

CONFIDENTIAL

Ofcom ref: 00776671

Direct line:

BBC Executive Complaints Unit

30 September 2019

BY EMAIL

Dear [REDACTED],

BBC Breakfast, BBC 1, 17 July 2019, 07:11

We are writing with regard to the above programme following the decision¹ of the BBC's Executive Complaints Unit ("ECU") relating to statements made about President Donald Trump by Naga Munchetty.

Ofcom has received ten complaints regarding the above programme and the outcome of the ECU decision.

Ofcom's Procedures for investigating breaches of content standards on BBC broadcasting services and BBC on demand programme service ("the Procedures")² state that ordinarily, Ofcom will only accept a complaint that has first been considered by the BBC³.

We note that in this case, the BBC has already had the opportunity to consider complaints about the programme's compliance with the BBC's Editorial Guidelines regarding due impartiality, and on 26 September 2019 published its decision partially upholding a complaint. The BBC Editorial Guidelines considered by the ECU closely reflect the due impartiality provisions of the Ofcom Broadcasting Code ("the Code"), in particular Rule 5.9⁴.

On this basis and given the significant amount of public concern expressed about this case, we consider that it is in the public interest for Ofcom to assess this programme. We are therefore currently assessing the programme against Section Five of the Code.

¹ See <http://www.bbc.co.uk/complaints/comp-reports/ecu/breakfastbbcone170719>

² https://www.ofcom.org.uk/_data/assets/pdf_file/0002/100100/Procedures-for-investigating-breaches-of-content-standards-on-BBC-broadcasting-services-and-BBC-on-demand-programme-services.pdf

³ Paragraph 1.15.

⁴ Rule 5.9 states "Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of 'personal view' or 'authored' programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views".

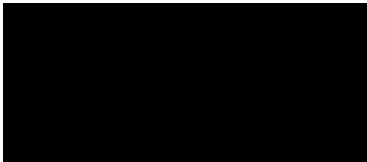
Request for background information

We already have a copy of the programme. In addition, we have a copy of the ECU's decision of 26 September 2019 and the BBC'S Executive Committee's statement of 27 September 2019.

If the BBC would like to provide us with any further information to inform our assessment, please can you do so by **5pm on Wednesday 2 October 2019**.

Given the level of public interest, you should be aware that we intend to publish our assessment of the programme, including a summary of any relevant information the BBC now wishes to provide, before announcing whether a full investigation is required.

Yours sincerely,

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From: [REDACTED]
To: [REDACTED]
Subject: EXTERNAL:FW: Request for information - BBC Breakfast - 17/7/19 - Ref. 00776671
Date: 01 October 2019 11:32:35

Dear [REDACTED]

In the light of yesterday evening's decision by the Director-General, I'm writing to enquire whether any of the complaints received by Ofcom are to the effect that the programme was in breach of Rule 5.9 of the Code (your letter's reference to "complaints regarding the above programme and the outcome of the ECU decision" being open to more than one interpretation in that respect). As the BBC's position now is that there was no breach of editorial standards in relation to impartiality, you'll appreciate that we need to know whether we have a case to answer before framing any response to your request for information.

I should also clarify the status of what your letter terms "the ECU's decision of 26 September". I take it this refers to the posting on the complaints pages of the BBC website, at <http://www.bbc.co.uk/complaints/comp-reports/ecu/breakfastbbcone170719>, which was published on that date. This is a summary of the finding itself, which takes the form of a letter sent to the complainant on an earlier date, and which sets out the ECU's reasoning in full.

Yours sincerely

[REDACTED]

From: [REDACTED]
Sent: 30 September 2019 18:25
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Request for information - BBC Breakfast - 17/7/19 - Ref. 00776671

Dear [REDACTED]

Thanks for your calls. As discussed, it would be helpful if you could set out for us the aspect of Ofcom's remit under which the request for information has been made.

Yours sincerely

[REDACTED]

From: [REDACTED]
Sent: 30 September 2019 16:57
To: [REDACTED]
Cc: ECU; [REDACTED]
Subject: Request for information - BBC Breakfast - 17/7/19 - Ref. 00776671

Classification: CONFIDENTIAL

Dear [REDACTED],

Please see attached a letter for your attention. Please can you confirm receipt as soon as possible.

Yours sincerely,

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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Ofcom ref: 00776671

[REDACTED]
BBC Executive Complaints Unit

[REDACTED]
[REDACTED]
[REDACTED]
1 October 2019

BY EMAIL

Dear [REDACTED]

BBC Breakfast, BBC 1, 17 July 2019, 07:11

In your email at 18:25 yesterday, you asked me to confirm the aspect of Ofcom's remit under which we are acting. We are assessing the programme in accordance with our duty under article 46(7) of the BBC Charter to secure the observance of standards in the content in the relevant UK Public Services.

In your email of earlier today, following the Director General's email to all staff yesterday evening, which we have seen, you ask whether the complaints were to the effect that the programme breached Rule 5.9 of the Broadcasting Code. In answer to your specific question, we have complaints expressing both points of view. Our letter yesterday set out the reasons for us deciding to assess this programme.

We continue to invite the BBC, if it wishes to do so, to provide any additional information it would like us to consider by 5pm 2 October 2019.

Yours sincerely,

[REDACTED]
[REDACTED]



From Director, Editorial Policy & Standards

Kevin Bakhurst
Group Director, Content Media Policy Group
Ofcom
Riverside House
2a Southwark Bridge Road
London, SE1 9HA

02 October 2019

Dear Kevin,

Breakfast, BBC One, 17 July 2019

I am writing in connection with [REDACTED]'s letters to [REDACTED] of 30 September, in which he gives notice of Ofcom's intention to conduct and publish an assessment of this programme against Section Five of the Code, and 1 October, in which he cites the duty set out under article 46(7) of the BBC Charter as Ofcom's warrant for doing so.

We do not agree that the Royal Charter provides Ofcom with any self-standing power to investigate a BBC programme for breaches of content standards. Those powers are set out in, and are limited to, the BBC Agreement and Ofcom's Procedures.

As it can be inferred from [REDACTED]'s letters that Ofcom is not at present able to consider via those Procedures the complaints that have been brought to it, I would be grateful for your further clarification of the basis on which you are proposing to assess the programme (with a view to publication of that assessment and potentially to undertaking an investigation).

We will of course wish to consider any further information you provide, and will continue to seek legal advice, but we do not at present wish to take up your invitation of providing further information.

Finally I would be grateful for your confirmation that Ofcom will not publish any assessment of the programme or make any announcement regarding a self-initiated investigation without first giving the BBC the opportunity to consider the clarification that I have requested and due opportunity to take advice on it. I am sure you will appreciate that an interpretation of article 46(7) of the Charter which would allow Ofcom to initiate assessments and investigations of programmes essentially at will is not one to which we accede.

Yours

David Jordan
Director, Editorial Policy and Standards

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Ofcom ref: 00776671

Kevin Bakhurst
Group Director, Content and
Media Policy Group

David Jordan
Director, Editorial Policy and Standards
BBC

3 October 2019

BY EMAIL: [REDACTED]

Dear David

BBC Breakfast, BBC 1, 17 July 2019, 07:11

Thank you for your letter received yesterday late afternoon. You ask us to clarify the basis on which we are assessing the above programme.

As [REDACTED] explained in his letter of 30 September, we have received a number of complaints about the programme and he referred to our Procedures for investigating breaches of content standards on BBC broadcasting services (“the Procedures”). [REDACTED] asked [REDACTED] to clarify the remit/duty under which Ofcom is acting. In response to that specific request, [REDACTED] explained that we are acting in accordance with our duty under article 46(7) of the BBC Charter.

Article 46(7) of the Charter states that one of the principal functions of Ofcom as the external regulator of the BBC is that it must secure the observance of standards in the relevant UK Public Services which must be in accordance with the Ofcom Broadcasting Code.

The Agreement sets out the procedures for the handling of complaints by the BBC and Ofcom. The BBC considers complaints against whether the BBC has observed the BBC Editorial Guidelines. Ofcom considers complaints against the Ofcom Broadcasting Code. As you know, the BBC Editorial Guidelines must incorporate the Ofcom Broadcasting Code.

The BBC Procedures provide that a complaint must *normally* in the first instance be resolved by the BBC. The Ofcom Procedures provide for the handling and resolution of complaints if a complainant is not satisfied with the resolution of a complaint by the BBC; and Ofcom may, in exceptional circumstances, intervene at an earlier stage to handle and resolve a relevant complaint which has not been resolved by the BBC. Further and separately, Ofcom may launch investigations on its own initiative and carry out such investigations as it considers appropriate to determine compliance with a specified requirement, which includes compliance with the Ofcom Broadcasting Code.

Clearly, the BBC has already had the opportunity to consider complaints about the programme’s compliance with the BBC’s Editorial Guidelines regarding due impartiality having first given the ECU finding (summary published on 26 September) followed by Tony Hall’s subsequent decision of 30 September.

In light of the complaints we have received and given the amount of public concern expressed about this case, and in particular the conflicting views coming from the BBC, we consider that it is in the public interest for Ofcom, as the external regulator of the BBC, to assess this programme against Section Five of the Broadcasting Code (due impartiality).

Alternatively, if it is being suggested that the BBC First process has somehow not occurred, as you know Ofcom may exceptionally step in at an earlier stage. Given the significant public interest in this matter, we consider this is an appropriate case to do so. Further, in any event and if necessary, for the same reasons, Ofcom considers it appropriate to assess whether it should initiate its own investigation of compliance.

We have a copy of the programme and copies of the summary finding of the ECU, the BBC Executive Committee's email and Tony Hall's email to all staff. We invited the BBC to provide any additional information you wished us to consider, which you state you do not presently wish to take up. If you change your mind, please could you provide any additional information expeditiously.

Given the public interest, there will be full transparency around this process. We currently intend to publish our assessment, including our decision on whether an investigation is necessary, in the next scheduled Broadcast Bulletin on Monday 7 October 2019. We would provide you with a copy of our assessment, at approximately 8am Monday, in advance of publication.

Yours sincerely,

A solid black rectangular box used to redact the signature of Kevin Bakhurst.

Kevin Bakhurst



From Director, Editorial Policy & Standards

Kevin Bakhurst Esq
Group Director, Content and Media Policy Group

October 4 2017

Thank you for your letter of 3 October.

I should begin by saying that, while we continue to disagree with Ofcom's approach, we will respond to any requests arising out of an investigation, should one eventuate, in the interest of a conclusion based on full information.

Turning to the points made in your letter, I note that my question about the basis on which Ofcom is proposing to assess the programme in question has not been directly answered; though you cite various bases which might apply, you do not make clear which of them in fact does. Whatever the answer to my question, though, we remain of the view that there is no proper basis for Ofcom's proposed action.

You refer to Article 46(7) of the Charter but, as observed in my previous letter, this confers no powers on Ofcom, but simply refers to powers set out in detail elsewhere, in the BBC Agreement and Ofcom's procedures. Nor does it impose a duty, in the name of some general public interest, to secure the observance of standards other than by the means set out elsewhere.

You go on to refer to your power to intervene in exceptional circumstances where the BBC has not resolved a complaint. You also refer to Ofcom's separate power to launch an investigation on its own initiative. Neither provides a convincing case for jurisdiction and eliding the two does not cure this.

First, Ofcom's own statements and policy documents specifically state that the power to undertake an investigation on its own initiative will be used in the absence of a complaint. That power and the separate power to intervene in the BBC's handling of a complaint are therefore mutually exclusive.

Second, this is not a case where exceptional circumstances (as envisaged in Ofcom's own Procedures) warrant intervention in the handling of a complaint because the BBC has not resolved a complaint. Subject to a referral to Ofcom, the one complaint which progressed as far as Stage 2 of the BBC's process has already been determined.

I am disappointed, therefore, that Ofcom is assessing a broadcast with a view potentially to undertaking an investigation for which it has no clear jurisdiction, rather than handling the complaints it has received about the programme in the normal way.

David Jordan

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Ofcom ref: 00776671

Kevin Bakhurst
Group Director, Content and
Media Policy Group

David Jordan
Director, Editorial Policy and Standards
BBC

6 October 2019

BY EMAIL: [REDACTED]

Dear David

BBC Breakfast, BBC 1, 17 July 2019, 07:11

Thank you for your letter of 4 October.

We remain satisfied that Ofcom has the power to act and, as the independent external regulator of the BBC, Ofcom should consider this matter.

Yours sincerely,

[REDACTED]

Kevin Bakhurst