

## **Top-secret evidence will be allowed in Bernard Collaery's court case, ACT Supreme Court judge rules**

*Elizabeth Byrne, ABC, 16 March 2022*

Evidence so secret that Canberra lawyer Bernard Collaery himself cannot know what it is will be permitted to be used by the Attorney-General in the case against him.

### Key points:

- \* Top-secret evidence will be allowed to be used in Bernard Collaery's conspiracy trial
- \* Justice David Mossop found the evidence could be presented as "court only" material
- \* A special counsel will be appointed to represent Mr Collaery's interests

Mr Collaery is accused of conspiring to reveal classified information about an alleged Australian spying operation in East Timor, during sensitive oil and gas treaty negotiations.

But the prosecution in the ACT Supreme Court has been bogged in a legal battle over secrecy, which has gone all the way to the High Court.

One of the difficulties in the case is that it is a three-way contest between Mr Collaery, Commonwealth prosecutors and the federal Attorney-General.

The delay has been further compounded by the fact that the case involves two types of evidence:

The first is the general prosecution evidence, and the second is so-called "court only" evidence, which the Attorney-General says should not even be shared with Mr Collaery or his lawyers.

There has been a dispute over whether the "court only" material should even be received by the court.

In a ruling this week, Supreme Court Justice David Mossop found the material could be received by the court, with Mr Collaery's interests represented by a specially appointed counsel.

That special counsel would be able to see the evidence and advocate on Mr Collaery's behalf.

### Balancing procedural fairness and national security concerns

Mr Collaery had objected not just to the inclusion of the material but also to the appointment of a special counsel.

But Justice Mossop found it was appropriate and would provide a level of procedural fairness to Mr Collaery while guarding against risks to national security concerns.

Justice Mossop also said the counsel would allow objections to the admissibility of specific evidence, and clear the way for cross-examination if that was needed.



The ruling is a setback for Mr Collaery. *(ABC News: Nick Haggarty)*

Justice Mossop said the secret material was contained in a series of affidavits from past and present senior government officers, including Frances Adamson and Nick Warner.

In justifying the need for the "court only" evidence, lawyers for the Attorney-General said none of the normal prosecution evidence would be withheld from Mr Collaery.

And that the "court only" evidence would only be used to explain why other matters in the case should not be publicly disclosed.

The ruling allowing "court only" material is a setback for Mr Collaery's bid to keep his trial as open as possible, after a [win last year in the ACT Court of Appeal, which cleared the way for other key evidence in the case to be heard in public.](#)

Mr Collaery had identified six issues that the Commonwealth said should remain secret because of a risk to national security interests, which he believed should be heard in open court.

But those issues remain a mystery.

The appeal decision has not been released with the Commonwealth now asking the High Court to overturn the ruling, to keep most of the trial secret.

Mr Collaery's co-accused, known as [Witness K, pleaded guilty and was given a three-month suspended sentence for his part in the conspiracy.](#)