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Witness K lawyers in fight to head off closed court hearing

Lawyer Bernard Collaery and Witness K are being prosecuted for disclosing that Australia spied on East Timor-Leste



Bernard Collaery (pictured) and Witness K applied to the ACT magistrates court to hold a hearing 'as soon as possible' on national security information. Photograph: Mike Bowers for the Guardian

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Lawyers for the whistleblower Witness K and lawyer Bernard Collaery have pushed the ACT magistrates court to make a ruling about national security information in a bid to head off a possible closed court hearing.

After weeks of negotiations, Witness K and Collaery failed to come to a comprehensive agreement with the commonwealth about handling of protected information in the prosecution of the pair for disclosing the fact Australia spied on Timor-Leste.

The director of public prosecutions has given notice the crown's brief of evidence in the case is expected to disclose national security information. That notice is likely to trigger the attorney general, Christian Porter, to issue a certificate of non-disclosure for information he judges is likely to prejudice national security.

Witness K and Collaery have applied to the ACT magistrates court to hold a hearing “as soon as possible” on national security information, before Porter can issue the certificate which would trigger a closed court hearing on the issue.

On Wednesday counsel for Witness K, Haydn Carmichael, told the court if it held a hearing on national security information the attorney general “ought not feel any concern or need” to issue a non-disclosure certificate.

Carmichael submitted the ACT chief magistrate Lorraine Walker is entitled to make an independent judgment about whether disclosure of protected information is likely to prejudice national security.

He said the possibility of a non-disclosure certificate process “must not and cannot” bypass the “alternate route” of the court holding a hearing to determine the issue of national security information for itself.

Counsel for Collaery, Christopher Ward, warned against a closed court hearing because legal representatives who had not obtained a security clearance to receive protected information - such as himself - would not be present.

He said this was a “powerful reason” not to set in train a process that would lead to a closed-court hearing, because it would cause an “almost irreparable” level of prejudice to Collaery.

Ward said the apparent intention of the prosecution to provide him with a redacted brief of prosecution and the inability of Collaery to brief him without disclosing protected information was “seriously hampering” the conduct of the defence.

Counsel for the attorney general, Tim Begbie, submitted that the general powers of the court do not displace the specific “mandatory regime” set in train by the prosecutors giving notice of expected disclosure of protected information.

Begbie said a hearing under section 21 of the National Security Information Act - requested by Witness K and Collaery - would deal with the same issues as one triggered by a non-disclosure certificate. It would be “inutile” - or pointless - to have separate hearings, he said.

Chief magistrate Walker noted that there is a process for legal representatives to obtain security clearance but it was likely to further delay the case.

She said she would determine the application for an urgent hearing on national security information on Friday, and indicated the full case was likely to be heard on 11-13 February.