

<https://www.theguardian.com/australia-news/2022/may/16/government-successfully-blocks-bernard-collaery-from-obtaining-documents-on-legality-of-spy-mission>

## Government successfully blocks Bernard Collaery from obtaining documents on legality of spy mission

Christopher Knaus – *The Guardian* 16 May 2022

### Judge says legality of intelligence operation irrelevant to charge of disclosure of classified information

The federal government has successfully blocked Bernard Collaery from obtaining key documents about the lawfulness of the notorious spy operation against [Timor-Leste](#), arguing that questions about its legality are irrelevant.

Collaery, a lawyer and one-time attorney general of the Australian Capital Territory, is [awaiting trial](#) on charges of conspiring to reveal classified information while working with his client, the former spy Witness K, in relation to a [2004 operation to bug the offices of Timor-Leste's government](#) during oil and gas negotiations.

To aid his defence, Collaery attempted to subpoena documents from the Australian Secret Intelligence Service, the Office of National Intelligence, the Department of Prime Minister and Cabinet and the Department of Foreign Affairs and Trade which he hoped would show whether the mission was conducted unlawfully and outside of the proper functions of Asis.

He argued he would be entitled to be acquitted if a jury had any reasonable doubt about the lawfulness of Asis's activities, making the documents relevant to his case.

But the commonwealth resisted the subpoenas, saying the material and questions about the legality of Asis's mission – the existence of which it has steadfastly refused to confirm or deny – were irrelevant to the case.

On Monday, Justice David Mossop agreed with the federal government and set aside Collaery's subpoenas.

He said the burden on the prosecution was only to prove that an offence had been committed by Collaery's alleged disclosure of protected Asis information. That "does not extend to a requirement to prove compliance with every provision of the [Intelligence Services] Act relevant to the activity of Asis which gives rise to the information or matter disclosed", Mossop said.

Mossop cited the 1974 royal commission examining intelligence and security, which discussed Asis's role and said that "in all cases, however, espionage is illegal and the clandestine service's job is to break those laws without being caught".

He found the Intelligence Services Act could not be interpreted as allowing information about Asis and its activities to be revealed in cases where it had not complied entirely with its legal obligations.

“Such an interpretation would render the provision ineffective and potentially compromise both Asis’s ability to obtain foreign intelligence and the safety of its personnel,” he said in a judgment summary.

Collaery hoped the documents, among other things, would establish whether the then foreign affairs minister, Alexander Downer, had given notice of the operation to parliament’s joint committee on intelligence and security, as required.

The lawyer sought to argue that failing to give such notice meant his prosecution for disclosing information about the same intelligence operation could not succeed.

Mossop said that cannot have been the intention of parliament when creating the nation’s intelligence laws.

“That would mean that, by reason of a procedural error on the part of the minister, the details of the operation, details of Asis operational methods and capacities, the identity of its agents and the identity of persons overseas who cooperated with Asis might all be disclosed without fear of prosecution,” he wrote. “The same consequences would flow if there was non-compliance with any of the other provisions identified by the defendant.”

“Those consequences may well be fatal for persons connected with the operation and would certainly be fatal to the capacity of Asis to obtain foreign intelligence.”

The Collaery case has been bogged down in protracted battles over the extraordinary level of secrecy shrouding parts of the prosecution’s case from the public and Collaery himself.

Collaery won a [major victory last year in the ACT](#) court of appeal which overturned secrecy orders covering parts of his trial.

But the commonwealth is making a second attempt – using evidence that Collaery is not allowed to see – to convince the courts that parts of the trial pose a national security risk and must not be heard publicly.

The extent of secrecy in the case is such that the ACT court of appeal’s initial judgment, handed down in October, still has not been published, because the commonwealth fears it contains information that will prejudice national security. Lawyers for the attorney general, Michaelia Cash, have [gone to the high court](#) to try to stop the full judgment from being published.

A Human Rights Law Centre senior lawyer, Kieran Pender, said the prosecution must cease.

“Whoever wins the election this weekend must drop the prosecution of Bernard Collaery, and the two other whistleblowers currently on trial, Richard Boyle and David McBride,” he said.

“Rather than dragging whistleblowers through the courts, in cases shrouded in secrecy, the new government should reform whistleblowing law to make it easier for Australians to safely and lawfully speak up about wrongdoing.”