

5 October 2011

Mike Smith
By email to: mikesmith464@gmail.com

Dear Mr Smith

OFFICIAL INFORMATION ACT REQUEST

I refer to your request of 4 October 2011 under the Official Information Act 1982 (the Act) for "copies of any and all communications with and from the Commission relating to the appearance of the Prime Minister on an hour-long Radio Live show on Friday 30 September".

In particular you have referred in your request to an article by John Hartevelt on the Stuff website where he says:

"It's not unusual for him to do this sort of thing. The electoral commission had apparently told Radio Live that he could not talk politics on the show. That's why he could not address any of the pressing issues being broadcast in news clips all around his cheerful broadcast. No worries."

The following documents come within the scope of your request and are enclosed:

1. Email from M Putnam, Radio Live to N McNaught, Electoral Commission dated 29 September 2011
2. Email from N McNaught, Electoral Commission to M Putnam, Radio Live dated 29 September 2011
3. Email from M Putnam, Radio Live to N McNaught, Electoral Commission dated 29 September 2011
4. Email from N McNaught, Electoral Commission to M Putnam, Radio Live dated 29 September 2011
5. Letter from R Peden, Chief Electoral Officer to M Putnam, Radio Live dated 29 September 2011
6. Email from M Putnam, Radio Live to N McNaught, Electoral Commission dated 29 September 2011
7. Email from A Romanos, APNZ to R Peden, Chief Electoral Officer dated 4 October 2011
8. Email from C Flatt, Labour Party to K Temel, Electoral Commission dated 3 October 2011
9. Letter from C Flatt, Labour Party to Chief Electoral Officer dated 3 October 2011
10. File note of telephone calls made by R Peden, Chief Electoral Officer 4 October 2011
11. Media enquiries received by the Electoral Commission regarding Radio Live show 29/30 September and 3/4/5 October 2011.

The following documents have been withheld:

1. The request received from Radio Live for an advisory opinion on the show dated 28 September 2011. The Electoral Commission must treat any request and supporting documents made available by the requestor to the Commission in accordance with section 204I of the Electoral Act 1993 as confidential until after the day after the day for the return of the writ (16 December 2011). This provision overrides the Official Information Act 1982.

You have the right under section 28(3) of the Act to complain to the Ombudsman about the decision to withhold this information.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'R Peden', with a long horizontal flourish extending to the right.

Robert Peden
Chief Electoral Officer

Encs

Natalie McNaught

From: Mary Putnam [mputnam@mediaworks.co.nz]
Sent: Thursday, 29 September 2011 9:15 a.m.
To: Natalie McNaught
Cc: Willy Trolove
Subject: RE: PM hosting on Radio Live Friday 30 September 2011

Many thanks Natalie,

Would you please also copy Willy Trolove from the PM's office in please as I shall be away from the office and out of email range between 2 and 6pm today.

Kindest regards,

Mary Putnam | Producer Willie and JT | RadioLIVE | +64 9 360 0330| +64 275 545 051 |
www.radiolive.co.nz

From: Natalie McNaught [mailto:Natalie.McNaught@elections.govt.nz]
Sent: Thursday, 29 September 2011 9:12 a.m.
To: Mary Putnam
Subject: RE: PM hosting on Radio Live Friday 30 September 2011

Hi Mary

A response has been prepared and is currently with the Chief Electoral Officer for his approval. I would hope to be in a position to provide you with the Commission's response later on today.

Kind regards

Natalie

Natalie McNaught | Senior Adviser Legal | Electoral Commission | Te Kaitiaki Take Kowhiri
Level 9 | 17-21 Whitmore Street | PO Box 3220 | Wellington
Tel: +64 4 498 2312 | Fax: +64 4 495 0031 | Web: www.elections.org.nz

From: Mary Putnam [mailto:mputnam@mediaworks.co.nz]
Sent: Thursday, 29 September 2011 9:05 a.m.
To: Natalie McNaught
Subject: FW: PM hosting on Radio Live Friday 30 September 2011
Importance: High

Hi Natalie,

Have you had a chance to consider this yet?

Kindest regards

Mary Putnam | Producer Willie and JT | RadioLIVE | +64 9 360 0330| +64 275 545 051 |
www.radiolive.co.nz

Natalie McNaught

From: Natalie McNaught
Sent: Thursday, 29 September 2011 10:12 a.m.
To: 'Mary Putnam'
Cc: 'Willy Trolove'
Subject: Radio Live show 30 September 2011
Attachments: Letter to Radio Live 29_9_11.pdf

Dear Mary

Further to your email request of 28 September 2011 seeking advice regarding the Prime Minister hosting a radio show on Radio Live please find attached a response from the Chief Electoral Officer.

Kind regards

Natalie

Natalie McNaught | Senior Adviser Legal | *Electoral Commission* | Te Kaitiaki Take Kowhiri
Level 9 | 17-21 Whitmore Street | PO Box 3220 | Wellington
Tel: +64 4 498 2312 | Fax: +64 4 495 0031 | Web: www.elections.org.nz

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29 September 2011

Mary Putnam
Producer
Radio Live

By email to: mputnam@mediaworks.co.nz

Dear Mary Putnam

PRIME MINISTER HOSTING RADIO LIVE SHOW – 30 SEPTEMBER 2011

Thank you for your email of 28 September, requesting an advisory opinion, pursuant to section 204I of the Electoral Act 1993, on whether a live radio show hosted by the Prime Minister on Friday 30 September 2011 on Radio Live will be an election advertisement as defined in the Electoral Act. You have also asked whether the format of the show as set out in the brief attached to your email will satisfy the rules in the Electoral Act and the Broadcasting Act 1989.

As the proposed show is to be broadcast live you are not in a position to provide the Electoral Commission with a recording or transcript of the show. The Electoral Commission is only able to provide an advisory opinion where a copy of the advertisement accompanies the request, allowing the Commission to take into consideration both the content and the overall effect of the advertisement in the context it will be published. In view of this the Electoral Commission is limited to providing you with general advice about the election advertising rules with regard to the proposed format of the show.

Executive Summary

In the Electoral Commission's view broadcasters need to exercise a high degree of caution with regard to party leaders and/or candidates hosting radio shows in the lead up to a general election. The broadcaster will be responsible for the content of a broadcast made with its authority.

Radio Live must ensure that the programme is not an election programme for the purposes of the Broadcasting Act as the broadcast of an election programme that encourages or appears to encourage voters to vote for the National Party or the Rt Hon John Key as a candidate is prohibited before writ day (26 October 2011 for the 2011 General Election). There are serious penalties for broadcasters that breach these rules.

The Prime Minister hosting a show of this nature is likely to attract close scrutiny at this time in the electoral cycle. If Radio Live was to proceed with the broadcast it would need to be confident it could put in place adequate controls to ensure that the programme did not breach the election advertising rules in the Electoral Act or the rules regarding election programmes in Part 6 of the Broadcasting Act.

Legislation

Section 3A of the Electoral Act provides a definition of election advertisement, which is set out below. In addition, section 3A provides certain exceptions to the meaning of what is an election advertisement which are also summarised below.

Section 204F of the Electoral Act requires that an election advertisement published at any time must include a promoter statement.

An election advertisement

- (a) means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
- (i) to vote, or not to vote, for a type of candidate described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the candidate is stated);
 - (ii) to vote, or not to vote, for a type of party described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party is stated) and
- (b) includes
- (i) a candidate advertisement; and
 - (ii) a party advertisement.

A **candidate advertisement** means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:

- (a) to vote for a constituency candidate (whether or not the name of the candidate is stated);
- (b) not to vote for a constituency candidate (whether or not the name of the candidate is stated).

The definition of **candidate** means a constituency candidate and includes a person who has declared his or her intention of becoming a constituency candidate.

A **party advertisement** means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:

- (a) to vote for a party (whether or not the name of the party is stated);
- (b) not to vote for a party (whether or not the name of the party is stated).

None of the following are election advertisements:

- contact information published in any medium by a member of Parliament that satisfies certain requirements as set out in section 3A of the Electoral Act,
- editorial content of a periodical, a radio or television programme, or a publication on a news media Internet site,
- any transmission of proceedings in the House of Representatives,
- personal political views published by an individual on the Internet or other electronic medium, where no payment is made or received.

Section 221A of the Electoral Act provides that no person shall publish or cause to be published in any newspaper, periodical, poster or handbill, or broadcast or cause or permit to be broadcast over any radio or television station, any advertisement relating to an election [not being an election advertisement as defined in section 3A] unless the advertisement contains a statement setting out the true name of the person for whom or at whose direction it is published and the address that person's place of residence or business.

Part 6 of the Broadcasting Act 1989 defines an **election programme** as “a programme that—

- (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of any person at an election; or
- (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of any person at an election; or
- (c) advocates support for a candidate or for a political party; or
- (d) opposes a candidate or a political party; or
- (e) notifies meetings held or to be held in connection with an election”.

It includes “visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.”

Electoral Commission’s advice

The Electoral Commission is able to provide Radio Live with the following general advice about the election advertising rules taking into consideration the proposed format of the show.

A radio programme will be an ‘election advertisement’ for the purposes of the Electoral Act if it contains material that encourages or persuades or appears to encourage or persuade voters to vote for or against a party or candidate at an election. A broadcast may be an ‘electoral advertisement’ for the purposes of section 221A of the Electoral Act if it contains information relating to an election. However, an ‘election advertisement’ for the purposes of section 3A does not include the editorial content of a radio programme and an ‘electoral advertisement’ for the purposes of section 221A does not restrict the broadcasting of news or comments by a broadcaster.

Section 70 of the Broadcasting Act provides a general prohibition for the broadcasting of an ‘election programme’. It will depend on the content of the show as to whether it falls within the meaning of an election programme. If the programme is an election programme there is a specific exemption to the general prohibition for the broadcasting, in relation to an election, of news, comment or current affairs programmes.

Whether a radio programme is an election or electoral advertisement under the Electoral Act and/or an election programme under the Broadcasting Act is a question of fact which has to be determined on a case by case basis. In terms of general advice, in determining whether a programme is election advertising and/or an election programme or not the Electoral Commission will consider a number of factors including:

- the format, nature, and content of the programme, e.g.:
 - whether the format is chosen by the broadcaster;
 - the extent to which the broadcaster retains control over the content of the programme;
 - are candidates and political parties subject to question and challenge?;
 - is the reporting objective and impartial?;
 - does the programme aim to inform the public by presenting a range of viewpoints (not encourage or persuade)?;
- whether the format, nature, or content of the programme has changed;
- who initiated the programme, and when;
- who has control of the programme production;

- whether payment been made to the broadcaster for the broadcast time, or production costs;
- if the programme has a regular schedule, and if that schedule is being maintained.

In the Electoral Commission's view broadcasters need to exercise a high degree of caution about party leaders and/or candidates hosting radio shows in the lead up to a general election. The broadcaster will be responsible for the content of a broadcast made with its authority.

Broadcasters are only allowed to broadcast election programmes between writ day (26 October) and the day before polling day (25 November) subject to certain requirements being met. It is a serious offence to broadcast an election programme at any other time.

A radio show that is not an election programme or an election advertisement can be broadcast at any time before polling day and there is no requirement to include a promoter statement. However, the Prime Minister hosting a show of this nature is likely to attract close scrutiny at this time in the electoral cycle. If Radio Live was to proceed with the broadcast it would need to be confident it could put in place adequate controls to ensure that the programme did not breach the election advertising rules in the Electoral Act or the rules regarding election programmes in Part 6 of the Broadcasting Act.

The above advice expressed about the application of the Electoral Act and the Broadcasting Act reflects the Electoral Commission's interpretation of the law and does not constitute legal advice. A court of law may reach a different view. You may wish to consider seeking independent legal advice on questions of compliance.

Yours sincerely



Robert Peden
Chief Electoral Officer

cc Willy Trolove, Communications Manager, Government Communications and
Government Research Unit

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Natalie McNaught

From: Mary Putnam [mputnam@mediaworks.co.nz]
Sent: Thursday, 29 September 2011 11:14 a.m.
To: Natalie McNaught
Subject: RE: Radio Live show 30 September 2011

Many thanks Natalie,

Appreciate the Chief Electoral Officer's comments.

Kindest regards

Mary Putnam | Producer Willie and JT | RadioLIVE | +64 9 360 0330 | +64 275 545 051 |
www.radiolive.co.nz

From: Natalie McNaught [mailto:Natalie.McNaught@elections.govt.nz]
Sent: Thursday, 29 September 2011 10:12 a.m.
To: Mary Putnam
Cc: Willy Trolove
Subject: Radio Live show 30 September 2011

Dear Mary

Further to your email request of 28 September 2011 seeking advice regarding the Prime Minister hosting a radio show on Radio Live please find attached a response from the Chief Electoral Officer.

Kind regards

Natalie

Natalie McNaught | Senior Adviser Legal | Electoral Commission | Te Kaitiaki Take Kowhiri
Level 9 | 17-21 Whitmore Street | PO Box 3220 | Wellington
Tel: +64 4 498 2312 | Fax: +64 4 495 0031 | Web: www.elections.org.nz

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Kristina Temel

From: Robert Peden
Sent: Tuesday, 4 October 2011 9:15 a.m.
To: Kristina Temel
Cc: Anastasia Turnbull
Subject: FW: Labour complaint

Can we discuss a response please

Ta
Robert

From: Amelia Romanos [<mailto:Amelia.Romanos@apnz.co.nz>]
Sent: Monday, 3 October 2011 7:34 p.m.
To: Robert Peden
Subject: Labour complaint

Hi Robert,

Are you able to give me a comment regarding Labour's complaint over John Key's segment on Radio Live last Friday. The party said it breached the prohibition on paid election programmes, and was an unauthorised election advertisement - is that possible?

The PM's office said the station cleared the segment with the Commission prior to the event, is that true?

Kind regards,

Amelia Romanos
Political journalist
APNZ
(04) 817 9240
021 823 818

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Kristina Temel

From: Chris Flatt [gensec@labour.org.nz]
Sent: Monday, 3 October 2011 4:46 p.m.
To: Kristina Temel
Cc: Natalie McNaught
Subject: URGENT Complaint - Prime Minister's Hour on Radio Live on 30 September 2011
Attachments: NZLP letter to EC re Prime Minister's Hour (03.10.11).pdf

URGENT Complaint - Prime Minister's Hour on Radio Live on 30 September 2011

Please find a letter attached regarding this matter. We respectfully request that this matter be treated with urgency.

Regards
Chris

Chris Flatt
General Secretary

New Zealand Labour Party
Level 1, Fraser House
160-162 Willis Street, Wellington
PO Box 784, Wellington 6140

Ph: (04) 384-7649
Mob: 027-451-3579
Fax: (04) 384-8060
<http://www.labour.org.nz>

Authorised by Chris Flatt, 160 Willis Street, Wellington

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NEW ZEALAND LABOUR PARTY

Fraser House, Labour Party Head Office



3 October 2011

Chief Electoral Officer
Electoral Commission
PO Box 3320
Wellington 6140

Attention: Robert Peden

Re: Complaint in relation to the Prime Minister's Hour on Radio Live on 30 September 2011

This is a formal complaint of a breach of the Electoral Act concerning a radio show hosted by the leader of the National Party, John Key, on the Radio Live radio station on 30 September 2011.

We have raised with Mediaworks as owners of Radio Live our concerns on this matter. These emails are attached.

The show in question featured the Leader of the National Party hosting a show where listeners called in and asked questions of him. He was left to answer those questions without having to provide alternative views or answers.

We believe the very act of installing the Prime Minister as sole host of an hour long talk programme, less than two months from the date of a general election, will encourage people to vote for him and the National Party and advocates support for him. While Mr Key notes that it was an 'election free zone' early on in the programme, the very act of noting that there is an election serves to link Mr Key with the act of voting at the election.

Further, Radio Live has refused to allow Labour Party leader Phil Goff to host a similar programme. This is blatant favouritism of one party leader over another and serves to further emphasise that Mr Key is somehow special and deserving of support/votes.

During the programme Mr Key was given an uninterrupted hour to promote his brand and personality. He chatted to various celebrities, including Ritchie McCaw, Richard Branson and Peter Jackson, and emphasised his personal connection with them.

This show was aired within the attributable period for election advertising, as defined under the Electoral Act. Mediaworks have confirmed that they will not provide the same opportunity to the Leader of the Opposition, Phil Goff.

The absence of an alternative viewpoint during John Key's show, and the refusal by Mediaworks to provide a similar opportunity to the Leader of the Opposition during the attributable period, could reasonably lead a member of the general public to be persuaded to vote or not vote for either John Key or his party on the basis of his remarks on that show.

Thus, the conduct of the broadcaster turned the show into an electoral advertisement under s3A of the Electoral Act.

The show did not feature a promoter statement from either John Key or from the National Party. Given that the show was an election advertisement, this is an additional breach under section 204F Electoral Act.

Urgency

We believe this complaint should be handled with urgency for the following reasons.

The programme received major publicity in the press and Mr Key's remarks on the show were reported subsequent to the programme. Further, the novel nature of the programme makes it memorable and Mr Key will no doubt be referring to his stint as a radio host in the coming weeks.

The programme is also available online at the Radio Live website. While the Commission has no jurisdiction over on-demand content online it effectively means that this 'advertisement' is able to be repeatedly listened to.

Further, the Commission could, if it upheld this complaint, order Radio Live to put a statement on its website noting its finding.

Therefore, this complaint should be handled urgently.

Yours faithfully,



Chris Flatt
General Secretary

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From: Jana Rangooni [mailto:jrangooni@mediaworks.co.nz]
Sent: Friday, September 30, 2011 08:10 AM
To: Fran Mold
Subject: RE: Hosting the show

Hi Fran

We have carefully thought this through and taken advice on it - this is not election coverage it is a programme we hope will encourage more listeners to our brand.

He will not be talking about policy or the election.

I can assure you our election coverage will be absolutely even handed and objective and to that end we should finalise plans for Phil to be booked in for available dates once the election period kicks off post RWC.

In the meantime we will continue to engage with politicians as part of regular and special programming and there is nothing inappropriate about our doing so with the election two months away.

Sorry I didn't get to meet you when I was down in Wellington in August it would be good to catchup but I appreciate you may have a very busy 2 months ahead.

Thanks

Jana

JANA RANGOONI | GENERAL MANAGER- TALK BRANDS| MEDIAWORKS RADIO | +64
9 9289200 | +64 21 244 6617

From: Fran Mold [mailto:fran.mold@parliament.govt.nz]
Sent: Thursday, 29 September 2011 3:44 p.m.
To: Jana Rangooni
Subject: Re: Hosting the show

Hi there

I'm sorry but it absolutely has everything to do with the election.
It is naïve to think otherwise given it is less than 2 months to election day.

It gives the leader of the National Party an absolute free hit. Especially given Mediaworks is going to such lengths to advertise it so prominently. This has not happened when Phil Goff or other leaders have appeared on the show to my knowledge.

It is very different having a politician on air in a situation where they are held to account by the host compared to this situation where John Key gets total control over the show.

We strongly believe this is unfair and the same opportunity should be given to other leaders.

We ask that you reconsider. It is important for news organisations to be neutral and fair in the lead-up to elections and to give their listeners the opportunity to hear from all politicians in an even-handed way.

Regards Fran Mold

From: Jana Rangooni [mailto:jrangooni@mediaworks.co.nz]
Sent: Thursday, September 29, 2011 03:21 PM
To: Fran Mold
Subject: Re: Hosting the show

Hi

This is nothing to do with the election and have a few ideas around the election and hope we can have Phil in more than once before then!

Thanks
Jana

Sent from my iPad

On 29/09/2011, at 2:55 PM, "Fran Mold" <fran.mold@parliament.govt.nz> wrote:

Hi there

We saw your press release today regarding National Leader John Key hosting a show on Radiolive tomorrow.

Given we are in the midst of an election, it would only be fair to give the same opportunity to other political leaders. So we are very keen to arrange for Labour Leader Phil Goff to come on the show as a host.

I note that you say it's an opportunity you'll be making available to whoever is Prime Minister. But it would be pretty naive to think that giving such an opportunity and publicity surrounding it to the leader of the National Party alone is not unfair to other leaders in the build up to the election.

I look forward to hearing from you soon.

Regards Fran Mold
Chief Press Secretary
Leader of the Opposition

Sent with Good (www.good.com)

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Media enquiries re Radio Live Broadcast

Time/date	Enquirer	Query	Response
29 September 3.50pm	Marie McNichols Press Gallery	any complaints about radiolive's programme with John Key? What about the legality of it?	No complaints recieved. We respond to complaints. Can't repond to this this because it hasn't happened yet.
30 September 3.20pm	Rachel Kerr Radio Live	any complaints about radiolive's programme with John Key?	No
3 Oct 5.45pm	Rachel Kerr Radio Live	any complaints about radiolive's programme with John Key?	Not as far as I know
4 Oct	Danya Levy Fairfax	Any more complaints about programme	No, just the one
4 Oct	Rebecca Wright TV3	Any more complaints about programme	No, just the one
5 Oct 9.35am 12ish 2.25pm 3.47pm	Danya Levy Fairfax	Who asked for advice? What was it? How long will it take?	Will come back to you on that A complaint has been received, it's being looked into, no comment to make until then. Can't give a defined timeframe
5 Oct 9.10am 1.55pm	John Drinnan NZ Herald Business	Who asked for advice? What was it?	Will come back to you on that
5 Oct 2.15pm	Julian Robins RNZ	How long will it take?	A complaint has been received, it's being looked into, no comment to make until then. Can't give a defined timeframe
5 Oct 2.50pm	Laura McQuillan Press Gallery	How long will it take?	A complaint has been received, it's being looked into, no comment to make until then. Can't give a defined timeframe

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File note of phone calls made by Robert Peden regarding the RadioLive show-
4 October 2011

Robert Peden phoned Willy Trolove at the Prime Minister's Office at 9:30 am, 4 October 2011.

Robert said that he had received an inquiry from Amelia Romanos, Associated Press regarding advice the Electoral Commission (EC) had provided to Radio Live before the show aired. Robert said that Ms Romanos has said that the Prime Minister's office had advised her that the Commission had cleared the show beforehand.

Robert asked did the PM's office say that the EC had cleared the segment? Did you read the advice?

We provided general advice to RadioLive copied to you?

What was the comment by the PM's office re the tenor of the advice provided?

Who spoke to her?

The problem we have is that Ms Romanos is saying that the PM's office has said that the EC cleared the segment and that is clearly not the case. The EC's advice set out the rules and recommended a high degree of caution.

Mr Trolove said that he had no knowledge of the PM's office having provided any comment or who would have commented.

He suggested that Robert call Lesley Hamilton (04) 817 9752.

Robert Peden called Lesley Hamilton at 9:35am. He said that the EC had had an inquiry from Amelia Romanos and that she had said that the PM's office had said that the station cleared the segment with the EC before it was aired. Did the PM's office say this? We had a request for an advisory opinion. We could not provide an advisory opinion as we cannot comment on a live show. We provided general advice.

Lesley suggested that Robert contact Jana Rangooni at MediaWorks. Robert reiterated that he is concerned that the journalist thinks that the PM's office said that the EC had cleared the broadcast, which is something that the EC was not in a position to do and did not do. Lesley provided a cell phone number for Jana Rangooni.

Robert Peden phoned Amelia Romanos at 9:45 am

She said she was in a hurry and that she had already had comment from Graeme Edgeler. Robert said I just want to clarify that you said in your e-mail that the PM's office said that the EC cleared the programme. The EC provided general advice along the lines of what is provided to the media in the EC's media handbook. I want to be very clear that the EC did not clear the programme. Ms Romanos asked how long it would take the EC to determine the complaint. Robert said that he would not comment on the conduct of the consideration of the complaint until consideration is completed.

Kristina Temel
Electoral Commission