




ESI Primer for PRA Requests

LCC's New Law & Election Seminar
December 11, 2019





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Overview

- Overview of ESI
- E-Discovery Reference Model
 - Information Governance
 - Identification
 - Preservation & Collection
 - Processing, Review, Analysis
 - Production
 - Presentation



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Overview of ESI

ESI = Electronically stored information: information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities

(Code Civ. Proc., § 2016.020, subds. (d)-(e))

Electronic Discovery (e-discovery) is the use of legal means to obtain ESI in the course of litigation (or to respond to requests for public records)



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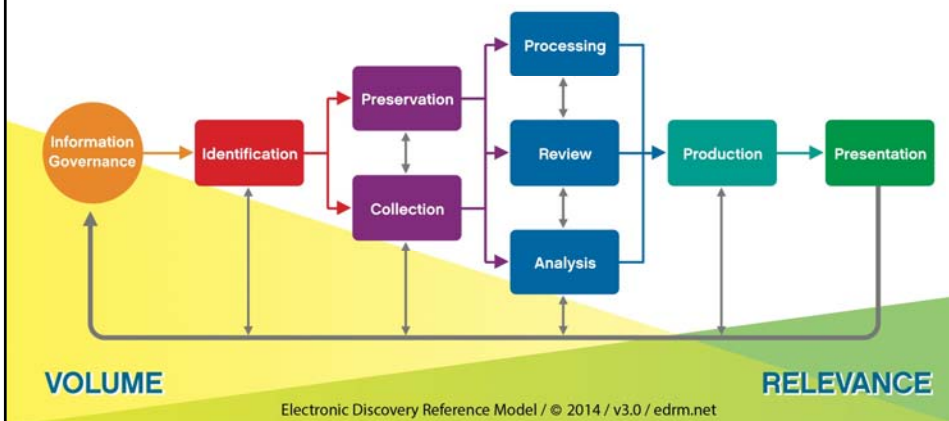
Overview of ESI... in the PRA context

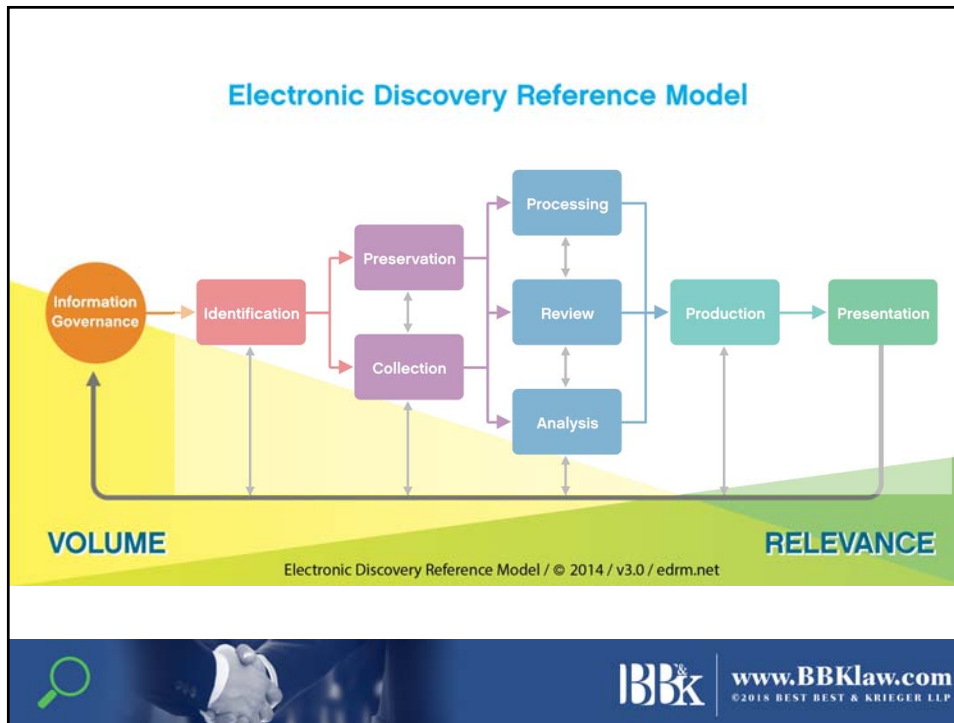
A writing is defined as “any handwriting, typewriting, printing, photostating, photographing, photocopying, **transmitting by electronic mail or facsimile**, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, **regardless of the manner in which the record has been stored.**”

(Gov Code § 6252(g))



Electronic Discovery Reference Model





Information Governance

- Information governance refers to how an organization manages its data (paper and electronic)
 - legal compliance
 - operational transparency
 - e-discovery efficiency

Information Governance... *in the PRA context*

- The PRA is...
 - a constitutional guarantee
 - that the public can
 - access an agency's records,
 - with some exceptions*



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Information Governance... *in the PRA context*

- The PRA is **NOT**...
 - a retention policy
 - a destruction policy
 - a privacy policy
 - a usage policy



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Information Governance... *in the PRA context*

The PRA “does not...prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records.

Its sole function is to provide for disclosure.”

(*LAPD v. Superior Court* (1977) 65 Cal.App.3d 661, 668.)



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Information Governance... *in the PRA context*

- Disclosure has become a heavy burden
 - Includes personal devices and accounts (*San Jose*)
 - Introduces the threat of Civil Discovery (*City of Los Angeles*)
 - Accounts for unpredictable attorneys' fees (*Sukumar*)
 - Requires an Enterprise Systems Catalog (*Gov. Code § 6270.5*)



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Information Governance... *in the PRA context*

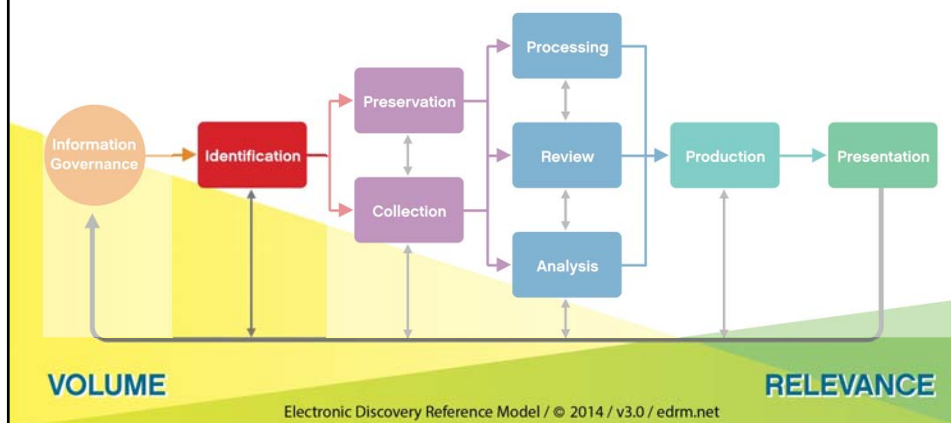
- Theme: Let's get our house in order.
 - mitigate risks and costs
- Do you have a PRA policy?
- Have you done any data mapping?
- Does your records retention schedule support your approach to public records?
- Have you enacted *San Jose* compliance policies and procedures?



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Electronic Discovery Reference Model



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Identification

- Identification refers to the process of determining...
 - **sources** of relevant ESI
 - **resources** for executing plan

two sides of the same coin...



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Identification... *in the PRA context*

Agencies must assist the member of the public
in making a focused and effective request that
reasonably describes identifiable records

(Gov. Code § 6253.1.)



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Identification... *in the PRA context*

Responsive records must “relate[] to the conduct of the public’s business” and must be “prepared, owned, used or retained by any state or local agency.”

(Gov. Code § 6252(e).)



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Identification... *in the PRA context*

- **Sources**...what are your obligations?
 - records in possession of consultants*
 - records on personal devices
 - records in personal email accounts
 - requires actual or constructive possession
 - how does this apply to [former] employees?
public officials?

**possibly*



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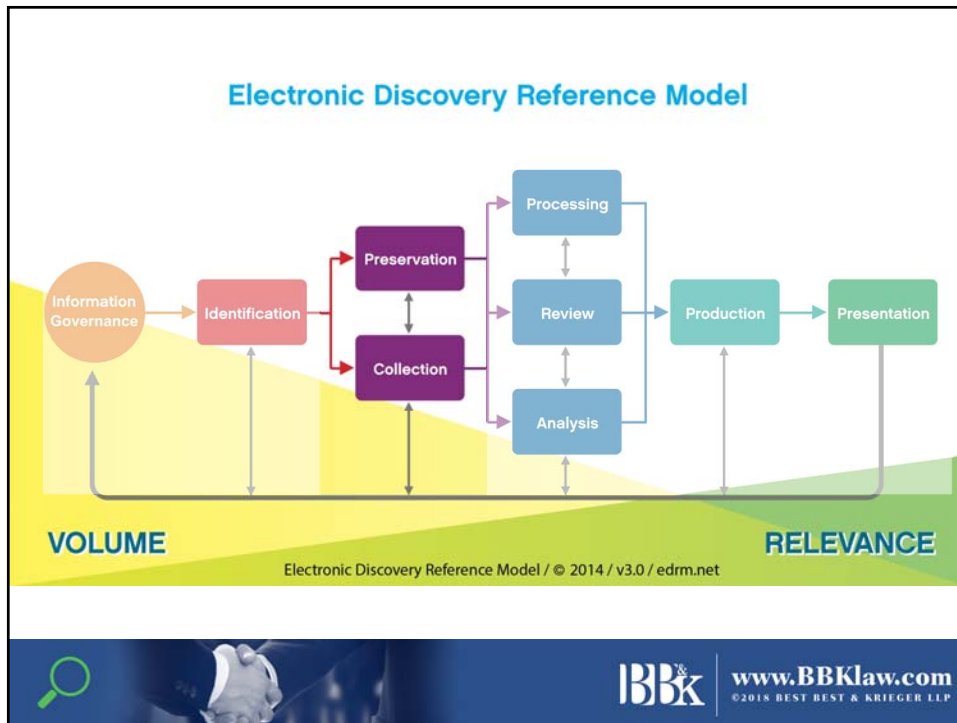
Identification... *in the PRA context*

- **Resources**...how will you execute?
 - Will you have to collect from third parties?
 - Will all of the records be electronic?
 - Will there be text msgs? audio? photos?
 - Will there be video redactions?
 - Will there be emails in personal accounts?
 - Will you need to do remote or onsite collections?
 - Will you need affidavits?
 - Will you need to produce in a specific format?



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Preservation & Collection

- Preservation refers to the process of ensuring that ESI is protected from inappropriate alteration or destruction
- Collection refers to the acquisition of potentially relevant ESI.

Preservation... *in the PRA context*

Nothing in the PRA specifically requires litigation holds and preservation notices...HOWEVER, the PRA does not “permit an agency to delay or obstruct” the production of public records.

(Gov. Code § 6253(d).)



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Preservation... *in the PRA context*

- Know your Preservation procedures
 - How are records retention and legal hold policies executed?
 - Do policies address personal devices, especially for a BYOD organization?
 - Are employees trained to identify and preserve public records on their own?
 - Is there a social media policy that addresses preservation?



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Collection... *in the PRA context*

If the responsive record is maintained in an electronic format,
the agency ...

- must make the information available in the format in which it is kept (protect security & proprietary software)
- must make the information available in an alternative format if that format is one the agency uses for itself or for provision to other agencies
- does not have to create records or reconstruct electronic records no longer in the agency's possession
- can charge for the cost of producing a copy of the record and the cost of any programming and computer services necessary to produce a copy of the record under specific circumstances

(Gov. Code § 6253.9.)



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Collection... *in the PRA context*

- Establish clear procedures for the inspection of records...when? how? who? where?

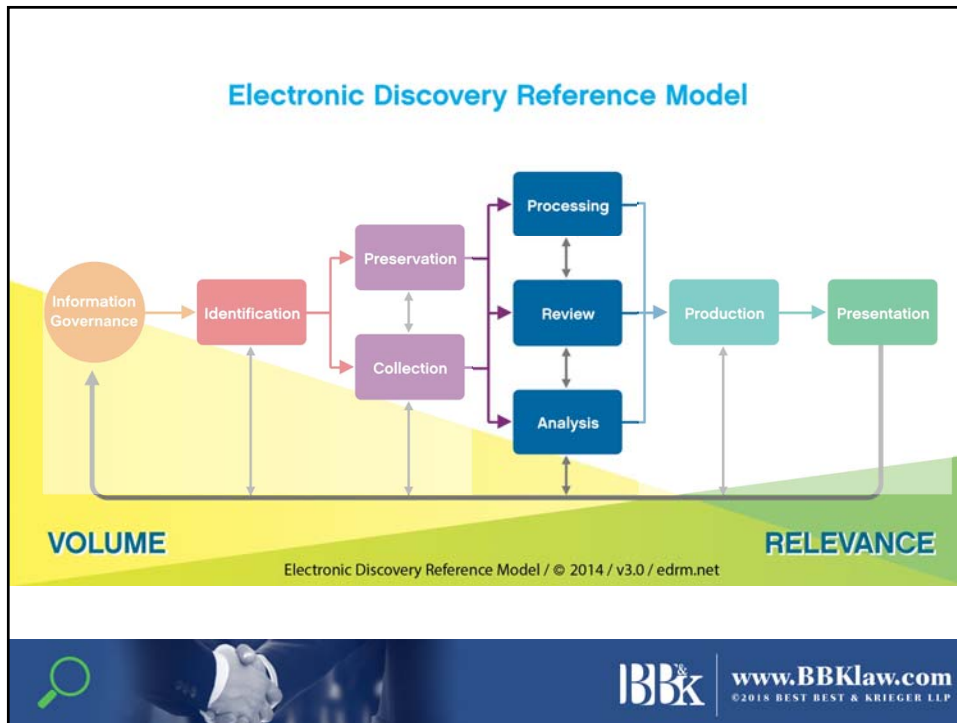


- Collect ESI in a manner that is legally defensible, proportionate, efficient, and auditable.
 - Preserve metadata in case it becomes the subject of a dispute.



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Processing, Review, & Analysis

- Processing – stripping away of data before review
- Review – identifying documents that are to be produced, withheld, and that increase or reduce exposure
- Analysis – finding facts, searching for hot docs, and enhancing review

Processing... in the PRA context

- ESI may arrive at this point in various formats
 - archives/back-up tapes
 - PSTs, PDFs, ZIPs, flash drives
 - with or without metadata
- ESI can be processed to simplify review
 - deduping (true or near duplicate)
 - coding and/or indexing
 - OCR'd (if necessary)



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Review... in the PRA context

Records are reviewed for information that is exempt...

- Personnel, Medical Records (§ 6254(c))
 - Exception: *Marken v. SMMUSD* (2012) 202 Cal.App.4th 1250
- Investigative Records (§ 6254(f))
- Pending Litigation (§ 6254(b))
- Library Patron Records (§§ 6254(j) and 6267)
- Attorney Client Privilege & Work Product (§ 6254(k))
- Trade Secrets (§ 6254(k))
- Voter Information (§ 6254.4)
- Tax Payer Information (§ 6254(i))
- Law Enforcement Records...stay tuned for lots of changes in 2019



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Review... *in the PRA context*

When records contain both exempt and disclosable information, an agency must redact the reasonably segregable portions of the record, unless the burden of redacting the record becomes too great.

(Gov. Code § 6253(a).)



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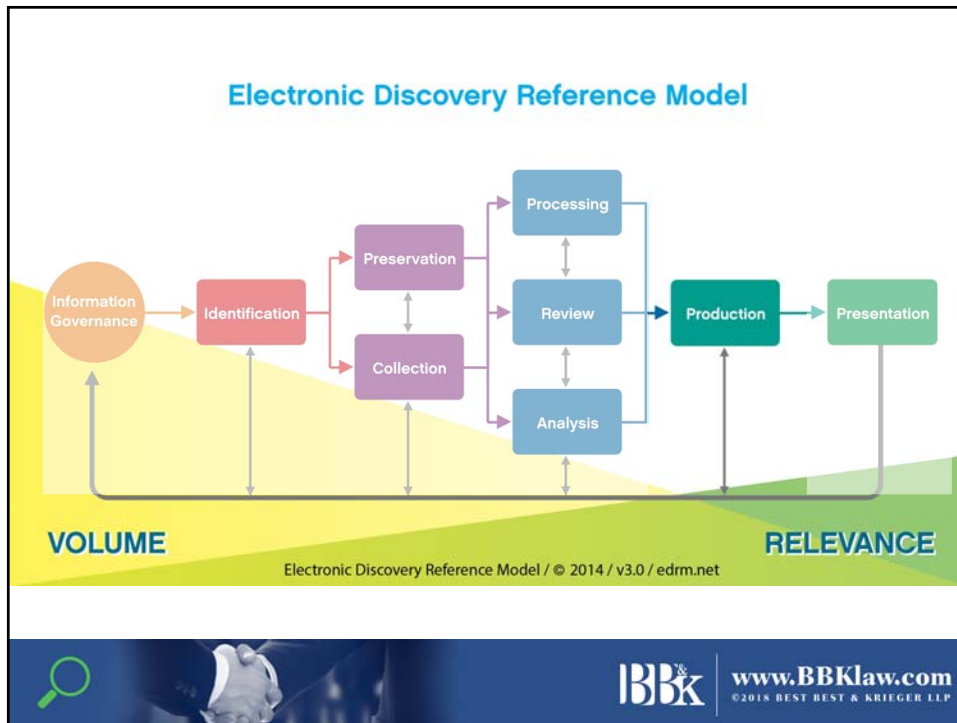
Analysis... *in the PRA context*

The PRA does not “permit an agency to delay or obstruct” the production of public records.

(Gov. Code § 6253(d).)



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Production

- Know what format has been requested, if any?
- The forms of production are:
 - Native – Files are produced in their native format.
 - Image (Near-Paper) – Files are converted to image files, typically .tif or .pdf.
 - Paper – ESI produced in paper format.

Production... in the PRA context



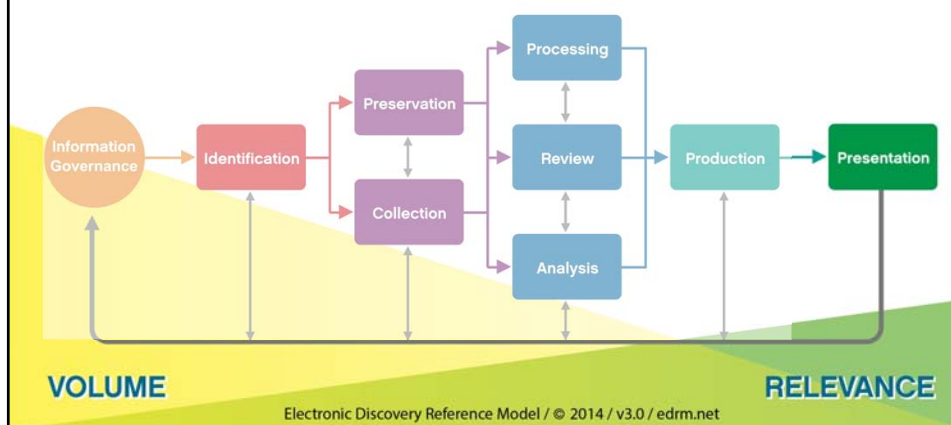
- An Ounce of Prevention...
 - Consider the best option for records
 - electronic – email/CD/flash/FTP
 - Apply indicia or bates numbering
 - Provide a rolling production when appropriate
 - Consider systematic digitization
 - whenever possible, maintain public records on your agency's web site



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Electronic Discovery Reference Model



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Presentation

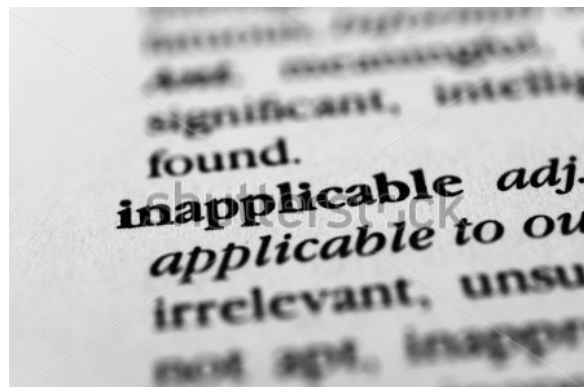
- Develop a presentation plan
- Select exhibits and their format
- Prepare and test exhibits
- Present exhibits
- Store/maintain exhibits



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Presentation... *in the PRA context*



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- **PRA Assessment:** ARC@bbklaw.com
- **Advice & Guidance:**

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