it looks like we kicked the cable on the way into the uh the studio today I don't know uh so we're sorry about that but uh

0:05

welcome again to the ethics fundamental series uh my name is Patrick Shepard and I'm pleased to be joined today by Cheryl

0:10

Kane piaseki welcome Cheryl I'm very glad to be here Patrick and uh we'll repeat the other one administrative announcement and uh

0:17

uh the the one administrative announcement that we'd like to share with you today is that honor about September 8th uh you will receive a

0:23

survey of Ethics officials and we'd like to encourage everyone who receives that to take that opportunity to share with

0:29

us the uh your opinion of the services that you uh you use from OGE and to give

0:35

us some ideas about how we can improve and what we're doing well we do act upon your feedback and we can only do that if

0:42

you share it with us so we'd encourage everyone who receives that uh too please take the a few minutes to complete then absolutely excellent so what are we

0:49

going to be discussing Today show um we're going to be discussing some part G of the standards of conduct which deals

0:54

with the misuse of position and there are various incendiary ways that that one can misuse their position

1:00

um and so it's probably one of the longest of the of the subparts in the standards of conduct um I think it's an interesting subpart

1:06

from the standpoint that it's um it's implementing um specifically articulated general

1:13

principles um that you find in in the 14 principles of conduct as well as articulated in one

1:19

part 101 of the standards of conduct but I think one of the other aspects to it that's interesting is these tend to be I

1:26

think some of the most implicated of this of the standards of conduct when it comes to employees being disciplined or

1:33

called out for misconduct and I think it's because these are the most obvious and observable of the types of

1:40

misconduct and employees I think also literally every federal employee is in a position to possibly contravene these

1:46

Provisions right anyone who has an official position has the ability to misuse it for personal purposes for

1:51

other sort of outside purposes and particular when you're talking about

1:57

these are things that we all have access to that we all are subject to and so yeah it's it's it's a greater likelihood

2:04

and it's just simply a more observable way for employees to engage in misconduct but I think one of the things

2:09

that I want to emphasize today is these Provisions may seem on their face to be

2:15

obvious but they can actually be quite tricky because there is a certain

2:21

element of subjectivity that goes into determining when is a use misuse that's

2:29

right and I think you know when you look at the relationship between the 14 principles uh those things seem to be

2:35

very straightforward but when we get to the particulars of drawing the line for the rule it is a little more uh a little

2:41

more challenging it is and and one of the things that we're going to be covering today as we go through each of

2:47

the various provisions of misuse of position are some of the legal advisors that OG has issued over the past several

2:52

years and we made those available to you in a single document on the max.gov site along with the slide deck it's there are

2:59

hyperlinks to each of the of the advisories that I'm going to be making reference to today but I think OG has

3:05

attempted to do in many of those advisories is to basically help articulate sort of the subtleties and

3:12

some of the nuances that go into making determinations about whether or not someone has misused their title for

3:18

example um so we're going to be covering you know in some part those different legal

3:23

advisories to give you a flavor for where OGE is trying to build some degree of flexibility into what might otherwise

3:29

appear to be very cut and dried or very black and white standards of conduct excellent okay so when let's get into

3:35

the slide deck we got a lot of territory to cover today because it's one of the longest one of the longest Provisions in the

**Section 2635 702**

3:41

standards of conduct so if we go down to the next slide we can do that there we go okay

3:50

um we're going to begin at the beginning because that's the best place to begin so what I'd like everybody to do is um

3:56

to get into some party of the standards of conduct and to look at five CFR section 2635 702 because I want us to

4:04

read that beginning paragraph because it's going to kind of set the

4:09

tone for the presentation today

4:15

and if we look at 702 it talks about use a public office for private gain so clearly it's talking

4:22

about this we all know this is one of the central core principles of ethical conduct and 702 is is an implementing

4:29

provision for that but let's read this click quickly it says and a flu shot uses public office for his own private

4:35

gain for the endorsement of any product service or Enterprise or for the private game of friends relatives or persons

4:40

with whom the employees Affiliated in a non-governmental capacity including non-profit organizations of which the

4:46

employees and officer remember persons with whom the employee has or seeks employment or business relations so that's kind of spelling out kind of what

4:52

you're going to find throughout the rest of subparchy or these specific illuminations of when you could use your

4:58

public office for private games I think of that as kind of the expanded principle it is right we have the principal don't use public office for

5:04

private gain and then we explicate what we mean by private gain exactly and then in the next but the next sentence I

5:10

think is very telling and I think people should not overlook this the specific prohibition set forth in paragraphs a

5:16

through D and we're going to go through each of those so shortly of this section apply this general standard but

5:22

are not intended to be exclusive or to limit the application of this section

5:28

what does that mean to you Patrick so I think what this is saying is that the principle is primary and while we have

5:36

some specific guidance on applying the principle in specific circumstances

5:42

the fact that we have not provided specific guidance on every possible application of the principle does not

5:49

undermine the scope of the principle or the applicability of the principle in all cases exactly and I think even sort

5:56

of in addition to that is even where we have tried to create some sort of an

6:01

illumination of what we think could be circumstances if you have a situation that does not

6:07

necessarily squarely fall within the four corners of that does not mean that you may not still have a situation where

6:14

the totality of the circumstances would indicate that the individual might be using their public office for private

6:20

gain so this is one of the reasons why on this slide I've given you 702 but I've

6:25

also pointed you back to the general principle which is at 101 B7

6:31

um and if we can have the next slide

**Recent MSPB Cases**

6:36

and this is I want I want to talk a little bit about this one case and this is in the recent mspb cases that we is

6:44

the first document in that list of documents we gave you in that one pager that I've given you for for resource materials and this is a fairly

6:51

relatively recent case it was adjudicated in March of 2014. um and here there was an SES official

6:57

who was actually removed from her position as the Director of an education activity at DOD because she was she was

7:05

charged with using her misusing her government position for the private gain

7:10

of her son's fiancee as the Director of the education

7:15

activity she had basically tried to um influence shall we say the decisions

7:22

of the Director of Human Resources who who along with their her staff was

7:28

obviously doing the the original vetting of all the people candidates who were applying

7:33

for the position that this SES official son's fiance was applying for um and the reason I want to raise this

7:40

is because the charge that was brought in this case was misuse of position for private gain

7:48

so it was the invocation of the general principle of misusing your government service for private gain and what the

7:55

administrative judge said that was that the agency was required to establish that the appellant had misused her

8:03

government position and that that misuse actually resulted in a private gain

8:09

and they were able to establish that she had in effect tried to use her influence

8:14

as director to influence the outcome and it turned out that her son's fiance actually was awarded the position was

8:21

hired for for the position so my point here is that

8:27

the agency did not have to look for a more explicit provision in subpart G to

8:33

bring a charge of misuse of public office for private gain they merely invoked public office for private gain

8:40

and were able to establish that a private gain had actually been um then uh provided or resulted from

8:47

from her actions it's interesting too that in this case the administrative judge also found that it was axiomatic

8:53

that the prohibition in this case includes the private gain of others

8:58

right connected to the employee and not just simply to the employee him or herself right so

9:04

um again to reinforce that that you can you can rely on the principle you don't have to necessarily dig into the weeds

9:10

if you have a situation where you think there is a misuse a public office for private gain yeah and I think that's an

9:16

important Point overall that uh you know the standard of conduct help us to implement the 14 principles of public

9:22

service right provide guidance on specific instances in which they might be implicated but they don't supplant

9:28

the need to continue to abide by those principles exactly exactly so if I could have the next slide

**Section 702A**

9:35

okay so now we're going to jump into each of the separate Provisions under 702 and the first one is it's 702a so if

9:42

everybody wants to find 702a now one thing you'll notice in in the

9:48

reg itself at 702a the title of this section is called inducement or coercion

9:53

of benefits and I think that language is a little heavy-handed

9:59

um I don't know about you Patrick um and in the provision it says in pollution out user permit the use of his

10:05

government position or title or any Authority associated with this public office in a manner that is intended to coerce

10:11

or induce another person including a subordinate to provide any benefit Financial or otherwise to himself or to

10:18

friends relatives or persons with whom the employee is Affiliated in a non-governmental capacity now if you'll notice the title to my

10:24

slide is not inducement of cohere or coercion of benefits what do I what is what's my title Patrick asking for

10:30

favors or seeking benefits yes and I I would I would submit that I think mine is a better description of what this

10:37

provision is trying to get at um because I think that when we think about

10:43

um an employee using their position in a way that would

10:48

um seek a benefit for themselves or for somebody else from a non-federal source

10:54

the very nature of the relationship between the government employee and the non-federal entity may be such that

11:01

coercion is just implied right so I don't think you have to have these egregious acts of coercion or inducement

11:08

of you know somebody strong-arming someone in order to be able to invoke 702a

11:13

so let's look at a couple of the questions that I came up with so we can sort of fare it out a little bit like you know how 702a might be implicated in

11:21

more subtle types of activities other than you know you know as a ham you know uh strong-arming someone so our first

11:28

question here is so would a government loan officer would we have any problems with a government loan officer asking

11:34

people whose loincy services to endorse him on LinkedIn what do you think about that Patrick I don't know this gives me

11:40

a little bit of pause okay because of the relationship between the loan officer and uh and the persons he's

11:47

requesting this action from is one of authority and it suggests the possibility that that might be abusive

11:54

in nature even if it's uh not intended that way that the person receiving the request might feel uh compelled or at

12:02

least strongly encouraged to comply with the wishes of this person exactly and I think your instincts are right on on on

12:07

the money and and this is exactly the kind of thing that I think we have to council employees about is whenever you

12:15

are in possession of a set of authorities over you know non-federal sources and you have the ability to

12:22

confer benefits or withhold benefits or somehow to affect material effects you know the lives of and livelihoods of

12:28

folks outside of government that what what may otherwise appear to you to be a

12:34

a benign sort of maybe even almost sort of a customary sort of thing that people

12:39

want feedback about how they're doing and if they're doing well they'd like to be able to to know that people are are

12:45

are in a position to be able to comment on the good services that they're providing but we've got some different

12:51

elements here that I don't think this isn't sort of typical of um send a letter to the person's supervisor saying what a good job they

12:58

did um here where the person is at first of all asking right for for the for the uh

13:04

for the endorsement and doing so in a public space dude so in in a public space and doing so

13:10

through a vehicle that I mean would also require something of the individual as well I don't think everybody's on

13:15

LinkedIn or is necessarily a participant in LinkedIn and so the vehicle through which it would be done and and the

13:22

nature of the relationship between the government employee and the people that this employee would be asking this favor

13:27

of I think suggests that this would probably not be an appropriate thing to do in situations like this I always like

13:34

to ask myself how would I feel as the recipient of this request exactly um because the intention of the employee

13:40

here is is probably quite Anodyne you know there isn't an intent to to you

13:45

know cause a fence or a compulsion um but the the recipient of that request

13:50

may very well feel that and I think this is the kind of relationship where regardless of how uh how gently the

13:58

request was made I might be understood to be sort of compulsory exactly exactly

14:06

exactly variation on theme um so a Department of Commerce employee meets an executive of a car

14:12

manufacturing company at a conference you know government employees meet people at conferences all the time so

14:17

now he would like to call this executive to ask for information and advice about the availability and advisability of one

14:24

of the company's new products which he is considering purchasing okay what do you think about this

14:30

I don't know this this one doesn't strike me it quite is uh quite as clearly as the last example uh you know

14:36

there's some factors in here uh that maybe muddy the analysis but you know we have this concern that they have special access to information in people by

14:44

virtue of uh His official position that Commerce employees position and and it seems that you know this information

14:50

these relationships are being put to work uh for a private interest namely the employees and I think the thing that

14:57

a couple of points here that that occur to me as well are is

15:03

um again it's coming from the perspective of what is that executive of that car manufacturing company going to

15:08

think or feel if he has casually met a federal employee who works for a department that

15:15

you know may or may not be in a position to affect him in the content of his business

15:21

um but having perhaps briefly met this individual this individual now is presuming a level of familiarity right

15:28

number one um under the guise of this official Authority that he has because it's

15:34

through that mechanism that he met this this this executive right

15:39

um and so under the color of that Authority is now presuming sort of a level of familiarity and is now asking

15:46

for information that this executive may or may not typically give out to anybody right and I think there's there's a

15:52

muddying here it would not be clear to me as the executive receiving this request for information uh from whom the

15:58

request is coming right this is being brought by this employee on behalf of the federal government or is it being

16:03

brought by the employee on his or her own behalf and my inclination to cooperate or to provide information

16:10

might be very different in those two cases um and to the extent the employee might be deliberately or even unknowingly

16:17

posing that dilemma yeah we might have a problem right and and if the if it seems

16:22

to me that one of the one of the difficulties we run into here are the potential problem we run into here is is

16:28

there some sort of presumption of tit for Tad then I mean is is the executive then going to be under the impression

16:34

well I offered information and was free with information to this employee

16:40

um about something that I don't want to say was proprietary and maybe not necessarily but that you know I did this

16:46

individual a favor by giving them information that they requested you know can I expect the same from them in a

16:53

circumstance where I want information right that maybe isn't necessarily something that the Department of Commerce would necessarily give out

16:58

routinely so you you create this I think you create a reciprocal kind of a

17:04

confusion I think it's confusion about it you know about whose interests and perspectives or do we need to be

17:10

considerative so the so the bottom line here for me and and that I'd like you all to sort of just really think about

17:16

is um any sort of circumstance where and employee is asking a favor of or is

17:23

seeking some sort of benefit for themselves personally and they're asking that favor or seeking that benefit under

17:30

the color of their official Authority even if ultimately the benefit or the

17:36

favor they're seeking would be for them to use for themselves personally I don't think it has to be explicitly

17:42

coercive or some real explicit sense of inducing a favor I think the mere

17:48

requesting a favor or seeking a benefit under color of authority is potentially

17:53

a misusable it's potentially exactly exactly okay so let's move on to the next

**Section 702C**

18:00

oh so if we look at it so that's 702 a

18:06

um now if we move on to 702 B 702 B um deals with a couple of different use

18:12

of title position and agency specifically uh Provisions

18:17

um the title of of this paragraph is appearance of governmental sanction and

18:23

so I think what we're looking at here under this paragraph are circumstances where when an employee is engaging in

18:29

activities in a personal capacity making sure that as you said that the mud that the waters don't get muddied right so

18:36

we're looking at situations where somebody is is engaged in an outside activity or has an outside business or

18:42

is doing something in their personal capacity they effectively have two uh

18:47

statuses they have an official government status and they have a private status and it's a bad matter of

18:53

not mixing up the two hats and keeping the two hats right we don't want to we don't want anyone to be confused about

18:58

when the government is speaking and when the employee is personally speaking and I think it's something that we need to

19:03

explain better to employees and we're going to come up here to an as in a sample that are an example that's going to talk about government scientists and

19:10

I know personally from some conversations that I've had that scientists in particular sometimes this

19:15

isn't this is an area that I think just requires better explanation on our part and that is this notion that you have a

19:22

different status that you have this official capacity status

19:27

which is not the same thing as a professional status its official capacity means when you're doing

19:33

something in your official capacity you're speaking as on behalf of the United States government you're speaking

19:39

as the United States government right as distinguishable from a non-official or a personal capacity activity that may very

19:46

well in some respects be related professionally to what you do for the government but it's not on behalf of the

19:52

government but it's not on behalf of the government and you're not allowed to presume to speak on behalf of the

19:57

government absent right approval to speak on behalf of the government right so that's really what this section is

20:04

trying to get at so if we look at the first I want to take this like two different things that get discussed in

20:09

in this paragraph and I want to take each separately the first is dealing with use of title or any Authority

20:16

associated with his public office in a manner that could reasonably be construed to imply that his agency or

20:21

the government sanctions or endorses his personal activities or those of another

20:26

and then it explicitly references the teaching speaking and writing in a personal capacity uh Provisions which

20:33

are separate Provisions which talk about when you may or may make reference to your title and position okay so we're

20:39

going to stop there because there's another a whole another set of stuff that gets dealt with in the second half and we're going to get to that and I

20:44

know that's of interest to a lot of people the letters are recommendation piece but we want to stop right now and just talk a little bit about use of

20:49

title position and agency and 702b and 807 B1 and B2

20:55

now OGE has issued a couple of legal advisories that we've made reference to and I want to talk a little bit about

21:01

those before we get to our questions in OGE 10x1 what OG has attempted to do there is to

21:09

clarify um the provisions in 807 B1 and B2 that

21:15

talk explicitly about when you may make reference to your title when you're teaching speaking and writing and 10x1

21:21

acknowledges Patrick that there are those two sort of distinct pieces in 807

21:27

that say in the one instance that if you're going to be teaching speaking or

21:32

writing you can make reference to your position as long as it's only one of several biographical details okay so

21:39

there's that and then the second one deals with if you're being published in a perfect in a professional Journal right that as long as you have a a

21:47

disclaimer a prominent disclaimer saying that the views represented do not necessarily reflect those of the United

21:54

States government and in 10x1 what we're basically saying is yeah those are fairly bright line

22:00

rules but for example with respect to the first one uh where you're giving it as

22:07

one of several biographical details 10x1 is saying okay OG hasn't created any

22:12

brightline numbers right how many details you have to include exactly so you so and we're not planning to do that

22:19

and we have no intention of doing that um and we recognize that there may be circumstances where editorial decisions

22:24

are made right outside outside control exactly um and so we don't want to be

22:30

punishing employees who are making an honest effort to comply with that right so in the in that circumstance we've

22:37

said you need to look at the totality of the circumstances and we need to make sure that we're taking in context we're

22:42

taking in a whole lot of other considerations and again this is a balancing act we're not uh trying to prevent employees from being able to

22:48

share their you know sort of professional qualifications uh we're not trying to require people to ignore their

22:56

service to the government when they're demonstrating their qualifications but where we are trying to make sure that uh

23:02

whatever activity they're engaging in doesn't appear to be coming from the United States government exactly and so

23:07

what 10x1 is trying to say is that's the reason why we we need to be looking at

23:13

context context is everything so we want to look at what the actual language is we want to look at the circumstances under which the title is being used in

23:21

the manner in which the title is being used before necessarily come arriving at the conclusion that a particular manner

23:27

in which a title was used is necessarily A misuse of position or a misuse of title because it doesn't explicitly fall

23:34

within the parameters of 807 B1 or B2 so

23:39

I would advise you to take a look at 10x1 and then we subsequent to that we issued

23:45

ogela1408 now whereas 10x1 is really dealing with the teaching speaking writing Provisions 1408 is trying to

23:51

take on the bigger picture of there are a lot of other circumstances where you might regret like for example Patrick when might you outside of teaching

23:57

speaking writing make reference to your title all right other kinds of outside employment

24:04

outside employment that's maybe not necessarily directly related to your duties but where your duties are maybe a

24:12

part of your qualification to hold that outside role um you know that's a place where you might you might find reference made to

24:19

your your employer the US government yeah and I think that what 1408 addresses itself to are exactly those

24:25

kinds of things where you're involved with like a professional organization um and how are you identified on their

24:32

website um instances like that and what and what 14

24:37

um 08 tries to do is to basically lay out some factors that you should consider

24:43

um that would either increase the likelihood uh that a reference could reasonably be construed as implying a

24:49

government sanction or endorsement and if you go to the next slide Patrick um this is kind of the the laundry list

24:56

of what we've given and these all make pretty pretty good sense don't they yeah I think these make a lot of sense and

25:02

you know I think what we're trying to uh prevent here is you know this confusion

25:08

about whether say you're serving on a profession in a professional organization if it looks like you are serving officially when you're in fact

25:14

not those are the kinds of places that we are concerned right hence the Nexus uh in the first standard uh and then the

25:21

relatedness standards yeah so we want to we want to be looking at you know the way the the the nature of the

25:28

organization and how closely is are its activities tied to like what the employee actually does for the government so that there could be a

25:33

confusion right um I think we we have particular sensitivities about if ever an

25:38

employee's title or authority is used to actually promote or market right um the activities or the positions or

25:46

the products or Services of an organization so there we might want to take a little bit more care absolutely

25:51

you know for the the the the mere use of your title or position in furtherance of

25:57

a private uh commercial interest uh satisfy so strongly the private game

26:04

portion of our analysis that but that we have to be extremely careful again and if you so if

26:10

any any indication that that this employee's official position was in any

26:17

way being associated with and therefore could be confused with supporting that type of an activity again I think we're

26:24

much more sensitive when it comes to those types of activities as opposed to people's customary I mean it's customary

26:31

for people to be identified by the work that they do you know and I think what we're trying to recognize that and recognize that as a customary practice

26:37

that federal employees should not have to disavow their jobs as federal employees in order to participate in

26:44

outside organizations again we're asking about how that the title of the position is being used right and to what end

26:51

right uh so if in if we had an employee who was engaged in some sort of outside Consulting activity and they said you

26:58

know this employees provided services to company X company y company Z agency a

27:03

agency C uh and they're highly qualified to provide the services that we provide

27:11

we're talking about the qualification of the individual right if we identify them only by their current government title

27:16

it appears that we're indeed using the public office for private gain exactly so let's move on to

27:23

a couple we have a couple of examples here I think to help sort of get us into and illustrate kind of the what we're

27:28

talking about here so the first one is and this is a sticky one whether government scientists could use their

27:33

titles and their agency names in slideshows or other presentations at professional events where they attend in

27:39

a personal capacity then I think this is a good question and I you know I've seen this asked a lot and I think you know

27:44

one of the concerns uh some reasons that employees want to do this is uh for

27:50

contact purposes you know if you'd like to get in touch with me if you'd like to work together or if you like to provide you know information uh they'd like to

27:57

be contacted in their official capacity um but it there are risks here right um

28:02

because there there is a danger that the recipients of of this activity or the recipients of the communications they're

28:09

making uh could perceive that as implying that those Communications were being made on behalf of the US

28:15

government right and I think it's particularly tricky when you know when professional organizations may very well

28:21

be very interested in the research that the individual is doing on behalf of the United States government I mean I think

28:26

it's in those circumstances where this is where you know agencies I think are are on the spot to sort of like decide

28:32

when it is appropriate for for their employees to actually be engaging in those activities in an official Duty capacity instead of making them sort of

28:39

choose between you know information they can provide and the status that they have to be in yeah and I think that's

28:46

you know a good piece of advice for ethics officials is you know to consider whether or not this activity would be better undertaken as part of the

28:52

official duties uh you know that can be limiting in its own way because we can only present information on behalf of

28:57

the US government that we're permitted to present on behalf of the US government right um but that may take away some of the

29:03

confusion uh so you know thinking of sending someone only in their personal capacities a remedy to those kinds of

29:09

limitations is is not always the best solution sometimes it is better if uh if it would be more appropriate for them to

29:15

attend officially to Simply send them officially because then these problems go away yeah so and I and I think again

29:21

you know being mindful of the 807 Provisions as well and the restrictions on compensation for teaching speaking

29:26

and writing that relates to your duties those are other things that we have to consider um in terms of if people are in effect

29:33

taking their government work and presenting it in a personal capacity right you know even if it's in the guise

29:38

of a professional association you you know when there's compensation involved then we have a whole other set of concerns that we have to be mindful of

29:45

absolutely so we can't come to sort of a rock in a hard place situation but yeah we want to think through those

29:50

permutations and the uh you know the possible outcome for limitations of each right okay so next slide

29:56

okay so now we have a slightly different uh fact pattern here now we have a law enforcement officer who wants to make

30:02

reference to his or her current position in advertising or promoting their security Consulting business

30:08

and this this one causes me some immediate concern uh because the

30:13

private gain portion of this is so explicit right we know what we're trying to do we're trying to make private

30:19

citizens money in a commercial activity right we're looking for clients

30:25

um so we know that there's a private gain involved so the concern is are we using the public office to further that

30:30

private game and I think this is a very dangerous area well

30:36

including a law enforcement officer to establish their Boniface on a fiber business and if their outside business is going

30:42

permitted and is out is in the you know it's related to the work that they perform for the government I don't I

30:49

personally don't think that there's any problem with making a mention for example to say I have 12 years of federal law enforcement experience right

30:55

I don't think that's the same as saying I am currently an FBI agent in the

31:02

something something something division um where you're making explicit reference to your current position which

31:08

could could on some level lead someone to well you could see a case where maybe on a business card for the outside

31:13

business right right you know you have the owner and CEO of XYZ security Consulting business uh and then you have

31:20

the photograph of the person and underneath it you have their official title right uh that would be confusing to me as a recipient of that it's

31:26

obviously being used for a private commercial purpose and that would cause me some serious concern however you know

31:32

12 years of law enforcement experience uh doesn't suggest to me the recipient of that communication that the government is indeed going to provide

31:39

these services to me or in other ways endorses those so I think this is

31:44

why it's really important the thing we discussed right at the beginning that the principle is primary and that we

31:49

provide guidance but the sort of totality and the Judgment required to do this is really one of fact matter

31:55

determinations and again it's it's it's you can make reference to your position it's the manner in which you're making

32:01

reference to your position and whether or not you can it's appropriate to make any kind of explicit reference to your

32:06

position or if you're actually just more or less referencing your experience in a broader more General way like federal

32:12

law enforcement you know Federal auditing that sort of type thing where you're talking more about the Professional Service like what it is

32:19

rather than specifically for whom you're providing that service right okay next slide please

32:26

um generally speaking this is a question we get a lot about and I'm we're not going to spend a whole lot of time on it

32:31

although I know people have Oodles of questions about social media and use of social media we issued a legal advisory

32:36

1503 and that's also in that list of advisories that you have the link to where we talk about

32:43

um basically what OG currently feels comfortable talking about and what is under our cognizance

32:49

um so as a general proposition make government employees identify their Federal positions in their social media accounts and the answer to that is yes

32:55

right yes okay okay

**Title Position**

33:00

um don't mean to shortchange that one but we have a whole legal advisory on it and we've got a lot more territory to

33:06

cover here so um so the next the second half of 702 B uh the first half talked about the title

33:13

position and Authority the second half of 702b I know causes people a lot of Confusion And this is the the reference

33:20

to um that an employee May sign the letter recommendation using his official title only response to a request for an

33:26

employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the

33:33

course of federal employment or whom he is recommending for federal employment so when we parse that the the takeaway I

33:41

want you to start out initially because it's going to help explain my methodology here or what we're going to do over the next several slides is that

33:47

there's really sort of two pieces here one is dealing explicitly with employment letters of recommendation

33:52

right okay and the other is talking more about these General sort of character references or other forms of reference

33:59

that may not be explicitly for employment they may be for others okay so we're going to start everybody

34:07

with just looking at letters of recommendation for employment okay

34:13

and this chart that I've given you here is to sort of try to help parse out that language in the provision so

34:20

an employee may use their title and they may use agency letterhead in two

34:26

instances the first is if they're recommending anyone for federal employment right okay so as

34:34

long as the employment is federal employment you may use your title and letterhead to recommend anyone

34:41

irrespective of how you know them irrespective of whether you've ever worked with them in federal service

34:46

if it's for federal employment you may use title and letterhead and this kind of makes sense to me

34:52

actually uh because you know the idea here is that you are helping to provide the government with information about

34:59

candidates that it would like to hire right and the government benefits When the picture of uh candidates for

35:05

government employment is more complete right so your contribution to the completeness of uh that application for

35:12

employment uh accrue is a benefit to the government so we say because that's the

35:17

case we permit you to use a title and letterhead to execute that activity and

35:22

I think the understanding too is that you know who better to tell the government who to hire other than other federal government employees who

35:28

actually know what the qualifications are that the federal government should be looking for um when hiring folks so that's the first

35:35

part the second is now when you're recommending for non-federal employment okay so if you want to recommend someone

35:41

for non-federal employment you may use your title and you may use letterhead if

35:47

you can write that letter of recommendation based upon your knowledge of the person which you acquired through

35:54

your federal service so here there has to be a Nexus between your understanding

36:00

of this individual and your federal service so it has to be somebody that you know through your government job and

36:06

can make comments about their qualifications based on your knowledge through your government job and I think this one also makes sense to me

36:12

especially when you think of the kinds of people people that you would probably ask for a letter of recommendation as a federal employee looking for outside

36:19

employment area you know employment outside the federal government that it's sort of part of your responsibilities as

36:25

a supervisor or colleague to provide feedback and commentary about

36:31

the performance of colleagues or subordinates right so we view this as kind of a part of your your

36:36

responsibilities as a supervisor or a colleague uh to uh to you know to to your government

36:43

role uh you know it's a customary part of of being a co-worker yeah and it's

36:48

not a misrepresentation because the the the basis upon which you're making this recommendation is based upon the

36:55

experience you actually had of this individual in the federal workplace in your federal capacity right so it's not

37:00

it's not misrepresenting your your opinions as merely personal ones they are ones that are official acquired

37:06

through your official conduct of your official Duty so for example we had summer interns here this summer right and I worked had the privilege of

37:13

working with a few of them and so if they were to to to call or ask if I could write a letter of recommendation

37:19

for them for some future employment uh uh through because I worked with them during the summer that would be the

37:24

basis upon in which I could do it and I would be able to use my title and official letter had to do it right so

37:30

what so the only time you may not use your title in letterhead in the context of letters of recommendation is if it's

37:36

for non-federal employment and you your knowledge of this individual is personal and it's not at

37:43

all based on your experience through Federal service okay so let's go to the for the the example I have the question

37:49

that I do and to sort of Flesh this out so the question to test your understanding of what we just talked

**Example Question**

37:55

about is so could a government employee write a letter of recommendation using her title and agency letterhead for her

38:00

neighbor's daughter who has applied for a position with the Department of Treasury okay so let's see

38:06

I'll sort of Porsche through this using the chart we were just looking at uh so this is not someone the employee Knows

38:12

by virtue of federal employment that's right however it is for a position with

38:18

the federal government that's correct uh so this uh this employee would be contributing to the fullness of the

38:23

government's knowledge about this candidate in writing this letter that's right uh so I think this would be uh

38:29

this would be an acceptable use of title and letterhead that's correct because it is a letter of a recommendation for

38:35

federal employment and once you've established that you know you can use your title in letterhead okay

38:40

so then the following question is so what if the neighbor's daughter was applying to a bank so it's a private

38:45

organization outside of the government so I don't know the neighbor's daughter by virtue of my government position right and uh and she is applying to a

38:53

position that's outside of the federal government so no benefits going to accrue to the government by virtue of my using my title and let her head in this

39:00

way so this would seem to be prohibited uh you know it's not an authorized use it's not an official use of my title or

39:08

agency letterhead and it doesn't fall within the interest of the government to do this so it would seem to be both a

39:13

misuse in that case and also for private gain because presumably the dollar will will benefit or accrue Again by virtue

39:19

of receiving this recommendation okay and let's be perfectly clear here what we are talking about isn't whether or

39:25

not you can write the letter of recommendation it's whether or not you can use your title like sign with your

39:30

title and use agency letterhead so in the first instance you can sign the letter using your title and using

39:37

agency letterhead in the second instance where it's going to the bank you could still write that letter of recommendation you just could not you

39:44

just could not sign it using your title and position and you could not use agency letterhead now what about making

39:49

reference to your position somewhere in the body of the letter yeah see I think this this is another place where the

39:55

principle is very important right we have to look at the nature of that reference to determine whether or not it

40:02

would constitute the appearance of government sanction or otherwise a pure coercive

40:08

um uh you know so so that the recipient might view this as unofficial communication or merely a reference

40:14

that's establishing my qualification to make these judgments about the person exactly and we have said that that you

40:19

know when it when it's appropriate and when it is material to like establishing your bonafides I mean because let's face

40:25

it when somebody's reading a letter of recommendation they want to they want to know why should I listen to you like what do you possibly have to contribute

40:31

to your knowledge of this person's character and abilities so making a reference to your position in the body

40:37

of the ladder is not necessarily a problem it you can do that but I do agree with you Patrick and that there

40:44

may be some circumstances where you want to you want to advise employees to be really careful and to make sure that

40:50

they're not inadvertently suggesting by the way that they disclose their

40:55

position or authority that they are in any way suggesting that they are this is

41:01

the view of the federal government there's a view of federal government or they're trying to bring the authority of the federal government to bear in in the

41:06

in the letter records yes I think the relationship between the the potential outside employer and the government

41:12

agency might be uh something to consider because we wouldn't want the recipient

41:17

of the letter to feel coerced in any way so if you were say a regulator of this bank right maybe their examiner I'd have

41:25

serious concerns that they could receive that without feeling some coercion based on the your

41:33

official title okay so that's actually a nice segue to our next Slide the next slide I'm

41:39

referencing yet another OGE and formal advisory opinion and it's 07 X11 we've given you the hyperlinks to this one as

41:45

well and this one is really useful because as we all know letters of

41:51

recommendation are not the only contexts in which we are sometimes asked by co-workers friends and others to to

41:59

provide employment recommendations or other types of employment contacts and

42:04

so what 07 is saying is okay in these other circumstances so for example you know like you know making a phone call

42:10

to to recommend or making some other sort of employment contact on behalf of

42:16

of a friend or a co-worker you know when is it appropriate how is it appropriate to do if it is appropriate to do and OGE

42:22

gives you a list of factors to consider including okay so who initiated the

42:28

employment contact did the the prospective employer contact you in which case it seems appropriate or more

42:34

appropriate to just respond to that contact right where it might be a little less appropriate for you to cold call

42:41

someone who's not expecting your phone call to initiate the contact about the

42:46

employment um Arrangement um does the employee have an independent relationship with the prospective

42:52

employer is it a prohibited source so again looking at the relationship between the entity that's being what's

42:58

receiving that's receiving the communication and the government agency and the and the employee of and their

43:04

relationship with the with the organization um is it a position that's actually even been applied for or is this one of those

43:10

where you're doing a fishing expedition to find out if they would be interested in right

43:15

um government resources whether any government resources are being used government phones government emails

43:21

those are all government resources and could give the impression that it's a government-sanctioned thing or an official communication so you want to be

43:27

mindful with that and then obviously looking at the totality of what the employee is conveying to make sure that

43:32

there isn't any suggestion of sort of coercion coercion Tit for Tat um reciprocity that sort of thing so I I

43:41

recommend 0711 to you for other than letters of recommendation for employment

43:46

a next slide please the next area that and it's it's it's similar

43:52

um are other types of character references other types of support letters that aren't for employment per

43:59

se but that have the nature of a character reference which we have also said there are circumstances when you

44:05

may use your title and your agency letterhead for for character reference types of things the area where it comes

44:11

up for us most often often are immigration support letters and so much so that we actually issued an informal

44:16

advisory on at OG 07x7 um now this this same issue comes up in the

44:24

context of letters of recommendation um and the same what I'm about to say applies to letters of recommendation for

44:29

employment too but we talk about it more explicitly in these immigration support letters because there's a lot of

44:35

question about whether or not engaging in that kind of a communication would be it would implicate the criminal statute

44:41

18 USC section 205. and what does 205 generally prescribe Patrick what does it

44:47

keep prevent inflation doing so generally employees may not act as agent to attorney or otherwise represent third

44:52

parties before an agency of the United States government okay so in this instance we'd be concerned about 205

44:59

because in Immigration support ladder is clearly going to go to some sort of federal entity that adjudicates

45:04

immigration issues and so then the question becomes is the nature of these letters such that you would be deemed to

45:11

be acting as an agent attorney or otherwise representing

45:16

um The Immigrant on whose behalf you um you were writing this letter right and

45:21

OG's opinion in 07 is based upon an office of legal counsel opinion which

45:28

basically said that um typically whenever you're engaging in

45:34

writing something of the ilk of a character reference where you are opining on the qualities and character

45:39

of an individual that that is fundamentally a self representational act right because the uh the person

45:47

who's requested or on whose behalf you're writing this letter doesn't exercise control over you right you're

45:52

not literally under their control well it's saying as long as it's as the character

45:58

reference is based on your own knowledge of the character and abilities of the individual so it is a representation of

46:04

your own opinions of this individual right then that self-representational in nature right and that's not a violation

46:10

of 205 right so the admonishment here is that when you're trying to determine

46:16

whether or not someone is acting as an agent for under 205

46:21

um in writing and submitting one of these letters you want to make sure that the federal employee is not in any way

46:26

under the control of that of that person on whose the half the letter is being

46:32

submitted that they're merely making a statement as to their own experience their own knowledge on their own behalf

46:38

right right so an example I think of where you might have a question about whether or not Ploy was actually under the control

46:44

of the person on who's beheading the letter would be let's say that the Immigrant that the person seeking the

46:49

immigration support letter actually just provided a template to the employee and said fill in your name and your address

46:55

that they've basically written the entire thing and provided the entire content of what is to go into this

47:00

letter and this employee was just asked to put in their personal information I that suggests to me that you're under

47:07

some degree of control and Direction by the immigrant right um because you it's

47:13

not stating your personal opinions you're just merely assigning your name to opinions that were expressed by this

47:18

individual right so it would be a circumstance like that that would transform what we have typically

47:24

otherwise said is not a 205 concern into a potential problem concern okay that

47:30

makes sense to the next slide please so the question then becomes well okay I

47:35

can write the Immigrant support letter but could I use my title and my agency letterhead to write that immigration support letter that's a that's a

47:42

fantastic question and I don't think we have uh such clear guidance in the regulation as we do in the case of uh

47:48

the employment letters we don't but we have said that what we'd say about letters of recommendation for employment

47:54

apply here as well which is if the basis upon which you are able to write this

48:01

immigration support letter is because of what you've experienced of this person through your government employment so

48:08

it's because it's through your service to the government that you got to know this person and that you can attest to

48:13

their character and provide the letter then you may use letterhead and you may sign using your your title because again

48:19

it's a matter of it's basically a quasi-official act sorry if you and I gotten to know this individual through

48:25

um you know maybe they you know through uh you know professional work maybe they were a

48:31

uh an unofficial in a foreign country for an academic institution that you worked with closely in your official

48:36

capacity or otherwise that you had a relationship with them officially then

48:41

that would be okay exactly exactly but it has to have been through your federal employment so if you've if these if you

48:47

if the basis upon which you're writing this letter is because it's your next door neighbor or it's a friend or it's

48:52

someone that you've met through some other non-profit work or whatever then that under that circumstance you could

48:58

still write the support letter but you could not sign it using your title and official position and you and you could

49:04

not use your agency letterhead interesting okay excellent next one

49:09

so similarly um there are other kinds of support letters and again we've got 98x18 talks

49:15

about yet another instance where you could write this character reference type of letter and it would fall within

49:21

the same parameters of what we just discussed with immigration support letters which is we had an instance

49:27

where a former supervisor was being sentenced they had been convicted of of

49:32

some crimes and were being sentenced and some of their subordinates or former subordinates wanted to send letters of

49:39

support um for the sentencing hearing and we said the same thing that we think those

49:44

letters are character references so they involve self-representation unless again obviously you would have

49:51

some suggestion that there was some controller Direction by the former supervisor right so there's no 205 issue

49:57

and the federal employees may use their title in letterhead because obviously the way they know the supervisor receive

50:03

this information by virtue of their federal employment and they're speaking to things they've experienced in the course of that employment exactly

50:09

exactly so hopefully that has cleared up some questions that folks may have had if you haven't read those opinions I

50:16

recommend that you do so that's interesting there are we've written quite a lot on this over the years yes we have uh for such a seemingly simple

50:22

regulation there's a lot of sort of nuance and complexity yes there is okay so

**Endorsements**

50:28

um the next provision is endorsements provision we're going to kind of kind of touch and go on that because actually we

50:34

are we're we're we're we're running out of time here and we've got a lot more to cover but

50:39

um the endorsements provision in 702 c um the takeaway I think in this

50:44

provision Patrick is that agencies need to know that OG is not presuming in this

50:49

section to tell departments and agencies what authorities they may have

50:55

officially right to endure course product services or Enterprises right so

51:01

this provision is is reaching to the individual conduct of employees yes

51:06

that's why we call it the standards of conduct for employees of the executive branch we're regulating it conduct by

51:12

employees right so we're concerned about when employees are without the authority

51:18

of the agency engaging in activities that would make it appear as though the

51:23

government endorses a service product or Enterprise let's talk about these two questions and

51:29

then I have one final point I want to make about circumstances where the agency itself is has the authority and

51:36

sort of some advice about when you're when you're exercising that Authority so the first question we have is an

51:41

employee sends an email to everyone in her agency to inform them of the special discount program her cell phone provider

51:46

offers to government employees what do you think about that Patrick I don't know this causes me a little bit

51:52

of concern uh because you know this this employee presumably is sending this email an official email account right uh

51:59

and they're doing so maybe not with the intent of drumming up business for this private company that offers the discount

52:05

but that's likely to be the effect of the of the communication um so you know I'd have some concern

52:11

that this would be a misuse of of government property or time yeah and I think that it could be it could be

52:17

mistaken as some sort of you know that we're that you're trying to endorse this particular cell phone provider over

52:23

others right um and I think particularly um you know if an agency has the ability

52:28

to do that and elects to do that that's one thing but if individual employees are are circulating suggestions to other

52:36

government employees and government email that these are the cell phone providers they should be looking for and

52:42

looking at um I think this is the kind of thing we want to we'd wanna I think this is

52:47

confusing because I know I I frequently receive emails from certain government officials in our agency informing me

52:53

about the availability of certain official benefits right right you know it changes to your your health insurance benefits or the availability of certain

53:00

Insurance programs or what have you and I could as the recipient of this communication become confused and view

53:07

this as you know a government endorsement of this program as as part of my sort of official benefits

53:13

um question two is an interesting one and this is one we've gotten on more than one occasion a company that provides personal retirement investment

53:20

advice would like to come and speak to your agencies employees about retirement planning

53:25

um I think this is this is a more interesting one like this is a question of the agency's disposition right of its

53:32

own resources uh in this case the resources would be uh you know probably some conference space and maybe some

53:37

efficient time um and the misuse rakes don't speak specifically to this but you know I do

53:45

have some sort of broader concerns about uh you know General fairness right is

53:50

this an opportunity available to all investment advisors are we providing a special preference uh to this one

53:55

provider so I think that there I think that's exactly the point I think that that I I'd like to sort of leave folks

54:02

with is you know if the agency makes determinations about granting access to

54:07

its employees to certain institutions like retirement investment advisors and things like that

54:14

um it's not for OGE to question whether or not an agency has an authority to do that under whatever you know Authority

54:20

you claim to have that but what we do say and what we do sort of suggest to other officials that you do is to you

54:27

know suggest to your your managers or the folks who are making these decisions exactly the question that Patrick posed

54:32

which is is there a fundamental fairness issue here why are we granting access to our employees to this one investment

54:39

firm and not to any other similarly situated investment firm that's out there and at least be prepared to answer

54:44

that question you know it's about Prudential management reasoning right this isn't about contravening the ethics

54:49

rules it's about thinking carefully about how your organization makes decisions for itself and fairness is a

54:56

principle of the sort of government's work isn't unique to the standards of conduct

55:01

right now if you when you do have an individual employees who are making those decisions on behalf of the agency

55:08

EG the agency said yes we're going to go ahead and we're going to allow this thing to occur you still have to look at

55:13

the individual employees who are making those decisions or who are involved in that and also make sure that they don't have additional

55:19

conflicts or impartiality issues or other sorts of things that might give cause for concern of misuse of of public

55:26

office for private gain right um so the the endorsement thing isn't the be-all or end-all to these kinds of questions

55:32

there are other things to consider right in in the case uh of question two you

55:37

know we can imagine the employee who has suggested this activity maybe has an outside relationship with this provider

55:44

of investment advice and they are kind of coming maybe not on their behalf but for their explicit benefit right uh to

55:51

try and secure for them agency resources and I think in that case uh it would clearly contravene the principle of

55:58

misuse of public officer private game right there inventing an official activity for this person's benefit right

56:04

right exactly so so you want to be looking at you know individual individuals relationships with

56:11

organizations both in in an official Duty way but also in the sort of like the personal way in which they have

56:18

affiliations or engage with these outside organizations okay next one

56:25

um the 702d I think is a provision that most people are not entirely familiar with or maybe don't come across as

56:32

frequently so I'd like us just to really really quickly take a look at 702d

56:38

um because it's it's the title of it is performance of official duties affecting

56:43

a private interest and it says to ensure that the performance of His official duties does

56:49

not give rise to an appearance of use of public office or private gain or of giving preferential treatment an

56:55

employee whose duties would affect the financial interests of a friend relative or person with whom he is Affiliated in

57:00

a non-governmental capacity shall comply with any applicable requirements of 2635.502

57:07

the secret covered relationship yes it's the it's the it's the secret sort of

57:12

expansion of 502 outside of 502 it cross-references you back to 502 but I

57:19

think in a nutshell what we're trying to get at here is whether or not there are circumstances where an employee can

57:24

engage in official Duty activities that could affect uh and benefit people with

57:32

whom they have affiliations in a non-governmental capacity so it's an impartiality type of concept and it also

57:39

deals with financial interests here as well right and I think this is kind of an interesting point to keep in mind and

57:44

that's the relationship of this provision to 18 USC section 208 sometimes we don't have an explicitly

57:49

imputed financial interest under Section 208 we tend to look just at some party of the standards but some part G is

57:56

another place to look right um because you know notwithstanding anything in subpart E we cannot use our public

58:02

office for private game so if uh we're going to engage in official activity that will accrue a benefit to some with

58:08

whom we have an outside relationship that could very well pose a contravention of subparchy exactly and

58:14

this and the I noticed that what I've put on the slide here I'm taking us back to that original scenario we talked

58:20

about that mspb case where the SES official was removed um for basically using her position to

58:26

get her son's fiancee a job in the activity where she was working and if

58:32

you remember back at the very beginning I said you know when it comes to charging folks with a with a with a

58:39

violation of the standards of Conduct in this particular case the charge that was brought before the mspb was one of

58:45

misusing government office for private gain they the agency did not attempt to shoehorn this into 702d and 702d might

58:54

not have been an entirely perfect fit but that's again the the just to to

58:59

remind you that you don't you don't necessarily have to go into the particularities of an a a b a c or a d

59:05

you'd just have to demonstrate that someone is miss you which is improperly used right their public office for the

59:10

private gain of themselves or someone else themselves or someone else exactly okay so if we go into the next slide

**Nonpublic information**

59:19

um Patrick I'm going to let you talk a little bit about non-public information before we get into these questions because I know this is an area in

59:25

particular that you you find this provision a little bit intriguing is that an appropriate way to describe it I

59:31

think there's there's simply a a problem with the way we shorthand this provision

59:37

okay uh and it's important to think about what we're actually discussing

59:42

here we're talking about the misuse of public office for private gain and then when we get to non-public information

59:47

we're talking about the misuse of non-public information for private gain

59:53

so this isn't a per se disclosure bar

59:58

but a Prohibition on misusing non-public information for private gain it's the

1:00:04

nature of the use of the non-public information that we're getting here and the purpose for the use and I think when

1:00:10

we uh when we tend to sort of shorthand this for employees what we tend to say is you can't disclose non-public

1:00:16

information and that's not actually what we're saying here so if we look at the prohibition we say

1:00:22

an employee shall not engage in a financial transaction using non-public information and we take that directly from uh the uh the 14 principles that's

1:00:31

literally in there so you cannot engage in a financial transaction e e that

1:00:36

transaction is based on non-public information so this is kind of the insider trading thing right and the interesting thing here is there needn't

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be any disclosure here right we can contravene this uh this provision without disclosing any information uh

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simply by having the information making decision based on that information we can we can violate uh and I think that's

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that's often lost right yeah I know since we can't allow the improper use of non-public information to further

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our own interests or those of another whether through advice or recommendation or by knowing unauthorized disclosure so

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we're explicit there are lots of ways that you can misuse non-public information other than disclosure right

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we can advise someone to engage in a financial transaction based on non-public information we can make a

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recommendation or we could indeed make a an unauthorized disclosure but it's not

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a per se prohibition exclusively about disclosure right right okay so let's look at these two

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questions as kind of an illustration of what we're talking about here first question employees been given access to information about an impending

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indictment that has not yet been announced to the public the employee short sells stock in the company that is involved in it and will be affected by

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the indictment yeah so there's not been a disclosure right it doesn't matter yeah this is non-public information

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we're using it uh to profit financially right we're shorting the company uh

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that's a misuse of non-public information for private game okay thank you too an employee with access to audit

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investigative and enforcement information in his agency's computer system uses that information in his private Consulting business

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well we certainly have the private interest private Consulting business it's a commercial Enterprise and this

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isn't an authorized use of this information right so yeah yeah so we don't even need to know to what extent

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that the the the this individual was disclosing this information to clients it's the fact that this wasn't an

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authorized use of this information you could be using this for business development they might might not even tell the potential clients you know

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where this information came from or how they knew they needed these services but you can't use non-public information for

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private game right right and the other thing I'd like to point out to folks too is make sure that you do pay attention

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to what constitutes um non-public information because it's

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you know it's stuff that's obviously you know statutorily protected and all those you know proprietary information yes all those things are covered but it's also

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um anything that has not actually been disseminated to the general public and is not authorized to be made available to the public on request so it's a

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little bit of broader definition than I think we would normally so so this could be this could definitely be information that it is intended to eventually be

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made available to the public but it has not yet but has not been authorized so maybe you're going to front run a press

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release uh you know your your agency is about to announce on indictment or something and you decide that you're

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going to go engage in a financial transaction based on this announcement before it's made right right the fact that it's eventually going to be made

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public doesn't absolve you of the misuse of non-public information because of the time you used it it was not in public

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exactly exactly very good okay next section

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okay the next section is the use of government property and and I think this is one um that we sort of we sort of

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um all think we understand what what that means um and and it's an area where the agency

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has an enormous amount of discretion I mean this really does come down to agency heads

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um being allowed to create housekeeping provisions and create de minimis uh personal use exceptions because I mean

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let's face it Patrick we yeah we we need to be good stewards of of government resources and government

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property but we are also you know cheek to jail with each other eight and a half hours a day you know five days a week so

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there is an employee morale issue that comes into play with also employees life don't stop saying that they walk through

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the door you know things happen life goes on and kids get sick uh spouses

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have car trouble you know things happen so I think this is one area where agencies

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um you know might want to be particularly careful about um informing employees about the where

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where the where the confines are of what in in the agency's mind is a reasonable

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de minimis use and what would constitute and that's hard I mean it's hard to draw those kind of bright lines abstinence

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set of facts I understand that but I think it's an area that that we need to be mindful of making sure that we think

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employees are adequately on notice about what constitutes misuse and this again is another one where

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um it's in the principles it's a b B9 in addition to being a separate provision in the standards of conduct and I have

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seen in some of these mspv cases where charges are brought under both the principles and the articulated standard

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in subpart G next to Diana I think discussed that uh this spring when we were talking about the elements of

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Ethics enforcement so you know that is very interesting and I think this is an area where in misuse policies to the

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extent you do have some right lines in those policies sharing those and sharing

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them frequently is very helpful uh because while they not might not be exhaustive they certainly indicate the

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thinking of the agency so if there are certain activities that are definitely prohibited you know do share those and

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provide the context of the rest of the policy because this is one area too where I can assure you

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employees are observing each other's use of government property so if there are

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ways in which you can try to create some bright lines you know I think so much the better because this is an area where

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I think I don't want to say monkey see monkey do but I think that you know your de minimis use policy becomes a matter

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of How It's practiced among colleagues rather than what your document says yeah there's a lot of you know possibility

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for erosion over time right um so you know if you have bright lines and you can remind employees of those

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bright lines periodically uh you can prevent prevent uh you know that erosion

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so our first question that we have and it's surprising because we we have actually gotten questions

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about this um and I'm assuming that many ethics officials possibly get these

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questions as well which is you know not only May employees use government resources for planning announcing and

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holding social events like baby showers or retirement parties but kind of like how much may employees use government

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resources to plan announce and hold social events like baby showers or retirement parties right and I think you

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know this gets to uh not just an Ethics issue but also a management issue exactly right what we're talking about

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is ensuring the efficiency of the service and not denigrating the

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workplace's ability to meet the official goals of the organization right so if I lose the ethics commercial sitting the

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agency when you have to stop doing this is when it starts to adversely affect the uh the workplace exactly so because

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I think again this is one of those things where you know uh maintaining you know the efficiency of service is is

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something that also has to be balanced with employee morale and I don't think that anybody wants to to create

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Draconian rules that make employees feel like working for the federal government is punitive and that they're never

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allowed to have any sort of social interaction there's never you know allowed to be any kind of personal private Esprit de corps

1:07:49

um it's always a matter of of moderation it's a matter of you know manageable levels of of use so but I think this is

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an area where the more that agencies can articulate these things that you know for the most part we encourage or we

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allow we permit blah however we discourage X right and that leads into

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question two which is how much personal use constitutes misuse um and again this is this is tough this

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is tough to know where to specifically draw the line right and you know I think it can be helpful here to go back to the

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principle right you know generally we're talking about use of public office for private gain so the nature of that

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private gain is important so you know I think I you know the the furtherance of outside commercial activities we can

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certainly you know prohibit but then when it comes to you know employee's personal use uh for you

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know family reasons or you know social reasons it gets a little trickier and we have to look at whether or not the

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efficiency of the service of the employees uh ability to conduct their official responsibilities it is being

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eroded right by this this uh this activity right um if you can give me the next slide

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Patrick um this is another mspb cases in those list of cases that we've we've given you

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um this is Smith versus the department of energy and here we had an HR assistant she received a 30-day

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suspension for misusing government property and for violating the personal use policy so this is another you know

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reason to sort of maybe to take a look again at your personal use policies and see to what extent

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um you know they they serve as a good you know notice to employees of what constitutes you know misuse of of

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government property and government time um and she was cited for sending over 4

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000 personal emails and emails containing inappropriate comments and excessively using the internet so

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clearly four thousand personal emails I think and by anybody's estimation would constitute a misuse of of you know your

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government time and uh I'm not sure I've sent four thousand personal emails my entire life

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um but again interestingly enough um in the mspv case they do make

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reference to the actual principles here and the you know the one principle that was I think cited

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um in this case was uh I don't think it was just the use of government property I think it was the the use of government

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time and an honest effort to perform your duties right um and they do cite that language in

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particular saying that this was a this was an indication where she was not engaging in an honest effort to perform

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her official duties in violation of that principle yeah another reason to look at

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the principles in addition to the specific provisions of the rule because they they can help

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us yes exactly so you can have several of those general principles that are implicated in a particular situation

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like a misuse situation like this one and that takes so that segues us into our last uh area of of subpart G which

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is use of government time and again this reflects back to 101 V5 which is the

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honest uh use of your time for the for for purposes of Performing your government

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job um so let's just go into the questions and then we can talk a little bit about uh what what 705 gets at the the first

1:11:05

question we have is can a supervisor direct or request that an executive

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assistant or other subordinate perform personal tasks or run personal errands

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well let's see I'll tackle this again from the the principle of not using public office for private gain well the

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private game here seems to be the private game of the supervisor right the government doesn't receive a benefit uh

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if the supervisor's dry cleaning is collected or letters are mailed personal

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letters um and then you know is this an appropriate use of a subordinates time well it doesn't seem to be an authorized

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use if the government's not receiving any benefit then the employee should not be engaged in that activity so this

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would seem to contravene our principles here but I also know in the private sector that's helping Executives

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particularly high level Executives uh live their lives is an understood part

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of the responsibilities of certain assistants so this can be this can result in some cultural friction right

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when we have certain high level officials coming in from the private sector but this applies no matter a

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housing or the official is the the time of government employees should be used for doing government work

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and if we look at 705 I mean it it says explicitly at 705a talks about an use of

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employees own time so it's talking about whether or not you know authorizing in accordance with law regulations that an

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employee shall use their own official time and an honest effort to perform official duties but there's a separate provision entirely that speaks directly

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to the use of a subordinates time and that's in 705 B and it says an employee

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shall not encourage direct coerce or request is subordinate

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to use official time to perform activities other than those required in the performance of official duties or

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authorized in accordance with law regulation so you're saying Cheryl even if my assistant really likes to pick up

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my dry cleaning uh during the work day and I thank them a lot every time they

1:13:02

do that that might also be prohibited because I might be offering some encouragement there yes and I think I I

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think the what we're trying to get at here is this isn't a matter of if you say it nicely and they agree that

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somehow that's not a misuse of this board in its time it's that you really shouldn't even be suggesting to the subordinate that they can be doing

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things for you in your as that do things for the supervisor you know

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um that are personal in nature for the benefit of the supervisor and in example one we try to sort of head off this

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question of well what if the person volunteers to do it you know what are what if it's sort of consensual wonder

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what if it's and we sort of tip our hat to that but then we sort of turn it

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around and say Well it may not be a problem under 705 but now it may be a

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problem under the gifts between employees rule so if you look at example one after B and if you look halfway down

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that paragraph it says where the arrangement is entirely voluntary and

1:14:01

appropriate compensation is paid the secretary May type the correspondence at home on our own time

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where the compensation is not adequate however the arrangement would involve a gift to the Superior in violation of the

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standards in subpart C of this part so in effect we're saying even if you have an executive assistant or some

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other subordinate who is voluntarily agreeing to do this they can they they if they elect to do

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that they would still then be in violation of some part C because they would be giving and a gift to their

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official Superior right I mean there is no exception in the gifts between employees rules that would allow you to

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to provide these personal benefits to your official Superior no I think that makes sense right because we want to

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prevent the abuse of that relationship we want to ensure that supervisors are conserving government time for

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government purposes uh and we want to avoid that misuse of uh the government Authority for one's private gain or the

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private gain of another right so that seems all consistent with the principles yes and the notion that sort of a

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superior subordinate relationship is almost inherently coercive right um you know we just don't want to get

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into the business of adjudicating when the subordinate was voluntarily and consensually giving their services to

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their Superior and we also don't want to create an exception to the principle that's not what we're trying to do here exactly we're trying to articulate

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explicit circumstances in which the principle applies without diminishing

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the applicability of the principle yeah well the point is the the subordinate wouldn't be allowed to waste their own time right so you know they wouldn't be

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allowed to you to to do personal tasks for themselves on official Duty time right so why would it suddenly be

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permissible for them to do that for their superiors right you know exactly um the rules apply to everyone no matter

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how senior exactly yes um okay so our question too then and this might make some ethics officials

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unhappy um they won't want to publicly announce

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this can a public Financial disclosure filer ask a subordinate or an Ethics

1:16:03

official to prepare a draft of her public form um I think this one's a little trickier

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because the completion of the public Financial disclosure report is an

1:16:15

obligation of public service for those who occupy those positions so it's part

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of the official Duty yes it's an official activity and the beneficiary of the filling out

1:16:29

of that form as the government and the citizens right I'm not really seeing a private gain here right

1:16:35

um yeah it's a it's a it's a form that the the the the public Financial disclosure filer is required to file as

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a condition of employment they have to file the form um just as with any other things that are a condition of employment you know

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doing that is sort of an official Duty act and so um you know a superior can assign an

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official Duty activity to anyone on their staff or whatever reasons they deem and so there would not be a misuse

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of your subordinates time if a senior employee were to ask a subordinate employee to prepare their financial

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disclosure form for them and I guess you know there's maybe a silver lining here which is that agencies uh you know to

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the extent they think they need more resources to help with timely filing uh want to direct some agency resources to

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the facilitating of timely filing they may do so uh so you know while it might

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be kind of uh not the most exciting day at work when uh when your agency comes by and drops off some financial

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information and asks you to complete the report uh you know to the extent that you the agency desires to help people

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file timely so you can provide better ethics advice if you want to direct some

1:17:45

administrative resources in that direction that would be an appropriate use of government resources

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so that's it for our presentation I know I've covered enough we've covered an awful lot in a very short period of time

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um but we think we think it's um we think it's important for you to read the advisories that we have offered which is

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why we gave that to you as a resource but um I would like to open up the phone lines now if folks have questions on the

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phone and also if you're on the Google Hangout and you have questions I know I've made you hold your water all this time

1:18:15

um but for those who are still with us and have some questions we'd be happy to take the remaining time to answer any questions

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good thank you well then again the question and answer session if you would like to ask a question please press star

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one you will be prompted to record your name be sure to unmute your phone once again

1:18:33

if you would like to ask a question please press star one you may withdraw your question at any time by pressing

1:18:38

star two and we'll pause for just a moment to allow those questions to start coming through okay awesome and while

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we're waiting on uh questions I'd just like to thank the folks who let us know that we are having a technical issue earlier uh we're kind of all in this

1:18:49

together and our goal is to get you the information uh as efficiently and conveniently as possible so it doesn't

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do anyone any benefit to ignore problems so thanks for letting us know so that we could correct that for you yeah and we and as you can imagine these these

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broadcasts have a considerable number of moving Parts um any of which if they are not working can can you know directly impair our

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ability to to deliver this to you so that's right so thank you guys yeah thanks very much

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thank you I'll take some time to uh to type in the questions I we did we did have a

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participant uh contact me after our last broadcast just as a reminder that I the

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questions that you ask are on the hangout uh do stay with the course right um so you want to be careful not to ask

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us any live questions about real employees doing real things at your real agencies so if you have questions you'd

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like clarification about some of the issues we're happy to take those um but we don't want to inadvertently disclose information about employees

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right once again on the phone lines if you

1:19:53

would like to ask a question please press star one and record your name

1:20:02

okay I'm not showing any questions on the hangout so maybe we did a very good job of covering it maybe we did or they

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were bored stiff and bagged out about a half an hour ago

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all right I think we don't have any questions coming through on the phone line okay thank you Aaron very much we're going to go ahead and sign off but

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again thank you very much for joining us and we look forward to seeing you next month for the fundamental series and the

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advanced practitioner series uh and in months in the future as well as for special broadcasts so thanks very much

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for joining us today Cheryl thank you very much Patrick and uh thank you all for joining us and we will see you next time