/uploads/2023/02/AGC-0226\\_0260.pdf](https://bccla.org/wp-content/uploads/2023/02/AGC-0226_0260.pdf)>; AGC0261\_0294, online: <[bccla.org/wp-content/uploads/2023/02/AGC-0261\\_0294.pdf](https://bccla.org/wp-content/uploads/2023/02/AGC-0261_0294.pdf)>.

15. *National Defence Act*, RSC 1985, c N-5, ss 273.62, 273.65.

- Canada Revenue Agency [AGCo148];
- Canadian Forces [AGCo116];
- Canadian Nuclear Safety Commission [AGCo149];
- Canadian Security Intelligence Service [AGCo165];
- Department of Foreign Affairs and International Trade [AGCo120 and AGCo150];
- Health Canada [AGCo147];
- Public Works and Government Services Canada [AGCo177];
- Natural Resources Canada [AGCo156];
- Royal Canadian Mounted Police [AGCo164]; and
- Shared Services Canada [AGCo128]

## 2. Policy and Operations Manuals

These documents include policy and operations manuals that guide the activities of the CSE and its various programs. These include multiple documents from the following series:

- Operational Policy Series (OPS);
- Canadian SIGINT Operations Instructions (CSOI);
- IT Security Operational Instructions (ITSOI);
- Canadian SIGINT Security Standards (CSSS);
- Policy and Communication Instructions (PCI); and
- SIGINT Programs Instructions (SPI).

## 3. Reports and Reviews

These documents cover a wide range of subjects, including:

- Annual reports from the CSE Commissioner [AGC0001-10, AGC0013-4, AGC0027, AGC0038, AGC0158, and AGC0282];
- CSE reports to the Minister of National Defence [AGC0070, AGC0194, and AGC0236-7];
- Documents detailing failures by the CSE to follow its own procedures intended to protect Canadians' information [AGC0261]; and
- Documents detailing the CSE's transfer of information about Canadians to its Five Eyes partners without properly removing identifying information [AGC0166 and AGC0278].

## **CONCLUSION**

The BCCLA hopes these documents will provide researchers, academics, journalists, and civil society with greater insight into the activities of the CSE, and looks forward to seeing what others can learn from these important materials.