IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEVEN SALAITA,	)	
	)	Case No. 15 C 924
Plaintiff,	)	
	)	Hon. Harry D. Leinenweber,
v.	)	District Judge
	)	
CHRISTOPHER KENNEDY, *et al*.,	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO PRESERVE EVIDENCE

Plaintiff STEVEN SALAITA, by his attorneys LOEVY & LOEVY and the CENTER FOR CONSTITUTIONAL RIGHTS, files this reply in support of his Motion to Preserve Evidence, stating as follows:

1. In their response, Defendants recast the serious concerns that underlie this motion to preserve evidence as a concern about a single email by a sole rogue administrator. That is not the case. Defendant Wise's September 18, 2014 email reveals an intention to flout document preservation and disclosure obligations, not only by her, but also by other Defendants and other top University officials. *See* Ex. A (Sept. 18, 2014 Wise Email, stating that "[w]e are doing virtually nothing over our Illinois email addresses") (emphasis added). In addition, in an August 14, 2015 article after Defendant Wise's resignation as Chancellor, the Chicago Tribune quotes her as saying regarding her use of personal email to conduct University business that "many of these same communications included campus counsel, Board members, and other campus leaders." Ex. B (Aug. 14, 2015 Chicago Tribune article). In other words, Board members and others either engaged or acquiesced in these practices.

2. Likewise, although Defendants claim that a preservation order is unnecessary because Defendants are on notice of their duty to preserve evidence, notice of such obligations by counsel and campus ethics officers in the past have proven inadequate. Indeed, the documents reveal that Defendant Wise and other senior officials of Defendant Board of Trustees knew that they had a duty to preserve and disclose information about University business, and deliberately chose to flout those duties by using personal emails to keep them secret.

3. Wiseôs email itself shows that by September 18, 2015, Wise and others already knew that the Salaita matter was ñnow in litigation phase,ò with attendant preservation and disclosure obligations. *Because of* those obligations, she and other senior officials were ñdoing virtually nothing over our Illinois email addresses,ò and, in her personal email account, she was even going so far as ñdeleting after sending.ò *See* Ex. A (Sept. 18, 2014 Wise Email). In fact, Wise and other top University officials, including Provost and Vice Chancellor Ilesanmi Adesida, were using personal emails to discuss Salaita as early as July 2014. *See* Ex. C (July 25, 2014 Adesida Email).

4. Second, other recently released documents reveal that Wise and other senior University officials have flouted known disclosure obligations in the past, including their preservation and disclosure obligations under the Illinois Freedom of Information Act (ñFOIAò). For example, on March 19, 2014, Defendant Wise sent an email to redacted recipients, stating that because of FOIA requests for her communications about University business, ñI am using my personal email and sending it to [redactedôs] personal email.ò *See* Ex. D (Mar. 19, 2014 Wise Email). In that same email chain, Wise stated that she had just sent an email to Associate Chancellor Robin Kalerôs personal email instructing her to hand-deliver a document to other University officials and prominent businesspeople, all for the purpose of preventing their disclosure through FOIA.

Id. Similarly, on April 25, 2014 Defendant Wise sent an email from her personal email account to the personal email account of Dick Meisinger, the Universityôs Associate Vice President for Strategic Initiatives, with the subject line ñBetter not to correspond on my IL emailò and instructing Meisinger ñPlease donôt ask anything . . . from your Illinois email.ò Ex. E (April 25, 2014 Wise Email).

5. So, not only is there a strong need for a preservation order, but Defendants articulate no prejudice from such an order. Defendantsôcounsel claims that a preservation order is unnecessary since it has already issued a preservation notice to Defendants, but this is not prejudice. In fact, if Defendants are now abiding by their obligations, then presumably nothing more is required and they will do nothing different upon entry of a court order. However, for those Defendants ï including employees or agents of Defendants ï who have flouted their obligations in the past, a court order to preserve evidence has consequences that may have some impact in preventing any further prejudice to Plaintiff from the destruction of evidence.

6. Finally, Defendantsôresponse creates the impression that the University voluntarily disclosed the September 19, 2014 Wise email, and that this suggests no preservation order is necessary. That is hardly the case. Defendants have known about the use of personal email accounts to circumvent disclosure obligations since at least April 2014. *See* Ex. F (Aug. 8, 2015 News-Gazette article). Rather than promptly disclose that fact, Defendants pursued motions to dismiss both the FOIA litigation and the federal lawsuit. It was only after both motions were denied, when it was clear that discovery in both lawsuits would require the disclosure of the September 19, 2014 Wise email and others, that the University finally disclosed the emails and underlying practices.

7. For all of these reasons, Plaintiff respectfully requests that his Motion to Preserve Evidence be granted.

RESPECTFULLY SUBMITTED,

/s/ Anand Swaminathan
One of Plaintiff's Attorneys

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EXHIBIT A

Message

From: Phyllis Wise [redacted]
Sent: 9/18/2014 4:18:53 PM
To: Michael LeRoy [redacted]
CC: [redacted]
Subject: Re: Myers v. Hasara

Indeed, Michael, it should not be you who reaches out to the students. Mitch should do that if he wants to.

Robin has warned me and others not to use email since we are now in litigation phase. We are doing virtually nothing over our Illinois email addresses. I am even being careful with this email address and deleting after sending.

Phyllis

Sent from my iPad

On Sep 18, 2014, at 2:43 PM, Michael LeRoy [redacted] wrote:
Phyllis,

These are splendid ideas; and I will reach out to Mitch (with whom I already have corresponded).

Following on this idea, I think that having Mitch mobilize that base would be more effective than an e-mail to students from me.

Robin, could you reach out, please, to Lynn and Chris, or alternatively, send me contact information?

Phyllis, whatever time this takes, we have to make this investment, on the merits but also as a matter of principle to preserve the supremacy of BOT governance; and the tide has shifted decisively on our side. We can be influenced by protest, but not governed by it.

There is a conversation taking place between the support team and Roy Campbell that is summarized by this note:

From: Leroy, Michael H
Sent: Thursday, September 18, 2014 3:26 PM
To:
Cc:
Subject:

Thanks so much, ____.

I hope we can get further clarification.

If a motion to vote can be entertained without being an agenda item, it would seem to defeat the notice provision in the bylaws.

In more practical terms, I would contact more people if I knew a vote was a real possibility; but if a vote cannot be scheduled without being an agenda item, I would take a more laid-back approach to the meeting.

Thanks in advance.

Michael

PS: The possibility that an **ambush vote** *could* occur really offends my democratic sensibilities, especially given the extreme gravity of the putative vote, and its possible late-timing in a marathon meeting.

Michael H. LeRoy

Michael H. LeRoy
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University of Illinois at Urbana-Champaign
(217) 244-4092
&
Lecturer in Law, University of Chicago Law School

On Thu, Sep 18, 2014 at 3:25 PM, Phyllis Wise [redacted] wrote:
Michael,

Thanks so much for letting us know. The Student Senate President, Mitch Dickey, may want to know about this, so that his colleagues are ready. I also met with Chris Isenhower, the chair of the Student Alumni Ambassadors (I will be meeting with the group of student leaders that he meets with regularly on Tuesday evening). Lynn Cheney is the Alumni Association staff member who supports the students. Both Chris and Lynn may want to know. In addition, Robin, I hope Renee Romano knows.

Thanks so much for your continuing efforts. This is taking so much of your precious time!
Phyllis

Sent from my iPad

On Sep 18, 2014, at 1:19 PM, Michael LeRoy <[redacted]> wrote:
Dear Phyllis and Robin,

I was planning on not contacting either of you today, or the next day, and so forth; but please be aware of

https://www.facebook.com/events/791869584202990/

I contacted every student senator on August 29 via e-mail to explain, in two sentences, why I strongly support our Chancellor.

In light of the new FB post, I will reach out again with a low-key, short message to encourage their attendance (without referencing the protest).

I, or a member of our faculty support team, will contact [redacted]

In this instance, we will refer to the protest; but we will also ask [redacted] to organize a well-behaved and orderly support group of students.

I am waiting for several hours to give time to my team to reply and share their thoughts.

If either one of you would like to add or modify this tentative plan, please let me know.

From my very limited vantage point, things seem to be significantly quieting down among faculty members, and from the support side of the equation, I don't think we should do anything that is provocative or otherwise stirs the pot.

On the other hand, I don't think our support team should be complacent.

Michael

On Wed, Sep 17, 2014 at 1:03 PM, Phyllis Wise [redacted]m> wrote:
Michael,

Thank you for making me aware of this.

Phyllis

Sent from my iPad

On Sep 17, 2014, at 9:24 AM, Michael LeRoy <[redacted] wrote:
I ran across a case in which Karen Hasara was sued in her capacity a mayor of Springfield by an employee who alleged a violation of First Amendment rights.

I mentioned this to Robin simply to suggest that Ms. Hasara might be a useful, personal resource for Phyllis-- as much from a coaching (and calming) perspective as anything else.
I passed the case along to Scott Rice; but I consider [redacted]

[redacted]

The Seventh Circuit Court of Appeals ruled for the terminated employee, ***but*** this is misleading: the ruling was whether the health officials critical statements were "public" in nature (as opposed to a private grievance about her work).
The point is that Mayor Hasara did not lose the case-- she only lost an issue in this ruling-- only that the case was ordered to trial (or was settled).
My database has 80+ faculty cases with a First Amendment issue (and growing), and the trend on this issue (not others) is quite favorable-- but there are adverse precedents, too.

Personally, I am optimistic on this issue due to statistical indicators of court behavior.
Anyway, in case you want to read the Hasara case, here it is.
i am meeting with Scott this afternoon.

No reply is necessary.
Be positive, always.

I am looking forward to the medical school concept moving forward, a far more important matter.

Michael

Meyers v. Hasara,226 F.3d 821 (7th Cir. 200)

James P. Baker (argued), Springfield, IL, for Plaintiff–Appellant.
Robert M. Rogers, City of Springfield, Bradley B. Wilson (argued), Corporation Counsel, Springfield, IL, for Defendants–Appellees.
Before WOOD, Jr., KANNE and DIANE P. WOOD, Circuit Judges.
KANNE, Circuit Judge.
At the behest of its mayor, the City of Springfield suspended health inspector Cynthia Myers for comments she made regarding an open-air produce market that allegedly had been operating in violation of city and state law. Myers considered the punishment a violation of her constitutional rights and sued the mayor and health department director under 42 U.S.C. § 1983. T

he district court granted the defendants summary judgment on the merits and also ruled that the defendants were entitled to qualified immunity because the law regarding discipline of public employees for exercising their First Amendment rights was not clearly established at the time of Myers' suspension. However, because the district court resolved factual disputes in favor of the defendants, we hold that summary judgment was not warranted in this case.

Furthermore, the standards concerning a public employer's authority to punish an employee for exercising rights guaranteed under the First Amendment were well established at the time of the events in question, and therefore qualified immunity was not justified. We reverse the grant of summary judgment and remand for trial.
i. History

Cynthia Myers worked as a supervisor and health inspector in Springfield's health inspection program. In that role, she oversaw the food inspection program, supervised five inspectors and performed routine health inspections of

restaurants, markets and stores for compliance with city and state health codes. Myers' boss was Steve Hall, the head of the Public Health Department Environmental Division, who reported to defendant Gail Danner, the acting head of the Public Health Department. Danner reported to Keith Haynes, the director of community services, who reported directly to defendant Karen Hasara, the Springfield mayor.

Although several steps removed from the pinnacle of Springfield power, Myers had some supervisory duties in her job and was called on to participate in making division decisions and formulating policies. The Springfield health department, in addition to enforcing its own ordinances, had entered into an agreement with the state to enforce the state's health laws. Furthermore, the city's health ordinances were required to be no less stringent than the state's.

In 1995, a business called Parsons' Produce operated an open-air market in the parking lot of a local department store. Parsons' sold fruit and vegetables under an agricultural commodity permit, which permitted the sale of fresh produce, but not packaged food products. The restriction on selling packaged foods stems from the increased risk of infestation and contamination in an open-air market and the recognition that the consumer typically knows to inspect and wash fresh food, but may not do the same with packaged products.

Myers inspected Parsons' Produce in 1995 and found that it was selling packaged food products in an open-air market in violation of state and local laws. Of the six businesses operating under an agricultural commodity permit in the city, only Parsons' sold packaged foods. Myers filed her report with Danner and Hall, who visited Parsons' and confirmed Myers' finding. Hall voiced concerns to Danner and Haynes about Parsons', which led to a meeting with the state health department, which then formally notified Haynes that Parsons' was in violation of state health laws. The city's legal department notified Haynes that Parsons' was in violation of city and state health laws, and that the city ordinance could not be amended to allow Parsons' to continue to operate as it was without losing state funding for the program. At the same time, Hall sent Haynes a memorandum encouraging the enforcement action against Parsons'. Hasara took office in 1995 and was informed of the situation with Parsons'. Several other meetings took place over the course of 1995, but no action was taken against Parsons' to stop it from selling packaged food products. Parsons' closed for the season in the fall of 1995.

In 1996, Parsons' reopened and expanded into a second location at a local mall. Myers again inspected its facility. Myers found that Parsons' continued to sell packaged food products without the proper license, and reported this finding to Danner. Knowing that it was operating in violation of the permit, Myers refused to act on its application for a new agricultural commodity permit. Hall supported Myers' position and refused to approve the permit application. Danner, however, acting on the directions of her superiors, approved the permit and informed Myers that she did not need to take any further action regarding Parsons'. The defendants claim that they gave Myers a clear directive to have no further involvement with Parsons', but Myers disputes this factual contention.

Hasara, Danner and Haynes met with state health officials in May 1996 and discussed the Parsons' permit situation. Hasara believed Parsons' was not violating the law and voiced support for Parsons'. State health officials disagreed, but allowed that it was a local matter and said the state health department would not interfere. Hasara instructed Danner and Haynes to allow Parsons' to operate as it had before. Myers had no other involvement with the permit issue, but responded to two complaints—one in May, the other in July—regarding Parsons'. Parsons' complained to Haynes that Myers was harassing it. Haynes investigated, but found no evidence to support the complaint.

Later in May, the local newspaper published an article concerning Parsons' and the health inspections, reporting that the market continued to operate in violation of city and state health codes. On May 30, while inspecting a restaurant at the mall where Parsons' operated one of its markets, Myers and another health inspector met with an assistant manager of the mall. Myers asked the manager whether he had seen the newspaper article, to which he responded that he had. In response to the manager's questions, Myers said that Parsons' was in violation of its permit and the city had decided to take no action against it. The mall manager was concerned about the mall's potential liability for health dangers caused by one of its tenants, and Myers indicated that she thought landlords could be held liable for the actions of their tenants.

Jeff Parsons, the owner of Parsons' Produce, soon found out about Myers' conversation with the mall manager, and complained to the mayor's office. Hasara wanted to fire Myers for expressing views contradictory to the city's policy on the issue, but Danner, Haynes and the city personnel director felt that termination was unwarranted. Hall also objected to disciplinary action against Myers. Instead, Myers was charged with failing to obey a reasonable directive and a hearing was held on the charge, at which Danner presided. On June 21, 1996, Myers was suspended for five days. No other action was taken against her.

Myers filed a two-count complaint against Hasara and Danner, alleging deprivations of her First and Fourteenth Amendment rights. After discovery, the defendants moved for summary judgment on the grounds that Myers' comments to the mall manager did not involve a matter of public concern, the city's interest in effective health inspection administration outweighed Myers' First Amendment rights and, in any event, Danner and Hasara were entitled to qualified immunity. The district court, applying the test for public-employee speech established in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), agreed on all three grounds and granted the defendants summary judgment. This appeal followed.

II. Analysis

1 2 3 We review *de novo* a grant of summary judgment, *see Weicherding v. Riegel*, 160 F.3d 1139, 1142 (7th Cir.1998), as well as a district court's decision that a defendant is entitled to qualified immunity. *See Forman v. Richmond Police Dep't*, 104 F.3d 950, 956–57 (7th Cir.1997). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether a genuine issue of material fact exists, we construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A. Pickering *Balancing*

4 In her complaint, Myers alleged that she had a protected First Amendment right to make the comments she did to the mall manager regarding Parsons' permit situation and the city's policy of not enforcing the relevant ordinance. The Supreme Court has long held that a public employee maintains a First Amendment right to speak out on matters of public concern even though she works for the government. *See Pickering*, 391 U.S. at 568, 88 S.Ct. 1731; *see also Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). A public employee can be punished for exercising that right only if the facts of the case, as reasonably known to the employer, indicate that the employer's interest in promoting efficiency of public services outweighs the employee's interest in free speech. *See Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. Courts after *Pickering* have engaged in a two-part analysis to determine whether the "interests of the [employee], as a citizen, in commenting upon matters of public concern" outweighed the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

1. Matters of Public Concern

5 6 In *Hulbert v. Wilhelm*, 120 F.3d 648, 653 (7th Cir.1997), we re-stated the *Pickering* analysis as a three-part inquiry, although still addressing the core concern identified in *Pickering*. We held that the first part of *Pickering* sought to determine (1) whether the speech would be protected if uttered by a private citizen and (2) whether the speech was more than an unprotected "personal employee grievance." *Hulbert*, 120 F.3d at 653. If so, then we would consider the speech to meet the test for speech by a citizen on a matter of public concern. *See id.* A number of factors are relevant to this analysis including the content, form and context of the remarks, *see Connick*, 461 U.S. at 147–48, 103 S.Ct. 1684, and whether the remarks can fairly be characterized as relating to issues of "political, social, or other concern to the community." *Id.* at 146, 103 S.Ct. 1684.

The district court held that the subject of Myers' comments was not a matter of public concern. We disagree. It is important to good government that public employees be free to expose misdeeds and illegality in their departments.

Protecting such employees from unhappy government officials lies at the heart of the *Pickering* cases, and at the core of the First Amendment. For example, in *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1218 (7th Cir.1994), the plaintiff, an employee in the building inspector's office, told the county planning commission that required inspections were not being done and provided a list showing that half of the required inspections had not been performed. The commission took no action, but later fired her in part because of her complaints regarding the building inspections. We held that the activities about which the plaintiff complained "were the type that result in the misuse of public funds and trust. These were not employment disputes or criticisms of the way that only [plaintiff's] job was affected." *Id.* at 1219–20. As a matter of law, we found these comments to be about matters of public concern. *Id.* at 1220.

Myers' comments to the mall manager are analogous. The city had a duty to enforce both its own and the state's food-inspection laws. There is no doubt that the inspection laws were valid and routinely enforced and that Parsons' practice of carrying packaged food products violated its permit. For whatever reason, the mayor and department head had decided not to enforce the law against Parsons' despite the city's duty to do so. Food-inspection rules, even ones that do not threaten cataclysmic harm, serve to protect the public health from risks of contamination. Like the plaintiff in *Marshall*, Myers found it objectionable that her department would refuse to enforce the law. The content of her comments to the mall manager involved a matter of public concern.

7 Following *Hulbert*, we find that Myers' criticism of the city for turning a blind eye to a known permit violation and potential health risk would have been protected if uttered by a private citizen and was more than a personal employee grievance. In fact, it bore no relation to the *827 gripes about office policies, scheduling and personnel decisions like those at issue in *Connick,* where the Court held that such employee grievances were not matters of public concern. 461 U.S. at 148, 103 S.Ct. 1684. The district court, examining the "content" of Myers' remarks, found that because she focused on Parsons' licensing problem, she was concerned not with a public health hazard but with her own dispute with her supervisors. *Myers v. Hasara*, 51 F.Supp.2d 919, 926–27 (C.D.Ill.1999). We disagree. Whistleblowing does not need to be limited to systemic charges of corruption to qualify as a matter of public concern. A specific violation of a law that creates a risk to public health, safety or good governance likewise is a matter of public concern. Myers knew of one such violation and reported it to an obviously concerned party who she knew would take action on it. The fact that "her exact language is directed specifically at Parsons'," *Myers*, 51 F.Supp.2d at 927, made sense considering that she perceived it to be a public health risk.

8 Furthermore, a "personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern." *Marshall*, 32 F.3d at 1219. Myers' disgust or frustration about the city's decision to ignore a health-code violation does not mean that her complaint was not a public concern. While the speaker's motivation is relevant to the *Pickering* analysis, it is not necessarily dispositive, *see Gregorich v. Lund*, 54 F.3d 410, 415 (7th Cir.1995); *Colburn v. Trustees of Indiana Univ.*, 973 F.2d 581, 587 (7th Cir.1992), and does not transform Myers' remarks into matters of private concern in this case. We disagree with the district court that she spoke "more as a disgruntled employee" or that her remarks in some way were a personnel grievance. We hold that the speech for which Myers was disciplined related to a matter of public concern, precluding summary judgment for the defendants on this issue.

2. The City's Interest

9 The district court found that the city's interest in "promoting efficient and effective public service outweighed Plaintiff's right to express herself." *Myers*, 51 F.Supp.2d at 928. However, in doing so, the district court resolved disputed issues of material fact in the defendant's favor, thereby rendering summary judgment improper. To answer the second part of the *Pickering* test, we have identified seven factors to consider. *See Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir.1999); *Wright v. Illinois Dep't of Children & Fam. Servs.*, 40 F.3d 1492, 1502 (7th Cir.1994). Among those relevant to the summary judgment in this case are whether the speech created disharmony in the workplace and whether the employment relationship requires personal loyalty and confidence. *See id.* Both of these factors were influenced by the question of whether Myers had been given a clear directive not to discuss the issue further.

The district court disregarded this question rather than resolve it in Myers' favor. In the district court's opinion, the issue was irrelevant because Hasara reasonably believed that Myers had been given the order. We disagree. Myers was suspended for violating a superior's order, an offense that undoubtedly raises a legitimate governmental interest. However, the parties dispute whether Myers was given this order. If she was not, then her remarks to the mall manager were not in violation of a clear directive, and the governmental interest in having employees follow orders and accurately portray the agency's policies was not implicated. Therefore, this issue goes to the heart of Myers' complaint and should have been resolved in her favor for purposes of summary judgment.

10 The district court further found that Myers' actions created disharmony because city officials disagreed about how or whether she should be punished. *Myers,* 51 F.Supp.2d at 928. This analysis treats the "disharmony" factor in a *Pickering* claim in a way that could prevent plaintiffs from ever prevailing. The disharmony that undermines the government interest in efficient and effective service stems from the content of the speech itself, such as by undermining public confidence in the agency or contradicting the agency's public message. We would imagine that in most *Pickering* claims, government officials debated the proper punishment for the speaker. This cannot be the source of the relevant disruption or disharmony since it would weigh against every plaintiff. Just as disharmony was present when the superiors discussed Myers' punishment, it would have been absent had they not sought to punish her.

11 Another factor to consider in balancing the government's interest is whether the time, place or manner of the employee's speech disrupted the government's provision of services. *See Coady v. Steil,* 187 F.3d 727, 731 (7th Cir.1999); *Wright,* 40 F.3d at 1502. This analysis questions whether the employee could have aired her concerns at a better time or in a better way and created unnecessary confusion or turmoil by expressing herself in the way she did. *Cf. Khuans v. School Dist.* 110, 123 F.3d 1010, 1017 (7th Cir.1997) (holding that teacher's complaints disrupted daily routine of school); *Breuer v. Hart,* 909 F.2d 1035, 1040 (7th Cir.1990) (explaining that complaint was filed in an appropriate manner, even though it legitimately addressed a matter of public concern).

The district court applied this factor in the defendants' favor because it found that Myers expressed her concerns to a limited audience that could not change city policy but could render economic harm to Parsons'. However, the fact that she spoke to a limited audience was not particularly disruptive to the government. In fact, her actions seemed discreet, in that she could have chosen far more disruptive forums, such as writing a letter to the local newspaper or appearing at a city council meeting. By Myers' action, the mall management and Parsons' may have complained to the city about the permit problem, but this seems a very limited form of disruption. Also, the district court noted that the mall manager believed Myers' comments were motivated by frustration with the city. This latter conclusion merely speaks to Myers' intent and is irrelevant to whether Myers chose the appropriate time, place and manner for her remarks. Assuming that Myers chose this forum, rather than had it chosen for her by the mall manager, it seems to be the least disruptive forum she could have picked. In addition, there were several factual questions regarding the conversation Myers had with the mall manager that the district court resolved against Myers, rather than in her favor as required on a summary judgment motion.

B. Qualified Immunity

12 Finally, the district court found that Hasara and Danner were entitled to qualified immunity. A government official is entitled to immunity from suit when performing discretionary functions unless the district court determines that (1) the plaintiff alleged a constitutional injury, and (2) the legal standards applicable to the injury were clearly established at the time. *See Harlow v. Fitzgerald,* 457 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Rakovich v. Wade,* 850 F.2d 1180, 1210 (7th Cir.1988). The district court held that Myers failed to allege a constitutional injury and dismissed the suit on the basis of qualified immunity. Because we reverse the grant of summary judgment on the ground that Myers successfully raised a question of material fact regarding her First Amendment claim, we likewise reverse the court's finding that she failed to meet the burden of pleading a constitutional injury.

13 The district court further found that Hasara suspended Myers because she "had disobeyed a directive in violation of civil service rule 48(e)." In the district court's view, the constitutional standards regarding a government employer's right to discipline an employee for engaging in protected speech in disregard of a supervisor's direct order were not

clearly established in 1996. However, several cases in this Circuit prior to 1996 discussed in detail the balancing of interests between a government employer's right to require obedience, confidentiality and silence against an employee's First Amendment right to speak on matters of public concern. *See, e.g.,* *Conner v. Reinhard*, 847 F.2d 384, 390–91 (7th Cir.1988); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 406–07 (7th Cir.1984); *Hanneman v. Breier*, 528 F.2d 750, 754 (7th Cir.1976). For instance, *O'Brien* involved police department regulations that prohibited all public criticism of the department and required police officers to keep all department business confidential. 748 F.2d at 405. We held that *Pickering* demanded the department weigh the police officer's individual right to speak on matters of public concern against the department's valid right to enforce the challenged rules before disciplining an officer for violating those rules. *Id.* at 406–07. Other cases have similarly required *Pickering* analysis even though the stated reason for an employee's discipline was insubordination rather than the content of the employee's speech. *See generally* *Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194 (7th Cir.1996); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir.1995). It was, therefore, clear in June 1996 that government employees had a First Amendment right to speak on matters of public concern that must be weighed against the employer's right to punish insubordination. Hasara and Danner cannot claim not to have known that disciplining Myers under these circumstances would not implicate her right to free speech.

iII. Conclusion

We hold that as a matter of law, Myers' comments regarding the city's decision not to enforce its health-code permit regulations focused on matters of public concern, and that because questions of material fact remain, summary judgment was inappropriate. This decision does not decide the merits of the factual issues one way or the other, but leaves factual determinations to a jury or a bench trial. Finally, Hasara and Danner were not entitled to qualified immunity. We therefore reverse the district court's grant of summary judgment and remand the case for further proceedings.

EXHIBIT B

U. of I. chancellor resigns again after board rejects deal

By **Jodi S. Cohen**
Chicago Tribune

AUGUST 14, 2015, 7:01 AM

The day after learning that University of Illinois trustees intend to fire her, embattled Chancellor Phyllis Wise said Thursday night that she has tendered her resignation for a second time and has declined an administrative position offered to her.

In an email sent to the media, Wise criticized the board's decision to reject her first resignation — and a $400,000 payment that went with it — and opt instead to start dismissal proceedings, calling it a move "motivated more by politics than the interests of the University."

"This action was unprecedented, unwarranted, and completely contrary to the spirit of our negotiations last week," said Wise, who had been chancellor of the Urbana-Champaign campus since 2011. "I have no intention, however, of engaging the Board in a public debate that would ultimately harm the University and the many people who have devoted time and hard work to its critical mission. Accordingly, I have again tendered my resignation as Chancellor and will decline the administrative position as adviser to the President."

Wise did not say in her statement whether she intends to remain on the U. of I. faculty. University spokesman Thomas Hardy said Wise's statement will be reviewed "and the university will determine its appropriate course of action."

The first public comments from Wise, 70, came a week after she first announced her resignation Aug. 6, citing "external issues" that were distracting the university from its mission.

U. of I. President Timothy Killeen had supported the resignation deal, which had been negotiated by attorneys for the university and Wise, and included the $400,000 payment.

The day after Wise's resignation was announced, U. of I. released about 1,100 pages of emails that showed she and other campus administrators used personal email accounts, at times in an apparent attempt to circumvent state public records laws when discussing sensitive and controversial issues, a violation of university policy.

In her statement, Wise said it "is simply false" that she used a personal email account with "illegal intentions or personal motivations."

"I acted at all times in what I believed to be the best interests of the University," Wise wrote. "In fact, many of these same communications included campus counsel, Board members, and other campus leaders."

Killeen said discussions about Wise's resignation began early last week when she was presented with the findings of the investigation into her use of a personal email account. Killeen said he did not "directly" ask Wise to resign and that she "indicated interest or willingness" to do so.

Wise said Thursday that she "acceded to the Board's and the President's request" to resign and, "in return," the university agreed to provide $400,000 in compensation that she says she was entitled to under her original employment agreement signed in 2011.

Whether she is entitled to the compensation could be an issue that is ultimately decided by the courts if Wise decides to file a lawsuit. Wise said she is now "consulting with lawyers and considering options to protect my reputation."

Wise's original employment offer said she would receive a $500,000 retention bonus after "the full five years" in the job, or a prorated portion if she left the position sooner not by her choice but by action of the board.

Wise on Thursday called the $400,000 payment a "retention incentive that I earned on a yearly basis" and that it was "not a bonus nor a golden parachute." She also said university officials knew that she had been saying that she planned to donate her deferred compensation to the new College of Medicine that she had championed as chancellor.

Killeen and board Chair Edward McMillan said this week that the payment offered to Wise as part of the resignation deal was designed to be "consistent with the (original) employment agreement," but stopped short of saying the university was contractually bound to give it to her.

"In a decision apparently motivated more by politics than the interests of the University, the Board reneged on the promises in our negotiated agreement and initiated termination proceedings," Wise said.

The payment had been met with widespread criticism, including from Gov. Bruce Rauner, whose administration urged the trustees not to approve it.

After a 90-minute closed-door meeting Wednesday, the U. of I. board's executive committee voted against it. In doing so, it rejected her entire resignation offer and decided instead to begin termination proceedings.

Killeen said he was appointing Wise to the position of adviser on biomedical affairs, reporting to him, while the proceedings progressed. She was to continue to draw her salary of $549,069 and retain her tenured faculty appointment.

"These recent events have saddened me deeply," Wise concluded in her statement. "I had intended to finish my career at this University, overseeing the fulfillment of groundbreaking initiatives we had just begun. Instead, I find myself consulting with lawyers and considering options to protect my reputation in the face of the Board's position. I continue to wish the best for this great institution, its marvelous faculty, its committed staff, and its talented students."

jscohen@tribpub.com

Twitter @higherednews

EXHIBIT C

From: Ilesanmi Adesida [redacted]n>
Sent: Friday, July 25, 2014 12:33 AM
To: Joyce Tolliver
Cc: Phyllis Wise; Nick Burbules
Subject: Re: Steven Salaita

Nick, Joyce,

Sorry, I was behind on my emailing all day today! Thank you for your willingness to engage with us on this matter. I will be available for the phone conference at 8 PM.

Ade

On Thu, Jul 24, 2014 at 11:09 AM, Joyce Tolliver [redacted]> wrote:
Phone conference at 8pm tomorrow works fine for me.

On Thu, Jul 24, 2014 at 9:40 AM, Phyllis Wise [redacted]> wrote:
Are you talking about Friday evening or Saturday morning?

Sent from my iPad

On Jul 24, 2014, at 9:34 AM, Nick Burbules [redacted]> wrote:

> **I could do a phone conference from our hotel at the airport. We should be settled and dined by then.**
>
> **Nick**

> On Thu, Jul 24, 2014 at 9:31 AM, Phyllis Wise [redacted]> wrote:
> Shall we try for 8pm on Friday? I hate to ask you to extend your week this way. If you would like, we can do it at my home. I'll alert Dick so that he cleans up since I will be away until then. If I have any trouble getting back, I'll let you know as I drive and we can go to a Plan B.
>
> Sent from my iPad
>
> On Jul 24, 2014, at 9:28 AM, Nick Burbules [redacted]> wrote:
>
>> I will be on an airplane at that time, unfortunately.
>>
>> Nick
>
> On Thu, Jul 24, 2014 at 9:24 AM, Phyllis Wise [redacted]>
> wrote:

Ade just told me that he will be in the office on Saturday. Nick, do you leave by then. If not, we could meet anytime after 10am. I am in Chicago on Sunday so cannot meet then.

Sent from my iPad

On Jul 24, 2014, at 8:39 AM, Nick Burbules [redacted] wrote:

> Duh, how could I forget the retreat?!!
>
> Maybe a conference call would be best. I could make myself available next week.

> On Thu, Jul 24, 2014 at 8:36 AM, Phyllis Wise [redacted] wrote:
> I am in Chicago today and tomorrow and back on Friday evening. I think traffic out of Chicago could be a problem. But I can be pretty sure I could be back by 8pm. I believe Ade leaves for a break on Saturday. I'd be happy to meet in person or by phone.
>
> Sent from my iPad
>
> On Jul 24, 2014, at 8:26 AM, Joyce Tolliver [redacted] wrote:
>
> > Dear Ade and Phyllis,
> >
> > I appreciate your reaching out to us. I think Nick is right that it would be good to have a conversation about this. Just let me know when would work for you. Of course you are always welcome to give me a call directly [redacted].
> >
> > best
> > Joyce
>
> On Thu, Jul 24, 2014 at 8:10 AM, Nick Burbules [redacted] wrote:
> Thanks Ade, Phylis,
>
> I share your concerns. I would be happy to meet to discuss this, which would be better than doing it through email. I am available all day today and tomorrow, then leave for a week with the family.
>
> Nick

On Thu, Jul 24, 2014 at 7:13 AM, Phyllis Wise <[redacted]> wrote:

Joyce, Nick and Ade,

Let me add that the hateful, totally unprofessional and unacceptable Twitters have appeared mainly since July. This is after the decision to hire him and after his acceptance of our offer. It reveals a side of the person that I believe makes it difficult for him to contribute to the culture of respect, collegiality, collaboration that we hold so dear.

Phyllis

On Thursday, July 24, 2014 6:28 AM, Ilesanmi Adesida <[redacted]> wrote:

Nick, Joyce,

We have run into a buzz saw again! This is with respect with the case of one Steven Salaita who is coming this Fall to the Department of American Indian Studies. His case made the NG a few days ago and that essentially was when we became aware of his intense tweets and messages on Israel, Jews,and the Middle East! Over the last two days, the Chancellor has been deluged with protest messages from outraged alumni and the public! I did not know about him and the Chancellor did not know about him at all. We can discuss the intricacies of his case and the fact that his case has not made it to the BoT yet; that is coming up in September. He is coming to campus in August to take up his position on campus.

One thing that we would like to to do is to figure out how we prevent this sort of highly charged and negative blow back like we have had on Kilgore and now Salaita in the future. Salaita was recruited over two years ago and his offer letter was signed in September last year. I know that we are trying to develop something for background check for criminal issues but this now borders of free speech/hateful speech domain. What is acceptable and what are not acceptable, that is the question. We have to engage carefully with

the Deans but I want to begin to seek your wise counsel in this domain even before that. This is potentially a slippery territory!

Ade

--
Joyce Tolliver

--
Joyce Tolliver

EXHIBIT D

Message

From: [redacted]
Sent: 3/19/2014 6:34:47 AM
To: Phyllis Wise [redacted]
Subject: Re: meeting with Chris Kennedy

Rick is traveling today so I read email to him. I will print out a copy and not forward to him. We appreciate all that you are doing for the COM. Great accomplishments take perseverance and I can tell that is one of your many strengths.

Take care
[redacted]
Sent from my iPad

On Mar 19, 2014, at 12:36 AM, Phyllis Wise [redacted]m> wrote:
Rick,

I may be getting paranoid, but since someone has FOIed all of the emails that Laura Frerichs has exchanged between herself and the internal and external advisory board members with regards to the COM, I am using my personal email and sending it to [redacted] personal email. Please see the email below that I just sent to Robin Kaler's personal email with instructions as to how to get it to everyone else. I know that you were [redacted] today, so I wanted to get you this information as quickly as I could.

One more thing that I forgot to put in the email below is that Chris wants to talk with Bob and me about the timing of when I would present to the Board committee. This would not be good, but I need to figure out what whether we can begin other steps (e.g. our faculty senate) before I get Board approval.

Best,
Phyllis

On Tuesday, March 18, 2014 11:30 PM, Phyllis Wise <[redacted] wrote:
Dear Robin,

Please print this email out and ask Phyllis to hand carry it to all of the people below. If you want to try to put this in BOX, that is fine with me. Someone, who is out to get Laura, has asked for all email exchanges between her and all of the internal and external advisory board members. So I want us to be really careful.

I will try to call Jim and Rick since I know they want to know quickly how things went. I have already spoken with Peter and I am at a meeting with Greg tomorrow and can give him a heads up.

Peter Fox
Jim Leonard
Greg Lykins
Chris Meyer
Rick Stephens
Jennifer Woodard

Laura Frerichs

Ade
Mike DeLorenzo
Pradeep Khanna
Normand Paquin
Dan Peterson
Peter Schiffer

I met with Chris Kennedy today (March 18, 2014). I went through all of the points that you all helped to prepare. I showed him the AAU data and the bubble diagram showing how this would impact the state, Chicago, central Illinois, Urbana-Champaign, and our campus. I told him about the BCD study and about Tripp Umbach. I gave him Paul's contact information and offered to make an e-introduction. He said he would call himself. I did not explain the 501C3 concept because we did not have time.

He started out saying: "I want to be super supportive". But the rest of the conversation was a litany of why we won't be able to get this done.

1. He doesn't think we have a real strategic plan and until we do, we cannot figure out how this fits into our long term plans. He was not complimentary of our plan, said that we had not gotten Board approval before sharing it with others. I told him that I was unaware that we (the campuses) were expected to get Board approval of our plans, and had understood that only the overall university strategic plan required Board approval. I told him that Information and Technology, Health and Wellness, and Economic Development were three of the six areas, which emerged during our discussions with

2. I did not tell him which Board members I had spoken with, but I suspect he knows. He said that talking with individual trustees was the worst kind of governance. I pointed out that if I spoke with more than two at a time, it would fall under the Open Meetings Act requirement.

3. He said that 80% of the population was in Chicagoland and that if they did not like this plan, they would kill it. He said it was a shame that Naomi and Mike Frerichs could not be helpful. He said that Rodney Davis is being targeted by the Dems. He said he was very helpful with the DMDI grant.

4. He said that Bob and he toured several FQHC's in Chicago. Each one has a community board - that if they did not like the idea, they would go to Denny Davis and he would feel obligated to bring in other legislators to kill it.

5. He urged me to talk with Mike Thomson (http://thomsonweir.com/firm-bios/). He said that he would be able to help with Cullerton. I did not tell him that we already had arranged a meeting. He said that Mike had fought the university previously because AT&T was one of his clients and they were agains UC2B.

6. He said that Mayor Emmanuel will be against it and wants his own strong College of Engineering in Chicago and does not want to depend upon Urbana-Champaign. He said that if Rauner gets elected the two will team up and get this done - if not at UIC at Northwestern.

7. He said that if we get a COM and compete for NIH $, that UIC will not get as much and that they will try to kill it. He said we have to get Paula, Lon and Dimitri on our side. He said "buy them out".

8. He said he would talk with Steve Koch.

9. He said that I should talk with Larry Schook since he has day-to-day contact with people in Chicago. I have heard that Larry is actively campaigning against our COM.

10 He is worried that if we create an independent COM that Peoria and Rockford will want their own. I told him that Peoria was relieved that we weren't going to make them align with us and that we would still teach the M1 year.

At the end of the meeting I re-emphasized that this was key to the future vibrancy of the Illinois economy, Chicago economy and ours. If we could not do this it would hurt all of the University of Illinois and certainly our campus. He said but there are 50 voices.

Phyllis

EXHIBIT E

Message

From: Phyllis Wise [redacted]
Sent: 4/25/2014 2:30:14 PM
To: Meisinger Dick [redacted]
Subject: Better not to correspond on my IL email

Dick,

I have been FOIAed on all correspondence relative to the COM. Please don't ask anything, as innocent as it may seem on that email from your Illinois email.

I left Tim a vm.

Phyllis

Sent from my iPad

EXHIBIT F

Widespread use of private email revealed a day after Wise resigns

Sat, 08/08/2015 - 7:00am | Julie Wurth (/author/julie-wurth) and Johnathan Hettinger (/author/johnathan-hettinger)

University of Illinois Chancellor Phyllis Wise conducted extensive university business on a private email account and failed to provide key documents in response to Freedom of Information Act requests, documents released by the university show.

The UI disclosed Friday that an ethics investigation revealed that certain administrative officials used personal email to conduct UI business and failed to turn over those documents as requested, a violation of university policy.

The findings came one day after Wise announced that she would step down as chancellor next week.

The more than 1,100 personal emails released by the university included many from Wise, but a university spokesman declined to say whether the ethics investigation led to her departure.

The emails had been the subject of 10 separate FOIA requests by eight separate individuals. The topics covered in the requests were Steven Salaita, James Kilgore and the Carle Illinois College of Medicine.

In several emails, Wise indicated she was trying deliberately to avoid FOIA disclosure by using her personal account — even though the UI instructs employees that personal emails about university business have to be examined for FOIA requests under university policy.

After the university learned about the personal emails, an official ethics inquiry was launched in late April by the University Counsel, University Ethics and Compliance and the external legal firm Jones Day, which was used to investigate inflated student profile data at the College of Law. The university paid Jones Day about $175,000 for the inquiry, which covered 2014 and 2015.

"A desire to maintain confidentiality on certain sensitive University-related topics was one reason personal email accounts were used to communicate about these topics," the UI's release said. "Some emails suggested that individuals were encouraged to use personal email accounts for communicating on such topics."

Wise's 'shocking' behavior

In a March 19, 2014, email about the proposed College of Medicine, Wise wrote: "I may be getting paranoid, but since someone has FOIed all of the emails that (research park director) Laura Frerichs has exchanged between herself and the internal and external advisory board members with regards to the COM, I am using my personal email and sending it to (name redacted) personal email."

In a September 2014 email regarding the Steven Salaita lawsuit, Wise wrote that campus spokeswoman Robin Kaler "has warned me and others not to use email since we are now in litigation phase. We are doing virtually nothing over our Illinois email addresses. I am even being careful with this email address and deleting after sending."

"It is shocking that Chancellor Wise was not only using her private email to avoid transparency, but deleting emails subject to litigation," said Maria LaHood of the Center for Constitutional Rights, which is representing Salaita in his federal lawsuit against the UI.

A Champaign County judge recently ordered the university to turn over thousands of documents on the case to Salaita. Besides Wise, the documents included emails from personal accounts held by Provost Ilesanmi Adesida and Board of Trustees Chairman Edward McMillan, as well as other administrators and professors.

But UI spokesman Thomas Hardy declined to say which individuals had been targeted in the FOIA requests and failed to turn over documents.

Hardy said administrators conducted other university business on their personal accounts as well, but the emails released Friday were the ones relevant to the FOIA requests. He also said some of the emails in the documents released have been made public through previous FOIA requests, as they'd been forwarded to other accounts.

What led to this

The problem came to light when officials came across an email for a FOIA request that referred to someone's "other email" account, Hardy said.

"We were told by somebody with information that it appeared that some individuals may be using personal emails and not making them available for consideration and FOIA responses," he said.

When investigators began their work, they found that "reliance on personal emails was becoming active or more prevalent" in January and February 2014 regarding plans for the new College of Medicine, so they included both 2014 and 2015 in their inquiry, Hardy said.

At that time, emails show, Wise was contacting business leaders and politicians to build support for the proposal, which was not yet public.

Employees are not prohibited from using personal emails to discuss university business, Kaler said. But a power-point used in FOIA training instructs them that "using a non-university email account or phone for university business doesn't necessarily protect that information from FOIA."

"It doesn't matter where the documents are. They can be electronic on your personal email, they can be in the trunk of your car. You have to produce them. That's the rule," she said.

In another email exchange with Kaler, Wise asked whether the UI's "box," or file-sharing server, would protect documents from FOIA disclosure. Kaler said it would not, though she noted that it "does reduce the number of electronic copies floating around campus." She also said the documents in question were protected from FOIA because they were drafts, but at some point the final versions would be subject to disclosure.

"Obviously, it probably would be best if people could limit their emails as they relate to university matters to their university email," Hardy said. "What people have to understand is that if we get a FOIA request on a particular topic or issue," the university has to be sure that it is providing all documents responsive to that request, whether on a personal or UI email account.

The Illinois Freedom of Information Act defines public records, including electronic communications, as all documents "pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body."

It does not address whether that includes personal emails, and case law is unclear on the issue.

'Transparency and trust'

Hardy said The News-Gazette's lawsuit in Madigan v. City of Champaign could apply, but it does not directly answer whether personal emails by UI employees are subject to FOIA. In that lawsuit, the city was forced to release text messages by council members during council meetings because the council was acting as a public body when the messages were sent.

However, Esther Seitz, a media law attorney at Donald M. Craven P.C., which represented The News-Gazette in that case, said the ruling made clear that any correspondence by a public official about public business is a public record.

Hardy said he doesn't know whether there will be any more resignations as a result of the inquiry.

"That would be something that would be determined by the president and Board of Trustees," he said.

Wise, who is traveling, could not be reached for comment Thursday or Friday. In her resignation announcement, she said that "external issues" over the last 12 months had become a distraction from her work as chancellor.

"She was aware that this inquiry was under way, because it involved her emails, and she cooperated with the inquiry," Hardy said. "Was this one of the issues she referred to? I don't know."

As a response to the inquiry, the university revised its FOIA policy to ensure more transparency in the future, officials said. While UI policy already tells employees that personal email accounts are subject to FOIA, the FOIA officer added clearer, more specific language on the issue.

The UI ethics office also held in-person training for 30 senior officials attending the May 7 Board of Trustees meeting, and will require senior officials to confirm compliance annually. Reminders and group training sessions will also become more available.

"Today, we have released documents to fulfill any incomplete FOIA requests," President Timothy Killeen said in a statement. "I am fully committed to a strong culture of transparency and trust, and I expect all U of I employees will be as well."

'A little embarrassing'

Professor Nicholas Burbules, whose personal emails to Wise about the Salaita case were included in the batch released Friday, said it's "a little embarrassing" that communications he considered personal were being made public, but "I stand by everything that I said."

Burbules said he supports the open records law, but says the situation raises larger questions about what constitutes university business.

"I fully support transparency and the need for public deliberations about public policy issues at a public university," he said. "But there's clearly a line, and I think it's a blurry line, between the conduct of university business and personal communication from Person A to Person B that is about a university matter but which is an expression of an individual opinion or a question or a half-baked thought that is a conversation. It's about a university matter but it doesn't seem to me that that is the conduct of university business."

He fears a "chilling effect" on communications between faculty members and administrators.

"I think people will become less willing to exchange frank, honest opinions ... if they're worrying that someday it's going to show up in the paper or on some blog site," he said, noting that it could push communication "even further into private channels that are no longer FOIA'ble. And that's not good either."