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Australia promises to limit use of documents seized in Asio raid

Legal team tells UN court material was seized because of fears a 'disaffected' former spy was disclosing information to Timor-Leste

[Daniel Hurst](#), political correspondent
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Australia's lawyers John Reid and Justin Gleeson at the international court of justice in The Hague. Photograph: Nicolas Delaunay/AFP/Getty Images

Australia has made fresh promises limiting how it might use documents [at the heart of a dispute with Timor-Leste](#), attempting to weaken the case for the international court of justice to order the sensitive material be surrendered.

The new commitments were revealed during a hearing in The Hague on Tuesday. They add to earlier undertakings by Australia's attorney general, George Brandis, not to personally seek details of the files seized from the offices of a Canberra-based lawyer working for Timor-Leste, nor to use them in the pending arbitration of a treaty dispute between the two countries.

Australia's legal team told the court that the Australian Security Intelligence Organisation (Asio) had lawfully

seized documents on 3 December because of legitimate fears that a “disaffected” former Australian Secret Intelligence Service (Asis) officer was committing offences by disclosing information to a foreign state.

Timor-Leste has said it has irrefutable proof that Australia bugged the country’s cabinet room to gain an unfair advantage in the leadup to a 2006 agreement extending the length of a crucial oil and gas treaty. Those claims are being examined by an arbitration tribunal.

Timor-Leste is seeking urgent orders from the UN court that Australia surrender the documents to prevent further harm ahead of a proper examination of the case at a later date. Australia argues the provisional measures sought by Timor-Leste are unnecessary, in part because of the “comprehensive” undertakings designed to address the country’s concerns.

Appearing before the court on Tuesday, Australia’s solicitor general, Justin Gleeson SC, said Brandis had previously directed that the material not be communicated to anyone involved in conducting the arbitration. Brandis had also committed not to seek to make himself aware of the contents of the material and had “put in place a direction to ensure that, pending this hearing, the materials would not be accessed by anyone”.

Gleeson said Brandis had promised to further limit the possible use of the documents after Timor-Leste’s legal team raised concerns on Monday that the material also related to potential maritime boundary negotiations, beyond any issue in the arbitration.

“Associated with this was a fear, expressed with no clear foundation, that Australian officials engaged in maritime boundary negotiations would look at the material,” Gleeson said.

He said a direction had been given to Asio “that the material is not to be communicated to any person for any purpose other than national security purposes including potential law enforcement referrals and prosecutions, until final judgment in this proceeding or until further or earlier order from this court”.

“The material will not be used by any part of the Australian government for any purposes other than national security purposes, including potential law enforcement referrals and prosecutions, and, without limitation, they will not be used for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations or for the purpose of this action or for the purpose of the arbitral proceedings,” he said.

Gleeson said the direction to Asio to keep the material sealed for all purposes would continue until a judgment was made on provisional measures.

Timor-Leste's representatives [used their opening submissions to the court on Monday to denounce the Asio raid](#), arguing national security interests were "not some magic wand" that allowed a country to wave away its obligations under international law.

Timor-Leste contended that the documents and electronic data removed from the offices of its Canberra-based legal adviser, Bernard Collaery, featured highly confidential, legally privileged correspondence with the government of Timor-Leste, including information about its strategy in the pending arbitration under the Timor Sea treaty with Australia. Timor-Leste argued it retained ownership of the documents and the removal breached its sovereignty and international law.

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But in outlining Australia's opening arguments, Gleeson said legal professional privilege did not apply where the communications were produced in the pursuance of a criminal offence, fraud or other improper purpose. He pointed to media reports that claimed Asis had broken into and bugged cabinet rooms. He did not confirm the reports but noted they described the source as a former Asis employee "currently unwell in an Australian hospital".

Gleeson said while the Australian legal team did not have access to the seized documents, there were "reasonable grounds to consider that the materials over which Timor-Leste asserts privilege may include written statements or affidavits by a former Asis officer made to Mr Collaery on behalf of Timor-Leste, disclosing national security information of Australia".

"If that be the case, those disclosures would involve the commission of serious criminal offences under the law of Australia," Gleeson said, referring to sections 39 and 41 of the Intelligence Services Act 2001, section 70 of the Crimes Act 1914 and section 91.1 of the criminal code.

Gleeson said Australia was not alone in prohibiting the disclosure of state secrets including intelligence obtained in the course of employment with intelligence agencies.

He said other countries with such practices included the US, Canada, Britain, France, New Zealand, Slovakia, Morocco, Russia, Somalia and India. He added that Timor-Leste had a similar criminal prohibition with punishments of up to 15 years for breach of state secrets.

"The critical matter at the heart of this dispute is that based upon what Timor-Leste says publicly, Australia is entitled to

have a legitimate concern that a former intelligence officer may have disclosed and may threaten further to disclose national security information, which would be a serious crime," Gleeson said.

"Australia is entitled to be concerned that Timor-Leste may be encouraging the commission of that crime. Those disclosures threaten our security interests.

"The security interests are broader than the fate of the arbitration. To place classified information in the hands of a foreign state is a serious wrong to Australia, as it would be with any nation.

"The true object of this request for provisional measures may be exposed as this: Timor-Leste seeks to prevent Australia taking steps properly available to us under our domestic law, law which is consistent with international law, to protect ourselves from a threat to security apparently posed by a disaffected former officer."

Henry Burmester QC, for Australia, said Collaery's office "did not become a foreign enclave" simply because it did work for the Timor-Leste government.

An international law professor appearing for Australia, James Crawford AC SC, suggested that one reason for Timor-Leste's pursuit of the documents in the international court of justice rather than at the arbitral tribunal was "to skirt around the confidentiality provisions" of the tribunal and "maximise the opportunity for publicity and comment prejudicial to Australia".

Gleeson said the "impassioned" and "inflammatory" remarks made on Monday by Sir Elihu Lauterpacht, acting for Timor-Leste, unfairly impugned the integrity and conduct of the attorney general of Australia and of unnamed Australian officers. Lauterpacht had told the court he was saddened that Australia's conduct "inexplicably" fell far short of the high standards that prevailed when he served as the principal legal adviser of the the Department of Foreign Affairs between 1975 and 1977.

The hearing continues on Wednesday, with Timor-Leste and Australia set to outline further arguments and answer questions from judges.