

Ofcom Broadcast Bulletin

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Introduction

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives¹, Ofcom must include these standards in a code or codes. These are listed below.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code"), which, can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.
- b) the Code on the Scheduling of Television Advertising ("COSTA") which contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>.
- c) certain sections of the BCAP Code: the UK Code of Broadcast Advertising, which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
 - the prohibition on 'political' advertising;
 - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
 - 'participation TV' advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including 'adult' chat), 'psychic' readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and 'message board' material where these are broadcast as advertising².

The BCAP Code is at: www.bcap.org.uk/The-Codes/BCAP-Code.aspx

- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information on television and radio licences can be found at: <http://licensing.ofcom.org.uk/tv-broadcast-licences/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>.

Other codes and requirements may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

¹ The relevant legislation is set out in detail in Annex 1 of the Code.

² BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases

Note to Broadcasters

Election and Referendum programming

On 3 May 2012, local elections will be held in a number of English local authority areas, Wales and Scotland. On the same day, elections will also be held for the London Assembly and the Mayor of London.

Ofcom reminds all broadcasters that great care needs to be taken when broadcasting election-related programming. In particular, broadcasters should ensure that they comply with Section Five (Due Impartiality) and Section Six (Elections and Referendums) of the Code, as well as the prohibition of political advertising contained in section 321 of the Communications Act 2003.

Ofcom will consider any breach arising from election-related programming to be potentially serious, and will consider taking regulatory action, as appropriate, in such cases, including considering the imposition of a statutory sanction.

Mayoral referendums are also taking place across 11 cities in England on **3 May 2012. Broadcasters should ensure that programming related to these referendums complies with Section Five of the Code. Section Six of the Code does not apply to local referendums – see meaning of “referendum period” as laid out in Section Six of the Code.**

For further information about the various elections being contested, and the referendums being held, on 3 May 2012 (including information about “election periods” and “referendum periods” as defined by the Code), broadcasters should visit the Electoral Commission website at www.electoralcommission.org.uk

Broadcasters are also reminded that if they would find it helpful to have informal guidance on Sections Five and Six of the Code, they can contact Ofcom directly (adam.baxter@ofcom.org.uk).

Standards cases

In Breach

Advertisement for the Bangladesh Nationalist Party

NTV, 22 to 28 November 2011, various times

Introduction

NTV is a news and general entertainment channel that is broadcast in Bangla and serves the Bangladeshi community in the UK and Europe. The licence for NTV is held by Runners TV Limited ("Runners TV" or "the Licensee").

The Bangladesh Nationalist Party is a political party in Bangladesh. A viewer contacted Ofcom, as he was concerned by the broadcast on NTV of an advertisement for the Bangladesh Nationalist Party's German branch, which invited viewers to attend an event. The advertisement was broadcast 37 times across a period of seven days leading up to the event. Broadcast in Bangla, the voiceover stated:

"On this coming Monday, 28th November 2011, at 4pm, the newly formed Bangladesh Nationalist Party, German committee, has arranged a welcoming event for the Opposition Chief Whip of the parliament of Bangladesh, Mr Zainul Abdin Farroque..."

The voiceover then:

- stated the full address of the event venue (in Berlin);
- named the event's special guests;
- invited viewers to attend the event; and
- named the Bangladesh Nationalist Party members who were issuing the invitation.

Throughout the advertisement, photographs of Ziaur Rahman (a late President of Bangladesh), Begum Khaleda Zia (a former Prime Minister of Bangladesh and current Leader of the Opposition) and their eldest son, Tareq Zia (Senior Vice Chairperson of the Bangladesh Nationalist Party) were shown on screen, together with the following text:

*"In the name of God, the most gracious and most merciful,
Long live Bangladesh.
The Bangladesh Nationalist Party, Germany branch"*

Information provided on screen also included the text of the voiceover, contact details of various Bangladesh Nationalist Party members and the bus route and nearest bus stop to the event venue.

Ofcom has a statutory duty, under section 319(2)(g) of the Communications Act 2003 ("the Act"), to secure the standards objective "that advertising that contravenes the

prohibition on political advertising set out in section 321(2) is not included in television or radio services.”

Political advertising is prohibited on radio and television under the terms of sections 321(2) and 321(3) of the Act and Rule 7.2 of the BCAP Code³.

For most matters, the BCAP Code is enforced by the Advertising Standards Authority (“ASA”). However, Ofcom remains responsible, under the terms of a Memorandum of Understanding between Ofcom and the ASA, for enforcing the rules on “political” advertising.

In this instance, Ofcom considered that the material raised issues warranting investigation under Rule 7.2 of the BCAP Code, which states, among other things:

“Advertising that contravenes the prohibition on political advertising set out below must not be included in television or radio services;

7.2.1 An advertisement contravenes the prohibition on political advertising if it is:

(a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature...;

7.2.2 For the purposes of this section objects of a political nature and political ends include each of the following:

(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;

(b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;

(c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;

(d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;

(e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;

(f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;

(g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends.”

³ The UK Code of Broadcast Advertising, available at:
<http://bcap.org.uk/The-Codes/BCAP-Code.aspx>

Response

Runners TV said “the advert had no political motivation to coerce or influence the [Bangladeshi] community” with regard to any of the objects listed under Rule 7.2.2 of the BCAP Code. It added that it had been reassured by the advertiser that the advertisement:

- promoted “a social function where the guest of honour was the Chief Whip ... who at the time was visiting Germany and ... had no political motivation in appearing at the gathering”; and
- “was not [broadcast] to promote any political agenda for the Bangladeshi Nationalist Party...”.

Nevertheless, the Licensee said it had asked its compliance team “to be vigilant on all aspects of ... Rule 7.2 of the BCAP Code for all future advertising, adding that:

- “it had put controls in place where any advertising that may have any indirect reference or undertone of a political party will not be broadcast on NTV”; and
- in addition to considering the content of advertisements, necessary checks would be made to understand “the character of the advertiser.”

Runners TV apologised for the breach, adding that it would endeavour to ensure future BCAP Code compliance.

Decision

Under the Act, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure certain standards objectives, one of which is “that advertising that contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services.” Section 321(2) of the Act states that, for the purposes of this standards objective, an advertisement contravenes the prohibition if it is:

- “(a)an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
- (b) an advertisement which is directed towards a political end; or
- (c) an advertisement which has a connection with an industrial dispute.”

Therefore, an advertisement may fall foul of the prohibition on political advertising either because of the character of the advertiser or because of the content and character of the advertisement.

This is replicated in Rule 7.2 of the BCAP Code, at paragraph 7.2.1. Likewise, in this context, what “political nature” and “political ends” includes is stated in paragraph 7.2.2, replicating the inclusive, non-exhaustive list of examples in section 321(3) of the Act, as follows:

- “(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;

- (b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
- (c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
- (d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
- (e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
- (f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;
- (g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends.”

While the Bangladesh Nationalist Party advertisement broadcast on NTV referred to a number of the Party’s members (from various levels of the organisation), it simply promoted a *“welcoming event for the Opposition Chief Whip of the parliament of Bangladesh, Mr Zainul Abdin Farroque...”*. Ofcom therefore noted that the advertisement was not directed towards a political end (where ‘political end’ includes any of (a) to (g), above).

However, the Bangladesh Nationalist Party is one of the major political parties in Bangladesh⁴ and therefore a body “whose objects are wholly or mainly of a political nature” (where ‘political nature’ includes any of (a) to (g), above). The Bangladesh Nationalist Party’s advertisement broadcast by Runners TV on NTV was therefore in breach of Rule 7.2 of the BCAP Code, which prohibits “an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature.”

Ofcom notes the Licensee’s apology and the action it has taken to ensure future compliance. While this breach was due to the character of the advertiser, and not because of the content and character of the advertisement broadcast on NTV, Ofcom does not expect any further breaches of Rule 7.2 of the BCAP Code by Runners TV.

Breaches of Rule 7.2 of the BCAP Code

⁴ Source – Foreign and Commonwealth Office, at:
<http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/asia-oceania/bangladesh/>

In Breach

Travel Channel viewer competitions

Travel Channel, 1997 onwards

Introduction

Travel Channel is a cable and satellite service offering travel and holiday programming. The service is available via satellite free-to-air across the United Kingdom and the Republic of Ireland and encrypted across Europe. The licence for the channel is held by Travel Channel International Limited ("TCI" or "the Licensee"). Travel Channel has been licensed to broadcast since 1993.

TCI also holds Ofcom licences for services called Travel Channel (German), Travel Channel 2, Travel Channel HD (Europe), Travel Channel TV and Retail TV.

A whistleblower contacted Ofcom with serious allegations of the unfair conduct of viewer competitions at Travel Channel over a number of years. Means of entry to these competitions included premium rate service (PRS) telephone calls.

The complainant alleged that between 1997 and 2008, and occasionally after 2008, TCI had conducted competitions unfairly, not picking winners at random. The complainant alleged that this had happened because TCI had wished to promote the channel to platform owners (cable, satellite and other operators) and in particular cable operators. Platform owners would feature competition winners in their magazines and promotional literature. According to the complainant, by ensuring the selection of winners who lived in the relevant area TCI would be able to show the value of Travel Channel to cable operators. This consideration was especially important to TCI, the complainant said, when negotiations for cable carriage, i.e. arrangements for carrying the channel in a particular cable area, were in hand.

Therefore, the complainant alleged, those entrants who entered by PRS means but did not live in the area concerned had no chance of winning a competition. In addition, the complainant alleged that all entrants who entered by website or post were excluded.

Following requests from Ofcom for further information the complainant gave a specimen example of a viewer competition that had been conducted in 2002 which offered a prize of a four-night city and resort break in the USA. The resort was named as Nemaquin Resort and Spa. In choosing a winner the Licensee had allegedly disregarded web and postal entries and had searched the list of PRS entrants for a winner who lived in a cable area for which the channel was negotiating a new carriage contract.

Further, the complainant told us, although the consolidation of the cable industry meant that over time geographical bias in selecting winners became less significant, TCI continued to ignore postal and website entries, picking only from PRS entries.

The complainant also alleged that in later years the Licensee ignored non-UK entries as it did not wish to deal with the logistics, and sometimes the extra cost, of arranging travel for an overseas winner to the destination other than via the designated airport in the UK.

As a result of the complaint, Ofcom required the Licensee to provide it with information, documentation and other material from the Licensee in respect of the conduct of its viewer competitions.

Among the evidence sought was documentation relating to compliance with a licence condition inserted by Ofcom into all TV broadcasters' licences, effective from August 2008. In brief, this condition makes clear the non-transferable responsibility of licensees for the handling of communications – including competition entries – from the public that are solicited in programmes; and where PRS is used for voting or competitions it imposes an obligation to engage an independent third party verifier to assess systems and conduct periodic audits¹.

The licence condition also requires that records of PRS competitions and votes are kept for at least two years. TCI was therefore asked to supply records covering this length of time, at a minimum.

During the course of correspondence with the Licensee, evidence emerged demonstrating three instances of potentially unfair conduct of competitions. Ofcom considered that these instances raised issues warranting investigation under Rule 2.11 in a previous version of the Code², published in July 2005, which was in force at the time of the broadcasts in question:

“Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known”.

We therefore sought the Licensee's comments as to how the competition in question complied with this rule.

Response

TCI expressed surprise at the request for information under the verification condition because internal checks demonstrated that it had stopped using a PRS service provider³ in 2003.

The Licensee told us that its records, including emails, dated back no earlier than May 2004. These records showed that since that time the only competition entry used was free entry through TCI websites. TCI said that since August 2007 winners of these free-entry web-based competitions have been picked at random using a computer software tool which is a wholly automated process.

However, TCI admitted that, in the earlier part of the period for which records exist (i.e. May 2004 – July 2007) winners were picked by a member of staff pointing “at random” at a row on a spreadsheet of details of entrants with correct answers. TCI accepted that “...there was a lack of senior management oversight in relation to these competitions and the manner in which the entries were administered.”

¹ For full details see http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/tech-guidance/guidance_verification_obj.pdf

² Available at <http://stakeholders.ofcom.org.uk/binaries/broadcast/Broadcast-Code-2005.pdf>

³ A PRS service provider is a specialist telecommunications company which provides the technical facilities for receiving and handling premium rate calls.

The Licensee said it had searched its records and could find no reference to a Nemacolin Resort competition. The Licensee told us that, “It is absolutely contrary to current, and to the best of [its] knowledge, historical policy of Travel Channel to intervene in the selection of competition winners...” in the way that had been alleged by the complainant.

After being instructed by Ofcom to search its records for all material relating to the selection of winners the Licensee admitted that on at least three occasions between May 2004 and July 2007 – i.e. before automated winner selection had been introduced – three instances of improper winner selection were uncovered. These had taken place because, “...the process of choosing a winner from amongst the pool of correct answers was influenced by the wish of the Travel Channel affiliate department to have a higher representation of winners from countries outside the UK.”

The Licensee went on to say that, “The number of disadvantaged people was relatively small because Travel Channel’s UK viewing share is less than one tenth of 1%...but this is not to seek to condone or minimise what happened.”

Although TCI had maintained that no PRS entry routes had been used in Travel Channel competitions since 2003, Ofcom pointed out to the Licensee that one of the emails made available to it following a search of records referred to phone entrants. TCI then made further searches that revealed the use of a second PRS service provider. This information allowed the Licensee to track down records of PRS use in competitions run in November 2004 and January 2005. TCI contacted this service provider and was told that it held no records of business with the Licensee.

Ofcom sought and received confirmation from the Licensee that it had examined all available sources of information and that these were the only two occasions that PRS use in competitions after 2003 could be established.

In respect of these competitions from November 2004 and January 2005 that included PRS entry, the Licensee said that it had no reason to believe that bias had affected the selection of winners but that it had no further material with which to be able to judge the fairness of the processes.

On the admissions of unfair selection in the three free-to-enter competitions, the Licensee told us,

“We can only reiterate that these very regrettable episodes, in which strictly random procedures were not adhered to, pre-dated [the later procedures], which since August 2007 we are confident have accorded all entrants an automatic equal chance of winning...”

TCI had issued a “refresher” memorandum to staff in light of Ofcom’s investigation.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material”. This objective is implemented by the rules in, among others, Section Two of the Code.

Rule 2.11 of the 2005 edition of the Code⁴ sought to ensure the fairness of the conduct of viewer competitions. Ofcom considers the unfair conduct of a viewer competition can amount to harm in two ways: where entry to the competition costs the viewer money (almost always in order to generate income for the licensee through the use of PRS) financial harm is caused; and irrespective of money, the undermining of trust in UK-licensed television services constitutes harm. Therefore serious breaches of the Code can occur when unfairness arises in the conduct of broadcasters' competitions even where participation is free.

In this case, viewers would have entered the three competitions on the basis that they had a fair and equal chance of winning when in fact TCI's conduct of the competitions, and in particular, its means of selecting winners, meant that the chances of winning were imbalanced and favoured some entrants over others. Therefore the three competitions were not conducted fairly, in breach of Rule 2.11 of the 2005 Code.

Ofcom views unfair conduct by licensees in viewer competitions very seriously indeed. Evidence of widespread abuses in this area, particularly with the use of PRS, that came to light some years ago caused considerable damage to the reputation of the industry and undermined trust that has taken some time to be re-established.

Although the complainant's serious allegations could not be fully substantiated, the fact that there had been three instances of unfair winner selection demonstrated that the Licensee had operated for a long period with inadequate processes and oversight. In Ofcom's view, this was a severe compliance failure. This was made worse by the apparent lack of thoroughness exercised in response to Ofcom's requests for information gathering and checking by the Licensee.

We considered whether a sanction should be imposed on the Licensee.

However, we noted that the complainant had apparently waited a very considerable time before approaching Ofcom, so that fuller and more satisfactory evidence could no longer be adduced. This meant that Ofcom was unable to conduct a full and fair assessment of the whole picture of the Licensee's conduct.

In addition, on the basis of the evidence put forward by TCI, Ofcom took into account that the aggravating factor of revenue generation through the use of PRS was absent from the three admitted breaches, and that no financial harm would have been caused as a result of the unfair conduct of those competitions.

More generally, we noted that the Licensee had apparently not sought to use PRS in competitions, other than in two isolated cases, for a number of years.

Ofcom also noted the Licensee's regret and that it had taken steps to remind staff of their responsibilities under the Code and the licence.

For these reasons Ofcom concluded that three breaches of the 2005 Code should be recorded but that no sanction should be imposed.

However, TCI is put on notice that any further instances of compliance failures in respect of the conduct of viewer competitions or in respect of any other use of PRS for viewer participation are likely to result in the imposition of a significant sanction.

Breaches of Rule 2.11 of the 2005 Code

⁴ See Rules 2.13 and 2.14 in the current version of the Code.

In Breach

Vampire Diaries

TV6 Sweden, 18 November 2011, 19:00

Introduction

TV6 is a Swedish language channel licensed by Ofcom that is controlled and complied by Viasat Broadcasting UK Limited (“Viasat” or “the Licensee”). Viasat holds 25 Ofcom licences for separate television channels which broadcast from the United Kingdom to various Scandinavian and Eastern European countries, including Sweden. The Viasat compliance department is based in London and manages compliance for all these licensees centrally. TV6 is not available on any of the United Kingdom’s broadcasting platforms and cannot be received in the UK on normal satellite or cable equipment.

The *Vampire Diaries* is a supernatural drama set in a fictional small town in America. It follows the lives of a group of young adults, some of whom are vampires and werewolves. This particular programme was the first episode of the third series.

A complainant alerted Ofcom to the broadcast of violent programme material on 18 November 2011 when children were likely to be watching.

There were two scenes in particular which contained depictions of violence and menace. The first featured two vampires entering the home of two women, who were later shown dead. The second involved a group of men in a bar, one of whom was restrained, while another threw darts at him. The restrained man was later forced to drink the blood dripping from another man’s wounded arm and later had his throat cut.

Ofcom considered the material raised issues warranting investigation under Rule 1.11 of the Code, which states:

Rule 1.11 “Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed ... and must also be justified by the context”.

We therefore sought Viasat’s comments on how the programme complied with this rule.

Response

The Licensee said the broadcaster had carefully assessed this episode of *Vampire Diaries* and created a version appropriate for pre-watershed broadcast, but that due to human error the original, unedited 21:00 version was broadcast.

Viasat said that it has taken steps to improve its “already stringent compliance procedures” and ensure this type of mistake is not repeated, including retraining of staff.

The Licensee said: “[We] take our responsibility to our viewers and compliance very seriously and regret the error that occurred in this instance.... We conduct training in broadcasting compliance several times a year for all relevant people and

departments and stress the importance of protecting our viewers from harmful material". Viasat added: "we feel that the success of this has been reflected in the fact that we have not had another similar complaint in the last few years".

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "persons under the age of eighteen are protected." This is reflected in the rules set out in Section One of the Code.

Rule 1.11 requires violence in pre-watershed programming to be "appropriately limited" and "justified by the context."

The opening scene of this programme began with intruders entering a home of two women and ended with a close up shot of a vampire biting a woman's neck, then pulling back to reveal blood spilling from his mouth, while the other terrified woman witnessed the violence. Approximately 13 minutes into the programme the aftermath of that attack was shown, when the dead bodies of the two women were discovered. This sequence included: images of bloody handprints all over the walls of the house and clear signs of a struggle; an image of the dead women sitting next to each other in the living room, covered in blood; and soon after three brief images of one woman's decapitated head falling away from her neck, the head hitting the floor and a third image (slightly longer in duration) of the head coming to a standstill on the floor.

The scene set in the bar included clear images of a distressed man, who was restrained and had darts embedded in his head and chest. Later an image was shown of another man throwing a dart at the restrained man and then pulling the dart out of his injured neck. A later scene, also set in the bar, included a close up image of a man cutting his wrist with a pocketknife and then forcing the restrained man to drink the blood dripping from the wound. The restrained man later had his throat cut, although this was not shown in detail.

Ofcom did not consider the violence depicted in these two sequences to be appropriately limited for broadcast at 19:00 because of their length, level of detail and menacing nature.

Ofcom next considered whether the violence was justified by the context. *Vampire Diaries* is a well established series aimed at older teenagers. We noted that this programme was broadcast on a general entertainment service. We also noted this programme was broadcast on a Friday evening at 19:00 and was preceded and followed by the *Simpsons*, which although not primarily aimed at children, does attract a reasonable proportion of child viewers. The scenes highlighted above in Ofcom's opinion, however, were not in keeping with audience expectations for broadcast at 19:00 and had the potential to distress younger viewers. In Ofcom's view, there was not sufficient justification for broadcasting these scenes of violence at 19:00 on this channel when children were available to view. The programme was therefore in breach of Rule 1.11.

We noted Viasat's acknowledgement that the programme was broadcast at an inappropriate time and its explanation for this error. However Ofcom is concerned that Viasat's compliance procedures allowed this programme to be shown before the watershed in breach of the Code. While we welcome the actions taken by the

Licensee in response to this complaint, Ofcom does not expect any recurrence of similar compliance failures by Viasat.

In the circumstances, Ofcom takes this opportunity to remind the Licensee and all other television broadcasters that it has recently published guidance on the compliance of material broadcast before the watershed, which is available on the Ofcom website at:

<http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/watershed-on-tv.pdf>.

Breach of Rule 1.11

In Breach

Road Wars

Pick TV, 11 January 2012, 18:00

Introduction

Road Wars is a fly-on-the-wall documentary featuring the work of traffic police squads in the UK and USA. The licence for Pick TV is held by British Sky Broadcasting Ltd (“Sky” or “the Licensee”).

Ofcom was alerted to offensive language in this broadcast by two complainants. During this episode, a man was arrested on suspicion of possessing Class A drugs and taken to a police station. On the way to the station, the man became violent and during an altercation that followed he used offensive language. The words “fuck” or “fucking” were broadcast five times.

Ofcom considered the material raised issues warranting investigation under Rule 1.14 of the Code, which states:

“The most offensive language must not be broadcast before the watershed...”.

We therefore asked Sky for its comments as to how this content complied with this Code rule.

Response

Sky apologised for any offence caused to viewers by the broadcast of offensive language in this programme. The Licensee said that upon discovering the incident it launched an immediate investigation and concluded that the broadcast of this post-watershed version of *Road Wars* resulted from human error.

Sky said that there are “various versions of certain episodes (pre watershed, post-watershed, not school holidays etc), all with appropriate time restrictions, held on our scheduling system.” It explained that these time restrictions are normally followed automatically. In this instance, however, the system’s restriction mechanism was manually overridden through human error and this allowed this version to be played out at 18:00. To prevent a recurrence, Sky added that it has “made some additional system changes...that will not allow a manually overridden programme to reach Transmission in the future.”

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that “persons under the age of eighteen are protected”. This objective is reflected in Section One of the Code.

Ofcom noted the immediate action taken by the Licensee to identify the cause of the incident and improve its compliance procedures. However, Rule 1.14 of the Code states unequivocally that “the most offensive language must not be broadcast before

the watershed...”. Ofcom research on offensive language¹ notes that the word “fuck” and similar words are considered by audiences to be amongst the most offensive language. The repeated use of the words “fuck” and “fucking” in this programme broadcast before the watershed was therefore a clear breach of Rule 1.14.

Breach of Rule 1.14

Licensees are reminded that Ofcom has recently published guidance on the compliance of material broadcast before the watershed, which is available on the Ofcom website at:

<http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/watershed-on-tv.pdf>.

¹ Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

In Breach

Hanging Up

Sony Entertainment Television, 29 January 2012, 20:00

Introduction

Sony Entertainment Television is owned and operated by Entertainment Networks (UK) Limited ("the Licensee").

Hanging Up is a comedy drama in which three dysfunctional sisters clash over who should take on the burden of looking after their ailing father. The film has been given a '15' certificate rating by the British Board of Film Classification. A complainant alerted Ofcom to the use of the word "fucking" in this broadcast of the film. Approximately 40 minutes into the film there is the following interchange between sisters Maddy and Eve:

Maddy: *"I've told you a million times, stop talking to me as if I'm like you!"*

Eve: *"Oh, fuck you! [turns to another character] And fuck you!"*

Ofcom considered the material raised issues warranting investigation under Rule 1.14 of the Code, which states:

"The most offensive language must not be broadcast before the watershed..."

Ofcom therefore requested comments from the Licensee about how the broadcast of this film complied with this Code rule.

Response

The Licensee said that the unedited version of this film carried a restriction that should have automatically prevented it from being scheduled before 9pm, but that a software upgrade on 5 November had disabled a block automatically preventing this post-watershed content from being scheduled before the watershed.

The Licensee confirmed its scheduling software has now been rectified, and that all Sony Entertainment Television schedules since the upgrade occurred had been checked. It also stated that there had been no other instances of post-watershed versions of films being transmitted pre-watershed, and that a manual check has been carried out on all schedules for the next month to ensure they are correct.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "persons under the age of eighteen are protected". This objective is reflected in Section One of the Code.

Rule 1.14 states that the most offensive language must not be broadcast before the watershed. Ofcom research on offensive language¹ clearly notes that the word "fuck"

¹ Audience attitudes towards offensive language on television and radio, August 2010

and other variations of this word are considered by audiences to be among the most offensive language. Such language is unacceptable before the watershed, whatever the audience profile of the channel.

Ofcom welcomes the action taken by the Licensee since it became aware of the transmission of the most offensive language in this case. However, Rule 1.14 of the Code states unequivocally that “the most offensive language must not be broadcast before the watershed...”. The broadcast of the word “fucking” in this programme was therefore a clear breach of Rule 1.14.

Ofcom takes this opportunity to remind the Licensee and all other television broadcasters that it has recently published guidance on the compliance of material broadcast before the watershed, which is available on the Ofcom website at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/watershed-on-tv.pdf>.

Breach of Rule 1.14

Note to Broadcasters

Compliance procedures and broadcast of unsuitable material before the watershed or when children are particularly likely to be listening

Ofcom has recently noted a number of cases where material which was originally produced for a post-watershed timeslot has been transmitted unedited or inappropriately edited for transmission pre-watershed or when children are particularly likely to be listening. This material often contains unsuitable language or violence. In such cases broadcasters frequently explain that such failures have occurred as a result of transmission and/or human errors.

All broadcasters are reminded that they are under a clear duty to ensure that robust procedures are in place, supported by a sufficient number of appropriately qualified and trained staff, to ensure full compliance with the Code.

All broadcasters must check their compliance procedures regularly to confirm they are effective enough to fulfil this requirement. Failure to have adequate procedures in place to ensure compliance with Ofcom's codes is a serious matter.

Ofcom recently made clear that it expects broadcasters to exercise particular care in relation to the protection of children and the compliance of material broadcast before the watershed on television, and on radio when children are particularly likely to be listening. Ofcom recently published new guidance on this area which can be found at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/watershed-on-tv.pdf> and <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/offensive-language.pdf>.

Broadcasters are put on notice that any serious or repeated failings in this area are likely to result in Ofcom taking further regulatory action, for example, the consideration of the imposition of statutory sanctions.

In Breach

Storm Night

Storm, 9 December 2011, 23:30

Introduction

Storm Night is interactive 'adult chat' advertising content broadcast on the service Storm (Sky channel number 966). The service is available freely without mandatory restricted access and is situated in the 'adult' section of the Sky electronic programme guide ("Sky EPG"). The licence for the service is held by Chat Central Limited ("Chat Central" or "the Licensee").

Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

A complainant alerted Ofcom to the broadcast of inappropriate content during *Storm Night* on 9 December 2011.

The female presenter was wearing: a grey pleated skirt, pulled up over her stomach and under her bare breasts; a striped tie draped over her shoulders; a novelty necklace; and white trainers and socks. The presenter was not wearing any underwear. During the broadcast she lay back on a desk, facing the camera with her legs tightly closed. At various points during the broadcast she changed position and covered her genital area with either a flat or cupped hand. Approximately 20 minutes into the broadcast she opened her legs to camera and placed a cupped hand over her genitals, clearly applying pressure against her genital area. She also poured white lotion onto her breasts, which remained there for the duration of the broadcast.

Ofcom considered the material raised issues warranting investigation under rule 4.2 of the BCAP Code:

"Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards."

Ofcom asked Chat Central for its comments as to how this content complied with this rule.

Response

The Licensee stated that the presenter's actions were on the boundaries of acceptability. Chat Central explained that it has since reminded the relevant producer and presenter of the need to comply with the requirements of the BCAP Code and associated Ofcom guidance and has ensured both parties are aware "of which aspects of that night's programming could have been construed as overstepping the mark".

Decision

Under the Communications Act 2003 ("the Act"), Ofcom has a statutory duty to require the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of

offensive and harmful material. Ofcom has a duty to set such standards for the content of programmes as appear to it best calculated to secure the standards objectives, one of which is that “the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented”. This standards objective is reflected in the rules set out in the BCAP Code.

Since 1 September 2010 all PRS-based ‘daytime chat’ and ‘adult chat’ television services have no longer been regulated as editorial content but as long-form advertising i.e. teleshopping. From that date the relevant standards code for such services became the BCAP Code rather than the Broadcasting Code.

The BCAP Code contains rules which permit ‘adult chat’ services to be advertised (and so broadcast) within prescribed times and on free-to-air channels that are specifically licensed by Ofcom for that purpose. When setting and applying standards in the BCAP Code to provide adequate protection to members of the public from serious or widespread offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. However, the advertising content of ‘adult chat’ services has much less latitude than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services, and consideration of acceptable standards will take that context into account.

Rule 4.2 of the BCAP Code provides that: “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.”

On 27 July 2011 Ofcom published revised guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services¹. This clearly sets out what Ofcom considers to be acceptable to broadcast on these services post-watershed.

For example this guidance explicitly states that ‘adult chat’ broadcasters should at no time:

- broadcast anal, labial or genital areas or broadcast images of presenters touching their genital or anal areas either with their hand or an object; and
- at no time broadcast shots of presenters using liquids of a sort in a way which suggests the liquid is ejaculate.

Ofcom has also made clear in a number of published decisions the type of material that is unsuitable to be broadcast in ‘adult chat’ advertising content that is available without mandatory restricted access².

¹ The guidance referred to is Ofcom’s guidance on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services updated and reissued on 27 July 2011: <http://stakeholders.ofcom.org.uk/binaries/broadcasting/guidance/bcap-guidance.pdf>.

² For example:

- *Bluebird Live, Bluebird 40+*:
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb1971/obb198.pdf>

In Ofcom's view the images highlighted above were strong and clearly capable of causing offence. We noted that the broadcast included material that is clearly inconsistent with Ofcom's guidance. For example: the presenter was clearly applying pressure against her genital area with her hand and used body lotion in a way that suggested it was ejaculate.

Ofcom noted that in conjunction with those images the presenter performed various other actions including: stroking her body; shaking her breasts to camera; and miming fellatio. Her position on screen (reclining on the desk facing the camera) also resulted in her genital area becoming the focal point of the shot, despite the fact there were no actual images of her genitals, intrusive or otherwise. Ofcom considered the material included images that are not permitted in 'adult chat' advertising content that is available without mandatory restricted access.

Ofcom considered that because the presenter was not wearing any underwear, the chances of the material contravening the relevant rules and guidance was significantly increased because she had to ensure her genital area was adequately covered by her hand each time she changed position. Ofcom does not prohibit nudity in adult sex chat services. However, as set out in Ofcom's guidance, images of presenters touching their genital or anal areas either with their hand or an object are prohibited within the context of 'adult chat' advertising content that is freely available without mandatory restricted access. In light of this we would caution against the use of naked presenters when broadcasting this content.

Under BCAP Code Rule 4.2 in order to assess whether serious or widespread offence was caused against generally accepted standards, Ofcom took into account whether appropriate scheduling restrictions were applied to this material. Ofcom noted that this content was broadcast well after the watershed and that viewers generally expect on all channels that stronger material will be shown after the 21:00 watershed. Ofcom also had regard to the fact that this channel was positioned in the 'adult' section of the Sky EPG and that viewers tend to expect the broadcast of stronger sexual material on channels in this section of the EPG than on other channels in other sections.

However in this case, given that the images were clearly at odds with Ofcom's guidance, the location of the channel in the 'adult section' of the EPG was not sufficient to ensure serious or widespread offence against generally accepted standards was not caused. This was regardless of the fact the content was shown between the hours of 23:30 and 00:00. Ofcom was also concerned at the degree of offence likely to be caused to viewers who might come across this material unawares.

Taking into account the above factors Ofcom concluded that relevant scheduling restrictions were not applied so as to ensure that the material broadcast was not capable of causing serious or widespread offence against generally accepted moral, social or cultural standards. Specifically, this content should not have been broadcast within the context of 'adult chat' advertising content that was freely available without mandatory restricted access. Therefore Ofcom found this material in breach of Rule 4.2 of the BCAP Code.

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- Red Light 1,2 and 3: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb185/obb185.pdf>
 - *Elite Nights, Elite TV and Elite TV 2*:
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb179/>

Ofcom noted that this was the first breach of this nature on this channel. However, the Licensee is put on notice that any future breaches of this nature may lead to Ofcom considering further regulatory action.

Breach of BCAP Code Rule 4.2

Advertising Scheduling Findings

In Breach

Advertising minutage

Wedding TV, 6 to 8 December 2011

Introduction

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states: “time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes.”

During monitoring of licensees’ compliance with COSTA, Ofcom noted that between 6 and 8 December 2011 Wedding TV transmitted more advertising than the amount permitted in a single clock hour as follows:

Date	Channel	Clock hour	Minutage
6 December 2011	Wedding TV	16	12:04
6 December 2011	Wedding TV	17	12:05
6 December 2011	Wedding TV	19	12:01
6 December 2011	Wedding TV	21	12:26
7 December 2011	Wedding TV	17	12:23
7 December 2011	Wedding TV	18	12:56
7 December 2011	Wedding TV	21	13:24
7 December 2011	Wedding TV	22	12:08
8 December 2011	Wedding TV	17	13:20
8 December 2011	Wedding TV	18	12:15
8 December 2011	Wedding TV	20	12:15
8 December 2011	Wedding TV	22	12:48

Ofcom considered this raised issues warranting investigation under Rule 4 of COSTA.

The Licensee for this service at the time the above material was broadcast was Wedding TV Ltd. However, on the above dates, Wedding TV Ltd was in administration. Ofcom therefore sought comments on how the content complied with the above rule from Leonard Curtis Ltd. (“the Administrators”) who were acting as Administrators for Wedding TV Ltd.

For information, the Wedding TV licence was transferred subsequently to Creamdove Ltd.

Response

The Administrators confirmed that the overruns only occurred during the instances stated, and that overall advertising time for each day was not exceeded as there were fewer commercials in the other clock hours.

It explained that the overruns occurred due to a scheduling error caused during a difficult time for the Wedding TV staff, following the appointment of the Administrators and the immediate requirement to reduce overheads, partially through redundancies.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers are best calculated to secure a number of standards objectives. One of these objectives is that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”.

Articles 20 and 23 of the EU Audiovisual Media Services (AVMS) Directive set out strict limits on the amount and scheduling of television advertising. Ofcom has transposed these requirements by means of key rules in COSTA. Ofcom undertakes routine monitoring of its licensees’ compliance with COSTA.

Rule 4 of COSTA requires that television advertising in each clock hour does not exceed 12 minutes. In this case, while Ofcom acknowledged the Administrators’ statement that the overall advertising for each day was not exceeded, Rule 4 does not permit a broadcaster to average its advertising minutage across a number of clock hours.

We took into account the difficult circumstances for Wedding TV Ltd’s staff in this instance, but the amount of advertising broadcast by Wedding TV on a number of occasions on these dates was in breach of Rule 4 of COSTA.

Breaches of Rule 4 of COSTA

Resolved

Advertising minutage

ITV4, 26 January 2012, 21:00

Introduction

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”) states:

“time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes.”

ITV2 Ltd (“the Licensee”) notified Ofcom that on 26 January 2012, ITV4 transmitted 13 minutes and two seconds of advertising in the 21:00 clock hour, therefore exceeding the amount permitted by Rule 4 of COSTA.

Ofcom considered the case raised issues warranting investigation in respect of Rule 4 of COSTA.

Response

The Licensee said the incident occurred during ITV4’s live coverage of the *Africa Cup of Nations* football tournament. It explained that a four minute commercial break intended to go to air directly after full time was broadcast approximately one minute later than planned, at 20:57.02. Consequently, the advertising break overran into the subsequent clock hour by 62 seconds. This hour therefore contained an additional 62 seconds of advertising as well as the scheduled 12 minutes.

The Licensee said that on this occasion, the “Network Director did not follow the standard and established operational procedure of escalating [the matter] to ITV.” However, it added that there were “mitigating factors” associated with this particular broadcast of live sport; including half-time overrunning to a total of 18 minutes prior to the start of the second half of the match, a five minute injury time period and a “major fracas on the pitch following the full time whistle”.

The Licensee said that, to prevent a recurrence of this incident, it had reinforced “the absolute necessity of close co-ordination and communication between the...transmission controller and ITV’s production assistant”. It had also arranged meetings with the relevant staff “to reaffirm the serious nature of the incident” and “underline that any commercial break restrictions are relayed to ITV production assistants with clear instructions regarding the relevant constraints.”

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content which it considers are best calculated to secure a number of standards objectives. One of these objectives is that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”.

Articles 20 and 23 of the EU Audiovisual Media Services (AVMS) Directive set out strict limits on the amount and scheduling of television advertising. Ofcom has transposed these requirements by means of key rules in COSTA.

Whilst noting that a 62 second overrun is significant, Ofcom took into account the following factors when reaching its decision:

- the Licensee notified Ofcom of the incident;
- the unusual and unforeseeable events of this particular live sporting event;
and
- the action taken by the Licensee to prevent a recurrence.

In the circumstances, Ofcom considers the matter resolved.

Resolved

Fairness and Privacy Cases

Upheld in Part

Complaint by Miss Wendy Newson¹

*Nightmare in Suburbia: Two Stolen Lives, Crime & Investigation Network,
4 October 2011*

Summary: Ofcom's decision is that this complaint of unfair treatment and unwarranted infringement of privacy made by Miss Wendy Newson should be partly upheld.

In summary, Ofcom's decision is as follows:

- The programme did not result in unfairness to Miss Wendy Newson in respect of her complaint that it stated that Miss Kim Newson "*flew the nest*" when she set up a home of her own in Lincoln.
- Having regard to the particular nature and content of this programme, the specific circumstances of the complainant, and the particular circumstances of this case, Miss Wendy Newson's privacy was unwarrantably infringed in the broadcast of the programme.
- Miss Wendy Newson did not have a legitimate expectation of privacy with regard to the broadcast of a photograph of her which had previously been published and therefore her privacy was not infringed in respect of the inclusion of this photograph in the programme as broadcast.

Introduction

On 4 October 2011, the Crime & Investigation Network channel broadcast an episode of *Nightmare in Suburbia*, a series examining serious crimes committed in the suburbs of the UK's big towns. This episode, entitled *Two Stolen Lives*, explored the murder of Miss Kim Newson in Lincoln in 2002 by her neighbour Mr Stephen Hughes. The Ofcom licence for this channel is held by A&E Networks.

The programme explained that at the time of her murder Miss Kim Newson, who was eighteen years old and pregnant, had recently left her parents' home to set up home with her boyfriend. It explored the police investigation into Miss Kim Newson's disappearance and murder. In particular, it focused upon the efforts which Mr Hughes made to cover up the murder.

A photograph of Miss Wendy Newson, Miss Kim Newson's mother, was included in one section of the programme.

On 5 October 2011, following the broadcast of the programme, Miss Wendy Newson complained to Ofcom that she was treated unjustly or unfairly in the programme as broadcast, and that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

¹ Although Newson is the surname the complainant took when she married Mr Newson the complainant uses the title Miss.

Summary of the complaint and broadcaster's response

The details of Miss Wendy Newson's complaint are set out below, followed by A&E Networks' response on particular points.

Before addressing the specific heads of complaint, A&E Networks ("A&E"), which responded on behalf of the Crime and Investigation Network, apologised for any distress and anguish caused to Miss Wendy Newson by the broadcast of this programme. However, A&E said that it believed that all consent issues were dealt with appropriately and that its response on this matter was based on information provided to it by the company which produced the programme, Nine Lives Media ("Nine Lives"). A&E added that the programme had been broadcast several times since its first broadcast in December 2009, and that prior to the October 2011 broadcast it had not received any complaints with regard to unfairness or infringement of privacy.

Unjust or unfair treatment

In summary, Miss Wendy Newson complained that she was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme said that Miss Kim Newson "*flew the nest*" from her home in Lincoln, when actually she had moved back to Lincoln from a house which Miss Wendy Newson had found for her and her boyfriend in Colne in Lancashire.

In summary, A&E responded that the phrase "flying the nest"; was a common term used to describe someone's child leaving the family home to live somewhere else. A&E was informed by Mr Graham White (the senior police officer investigating the disappearance and murder of Miss Kim Newson) that eighteen years old Miss Kim Newson had set up home with her boyfriend in a flat at 35 Monks Road, Lincoln. In support of its position, A&E provided Ofcom with a copy of an email sent to Nine Lives by Mr White during the making of the programme. Finally, A&E stated that the line in the script that included this term was a positive reference to Miss Kim Newson moving back to Lincoln and was not intended to have any negative connotations.

Unwarranted infringement of privacy

In summary, Miss Wendy Newson complained that her privacy was unwarrantably infringed in the programme as broadcast in that:

- b) The programme, which was about her daughter's murder, was broadcast without her knowledge or consent.

By way of background, Miss Wendy Newson said that when she contacted Nine Lives after the October 2011 broadcast to complain, she was told that the programme makers had an email from the police in Lincoln which stated that Mr Newson (Miss Wendy Newson's ex-husband and Miss Kim Newson's father) had said that Miss Wendy Newson did not want to take part in the programme but had no problem with its being made. Miss Wendy Newson said this was not the case.

In summary, A&E responded that programmes in the *Nightmare in Suburbia* series were only made when the consent of both the police team that investigated the crime and the immediate family of the victim had been secured. A&E acknowledged that in some cases the victim's family did not want to be

interviewed on camera for the documentary, but said that it always made sure they were happy for filming to go ahead and that the family could check the programme for any factual inaccuracies at the editing stage. A&E added that its position regarding these matters was always made clear to the police forces it worked with. It also said that it had not proceeded with a number of potential programmes for this series, including one about another case investigated by Lincolnshire Police, after the victims' families had refused consent.

A&E said that before making this programme Nine Lives understood that it had the consent and full co-operation of both Lincolnshire Police who investigated the Kim Newson case in 2002 and, through the police Family Liaison Officer, the Newson family. In particular, A&E said that Nine Lives had understood that both Miss Kim Newson's parents were happy for the film to be made.

A&E said that, as in the majority of the programmes about murder cases which Nine Lives made for it, it was decided that the police Family Liaison Officer (in this case Mr Mark Blackburn) should make contact with the murder victim's family, on behalf of the production company. A&E added that Mr Blackburn passed Mr and Miss Wendy Newson's response on to Lincolnshire Police, who in turn informed Nine Lives that both Mr and Miss Wendy Newson were happy for the production to go ahead. In support of its position on this matter A&E provided Ofcom with an exchange of emails between Mr Blackburn and Mr Graham White of the Lincolnshire Police on 4 October 2011. The email exchange (which Mr White forwarded to Nine Lives on the same day) was prompted by Nine Lives' receipt of a complaint from Miss Wendy Newson that she had not been informed that the programme was being made. In the exchange Mr Blackburn confirmed that prior to the making of the programme he had been unable to contact Miss Wendy Newson, who had been unwell, and that he had contacted Mr Newson, who informed him that Miss Wendy Newson "did not want to take part" but had "no concerns" about the programme.

A&E said that on 4 November 2009, during Nine Lives' initial meeting with Lincolnshire Police about this programme, Mr White and his deputy confirmed that both Mr and Miss Wendy Newson had approved the programme's production and were comfortable for it to proceed.

They also indicated that they thought that there was a strong possibility that Mr Newson would consider filming an interview but that the same was not true of Miss Wendy Newson because she had recently suffered a breakdown and spent time in hospital. A&E said that it was again decided that Mr Blackburn should make contact with Mr and Miss Wendy Newson with regard to being interviewed but added that the judgement as to whether, given her ill health, it was appropriate to contact Miss Wendy Newson about an interview was left to Mr Blackburn. A&E said that this was in accordance with the standard practice whereby the programme makers only make direct contact with members of the family once they had confirmed, through the police, that the family was happy to talk to them. A&E added that this always happened even though by this stage of production the family members would already have given their consent to the making of the programme.

A&E said that after this meeting one of the programme makers spoke to Mr Newson twice on the telephone. On the first occasion he agreed to take part in an interview but during the second conversation he said that he could not do so but asked if he could give a statement about how the loss of his daughter had affected him instead. (A&E provided Ofcom with a copy of a statement, drafted by

the programme makers on Mr Newson's behalf and subsequently signed by him, which was included at the end of the documentary). A&E said that following Mr Newson's decision not to be interviewed Mr Blackburn told the programme makers that he believed that Miss Wendy Newson "was in hospital after suffering a breakdown", so an interview would not be possible.

A&E also said that, again in accordance with its standard practice with programmes such as *Nightmare in Suburbia: Two Stolen Lives*, approval of the completed programme was sought from both the police who investigated the crime and the family. It said that on 14 December 2009 copies of the film were sent to the Lincolnshire Police so that the senior investigating officers, together with the family liaison officer (Mr Blackburn) and Mr and Miss Wendy Newson could all view the documentary and give feedback. A&E added that all the copies of the programme were sent to the police rather than directly to the family.

A&E said that Mr Newson watched the programme with Mr Blackburn and made no requests for any changes to be made. A&E also said that having sent copies of the programme to the police (in accordance with its usual procedures) and received feedback from them that *Nine Lives* believed that Miss Wendy Newson was also shown the film and had found it to be factually accurate. However, since receiving this Ofcom complaint, they had been told that Miss Wendy Newson was not in fact shown the film as Mr Blackburn could not get in contact with her and believed she may have been in hospital at that time.

A&E acknowledged that, contrary to the police's understanding, Miss Wendy Newson had not been informed about the making of the programme by her ex-husband (Mr Newson) or told him that she consented to its being made. However, having also acknowledged that due to the length of time since the programme was originally made it no longer had access to all of the email correspondence relating to this programme, A&E said that throughout the making of the programme it had understood that both Mr and Miss Wendy Newson had full knowledge of the programme, had consented to its being made and that they had checked it for any factual inaccuracies prior to its transmission. A&E added that it believed that it had done all it could to ensure that Miss Wendy Newson knew about and had consented to the making of the programme, and that if any concerns had been raised about the programme it would not have been made because A&E would never want to cause additional and unnecessary distress to any family who have been affected by such a tragedy.

- c) A photograph of her, which had previously appeared in the newspaper, was included in the programme.

In summary, A&E responded that the programme included one photograph of Miss Wendy Newson which was acquired, through the police, from *The Lincolnshire Echo*. A&E said that given the photograph had been printed in the newspaper prior to the broadcast it was already in the public domain when it was shown in the programme². A&E also said that the photograph was the first image found in a Google search under the name "Wendy Newson" and was available on the website of *The Lincolnshire Echo*. It added that still images of both Mr and

² In response to a question from Ofcom A&E confirmed that *The Lincolnshire Echo* first published the photograph in the newspaper on 26 March 2003 (i.e. at the time of Mr Stephen Hughes' trial); and, that it was subsequently published again in an article about Miss Wendy Newson which appeared in the same newspaper on 20 May 2010.

Miss Wendy Newson were included in the programme in the belief that both were happy for it to be made and had seen it prior to transmission.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions. In addition, Ofcom considered the results of an internet search for articles mentioning Miss Kim Newson and/or Miss Wendy Newson. This was for the purposes of ascertaining when, and to what extent, the information that is now the subject of the complaint may have already been in the public domain.

Unjust or unfair treatment

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decision on the individual heads of complaint detailed below.

- a) Ofcom first considered Miss Wendy Newson's complaint that she was treated unfairly in that the programme said that Miss Kim Newson "*flew the nest*" from her home in Lincoln, when actually she had moved back to Lincoln from a house which Miss Wendy Newson had found for her and her boyfriend in Colne in Lancashire.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 which provides that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation, and that anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.

Ofcom noted that the programme started with the following commentary:

"Under the gaze of Lincoln's historic Cathedral, eighteen-year-old Kim Newson created her first home... And Kim was about to start a family of her own. Towards the end of 2001, she and her boyfriend discovered they were having a baby..."

Soon after the title sequence the narrator said:

“Although Kim was close to her family, like many eighteen year olds, she was keen to start her own life. In December 2001, Kim flew the nest and moved to Lincoln with her long-term boyfriend, Jason. They rented a flat on Monks Road and before long Kim discovered two would soon become three.”

Ofcom observed that the programme included interviews with several members of the Lincolnshire police force who worked on the investigation into Miss Kim Newson’s murder, including Mr Blackburn, the Family Liaison Officer, and Mr White, the Senior Investigating Officer. In Ofcom’s view the sections of Mr Blackburn’s and Mr White’s interviews which were shown between the sections of commentary noted above made it clear that Miss Kim Newson was very close to her family, and in particular to her father, and that, although she was only eighteen years old, she had planned to have a baby and was very excited about being pregnant.

Ofcom considered that the programme’s use of the phrase *“flew the nest”* in the above context simply indicated that Miss Kim Newson had left the parental home. We considered that the programme did not use this phrase in any negative way to suggest her relationship with her parents was unsatisfactory but indicated that, like many other young people of her age, Miss Kim Newson decided to set up home on her own for the first time.

Ofcom noted Miss Wendy Newson’s complaint that rather than the flat at Monk’s Road, Lincoln being Miss Kim Newson’s *“first home”* of her own, as indicated by the programme, she had previously lived with her boyfriend in a house which Miss Wendy Newson had found for them in Colne in Lancashire. However, Ofcom did not consider that this minor factual inaccuracy would have materially affected viewers’ opinions of Miss Wendy Newson in any adverse way.

In light of these factors Ofcom’s found that the programme did not result in unfairness to Miss Wendy Newson in respect of her complaint that it said that Miss Kim Newson *“flew the nest”*.

Unwarranted infringement of privacy

In Ofcom’s view, the individual’s right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus intensely on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- b) Ofcom first considered Miss Wendy Newson’s complaint that her privacy was unwarrantably infringed in the programme as broadcast, in that the programme, which was about her daughter’s murder, was broadcast without her knowledge or consent.

Miss Wendy Newson said that when she contacted Nine Lives after the broadcast to complain, she was told that the programme makers had an email from the police in Lincoln which stated that Mr Newson (Miss Wendy Newson’s ex-husband and Ms Newson’s father) had said that Miss Wendy Newson did not

want to take part in the programme but had no problem with its being made. Miss Wendy Newson said this was not the case.

Relevant practices of the Code

With regard to the part of this head of complaint which relates to the broadcaster not having secured the consent of Miss Wendy Newson to broadcast a programme about the murder of her daughter, Ofcom considers that the relevant practice under the Code is Practice 8.6. This practice states that: "If the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted...".

Ofcom considers that this head of complaint also contains a discrete element of complaint in relation to an alleged failure by the broadcaster to inform Miss Wendy Newson of its plans for the programme and its intended broadcast. Practice 8.19 of the Code states that broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well as factual programmes. The practice sets out the particular steps that are contemplated in this respect, and states that:

"In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past."

These, therefore, are the practices of Section Eight which Ofcom considers are specifically relevant to address in relation to Miss Wendy Newson's privacy complaint. However, to establish whether A&E was required to comply with these practices, Ofcom first considered whether Miss Wendy Newson had a "legitimate expectation of privacy" under Section Eight of the Code in respect of the particular material broadcast about the murder of her daughter.

If so, then it is necessary to consider the particular application of the above practices in this case, whether A&E failed to comply with them, and whether the infringement of Miss Wendy Newson's legitimate expectation of privacy was warranted under those practices (and under Rule 8.1), either on public interest grounds or otherwise.

Legitimate expectation of privacy

The programme reviewed the police investigation into Miss Kim Newson's disappearance, the subsequent discovery that she had been murdered and the investigation into her murder. In addition to the detailed recollections of Mr Blackburn and Mr White (which included a description of how the police believed Miss Kim Newson was murdered) the programme showed footage of the flat in Monks Road where Miss Kim Newson lived and that of Mr Stephen Hughes (her downstairs neighbour) who was arrested and convicted of her murder. It also included police archive images of blood-stained items, furniture and fittings found in the Monks Road property and a number of dramatic reconstructions of the events leading up to the murder and various elements of the investigation. In particular, Ofcom observed that the programme showed reconstructions of the

forensic examination of the property in Monks Road, which was where the murder took place, and of the search of the River Witham where parts of Miss Kim Newson's dismembered body were found.

The programme also showed a police archive image of a duffle bag in which both the lath hammer, which was believed to have been the weapon used to Kill Miss Kim Newson, and parts of Miss Kim Newson's body were found. After showing this image the programme included Mr White saying: *"It was impossible to tell the part of the body they had come from but my instinct told me that it had to be the remains of Kim..."* before the narrator confirmed that the duffle bag had contained *"parts of Kim's body...[but that] the majority of the eighteen year old's body was still missing"*. Later, the programme detailed how the police had subsequently found Miss Kim Newson's head in another section of the river. Immediately after the section of the programme showing the duffle bag Mr White said that the police then broke the news *"to Kim's family... that their daughter was dead"* and Mr Blackbourn said: *"We went round to see Barry and Wendy and told them what we'd found. They were very very upset, inconsolable, and I think it dawned on them what had happened to their daughter"*. Mr Blackbourn's comments were made alongside individual photographs of Mr Newson and of Miss Wendy Newson.

The guidance on the meaning of "legitimate expectation of privacy" (which introduces the practices under Section Eight) makes clear that such expectations depend on the circumstances and *"will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye. There may be circumstances where people can reasonably expect privacy even in a public place...People under investigation or in the public eye, and their immediate family and friends, retain a right to a private life, although private behaviour can raise issues of legitimate public interest."*

Practice 8.3 of the Code also makes clear that *"When people are caught up in events which are covered by the news they still have a right to privacy in both the making and the broadcast of a programme, unless it is warranted to infringe it. This applies both to the time when these events are taking place and to any later programmes that revisit those events."*

In Ofcom's view, these provisions make clear that persons are not necessarily deprived of expectations of privacy under Section Eight of the Code if information in respect of which they claim a right to privacy has been put into the public domain in the past.

In the particular circumstances of this case, Ofcom considered that Miss Wendy Newson did have a legitimate expectation of privacy with regard to the broadcast of the programme.

These circumstances included that:

- The subject matter of the programme concerned a close member of Miss Wendy Newson's immediate family, namely her daughter.
- Information about the murder of the complainant's daughter (and her unborn grandchild) was personal to her, and related to intensely traumatic events which self-evidently would have caused her substantial grief.

- While information on the case, which included specific details about Miss Kim Newson's murder and the police investigation that followed, remained retrievable on the internet for the public to seek out³, the effect of the programme – and its broadcast several times on television by the Crime & Investigation Network – was to resurrect the case for the audience in a new way which could have a significant effect on Miss Wendy Newson.
- The programme not only provided an outline of the case, but included detailed reconstructions of Miss Kim Newson's disappearance, the circumstances of her murder, and the resulting police investigation.

Ofcom observed that A&E did not argue that Miss Wendy Newson did not have a legitimate expectation of privacy with regard to this programme.

Taking these factors together, Ofcom therefore considered that Miss Wendy Newson had a legitimate expectation of privacy with regard the broadcast of the programme. However, this expectation was limited by the fact that a number of the details of Miss Kim Newson's murder which were included in the programme had already been disseminated for example by means of articles on the BBC news website and in a local newspaper⁴ at the time of Mr Hughes' trial, as well as in an edition of the BBC's current affair programme, *Panorama*, which was broadcast on 11 October 2007. That information was therefore in the public domain prior to the broadcast of the programme on 4 October 2011. Also Ofcom notes that Miss Wendy Newson spoke in public about the severe and adverse effects on her mental and physical health of her daughter's murder when she gave an interview to *The Lincolnshire Echo* on 20 May 2010 (seventeen months prior to the date of the broadcast of the programme to which this complaint relates).

Ofcom went on to consider whether the intrusion into Miss Wendy Newson's legitimate expectation of privacy (through the programme about her daughter's murder being broadcast without her knowledge or consent) was warranted.

In this context "warranted" has a particular meaning. It means that, where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy⁵.

³ A recent internet search by Ofcom found two articles from the BBC News website and another article from *The Lancashire Telegraph*, published during Mr Hughes trial in March 2003. Ofcom also found the script of an edition of *Panorama* (the BBC's current affairs programme) broadcast on 11 October 2007 which looked at the role of the police DNA database in catching criminals. This script included various details about the use of DNA in the case of Miss Kim Newson, which were also covered in the programme as broadcast.

⁴ See footnote 3 above.

⁵ Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public.

Practice 8.6

As set out above, Ofcom considers that head b) has to be considered in relation to Practice 8.6 since it relates to an alleged failure by the broadcaster in the particular circumstances of this case to obtain consent from the complainant to broadcast the story about the murder of her daughter. Practice 8.6 states that “If the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. [...]”

With regard to Practice 8.6, Ofcom observed that on the information available to it, it appears that Miss Wendy Newson did not consent to the making and broadcast of this programme.

Ofcom recognised that the programme makers wished and took steps to secure consent from Miss Wendy Newson and that, in light of assurances received from Lincolnshire Police, the broadcaster believed in good faith that it had done so. Specifically, it arranged for the police Family Liaison Officer (Mr Blackburn) to: contact both Mr and Miss Wendy Newson in order to tell them about the plan for the programme and to ask for their consent to its making and broadcast; subsequently, ask each of them for an interview (if he considered it to be appropriate); and, finally offer each of them a chance to view and make comments on the programme prior to its broadcast. In addition, Ofcom noted that on 4 November 2009 the police informed the programme makers that both Mr and Miss Wendy Newson had approved the programme’s production and were comfortable for it to proceed, but also that Miss Newson had had a breakdown and had been in hospital.

Ofcom noted that in solely using the police to liaise with the family in a sensitive case such as this one the programme makers were following a well-established protocol, agreed with the police and designed to minimise distress to the victim’s family, which had enabled them to secure appropriate consent from the families of victims featured in other editions of the programme.

However, in the particular circumstances of this case (where:

- the complainant had been through a bereavement following the murder of her daughter in a manner which would have made that bereavement particularly difficult to bear;
- the programme makers planned to broadcast a programme which would include detailed information about Miss Kim Newson’s murder and the investigation that followed which would be very likely to cause particular distress to the complainant (the murder victim’s mother);
- where the programme makers were made aware that the complainant had recently suffered a breakdown that had necessitated her being hospitalised; and
- reliance was placed solely on the confirmation from Miss Wendy Newson’s ex-husband that she consented to the programme, in circumstances where his interests, and those of Miss Newson, may not have been the same;)

Ofcom did not consider that the steps taken by the programme makers were sufficient to ensure that Miss Wendy Newson's consent had been obtained. In particular, Ofcom observed that in this case the programme makers relied not only upon the police to act on their behalf with regard to securing Miss Wendy Newson's consent to the making and broadcast of the programme, but that the police in turn relied upon the assurance of the complainant's ex-husband that while Miss Wendy Newson did not wish to take part in the programme she was content for it to be made and broadcast.

In reaching a conclusion, Ofcom took account of not only the broadcaster's right to freedom of expression and the complainant's lowered expectation of privacy for the reasons set out above, but also of the specific circumstances of the complaint (in particular the broadcaster wished and took steps to obtain the Miss Newson's consent through the police, the police did not in fact obtain that consent, and the broadcaster was made aware that the complainant had recently suffered a breakdown that had necessitated her going to hospital). Intrusions of privacy related to programmes about the work of the police can sometimes be justified on the grounds that there is a public interest in broadcasters and programme makers producing and broadcasting programmes that show the work of the police and other organisations involved with law enforcement. However, we noted that in this case the broadcaster did not put forward any argument that the intrusion into Miss Wendy Newson's privacy by the broadcast of the programme without her consent was warranted.

Ofcom's therefore found that on the facts of this particular case that Miss Wendy Newson's privacy was unwarrantably infringed under Practice 8.6.

Practice 8.19

Practice 8.19 is different from practices in other parts of Section Eight, and from Practice 8.6 in particular, as it addresses the potential suffering and distress which might be caused to "victims and/or relatives when [broadcasters make or broadcast] programmes intended to examine past events that involve trauma to individuals (including crime)...".

For that reason, Practice 8.19 requires that "Broadcasters should try to reduce the potential distress to such victims and/or relatives ...unless it is warranted to do otherwise". The Practice then sets out the particular steps that are contemplated in this respect, and states that (emphases added by Ofcom):

"In particular, so far as is reasonably practicable, surviving victims and/or the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast, even if the events or material to be broadcast have been in the public domain in the past."

It is clear from the terms of the bullet point to Practice 8.19 that it does not (by contrast with Practice 8.6) guide or require broadcasters to obtain (prior) consent or permission from relevant surviving victims and/or immediate relatives to broadcast material in certain circumstances. It simply contemplates broadcasters seeking to reduce potential distress to victims and/or relatives by, "*so far as is reasonably practicable*", informing them of the "*plans for the programme and its intended broadcast*". The bullet point is expressed to apply "*even if the events or material to be broadcast have been in the public domain in the past*", which was the case in the circumstances of this complaint.

Given the subject matter of the programme (i.e. the story of Miss Kim Newson's disappearance and the murder investigation which followed) and the detail included (notably the descriptions of the murder and the reconstructions of the investigation), Ofcom considers that the programme clearly had potential to cause severe distress to Miss Wendy Newson. Ofcom also notes that A&E has made it clear that it understood the potential for the making and broadcast of this programme to cause the complainant distress.

Ofcom again recognised that the programme makers took steps to ensure that Miss Wendy Newson was informed of the plan to make and broadcast this programme and that on the assurances of Lincolnshire Police, the programme makers believed that Miss Wendy Newson had not only been informed about the plan to make and broadcast the programme, but had consented to its being made and been given a chance to view it prior to broadcast.

However, Ofcom also observed that, as A&E acknowledged in its response, none of this occurred and therefore Miss Wendy Newson was not made aware of the programme until its broadcast on 4 October 2011.

In light of this and in light of the very specific circumstances of this case (in particular, the nature of the programme; the close relationship of the complainant to the victim of the murder featured in the programme; the fact that the programme makers were aware that Miss Wendy Newson had a breakdown that had necessitated her being hospitalised at the time the programme was being made; and that – as has become clear - the assurances given to the programme makers by the police were drawn from the complainant's ex-husband rather than the complainant herself) Ofcom did not consider that the steps taken by the programme makers were sufficient to ensure that Miss Wendy Newson had been informed of the plans for the programme and its intended broadcast.

Given these factors, and again in the absence of any argument from the broadcaster that not contacting Mrs Newson in order to inform her of its intention to broadcast this programme, was warranted. Ofcom's found that in the circumstances of this particular case Miss Wendy Newson's privacy was unwarrantably infringed under Practice 8.19.

- c) Ofcom next considered the complaint that Miss Wendy Newson's privacy was unwarrantably infringed in the programme as broadcast in that a photograph of her, which had previously appeared in a newspaper, was included in the programme.

In considering this head of complaint, Ofcom again had regard to Practice 8.6 of the Code.

In order to establish whether or not Miss Wendy Newson's privacy was unwarrantably infringed specifically as a result of the inclusion of the photograph of her in the programme Ofcom first assessed the extent to which she had a legitimate expectation of privacy in this respect.

Ofcom observed that the image in question was a close-up photograph of Miss Wendy Newson's face from which she was clearly identifiable. The script of the programme made clear to viewers that the woman in this photograph was Miss Wendy Newson, the mother of Miss Kim Newson who had been murdered.

Ofcom noted that the photograph of Miss Wendy Newson was originally published in *The Lincolnshire Echo* on 26 March 2003 and again appeared within an article that was printed in the 20 May 2010 edition of the same newspaper. The article was based on an interview with Miss Wendy Newson in which she discussed in detail her reaction to the murder of her daughter and the various serious health problems she faced following the murder.

Ofcom considered that, as a result of its publication in *The Lincolnshire Echo* on at least two occasions (the latter in 2010), the photograph of Miss Wendy Newson was in the public domain at the time of the broadcast of this programme. In addition, Ofcom noted that (in contrast to the coverage of Mr Stephen Hughes trial and conviction - which took place in early 2003) the subsequent publication of this photograph took place a relatively short period (just over seventeen months) prior to the broadcast of the programme - about which this complaint was made.

Taking into account these factors and in particular that the photograph was published within an article which was closely linked to the story of Miss Kim Newson's murder, Ofcom considered that Miss Wendy Newson did not have a legitimate expectation of privacy in regard to the inclusion of this photograph in the programme as broadcast.

Therefore, Ofcom's found that Miss Wendy Newson's legitimate expectation of privacy was not unwarrantably infringed in the programme as broadcast in this respect.

Accordingly, Ofcom's decision is that Miss Newson's complaint of unfair treatment should not be upheld and that part of her complaint of unwarranted infringement of privacy in the programme as broadcast should be upheld.

Upheld in Part

Complaint by Mr David Richardson

The Sex Education Show, Stop Pimping Our Kids, Channel 4, 19 April 2011

Summary: Ofcom has upheld in part this complaint of unwarranted infringement of privacy in the obtaining of material included in the programme and in the programme as broadcast made by Mr David Richardson. In reaching its decision, Ofcom acknowledges Channel 4's acceptance that its decision not to remove or obscure Mr Richardson's image was wrong and its subsequent apology, and its attempt to resolve the issue with Mr Richardson.

The programme focused on the increasing sexualisation of children and highlighted the role that high street stores were playing by selling clothes that were deemed to be unsuitable for the intended age group. Mr Richardson was shown briefly in the programme as broadcast, in his capacity as a plain clothes store detective.

Following the broadcast of the programme, Mr Richardson complained to Ofcom that his privacy was unwarrantably infringed in the obtaining of material included in the programme and in the programme as broadcast.

In summary, Ofcom found as follows:

- Mr Richardson did not have a legitimate expectation of privacy in relation to the obtaining of material included in the programme, because he was filmed in a public place carrying out activities which could be viewed by any passer-by.
- Mr Richardson did have a legitimate expectation of privacy that the footage filmed would not be broadcast to a wider audience and this was not outweighed by the broadcaster's right to freedom of expression. His privacy was therefore unwarrantably infringed in the programme as broadcast.

Introduction

On 19 April 2011, Channel 4 broadcast an edition of *The Sex Education Show* presented by Anna Richardson. The series looked into concerns about the increased sexualisation of children and this episode focused on some high street stores selling products for children which *"turn them into mini adults and cut short their childhood"*.

The presenter stated that her aim was *"naming and shaming the stores that are making money out of selling products that contribute to sexualising our kids"*. One of the stores featured in the programme was the high street chain Primark, and the programme included footage of the presenter and members of the crew entering a Primark store to film. Mr David Richardson, a plain clothes store detective working for Primark at the time, was briefly shown unobscured in the footage and was heard saying: *"Excuse me, you can't come in here"*. Mr Richardson was briefly shown again whilst the presenter was in the store and as she was being escorted out of the store by a security guard.

Following the broadcast of the programme, Mr Richardson complained to Ofcom that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

Summary of the complaint and broadcaster's response

In summary, Mr Richardson complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that:

- a) The film crew started filming him in his workplace without his permission.

In summary and in response, Channel 4 said that at the time of filming the programme makers did not consider there to be any particular sensitivity in the circumstances of the filming which would subsequently require Mr Richardson's image to be obscured or removed from the programme. This was because most of the footage was filmed from the street and Mr Richardson's appearance was only incidental. In addition, the footage was reflective of what happened on the day and did not necessarily dwell on Mr Richardson.

Mr Richardson also complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- b) He had made it clear to the crew that he did not want his face shown on any programme. However his face was clearly visible in the broadcast version of the programme.

In summary and in response, Channel 4 said that during the editing process there was a discussion with the programme makers about whether Mr Richardson should appear in the programme and whether his image should be blurred. The programme makers had informed Channel 4 that Mr Richardson had shouted to the camera crew that if they showed his face, they would be hearing from his solicitor. Channel 4 said that at the time they genuinely considered that in the circumstances of the filming there was no particular sensitivity which would require the footage of Mr Richardson to be obscured or removed from the programme when broadcast. However, in hindsight, they considered that the decision not to remove or obscure his image was wrong and apologised for any distress and harm caused to Mr Richardson and offered an apology to Mr Richardson and to remove or obscure his image from any future broadcast or online version of the programme. However, Mr Richardson indicated, nevertheless, that he wished to pursue the complaint with Ofcom.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unjust or unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of Ofcom's Broadcasting Code ("the Code"), which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- a) Ofcom first considered the complaint that Mr Richardson's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, in that the film crew started filming him at his workplace without his consent.

In considering this part of the complaint Ofcom also had regard to Practice 8.5 of the Code, which states that "any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted."

In order to establish whether Mr Richardson's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme, Ofcom first assessed the extent to which he had a legitimate expectation of privacy in respect of the filming of him at his workplace.

Ofcom viewed the unedited footage and noted that the store's entrance was on a public street to which the general public had unrestricted access. As the presenter, Ms Anna Richardson, approached the entrance to the store, a security guard dressed in uniform was seen standing in front of Mr Richardson. The footage showed Mr Richardson, who was in plain clothes, telling Ms Anna Richardson that she could not come in to the store. A camera operator appeared to be filming just outside the store's entrance as Ms Richardson and her colleagues advanced further into the shop, with another camera operator following behind them. Mr Richardson was seen putting his hands near his face at times during the filming. As the presenter prepared to go further into the store, a colleague of Mr Richardson grabbed her and moved her towards the store's entrance. The presenter and her colleagues moved out of the store onto the street and Mr Richardson was heard saying "*if my face is on this you'll be hearing from my solicitor*". Ofcom observed that this section of filming lasted for no more than five minutes. The filming was focused on the presenter, rather than Mr Richardson who only appeared very briefly in the filming and was purely incidental to the main footage being filmed.

Taking account of the above, Ofcom considered that the footage which included Mr Richardson was obtained in circumstances in which he did not have a legitimate expectation of privacy. This is because the filming took place in a place open to the public, and there was nothing inherently private or otherwise sensitive about the circumstances in which Mr Richardson was filmed. As a result, Ofcom concluded that Mr Richardson did not have any legitimate expectation of privacy in connection with the obtaining of material included in the programme. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Mr Richardson's privacy was warranted.

- b) Ofcom next considered the complaint that Mr Richardson's privacy was unwarrantably infringed in the programme as broadcast because he had made it clear to the film crew that he did not want his face shown on any programme. However his face was clearly visible in the broadcast.

Ofcom had regard to Practice 8.6 of the Code, which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In considering whether Mr Richardson's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he had a legitimate expectation of privacy that footage filmed of him would not appear in the programme as broadcast unobscured to a wider audience.

Ofcom noted that Mr Richardson appeared briefly (approximately five seconds) in the programme as broadcast. Mr Richardson was heard saying "*you can't come in here*" and was shown placing his hand over one of the cameras, while trying to usher the crew outside the store with the assistance of other uniformed members of the store's security team. Although the footage was brief and Mr Richardson was not the focus of the footage, his face was not obscured in any way and therefore Mr Richardson was, in Ofcom's view, identifiable from the footage.

Ofcom took into account the facts that: Mr Richardson's appearance in the footage was incidental; he was not the subject of the filming; and, his identity was not material to the issues which the programme was seeking to address. However, Ofcom also took into consideration the fact that Mr Richardson was working in his capacity as a plain clothes store detective, a position in which a certain degree of anonymity was necessary in order to carry out the role effectively. Moreover, he had indicated clearly to the programme makers that he did not want to be shown in the programme and therefore had not given his consent to appearing in the programme as broadcast. Consequently, Ofcom considered that, while the circumstances in which Mr Richardson was filmed did not attract a legitimate expectation of privacy (as set out in head a) of the Decision above), Mr Richardson did have a legitimate expectation of privacy in relation to being shown in the programme as broadcast.

Having found that Mr Richardson had a legitimate expectation of privacy in relation to the broadcast of the unobscured footage of Mr Richardson, Ofcom went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to broadcast matters of genuine public interest without undue interference.

Ofcom acknowledged that the programme highlighted what it considered to be the increasing sexualisation of young children and that stores such as Primark were contributing to this by selling certain items of clothing. Therefore, Ofcom considered that there was a genuine public interest in being able to highlight this by entering the shop. However, Ofcom noted that the programme makers were aware that Mr Richardson did not wish to be shown in the programme and that his appearance in the course of carrying out his duties as a plain clothes store detective, was incidental and therefore not material to the issues addressed in the programme. Therefore in the particular circumstances of this case, the broadcaster's right to freedom of expression did not outweigh Mr Richardson's right to privacy in the circumstances.

In conclusion, whilst Ofcom acknowledged the general subject matter of the programme was in the public interest, there was no specific public interest justification for the intrusion into Mr Richardson's privacy. Ofcom therefore found that Mr Richardson's privacy was unwarrantably infringed in the programme as broadcast.

Accordingly, Ofcom has upheld in part Mr Richardson's complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme and in the programme as broadcast.

Not Upheld

Complaint by Mr Michael McCann MP

The Investigation: Donations, Dinners and Deals, BBC Radio Scotland, 27 February 2011

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment made by Mr Michael McCann MP.

This programme reported on Scotland's local authority planning processes and the concerns that it was not as open and accountable as it could be. Part of the programme, which was approximately 28 minutes in duration, included allegations about the Labour Party MP, Mr Michael McCann. The allegations were that Mr McCann improperly failed to declare his relationship with a property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on South Lanarkshire Council's Planning Committee. The report included a number of factors that it alleged demonstrated that a relationship existed between the two men.

Mr McCann complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast.

Ofcom found that the broadcaster had taken reasonable care to satisfy itself that the material facts were not presented, omitted or disregarded in a way that portrayed Mr McCann unfairly in the programme as broadcast.

Introduction

On 27 February 2011 at 10:30 hours, BBC Radio Scotland broadcast an edition of its investigative current affairs programme, *The Investigation*. This edition, entitled *Donations, Dinners and Deals*, reported on Scotland's local authority planning processes and concerns that it was not as open and accountable as it could be. Part of the report looked at an allegation that Mr Michael McCann MP¹ had failed to declare his relationship with a local property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on the Planning Committee of South Lanarkshire Council ("the Council"). The programme was approximately 28 minutes in duration.

The programme reported that the BBC had become aware of problems in the planning processes of the Council which involved a property developer (i.e. Mr Kean) and some of his "*friends*". In the programme, the reporter questioned how close a councillor sitting on a planning committee had to be to someone submitting a planning application before declaring an interest. The programme considered the provisions of the Code of Conduct for Councillors² ("the Code of Conduct") which, the programme noted, "*says that councillors must declare any interest which could potentially affect their discussions and decision making*". The programme then included the following quote from the Code of Conduct:

¹ Mr McCann is the Labour Party Member of Parliament for the constituency of East Kilbride, Strathaven and Lesmahagow.

² The Code of Conduct for Councillors, produced by the Standards Commission for Scotland, sets out the standards of behaviour expected of councillors in Scotland.

“the test is whether a member of the public, acting reasonably, would think that a particular interest could influence your role as a councillor”.

An interview with Professor Richard Kerley³ of Queen Margaret University Edinburgh was included in the programme. Professor Kerley explained that if a councillor on a committee had a financial interest in a particular planning application or had a friend who was an applicant, it would be wise for that councillor to declare that interest and either leave the committee room, or physically push themselves away from the table and make it clear that they would take no part in the discussion and to have this recorded in the minutes. Professor Kerley also said that what mattered was how a particular relationship would be perceived by the public.

The programme went on to state that Mr McCann, when a councillor, had sat on the Council's Planning Committee when it had approved dozens of Mr Kean's planning proposals without declaring an interest. The reporter said that Mr McCann and Mr Kean were *“associates and have been for several years”* and described a photograph of Mr McCann with Mr Kean *“at a party”* during the 2005 General Election.

An extract of a recording of Mr McCann's 2010 General Election acceptance speech was also included in the report in which he was heard saying *“I know the difference between right and wrong and I know the difference between acceptable and unacceptable behaviour”*. This was immediately followed by the reporter stating that Mr McCann had held his election victory party at the 'Legends Bar' which was situated in *“a building owned by Mr Kean, although he's not the licensee [of the 'Legends' Bar]”*. The programme also stated that four months before the 2010 General Election, the Labour Party had held a fundraising event at the bar at the cost of more than £4,000. The reporter went on to say that the BBC had learned that Mr McCann's daughter also kept her horse on Mr Kean's farm which was less than a mile away from Mr McCann's constituency home. The reporter said that the programme makers had asked Mr McCann what the financial arrangement was for stabling the horse on Mr Kean's farm, as it was not *“mentioned in his register of members' interests”*, but that Mr McCann had declined to answer.

The reporter then stated that Mr Eddie McAvoy, the Leader of the Council, had confirmed to the BBC that Mr McCann and Mr Kean *“did indeed go back a long time”*, but that it was a matter for an individual councillor to decide if any relationship should be declared or not. The programme went on to state that over the past three years, Mr Kean and his brother had donated more than £5,000 to the Labour Party.

The programme said that in 2005, Mr McCann, as a councillor, had *“strenuously”* supported an application for a pharmacy to be allowed to open in one of Mr Kean's vacant properties. At the time, there had been a rival application for a pharmacy a few streets away which Mr McCann claimed would cause traffic problems. The programme included a contribution from Councillor Graham Simpson, a fellow councillor at the time, who claimed that Mr McCann had pressured him to support Mr Kean's application. Councillor Simpson said that Mr McCann had left *“a wholly inappropriate”* telephone message for him and a recording of it was played in the programme, though owing to bad sound quality, a voiceover read out the detail:

“Graham, this is Michael McCann. I never saw you at council last night. You could have still contacted me to tell me what your views are. So I presume they're

³ Professor Kerley is Professor of Management at Queen Margaret University with a special interest in public service management.

exactly as they were before, i.e. totally and utterly confused. You had your chance Graham [Simpson]. Bye”.

The reporter said that the pharmacy application Mr McCann supported would have meant a financial benefit to Mr Kean if it had been successful. The reporter stated in the programme that, as the Conservative candidate standing against Mr McCann in the 2010 General Election, Councillor Simpson had asked questions about Mr McCann’s relationship with Mr Kean. Councillor Simpson said in the programme that his questions remained unanswered.

The reporter went on to state that Mr McCann’s interest in developments involving Mr Kean continued after he stopped being a councillor and became an MP. The reporter said that in September 2010, Mr McCann had *“vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds”*. The programme explained that Mr Kean owns part of a piece of land that he wanted to sell to Tesco for the development of a supermarket, but that the planning application was up against a rival planning application from Scottish Enterprise which wanted to sell nearby land to ASDA. The programme stated that Scottish Enterprise was taking legal action against the Council over claims that the application relating to Mr Kean’s land had received preferential treatment. The reporter described a letter, which he said the BBC had obtained under the Freedom of Information Act, from Mr McCann to Scottish Enterprise. The reporter said that Mr McCann’s letter displayed a *“forensic interest in the deal and contains no fewer than 33 questions, one of which Scottish Enterprise refused to fully answer because it was commercially sensitive”*. The reporter went on to say that Mr McCann now faced questions himself *“as to why he got himself involved in a planning application which could have been in Mr Kean’s interest to fail”*.

The programme then included further comments from Professor Kerley who said that the manner of the letter and the way it was written:

“indicated some breakdown between an organisation [Scottish Enterprise] and an elected representative [Mr McCann], in this case a Westminster MP, who should actually be working together, and it’s hard to see how they can work together when they have that kind of letter being fired in”.

Part of a recorded interview with Mr Alex Neil, a Scottish Nationalist Party (“SNP”) Member of the Scottish Parliament (“MSP”) was also included in the programme. Mr Neil said that there was enough information made available to him by the BBC to indicate that *“there is a strong case for a criminal investigation to establish whether anything untoward has actually happened”*. Mr Neil’s comments were followed by an extract of a statement given to the programme makers by Mr McCann in which he rejected *“any allegation of impropriety whatsoever”* and that the programme maker’s claim that he had *“a relationship with Mr Kean is wildly exaggerated”*.

The programme then moved on to examine whether there was a wider problem with the planning processes in Scotland.

Towards the end of the programme, the reporter said that Mr McCann refused to speak to his local newspaper, the ‘East Kilbride News’, which had published questions from his opponents about his relationship with Mr Kean. It also stated that Mr McCann, however, was a columnist for a rival local newspaper, the ‘East Kilbride Mail’, which rented its offices from Mr Kean. The reporter said that, out of 45 shareholders in the newspaper, Mr Kean was the *“ninth biggest”* shareholder. The

programme concluded by stating that the BBC would make its dossier available to any authority who wished to investigate the allegations.

Following the broadcast of the programme, Mr McCann complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast.

The Complaint

Mr McCann's case

In summary, Mr McCann complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme portrayed him unfairly as it implied impropriety on his part in the decision making process of the Council's Planning Committees. In particular, Mr McCann complained that:
 - i) In relation to the Code of Conduct, the programme stated that Mr McCann (when a councillor sitting on the Planning Committee) should have declared an interest due to his "relationship" with Mr Kean. Mr McCann said that important information from the Code of Conduct relating to the declaration of interests was omitted from the programme and was therefore not given to listeners. Also, Mr McCann said that Professor Kerley was asked by the reporter whether an interest should be declared even if a councillor "*never talk[s] to the person [about the planning application]*", to which Professor Kerley replied "*absolutely*". Mr McCann said that Professor Kerley's "expert" view was false.
 - ii) The programme failed to investigate and report on a complaint made by Mr David Watson, an SNP councillor, to the Parliamentary Commissioner for Standards in 2008 about Mr McCann in which Mr Watson alleged that Mr McCann had failed to declare an interest on a planning application concerning an individual on the basis that the individual had made a donation to the East Kilbride, Strathaven and Lesmahagow constituency Labour Party ("the 2008 complaint"). Mr McCann said that the 2008 complaint was rejected because the individual concerned had been a longstanding donor to the Labour Party and that there was no connection between the donation to the Labour Party and the planning application. By not including a reference to the 2008 complaint in the programme, despite it being on the public record, Mr McCann said that the omission led to the programme being unfair.
 - iii) The programme referred to a photograph of Mr McCann and Mr Kean in a manner that attempted to convince listeners that an improper relationship was taking place.

Mr McCann said he and Mr Kean were members of the Labour Party and that the photograph had been taken on the evening when Mr Adam Ingram had been re-elected as Member of Parliament for the East Kilbride constituency. Mr McCann said that he had been the constituency secretary at the time and that many photographs had been taken of Labour Party members and supporters during that evening. Mr McCann said that it was unreasonable to allege, as the programme did, that the mere existence of such a photograph was confirmation of an improper relationship between those individuals in the photograph. Mr McCann said that to refer to the photograph in that way was deliberately misleading and unfair.

- iv) The programme made a reference to the fact that Mr McCann had held his 2010 General Election victory party in a public bar called the 'Legends Bar', which was situated in a building owned by Mr Kean. Mr McCann said that he had paid for the victory party himself as an individual and that he could not see the relevance of this to the suggestion of impropriety. Mr McCann said that including this information in the report was another example of unfair and misleading reporting.
- v) The programme stated that Mr Kean and his brother had donated over £5,000 to the Labour Party over the past few years. Mr McCann said that every donation made by Mr Kean, any member of his family or indeed any other individual who chooses to make a donation to the Labour Party has been properly recorded and registered with the appropriate bodies. Mr McCann said that the mention of this in the programme was in order to suggest that there was something improper going on.
- vi) The programme questioned Mr McCann's decision to write to Scottish Enterprise in September 2010 and suggested that he had interfered with a planning application which was factually incorrect.

Mr McCann said that "Scottish Enterprise was not a planning authority" and that the questions he had asked were "entirely legitimate in his capacity as a Member of Parliament". In his response to the BBC about the allegations to be raised in the programme, Mr McCann explained that, owing to a dispute in the Court of Session in Scotland involving some of the issues he had raised in his letter to Scottish Enterprise, it was inappropriate for him to comment. However, Mr McCann said that the BBC disregarded this information and proceeded to broadcast the programme which suggested that there had been some impropriety in his decision to write to Scottish Enterprise. Mr McCann said that he had written to Scottish Enterprise on the basis of information received from his constituency surgeries and that he was not in a position to divulge further details until the conclusion of the matter being considered by the Court of Session. However, Mr McCann said that the programme made the suggestion that in performing his duties as a parliamentarian he had, in some way, acted improperly.

- vii) The programme also alleged that there was something sinister in his business with Scottish Enterprise to the extent that the reporter stated in the programme that he had managed to obtain a copy of the Mr McCann's letter through a Freedom of Information Act request ("FOI request"). Mr McCann said that this statement was made in an attempt to suggest that the FOI request was necessary in order for the programme makers to unearth a vital piece of information. Mr McCann said that this was nonsense and misleading as the reporter could have obtained the information from Mr McCann himself, if he had requested it directly.
- viii) The programme included a quote from Mr Neil MSP, who claimed that the BBC had made available enough information to merit a criminal investigation and then qualified his statement by stating that he had no evidence to support that claim. Mr McCann said that again it was unfair and unacceptable for the programme to broadcast an allegation of criminal activity without having a "scintilla of evidence" to support the claims.

- ix) The programme included allegations made by Councillor Simpson, a Conservative councillor for the Council and Mr McCann's opponent in the 2010 General Election, that he had asked questions about Mr McCann's relationship with Mr Kean and that he had never received any answers. Mr McCann said that this was a false statement.

Mr McCann said that during his time on the Planning Committee he had no conflict which prevented him from participating in any planning processes and therefore never had to declare an interest. He said that Councillor Simpson also alleged that, at the relevant time, the planning officers had been corrupted. However, Mr McCann said that Councillor Simpson was unable to provide any evidence to support his claims and so lacked credibility. Mr McCann said that all this evidence was in the public domain, but that the programme makers appeared to have overlooked the "obvious political game" and put together an unfair programme.

- x) The programme "charged" Mr McCann with backing an application for a pharmacy "solely" to benefit Mr Kean because he had empty shop units. Mr McCann said that this was false and laughable as, if the reporter had investigated the facts properly, he would have seen that Councillor Simpson had also backed the application. Mr McCann said that he had supported the application to benefit his constituents and had opposed another one because the area was already suffering from traffic congestion.
- xi) Councillor Simpson alleged in the programme that Mr McCann had "bullied and intimidated" him in a telephone message about the pharmacy. The programme said that Councillor Simpson had kept the message and it was read out in the programme. Mr McCann said that the message was edited and was read out as a voice over with the clear intention of creating a sinister effect. Mr McCann said that the claim made in the programme was ludicrous.
- xii) The programme referred to the fact that Mr McCann refused to deal with the 'East Kilbride News'. Mr McCann said that the reporter attempted to mislead listeners into believing that he only did business with another local newspaper, the 'East Kilbride Mail'. Mr McCann said that the reason he did not do business with that particular newspaper (i.e. the 'East Kilbride News') was clearly set out on his website which the BBC had accessed. Mr McCann said that given the reporter had viewed his website he must have, on the balance of probabilities, read the articles explaining his strained relationship with the newspaper. Mr McCann said that the reporter distorted the facts in the programme, which was unfair.

The BBC's case

In summary, the BBC responded to Mr McCann's complaint of unjust or unfair treatment as follows:

- a) In response to Mr McCann's complaint that he was portrayed unfairly in the programme unfairly in that it implied impropriety on his part in the decision making process of the Council's Planning Committees:
 - i) The BBC said that the Code of Conduct dealt with a number of matters including the declaration of interests by councillors which was itself dealt with at a number of points in the Code of Conduct. The BBC said that the

programme highlighted what the programme makers believed to be the most directly relevant part of the Code of Conduct which was summed up as:

“The Councillors’ Code of Conduct says that councillors must declare any interests which could potentially affect their discussions and decision making”.

The BBC said that it believed that the relevant provision of the Code of Conduct was fairly and accurately represented and that it did not believe that important information from the Code of Conduct was omitted thus giving rise to unfairness to Mr McCann.

The BBC said that Professor Kerley, whose expert view was disputed by Mr McCann, was an acknowledged and respected expert on local government. If Mr McCann believed Professor Kerley’s view to be false, the BBC said that it believed it incumbent upon Mr McCann to specify the respects in which he believed that to be the case and the expert authorities upon which he bases his view.

- ii) The BBC said that it did not believe that the 2008 complaint referred to by Mr McCann raised issues which bear directly upon the issues being raised in relation to Mr McCann. If Mr McCann believed that the 2008 complaint did raise issues which were relevant then the BBC said that he should explain why he believed that to be the case. In the absence of such an explanation, the BBC said that it found it difficult to comment further.
- iii) The BBC said that at the heart of the investigation reported by the programme was the fact that there was a relationship between Mr McCann and Mr Kean and that this had not been declared by Mr McCann, when he was involved in Council decisions in which Mr Kean had a direct interest. The BBC said that evidence as to this relationship, obtained by the programme makers, raised the question as to whether it represented an interest which should have been declared by Mr McCann. The BBC said that it did not believe that the reference to the photograph, accompanied by the commentary, carried any suggestion beyond that – that there was a relationship between the two men. It was not, as Mr McCann claimed, used as evidence of an improper relationship, merely evidence of a relationship giving rise to questions as to whether he should have declared it.
- iv) The BBC said that, again, the reference to this event served only to provide further support for the proposition that there was a relationship between the two men, not that there was anything improper in that relationship.
- v) The BBC said that this information was provided by the programme merely as further evidence of the existence of a relationship between Mr Kean and the local Labour Party, of which Mr McCann is a prominent member. The programme said nothing in this respect which suggested that there was anything improper “going on”.
- vi) The BBC said that the programme did not suggest that Mr McCann had “interfered with” the “planning application” in question which involved ASDA. The programme had said that Mr McCann had “intervened” in a “planning dispute”. The BBC said that the word “intervene” did not carry the suggestion of illegitimate or inappropriate involvement which might be carried by “interfere”. The BBC said that it was beyond dispute that there was a planning

“dispute” and it was beyond dispute that Mr McCann *“intervened”* in it. The BBC said that Mr McCann’s letter to Scottish Enterprise was itself sufficient evidence of that.

The BBC said that the court case to which Mr McCann referred was a civil dispute being contested in the Court of Session. As such, the case was not being heard before a jury and a response from Mr McCann would not have given rise to any risk of prejudice to the administration of justice. Furthermore, the BBC said that were there any risk of contempt of court, it would have attached to the BBC’s publication of privileged matters, rather than to Mr McCann had he conveyed them to the BBC in confidence with an explanation as to why he could not comment publicly. It said that there was no reason why Mr McCann could not have provided, at the very least, a private explanation to the programme makers. However, he chose not to.

- vii) The BBC said that the use of FOI requests by journalists was routine and did not carry any suggestion that information might not have been obtained by other routes. Furthermore, it said that such applications may be preferable inasmuch as they were designed to ensure that relevant documents were comprehensively acquired – even documents of which the applicant might not be aware.
- viii) The BBC said that the programme did not broadcast an allegation of criminal activity. The BBC said that Mr Neil had commented upon a set of circumstances where an elected representative, sitting on the Council’s Planning Committee, had voted many times in support of planning applications brought by a developer with whom, it turned out, he had enjoyed a longstanding association. That relationship was never declared in the course of those planning decisions being taken. The BBC said that whilst the programme did not allege that there was anything improper involved in the relationship between Mr McCann and Mr Kean, it was plain that the lack of transparency involved in declining to acknowledge the relationship in the course of those planning applications might give rise to a reasonable suspicion that the undeclared interest may have influenced Mr McCann in his role as councillor. The BBC said that transparency served, in part at least, to eliminate the suspicion of improper behaviour. Therefore, a lack of transparency may well give rise to such suspicion. In these circumstances, the BBC believed that the comments of Mr Neil, which he qualified, were entirely fair comment; that the lack of transparency created a situation where a suspicion of improper behaviour may have arisen and must be investigated.
- ix) The BBC said that it was not clear whether Mr McCann was saying in his complaint that it was false of Councillor Simpson to say that he had raised questions about Mr McCann’s relationship with Mr Kean or that it was false to claim that the questions had not been answered. The BBC said that there was clear evidence that Councillor Simpson had raised questions about Mr McCann’s relationship with Mr Kean and that the BBC had been assured by Councillor Simpson that he had not received an answer. The BBC said that it found it hard to believe that, having received answers to those questions, Councillor Simpson would then deny having done so and conceal them. However, if Mr McCann believed this to be the case, the BBC said that it invited him to provide Ofcom with the answers that he provided to Councillor Simpson in this regard.

- x) The BBC said that Councillor Simpson had backed both pharmacy applicants, not one in preference to another. The BBC said that Mr McCann, on the other hand, had strenuously supported a pharmacy proposal for one of Mr Kean's vacant properties and had vigorously opposed the rival application. The BBC said that it did not dispute that Mr McCann's reasons for backing one particular bid may have been valid but the lack of transparency involved in Mr McCann not declaring his relationship with Mr Kean meant that Mr McCann had created a situation which gave rise to reasonable questions as to the propriety of his behaviour.
- xi) The BBC said that Mr McCann stated that it was not credible to describe the telephone message as intimidatory or bullying. However, neither the programme nor Councillor Simpson actually did so. The BBC said that Councillor Simpson had described Mr McCann's behaviour prior to the telephone message as bullying. He described the phone message itself as *"aggressive"* and *"inappropriate"*. Even so, the BBC said that the programme did not endorse Councillor Simpson's view or allow it to stand unverified. The BBC said that listeners would have been able, to a significant degree, to assess the nature and tone of the message for themselves from the use of the recording in the programme. The BBC said that, ideally, the recorded message would have been used without a voiceover but that this was not practicable due to the poor audio quality. However, the BBC said that listeners would have been able to assess the actual words used and to gain a fair impression of the manner of the call from a voiceover which was carefully produced to reproduce, as far as possible, the tone and delivery of the original message. The BBC said that some 75 per cent of the original message was used in the programme and that it was carefully edited to give an accurate reflection of the whole message.
- xii) The BBC said that the programme did not say that Mr McCann "only" dealt with the 'East Kilbride Mail' newspaper. The BBC clarified that the programme said that Mr McCann refused to speak to the East Kilbride News and that he *"has a good relationship with the rival newspaper, the EK Mail ['East Kilbride Mail'], and writes a column for the free sheet"*. The programme also noted that Mr Kean was a shareholder in the 'East Kilbride Mail'. The BBC said that it could not agree that there was any suggestion of impropriety in the programme such as would constitute unfairness to Mr McCann. The BBC said that these were merely statements of fact which further established an association between Mr McCann and Mr Kean.

Mr McCann's comments

In summary, Mr McCann commented on the BBC's statement in relation to his complaint of unjust or unfair treatment as follows:

- a) In response to the BBC's statement in relation to Mr McCann's complaint that he was portrayed unfairly in the programme in that it implied impropriety:
 - i) Mr McCann said that the programme did not state that it was "summing" up the Code of Conduct but rather stated "that the codes says..." which was a factually incorrect statement.

Mr McCann said that the Code of Conduct was a detailed document, but that the BBC had given the impression that it contained one line. Mr McCann said that Professor Kerley's first comment in the programme followed an

inaccurate quote from the Code of Conduct by the programme's reporter. Mr McCann said that Professor Kerley was not quoting the Code of Conduct or offering an opinion on it, he was giving his view on what was "wise" in the circumstances. The programme inferred it was his interpretation of the Code of Conduct.

- ii) Mr McCann said that the 2008 complaint did bear directly on his case because the accusation was about a Labour donor and planning matters.
- iii) Mr McCann said that the Code of Conduct set rules on how councillors should behave in relation to planning matters and relationships and that having a photograph taken did not suggest a relationship. Mr McCann said that it was "just a photograph [and that] politicians had quite a lot of them taken". Mr McCann also noted that the dictionary states that an 'associate' is a person who joins with others in some activity or endeavour. Mr McCann questioned what activity or endeavour he was supposed to be joining with Mr Kean in.
- iv) Mr McCann said that the original questions from the programme makers suggested that Mr Kean had hosted his victory party and that this was further evidence of a relationship. Mr McCann said that he had paid the landlord of the public house for the victory party and he questioned how this was evidence of a relationship with Mr Kean.
- v) Mr McCann said that the inference that everyone he had spoken to after the programme was aired had drawn was "the Labour Party donation" equals "influence /impropriety". Mr McCann said that the Labour Party had received the donations, not him and questioned why he had been singled out amongst other Labour Party councillors.
- vi) Mr McCann said that he did not interfere with any planning dispute. Mr McCann said that he had asked Scottish Enterprise pertinent questions about a land deal, which he said had "damaged the economic development of [his] constituency" and had "damaged another company in East Kilbride". Mr McCann made the point that the BBC had stated that he did not "just intervene" but that he had "*vigorously intervened*". Mr McCann said that the questions he had asked Scottish Enterprise were clear and specific and reiterated that he had not intervened in a planning dispute. Mr McCann said that to have done so would have meant him engaging with a planning applicant or the planning authority: he did neither. Mr McCann also questioned why the BBC had not said anything to him about, or made reference in the programme to, the distinction between "a 'civil' case and a 'criminal' case".
- vii) Mr McCann questioned why the programme needed to mention the FOI request if not to create the impression that the letter had to be "jimmied out of someone". He said that if the explanation was so neutral why did the report not simply state, "we have a letter..."
- viii) Mr McCann said that Mr Neil was commenting on a set of circumstances that the BBC had manipulated into a story. As an SNP politician attacking a Labour Party politician, Mr McCann said that it was not a difficult role for him to fulfil.
- ix) Mr McCann said that Councillor Simpson was a political opponent and questioned whether the programme makers considered whether or not he

had a political motive for attacking him. Mr McCann said that Councillor Simpson had made the allegations prior to the programme and that those allegations had been “shot down” when he could not offer any evidence to support his claims.

- x) Mr McCann said that a pharmacy had been proposed in an area that was heavily congested with local traffic, served only a small part of his council ward and had a bad road safety record against a proposal for a pharmacy in a shopping area with car park facilities which served the whole community. He said that the pharmacy was sorely needed and that he had backed the latter proposal for obvious reasons. Moreover, Mr McCann said that decisions on pharmacy licenses were made by the NHS and not councillors. Mr McCann said that he had no role in the decision making process and had been transparent in his views.
- xi) Mr McCann said that the programme had not read out the full message that he had left on Councillor Simpson’s phone. He said it had been edited and a voiceover was placed over it to create a sinister tone. Mr McCann said that his message had been condescending because he had felt that Councillor Simpson’s position had been ridiculous and untenable.

Mr McCann said that in the programme the words *“you’ve had your chance”* were used to create a sinister effect when in fact they referred to a previous statement made by him, which was edited, which read “I will be putting a further document together today. I will be setting out that both you and Councillor Watson are going to back a pharmacy in Severn Road which is going to cause chaos in the area”. Mr McCann said that his words confirmed that Councillor Simpson had lost his chance to get “on board” with Mr McCann’s position. By deleting the full quotation and using the words *“you’ve had your chance”* Mr McCann said that it created an environment where the listener had to decide what that statement meant. Mr McCann said that some people he had spoken to after the programme had aired had felt that it sounded like a threat, but when Mr McCann gave them the full quote, they then understood the context in which it was given.

- xii) Mr McCann said that the programme “clearly and unambiguously inferred” that he did not deal with the ‘East Kilbride News’ without offering an explanation and then slotted in that he had a good relationship with the ‘East Kilbride Mail’, a newspaper which Mr Kean was a shareholder. Mr McCann said that there was no such entity as the ‘East Kilbride Mail’, the title being part of the Forth Independent Newspaper Group (“FIN Group”). Mr Kean therefore could not possibly have shares in the ‘East Kilbride Mail’ alone. Mr McCann said that the programme’s reporter had not asked him about his relationship with the ‘East Kilbride News’ in his email. correspondence.

The BBC’s final response

In summary, the BBC responded to Mr McCann’s comments as follows:

- a) In response to Mr McCann’s complaint of unjust or unfair treatment:
 - i) The BBC said that its initial statement in response to the complaint did not state that the programme summed up the Code of Conduct. It said that it highlighted the most directly relevant part of the Code of Conduct and summed that up. The BBC said that it still believed that to be the case and

that it did not accept that the programme gave the impression that the Code of Conduct consisted of a single line. In any case, the BBC said that this had no bearing on the issue complained of.

The BBC maintained that Professor Kerley had expertise in local government matters and was qualified to offer expert comments on the issues raised in this programme. The BBC said that it did not accept Mr McCann's view that Professor Kerley was not offering an opinion based on the Code of Conduct and said that it believed that the report accurately summarised the relevant part of the Code of Conduct.

- ii) The BBC maintained that it did not accept that the 2008 complaint raised issues which bear directly upon the matters raised in the programme in relation to Mr McCann merely because, as Mr McCann asserted, the two stories enjoyed certain common features. The BBC said that did not, in itself, make it relevant to the case at hand.
- iii) The BBC said that the reference to the photograph in the programme simply represented one piece of evidence of a relationship between Mr McCann and Mr Kean – a relationship, which, the BBC noted raised the question as to whether it should properly have been declared.
- iv) The BBC said that the questions posed by a journalist preparatory to the broadcast of the programme and to clarify the facts of the matter could not be taken to reflect what the programme actually said or intended to say. The BBC said that the programme itself did not claim that Mr Kean had hosted Mr McCann's victory party. The BBC said that the information contained in the programme relating to this particular matter went to establishing the association between Mr McCann and Mr Kean.
- v) The BBC said that the programme was not centrally concerned with the issue of donations to the Labour Party. Such donations were only relevant in so far as they provided further evidence of a relationship between Mr Kean and the local Labour Party in which Mr McCann is a prominent figure.
- vi) The BBC reiterated its initial statement in response to the complaint and said that it had nothing to add to its observations on Mr McCann's claims to have been legally inhibited from commenting on these matters at the time of the programme.
- vii) The BBC said it had nothing further to add on this point.
- viii) The BBC said that it did not accept that the story was manipulated to elicit a particular response from Mr Neil. It said that the facts were set out and Mr Neil was invited to comment on the issue of whether the relationship between Mr McCann and Mr Kean should properly have been declared. The BBC also noted that Mr McCann's participation in the decision affecting Mr Kean was a matter of public record and nothing hinged on the BBC specifying particular cases.
- ix) The BBC said that Councillor Simpson had given his assurance to it that he had not received answers to questions that he had raised about Mr McCann's relationship with Mr Kean.

- x) The BBC said that the lack of transparency involved was that of not declaring the existence of a relationship which, under the terms of the Code of Conduct, would have appeared to be declarable.
- xi) The BBC said that the words “*you’ve had your chance*” were used by Mr McCann and it believed that it was clear from the context created by the rest of the message used in the programme that it referred to Councillor Simpson having had his last chance to change his position. The BBC said that it had already explained in its first statement that the tone adopted for reading this message was modelled closely on the original. The BBC said that if Mr McCann believed that the words sounded sinister, then Mr McCann must bear the responsibility for that.
- xii) The BBC said that Mr McCann was correct in saying that Mr Kean did not have shares in the ‘East Kilbride News’ newspaper as such but in the FIN Group of which the paper is part. However, this did not alter the fact that Mr Kean had a financial interest in the ‘East Kilbride News’ which was an “entity” in its own right.

Decision

Ofcom’s statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, a transcript of it and written submissions from both parties.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster’s actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom’s Broadcasting Code (“the Code”). Ofcom had regard to this Rule when reaching its decisions on the head, and individual sub-heads, of complaint detailed below.

- a) Ofcom considered Mr McCann’s complaint that the programme portrayed him unfairly in that it implied impropriety on his part in the decision making process of the Council’s Planning Committee.

When considering this head of complaint, Ofcom had regard to whether the portrayal of Mr McCann was consistent with the broadcaster’s obligation to ensure that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr McCann (as outlined in Practice 7.9 of the Code).

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest. However, in presenting material that could be regarded as amounting to significant allegations, reasonable care must be taken not to do so in a manner

that does not cause unfairness to individuals or organisations. In this particular case, Ofcom considered that it was in the public interest for the programme to report on the allegations such as those covered in the programme but that this needed to be consistent with the requirements of the Code.

Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Mr McCann was portrayed unfairly in the programme as broadcast as regards this head of complaint.

- i) In relation to the complaint that important information from the Code of Conduct was omitted from the programme, Ofcom first noted the comments made in the programme by the reporter, a voice over quoting from the Code of Conduct and Professor Kerley about the declaration of interests by councillors under the Code of Conduct:

Reporter: *"...so as a councillor sitting on the Planning Committee, just how close do you need to be to someone submitting a planning application before you should declare an interest?"*

"The Councillors' Code of Conduct says that the councillors must declare any interest which could potentially affect their discussions and decision making. It says:"

Voice over: *"The test is whether a member of the public, acting reasonably, would think that a particular interest would influence your role as a councillor".*

Professor Kerley: *"You're a member of the committee that's deciding, you're ultimately a member of the Council that might decide something, you simply say, I have an interest in this because: it may be you have an investment, it may be it's just a friendship and it would be wise to say, I have an interest in this, I am a friend of the applicant for this, I will take no part in this discussion. You either leave the room or you literally kind of push yourself back from the Committee table and you have it recorded in the minutes".*

Reporter: *"Even if you never talk to that person about this development of planning, or council matters, should you still declare an interest?"*

Professor Kerley: *"Oh absolutely. I mean it's not the conversation that goes on between two of you or three of you in private, it's how it's perceived by the people of that, that council area, the people who elect you. I mean you can't prevent friendship but I think in terms of what the electorate would expect, what citizens would expect, that you just simply say, I can't be party to this decision because I have an interest in this".*

Reporter: *"So it's not just then about justice being done, it's about it being seen to be done?"*

Professor Kerley: *"Being seen to be done yes, yes, absolutely".*

Ofcom recognised that selecting and editing material for inclusion in a programme was an editorial decision for the programme makers and the broadcaster and that such editing and selection should be done in a fair manner. In Ofcom's view, it was made sufficiently clear to listeners at the outset of the report that the essence of the allegations raised concerned the relationships between "*a millionaire developer* [Mr Kean]" and "*senior politicians*" and, in particular, the allegation that Mr McCann did not declare his relationship with Mr Kean when he sat as a councillor on the Council's Planning Committee. In this context, Ofcom noted that the report included reference to the Code of Conduct and Professor Kerley's contribution as background to the allegations and to establish what obligations councillors were bound by and the circumstances when they should declare relevant interests.

Ofcom noted extracts from the Code of Conduct provided to it by Mr McCann in his complaint and the BBC in its statements in response to the complaint. Ofcom does not propose to reproduce those extracts in this Decision in full; however, it has also carefully read the relevant clauses of the Code of Conduct and has considered them against the statement made by the reporter in the programme and Professor Kerley's remarks.

The full text of the Code of Conduct ⁴ sets out in detail what conduct is expected from those in public office in Scotland and provides guidance to those having to make the decision whether or not a particular interest is something that has to be declared. Ofcom also took note of the 'Key Principles of the Code of Conduct' at the beginning of the Code of Conduct and took particular note of the heading 'Honesty' under which it is stated that:

"You must declare any private interests relating to your public duties and take steps to resolve any conflicts arising in a way that protects the public interest".

Ofcom noted that the wording stated by the programme's voice over paraphrased the 'objective test' with which all councillors must comply. The full text of the text is given in the Code of Conduct as:

"whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a councillor".

The webpage where the Code of Conduct can be accessed outlined the main components of the Code of Conduct. In particular, Ofcom noted the heading 'Declaring Interests' which states:

"The Codes of Conduct state which interests a councillor or member of a public body must declare and when they must withdraw from a meeting and not vote as a result of a potential conflict of interest. The fundamental position is that no one should use, or give the appearance of using, their public position to further their private interests".

Turning to the reporter's statement, Ofcom took the view that in the relatively short time available in the programme it would not have been possible, or necessary, for the programme makers to describe at length the full details

⁴ www.scotland.gov.uk/topics/government/local-government/ethical-standards/codes.

contained in the Code of Conduct relating to the declaration of interests. However, it considered that any reference to or summary of it in the programme must be presented fairly and in a way that would not mislead the audience. In the particular circumstances of this case, and having read the detail of the Code of Conduct itself and the accompanying material quoted above, Ofcom considered that the reporter's statement and the voice over statement of the 'objective test', albeit brief, fairly summarised the points in the Code of Conduct relating to the declaration of interests. Ofcom concluded that the summaries of the Code of Conduct presented in the programme made it sufficiently clear that the interests that must be declared were those that potentially could prejudice a councillor's ability to engage in discussion and decision making. Ofcom took the view that listeners would have understood that the interests referred to in the statement were those that would not be reasonably regarded by the public as so insignificant or remote that it would be unlikely to prejudice a councillor's discussions or decision making.

With regard to Professor Kerley's contribution, it is not Ofcom's role to establish whether the substance of Professor Kerley's contribution to the programme was correct or not, but to determine whether, in broadcasting his opinions, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Mr McCann. In doing so, Ofcom considered the context of Professor Kerley's opinion as expressed in the programme and whether the programme's presentation of his opinion resulted in unfairness.

Ofcom noted that Professor Kerley's comments followed immediately after the reporter's summarised statement regarding the Code of Conduct. Professor Kerley was introduced in the programme by the reporter as "*Professor Richard Kerley from Queen Margaret University*". Ofcom took the view that Professor Kerley was presented as an "expert" and that listeners would have understood that the purpose of his contribution to the programme was to express his expert opinion on the meaning of the Code of Conduct in relation to the declaration of interests and whether it would be appropriate for a councillor to declare an interest if he/she was friends with an applicant to a Council committee. Based upon Professor Kerley's professional expertise in the subject, which was signposted to listeners by the reporter's introduction of him, Ofcom considered that it was legitimate for the programme to include Professor Kerley's expert opinion.

In these circumstances, Ofcom went on to consider whether not the presentation of Professor Kerley's opinion in the programme resulted in any unfairness to Mr McCann. Ofcom again noted the manner in which Professor Kerley was introduced by the programme (see paragraph above) and was shown expressing his expert opinion on how the Code of Conduct should be interpreted. Ofcom also noted that Professor Kerley had used the phrase "*it would be wise*", in giving his view on what action a councillor should take if they decided to declare that they were friends with an applicant and further the emphasis on the importance of how a particular interest (or in this case, friendship) would be perceived by a member of the public when deciding whether or not to declare an interest. Ofcom considered that the language used by Professor Kerley in giving his opinion was couched in terms that would have left listeners in little doubt that his comments constituted his opinion only and were not directed specifically at the circumstances that the programme later alleged in relation to Mr McCann and Mr Kean.

In Ofcom's view, the programme's presentation of Professor Kerley and the nature and content of his comments would have made it clear to listeners that he was an expert giving an informed opinion on a given set of factors relating to the application of the Code of Conduct and the circumstances in which it would be "wise" for councillors, generally, to declare an interest.

Taking into account all the factors referred to above, Ofcom considered that manner in which the Code of Conduct was summarised by the reporter and the presentation of Professor Kerley's contribution in relation the interpretation of the Code of Conduct was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding to the Code of Conduct in a way that was unfair to Mr McCann.

- ii) Ofcom next considered Mr McCann's complaint that the programme's omission of the findings of the Parliamentary Commissioner for Standards who rejected the 2008 complaint led the programme to be unfair.

Again, Ofcom recognises that programme makers and broadcasters can legitimately select whether to include or not include information or material in a programme. Ultimately, this is an editorial decision for broadcasters to make prior to the broadcast of a programme. However, broadcasters must ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the omission of the outcome of the 2008 complaint resulted in unfairness in the programme as broadcast.

From the submissions provided by both Mr McCann and the BBC, Ofcom noted that the allegations made in the programme shared some common features with the 2008 complaint, which was rejected. Ofcom considered that the programme made it very clear to listeners from the outset that the report was the result of a BBC investigation into relationships between Mr Kean and "senior politicians" of whom, it alleged, Mr McCann was one. Ofcom also noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted. In particular, Ofcom noted that the report said that Mr McCann had told the programme makers that some of the allegations made in the programme had come from a political opponent and it quoted Mr McCann as saying that:

"BBC Scotland has made several unsubstantiated and false allegations. Others are linked to an ongoing court case. I'm therefore prevented from discussing these outrageous smears. During my time as an elected member of South Lanarkshire Council's planning committee, I never once voted against a recommendation made by officers, I complied at all times with rules rightfully imposed upon councillors and I therefore reject any allegation of impropriety whatsoever. Your claim that I have a relationship with Mr Kean is wildly exaggerated".

Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left listeners in no doubt that he rejected the allegations of impropriety.

Ofcom considered that Mr McCann's statement in which he rejected unequivocally the allegations made in the programme was included in the

programme and it was clear that the focus of the programme was on the findings of specific investigation carried out by the programme makers into events other than those which were considered by the Parliamentary Commissioner for Standards in relation to the 2008 complaint. Ofcom also noted the need for brevity when presenting a number of factors in the relative time constraints of the programme. On this basis Ofcom did not consider that it was incumbent for the programme makers to make reference to the 2008 complaint in the programme, despite the similarity with some of the allegations being made in the programme.

Ofcom considered that the omission of a reference to the 2008 complaint did not in itself lead to the report to being unfair to Mr McCann.

- iii) Ofcom considered the complaint that the programme referred to a photograph of Mr McCann in a manner to convince listeners of an improper relationship between him and Mr Kean.

Ofcom has already indicated in the preceding sub-heads of complaint above that it recognises that programme makers and broadcasters can legitimately select whether to include or not include information or material in a programme. However, such editorial discretion comes with an obligation on broadcasters to decision ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to the photograph in the programme was presented in a way that was unfair to Mr McCann.

Ofcom noted that the photograph referred to in the programme depicted Mr McCann standing next to Mr Adam Ingram (former MP for East Kilbride, Strathaven and Lesmahagow) and Mr Kean. The photograph had been taken on the night of the 2005 General Election when Mr Ingram had been re-elected as the MP for East Kilbride, Strathaven and Lesmahagow. Ofcom understood that Mr McCann had acted as Mr Ingram's election agent at the time and Mr Kean was a Labour Party member.

Ofcom noted the reporter's commentary that accompanied the reference to the photograph in the programme. The photograph was referred to immediately after the reporter's introduction of Mr McCann and that he had been a councillor who had sat on a planning committee that had approved "dozens" of Mr Kean's planning proposals. The programme stated that:

"Now the BBC can reveal they too [i.e. Mr McCann and Mr Kean] are associates and have been for several years. We've seen a picture of them together at a party during the 2005 Westminster election".

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to a photograph of Mr McCann with Mr Kean and Mr Ingram in 2005 when Mr McCann was a councillor. In this context, Ofcom considered that the reference to the photograph was used primarily as a device to demonstrate the programme's assertion that a relationship between Mr McCann and Mr Kean did exist and was such that it should have been

declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and to make reference to the photograph.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left listeners in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the manner in which the photograph was referred to in the programme was to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in establishing that there was a relationship between the two men and that it was such that Mr McCann may have been required to declare it when he was a councillor. Used in this context, Ofcom considered that listeners would have understood the purpose of the inclusion of the reference to the photograph and that it did not, in itself, amount to an allegation of impropriety.

- iv) Ofcom considered the complaint that the programme's reference to Mr McCann holding his election victory party in the 'Legends Bar' suggested impropriety which was unfair.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to Mr McCann holding his election victory party at the 'Legends Bar' in a building owned by Mr Kean was presented in a way that was unfair to him.

Ofcom noted the following commentary made by the programme's reporter that accompanied footage of the exterior of the 'Legends Bar':

"The BBC understands he held his late night victory party in Legends Bar in a building owned by Mr Kean, although he is not the licensee".

Ofcom noted that the programme made it clear that Mr Kean owned the building rather than he owned the business (i.e. the bar) that was situated within it.

Ofcom considered that the purpose of the programme was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The programme presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to Mr McCann's election victory party being held in a building that was owned by Mr Kean. In this context, Ofcom considered that the reference to the 'Legends Bar' was used primarily to demonstrate the programme's assertion that a relationship between Mr McCann and Mr Kean

existed and may have been such that Mr McCann may have been required to declare it when he was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and to make reference to the ownership of the building the bar was situated in. It was clear from the programme that Mr Kean was stated as not being the licensee of the bar, but rather the owner of the building.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left listeners in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the 'Legends Bar' was referred to in the programme in order to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that listeners would have understood that the reference to the party being held in a building owned by Mr Kean did not, in itself, amount to an allegation of impropriety.

- v) Ofcom considered the complaint that the reference to the donations to the Scottish Labour Party by Mr Kean and his brother suggested that there was "something improper going on".

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to the donations made by Mr Kean and his brother in was presented in a way that was unfair to Mr McCann.

Ofcom noted the following commentary made by the programme's reporter that related to donations made by Mr Kean and his brother to the Labour Party:

"Over that last three years Mr Kean and his brother have donated more than £5,000 to the Labour Party".

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to the fact that both Mr Kean and his brother had donated over £5,000 to the Labour Party. Ofcom noted the BBC's submission that the reference to the donations was used to show the existence of a relationship between Mr Kean and the local Labour Party, of which Mr McCann is a prominent figure.

In this context, Ofcom considered that the reference to Mr Kean's donations was used in the programme to support the programme's assertion that a relationship between Mr McCann and Mr Kean did exist (in this case a link through the local Labour Party), and the relationship was such that it should have been declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and the extent of the connection between Mr Kean and Mr McCann.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left listeners in no doubt that he refuted the allegations of impropriety.

Ofcom considered that the reference to the donations in the programme attempted to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that listeners would have understood that the reference to the donations did not, in itself, amount to an allegation of impropriety.

- vi) Ofcom considered the complaint that the programme questioned Mr McCann's decision to write to Scottish Enterprise and suggested he had interfered with the planning application.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the programme's references to Mr McCann's letter to Scottish Enterprise were presented in a way that was unfair to him.

Ofcom noted the following commentary made in the programme by the reporter about Mr McCann's letter to Scottish Enterprise:

"Mr McCann's interest in Mr Kean's developments didn't stop when he left his job as a councillor and became an MP. The BBC can reveal that last September, Mr McCann vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds".

"Mr Kean owns part of a piece of land on the outskirts of East Kilbride which he wants to sell to Tesco. [...] But that application is up against a rival one from ASDA, just a mile up the road. That land is owned by Scottish Enterprise, which is also seeking planning permission. The process is mired in dispute. Scottish Enterprise's developer is taking South Lanarkshire Council to court over claims the Kean related bid was given preferential treatment".

"Under freedom of information, the BBC has obtained a letter written by Mr McCann in his capacity as an MP to Scottish Enterprise about its supermarket plans. The letter displays a forensic interest in the deal and

contains no fewer than thirty three questions: One of which Scottish Enterprise refused to answer because it was commercially sensitive. Now the Labour MP faces questions himself about what he got involved in a planning application which could have been in Mr Kean's interest to fail".

Ofcom noted that although Mr McCann referred to the word "interfered" in his complaint, it was clear from watching the programme as broadcast and reading the transcript of it that the actual word used was "*intervened*".

Having carefully considered the submissions of both parties to the complaint, Ofcom noted that there was no dispute between the broadcaster and Mr McCann to the fact that he had written to Scottish Enterprise and had posed 33 questions to Scottish Enterprise. Ofcom noted that the programme makers had specifically asked Mr McCann in an email dated 21 February 2011, prior to the broadcast of the programme, to comment on what prompted him to make "such a vigorous intervention". Ofcom also recognised that on the date of broadcast, Mr McCann responded to the programme makers by stating that legal proceedings were currently active in relation to "the supermarket" and that, owing to this, he was prevented from commenting on it.

Ofcom appreciated that Mr McCann believed that he was unable because of legal proceedings to provide the programme makers at the time of broadcast with any detail about the reasons for his letter to Scottish Enterprise. Ofcom noted that the programme had made reference to Mr McCann's statement that owing "*to an ongoing court case, I am therefore prevented from discussing these outrageous smears*". However, whatever Mr McCann's motives for writing the letter, it was clear to Ofcom that he wrote to Scottish Enterprise about the supermarket planning application and had asked a significant number of questions relating to it. Ofcom noted from Mr McCann's submissions to it that he had written the letter to Scottish Enterprise about "a land deal" on the "basis of information" he had received from his constituents. Mr McCann stated that he had done so because the deal "damaged the economic development" of his constituency and had "damaged another company in East Kilbride".

Ofcom considered that while Mr McCann maintained that he did not intervene in a "*planning dispute*", it considered that the programme's use of the word "*intervened*" fairly represented the position known to the programme makers at the time that is that Mr McCann had written to Scottish Enterprise. Ofcom also considered that the use of the term "*planning dispute*", although not entirely accurate, sufficiently summed up the programme makers' understanding that Mr McCann had raised numerous questions about a planning application that could be reasonably considered to amount to a dispute about the land deal. Ofcom also considered that despite the emotive nature of the word "*vigorously*", the context in which it was used in the programme (namely, in connection with a letter containing 33 individual questions), was not unreasonable.

Taking the above factors into account, Ofcom considered that the broadcaster had taken reasonable steps when presenting this material fact not to do so in a way that was unfair to Mr McCann.

- vii) Ofcom considered the complaint that the programme was misleading because the reporter stated that he had managed to obtain a copy of Mr McCann's letter to Scottish Enterprise through a freedom of information

(“FOI”) request. Mr McCann said that the reporter could have obtained a copy of the letter directly from him if he had requested it.

Ofcom considers that in principle the manner in which material and information is obtained in the making of a programme is a matter for the programme makers and the broadcaster. It is an editorial decision and it would be undesirable, in Ofcom’s view, for programme makers and broadcasters to cede editorial control over the way that material is gathered in the making of a programme. However, the broadcaster must ensure that the manner in which this material is presented in the programme as broadcast is done so in a way that does not result in unfairness to an individual or organisation.

In the circumstances of this particular case, Ofcom considered whether or not the presentation of the letter being obtained “*Under Freedom of Information...*” (see the preceding sub-head vi) above for full quotation from the programme) resulted in unfairness to Mr McCann.

Ofcom noted Mr McCann’s submission that had the reporter could have requested the letter from him directly. It also noted the broadcaster’s response that it was a matter of routine for journalists to make FOI requests and that such a FOI application may be preferable to ensure that “relevant documents are comprehensively acquired”. Ofcom considered that it was entirely a matter for the programme makers how they decided to conduct their investigation into the allegations that were subsequently presented in the programme (provided they complied with the Code).

Ofcom also noted the reporter’s commentary in the programme relating to Mr McCann’s letter to Scottish Enterprise (as quoted in the preceding sub-head of complaint) and had particular regard to the following sentence: “*Under Freedom of Information, we’ve obtained this letter he wrote to Scottish Enterprise...*”.

Ofcom recognised that a reference in a news report or other factual programme to material being obtained by an FOI request had the potential to lead listeners into the belief that the material may not have been made available to the programme makers by any other means. However, in the circumstances of this case, Ofcom considered that the language used by the reporter in introducing the letter and describing the manner in which it was obtained, it would have been sufficiently clear to listeners that this was a statement of fact. Ofcom considered that the use of this terminology by the reporter was unlikely to have led listeners into thinking that the programme makers had had to resort to making an FOI request to obtain the letter, the implication being that it had not been made available to them by Mr McCann. Ofcom considered therefore that the broadcaster had taken reasonable steps when presenting this material fact not to do so in a way that was unfair to Mr McCann.

- viii) Ofcom considered the complaint that a quote from Mr Neil MSP alleging criminal activity was included in the programme without a “scintilla of evidence”.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure

that material facts are presented fairly. Therefore, Ofcom considered whether or not Mr Neil's comments were presented in a way that was unfair to Mr McCann.

Ofcom noted Mr Neil's contribution to the programme immediately followed the programme's allegations surrounding Mr McCann's alleged involvement in the planning application involving Scottish Enterprise:

Reporter: *"Senior SNP politician Alex Neil says this is now an area of huge concern".*

Mr Neil: [caption: Alex Neil MSP, SNP – Central Scotland].

"Very clearly there are legitimate questions to be asked and to be answered, and my view is there is enough information made available now, by the BBC, that there is a strong case for a criminal investigation to establish whether anything untoward has actually happened. I'm not saying there has or there hasn't, but I think to clear the air and to make sure that the system is above board in South Lanarkshire, there needs to be a criminal investigation to establish the facts".

Ofcom took the view that Mr Neil's political position and party allegiance was made explicitly clear from the reporter's introduction and the 'on-screen' caption that appeared at the beginning of Mr Neil's contribution. Ofcom considered that while Mr Neil was giving his opinion on the how he believed the allegations made in the programme should be taken forward (i.e. a *"criminal investigation"*), listeners would have understood that the comments were being made by a senior politician belonging to a rival political party to Mr McCann and that they would have been able to form their own judgement on the partiality, or otherwise, of his views.

In these circumstances, Ofcom went on to consider whether the inclusion of Mr Neil's contribution resulted in unfairness to Mr McCann. Once again, Ofcom noted the manner in which Mr Neil was introduced in the report (see preceding paragraph) and that he was expressing his own view. Ofcom noted that Mr Neil's had used the phrases *"...to establish whether anything untoward has actually happened"* and *"I'm not saying there has or there hasn't..."*. Ofcom considered that the language used by Mr Neil in his contribution was expressed in a way that would have left listeners in little doubt he was not stating definitively that there was any evidence of "criminal activity", but that he was making the point that in the interests of openness and transparency, a police investigation should take place to *"establish the facts"*.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme, including the comments made by Mr Neil, would have left listeners in no doubt that he refuted the allegations of impropriety.

Taking these factors above into account, Ofcom took the view that Mr Neil's comments had suggested that he believed that there was sufficient reasons

for a “*criminal investigation*” to “*clear the air*”. Ofcom considered that the report had presented Mr Neil’s comments as his own view and that it was made clear to listeners that Mr McCann “*rejected any allegation of impropriety*”. Ofcom considered therefore that the broadcaster had taken reasonable care when presenting Mr Neil’s comments not to do so in a way that was unfair to Mr McCann.

- ix) Ofcom considered the complaint that the programme included allegations made by Councillor Simpson that he had not received answers to questions he had put to Mr McCann.

In considering this sub-head of complaint, Ofcom’s role was not to establish conclusively from the programme as broadcast or the submissions provided by the parties, whether the programme gave a true and factual account about whether or not Mr McCann answered Councillor Simpson’s questions about his relationship with Mr Kean. Instead, its role was to address itself to the issue of whether the broadcaster took reasonable care to satisfy itself that material facts were not presented in a way that was unfair.

Ofcom noted the following exchange between the reporter and Councillor Simpson in the programme:

Reporter: *“Graham Simpson was a Conservative candidate in the last Westminster election and stood against Mr McCann. He asked questions about his opponent’s relationship with Mr Kean”.*

Councillor Simpson: *“I merely asked questions which have still not been answered. The questions were, what are your links to Mr Kean? And if there are such links, why haven’t you declared them?”*

Ofcom noted that Mr McCann said in his submissions that Councillor Simpson’s claim that he did not receive answers was false and that he said that he had made several public statements that he had never declared an interest in planning matters because he did not have an interest to declare. Ofcom also noted that the BBC said that it had been given an assurance by Councillor Simpson that he had not received an answer to his questions to Mr McCann about his relationship with Mr Kean.

In considering the context in which Councillor Simpson’s comments about unanswered questions were made, Ofcom noted that Councillor Simpson’s comments followed the section of the programme that reported on Mr McCann’s involvement in a planning application for a pharmacy and a telephone message that he had left Councillor Simpson in relation to that application (these issues are considered under sub-heads x) and xi) below). Ofcom noted that Councillor Simpson had been a councillor along with Mr McCann at the time of the pharmacy application and had stood as a rival Conservative candidate against Mr McCann in the 2010 General Election. In this context, Ofcom took the view that Councillor Simpson was providing the programme makers with his personal account of his involvement with Mr McCann. Ofcom considered that Councillor Simpson had the right to impart his personal recollection to the programme makers and that it was legitimate for the broadcaster to include his first hand testimony in the programme.

In these circumstances, Ofcom went on to consider whether the presentation of Councillor Simpson's comments resulted in unfairness to Mr McCann. Once again, Ofcom noted the manner in which Councillor Simpson's political history was introduced by the reporter (see extract from the programme above) and that Councillor Simpson was expressing his own personal account. Ofcom took the view that, the reporter's remarks made Councillor Simpson's political opposition to Mr McCann and his political allegiances explicitly clear to listeners. Ofcom also considered that while Councillor Simpson recounted his personal recollection about questions he considered to remain unanswered, listeners would have understood the context in which his comments were being made – that is by a rival politician belonging to a rival political party to Mr McCann and as someone who had opposed and lost to him in the 2010 General Election. In these circumstances, Ofcom took the view that listeners would have been able to make their own judgement on the partiality, or otherwise, of Councillor Simpson's comments.

Ofcom also noted that although Mr McCann said that he had made several public statements that he had never declared a public interest in planning matters because he did not have an interest to declare, he did not say that he had publicly explained his links with Mr Kean.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme, including the comments made by Councillor Simpson, would have left listeners in no doubt that he refuted the allegations of impropriety.

Taking into account all the factors referred to above, Ofcom considered that manner in which Councillor Simpson's personal recollection was presented in the programme was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding the alleged unanswered questions in a way that was unfair to Mr McCann.

- x) Ofcom considered the complaint that the programme had "charged" Mr McCann with backing an application for a pharmacy solely to benefit Mr Kean.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the programme presented the material facts relating to the pharmacy application in a way that was unfair to Mr McCann.

In considering this particular sub-head of complaint, Ofcom noted the comments made by the reporter in the programme that related to Mr McCann's involvement with the pharmacy application:

"In 2005, while still a councillor, Mr McCann strenuously supported a pharmacy proposal for one of Mr Kean's vacant properties. At the same time, there was a rival pharmacy application just a few streets away, which Mr McCann insisted was going to cause travel chaos. The two applications were to go before the NHS board".

Ofcom noted from Mr McCann's complaint that he had supported the pharmacy application for the benefit of his constituents and that he had opposed another application for a pharmacy because the area was already suffering from traffic congestion. It also noted that his reasons for supporting the application were not disputed by the BBC.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to Mr McCann's support for a proposal for a pharmacy that would be situated in a property owned by Mr Kean. In this context, Ofcom considered that the reference to Mr McCann's support for the proposal was used primarily to demonstrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed. Ofcom took the view that the programme did not distort or misrepresent the material facts in relation to Mr McCann's position regarding the pharmacy application and that it was legitimate for the programme to explore whether there was connection between Mr Kean and Mr McCann through its reference to the pharmacy application.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left listeners in no doubt that he refuted the allegations of impropriety.

Ofcom considered that the programme's inclusion of the reference to the pharmacy application, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Ofcom considered that listeners would have understood the purpose of the reference to the pharmacy application and that the nature of the reference to Mr McCann's involvement in the pharmacy application did not, in itself, amount to an allegation of impropriety or being "charged" in a way that was unfair to Mr McCann.

- xi) Ofcom next considered the complaint that Councillor Simpson alleged that Mr McCann had "bullied and intimidated him" in a telephone message about the pharmacy application and that the message had been edited and presented with the intention of creating a "sinister" effect.

Ofcom noted the following extract from the programme:

Reporter: *"One of the other local councillors, Graham Simpson, claims Mr McCann pressured him to agree to support the pharmacy application for Mr Kean's plot. Councillor Simpson told me what happened".*

Councillor Simpson: *"He gave me a deadline. I took the view I'm not going to be bullied by this man, so I didn't respond to him and he then left a message on my telephone".*

Reporter: *"Which you kept?"*

Councillor Simpson: *"I did keep it. I was astonished by the tone. I just felt it was wholly inappropriate and not the way that a councillor should be acting to another councillor".*

Reporter: *"We've provided a voice over of the message because of the quality of the recording".*

At this point in the programme, part of the actual recorded voice message was played, however its content was barely audible and so a voiceover was provided.

Voice over: *"Graham, this is Michael McCann, I never saw you at Council last night. You could still have contacted me to tell me what your views are, so I presume they're still exactly as they were before, i.e. totally and utterly confused. You had your chance Graham. Bye".*

Reporter: *"And what do you take from that?"*

Councillor Simpson: *"I thought the tone was aggressive, but as I say, it's just wholly inappropriate and you have to wonder why would somebody act in that manner over a pharmacy application".*

Reporter: *"Now the application which he was supporting would have ended up in a financial benefit for James Kean".*

Councillor Simpson: *"It ends up with James Kean getting a tenant".*

Reporter: *"In the end neither pharmacy was approved".*

Ofcom also took into account the full, unedited transcript of the telephone message left for Councillor Simpson by Mr McCann:

"Graham, this is Michael McCann, I never saw you last night at [the] Council. I assume you couldn't make it, but you could still have contacted me to tell me what your views are.

So therefore I take it they are just the same as they were before, i.e. completely and utterly confused and, therefore, I will be putting out a further document today. I will be setting out that both you and Councillor Watson are going to back a pharmacy in Severn Road which is going to cause chaos in the area.

You had your chance Graham. Bye".

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure

that material facts are presented fairly. Therefore, Ofcom considered whether or not the programme presented the material facts relating to the telephone message in a way that was unfair to Mr McCann.

Ofcom noted that the reporter explained to listeners before the message was played that a *“voice over of the message”* had been provided owing to the quality of the recording. The beginning of the actual message was played that demonstrated the low quality of the recording before the voiceover of the message was read out. Ofcom noted that towards the end of the voice over, the end of the actual recording was played in which Mr McCann could be heard to say *“You had your chance Graham. Bye”*.

Having listened to the message as presented in the programme and having read the transcript of the programme, and compared it with the unedited transcript of the full telephone message, Ofcom considered that the edited version included in the programme adequately reflected the content of the full message that Mr McCann had left. In Ofcom’s view, listeners would have understood that Mr McCann considered that Councillor Simpson’s views on the pharmacy application were *“totally and utterly confused”*. Ofcom also took the view that the voice over had not been read in a way that listeners were likely to consider to be *“sinister”*. In any event, as Mr McCann was heard to say *“You had your chance Graham”* from the actual recording of the telephone message, Ofcom considered that listeners would have been in a position to make a judgement as to the tone of his comments. In these circumstances, Ofcom considered that the telephone message had not been edited in a way that was unfair to Mr McCann.

Being satisfied that the content of the telephone message was not edited unfairly, Ofcom went on to consider whether its inclusion in the programme was presented fairly.

Ofcom began by considering the context in which the telephone message and Councillor Simpson’s comments about it were included in the programme. Ofcom noted that Councillor Simpson’s comments followed the section of the programme that reported on Mr McCann’s involvement in a planning application for a pharmacy (these issues are considered under sub-head x) above). Ofcom noted that Councillor Simpson had been a councillor along with Mr McCann at the time of the pharmacy application and that he believed that the tone of Mr McCann’s telephone message made during the application process had been *“aggressive”* and *“inappropriate”*. He had also stated that he had no intention of being *“bullied”* by Mr McCann. In this context, Ofcom took the view that Councillor Simpson was providing the programme makers with his personal account of his involvement with Mr McCann during the pharmacy application process and was giving his personal interpretation of Mr McCann’s behaviour and what he understood Mr McCann’s meaning to be behind the telephone message. Ofcom considered that Councillor Simpson had the right to impart his personal recollection and opinion to the programme makers and that it was legitimate for the broadcaster to include his first hand testimony in the programme.

Having considered that it was legitimate for the programme makers to include Councillor Simpson’s first hand testimony of Mr McCann’s alleged behaviour in the programme, Ofcom went on to consider whether the presentation of Councillor Simpson’s comments resulted in unfairness to Mr McCann.

Ofcom took the view that the reporter's remarks (see extract from programme quoted in sub-head ix) of the Decision above) made it explicitly clear to listeners that Councillor Simpson was a political rival to Mr McCann. Ofcom also noted that the reporter's use of the word "*claims*" at the beginning of this particular part of the programme would have left listeners in little doubt that what was to follow represented Councillor Simpson's personal account. Ofcom further considered that while Councillor Simpson recounted his personal account about Mr McCann's telephone message, listeners would have understood the context in which his comments were being made, that is, by a rival politician belonging to a rival political party to Mr McCann and as someone who had opposed and lost to him in the 2010 General Election. In these circumstances, Ofcom took the view that listeners would have been able to form their own judgement on the partiality, or otherwise, of Councillor Simpson's comments about the telephone message.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme, including the comments made by Councillor Simpson and the presentation of the voiceover, would have left listeners in no doubt that he refuted the allegations of impropriety.

Taking into account all the factors referred to above, Ofcom considered that manner in which Councillor Simpson's personal recollection was presented in the programme was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding the alleged unanswered questions in a way that was unfair to Mr McCann.

- xii) Ofcom considered the complaint that the reporter distorted the facts in relation to Mr McCann's dealings with the 'East Kilbride News' and 'East Kilbride Mail' newspapers in a way that was misleading to the viewer and unfair to Mr McCann.

Ofcom considers that the manner in which material and information is presented in a programme is a matter of editorial discretion for the programme makers and the broadcaster to make prior to broadcast. However, the broadcaster must ensure that the manner in which this material is presented in the programme as broadcast is done so in a way that does not result in unfairness to an individual or organisation.

In considering this particular sub-head of complaint, Ofcom noted the comments made by the reporter in the programme that related to Mr McCann and two local newspapers:

"In East Kilbride Mr McCann refuses to speak to his local newspaper, the EK News [East Kilbride News], which published questions from opponents about his relationship with Mr Kean. Mr McCann does however have a good relationship with the rival newspaper, the EK Mail [East Kilbride Mail], and writes a column for the free sheet. The EK Mail rents its office space from Mr Kean, who, out of 45 shareholders in the paper, is the ninth biggest".

Ofcom noted from Mr McCann's complaint that he had stated that the reason that he did not do business with the 'East Kilbride News' newspaper was set out on his website and that he described his relationship with this newspaper as being "strained". It also noted that it was not disputed by the parties to the complaint that Mr McCann regularly contributed to the 'East Kilbride Mail' newspaper.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to the two East Kilbride local newspapers, one of which rented office space from one of its shareholders, Mr Kean, and published a regular contribution by Mr McCann. In this context, Ofcom considered that the reference was used primarily to demonstrate the programme's assertion that a relationship between Mr McCann and Mr Kean did exist. Ofcom considered that the programme did not distort or misrepresent the material facts in relation to Mr McCann's position regarding the local newspapers and that it was legitimate for the programme to explore whether there was a connection between Mr Kean and Mr McCann through its reference to the 'East Kilbride Mail' newspaper.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left listeners in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the reference to the Mr McCann's relationship, or otherwise, to both the 'East Kilbride News' and the 'East Kilbride Mail' newspapers was included in the programme to demonstrate a connection between Mr McCann (who regularly contributed to the 'East Kilbride Mail') and Mr Kean (who not only owned the offices that the 'East Kilbride Mail' rented, but was also a shareholder in the newspaper). Ofcom considered that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Used in this context, Ofcom considered that listeners would have understood the purpose of its inclusion and that the reference to the newspapers did not, in itself, amount to an allegation of impropriety or was misleading in a way that was unfair to Mr McCann.

Having considered each of the sub-heads of Mr McCann's complaint that the programme portrayed him unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr McCann unfairly. Ofcom also considered that the broadcaster had presented a summary of Mr McCann's statement in response to the allegations (see sub-head ii) above) towards the end of the programme. Ofcom took the view that Mr McCann's unequivocal rejection of the

allegations of impropriety made clear his point of view about the allegations made in the programme and that his position was fairly summarised and presented in a manner that enabled listeners to reach their own conclusions on the issues raised in the programme.

Ofcom therefore found no unfairness to Mr McCann in this respect.

Accordingly, Ofcom has not upheld Mr McCann's complaint of unjust or unfair treatment in the programme as broadcast.

Not Upheld

Complaint by Mr Michael McCann MP on his own behalf and on behalf of his daughter

Newsnight Scotland, BBC2 Scotland, 23 February 2011

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy in the programme as broadcast by Mr Michael McCann MP on his own behalf and on behalf of his daughter.

This programme included a report of approximately seven minutes in duration that centred on allegations about the Labour Party MP, Mr Michael McCann. The allegations were that Mr McCann improperly failed to declare his relationship with a property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on South Lanarkshire Council's Planning Committee. The report included a number of factors that it alleged illustrated that a relationship existed between the two men. One of these factors was that Mr McCann's daughter stabled her horse on Mr Kean's farm. A photograph of Mr McCann's daughter sitting on a horse was shown briefly in the report (although her face was obscured).

Mr McCann complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his daughter's privacy was unwarrantably infringed in the programme as broadcast.

Ofcom found the following:

- The broadcaster had taken reasonable care to satisfy itself that the material facts were not presented unfairly, omitted or disregarded in a way that portrayed Mr McCann unfairly in the programme as broadcast.
- Although Mr McCann's daughter had an expectation of privacy, albeit limited, in relation to the inclusion of the photograph of her in the programme without appropriate consent, Ofcom concluded that the broadcaster's right to freedom of expression outweighed the intrusion into her privacy. Therefore, there was no unwarranted infringement of Mr McCann's daughter's privacy in the programme as broadcast.

Introduction

On 23 February 2011 at 22:30 hours, BBC2 Scotland broadcast an edition of its regional news and current affairs programme *Newsnight Scotland*. This edition included a report of approximately seven minutes duration that centred on allegations that Mr Michael McCann MP¹ had failed to declare his relationship with local a property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on the Planning Committee of South Lanarkshire Council ("the Council").

In the programme, the reporter questioned how close councillors sitting on planning committees had to be to someone submitting a planning application before declaring an interest. The programme looked at the provisions of the Code of Conduct for

¹ Mr McCann is the Labour Party Member of Parliament for the constituency of East Kilbride, Strathaven and Lesmahagow.

Councillors² (“the Code of Conduct”) which, the reporter noted, *“says that councillors must declare any interest which could potentially affect their discussions and decision making”*. The programme then included the following quote from the Code of Conduct:

“the test is whether a member of the public, acting reasonably, would think that a particular interest could influence your role as a councillor”.

Interview footage of Professor Richard Kerley³ of Queen Margaret University Edinburgh, was then included in the programme. Professor Kerley explained that if a councillor on a committee had a financial interest in a particular planning application or had a friend who was an applicant, it would be wise for that councillor to declare that interest and either leave the room, or physically push themselves away from the table and make it clear that they would take no part in the discussion and to have this recorded in the minutes.

The programme went on to state that Mr McCann, when a councillor, had sat on the Council’s Planning Committee when it had approved dozens of Mr Kean’s planning proposals without declaring an interest. The reporter said that Mr McCann and Mr Kean were *“associates and have been for several years”* and a photograph was shown of Mr McCann with Mr Kean in 2005 when Mr McCann was the election agent for Mr Adam Ingram, the former MP for East Kilbride, Strathaven and Lesmahagow.

An extract of footage of Mr McCann’s 2010 General Election acceptance speech was shown at this point of the programme in which he was shown saying *“I know the difference between right and wrong and I know the difference between acceptable and unacceptable behaviour”*. This was immediately followed by the reporter stating that Mr McCann had held his election victory party at the ‘Legends Bar’ which was situated in a building owned by Mr Kean. The reporter went on to say that the BBC had learned that Mr McCann’s daughter kept her horse on Mr Kean’s farm which was less than a mile away from Mr McCann’s constituency home. This was accompanied by video footage of Mr Kean’s farm and Mr McCann’s constituency home and a photograph of Mr McCann’s daughter sitting on her horse, though her face was obscured. The reporter also said that the programme makers had asked Mr McCann what the financial arrangement was for stabling the horse on Mr Kean’s farm as it was not *“mentioned in his register of members’ interests”*, but that Mr McCann had declined to answer.

The reporter then stated that Mr Eddie McAvo, the Leader of the Council, had confirmed to the BBC that Mr McCann and Mr Kean *“did indeed go back a long time”*, but that it was a matter for an individual councillor to decide if any relationship should be declared or not. The programme went on to state that over the past three years, Mr Kean and his brother had donated more than £5,000 to the Labour Party.

The reporter went on to state that Mr McCann’s interest in developments involving Mr Kean continued when he became an MP. The reporter said that in September 2010, Mr McCann had *“vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds”*. The programme explained that Mr Kean owned land that he wanted to sell to Tesco, but that his planning application was up

² The Code of Conduct for Councillors, provided by the Standards Commission for Scotland, which sets out the standards of behaviour expected of councillors in Scotland.

³ Professor Kerley is Professor of Management at Queen Margaret University with a special interest in public service management.

against a rival application from Scottish Enterprise who wanted to sell nearby land to ASDA. The programme showed a letter, which the reporter said had been obtained by the BBC under the Freedom of Information Act, from Mr McCann to Scottish Enterprise. The reporter said that Mr McCann's letter displayed a *"forensic interest in the deal and contains no fewer than 33 questions, one of which Scottish Enterprise refused to fully answer because it was commercially sensitive"*. The reporter went on to say that Mr McCann now faced questions *"as to why he got himself involved in a planning application which could have been in Mr Kean's interest to fail"*.

The programme then showed interview footage of Mr Alex Neil, a Scottish National Party ("SNP") Member of the Scottish Parliament ("MSP"), who said that there was enough information made available to him by the BBC to indicate that *"there is a strong case for a criminal investigation to establish whether anything untoward has actually happened"*. Mr Neil's comments were followed by an extract of a statement given to the programme by Mr McCann in which he rejected *"any allegation of impropriety whatsoever"* and that the programme maker's claim that he had *"a relationship with Mr Kean is wildly exaggerated"*.

The reporter concluded by stating that Mr McCann refused to speak to one local newspaper, the 'East Kilbride News', which published questions from his opponents about his relationship with Mr Kean. The reporter also stated that Mr McCann, however, was a columnist for a rival local newspaper, the 'East Kilbride Mail', which rented its office space from Mr Kean who, the reporter claimed, was one of the newspaper's significant shareholders.

Following the broadcast of the programme, Mr McCann complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his daughter's privacy was unwarrantably infringed in the programme as broadcast.

The Complaint

Mr McCann's case

Unjust or unfair treatment

In summary, Mr McCann complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme portrayed him unfairly as it implied impropriety on his part in the decision making process of the Council's Planning Committees. In particular, Mr McCann complained that:
 - i) In relation to the Code of Conduct, the programme stated that Mr McCann (when a councillor sitting on the Planning Committee) should have declared an interest due to his "relationship" with Mr Kean. Mr McCann said that important information from the Code of Conduct relating to the declaration of interests was omitted from the programme and was therefore not given to viewers. Mr McCann said that Professor Kerley's "expert" view was false.
 - ii) The programme failed to investigate and report on a complaint made by Mr David Watson, an SNP councillor, to the Parliamentary Commissioner for Standards in 2008 about Mr McCann in which Mr Watson alleged that Mr McCann had failed to declare an interest on a planning application concerning an individual on the basis that the individual had made a donation to the East Kilbride, Strathaven and Lesmahagow constituency Labour Party ("the 2008

complaint”). Mr McCann said that the 2008 complaint was rejected because the individual concerned had been a longstanding donor to the Labour Party and that there was no connection between the donation to the Labour Party and the planning application. By not including a reference to the 2008 complaint in the programme, despite it being on the public record, Mr McCann said that the omission led to the report being unfair.

- iii) The programme used a photograph of Mr McCann and Mr Kean in a manner that attempted to convince viewers that an improper relationship was taking place.

Mr McCann said he and Mr Kean were members of the Labour Party and that the photograph had been taken on the evening when Mr Ingram had been re-elected. Mr McCann said that he had been the constituency secretary at the time and that many photographs had been taken of Labour Party members and supporters during that evening. Mr McCann said that it was unreasonable to allege, as the programme did, that the mere existence of such a photograph was confirmation of an improper relationship between those individuals in the photograph. Mr McCann said that to use the photograph in that way was deliberately misleading and unfair.

- iv) The programme made a reference to the fact that Mr McCann had held his 2010 general election victory party in a public bar called the ‘Legends Bar’, which was situated in a building owned by Mr Kean. Mr McCann said that he had paid for the victory party himself as an individual and that he could not see the relevance of this to the suggestion of impropriety. Mr McCann said that including this information in the report was another example of unfair and misleading reporting.
- v) The programme stated that Mr Kean and his brother had donated over £5,000 to the Labour Party over the past few years. Mr McCann said that every donation made by Mr Kean, any member of his family or indeed any other individual who chooses to make a donation to the Labour Party has been properly recorded and registered with the appropriate bodies. Mr McCann said that the mention of this in the programme was in order to suggest that there was something improper going on.
- vi) The programme questioned Mr McCann’s decision to write to Scottish Enterprise in September 2010 and suggested that he had interfered with a planning application, which was factually incorrect.

Mr McCann said that “Scottish Enterprise was not a planning authority” and that the questions he had asked were “entirely legitimate in his capacity as a Member of Parliament”. In his response to the BBC about the allegations to be raised in the programme, Mr McCann explained that, owing to a dispute in the Court of Session in Scotland involving some of the issues he had raised in his letter to Scottish Enterprise, it was inappropriate for him to comment. However, Mr McCann said that the BBC disregarded this information and proceeded to broadcast the programme which suggested that there had been some impropriety in his decision to write to Scottish Enterprise. Mr McCann said that he had written to Scottish Enterprise on the basis of information received from his constituency surgeries and that he was not in a position to divulge further details until the conclusion of the matter being considered by the Court of Session. However, Mr McCann said that the programme made

the suggestion that in performing his duties as a parliamentarian he had, in some way, acted improperly.

- vii) The programme also alleged that there was something sinister in his business with Scottish Enterprise to the extent that the reporter stated in the programme that he had managed to obtain a copy of the Mr McCann's letter through a Freedom of Information Act request ("FOI request"). Mr McCann said that this statement was made in an attempt to suggest that the FOI request was necessary in order for the programme makers to unearth a vital piece of information. Mr McCann said that this was nonsense and misleading as the reporter could have obtained the information from Mr McCann himself, if he had requested it directly.
- viii) The programme included a quote from Mr Neil MSP, who claimed that the BBC had made available enough information to merit a criminal investigation and then qualified his statement by stating that he had no evidence to support that claim. Mr McCann said that again it was unfair and unacceptable for the programme to broadcast an allegation of criminal activity without having a "scintilla of evidence" to support the claims.
- ix) The programme referred to the fact that Mr McCann refused to deal with the 'East Kilbride News'. Mr McCann said that the reporter attempted to mislead viewers into believing that he only did business with another local newspaper, the 'East Kilbride Mail'. Mr McCann said that the reason he did not do business with that particular newspaper (i.e. the 'East Kilbride News') was clearly set out on his website which the BBC had accessed and used as a backdrop for his quotes. Mr McCann said that given the reporter had viewed his website and, on the balance of probabilities, must have read the articles explaining his strained relationship with the newspaper, the reporter distorted the facts in the programme, which was unfair.

Unwarranted infringement of privacy

In summary, Mr McCann complained on behalf of his daughter that her privacy was unwarrantably infringed in the broadcast of the programme in that:

- b) A photograph of her (taken when she was 14 years old) was shown in the programme without consent. Mr McCann's daughter was 15 years old at the time of the broadcast of the programme.

By way of background, Mr McCann said that the report focused on him as a politician. He said that his daughter was not a politician and so there was no need whatsoever to include her image in the programme. Mr McCann said that his daughter was made fun of at school and that her exam performance suffered as a result of the programme.

The BBC's case

Unjust or unfair treatment

In summary, the BBC responded to Mr McCann's complaint of unjust or unfair treatment as follows:

- a) In response to Mr McCann's complaint that he was portrayed unfairly in the programme unfairly in that it implied impropriety on his part in the decision making process of the Council's Planning Committees:
- i) The BBC said that the Code of Conduct dealt with a number of matters including the declaration of interests by councillors which was itself dealt with at a number of points in the Code of Conduct. The BBC said that the programme highlighted what the programme makers believed to be the most directly relevant part of the Code of Conduct which was summed up as:

"The Councillors' Code of Conduct says that councillors must declare any interests which could potentially affect the discussions and decision making".

The BBC said that it believed that the relevant provision of the Code of Conduct was fairly and accurately represented and that it did not believe that important information from it was omitted thus giving rise to unfairness to Mr McCann.

The BBC said that Professor Kerley was an acknowledged and respected expert on local government.

- ii) The BBC said that it did not believe that the 2008 complaint referred to by Mr McCann raised issues which bear directly upon the issues being raised in relation to Mr McCann. If Mr McCann believed that the 2008 complaint did raise issues which were relevant then the BBC said that he should explain why he believed that to be the case. In the absence of such an explanation, the BBC said that it found it difficult to comment further.
- iii) The BBC said that at the heart of the investigation reported by the programme was the fact that there was a relationship between Mr McCann and Mr Kean and that this had not been declared by Mr McCann, when he was involved in Council decisions in which Mr Kean had a direct interest. The BBC said that evidence as to this relationship, obtained by the programme makers, raised the question as to whether it represented an interest which should have been declared by Mr McCann. The BBC said that the use of the photograph complained of was simply visual evidence of the association between Mr McCann and Mr Kean. The BBC said that it did not believe that the use of the photograph, accompanied by the commentary, carried any suggestion beyond that – that there was a relationship between the two men. It was not, as Mr McCann claimed, used as evidence of an improper relationship, merely evidence of a relationship giving rise to questions as to whether he should have declared it.
- iv) The BBC said that, again, the reference to this event served only to provide further support for the proposition that there was a relationship between the two men, not that there was anything improper in that relationship.
- v) The BBC said that this information was provided by the programme merely as further evidence of the existence of a relationship between Mr Kean and the local Labour Party, of which Mr McCann is a prominent member. The programme said nothing in this respect which suggested that there was anything improper "going on".

- vi) The BBC said that the programme did not suggest that Mr McCann had “interfered with” the “planning application” in question which involved ASDA. The programme had said that Mr McCann had “*intervened*” in a “*planning dispute*”. The BBC said that the word “*intervene*” did not carry the suggestion of illegitimate or inappropriate involvement which might be carried by “interfere”. The BBC said that it was beyond dispute that there was a planning “*dispute*” and it was beyond dispute that Mr McCann “*intervened*” in it. The BBC said that Mr McCann’s letter to Scottish Enterprise was itself sufficient evidence of that.

The BBC said that the court case to which Mr McCann referred was a civil dispute being contested in the Court of Session. As such, the case was not being heard before a jury and a response from Mr McCann would not have given rise to any risk of prejudice to the administration of justice. Furthermore, the BBC said that were there any risk of contempt of court, it would have attached to the BBC’s publication of privileged matters, rather than to Mr McCann had he conveyed them to the BBC in confidence with an explanation as to why he could not comment publicly. It said that there was no reason why Mr McCann could not have provided, at the very least, a private explanation to the programme makers. However, he chose not to.

- vii) The BBC said that the use of FOI requests by journalists was routine and did not carry any suggestion that information might not have been obtained by other routes. Furthermore, it said that such applications may be preferable inasmuch as they were designed to ensure that relevant documents were comprehensively acquired – even documents of which the applicant might not be aware.
- viii) The BBC said that the programme did not broadcast an allegation of criminal activity. The BBC said that Mr Neil had commented upon a set of circumstances where an elected representative, sitting on the Council’s Planning Committee, had voted many times in support of planning applications brought by a developer with whom, it turned out, he had enjoyed a longstanding association. That relationship was never declared in the course of those planning decisions being taken. The BBC said that whilst the programme did not allege that there was anything improper involved in the relationship between Mr McCann and Mr Kean, it was plain that the lack of transparency involved in declining to acknowledge the relationship in the course of those planning applications might give rise to a reasonable suspicion that the undeclared interest may have influenced Mr McCann in his role as councillor. The BBC said that transparency served, in part at least, to eliminate the suspicion of improper behaviour. Therefore, a lack of transparency may well give rise to such suspicion. In these circumstances, the BBC said that it believed that the comments of Mr Neil, which he qualified, were entirely fair comment; that the lack of transparency created a situation where a suspicion of improper behaviour may have arisen and must be investigated.
- ix) The BBC said that the programme did not say that Mr McCann “only” dealt with the ‘East Kilbride Mail’ newspaper. The BBC clarified that the programme said that Mr McCann refused to speak to the ‘East Kilbride News’ and that he “*has a good relationship with the rival newspaper, the EK Mail [‘East Kilbride Mail’], and writes a column for the free sheet*”. The programme also noted that Mr Kean was a shareholder in the ‘East Kilbride Mail’. The BBC said that it could not agree that there was any suggestion of impropriety in the

programme such as would constitute unfairness to Mr McCann. The BBC said that these were merely statements of fact which further established an association between Mr McCann and Mr Kean.

Unwarranted infringement of privacy

In summary, the BBC responded to Mr McCann's complaint on behalf of his daughter that her privacy was unwarrantably infringed in the programme as broadcast as follows:

- b) The BBC said that the picture of Mr McCann's daughter had been placed in the public domain with Mr McCann's apparent consent when it appeared in the East Kilbride News. It was included within the programme as visual evidence that Mr McCann's daughter's horse was stabled on land owned by Mr Kean (along with a horse owned by Mr Kean). The BBC said that the fact that this arrangement was clearly in place did not appear on Mr McCann's Declaration of Interests as a gift or otherwise - the stabling of a horse would normally carry with it a financial burden of thousands of pounds each year.

However, the BBC said that Mr McCann's daughter's face was suitably blurred to protect her privacy so that showing the picture could have amounted to no more of a breach of privacy than identifying that the horse belonged to her. Insofar as this served evidential purposes in the programme, strongly corroborating the programme's belief that there existed a relationship between Mr McCann and Mr Kean which may have been declarable, the BBC said that it believed that any residual breach of his daughter's privacy which may have occurred in the broadcast of the programme was warranted by the public interest in publishing such evidence of association.

Mr McCann's comments

Unjust or unfair treatment

In summary, Mr McCann commented on the BBC's statement in relation to his complaint of unjust or unfair treatment as follows:

- a) In response to the BBC's statement in relation to Mr McCann's complaint that he was portrayed unfairly in the programme in that it implied impropriety:
 - i) Mr McCann said that the programme did not state that it was "summing" up the Code of Conduct but rather stated "*that the codes says*" which was a factually incorrect statement.

Mr McCann said that the Code of Conduct was a detailed document, but that the BBC had given the impression that it contained one line. Mr McCann said that Professor Kerley's comment in the programme followed an inaccurate quote from the Code of Conduct by the programme's reporter. Mr McCann said that Professor Kerley was not quoting the Code of Conduct or offering an opinion on it, he was giving his view on what was "wise" in the circumstances. The programme inferred it was his interpretation of the Code of Conduct.

- ii) Mr McCann said that the 2008 complaint did bear directly on his case because the accusation was about a Labour donor and planning matters.

- iii) Mr McCann said that the Code of Conduct set rules on how councillors should behave in relation to planning matters and relationships and that having a photograph taken did not suggest a relationship. Mr McCann said that it was “just a photograph” and that “politicians had quite a lot of them taken”. Mr McCann also noted that the dictionary states that an “associate” is a person who joins with others in some activity or endeavour. Mr McCann questioned what activity or endeavour he was supposed to be joining with Mr Kean in.
- iv) Mr McCann said that the original questions from the programme makers suggested that Mr Kean had hosted his victory party and that this was further evidence of a relationship. Mr McCann said that he had paid the landlord of the public house for the victory party and he questioned how this was evidence of a relationship with Mr Kean.
- v) Mr McCann said that the inference that everyone he had spoken to after the programme was broadcast had drawn was “the Labour Party donation” equals “influence /impropriety”. Mr McCann said that the Labour Party had received the donations, not him and questioned why he had been singled out amongst other Labour Party councillors.
- vi) Mr McCann said that he did not interfere with any planning dispute. Mr McCann said that he had asked Scottish Enterprise pertinent questions about a land deal, which he said had “damaged the economic development of [his] constituency” and had “damaged another company in East Kilbride”. Mr McCann made the point that the BBC had stated that he did not “just intervene” but that he had “*vigorously intervened*”. Mr McCann said that the questions he had asked Scottish Enterprise were clear and specific and reiterated that he had not intervened in a planning dispute. Mr McCann said that to have done so would have meant him engaging with a planning applicant or the planning authority: he did neither. Mr McCann also questioned why the BBC had not said anything to him about, or made reference in the programme to, the distinction between “a ‘civil’ case and a ‘criminal’ case”.
- vii) Mr McCann questioned why the programme needed to mention the FOI request if not to create the impression that the letter had to be “jimmied out of someone”. He said that if the explanation was so neutral, why did the report not simply state, “we have a letter...”.
- viii) Mr McCann said that Mr Neil was commenting on a set of circumstances that the BBC had manipulated into a story. As an SNP politician attacking a Labour Party politician, Mr McCann said that it was not a difficult role for him to fulfil.
- ix) Mr McCann said that the programme “clearly and unambiguously inferred” that he did not deal with the ‘East Kilbride News’ but offered no explanation. It stated that he had a good relationship with the ‘East Kilbride Mail’, a paper in which Mr Kean was a shareholder. Mr McCann said the programme’s reporter had not asked him about his relationship with the ‘East Kilbride News’ in his email correspondence with him.

Unwarranted infringement of privacy

In summary, Mr McCann commented as follows:

- b) Mr McCann said that the photograph of his daughter that appeared in the 'East Kilbride News' was taken when she had won a horse riding event, not because her father was the subject of a BBC story. He said that she was clearly identified in the photograph.

The BBC's final response

Unjust or unfair treatment

In summary, the BBC responded to Mr McCann's comments as follows:

- a) In response to Mr McCann's complaint of unjust or unfair treatment:

- i) The BBC said that its initial statement in response to the complaint did not state that the programme summed up the Code of Conduct. It said that it highlighted the most directly relevant part of the Code of Conduct and summed that up. The BBC said that it still believed that to be the case and that it did not accept that the programme gave the impression that the Code of Conduct consisted of a single line. In any case, the BBC said that this had no bearing on the issue complained of.

The BBC maintained that Professor Kerley had expertise in local government matters and was qualified to offer expert comment on the issues raised in this programme. The BBC said that it did not accept Mr McCann's view that Professor Kerley was not offering an opinion based on the Code of Conduct. The BBC said that it believed that the report accurately summarised the relevant part of the Code of Conduct.

- ii) The BBC maintained that it did not accept that the 2008 complaint raised issues which bear directly upon the matters raised in the programme in relation to Mr McCann merely because, as Mr McCann asserted, the two stories enjoyed certain common features. The BBC said that, did not, in itself, make it relevant to the case at hand.
- iii) The BBC said that the use of the photograph in the programme simply represented one piece of evidence of a relationship between Mr McCann and Mr Kean, a relationship, which the BBC noted raised the question as to whether it should properly have been declared.
- iv) The BBC said that the questions posed by a journalist preparatory to the broadcast of the programme and to clarify the facts of the matter could not be taken to reflect what the programme actually said or intended to say. The BBC said that the programme itself did not claim that Mr Kean had hosted Mr McCann's victory party. The BBC said that the information contained in the programme relating to this particular matter went to establishing the association between Mr McCann and Mr Kean.
- v) The BBC said that the programme was not centrally concerned with the issue of donations to the Labour Party. Such donations were only relevant in so far as they provided further evidence of a relationship between Mr Kean and the local Labour Party in which Mr McCann is a prominent figure.
- vi) The BBC reiterated its initial statement in response to the complaint and said that it had nothing to add to its observations on Mr McCann's claims to have

been legally inhibited from commenting on these matters at the time of the programme.

vii) The BBC said it had nothing further to add on this point.

viii) The BBC said that it did not accept that the story was manipulated to elicit a particular response from Mr Neil. It said that the facts were set out and Mr Neil was invited to comment on the issue of whether the relationship between Mr McCann and Mr Kean should properly have been declared.

ix) The BBC had nothing to add in relation to Mr McCann's relationship with the East Kilbride News.

Unwarranted infringement of privacy

The BBC said that it had nothing further to add in relation to the use of the photograph of Mr McCann's daughter in the programme.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, a transcript of it and written submissions from both parties.

Unjust or unfair treatment

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the head, and individual sub-heads, of complaint detailed below.

a) Ofcom first considered Mr McCann's complaint that the programme portrayed him unfairly in that it implied impropriety on his part in the decision making process of the Council's Planning Committee.

When considering this head of complaint, Ofcom had regard to whether the portrayal of Mr McCann was consistent with the broadcaster's obligation to ensure that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr McCann (as outlined in Practice 7.9 of the Code).

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest. However, in presenting material that could be regarded as amounting to

significant allegations, reasonable care must be taken not to do so in a manner that does not cause unfairness to individuals or organisations. In this particular case, Ofcom considered that it was in the public interest for the programme to report on the allegations such as those covered in the programme but that this needed to be consistent with the requirements of the Code.

Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Mr McCann was portrayed unfairly in the programme as broadcast as regards to this head of complaint.

- i) In relation to the complaint that important information from the Code of Conduct was omitted from the programme, Ofcom first noted the comments made in the programme by the reporter, a voice over quoting from the Code of Conduct and Professor Kerley about the declaration of interests by councillors under the Code of Conduct:

Reporter: *"The Councillors' Code of Conduct says that the councillors must declare any interest which could potentially affect their discussions and decision making".*

Voice over: *"The test is whether a member of the public, acting reasonably, would think that a particular interest could influence your role as a councillor".*

Professor Kerley: *"You're a member of the Committee that's deciding, you're also a member of the Council that might decide something, you simply say, I have an interest in this because: it may be you have an investment, it maybe it's just a friendship and it would be wise to say, I have an interest in this, I am a friend of the applicant for this, I will take no part in this discussion. You either leave the room or you literally kind of push yourself back from the Committee table and you have it recorded in the minutes".*

Ofcom recognised that selecting and editing material for inclusion in a programme was an editorial decision for the programme makers and the broadcaster and that such editing and selection should be done in a fair manner. In Ofcom's view, it was made sufficiently clear to viewers at the outset of the report that the essence of the allegations raised concerned the relationships between *"a millionaire developer [Mr Kean]"* and *"senior politicians"* and, in particular, the allegation that Mr McCann did not declare his relationship with Mr Kean when he sat as a councillor on the Council's Planning Committee. In this context, Ofcom noted that the report included reference to the Code of Conduct and Professor Kerley's contribution as background to the allegations and to establish what obligations councillors were bound by and the circumstances when they should declare relevant interests.

Ofcom noted extracts from the Code of Conduct provided to it by Mr McCann in his complaint and the BBC in its statements in response to the complaint. Ofcom does not propose to reproduce those extracts in this Decision in full; however, it has also carefully read the relevant clauses of the Code of Conduct and has considered them against the statement made by the reporter in the programme and Professor Kerley's remarks.

The full text of the Code of Conduct⁴ and noted that it sets out in detail what conduct is expected from those in public office in Scotland and provides guidance to those having to make the decision whether or not a particular interest is something that has to be declared. Ofcom also took note of the 'Key Principles of the Code of Conduct' at the beginning of the Code of Conduct and took particular note of the heading 'Honesty' under which it is stated that:

"You must declare any private interests relating to your public duties and take steps to resolve any conflicts arising in a way that protects the public interest".

Ofcom noted that the wording stated by the programme's voice over paraphrased the 'objective test' with which all councillors must comply. The full text of the text is given in the Code of Conduct as:

"whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a councillor".

The webpage where the Code of Conduct can be accessed outlined the main components of the Code of Conduct. In particular, Ofcom noted the heading 'Declaring Interests' which states:

"The Codes of Conduct state which interests a councillor or member of a public body must declare and when they must withdraw from a meeting and not vote as a result of a potential conflict of interest. The fundamental position is that no one should use, or give the appearance of using, their public position to further their private interests".

Turning to the reporter's statement, Ofcom took the view that in a relatively short news report it would not have been possible, or necessary, for the programme makers to describe at length the full details contained in the Code of Conduct relating to the declaration of interests. However, it considered that any reference to or summary of it in the programme must be presented fairly and in a way that would not to mislead the audience. In the particular circumstances of this case, and having read the detail of the Code of Conduct itself and the accompanying material quoted above, Ofcom considered that the reporter's statement and the voice over statement of the 'objective test', albeit brief, fairly summarised the points in the Code of Conduct relating to the declaration of interests. Ofcom concluded that the summaries of the Code of Conduct presented in the programme made it sufficiently clear that the interests that must be declared were those that potentially could prejudice a councillor's ability to engage in discussion and decision making. Ofcom took the view that viewers would have understood that the interests referred to in the statement were those that would not be reasonably regarded by the public as so insignificant or remote that it would be unlikely to prejudice a councillor's discussions or decision making.

With regard to Professor Kerley's contribution, it is not Ofcom's role to establish whether the substance of Professor Kerley's contribution to the programme was correct or not, but to determine whether, in broadcasting his opinions, the broadcaster took reasonable care not to present, disregard or

⁴ www.scotland.gov.uk/topics/government/local-government/ethical-standards/codes.

omit material facts in a way that was unfair to Mr McCann. In doing so, Ofcom considered the context of Professor Kerley's opinion as expressed in the programme and whether the programme's presentation of his opinion resulted in unfairness.

Ofcom noted that Professor Kerley's comments followed immediately after the reporter's summarised statement regarding the Code of Conduct. Professor Kerley was introduced in the programme by the reporter (and an on-screen caption) as "*Professor Richard Kerley from Queen Margaret University*". Ofcom took the view that Professor Kerley was presented as an "expert" and that viewers would have understood that the purpose of his contribution to the programme was to express his expert opinion on the meaning of the Code of Conduct in relation to the declaration of interests and whether it would be appropriate for a councillor to declare an interest if he/she was friends with an applicant to a Council committee. Based upon Professor Kerley's professional expertise in the subject, which was signposted to viewers by the reporter's introduction of him, Ofcom considered that it was legitimate for the programme to include Professor Kerley's expert opinion.

In these circumstances, Ofcom went on to consider whether not the presentation of Professor Kerley's opinion in the programme resulted in any unfairness to Mr McCann. Ofcom again noted the manner in which Professor Kerley was introduced by the programme (see paragraph above) and was shown expressing his expert opinion on how the Code of Conduct should be interpreted. Ofcom also noted that Professor Kerley had used the phrase "*it would be wise*", in giving his view on what action a councillor should take if they decided to declare that they were friends with an applicant. Ofcom considered that the language used by Professor Kerley in giving his opinion was couched in terms that would have left viewers in little doubt that his comments constituted his opinion only and were not directed specifically at the circumstances that the programme later alleged in relation to Mr McCann and Mr Kean. In Ofcom's view, the programme's presentation of Professor Kerley and the nature and content of his comments would have made it clear to viewers that he was an expert giving an informed opinion on a given set of factors relating to the application of the Code of Conduct.

Taking into account all the factors referred to above, Ofcom considered that manner in which the Code of Conduct was summarised by the reporter and the presentation of Professor Kerley's contribution in relation the interpretation of the Code of Conduct was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding to the Code of Conduct in a way that was unfair to Mr McCann.

- ii) Ofcom next considered Mr McCann's complaint that the programme's omission of the findings of the Parliamentary Commissioner for Standards who rejected the 2008 complaint led the programme to be unfair.

Again, Ofcom recognises that programme makers and broadcasters can legitimately select whether to include or not include information or material in a programme. Ultimately, this is an editorial decision for broadcasters to make prior to the broadcast of a programme. However, broadcasters must ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the omission of the outcome of the 2008 complaint resulted in unfairness in the programme as broadcast.

From the submissions provided by both Mr McCann and the BBC, Ofcom noted that the allegations made in the programme shared some common features with the 2008 complaint, which was rejected. Ofcom considered that the programme made it very clear to viewers from the outset that the report was the result of a BBC investigation into relationships between Mr Kean and “senior politicians” of whom, it alleged, Mr McCann was one. Ofcom also noted that the programme makers had sought Mr McCann’s response to the allegations made in the programme and that a summary of his response was quoted. In particular, Ofcom noted that the report quoted Mr McCann as saying that:

“BBC Scotland has made several unsubstantiated and false allegations. Others are linked to an ongoing court case, I am therefore prevented from discussing these outrageous smears. I complied at all times with rules rightly imposed upon councillors and I therefore reject any allegation of impropriety whatsoever. Your claim that I have a relationship with Mr Kean is wildly exaggerated”.

Ofcom took the view that the presentation of the summary of Mr McCann’s statement in response to the allegations raised in the programme would have left viewers in no doubt that he rejected the allegations of impropriety.

Ofcom considered that Mr McCann’s statement in which he rejected unequivocally the allegations made in the programme was included in the programme and it was clear that the focus of the programme was on the findings of specific investigation carried out by the programme makers into events other than those which were considered by the Parliamentary Commissioner for Standards in relation to the 2008 complaint. Ofcom also noted the need for brevity when presenting a number of factors in a relatively short report. On this basis, Ofcom did not consider that it was incumbent for the programme makers to make reference to the 2008 complaint in the programme, despite the similarity with some of the allegations being made in the programme.

Ofcom considered that the omission of a reference to the 2008 complaint did not in itself lead to the report to being unfair to Mr McCann.

- iii) Ofcom considered the complaint that the programme used a photograph of Mr McCann in a manner to convince viewers of an improper relationship between him and Mr Kean.

Ofcom has already indicated in the preceding sub-heads of complaint above that it recognises that programme makers and broadcasters can legitimately select whether to include or not include information or material in a programme. However, such editorial discretion comes with an obligation on broadcasters to decision ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the inclusion of the photograph in the programme was presented in a way that was unfair to Mr McCann.

Ofcom noted that the photograph showed Mr McCann standing next to Mr Adam Ingram and Mr Kean (who was shown standing on the other side of Mr Ingram). The photograph had been taken on the night of the 2005 General Election when Mr Ingram had been re-elected as the MP for East Kilbride, Strathaven and Lesmahagow. Ofcom understood that Mr McCann had acted

as Mr Ingram's election agent at the time and Mr Kean was a Labour Party member.

Ofcom noted the reporter's commentary that accompanied the photograph in the programme. The photograph was shown immediately after the reporter's introduction of Mr McCann and that he had been a councillor who had sat on a planning committee that had approved "dozens" of Mr Kean's planning proposals. The programme stated that:

"And the BBC can reveal they too [i.e. Mr McCann and Mr Kean] are associates and have been for several years. Here they are pictured together in 2005 when Mr McCann was election agent for the areas' former MP, Adam Ingram".

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the photograph of Mr McCann with Mr Kean and Mr Ingram in 2005 when Mr McCann was a councillor. In this context, Ofcom considered that the photograph was used primarily as a visual device to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean did exist and was such that it should have been declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and to use the photograph in an illustrative manner.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the manner in which the photograph was shown in the programme was to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Used in this context, Ofcom considered that viewers would have understood the purpose of its inclusion and that the photograph did not, in itself, amount to an allegation of impropriety.

- iv) Ofcom considered the complaint that the programme's reference to Mr McCann holding his election victory party in the 'Legends Bar' suggested impropriety which was unfair.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether

or not the reference to Mr McCann holding his election victory party at the 'Legends Bar' in a building owned by Mr Kean was presented in a way that was unfair to him.

Ofcom noted the following commentary made by the programme's reporter that accompanied footage of the exterior of the 'Legends Bar':

"And the BBC understands he held his late night victory party here in Legends Bar in a building owned by Mr Kean".

Ofcom noted that the programme made it clear that Mr Kean owned the building rather than he owned the business (i.e. the bar) that was situated within it.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to Mr McCann's election victory party being held in a building that was owned by Mr Kean. In this context, Ofcom considered that the reference to the 'Legends Bar' was used primarily to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and may have been such that Mr McCann may have been required to declare it when he was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and to make reference to the ownership of the building the bar was situated in.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the 'Legends Bar' was referred to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that viewers would have understood that the reference to the party being held in a building owned by Mr Kean did not, in itself, amount to an allegation of impropriety.

- v) Ofcom considered the complaint that the reference to the donations to the Scottish Labour Party by Mr Kean and his brother suggested that there was "something improper going on".

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether

or not the reference to the donations made by Mr Kean and his brother in was presented in a way that was unfair to Mr McCann.

Ofcom noted the following commentary made by the programme's reporter that related to donations made by Mr Kean and his brother to the Labour Party:

"Over that last three years Mr Kean and his brother have donated over £5,000 to the Labour Party".

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was reference to the fact that both Mr Kean and his brother had donated over £5,000 to the Labour Party. Ofcom noted the BBC's submission that the reference to the donations was used to show the existence of a relationship between Mr Kean and the local Labour Party of which Mr McCann is a prominent figure.

In this context, Ofcom considered that the reference to Mr Kean's donations was used in the programme to support the programme's assertion that a relationship between Mr McCann and Mr Kean did exist (in this case a link through the local Labour Party), and the relationship was such that it should have been declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and the extent of the connection between Mr Kean and Mr McCann.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he refuted the allegations of impropriety.

Ofcom considered that the reference to the donations in the programme attempted to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that viewers would have understood that the reference to the donations did not, in itself, amount to an allegation of impropriety.

- vi) Ofcom considered the complaint that the programme questioned Mr McCann's decision to write to Scottish Enterprise and suggested he had interfered with the planning application.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure

that material facts are presented fairly. Therefore, Ofcom considered whether or not the programme's references to Mr McCann's letter to Scottish Enterprise were presented in a way that was unfair to him.

Ofcom noted the following commentary made in the programme by the reporter about Mr McCann's letter to Scottish Enterprise:

"And the BBC can reveal that last September, Mr McCann vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds. Under Freedom of Information, we've obtained this letter he wrote to Scottish Enterprise which had mounted a rival supermarket application to one closely linked to Mr Kean. The letter displays a forensic interest in the deal and contains no fewer than thirty three questions: One of which Scottish Enterprise refused to answer because it was commercially sensitive".

"Now the Labour MP faces questions himself about what he got involved in a planning application which could have been in Mr Kean's interest to fail".

Ofcom noted that although Mr McCann referred to the word "interfered" in his complaint, it was clear from watching the programme as broadcast and reading the transcript of it that the actual word used was "*intervened*".

Having carefully considered the submissions of both parties to the complaint, Ofcom noted that there was no dispute between the broadcaster and Mr McCann to the fact that he had written to Scottish Enterprise and had posed 33 questions to Scottish Enterprise. Ofcom noted that the programme makers had specifically asked Mr McCann in an email dated 21 February 2011, prior to the broadcast of the programme, to comment on what prompted him to make "such a vigorous intervention". Ofcom also recognised that on the date of broadcast, Mr McCann responded to the programme makers by stating that legal proceedings were currently active in relation to "the supermarket" and that, owing to this, he was prevented from commenting on it.

Ofcom appreciated that Mr McCann believed that he was unable because of legal proceedings to provide the programme makers at the time of broadcast with any detail about the reasons for his letter to Scottish Enterprise. Ofcom noted that the programme had made reference to Mr McCann's statement that owing "*to an ongoing court case, I am therefore prevented from discussing these outrageous smears*". However, whatever Mr McCann's motives for writing the letter, it was clear to Ofcom that he wrote to Scottish Enterprise about the supermarket planning application and had asked a significant number of questions relating to it. Ofcom noted from Mr McCann's submissions to it that he had written the letter to Scottish Enterprise about "a land deal" on the "basis of information" he had received from his constituents. Mr McCann stated that he had done so because the deal "damaged the economic development" of his constituency and had "damaged another company in East Kilbride".

Ofcom considered that while Mr McCann maintained that he did not intervene in a "*planning dispute*", it considered that the programme's use of the word "*intervened*" fairly represented the position known to the programme makers at the time that is that Mr McCann had written to Scottish Enterprise. Ofcom also considered that the use of the term "*planning dispute*", although not

entirely accurate, sufficiently summed up the programme makers' understanding that Mr McCann had raised numerous questions about a planning application that could be reasonably considered to amount to a dispute about the land deal. Ofcom also considered that despite the emotive nature of the word "*vigorously*", the context in which it was used in the programme (namely, in connection with a letter containing 33 individual questions) was not unreasonable.

Taking the above factors into account, Ofcom considered that the broadcaster had taken reasonable steps when presenting this material fact not to do so in a way that was unfair to Mr McCann.

- vii) Ofcom considered the complaint that the programme was misleading because the reporter stated that he had managed to obtain a copy of Mr McCann's letter to Scottish Enterprise through an FOI request. Mr McCann said that the reporter could have obtained a copy of the letter directly from him if he had requested it.

Ofcom considers that in principle the manner in which material and information is obtained in the making of a programme is a matter for the programme makers and the broadcaster. It is an editorial decision and it would be undesirable, in Ofcom's view, for programme makers and broadcasters to cede editorial control over the way that material is gathered in the making of a programme. However, the broadcaster must ensure that the manner in which this material is presented in the programme as broadcast is done so in a way that does not result in unfairness to an individual or organisation.

In the circumstances of this particular case, Ofcom considered whether or not the presentation of the letter being obtained "*Under Freedom of Information...*" resulted in unfairness to Mr McCann.

Ofcom noted Mr McCann's submission that had the reporter could have requested the letter from him directly. It also noted the broadcaster's response that it was a matter of routine for journalists to make FOI requests and that such an FOI application may be preferable to ensure that "relevant documents are comprehensively acquired". Ofcom considered that it was entirely a matter for the programme makers how they decided to conduct their investigation into the allegations that were subsequently presented in the programme (provided they complied with the Code).

Ofcom also noted the reporter's commentary in the programme relating to Mr McCann's letter to Scottish Enterprise (as quoted in the preceding sub-head of complaint) and had particular regard to the following sentence: "*Under Freedom of Information, we've obtained this letter he wrote to Scottish Enterprise...*".

Ofcom recognised that a reference in a news report or other factual programme to material being obtained by an FOI request had the potential to lead viewers into the belief that the material may not have been made available to the programme makers by any other means. However, in the circumstances of this case, Ofcom considered that the language used by the reporter in introducing the letter and describing the manner in which it was obtained, it would have been sufficiently clear to viewers that this was a statement of fact. Ofcom considered that the use of this terminology by the

reporter was unlikely to have led viewers into thinking that the programme makers had had to resort to making an FOI request to obtain the letter, the implication being that it had not been made available to them by Mr McCann. Ofcom considered therefore that the broadcaster had taken reasonable steps when presenting this material fact not to do so in a way that was unfair to Mr McCann.

- viii) Ofcom considered the complaint that a quote from Mr Neil MSP alleging criminal activity was included in the programme without a “scintilla of evidence”.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not Mr Neil’s comments were presented in a way that was unfair to Mr McCann.

Ofcom noted Mr Neil’s contribution to the programme immediately followed the programme’s allegations surrounding Mr McCann’s alleged involvement in the planning application involving Scottish Enterprise:

Reporter: *“Senior SNP politician Alex Neil says this is now an area of huge concern”.*

Mr Neil: [caption: Alex Neil MSP, SNP – Central Scotland].

“There is a strong case for a criminal investigation to establish whether anything untoward has actually happened. I’m not saying there has or there hasn’t, but I think to clear the air and to make sure that the system is above board in South Lanarkshire, there needs to be a criminal investigation to establish the facts”.

Ofcom took the view that Mr Neil’s political position and party allegiance was made explicitly clear from the reporter’s introduction and the ‘on-screen’ caption that appeared at the beginning of Mr Neil’s contribution. Ofcom considered that while Mr Neil was giving his opinion on the how he believed the allegations made in the programme should be taken forward (i.e. a “criminal investigation”), viewers would have understood that the comments were being made by a senior politician belonging to a rival political party to Mr McCann and that they would have been able to form their own judgement on the partiality, or otherwise, of his views.

In these circumstances, Ofcom went on to consider whether the inclusion of Mr Neil’s contribution resulted in unfairness to Mr McCann. Once again, Ofcom noted the manner in which Mr Neil was introduced in the report (see preceding paragraph) and that he was expressing his own view. Ofcom noted that Mr Neil’s had used the phrases “...to establish whether anything untoward has actually happened” and “I’m not saying there has or there hasn’t...”. Ofcom considered that the language used by Mr Neil in his contribution was expressed in a way that would have left viewers in little doubt he was not stating that there was any evidence of “criminal activity”, but that he was making the point that in the interests of openness and transparency, a police investigation should take place to “establish the facts”.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme, including the comments made by Mr Neil, would have left viewers in no doubt that he refuted the allegations of impropriety.

Taking these factors above into account, Ofcom took the view that Mr Neil's comments had suggested that he believed that there was sufficient reasons for a "*criminal investigation*" to "*clear the air*". Ofcom considered that the report had presented Mr Neil's comments as his own view and that it was made clear to viewers that Mr McCann "*rejected any allegation of impropriety*". Ofcom considered therefore that the broadcaster had taken reasonable care when presenting Mr Neil's comments not to do so in a way that was unfair to Mr McCann.

- ix) Ofcom considered the complaint that the reporter distorted the facts in relation to Mr McCann's dealings with the 'East Kilbride News' and 'East Kilbride Mail' newspapers in a way that was misleading to the viewer and unfair to Mr McCann.

Ofcom considers that the manner in which material and information is presented in a programme is a matter of editorial discretion for the programme makers and the broadcaster to make prior to broadcast. However, the broadcaster must ensure that the manner in which this material is presented in the programme as broadcast is done so in a way that does not result in unfairness to an individual or organisation.

In considering this particular sub-head of complaint, Ofcom noted the comments made by the reporter in the programme that related to Mr McCann and two local newspapers:

"In East Kilbride Mr McCann refuses to speak to his local newspaper, the EK News [East Kilbride News], which published questions from opponents about his relationship with Mr Kean. Mr McCann does however write a column for the rival free sheet, the EK Mail [East Kilbride Mail], which rents its office space from Mr Kean. Mr Kean is one of the paper's significant shareholders".

Ofcom noted from Mr McCann's complaint that he had stated that the reason that he did not do business with the 'East Kilbride News' newspaper was set out on his website and that he described his relationship with it newspaper as being "strained". It also noted that it was not disputed by the parties to the complaint that Mr McCann regularly contributed to the 'East Kilbride Mail' newspaper.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to demonstrate and illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to the two East Kilbride local

newspapers, one of which rented office space from one of its shareholders, Mr Kean, and published a regular contribution by Mr McCann. In this context, Ofcom considered that the reference was used primarily to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean did exist. Ofcom considered that the programme did not distort the facts in relation to Mr McCann's position regarding the local newspapers and that it was legitimate for the programme to explore this issue and to allude to a connection between Mr Kean and Mr McCann through the reference to the 'East Kilbride Mail' newspaper.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the reference to the Mr McCann's relationship, or otherwise, to both the 'East Kilbride News' and the 'East Kilbride Mail' newspapers was included in the programme to demonstrate a connection between Mr McCann (who regularly contributed to the 'East Kilbride Mail') and Mr Kean (who not only owned the offices that the 'East Kilbride Mail' rented, but was also a shareholder in the newspaper). Ofcom considered that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that a relationship between the two men existed and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Used in this context, Ofcom considered that viewers would have understood the purpose of its inclusion and that the reference to the newspapers did not, in itself, amount to an allegation of impropriety or was misleading in a way that was unfair to Mr McCann.

Having considered each of the sub-heads of Mr McCann's complaint that the programme portrayed him unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr McCann unfairly. Ofcom also considered that the broadcaster had presented a summary of Mr McCann's statement in response to the allegations (see sub-head ii) above) towards the end of the report. Ofcom took the view that Mr McCann's unequivocal rejection of the allegations of impropriety made clear his point of view about the allegations made in the programme and that his position was fairly summarised and presented in a manner that enabled viewers to reach their own conclusions on the issues raised in the programme.

Ofcom therefore found no unfairness to Mr McCann in this respect.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

- b) Ofcom considered Mr McCann's complaint made on behalf of his daughter that her privacy was unwarrantably infringed in the programme as broadcast in that a photograph of her was shown without consent.

In considering this head of complaint, Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. It also had regard to Practice 8.20 of the Code which states that "broadcasters should pay particular attention to the privacy of people under sixteen" and that "they do not lose their rights to privacy because, of example, the fame or notoriety of their parents". Ofcom also had regard to Practice 8.21 of the Code which states that "where a programme features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained from: a parent, guardian or other person of eighteen or over in loco parentis; and wherever possible, the individual concerned; unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent".

In considering whether or not Mr McCann's daughter's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she could have legitimately expected that the photograph of her would not be broadcast without consent.

Ofcom considered that the immediate family of people under investigation or in the public eye retain their right to privacy and with particular reference to Practices 8.20 and 8.21 of the Code, Ofcom considered that particular attention must be paid to the privacy of people under the age of sixteen years. In the circumstances of this case, Ofcom noted that Mr McCann's daughter was 15 years old at the time of the broadcast of the programme in which her photograph appeared.

Ofcom also considered the nature of the photograph of Mr McCann's daughter (which appeared in the programme for approximately three seconds) and the context it was used in the programme.

Ofcom noted that the photograph depicted Mr McCann's daughter sitting on a horse and wearing a horse riding helmet. Her face had been obscured by the programme makers and she was not shown in close up. From the submissions of the parties to the complaint, Ofcom took note that the photograph had been taken at horse riding event in which Mr McCann's daughter had won a competition. Ofcom also noted the following commentary from the report that accompanied the photograph:

"We've also learned that Mr McCann's daughter keeps her horse on Mr Kean's farm. The farm is less than a mile away from the MP's constituency home [...] We asked Mr McCann what the financial arrangements are for stabling a horse, since it's not mentioned on his register of member's interests. He declined to answer".

Ofcom noted that Mr McCann's daughter was not the focus of the report and that the reference to her horse being stabled was used with the aim of establishing a link between her father and Mr Kean, on whose land her horse was stabled. It noted too that Mr McCann's daughter's face was obscured in the photograph and that her name was not disclosed in the programme. However, Ofcom considered that the inclusion of the photograph along with the reference to the horse and that she was Mr McCann's daughter rendered her identifiable.

Given that Mr McCann's daughter's was under the age of sixteen at the time of the broadcast and that she was not the focus of the report, Ofcom considered that she had a legitimate expectation that a photograph of her would not be broadcast without prior consent being obtained by the broadcaster, unless it was warranted to proceed without consent.

Ofcom noted from the submissions of both parties to the complaint that the photograph of Mr McCann's daughter had first appeared in an edition of the East Kilbride News newspaper after she had won a competition at a horse riding event. It was an image, Ofcom considered, that was already in the public domain. It also considered that the content of the photograph of Mr McCann's daughter, in itself, did not reveal information about her that could be reasonably regarded as either private or sensitive in nature. This, in Ofcom's view, limited the expectation that Mr McCann's daughter had into the intrusion into her privacy.

Having found that Mr McCann's daughter had a legitimate expectation of privacy, albeit limited, in relation to the inclusion of the photograph of her in the programme without appropriate consent, Ofcom went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to broadcast matters of genuine public interest without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to justify the intrusion into Mr McCann's daughter's privacy by including this photograph of her without appropriate consent.

Ofcom considered that the report was a serious piece of broadcast journalism and that there was a legitimate public interest in the programme's examination into allegations into the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean, a property developer. Ofcom recognised that Mr McCann is a prominent political figure in Scotland and that the report presented a number of factors that it said demonstrated that a relationship existed between Mr McCann and Mr Kean. One of those factors was that Mr McCann's daughter stabled her horse on Mr Kean's farm. In this context, Ofcom considered that the photograph was used primarily as a visual device to illustrate the programme's assertion that the relationship between Mr McCann and Mr Kean was such that it should have been declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and that use of the photograph of Mr McCann's daughter on her horse (in which her face was obscured and had been placed in the public domain already) to illustrate the fact that the horse was stabled on Mr Kean's property was relevant to the narrative of the report.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression and to impart information and ideas and the audience's right to receive the same without interference, in the circumstances of this particular case, outweighed Mr McCann's daughter's expectation of privacy. Ofcom therefore found in the circumstances of the case

that the use of the photograph (which was already in the public domain) was warranted without consent and that there was no unwarranted infringement of Mr McCann's daughter's privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Mr McCann's complaint of unjust or unfair treatment. It has not upheld Mr McCann's complaint on his daughter's behalf that her privacy was unwarrantably infringed in the programme as broadcast.

Not Upheld

Complaint by Mr Michael McCann MP on his own behalf and on behalf of his daughter

Reporting Scotland, BBC1 Scotland, 23 February 2011

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy in the programme as broadcast by Mr Michael McCann MP on his own behalf and on behalf of his daughter.

This programme included a report of approximately four minutes in duration that centred on allegations about the Labour Party MP, Mr Michael McCann. The allegations were that Mr McCann improperly failed to declare his relationship with a property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on South Lanarkshire Council's Planning Committee. The report included a number of factors that it alleged illustrated that a relationship existed between the two men. One of these factors was that Mr McCann's daughter stabled her horse on Mr Kean's farm. A photograph of Mr McCann's daughter sitting on a horse was shown briefly in the report (although her face was obscured).

Mr McCann complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his daughter's privacy was unwarrantably infringed in the programme as broadcast.

Ofcom found the following:

- The broadcaster had taken reasonable care to satisfy itself that the material facts were not presented unfairly, omitted or disregarded in a way that portrayed Mr McCann unfairly in the programme as broadcast.
- Although Mr McCann's daughter had an expectation of privacy, albeit limited, in relation to the inclusion of the photograph of her in the programme without appropriate consent, Ofcom concluded that the broadcaster's right to freedom of expression outweighed the intrusion into her privacy. Therefore, there was no unwarranted infringement of Mr McCann's daughter's privacy in the programme as broadcast.

Introduction

On 23 February 2011, BBC1 Scotland broadcast at 18:30 hours an edition of its regional news programme *Reporting Scotland*. This edition included a report of four minutes duration that centred on allegations that Mr Michael McCann MP¹ had failed to declare his relationship with a property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on the Planning Committee of South Lanarkshire Council ("the Council").

¹ Mr McCann is the Labour Party Member of Parliament for the constituency of East Kilbride, Strathaven and Lesmahagow.

In the report, the programme's reporter stated that the Code of Conduct for Councillors² ("the Code of Conduct") said that councillors "*must declare any interests which could potentially affect the discussions and decision making*".

Interview footage of Professor Richard Kerley³ of Queen Margaret University Edinburgh was included in the report. He explained that if a councillor had a friend who was an applicant in a planning proposal, he or she would be wise to declare that interest and either leave the committee room or physically push themselves away from the table and make it clear that they would take no part in the discussion and to have this recorded in the minutes.

The programme went on to state that Mr McCann, when a councillor, had sat on the Council's Planning Committee when it had approved dozens of Mr Kean's planning proposals without declaring an interest. The reporter said that Mr McCann and Mr Kean were "*associates and have been for several years*" and a photograph was shown of Mr McCann with Mr Kean in 2005, when Mr McCann was the election agent for Mr Adam Ingram the former MP for East Kilbride, Strathaven and Lesmahagow.

An extract of footage of Mr McCann's 2010 General Election victory speech was shown at this point of the programme in which he was shown saying "*I know the difference between right and wrong*". This was immediately followed by the reporter stating that Mr McCann had held his election victory party at the 'Legends Bar' which was situated in a building owned by Mr Kean. The reporter went on to say that the BBC had learned that Mr McCann's daughter kept her horse on Mr Kean's farm. This was accompanied by a photograph of Mr McCann's daughter sitting on her horse, though her face was obscured. The reporter said that the programme makers had asked Mr McCann what the financial arrangement was for stabling the horse, but Mr McCann had declined to answer.

The reporter then stated that Mr Eddie McAvoy, the Leader of the Council, had confirmed to the BBC that Mr McCann and Mr Kean "*did indeed go back a long time*", but that it was a matter for an individual councillor to decide if any relationship should be declared or not. The programme went on to state that over the past three years, Mr Kean and his brother had donated more than £5,000 to the Scottish Labour Party ("the Labour Party").

The reporter then went on to say that in September 2010, Mr McCann had "*vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds*". The programme showed a letter, which the reporter said had been obtained by the BBC under the Freedom of Information Act, from Mr McCann to Scottish Enterprise, a company that had mounted a rival planning application for the development of a supermarket site to one closely linked to Mr Kean. The reporter said that Mr McCann's letter had displayed a "*forensic interest in the deal and contains no fewer than 33 questions, one of which Scottish Enterprise refused to answer because it was commercially sensitive*". The reporter went on to say that Mr McCann now faced questions "*as to why he got himself involved in a planning application which could have been in Mr Kean's interest to fail*".

² The Code of Conduct for Councillors, produced by the Standards Commission for Scotland, sets out the standards of behaviour expected of councillors in Scotland.

³ Professor Kerley is Professor of Management at Queen Margaret University with a special interest in public service management.

The programme then showed interview footage of Mr Alex Neil, a Scottish Nationalist Party ("SNP") Member of the Scottish Parliament ("MSP") who said that *"there is a strong case for a criminal investigation to establish whether anything untoward has actually happened"*. Mr Neil's comments were followed by an extract of a statement given to the programme by Mr McCann in which he rejected *"any allegation of impropriety whatsoever"* and that the programme maker's claim that he had *"a relationship with Mr Kean is wildly exaggerated"*.

Following the broadcast of the programme, Mr McCann complained to Ofcom that he was treated unjustly or unfairly in the programme as broadcast and that his daughter's privacy was unwarrantably infringed in the programme as broadcast.

The Complaint

Mr McCann's case

Unjust or unfair treatment

In summary, Mr McCann complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme portrayed him unfairly as it implied impropriety on his part in the decision making process of the Council's Planning Committees. In particular, Mr McCann complained that:
 - i) In relation to the Code of Conduct, the programme stated that Mr McCann (when a councillor sitting on the Planning Committee) should have declared an interest due to his "relationship" with Mr Kean. Mr McCann said that important information from the Code of Conduct relating to the declaration of interests was omitted from the programme and was therefore not given to viewers. Mr McCann said that Professor Kerley's "expert" view was false.
 - ii) The programme failed to investigate and report on a complaint made by Mr David Watson, an SNP councillor, to the Parliamentary Commissioner for Standards in 2008 about Mr McCann in which Mr Watson alleged that Mr McCann had failed to declare an interest on a planning application concerning an individual on the basis that the individual had made a donation to the East Kilbride, Strathaven and Lesmahagow constituency Labour Party ("the 2008 complaint"). Mr McCann said that the 2008 complaint was rejected because the individual concerned had been a longstanding donor to the Labour Party and that there was no connection between the donation to the Labour Party and the planning application. By not including a reference to the 2008 complaint in the programme, despite it being on the public record, Mr McCann said that the omission led to the programme being unfair.
 - iii) The programme used a photograph of Mr McCann and Mr Kean in a manner that attempted to convince viewers that an improper relationship was taking place.

Mr McCann said he and Mr Kean were members of the Labour Party and that the photograph had been taken on the evening when Mr Ingram had been re-elected. Mr McCann said that he had been the constituency secretary at the time and that many photographs had been taken of Labour Party members and supporters during that evening. Mr McCann said that it was unreasonable to allege, as the programme did, that the mere existence of such a photograph was confirmation of an improper relationship between those

individuals in the photograph. Mr McCann said that to use the photograph in that way was deliberately misleading and unfair.

- iv) The programme made a reference to the fact that Mr McCann had held his 2010 General Election victory party in a public bar called the 'Legends Bar', which was situated in a building owned by Mr Kean. Mr McCann said that he had paid for the victory party himself as an individual and that he could not see the relevance of this to the suggestion of impropriety. Mr McCann said that including this information in the report was another example of unfair and misleading reporting.
- v) The programme stated that Mr Kean and his brother had donated over £5,000 to the Labour Party over the past few years. Mr McCann said that every donation made by Mr Kean, any member of his family or indeed any other individual who chooses to make a donation to the Labour Party has been properly recorded and registered with the appropriate bodies. Mr McCann said that the mention of this in the programme was in order to suggest that there was something improper going on.
- vi) The programme questioned Mr McCann's decision to write to Scottish Enterprise in September 2010 and suggested that he had interfered with a planning application which was factually incorrect.

Mr McCann said that "Scottish Enterprise was not a planning authority" and that the questions he had asked were "entirely legitimate in his capacity as a Member of Parliament". In his response to the BBC about the allegations to be raised in the programme, Mr McCann explained that, owing to a dispute in the Court of Session in Scotland involving some of the issues he had raised in his letter to Scottish Enterprise, it was inappropriate for him to comment. However, Mr McCann said that the BBC disregarded this information and proceeded to broadcast the programme which suggested that there had been some impropriety in his decision to write to Scottish Enterprise. Mr McCann said that he had written to Scottish Enterprise on the basis of information received from his constituency surgeries and that he was not in a position to divulge further details until the conclusion of the matter being considered by the Court of Session. However, Mr McCann said that the programme made the suggestion that in performing his duties as a parliamentarian he had, in some way, acted improperly.

- vii) The programme also alleged that there was something sinister in his business with Scottish Enterprise to the extent that the reporter stated in the programme that he had managed to obtain a copy of the Mr McCann's letter through a Freedom of Information Act request ("FOI request"). Mr McCann said that this statement was made in an attempt to suggest that the FOI request was necessary in order for the programme makers to unearth a vital piece of information. Mr McCann said that this was nonsense and misleading as the reporter could have obtained the information from Mr McCann himself, if he had requested it directly.
- viii) The programme included a quote from Mr Neil MSP, who claimed that there was a case to merit a criminal investigation and then qualified his statement by stating that he had no evidence to support that claim. Mr McCann said that again it was unfair and unacceptable for the programme to broadcast an allegation of criminal activity without having a "scintilla of evidence" to support the claims.

Unwarranted infringement of Privacy

In summary, Mr McCann complained on behalf of his daughter that her privacy was unwarrantably infringed in the broadcast of the programme in that:

- b) A photograph of her (taken when she was 14 years old) was shown in the programme without consent. Mr McCann's daughter was 15 years old at the time of the broadcast of the programme.

By way of background, Mr McCann said that the report focused on him as a politician. He said that his daughter was not a politician and so there was no need whatsoever to include her image in the programme. Mr McCann said that his daughter was made fun of at school and that her exam performance suffered as a result of the programme.

The BBC's case

Unjust or unfair treatment

In summary, the BBC responded to Mr McCann's complaint of unjust or unfair treatment as follows:

- a) In response to Mr McCann's complaint that he was portrayed unfairly in the programme unfairly in that it implied impropriety on his part in the decision making process of the Council's Planning Committees:
 - i) The BBC said that the Code of Conduct dealt with a number of matters including the declaration of interests by councillors which was itself dealt with at a number of points in the Code of Conduct. The BBC said that the programme highlighted what the programme makers believed to be the most directly relevant part of the Code of Conduct which was summed up as:

"The Councillors' Code of Conduct says that councillors must declare any interests which could potentially affect the discussions and decision making".

The BBC said that it believed that the relevant provision of the Code of Conduct was fairly and accurately represented and that it did not believe that important information from it was omitted thus giving rise to unfairness to Mr McCann. The BBC said that Professor Kerley was an acknowledged and respected expert on local government.

- ii) The BBC said that it did not believe that the 2008 complaint referred to by Mr McCann raised issues which bear directly upon the issues being raised in relation to Mr McCann. If Mr McCann believed that the 2008 complaint did raise issues which were relevant then the BBC said that he should explain why he believed that to be the case. In the absence of such an explanation, the BBC said that it found it difficult to comment further.
 - iii) The BBC said that at the heart of the investigation reported by the programme was the fact that there was a relationship between Mr McCann and Mr Kean and that this had not been declared by Mr McCann, when he was involved in Council decisions in which Mr Kean had a direct interest. The BBC said that

evidence as to this relationship, obtained by the programme makers, raised the question as to whether it represented an interest which should have been declared by Mr McCann. The BBC said that the use of the photograph complained of was simply visual evidence of the association between Mr McCann and Mr Kean. The BBC said that it did not believe that the use of the photograph, accompanied by the commentary, carried any suggestion beyond that – that there was a relationship between the two men. It was not, as Mr McCann claimed, used as evidence of an improper relationship, merely evidence of a relationship giving rise to questions as to whether he should have declared it.

- iv) The BBC said that, again, the reference to this event served only to provide further support for the proposition that there was a relationship between the two men, not that there was anything improper in that relationship.
- v) The BBC said that this information was provided by the programme merely as further evidence of the existence of a relationship between Mr Kean and the local Labour Party, of which Mr McCann is a prominent member. The programme said nothing in this respect which suggested that there was anything improper “going on”.
- vi) The BBC said that the programme did not suggest that Mr McCann had “interfered with” the “planning application” in question. The programme had said that Mr McCann had “*intervened*” in a “*planning dispute*”. The BBC said that the word “*intervene*” did not carry the suggestion of illegitimate or inappropriate involvement which might be carried by “interfere”. The BBC said that it was beyond dispute that there was a planning “*dispute*” and it was beyond dispute that Mr McCann “*intervened*” in it. The BBC said that Mr McCann’s letter to Scottish Enterprise was itself sufficient evidence of that.

The BBC said that the court case to which Mr McCann referred was a civil dispute being contested in the Court of Session. As such, the case was not being heard before a jury and a response from Mr McCann would not have given rise to any risk of prejudice to the administration of justice. Furthermore, the BBC said that were there any risk of contempt of court, it would have attached to the BBC’s publication of privileged matters, rather than to Mr McCann had he conveyed them to the BBC in confidence with an explanation as to why he could not comment publicly. It said that there was no reason why Mr McCann could not have provided, at the very least, a private explanation to the programme makers. However, he chose not to.

- vii) The BBC said that the use of FOI requests by journalists was routine and did not carry any suggestion that information might not have been obtained by other routes. Furthermore, it said that such applications may be preferable inasmuch as they were designed to ensure that relevant documents were comprehensively acquired – even documents of which the applicant might not be aware.
- viii) The BBC said that the programme did not broadcast an allegation of criminal activity. The BBC said that Mr Neil had commented upon a set of circumstances where an elected representative, sitting on the Council’s Planning Committee, had voted many times in support of planning applications brought by a developer with whom, it turned out, he had enjoyed a longstanding association. That relationship was never declared in the course of those planning decisions being taken. The BBC said that whilst the

programme did not allege that there was anything improper involved in the relationship between Mr McCann and Mr Kean, it was plain that the lack of transparency involved in declining to acknowledge the relationship in the course of those planning applications might give rise to a reasonable suspicion that the undeclared interest may have influenced Mr McCann in his role as councillor. The BBC said that transparency served, in part at least, to eliminate the suspicion of improper behaviour. Therefore, a lack of transparency may well give rise to such suspicion. In these circumstances, the BBC believed that the comments of Mr Neil, which he qualified, were entirely fair comment; that the lack of transparency created a situation where a suspicion of improper behaviour may have arisen and must be investigated.

Unwarranted infringement of privacy

In summary, the BBC responded to Mr McCann's complaint on behalf of his daughter that her privacy was unwarrantably infringed in the programme as broadcast as follows:

- b) The BBC said that the picture of Mr McCann's daughter had been placed in the public domain with Mr McCann's apparent consent when it appeared in the East Kilbride News. It was included within the programme as visual evidence that Mr McCann's daughter's horse was stabled on land owned by Mr Kean (along with a horse owned by Mr Kean). The BBC said that the fact that this arrangement was clearly in place did not appear on Mr McCann's Declaration of Interests as a gift or otherwise - the stabling of a horse would normally carry with it a financial burden of thousands of pounds each year.

However, the BBC said that Mr McCann's daughter's face was suitably blurred to protect her privacy so that showing the picture could have amounted to no more of a breach of privacy than identifying that the horse belonged to her. Insofar as this served evidential purposes in the programme, strongly corroborating the programme's belief that there existed a relationship between Mr McCann and Mr Kean which may have been declarable, the BBC said that it believed that any residual breach of his daughter's privacy which may have occurred in the broadcast of the programme was warranted by the public interest in publishing such evidence of association.

Mr McCann's comments

Unjust or unfair treatment

In summary, Mr McCann commented on the BBC's statement in relation to his complaint of unjust or unfair treatment as follows:

- a) In response to the BBC's statement in relation to Mr McCann's complaint that he was portrayed unfairly in the programme in that it implied impropriety:
 - i) Mr McCann said that the programme did not state that it was "summing" up the Code of Conduct but rather stated "*that the codes says*" which was a factually incorrect statement.

Mr McCann said that the Code of Conduct was a detailed document, but that the BBC had given the impression that it contained one line. Mr McCann said that Professor Kerley's comment in the programme followed an inaccurate quote from the Code of Conduct by the programme's reporter. Mr McCann

said that Professor Kerley was not quoting the Code of Conduct or offering an opinion on it, he was giving his view on what was “wise” in the circumstances. The programme inferred it was his interpretation of the Code of Conduct.

- ii) Mr McCann said that the 2008 complaint did bear directly on his case because the accusation was about a Labour donor and planning matters.
- iii) Mr McCann said that the Code of Conduct set rules on how councillors should behave in relation to planning matters and relationships and that having a photograph taken did not suggest a relationship. Mr McCann said that it was “just a photograph” and that “politicians had quite a lot of them taken”. Mr McCann also noted that the dictionary states that an associate is a person who joins with others in some activity or endeavour. Mr McCann questioned what activity or endeavour he was supposed to be joining with Mr Kean in.
- iv) Mr McCann said that the original questions from the programme makers suggested that Mr Kean had hosted his victory party and that this was further evidence of a relationship. Mr McCann said that he had paid the landlord of the public house for the victory party and he questioned how this was evidence of a relationship with Mr Kean.
- v) Mr McCann said that the inference that everyone he had spoken to after the programme was broadcast had drawn was “the Labour Party donation” equals “influence /impropriety”. Mr McCann said that the Labour Party had received the donations, not him and questioned why he had been singled out amongst other Labour Party councillors.
- vi) Mr McCann said that he did not interfere with any planning dispute. Mr McCann said that he had asked Scottish Enterprise pertinent questions about a land deal, which he said had “damaged the economic development of [his] constituency” and had “damaged another company in East Kilbride”. Mr McCann made the point that the BBC had stated that he did not “just intervene” but that he had “*vigorously intervened*”. Mr McCann said that the questions he had asked Scottish Enterprise were clear and specific and reiterated that he had not intervened in a planning dispute. Mr McCann said that to have done so would have meant him engaging with a planning applicant or the planning authority: he did neither. Mr McCann also questioned why the BBC had not said anything to him about, or made reference in the programme to, the distinction between “a ‘civil’ case and a ‘criminal’ case”.
- vii) Mr McCann questioned why the programme needed to mention the FOI request if not to create the impression that the letter had to be “jimmied out of someone”. He said that if the explanation was so neutral, why did the report not simply state, “we have a letter...”.
- viii) Mr McCann said that Mr Neil was commenting on a set of circumstances that the BBC had manipulated into a story. As an SNP politician attacking a Labour Party politician, Mr McCann said that it was not a difficult role for him to fulfil.

Unwarranted infringement of privacy

In summary, Mr McCann commented as follows:

- b) Mr McCann said that the photograph of his daughter that appeared in the East Kilbride News was taken when she had won a horse riding event, not because her father was the subject of a BBC story. He said that she was clearly identified in the photograph.

The BBC's final response

Unjust or unfair treatment

In summary, the BBC responded to Mr McCann's comments as follows:

- a) In response to Mr McCann's complaint of unjust or unfair treatment:

- i) The BBC said that its initial statement in response to the complaint did not state that the programme summed up the Code of Conduct. It said that it highlighted the most directly relevant part of the Code of Conduct and summed that up. The BBC said that it still believed that to be the case and that it did not accept that the programme gave the impression that the Code of Conduct consisted of a single line. In any case, the BBC said that this had no bearing on the issue complained of.

The BBC maintained that Professor Kerley had expertise in local government matters and was qualified to offer expert comment on the issues raised in this programme. The BBC said that it did not accept Mr McCann's view that Professor Kerley was not offering an opinion based on the Code of Conduct. The BBC said that it believed that the report accurately summarised the relevant part of the Code of Conduct.

- ii) The BBC maintained that it did not accept that the 2008 complaint raised issues which bear directly upon the matters raised in the programme in relation to Mr McCann merely because, as Mr McCann asserted, the two stories enjoyed certain common features. The BBC said that did not, in itself, make it relevant to the case at hand.
- iii) The BBC said that the use of the photograph in the programme simply represented one piece of evidence of a relationship between Mr McCann and Mr Kean – a relationship, which, the BBC noted, raised the question as to whether it should properly have been declared.
- iv) The BBC said that the questions posed by a journalist preparatory to the broadcast of the programme and to clarify the facts of the matter could not be taken to reflect what the programme actually said or intended to say. The BBC said that the programme itself did not claim that Mr Kean had hosted Mr McCann's victory party. The BBC said that the information contained in the programme relating to this particular matter went to establishing the association between Mr McCann and Mr Kean.
- v) The BBC said that the programme was not centrally concerned with the issue of donations to the Labour Party. Such donations were only relevant in so far as they provided further evidence of a relationship between Mr Kean and the local Labour Party in which Mr McCann is a prominent figure.
- vi) The BBC reiterated its initial statement in response to the complaint and said that it had nothing to add to its observations on Mr McCann's claims to have

been legally inhibited from commenting on these matters at the time of the programme.

vii) The BBC said it had nothing further to add on this point.

viii) The BBC said that it did not accept that the story was manipulated to elicit a particular response from Mr Neil. It said that the facts were set out and Mr Neil was invited to comment on the issue of whether the relationship between Mr McCann and Mr Kean should properly have been declared.

Unwarranted infringement of privacy

The BBC said that it had no further comments in relation to the use of the photograph of Mr McCann's daughter in the programme.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, a transcript of it and written submissions from both parties.

Unjust or unfair treatment

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the head, and individual sub-heads, of complaint detailed below.

- a) Ofcom first considered Mr McCann's complaint that the programme portrayed him unfairly in that it implied impropriety on his part in the decision making process of the Council's Planning Committee.

When considering this head of complaint, Ofcom had regard to whether the portrayal of Mr McCann was consistent with the broadcaster's obligation to ensure that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr McCann (as outlined in Practice 7.9 of the Code).

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest. However, in presenting material that could be regarded as amounting to significant allegations, reasonable care must be taken not to do so in a manner that does not cause unfairness to individuals or organisations. In this particular case, Ofcom considered that it was in the public interest for the programme to

report on the allegations such as those covered in the programme but that this needed to be consistent with the requirements of the Code.

Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Mr McCann was portrayed unfairly in the programme as broadcast as regards this head of complaint.

- i) In relation to the complaint that important information from the Code of Conduct was omitted from the programme, Ofcom first noted the comments made in the programme by the reporter and Professor Kerley about the declaration of interests by councillors under the Code of Conduct:

Reporter: *"The Councillors' Code of Conduct says that the councillors must declare any interest which could potentially affect their discussions and decision making".*

Professor Kerley: *"It would be wise to say, I have an interest in this, I am a friend of the applicant for this, I will take no part in this discussion. You either leave the room or you literally kind of push yourself back from the Committee table and you have it recorded in the minutes".*

Ofcom recognised that selecting and editing material for inclusion in a programme was an editorial decision for the programme makers and the broadcaster and that such editing and selection should be done in a fair manner. In Ofcom's view, it was made sufficiently clear to viewers at the outset of the report that the essence of the allegations raised concerned the relationships between *"a millionaire developer [Mr Kean]"* and *"senior politicians"* and, in particular, the allegation that Mr McCann did not declare his relationship with Mr Kean when he sat as a councillor on the Council's Planning Committee. In this context, Ofcom noted that the report included reference to the Code of Conduct and Professor Kerley's contribution as background to the allegations and to establish what obligations councillors were bound by and the circumstances when they should declare relevant interests.

Ofcom noted extracts from the Code of Conduct provided to it by Mr McCann in his complaint and the BBC in its statements in response to the complaint. Ofcom does not propose to reproduce those extracts in this Decision in full; however, it has also carefully read the relevant clauses of the Code of Conduct and has considered them against the statement made by the reporter in the programme and Professor Kerley's remarks.

The full text of the Code of Conduct⁴ and noted that it sets out in detail what conduct is expected from those in public office in Scotland and provides guidance to those having to make the decision whether or not a particular interest is something that has to be declared. Ofcom also took note of the 'Key Principles of the Code of Conduct' at the beginning of the Code of Conduct and took particular note of the heading 'Honesty' under which it is stated that:

⁴ www.scotland.gov.uk/topics/government/local-government/ethical-standards/codes.

“You must declare any private interests relating to your public duties and take steps to resolve any conflicts arising in a way that protects the public interest”.

Ofcom noted that the webpage where the Code of Conduct can be accessed outlined the main components of the Code of Conduct. In particular, Ofcom noted the heading ‘Declaring Interests’ which states:

“The Codes of Conduct state which interests a councillor or member of a public body must declare and when they must withdraw from a meeting and not vote as a result of a potential conflict of interest. The fundamental position is that no one should use, or give the appearance of using, their public position to further their private interests”.

Turning to the reporter’s statement, Ofcom took the view that in a relatively short news report it would not have been possible, or necessary, for the programme makers to describe at length the full details contained in the Code of Conduct relating to the declaration of interests. However, it considered that any reference to or summary of it in the programme must be presented fairly and in a way that would not to mislead the audience. In the particular circumstances of this case, and having read the detail of the Code of Conduct itself and the accompanying material quoted above, Ofcom concluded that the reporter’s statement, albeit brief, fairly summarised the points in the Code of Conduct relating to the declaration of interests. The summary used by the reporter was clear that the interests that must be declared were those that potentially could prejudice a councillor’s ability to engage in discussion and decision making. Ofcom took the view that viewers would have understood that the interests referred to in the statement were those that would not be reasonably regarded by the public as so insignificant or remote that it would be unlikely to prejudice a councillor’s discussions or decision making.

With regard to Professor Kerley’s contribution, it is not Ofcom’s role to establish whether the substance of Professor Kerley’s contribution to the programme was correct or not, but to determine whether, in broadcasting his opinions, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Mr McCann. In doing so, Ofcom considered the context of Professor Kerley’s opinion as expressed in the programme and whether the programme’s presentation of his opinion resulted in unfairness.

Ofcom noted that Professor Kerley’s comments followed immediately after the reporter’s summarised statement regarding the Code of Conduct. Professor Kerley was introduced in the programme by an on-screen caption which read “*Professor Richard Kerley Queen Margaret University*”. Ofcom took the view that Professor Kerley was presented as an “expert” and that viewers would have understood that the purpose of his contribution to the programme was to express his expert opinion on the meaning of the Code of Conduct in relation to the declaration of interests and whether it would be appropriate for a councillor to declare an interest if he/she was friends with an applicant to a Council committee. Based upon Professor Kerley’s professional expertise in the subject, which was signposted to viewers by the programme’s introduction of him, Ofcom considered that it was legitimate for the programme to include Professor Kerley’s expert opinion.

In these circumstances, Ofcom went on to consider whether not the presentation of Professor Kerley's opinion in the programme resulted in any unfairness to Mr McCann. Ofcom again noted the manner in which Professor Kerley was introduced by the programme (see paragraph above) and was shown expressing his expert opinion on how the Code of Conduct should be interpreted. Ofcom also noted that Professor Kerley had used the phrase "*it would be wise*", in giving his view on what action a councillor should take if they decided to declare that they were friends with an applicant. Ofcom considered that the language used by Professor Kerley in giving his opinion was couched in terms that would have left viewers in little doubt that his comments constituted his opinion only and were not directed specifically at the circumstances that the programme later alleged in relation to Mr McCann and Mr Kean. In Ofcom's view, the programme's presentation of Professor Kerley and the nature and content of his comments would have made it clear to viewers that he was an expert giving an informed opinion on a given set of factors relating to the application of the Code of Conduct.

Taking into account all the factors referred to above, Ofcom considered that manner in which the Code of Conduct was summarised by the reporter and the presentation of Professor Kerley's contribution in relation the interpretation of the Code of Conduct was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding to the Code of Conduct in a way that was unfair to Mr McCann.

- ii) Ofcom next considered Mr McCann's complaint that the programme's omission of the findings of the Parliamentary Commissioner for Standards who rejected the 2008 complaint led the programme to be unfair.

Again, Ofcom recognises that programme makers and broadcasters can legitimately select whether to include or not include information or material in a programme. Ultimately, this is an editorial decision for broadcasters to make prior to the broadcast of a programme. However, broadcasters must ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the omission of the outcome of the 2008 complaint resulted in unfairness in the programme as broadcast.

From the submissions provided by both Mr McCann and the BBC, Ofcom noted that the allegations made in the programme shared some common features with the 2008 complaint, which was rejected. Ofcom considered that the programme made it very clear to viewers from the outset that the report was the result of a BBC investigation into relationships between Mr Kean and "*senior politicians*" of whom, it alleged, Mr McCann was one. Ofcom also noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted. In particular, Ofcom noted that the report quoted Mr McCann as saying that:

"BBC Scotland has made several unsubstantiated and false allegations. I complied at all times with rules rightly imposed upon councillors and I therefore reject any allegation of impropriety whatsoever. Your claim that I have a relationship with Mr Kean is wildly exaggerated."

Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he rejected the allegations of impropriety.

Ofcom considered that Mr McCann's statement in which he rejected unequivocally the allegations made in the programme was included in the programme and it was clear that the focus of the programme was on the findings of specific investigation carried out by the programme makers into events other than those which were considered by the Parliamentary Commissioner for Standards in relation to the 2008 complaint. Ofcom also noted the need for brevity when presenting a number of factors in a relatively short report. On this basis, Ofcom did not consider that it was incumbent for the programme makers to make reference to the 2008 complaint in the programme, despite the similarity with some of the allegations being made in the programme.

Ofcom considered that the omission of a reference to the 2008 complaint did not in itself lead to the report to being unfair to Mr McCann.

- iii) Ofcom considered the complaint that the programme used a photograph of Mr McCann in a manner to convince viewers of an improper relationship between him and Mr Kean.

Ofcom has already indicated in the preceding sub-heads of complaint above that it recognises that programme makers and broadcasters can legitimately select whether to include or not include information or material in a programme. However, such editorial discretion comes with an obligation on broadcasters to decision ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the inclusion of the photograph in the programme was presented in a way that was unfair to Mr McCann.

Ofcom noted that the photograph showed Mr McCann standing next to Mr Adam Ingram and Mr Kean (who was shown standing on the other side of Mr Ingram). The photograph had been taken on the night of the 2005 general election when Mr Ingram had been re-elected as the MP for East Kilbride, Strathaven and Lesmahagow. Ofcom understood that Mr McCann had acted as Mr Ingram's election agent at the time and Mr Kean was a Labour Party member.

Ofcom noted the reporter's commentary that accompanied the photograph in the programme. The photograph was shown immediately after the reporter's introduction of Mr McCann and that he had been a councillor who had sat on a planning committee that had approved "dozens" of Mr Kean's planning proposals. The programme stated that:

"And the BBC can reveal they too [i.e. Mr McCann and Mr Kean] are associates and have been for several years. Here they are pictured together in 2005 when Mr McCann was election agent for the areas' former MP, Adam Ingram".

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers' into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report

presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the photograph of Mr McCann with Mr Kean and Mr Ingram in 2005 when Mr McCann was a councillor. In this context, Ofcom considered that the photograph was used primarily as a visual device to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean did exist and was such that it should have been declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and to use the photograph in an illustrative manner.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the manner in which the photograph was shown in the programme was to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship it was such that Mr McCann may have been required to declare it when he was a councillor. Used in this context, Ofcom considered that viewers would have understood the purpose of its inclusion and that the photograph did not, in itself, amount to an allegation of impropriety.

- iv) Ofcom considered the complaint that the programme's reference to Mr McCann holding his election victory party in the 'Legends Bar' suggested impropriety which was unfair.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to Mr McCann holding his election victory party at the 'Legends Bar' in a building owned by Mr Kean was presented in a way that was unfair to him.

Ofcom noted the following commentary made by the programme's reporter that accompanied footage of the exterior of the 'Legends Bar':

"And the BBC understands he held his late night victory party here in Legends Bar in a building owned by Mr Kean".

Ofcom noted that the programme made it clear that Mr Kean owned the building rather than he owned the business (i.e. the bar) that was situated within it.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers' into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report

presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to Mr McCann's election victory party being held in a building that was owned by Mr Kean. In this context, Ofcom considered that the reference to the 'Legends Bar' was used primarily to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and may have been such that Mr McCann may have been required to declare it when he was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and to make reference to the ownership of the building the bar was situated in.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he refuted the allegations of impropriety.

Ofcom took the view that the 'Legends Bar' was referred to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that viewers would have understood that the reference to the party being held in a building owned by Mr Kean did not, in itself, amount to an allegation of impropriety.

- v) Ofcom considered the complaint that the reference to the donations to the Scottish Labour Party by Mr Kean and his brother suggested that there was "something improper going on".

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to the donations made by Mr Kean and his brother in was presented in a way that was unfair to Mr McCann.

Ofcom noted the following commentary made by the programme's reporter that related to donations made by Mr Kean and his brother to the Labour Party:

"Over that last three years Mr Kean and his brother have donated over £5,000 to the Scottish Labour Party".

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers' into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was reference to the fact that both Mr Kean and his brother had donated over £5,000 to the Labour Party. Ofcom noted the BBC's submission

that the reference to the donations was used to show the existence of a relationship between Mr Kean and the local Labour Party of which Mr McCann is a prominent figure.

In this context, Ofcom considered that the reference to Mr Kean's donations was used in the programme to support the programme's assertion that a relationship between Mr McCann and Mr Kean did exist (in this case in a link though the local Labour Party), and the relationship was such that it should have been declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and the extent of the connection between Mr Kean and Mr McCann.

Ofcom noted that the programme makers had sought Mr McCann's response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann's statement in response to the allegations raised in the programme would have left viewers in no doubt that he refuted the allegations of impropriety.

Ofcom considered that the reference to the donations in the programme attempted to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that viewers would have understood that the reference to the donations did not, in itself, amount to an allegation of impropriety.

- vi) Ofcom considered the complaint that the programme questioned Mr McCann's decision to write to Scottish Enterprise and suggested he had interfered with the planning application.

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the programme's references to Mr McCann's letter to Scottish Enterprise were presented in a way that was unfair to him.

Ofcom noted the following commentary made in the programme by the reporter about Mr McCann's letter to Scottish Enterprise:

"And the BBC can reveal that last September, Mr McCann vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds. Under Freedom of Information, we've obtained this letter he wrote to Scottish Enterprise which had mounted a rival supermarket application to one closely linked to Mr Kean. The letter displays a forensic interest in the deal and contains no fewer than thirty three questions: One of which Scottish Enterprise refused to answer because it was commercially sensitive".

"Now the Labour MP faces questions himself about what he got involved in a planning application which could have been in Mr Kean's interest to fail".

Ofcom noted that although Mr McCann referred to the word “interfered” in his complaint, it was clear from watching the programme as broadcast and reading the transcript of it that the actual word used was “*intervened*”.

Having carefully considered the submissions of both parties to the complaint, Ofcom noted that there was no dispute between the broadcaster and Mr McCann to the fact that he had written to Scottish Enterprise and had posed 33 questions to Scottish Enterprise. Ofcom noted that the programme makers had specifically asked Mr McCann in an email dated 21 February 2011, prior to the broadcast of the programme, to comment on what prompted him to make “such a vigorous intervention”. Ofcom also recognised that on the date of broadcast, Mr McCann responded to the programme makers by stating that legal proceedings were currently active in relation to “the supermarket” and that, owing to this, he was prevented from commenting on it.

Ofcom appreciated that Mr McCann believed that he was unable to provide the programme makers at the time of broadcast with any detail about the reasons for his letter to Scottish Enterprise. However, whatever Mr McCann’s motives for writing the letter, it was clear to Ofcom that he wrote to Scottish Enterprise about the supermarket planning application and had asked a significant number of questions relating to it. Ofcom noted from Mr McCann’s submissions to it that he had written the letter to Scottish Enterprise about “a land deal” on the “basis of information” he had received from his constituents. Mr McCann stated that he had done so because the deal “damaged the economic development” of his constituency and had “damaged another company in East Kilbride”.

Ofcom considered that while Mr McCann maintained that he did not intervene in a “*planning dispute*”, it considered that the programme’s use of the word “*intervened*” fairly represented the position known to the programme makers at the time that is that Mr McCann had written to Scottish Enterprise. Ofcom also considered that the use of the term “*planning dispute*”, although not entirely accurate, sufficiently summed up the programme makers’ understanding that Mr McCann had raised numerous questions about a planning application that could be reasonably considered to amount to a dispute about the land deal. Ofcom also considered that despite the emotive nature of the word “*vigorously*”, the context in which it was used in the programme, (namely, in connection with a letter containing 33 individual questions) was not unreasonable.

Taking the above factors into account, Ofcom considered that the broadcaster had taken reasonable steps when presenting this material fact not to do so in a way that was unfair to Mr McCann.

- vii) Ofcom considered the complaint that the programme was misleading because the reporter stated that he had managed to obtain a copy of Mr McCann’s letter to Scottish Enterprise through an FOI request. Mr McCann said that the reporter could have obtained a copy of the letter directly from him if he had requested it.

Ofcom considers that in principle the manner in which material and information is obtained in the making of a programme is a matter for the programme makers and the broadcaster. It is an editorial decision and it would be undesirable, in Ofcom’s view, for programme makers and

broadcasters to cede editorial control over the way that material is gathered in the making of a programme. However, the broadcaster must ensure that the manner in which this material is presented in the programme as broadcast is done so in a way that does not result in unfairness to an individual or organisation.

In the circumstances of this particular case, Ofcom considered whether or not the presentation of the letter being obtained "*Under Freedom of Information...*" resulted in unfairness to Mr McCann.

Ofcom noted Mr McCann's submission that had the reporter could have requested the letter from him directly. It also noted the broadcaster's response that it was a matter of routine for journalists to make FOI requests and that such an FOI application maybe preferable to ensure that "relevant documents are comprehensively acquired". Ofcom considered that it was entirely a matter for the programme makers how they decided to conduct their investigation into the allegations that were subsequently presented in the programme (provided they complied with the Code).

Ofcom also noted the reporter's commentary in the programme relating to Mr McCann's letter to Scottish Enterprise (as quoted in the preceding sub-head of complaint) and had particular regard to the following sentence: "*Under Freedom of Information, we've obtained this letter he wrote to Scottish Enterprise...*".

Ofcom recognised that a reference in a news report or other factual programme to material being obtained by an FOI request had the potential to lead viewers into the belief that the material may not have been made available to the programme makers by any other means. However, in the circumstances of this case, Ofcom considered that the language used by the reporter in introducing the letter and describing the manner in which it was obtained, it would have been sufficiently clear to viewers that this was a statement of fact. Ofcom considered that the use of this terminology by the reporter was unlikely to have led viewers into thinking that the programme makers had had to resort to making an FOI request to obtain the letter, the implication being that it had not been made available to them by Mr McCann. Ofcom considered therefore that the broadcaster had taken reasonable steps when presenting this material fact not to do so in a way that was unfair to Mr McCann.

- viii) Ofcom considered the complaint that a quote from Mr Neil MSP alleging criminal activity was included in the programme without a "scintilla of evidence".

As already observed in sub-head iii) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion as to what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not Mr Neil's comments were presented in a way that was unfair to Mr McCann.

Ofcom noted Mr Neil's contribution to the programme immediately followed the programme's allegations surrounding Mr McCann's alleged involvement in the planning application involving Scottish Enterprise:

Reporter: *“Senior SNP politician Alex Neil says this is now an area of huge concern”.*

Mr Neil: [caption: Alex Neil MSP, SNP – Central Scotland].

“There is a strong case for a criminal investigation to establish whether anything untoward has actually happened. I’m not saying there has or there hasn’t, but I think to clear the air and to make sure that the system is above board in South Lanarkshire, there needs to be a criminal investigation to establish the facts”.

Ofcom took the view that Mr Neil’s political position and party allegiance was made explicitly clear from the reporter’s introduction and the ‘on-screen’ caption that appeared at the beginning of Mr Neil’s contribution. Ofcom considered that while Mr Neil was giving his opinion on the how he believed the allegations made in the programme should be taken forward (i.e. a *“criminal investigation”*), viewers would have understood that the comments were being made by a senior politician belonging to a rival political party to Mr McCann and that they would have been able to form their own judgement on the partiality, or otherwise, of his views.

In these circumstances, Ofcom went on to consider whether the inclusion of Mr Neil’s contribution resulted in unfairness to Mr McCann. Once again, Ofcom noted the manner in which Mr Neil was introduced in the report (see preceding paragraph) and that he was expressing his own view. Ofcom noted that Mr Neil’s had used the phrases *“...to establish whether anything untoward has actually happened”* and *“I’m not saying there has or there hasn’t...”*. Ofcom considered that the language used by Mr Neil in his contribution was expressed in a way that would have left viewers in little doubt he was not stating that there was any evidence of *“criminal activity”*, but that he was making the point that in the interests of openness and transparency, a police investigation should take place to *“establish the facts”*.

Ofcom noted that the programme makers had sought Mr McCann’s response to the allegations made in the programme and that a summary of his response was quoted (see sub-head ii) above). Ofcom took the view that the presentation of the summary of Mr McCann’s statement in response to the allegations raised in the programme, including the comments made by Mr Neil, would have left viewers in no doubt that he refuted the allegations of impropriety.

Taking these factors above into account, Ofcom took the view that Mr Neil’s comments had suggested that he believed that there was sufficient reasons for a *“criminal investigation”* to *“clear the air”*. Ofcom considered that the report had presented Mr Neil’s comments as his own view and that it was made clear to viewers that Mr McCann *“rejected any allegation of impropriety”*. Ofcom considered therefore that the broadcaster had taken reasonable care when presenting Mr Neil’s comments not to do so in a way that was unfair to Mr McCann.

Having considered each of the sub-heads of Mr McCann’s complaint that the programme portrayed him unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr McCann unfairly. Ofcom also considered

that the broadcaster had presented a summary of Mr McCann's statement in response to the allegations (see sub-head ii) above) towards the end of the report. Ofcom took the view that Mr McCann's unequivocal rejection of the allegations of impropriety made clear his point of view about the allegations made in the programme and that his position was fairly summarised and presented in a manner that enabled viewers to reach their own conclusions on the issues raised in the programme.

Ofcom therefore found no unfairness to Mr McCann in this respect.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

- b) Ofcom considered Mr McCann's complaint made on behalf of his daughter that her privacy was unwarrantably infringed in the programme as broadcast in that a photograph of her was shown without consent.

In considering this head of complaint, Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. It also had regard to Practice 8.20 of the Code which states that "broadcasters should pay particular attention to the privacy of people under sixteen" and that "they do not lose their rights to privacy because, of example, the fame or notoriety of their parents". Ofcom also had regard to Practice 8.21 of the Code which states that "where a programme features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained from: a parent, guardian or other person of eighteen or over in loco parentis; and wherever possible, the individual concerned; unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent".

In considering whether or not Mr McCann's daughter's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she could have legitimately expected that the photograph of her would not be broadcast without consent.

Ofcom considered that the immediate family of people under investigation or in the public eye retain their right to privacy and with particular reference to Practices 8.20 and 8.21 of the Code, Ofcom considered that particular attention must be paid to the privacy of people under the age of 16 years. In the circumstances of this case, Ofcom noted that Mr McCann's daughter was 15 years old at the time of the broadcast of the programme in which her photograph appeared.

Ofcom also considered the nature of the photograph of Mr McCann's daughter (which appeared in the programme for approximately three seconds) and the context it was used in the programme.

Ofcom noted that the photograph depicted Mr McCann's daughter sitting on a horse and wearing a horse riding helmet. Her face had been obscured by the programme makers and she was not shown in close up. From the submissions of the parties to the complaint, Ofcom took note that the photograph had been taken at a horse riding event in which Mr McCann's daughter had won a competition. Ofcom also noted the following commentary from the report that accompanied the photograph:

"We've also learned that Mr McCann's daughter keeps her horse on Mr Kean's farm. We asked Mr McCann what the financial arrangements are for stabling a horse. He declined to answer".

Ofcom noted that Mr McCann's daughter was not the focus of the report and that the reference to her horse being stabled was used with the aim of establishing a link to the alleged relationship between her father and Mr Kean, on whose land her horse was stabled. It noted too that Mr McCann's daughter's face was obscured in the photograph and that her name was not disclosed in the programme. However, Ofcom considered that the inclusion of the photograph along with the reference to the horse and that she was Mr McCann's daughter rendered her identifiable.

Given that Mr McCann's daughter's was under the age of 16 at the time of the broadcast and that she was not the focus of the report, Ofcom considered that she had a legitimate expectation that a photograph of her would not be broadcast without prior consent being obtained by the broadcaster, unless it was warranted to proceed without consent.

Ofcom noted from the submissions of both parties to the complaint that the photograph of Mr McCann's daughter had first appeared in an edition of the East Kilbride News newspaper after she had won a competition at a horse riding event. It was an image, Ofcom considered, that was already in the public domain. It also considered that the content of the photograph of Mr McCann's daughter, in itself, did not reveal information about her that could be reasonably regarded as either private or sensitive in nature. This, in Ofcom's view, limited the expectation that Mr McCann's daughter had into the intrusion into her privacy.

Having found that Mr McCann's daughter had a legitimate expectation of privacy, albeit limited, in relation to the inclusion of the photograph of her in the programme without appropriate consent, Ofcom went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to broadcast matters of genuine public interest without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to justify the intrusion into Mr McCann's daughter's privacy by including this photograph of her without appropriate consent.

Ofcom considered that the report was a serious piece of broadcast journalism and that there was a legitimate public interest in the programme's examination into allegations into the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean, a property developer. Ofcom recognised that Mr McCann is a prominent political figure in

Scotland and that the report presented a number of factors that it said demonstrated that a relationship existed between Mr McCann and Mr Kean. One of those factors was that Mr McCann's daughter stabled her horse on Mr Kean's farm. In this context, Ofcom considered that the photograph was used primarily as a visual device to illustrate the programme's assertion that the relationship between Mr McCann and Mr Kean was such that it should have been declared when Mr McCann was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and that use of the photograph of Mr McCann's daughter on her horse (in which her face was obscured and had been placed in the public domain already) to illustrate the fact that the horse was stabled on Mr Kean's property was relevant to the narrative of the report.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression and to impart information and ideas and the audience's right to receive the same without interference, in the circumstances of this particular case, outweighed Mr McCann's daughter's expectation of privacy. Ofcom therefore found in the circumstances of the case that the use of the photograph (which was already in the public domain) was warranted without consent and that there was no unwarranted infringement of Mr McCann's daughter's privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Mr McCann's complaint of unjust or unfair treatment. It has not upheld Mr McCann's complaint on his daughter's behalf that her privacy was unwarrantably infringed in the programme as broadcast.

Not Upheld

Complaint by Mr James Kean

The Investigation: Donations, Dinners and Deals, BBC Radio Scotland, 27 February 2011

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment in the programme as broadcast by Mr James Kean.

This programme reported on Scotland's local authority planning processes and the concerns that it was not as open and accountable as it could be. Part of the programme which was approximately 28 minutes in duration, included allegations that Councillor Jim Docherty and Mr Michael McCann MP failed to declare their relationships with a property developer and Labour Party donor, Mr James Kean, when Councillor Docherty and Mr McCann sat as councillors on South Lanarkshire Council's Planning Committee. The report included a number of examples that it alleged demonstrated that a relationship existed between the men.

Mr Kean's solicitors complained to Ofcom on his behalf that he was treated unjustly or unfairly in the programme as broadcast.

Ofcom found that the broadcaster had taken reasonable care to satisfy itself that the material facts, including Mr Kean's denial of any wrongdoing, were not presented unfairly, omitted or disregarded in a way that portrayed Mr Kean unfairly in the programme as broadcast.

Introduction

On 27 February 2011 at 10:30 hours, BBC Radio Scotland broadcast an edition of its investigative current affairs programme, *The Investigation*. This edition, entitled *Donations, Dinners and Deals*, reported on Scotland's local authority planning processes and concerns that it was not as open and accountable as it could be. Part of the report looked at an allegation that Mr Michael McCann MP¹ had failed to declare his relationship with a local property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on the Planning Committee of South Lanarkshire Council ("the Council"). The programme's duration was approximately 28 minutes.

The report began by stating that the BBC had become aware of problems in the planning processes of the Council involving a successful property developer, namely Mr Kean, and some of his friends. Mr Kean was introduced in the report as:

"James Kean is a millionaire Labour [Party] donor who rubs shoulders with stars like Ally McCoist playing in charity football matches, like this one. But it's his relationships with some politicians from South Lanarkshire Council which have caused concern".

¹ Mr McCann is the Labour Party Member of Parliament for the constituency of East Kilbride, Strathaven and Lesmahagow.

Councillor Docherty and Mr Kean

The programme referred to Mr Kean's alleged friendship with Councillor Jim Docherty, a "*long-standing*" Labour councillor in South Lanarkshire. It stated that Mr Kean was godfather to Councillor Docherty's child and that Councillor Docherty was a regular guest at Mr Kean's holiday home at Loch Fyne. The programme also said that Mr Kean and Councillor Docherty were regularly seen dining together and that the Councillor Docherty had also bought his house from Mr Kean who also lived nearby. The programme said that Councillor Docherty sat on the Council's Planning Committee and that Councillor Docherty had never made a public declaration of his friendship with Mr Kean even though the Planning Committee had approved dozens of planning applications from Mr Kean.

Later in programme, the reporter discussed whether there was a wider problem with the planning process in South Lanarkshire. The programme highlighted a complaint in 2010 that had been sent to the Chief Investigating Officer of the Scottish Local Authority Standards Commission about Councillor Docherty's relationship to Mr Kean after Councillor Docherty bought his house for £320,000 from Mr Kean. It said that Councillor Docherty had been cleared of any wrongdoing and that the report into the complaint concluded that there was no evidence to show a relationship between the two men. However, a few days after the report was published, the programme stated that the BBC revealed that Councillor Docherty and Mr Kean had been friends for many years and that Mr Kean was godfather to Councillor Docherty's child.

The programme reported that the BBC had become aware of problems in the planning processes of the Council which involved "*a hugely successful property developer*", namely Mr Kean, and "*some of his friends*". The programme's reporter questioned how close a councillor sitting on planning committees had to be to someone submitting a planning application before declaring an interest. The programme considered the provisions of the Code of Conduct for Councillors² ("*the Code of Conduct*") which, the reporter noted "*says that councillors must declare any interest which could potentially affect their discussions or decision making*". The programme then included the following quote from the Code of Conduct:

"The test is whether a member of the public, acting reasonably, would think that a particular interest could influence your role as a councillor".

An interview with Professor Richard Kerley³ of Queen Margaret University Edinburgh was included in the report to explain the importance of transparency in local politics. He said that if a councillor on a committee had a financial interest in a particular planning application or had a friend who was an applicant, it would be wise for that councillor to declare that interest and either leave the committee room, or physically push themselves away from the table and make it clear that they would take no part in the discussion and have this recorded in the minutes of the meeting. Professor Kerley also said that what mattered was how a particular relationship would be perceived by the public.

² The Code of Conduct for Councillors, produced by the Standards Commission for Scotland, sets out the standards of behaviour expected of councillors in Scotland.

³ Professor Kerley is Professor of Management at Queen Margaret University with a special interest in public service management.

Mr McCann and Mr Kean

The programme went on to say that Mr McCann, when a councillor, had sat on the Council's planning committee which had approved dozens of Mr Kean's planning proposals without declaring an interest. The reporter said that Mr McCann and Mr Kean were "*associates and have been for several years*" and described a photograph of Mr McCann with Mr Kean "*at a party*" during the 2005 General Election.

An extract of the recording of Mr McCann's acceptance speech in the 2010 General Election was also included at this point in the programme in which he was heard saying "*I know the difference between right and wrong and I know the difference between acceptable and unacceptable behaviour*". This was immediately followed by the reporter stating that Mr McCann had held his election victory celebrations at the 'Legends Bar' which was situated "*in a building owned by Mr Kean, although he's not the licensee [of the 'Legends Bar']*". The programme also stated that four months before the 2010 General Election, the Labour Party had held a fundraising event at the bar at the cost of more than £4,000. The reporter went on to say that the BBC had learned that Mr McCann's daughter also kept her horse on Mr Kean's farm which was less than a mile away from Mr McCann's constituency home. The reporter said that he had asked Mr McCann what the financial arrangement was for stabling the horse on Mr Kean's farm, as it was not "*mentioned in his register of members' interests*", but that Mr McCann had declined to answer.

The reporter then stated that Mr Eddie McAvo, the Leader of the Council, had confirmed to the BBC that Mr McCann and Mr Kean "*did indeed go back a long time*", but that it was a matter for an individual councillor to decide if any relationship should be declared or not. The programme went on to state that over the past three years, Mr Kean and his brother had donated more than £5,000 to the Labour Party.

The programme said that in 2005, Mr McCann, as a councillor, had "*strenuously*" supported an application for a pharmacy to be allowed to open in one of Mr Kean's vacant properties. At the time, there had been a rival application for a pharmacy a few streets away which Mr McCann claimed would cause traffic problems. The reporter said that the pharmacy application Mr McCann supported would have meant a financial benefit to Mr Kean if it had been successful.

The reporter went on to say that Mr McCann's interest in developments involving Mr Kean continued after he stopped being a councillor and became an MP. The reporter said that in September 2010, Mr McCann had "*vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds*". The programme explained that Mr Kean part-owned land that he wanted to sell to Tesco for the development of a supermarket, but that the planning application was up against a rival application from Scottish Enterprise who wanted to sell nearby land to ASDA. The programme stated that Scottish Enterprise was taking legal action against the Council over claims that the application relating to Mr Kean's land had received preferential treatment. The reporter described a letter, which he said the BBC had obtained under the Freedom of Information Act, from Mr McCann to Scottish Enterprise. The reporter said that Mr McCann's letter displayed a "*forensic interest in the deal and contains no fewer than 33 questions, one of which Scottish Enterprise refused to fully answer because it was commercially sensitive*". The reporter went on to say that Mr McCann now faced questions "*as to why he got himself involved in a planning application which could have been in Mr Kean's interest to fail*".

The programme then included further opinion of Professor Kerley who said that the manner of the letter and the way it was written:

“indicated some breakdown between an organisation [Scottish Enterprise] and an elected representative [Mr McCann], in this case a Westminster MP, who should actually be working together, and it’s hard to see how they can work together when they have that kind of letter being fired in”.

Part of a recorded interview with Mr Alex Neil, a Scottish National Party (“SNP”) Member of the Scottish Parliament (“MSP”) was also included in the programme. Mr Neil said that there was enough information made available to him by the BBC to indicate that *“there is a strong case for a criminal investigation to establish whether anything untoward has actually happened”*. Mr Neil’s comments were followed by an extract of a statement given to the programme makers by Mr McCann in which he rejected *“any allegation of impropriety whatsoever”* and that the programme maker’s claim that he had *“a relationship with Mr Kean is wildly exaggerated”*.

The programme then moved on to examine whether there was a wider problem with the planning process in Scotland.

Towards the end of the programme, the reporter stated that *“Mr Kean vigorously denies any wrongdoing in relation to any planning matter”* and that in May 2010 Mr Kean had commissioned an independent review of over fifty of his planning applications since 1995. The programme reported that the review had found:

“All these applications had been dealt with following the correct procedures and there is no indication of any preferential treatment or maladministration”.

The programme explained that the review had been carried out by the same agency who had also been instructed by the company in charge of developing the land part-owned by Mr Kean in favour of the supermarket planning application.

The programme concluded with the reporter saying that Mr McCann refused to speak to this local newspaper, the ‘East Kilbride News’, which published questions from his opponents about his relationship with Mr Kean. The reporter stated that Mr McCann was a columnist for a rival local newspaper, the ‘East Kilbride Mail’, which rented its office space from Mr Kean. The reporter said that, out of 45 shareholders, Mr Kean was the ninth biggest shareholder in the newspaper. The programme concluded by stating that the BBC would make its dossier available to any authority who wished to investigate the allegations.

Following the broadcast of the programme, Macdonalds Solicitors (“Mr Kean’s solicitors”) complained to Ofcom on Mr Kean’s behalf that he was treated unjustly or unfairly in the programme as broadcast.

The Complaint

Mr Kean’s case

In summary, Mr Kean’s solicitors complained that Mr Kean was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme portrayed Mr Kean unfairly in that it attacked his character and gave the impression that he used his connections with councillors to gain favours in the planning process, which if proved, would be a criminal offence. Mr Kean’s

solicitors said that Mr Kean was not currently subject to a criminal investigation in relation to this or any other matter. Mr Kean's solicitors also said that the programme had no journalistic legitimacy and that its content was calculated to be one-sided and prejudicial to cause maximum damage to Mr Kean which was unfair.

Mr Kean's solicitors complained that the programme included allegations about Mr Kean which were untrue, misleading and unfair. In particular:

- i) Although the programme stated otherwise, Mr Kean had no relationship with Mr McCann other than being an acquaintance. Mr Kean's solicitors said that the programme was completely misleading in this respect.
 - ii) The programme tried to link Mr Kean with Mr McCann by reporting that Mr McCann's parliamentary election celebrations were held in a public house owned by Mr Kean. This was misleading as Mr Kean has no connection with the business operation of the public house, which the BBC knew, and did not provide any hospitality.
 - iii) The programme called for a criminal investigation into Mr Kean's alleged relationships with councillors, despite containing no evidence of any impropriety whatsoever.
 - iv) The programme included a contribution from Professor Kerley, an expert on local government but not a legal expert on the interpretation of the Code of Conduct upon which he was asked to comment. Mr Kean's solicitors said that Professor Kerley's comments were misleading and inaccurate.
 - v) The programme claimed that Mr Kean was a significant shareholder in a local newspaper the 'East Kilbride Mail' and attempted to link him with Mr McCann who was a columnist for the paper. In fact, Mr Kean's solicitors said that Mr Kean held only four per cent of the issued share capital of the newspaper and so the programme was misleading and inaccurate in this regard.
 - vi) The programme implied that by making donations of over £5,000 to the Scottish Labour Party (which was an inaccurate figure), Mr Kean had gained influence in the local planning process. Mr Kean's solicitors said that it would have been reasonable for the programme to have put this modest political donation in context with other similar donations given by other business entities to other political parties.
- b) Mr Kean's solicitors said that the programme makers had been provided with a detailed response on behalf of Mr Kean to questions they had put to him two days before the broadcast of the programme. However, this response was not used in the programme other than a mention of a denial by Mr Kean to the allegations made against him.

The BBC's case

In summary, the BBC responded to the complaint of unjust or unfair treatment as follows:

- a) The BBC said that it did not accept that Mr Kean was portrayed unfairly in the programme or that any impression was given that he had used "*connections*" to gain favours in the planning process. The BBC also said that the programme

made no allegations about improper behaviour by Mr Kean. Rather, the BBC noted that the programme had focussed upon whether the fact of his relationship with Mr McCann should have been declared by Mr McCann in the course of considering planning applications brought by Mr Kean. The BBC said that this was made clear by the questions put to Professor Kerley in the programme and his responses to them in relation to the Code of Conduct (see sub-head iv) below). The BBC said that it believed that the programme was clear to listeners that the matter under investigation was Mr McCann's failure to declare his relationship with Mr Kean rather than allegations that the relationship was in any way improper.

In response to the sub-heads of complaint, the BBC said that:

- i) The BBC said that it did not agree that the relationship between Mr Kean and Mr McCann could accurately be described as a "mere acquaintanceship". It said that the programme had produced testimony from Mr McAvoy, the Leader of the Council, who had told the programme makers that Mr Kean and Mr McCann "*go back a long time*". The BBC also said that the programme provided evidence that Mr McCann's daughter's horse was stabled on Mr Kean's farm and had stated that Mr McCann had declined to provide details as to whether this was a commercial arrangement or whether he derived any financial benefit from it. The BBC said that the programme also produced several examples of events which suggested that Mr McCann and Mr Kean enjoyed a social relationship. Taking this into account, the BBC said that it believed that the programme was justified in asking if the relationship was such that Mr McCann should have declared it when he sat on the Council's Planning Committee. The BBC said that it did not accept that the report, by raising the question, gave rise to any unfairness to Mr Kean against whom no allegations of impropriety were made.
- ii) The BBC said that the programme had stated that Mr McCann's election celebrations had taken place in "*a building owned by Mr Kean*" which was a matter of fact. The programme did not suggest that Mr Kean had provided hospitality. In any case, even if inaccurate, the BBC said that the statement could only give rise to unfairness to Mr Kean if it were the case that there was no relationship between him and Mr McCann. The BBC said that there was other evidence of the relationship between the two men.
- iii) The BBC said that the programme did not call for a criminal investigation. It said that the programme reported that Mr Neil was calling for an investigation. Even this, however, the BBC said was suitably "caveated" so that no unfair impression might be given that there was evidence of impropriety. The BBC said that Mr Neil had said that an investigation, prompted by Mr McCann's failure to declare the relationship rather than anything alleged of Mr Kean, was necessary to establish whether there had been impropriety or not, and that Mr Neil had clearly asserted that he was not alleging that there had been.
- iv) The BBC said that Professor Kerley was an acknowledged and respected expert on local government. It said that if Mr Kean believed that view to be misleading and inaccurate, the BBC said that it would be incumbent upon him to specify the respects in which he believed that to be the case and the expert authorities upon which he based his view. In the absence of further detail, the BBC said that it did not feel able to comment further.

- v) The BBC said that the programme did not say that Mr Kean was one of the newspaper's major shareholders. The BBC said that it believed that Mr Kean's significance as a shareholder was not based simply on the number of shares he held, but on other factors such as his high public profile locally and his business interests. For example, the BBC said that Mr Kean owned the building within which the 'East Kilbride Mail' rented its offices. The BBC said that it did not believe that someone who owned four per cent of an enterprise could be described as an "insignificant" stakeholder.
- vi) The BBC said that the programme did not say that Mr Kean had made donations of more than £5,000 to the Labour Party. Rather, it said that:

"Over the last three years Mr Kean and his brother have donated more than £5,000 to the Labour Party".

The BBC said that the figure given in the programme was broadly accurate. It said that the exact figure found in the Electoral Commission records was £5260. The BBC said that nowhere in the programme was it suggested that the donations led to Mr Kean gaining influence over the planning processes of the Council and said that it did not believe that a comparison with other small donations made by other businesses to political parties would have been relevant to the issues under consideration.

- b) In response to the complaint that a detailed response from Mr Kean's solicitors was not used in the programme, other than a mention of a denial by Mr Kean to the allegations made against him, the BBC said that the programme made no allegations of impropriety against Mr Kean and, therefore there was no requirement for the programme makers to extend a right of reply to any specific issues relating to him. However, for the avoidance of any doubt, the BBC said that the programme makers had felt it appropriate that Mr Kean's assurance that he had been guilty of no improper behaviour should be included in the programme.

The complainant's comments

In summary, Mr Kean's solicitors commented on the BBC's statement as follows:

- a) In response to the BBC's statement, Mr Kean's solicitors said that the programme's introduction had stated that there were calls for an enquiry into the relationship between *"this Lanarkshire MP [Mr McCann] and a local businessman's [Mr Kean] planning applications"* and that there had been a call for a *"criminal enquiry into the planning processes of one of Scotland's biggest councils"*. The clear implication of these comments, Mr Kean's solicitor's said, was that both Mr McCann and Mr Kean should be subject to a criminal enquiry.

In relation to the sub-heads of complaint, Mr Kean's solicitors said as follows:

- i) Mr Kean's solicitors said that Mr McAvoy's quote was not evidence of friendship, nor was the fact that two neighbours' daughters had arrangements regarding the stabling of their horses. The programme did not produce examples of events which suggested that Mr Kean and Mr McCann enjoyed a social relationship. The programme instead referred to a photograph from five years ago taken at the election of Mr McCann's predecessor which was attended by hundreds of Labour Party supporters. Mr Kean's solicitors said

that the programme attempted to imply a much closer relationship between the two men than that which existed in reality.

- ii) Mr Kean's solicitors said that the programme confirmed that Mr McCann's election celebrations had taken place in a "*building owned by Mr Kean*". It was a fact that the building in which the 'Legends Bar' was situated was owned by Mr Kean. Mr Kean's solicitors said that it was not clear why that would be evidence of any connection or friendship. In particular, Mr Kean's solicitors said that Mr Kean owned other properties rented out as restaurants, for example, though that did not mean that he had a connection or a friendship with anyone who used the facilities provided by the operators of the businesses run from the premises.
- iii) Mr Kean's solicitors said that the quote attributed to Mr Neil was misleadingly incomplete. Mr Neil had actually said that "enough information has been made available by the BBC that there is a strong case for criminal investigation". Mr Kean's solicitors said that Mr Neil was a member of the SNP and was therefore unlikely to be an impartial purveyor of whatever information was provided to him by the programme makers. The further reference to a criminal investigation, clearly and at the very least implied that Mr Kean should be one of the parties subject to the criminal investigation.
- iv) Mr Kean's solicitors said that although Professor Kerley's qualifications were not disputed, he was a former member of the Labour Party and so was not impartial. Mr Kean's solicitors said that Professor Kerley was not legally qualified and the questions which he was asked about the application of the Code of Conduct clearly required a legal response. The Code of Conduct did not mention the word "friendship" but Professor Kerley's contribution referred to it several times and he stated that all friendships must be declared under the terms of the Code of Conduct. Mr Kean's solicitors said that this was not the case and that Professor Kerley's responses were elicited specifically by the BBC to cement the case that they were building against Mr Kean and Mr McCann.
- v) Mr Kean's solicitors said that to describe Mr Kean as a shareholder would have been accurate, but the description given by the BBC was inaccurate. In any event, Mr Kean's solicitors said that the implication was to create a further link between Mr Kean and Mr McCann. However, such a link would not be evidence of friendship or an acquaintanceship. Mr Kean's solicitors said that there was nothing unusual about the fact that a local businessman held a small shareholding in a local newspaper to which the local MP made regular contributions.
- vi) Mr Kean's solicitors said that the clear implication of the programme was that the donations made by Mr Kean (and his brother) were linked to irregularities in the Council planning process and that although it had been pointed out to the BBC prior to the broadcast of the programme that the Labour Party had not held a majority on the Council or its Planning Committee for several years. Mr Kean's solicitors said that this fact was conveniently omitted from the programme. The donations made by Mr Kean and his brother had been similar in amount to dozens of donations made by other local businesses. Mr Kean's solicitors said that it was a clear attempt by the BBC to make a relatively modest donation appear to be a very significant part of a much bigger "scandal".

- b) Mr Kean's solicitors said that the programme had suggested impropriety on the part of Mr Kean by implications and innuendo. Mr Kean's solicitors said that the full text of the response to the programme makers sent on behalf of Mr Kean the day before the broadcast revealed that the BBC had been invited to investigate the whole story relating to the supermarket planning applications and that it had refused, or omitted, to do so.

The BBC's final response

In summary, the BBC responded to the complainant's comments as follows:

- a) The BBC said that it was not the case that the BBC called for a criminal investigation in any of the broadcasts complained of. The BBC said that the programme merely reported comments made on that particular point by a senior Scottish politician [i.e. Mr Neil].

In relation to the sub-heads of complaint:

- i) The BBC said that the complainant's contention that *"the fact that two neighbour's daughters have made arrangements regarding their horses"* was not evidence of a relationship failed to recognise that an arrangement, involving the stabling of Mr McCann's daughter's horse on Mr Kean's land, inevitably carried with it the possibility of a financial benefit. The BBC said that the question was not whether there was any arrangement between the daughters, but whether the arrangement was of financial benefit to Mr McCann and/or his immediate family. The BBC said that it believed that the other evidence adduced in the programme as to a relationship between the two men was compelling.
- ii) The BBC said that the reference to the ownership of the building in which the 'Legends Bar' was situated provided further evidence that a relationship existed between the two men which should have been declared by Mr McCann.
- iii) The BBC said that this matter was not part of the original complaint made on behalf of Mr Kean and was not part of the complaint as entertained by Ofcom. Furthermore, the complainant has not specified how the manner in which Mr Neil's remarks were edited may have been unfair. As such, the BBC said that it was unable to comment further. The BBC reiterated that it did not call for a criminal investigation; it reported that a prominent member of the SNP, Mr Neil, was making such a call.
- iv) The BBC said that it noted that the complainant did not dispute Professor Kerley's credentials, which clearly showed his expertise in local government matters and which, it believed, qualified him to offer expert comment on the issues raised in the report. The BBC said that it did not agree that a *"legal response"* was required in commenting on the Code of Conduct. The BBC said that it did not agree that the fact that Professor Kerley did not hold legal qualifications meant that he was unqualified to comment on the Code of Conduct.
- v) The BBC said that it did not agree that the description used in the programme was incorrect for the reasons set out in its first statement. It said that it represented additional evidence that a relationship existed between the two

men and raised the question as to whether the relationship with Mr Kean should have been declared by Mr McCann.

- vi) The BBC said that the programme did not suggest or imply that donations made by Mr Kean (and his brother) were linked to irregularities in the planning processes of Council. The BBC said that the central question raised by the programme was whether the relationship which undoubtedly existed between Mr McCann and Mr Kean should have been declared by Mr McCann when, as an elected councillor, he was considering matters which had a bearing on the interests of Mr Kean.
- b) The BBC said that coverage of this particular matter (i.e. the supermarket planning applications) in the programme complained of was not part of the original complaint or part of the complaint as entertained by Ofcom. However, the BBC pointed out that the programme in question was not primarily about the detailed history of this, or any other, planning application. The BBC said that the programme was about the existence of a relationship between Mr Kean and Mr McCann and whether that relationship should have been declared by Mr McCann.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and written submissions from both parties.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the heads, and individual sub-heads, of the complaint detailed below.

- a) Ofcom first considered Mr Kean's complaint that the programme portrayed him unfairly in that it attacked his character and gave the impression that he used his connections with councillors to gain favours in the planning process.

When considering this head of complaint, and the individual sub-heads of complaint below, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr Kean (as outlined in Practice 7.9 of the Code).

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest.

However, in presenting material that could be regarded as amounting to significant allegations, reasonable care must be taken not to do so in a manner that does not cause unfairness to individuals or organisations. In this particular case, Ofcom considered that it was in the public interest for the programme to report on the issues such as those covered in it, but that this needed to be consistent with the requirements of the Code.

Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Mr Kean was portrayed unfairly in the programme as broadcast.

- i) Ofcom considered the complaint that, although the programme stated otherwise, Mr Kean had no relationship with Mr McCann other than being an acquaintance.

Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the references to Mr Kean having a relationship with Mr McCann were presented in a way that was unfair to Mr Kean.

Ofcom considered that the purpose of the programme was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. Ofcom noted that the programme presented a number of pieces of evidence that aimed to demonstrate that a relationship existed between Mr McCann and Mr Kean. In particular, Ofcom noted that the programme reported that both men had been "*associates*" for several years and referred to a photograph of them together at a Labour Party celebration in 2005. It also reported that: Mr McCann had held his election celebrations at a bar situated in a building owned by Mr Kean (see sub-head ii) below); Mr McCann's daughter stabled her horse on Mr Kean's farm; and, Mr McCann was a regular contributor to a local newspaper that rented its offices in a building owned by Mr Kean and in which Mr Kean was a shareholder (see sub-head v) below). Ofcom also noted that the programme reported the testimony of the Leader of the Council, Mr McAvoy, that Mr Kean and Mr McCann "*go back a long time*".

Ofcom considered that the pieces of evidence presented in the programme were used primarily to demonstrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and may have been such that Mr McCann may have been required to declare it when he was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and to refer to the pieces of evidence in the programme to illustrate the extent of the relationship between Mr Kean and Mr McCann.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann. Towards the end of the report, a summary of a statement made on Mr Kean's behalf by his solicitors was included in the programme which stated that "*Mr Kean vigorously denies any wrongdoing in relation to any planning matter*". Although brief, Ofcom took the view that the scope of

the statement included the references made in the programme to the pieces of evidence aiming to establish the extent of his relationship with Mr McCann and that its presentation in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom considered that the inclusion of the pieces of evidence detailed above formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that the pieces of evidence did not, in themselves, suggest any improper behaviour on Mr Kean's part and that listeners would have been in a position to decide for themselves the extent of Mr Kean's and Mr McCann's relationship and whether it was that of an "acquaintance" or something more. Ofcom did not consider that the programme was misleading in this respect.

- ii) Ofcom considered the complaint that the programme tried to link Mr Kean with Mr McCann by reporting that Mr McCann's General Election celebrations were held in a public house owned by Mr Kean.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to Mr Kean owning the building in which Mr McCann held his election victory party was presented in a way that was unfair to Mr Kean.

Ofcom noted the following commentary made by the programme's reporter that accompanied footage of the exterior of the 'Legends Bar':

"The BBC understands he held his late night victory party in Legends Bar, a building owned by Mr Kean, although he's not the licensee".

Ofcom noted that the programme made it clear that Mr Kean owned the building rather than being the owner of the business that was situated in it (i.e. the 'Legends Bar').

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. As already considered in sub-head i) above, the programme presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One piece of evidence was the programme's reference to Mr McCann's election victory celebrations being held in a building that was owned by Mr Kean. In this context, Ofcom considered that the reference to the 'Legends Bar' was used primarily to demonstrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and that the relationship may have been such that Mr McCann may have been required to declare it when Mr McCann was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and to make reference to Mr Kean's ownership of the building in which the bar was situated in. It was clear to Ofcom, as it would have been to listeners from the programme, that Mr Kean

was stated as not being the licensee of the bar, but rather the owner of the building.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the reference to Mr Kean's ownership of the building in which the 'Legend's bar' was situated and that its presentation in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom took the view that the reference to the 'Legends Bar', along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that listeners would have understood that the reference to Mr McCann's election victory celebrations being held in a building owned by Mr Kean did not, in itself, suggest any improper behaviour on Mr Kean's part. Ofcom also did not consider that the programme was misleading in this respect.

- iii) Ofcom considered the complaint that the programme called for a criminal investigation into Mr Kean's alleged relationships with councillors, despite containing no evidence of any impropriety whatsoever.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to a call for "*a criminal investigation*" in the programme was presented in a way that was unfair to Mr Kean.

Ofcom noted that the references to "*a criminal investigation*" related to the allegations about the relationship between Mr Kean and Mr McCann were made in the programme by one of the contributors to it rather than by the programme's reporter. It noted that Mr Neil was first heard at the beginning of the programme saying:

"...my view is there is enough information made available now by the BBC that there is a strong case for a criminal investigation".

Later in the programme, Ofcom noted that a longer extract of Mr Neil's contribution was included in which he said:

Mr Neil: *"Very clearly there are legitimate questions to be asked and to be answered, and my view is there is enough information made available now, by the BBC, that there is a strong case for a criminal investigation to establish whether anything untoward has actually happened. I'm not saying there has or there hasn't, but I think to clear the air and to make sure that the system is above board in South Lanarkshire, there needs to be a criminal investigation to establish the facts".*

Ofcom went on to consider whether the inclusion of Mr Neil's contribution to the programme resulted in unfairness to Mr Kean. Ofcom noted that Mr Neil was introduced by the reporter as a "*Senior SNP politician*". Ofcom considered that while Mr Neil was giving his personal opinion on the how he believed the allegations made in the programme about Mr McCann's relationship with Mr Kean should be taken forward (i.e. a "*criminal investigation*") listeners would have understood that the comments were being made by a senior politician belonging to a rival political party to that which Mr McCann belonged and that they would have been able to form their own judgement on the partiality, or otherwise, of Mr Neil's views.

Ofcom also noted that Mr Neil's had used the phrases "*...to establish whether anything untoward has actually happened*" and "*I'm not saying there has or there hasn't...*". Ofcom considered that the language used by Mr Neil in his contribution was such that listeners would have been left in little doubt that he was not stating definitively that there was any evidence of criminal activity, but was making the point that in the interests of openness and transparency, a police investigation should take place to "*establish the facts*".

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the comments made by Mr Neil and the programme's presenter and that its presentation of in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Taking these factors above into account, Ofcom took the view that Mr Neil's comments had suggested that he believed that there were sufficient reasons for a "*criminal investigation*" to "*clear the air*". Ofcom considered that the programme had presented Mr Neil's comments as his own view and that was made clear to viewers that Mr Kean "*vigorously denies*" any allegation of wrongdoing. It also considered that the presenter's comments had been a fair summary of Mr Neil's position. In these circumstances, Ofcom considered that the broadcaster had taken reasonable care when presenting Mr Neil's comments not to do so in a way that created unfairness to Mr Kean.

- iv) Ofcom considered the complaint that the programme included a contribution from Professor Kerley whose comments on the Code of Conduct were misleading and inaccurate.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. It is important to note that Ofcom's role is not to establish whether the substance of Professor Kerley's contribution to the programme was correct or not, but to determine whether, in broadcasting his opinions, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Mr Kean. In doing so, Ofcom considered the basis for Professor Kerley's opinion as expressed in the programme and whether the context of the programme's presentation of his opinion resulted in unfairness.

Ofcom noted the following extract from the programme in which comments made by Professor Kerley in the programme about the Code of Conduct and the declaration of interests were included:

Professor Kerley: *"You're a member the committee that's deciding, you're ultimately a member of the Council that might decide something, you simply say, I have an interest in this because; it may be you have an investment, it may be it's just a friendship and it would be wise to say, I have an interest in this, I am a friend of the applicant for this, I will take no part in this discussion. You either leave the room or you literally kind of push yourself back from the Committee table and you have it recorded in the minutes".*

Reporter: *"Even if you never talk to that person about this development of planning, or council matters, should you still declare an interest?"*

Professor Kerley: *"Oh absolutely. I mean it's not the conversation that goes on between two of you or three of you in private, it's how it's perceived by the people of that, that council are, the people who elect you. I mean you can't prevent friendship but I think in terms of what the electorate would expect, what citizens would expect, that you just simply say, I can't be party to this decision because I have an interest in this".*

Reporter: *"So it's not just then about justice being done, it's about it being seen [to be done]?"*

Professor Kerley: *"Yes, yes, absolutely".*

Ofcom noted that Professor Kerley's comments followed immediately after the reporter had summarised the Code of Conduct and had questioned how close a councillor should be to someone submitting a planning application before declaring an interest. Professor Kerley was introduced in the programme by the reporter as *"Professor Kerley from Queen Margaret University"*. Ofcom took the view that Professor Kerley was presented as an "expert" and that listeners would have understood that the purpose of his contribution to the programme was to express his expert opinion on the meaning of the Code of Conduct in relation to the declaration of interests and whether it would be appropriate for a councillor to declare an interest if he/she was friends with an applicant to a council committee. Based upon Professor Kerley's professional expertise in the subject, which was signposted to listeners by the reporter's introduction of him, Ofcom considered that it was legitimate for the programme to include Professor Kerley's expert opinion. Ofcom took the view that the fact that Professor Kerley was not legally qualified was irrelevant and did not impact on his ability to interpret the provisions of the Code of Conduct.

In these circumstances, Ofcom went on to consider whether or not the presentation of Professor Kerley's opinion in the programme resulted in any unfairness to Mr Kean. Ofcom again noted that Professor Kerley was shown expressing his expert opinion on how the Code of Conduct should be interpreted. It also noted that Professor Kerley had used the phrase *"it would be wise"*, in giving his view on what action a councillor should take if they decided to declare that they were friends with an applicant and that he

emphasised the importance of how a particular interest (or in this case, friendship) would be perceived by a member of the public when deciding whether or not to declare that interest. Ofcom considered that the language used by Professor Kerley in giving his opinion was couched in terms that would have left listeners in little doubt that his comments constituted his opinion only and were not directed specifically at the circumstances that the programme later alleged in relation to Mr Kean and Mr McCann. In Ofcom view, the presentation of Professor Kerley and the nature and content of his comments would have made it clear to viewers that he was an expert giving an informed opinion on a given set of factors relating to the application of the Code of Conduct.

Taking into account all the factors referred to above, Ofcom considered that manner in which the Code of Conduct was summarised by the reporter and the presentation of Professor Kerley's contribution in relation the interpretation of the Code was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding to the Code of Conduct in a way that was unfair to Mr Kean.

- v) Ofcom considered the complaint that the programme claimed that Mr Kean was a significant shareholder of a local newspaper the 'East Kilbride Mail' and attempted to link him with Mr McCann who was a columnist for the paper.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to Mr Kean being a shareholder of the newspaper was presented in a way that was unfair to Mr Kean.

In considering this particular sub-head of complaint, Ofcom noted the comments made by the reporter in the programme that related to Mr Kean and the newspaper:

"In East Kilbride Mr McCann refuses to speak to his local newspaper, the EK News ['East Kilbride News'], which published questions from opponents about his relationship with Mr Kean. Mr McCann does however have a good relationship with the rival newspaper, the EK Mail, and writes a column for the free sheet. The EK Mail ['East Kilbride Mail'] rents its office space from Mr Kean, who, out of 45 shareholders in the paper, is the ninth biggest".

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to the 'East Kilbride Mail' which rented office space from one of its shareholders, Mr Kean, and published a regular contribution by Mr McCann. In this context, Ofcom considered that the reference was used primarily to demonstrate the programme's assertion that a relationship between Mr McCann and Mr Kean did exist. Ofcom considered

that the programme did not distort or misrepresent the material facts in relation to Mr Kean as a shareholder in the newspaper and that it was legitimate for the programme to explore whether there a connection between Mr Kean and Mr McCann through its reference to the 'East Kilbride Mail' newspaper.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the comments relating to Mr Kean's involvement with the 'East Kilbride Mail' and that its presentation of in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom took the view that the reference to Mr McCann's relationship with the 'East Kilbride Mail' newspaper was included in the programme to demonstrate a connection between Mr McCann (who regularly contributed to the 'East Kilbride Mail') and Mr Kean (who not only owned the offices that the 'East Kilbride Mail' rented, but was also a shareholder in the newspaper). Ofcom considered that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that a relationship between the two men existed and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Used in this context, Ofcom considered that listeners would have understood the purpose of its inclusion and that the reference to Mr Kean being the "*ninth biggest*" shareholder did not, in itself, suggest any improper behaviour on Mr Kean's part or mislead listeners in a way that was unfair to him.

- vi) Ofcom considered the complaint that the programme implied that by making donations of over £5,000 to the Labour Party Mr Kean had gained inappropriate influence in the local planning process.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to the donations to the Labour Party in the programme was presented in a way that was unfair to Mr Kean.

Ofcom noted the following commentary made by the programme's reporter that related to donations made by Mr Kean and his brother to the Labour Party:

"Over the last three years Mr Kean and his brother have donated more than £5,000 to the Labour Party".

Ofcom noted from the BBC's submissions that the actual figure was £5,260, a figure that was not disputed by Mr Kean's solicitors. Ofcom considered that the programme's reference to the donations amounting to "*more than £5,000*" was a fair reflection of the amount.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations

about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to demonstrate that a relationship existed between Mr McCann and Mr Kean. One piece of evidence was a reference to the fact that both Mr Kean and his brother had donated more than £5,000 to the Labour Party. Ofcom noted the BBC's submission that the reference to the donations was used to show the existence of a relationship between Mr Kean and the local Labour Party of which Mr McCann is a prominent figure.

In this context, Ofcom considered that the reference to Mr Kean's donations was used in the programme to support the programme's assertion that a relationship between Mr McCann and Mr Kean did exist (in this case through the local Labour Party) and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and the extent of the relationship between Mr Kean and Mr McCann.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the reference to the donations he had made to the Labour Party and that its presentation in the programme would have left viewers in no doubt that he refuted any allegation of impropriety.

Ofcom considered that the reference to the donations in the programme attempted to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that listeners would have understood that the reference to the donations did not, in itself, suggest any improper behaviour on Mr Kean's part or mislead viewers in a way that was unfair to him.

Having considered each of the sub-heads to the complaint made by Mr Kean's solicitors that the programme portrayed him unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr Kean unfairly. Ofcom also considered that the broadcaster had presented a summary of the statement made by Mr Kean's solicitors in response to the allegations (see sub-head i) above) towards the end of the report. Ofcom took the view that Mr Kean's unequivocal denial of any wrongdoing in relation to any planning matter made clear his point of view about the allegations made in the programme and that Mr Kean's position was fairly summarised and presented in a manner that enabled listeners to reach their own conclusions on the issues raised in the programme.

Ofcom therefore found no unfairness to Mr Kean in this respect.

- b) Ofcom then considered Mr Kean's complaint that the response his solicitors had given to the programme makers before the broadcast of the programme was not used other than to mention a denial of the allegations made against him.

When considering this head of complaint, Ofcom again had regard to whether the portrayal of Mr Kean was consistent with the broadcaster's obligation to ensure that material facts had not been presented, disregarded or omitted in a way which was unfair to him (as outlined in Practice 7.9 of the Code). Also it took into consideration Practice 7.13 of the Code which provides that where it is appropriate to represent the views of a person that is not participating in the programme this must be done in a fair manner.

Ofcom noted from the submission of both parties to the complaint that the programme makers had written to Mr Kean on 21 February 2011 inviting him to respond to allegations that would be made in a series of news reports about his relationship with Mr McCann and Councillor Docherty, and the implication of these relationships when it planning application in which Mr Kean or his companies were involved came before the Council's Planning Committee on which Mr McCann and Councillor Docherty had sat. On 22 February 2011, Ofcom noted that Mr Kean's solicitors provided the programme makers with an email response from Mr Kean in which a number of specific points were addressed and referred to. Ofcom noted that this email contained the following sentence:

"My client [Mr Kean] vigorously denies any wrongdoing in connection with securing any planning permission from any Planning Authority".

Ofcom then took note of the relevant part of the programme in which Mr Kean's solicitors' statement was summarised and presented by the reporter:

"Mr Kean vigorously denies any wrongdoing in relation to any planning matter".

Again, Ofcom recognises that programme makers and broadcasters can legitimately select and edit material provided to it by way of a written statement for inclusion in a programme. This is an editorial decision and it would be unreasonable, in Ofcom's view, for an individual to expect a broadcaster to cede editorial control or to include a lengthy written statement in full. Broadcaster must, however, ensure that where it is appropriate to represent the views of a person not participating in a programme that it is done in a fair manner.

In the particular circumstances of this case, Ofcom noted that the statement provided on behalf of Mr Kean by his solicitors was edited and summarised in the programme as quoted above. Ofcom considered that although the programme makers had decided not to present the statement in its entirety, the edited extract of the response included in the programme adequately set out, in Ofcom's view, Mr Kean's position regarding the issues raised by the programme makers in a way that would have left viewers in no doubt that Mr Kean denied any wrongdoing in connection with securing planning permission.

Taking all the factors above into account, Ofcom was satisfied that Mr Kean's solicitors' response made on his behalf, although summarised and edited, adequately reflected Mr Kean's denial of any wrongdoing in relation to securing planning permission. Ofcom concluded that the statement was presented in a manner that did not mislead listeners or portray Mr Kean position unfairly.

Ofcom therefore found no unfairness to Mr Kean in this regard.

Accordingly, Ofcom has not upheld Mr Kean's complaint of unjust or unfair treatment in the programme as broadcast.

Not Upheld

Complaint by Mr James Kean

Newsnight Scotland, BBC2 Scotland, 23 February 2011

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy in the making and broadcast of the programme by Mr James Kean.

This programme included a report of approximately seven minutes in duration that centred on allegations that Councillor Jim Docherty and Mr Michael McCann MP improperly failed to declare their relationships with Mr James Kean, a property developer and Labour Party donor, when Councillor Docherty and Mr McCann sat as councillors on South Lanarkshire Council's Planning Committee. The report included a number of examples that it alleged illustrated that a relationship existed between the men. Footage of Mr Kean's farm was shown in the programme.

Mr Kean's solicitors complained to Ofcom on his behalf that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the making and broadcast of the programme.

Ofcom found the following:

- The broadcaster had taken reasonable care to satisfy itself that the material facts, including Mr Kean's denial of any wrongdoing, were not presented unfairly, omitted or disregarded in a way that portrayed Mr Kean unfairly in the programme as broadcast.
- Although Mr Kean had an expectation of privacy, albeit limited, in relation to the filming of his private residence and the subsequent inclusion of footage of his home in the programme without his consent, Ofcom concluded that the broadcaster's right to freedom of expression outweighed the intrusion into his privacy. Therefore, there was no unwarranted infringement of Mr Kean's privacy in the making or in the broadcast of the programme.

Introduction

On 23 February 2011 at 22:30 hours, BBC2 Scotland broadcast an edition of its regional news and current affairs programme *Newsnight Scotland*. This edition included a report of approximately seven minutes duration that centred on allegations that Mr Michael McCann MP¹ had failed to declare his relationship with a local property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on the Planning Committee of South Lanarkshire Council ("the Council").

The report began with footage of Mr Kean playing in a charity football match to the accompanying commentary:

¹ Mr McCann is the Labour Party Member of Parliament for the constituency of East Kilbride, Strathaven and Lesmahagow.

“James Kean is a millionaire property developer and Labour donor who rubs shoulders with stars like Ally McCoist. But it’s his relationships with some South Lanarkshire politicians which have caused concern”.

Councillor Docherty and Mr Kean

The programme went on to show a photograph of Mr Kean along with a photograph of Councillor Jim Docherty, a Labour councillor in South Lanarkshire. The programme said that the two men had been good friends for many years and that while Councillor Docherty sat on the Council’s Planning Committee when it approved dozens of planning applications from Mr Kean, although he had never declared his friendship with Mr Kean. Furthermore, the reporter said that Mr Kean was godfather to Councillor Docherty’s child. Later into the programme, the reporter also stated that Councillor Docherty had bought his house from Mr Kean.

The reporter then questioned how close councillors sitting on planning committees had to be to someone submitting a planning application before declaring an interest. The programme looked at the provisions of the Code of Conduct for Councillors² (“the Code of Conduct”) which, the reporter noted, *“says that councillors must declare any interest which could potentially affect their discussions and decision making”*. The programme then included the following quote from the Code of Conduct:

“the test is whether a member of the public, acting reasonably, would think that a particular interest could influence your role as a councillor”.

Interview footage of Professor Richard Kerley³ of Queen Margaret University Edinburgh was then included in the programme. Professor Kerley explained that if a councillor on a committee had a financial interest in a particular planning application or had a friend who was an applicant, it would be wise for that councillor to declare that interest and either leave the committee room, or physically push themselves away from the table and make it clear that they would take no part in the discussion and have this recorded in the minutes of the meeting.

Mr McCann and Mr Kean

The programme went on to state that Mr McCann, when a former South Lanarkshire councillor, had, *“like Mr Docherty”*, sat on the Council’s Planning Committee when it had approved dozens of Mr Kean’s planning proposals without declaring an interest. The reporter said that Mr McCann and Mr Kean were *“associates and have been for several years”* and a photograph was shown of Mr McCann with Mr Kean in 2005 when Mr McCann was the election agent for Mr Adam Ingram, the former Labour MP for East Kilbride, Strathaven and Lesmahagow.

An extract of footage of Mr McCann’s 2010 General Election acceptance speech was shown at this point of the programme in which he was shown saying *“I know the difference between right and wrong and I know the difference between acceptable and unacceptable behaviour”*. This was immediately followed by the reporter stating that Mr McCann had held his election victory celebrations at the ‘Legends Bar’ which was situated in a building owned by Mr Kean. The reporter went on to say that the

² The Code of Conduct for Councillors, produced by the Standards Commission for Scotland, sets out the standards of behaviour expected of councillors in Scotland.

³ Professor Kerley is Professor of Management at Queen Margaret University with a special interest in public service management.

BBC had learned that Mr McCann's daughter also kept her horse on Mr Kean's farm which was less than a mile away from Mr McCann's constituency home. This was accompanied by video footage of Mr Kean's farm, Mr McCann's constituency home and Councillor Docherty's home. The reporter said that he had asked Mr McCann what the financial arrangement was for stabling the horse on Mr Kean's farm as it was not "*mentioned in his register of members' interests*", but that Mr McCann had declined to answer.

The reporter then stated that Mr Eddie McAvoy, the Leader of the Council, had confirmed to the BBC that Mr McCann and Mr Kean "*did indeed go back a long time*", but that it was a matter for an individual councillor to decide if any relationship should be declared or not. The programme went on to state that over the past three years, Mr Kean and his brother had donated more than £5,000 to the Labour Party.

The reporter went on to say that Mr McCann's interest in developments involving Mr Kean continued when he became an MP. The reporter said that in September 2010, Mr McCann had "*vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds*". The programme explained that Mr Kean owned land that he wanted to sell to Tesco, but that his planning application was up against a rival application from Scottish Enterprise who wanted to sell nearby land to ASDA. The programme showed a letter, which the reporter said had been obtained by the BBC under the Freedom of Information Act, from Mr McCann to Scottish Enterprise. The reporter said that Mr McCann's letter displayed a "*forensic interest in the deal and contains no fewer than 33 questions, one of which Scottish Enterprise refused to fully answer because it was commercially sensitive*". The reporter went on to say that Mr McCann now faced questions "*as to why he got himself involved in a planning application which could have been in Mr Kean's interest to fail*".

The programme then showed interview footage of Mr Alex Neil, a Scottish National Party ("SNP") Member of the Scottish Parliament ("MSP"), who said that there was enough information made available to him by the BBC to indicate that "*there is a strong case for a criminal investigation to establish whether anything untoward has actually happened*". Mr Neil's comments were followed by an extract of a statement given to the programme by Mr McCann in which he rejected "*any allegation of impropriety whatsoever*" and that the programme maker's claim that he had "*a relationship with Mr Kean is wildly exaggerated*".

The programme also stated that Mr Kean "*vigorously denies any wrongdoing in relation to any planning matter*".

The report concluded by stating that Mr McCann refused to speak to one local newspaper, the 'East Kilbride News', which published questions from his opponents about his relationship with Mr Kean. It also stated that Mr McCann was a columnist for a rival local newspaper, the 'East Kilbride Mail', which rented its office space from Mr Kean who, the reporter claimed, was one of the newspaper's significant shareholders.

Following the broadcast of the programme, Macdonalds Solicitors ("Mr Kean's solicitors") complained to Ofcom on Mr Kean's behalf that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the making and broadcast of the programme.

The Complaint

Mr Kean's case

Unjust or unfair treatment

In summary, Mr Kean's solicitors complained that Mr Kean was treated unjustly or unfairly in the programme as broadcast in that:

- a) The programme portrayed Mr Kean unfairly in that it attacked his character and gave the impression that he used his connections with councillors to gain favours in the planning process, which if proved, would be a criminal offence. Mr Kean's solicitors said that Mr Kean was not currently subject to a criminal investigation in relation to this or any other matter. Mr Kean's solicitors also said that the programme had no journalistic legitimacy and that its content was calculated to be one-sided and prejudicial to cause maximum damage to Mr Kean which was unfair.

Mr Kean's solicitors complained that the programme included allegations about Mr Kean which were untrue, misleading and unfair. In particular:

- i) Although the programme stated otherwise, Mr Kean had no relationship with Mr McCann other than being an acquaintance. Mr Kean's solicitors said that the programme was completely misleading in this respect.
 - ii) The programme tried to link Mr Kean with Mr McCann by reporting that Mr McCann's parliamentary election celebrations were held in a public house owned by Mr Kean. This was misleading as Mr Kean has no connection with the business operation of the public house, which the BBC knew, and did not provide any hospitality.
 - iii) The programme called for a criminal investigation into Mr Kean's alleged relationships with councillors, despite containing no evidence of any impropriety whatsoever.
 - iv) The programme included a contribution from Professor Kerley, an expert on local government but not a legal expert on the interpretation of the Code of Conduct upon which he was asked to comment. Mr Kean's solicitors said that Professor Kerley's comments were misleading and inaccurate.
 - v) The programme claimed that Mr Kean was a significant shareholder in a local newspaper the 'East Kilbride Mail' and attempted to link him with Mr McCann who was a columnist for the paper. In fact, Mr Kean's solicitors said that Mr Kean held only four per cent of the issued share capital of the newspaper and so the programme was misleading and inaccurate in this regard.
 - vi) The programme implied that by making donations of over £5,000 to the Labour Party (which was an inaccurate figure), Mr Kean had gained influence in the local planning process. Mr Kean's solicitors said that it would have been reasonable for the programme to have put this modest political donation in context with other similar donations given by other business entities to other political parties.
- b) Mr Kean's solicitors said that the programme makers had been provided with a detailed response on behalf of Mr Kean to questions they had put to him two

days before the broadcast of the programme. However, this response was not used in the programme other than a mention of a denial by Mr Kean to the allegations made against him.

Unwarranted infringement of privacy

In summary, Mr Kean's solicitors complained that Mr Kean's privacy was unwarrantably infringed during the making of the programme in that:

- c) The programme makers filmed Mr Kean's private residence without his permission.

Mr Kean's solicitors also complained that Mr Kean's privacy was unwarrantably infringed in the programme as broadcast in that:

- d) Pictures of Mr Kean's private residence were broadcast in the programme. The pictures were of no relevance to the matters under report.

The BBC's case

Unjust or unfair treatment

In summary, the BBC responded to the complaint of unjust or unfair treatment as follows:

- a) The BBC said that it did not accept that Mr Kean was portrayed unfairly in the programme or that any impression was given that he had used "*connections*" to gain favours in the planning process. The BBC also said that the programme made no allegations about improper behaviour by Mr Kean. Rather, the BBC noted that the programme had focussed upon whether the fact of his relationship with Mr McCann should have been declared by Mr McCann in the course of considering planning applications brought by Mr Kean. The BBC said that this was made clear by the studio presenter's introduction to the report:

"The investigation reveals allegations that the former South Lanarkshire Councillor and Labour MP, Michael McCann, did not declare his relationship with a local property tycoon and Labour donor called James Kean".

The BBC said that it believed that this introduction made it clear to viewers that the matter under investigation was Mr McCann's failure to declare his relationship with Mr Kean rather than allegations that the relationship was in any way improper.

In response to the sub-heads of complaint, the BBC said that:

- i) The BBC said that it did not agree that the relationship between Mr Kean and Mr McCann could accurately be described as a "mere acquaintanceship". It said that the programme had produced testimony from Mr McAvoy, the Leader of the Council, who had told the programme makers that Mr Kean and Mr McCann "*go back a long time*". The BBC also said that the programme provided evidence that Mr McCann's daughter's horse was stabled on Mr Kean's farm and had stated that Mr McCann had declined to provide details as to whether this was a commercial arrangement or whether he derived any financial benefit from it. The BBC said that the programme also produced several examples of events which suggested that Mr McCann and Mr Kean

enjoyed a social relationship. Taking this into account, the BBC said that it believed that the programme was justified in asking if the relationship was such that Mr McCann should have declared it when he sat on the Council's Planning Committee. The BBC said that it did not accept that the report, by raising the question, gave rise to any unfairness to Mr Kean against whom no allegations of impropriety were made.

- ii) The BBC said that the programme had stated that Mr McCann's election celebrations had taken place in "*a building owned by Mr Kean*" which was a matter of fact. The programme did not suggest that Mr Kean had provided hospitality. In any case, even if inaccurate, the BBC said that the statement could only give rise to unfairness to Mr Kean if it were the case that there was no relationship between him and Mr McCann. The BBC said that there was other evidence of the relationship between the two men.
- iii) The BBC said that the programme did not call for a criminal investigation. It said that the programme reported that Mr Neil was calling for an investigation. Even this, however, the BBC said was suitably "caveated" so that no unfair impression might be given that there was evidence of impropriety. The BBC said that Mr Neil had said that an investigation, prompted by Mr McCann's failure to declare the relationship rather than anything alleged of Mr Kean, was necessary to establish whether there had been impropriety or not, and that Mr Neil had clearly asserted that he was not alleging that there had been.
- iv) The BBC said that Professor Kerley was an acknowledged and respected expert on local government. It said that if Mr Kean believed that view to be misleading and inaccurate, the BBC said that it would be incumbent upon him to specify the respects in which he believed that to be the case and the expert authorities upon which he based his view. In the absence of further detail, the BBC said that it did not feel able to comment further.
- v) The BBC said that the programme did not say that Mr Kean was one of the newspaper's major shareholders. The BBC said that it believed that Mr Kean's significance as a shareholder was not based simply on the number of shares he held, but on other factors such as his high public profile locally and his business interests. For example, the BBC said that Mr Kean owned the building within which the 'East Kilbride Mail' rented its offices. The BBC said that it did not believe that someone who owned four per cent of an enterprise could be described as an "insignificant" stakeholder.
- vi) The BBC said that the programme did not say that Mr Kean had made donations of more than £5,000 to the Labour Party. Rather, it said that:

"Over the last three years Mr Kean and his brother have donated more than £5,000 to the Labour Party".

The BBC said that the figure given in the programme was broadly accurate. It said that the exact figure found in the Electoral Commission records was £5260. The BBC said that nowhere in the programme was it suggested that the donations led to Mr Kean gaining influence over the planning processes of the Council and it said that it did not believe that a comparison with other small donations made by other businesses to political parties would have been relevant to the issues under consideration.

- b) In response to the complaint that a detailed response from Mr Kean's solicitors was not used in the programme, other than a mention of a denial by Mr Kean to the allegations made against him, the BBC said that the programme made no allegations of impropriety against Mr Kean and, therefore, there was no requirement for the programme makers to extend a right of reply to any specific issues relating to him. However, for the avoidance of any doubt, the BBC said that the programme makers had felt it appropriate that Mr Kean's assurance that he had been guilty of no improper behaviour should be included in the programme.

Unwarranted infringement of privacy

In summary, the BBC responded to the complaint that Mr Kean's privacy was unwarrantably infringed during the making of the programme as follows:

- c) The BBC said that Mr Kean's house was, in fact, the farm where Mr McCann's daughter's horse was stabled and that this particular matter was, it believed, of direct relevance in establishing that there was a relationship between Mr Kean and Mr McCann.

The BBC said that as all filming was carried out from a public road, there was no requirement of the programme makers to obtain Mr Kean's permission for filming which, in any case, was warranted by the public interest in examining the relationship between Mr McCann and Mr Kean and providing evidence as to that relationship.

- d) In summary, the BBC responded to the complaint that Mr Kean's privacy was unwarrantably infringed in the programme as broadcast as follows:

The BBC said that Mr Kean's residence was the farm where Mr McCann's daughter's horse was stabled. The BBC said that the property was, therefore, directly relevant to the issue being investigated insofar as it helped to establish that there a relationship existed between Mr Kean and Mr McCann.

The BBC said that the image of his home used in the programme was fleeting and gave no indication as to where the property was located. In such circumstances, it said that Mr Kean's expectation of privacy would have been limited and that any residual infringement of privacy in the broadcast of the programme was warranted by the public interest in examining the relationship between Mr McCann and Mr Kean and providing evidence of that relationship.

The complainant's comments

Unjust and unfair treatment

In summary, Mr Kean's solicitors commented on the BBC's statement as follows:

- a) In response, Mr Kean's solicitors said that the programme's introduction had stated that there were calls for an enquiry into the relationship between *"this Lanarkshire MP [Mr McCann] and a local business man's [Mr Kean] planning applications"* and that there had been calls for a *"criminal enquiry into the planning processes of one of Scotland's biggest councils"*. The clear implication of these comments, Mr Kean's solicitor's said, was that both Mr McCann and Mr Kean should be subject to a criminal enquiry.

In relation to the sub-heads of complaint, Mr Kean's solicitors said as follows:

- i) Mr Kean's solicitors said that Mr McAvoy's quote was not evidence of friendship, nor was the fact that two neighbours' daughters had arrangements regarding the stabling of their horses. The programme did not produce examples of events which suggested that Mr Kean and Mr McCann enjoyed a social relationship. The programme instead showed a photograph from five years ago taken at the election of Mr McCann's predecessor which was attended by hundreds of Labour Party supporters. Mr Kean's solicitors said that the programme attempted to imply a much closer relationship between the two men than that which existed in reality.
- ii) Mr Kean's solicitors said that the programme confirmed that Mr McCann's election celebrations had taken place in "*a building owned by Mr Kean*". It was a fact that the building in which the 'Legends Bar' was situated was owned by Mr Kean. Mr Kean's solicitors said that it was not clear why that would be evidence of any connection or friendship. In particular, Mr Kean's solicitors said that Mr Kean owned other properties rented out as restaurants, for example, though that did not mean that he had a connection or a friendship with anyone who used the facilities provided by the operators of the businesses run from the premises.
- iii) Mr Kean's solicitors said that the quote attributed to Mr Neil was misleadingly incomplete. Mr Neil had actually said that "enough information has been made available by the BBC that there is a strong case for criminal investigation". Mr Kean's solicitors said that Mr Neil was a member of the SNP and was therefore unlikely to be an impartial purveyor of whatever information was provided to him by the programme makers. The further reference to a criminal investigation, clearly at the very least, implied that Mr Kean should be one of the parties subject to the criminal investigation.
- iv) Mr Kean's solicitors said that although Professor Kerley's qualifications were not disputed, he was a former member of the Labour Party and so was not impartial. Mr Kean's solicitors said that Professor Kerley was not legally qualified and the questions which he was asked about the application of the Code of Conduct clearly required a legal response. The Code of Conduct did not mention the word "friendship" but Professor Kerley's contribution referred to it several times and he stated that all friendships must be declared under terms of the Code of Conduct. Mr Kean's solicitors said that this was not the case and that Professor Kerley's responses were elicited specifically by the BBC to cement the case that they were building against Mr Kean and Mr McCann.
- v) Mr Kean's solicitors said that to describe Mr Kean as a shareholder would have been accurate, but the description given by the BBC was inaccurate. In any event, Mr Kean's solicitors said that the implication was to create a further link between Mr Kean and Mr McCann. However, such a link would not be evidence of friendship or an acquaintanceship. Mr Kean's solicitors said that there was nothing unusual about the fact that a local businessman held a small shareholding in a local newspaper to which the local MP made regular contributions.
- vi) Mr Kean's solicitors said that the clear implication of the programme was that the donations made by Mr Kean (and his brother) were linked to irregularities in the Council planning process and that, although it had been pointed out to the BBC prior to the broadcast of the programme that the Labour Party had not held a majority on the Council or its Planning Committee for several years. Mr Kean's

solicitors said that this fact was conveniently omitted from the programme. The donations made by Mr Kean and his brother had been similar in amount to dozens of donations made by other local businesses. Mr Kean's solicitors said that it was a clear attempt by the BBC to make a relatively modest donation appear to be a very significant part of a much bigger "scandal".

- b) Mr Kean's solicitors said that the programme had suggested impropriety on the part of Mr Kean by "implications and innuendo". Mr Kean's solicitors said that the full text of the response to the programme makers sent on behalf of Mr Kean the day before the broadcast revealed that the BBC had been invited to investigate the whole story relating to the supermarket planning applications and that it had refused, or omitted, to do so.

Unwarranted infringement of privacy

In summary, Mr Kean's solicitors commented as follows:

- c) Mr Kean was not aware of any "arrangement" for the stabling of Mr McCann's daughter's horse. Mr Kean did not provide livery or any other similar service for anyone, let alone Mr McCann or his daughter, nor does any other member of Mr Kean's family. Mr Kean's solicitors said that the BBC's inference seemed to be that if two children played for the same football team, then their fathers must be friends.
- d) Mr Kean's solicitors said that Mr Kean could not see why broadcasting footage of his private residence could be in the public interest or evidence of a relationship with Mr McCann.

The BBC's final response

Unjust or unfair treatment

In summary, the BBC responded to the complainant's comments as follows:

- a) The BBC said that it was not the case that the BBC called for a criminal investigation in any of the broadcasts complained of. The BBC said that the programme merely reported comments made on that particular point by a senior Scottish politician [i.e. Mr Neil].

In response to the complainant's comments relating to the sub-heads of complaint:

- i) The BBC said that the complainant's contention that *"the fact that two neighbours' daughters have made arrangements regarding their horses"* was not evidence of a relationship failed to recognise that an arrangement, involving the stabling of Mr McCann's daughter's horse on Mr Kean's land, inevitably carried with it the possibility of a financial benefit. The BBC said that the question was not whether there was any arrangement between the daughters, but whether the arrangement was of financial benefit to Mr McCann and/or his immediate family. The BBC said that it believed that the other evidence adduced in the programme as to a relationship between the two men was compelling.
- ii) The BBC said that the reference to the ownership of the building in which the 'Legends Bar' was situated provided further evidence that a relationship

existed between the two men which should have been declared by Mr McCann.

- iii) The BBC said that this matter was not part of the original complaint made on behalf of Mr Kean and was not part of the complaint as entertained by Ofcom. Furthermore, the complainant has not specified how the manner in which Mr Neil's remarks were edited may have been unfair. As such, BBC said that it was unable to comment further. The BBC reiterated that it did not call for a criminal investigation; it reported that a prominent member of the SNP, Mr Neil, was making such a call.
- iv) The BBC said that it noted that the complainant did not dispute Professor Kerley's credentials, which clearly showed his expertise in local government matters and which, it believed, qualified him to offer expert comment on the issues raised in the report. The BBC said that it did not agree that a "legal response" was required in commenting on the Codes of Conduct. The BBC said that it did not agree that the fact that Professor Kerley did not hold legal qualifications meant that he was unqualified to comment on the Code of Conduct.
- v) The BBC said that it did not agree that the description used in the programme was incorrect for the reasons set out in its first statement. It said that it represented additional evidence that a relationship existed between the two men and raised the question as to whether the relationship with Mr Kean should have been declared by Mr McCann.
- vi) The BBC said that the programme did not suggest or imply that donations made by Mr Kean (and his brother) were linked to irregularities in the planning processes of Council. The BBC said that the central question raised by the programme was whether the relationship which undoubtedly existed between Mr McCann and Mr Kean should have been declared by Mr McCann when, as an elected councillor, he was considering matters which had a bearing on the interests of Mr Kean.
- b) The BBC said that coverage of this particular matter (i.e. the supermarket planning applications) in the programme complained of was not part of the original complaint or part of the complaint as entertained by Ofcom. However, the BBC pointed out that the programme in question was not primarily about the detailed history of this, or any other, planning application. The BBC said that the programme was about the existence of a relationship between Mr Kean and Mr McCann and whether that relationship should have been declared by Mr McCann.

Unwarranted infringement of privacy

In relation to heads c) and d) of the complaint of unwarranted infringement of privacy, the BBC said that it had already dealt with these in its initial statement in response to the complaint.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and written submissions from both parties.

Unjust or unfair treatment

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the heads, and individual sub-heads, of the complaint detailed below.

- a) Ofcom first considered Mr Kean's complaint that the programme portrayed him unfairly in that it attacked his character and gave the impression that he used his connections with councillors to gain favours in the planning process.

When considering this head of complaint, and the individual sub-heads of complaint below, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr Kean (as outlined in Practice 7.9 of the Code).

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest. However, in presenting material that could be regarded as amounting to significant allegations, reasonable care must be taken not to do so in a manner that does not cause unfairness to individuals or organisations. In this particular case, Ofcom considered that it was in the public interest for the programme to report on the issues such as those covered in it, but that this needed to be consistent with the requirements of the Code.

Ofcom considered the following sub-heads of complaint of complaint in order to reach an overall decision as to whether Mr Kean was portrayed unfairly in the programme as broadcast as regards this head of complaint.

- i) Ofcom considered the complaint that, although the programme stated otherwise, Mr Kean had no relationship with Mr McCann other than being an acquaintance.

Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the references to Mr Kean having a relationship with Mr McCann were presented in a way that was unfair to Mr Kean.

Ofcom considered that the purpose of the programme was to present the findings of an investigation carried out by the programme makers into

allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. Ofcom noted that the programme presented a number of pieces of evidence that aimed to illustrate that a relationship existed between Mr McCann and Mr Kean. In particular, Ofcom noted that the programme reported that both men had been "associates" for several years and showed a photograph of them together at a Labour Party celebration in 2005. It also reported that: Mr McCann had held his election celebrations at a bar situated in a building owned by Mr Kean (see sub-head ii) below); Mr McCann's daughter stabled her horse on Mr Kean's farm; and, Mr McCann was a regular contributor to a local newspaper that rented its offices in a building owned by Mr Kean and that Mr Kean was a shareholder in that newspaper (see sub-head v) below). Ofcom also noted that the programme reported the testimony of the Leader of the Council, Mr McAvoy, who was reported to have said that Mr Kean and Mr McCann "*do indeed go back a long time*".

Ofcom considered that the pieces of evidence presented in the programme were used primarily to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and may have been such that Mr McCann may have been required to declare it when he was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and to refer to the pieces of evidence in the programme to illustrate the extent of the relationship between Mr Kean and Mr McCann.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann. Towards the end of the report, a summary of a statement made on Mr Kean's behalf by his solicitors was included in the stating "*Mr Kean vigorously denies any wrongdoing in relation to any planning matter*". Although brief, Ofcom took the view that the scope of the statement included the references made in the programme to the pieces of evidence aiming to establish the extent of his relationship with Mr McCann and that its presentation in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom considered that the inclusion of the pieces of evidence detailed above formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that the pieces of evidence did not, in themselves, suggest any improper behaviour on Mr Kean's part and that viewers would have been in a position to decide for themselves the extent of Mr Kean's and Mr McCann's relationship and whether it was that of an "acquaintance" or something more. Ofcom did not consider that the programme was misleading in this respect.

- ii) Ofcom considered the complaint that the programme tried to link Mr Kean with Mr McCann by reporting that Mr McCann's election celebrations were held in a public house owned by Mr Kean.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure

that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to Mr Kean owning the building in which Mr McCann held his election victory party was presented in a way that was unfair to Mr Kean.

Ofcom noted the following commentary made by the programme's reporter that accompanied footage of the exterior of the 'Legends Bar':

"And the BBC understands he held his late night victory party here in Legends Bar, a building owned by Mr Kean".

Ofcom took the view that the programme was clear that Mr Kean owned the building rather than he owned the business (i.e. the 'Legends Bar') that was situated within it.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. As already considered in sub-head i) above, the programme presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One piece of evidence was the programme's reference to Mr McCann's election victory celebrations being held in a building that was owned by Mr Kean. In this context, Ofcom considered that the reference to the 'Legends Bar' was used primarily to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and that the relationship may have been such that Mr McCann may have been required to declare it when Mr McCann was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and to make reference to Mr Kean's ownership of the building in which the bar was situated in.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the reference to Mr Kean's ownership of the building in which the 'Legend's bar' was situated and that its presentation in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom took the view that the reference to the 'Legends Bar', along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that it may have required Mr McCann to have declared it when he was a councillor. In this context, Ofcom considered that viewers would have understood that the reference to Mr McCann's election victory celebrations being held in a building owned by Mr Kean did not, in itself, suggest any improper behaviour on Mr Kean's part. Ofcom also did not consider that the programme was misleading in this respect.

- iii) Ofcom considered the complaint that the programme called for a criminal investigation into Mr Kean's alleged relationships with councillors, despite containing no evidence of any impropriety whatsoever.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to a call for “*a criminal investigation*” in the programme was presented in a way that was unfair to Mr Kean.

Ofcom noted that the references to “*a criminal investigation*” related to the allegations about the relationship between Mr Kean and Mr McCann were made in the programme by one of the contributors to it rather than by the programme’s reporter. It noted that the programme’s studio presenter introduced the report in the programme by stating that:

“There’s been a call for a criminal enquiry into the planning process of one of Scotland’s biggest councils”.

Ofcom considered that the studio presenter’s introductory comments reflected the view opined by Mr Neil later in the report in which he said:

Mr Neil: *“Very clearly there are legitimate questions to be asked and to be answered, and my view is there is enough information made available now, by the BBC, that there is a strong case for a criminal investigation to establish whether anything untoward has actually happened. I’m not saying there has or there hasn’t, but I think to clear the air and to make sure that the system is above board in South Lanarkshire, there needs to be a criminal investigation to establish the facts”.*

Ofcom then considered whether the inclusion of Mr Neil’s contribution and the introductory statement made by the presenter resulted in unfairness to Mr Kean. Ofcom noted that Mr Neil was introduced by the reporter as “*Senior MSP politician Alex Neil*” and that a caption appeared over his contribution that stated “*Alex Neil MSP, SNP Central Scotland*”. Ofcom considered that while Mr Neil was giving his personal opinion on the how he believed the allegations made in the programme about Mr McCann’s relationship with Mr Kean should be taken forward (i.e. a “*criminal investigation*”), viewers would have understood that the comments were being made by a senior politician belonging to a rival political party to that which Mr McCann belonged and that they would have been able to form their own judgement on the partiality, or otherwise, of Mr Neil’s views.

Ofcom also noted that Mr Neil’s had used the phrases “*...to establish whether anything untoward has actually happened*” and “*I’m not saying there has or there hasn’t...*”. Ofcom considered that the language used by Mr Neil in his contribution was such that viewers would have been left in little doubt that he was not stating definitively that there was any evidence of criminal activity, but was making the point that in the interests of openness and transparency, a police investigation should take place to “*establish the facts*”.

Ofcom also noted that the programme makers had sought Mr Kean’s response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean’s solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the comments made

by Mr Neil and the programme's presenter and that its presentation of in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Taking these factors above into account, Ofcom took the view that Mr Neil's comments had suggested that he believed that there were sufficient reasons for a "*criminal investigation*" to "*clear the air*". Ofcom considered that the programme had presented Mr Neil's comments as his own view and that was made clear to viewers that Mr Kean "*vigorously denies*" any allegation of wrongdoing. It also considered that the presenter's comments had been a fair summary of Mr Neil's position. In these circumstances, Ofcom considered that the broadcaster had taken reasonable care when presenting Mr Neil's comments not to do so in a way that created unfairness to Mr Kean.

- iv) Ofcom considered the complaint that the programme included a contribution from Professor Kerley whose comments on the Code of Conduct were misleading and inaccurate.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. It is important to note that Ofcom's role is not to establish whether the substance of Professor Kerley's contribution to the programme was correct or not, but to determine whether, in broadcasting his opinions, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Mr Kean. In doing so, Ofcom considered the basis for Professor Kerley's opinion as expressed in the programme and whether the context of the programme's presentation of his opinion resulted in unfairness.

Ofcom noted the following extract from the programme in which comments made by Professor Kerley about Code of Conduct and the declaration of interests were included:

Reporter: *"The Councillors' Code of Conduct says that the councillors must declare any interest which could potentially affect their discussions and decision making".*

Voice over: *"The test is whether a member of the public, acting reasonably, would think that a particular interest could influence your role as a councillor".*

Professor Kerley: *"You're a member the committee that's deciding, you're ultimately a member of the Council that might decide something, you simply say, I have an interest in this because: it may be you have an investment, it may be it's just a friendship and it would be wise to say, I have an interest in this, I am a friend of the applicant for this, I will take no part in this discussion. You either leave the room or you literarily kind of push yourself back from the Committee table and you have it recorded in the minutes".*

Ofcom noted that Professor Kerley's comments followed immediately after the reporter had summarised the Code of Conduct and had questioned how close a councillor should be to someone submitting a planning application before

declaring an interest. Professor Kerley was introduced in the programme by the reporter (and an on-screen caption) as “*Professor Richard Kerley from Queen Margaret University*”. Ofcom took the view that Professor Kerley was presented as an “expert” and that viewers would have understood that the purpose of his contribution to the programme was to express his expert opinion on the meaning of the Code of Conduct in relation to the declaration of interests and whether it would be appropriate for a councillor to declare an interest if he/she was friends with an applicant to a council committee. Based upon Professor Kerley’s professional expertise in the subject, which was signposted to viewers by the reporter’s introduction (and on-screen caption) of him, Ofcom considered that it was legitimate for the programme to include Professor Kerley’s expert opinion. Ofcom took the view that the fact that Professor Kerley was not legally qualified was irrelevant and did not impact on his ability to interpret the provisions of the Code of Conduct.

In these circumstances, Ofcom went on to consider whether or not the presentation of Professor Kerley’s opinion in the programme resulted in any unfairness to Mr Kean. Ofcom again noted that Professor Kerley was shown expressing his expert opinion on how the Code of Conduct should be interpreted. It also noted that Professor Kerley had used the phrase “*it would be wise*”, in giving his view on what action a councillor should take if they decided to declare that they were friends with an applicant and that he emphasised the importance of how a particular interest (or in this case, friendship) would be perceived by a member of the public when deciding whether or not to declare that interest. Ofcom considered that the language used by Professor Kerley in giving his opinion was couched in terms that would have left viewers in little doubt that his comments constituted his opinion only and were not directed specifically at the circumstances that the programme later alleged in relation to Mr Kean and Mr McCann. In Ofcom’s view, the presentation of Professor Kerley and the nature and content of his comments would have made it clear to viewers that he was an expert giving an informed opinion on a given set of factors relating to the application of the Code of Conduct.

Taking into account all the factors referred to above, Ofcom considered that manner in which the Code of Conduct was summarised by the reporter and the presentation of Professor Kerley’s contribution in relation the interpretation of the Code was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding to the Code of Conduct in a way that was unfair to Mr Kean.

- v) Ofcom considered the complaint that the programme claimed that Mr Kean was a significant shareholder of a local newspaper the ‘East Kilbride Mail’ and attempted to link him with Mr McCann who was a columnist for the paper.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to Mr Kean being a shareholder of the newspaper was presented in a way that was unfair to Mr Kean.

In considering this particular sub-head of complaint, Ofcom noted the comments made by the reporter in the programme that related to Mr Kean and the newspaper:

“In East Kilbride Mr McCann refuses to speak to his local newspaper, the EK News [‘East Kilbride News’], which published questions from opponents about his relationship with Mr Kean. Mr McCann does however have a good relationship with the rival free sheet, the EK Mail [‘East Kilbride Mail’], which rents its office space from Mr Kean. Mr Kean is one of the paper’s significant shareholders”.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council’s Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence included was the reference to the ‘East Kilbride Mail’ which rented office space from one of its shareholders, Mr Kean, and published a regular contribution by Mr McCann. In this context, Ofcom considered that the reference was used primarily to illustrate the programme’s assertion that a relationship between Mr McCann and Mr Kean did exist. Ofcom considered that the programme did not distort or misrepresent the material facts in relation to Mr Kean as a shareholder in the newspaper and that it was legitimate for the programme to explore whether there a connection between Mr Kean and Mr McCann through its reference to the ‘East Kilbride Mail’ newspaper.

Ofcom also noted that the programme makers had sought Mr Kean’s response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean’s solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the comments relating to Mr Kean’s involvement with the ‘East Kilbride Mail’ and that its presentation of in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom took the view that the reference to Mr McCann’s relationship with the ‘East Kilbride Mail’ newspaper was included in the programme to demonstrate a connection between Mr McCann (who regularly contributed to the ‘East Kilbride Mail’) and Mr Kean (who not only owned the offices that the ‘East Kilbride Mail’ rented, but was also a shareholder in the newspaper). Ofcom considered that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme’s narrative in aiming to establish that a relationship between the two men existed and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Used in this context, Ofcom considered that viewers would have understood the purpose of its inclusion and that the reference to Mr Kean being a “significant” shareholder did not, in itself, suggest any improper behaviour on Mr Kean’s part or mislead viewers in a way that was unfair to him.

- vi) Ofcom considered the complaint that the programme implied that by making donations of over £5,000 to the Labour Party Mr Kean had gained inappropriate influence in the local planning process.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to the donations to the Labour Party in the programme was presented in a way that was unfair to Mr Kean.

Ofcom noted the following commentary made by the programme's reporter that related to donations made by Mr Kean and his brother to the Labour Party:

"Over the last three years Mr Kean and his brother have donated more than £5,000 to the Labour Party".

Ofcom noted from the BBC's submissions that the actual figure was £5,260, a figure that was not disputed by Mr Kean's solicitors. Ofcom considered that the programme's reference to the donations amounting to *"more than £5,000"* was a fair reflection of the amount.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One piece of evidence was a reference to the fact that both Mr Kean and his brother had donated more than £5,000 to the Labour Party. Ofcom noted the BBC's submission that the reference to the donations was used to show the existence of a relationship between Mr Kean and the local Labour Party of which Mr McCann is a prominent figure.

In this context, Ofcom considered that the reference to Mr Kean's donations was used in the programme to support the programme's assertion that a relationship between Mr McCann and Mr Kean did exist (in this case through the local Labour Party) and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and the extent of the relationship between Mr Kean and Mr McCann.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the reference to the donations he had made to the Labour Party and that its presentation in the programme would have left viewers in no doubt that he refuted any allegation of impropriety.

Ofcom considered that the reference to the donations in the programme attempted to demonstrate that a relationship existed between Mr McCann and

Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that viewers would have understood that the reference to the donations did not, in itself, suggest any improper behaviour on Mr Kean's part or mislead viewers in a way that was unfair to him.

Having considered each of the sub-heads to the complaint made by Mr Kean's solicitors that the programme portrayed him unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr Kean unfairly. Ofcom also considered that the broadcaster had presented a summary of the statement made by Mr Kean's solicitors in response to the allegations (see sub-head i) above) towards the end of the report. Ofcom took the view that Mr Kean's unequivocal denial of any wrongdoing in relation to any planning matter made clear his point of view about the allegations made in the programme and that Mr Kean's position was fairly summarised and presented in a manner that enabled viewers to reach their own conclusions on the issues raised in the programme.

Ofcom therefore found no unfairness to Mr Kean in this respect.

- b) Ofcom then considered Mr Kean's complaint that the response his solicitors had given to the programme makers before the broadcast of the programme was not used other than to mention a denial of the allegations made against him.

When considering this head of complaint, Ofcom again had regard to whether the portrayal of Mr Kean was consistent with the broadcaster's obligation to ensure that material facts had not been presented, disregarded or omitted in a way which was unfair to him (as outlined in Practice 7.9 of the Code). Also it took into consideration Practice 7.13 of the Code which provides that where it is appropriate to represent the views of a person that is not participating in the programme this must be done in a fair manner.

Ofcom noted from the submission of both parties to the complaint that the programme makers had written to Mr Kean on 21 February 2011 inviting him to respond to allegations that would be made in a series of news reports about his relationship with Mr McCann and Councillor Docherty, and the implications of these relationships when planning applications in which Mr Kean or his companies were involved came before the Council's Planning Committees on which Mr McCann and Councillor Docherty had sat. On 22 February 2011, Ofcom noted that Mr Kean's solicitors provided the programme makers with an email response from Mr Kean in which a number of specific points were addressed and referred to. Ofcom noted that this email contained the following sentence:

"My client [Mr Kean] vigorously denies any wrongdoing in connection with securing any planning permission from any Planning Authority".

Ofcom then took note of the relevant part of the programme in which Mr Kean's solicitors' statement was summarised and presented by the reporter:

"Mr Kean vigorously denies any wrongdoing in relation to any planning matter".

Again, Ofcom recognises that programme makers and broadcasters can select and edit material provided to it by way of a written statement for inclusion in a programme. This is an editorial decision and it would be unreasonable, in Ofcom's view, for an individual to expect a broadcaster to cede editorial control or to include a lengthy written statement in full. Broadcasters must, however, ensure that where it is appropriate to represent the views of a person not participating in a programme that it is done in a fair manner.

In the particular circumstances of this case, Ofcom noted the statement provided on behalf of Mr Kean by his solicitors was edited and summarised in the programme as quoted above. Ofcom considered that although the programme makers had decided not to present the statement in its entirety, the edited extract of the response included in the programme adequately set out, in Ofcom's view, Mr Kean's position regarding the issues raised by the programme makers in a way that would have left viewers in no doubt that Mr Kean denied any wrongdoing in connection with securing planning permission.

Taking all the factors above into account, Ofcom was satisfied that Mr Kean's solicitors' response made on his behalf, although summarised and edited, adequately reflected Mr Kean's denial of any wrongdoing in relation to securing planning permission. Ofcom concluded that the statement was presented in a manner that did not mislead viewers or portray Mr Kean's position unfairly.

Ofcom therefore found no unfairness to Mr Kean in this regard.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

- c) Ofcom considered Mr Kean's complaint that his privacy was unwarrantably infringed in the making of the programme in that his private residence was filmed without his permission.

In considering this head of complaint, Ofcom had regard to Practice 8.5 of the Code which states that any infringement in the making of a programme should be with the person's consent or otherwise be warranted.

In considering whether or not Mr Kean's privacy was unwarrantably infringed in the making of the programme as broadcast, Ofcom first considered the extent to which he could have legitimately expected that the footage of his private residence would not be filmed for subsequent broadcast without his consent.

Ofcom noted from the footage shown in the programme that Mr Kean's farm had been filmed and that part of that footage was included in the section of the programme that referred to the stabling arrangements of Mr McCann's daughter's

horse. Ofcom noted that the footage included in the programme showed a house which was visible behind a set of large gates and part of a perimeter wall. It was accompanied by the reporter's commentary identifying the property as "*Mr Kean's farm*".

Having carefully examined the footage (and taken account of the parties' submissions), Ofcom considered that the programme makers had filmed Mr Kean's property from the public highway and, it appeared to Ofcom, that they had filmed openly through the wire fencing around its perimeter. From the footage shown in the programme, the property did not appear to be hidden from view from the public road.

In the particular circumstances of this case, Ofcom considered that the programme makers had filmed Mr Kean's property from a point on the public highway which could be seen by members of the general public passing by. Ofcom also considered that the manner in which the footage was obtained appeared not to be obtrusive and that there was no suggestion by the complainant in the submissions that the programme makers had disturbed Mr Kean or members of his family in the process of filming the property.

However, Ofcom recognised that the filming and broadcast of footage of an individual's home may give rise to an expectation of privacy. Notwithstanding the circumstances in which Mr Kean's home was filmed (as described above), Ofcom considered that, in the particular circumstances of this case, Mr Kean had an expectation of privacy, albeit limited owing to the nature in which it was filmed, that his property would not be filmed for subsequent broadcast in a television programme.

Taking all the above factors into account, Ofcom considered that Mr Kean had a legitimate expectation of privacy, albeit limited in the circumstances, in relation to his property being filmed without the programme makers securing his prior consent.

Given this conclusion, Ofcom then assessed whether the programme makers had secured Mr Kean's consent for the footage of his property to be filmed. Ofcom acknowledged that neither party disputed that Mr Kean's prior consent had not been given.

Ofcom went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to gather information and film in making programmes without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to justify the intrusion into Mr Kean's privacy by filming his property in the particular circumstances.

Ofcom considered that the report was a serious piece of broadcast journalism and that there was a genuine public interest in the programme's examination into allegations regarding the planning processes of the Council and, in particular, the alleged failure of local politicians to declare their relationships with Mr Kean, a property developer, when sitting on Council Planning Committees. Ofcom recognised that one of the local politicians identified in the programme, Mr McCann, is a prominent political figure in Scotland and that the report presented a number of pieces of evidence that it said demonstrated that a relationship existed between Mr McCann and Mr Kean. One such piece of evidence was that Mr McCann's daughter stabled her horse on Mr Kean's farm. In this context,

Ofcom considered that the footage of Mr Kean's property was used primarily as a visual device to illustrate the programme's assertion that the relationship between the two men was such that Mr McCann may have been required to declare it when he was a councillor sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and that filming of his property without prior consent to illustrate the fact that the horse was stabled on Mr Kean's farm was relevant to the narrative of the report.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression without interference, in the circumstances of this particular case, outweighed Mr Kean's expectation of privacy. Ofcom therefore found that the filming of Mr Kean's property was warranted without his consent and that there was no unwarranted infringement of his privacy in the making of the programme.

- d) Ofcom considered Mr Kean's complaint that his privacy was unwarrantably infringed in the programme as broadcast in that pictures of his private residence were broadcast in the programme.

In considering this head of complaint, Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. It also had regard to Practice 8.2 which states that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

In considering whether or not Mr Kean's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he could have legitimately expected that the footage of his private residence would not be broadcast and disclosed to a wider audience without consent. Ofcom noted that the footage included in the programme showed a house which was visible behind a set of large gates and part of a perimeter wall. It was accompanied by the reporter's commentary identifying it as "*Mr Kean's farm*". Ofcom noted that Mr Kean's home was visible on screen for approximately one second. Ofcom also noted that the programme described Mr Kean's farm to be "*less than a mile*" from Mr McCann's constituency home. Ofcom considered that Mr Kean's farm was identifiable from the footage included in the report and that its location was discernable from the information given in the report.

Again, as already considered in head c) of the Decision above, Ofcom, recognised that the filming and subsequent broadcast of footage of an individual's home may give rise to an expectation of privacy. Ofcom considered that, in the particular circumstances of this case, Mr Kean had a limited expectation of privacy in the broadcast of footage of his home to a wider audience in a television programme which investigated the implications of his relationships with local politicians.

Taking all the above factors into account, Ofcom considered that Mr Kean had a legitimate expectation of privacy, albeit limited in the circumstances, in relation to footage of his home being broadcast in the programme.

Given this conclusion, Ofcom then assessed whether the programme makers had secured Mr Kean's consent for the footage of his property to be filmed. Ofcom

acknowledged that neither party disputed that Mr Kean's prior consent had not been given.

Ofcom went on to consider whether the intrusion into Mr Kean's expectation of privacy was warranted and the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to impart information and ideas and the audience's right to receive the same in programmes without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to justify the intrusion into Mr Kean's privacy by including footage of his home in the particular circumstances.

Ofcom again considered that the report was a serious piece of broadcast journalism and that there was a genuine public interest in the programme's examination into allegations into the planning processes of the Council and, in particular, the alleged failure of local politicians to declare their relationships with Mr Kean, a property developer, when sitting on Council Planning Committees. Ofcom recognised that one of the local politicians identified in the programme, Mr McCann, is a prominent political figure in Scotland and that the report presented a number of pieces of evidence that it said demonstrated that a relationship existed between Mr McCann and Mr Kean. One such piece of evidence was that Mr McCann's daughter stabled her horse on Mr Kean's farm. In this context, Ofcom considered that the very brief footage of Mr Kean's property was used primarily as a visual device to illustrate the programme's assertion that the relationship between Mr McCann and Mr Kean was such that Mr McCann may have been required to declare it when he was a councillor sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and that to include footage of his property without prior consent to illustrate the fact that the horse was stabled on Mr Kean's farm was relevant to the narrative of the report.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression and to impart information without interference, in the circumstances of this particular case, outweighed Mr Kean's expectation of privacy. Ofcom therefore found that the inclusion of footage of Mr Kean's property in the programme as broadcast was warranted without his consent and that there was no unwarranted infringement of his privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Mr Kean's complaint of unjust or unfair treatment or unwarranted infringement of privacy in the making or the broadcast of the programme.

Not Upheld

Complaint by Mr James Kean

Reporting Scotland, BBC1 Scotland, 23 February 2011

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy in the making and broadcast of the programme by Mr James Kean.

This programme included a report of approximately four minutes in duration that centred on allegations that Councillor Jim Docherty and Mr Michael McCann MP improperly failed to declare their relationships with Mr James Kean, a property developer and Labour Party donor, when Councillor Docherty and Mr McCann sat as councillors on South Lanarkshire Council's Planning Committee. The report included a number of examples that it alleged illustrated that a relationship existed between the men. Footage of Mr Kean's farm was shown in the programme.

Mr Kean's solicitors complained to Ofcom on his behalf that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the making and broadcast of the programme.

Ofcom found the following:

- The broadcaster had taken reasonable care to satisfy itself that the material facts, including Mr Kean's denial of any wrongdoing, were not presented unfairly, omitted or disregarded in a way that portrayed Mr Kean unfairly in the programme as broadcast.
- Although Mr Kean had an expectation of privacy, albeit limited, in relation to the filming of his private residence and the subsequent inclusion of footage of his home in the programme without his consent, Ofcom concluded that the broadcaster's right to freedom of expression outweighed the intrusion into his privacy. Therefore, there was no unwarranted infringement of Mr Kean's privacy in the making or in the broadcast of the programme.

Introduction

On 23 February 2011, BBC1 Scotland broadcast at 18:30 hours an edition of its regional news programme *Reporting Scotland*. This edition included a report of approximately four minutes duration that centred on allegations that Mr Michael McCann MP¹ had failed to declare his relationship with a local property developer and Labour Party donor, Mr James Kean, when Mr McCann sat as a councillor on the Planning Committee of South Lanarkshire Council ("the Council").

The report began with footage of Mr Kean playing in a charity football match to the accompanying commentary:

"James Kean is a millionaire property developer and Labour [Party] donor who rubs shoulders with stars like Ally McCoist. But it's his relationships with some South Lanarkshire politicians which have caused concern".

¹ Mr McCann is the Labour Party Member of Parliament for the constituency of East Kilbride, Strathaven and Lesmahagow.

Councillor Docherty and Mr Kean

The programme went on to show a photograph of Mr Kean along with a photograph of Councillor Jim Docherty, a Labour councillor in South Lanarkshire. The programme said that the two men had been good friends for many years and that while Councillor Docherty had sat on the Council's Planning Committee he had failed to declare this relationship with Mr Kean.

The programme's reporter stated that the Code of Conduct for Councillors² ("the Code of Conduct") *"says that councillors must declare any interests which could potentially affect the discussions and decision making"*.

Interview footage of Professor Richard Kerley³ of Queen Margaret University Edinburgh was then included in the programme. Professor Kerley explained that if a councillor had a friend who had submitted a planning application, he or she would be wise to declare that interest and either leave the committee room or physically push themselves away from the table and make it clear that they would take no part in the discussion and have this recorded in the minutes of the meeting.

Mr McCann and Mr Kean

The programme went on to state that Mr McCann, when a former South Lanarkshire councillor, had also sat *"like Mr Docherty"* on the Council's Planning Committee when it had approved dozens of Mr Kean's planning proposals without declaring an interest. The reporter said that Mr McCann and Mr Kean were *"associates and have been for several years"* and a photograph was shown of Mr McCann with Mr Kean in 2005, when Mr McCann was the election agent for Mr Adam Ingram, the former Labour MP for East Kilbride, Strathaven and Lesmahagow.

An extract of footage of Mr McCann's 2010 General Election acceptance speech was shown at this point of the programme in which Mr McCann was shown saying *"I know the difference between right and wrong"*. This was immediately followed by the reporter stating that Mr McCann had held his election victory celebrations at the 'Legends Bar' which was situated in a building owned by Mr Kean. The reporter went on to say that the BBC had also learned that Mr McCann's daughter kept her horse on Mr Kean's farm. The reporter said that he had asked Mr McCann what the financial arrangement was for stabling the horse on Mr Kean's land, but Mr McCann had declined to answer. Footage of Mr Kean's farm was shown in the programme.

The reporter then stated that Mr Eddie McAvoy, the Leader of the Council, had confirmed to the BBC that Mr McCann and Mr Kean *"did indeed go back a long time"*, but that it was a matter for an individual councillor to decide if any relationship should be declared or not. The programme went on to state that over the past three years, Mr Kean and his brother had donated more than £5,000 to the Scottish Labour Party ("the Labour Party").

² The Code of Conduct for Councillors, produced by the Standards Commission for Scotland, sets out the standards of behaviour expected of councillors in Scotland.

³ Professor Kerley is Professor of Management at Queen Margaret University with a special interest in public service management.

The reporter then went on to say that in September 2010, Mr McCann had *“vigorously intervened in a planning dispute from which Mr Kean could end up making millions of pounds”*. The programme showed a letter, which the reporter said had been obtained by the BBC under the Freedom of Information Act, from Mr McCann to Scottish Enterprise, a company that had mounted a rival planning application for the development of a supermarket site to one closely linked to Mr Kean. The reporter said that Mr McCann’s letter had displayed a *“forensic interest in the deal and contains no fewer than 33 questions, one of which Scottish Enterprise refused to answer because it was commercially sensitive”*. The reporter went on to say that Mr McCann now faced questions *“about why he got himself involved in a planning application which could have been in Mr Kean’s interest to fail”*.

The programme then showed interview footage of Mr Alex Neil, a Scottish National Party (“SNP”) Member of the Scottish Parliament (“MSP”), who said that *“there is a strong case for a criminal investigation to establish whether anything untoward has actually happened”*. Mr Neil’s comments were followed by an extract of a statement given to the programme by Mr McCann in which he rejected *“any allegation of impropriety whatsoever”* and that the programme maker’s claim that he had *“a relationship with Mr Kean is wildly exaggerated”*.

The report concluded by stating that *“Mr Kean vigorously denies any wrongdoing in relation to any planning matter”*.

Following the broadcast of the programme, Macdonalds Solicitors (“Mr Kean’s solicitors”) complained to Ofcom on behalf of Mr Kean that he was treated unjustly or unfairly in the programme as broadcast and that his privacy was unwarrantably infringed in the making and broadcast of the programme.

The Complaint

Mr Kean’s case

Unjust or unfair treatment⁴

In summary, Mr Kean’s solicitors complained that Mr Kean was treated unjustly or unfairly in the programme as broadcast in that:

⁴ Mr Kean’s complaint about *Reporting Scotland* was entertained by Ofcom on 5 May 2011, along with his complaint about *Newsnight Scotland* broadcast on the same day and *The Investigation: Donations, Dinners and Deals*, a BBC Radio Scotland programme broadcast on 27 February 2011. Mr Kean’s complaint regarding all three programmes was composed of a number of heads and sub-heads of complaint of unfair treatment that addressed various aspects of each programme. While the majority of heads and sub-heads of complaint were common to all three programmes, one or two were specific to one or two of the programmes only. In particular, one head of complaint of unfair treatment related to the programme’s reporter’s comments about Mr Kean’s connections with the ‘East Kilbride Mail’. This sub-head of complaint of unfair treatment related to content in *Newsnight Scotland* and *The Investigation: Donations, Dinners and Deals* only and not *Reporting Scotland*. However, Ofcom inadvertently included this sub-head of complaint in its final Entertainment Decision to entertain Mr Kean’s complaint about *Reporting Scotland*. Neither party to this complaint raised this error with Ofcom at the time the complaint was entertained, although Ofcom noted that the BBC said that *“Reporting Scotland did not refer to this matter”* in its statement in response to the complaint. As the inclusion of this sub-head of complaint of unfair treatment in the Entertainment Decision was an error, Ofcom has not considered it in this Provisional Decision.

- a) The programme portrayed Mr Kean unfairly in that it attacked his character and gave the impression that he used his connections with councillors to gain favours in the planning process, which if proved, would be a criminal offence. Mr Kean's solicitors said that Mr Kean was not currently subject to a criminal investigation in relation to this or any other matter. Mr Kean's solicitors also said that the programme had no journalistic legitimacy and that its content was calculated to be one-sided and prejudicial to cause maximum damage to Mr Kean which was unfair.

Mr Kean's solicitors complained that the programme included allegations about Mr Kean which were untrue, misleading and unfair. In particular:

- i) Although the programme stated otherwise, Mr Kean had no relationship with Mr McCann other than being an acquaintance. Mr Kean's solicitors said that the programme was completely misleading in this respect.
 - ii) The programme tried to link Mr Kean with Mr McCann by reporting that Mr McCann's parliamentary election celebrations were held in a public house owned by Mr Kean. This was misleading as Mr Kean has no connection with the business operation of the public house, which the BBC knew, and did not provide any hospitality.
 - iii) The programme called for a criminal investigation into Mr Kean's alleged relationships with councillors, despite containing no evidence of any impropriety whatsoever.
 - iv) The programme included a contribution from Professor Kerley, an expert on local government but not a legal expert on the interpretation of the Code of Conduct upon which he was asked to comment. Mr Kean's solicitors said that Professor Kerley's comments were misleading and inaccurate.
 - v) The programme implied that by making donations of over £5,000 to the Labour Party (which was an inaccurate figure), Mr Kean had gained influence in the local planning process. Mr Kean's solicitors said that it would have been reasonable for the programme to have put this modest political donation in context with other similar donations given by other business entities to other political parties.
- b) Mr Kean's solicitors said that the programme makers had been provided with a detailed response on behalf of Mr Kean to questions they had put to him two days before the broadcast of the programme. However, this response was not used in the programme other than a mention of a denial by Mr Kean to the allegations made against him.

Unwarranted infringement of privacy

In summary, Mr Kean's solicitors complained that Mr Kean's privacy was unwarrantably infringed during the making of the programme in that:

- c) The programme makers filmed Mr Kean's private residence without his permission.

Mr Kean's solicitors also complained that Mr Kean's privacy was unwarrantably infringed in the programme as broadcast in that:

- d) Pictures of Mr Kean's private residence were broadcast in the programme. The pictures were of no relevance to the matters under report.

The BBC's case

Unjust or unfair treatment

In summary, the BBC responded to the complaint of unjust or unfair treatment as follows:

- a) The BBC said that it did not accept that Mr Kean was portrayed unfairly in the programme or that any impression was given that he had used "*connections*" to gain favours in the planning process. The BBC also said that the programme made no allegations about improper behaviour by Mr Kean. Rather, the BBC noted that the programme had focussed upon whether the fact of his relationship with Mr McCann should have been declared by Mr McCann in the course of considering planning applications brought by Mr Kean. The BBC said that this was made clear by the studio presenter's introduction to the report:

"The investigation reveals allegations that former South Lanarkshire Councillor and Labour MP, Michael McCann, did not declare his relationship with local property tycoon and Labour donor, James Kean".

The BBC said that it believed that this introduction made it clear to viewers that the matter under investigation was Mr McCann's failure to declare his relationship with Mr Kean rather than allegations that the relationship was in any way improper.

In response to the sub-heads of complaint:

- i) The BBC said that it did not agree that the relationship between Mr Kean and Mr McCann could accurately be described as a "mere acquaintanceship". It said that the programme had produced testimony from Mr McAvoy, the Leader of the Council who had told the programme makers that Mr Kean and Mr McCann "*go back a long time*". The BBC also said that the programme provided evidence that Mr McCann's daughter's horse was stabled on Mr Kean's farm and had stated that Mr McCann had declined to provide details as to whether this was a commercial arrangement or whether he derived any financial benefit from it. The BBC said that the programme also produced several examples which suggested that Mr McCann and Mr Kean enjoyed a social relationship. Taking all of this into account, the BBC said that it believed that the programme was justified in asking if the relationship was such that Mr McCann should have declared it when he sat on the Council's Planning Committee. The BBC said that it did not accept that the report in raising the question gave rise to any unfairness to Mr Kean against whom no allegations of impropriety were made.
- ii) The BBC said that the programme had stated that Mr McCann's election celebrations had taken place "*in a building owned by Mr Kean*" which was a matter of fact. The programme did not suggest that Mr Kean had provided hospitality. In any case, even if inaccurate, the BBC said that this statement could only give rise to unfairness to Mr Kean if it were the case that there was no relationship between him and Mr McCann. The BBC said that there was other evidence of the relationship between the two men.

- iii) The BBC said that the programme did not call for a criminal investigation. It said that the programme reported that Mr Neil was calling for an investigation. Even this, however, the BBC said was suitably “caveated” so that no unfair impression might be given that there was evidence of impropriety. The BBC said that Mr Neil had said that an investigation, prompted by Mr McCann’s failure to declare the relationship rather than anything alleged of Mr Kean, was necessary to establish whether there had been impropriety or not, and Mr Neil had clearly asserted that he was not alleging that there had been.
- iv) The BBC said that Professor Kerley was an acknowledged and respected expert on local government. It said that if Mr Kean believed that view to be misleading and inaccurate, the BBC said that it would be incumbent upon him to specify the respects in which he believed that to be the case and the expert authorities upon which he based his view. In the absence of further detail, the BBC said that it did not feel able to comment further.
- v) The BBC said that the programme did not say that Mr Kean had made donations of more than £5,000 to the Labour Party. Rather, it said that:

“Over the last three years Mr Kean and his brother have donated more than £5,000 to the Scottish Labour Party”.

The BBC said that the figure given in the programme was broadly accurate. It said that the exact figure found in the Electoral Commission records was £5260. The BBC said that nowhere in the programme was it suggested that the donations led to Mr Kean gaining influence over the planning processes of the Council and said that it did not believe that a comparison with other small donations made by other businesses to political parties would have been relevant to the issues under consideration.

- b) In response to the complaint that a detailed response from Mr Kean’s solicitors was not used in the programme, other than a mention of a denial by Mr Kean to the allegations made against him, the BBC said that the programme made no allegations of impropriety against Mr Kean and, therefore there was no requirement for the programme makers to extend a right of reply to any specific issues relating to him. However, for the avoidance of any doubt, the BBC said that the programme makers had felt it appropriate that Mr Kean’s assurance that he had been guilty of no improper behaviour should be included in the programme.

Unwarranted infringement of privacy

In summary, the BBC responded to the complaint that Mr Kean’s privacy was unwarrantably infringed in the making and broadcast of the programme as follows:

- c) The BBC said that Mr Kean’s house was, in fact, the farm where Mr McCann’s daughter’s horse was stabled and that this particular matter was, it believed, of direct relevance in establishing that there was a relationship between Mr Kean and Mr McCann.

The BBC said that as all filming was carried out from a public road, there was no requirement of the programme makers to obtain Mr Kean’s permission for filming which, in any case, was warranted by the public interest in examining the

relationship between Mr McCann and Mr Kean and providing evidence as to that relationship.

- d) The BBC said that Mr Kean's residence was the farm where Mr McCann's daughter's horse was stabled. The BBC said that the property was, therefore, of direct relevance to the issue being investigated insofar as it helped to establish that there is a relationship between Mr Kean and Mr McCann.

The BBC said that the image of the farm used in the programme was fleeting and gave no indication as to where the property was located. In such circumstances, it said that Mr Kean's expectation of privacy would have been limited and that any residual infringement of privacy in the broadcast of the programme was warranted by the public interest in examining the relationship between Mr McCann and Mr Kean and providing evidence of that relationship.

The complainant's comments

Unjust and unfair treatment

In summary, Mr Kean's solicitors commented on the BBC's statement as follows:

- a) In response, Mr Kean's solicitors said that the programme's introduction had stated that there were calls for an enquiry into the relationship between "*this Lanarkshire MP*" [Mr McCann] and a "local business man's [Mr Kean] planning applications" and that there had been calls for a "*criminal enquiry into the planning processes of one of Scotland's biggest councils*". The clear implication of these comments, Mr Kean's solicitor's said, was that both Mr McCann and Mr Kean should be subject to a criminal enquiry.

In relation to the sub-heads of complaint:

- i) Mr Kean's solicitors said that Mr McAvoy's quote was not evidence of friendship, nor was the fact that two neighbours' daughters had arrangements regarding the stabling of their horses. The programme did not produce examples of events which suggested that Mr Kean and Mr McCann enjoyed a social relationship. The programme instead showed a photograph from five years ago taken at the election of Mr McCann's predecessor which was attended by hundreds of Labour Party supporters. Mr Kean's solicitors said that the programme attempted to imply a much closer relationship between the two men than that which existed in reality.
- ii) Mr Kean's solicitors said that the programme confirmed that Mr McCann's election celebrations had taken place in a "building owned by Mr Kean". It was a fact that the building in which the 'Legends Bar' is situated was owned by Mr Kean. Mr Kean's solicitors said that it was not clear why that would be evidence of any connection or friendship. In particular, Mr Kean's solicitors said that Mr Kean owned other properties rented out as restaurants, for example, though that did not mean that he had a connection or a friendship with anyone who used the facilities provided by the operators of the businesses run from the premises.
- iii) Mr Kean's solicitors said that Mr Neil was a member of the SNP and was therefore unlikely to be an impartial purveyor of whatever information was provided to him by the programme makers. The further reference to a criminal

investigation, clearly at the very least implied that Mr Kean should be one of the parties subject to the criminal investigation.

- iv) Mr Kean's solicitors said that although Professor Kerley's qualifications were not disputed, he was a former member of the Labour Party and so was not impartial. Mr Kean's solicitors said that Professor Kerley was not legally qualified and the questions which he was asked about the application of the Code of Conduct clearly required a legal response. The Code of Conduct did not mention the word "friendship" but Professor Kerley's contribution referred to it several times and he stated that all friendships must be declared under the terms of the Code of Conduct. Mr Kean's solicitors said that this was not the case and that Professor Kerley's responses were elicited specifically by the BBC to cement the case that they were building against Mr Kean and Mr McCann, but they were not wholly accurate.
- v) Mr Kean's solicitors said that the clear implication of the programme was that the donations made by Mr Kean (and his brother) were linked to irregularities in the Council planning process and that although it had been pointed out to the BBC prior to the broadcast of the programme that the Labour Party had not held a majority on the Council or on its planning committee for several years, Mr Kean's solicitors said that this fact was conveniently omitted from the programme. The donations made by Mr Kean and his brother had been similar in amount to dozens of donations made by other local businesses. Mr Kean's solicitors said that it was a clear attempt by the BBC to make a relatively modest donation appear to be a very significant part of a much bigger "scandal".
- b) Mr Kean's solicitors said that the programme had suggested impropriety on the part of Mr Kean by "implications and innuendo". Mr Kean's solicitors said that the full text of the response to the programme makers sent on behalf of Mr Kean the day before the broadcast revealed that the BBC had been invited to investigate the whole story relating to the supermarket planning applications and that it had refused, or omitted, to do so.

Unwarranted infringement of privacy

In summary, Mr Kean's solicitors commented as follows:

- c) Mr Kean was not aware of any "arrangement" for the stabling of Mr McCann's daughter's horse. Mr Kean did not provide livery or any other similar service for anyone, let alone Mr McCann or his daughter, nor does any other member of Mr Kean's family. Mr Kean's solicitors said that the BBC's inference seemed to be that if two children played for the same football team, then their fathers must be friends.
- d) Mr Kean's solicitors said that Mr Kean could not see why broadcasting footage of his private residence could be in the public interest or evidence of a relationship with Mr McCann.

The BBC's final response

Unjust or unfair treatment

In summary, the BBC responded to the complainant's comments as follows:

- a) The BBC said that it was not the case that the BBC called for a criminal investigation in any of the broadcasts complained of. The BBC said that the programmes merely reported comments made on that particular point by a senior Scottish politician (i.e. Mr Neil).

In response to the complainant's comments relating to the sub-heads of complaint:

- i) The BBC said that the complainant's contention that "the fact that two neighbours' daughters have made arrangements regarding their horses" was not evidence of a relationship failed to recognise that an arrangement, involving the stabling of Mr McCann's daughter's horse on Mr Kean's land, inevitably carried with it the possibility of a financial benefit. The BBC said that the question was not whether there was any arrangement between the daughters, but whether the arrangement was of financial benefit to Mr McCann and/or his immediate family. The BBC said that it believed that the other evidence adduced in the programme as to a relationship between the two men was compelling.
 - ii) The BBC said that the report did not state that the bar was owned by Mr Kean. The BBC said that it believed that this provided further evidence that a relationship existed between the two men which should have been declared by Mr McCann.
 - iii) The BBC reiterated that it did not call for a criminal investigation; it reported that a prominent member of the SNP, Mr Neil, was making such a call.
 - iv) The BBC said that it noted that the complainant did not dispute Professor Kerley's credentials, which clearly showed his expertise in local government matters and which, it believed, qualified him to offer expert comment on the issues raised in the report. The BBC said that it did not agree that a "legal response" was required in commenting on the Code of Conduct. The BBC said that it did not agree that the fact that Professor Kerley did not hold legal qualifications meant that he was unqualified to comment on the Code of Conduct.
 - v) The BBC said that the programme did not suggest or imply that donations made by Mr Kean (and his brother) were linked to irregularities in the planning processes of Council. The BBC said that the central question raised by the programme was whether the relationship which undoubtedly existed between Mr McCann and Mr Kean should have been declared by Mr McCann when, as an elected councillor, he was considering matters which had a bearing on the interests of Mr Kean.
- b) The BBC said that coverage of this particular matter (i.e. the supermarket planning applications) in the programme complained of was not part of the original complaint or part of the complaint as entertained by Ofcom. However, the BBC pointed out that the programme in question was not primarily about the detailed history of this, or any other, planning application. The BBC said that the programme was about the existence of a relationship between Mr Kean and Mr McCann and whether that relationship should have been declared by Mr McCann.

Unwarranted infringement of privacy

In relation to heads c) and d) of the complaint of unwarranted infringement of privacy, the BBC said that it had already dealt with these in its initial statement in response to the complaint.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording and transcript of the programme as broadcast and written submissions from both parties.

Unjust or unfair treatment

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the individual heads, and sub-heads, of the complaint detailed below.

- a) Ofcom first considered Mr Kean's complaint that the programme portrayed him unfairly in that it attacked his character and gave the impression that he used his connections with councillors to gain favours in the planning process.

When considering this head of complaint, and the individual sub-heads of complaint below, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr Kean (as outlined in Practice 7.9 of the Code).

The Code recognises the importance of freedom of expression and the need to allow broadcasters the freedom to broadcast matters of a genuine public interest. However, in presenting material that could be regarded as amounting to significant allegations, reasonable care must be taken not to do so in a manner that does not cause unfairness to individuals or organisations. In this particular case, Ofcom considered that it was in the public interest for the programme to report on the issues such as those covered in it, but that this needed to be consistent with the requirements of the Code.

Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Mr Kean was portrayed unfairly in the programme as broadcast.

- i) Ofcom considered the complaint that, although the programme stated otherwise, Mr Kean had no relationship with Mr McCann other than being an acquaintance.

Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the references to Mr Kean having a relationship with Mr McCann were presented in a way that was unfair to Mr Kean.

Ofcom considered that the purpose of the programme was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. Ofcom noted that the programme presented a number of pieces of evidence that aimed to illustrate that a relationship existed between Mr McCann and Mr Kean. In particular, Ofcom noted that the programme reported that both men had been "*associates*" for several years and showed a photograph of them together at a Labour Party celebration in 2005. It also reported that Mr McCann had held his election celebrations at a bar situated in a building owned by Mr Kean (see sub-head ii) below) and that Mr McCann's daughter stabled her horse on Mr Kean's farm. Ofcom noted too that the programme reported the testimony of the Leader of the Council, Mr McAvoy, who was reported to have said that Mr Kean and Mr McCann "*do indeed go back a long time*".

Ofcom considered that the pieces of evidence presented in the programme were used primarily to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and may have been such that Mr McCann may have been required to declare it when he was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and to refer to the pieces of evidence in the programme to illustrate the extent of the relationship between Mr Kean and Mr McCann.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann. The report concluded with a summary of a statement made on Mr Kean's behalf by his solicitors was included in the stating "*Mr Kean vigorously denies any wrongdoing in relation to any planning matter*". Although brief, Ofcom took the view that the scope of the statement included the references made in the programme to the pieces of evidence aiming to establish the extent of his relationship with Mr McCann and that its presentation in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom considered that the inclusion of the pieces of evidence detailed above formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when Mr McCann was a councillor. In this context, Ofcom considered that the pieces of evidence did not, in themselves, suggest any improper behaviour on Mr Kean's part and that viewers would have been in a position to decide for themselves the

extent of Mr Kean's and Mr McCann's relationship and whether it was that of an "acquaintance" or something more. Ofcom did not consider that the programme was misleading in this respect.

- ii) Ofcom considered the complaint that the programme tried to link Mr Kean with Mr McCann by reporting that Mr McCann's General Election celebrations were held in a public house owned by Mr Kean.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to Mr Kean owning the building in which Mr McCann held his General Election victory party was presented in a way that was unfair to Mr Kean.

Ofcom noted the following commentary made by the programme's reporter that accompanied footage of the exterior of the 'Legends Bar':

"And the BBC understands he held his late night victory party here in Legends Bar in a building owned by Mr Kean".

Ofcom took the view that the programme was clear that Mr Kean owned the building rather than he owned the business (i.e. the 'Legends Bar') that was situated within it.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. As already considered in sub-head i) above, the programme presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One piece of evidence was the programme's reference to Mr McCann's election victory celebrations being held in a building that was owned by Mr Kean. In this context, Ofcom considered that the reference to the 'Legends Bar' was used primarily to illustrate the programme's assertion that a relationship between Mr McCann and Mr Kean existed and that the relationship may have been such that Mr McCann may have been required to declare it when Mr McCann was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and to make reference to Mr Kean's ownership of the building in which the bar was situated in.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the reference to Mr Kean's ownership of the building in which the 'Legends bar' was situated and that its presentation in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Ofcom took the view that the reference to the 'Legends Bar', along with other pieces of evidence presented in the programme, formed part of the

programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that viewers would have understood that the reference to Mr McCann's election victory celebrations being held in a building owned by Mr Kean did not, in itself, suggest any improper behaviour on Mr Kean's part. Ofcom also did not consider that the programme was misleading in this respect.

- iii) Ofcom considered the complaint that the programme called for a criminal investigation into Mr Kean's alleged relationships with councillors, despite containing no evidence of any impropriety whatsoever.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to a call for "*a criminal investigation*" in the programme was presented in a way that was unfair to Mr Kean.

Ofcom noted that the references to "a criminal investigation" related to the allegations about the relationship between Mr Kean and Mr McCann were made in the programme by one of the contributors to it rather than by the programme's reporter. Ofcom noted that the programme's studio presenter introduced the report in the programme by stating that:

"There's been a call for a criminal enquiry into the planning process of one of Scotland's biggest councils after a BBC investigation revealed relationships between a millionaire developer and senior politicians".

Ofcom considered that the studio presenter's introductory comments reflected the view opined by Mr Neil later in the report in which he said:

Mr Neil: *"There is a strong case for a criminal investigation to establish whether anything untoward has actually happened. I'm not saying there has or there hasn't, but I think to clear the air and to make sure that the system is above board in South Lanarkshire, there needs to be a criminal investigation to establish the facts".*

Ofcom then considered whether the inclusion of Mr Neil's contribution and the introductory statement made by the presenter resulted in unfairness to Mr Kean. Ofcom noted that Mr Neil was introduced by the reporter as "*Senior MSP politician Alex Neil*" and that a caption appeared over his contribution that stated "*Alex Neil MSP, SNP Central Scotland*". Ofcom considered that while Mr Neil was giving his personal opinion on the how he believed the allegations made in the programme about Mr McCann's relationship with Mr Kean should be taken forward (i.e. a criminal investigation) viewers would have understood that the comments were being made by a senior politician belonging to a rival political party to that which Mr McCann belonged and that they would have been able to form their own judgement on the partiality, or otherwise, of Mr Neil's views.

Ofcom also noted that Mr Neil's had used the phrases "*...to establish whether anything untoward has actually happened*" and "*I'm not saying there has or there hasn't...*". Ofcom considered that the language used by Mr Neil in his

contribution was such that viewers would have been left in little doubt that he was not stating definitively that there was any evidence of criminal activity, but was making the point that in the interests of openness and transparency, a police investigation should take place to “*establish the facts*”.

Ofcom also noted that the programme makers had sought Mr Kean’s response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean’s solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the comments made by Mr Neil and the programme’s presenter and that its presentation of in the programme would have left viewers in no doubt that Mr Kean refuted any allegation of impropriety.

Taking these factors above into account, Ofcom took the view that Mr Neil’s comments had suggested that he believed that there were sufficient reasons for a “*criminal investigation*” to “*clear the air*”. Ofcom considered that the programme had presented Mr Neil’s comments as his own view and that was made clear to viewers that Mr Kean “*vigorously denies*” any allegation of wrongdoing. Ofcom also considered that the presenter’s comments had been a fair summary of Mr Neil’s position. In these circumstances, Ofcom considered that the broadcaster had taken reasonable care when presenting Mr Neil’s comments not to do so in a way that created unfairness to Mr Kean.

- iv) Ofcom considered the complaint that the programme included a contribution from Professor Kerley whose comments on the Code of Conduct were misleading and inaccurate.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. It is important to note that Ofcom’s role is not to establish whether the substance of Professor Kerley’s contribution to the programme was correct or not, but to determine whether, in broadcasting his opinions, the broadcaster took reasonable care not to present, disregard or omit material facts in a way that was unfair to Mr Kean. In doing so, Ofcom considered the basis for Professor Kerley’s opinion as expressed in the programme and whether the context of the programme’s presentation of his opinion resulted in unfairness.

Ofcom noted the following extract from the programme in which comments made by Professor Kerley about the Code of Conduct and the declaration of interests were included:

Reporter: “*The Councillor’s Code of Conduct says that councillors must declare any interests which could potentially affect the discussions and decision making*”.

Professor Kerley: “*it would be wise to say, I have an interest in this, I am a friend of the applicant for this, I will take no part in this discussion. You either leave the room or you literally kind of push yourself back from the Committee table and you have it recorded in the minutes*”.

Ofcom noted that Professor Kerley's comments followed immediately after the reporter had summarised the Code of Conduct. Professor Kerley was introduced to viewers by an on-screen caption which read "*Professor Richard Kerley, Queen Margaret University*". Ofcom took the view that Professor Kerley was presented as an "expert" and that viewers would have understood that the purpose of his contribution to the programme was to express his expert opinion on the meaning of the Code of Conduct in relation to the declaration of interests and whether it would be appropriate for a councillor to declare an interest if he or she was friends with an applicant to a council committee. Based upon Professor Kerley's professional expertise in the subject which was signposted to viewers by the on-screen caption introducing him, Ofcom considered that it was legitimate for the programme to include Professor Kerley's expert opinion. Ofcom took the view that the fact that Professor Kerley was not legally qualified was irrelevant and did not impact on his ability to interpret the provisions of the Code of Conduct.

In these circumstances, Ofcom went on to consider whether or not the presentation of Professor Kerley's opinion in the programme resulted in any unfairness to Mr Kean. Ofcom again noted that Professor Kerley was shown expressing his expert opinion on how the Code of Conduct should be interpreted. It also noted that Professor Kerley had used the phrase "*it would be wise*", in giving his view on what action a councillor should take if they decided to declare that they were friends with an applicant and that he emphasised the importance of how a particular interest (or in this case, friendship) would be perceived by a member of the public when deciding whether or not to declare that interest. Ofcom considered that the language used by Professor Kerley in giving his opinion was couched in terms that would have left viewers in little doubt that his comments constituted his opinion only and were not directed specifically at the circumstances that the programme later alleged in relation to Mr Kean and Mr McCann. In Ofcom's view, the presentation of Professor Kerley and the nature and content of his comments would have made it clear to viewers that he was an expert giving an informed opinion on a given set of factors relating to the application of the Code of Conduct.

Taking into account all the factors referred to above, Ofcom considered that manner in which the Code of Conduct was summarised by the reporter and the presentation of Professor Kerley's contribution in relation the interpretation of the Code was such that the broadcaster had taken reasonable care to ensure that the programme did not present, disregard or omit material facts regarding to the Code of Conduct in a way that was unfair to Mr Kean.

- v) Ofcom considered the complaint that the programme implied that by making donations of over £5,000 to the Scottish Labour Party Mr Kean had gained inappropriate influence in the local planning process.

As already observed in sub-head i) above, Ofcom recognises that while programme makers and broadcasters have editorial discretion over what material to include in a programme, there is an obligation on them to ensure that material facts are presented fairly. Therefore, Ofcom considered whether or not the reference to the donations to the Labour Party in the programme was presented in a way that was unfair to Mr Kean.

Ofcom noted the following commentary made by the programme's reporter that related to donations made by Mr Kean and his brother to the Labour Party:

"Over the last three years Mr Kean and his brother have donated more than £5,000 to the Scottish Labour Party".

Ofcom noted from the BBC's submissions that the actual figure was £5,260, a figure that was not disputed by Mr Kean's solicitors. Ofcom considered that the programme's reference to the donations amounting to *"more than £5,000"* was a fair reflection of the amount.

Ofcom considered that the purpose of the report was to present the findings of an investigation carried out by the programme makers into allegations about the planning processes of the Council and, in particular, the alleged failure of Mr McCann while he was a councillor sitting on the Council's Planning Committee to declare his relationship with Mr Kean. The report presented a number of pieces of evidence to illustrate that a relationship existed between Mr McCann and Mr Kean. One piece of evidence was a reference to the fact that both Mr Kean and his brother had donated more than £5,000 to the Labour Party. Ofcom noted the BBC's submission that the reference to the donations was used to show the existence of a relationship between Mr Kean and the local Labour Party of which Mr McCann is a prominent figure.

In this context, Ofcom considered that the reference to Mr Kean's donations was used in the programme to support the programme's assertion that a relationship between Mr McCann and Mr Kean did exist (in this case through the local Labour Party) and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. Ofcom considered that it was legitimate for the programme to explore this issue and the extent of the relationship between Mr Kean and Mr McCann.

Ofcom also noted that the programme makers had sought Mr Kean's response to the allegations made in the programme about his relationship with Mr McCann and that a summary of a response provided by Mr Kean's solicitors was included in the programme (see sub-head i) above). Ofcom took the view that the scope of the statement included the reference to the donations he had made to the Labour Party and that its presentation in the programme would have left viewers in no doubt that he refuted any allegation of impropriety.

Ofcom considered that the reference to the donations in the programme attempted to demonstrate that a relationship existed between Mr McCann and Mr Kean and that its inclusion, along with other pieces of evidence presented in the programme, formed part of the programme's narrative in aiming to establish that there was a relationship between the two men and that the relationship was such that Mr McCann may have been required to declare it when he was a councillor. In this context, Ofcom considered that viewers would have understood the purpose of the reference to the donations and that the reference did not, in itself, suggest any improper behaviour on Mr Kean's part or mislead viewers in a way that was unfair to him.

Having considered each of the sub-heads to the complaint made by Mr Kean's solicitors that the programme portrayed him unfairly, Ofcom concluded that,

overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed Mr Kean unfairly. Ofcom also considered that the broadcaster had presented a summary of the statement made by Mr Kean's solicitors in response to the allegations (see sub-head i) above) towards the end of the report. Ofcom took the view that Mr Kean's unequivocal denial of any wrongdoing in relation to any planning matter made clear his point of view about the allegations made in the programme and that Mr Kean's position was fairly summarised and presented in a manner that enabled viewers to reach their own conclusions on the issues raised in the programme.

Ofcom therefore found no unfairness to Mr Kean in this respect.

- b) Ofcom then considered Mr Kean's complaint that the response his solicitors had given to the programme makers before the broadcast of the programme was not used other than to mention a denial of the allegations made against him.

When considering this head of complaint, Ofcom again had regard to whether the portrayal of Mr Kean was consistent with the broadcaster's obligation to ensure that material facts had not been presented, disregarded or omitted in a way which was unfair to him (as outlined in Practice 7.9 of the Code). Also it took into consideration Practice 7.13 of the Code which provides that where it is appropriate to represent the views of a person that is not participating in the programme this must be done in a fair manner.

Ofcom noted from the submission of both parties to the complaint that the programme makers had written to Mr Kean on 21 February 2011 inviting him to respond to allegations that would be made in a series of news reports about his relationship with Mr McCann and Councillor Docherty, and the implication of these relationships when planning applications in which Mr Kean or his companies were involved came before the Council's Planning Committees on which Mr McCann and Councillor Docherty had sat. On 22 February 2011, Ofcom noted that Mr Kean's solicitors provided the programme makers with an email response from Mr Kean in which a number of specific points were addressed and referred to. Ofcom noted that this email contained the following sentence:

"My client [Mr Kean] vigorously denies any wrongdoing in connection with securing any planning permission from any Planning Authority".

Ofcom then took note of the relevant part of the programme in which Mr Kean's solicitors' statement was summarised and presented by the reporter:

"Mr Kean vigorously denies any wrongdoing in relation to any planning matter".

Again, Ofcom recognises that programme makers and broadcasters can legitimately select and edit material provided to it by way of a written statement for inclusion in a programme. This is an editorial decision and it would be unreasonable, in Ofcom's view, for an individual to expect a broadcaster to cede editorial control or to include a lengthy written statement in full. Broadcaster must, however, ensure that where it is appropriate to represent the views of a person not participating in a programme that it is done in a fair manner.

In the particular circumstances of this case, Ofcom noted that the statement provided on behalf of Mr Kean by his solicitors was edited and summarised in the

programme as quoted above. Ofcom considered that although the programme makers had decided not to present the statement in its entirety, the edited extract of the response included in the programme adequately set out, in Ofcom's view, Mr Kean's position regarding the issues raised by the programme makers in a way that would have left viewers in no doubt that Mr Kean denied any improper behaviour or wrongdoing in connection with securing planning permission.

Taking all the factors above into account, Ofcom was satisfied that Mr Kean's solicitors' response made on his behalf, although summarised and edited, adequately reflected Mr Kean's denial of any wrongdoing in relation to securing planning permission. Ofcom concluded that the statement was presented in a manner that did not mislead viewers or portray Mr Kean's position unfairly.

Ofcom therefore found no unfairness to Mr Kean in this regard.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

- c) Ofcom considered Mr Kean's complaint that his privacy was unwarrantably infringed in the making of the programme in that his private residence was filmed without his permission.

In considering this head of complaint, Ofcom had regard to Practice 8.5 of the Code which states that any infringement in the making of a programme should be with the person's consent or otherwise be warranted.

In considering whether or not Mr Kean's privacy was unwarrantably infringed in the making of the programme as broadcast, Ofcom first considered the extent to which he could have legitimately expected that the footage of his private residence would not be filmed for subsequent broadcast without his consent.

Ofcom noted from the footage shown in the programme that Mr Kean's farm had been filmed and that part of that footage was included in the section of the programme that referred to the stabling arrangements of Mr McCann's daughter's horse. Ofcom noted that the footage included in the programme showed a building which was accompanied by the reporter's commentary identifying it as "*Mr Kean's farm*".

Having carefully examined the footage (and taken account of the parties' submissions), Ofcom considered that the programme makers had filmed Mr Kean's property from the public highway and, it appeared to Ofcom, that they had filmed openly through the wire fencing around its perimeter. From the footage shown in the programme, the property did not appear to be hidden from view from the public road.

In the particular circumstances of this case, Ofcom considered that the programme makers had filmed Mr Kean's property from a point on the public highway which could be seen by members of the general public passing by. Ofcom also considered that the manner in which the footage was obtained appeared not to be obtrusive and that there was no suggestion by the complainant in the submissions that the programme makers had disturbed Mr Kean or members of his family in the process of filming the property.

However, Ofcom recognised that the filming and broadcast of footage of an individual's home may give rise to an expectation of privacy. Notwithstanding the circumstances in which Mr Kean's private residence was filmed (as described above), Ofcom considered that, in the particular circumstances of this case, Mr Kean had an expectation of privacy, albeit limited owing to the nature in which it was filmed, that his property would not be filmed for subsequent broadcast in a television programme.

Taking all the above factors into account, Ofcom considered that Mr Kean had a legitimate expectation of privacy, albeit limited in the circumstances, in relation to his property being filmed without the programme makers securing his prior consent.

Given this conclusion, Ofcom then assessed whether the programme makers had secured Mr Kean's consent for the footage of his property to be filmed. Ofcom acknowledged that neither party disputed that Mr Kean's prior consent had not been given.

Ofcom went on to consider the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to gather information and film in making programmes without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to justify the intrusion into Mr Kean's privacy by filming his property in the particular circumstances.

Ofcom considered that the report was a serious piece of broadcast journalism and that there was a genuine public interest in the programme's examination into allegations regarding the planning processes of the Council and, in particular, the alleged failure of local politicians to declare their relationships with Mr Kean, a property developer, when sitting on Council Planning Committees. Ofcom recognised that one of the local politicians identified in the programme, Mr McCann, is a prominent political figure in Scotland and that the programme presented a number of pieces of evidence it said demonstrated that a relationship existed between Mr McCann and Mr Kean. One of the pieces of evidence was that Mr McCann's daughter stabled her horse on Mr Kean's farm. In this context, Ofcom considered that the brief footage of Mr Kean's property was used primarily as a visual device to illustrate the programme's assertion that the relationship between the two men was such that Mr McCann may have been required to declare it when Mr McCann was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and that filming of his property without prior consent to illustrate the fact that the horse was stabled on Mr Kean's farm was relevant to the narrative of the report.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression without interference, in the circumstances of this particular case, outweighed Mr Kean's expectation of

privacy. Ofcom therefore found that the filming of Mr Kean's property was warranted without his consent and that there was no unwarranted infringement of his privacy in the making of the programme.

- d) Ofcom considered Mr Kean's complaint that his privacy was unwarrantably infringed in the programme as broadcast in that pictures of his private residence were broadcast in the programme.

In considering this head of complaint, Ofcom had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted. It also had regard to Practice 8.2 which states that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

In considering whether or not Mr Kean's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which he could have legitimately expected that the footage of his private residence would not be broadcast and disclosed to a wider audience without consent. Ofcom noted that the footage of Mr Kean's farm that was included in the programme showed a building, which was visible on screen for approximately three seconds, accompanied by the reporter's commentary identifying it as "*Mr Kean's farm*".

Again, as already considered in head c) of the Decision above, Ofcom recognised that the filming and subsequent broadcast of footage of an individual's home may give rise to an expectation of privacy. Ofcom considered that, in the particular circumstances of this case, Mr Kean had a limited expectation of privacy in the broadcast of footage of his private residence to a wider audience in a television programme which investigated the implications of his relationships with local politicians.

Taking all the above factors into account, Ofcom considered that Mr Kean had a legitimate expectation of privacy, albeit limited in the circumstances, in relation to footage of his home being broadcast in the programme.

Given this conclusion, Ofcom then assessed whether the programme makers had secured Mr Kean's consent for the footage of his property to be filmed. Ofcom acknowledged that neither party disputed that Mr Kean's prior consent had not been given.

Ofcom went on to consider whether the intrusion into Mr Kean's expectation of privacy was warranted and the broadcaster's competing right to freedom of expression and the need for broadcasters to have the freedom to impart information and ideas and the audience's right to receive the same in programmes without undue interference. In this respect, Ofcom considered whether there was sufficient public interest to justify the intrusion into Mr Kean's privacy by including footage of his home in the particular circumstances.

Ofcom again considered that the report was a serious piece of broadcast journalism and that there was a genuine public interest in the programme's examination into allegations into the planning processes of the Council and, in particular, the alleged failure of local politicians to declare their relationships with Mr Kean, a property developer, when sitting on Council Planning Committees. Ofcom recognised that one of the local politicians identified in the programme, Mr

McCann, is a prominent political figure in Scotland and that the programme presented a number of pieces of evidence that it said demonstrated that a relationship existed between Mr McCann and Mr Kean. One such piece of evidence was that Mr McCann's daughter stabled her horse on Mr Kean's farm. In this context, Ofcom considered that the very brief footage of Mr Kean's property was used primarily as a visual device to illustrate the programme's assertion that the relationship between Mr McCann and Mr Kean was such that Mr McCann may have been required to declare it when he was a councillor and sitting on the Council's Planning Committee. Ofcom considered that it was legitimate for the programme to explore this issue and that to include footage of his property without prior consent to illustrate the fact that the horse was stabled on Mr Kean's farm was relevant to the narrative of the report.

On balance and given all the factors set out above, Ofcom concluded that the broadcaster's right to freedom of expression and to impart information without interference, in the circumstances of this particular case, outweighed Mr Kean's expectation of privacy. Ofcom therefore found that the inclusion of footage of Mr Kean's property in the programme as broadcast was warranted without his consent and that there was no unwarranted infringement of his privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Mr Kean's complaint of unjust or unfair treatment or unwarranted infringement of privacy in the making or the broadcast of the programme.

Not Upheld

Complaint by Mr Conor O'Dwyer and Mrs Michaela O'Dwyer

Homes from Hell: Chasing the Dream, ITV1 and ITV2, 19 July 2011, 20 July 2011 and 7 September 2011

Summary: Ofcom has not upheld this complaint of unjust and unfair treatment in the programme as broadcast made by Mr Conor O'Dwyer and Mrs Michaela O'Dwyer.

This programme included the story of Mr and Mrs O'Dwyer who had experienced problems with a firm of property developers to whom they had paid money towards the purchase of a villa in the Republic of Cyprus. The programme included interview footage of Mr and Mrs O'Dwyer who explained how their dispute with the developers began and how this led to Mr O'Dwyer being assaulted twice by the developers and the campaign he had conducted to get his money back. The programme also included comments from the developers' lawyers about the dispute and Mr O'Dwyer's actions.

Mr and Mrs O'Dwyer complained to Ofcom that they were treated unfairly in the programme as broadcast in that material facts were presented in a way that resulted in a negative impression of them being given.

Ofcom found that the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint detailed below) were not presented, omitted or disregarded in a way that portrayed Mr and Mrs O'Dwyer unfairly in the programme as broadcast.

Introduction

On 19 July 2011, ITV1 broadcast an edition of *Homes from Hell*, entitled *Chasing the Dream*, which looked at a variety of problems faced by British people who had invested money in property both in the UK and abroad. The programme was repeated on ITV1 on 20 July 2011 and again on ITV2 on 7 September 2011.

One of the stories included in the programme was that of Mr Conor O'Dwyer and Mrs Michaela O'Dwyer, who had paid a £100,000 deposit on a four bedroom villa in the town of Frenaros, in the Republic of Cyprus ("Cyprus"). In the programme, Mr O'Dwyer explained that one of the reasons for choosing the property was the amount of privacy the garden offered and that the plans had shown that his family's privacy would have been secured. The programme said that, in February 2006, Mr O'Dwyer went to see the building works and was surprised to find that three other villas had been built near to his and that his garden was now completely overlooked. The programme said that Mr O'Dwyer had gone to the offices of Karayiannas & Sons ("the developers") the next day and discovered that the site plans had been changed. The programme said that the builder offered Mr O'Dwyer his money back, but that Mr and Mrs O'Dwyer had decided to continue with the purchase of the villa as their preparations to move were so far advanced.

The programme went on to say that Mr and Mrs O'Dwyer had felt betrayed and that *"in their anger they recorded meetings with the developer to post on the internet"* in an attempt to warn other potential buyers of their experience. The programme said that Mr and Mrs O'Dwyer's behaviour had incensed the developers, who had thought that they were negotiating in *"good faith"*, and that the *"relations broke down"*. The

programme said that *“with [their] hard earned reputation at stake”* the developers no longer wanted to sell the property to Mr O’Dwyer, but that Mr O’Dwyer was not about to *“let go of the house”*. Footage taken by Mr O’Dwyer in 2006 (*“the video footage”*) of *“a chance meeting”* between him and the developers at the building site was then included in the programme which appeared to show Mr O’Dwyer being assaulted by the developers (*“the first assault”*). The programme said that *“Christoforos Karayiannas and his son, Marios [the developers] were arrested”* and that they were *“later found guilty of assault and paid damages”* to Mr O’Dwyer. After this incident, the programme said that *“what had been a feud, was now a war”* and that Mr O’Dwyer began *“a campaign that would consume his life”*.

The programme said that in 2008, Mr O’Dwyer went back to Cyprus and was assaulted (*“the second assault”*) after colliding with Mr Marios Karayiannas’ car. Mr O’Dwyer spent a few days in hospital and the developers were given a ten month suspended sentence for *“actual bodily harm”*. The programme said that the developers’ lawyers had said that the assault was the result of Mr O’Dwyer’s campaign, which was deliberately provocative.

The programme then went on to state that in 2009, the developers had offered Mr and Mrs O’Dwyer their money back with interest, but that they refused and had wanted their money back with interest, plus an increase in the value of the house and their legal fees and expenses. Mr and Mrs O’Dwyer were then shown driving to the developers’ offices to protest and raise awareness of their situation. The programme said that Mr O’Dwyer had been campaigning for five years and that he had been *“relentless in his quest”*. It said that the developers felt that they were being *“victimised, pressured and defamed”* and that they had built over a thousand homes but had never encountered anything like this situation. Footage of Mr Christoforos Karayiannas was shown arguing with a police officer and the programme explained that it was a criminal offence in Cyprus to publicly insult someone and that one of the developers had claimed that he was insulted by the wording on Mr O’Dwyer’s banner which stated that the developers were *“criminals”*. The programme showed an exchange between Mr O’Dwyer and a police officer who told him to report to the police station in half an hour or face arrest. The programme said that Mr and Mrs O’Dwyer disregarded the police officer’s instructions and were then shown driving to view their house, which was now occupied. The programme said that on the following day, Mr O’Dwyer was charged by the police with *“public insult to Karayiannas & Sons”* and that he was again pursuing his campaign outside the Presidential Palace in Nicosia, Cyprus.

The programme concluded Mr and Mrs O’Dwyer’s story by stating that *“Karayiannas & Son have set up their own website challenging Conor O’Dwyer”* and that Mr and Mrs O’Dwyer continued their protest and believed that their court case will be heard later in 2011.

Following the first broadcast of the programme on 19 July 2011 and the repeat on 20 July 2011, Mr O’Dwyer complained to Ofcom that he and his wife were treated unjustly or unfairly in the programme as broadcast.

Summary of the complaint and the broadcaster’s response

In summary, Mr and Mrs O’Dwyer complained that they were treated unjustly or unfairly in the programme as broadcast in that:

- a) Material facts were edited unfairly and were either presented, omitted or disregarded in a way that resulted in a negative impression being given of Mr and Mrs O'Dwyer in the programme.

In particular, Mr and Mrs O'Dwyer cited the following instances in the programme to support their complaint:

- i) The programme stated that *"The builder offered Conor his money back"*.

Mr and Mrs O'Dwyer said that this statement was false and that it portrayed Mr O'Dwyer as a "hypocrite and someone not to be trusted". Mr O'Dwyer said that the developer had made no genuine offer of a refund in 2006, only a verbal indication that he would consider giving Mr and Mrs O'Dwyer a refund. Mr O'Dwyer said that the programme omitted part of his contribution in which he explained that the developer had retracted the offer of a refund. Mr O'Dwyer said that this omission left the viewer with the unfair impression that he and his wife had been given a legitimate offer of a refund by the developer and refused it. Mr O'Dwyer said that the fact was that the offer was retracted and that he and his wife had no choice but to proceed with going ahead with the house as they were contracted to do so.

In response, ITV said that the programme's commentary stated that *"The builder offered to give Conor his money back"*. This, ITV said, was a factual statement that was demonstrably true. The developers had offered to give Mr and Mrs O'Dwyer their money back on at least three occasions:

- First time in February 2006: the developers offered to buy Mr and Mrs O'Dwyer out of their contract or give them extra land at the side of the villa. Mr O'Dwyer referred to this offer in his letter to the developers dated 13 February 2006;
- Second time in mid-2007: the developers offered Mr and Mrs O'Dwyer their money back, less agent's fees. This offer was confirmed by Mr O'Dwyer in a statement he signed for the programme makers on 4 July 2011; and
- Third time in 2009: the developer offered Mr and Mrs O'Dwyer his money back plus interest.

ITV said that it is clear from the programme (and Mr O'Dwyer's letter of 13 February 2006) that in 2006 the developers had not made an offer that was acceptable to Mr O'Dwyer and that therefore, even though the house was no longer his *"dream home"*, Mr O'Dwyer would continue with its purchase in the hope of selling it on. ITV said that it was clear from the letter that Mr O'Dwyer had no intention of accepting an offer of his money back and this was fairly reflected in the commentary. It said that there was nothing unfair in reflecting the fact of these offers made by the developers, indeed, ITV said that it was required to report the dispute in a fair and balanced manner.

In summary and in response to ITV's statement, Mr and Mrs O'Dwyer said that ITV's reference to the later offers (i.e. in 2007 and 2009) had been irrelevant and had confused the issue.

ITV commented that the fact that an offer was made to Mr and Mrs O'Dwyer in 2006 to buy back the house was not in issue and that the programme had given a fair and accurate reflection of the facts.

- ii) The programme stated that *"In their anger, they recorded meetings with the developer to post on the internet in an attempt to make other buyers aware of their experience"*.

Mr O'Dwyer said that he did not post the recordings of the meetings on the internet through his website out of *"anger"*, but that he had posted the material on his website *"not only for my personal safety, but also to protect my investment"*. Mr O'Dwyer said that the statement made in the programme was untrue and gave the impression that he was a *"hothead, unreasonable, out of control or aggressive"*.

ITV said in response that the programme's reporting of this action did not unfairly portray Mr O'Dwyer as a *"hothead, unreasonable, out of control or aggressive"*. It said that it was fair and accurate for the programme to say that Mr O'Dwyer was angered by the whole experience and that this was obvious from his interviews and his actions over the years. ITV said that the anger and frustration motivated him to post information about his experiences on his website (a website that he still maintained) in an effort to warn other potential buyers. ITV also said that the commentary just before that relating to the internet posts stated that *"Conor and Michaela were desperately upset. They felt betrayed. They had bought into a dream only to see it compromised"*. This ITV said, sympathetically described how Mr and Mrs O'Dwyer had felt and gave a fair and accurate description of the steps that they subsequently took.

- iii) The programme said that *"Their actions incensed the developers who thought they were negotiating in good faith. Relations broke down"*.

Mr O'Dwyer said that his relationship with the developers had already broken down before he mentioned his website to them. Prior to that, Mr O'Dwyer said that it was inconceivable that the developers thought that they were *"negotiating in good faith"* and that had the programme makers scrutinised the developers' position as closely as they did theirs, then this would have been apparent. Mr O'Dwyer said that it was unfair for the programme to include the developers' thoughts on the case rather than the facts. Mr O'Dwyer said that their story was portrayed in a *"tit for tat fashion"*, which steered away from the typical *Homes From Hell* style in which they believed they were participating.

ITV said in response that anyone against whom a substantive allegation is made in any programme is entitled to an opportunity to respond and that it was obliged to seek and include a response from those against whom the allegation is made. ITV said that the programme makers had approached the developers with a right of reply letter inviting them to respond to a number of allegations made by Mr O'Dwyer. The developers referred the programme makers back to an interview that their lawyer had given to ITV in the autumn of 2010. ITV said that in this interview, the lawyer had said that Mr O'Dwyer's website frustrated them when they thought that they were negotiating in good faith only to have extracts of those negotiations posted on the website. ITV said that these circumstances were reflected fairly in the programme. It said that the story was not unfairly told in a *"tit for tat"* manner as Mr O'Dwyer characterised it, instead it presented each side of the story in order to provide a fair and accurate overview of events.

- iv) The programme stated that *“With his hard earned reputation at stake, Karayiannas was adamant that he didn’t want to sell the house to Conor anymore”*. It also stated that the developers had *“built over a thousand houses and never experienced a situation like this”*.

Mr O’Dwyer said that these statements portrayed the developers as hard working, respectable businessmen who had no other dissatisfied customers. Mr O’Dwyer said that this was untrue and it unfairly portrayed him as the exception. He said that viewers could have been forgiven for thinking they were watching “Customer From Hell” rather than *Homes From Hell*.

In reply ITV said that, as explained in response to iii) above, it was obliged to seek a response from a party against whom a substantial allegation has been made and to reflect that response fairly in the programme. It said that the developers’ lawyers had told the programme makers that 90 per cent of their business was with purchasers from the UK and that Mr O’Dwyer’s website could do the developers’ reputation some serious damage within that market. ITV said that the developers’ lawyers also said that they had *“built over a thousand houses and never experienced a situation like this”*. ITV was obliged to reflect the developers’ position, notwithstanding that Mr O’Dwyer may not agree with it. ITV said that it reflected fairly the positions of both parties.

- v) The programme stated that *“But Conor wasn’t about to let go of the house and, on a visit to the site, a chance meeting with the developers turned explosive”*.

Mr O’Dwyer said that this statement, along with other statements made by the programme all went to suggest that he was unreasonable and had provoked the developers who, in a *“chance meeting”*, assaulted Mr O’Dwyer. Mr O’Dwyer said that the developers had been called to the site and that it was not a *“chance meeting”*.

ITV said in response to this point that the meeting between Mr O’Dwyer and the developers on that occasion was a chance encounter that quickly turned sour. This was evident, according to ITV, from the translated transcript of the video footage that Mr O’Dwyer provided to ITV (and provided to Ofcom). ITV said that it could be seen from the translation that one of the developers called the police almost immediately upon seeing Mr O’Dwyer. This, ITV said, was unlikely to be something that the developers would have done if they had pre-arranged the meeting. Furthermore, far from suggesting Mr O’Dwyer had been unreasonable or provocative on this occasion, ITV said that the programme fairly and accurately described how the encounter ultimately led to the developers being found guilty of assaulting Mr O’Dwyer in the civil court.

In relation to the translated transcript of the video footage, Mr and Mrs O’Dwyer commented in response to ITV’s statement that they believed that ITV had been deceitful in its response to Ofcom and had broken its own Code of Conduct on Honesty and Fair Dealing. Mr and Mrs O’Dwyer said that video footage that was broadcast did include the footage of one of the developers threatening Mr O’Dwyer that he will “smash his little teeth”, but that ITV did not have the translated transcript at the time. Mr and Mrs O’Dwyer said that

because ITV did not have a translated transcript before the broadcast of the programme they therefore could not have based any editorial decision on it.

ITV said that it denied the allegation of deceit. It said that Mr and Mrs O'Dwyer appeared to have come to this conclusion because the programme did not include a part of the dialogue between Mr O'Dwyer and the developers in which one of the developers threatened to "smash his [Mr O'Dwyer's] little teeth". ITV said that when the programme makers had the footage translated, much of the dialogue was indistinct. However, it said that given the programme reported the violent outcome of the meeting, the reasonable and fair editorial decision was taken that it was unnecessary to use the entirety of the footage of the event.

- vi) Mr O'Dwyer said that he and his wife had provided the programme makers with their own video footage of the incident in 2006, in which the first assault took place, on the understanding that it would be used with subtitles of the "important Greek spoken content". He said that this was confirmed to him in a meeting with the programme makers on 4 July 2011, but the guarantee was broken. Mr O'Dwyer said he and his wife did not agree to ITV using the footage without including the developer saying "crush his head" and "break his teeth". He said that this showed the developers in their true light and its omission from the programme was unfair.

In response ITV said that it was not accepted that it was ever agreed that Mr O'Dwyer's consent for the programme makers to use his video footage was qualified in this way. ITV said that it made its obligations in respect of fairness very clear to Mr O'Dwyer throughout its dealings with him. ITV said that he was fully aware that it could not include any statements or allegations that it was not in a position to verify and that it could not simply rely on his version of events in lieu of ITV's own research. Furthermore, ITV said that it made it very clear to Mr O'Dwyer (see email of 18 July 2011 from the programme makers to Mr O'Dwyer) that ITV could not include all of the footage he provided due to editorial reasons and time constraints. ITV said that it disagreed that the omission of these words failed to show the developers in their true light and was therefore unfair because the very fact that the piece went on to state that the developers were found guilty of assault after the incident provided the viewers with all the information they would need to make a fair and accurate assessment of the situation.

- vii) In relation to the portrayal of the first assault on Mr O'Dwyer in the programme, Mr O'Dwyer said that the programme should have made it clear that the developers escaped a criminal conviction, as the case was dropped because Mr O'Dwyer was absent. Mr O'Dwyer said that the reference to the damages that he was awarded was not put in context and unfairly portrayed it as "justice served".

In response ITV said that the commentary stated in an objective manner the charges the developers were found guilty of and the punishment they had received. ITV said that it would not therefore have been responsible or fair for it to speculate as to what could have happened at court if Mr O'Dwyer had been present.

- viii) The programme stated that *"What had been a feud was now a war. With neither side prepared to back down. Conor wanted the house; Karayiannas wanted Conor out of his life. But Conor wasn't going anywhere. With his*

dream in tatters, he began a campaign that would consume his life". Mr O'Dwyer said that this statement was false.

Mr O'Dwyer said that after the first assault on him in 2006 he had taken down his website (which had only been active for six days) and replaced it with a statement. He said that he and his wife had backed down in that the statement did not name the developers and Mr and Mrs O'Dwyer did not promote its existence. The website remained inactive until 2007. Mr O'Dwyer said that during this time the developers had sold the property and had kept Mr and Mrs O'Dwyer's money "in a rapidly increasing house market". By not presenting these facts the programme gave a negative impression Mr and Mrs O'Dwyer.

On this point ITV said that the purpose of this part of the commentary was to describe how the feud between the parties carried on and it was undeniable that neither party was willing to back down. ITV said that what had been a dispute had escalated into violence on the part of the developers, for which they were convicted in a civil court. ITV said that if Mr O'Dwyer had temporarily suspended or made changes to his website, that did not mean that he backed down in terms of his case in relation to the property. Indeed, ITV said that Mr O'Dwyer stepped up his campaign in order to bring it to the attention of as wide an audience as possible. The programme did not suggest that he wanted a "war", it was quite clear that what he wanted was the case to be concluded to his own satisfaction.

- ix) The programme said *"Karayiannas & Sons' lawyers said the assault was a result of Conor's campaign, deliberately to provoke the developers"*.

Mr O'Dwyer said that the inclusion of this statement in the programme portrayed him "almost as the aggressor" and suggested that the second assault on him was justified. Mr O'Dwyer said that the programme omitted crucial facts relevant to the assault and gave credence to the developers, which gained them sympathy. He said that the programme should have expressed how Mr O'Dwyer had been outraged by the sentence given to the developers for the second assault on him and that the prosecuting authority was appealing the decision. This would have put into context the protests that Mr O'Dwyer was shown engaged in later in the programme.

ITV said in response that by explaining in the programme the second assault and showing pictures of Mr O'Dwyer in hospital and revisiting the location of the assault with him as well as presenting the viewer with how these events made him feel, ITV said it was happy that Mr O'Dwyer's later protests were properly contextualised for the viewer. ITV said that it therefore also decided that it was fair and necessary to include a comment from the developers explaining how the dispute with Mr O'Dwyer made them feel. The programme remained as objective and fair as possible. ITV said that it was happy that the part of the story that dealt with the second assault covered adequately the relevant details of that incident in the time available. ITV said that it firmly believed that the comment in no way reduced the culpability of the developers as they were after all convicted criminals and the comment was necessarily included to demonstrate that their behaviour arose from the same dispute.

- x) The programme said *"In 2009, the O'Dwyers were offered their money back, plus interest. They refused. To walk away, they wanted their money back plus interest, plus an increase in the house's value, plus legal fees and expenses"*.

Mr O'Dwyer said that intonation used by the programme narrator to read this statement, along with the gratuitous use of the word "plus", implied that he was unreasonable and greedy. Mr O'Dwyer said that the programme omitted crucial facts relating to Mr and Mrs O'Dwyer's case and left viewers questioning why anyone would give them any support when they were turning down offers of settlement. Mr O'Dwyer said that this offer had been conditional on them dropping all criminal cases against the developers, removing all internet material, and making a public apology to the developers. Mr O'Dwyer said that the programme implied that they were fighting for more than they were entitled to which portrayed them unfairly as unreasonable and foolish.

In reply, ITV said that Mr O'Dwyer was made this offer by the developers and that he had turned it down because he did not find it to be a satisfactory offer and instead wanted his money back plus interest, plus an increase in the house's value, plus legal fees and expenses. ITV said that this was a fair reflection of facts confirmed to ITV by Mr O'Dwyer himself in his signed statement of 4 July 2011. There was no omission of crucial facts, nor was anything implied in the statement (in which there was no mention of any condition to drop all criminal cases). ITV said that the reality was that Mr O'Dwyer wanted more than was offered to him and he had turned down the offers the developers made.

- xi) The programme stated that *"In Cyprus, it's a criminal offence to publicly insult someone and Karayiannas is insulted by Conor's banner"*. It later said that *"Conor was charged by the Cypriot police for public insult"*.

Mr O'Dwyer said that these statements wrongly implied that there was a "public insult". He said that his banner had read "Karayiannas are criminals", which was a matter of fact. Mr O'Dwyer said that his and his wife's protest outside the developers' offices had been silent. Although the police later claimed that he had been shouting "you bastards" to the developers, which Mr O'Dwyer denied, it would have been fairer for the programme to have included this "falsehood" as the programme makers had filmed throughout his protest.

In response, ITV said that although two members of the developers' family had indeed been convicted of a criminal offence, the remainder of the wider family involved in the business had not. As a responsible broadcaster, ITV said that it was extremely mindful of its legal and regulatory obligations in respect of defamation and fairness and it would have been defamatory of and unfair to the other members of the developers' family to broadcast an image of the banner which claimed that the whole family were criminals. ITV said that it explained to Mr O'Dwyer on several occasions in advance of broadcast why the programme would not show the banner so that he would understand the reason for its omission.

- xii) Mr O'Dwyer said that the programme unfairly omitted to make clear to viewers that the developer had sold Mr and Mrs O'Dwyer's house to another family at a higher price and kept their money. Mr O'Dwyer said that their story could not be told without reference to this fact as it was fundamental to their case and the back-story to their protests.

In response, ITV said that as the property Land Registry in Cyprus is not a public record, the programme makers were not permitted to see the Land Registry report for the house. Instead, ITV said that the programme makers had approached the developers' lawyers for confirmation on ownership of the property. For the avoidance of doubt, ITV said that the registered owners of the property have always been the developers. They confirmed to the programme makers that the house had not been sold to the woman who was staying there and that it could not be sold to her until the court case with Mr O'Dwyer was resolved. ITV said that the woman who was staying in the house was renting it and had not bought it. This was the information that ITV had at the time of broadcast.

In representations made in response to ITV's statement, Mr O'Dwyer said that the reference by ITV to the Cyprus Land Registry was trying to deceive Ofcom as to the material the programme makers had at the time of broadcast.

ITV replied that it had not been deceitful to Ofcom in any of its responses to the complaint and had merely tried to explain to Ofcom why certain decisions in respect of the programme and its content were made. ITV said that it was not in a position to "objectively verify" that the property had been sold because it did not have access to the Cypriot Land Registry. ITV said that this was the reason that it did not discuss any alleged sale of the property in the programme and that it would have been irresponsible to have done otherwise.

- xiii) Mr O'Dwyer said that the programme portrayed his protest outside the Presidential Palace, which took place in November 2010, as taking place after he was charged for public insult in February 2011. Mr O'Dwyer said that this led viewers into believing that even after being charged with a criminal offence, he behaved in a belligerent manner and had gone on to do the same (i.e. make public insults). Mr O'Dwyer said that he had not protested in Cyprus since being charged in February 2011. Mr O'Dwyer said that part of the writing on his banners had been obscured by the programme makers in the programme, which implied that what was written on them was insulting. In fact, the banners listed Mr O'Dwyer's reasons for protesting and were factually correct. Mr O'Dwyer said that the viewer was left with no idea of the seriousness of the issues Mr and Mrs O'Dwyer faced and that they were left with the image of a "belligerent man engaged in extreme measures".

ITV said in response that, as explained in response to sub-head xi) above, the programme had blurred the banners because they contained allegations that the programme makers had no way of verifying and because they included Mr O'Dwyer's website address. ITV said that it was not willing to show the website address because it could not direct viewers to a website that could contain defamatory material. ITV said that this was explained to Mr O'Dwyer before the programme went to broadcast. That Mr O'Dwyer continued his campaign against the developers was clear for example, from his protest at 'A Place in the Sun LIVE' exhibition in Earls Court in March 2011. The viewers would have understood the situation that Mr O'Dwyer finds himself in (hundreds of thousands of pounds out of pocket and no house).

Mr O'Dwyer responded to the reasons given by ITV for blurring his banners as follows. He said that the banners had said nothing derogatory and gave some examples, for instance "sleeping rough for justice" and "Mr President that is your house – look at mine". Mr O'Dwyer said that his placard boards had been shown uncensored in the Greek national press.

ITV replied that it had already explained in its initial statement in response it reasons why the wording of Mr O'Dwyer's banners had been obscured in the programme and that it had nothing further to add on this point.

- xiv) Mr O'Dwyer said that it was unfair for the programme to include the statement at the end of the programme that the developer had "*set up their own website challenging Conor O'Dwyer*". He said that the content of the website was false and that it had made a number of untrue claims accusing Mr O'Dwyer of being a "spy", "working for a Turkish developer" and "a man with a hidden political agenda". Mr O'Dwyer said that it was unfair to mention the developers' website as the final thought for the viewer.

Mr O'Dwyer concluded by stating that he and his wife were asked to participate in the programme on basis of an associate producer's email that said "...it's a prime time ITV show so will highlight your case massively in the UK press to try and stop what's happened to your family happening to others". Mr O'Dwyer said that the programme did none of that and that the only people it helped were the developers.

ITV said in response that it did not provide the viewers with the website address of the developers in the same way that it did not provide the viewers with the website address of Mr O'Dwyer. The reason for this was that it was not in a position to verify the content of either website and could not risk directing the viewers to potentially defamatory material. It was not unfair to mention that the builders had set up their own website; it was a statement of fact.

That ITV did not represent the story to Mr and Mrs O'Dwyer's satisfaction did not mean, in ITV's view, that they were treated unjustly or unfairly in the programme as broadcast. The programme did not explore every single detail of the story, but it did attempt, in the limited time available, to broadly and fairly describe the key events and the motivations behind each party's decision. In telling Mr and Mrs O'Dwyer's story, ITV said it was confident that the programme presented the facts and both sides objectively and fairly and in accordance with its duty as a responsible broadcaster.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and supporting material. Ofcom also took careful account of all the representations made by both parties in response to being

given the opportunity to comment on Ofcom's preliminary view on this complaint. Ofcom recognises that in response to the preliminary view Mr and Mrs O'Dwyer said they did not accept Ofcom's decision not to uphold their complaint. Nonetheless, Ofcom had attentive regard to all their further representations in finalising this decision, although Ofcom concluded that none of the further points they raised should materially affect the outcome of their complaint.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). Ofcom had regard to this Rule when reaching its decisions on the individual heads of complaint detailed below.

- a) Ofcom considered the complaint that material facts were either presented, omitted or disregarded in a way that resulted in a negative impression of Mr and Mrs O'Dwyer in the programme.

When considering the complaint and the individual sub-heads of complaint below, Ofcom had regard to whether reasonable care was taken by the broadcaster to satisfy itself that material facts had not been presented, disregarded or omitted in a way which was unfair to Mr and Mrs O'Dwyer (as outlined in Practice 7.9 of the Code).

Ofcom recognises that programme makers and broadcasters can select and edit material provided to it by contributors for inclusion in a programme. This is an editorial decision and it would be unreasonable, in Ofcom's view, for an individual to expect a broadcaster to cede editorial control or to include lengthy contributions in full. Broadcasters must, however, ensure that material facts and contributions are presented fairly. It is in this context that Ofcom considered whether or not Mr and Mrs O'Dwyer were portrayed unfairly in the programme.

In reaching its decision, Ofcom considered the following sub-heads of complaint in order to reach an overall decision as to whether Mr and Mrs O'Dwyer were portrayed unfairly in the programme as broadcast.

- i) Ofcom considered the complaint that the programme's statement that "*The builder offered Conor his money back*" was false and that it portrayed Mr O'Dwyer as a "hypocrite and someone not to be trusted".

Ofcom noted the following extract from the programme:

Commentary: "*By now Conor and Michaela had spent 100,000 pounds towards their 250,000 pound villa. The builder offered to give Conor his money back.*"

Mr O'Dwyer: "*We said to the developer that despite what he's done to us, preparations to move were so far advanced that we would have the house in any event and hopefully we would sell it on quite quickly. But it was no longer our dream home.*"

Mrs O'Dwyer: "*No*".

Ofcom also noted a letter dated 13 February 2006 from Mr O'Dwyer to the developers in which he detailed a number of offers apparently made by the developers to resolve the matter. One such offer was to "buy us [Mr and Mrs

O'Dwyer] out". In the letter, Mr O'Dwyer explained to the developers that he could not put a price on what a suitable offer should be as any deal to "buy us out" would leave him and his wife looking for another property at "last year's prices". He also said that there would be other related costs to include, such as rented accommodation.

Ofcom took note too of a statement signed by Mr O'Dwyer and witnessed by the programme makers on 4 July 2011 that set out the details of two verbal offers made by the developers in 2007 and 2009 respectively. The 2007 offer offered Mr O'Dwyer "money back less agent's fees" and the 2009 offer had offered him "money back plus interest". Ofcom noted that the statement included Mr O'Dwyer's refusal of both offers because there had been a significant rise in house prices in Cyprus.

Ofcom considered that the purpose of this particular type of programme was to tell the story of people who had experienced problems with property related issues both in the UK and abroad. In the case of Mr and Mrs O'Dwyer, Ofcom noted that the programme aimed to recount the circumstances surrounding their dispute with the developers in Cyprus and, in doing so, it presented a number of events and facts to create a narrative for viewers to follow. In order to do this, and to present it in the relatively short amount of time available in a programme of this nature, Ofcom noted that the events and material facts surrounding the dispute between Mr and Mrs O'Dwyer and the developers were summarised and that Mr and O'Dwyer's contribution was condensed.

Ofcom noted from the material provided to it in Mr and Mrs O'Dwyer's complaint and ITV's submission that the history behind the dispute between Mr and Mrs O'Dwyer and the developers went back many years and that over time, a number of offers, and at least one counter offer from Mr and Mrs O'Dwyer, had been made between them in relation to the money they had paid. However, Ofcom considered that while it was incumbent on the programme makers to present material facts fairly, it was not obliged to present all the facts and events surrounding the offers and counter offers.

Ofcom considered that although the programme makers had decided not to present all the facts in their entirety, the summary of the facts as presented in the programme (and quoted above) adequately set out, in Ofcom's view, the position that the developers had offered Mr and Mrs O'Dwyer their money back and that Mr and Mrs O'Dwyer had decided not to accept the offer for the reasons that they expressed in the programme.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the representation of the developers' offers of a refund of the money, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- ii) Ofcom considered the complaint that the programme's statement that Mr O'Dwyer had posted recordings of his meetings with the developer on his website out of "anger" was untrue and gave the impression that he was "a hothead, unreasonable, out of control or aggressive".

Ofcom noted the following commentary in the programme:

“Conor and Michaela were desperately upset. They felt betrayed. They had bought into a dream only to see it compromised.

In their anger they recorded meetings with the developer...to post on the internet in an attempt to make other buyers aware of their experience.

Their actions incensed the developers who thought they were negotiating in good faith.

Relations broke down. With his hard-earned reputation at stake, Karayiannas [the developers] was adamant he didn't want to sell the house to Conor any more...”.

Ofcom considered that the word “*anger*” is emotive and to use it in a programme to portray an individual's motivation for a particular action or behaviour has, in Ofcom's view, the potential to create unfairness to those to whom it is attributed.

In the circumstances of this case, Ofcom had regard, again, to the material provided to it by the complainants and the broadcaster. From the various letters from Mr O'Dwyer to the developers and documented notes of telephone conversations between the parties, it was clear to Ofcom that Mr O'Dwyer was upset with the way the development of their “*dream home*” had gone and that he was determined to get the dispute with the developers resolved to his satisfaction. Throughout his dealings with the developers, Ofcom noted that the content and tone of Mr O'Dwyer's correspondence, notes of meetings, and telephone conversations was polite and precise, and did not display, in Ofcom's view, any outward signs of the distress that he said (and Ofcom did not doubt it) the dispute had caused him and his family. However, in contrast to the measured approach taken by Mr O'Dwyer in his contact with the developers, Ofcom noted that his website that he dedicated to his case against the developers had the address “*www.lyingbuilder.com*” and that since 2006, he had actively sought to resolve the dispute with the developers by protesting, for example, outside: the developers' property; the Cypriot High Commission in London; and the Presidential Palace in Cyprus itself. Ofcom also noted that Mr O'Dwyer had spent a considerable amount of time, effort and money in Cyprus pursuing the developers and his cause.

In Ofcom's view, it was likely that, from the manner in which Mr O'Dwyer was depicted, viewers would have considered that Mr O'Dwyer's actions were those of a man who felt frustrated, aggrieved and dissatisfied with the developers and the official Cypriot response to his situation. While the word “*anger*” may not have been the way in which Mr O'Dwyer would have categorised his motivation for setting up his website, Ofcom considered that it was unlikely that the use of the word in the programme would not have led viewers into believing that he was a “hot head” who was “unreasonable” and aggressive. In fact, Ofcom considered that a considerable amount of time was given in the programme to the inclusion of footage of Mr and Mrs O'Dwyer and their thoughts and feelings about the dispute and the particular events that had happened. In Ofcom's view, viewers would have been able to assess Mr O'Dwyer's demeanour and reach their own conclusions as to whether or not he was “out of control or aggressive”.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did

not present, disregard or omit material facts, with regard to the use of the word “anger” and his motivation for posting the recorded meetings on his website, in a way that resulted in unfairness to Mr and Mrs O’Dwyer.

- iii) Ofcom considered the complaint that it was unfair for the programme to include the developer’s thoughts on the case and that Mr and Mrs O’Dwyer’s story was portrayed in a “tit for tat fashion”.

Ofcom noted the commentary in the programme (as set out in sub-head ii) above) and in particular noted the reference to the *“developers who thought they were negotiating in good faith”*.

Ofcom noted from ITV’s statement in response to the complaint that the programme makers had taken the decision to invite the developers to respond to a number of allegations made by Mr O’Dwyer that were to be included in the programme. Ofcom noted that the programme makers had relied on an interview that was given by the developers’ lawyers in 2010 who had said that they believed that Mr O’Dwyer’s website had frustrated them when they had thought they were acting in good faith. Ofcom also noted that in an email sent from the programme makers to Mr O’Dwyer on 18 July 2011 (which was the day before the programme was first broadcast) the programme makers explained to him that:

“With regards to giving a right to reply to the developers; it would not be fair on you [i.e. Mr O’Dwyer] if we made a film from the developers’ perspective without giving you a right to reply so, it would be unfair if we didn’t give the developers the chance to comment on your allegations. The developers’ right to reply will be made up of elements from the interview which their solicitors gave to us while we were filming with you in Cyprus”.

Ofcom considers that if a programme is to make allegations of wrongdoing, incompetence or any other significant allegations, those concerned should be given an appropriate and timely opportunity to respond. This is an important tenet in avoiding unfairness to individuals and organizations and it is reflected in Practice 7.11 of Ofcom’s own Broadcasting Code. In these circumstances, Ofcom considered that it was reasonable and appropriate in the circumstances for the programme makers to give the developers (through their lawyers) an opportunity to put their side to a story that was presented in the programme very much through the viewpoint of Mr and Mrs O’Dwyer.

While Ofcom appreciated that Mr and Mrs O’Dwyer held strong feelings about the dispute and their dealings with the developers, Ofcom considered that the broadcaster had acted responsibly by seeking and subsequently including in the programme comments from the developers’ lawyers about the allegations made by the complainants. Not to have done so may have led to unfairness in the programme to the developers. In Ofcom’s view, the programme was not presented in a “tit for tat” manner, but that it set out the two sides to the dispute in a way that fairly reflected Mr and Mrs O’Dwyer’s and the developers’ respective positions and that viewers would have been left in the position to reach their own conclusions on the actions and motivations of the developers and Mr and Mrs O’Dwyer.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did

not present, disregard or omit material facts, with regard to the representation of comments made by the developers' lawyers, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- iv) Ofcom considered the complaint that the programme's portrayal of the developers as hard working, respectable businessmen with no other dissatisfied customers was untrue and portrayed Mr O'Dwyer as the exception.

Ofcom noted the commentary in the programme (as set out in sub-head ii) above) and in particular noted the reference *"With his hard-earned reputation at stake, Karayiannas [the developers] was adamant he didn't want to sell the house to Conor any more"*. It also noted commentary later in the programme that stated: *"They [the developers] say they have built over a thousand houses and never experienced the situation like this"*.

As already set out in sub-head iii) above, Ofcom considers that if a programme is to make allegations of wrongdoing, incompetence or any other significant allegations, those concerned should be given an appropriate and timely opportunity to respond. Ofcom considered that in the circumstances, the programme makers had acted responsibly by seeking and subsequently including in the programme comments from the developers' lawyers about the allegations made by the complainants. Not to have done so may have led to unfairness in the programme to the developers.

Ofcom considered that the reference in the programme to the developers having built *"over a thousand houses and never experienced a situation like this"* was a reflection of the comments made by the developers' lawyers in stating the position of the developers. Again, while Ofcom appreciated that Mr and Mrs O'Dwyer held strongly feelings about the dispute and their dealings with the developers, it considered that it was fair and appropriate for the programme makes to include the comments from the developers' perspective in the programme. Ofcom considered that by presenting both sides of the dispute in the programme, viewers would have been in a position to reach their own conclusions as to the actions and motivations of the developers and Mr and Mrs O'Dwyer. Ofcom was satisfied that Mr O'Dwyer was not portrayed in a way that was unfair to him and his wife.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to including the views of the developers' lawyers, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- v) Ofcom considered the complaint that the programme suggested that Mr O'Dwyer was unreasonable and had provoked the developers who, in *"a chance meeting"*, had assaulted Mr O'Dwyer.

Ofcom noted the following commentary in the programme:

"But Conor wasn't about to let go of the house and on a visit to the site a chance meeting with the developers turned explosive".

Ofcom also noted the following extract taken from Mr O'Dwyer's home video that was included in the programme:

Mr O'Dwyer: *"This should be very interesting. They blocked my car in with their car..."*

You say I can't go, you say I can't go!

I would like to leave now.

Developer: *Stay here.*

Mr O'Dwyer: *You hit me, huh.*

Developer: *Put down the camera.*

Mr O'Dwyer: *You've hit me. You've hit me have you, this is way you do business, yah?*

Developer: *You've got everything.*

Mr O'Dwyer: *Absolutely. There's only one way to deal with people who lie, Marios, OK.*

Ok, You think I'm afraid of you people.

Developer: *You're in my land.*

Mr O'Dwyer: *You think I'm afraid, are you threatening me?*

You think I'm afraid of you? You think I'm afraid of you?

Mr O'Dwyer: *They grabbed my camera and smashed it to the ground.*

Commentary: *Christoforos Karayiannas and his son Marios [the developers] were arrested. They were found guilty of assault in a Civil Court and paid damages to Conor".*

As set out in sub-head i) above, Ofcom noted that the events and material facts surrounding the dispute between Mr and Mrs O'Dwyer and the developers were summarised and that Mr and O'Dwyer's contribution was condensed. It also noted that while it was incumbent on the programme makers to represent material facts fairly, it was not incumbent to present all the facts and events surrounding Mr and Mrs O'Dwyer's story.

Whether or not the incident had occurred due to "*a chance meeting*" is not a matter that Ofcom can determine. The issue for Ofcom is whether this statement and the overall depiction of the first assault created unfairness to Mr and Mrs O'Dwyer. Having watched the footage included in the programme and carefully read an unedited translated transcript of the video footage provided to the programme Ofcom took the view that the programme's presentation of the circumstances surrounding the first assault upon Mr O'Dwyer fairly summarised the events as they happened. In Ofcom's view, viewers would have been aware from the presentation in the programme that Mr O'Dwyer had been assertive, but not aggressive, in the meeting with the developers and that it was the developers who had had turned to violence against him. The programme also included the outcome of the assault

immediately after the footage thereby leaving viewers in little doubt that any fault to be attributed in the incident lay with the developers.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the presentation of the first assault, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- vi) Ofcom considered the complaint that video footage provided to the programme makers by the complainants was used in the way that they had not agreed.

Ofcom recognised that there was a disparity in the complainants' recollection and that of the programme makers in relation to the way and the extent that Mr O'Dwyer's video footage would be used in the programme. Ofcom noted that in the email from the programme makers to Mr and Mrs O'Dwyer dated 18 July 2011, the programme makers explained that:

"...because of time limitations there is only so much footage we can show. We have used the footage we believe is most relevant to explain to the viewer the circumstances of the attack, we just can't show it all".

Ofcom noted that this email was sent to Mr and Mrs O'Dwyer the day before the programme was first broadcast, and that no other documentary material was provided to Ofcom in the written submissions to assist it in deciding whether any assurances were given to Mr O'Dwyer about the extent to which his video footage would be used. In the particular circumstances of this case, it was not possible for Ofcom to conclude whether or not Mr and Mrs O'Dwyer were given a specific assurance earlier in the programme making process.

However, Ofcom is not required to resolve conflicts of this nature, but to adjudicate on whether the complainant has been treated unfairly in a programme.

Therefore, Ofcom recognised that while it is a matter of editorial discretion as to what material should or should not be included in a programme, there is an obligation on programme makers and broadcasters to ensure that material facts are presented fairly.

Ofcom considered whether the omission in the programme of video footage of one of the developers' threats towards Mr O'Dwyer resulted in unfairness to Mr and Mrs O'Dwyer. Ofcom again considered the presentation of the first assault upon Mr O'Dwyer (see sub-head v) above) and took the view that it was clear from the video footage included in the programme and the way it was presented that it was the developers who had resorted to violence against Mr O'Dwyer and that it resulted in them being arrested and subsequently convicted of assault. Ofcom considered that this would have left viewers in little doubt that any fault to be attributed in the incident lay with the developers and that they would have been able reach their own conclusions as to the developers' character and behaviour.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the omission of

the threats made by the developers that was filmed by Mr O'Dwyer, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- vii) Ofcom considered the complaint that the portrayal of the first assault on Mr O'Dwyer was not put into context and that it was unfairly portrayed as "justice served".

Ofcom noted the commentary from the programme (see head v) above) and the particular reference to the developers being arrested and being found guilty of assault.

As set out in sub-head i) above, Ofcom noted that the events and material facts surrounding the dispute between Mr and Mrs O'Dwyer and the developers were summarised and that Mr and O'Dwyer's contribution was condensed. It also noted that while it was incumbent on the programme makers to represent material facts fairly, it was not incumbent to present all the facts and events surrounding Mr and Mrs O'Dwyer's story.

Ofcom noted Mr O'Dwyer's assertion that it was unfair for the programme not to have mentioned that the developers did not receive a criminal conviction because the criminal case against them had been "dropped" due to Mr O'Dwyer being absent. However, Ofcom took the view that the programme had summarised the events following the first assault on Mr O'Dwyer, namely the arrest and subsequent punishment of the developers for the assault. Ofcom recognised that Mr O'Dwyer would have preferred for further detail relating to the assault (and, indeed, the dispute itself) to have been included in the programme. However, Ofcom took the view that the programme makers, in exercising their editorial control of what was to be included in the programme, fairly summarised and presented the facts that: the developers were arrested; found guilty of assault; and, paid Mr O'Dwyer damages as a result. Ofcom accepted the broadcaster's assertion that to have speculated on anything beyond the facts known would not have been responsible.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to portrayal of the first assault not being put in context, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- viii) Ofcom considered the complaint that the programme's statement (*"What had been a feud was now a war... with neither side prepared to back down. Conor wanted the house; Karayiannas wanted Conor out of his life. But Conor wasn't going anywhere. With his dream in tatters, he began a campaign that would consume his life"*) was false and gave a negative impression of Mr and Mrs O'Dwyer.

As set out in sub-head i) above, Ofcom noted that the events and material facts surrounding the dispute between Mr and Mrs O'Dwyer and the developers were summarised and that Mr and O'Dwyer's contribution was condensed. It also noted that while it was incumbent on the programme makers to represent material facts fairly, it was not incumbent to present all the facts and events surrounding Mr and Mrs O'Dwyer's story.

As already referred to in sub-head ii) of the decision above, it was clear to Ofcom that Mr and Mrs O'Dwyer had been upset with the way the

development of their “*dream home*” had gone and that Mr O’Dwyer was determined to get the dispute resolved to his satisfaction. Up to this point in the programme, Ofcom considered that it had been fair in relaying the facts and events surrounding the dispute and in presenting the position of both Mr and Mrs O’Dwyer and the developers. In particular, Ofcom noted that the programme had chronicled the major events so far in the story and that what had started out as a property dispute had escalated into a situation where acts of violence had been perpetrated by the developers and that the positions of both sides appeared to have become entrenched.

In Ofcom’s view, it was likely that viewers would have considered that Mr O’Dwyer’s actions and those of the developers demonstrated that both sides of the dispute felt frustrated, aggrieved and dissatisfied with the situation. In fact, later in the programme, further evidence of the escalation of the hostility that appeared to exist between Mr O’Dwyer and the developers was presented in the programme by reference to a second assault by the developers on Mr O’Dwyer and the demonstrations that he had conducted in the UK and in Cyprus.

Ofcom recognised that the word “*war*” was emotive and that it may not have been the way in which Mr O’Dwyer would have categorised the relationship between him and the developers. However, Ofcom considered that it was unlikely that the use of the word in the programme would have led viewers to judge Mr O’Dwyer negatively. In fact, Ofcom considered that in the parts of the programme that featured Mr and Mrs O’Dwyer’s story, a considerable amount of time was given to the inclusion of footage of the couple and their struggle to resolve the dispute to their satisfaction. In Ofcom’s view, viewers would have been able to assess the facts and events surrounding the dispute and to reach their own conclusions as to the actions and motives of the developers and Mr and Mrs O’Dwyer.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the apparent escalation of the dispute, in a way that resulted in unfairness to Mr and Mrs O’Dwyer.

- ix) Ofcom considered the complaint that the inclusion of the statement in the programme that the developers said that the assault had been the result of deliberate provocation by Mr O’Dwyer portrayed him “almost as the aggressor” and suggested that the second assault on him was “justified”.

Ofcom noted the following commentary in the programme:

“Christoforos Karayiannas and his son Marios [the developers] each received a 10 month suspended sentence for actual bodily harm.

Karayiannas and Sons’ lawyers said the assault was a result of Conor’s campaign deliberately to provoke the developers”.

As already set out in sub-head iii) above, Ofcom considers that if a programme is to make significant allegations, those concerned should be given an appropriate and timely opportunity to respond. Ofcom considered that in the circumstances, the programme makers had acted responsibly by seeking and subsequently including in the programme comments from the

developers' lawyers about the allegations made by the complainants. Not to have done so may have led to unfairness in the programme to the developers.

Ofcom considered that the reference in the programme to the developers' lawyers' statement that the second assault upon Mr O'Dwyer was the result of his *"campaign deliberately to provoke the developers"* reflected the comments made by the developers' lawyers in stating the position of the developers in relation to a serious incident. Again, while Ofcom appreciated that Mr and Mrs O'Dwyer held strongly feelings about the dispute and their dealings with the developers, it considered that it was fair and appropriate for the programme makers to include the comments explaining the developers' reasons for the second assault in the programme. Ofcom considered that the fact that the statement was included in the programme did not confirm, or otherwise, the veracity of the statement, and that viewers would have understood this to be the case.

In relation to Mr O'Dwyer's point that the programme omitted his outrage at the sentence given to the developers and that the prosecuting authority was appealing the decision, Ofcom again considered whether or not the omission resulted in unfairness to Mr O'Dwyer. Ofcom noted that the events and material facts surrounding the dispute between Mr and Mrs O'Dwyer and the developers were summarised and that Mr and O'Dwyer's contribution was condensed. It also noted that while it was incumbent on the programme makers to represent material facts fairly, it was not incumbent to present all the facts and events surrounding Mr and Mrs O'Dwyer's story. Ofcom considered that in presenting both sides of the dispute in the programme, viewers would have been in a position to reach their own conclusions as to the actions and motivations of the developers and Mr and Mrs O'Dwyer. Ofcom was satisfied therefore that the inclusion of the comments made by the developers' lawyers about the reasons they said lay behind the second assault was done in a manner that did not result in Mr O'Dwyer being portrayed in a way that was unfair to him and his wife.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the representation of the developers' lawyers' comments relating to their reasons for the second assault, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- x) Ofcom considered the complaint that the programme implied that Mr O'Dwyer was unreasonable and greedy.

Ofcom noted the following commentary from the programme:

"In 2009 the O'Dwyers were offered their money back plus interest. They refused. To walk away they wanted their money back plus interest, plus an increase in the house's value, plus legal fees and expenses".

As already observed in sub-head i) above, Ofcom noted the history surrounding the offers and counter offer relating to the refund of the money. In particular, Ofcom again noted the statement signed by Mr O'Dwyer and witnessed by the programme makers on 4 July 2011 that set out the details of two verbal offers made by the developers in 2007 and 2009 respectively. Ofcom noted that the offer made in 2009 had offered Mr and Mrs O'Dwyer

their “money back plus interest”, but that Mr O’Dwyer had refused this offer because there had been a significant rise in house prices in Cyprus. In addition, Mr O’Dwyer made it clear in this statement what he considered would be an appropriate resolution of the dispute. In the signed statement, Ofcom noted that Mr O’Dwyer stated that he wanted:

- “A. The return of the money paid to Karayiannas and Sons [the developers].
- B. Interest on the above sum.
- C. The difference between the value of the house in 2005 and the current market value.
- D. All expenses and legal costs”.

Based on this statement alone, Ofcom considered that it was legitimate for the programme makers to rely on its content and to present a summary of it in the programme. Ofcom considered that the programme accurately reflected Mr O’Dwyer’s position in relation to the offers of refund given by the developers and the terms that he considered appropriate to settle the dispute. It also noted that earlier in the programme, Mr and Mrs O’Dwyer had expressed their reasons why they were not prepared to accept the offers. In Ofcom’s view, viewers were presented with the fact that offers had been made to Mr and Mrs O’Dwyer, but that those offers had been rejected for the reasons given by Mr and Mrs O’Dwyer in the programme. In these circumstances, Ofcom considered that viewers would have been in a position to have reached their own conclusion as to whether Mr and Mrs O’Dwyer were being “unreasonable” or not.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the Mr and Mrs O’Dwyer’s rejection of the offers made by the developers and what they wanted in order to settle the dispute, in a way that resulted in unfairness to them.

- xi) Ofcom considered the complaint that the statements made in the programme relating to Mr O’Dwyer’s banner implied wrongly that they had contained wording that amounted to a “public insult”.

Ofcom noted the following commentary in the programme:

“In Cyprus it’s a criminal offence to publicly insult someone and Karayiannas is insulted by Conor’s banner”.

“...Conor was charged by the Cypriot police with public insult to Karayiannas and Sons [the developers]”.

Ofcom noted from the complaint that Mr O’Dwyer’s banner had read “Karayiannas are criminals” and it acknowledged Mr O’Dwyer’s point that since the developers had a criminal conviction for the assault on him, the wording on the banner was a matter of fact. However, Ofcom also acknowledged the broadcaster’s position that it would have been unfair and potentially defamatory to other members of the developer’s family to have included the banner with its wording unobscured.

As already observed in head a) of the decision above, while programme makers and broadcasters have editorial discretion as to what material to include or not to include in a programme, there is an obligation on them to ensure that material facts are presented fairly.

Ofcom understood the programme makers' concern about including the wording of Mr O'Dwyer's banner in the programme unobscured and noted that Mr O'Dwyer had been informed by the programme makers on several occasions before the programme was broadcast that wording would be obscured. Ofcom considered that the reasons given by the programme makers for omitting the wording of Mr O'Dwyer's banner were reasonable in the circumstances and that they had exercised their editorial discretion responsibly.

In considering whether the programme makers' decision to omit this wording from the programme resulted in unfairness to Mr and Mrs O'Dwyer, Ofcom noted that the programme had already made it clear to viewers that the developers had assaulted Mr O'Dwyer on two occasions and had been criminally convicted for one of the incidents. It had shown footage of the first assault taken by Mr O'Dwyer and had shown photographs of Mr O'Dwyer in hospital after the second assault. In Ofcom's view, the programme had already made it clear that the developers had engaged in criminality in the course of the dispute and that the omission of the wording of Mr O'Dwyer's banner would not have materially affected viewers' understanding of Mr and Mrs O'Dwyer's cause and the nature of their protest outside the developers' premises.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the omission of the wording of Mr O'Dwyer's banner and the portrayal of Mr and Mrs O'Dwyer's protest outside the developers' premises, in a way that resulted in unfairness to them.

- xii) Ofcom considered the complaint that the programme omitted unfairly to make clear that the developers had sold the house to another family and had kept Mr and Mrs O'Dwyer's money.

Ofcom noted the following extract from the programme:

Commentary: *"Disregarding the police, the O'Dwyers are determined to see the villa they have never ever spent a night in."*

Mr O'Dwyer: *There's our house over there.*

Mrs O'Dwyer: *Yup. And there it is...*

Mr O'Dwyer: *Yes...and there it is.*

Mrs O'Dwyer: *Being enjoyed by someone else.*

[Dog Barks]

Man on veranda: *See 'em off!*

Mr O'Dwyer: *Um, It's strange seeing it you know, we put a lot of effort into how it was going to look, choosing the columns changing the windows, and err you know its mixed feelings, it's quite sad and ah, disappointing...yeah".*

Ofcom noted from the broadcaster's statement that the programme makers had approached the developers' lawyers to ascertain who the owners of the disputed property were. Ofcom noted that it appeared that the developers were the actual registered owners of the property and that, until the dispute was resolved in the courts, they had rented it out to the people shown in the programme.

In these circumstances, Ofcom considered that it would not have been factually correct for the programme makers to have presented in the programme that the developers had sold the property to someone else.

In relation to the omission from the programme that the developers had kept Mr and Mrs O'Dwyer's money, Ofcom considered that the programme had made it clear to viewers early on in the story that Mr and Mrs O'Dwyer had paid "*£100,000 towards their £250,000 villa*" and that a series of offers had been made about refunding the money. It was also made clear in the programme that Mr and Mrs O'Dwyer had refused to accept the offers and had provided the developers with a counter offer, the terms of which the developers did not accept. Towards the end of the part of the programme that featured Mr and Mrs O'Dwyer's story, Mr O'Dwyer was shown saying:

"Erm, I'm out of everything, you know, over £100,000 to the developer, and an equal amount in lawyers' fees, flights rented accommodation...and my money's in the developer's bank, my contract's in the Land Registry and someone else is in my house".

Immediately following this statement, the programme's commentary explained that "*Conor chased his dream, now he is chasing a victory through the Cypriot courts*".

Ofcom considered that by including Mr O'Dwyer's comments about his money and the references to the offers made by the developers to refund the money (which Mr and Mrs O'Dwyer rejected) the programme made it clear to viewers that the developers retained their money, and that the dispute had escalated to such a level that it was unlikely that the matter would be resolved other than through the Cypriot courts.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to who had Mr and Mrs O'Dwyer's money and to the fact that someone else was living in the villa, in a way that resulted in unfairness to them.

- xiii) Ofcom considered the complaint that the programme portrayed Mr O'Dwyer's protest outside the Presidential Palace unfairly in that it portrayed the image of a "belligerent man engaged in extreme measures".

Ofcom noted the following commentary from the programme:

“Today he’s on the campaign trail again. This time at the presidential palace in the Cypriot capital Nicosia”.

Ofcom noted that Mr O'Dwyer was shown camping outside the palace perimeter with banners relating to his dispute with the developers. It noted from the parties' submissions that Mr O'Dwyer's banners contained references to his website and wording that the programme makers decided it did not want to include in the programme on the grounds that they were defamatory or could not be verified independently.

As already observed in head a) of the decision above, while programme makers and broadcasters have editorial discretion as to what material to include or not to include in a programme, there is an obligation on them to ensure that material facts are presented fairly.

Ofcom also took note of the reasons given by the programme makers already set out in sub-head ix) above for deciding to omit wording that they believed was potentially defamatory or unfair in nature and considered that the programme makers' decision was reasonable in the circumstances and that they had exercised their editorial discretion responsibly.

In considering whether the programme makers' decision to omit the wording from the programme resulted in unfairness to Mr and Mrs O'Dwyer, Ofcom noted that the programme had by this point set out the major events of the story and had presented both sides of the dispute in a way that enabled viewers to reach their own conclusions about the motivations and character of the protagonists. The omission of the actual wording on Mr O'Dwyer's banners, in Ofcom's view, was unlikely to have materially affected viewers' understanding of Mr and Mrs O'Dwyer's cause and the nature of their protest outside the developers' premises.

Far from being portrayed as “a belligerent man engaged in extreme measures”, Ofcom considered that it was likely that viewers (from the portrayal of Mr and Mrs O'Dwyer throughout the programme) would have considered that his protest outside the Presidential Palace, depicted a man who felt frustrated, aggrieved and dissatisfied with the developers and the official Cypriot response to the situation he and his wife found themselves in. Ofcom considered that a considerable amount of time was given in the programme to the inclusion of footage of Mr and Mrs O'Dwyer and their thoughts and feelings about the dispute and the particular events that had transpired. In Ofcom's view, viewers would have been able to assess Mr O'Dwyer's demeanour and reach their own conclusions as to whether or not he was “belligerent” and “engaged in extreme measures”.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the omission of the wording of Mr O'Dwyer's banners and the portrayal of his protest outside the Presidential Palace, in a way that resulted in unfairness to Mr and Mrs O'Dwyer.

- xiv) Ofcom finally considered the complaint that it was unfair for the programme to include as the final thought the view that the developers had set up their own website challenging Mr O'Dwyer.

Ofcom noted the following commentary in the programme:

“In Cyprus Karayiannas and Son have set up their own website challenging Conor O’Dwyer.

Conor and Michaela are continuing their protests and believe their civil case will be heard later this year”.

As already referred to in sub-head ii), Ofcom considers that if a programme is to make allegations of wrongdoing, incompetence or any other significant allegations, those concerned should be given an appropriate and timely opportunity to respond. This is an important tenet in avoiding unfairness to individuals and organizations in a programme and it is reflected in Practice 7.11 of Ofcom’s own Broadcasting Code. In these circumstances, Ofcom considered that it was reasonable and appropriate in the circumstances for the programme makers to give the developers (through their lawyers) an opportunity to put their side of a story that was presented in the programme very much through the viewpoint of Mr and Mrs O’Dwyer.

While Ofcom appreciated that Mr and Mrs O’Dwyer held strong feelings about the dispute and their dealings with the developers, Ofcom considered that the broadcaster had acted responsibly by seeking and subsequently including in the programme comments from the developers’ lawyers about the allegations made by the complainants. Not to have done so may have led to unfairness in the programme to the developers. In Ofcom’s view, the statement about the website, which was a statement of fact rather than an opinion, was not presented as a “final thought” for viewers to ponder. Instead, it set out the developer’s reaction to Mr O’Dwyer actions in relation to the dispute. Ofcom noted too that the final remarks in the programme related to Mr and Mrs O’Dwyer’s story, concluding with an update on their continuing protests and their belief that their civil case was pending.

Taking these factors into account, Ofcom considered that the programme makers took reasonable care to satisfy themselves that the programme did not present, disregard or omit material facts, with regard to the inclusion of a summary of the developers’ lawyers comments at the end of the programme that the developers had set up their own website, in a way that resulted in unfairness to Mr and Mrs O’Dwyer.

Having considered each of the sub-heads of the complaint made by Mr and Mrs O’Dwyer that the programme portrayed them unfairly, Ofcom concluded that, overall, the broadcaster had taken reasonable care to satisfy itself that the material facts (as specified in the sub-heads of complaint above) were not presented, omitted or disregarded in a way that portrayed them unfairly. Ofcom also considered that the broadcaster had presented Mr and Mrs O’Dwyer’s story, which was largely based on their own testimony, and comments made by the developer’s lawyers, in a way that presented both sides of the dispute in a fair way. Ofcom was satisfied that Mr and Mrs O’Dwyer’s position had been summarised fairly and had been presented in a way that enabled viewers to reach their own conclusions on the issues raised in the programme.

Ofcom therefore found that there was no unjust or unfair treatment to Mr and Mrs O’Dwyer in the programme as broadcast.

Accordingly, Ofcom has not upheld Mr and Mrs O'Dwyer's complaint of unjust and unfair treatment in the programme as broadcast.

Other Programmes Not in Breach

Up to 27 February 2012

Programme	Broadcaster	Transmission Date	Categories
Andrew Peach	BBC Radio Berkshire	09/12/2011	Scheduling
Angie Greaves (Magic) and Martin Archer (Kiss)	Magic and Kiss 100	07/12/2011	Competitions
Coronation Street	ITV1	23/01/2012	Product placement
Crime Thriller Awards	ITV3	08/10/2011	Voting
Shot One	UCTV	01/12/2011	Generally accepted standards
Straight Talk	Voice of Africa Radio	21/08/2011	Generally accepted standards
Vigil for Christ	Rainbow Radio	12/01/2012	Generally accepted standards

Complaints Assessed, not Investigated

Between 14 and 27 February 2012

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
10 O'Clock Live	Channel 4	15/02/2012	Generally accepted standards	4
10 O'Clock Live	Channel 4	15/02/2012	Religious/Beliefs discrimination/offence	2
10 O'Clock Live	Channel 4	18/02/2012	Generally accepted standards	1
10 O'Clock Live	Channel 4	22/02/2012	Generally accepted standards	3
10 O'Clock Live	Channel 4	22/02/2012	Generally accepted standards	9
10 O'Clock Live (trailer)	Channel 4	15/02/2012	Generally accepted standards	1
5 Live Drive	BBC Radio 5 Live	21/02/2012	Generally accepted standards	1
Abadas	CBeebies	n/a	Outside of remit / other	1
Abdul Shakoor Karim	Asian Sound Radio (Manchester)	10/10/2011	Outside of remit / other	1
Advertisements	NDTV Imagine	n/a	Advertising scheduling	1
Advertisements	Sunrise TV	n/a	Advertising scheduling	1
Advertisements	Various	n/a	Advertising minutage	2
Advertisements	Various	n/a	Advertising scheduling	1
Africa Cup of Nations	Various	20/02/2012	Outside of remit / other	1
Alan Carr's New Year Specstacular	Channel 4	31/12/2011	Generally accepted standards	1
American Idol	ITV2	09/02/2012	Generally accepted standards	1
America's Funniest Home Videos	Kanal 5 (Sweden)	21/01/2012	Generally accepted standards	1
Anglia Tonight	ITV1 Anglia	13/02/2012	Animal welfare	1
BBC Midlands Today	BBC 1	22/02/2012	Outside of remit / other	1
BBC News	BBC	n/a	Outside of remit / other	1
BBC News	BBC 1	21/02/2012	Race discrimination/offence	1
BBC News	BBC News	18/02/2012	Outside of remit / other	1
BBC News	BBC News	19/02/2012	Under 18s in programmes	1
BBC News	BBC News	24/02/2012	Outside of remit / other	1

BBC News	BBC News	n/a	Outside of remit / other	1
BBC News at Ten	BBC 1	22/02/2012	Generally accepted standards	4
Being Human	BBC 3	12/02/2012	Outside of remit / other	1
Benidorm	ITV1	24/02/2012	Drugs, smoking, solvents or alcohol	1
Benidorm	ITV1	24/02/2012	Generally accepted standards	2
Best of Crash	Motors TV	07/02/2012	Outside of remit / other	1
Big Fat Gypsy Weddings	Channel 4	14/02/2012	Animal welfare	21
Big Fat Gypsy Weddings	Channel 4	14/02/2012	Generally accepted standards	1
Big Fat Gypsy Weddings	Channel 4	14/02/2012	Harm	1
Big Fat Gypsy Weddings	Channel 4	14/02/2012	Materially misleading	4
Big Fat Gypsy Weddings	Channel 4	14/02/2012	Under 18s in programmes	2
Big Fat Gypsy Weddings (trailer)	Channel 4	12/02/2012	Generally accepted standards	1
Big Fat Gypsy Weddings (trailer)	Channel 4	14/02/2012	Generally accepted standards	1
Big Fat Gypsy Weddings (trailer)	Channel 4	n/a	Generally accepted standards	6
Big Fat Gypsy Weddings (trailer)	Channel 4	n/a	Race discrimination/offence	1
Black Mirror: The National Anthem	Channel 4	04/12/2011	Generally accepted standards	1
Bomber Boys	BBC 1	05/02/2012	Outside of remit / other	1
Breakfast News	BBC News	22/02/2012	Outside of remit / other	1
Call the Midwife	BBC 1	12/02/2012	Generally accepted standards	1
Cardinal Burns (trailer)	E4	26/02/2012	Nudity	2
Celebrity Big Brother	Channel 5	25/01/2012	Voting	3
Celebrity Juice	ITV2	25/02/2012	Animal welfare	1
Celebrity Juice (trailer)	ITV1	11/02/2012	Scheduling	2
Celebrity Juice (trailer)	ITV1	11/02/2012	Sexual material	1
Celebrity Juice (trailer)	ITV1	12/02/2012	Scheduling	1
Celebrity Juice (trailer)	ITV1	18/02/2012	Scheduling	1
Celebrity Juice (trailer)	ITV2	08/02/2012	Scheduling	1
Clive Warren's Pop Quiz	Metro Radio	03/02/2012	Competitions	1
Come Dine With Me	Channel 4	03/02/2012	Sexual material	1
Come Dine with Me	Channel 4	10/02/2012	Sexual material	1

Come Dine with Me	Channel 4	18/02/2012	Transgender discrimination/offence	1
Come Dine With Me	More 4	09/02/2012	Sexual orientation discrimination/offence	1
Confessions of a Nurse	More4	07/02/2012	Violence and dangerous behaviour	1
Continuity announcement	Dave	25/02/2012	Offensive language	1
Cornwall with Caroline Quentin	ITV1	13/02/2012	Materially misleading	1
Coronation Street	ITV1	13/01/2012	Disability discrimination/offence	1
Coronation Street	ITV1	03/02/2012	Generally accepted standards	1
Coronation Street	ITV1	13/02/2012	Disability discrimination/offence	1
Coronation Street	ITV1	17/02/2012	Promotion of products/services	3
Coronation Street	ITV1	19/02/2012	Race discrimination/offence	3
Coronation Street	ITV1	20/02/2012	Generally accepted standards	1
Coronation Street	ITV1	20/02/2012	Under 18s in programmes	2
Coronation Street	ITV1	23/02/2012	Generally accepted standards	1
Coronation Street	ITV1	n/a	Product placement	1
Countdown	Channel 4	13/02/2012	Harm	1
Countdown	Channel 4	22/02/2012	Generally accepted standards	1
Countdown	Channel 4	24/02/2012	Due impartiality/bias	5
Countdown	Channel 4	27/02/2012	Due impartiality/bias	1
Country House Rescue	Channel 4	14/02/2012	Offensive language	1
Cowboy Builders	Channel 5	15/02/2012	Outside of remit / other	1
Daddy Daycare	Channel 4	15/02/2012	Gender discrimination/offence	1
Daddy Daycare	Channel 4	15/02/2012	Generally accepted standards	1
Daddy Daycare	Channel 4	15/02/2012	Offensive language	7
Daddy Daycare	Channel 4	15/02/2012	Under 18s in programmes	1
Daddy Daycare	Channel 4	22/02/2012	Under 18s in programmes	3
Dancing on Ice	ITV1	12/02/2012	Generally accepted standards	1
Dancing on Ice	ITV1	19/02/2012	Generally accepted standards	1
Dancing on Ice	ITV1	26/02/2012	Outside of remit / other	1
Dave's One Night Stand	Dave	23/02/2012	Race discrimination/offence	1
Daybreak	ITV1	28/11/2011	Competitions	1
Daybreak	ITV1	15/02/2012	Gender	1

			discrimination/offence	
Daybreak	ITV1	15/02/2012	Generally accepted standards	1
Digital on-screen graphics	Various	n/a	Outside of remit / other	1
Doctors	BBC 1	10/02/2012	Sexual material	1
Doctors	BBC 1	17/02/2012	Generally accepted standards	1
Drivetime	Jack 106 FM (Hertfordshire)	22/02/2012	Generally accepted standards	1
EastEnders	BBC 1	07/02/2012	Race discrimination/offence	1
EastEnders	BBC 1	13/02/2012	Drugs, smoking, solvents or alcohol	1
EastEnders	BBC 1	13/02/2012	Sexual material	1
EastEnders	BBC 1	24/02/2012	Generally accepted standards	1
EastEnders	BBC 1	24/02/2012	Generally accepted standards	1
EastEnders	BBC 1	n/a	Drugs, smoking, solvents or alcohol	1
EastEnders Omnibus	BBC 1	19/02/2012	Race discrimination/offence	1
Emmerdale	ITV1	13/02/2012	Generally accepted standards	16
FA Cup Fifth Round	ITV1	19/02/2012	Generally accepted standards	1
Film4 promotion	Channel 4	04/02/2012	Sexual material	1
Final Score	BBC 2	11/02/2012	Outside of remit / other	1
Formula 1	Sky Sports	n/a	Listed Events	1
Gao Geram	Channel S	08/02/2012	Animal welfare	1
Geoff Lloyd	Absolute Radio	14/02/2012	Generally accepted standards	1
Geordie Shore	MTV	21/02/2012	Generally accepted standards	3
Gillette Soccer Saturday	Sky Sports News	11/02/2012	Generally accepted standards	1
Gok's Teens: The Naked Truth	Channel 4	07/02/2012	Generally accepted standards	1
Grimm (trailer)	Watch	n/a	Scheduling	1
Harry Hill's TV Burp	ITV1	25/02/2012	Sexual material	1
Harry Hill's TV Burp	ITV1	25/02/2012	Violence and dangerous behaviour	2
Harry Hill's TV Burp	ITV1	26/02/2012	Violence and dangerous behaviour	1
Harveys The Furniture Store's sponsorship of Coronation Street	ITV1	10/02/2012	Generally accepted standards	1
Harveys The Furniture Store's sponsorship of Coronation Street	ITV1	n/a	Generally accepted standards	1

Harveys The Furniture Store's sponsorship of Coronation Street	ITV1	n/a	Generally accepted standards	3
Harveys The Furniture Store's sponsorship of Coronation Street	ITV1	n/a	Harm	1
Holby City	BBC 1	21/02/2012	Drugs, smoking, solvents or alcohol	1
Hollyoaks (trailer)	Channel 4 +1	14/02/2012	Scheduling	1
Homeland	Channel 4	19/02/2012	Violence and dangerous behaviour	1
Hywel & Jamie's Breakfast Adventure	Rock FM 97.4	10/02/2012	Generally accepted standards	1
ITN News	ITV1	19/02/2012	Fairness & Privacy	1
ITV News and Weather	ITV1	15/02/2012	Fairness & Privacy	1
ITV News at Ten and Weather	ITV1	13/02/2012	Due impartiality/bias	1
Jeff Randall Live	Sky News	20/02/2012	Materially misleading	1
Jodie Marsh - Bullied: My Secret Past	Channel 5	25/01/2012	Crime	1
Kevin Bridges: What's the Story?	BBC 1	22/02/2012	Generally accepted standards	1
Kidnap and Ransom	ITV1	23/02/2012	Advertising scheduling	1
Little Bill	Nick Jr	18/02/2012	Violence and dangerous behaviour	1
Live Fight Club	British Eurosport	25/02/2012	Outside of remit / other	1
Live from Madinah Munawara	Ummah Channel	27/01/2012	Charity appeals	1
London Tonight	ITV1 London	13/02/2012	Due impartiality/bias	1
Love Machine (Trailer)	Sky	n/a	Generally accepted standards	1
Magnum Mini's sponsorship of ITV Mystery Dramas	ITV1	30/01/2012	Sponsorship credits	1
Mammor och Minimodeller	TV3	16/01/2012	Under 18s in programmes	3
Match of the Day	BBC 1	11/02/2012	Outside of remit / other	1
Match of the Day Live	BBC 1	26/02/2012	Outside of remit / other	1
Match of the Day: Southampton v Portsmouth	BBC 1	18/12/2011	Offensive language	1
Midsomer Murders	ITV1	19/12/2011	Sexual material	1
NCIS	FX	06/02/2012	Scheduling	1
Neighbours	Channel 5	02/02/2012	Product placement	1
New You've Been Framed!	ITV1 London	25/02/2012	Generally accepted standards	5
Nick Ferrari	LBC 97.3FM	14/02/2012	Generally accepted standards	1

Official Top 10	Viva	07/02/2012	Nudity	1
Panorama	BBC 1	10/02/2012	Animal welfare	1
Party Paramedics	Channel 4	30/01/2012	Materially misleading	2
Premier League Football	Sky Sports 2	11/02/2012	Generally accepted standards	1
Premier League Football	Sky Sports 2	11/02/2012	Offensive language	1
Premier League Football	Sky Sports 2	11/02/2012	Violence and dangerous behaviour	1
Programming	Radio Cardiff	n/a	Outside of remit / other	1
Programming	Various (radio)	n/a	Offensive language	1
Protecting Our Children	BBC 2	13/02/2012	Outside of remit / other	1
Question Time	BBC 1	09/02/2012	Outside of remit / other	1
Room 101	BBC 1	24/02/2012	Animal welfare	1
Rude Tube	Channel 4	17/02/2012	Under 18s in programmes	1
Rugby Union	Sky Sports 2	22/01/2012	Race discrimination/offence	1
Sadie J	CBBC	04/02/2012	Sexual orientation discrimination/offence	1
Saxon Hoard: A Golden Discovery	BBC 2	26/01/2012	Flashing images/risk to viewers who have PSE	1
Scott Mills	BBC Radio 1	22/02/2012	Sexual material	1
Six Nations Rugby Union	BBC 1	04/02/2012	Religious/Beliefs discrimination/offence	4
Soho Blues	Channel 5	06/02/2012	Race discrimination/offence	1
Sport on BBC Berkshire	BBC Radio Berkshire	04/02/2012	Race discrimination/offence	1
Starz Music	Starz TV	07/02/2012	Generally accepted standards	1
Strictly Come Dancing	BBC 1	n/a	Promotion of products/services	1
Sun, Sex and Suspicious Parents	BBC 3	08/02/2012	Generally accepted standards	1
Sunrise	Sky News	03/02/2012	Race discrimination/offence	1
TFM competition	TFM	n/a	Competitions	1
That Sunday Night Show	ITV1	12/02/2012	Harm	1
That Sunday Night Show	ITV1	26/02/2012	Religious/Beliefs discrimination/offence	1
The Alan Brazil Sports Breakfast	Talksport	10/02/2012	Race discrimination/offence	1
The Alan Titchmarsh Show	ITV1	27/01/2012	Due impartiality/bias	1
The Alan Titchmarsh Show	ITV1	16/02/2012	Harm	1
The Brit Awards 2012	ITV1	21/02/2012	Generally accepted standards	12
The Brit Awards 2012	ITV1	21/02/2012	Offensive language	1

The Brit Awards 2012	ITV1	21/02/2012	Transgender discrimination/offence	2
The Chawners' Last Chance	Bio	14/02/2012	Animal welfare	1
The Chris Moyles Show	BBC Radio 1	15/02/2012	Gender discrimination/offence	1
The Crimson Petal and the White	BBC 2	27/04/2011	Sexual material	1
The Garage	Quest	13/02/2012	Harm	1
The Graham Norton Show	BBC 1	24/02/2012	Generally accepted standards	1
The Great British Countryside	BBC 1	23/02/2012	Violence and dangerous behaviour	1
The Jeremy Kyle Show	ITV1	16/02/2012	Generally accepted standards	1
The Jeremy Kyle Show	ITV2	24/02/2012	Generally accepted standards	1
The Magicians	BBC 1	21/01/2012	Sexual material	1
The Magicians	BBC 1	11/02/2012	Generally accepted standards	1
The National Lottery: Who Dares Wins	BBC 1	21/01/2012	Competitions	1
The One Show	BBC 1	10/02/2012	Race discrimination/offence	1
The Only Way is Essex	ITV2	12/02/2012	Product placement	1
The Only Way is Essex	ITV2	15/02/2012	Animal welfare	1
The Only Way Is Essex (trailer)	ITV1	04/02/2012	Scheduling	1
The Only Way is Essex (trailer)	ITV1	12/02/2012	Generally accepted standards	1
The Remix with Eddy Temple Morris	XFM	17/02/2012	Offensive language	1
The Wright Stuff	Channel 5	08/02/2012	Race discrimination/offence	6
The Wright Stuff	Channel 5	22/02/2012	Generally accepted standards	2
This is Bolton	Bolton FM	14/02/2011	Disability discrimination/offence	1
This Morning	ITV1	06/02/2012	Generally accepted standards	1
This Morning	ITV1 London	16/02/2012	Disability discrimination/offence	1
This Morning	ITV1 London	17/02/2012	Scheduling	1
Tombola.co.uk's sponsorship of Emmerdale	ITV1	21/02/2012	Generally accepted standards	1
Top Gear	BBC 2	12/02/2012	Harm	1
Top Gear	BBC 2	12/02/2012	Offensive language	1
Top Gear	BBC 2	19/02/2012	Religious/Beliefs discrimination/offence	1
Top Gear	Dave	15/02/2012	Animal welfare	1
True Stories: Gypsy Blood	Channel 4	19/01/2012	Animal welfare	2

True Stories: Gypsy Blood	Channel 4	19/01/2012	Generally accepted standards	502
True Stories: Gypsy Blood	Channel 4	19/01/2012	Materially misleading	1
True Stories: Gypsy Blood	Channel 4	19/01/2012	Violence and dangerous behaviour	2
True Stories: My Social Network Stalker	Channel 4	20/02/2012	Generally accepted standards	5
UEFA Europa League	ITV1 London	16/02/2012	Outside of remit / other	1
Various	BBC channels	n/a	Drugs, smoking, solvents or alcohol	1
Various	BBC channels	n/a	Offensive language	1
Various	Various	n/a	Drugs, smoking, solvents or alcohol	1
Various	Various	n/a	Television Access Services	1
Weekend Morning	Venus TV	19/02/2012	Generally accepted standards	1
Winners and Losers	ITV2	05/02/2012	Offensive language	1
Wipeout	Kanal 5 (Sweden)	24/01/2012	Offensive language	1
Wonga.com's sponsorship of Channel 5 drama	Channel 5	10/02/2012	Generally accepted standards	1
Wonga.com's sponsorship of Channel 5 drama	Channel 5	17/02/2012	Generally accepted standards	3
Wonga.com's sponsorship of Channel 5 drama	Channel 5	18/02/2012	Generally accepted standards	2
Wonga.com's sponsorship of Channel 5 drama	Channel 5	n/a	Sponsorship credits	1
World's Toughest Trucker	Channel 5	27/01/2012	Offensive language	1
You've Been Framed!	ITV1	11/02/2012	Generally accepted standards	1
You've Been Framed! Top 100 Kids	ITV1	04/02/2012	Generally accepted standards	1
You've Been Framed! Top 100 Kids	ITV1	04/02/2012	Under 18s in programmes	1

Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 1 and 14 March 2012.

Programme	Broadcaster	Transmission Date
606	BBC Radio 5 Live	25 February 2012
Advertising minutage	DM Digital	11 November 2011
Advertising minutage	UMP Movies	n/a
Befarmaeed Shaam	Manoto1	27 December 2011
Black Mirror: The National Anthem	Channel 4	04 December 2011
Channel 4 News	Channel 4	25 January 2012
Focus Nigeria	AIT International	09 February 2012
Gavin and Stacey	Gold	25 February 2012
Greigsy at Breakfast	Northsound 1	23 February 2012
Homeland	Channel 4	04 March 2012
Homes from Hell	ITV2	26 November 2011
Religion and Society	Voice of Russia	24 February 2012
Selkirk News	BBC Radio Scotland	26 January 2012
Smart on Sunday	XFM London	04 March 2012
Swamp Brothers	Quest	09 March 2012
The Anything Goes Show	105.9 Bishop FM	27 February 2012
The Commisioner	Movies 4 Men	16 February 2012
The Real Radio Football Phone-In	Real Radio Scotland	23 February 2012

It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.

For more information about how Ofcom assesses complaints and conducts investigations go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

For fairness and privacy complaints go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>.