

## Chapter 2

### The evidence from DPS

2.1 This chapter deals with the main arguments put forward in the submission from DPS. It contains an outline of the investigation which sparked the inquiry and then deals with the arguments submitted on the matters of privilege. Other matters relevant to those arguments are dealt with as they arise.

#### **Contradictory evidence**

2.2 It is necessary first, however, to deal with contradictions between the evidence the department provided at the May estimates hearing, its submission and additional documents provided on 11 November 2014.

2.3 The DPS Secretary told the estimates hearing in May 2014 that the matter now referred to the Privileges Committee had only come to her attention on the day of that hearing, on the basis of inquiries she made after questions were asked of the Senate department.

2.4 Her evidence was that it was “possible DPS has breached the code [of practice] in investigating a case to do with a staff member”,<sup>22</sup> and she explained the apparent breach as “an inadvertent conflict between staff management issues and the protocol of the protection of members’ and senators’ rights to do business in the building”.<sup>23</sup> The Secretary told the hearing that “there may have been an inadvertent and ancillary breach of the statement of purpose” because the CCTV footage “may have captured [the employee] doing other activities in the building besides the one for which the CCTV footage was released”.<sup>24</sup>

2.5 When asked whether the activities she had referred to involved a person or people providing information to Senator Faulkner, Ms Mills replied “That is what I am looking into. That is the issue that was brought to my attention today...”<sup>25</sup>

#### ***Submission***

2.6 The DPS submission contradicted the Secretary’s evidence at estimates. It stated that the discovery of footage showing the employee placing an envelope under a senator’s office door was communicated to the Secretary on 27 February, three months prior to the hearing. The submission did not suggest that there had been an inadvertent conflict. Instead it is founded on the Secretary’s response, given the same day, “that ‘contact by individuals with parliamentarians is not something we monitor...’”. The submission asserts that:

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22 FPA transcript, 26 May 2014, p.23.

23 FPA transcript, 26 May 2014, p.25.

24 FPA transcript, 26 May 2014, p. 28.

25 FPA transcript, 26 May 2014, p. 28.

Accordingly, the footage relating to the visit to the Senator's office was not investigated further and Employee X was not questioned in any way in relation to her attendance at the Senator's office.<sup>26</sup>

2.7 The submission contends that the Secretary "made a conscious decision *not* to take action in respect of Employee X's approach to Senator Faulkner by effectively instructing that DPS could not consider that conduct and had no interest in the matter."<sup>27</sup> The submission does not explain why the Secretary did not acknowledge or address this "conscious decision" and instruction when later asked about the matter at estimates.

### ***Additional documents***

2.8 When the committee sought a submission from DPS it had asked for copies of any internal DPS records relating to the use of the images, but none were provided. The committee therefore asked for records to substantiate the above assertions and to clarify related matters. Additional documents were provided on 11 November 2014, among them the request that the Secretary approve a preliminary Code of Conduct investigation<sup>28</sup> and email correspondence containing the Secretary's response to the discovery of the contentious images.<sup>29</sup>

2.9 Despite her evidence to the estimates hearing that the matters now referred to the Privileges Committee first came to her attention during those hearings, these documents demonstrate that the Secretary was made aware of all aspects of the incident as it transpired. In particular, the documents show:

- that when Ms Mills approved a preliminary code of conduct investigation on 25 February she also approved the release of still photographs from security cameras
- that the request which Ms Mills approved on 25 February informed her that the CCTV system had already been used to gather information on the matter
- that the discovery of footage showing the employee placing an envelope under Senator Faulkner's office door was communicated to Ms Mills on 27 February.

2.10 The Secretary's response is contained in an email to one of her staff:

You may be aware that contact by individuals with parliamentarians is not something that we monitor in order to provide privacy to them in the conduct of their business. Happy to discuss.

2.11 The submission and additional documents cast considerable doubt upon the evidence given by the Secretary. The committee has not been able to reconcile the

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26 DPS submission, 26 September 2014, paragraph 21.

27 DPS submission, paragraph 40.

28 Referred to in the DPS submission at paragraph 17.

29 Referred to in the DPS submission at paragraph 21.

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evidence given at the estimates hearing with the submission and documents which DPS has subsequently provided, and considers that the Finance and Public Administration Legislation Committee was misled about the Secretary's knowledge of the events that led to this inquiry.

2.12 The committee has determined that it is appropriate in the circumstances to publish the relevant documents so that they are available to the Finance and Public Administration Legislation Committee in its oversight of the Department of Parliamentary Services.

2.13 There should be no doubt, however, that the committee considers the misleading of the legislation committee in these circumstances to be a serious breach of accountability and probity.

### **The Code of Conduct investigation**

2.14 An anonymous note, described as "belittling and accusatory", was left for a manager in DPS, who found it distressing. On advice from the DPS Secretary, the recipient raised the matter with the DPS Human Resource (HR) Services section, which commenced an investigation. The main DPS submission<sup>30</sup> sets out an account of its investigation.

2.15 'Swipe access' records from the parliamentary security system were checked, which showed that a particular DPS employee (referred to as 'Employee X' in the submission) had entered Parliament House on the night before the note was discovered. HR officers then sought approval to view CCTV footage to confirm the employee's "entry to, exit from and movements within, Parliament House on the evening of 18 February 2014". It is apparent from emails attached to the submission that this approval was given orally.

2.16 The footage showed the employee near the work area where the note was found (although it didn't show her entering that area) and showed her in some images carrying papers which she no longer had when she left the building. On the basis of this information, HR recommended that a preliminary code of conduct investigation be undertaken – a recommendation the Secretary approved on 25 February. The submission later explains that a preliminary investigation is part of ordinary administrative practice, designed to help a decision-maker determine whether "there is a suspected breach of the Parliamentary Service Code of Conduct that ought to be dealt with by way of a formal investigation".<sup>31</sup>

### ***Committee comment***

2.17 The committee notes that the above activity – interrogation of the parliamentary swipe access records and the accessing of the CCTV security system – occurred prior to the approval of this preliminary investigation.

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30 At paragraphs 11 to 30.

31 DPS submission, paragraph 39.

### ***The preliminary investigation commences***

2.18 Later that day, the officer undertaking the investigation of the distressing note requested access to relevant footage and the isolation of particular images. This was approved by the Assistant Secretary in a one word email (“approved”) on 26 February. The investigating officer emailed the employee seeking an explanation of her presence and “precise movements” in the building on the evening of 18 February. The email mentions that security footage had been checked. When the employee responded the following day, the submission records that DPS regarded her explanation as “unsatisfactory, and potentially dishonest”.<sup>32</sup>

2.19 At around the same time security staff who had continued to scan the security footage and located images that “showed (for the first time)” the employee “placing an envelope under the door of a Senator’s suite”. The submission does not identify the senator, but records that:

This information was communicated to the Secretary on 27 February, whereupon the Secretary responded that ‘contact by individuals with parliamentarians is not something we monitor...’. Accordingly, the footage relating to the visit to the Senator’s office was not investigated further and Employee X was not questioned in any way in relation to her attendance at the Senator’s office.<sup>33</sup>

### ***The formal investigation***

2.20 The submission records that the Secretary, on 12 March, approved a formal Code of Conduct process “solely in connection with” the anonymous note; that “No reference to Employee X’s visit to the Senator’s suite was included in the briefing” and the investigator was not “at that stage” briefed with any CCTV material relating to the visit to the senator’s office.<sup>34</sup>

2.21 Although not referred to in the main submission, an attachment indicates that the investigator sought and was granted a copy of unspecified “footage” on 31 March 2014. The record provided of this request and approval does not provide any identifying detail.

2.22 On 2 April 2014, the investigator provided the employee with details of the formal investigation, to which was appended printed copies of CCTV images. On 14 April 2014, the employee responded to the allegations and, according to the investigator’s draft report, “at this stage noted (for the first time)” that there had been two reasons for her visit to Parliament House... ‘I also had some personal business with a Senator and left documents at the Senator’s office’.<sup>35</sup>

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32 DPS submission, paragraph 20.

33 DPS submission, paragraph 21. The committee sought records from DPS to substantiate these matters – see **Contradictory evidence**, above.

34 DPS submission, paragraph 22.

35 DPS submission, paragraph 25.

2.23 The draft investigation report and CCTV footage was sent to the employee on 13 May. The report referred to the employee placing an envelope under the door of “suite 42”, recited the employee’s statement that she had ‘personal business’ with the senator, and stated the investigator’s view that this failed to “adequately account for” the employee’s visit “having regard to the balance of her route”. The submission contends that “The draft report did not otherwise engage with Employee X’s visit to the Senator’s suite.”<sup>36</sup>

2.24 Two weeks later the matter was raised at estimates, with an indication it would be raised as a matter of privilege. The Secretary then ceased the investigation, citing the “undesirability of a Code of Conduct process remaining unresolved for a potentially substantial length of time”. Correspondence from the employee indicates this occurred on 24 June 2014.

2.25 This part of the submission concludes by stating that the employee “has subsequently left the employment of DPS for reasons not connected to the Code of Conduct investigation of the CCTV footage issue.”<sup>37</sup>

### **The employee**

2.26 For her part, the employee denies leaving the note. In a letter to Senator Faulkner, dated 11 April 2014, the employee describes the commencement of the Code of Conduct process. She states:

...of course I haven’t revealed why I was in the building that night but I suspect I am going to be grilled by DPS about where I was walking at that time of night and what was in the envelope... I’m concerned that DPS’s story for using the security footage is a bit of a furphy and they are looking to find anyone that provides senators with information about the department. Given my current situation, I’m also concerned that this is not a legitimate use of the security cameras.

2.27 The committee considers it was not unreasonable for the employee to seek to withhold from DPS the fact that she had visited a senator’s office in the circumstances. An annotation to the document, marked ‘update’ notes advice from the employee’s solicitor recommending she advise DPS that she was going to a senator’s office for personal business.

2.28 In another note the employee states her belief that “Three long-term ongoing staff members...have had their employment terminated over the past three months. ...they were monitored with the in-house security cameras over several months without their knowledge and without a written policy.”

2.29 The committee has not seen any evidence to support this claim, however it has been provided with records of the use of CCTV images in other staff-related cases. In each case, the record comprises a single email request and a written record of approval being made. The fact that stories such as these are circulating in DPS is no doubt

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36 DPS submission, paragraph 27.

37 DPS submission, paragraph 30.

capable of increasing the apprehension of staff that they may be monitored for different purposes.

2.30 With that background, the committee turns to the DPS submission on the terms of reference.

### **Arguments in the DPS submission**

2.31 The DPS submission deals first with paragraph (b) of the terms of reference, arguing that “a proper understanding of the disciplinary matter will assist the Committee in reaching the correct conclusions on the remainder of the issues in question”.<sup>38</sup> The overall approach of the submission is to treat the question of possible improper interference with senators’ duties as ancillary to the question whether a penalty has been inflicted on the employee.

2.32 The committee does not agree that this approach is warranted. Although the matters turn on the same facts, they are separate questions. As has been noted, the chief concern raised by the Finance and Public Administration Legislation Committee and by Senator Faulkner is the matter of improper interference.

#### **(a) Improper interference with the free performance of a senator’s duties**

2.33 The DPS submission on the improper interference matter fails in many ways to engage with the issues at hand. In particular, the task that it sets itself is to demonstrate that there has been no improper interference either by way of:

- a. disciplining an employee over the provision of information to Senator Faulkner; or
- b. use of the CCTV system to conduct unauthorised surveillance, either of Senator Faulkner, his office, or persons who may attend his office to provide information.<sup>39</sup>

2.34 The submission goes on to argue, in effect, that the use of the CCTV system falls short of a dictionary definition of “surveillance” and cannot therefore constitute interference.<sup>40</sup> It should be understood that the committee has not been charged with assessing whether there has been “unauthorised or improper surveillance”. While different parties have used the terms “surveillance”, “spying”, “monitoring” and, simply, “use of footage”, the committee’s concerns, and its terms of reference, are about improper interference. As has been noted, it is the effect of the conduct that concerns the committee. Conduct that has the effect or tendency of obstructing senators in their duties may be dealt with as a contempt, regardless of the form or description of that conduct.

2.35 In any case, DPS submits that:

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38 DPS submission, paragraph 34.

39 DPS submission, paragraph 54.

40 Paragraphs 59 to 65.

Where the one-off use of CCTV footage, referable to a particular incident not known to be connected to parliamentary business, has been duly authorised under the CCTV Code of Practice..., and that Code of Practice has in turn been authorised by the Presiding Officers..., it is difficult to see how that use could nonetheless constitute unauthorised or improper surveillance, contrary to parliamentary privilege.<sup>41</sup>

2.36 The following matters invite examination:

- the contention that the incident was “not known to be connected to parliamentary business”
- whether the use of CCTV footage may amount to interference
- whether the use of the CCTV footage was “duly authorised under the CCTV Code of Practice”.

### **The transacting of parliamentary business**

2.37 A theme repeated throughout the submission and accompanying advice is that there was nothing to indicate to DPS officers that the interaction caught on camera related to parliamentary business, for example:

Prior to Senator Faulkner’s indication at Senate Estimates on 26 May 2014 (which was clearly past the time that relevant decisions were made) that he considered [the employee] to be a whistleblower, there was no indication that the purpose of her visit may have related to parliamentary proceedings.<sup>42</sup>

2.38 This is in support of a thesis that, if the investigators were unaware they were witnessing something connected to parliamentary business they could not be said to be obstructing it, and certainly not knowingly. Whatever the merits of that case, the additional documents provided on 11 November dispose of this line of argument.

2.39 The email correspondence in those documents is illuminating. On 27 February 2014, after writing to the employee requiring an explanation of her presence in the building, the officer appointed to undertake the preliminary code of conduct investigation wrote to his supervisor:

After sending this letter (at 4.13 PM yesterday) I was advised ... (at 4.55 PM yesterday) that there was also security camera vision of [the employee] depositing a “brown envelope” at the office of Senator John Faulkner. Given that Senator Faulkner is now in opposition I question what legitimate reasons there could be for depositing a “brown envelope” at his office at that time of night and also recall Senator Faulkner’s keen interest in matters pertaining to Hansard in Senate estimates earlier this week...

2.40 The supervisor then wrote to the Secretary:

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41 Paragraph 63.

42 DPS submission, paragraph 58. *See also* paragraphs 25, 63, 65 and 71; and the discussion of “breach of parliamentary privilege” in the AGS advice.

Through investigating additional footage of [the employee's] movements, DPS footage has also shown that [she] deposited a brown envelope under the door of Senator Faulkner's office before our Senate Estimates Hearing. It is also noted that Senator Faulkner is now in opposition which does question whether the Parliamentary Service Value of 'Impartial' has been breached in this case.

Noting that we have previously discussed the issue of DPS employees being in a privileged position by working in Parliament House and having 'direct' contact with Parliamentarians, as well as noting that some Hansard Editors this week may also have been distributing material... I wanted to draw this substantial evidence to your attention.

2.41 The first reaction of the officer appointed to undertake the preliminary investigation is to question the legitimacy of the employee's actions. His supervisor sees it as "substantial evidence" of a breach of the code of conduct, quite distinct from the matter they are investigated.

2.42 Their references to the senator now being 'in opposition' are curious.

2.43 In any case, both officers immediately associate the envelope with Senator Faulkner's participation in Senate estimates, and with DPS' appearances there. Both officers immediately draw adverse inferences. This exchange demonstrates the inherent risk in allowing the use of CCTV images in these circumstances.

2.44 The exchange also reveals further contradictions in the evidence supplied by DPS. Its legal advice argues:

On the facts of the case, it seems clear that the DPS officers who were involved in the use of the footage were unaware they were witnessing the transacting of any parliamentary business. Nothing Employee X had told them suggested this was the case – quite the opposite.<sup>43</sup>

2.45 The emails contradict the conclusions DPS is asking the committee to accept. They demonstrate that the officers involved knew what they were witnessing, and came to this conclusion before the employee has told them *anything*. They also undermine the factual basis of that part of the legal advice.

2.46 The report now turns to the second DPS argument about improper interference – that the 'one-off' use of footage cannot amount to interference.

### **Use of CCTV footage as improper interference**

2.47 In paragraph 56 of its submission, DPS states that it:

accepts that sanctioning an employee over their provision of information to a parliamentarian, for parliamentary purposes, could constitute an improper interference... insofar as that action might tend to discourage persons from providing information to a senator for parliamentary purposes.

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43 AGS Advice, 18 September 2014, paragraph 77.



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but it argues<sup>44</sup> that there is “simply no connection between the investigation and Employee X’s dealing with the Senator”.

2.48 In paragraph 66 the submission argues that Senator Faulkner has not been “hampered or obstructed...insofar as his ability to collect information from ‘whistleblowers’ or others”, citing “the fact that Employee X apparently returned to Senator Faulkner with concerns about the investigation” as evidence for this claim. The submission does not otherwise engage with the likelihood of others being deterred from providing information to senators, despite it being the focus of the complaints raised by the Finance and Public Administration Legislation Committee and by Senator Faulkner.

### ***Committee comment***

2.49 The fact that the employee found another way to communicate with Senator Faulkner does not deal with the broader question whether other people may be deterred from providing information to senators. The use of the CCTV system which has led to this inquiry has similarities to allegations aired in the media 3 years earlier that security cameras were used to try to identify whistleblowers providing information to Senator Faulkner. The committee has also been provided with records indicating the use of CCTV images for other purposes involving staffing matters, which may add further to people’s apprehension about being monitored.

2.50 Such apprehensions may have the effect of discouraging people from providing information to senators, which may limit the information available to them and affect their committee work.

2.51 Before leaving this area it is worth noting that DPS also states that:

unauthorised surveillance of a parliamentarians’ office could be contrary to parliamentary privilege, especially in cases where the product of that unauthorised surveillance is use to intimidate persons who provide information to parliamentarians. However, once again, DPS submits that this is simply not made out on the facts.<sup>45</sup>

2.52 The fact that DPS seems to consider that there might be circumstances in which the unauthorised surveillance of a parliamentarians’ office might *not* be contrary to privilege is of concern to the committee.

### **Authorisation under the CCTV Code of Practice**

2.53 Turning to the third argument in this area, DPS submits that there can be no finding of improper interference with senators’ duties where:

DPS’ actions in using CCTV footage as evidence in disciplinary proceedings was authorised under, and in accordance with, procedures

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44 DPS submission, at paragraph 57.

45 DPS Submission, paragraph 58.

approved by the Presiding Officers, and in circumstances where those procedures were applied for proper and lawful purposes.<sup>46</sup>

2.54 The argument is inconsistent with well-established principles about the powers, privileges and immunities of the parliament, and the manner in which they constrain administrative action. An act which is otherwise “lawful” or “proper” or “authorised” may nevertheless amount to a contempt. A sound formulation of that advice, to which the committee has referred many times, is that:

In establishing whether a contempt has been committed, the matters to be examined are the tendency, effect and intention of the act in question, not the lawfulness of the act or whether there is otherwise a legal right to perform the act.<sup>47</sup>

2.55 It is a matter of concern to the committee that the administrators of the CCTV system have put forward an argument which is contrary to parliamentary law and practice. The committee is also concerned about short-comings in the administration of the system revealed by the matter. The report deals in some detail with the authority of the Code of Practice in chapter 3. For present purposes, it suffices to outline the committee’s conclusions on this argument, which are as follows:

- the approval of the CCTV Code of Practice by the Presiding Officers gives it no special status. The Presiding Officers’ powers here are exercised on behalf of the Parliament, subject to any orders of the Houses, and subject to the powers, privileges and immunities of the Houses and their members. Any activity (including the operation of the CCTV system) undertaken under the authority of that power is subject to the same limitations.
- the particular use of the CCTV system in this case was not authorised *under* the Code of Practice, because the use doesn’t come within its overarching security purpose, nor within a “plain language” reading of the Code.
- in any case, the particular use of the CCTV system did not occur *in accordance with* the Code, because of some apparent breaches, including a failure to seek the Presiding Officers’ approval for the release of images.

### **(b) The taking of disciplinary action**

2.56 On the second matter referred, the submission argues that there can be no finding that action was taken against an employee because of the provision of information to a senator because no-one in DPS was aware of the employee’s dealings with Senator Faulkner (or any senator) at the time decisions were made about instigating and undertaking an investigation into a code of conduct matter: “the

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46 DPS submission, paragraph 4.

47 Advice of the former Clerk of the Senate to the Committee of Privileges, 6 March 1989; published by the committee with its 18th Report.

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investigation was commenced and undertaken in good faith by those involved with due deference to principles of parliamentary privilege.”<sup>48</sup>

### *Timing and the taking of disciplinary action*

The submission argues:

- the timeline “clearly demonstrates that there was no causal connection between the taking of disciplinary action” against the employee and her interactions with the senator;<sup>49</sup>
- preliminary investigations were approved on 25 February, and the employee’s interactions with the senator not discovered until the following day.<sup>50</sup>

2.57 The committee considers it unlikely that the disciplinary action commenced as a result of the employee’s interaction with the senator, and agrees that the facts do not support this.

2.58 The submission also argues that, although DPS officers knew about that interaction when the formal investigation was approved “it does not follow” that this new information “was taken into account or that it changed the rationale of the decision-makers in determining a course of action”. Rather, “the relevant decision-maker (the Secretary) made a conscious decision *not* to take action in respect of Employee X’s approach to Senator Faulkner, by effectively instructing that DPS could not consider that conduct and had no interest in that matter.”<sup>51</sup>

2.59 There is no way to substantiate this assertion. This demonstrates the inherent problem with allowing the use of the images. As noted in relation to the email correspondence of 27 February, both officers involved assumed what they were witnessing was a departmental whistle-blower providing information to a senator, immediately drew adverse inferences from the exchange and communicated these to the Secretary. It is impossible to establish whether that information influenced those officers’ decisions – or the Secretary’s decisions – in the subsequent stages of the investigation. The submission denies that this is the case, but there is no way of knowing.

2.60 After the Code of Conduct process was discontinued, the committee understands that these officers (including the Secretary) were involved in making a series of employment decisions in which the employee was refused redeployment within DPS and eventually departed with an involuntary redundancy. Again, there is no way of establishing whether the information gained by this use of the CCTV system played any part in those decisions. The committee recalls that the description of the employee’s departure in the DPS submission simply notes that the employee “has

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48 DPS Submission, paragraph 3.

49 DPS Submission, paragraph 37.

50 DPS Submission, paragraph 38.

51 DPS submission, paragraph 40.

subsequently left the employment of DPS for reasons not connected to the Code of Conduct investigation of the CCTV footage issue.”<sup>52</sup>

***Committee comment***

2.61 The committee considers that the timing of this instance does not allow that the disciplinary proceedings arose because of the provision of information to Senator Faulkner. However it is not possible to determine whether subsequent decisions in the investigation and in other matters involving the employee were influenced by knowledge of the CCTV images.

2.62 The committee has already dealt with the likely connection of the provision of information to parliamentary proceedings and concludes that, were it to be shown that action was taken against the employee in connection with the provision of this information to Senator Faulkner, it would be open to the Senate to deal with that action as a contempt.

2.63 In the next chapter the report deals in more detail with the CCTV Code of conduct, before returning to its conclusions and recommendations in chapter 4.

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52 DPS submission, paragraph 30.