

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: October 13, 2006

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Writers Guild of America, West,
Inc. (Universal Network
Television, LLC and NBC Studios, 240-3367
Inc.) 542-3367
Cases 31-CB-12062 and 31-CB-12063 542-6770
542-7533
542-7550

This case was submitted for advice on (1) whether the Union violated Section 8(b)(1)(B) by instructing the Employer's supervisors - who are Union members and perform bargaining-unit work in addition to their supervisory duties - not to perform certain tasks regarding made-for-internet programming ("webisodes") related to the television programs "The Office" and "Crossing Jordan";¹ and (2) whether an allegation that the Union violated Section 8(b)(3) by refusing to honor an agreement covering webisode work should be deferred to arbitration under Collyer Insulated Wire.²

We conclude that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(B) by threatening the supervisor-members with discipline if they write for webisodes or hire or assign work to writers for webisodes, because, in the circumstances of this case, those duties involve 8(b)(1)(B)-covered contract interpretation. [FOIA Exemptions 2 and 5

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¹ The charges also alleged violations regarding webisodes for the programs "Heroes" and "Battlestar Galactica," but the charging parties have since notified the Region that they are no longer pursuing those allegations.

² 192 NLRB 837 (1971).

FACTS

Universal Network Television and NBC Studios (collectively, the "Employer") are parties to a collective-bargaining agreement ("MBA") with Writers Guild of America, west ("the Union") covering television writers.³ The MBA covers the minimum terms and conditions of employment for writers; generally, writers may negotiate better terms directly with employers. The MBA also covers writing work performed by individuals - e.g. executive producers - who also perform non-writing, non-bargaining unit work.⁴ These individuals are known as "hyphenates." Generally, a television program's permanent staff writers are hyphenates while its free-lance writers perform only writing work.

Typically, one hyphenate per television show serves as the "show runner." Show runners are in charge of the overall creative direction of the show and are the highest ranking hyphenates. They generally hire and fire writers and assign the writing of episodes or scenes to certain writers, in addition to writing and polishing other writers' work.⁵ For example, Greg Daniels, the show runner for "The Office," decides which writers he wants to hire and deals with their agents to secure their services and negotiate their personal service contracts. Robert Rovner, a new show runner for "Crossing Jordan," is not involved in negotiating writers' compensation, but does assign writers for various episodes.⁶ Tim Kring, show runner for "Heroes," hires and fires writers, discusses specifics of writers'

³ Technically, Universal Network Television is a member of and signatory to the Alliance of Motion Picture & Television Producer's (AMPTP) multiemployer collective-bargaining agreement with the Union, while NBC Studios is signatory to a separate, virtually identical agreement with the Union. For purposes of this memorandum, we refer to both contracts as the "MBA."

⁴ While some executive producers perform writing and nonwriting work, other executive producers do not perform any writing work. These nonwriting executive producers are not covered by the MBA.

⁵ Show runners may also be involved in casting, promotions, music, and marketing. Show runners are ultimately responsible for the show being a finished, polished product that does not run over budget.

⁶ Two other hyphenates, Jon Cowan and Kathy McCormick, also serve as show runners on "Crossing Jordan."

employment with their agents, and decides who writes what.⁷ In addition, show runners are involved, to some degree, in the resolution of disputes and grievances. Thus, Employer Vice President of Labor Relations Steven Berkowitz states that disputes involving writers initially go to the show runner first, and if unresolved, go through the formal contractual grievance procedure.

In 2001, the parties negotiated a side letter agreement on written material for programs made for the internet ("webisodes").⁸ The side letter authorizes a party-employer to, at its option, execute a letter of adherence to cover writing work on webisodes. The side letter provides that the terms of the letter of adherence will be binding and will require the party-employer to abide by the pension, health, and union-security provisions of the MBA. The side letter further states that "[n]o other terms of the [MBA] shall apply to the employment of such writer...unless agreed in writing between the [Union] and the writer, on the one hand, and the Company, on the other."⁹ The Union promulgated a form letter of adherence for use in connection with the side letter.

The Employer interprets the side letter to be the sole instrument governing the terms and conditions of employment for webisode writers and that the only MBA terms applicable to webisodes are the pension, health, and union-security provisions. The Union, on the other hand, takes the position that the side letter not only requires the Employer to abide by the MBA's provisions on pension, health, and union-security, but also that the Employer must bargain with the Union over the remaining terms and conditions of employment, particularly compensation.

⁷ As noted above, "Heroes" is no longer a subject matter of this case. Kring was the show runner for "Crossing Jordan," but turned over his show runner duties to Rovner, Cowan, and McCormick because it is an established show and he currently is focusing on "Heroes," a new show.

⁸ The side letter was carried forward into the current MBA.

⁹ The side letter also contains a reservation of rights provisions stating that "[n]othing contained in this Sideletter shall be deemed a waiver of any party's legal position with respect to the application of this or any prior [MBA] to written material written for the [i]nternet. The parties reserve all of their legal positions with respect to such material."

The webisodes involved here are made-for-internet programming related to existing television shows. Webisodes for "The Office" are separate two-minute programs using actors from the program but available exclusively on the internet. Webisodes for "Crossing Jordan" are interactive virtual autopsies, showing a body of one of the "victims" on that week's show and permitting internet users to click their cursors on various body parts to obtain clues to help determine the cause of death.¹⁰ Webisodes for "Heroes" take the form of internet comic books which internet users flip through using their cursors.¹¹

In spring 2006, the Employer and Daniels discussed producing webisodes for "The Office."¹² Daniels wanted to hire Jason Kessler, who was not a Union member, to write the webisodes. The Union wanted the webisode writing work to be covered by the MBA, but the Employer wanted Kessler to be part of the promotional department, which is not subject to the MBA.

In June, Daniels attempted to broker a deal regarding Kessler that was acceptable to all the parties, meeting several times with Union Interim Executive Director David Young and Employer Vice President Berkowitz. Berkowitz states that Daniels expressed concern that he might get in trouble with the Union if he assigned the webisode work to non-Union writers and that the Union was pressuring him to get the company to negotiate additional terms and conditions of employment for webisodes.¹³ Ultimately, the Employer proposed to hire Kessler and apply the pension, health, and union-security provisions of the MBA, i.e. its interpretation of what the side letter required.

On June 29, Berkowitz sent a letter to Young offering to sign a letter of adherence for Kessler to write webisodes of "The Office."¹⁴ Young did not respond to

¹⁰ The "Crossing Jordan" webisodes have scripts, but, unlike the webisodes for "The Office," do not involve actors speaking lines.

¹¹ Text is written for the "bubbles" above the comic book characters' heads, and the artwork is contracted out. There is no live action dialogue.

¹² All dates are in 2006 unless otherwise indicated.

¹³ Daniels disputes advising anyone at the Employer that he might get in trouble if he hired Kessler.

¹⁴ Berkowitz attached the Union's form letter of adherence.

Berkowitz initially. Meanwhile, on July 17, Young sent a letter to Employer Senior Vice President for Labor Relations J. Keith Gorham stating the Union's position that compensation for employees performing webisode writing work must be negotiated separately with the Union. The letter further stated that "[a]bsent a quick resolution, the [Union] will instruct its members not to perform such non-union work, under authority of the [Union's] Working Rules." Sometime after July 17, Young responded to Berkowitz' June 29 letter and informed him that the Union would not sign the letter of adherence regarding Kessler.

On July 26, the Union hosted a dinner for show runners, attended by both Daniels and Kring.¹⁵ Their accounts differ somewhat. Daniels states that Young informed show runners of the Union's position regarding webisodes; that the parties were trying to resolve the issue; that show runners were not allowed to write for or perform any writing work on webisodes; and to wait for the Union's approval before doing so. Young did not directly tell the show runners that they would be disciplined if they wrote webisodes, but Daniels believed discipline was implied, because show runners could be subject to discipline if they defied the Union's directives. Daniels did not interpret Young's statement to have anything to do with the performance of what he considered to be "executive producer" responsibilities, only writing work on webisodes. Kring states that Young advised the show runners to take a hard line on the webisodes issue, because it would help the Union get the Employer to negotiate. Young did not expressly tell show runners not to work on webisodes, or threaten show runners with internal discipline if they worked on webisodes, but Kring interpreted his statements to mean that show runners should not work on the webisodes or turn in completed webisodes to the Employers.¹⁶

In late July, the show runners for "Heroes" and "Crossing Jordan" sent the Employer e-mails stating that they assume an agreement will be reached with the Union regarding webisodes; that, as loyal Union members, they support the Union's position on webisodes; and that "some

¹⁵ Rovner did not attend this dinner.

¹⁶ The Union had hosted an earlier dinner for show runners on July 12, attended by Rovner, but not Daniels or Kring. At that dinner, Young told the show runners to continue writing and doing work on webisodes while the Union and Employer tried to resolve the webisode compensation situation.

agreement needs to be reached" before webisodes are released or aired.

On July 31, representatives of the Employer and Union met. The Union representatives sought to negotiate a full-fledged contract covering webisode writing. The Employer representatives stated that webisodes were promotional material, not subject to the MBA, but that the Employer was willing to sign the letter of adherence for "The Office" pursuant to the side letter. The Union countered that the side letter was meant for material unrelated to preexisting shows, that webisodes were covered under the MBA, and that the Employer would have to negotiate with the Union over webisodes.

On August 2, the Union sent a letter to show runners and other writers stating the Union's position that writing work performed for webisodes "requires more than the pension and health only deal being promulgated by NBC-Universal" and that "writer-producers, story editors and other writers in similar positions" must be compensated above their negotiated series salary when performing writing or rewriting/polishing services for webisodes.¹⁷ The letter further stated that "[c]ontracts recently submitted to writers providing for such additional services specifically violated the [MBA] and are invalid."¹⁸ The letter also stated that the Union had advised the Employer that it had instructed writers not to perform any of these services until the Employer negotiated an appropriate agreement with the Union.

On August 10, the Employer met with the Union again. The Employer reiterated its position that the Union should sign the letter of adherence for "The Office" webisodes and accused the Union of advising show runners not to work in any capacity (as producers or writers) on webisodes. The Union representatives did not deny this, and said they would continue this course of conduct unless the Employer negotiated a deal with the Union.

On August 11, the Union sent another letter to show runners and other writers.¹⁹ The letter recounts the August

¹⁷ Daniels, Rovner, and Kring all received the letter.

¹⁸ It is unclear whether this referred to new writer contracts such as the Kessler contract, or to personal service contracts with hyphenates that did not provide additional compensation for webisodes, or both.

¹⁹ Rovner and Kring received this letter. There is no evidence that Daniels received it.

10 meeting, particularly the Union's position that the Employer's personal service contracts with writers for webisodes violated the MBA. The letter adds that the Union will continue to assert the position that an agreement must be reached on webisodes that includes reuse fees for writers, and asks that the writers assert that position as well.

That same day, Rovner and the other show runners for "Crossing Jordan" notified the Employer that they would no longer write webisodes.²⁰

On August 17, Employer executive Rick Olshansky wrote a letter to Daniels' attorney. The letter's first paragraph stated that Daniels had advised the Employer that he was "unwilling or unable to cooperate in the production of [webisodes] despite the Studio's right to assign him such work" under his personal services agreement due to the Union's "threat to discipline him should he perform such services before the [Union] has negotiated...additional terms and conditions" regarding webisode work. Olshansky sent Kring's attorney a virtually identical letter on the same date.

In response, Daniels' and Kring's attorneys sent letters to Olshansky on August 17. Daniels' attorney confirmed that, "[f]or the reasons so eloquently stated in the first paragraph of your letter, Mr. Daniels is not prepared to render services in connection with [webisodes]." Daniels' attorney added that the Union has advised Daniels that the performance of those services would violate the MBA. Kring's attorney confirmed that, "[a]s you acknowledge in the first paragraph of your letter, [Kring] is unable to render writing services for [webisodes] for the series pursuant to the instructions of [the Union]." The attorney's letter adds that because Kring's services are subject to the terms of the MBA, he has not breached his obligations pursuant to his personal services contract.

²⁰ They had continued to perform writing work on the webisodes until August 11 because they had been optimistic that the Union and Employer would resolve their dispute.

No new webisodes for "The Office" have been written.²¹ Three scripts for "Crossing Jordan" webisodes were created before the show runners decided to stop writing for the webisodes on August 11. Non-written elements for six additional "Crossing Jordan" webisodes, including footage from the shows and digital stills, were submitted to the Employer.

On August 29, the Employer filed a claim for arbitration alleging that the Union has (1) breached the side letter by refusing to execute the letter of adherence for webisodes for "The Office," indicating that it would refuse to execute the letter of adherence for webisodes related to other programs, and ordering its members not to work on webisodes; (2) breached the MBA's no-strike clause by ordering its members not to perform services in connection with webisodes; and (3) breached another provision of the MBA by adopting and enforcing work rules that conflict with the side letter.

On August 31, the Union filed a counterclaim for arbitration alleging that the Employer has (1) breached the MBA and the side letter by refusing to bargain over additional terms and conditions (in addition to pension, health, and union-security) for webisode work; (2) breached Article 14 of the MBA by instructing hyphenates to perform writing services (including rewriting and polishing work) on webisodes for no additional compensation; and (3) breached Article 14 of the MBA by including language in hyphenates' personal service contracts that improperly offset compensation for their writing services toward the payment of compensation for their services on webisodes.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(B) by threatening the show runners with discipline if they write for webisodes or assign writing work for webisodes, because, under the circumstances of this case, those duties require the show runners to perform 8(b)(1)(B)-covered "contract interpretation" of the MBA and side letter regarding webisodes. [FOIA Exemptions 2 and 5

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²¹ Kessler was never hired. Daniels states that he wanted to hire Kessler to write the webisodes for "The Office," but that, before that could happen, there "ha[d] to be some mutually agreed upon resolution regarding his status."

A. Section 8(b)(1)(B)

Section 8(b)(1)(B) prohibits unions from restraining or coercing employers in the selection of their collective-bargaining or grievance representatives. The proscribed conduct may be applied directly against the employer to force it to select or replace an 8(b)(1)(B) representative or indirectly against the employer's 8(b)(1)(B) representative in order to adversely affect how the representative performs the covered functions of collective bargaining or grievance processing. Contract interpretation is so closely related to collective bargaining that it is considered a Section 8(b)(1)(B) activity.²²

An 8(b)(1)(B) violation will be found where (1) the union has a collective-bargaining relationship with the employer or seeks to establish one; (2) the employer representative engages in Section 8(b)(1)(B) activities; and (3) the union's conduct has a foreseeable adverse effect on the employer representative's future performance of that 8(b)(1)(B) duty.²³ Conduct directed at the representative's performance of non-8(b)(1)(B) duties is not unlawful.²⁴ While a nexus must exist between the union's conduct toward the employer representative and the employer representative's performance of 8(b)(1)(B) duties, actual harm to a representative's performance of 8(b)(1)(B) duties is not necessary.²⁵

²² Elevator Constructors Local 10 (Thyssen General Elevator Co.), 338 NLRB 701, 701 & n.14 (2002); Elevator Constructors Local 1 (National Elevator Industry), 339 NLRB 977, 983 (2003); Teamsters Local 507 (Klein News), 306 NLRB 118, 120, 121 (1992). Accord: NLRB v. IBEW Local 340 (Royal Electric), 481 U.S. 573, 586 (1987) (describing 8(b)(1)(B) activities as including contract interpretation).

²³ NLRB v. IBEW Local 340 (Royal Electric), 481 U.S. at 581-585; Electrical Workers IBEW Local 1547 (Veco, Inc.), 300 NLRB 1065, 1065 (1990), enfd. 971 F.2d 1435 (9th Cir. 1992).

²⁴ Sheet Metal Workers Local 33 (Cabell Sheet Metal), 316 NLRB 504, 504 n.3 (1995) (no violation where union's internal discipline against 8(b)(1)(B) representative was not related to his performance of 8(b)(1)(B) duties).

²⁵ Food & Commercial Workers Local 342-50 (Pathmark Stores), 339 NLRB 148, 150 (2003), citing American Broadcasting Co. v. Writers Guild of America, 437 U.S. 411, 432 (1978) (explaining that "whether union conduct would or might adversely affect the performance of the [representative's]

1. The show runners' assignment of webisode writing work to other writers and show runners' own performance of webisode writing work require 8(b)(1)(B) contract interpretation.

This case must be viewed in the context of the interpretive dispute between the Union and Employer regarding the circumstances under which the MBA and side letter permit webisode writing to be performed. As discussed above, the Employer interprets these agreements to permit webisode writing so long as the MBA's pension, health, and union-security provisions are applied, while the Union's interpretation would require the parties to negotiate compensation and other terms in addition to the aforementioned MBA provisions before any webisode writing occurs.

The show runners' assignment of writing work on webisodes to other writers, in these circumstances, is 8(b)(1)(B)-covered contract interpretation. An important aspect of a show runner's duties is hiring writers and assigning writing work to others on behalf of the Employer. In order to carry out these tasks regarding webisodes, a show runner must make a threshold determination on the correct interpretation of the MBA and side letter. In Electrical Workers IBEW Local 77 (Bruce-Cadet), the Board found that two union-member foremen, who were responsible for assigning work to electrical workers on behalf of their employer, performed 8(b)(1)(B) "contract interpretation" when they assigned disputed work to members of one union instead of its sister local based on an informal jurisdictional agreement between the unions to which their employer had assented.²⁶ Similarly, show runners' hiring of webisode writers or assigning of webisode writing to other

grievance-adjustment duties is...*necessarily a matter of probabilities*") (emphasis added).

²⁶ 289 NLRB 516, 519 (1988), *enfd.* 895 F.2d 1570 (9th Cir. 1990). See also Elevator Constructors Local 10 (Thyssen General Elevator Co.), 338 NLRB at 702 (supervisor-union member engaged in "contract interpretation" when he denied other member's wage claim, despite no evidence he reviewed specific contractual provision, because contract covered wage rates, member claimed higher rate than provided in contract, and supervisor-member recommended contractual rate).

writers requires the show runners to perform "contract interpretation" for the Employer.²⁷

Furthermore, in the unique circumstances of this case, the show runners' own performance of writing work on webisodes also constitutes 8(b)(1)(B) contract interpretation. If show runners are to perform writing work on webisodes, then they - as the Employer representatives vested with authority to hire and assign writing work - must, in effect, assign writing work to themselves. The show runners' own performance of webisode writing work is therefore conditioned on their exercise of a Section 8(b)(1)(B) duty: interpreting whether the MBA and side letter permit the assignment of webisode writing work.²⁸ In other words, viewed in the context of the instant contract dispute, the show runners' performance of webisode writing work is "intertwined with their [Section] 8(b)(1)(B) duty."²⁹

Accordingly, in light of the current interpretive dispute between the Union and the Employer, the show runners' assignment of webisode writing work to others, as well as their own performance of writing work, constitutes 8(b)(1)(B) contract interpretation.³⁰

²⁷ We do not need to determine whether show runners performed contract interpretation in other hiring or work assignment contexts or otherwise engaged in collective bargaining or grievance adjustment activities on behalf of the Employer. See Electrical Workers IBEW Local 77 (Bruce-Cadet), 289 NLRB at 519 n.10 (in light of finding that foremen were fined for performing contract interpretation duties, Board declined to pass on their status as 8(b)(1)(B) grievance adjusters).

²⁸ See Electrical Workers IBEW Local 77 (Bruce-Cadet), 289 NLRB at 519 (union-member working foremen performed 8(b)(1)(B) contract interpretation when, in the context of a jurisdictional dispute over assignment of work between sister locals, they assigned work to themselves).

²⁹ NLRB v. Electrical Workers IBEW Local 77, 895 F.2d at 1575.

³⁰ Our conclusion is limited to the unique circumstances of this case where (1) there is an interpretive dispute over whether the MBA and side letter permit the Employer to assign writing work for webisodes and (2) the individuals who assign that work - the show runners - must necessarily decide whether to apply the Employer's or Union's interpretation. We have not concluded that writing work or the assignment of writing work in the industry - for

2. The Union's communications to the show runners regarding webisodes contained threats of discipline that would have a foreseeable adverse effect on show runners' performance of the above 8(b)(1)(B) contract interpretation functions.

The Union's statements at the July 26 dinner, together with the August letters, constituted threats to discipline show runners if they assign webisode writing work in a manner contrary to the Union's interpretation of the MBA and side letter. At the dinner, Young instructed show runners not to write for or perform "any writing work" on webisodes.³¹ He further instructed show runners to take a "hard line" regarding webisodes in order to pressure the Employer to negotiate the webisode issue with the Union. The August letters reiterated the Union's interpretation of the contract and informed show runners that personal service contracts submitted to writers for webisodes violated the MBA. These communications must be considered in light of the Union's constitution, which subjects members to discipline for "failing to abide by the requirements of any collective bargaining agreement...to which the [Union] is party."³² Considering the show runners' role in hiring and assigning work to writers, this would have a foreseeable adverse effect on show runners' willingness to freely interpret the MBA and side letter in carrying out their duties for the Employer.³³

television programs or webisodes - generally constitutes 8(b)(1)(B) contract interpretation.

³¹ In this context, the instruction not to perform "any writing work" arguably encompasses more than just actual writing, but also the assignment of writing.

³² Union Constitution, Article X, subpart A. Moreover, Union Working Rule 5 states that "[e]ach member shall comply with the terms of the [MBA] in spirit as well as in letter, and shall not accept any employment, sign any contract or make any agreement for employment which violates such [MBAs]." Article XVI (Working Rules) of the Union Constitution and Bylaws states that "[v]iolators of any working rule shall be subject to discipline under Article X, subpart A. of this Constitution."

³³ See Elevator Constructors Local 1 (National Elevator Industry), 339 NLRB at 983 (discipline imposed because of supervisor-member's "interpretation of the contract in a manner which was contrary to [union's] interpretation" had foreseeable adverse effect on his future conduct as employer's 8(b)(1)(B) representative).

The Union also threatened show runners with discipline if they perform actual writing on webisodes in a manner inconsistent with the Union's interpretation of the MBA and side letter. At the July 26 dinner, Young told show runners they were not allowed to write on webisodes until receiving the Union's approval. By so forbidding show runners from writing webisodes, the Union communicated a threat of discipline.³⁴ Indeed, the Union has essentially admitted in its position statement that it threatened show runners with discipline if they perform webisode writing work; it denies only that it threatened discipline for non-writing, or other supervisory, work. Because show runners assign to themselves any webisode writing work they ultimately perform, and assignment of webisode writing work requires contract interpretation under the circumstances of this case, the Union's threat has a sufficient nexus to the show runners' 8(b)(1)(B) duties to support finding a violation.³⁵

B. [FOIA Exemptions 2 and 5]

[FOIA Exemptions 2 and 5

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³⁴ Cf. Food & Commercial Workers Local 342-50 (Pathmark Stores), 339 NLRB at 150 (rejecting union's argument that its statements were mere proposals or demands rather than threats).

³⁵ We would reject an argument that nothing the Union said would preclude show runners from assigning webisode writing work to themselves so long as they declined to perform the writing work. The Board rejected a similar argument in Electrical Workers IBEW Local 77 (Bruce-Cadet), 289 NLRB at 519 & n.9. There, the union asserted that its discipline of two foremen was not directed at their interpretation of an informal work jurisdiction agreement, because the stated purpose of the discipline was that the foremen personally performed work outside of their union's jurisdiction. The Board found that the union's argument "ignore[d] the context in which the discipline was imposed": the foremen had been authorized to determine, on their employer's behalf, who should perform the disputed work; they interpreted the jurisdictional agreement adverse to the interests of the union, assigning the work to themselves and other members of another union; and they were subsequently fined. Ibid.

[FOIA Exemptions 2 and 5, cont'd.

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[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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³⁷ [FOIA Exemptions 2 and 5

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³⁸ [FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5, cont'd.

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[FOIA Exemptions 2 and 5

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B.J.K.

³⁹ [FOIA Exemptions 2 and 5

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⁴⁰ [FOIA Exemptions 2 and 5

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⁴¹ [FOIA Exemptions 2 and 5

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