

## Complaint by Ms G about Look East (West)

<b>Type of case</b>	Privacy
<b>Outcome</b>	Upheld
<b>Service</b>	BBC 1 (regional)
<b>Date &amp; time</b>	10 August 2021, 18:30
<b>Category</b>	Privacy
<b>Summary</b>	We have upheld a complaint about unwarranted infringement of privacy in connection with the obtaining of material included in the programme, and in the programme as broadcast.

### Case summary

The programme featured a report about NHS waiting times during the Covid 19 pandemic and showed footage of the Health Secretary, Mr Sajid Javid, visiting Milton Keynes University Hospital. Footage was included of Mr Javid in a hospital waiting room in which the complainant, Ms G, could be seen in the background with her face unobscured. Ms G complained that her privacy was unwarrantably infringed in both the obtaining and subsequent broadcast of this footage in the programme.

Ofcom found that Ms G had a legitimate expectation of privacy both in connection with the obtaining of material included in the programme, and in the programme as broadcast, and that this outweighed the broadcaster's and audience's right to freedom of expression and the public interest in the filming and the broadcast of the footage.

### Programme summary

On 10 August 2021, BBC 1 broadcast its regional evening news programme, *Look East (West)*. The programme included a report on NHS surgery waiting times during the Covid 19 pandemic and footage was shown of Health Secretary, Mr Sajid Javid, visiting Milton Keynes University Hospital. The footage included various interview clips of Mr Javid who was walking through the hospital corridors alongside the Chief Executive of the NHS, Ms Amanda Pritchard. Part of the report showed Mr Javid and Ms Pritchard talking to hospital staff inside the hospital. The footage showed a close-up of Mr Javid's face as he was talking and, in the background, a woman (the complainant, Ms G) wearing a face mask could

be seen sitting in a waiting area. While Mr Javid was still speaking, the woman was shown pulling down her face mask, so her face was visible for approximately three seconds. The footage then showed Mr Javid standing outside and in front of a building with a large sign which read: “Cancer Centre”. The report ended without any further footage of the complainant being shown.

## Summary of the complaint and broadcaster’s response

### Complaint

- a) Ms G complained that her privacy was unwarrantably infringed in connection with the obtaining of material included in the programme because she was filmed without her consent. Ms G said she should have been asked to sit elsewhere. Ms G said that she spoke to the Cancer Centre receptionist following the broadcast and was told that the programme makers should not have been taking photos in the waiting rooms.
- b) Ms G complained that her privacy was unwarrantably infringed in the programme as broadcast because footage of her was included without her consent. Ms G explained that she had recently been diagnosed with cancer and that “very few people” had known this at the time as she wanted to know the full extent of the diagnosis before telling people. She said that “unbeknown to me I was in the clip and on the television waiting to be called in for my appointment” at the Cancer Centre. Ms G said that her friends had contacted her following the broadcast to say that they had recognised her on the television. Ms G said this was a “breach of my confidentiality and also my human rights” and added that her face should have been blurred.

### Broadcaster’s response

The BBC said that to illustrate the backlog in the health service resulting from restrictions arising from the Covid-19 pandemic, the BBC included footage of Mr Javid and Ms Pritchard visiting the cancer treatment centre at Milton Keynes University Hospital.

The BBC said that the footage was provided to the programme makers, who were at the hospital, by the Department of Health and Social Care (“DHSC”). It added that the footage was included in the *BBC News* at 18:00 on BBC 1 and in the edition of *Look East* complained of, but only the latter programme included footage in which the complainant’s face was visible.

- a) The BBC provided Ofcom with a note from the BBC News producer responsible for the filming at the hospital. The note said:

“I was the field producer for BBC News and made clear to the press team above on the phone before the visit and onsite that we would need consent of any patients filmed - both press officers were on hand at all times during the visit to indicate who we could film and who we could not - they too were alive to this throughout the visit.

There were two occasions when I could not accompany our BBC camera crew during filming this visit - inside a theatre and inside the Cancer centre. I resisted this initially - as I said I need to be with the crew to make sure we are filming the correct things and have consent - but they insisted for Covid security numbers needed to be bare minimum - as

this was just for shots inside of the SoS and Amanda Pritchard meeting staff.

I explained that they would have to be clear to me on their return that everything we filmed was fine for broadcast - and no person filmed who would be unhappy and identifiable. I double checked this verbally when they returned from the cancer centre as I needed to ensure the rushes were clear to be sent to our broadcast pool partners ITN and SKY”.

The BBC said that it contacted the DHSC following a complaint from Ms G to the BBC and provided Ofcom with a copy of the correspondence. In its statement, the broadcaster referred to the following response from the DHSC’s press team:

“We checked that all areas we would be filming in had had consent sought from patients and staff, and have this agreed in advance with the trust if we’re sorting filming. My sincere apologies that this person feels this wasn’t done. We’ll raise with the trust and ensure next time we’re working with yourselves its triple checked”.

The BBC said that it appeared that the Hospital Trust had failed to explain to Ms G that filming would take place in the hospital and her consent was not obtained. It said that while it accepted that Ms G’s privacy was infringed in connection with the obtaining of material, BBC News had been assured that anyone within range of the camera in Milton Keynes hospital would have been advised that filming would be taking place and given consent to be included. The BBC said that the infringement was accidental and occurred because of an oversight by a third party over which it had no direct control.

- b) The BBC reiterated that the footage of Ms G was broadcast in the belief that patients at the hospital would have given consent for their images to be captured. The BBC said that, as there was no record to the contrary, there was no reason not to use the footage in which Ms G appeared. The BBC said that the breach of privacy in the broadcast was inadvertent and that the footage has since been marked “not for re-use”. The broadcaster also said that it had apologised to Ms G.

### **Ofcom’s Preliminary View**

Ofcom prepared a Preliminary View that Ms G’s complaint should be upheld. Both parties were given the opportunity to make representations on the Preliminary View, but neither chose to do so.

### **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 unwarranted infringements 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, a copy of correspondence between the broadcaster and DHSC, a copy of correspondence between the broadcaster and complainant 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 broadcaster and audience to freedom of expression under Article 10 of the European Convention on Human Rights. This includes audiences' right to receive ideas and information without undue interference. 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 [Ofcom 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.

In addition to this rule, Section Eight (Privacy) of the Code contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 8.1 and failure to follow these practices will only constitute a breach where it results in an unwarranted infringement of privacy.

- a) Ofcom considered Ms G's complaint that her privacy was unwarrantably infringed in connection with the obtaining of the material in the programme as broadcast because she was filmed without her consent whilst she was waiting for her appointment at the Cancer Centre at Milton Keynes University Hospital.

Ofcom had regard to the following Code practices:

- Practice 8.5 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.
- Practice 8.8 which states that when filming or recording in institutions, organisations or other agencies, permission should be obtained from the relevant authority or management, unless it is warranted to film or record without permission. Individual consent of employees or others whose appearance is incidental or where they are essentially anonymous members of the general public will not normally be required.

However, in potentially sensitive places such as ambulances, hospitals, schools, prisons or police stations, separate consent should normally be obtained before filming or recording and for broadcast from those in sensitive situations (unless not obtaining consent is warranted). If

the individual will not be identifiable in the programme then separate consent for broadcast will not be required.

Ofcom first considered the extent to which Ms G had a legitimate expectation of privacy in the particular circumstances in which the material included in the programme had been obtained. The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must always be judged in light of the circumstances in which the individual concerned finds him or herself.

The broadcast footage showed that Ms G was filmed in a waiting area at Milton Keynes University Hospital. As recognised in Practice 8.8 of the Code, hospitals are considered potentially sensitive places. We took into account that Ms G was attending the hospital for an appointment at the Cancer Centre and that her presence there, in light of her circumstances, was of sensitivity to her. While it was not clear from the footage whether this area of the hospital was readily accessible to members of the public or not, Ofcom understood that due to restrictions in place at the time, there were limitations on the number of people who could enter this particular area. We acknowledged that Ms G was only filmed in the background and for a few seconds. However, given that she was filmed inside the hospital attending a specialist centre, and given that this was specifically identified as the Cancer Centre in the programme, the broadcaster was likely to have obtained at least some sensitive information about her, i.e. that she was attending the hospital and that her reason for attending was potentially related to cancer. We also took into account that while Ms G was filmed openly, she was not aware that she had been filmed and she had not been asked to provide her consent to being filmed.

Taking all these factors into account, we considered that the material obtained included footage of Ms G in a sensitive situation and the information obtained was of sensitivity to her. Therefore, in our view, Ms G had a legitimate expectation of privacy in relation to the filming of this footage of her.

It was not disputed by the parties that Ms G was filmed without her consent. We therefore went on to consider whether the infringement of Ms G's legitimate expectation of privacy was warranted under the Code.

The Code states that "warranted" has a particular meaning. Where broadcasters wish to justify an infringement of privacy, 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, the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest could include revealing or detecting crime, protecting public health and safety, exposing misleading claims by individuals or organisations or disclosing incompetence that affects the public.

Ofcom carefully balanced Ms G's right to privacy with regards to obtaining the footage of her with the broadcaster's and audience's right to freedom of expression; taking into account whether there was a public interest in obtaining the footage of Ms G. In balancing the competing rights of the parties, we took into account that the broadcaster accepted that obtaining the footage of Ms G had infringed Ms G's legitimate expectation of privacy and it did not put forward any argument that the infringement was warranted. We also took into account that the broadcaster did not seek

to provide any public interest justification for obtaining the footage without Ms G's informed consent. Ofcom recognised that the BBC said that any infringement of Ms G's privacy was "accidental", and that it had subsequently apologised to Ms G. However, taking all the above factors into account and in the absence of any public interest justification or other reason why the filming was warranted in the public interest, Ofcom considered that, on balance, the broadcaster's and audience's right to freedom of expression did not outweigh Ms G's legitimate expectation of privacy in relation to the filming of her in the circumstances of the case.

Therefore, Ofcom found that Ms G's privacy was unwarrantably infringed in connection with the obtaining of material included in the programme.

- b) Ofcom next considered Ms G's complaint that her privacy was unwarrantably infringed in the programme as broadcast because footage of her sitting in the Cancer Centre was broadcast in the programme without her consent.

In addition to the Practice 8.8 as set out above, we had regard to Practice 8.6 which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

We first considered the extent to which Ms G had a legitimate expectation of privacy in relation to the broadcast of the footage of her in the programme. We have applied the same objective test as set out in head a) above.

As set out in the "Programme summary" above, the programme included footage of Mr Javid talking to hospital staff, in the background of which Ms G could be seen sitting in a hospital waiting room. During the footage, Ms G pulled her facemask down so that her face was visible for approximately three seconds. This was followed by footage of Mr Javid speaking outside a building named "Cancer Centre".

As explained in more detail in head a) above, the footage broadcast showed Ms G in a sensitive situation, namely waiting in a hospital waiting room at Milton Keynes University Hospital. We took into account that the programme did not provide any specific detail as to the reason Ms G was at the hospital and it was not directly stated where in the hospital Ms G was, although we took into account that the footage of Ms G was immediately followed by Mr Javid standing outside the "Cancer Centre" building. We therefore considered that it would not have been unreasonable for viewers to have assumed that Ms G was a patient at the hospital, particularly given the Covid restrictions that were in place at the time, and that she was potentially a patient at the Cancer Centre. In any case, we took into account that the circumstances around Ms G's attendance at the hospital was extremely sensitive to her given that she had informed very few people about her cancer diagnosis and the broadcast of the footage disclosed the likelihood that she was a patient at the hospital. While we had regard to the fact that the footage of Ms G was relatively brief, that she was not named or otherwise identified and that she appeared in the background, her face was shown unobscured. We therefore considered that Ms G would likely have been recognisable to those who knew her.

Taking the above factors into account, Ofcom considered that given the circumstances in which Ms G had been filmed; in particular the fact that the programme showed Ms G in a sensitive

situation and revealed sensitive information about her, Ms G had a legitimate expectation of privacy in relation to the broadcast of this footage.

It was not disputed by the parties that footage of Ms G was included in the programme as broadcast without her consent. We therefore went on to consider whether the infringement of Ms G's legitimate expectation of privacy was warranted under the Code.

Ofcom has carefully balanced Ms G's right to privacy with regards to the inclusion of the relevant footage of her in the programme with the broadcaster's and audience's right to freedom of expression, which includes the audience's right to receive the information broadcast without unnecessary interference.

We took into account that the programme showed Ms G in a sensitive situation, namely waiting for an appointment in a hospital. As at head a) above, in weighing up the competing rights of the parties, we took into account that the broadcaster accepted that the broadcast of the footage of Ms G had infringed her legitimate expectation of privacy, and that it did not put forward any argument that the infringement was warranted, only that it was inadvertent. We also took into account that the broadcaster did not seek to provide any public interest justification for the broadcast of the footage. We noted the BBC's submission that it had marked the footage of Ms G as "not for re-use" and had apologised to her for the broadcast. Nevertheless, we considered that the filming of Ms G captured her in a particularly sensitive situation where she may have been feeling vulnerable and, in broadcasting the footage of her in a hospital waiting room, the programme revealed information about Ms G that she might reasonably consider sensitive and private.

Taking all the above factors into account and having carefully weighed the competing rights of the parties, Ofcom considered that, on balance, the broadcaster's and audience's right to freedom of expression and the public interest in broadcasting the footage of Ms G did not outweigh her legitimate expectation of privacy in relation to its broadcast. Therefore, we considered that Ms G's privacy was unwarrantably infringed in the programme as broadcast.

**Ofcom has upheld Ms G's complaint of unwarranted infringement of privacy in connection with the obtaining of material included in the programme, and in the programme as broadcast.**