

SECURITY INTELLIGENCE REVIEW COMMITTEE

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SIRC REVIEW 2014-07
CSIS'S RELATIONSHIP WITH
THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND
DEVELOPMENT (DFATD)

SUMMARY

- This review examined the recent evolution of CSIS's relationship with the Department of Foreign Affairs, Trade and Development (DFATD), both overseas and between respective headquarters. Overall, SIRC found the Service's relationship with DFATD at overseas Missions to be positive.
- Notwithstanding the positive finding, SIRC identified two key challenges at play in the CSIS-DFATD relationship. First, despite the existence of a 2007 Protocol guiding information disclosure between CSIS and DFATD, the process is not functioning in a formalized or systematic manner. Second, the review found that there is insufficient operational and/or program deconfliction between CSIS and DFATD. With this as context, the Committee made two recommendations aimed at addressing the overarching need to ensure that CSIS prioritizes the relationship with DFATD moving forward.
- The review also identified significant potential legal concerns with respect to CSIS's activities and Canada's obligations under international agreements, namely the United Nations Al Qaeda Taliban Regulations (UNAQTR). At issue is that CSIS cannot systematically attest as to whether or not past human source operations have already violated Canadian law.
- Given the seriousness of the above finding, the Committee has made two comprehensive recommendations aimed at ensuring that CSIS maintains appropriate interpretation and accountability in regards to human source operations affected by binding Canadian law. As a further layer of accountability, SIRC will follow up next year during its certification of the 2014-2015 Director's annual report.

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1 INTRODUCTION

First guided by a single Memorandum of Understanding (MOU) in 1986, over the past decade, six additional agreements have aimed to provide a framework for the relationship between CSIS and the Department of Foreign Affairs, Trade and Development (DFATD). These formalized guidelines have been paralleled by an increase in the number of CSIS employees working overseas, as well as corporate and operational exchanges of information. In sum, DFATD is one of the most significant consumers of CSIS intelligence products, and moreover, plays an integral role in supporting the Service's overseas security intelligence mandate.

SIRC found the Service's overall relationship with DFATD at overseas Missions to be positive. Problematic issues have typically been resolved absent the need for high-level managerial involvement. This is a credit to the professionalism exhibited by CSIS employees working abroad, who routinely achieve resolutions alongside their DFATD counterparts on what are, in many cases, complex problems.

That said, the review did identify some broad challenges at play in the CSIS-DFATD relationship which have not been resolved despite acknowledgement by both parties. Some of these issues were raised by former-CSIS Director Richard Fadden to the Deputy Minister of DFATD in April 2013, and while a number of them have since abated – and in some cases been replaced by new challenges – SIRC found that CSIS had yet to address a few of the more salient challenges and cannot account for why one issue, in particular, was left in abeyance.

Three core findings summarize concerns identified within this review. First, SIRC found that despite the existence of a 2007 Protocol guiding information disclosure between CSIS and DFATD, the process is not functioning in a formalized or systematic manner. Second, the review found that there is insufficient operational and/or program deconfliction between CSIS and DFATD. Third, SIRC found that CSIS lacks procedures to systematically verify whether a large number of human source operations are in possible contravention of Canadian regulations implementing United Nations Security Council (UNSC) resolutions. Consequently, CSIS cannot systematically attest as to whether or not past human source operations have already violated Canadian law. This last finding is of significant concern to the Committee.

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2 METHODOLOGY

This review examined the recent evolution of CSIS's relationship with DFATD, both overseas and between respective HQs. SIRC has been tracking the CSIS-DFATD overseas relationship for years, albeit always within reviews focused on particular investigations or foreign stations. Although most reviews of CSIS's overseas activities mention DFATD, a few key issues in this partnership have attracted attention, which lead to the Committee's decision to take a more comprehensive examination.¹ One of the purposes of this review, therefore, was to confirm whether or not these relationship challenges were isolated.

SIRC evaluated CSIS's activities in regards to: compliance with legislation, formal arrangements (e.g. MOUs)² and Ministerial Direction governing information exchanges with domestic partners; the efficacy and utility of CSIS's relationship with DFATD at various levels (e.g. HQ, specific stations, etc.); and the effects of CSIS's expanded activities abroad on the relationship and on its provision of advice to the Government of Canada (GoC). The following four tools were used to assess these activities: CSIS documentation as contained in corporate and operational databases; exchanges of information between CSIS and DFATD; surveys filled out by CSIS and DFATD personnel; and, face-to-face meetings with key CSIS personnel.

The review period was August 1, 2012 to August 1, 2014, although information from outside this period was used to make a full assessment on specific aspects of the Service's relationship with DFATD.

¹ SIRC Study 2013-08, p.16.

² SIRC examined the following MOUs: "Release of Information Pursuant to Paragraph 8 (2) (e) of the Privacy Act," February 18, 1986; "Protocol concerning cooperation in respect of consular cases involving Canadians detained abroad as part of a national security or terrorism-related cases,

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3 RELATIONSHIP SCOPE AND CONTEXT

All employees representing the GoC abroad are subject to DFATD's administrative regulations. Although CSIS employees posted overseas work to further the Service's mandate,

CSIS and DFATD interact on a daily basis on numerous fronts: for example, DFATD plays a significant role in the provision of diplomatic accreditation for CSIS employees; is consulted by the Service on the designation of Dangerous Operational Environments (DOEs), high-risk operations and foreign arrangements; is a significant client of CSIS's s.16 and s.12 products

The review afforded SIRC with the opportunity to examine a wide spectrum of corporate and operational files, shedding light on certain CSIS activities which SIRC would not normally review in the context of specific investigations.

Moving beyond HQ-driven initiatives, the review also provided insight into the status of CSIS's relationship with DFATD counterparts at multiple Missions abroad. From this unique vantage-point, it became clear that the CSIS-DFATD overseas relationship is primarily personality-driven. When problems have arisen, successful conflict resolution depended on a mutual willingness by individual employees at Mission to seek constructive outcomes. There were cases reviewed, for example, where CSIS employees felt that their efforts at collaboration were simply not reciprocated even though irreconcilable mandate issues were not at play.⁹ That said, **SIRC found CSIS's overall relationship with DFATD at Missions overseas to be positive.**¹⁰

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As would be expected of such a diffuse and evolving partnership, SIRC noted certain more complex challenges.

Despite SIRC's expectation of constructive momentum, **SIRC found that some of the more prominent issues between CSIS and DFATD identified in 2013 remain unresolved.**

Admittedly, a few of the specific challenges cited have been addressed at working levels, or have been replaced by new issues. Moreover, there have been regular interactions between CSIS and DFATD: CSIS middle management meetings with DFATD occur approximately every three weeks, and both the CSIS Director and CSIS Assistant Directors (AD) interact with DFATD counterparts at Assistant Deputy Minister (ADM) and DM committees, in addition to direct executive correspondence with DFATD on specific files.¹⁶ That said, there has been little engagement on certain issues that required executive-level commitment.¹⁷

3.1 Information Sharing At Missions

Canadian government departments and agencies rely on a number of legislative authorities to guide their information sharing. Disclosure provisions within a department or agency's enabling legislation can either expressly prohibit or authorize information sharing for national security purposes. The *Privacy Act*, for instance, prohibits the disclosure of personal information absent consent, except as authorized by statute. These rules can be somewhat ambiguous for those on the front lines of a department who must balance individual privacy rights alongside national security interests, especially when the issue is a Canadian detained abroad over terrorism-related activities.

This challenge was underscored by Justice O'Connor while examining GoC officials' actions in the Maher Arar case. In the end, Justice O'Connor recommended that Canadian officials

¹⁰ When asked "how would you characterize the overall relationship with DFATD at the Mission?" the majority responded that the partnership was positive. Moreover, this sentiment was echoed by DFATD. Refer to CSIS Station Survey Responses, January 7, 2015; and DFATD Letter to SIRC, File 2800-194, March 16, 2015.

¹¹ Letter from CSIS Director to Deputy Minister DFATD, April 5, 2013.

¹⁶ SIRC reviewed all CSIS Director Memorandums to the Minister of Public Safety pertaining to DFATD, as well as all executive-level memorandums between CSIS and DFATD.

¹⁷ For example, SIRC has received no record of a Joint-Management Team (JMT) meeting at the executive level from Spring 2013 to January 2015. The JMT, according to the 2009 CSIS-DFATD MOU, is to "act as a primary channel for managing intelligence cooperation between the Department and the Service, including consultations with regard to all potentially high-risk operations for the covert collection of intelligence abroad".

develop a "coordinated and coherent approach" to such cases.¹⁸ CSIS and DFATD adopted the recommendation by enacting a non-classified Protocol in November 2007.¹⁹

SIRC therefore expected to see a clear and harmonized approach by CSIS and DFATD on this matter.

SIRC sought to place this issue into proper perspective by surveying CSIS Stations directly. A minority of Stations reported back that challenges existed with DFATD, including: "differing cultures," "a lack of understanding," being regarded by consular staff as "opponents," and how "different mandates" and imprecise MOU(s) have complicated cooperation.²² These survey results must be balanced alongside the majority of CSIS respondents who cited positive cooperation.

CSIS HQ has repeatedly raised Protocol disclosure issues with DFATD HQ.

¹⁸ Commission of Inquiry into the Actions of Canadian Officials in relations to Maher Arar: Analysis and Recommendations, September 18, 2006, p.349.

¹⁹ "Protocol concerning cooperation in respect of consular cases involving Canadians detained abroad as part of a national security or terrorism-related cases," November 2, 2007.

²² CSIS Station Survey Responses, January 7, 2015.

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CSIS again raised this issue with DFATD HQ as recently as January 2015, and moreover, it has attempted to engage on this matter through both the ADM and DM committees.

The O'Connor Commission recommendation and resulting Protocol were to help ensure that disclosure between DFATD and CSIS would be formalized and become "systematic in all cases."²⁹ **SIRC found that that despite the existence of the 2007 Protocol guiding information disclosure between CSIS and DFATD, the process is not functioning in a formalized or systematic manner.** Although an issue in a minority of overseas Missions, the spectre of the foreign fighter's phenomenon necessitates the timely sharing of information, consistent with legislative requirements governing privacy.

As such, **the Committee recommends that CSIS renegotiate the 2007 Protocol with DFATD in order to reach mutual agreement on issues which have impeded the functionality of the agreement.** SIRC is not suggesting that one party to the Protocol is more responsible for its imprecise implementation than the other;³⁰ instead, SIRC observed a need for CSIS and DFATD to make a clear determination on the exact challenges so as to create a mechanism which can be applied consistently within all overseas Missions.

²⁹ Commission of Inquiry into the Actions of Canadian Officials in relations to Maher Arar: Analysis and Recommendations, September 18, 2006, p.352.

³⁰ For its part, DFATD noted that "The sharing of consular information collected by DFATD with other government departments is complex and sensitive...Decisions regarding the sharing of information are made between the headquarters of DFATD and CSIS and any sharing of information takes into account the appropriate legislative requirements, including both the *Privacy Act* and the *Canadian Charter of Rights and Freedoms*." Refer to DFATD Letter to SIRC, File 2800-194, March 16, 2015.

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4 OVERSEAS OPERATIONS

SIRC has been examining the CSIS-DFATD overseas relationship for years. One of the reasons the Committee decided to take a more comprehensive examination of this partnership, therefore, was to help determine the degree to which issues identified within past reviews are systemic.

4.1 Disclosure of Foreign Activities

One issue the Committee has been following is the extent to which DFATD expects to be forewarned of CSIS's foreign operations, juxtaposed against the Service's assessment of how much DFATD needs to know. The various and DFATD employees who spoke to SIRC have offered a range of perspectives on this subject.

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4.2 Overseas Deconfliction

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Of particular concern to SIRC, however, is the potential that a lack of consultation between CSIS and DFATD –

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Despite the intention of enabling transparency on issues of mutual concern, **the review found that there is insufficient operational and/or program deconfliction between CSIS and DFATD.**

After much analysis and consideration, SIRC believes that the reason the 2009 MOU no longer functions as initially envisioned is very much a product of the evolution of CSIS's and DFATD's foreign postures.

CSIS and DFATD must maintain transparency on activities of mutual interest so that GoC priorities are not unintentionally being undermined. **In light of pending legislation which will expand CSIS's foreign operational footprint, the Committee recommends the development of clear deconfliction guidelines between CSIS and DFATD where there is the potential for operational and/or program entanglement.** Ideally, this would first entail high-level discussions between CSIS and DFATD to outline core principles moving forward. The ultimate goal would be a revamped MOU which more appropriately addresses the working realities of the respective parties.

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5 UNITED NATIONS SECURITY COUNCIL RESOLUTIONS AND IMPACT ON CSIS

In April 2013, Director Fadden met with members of his executive team to prepare for his pending meeting with DFATD. Within the preparatory notes, two Canadian sources of law implementing some of Canada's obligations under international agreements are cited as topics of expected discussion: the *Special Economic Measures Act* (SEMA) and the *United Nations Al Qaeda Taliban Regulations* (UNAQTR). Alongside a reference to SEMA, it states "ministerial exemption," while beside a reference to the UNAQTR, it states "requires regulatory change".⁵³ SIRC decided to follow-up on the status of the Service's handling of the UNAQTR issue.⁵⁴

5.1 Management of UNAQTR at CSIS

The *United Nations Act* (R.S.C., 1985, C. U-2) is a law of the Parliament of Canada which enables the Governor in Council to make such orders and regulations considered necessary to give effect, under Canadian domestic law, to measures that Canada is called upon to apply by the United Nations Security Council (UNSC). The UNSC has over time adopted many resolutions dealing with the threat of terrorism related to Al Qaeda and the Taliban in which it has called on UN member states, such as Canada, to apply measures against these groups. The UNAQTR are Canadian domestic regulations, binding under Canadian law, made pursuant to the *United Nations Act* to give effect to UNSC measures against Al Qaeda and the Taliban.

UNAQTR prohibit specific actions as sanctions against these entities. Section 2 of the UNAQTR explicitly states that they are binding on the Crown. Acting in violation of the UNAQTR is an offense in Canada by virtue of section 3 of the *United Nations Act*. The most relevant section of the UNAQTR in terms of impacts on CSIS's work is section 3, under the heading of "Prohibitions". From 2006 to September 2014, section 3 read as follows:

No person in Canada and no Canadian outside Canada shall knowingly provide or collect by any means, directly or indirectly, funds with the intention that the funds be used, or in the knowledge that the funds are to be used, by the Taliban, a person associated with the Taliban, Usama Bin Laden or his associates.⁵⁵

Since September 2014, the new wording of section 3 is the following:

No person in Canada and no Canadian outside Canada shall knowingly provide or collect by any means, directly or indirectly, funds with the intention that the funds be used, or in the knowledge that the funds are to be used, by a person associated with the Taliban or a person associated with Al-Qaida.⁵⁶

The significant change is the use of the phrases "person associated with the Taliban" and "person associated with Al-Qaida" which is clearer and more defined, referring to sanctions lists administered by UNSC committees.

⁵³ CSIS Document, "Pre-JMT Minutes," April 4, 2013.

⁵⁴ SEMA is discussed in greater detail SIRC's review of CSIS's Counter-Proliferation Strategy (Study 2014-06).

⁵⁵ *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444, version in force from 2006-06-23 to 2014-09-25.

⁵⁶ *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444, version in force from 2014-09-25 to present.

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In November 2011, the Inspector General (IG) of CSIS reported to the Minister of Public Safety on the Service's activities related to the UNAQTR.

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5.2 SIRC's Examination of the UNAQTR Issue

The first fundamental principle for all CSIS operations, as per Ministerial Direction, is that "the rule of law must be observed".⁶² Moreover, Ministerial Direction to CSIS is equally clear that in instances where a human source has engaged in illegal activities, a summary will be included in the Director's Annual Report, consistent with the broad reporting requirements set out by the Minister.⁶³

SIRC received no documentation indicating that CSIS has reported to the Minister on human sources being in contravention of the UNAQTR, or on a CSIS employee or operation being in contravention of the UNAQTR. Consequently, SIRC expected to find a robust process for ensuring that sources and operations are directed in a manner consistent with the UNAQTR.⁶⁴ However, when asked about this process, CSIS responded that "the Service has not undertaken any review to identify sources that may be impacted by the UNAQTR."

⁶² Ministerial Direction additionally notes that "Human sources will carry out their tasks on behalf of the Service without engaging in illegal activities." Refer to Ministerial Direction For Operations, Section 6(2) of the *CSIS Act*, p.1, and ANNEX B.

⁶³ For example, the Service is required to report to the Minister when there is a potential that a CSIS activity may have significant adverse impact on Canadian interests, such as: discrediting the Service or the Government of Canada; giving rise to public controversy; a clear risk to human life; affecting domestic interdepartmental or intergovernmental relations; affecting Canadian relations with any country or international organization of states; and/or contravening any of the guidelines set out herein with respect to the management of the Service. Refer to Ministerial Direction For Operations, Section 6(2) of the *CSIS Act*, p.2 and Annex B.

⁶⁴ SIRC made a number of requests for CSIS information/explanations on this subject. Refer to SIRC Memos to ER&L on following dates: December 18, 2014; January 6, 2015; January 23, 2015; two requests on February 13, 2015; February 23, 2015; and March 12, 2015.

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5.3 UNAQTR: Findings and Recommendations

After careful analysis, SIRC makes two findings. First, CSIS lacks a procedure to systematically verify whether the AQ/Taliban operations it conducts are in contravention of the UNAQTR.⁶⁹ **Second, SIRC found that CSIS cannot systematically attest as to whether or not its past human source operations have already violated the UNAQTR.**

The scope of such a determination is far beyond what SIRC can cover in this review:

As a result, **SIRC recommends that CSIS put in place formal mechanisms to ensure that none of its human source operations are in contravention of the UNAQTR or any similar Canadian statute or regulations.**

In light of Ministerial Direction that CSIS must observe the rule of law in carrying out its activities, the Committee, as per s. 40(1)(a) of the CSIS Act, is directing the Service to conduct a review of the specific activities involving compliance with Canadian laws and regulations implementing measures, decisions, resolutions or recommendations of an international organization of states of which Canada is a member. The findings of this report should be included within the CSIS Director's classified annual report to the Minister of Public Safety.

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6 CONCLUSION

Although the CSIS/DFATD relationship has been managed on a case-by-case basis in recent years, with significant change pending to the legislative landscape, it is apparent that this partnership could both expand and become much more complex. With this as context, the Committee made two recommendations aimed at addressing the overarching need to ensure that CSIS prioritizes the relationship with DFATD moving forward.

Finally, the Committee has made two comprehensive recommendations aimed at ensuring that CSIS maintains appropriate interpretation and accountability in regards to human source operations affected by binding Canadian law implementing measures, decisions, resolutions or recommendations adopted at the international level. As a further layer of accountability, SIRC will inform the Minister of Public Safety of this issue within the 2014-2015 Certificate and will follow up next year during its certification of the 2014-2015 Director's annual report.

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ANNEX A – SUMMARY OF FINDINGS

- SIRC found CSIS's overall relationship with DFATD at Missions overseas to be positive.
- SIRC found that some of the more prominent issues between CSIS and DFATD identified in 2013 remain unresolved.
- SIRC found that despite the existence of a 2007 Protocol guiding information disclosure between CSIS and DFATD, the process is not functioning in a formalized or systematic manner.
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- SIRC found that there is insufficient operational and/or program deconfliction between CSIS and DFATD.
- SIRC found that CSIS lacks a procedure to systematically verify whether the Al-Qaida and Taliban operations it conducts are in contravention of the United Nations Al Qaeda Taliban Regulations (UNAQTR).
- SIRC found that CSIS cannot systematically attest as to whether or not its past human source operations have already violated the UNAQTR.

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ANNEX B – SUMMARY OF RECOMMENDATIONS

- SIRC recommends that CSIS renegotiate the 2007 Protocol with DFATD in order to reach mutual agreement on issues which have impeded the functionality of the agreement.
- SIRC recommends the development of clear deconfliction guidelines between CSIS and DFATD where there is the potential for operational and/or program entanglement.
- SIRC recommends that CSIS put in place formal mechanisms to ensure that none of its human source operations are in contravention of the UNAQTR or any similar Canadian statute or regulations.
- In light of Ministerial Direction that CSIS must observe the rule of law in carrying out its activities, the Committee, as per s. 40(1)(a) of the *CSIS Act*, is directing the Service to conduct a review of the specific activities involving compliance with Canadian laws and regulations implementing measures, decisions, resolutions or recommendations of an international organization of states of which Canada is a member. The findings of this report should be included within the CSIS Director's classified annual report to the Minister of Public Safety.

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