

**RESPONSE BY CHANNEL 4 TELEVISION CORPORATION ("CHANNEL 4")  
TO A FAIRNESS AND PRIVACY COMPLAINT TO OFCOM FROM JULIAN ASSANGE  
RE: *TRUE STORIES: "WIKILEAKS: SECRETS AND LIES"*, MORE 4, 29<sup>TH</sup> NOVEMBER 2011**

**CASE NO. 1-196583661**

**Introduction**

Ofcom has entertained a number of complaints of unfair treatment and (in one respect) unwarranted invasion of privacy ("the Complaint") from Julian Assange of WikiLeaks ("the Complainant") arising from this documentary entitled "*WikiLeaks: Secrets and Lies*" ("the Programme") which was broadcast on More 4 as part of the *True Stories* strand. Ofcom's Entertainment Decision and the full complaint from Mr Assange were supplied to Channel 4 by Ofcom on 14<sup>th</sup> February 2012. A full transcript of the Programme is attached (**Appendix 1**).

The Programme was produced by Oxford Film and Television ("the Producers") which has a distinguished track record in making factual programmes, and was directed by Patrick Forbes, a very experienced and award-winning documentary maker. Julian Assange is arguably one of the most high profile international figures in recent years. The WikiLeaks organisation has been at the forefront of a number of well-publicised and orchestrated leaks of previously withheld and confidential information on the most important subjects of our time such as the conflicts in Afghanistan and Iraq and international diplomatic relations. Through his running of these campaigns to release information, and further his belief in full disclosure and freedom of expression, Mr Assange has become an internationally recognised public figure provoking strong opinions from detractors as well as supporters of his controversial work. His extraordinarily high profile meant that when allegations of sexual assault were levelled against him in Sweden, allegations he strenuously denies, and his extradition from the UK sought, it dominated the news agenda throughout the world. However few, if any, candid interviews with Julian Assange himself have emerged and this documentary attempted to tell the story of WikiLeaks' extraordinary revelations and the consequent disputes and legal battles from the perspective of the key players – including Mr Assange himself.

The aim of the director was to strip the WikiLeaks story back to its basic elements and ask the key protagonists to tell their story first hand, for the first time. This was with a view to examining both the futility of trying to keep secrets secret and the positive things that could follow from revealing them – such as exposing wrongdoing and the overthrowing of autocratic governments. This process also uncovered a bitter enmity and rivalry between the major participants that has run the risk of obscuring the positive outcomes their endeavours have achieved. Global public success - the publication of the Iraq and diplomatic cables, the emergence of the Arab Spring – has unfolded alongside darker personal stories – the alleged WikiLeaks source Bradley Manning awaiting trial in conditions of near torture and Julian Assange falling out with his media partners and facing his own legal battles.

Channel 4 submits that the documentary was a fair portrayal of Mr Assange and that no matters either included in the Programme or omitted from the Programme amount to unfair treatment of him. It is our submission that consideration of the five hours of the full unbroadcast rushes of Mr Assange's interview with Patrick Forbes ("the Director") and the way in which it was edited into the Programme, as well as the content of the emails between the parties' representatives prior to

filming, demonstrate that the Producers fully discharged their obligations of fairness towards to Complainant. In particular the nature of the extended interview and the way in which it was edited to reflect his position and views demonstrates that Mr Assange was given a full opportunity to put his perspective on the matters discussed in the Programme. A DVD containing 6 time-coded QuickTime files of the Complainant's full unedited interview is enclosed (**Appendix 2**) together with a time-coded transcript (**Appendix 3**). Furthermore, the email exchanges prior to the interview being filmed, and the pre-interview meeting which took place, show that the Producers went to great lengths to provide Mr Assange with details of the Programme and its contributors as it evolved. We submit that these details went well beyond the information with which they were obliged to provide him.

A recurring theme of Mr Assange's complaint of unfair treatment is that he clearly disapproves of many of the Programme's other interviewees and disputes much of what they say in the Programme. Mr Assange evidently has his own version of key events and his own opinions on them and the key players. He has taken exception to the Programme because it contains views and opinions which run counter to his own and features people expressing those views with whom Mr Assange disagrees or he believes are otherwise discreditable. Mr Assange may not like the Programme, and he may not agree with much of what its other contributors say, but it does not follow from this that the Programme is unfair to him.

At the heart of the Complaint is a fundamental misunderstanding about the requirements of Section 7 of the Ofcom Broadcasting Code ("the Code") which overlooks the importance of the role of Article 10 of the European Convention on Human Rights. Article 10 enshrines the right to freedom of expression and the Code has been drafted, and is applied by Ofcom, in accordance with that Article's principles.

It would not accord with Article 10 to expect a programme maker or broadcaster preparing a documentary to be, in effect, required to hand over their research materials, interviews and so on to a central interviewee. There is a well established duty to obtain a 'right of reply' in respect of "significant allegations" from their subject for their response and perspective. It is then incumbent upon the programme makers and broadcaster to consider what needs to be reflected in a programme in the interests of fairness and accuracy. It does not follow that every comment made by every interviewee must be put to the subject for their response nor every response made by the subject included in the programme – this is only required where not to do so would be unfair to the subject.

Both Channel 4 and the Producers firmly believe and submit that there was no unfairness to Mr Assange in the Programme and that his privacy was not unwarrantably infringed and we will invite Ofcom to dismiss the Complaint in its entirety.

### **Summary of Complaint**

Mr Assange's complaint to Ofcom that he was treated unjustly or unfairly in the Programme as broadcast falls under three heads, he claims that:

- a) The Producers did not obtain his informed consent to appear in the Programme.
- b) The Programme presented, disregarded and omitted material facts in a way that was unfair to him; and

- c) He was not given a timely and appropriate opportunity to respond to the allegations made in the Programme. In particular, he complains that he was “not given direct questions to answer in relation to many of the allegations stated in the programme.”

Mr Assange also complains that his privacy was unwarrantably infringed in the Programme as broadcast in so far as he claims that:

- d) Footage of him in a nightclub in Iceland was broadcast in the Programme without his consent.

### **Response to the Complaint**

We will deal in turn with each paragraph - a) to d) - in the Entertainment Decision and their respective sub paragraphs with the reference to the relevant rules and practices to be followed in the Ofcom Broadcasting Code (“the Code”).

### **Alleged unjust or unfair treatment**

#### **Response to paragraph a) of the Entertainment Decision**

##### **Complaint**

*a) The programme did not obtain Mr Assange’s informed consent to appear in the programme. In particular, Mr Assange complained that:*

- i. The programme makers misrepresented to him what the programme would focus on.*
- ii. He was not made aware of other key contributors who would be appearing in the programme.*
- iii. Opportunities to preview the programme were not offered to him but were offered to other contributors such as “The Guardian” newspaper.*

##### **Response**

This aspect of the Complaint demonstrates a fundamental misunderstanding on the part of the Complainant of the requirements of the Code.

Rule 7.3 of the Code, which sets out what is likely to constitute ‘informed consent’, provides that:

*“Where a person is invited to make a contribution to a programme... they should normally, at an appropriate stage:*

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;*
- be told what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc.;*
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;*

- *be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;*
- *be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and*
- *be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it."*

Crucially, underlying Rule 7.3, as with this whole chapter of the Code governing fair treatment, is the overarching principle that these rules are ***"to ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes"***. Indeed in the Foreword to this Chapter of its code Ofcom points out that a ***"failure to follow these practices will only constitute a breach where it results in unfairness to an individual or organisation in the programme"***. The Rule also contains two important provisos: ***"normally"*** and ***"at an appropriate stage"*** both of which acknowledge that what is in the interests of fairness will vary case by case and that this will be determined by reference to the overarching principle.

The Complainant was interviewed towards the very end of the production process when the majority of interviews had been filmed. Importantly, this was not an investigative programme and it contained no new revelations that the interests of fairness required be put to Mr Assange in advance of his interview. The insights provided by the Programme were provided through the way in which the protagonists presented themselves and the facts. By the time the Programme came to be made the disputes between Mr Assange and the Guardian and other newspapers and the criticisms made of Mr Assange and his response were in the public domain. Indeed some of the Programme's interviewees, including David Leigh of the Guardian and Daniel Domscheit-Berg, formerly of WikiLeaks, had published books providing their detailed account of key events.

Taking each relevant bullet point of this Rule in turn, it can be seen that the Producers fully complied with their obligations and the Complainant was made aware of:

- ***the nature and purpose of the programme, what the programme is about and ... a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast***

It is clear from the email exchanges pre-filming that Mr Assange was made aware of the nature of the Programme and why he was being asked to contribute to it.

The initial approach to Mr Assange was from the Assistant Producer, Tilly Cowan, who was friendly with Mr Assange's assistant, Sarah Harrison, with whom she had worked at the Bureau of Investigative Journalism.

In her first approach in her email of 6<sup>th</sup> July 2011 Tilly Cowan wrote to Sarah Harrison:

*"...we are producing a feature length documentary exploring the story of Wikileaks. We will be looking at the impact Wikileaks has had on the world, and also at the treatment and the trial of Bradley Manning and assessing whether a fair trial is in fact taking place. The film*

will be released at the end of the year on Channel 4, on several German stations and is set to hopefully be distributed in cinemas across the world.

*I was at the talk on Saturday and it is exactly these sorts of questions, but in even more detail, that we are interested in asking Julian. How has Wikileaks changed global political interaction, political transparency and why is it so important for the progress of civilization that we have this mine of information in order understand how humanity operates - potentially forcing us to behave in a moral way. The idea discussed that Wikileaks has made it impossible for people not to know what is happening in the name of war and diplomacy is very compelling as is the idea that states have been forced into a state of undeniability over their actions. We are honestly not at all interested in the personal life of Julian but in his work to bring about the biggest leak in history."*

In answer to the question posed by Sarah Harrison in her email reply of 6<sup>th</sup> July 2011 "6) What is the concept/angle for the film?" Tilly Cowan responded on 7<sup>th</sup> July:

*"We are setting out to make a definitive factual account of the wikileaks affair. It will focus on the core of the story, the substance, content, and impact of the Iraqi, Afghan and diplomatic cables, rather than the way in which the media and others have handled them, or any unrelated legal proceedings. We want to make sure it is vital that a balanced picture emerges of this process, and therefore we want to talk to different parties involved. We are also closely following Manning's treatment, his case and how it is being handled, assessing whether he is or will be able to have a fair trial or is being treated in a humane way during his confinement" (emphasis added).*

Mr Assange also complains in his covering email to Ofcom of 10<sup>th</sup> January that the statement "It will focus on the core of the story, the substance, contact and impact of the Iraq, Afghan and diplomatic cables, rather than the way in which the media and others have handled them, or any unrelated legal proceedings.." was misleading. It is fair to say that during the course of filming the bitter enmities between the key protagonists and their criticisms of each other became increasingly apparent and so the evolution of the project in this respect was reflected in subsequent emails.

Specifically, after a number of email exchanges, and following a meeting between Julian Assange and Sarah Harrison on the one hand and Patrick Forbes and Tilly Cowan of the Producers on the other shortly before the interview was recorded, Ms Cowan stated<sup>1</sup> in an email of 23<sup>rd</sup> August 2011:

*"The film is a story of a defining moment in history and we want Julian's account of events as the central protagonist. So I guess our framing of Julian is simply that – as wikileaks progenitor (sic), and defining spirit, and it's really important that he gives his own account of what happened, and why it did, this covers events, philosophy and results..And yes in some instances that will involve responding to what others say/their version of events in during the process, but what we really want his (sic) him recounting and explaining a very important story in his own words....Because what we're after is the definitive account by the*

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<sup>1</sup> Email 23<sup>rd</sup> August 2011

*people involved – Julian was the driving force of this whole event, and at the epicentre as the story unfolded, and therefore it is essential to hear his take on what happened and what impact he considers this to have had and continues to have as more material is divulged” (emphasis added).*

In our submission this was an entirely fair and accurate description of ***“the nature and purpose of the programme, what the programme is about and ... a clear explanation of why [Mr Assange was] asked to contribute”***, as required by the Ofcom Code.

Furthermore the standard release form which Mr Assange was given to sign after his interview (which was in fact amended at his request<sup>2</sup> and signed by him subsequently two months later on 11<sup>th</sup> November 2011) contained the brief programme description: “A definitive account of the WikiLeaks affair. It will focus on the core of the story, the substance, content, and impact of the Iraqi, Afghan and diplomatic cables.” This was a factual and a far from misleading description of the Programme which discusses at some length the “the substance, content, and impact of the Iraqi, Afghan and diplomatic cables” looking at the emergence of the Arab Spring and the impact on repressive regimes. This included the following extract from Mr Assange’s interview when he said that “some critics say the Cablegate material will de-stabilise the Middle East. But it turns out those critics were right, we put in a sort of politic response to that frequent criticism that while we would not say de-stabilise we would say re-stabilise the Middle East into a new more harmonious democratic system.”

Additionally, the Complainant was kept up-to-date on the broadcast date of the Programme.

The objections raised by the Complainant prior to broadcast and his purported withdrawal of consent (see his email of 17<sup>th</sup> November 2011) followed Channel 4’s press statement about the Programme which included extracts from some of the interviewees who were critical of Mr Assange. Mr Assange claimed that that he had been misled about the Programme and that it would prejudice his appeal against the extradition process and mistakenly assumed that the dealings between the Producers and the Guardian were in some way improper.

- ***what kind of contribution they are expected to make, for example live, pre-recorded, interview, discussion, edited, unedited, etc***

The documentary was feature length (at 72 minutes) rather than a standard hour slot length but Mr Assange was aware in providing a filmed interview of 5 hours duration that this would be heavily edited. It is necessary for programme makers to make editorial decisions and judgements when selecting material for broadcast and, provided they do so

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<sup>2</sup> The amendment (additional wording) provided that “You agree that the Contribution and extracts therefrom will be used solely in and for the purpose of promoting the Programme (which for avoidance of doubt shall include any international version(s) of the Programme). You also agree that the Contribution (in whole or in part) will not otherwise than in this context, be licensed or provided by you to any media outlet or production company for the purposes of broadcast.”

fairly, their rights to freedom of expression permit them a free rein to do so without interference from a contributor or a regulator.

- ***the areas of questioning and, wherever possible, the nature of other likely contributions***

This was not an adversarial interview where “allegations” were “put to” Mr Assange for his response, indeed this was in accordance with the express wishes of Mr Assange (see below<sup>3</sup>). It was rather an opportunity for him to give his version of and comment on key events. Mr Assange did not at any time during the interview seek details of the questions nor did he object to any of the questions asked, at the time or afterwards. In fact at the start of the interview (and this is in the Programme) he asks the Director “how many questions have you got?” The answer is “oh tons, I’ve got lots but you know be yourself I think is the main thing”. Mr Assange is relaxed throughout the filming and did not ask if he could make any additional comments on camera at the end of the interview. He happily signed a detailed release form (attached at **Appendix 4**) on 11<sup>th</sup> November 2011 some two months after his interview was filmed.

Indeed after a meeting had taken place between the Director, Patrick Forbes and Julian Assange, at which Ms Cowan and Ms Harrison were present, Sarah Harrison stated in her email of 22<sup>nd</sup> August to Tilly Cowan:

*“It is good that he will be given a chance to give a reply to anything said by the other talking heads. But we want to confirm the way in which this will be framed. It will be good for him to have an opportunity to put his side out on some things, but we don’t want it done in the accusatory style of someone such as Sweeny (not that you would - that is an extreme example, but you get my point)” – emphasis added.*

Crucially the Rule in the Ofcom Code requires programme makers to inform an interviewee about “***the nature of other likely contributions***”. It does not require that interviewees be supplied with a list of the names of contributors. In addition, as with all the requirements of the Rules in this Chapter of the Code, the requirement to be informed of “*the nature of [other]... likely contributions*” is only relevant where it would otherwise result in unfairness. However, a number of names and other details were provided to Mr Assange.

In answer to the questions posed by Sarah Harrison in her email of 6<sup>th</sup> July 2011:

*“3) What questions/topics will you be wanting to discuss with Julian? (I know you say something here, but if this can be elaborated on then that would be great. Is it just the questions Amy asked, or others...)....*

*5) Who are the other people you are interviewing?”*

Tilly Cowan responded on 7<sup>th</sup> July:

Question 3

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<sup>3</sup> email of 22<sup>nd</sup> August 2011 Sarah Harrison to Tilly Cowan

*"We would like to know what motivates Julian to do what he does, how he feels about what Wikileaks has achieved, what impact he considers the leaking of the war logs/cables to have been on the political landscape, ordinary people and society and on traditional journalism. We also would like him to tell us his story of how this all unfolded how he felt when he got the material, what a feat it was to deal with it all and how he planned the strategy of getting it out there. Also what it was like to watch the world's reaction as it all unfolded in front of him, what it was like to be at the helm of something so important. Basically, we would like him to give us a factual account of what happened during this period but also what it felt like to be leading the whole process and why he considers what he does to be so important and what changes it has brought about. It would also be great to know what he envisages for the future."*

#### Question 5

*"We have only been working on this for a week but we will be interviewing Der Spiegel and the Guardian who we have exclusive access to, as of course they were part of the story, but this is not a media focused story I want to stress. We are also talking to David House and Naomi Colvin so we hope to interview them as well, although this has not yet been confirmed. We are just starting to work out who else we want to interview at the moment."*

Sarah Harrison requested more detail in her email of 21 July including "how (sic) at the Guardian and Der Spiegel have you /are you speaking to"

Ms Cowan gave some additional detail:

*"Our focus is the factual accounting (sic) of the Wikileaks story from the Apache video release through to the release of the cables. Therefore, the first narrative will retell the story of the leaks-their handling and their impact and the second narrative will be assessing the treatment and trial of Bradley Manning and the lead up to the case."*

*"Our aim is to tell the story of leaks, from those who were there at the time who will guide us through how it all unfolded. We will also examine the impact of the leaks – with soldiers like Josh and Ethan explaining the importance of why this information needed to be seen by the world, the extent the leaks played in the Arab Spring, the embarrassment caused to the Obama administration etc. We will also look at what the enduring legacy might be."*  
Emphasis added.

Tilly Cowan added:

*"At Der Spiegel we are speaking to Georg Mascolo and Holger Stark at the Guardian so far we have been in touch with Alan Rusbridger and David Leigh and we are going to speak to one or two others who dealt with the material but we have not yet been in touch with them. We are speaking to Dean Baquet and Bill Keller at the New York Times. This is so they can tell us about how the story of the leaks unfolded, their dealings with the US administration and what was significant about content of the leaks."*



It can be seen from the above that a great deal of detailed information about the likely content and focus of the Programme and interviewees was provided to Mr Assange. In addition, at the pre interview meeting with Mr Assange and his assistant, Sarah Harrison, he was informed that the Producers had spoken to Nick Davies, although they had not interviewed him at this point. The Producers – specifically the Director Patrick Forbes and Tilly Cowan - confirm that they told Mr Assange that they had interviewed people from the Guardian and that there was an exclusive access deal with them and this was confirmed in an early email of 7<sup>th</sup> July 2011 by Ms Cowan who stated “*we will be interviewing...the Guardian who we have exclusive access to...*”

During the course of his interview the “*nature of other likely contributions*” would have been readily apparent to the Complainant. Throughout the interview the Complainant was asked questions which would make this clear, for example he was asked to comment on the apparent fall out with the “New York Times” and about an alleged “row” with “the Guardian” over the publication of the unredacted files and his response was fairly included in the Programme.

The Producers did interview peace activist Josh Stieber, as they informed Mr Assange, but his interview did not ultimately get used in the Programme. They were unable to interview Iraq war veteran Ethan McCord who was not available at the time the Producers were in the US.

Mr Assange also complains about a lack of pro-WikiLeaks interviewees. However, the Producers sent an email requesting an interview with WikiLeaks spokesperson Kristinn Hrafnsson but no response was received. This email was not attached to the Complaint and so we attach it now (**Appendix 5** – Additional Emails between Complainant and Producers). The Producers also asked to film the Wikileaks team working or simply to talk to them but this access was denied.

Although the intention was to interview Mr Assange last, Daniel Domscheit-Berg, for logistical reasons, was not interviewed until after Mr Assange’s interview had been recorded. He made no new claims or “significant allegations”<sup>4</sup> which the interests of fairness required be put to the Complainant for a further response.

- ***any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness***

There were no such changes in our submission that would satisfy this criterion. Although updates were from time to time given by email from Ms Cowan to Ms Harrison about interviewees they hoped to film and how the focus of the Programme was developing none of these were significant issues that would reasonably have an impact on a decision by Mr Assange to speak about matters and events in which he played such a central role.

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<sup>4</sup> Under Rule 7.11 of the Code

This rule of the Code also requires the person to be told ***“the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution;”*** and be given ***“clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it.”*** Mr Assange clearly understood his contractual rights and this is why he did not sign a release form until it was amended to include the provision cited above which prevented the Producers from using parts of his interview out of the context of the whole Programme. Further he agreed that the Producers “shall be entitled to cut and edit the Contribution as you deem fit and you shall not be obliged to include all or any of the Contribution in the Programme.”

No request for a preview of the Programme was made at any time by Mr Assange. Had it been, the Producers would have discussed with Channel 4 whether such a screening would have been appropriate and, if so, on what terms. Any such agreement, which would not be usual in these circumstances, would have been set out clearly in the release form and it would have been expressly agreed that final editorial control would remain with Channel 4.

To sum up:

- i. *The programme makers misrepresented to him what the programme would focus on.*

It is clear from the attached emails prior to the interview being filmed, the release form and the interview with Mr Assange himself that this was not the case and that he was in fact given a detailed and accurate description of the Programme as it evolved including who would be likely to be featuring in it.

- ii. *He was not made aware of other key contributors who would be appearing in the programme.*

Again the email exchanges contradict this. Furthermore, Mr Assange was well aware of who the key players were in the story. Also it was apparent from his interview that the Producers had spoken to his critics which is why he was asked about the “row” with “the Guardian” over redaction of the cables and the apparent falling out with the “New York Times”.

- iii. *Opportunities to preview the programme were not offered to him but were offered to other contributors such as “The Guardian” newspaper.*

The Producers entered into a perfectly legitimate access agreement with “the Guardian”. This had to be carefully negotiated because the Guardian had concluded an agreement with Dream Works concerning the film rights to the book “WikiLeaks: Inside Julian Assange’s War on Secrecy” and so rights for the documentary needed to be carefully discussed and agreed. David Leigh of the Guardian acted as an ad hoc consultant and he provided access to many useful contacts and assisted in the process of checking on certain factual matters. A reasonable fee, which is confidential, was agreed with him to cover these consultancy services. Mr Leigh was not an advisor to the Programme and was not credited as such. The Guardian requested, and was granted, a right to preview the Programme solely for the purpose of raising concerns about factual accuracy. Nothing in

this relationship was either improper or unfair to the Complainant. The Complainant did not at any stage when the interview with him was negotiated request a preview of the Programme and the issue was not raised when he signed the amended release form.

## Response to paragraph b) of the Entertainment Decision

### **Complaint**

*b) The programme presented, disregarded and omitted material facts in a way that was unfair to Mr Assange.*

We will address each point individually below.

### **Response**

The Complainant does not agree with the way some matters were presented in the Programme and he considers that certain facts or matters he believes to be important have been omitted. However, it does not follow from this that any such presentations or omissions (which must first be properly considered to be of “**material facts**”) have caused him any unfairness.

We will address each of these in turn using Ofcom’s numbering system:

- i. *Broadcast material which was highly prejudicial to his extradition hearing (which was held a few days after the programme was broadcast), and other potential hearings related to the allegations of rape or WikiLeaks. Mr Assange said that the programme included comments from interviewees, who had no first-hand knowledge of the allegations he faced. In addition, the programme did not interview any of Mr Assange’s legal team who had the authority to provide information on the allegations.*

### Response:

It is fanciful to suggest that a documentary programme could in any way influence the decision making of the Supreme Court in this country. The Contempt of Court Act 1981 is designed to prevent prejudice to legal proceedings and it was not applicable to this hearing. Indeed Mr Assange’s application to continue his fight was ultimately successful and so it follows there has been no such prejudice. The attempt to extradite Mr Assange from the UK, his legal battle to oppose extradition, the allegations made about him in Sweden, and his immediate public response to them were crucial aspects of the story and so it would have been bizarre not to have referred to them in the Programme. Indeed, Mr Assange spoke about the case in his interview and a brief extract<sup>5</sup> was included in the Programme. At no time did Mr Assange suggest that the Producers spoke to his legal team. Indeed his own argument is contradictory – he seems to take the view that putting more of his defence would not have been prejudicial to the proceedings whereas not doing so was prejudicial.

The legal case was not the focus of the Programme but it fairly reported that Mr Assange denies the allegations and was continuing the appeal process. At no point was there any

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<sup>5</sup> Page 59 of the Transcript, **Appendix 3** ““it’s revealed a really extraordinary between Sweden and the United States that I wasn’t aware of.”

suggestion, either in commentary or by an interviewee, that the allegations were true and it was not the purpose of the Programme to establish their veracity. The Programme simply stated the fact that the allegations had been made against Mr Assange was true. For example Nick Davies said: "I am not saying that I know that Julian is guilty of a crime, I don't know the truth about that, I'm saying that Julian misled the world when he claimed, or hinted, that there was some kind of conspiracy by the Americans behind it."

There was no unfairness to the Complainant in the way in the allegations of sexual assault in Sweden and subsequent legal proceedings were reported – by commission or omission. Furthermore, given that Mr Assange had initially claimed publicly that the allegations were part of an American intelligence dirty tricks conspiracy against him it was reasonable to hear from those who were critical of his decision to do so without an apparent evidential basis to support these claims.

ii. *Omitted crucial facts, such as:*

- *That Mr Leigh had broken a written agreement and had revealed a secret decryption key which led to the publishing of the "unredacted cables" [i.e. the U.S Diplomatic Cables]. Instead, the programme said that this was an incomprehensible and reprehensible decision made by WikiLeaks;*

The Producers and Channel 4 made a legitimate editorial decision that this complicated dispute between Mr Assange and the Guardian was not relevant to the Programme and that the interests of fairness did not demand that it be included. There are two diametrically opposing views here and they both cannot be right. Had the Programme told this story it would have required a significant amount of screen time to do it justice. The Producers took the reasonable decision not to include either side of this dispute on the basis that the decryption key issue is ultimately not relevant to the publication by Mr Assange of the unredacted cables.

What is clear is that Mr Assange gave Mr Leigh the unredacted master file of diplomatic cables and that he gave him an encryption key. Mr Leigh understood that the "password", as he calls it, would have no relevance after a short time. He claims that Mr Assange told him that "this file would then expire, be deleted within a matter of hours" and says Mr Assange described it as a temporary website. Unfortunately this understanding was not correct.<sup>6</sup> Mr Assange was, and indeed still is, very critical of Mr Leigh's decision to publish the key in his book. Some months prior to this publication, WikiLeaks, unbeknownst to David Leigh, replicated the files on the web. Mr Assange alleges that Daniel Domscheit-Berg allowed a German publication to make the connection between the files and the published encryption key and that it is only for this reason he (Assange) was forced to publish the unredacted files in their entirety. However, this account is disputed in a number of respects. Most crucially, and it is indeed part of WikiLeaks' stated *raison d'être*, it does not appear to be disputed that Mr

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<sup>6</sup> Page 54 transcript

Assange always intended to publish the cables in their unredacted form. Indeed, he states in his interview<sup>7</sup> as follows:

“...and that was then enough um for anyone interested er in the subject to go and find it and decrypt it, and that is what happened, and it started er spreading um via twitter, this information, um and eventually started appearing on websites and then someone threw it on a search engine, etc. So, at that point um we understood that although we had been preparing to publish the majority of material by November 29 we’d have to rush this forward and publish all the rest.”

On the basis of this a reasonable editorial decision was made that the detail of this dispute was not relevant and that there was no unfairness to Mr Assange not to include it in the Programme. The Programme does include Mr Domscheit-Berg drawing the distinction between “a pro whistle blowing organisation” and “a mere anti-secrecy organisation” and he describes the decision to publish the cables in full as “about the worst decision I am aware of” but does not use the words “*incomprehensible and reprehensible*”. Other respected media outlets have criticised Mr Assange’s actions but the Programme did not include these criticisms.

The Programme gives the final word to Mr Assange with his justification for his decision to publish the unredacted Afghan war logs:

“There is a view that one should never be permitted to be criticised for being even possibly in the future engaged in a contributory act that might be immoral. And that type of arse-covering is more important than actually saving people’s lives. That it is better to let a thousand people die than risk going to save them and possibly running over someone on the way. And that is something that I find to be philosophically repugnant.”<sup>8</sup>

- *Attributing the statement “they’re American informants, they deserve to die” to Mr Assange but failing to mention that two individuals, Mr Goetz and Mr Stark, who were also present at the time this statement was supposed to have been made, have no recollection of Mr Assange making such a statement;*

This is not the correct position. The dinner at Moro restaurant in London was attended by Julian Assange, Declan Walsh and David Leigh of the Guardian, and John Goetz and Marcel Rosenbach of Der Spiegel. Holger Stark of Der Spiegel told the Producers (on camera in his interview) that he was not there and was away at the time. Unsurprisingly perhaps, but Declan Walsh, the Guardian’s Afghan correspondent, entirely supports David Leigh’s account. In fact in the Guardian book “WikiLeaks Inside Julian Assange’s War on Secrecy”<sup>9</sup> co-authored by David Leigh, it is reported that Declan Walsh, who is quoted, was particularly concerned by this comment, which he calls “callous”, on the basis of his knowledge of the country, and the virulence of its

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<sup>7</sup> Roll 44, page 6 BITC 17.53.32

<sup>8</sup> Roll 43 – page 7 BITC 17.05.43

<sup>9</sup> pp 110-112

feuds<sup>10</sup>, see **Appendix 6**. Marcel Rosenbach declined to be interviewed for the Programme and John Goetz would not discuss the dinner on camera. However, Mr Goetz did not at any time tell the Producers that Mr Assange did not make this statement.

The Director asked Mr Assange during his interview “So come on, redaction’s going on at the same time, now there is or isn’t a row going on about redaction, I haven’t the faintest clue whether there is or isn’t, there are so many conflicting versions, what is going on?”. Mr Assange answered “no, there’s no row going on about redactions at all. Not at all.”<sup>11</sup> It was therefore entirely fair to include the previously published claim from David Leigh, as corroborated by Mr Walsh, followed by Mr Assange’s denial that was a “row” – “There was, there was no row at all, there was no row, there was no, there was not even only hints of a discussion”.<sup>12</sup> The complaint as entertained does not include as a potential point of unfairness that Mr Assange’s denial was not explicitly reported but rather focuses on his claim that two other witnesses disputed he said it. However, in any event, the viewer is left with the clear and unequivocal impression that Julian Assange denies having made this remark because he denies there was a “row. Not to include an explicit denial from him caused no unfairness and it is not tenable to suggest that it was also incumbent upon the Producers to interview people who Mr Assange suggests would agree he did not say the remark alleged by Leigh and Walsh – not least because that is at odds with the Producer’s research.

- *Failing to mention that Mr Domscheit-Berg (whose status was misrepresented by being described as a “WikiLeaks spokesperson” in the programme) had: stolen funds and sabotaged WikiLeaks; deleted thousands of submissions revealing war crimes and corruption in financial institutions; profited from and unleashed the chain of events that led to the publishing of the unredacted Diplomatic Cables. After February 2011, Mr Domscheit-Berg had little to no involvement with WikiLeaks operations after being sacked on 14 September 2010. Mr Assange added that all this information was available in two public statements issued by WikiLeaks;*

It is clear from the Producer’s research conversations with Holger Stark and John Goetz of Der Spiegel, and from their recorded interviews, that Daniel Domscheit-Berg was instrumental in the crucial deal being made between Der Spiegel and WikiLeaks and that he was the key middle man in relation to their dealings. By their own account, Mr Domscheit-Berg advised that Der Spiegel work with WikiLeaks and he alerted them to a big story coming up that he suggested they should work on together. Domscheit-Berg also set up Mr Stark’s trip to London to meet Julian Assange which led to Der Spiegel becoming a major media partner with WikiLeaks in the key publication events discussed in the Programme.

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<sup>11</sup> Roll 43 page 5 BITC 16.59.16

<sup>12</sup> Roll 43 – page 7 BITC 17.05.33

As to his title, Mr Domscheit-Berg published a book entitled “Inside WikiLeaks: My Time with Julian Assange at the World’s Most Dangerous Website” and is described on the front cover as “former spokesman of WikiLeaks” and the book describes him as “the effective No. 2 at WikiLeaks and the organization’s most public face, after Julian Assange”.

It was not the role of the Programme to rehearse the public or private disputes between Mr Assange and Mr Domscheit-Berg, including the Complainant’s various allegations against him and contention that his role as spokesperson was limited to Germany. The Programme reported that Mr Domscheit-Berg had been “suspended for disloyalty insubordination and de-stabilization in a time of crisis” and it would not have been appropriate, and was not incumbent upon, the Producers to report the detailed, defamatory and unsubstantiated claims made against him by the Complainant.

In terms of fairness and accuracy, the crucial issue is that Mr Domscheit-Berg was involved in the key events at WikiLeaks at the material time and was therefore able to give a view on what happened at the time and events subsequently. This was not unfair to the Complainant Mr Assange’s own account about Mr Domscheit-Berg’s time at WikiLeaks appears contradictory as he claims in his complaint that Mr Domscheit-Berg had “little to no involvement in Wikileaks post February 2010 and none at all after 25 August 2010”. From the more detailed complaint it seems a key to this issue is that the Complainant is aggrieved because he claims a total of 6 minutes of airtime was given to Mr Domscheit-Berg and only 8 minutes to Mr Assange. However fairness is not about the amount of time given or not given to interviewees or their critics. It was not unfair to Mr Assange to omit his detailed criticisms of Mr Domscheit-Berg. The important thing was to reflect the fact that he had been suspended from WikiLeaks, report the reasons for this and for Mr Assange to be given the opportunity to put his position on the matters aired in the Programme.

- *Disregarding the fact that the reason that Mr Assange did not want “The New York Times” to be involved in the publishing of the Diplomatic Cables was because “The New York Times” had told the Pentagon about earlier releases; and*

This fact was reported and was not “disregarded”. The Complainant does not demur from his statement in the Programme that the New York Times “produced a sleazy hit piece, targeting me personally and WikiLeaks as an organisation, full of factual inaccuracies that could have easily been checked. It was a sleazy tabloid hit piece.” But claims that the true reason he did not want them involved in publishing the cables was because they had informed the Pentagon in advance about earlier proposed publications.

In his interview Mr Assange says, in criticising “the Guardian” for including the “New York Times” in the arrangement: “knowing that we did not want to deal with “the New York Times” anymore because of their jour-, journalistic failures previously and attacks on this organisation and one of our alleged sources.” It is clear therefore, that as the other interviewees involved contend, a key reason, if not the key reason, behind

Mr Assange's decision to exclude them was his dissatisfaction with the New York Times' coverage of him and WikiLeaks.

In any event, the Programme addressed the Complainant's objections to the "New York Times'" decision to tell the White House in advance of publication - a view shared by David Leigh. The Programme included Mr Assange's comment "We were shooting ourselves as an organisation every time we worked with "the New York Times". If you're producing journalism with a goal of it producing justice, then you don't want that goal undermined" as well as his view that "the organisation you are exposing should not know before the victim. Bill Keller [of the New York Times] once said that while he may be a journalist, but he's not my kind of journalist, and well thank God, I mean that's all I can say, thank God I'm not Bill Keller's type of journalist." The Programme also reported Bill Keller's defence of his paper's actions: "I mean there was never any question we were going to take this to the administration and get their reaction. I mean you do that on any story." This was a balanced report on the differing views and caused no unfairness to the Complainant.

- *Disregarding the banking blockade against WikiLeaks and the ongoing harassment of WikiLeaks volunteers. Mr Assange said that the programme gave the impression that WikiLeaks suspended publication because of his impending court hearing when, in fact, WikiLeaks suspended publication on 27 October 2011 due to financial blockades that were imposed on WikiLeaks, before the High Court made its decision on 2 November 2011.*

The Programme ends with two very brief captions reporting two events since the Programme was filmed.

The first is:

"November 2nd 2011

The High Court rejects Julian's appeal. Julian is appealing – again."

The second is:

"WikiLeaks suspends all publishing."

The two captions were reporting entirely separate matters and were even separated by actuality of Julian Assange outside court. There is no suggestion these events are related to each other and we do not consider the reasonable viewer would have made such an inference.

- iii. *The programme portrayed Mr Assange as "anti-American" and a "hacker" rather than a journalist or publisher.*

We are at a loss to understand the basis for Mr Assange's complaint that he was portrayed as "anti-American". It is an undisputed fact that he has been involved in the release of material that the American authorities did not wish to be published – indeed he states that to be a key purpose of WikiLeaks and says of Hilary Clinton in regard to the diplomatic cables "She said that she would be apologising for the rest of her life, but she



should be apologising for the rest of her life as a result of the crimes that she's authorised." It is a matter of public record that Julian Assange was at an early stage of his career a well-known hacker. In his interview the director asked him if he is different to mainstream journalists and his reply was included in the Programme. He answered:

"When I was in, did a conference at Berkeley and I said there "are you a journalist or are you an activist?" I then thought who cares you know isn't it more interesting just what you, what you let the, let the, let the information speak for itself? But why is that? Well, you know as far as journalism is getting information the public doesn't know and processing it, verifying it's true, giving it to the public in various ways, well I'm a journalist. But if I had to choose between the goals of justice and the goals of whatever that is I would choose the goals of justice. So to that degree I'm an activist."<sup>13</sup>

In his full interview he says before this:

"...yes I've done a lot of journalism and I've written books and I have done two documentaries and so on, but um if you mean journalist as someone all they do is they write stories, no I'm not, I'm not just that. Um that's a noble profession but I am a systematiser, I like to solve big problems, and the way you solve big problems is you see what someone does individually, in one case, and then you try and do it in a thousand cases and in a million cases and you create a system to do it. Um and to that degree I am an engineer, that's-, and it's a different approach, one wants to solve the whole problem, not just knock off um there..."

We do not accept that by referring to his hacking past the Programme suggested that the Complainant was "*a "hacker" rather than a journalist or publisher.*" It reported Mr Assange's conviction for hacking the Nortel network. This is an issue he is still comfortable discussing as can be seen from this article in the Independent newspaper on 22<sup>nd</sup> September 2011, not long after his interview for the Programme was recorded:

<http://www.independent.co.uk/news/uk/home-news/julian-assange-i-am-ndash-like-all-hackers-ndash-a-little-bit-autistic-2358654.html>

In this article he discusses his hacking past and says "Every hacker has a handle, and I took the name Mendax, from Horace's Splendide Mendax – nobly untruthful, or perhaps 'delightfully deceptive'".

Furthermore the Complainant was captioned throughout as "Julian Assange – WikiLeaks". The Programme made it clear he had been at the heart of key journalistic collaborations between mainstream media outlets. We do not consider that there was any unfairness to Mr Assange in this portrayal.

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<sup>13</sup> Roll 43 – page 9, 17.16.22

## **Response to paragraph c) of the Entertainment Decision**

### **Complaint**

c) Mr Assange was not given a timely and appropriate opportunity to respond to the allegations made in the programme. In particular, Mr Assange stated that he was not given direct questions to answer in relation to many of the allegations stated in the programme

### **Response**

Section 7.11 of the Code states that *"if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond"* (emphasis added). The Complainant seems to labouring under the misapprehension that this places a requirement on programme makers to provide the subject of a programme with every single criticism or comment made about them in a programme.

The opportunity must be *"appropriate"*. It was in our submission entirely *"appropriate"*, particularly given the amount of information, claims and counter claims in the public domain, to seek Julian Assange's position by way of a non-adversarial interview in which he was allowed to expound his views and answer his critics even if not on every occasion criticisms were directly attributed to the person who made them in the Programme. The Programme contained no *"significant allegations"* about wrong doing or incompetence or otherwise on the part of Mr Assange that he did not have the opportunity to comment on. Furthermore his responses were edited fairly and reflected in the Programme.

An analysis of the unbroadcast interview transcript (**Appendix 3**) demonstrates that the answers from Mr Assange included in the Programme were both in response to direct questions and fairly edited and not taken out of their proper context. For ease of reference we have highlighted in the transcript of the unbroadcast interview the sections from it that were broadcast in the Programme and highlighted Mr Assange's interview in the Programme transcript.

It would not have been *"appropriate"* to have provided the Complainant with each and every actual comment or statement of general opinion expressed by interviewees and attributed to them. Indeed the Producers did not go back to any interviewees and specifically put to them the specific criticisms Mr Assange made of them. This approach is simply not required by the Code or the interests of fairness. It is expressly denied that any matters not directly put to the Complainant led to any unfairness.

Some trenchant criticisms are made of Mr Assange by a number of interviewees but he is given an appropriate opportunity to answer his detractors. For example, Mr Assange complains about the inclusion of the opinion expressed by Nick Davies, in the context of Mr Assange's claims that the Swedish allegations were a dirty tricks plot against him, that "I don't know that I've ever met a human being as dishonest as Julian". However, Mr Assange also talks about Nick Davies in the strongly critical terms saying: "It's one of one of the extraordinary things about British journalism; it is the most credit stealing, credit whoring, back stabbing industry I have ever encountered. And Nick Davies is a part of that industry." The role of a documentary of this nature is to present opposing views fairly and leave the audience to draw their own conclusions.

## **Alleged unwarranted infringement of privacy**

### **Response to paragraph d) of the Entertainment Decision**

#### **Complaint**

*d) Footage that was filmed of Mr Assange in a nightclub in Iceland was broadcast in the programme without his consent.*

*Mr Assange said that the person who recorded the video sought his permission to film him in the nightclub and that Mr Assange agreed to this on the basis that it would be for his personal use only. However, it was broadcast in the programme and Mr Assange had no knowledge of how the programme's producer sourced this footage. Mr Assange said that he could not understand why this footage had been included in the programme or why it was relevant.*

#### **Response**

It is our contention that Mr Assange did not have a legitimate expectation of privacy in relation to this footage but that, if he did, the material was in the public domain to such a degree that it had lost any quality of privacy.

An individual's right to privacy must be considered and balanced against the competing rights of the broadcaster, programme maker and audience to freedom of expression in light of all relevant circumstances. Neither right has precedence over the other and where there is a conflict between the two, it is necessary for Ofcom to undertake an intense focus on the comparative importance of the specific rights. Any justification for interfering with or restricting either 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. It is acknowledged by Rule 8.6 of the Code, 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.

In considering whether or not the Complainants' privacy was unwarrantably infringed in the making or broadcast of the Programme Ofcom must first assess the extent to which they had a legitimate expectation of privacy in respect of the circumstances in which they were filmed and the manner in which they featured in the Programme as broadcast.

It is submitted that the Complainant did not have a legitimate expectation of privacy with regard to the filming of him dancing in a night club on the following basis:

- The night club was a place open to members of the public and this was not a private or restricted invitation event.
- The filming of Mr Assange was not done surreptitiously and was with his knowledge and permission
- Mr Assange is not engaged in a private act and the footage includes nothing of a sensitive or private nature.

If on the other hand Ofcom takes the view that Mr Assange had a legitimate expectation of privacy then it is our contention that this had been lost since the footage has been shown so frequently around the world.

With regard to Practice 8.6 of the Code, it is not disputed that the Complainant gave consent for the filming but that his consent was not sought for its broadcast. The footage was legitimately licensed from the person who filmed it. Crucially, the material is in the public domain and so any privacy rights that the Complainant may have enjoyed with regard to the footage has been lost. The person who filmed it and licensed it to the Producers says he did not know who Mr Assange was when he filmed it. He accepts that Mr Assange would not have expected him to put it on YouTube where it has received over 677,034 hits

<http://www.youtube.com/watch?v=vNqd4hW98sQ>.

The copyright owner informed the Producers that he has since 1<sup>st</sup> April 2011 sold the clip or approved its use on a non-exclusive license basis to a number of media organisations. The footage has not just appeared on YouTube but on the website of well-known publications as well, for example:

- Fox News showed the clip on their "Red Eye with Greg Gutfeld" programme.
- ABC news showed the clip online, it is still available on their web site [http://abcnews.go.com/meta/search/imageDetail?format=plain&source=http://abcnews.go.com/images/International/abc\\_ann\\_assange\\_dancing\\_110401](http://abcnews.go.com/meta/search/imageDetail?format=plain&source=http://abcnews.go.com/images/International/abc_ann_assange_dancing_110401)
- Aftonbladet (in Sweden) showed it on their internet television service, along with an interview from the DJ who filmed it.
- The week before it was broadcast in the Programme it was published on the Daily Mail's web site. <http://www.dailymail.co.uk/news/article-1372413/Wikibeat-Leaked-footage-Julian-Assange-dancing-badly-Rekyjavik-club-emerges.html>
- Vanity Fair: <http://www.vanityfair.com/online/daily/2011/03/julian-assanges-cool-dance-move-needs-a-name>
- <http://www.theweek.co.uk/arts-life/6575/julian-assange-dancing-nightclub>
- Forbes magazine: <http://www.forbes.com/sites/kashmirhill/2011/03/31/leaked-video-of-julian-assange-dancing/>. It is likely, according to the rights holder, that other outlets have used it under the "fair use" doctrine.

It is therefore our submission that Mr Assange did not have a legitimate expectation of privacy with regard to the filming or broadcast of the footage. Further we submit that the material was demonstrably in the public domain and thus any degree or quality of privacy had been lost prior to the broadcast of the Programme.

Further, the use of footage already widely published around the world caused no unfairness to Mr Assange in this context. It was felt editorially justified, and indeed fairer, to show Mr Assange in a more informal setting rather than a more formal one such as a press conference or outside court. There was no suggestion it depicted the events in question and its use was in no way unfair.

## **Conclusion**

In conclusion we believe that we have demonstrated that the programme makers and the Programme were scrupulously fair in their treatment of the Complainant and that there was no unwarranted infringement of his privacy. An analysis of the emails passing pre-interview between Ms Cowan of the Producers and the Complainant's assistant, Ms Harrison, demonstrate that all the obligations set out in the Ofcom Code were followed. It can be seen that all material and significant allegations were put to Mr Assange where fairness required it and his responses were edited fairly into the Programme to reflect his position. Matters he has complained were omitted were simply not relevant and it was not unfair to exclude them. As far as the nightclub footage is concerned we contend that Mr Assange did not have a legitimate expectation of privacy and that the material was demonstrably in the public domain.

It is submitted that there was no unfair treatment of the Complainant and that his privacy was not unwarrantably infringed. We therefore invite Ofcom to dismiss the Complaint in its entirety.

**Channel 4 Television Corporation**

**14<sup>th</sup> March 2012**