



## Complaint by Mr Graham Herschell about *Motorway Cops: Catching Britain's Speeders*

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| <b>Type of case</b>    | Fairness and Privacy  |
| <b>Outcome</b>         | Not Upheld  |
| <b>Service</b>         | Channel 5   |
| <b>Date &amp; time</b> | 8 May 2023, 21:00   |
| <b>Category</b>        | Privacy   |
| <b>Summary</b>         | We have not upheld a complaint about unwarranted infringement of privacy in the programme as broadcast. |

### Case summary

The programme included footage of Mr Graham Herschell being stopped, questioned, and arrested on suspicion of theft of a motor vehicle and driving while disqualified, and further arrested due to his refusal to take a breathalyser test. It also included footage of him at a police station. Mr Herschell complained that his privacy was unwarrantably infringed in the programme as broadcast because unobscured footage of him was included without his consent.

Ofcom’s decision is that Mr Herschell had a legitimate expectation of privacy in relation to the broadcast of the footage without his consent. However, we considered that, in the particular circumstances of the case, Mr Herschell’s legitimate expectation of privacy did not, on balance, outweigh the broadcaster’s right to freedom of expression, and the public interest in including the material in the programme. Therefore, we considered that there was no unwarranted infringement of Mr Herschell’s privacy in the programme as broadcast.

## Programme summary

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On 8 May 2023, Channel 5 broadcast an edition of *Motorway Cops: Catching Britain's Speeders*, a documentary series following police units as they respond to incidents of "dangerous and criminal driving".

The programme began with a 'coming up' section, in which a police officer was shown getting out of his vehicle after spotting a suspect (the complainant, Mr Herschell). The police officer could be heard saying: *"Hang on there a minute, mate"*. The programme's narrator explained: *"Tonight, PC Niaz gets his man"*. As PC Niaz approached Mr Herschell, he said: *"Right, you are under arrest for disqual driving"*. The narration continued: *"But there are more questions than answers"*.

The following exchange between PC Niaz and Mr Herschell was shown:

Mr Herschell: *"Where is the car?"*

PC Niaz: *You know where the car is mate, because you parked it.*

Mr Herschell: *Well, where is it?"*

The 'coming up' preview continued without further reference or footage of Mr Herschell.

Later in the programme, PC Niaz was shown setting off on patrol. The narrator said: *"Today, he is strutting his stuff on the M6"*. A call on the police radio from another police officer was included and a transcript was shown on screen: *"Caller reported someone's car has been stolen through the early hours of the morning. It's a Polo in blue"*. PC Niaz then said: *"A blue Polo"*.

PC Niaz was shown driving towards the location of the car. PC Niaz explained:

*"We've got a blue VW Polo, which has been taken overnight from an address in Warrington. I believe it's a relation who's taken the vehicle, but it has been reported as stolen. And the person who has taken it, it looks like he's not on the insurance"*.

The narrator then said:

*"Every year on Britain's roads, around 130 people are killed by uninsured or untraced drivers"*.

The programme then showed an incident involving an unidentified uninsured driver. The programme then returned to footage of PC Niaz in his car. He said:

*"We're making it to junction 18 now to meet up with our patrols, and then we will look at formulating some form of plan as to how we are going to deal with it"*.

The narration continued:

*"On the edge of Warrington, Niaz and three more patrols are closing in on an uninsured driver"*.

Another call on the police radio was included and appeared on screen:

*"We would rather get the vehicle with him driving it, as he is disqualified and possibly intoxicated as well"*.

PC Niaz then said:

*“He has potentially been drinking as well, so it adds a raised level”. The call continued: “3-2-9 vehicle is making off, not pursuit trained, so we can’t pursue”.*

PC Niaz said:

*“The vehicle is making its way back to the home address, at sight of the police vehicle and it’s made off from it”.*

A further call was included which stated: *“The vehicle’s been found”*. PC Niaz said: *“He’s got the vehicle. It’s parked up”*. PC Niaz was then shown pulling up alongside the parked vehicle and another police car. A police officer could be heard saying: *“The male is not with the vehicle”*.

The programme then showed PC Niaz drive off in pursuit of the individual. He said:

*“It’s been left insecure, and the male is out. We’re just basically going off on the periphery to see if we can see anybody out on foot”.*

PC Niaz then had the following exchange with a colleague over the police radio:

PC Niaz: *“Uniform 6-5, have we got a description of the male and potentially what he is wearing, just in case he is in the vicinity?”*

Colleague: *As best as I can tell. I would say it’s a white male wearing a dark coloured hooded top, with a dark t-shirt underneath.*

PC Niaz: *6-5 that’s all received, thank you. And what age are we looking at for the male?*

Colleague: *He’s born 1984, that would make him late 30s.*

PC Niaz: *All received, thank you.*

Colleague: *Off his picture Niaz, he’s got thinning fair hair, its parted. He’s got some stubble as well.*

PC Niaz: *Yeah, all received”.*

The footage then showed PC Niaz spotting an individual walking along the street. The conversation with his colleague continued:

PC Niaz: *“Uniform 6-5, could it potentially be a grey hoodie top?”*

Colleague: *3-2-9, when we tried to stop it, it was a grey hoodie.*

PC Niaz: *Uniform 6-5, the male’s walking on-”.*

PC Niaz was then shown parking his vehicle and calling out: *“Hang on there a minute mate, hang on there”.*

A number of other police officers arrived at the scene, and PC Niaz cautioned Mr Herschell:

*“You are under arrest for disqual driving, theft of a motor vehicle. Put your hands behind your back for us please [another police officer was shown handcuffing Mr Herschell]”.*

PC Niaz, Mr Herschell, and another police officer, then had the following exchange:

PC Niaz: *“Where are the keys to the vehicle?”*

Mr Herschell: *The keys for what?*

PC Niaz: *Mate, don’t try any sort of -*

Mr Herschell: *You’ve literally stopped me walking for a paper.*

PC Niaz: *Yeah, course we have. So, at this time, you are under arrest on suspicion of theft of a motor vehicle [footage was shown of a bottle of vodka on a wall].*

Mr Herschell: *Where is the car?*

PC Niaz: *You know where the car is mate, because you parked it.*

Mr Herschell: *Where, where is it?*

Police Officer: *There’s going to be about four bobbies putting statements in to say they’ve seen you driving, so.*

Mr Herschell: *Seen us where, seen us where?*

PC Niaz: *Intoxicants smelt on your breath, as I believe you were driving that vehicle. Under Section 6A of the Road Traffic Act -*

Mr Herschell: *No need to shout at me.*

PC Niaz: *I am going to require a preliminary breath test at the roadside.*

Mr Herschell: *What for, walking down to the shop?*

PC Niaz: *Yeah mate, alright, yeah ok.*

Mr Herschell: *Alright mate.*

PC Niaz: *Whatever”.*

The programme then showed footage of another police officer holding up a breathalyser to Mr Herschell. The police officer and Mr Herschell had the following conversation:

Police Officer: *“Any reason why you can’t blow through a plastic tube?”*

Mr Herschell: *Because I don’t want to.*

Police Officer: *Ok, because then if you fail to provide, that’s a charge.*

Mr Herschell: *Fair enough then, fair enough mate.*

Police Officer: *So, are you going to blow through it?*

Mr Herschell: *No.*

Police Officer: *No, ok”.*

The programme then showed PC Niaz checking his watch, and he said: *“Refusal at 16, 12:16”.* Mr Herschell then had the following conversation with another police officer, who was detaining him:

Mr Herschell: *“You’re arresting me under duress.*

Police Officer: *That doesn’t make any sense.*

Mr Herschell: *Under duress, because I don’t want to. I don’t want to be arrested.*

Police Officer: *Nobody wants to be arrested, do they? But you’re not under duress”.*

Mr Herschell was then shown being escorted into the back of a police van. PC Niaz said:

*“We’ve located the male from the vehicle. I’ve arrested him for suspicion of theft of that motor vehicle. He’s refused the roadside breath test, so he’s been further arrested for the refusal of that. He’s also a disqualified driver, so he’s been further arrested for that [the police van was shown driving away]. Clearly intoxicants smelled on his breath, so now we are on route to Runcorn custody”.*

The programme then showed footage of Mr Herschell being processed inside the police station. Alongside this footage, the following text appeared:

*“TAKING VEHICLE WITHOUT CONSENT: NO FURTHER ACTION. GUILTY: DRINK DRIVING. GUILTY: DRIVING WHILE DISQUALIFIED. GUILTY: DRIVING WITHOUT INSURANCE. DISQUALIFIED FROM DRIVING FOR 5 YEARS & 2 MONTHS. REQUIRED TO TAKE AN EXTENDED DRIVING TEST. FINE & COSTS: £154”.*

The programme then went on to show PC Niaz in his police car, he said:

*“The driver provided two evidential breath specimens, even though he failed to provide at the roadside. The lower one being 132, so the legal limit being 35. So, just think if he was involved in a collision, or it became a fatality on the back of that. I’m just glad that we weren’t dealing with something more serious”.*

The programme continued with no further reference to the incident involving Mr Herschell and no further footage of him was shown again. Mr Herschell was not named in the programme, however his face was shown unobscured, and his voice was heard undisguised.

## Summary of the complaint and broadcaster’s response

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### Complaint

Mr Herschell complained that his privacy was unwarrantably infringed in the programme as broadcast because unobscured footage of him was included in the programme without his consent. Mr Herschell said that he had “the right to a private life”, and that “the broadcaster could have

made steps in order to protect [his] identity". He added that the broadcaster did not contact him to obtain his consent prior to broadcast.

## Broadcaster's response

Channel 5 said that it did not consider Mr Herschell's privacy had been unwarrantably infringed in the programme as broadcast. It said that it was clear from the unedited footage (which it provided to Ofcom) that the complainant had been made aware that he was being filmed for the Channel 5 series, and that this filming would be conducted by a cameraman, police body cameras, and fixed cameras in the police station. The broadcaster acknowledged that Mr Herschell had not consented to the filming being included in the programme, but submitted that such consent was not required. It added that Mr Herschell was told that his objection to the footage being included in the programme had been noted, and that a decision would be taken later as to whether the footage would be used.

Regarding Mr Herschell's complaint that he had not been contacted prior to broadcast, Channel 5 said that the complainant had declined to give his details to the programme makers, and so was told that he could contact the programme makers himself as their details would be left on a card with the police. The broadcaster said that the complainant made no contact with programme makers.

Channel 5 submitted that Mr Herschell's consent was not required to include unobscured footage of him in the programme. It said that in relation to the incident that featured in the broadcast footage, the complainant was convicted of drink driving, driving while disqualified and driving without insurance. The broadcaster said that, as a result, Mr Herschell was given a custodial sentence of four months, he was disqualified from driving for five years and two months and required to pass an extended driving test before being able to drive again. Channel 5 said that, in accordance with the principle of open justice, it was entitled to report on the complainant's arrest and other information surrounding this as it was referred to in open court. It cited two newspaper articles<sup>1</sup> which reported on the same incident, arrest, and conviction.

The broadcaster referred to two previous Ofcom Fairness and Privacy Adjudications regarding episodes of the television programmes *Police Interceptors*<sup>2</sup> and *Motorway Cops*<sup>3</sup>. Channel 5 said that the analysis in the cases were pertinent to the case of Mr Herschell. It said that, in particular, the footage that was broadcast of Mr Herschell was filmed in public places, namely the roadside and the public area of a police station, which attracted a limited expectation of privacy.

The broadcaster said that the footage of Mr Herschell being questioned and arrested at the roadside that was included in the programme was openly filmed by the programme makers in a public place and in full view of any members of the public who were passing by. It said that the complainant appeared to be relatively calm, if irritable, with the police officers, and that he was not shown engaged in any conduct or action which could reasonably be regarded as particularly sensitive or private. Channel 5 said that, similarly, the brief footage that was broadcast of Mr Herschell being booked in at the police station was filmed openly and in a public area. It said that the complainant

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<sup>1</sup> <https://www.warringtonguardian.co.uk/news/23288347.driver-drink-drive-history-caught-almost-four-times-limit/> and <https://www.rhyljournal.co.uk/news/23322460.prison-man-guilty-driving-offences-st-asaph-pensarn/>

<sup>2</sup> See [Issue 268 of Ofcom's Broadcast and On Demand Bulletin](#), published on 1 December 2014, p.38.

<sup>3</sup> See [Issue 454 of Ofcom's Broadcast and On Demand Bulletin](#), published on 11 July 2022.

was not audible in the footage in the police station, and was shown calmly standing at the desk while he cooperated with the process. The broadcaster said that Mr Herschell did not appear to be in a sensitive or vulnerable state at the time, and no disclosures of a particularly sensitive or private nature were made. It added that the complainant had not identified in his complaint to Ofcom any private or sensitive information about himself that had been disclosed in the programme.

Channel 5 said that Mr Herschell's conviction, the circumstances in which he was stopped and arrested by the police, and the footage of him being processed at the police station were not matters which he had an expectation of privacy over, given that he was convicted and sentenced in open court prior to the footage being broadcast. In addition, it said that no significant private information was disclosed in the broadcast that would not have already been disclosed in open court. The broadcaster said that it followed that Mr Herschell had no legitimate expectation of privacy and that the broadcast did not unwarrantably infringe any aspect of his private life.

The broadcaster said that, if Ofcom considered that Mr Herschell's Article 8 rights were engaged in relation to the programme and that he had some legitimate expectation of privacy, it said that any expectation of privacy he might be found to have would be outweighed by Channel 5's Article 10 rights<sup>4</sup> to impart information to viewers and the viewers' right to receive such information. Channel 5 said that it was undeniable that driving a vehicle while disqualified and over the prescribed limit is a serious and dangerous crime, and that the detection, apprehension, investigation, and conviction of such individuals is a matter of genuine public interest. It added that in the case of *Motorway Cops*, each story is considered by a legal adviser and at the highest levels within Channel 5.

Channel 5 said that there can be no doubt that the activities of police officers are matters of genuine public interest, including the way the law is utilised, or ignored. The broadcaster said that, in the case of *Motorway Cops*, there is an undoubted public interest in seeing how and in what manner police officers carry out their duties; how the investigation of criminal offences affects members of the public and society in general; and what difficulties and situations police officers encounter when performing their public duties. It said that, equally, there is a clear public interest in members of the public seeing how the effective enforcement of legalisation and regulations affects people who are arrested and convicted because of the actions of police officers. Channel 5 said that seeing the impact of their transgressions conveys to members of the public the seriousness of such transgressions, and the true consequences of breaking the law.

Channel 5 concluded that broadcasting the segment involving Mr Herschell and his criminal conduct was in the public interest and therefore, the programme as broadcast did not constitute an unwarranted infringement of any privacy rights he may have had.

## Ofcom's Preliminary View

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Ofcom prepared a Preliminary View that Mr Herschell's complaint should be not upheld. Both parties were given the opportunity to make representations on the Preliminary View, but neither chose to do so.

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<sup>4</sup> [Articles 8 and 10 of the European Convention on Human Rights.](#)

## Decision

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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 infringement of privacy in programmes.

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 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 both the programme and the unedited footage of Mr Herschell at the roadside, and at the police station. We also considered the complaint as entertained by Ofcom, and the broadcaster's response, which we have summarised above insofar as Ofcom considered it relevant to its consideration of the entertained complaint.

In Ofcom's view, the individual's right to privacy must be balanced against the competing rights of the broadcaster to freedom of expression and of the audience to receive ideas and information without undue interference. Neither right 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 considered 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.

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.

In considering this complaint, Ofcom had regard to the following Code Practices:

Practice 8.4: "Broadcasters should ensure that words, images or actions filmed or recorded in, or broadcast from, a public place, are not so private that prior consent is required before broadcast from the individual or organisation concerned, unless broadcasting without their consent is warranted".

Practice 8.6: "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".

Practice 8.8: "...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)".

## Legitimate expectation of privacy

We first assessed the extent to which Mr Herschell had a legitimate expectation of privacy in relation to the footage included in the programme as broadcast. The test applied by Ofcom as to whether a legitimate expectation of privacy arises is objective: it is fact sensitive and must always be assessed in light of the circumstances in which the individual finds him or herself.

The Code's statement on the meaning of "legitimate expectation of privacy" makes clear that such an expectation:

"...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..."

We took into account the footage shown in the programme, as described in the "Programme summary" above. Mr Herschell was shown in the programme being stopped, questioned, and arrested on suspicion of theft of a motor vehicle and driving while disqualified. He was also shown being questioned by a police officer at the roadside and asked to take a breathalyser test, which he refused, and subsequently further arrested for refusing. Mr Herschell was later shown being escorted into the back of a police van and then being processed inside the police station. Mr Herschell was not referred to by name in the programme, however his face was shown unobscured, and his voice could be heard throughout. In those circumstances, we considered that the complainant was identifiable in the footage as broadcast.

We took account of Channel 5's submission that the footage included in the programme was filmed openly by the programme makers in a public place and in full view of any members of the public who might have been passing by. However, we acknowledged that there may be circumstances where someone can have a legitimate expectation of privacy, even in a public place. We also took into consideration Channel 5's submission that the complainant was not shown engaged in any conduct or action which could reasonably be regarded as being particularly sensitive or private to him, and that Mr Herschell had not identified in his complaint to Ofcom any private or sensitive information about him that was disclosed by the footage.

We had regard to Channel 5's submission that Mr Herschell did not appear to be in a sensitive or vulnerable state while interacting with the police, nor did he disclose any particularly sensitive or private information. However, in our view, the situation in which Mr Herschell was shown (i.e. being arrested, questioned, and asked to take a breathalyser test) could be regarded as potentially sensitive in the circumstances, and where a person may expect some degree of privacy. We also understood that Mr Herschell was under the influence of alcohol. Further, in accordance with Practice 8.8, police stations are potentially sensitive environments, and we considered that the process of being booked into the custody area of a police station (a place, in our view, where members of the public do not have ready access to) could be regarded as a sensitive situation. Ofcom considered that the situation in which Mr Herschell was shown could reasonably be regarded as potentially sensitive in those circumstances and where an individual may expect some degree of privacy.

We considered Channel 5's submission that Mr Herschell was convicted in open court and that in accordance with the principle of open justice, it was entitled to report on his arrest, conviction and other information surrounding this as it would have been referred to in open court. We sought further clarification from Channel 5 on this point who confirmed that Mr Herschell pleaded guilty to the offences and was sentenced in open court. Given these circumstances, it said no footage was likely to have been produced as evidence to be viewed in open court nor did the programme makers receive a request for any footage they filmed to have been produced in court. We acknowledged that a criminal conviction may be a matter of public record, and an individual will not usually have a legitimate expectation of privacy regarding the reporting of the fact of their conviction. However, in this case, Mr Herschell's interaction with police officers at the roadside and the police station was not used in open court, and therefore it was unlikely to have been in the public domain prior to the programme broadcast.

Having taken all the factors above into account, we considered that, in the circumstances, Mr Herschell had a legitimate expectation of privacy in relation to the broadcast of the footage at the roadside and in the police station. However, we considered that this expectation was limited given that, by the date of broadcast, Mr Herschell had been convicted of criminal offences in relation to the events relating to his arrest featured in the programme.

## Consent

It was not disputed by Channel 5 that Mr Herschell made clear to the programme makers that he did not consent to the broadcast of the footage of him in the programme, nor that Mr Herschell's consent was not obtained prior to the broadcast of the programme. We therefore went on to consider whether the infringement of the complainant's legitimate expectation of privacy was warranted.

## Warranted

The Code states that "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 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 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 Mr Herschell's right to privacy over the relevant footage in the programme with the broadcaster's and audience's right to freedom of expression. In particular, we considered whether there was sufficient public interest which might justify the infringement of Mr Herschell's legitimate expectation of privacy in broadcasting the footage.

We took into account Channel 5's submissions that there was a public interest justification in broadcasting footage which showed how police officers carry out their duties; how the investigation of criminal offences affects members of the public and society in general; and what difficulties and situations police officers encounter when performing their public duties. In Ofcom's view, there was genuine and significant public interest in broadcasting footage which showed the work of the police acting in the interests of the public, how they approach and tackle suspected crime, and in this case, in programme makers being able to broadcast situations that demonstrate to the public the potential consequences of drink driving. In our view, in this case, showing footage of Mr Herschell

without his consent, as he was stopped, arrested, questioned and processed at the police station served this public interest, as it provided a real-life case study of someone committing road traffic offences and the work of the police to prevent Mr Herschell from potentially endangering himself and other members of the public. In Ofcom's view, the footage shown was directly relevant to the police's work in investigating and gathering evidence relating to Mr Herschell's suspected illegal and potentially dangerous conduct and was thus proportionate and directly relevant to the subject matter of the programme.

Therefore, taking all the above factors into account, Ofcom considered that, on balance, the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without undue interference outweighed Mr Herschell's legitimate expectation of privacy in relation to the inclusion of the footage of him in the programme as broadcast. We therefore considered that Mr Herschell's privacy was not unwarrantably infringed in the programme as broadcast.

**Ofcom has not upheld Mr Herschell's complaint of unwarranted infringement of privacy in the programme as broadcast.**