



The Engineering of Public Records Processing

City Clerks New Law and Elections Seminar
December 8, 2021



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Overview

- PRA
 - Overview
- e-Discovery
 - e-Discovery Reference Model
 - e-Discovery Best Practices



Overview of Public Records Act

PRA Overview

- “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state” (§6250)
 - purpose (FOIA): to ensure an informed citizenry, vital to the functioning of a democratic society
(NLRB. v. Robbins Tire & Rubber Co. (1978) 437 U.S. 214, 242)
- public writings shall be open to public scrutiny
- disclosable public records must be made “promptly” available for inspection (§6253(b))
- agencies must assist the member of the public in making a focused and effective request (§6253.1)

PRA Overview

PRA Lifecycle – after a request is received...

- within 10 days, the City must respond with
 - **Production letter** – provides the record(s) and identifies any applicable exemptions
 - **Determination letter** – tells the requester the date on which they will get the record(s)
 - **Extension letter** – tells the requester that a determination letter will come within 14 days of the date of the letter



e-Discovery

CASE IN POINT

by Tom Fishburne

THE E-DISCOVERY CLE

CaseCentral



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CASECENTRAL.COM/CASEINPOINT

e-Discovery

Electronic Discovery (e-discovery) is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes.

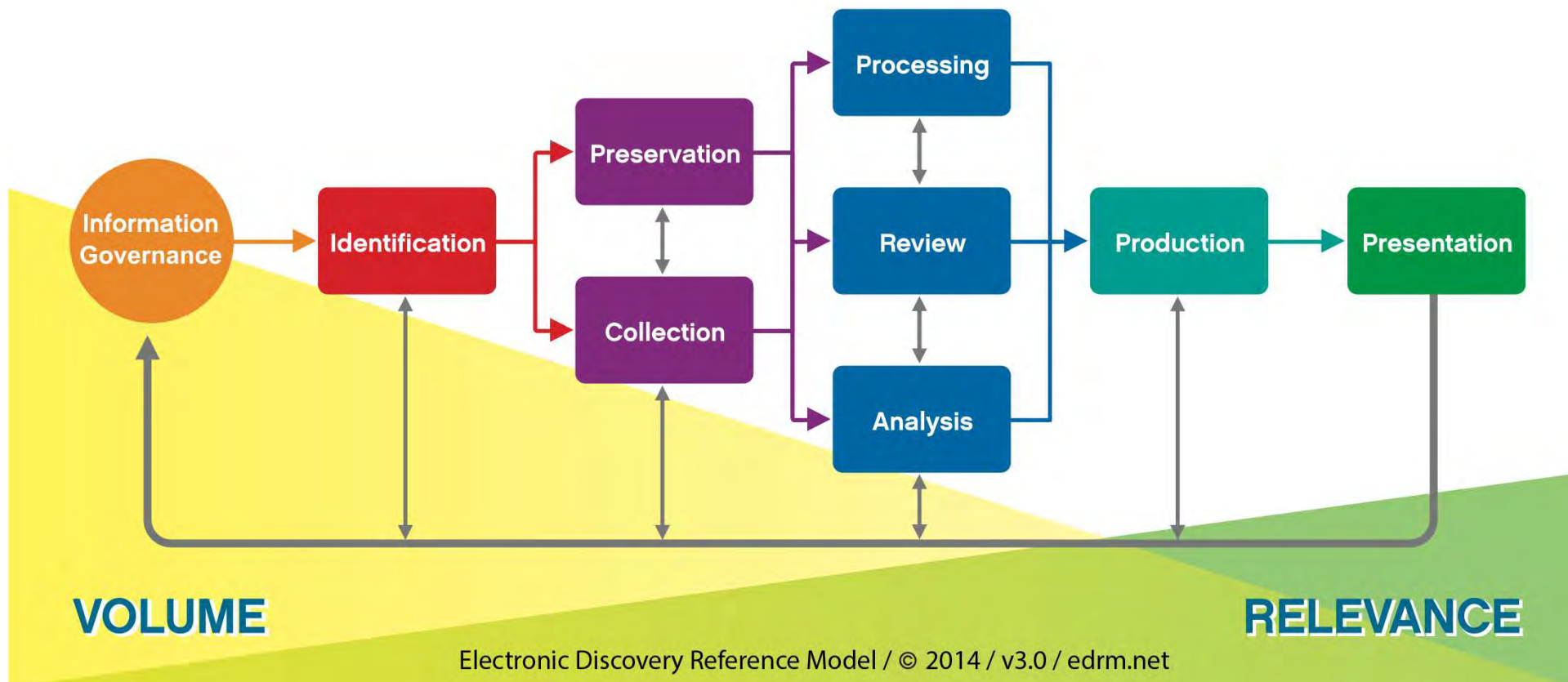
ESI = Electronically stored information: information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities (Source: Code Civ. Proc., § 2016.020, subds. (d)-(e).)

e-Discovery

in the PRA context

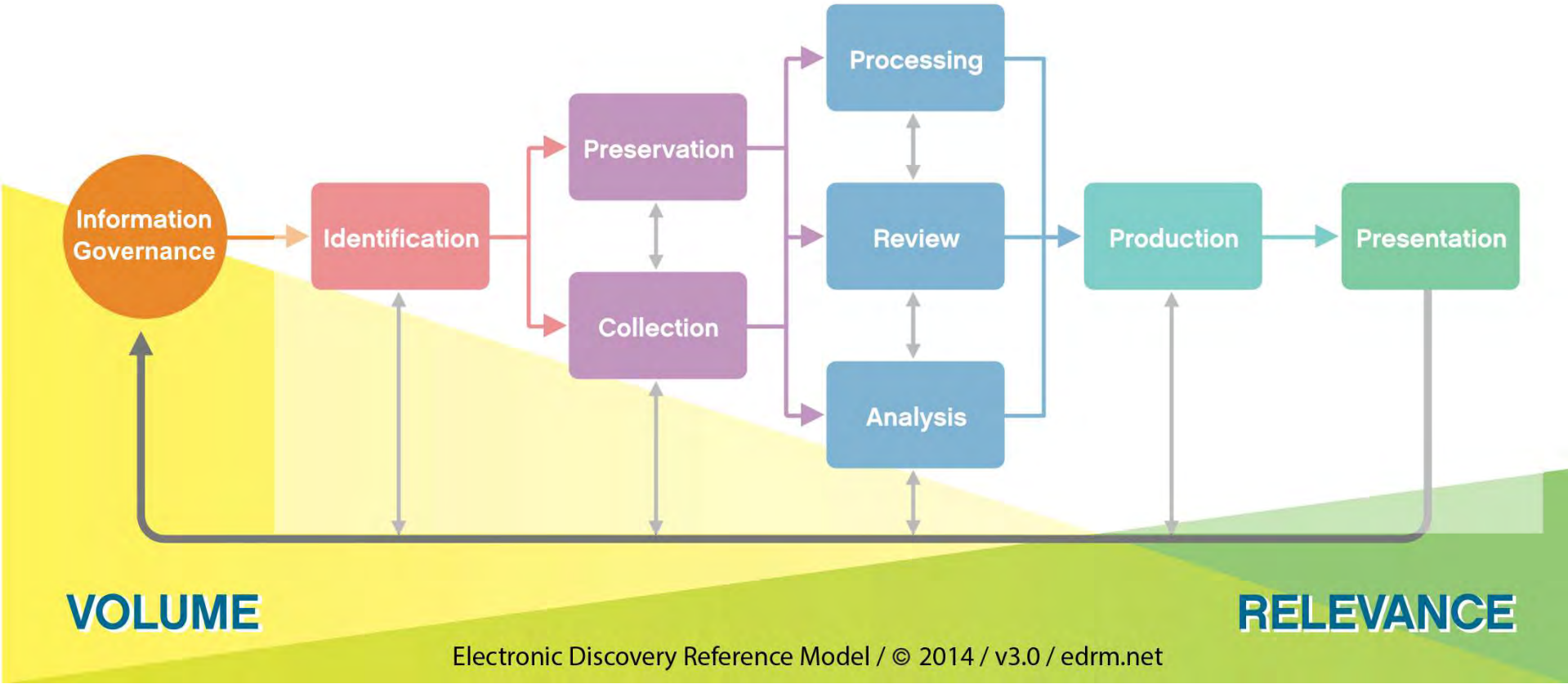
A writing is defined as “any handwriting, typewriting, printing, photostating, photographing, photocopying, **transmitting by electronic mail or facsimile**, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, 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))



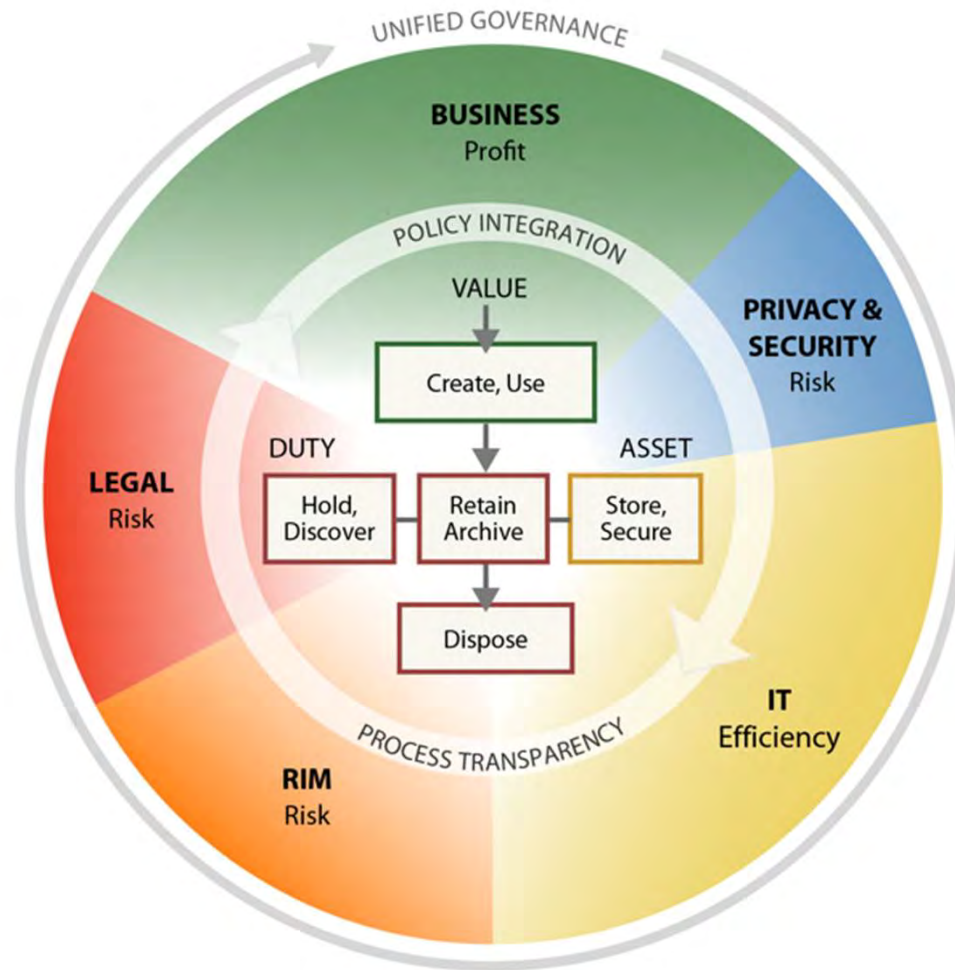
e-Discovery Reference Model

Electronic Discovery Reference Model



Information Governance Reference Model (IGRM)

Linking duty + value to information asset = efficient, effective management



Information Governance

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

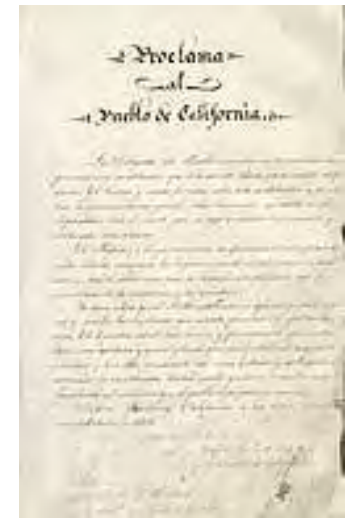


Information Governance...

in the PRA context

- The PRA is...

a constitutional guarantee
that the public can
access an agency's records,
with some exceptions



Information Governance...

in the PRA context

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



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.)

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*)

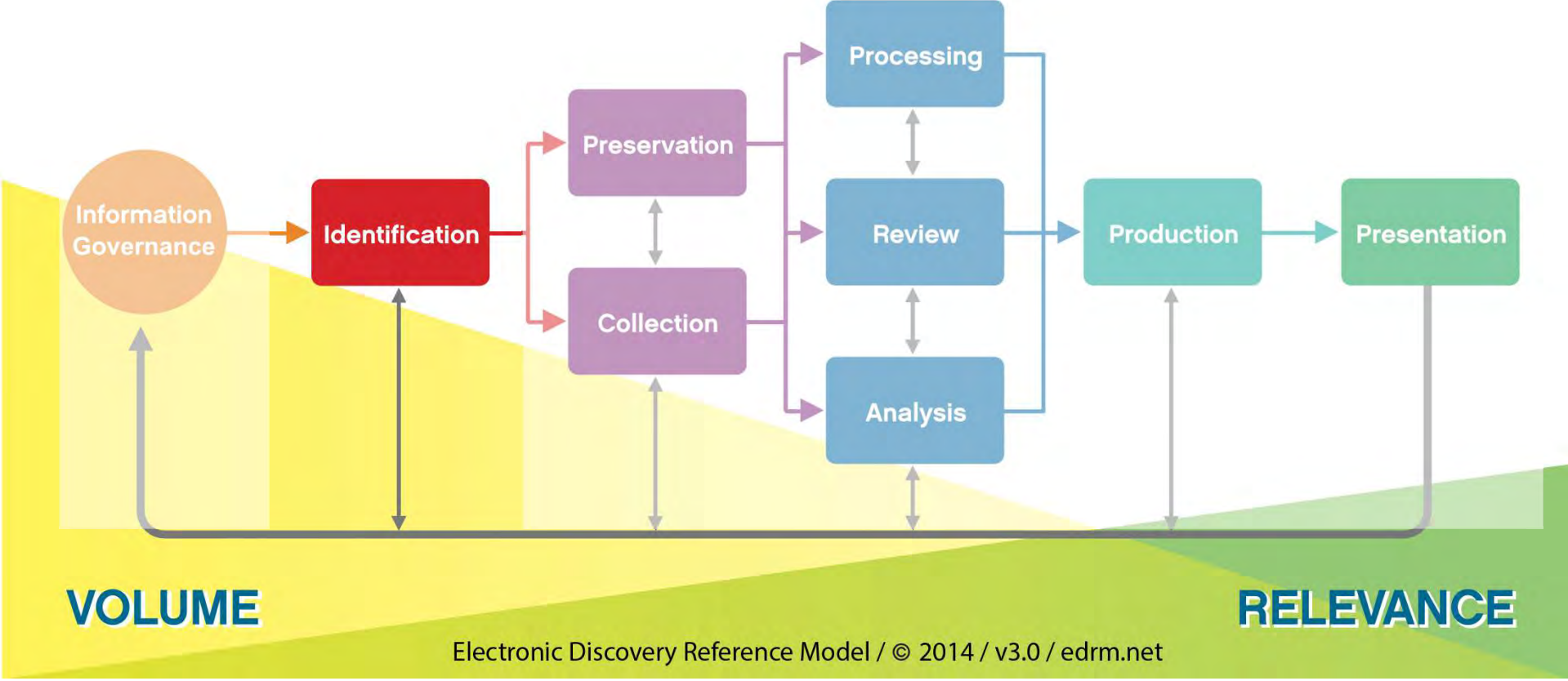


Information Governance...

in the PRA context

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

Electronic Discovery Reference Model



Identification

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

two sides of the same coin...



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.)

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).)

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*

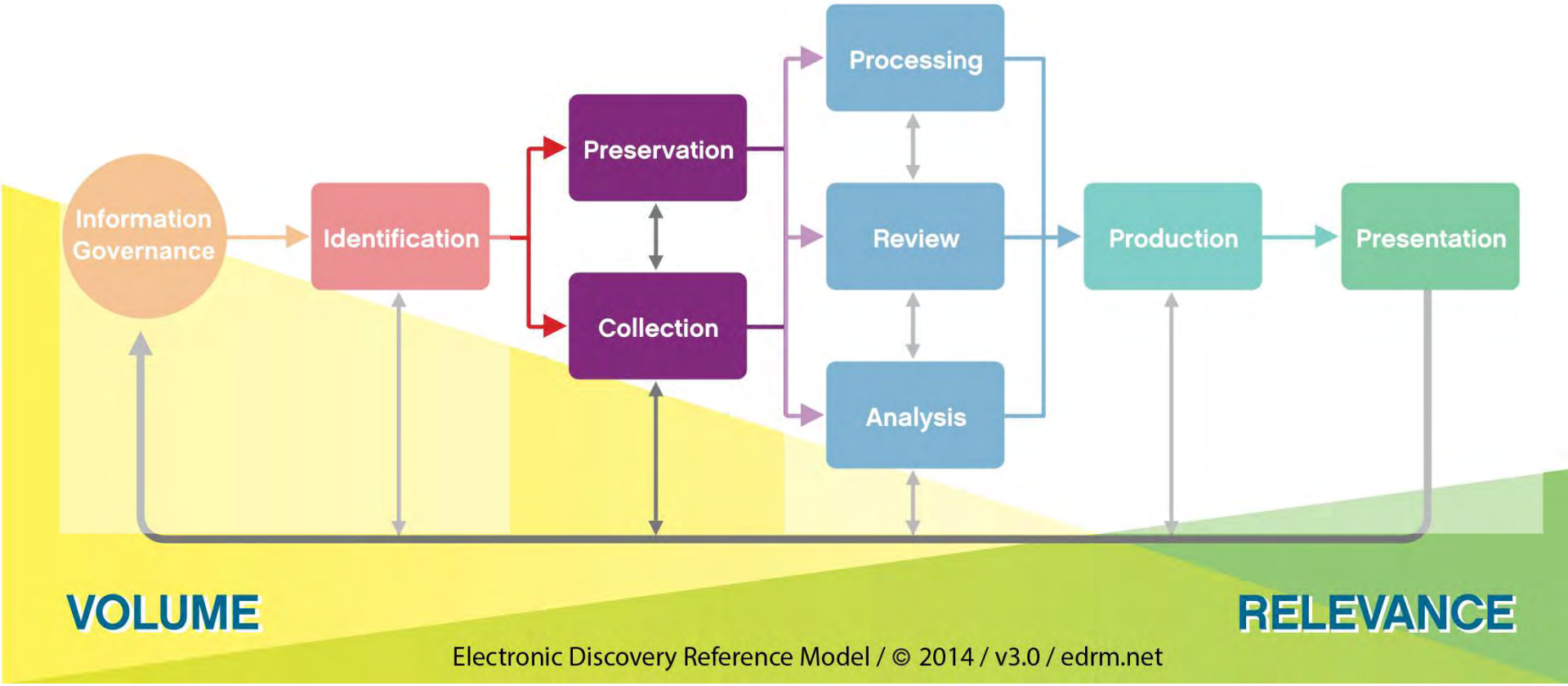


Identification...

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?

Electronic Discovery Reference Model



Preservation & Collection

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



Preservation ≠ Collection

Preservation

- conserves the data
- makes sure the data is not deleted and is available for review and production later

Collection

- gathers the data
- first active step toward production
- feeds into the review process
- can be used as a way to preserve

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).)

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?



bring
your own
device



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)

Collection...

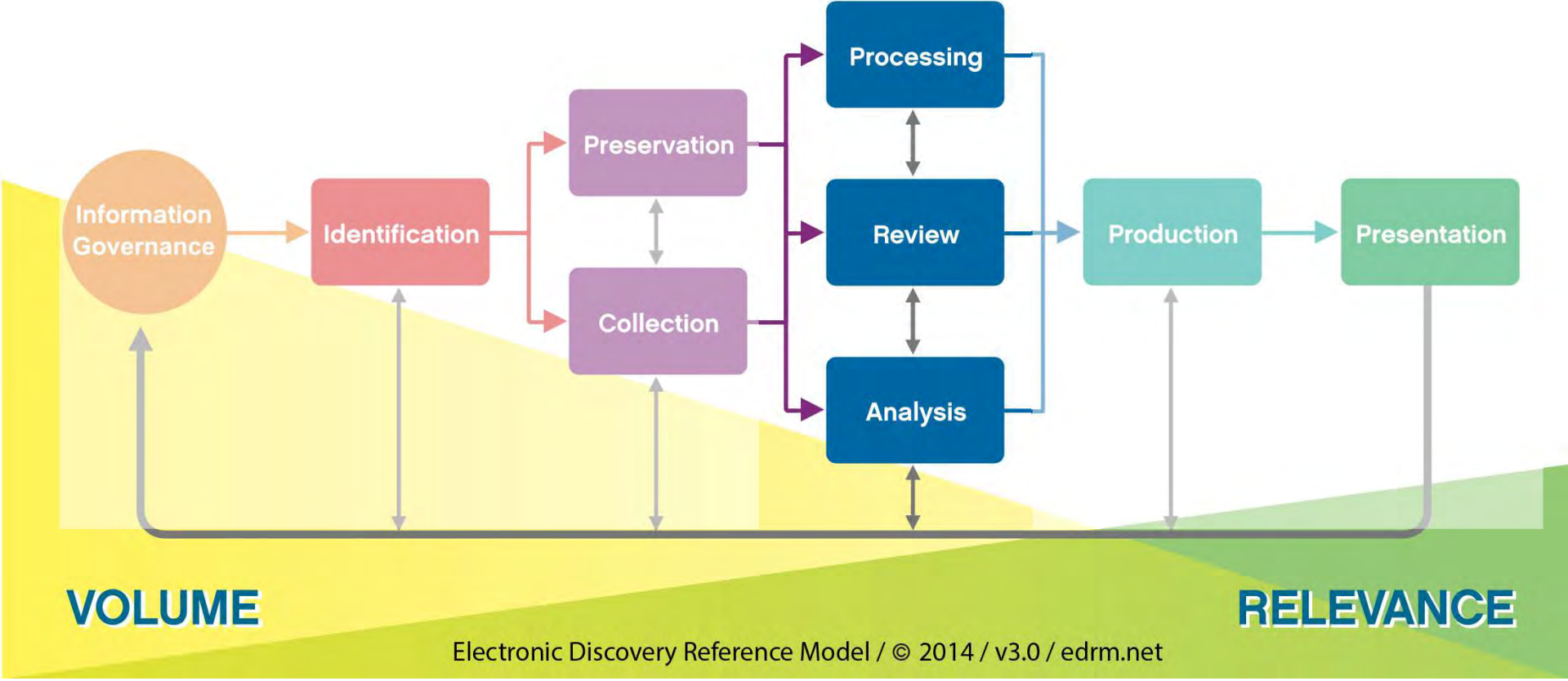
in the PRA context

- 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.

Electronic Discovery Reference Model



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)

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...lots of changes (SB 1421 & SB 16)

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).)

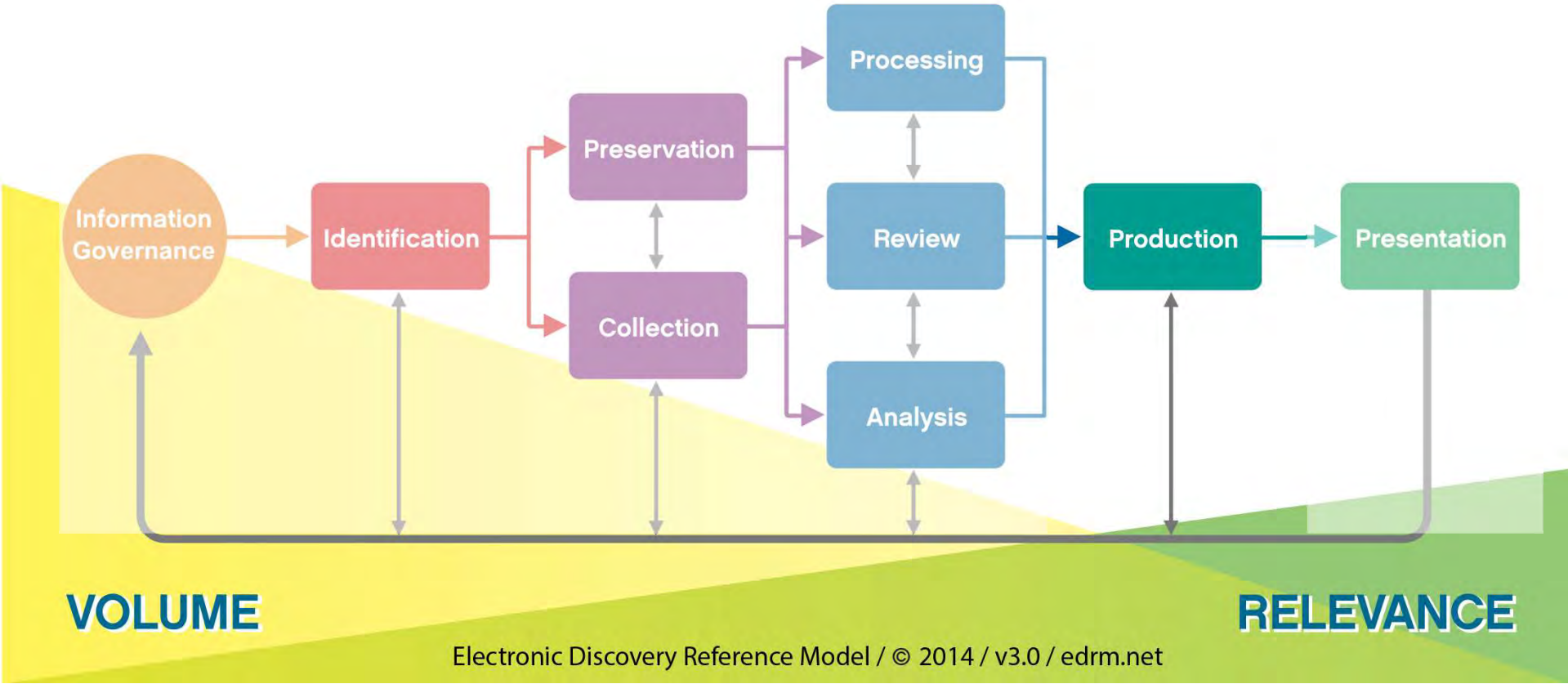
Analysis...

in the PRA context

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

(Gov. Code § 6253(d).)

Electronic Discovery Reference Model



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.

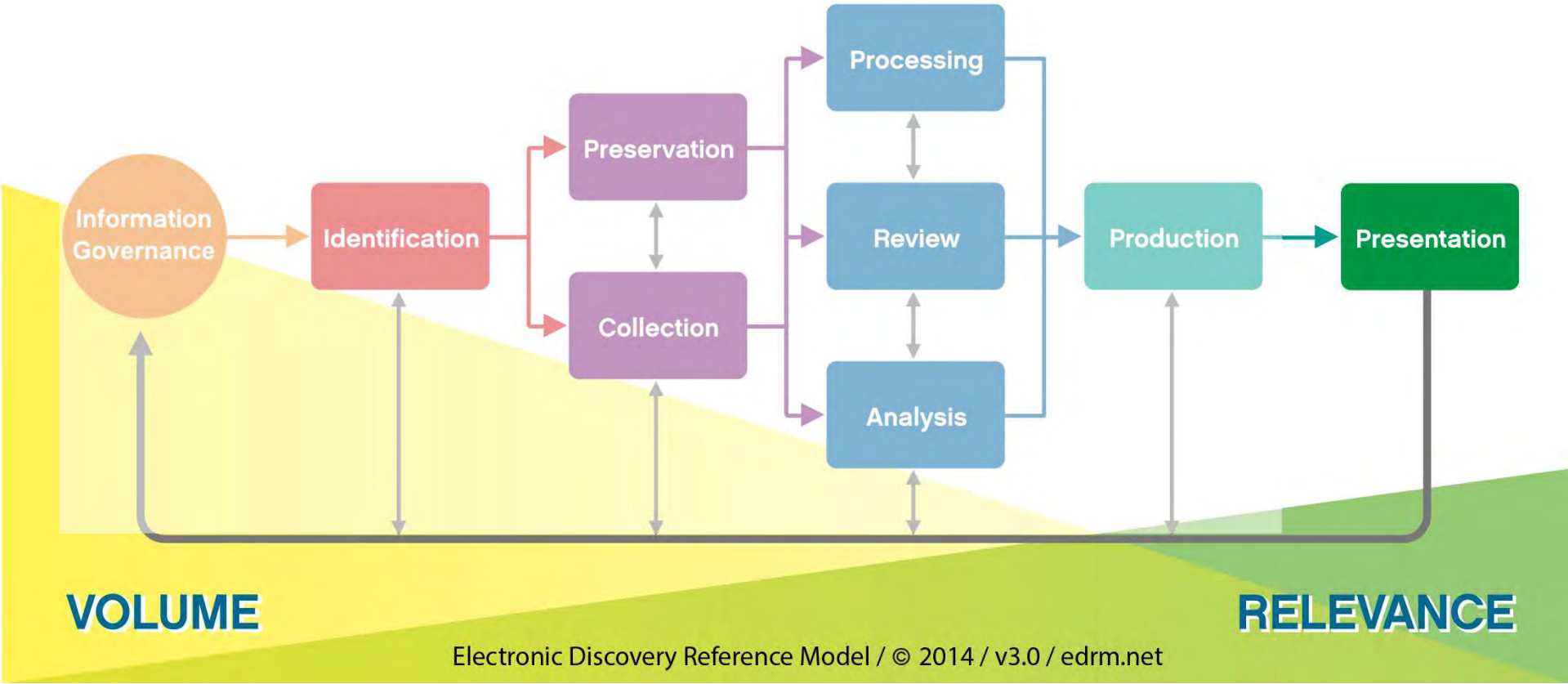
Production...

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

Electronic Discovery Reference Model



Presentation

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

Presentation...

in the PRA context





Sukumar v. San Diego

14 Cal.App.5th 451 (2017)



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Sukumar Case

- Facts about Respondent - City of San Diego
 - An amazingly beautiful coastal & border community
 - Population: 1.37 million people
 - 8th largest city in the US and 2nd largest in Calif.
 - Over 80 educational and research institutes in the region
 - incl UC San Diego, #3 in the US & #17 in the world
 - #1 in concentration of military/defense assets in the world
 - Incredibly competent City Attorney's Office that receives well over 7,000 PRA requests a year
 - Plus, over 20,000 misdemeanor cases and 200 new civil cases each year

Sukumar Case

- Facts About Petitioner - Ponani Sukumar
 - owned and operated a business: Holistic Vegetarian House Corporation
 - he was a resident of San Diego
 - opened his business in 1992
 - dining/fine foods/eating places industry
 - generated over \$200,000 in annual revenues
 - employed approximately 9 people
 - at this single location....



Sukumar Case



Sukumar Case

Timeline

1992	Sukumar begins operating a business at his residence
2005	First complaint from Sukumar's neighbors
2006	Sukumar first ordered to correct code violations
2014	Email between a complainant and city staff & electeds
Aug 2015	Sukumar issues PRA request for records from 1990-2015
Sep 2015	Sukumar files petition re City's PRA response
Mar 2016	Court heard discovery motions and ordered a PMK depo City declared all responsive records had been produced
Apr 2016	PMK Depo & production of additional records
Jun 2016	Trial Court denies writ
Aug 2017	Court of Appeal reverses and awards fees (>\$100,000)

Sukumar Case - Lessons

*“There are known knowns.
These are things we know that we know.
There are known unknowns.
There are things that we know we don’t know,
but there are also unknown unknowns.
These are things we don’t know we don’t know.”*

~ Donald Rumsfeld

Lesson #1

Always engage the requester and attempt to clarify (and possibly narrow) the request.

Sukumar Case - Lessons

Lesson #1

Always engage the requester and attempt to clarify (and possibly narrow) the request (@456).

In *Sukumar*....

- The request asked for 25 years' worth of records, and the City attempted to respond fully within a month.
 - The request may have been too broad and should have taken months to fulfill.
- Part of what needed to be discussed in advance was the access to the archived emails (i.e. pre-2006).

Sukumar Case - Lessons

Lesson #1

Always engage the requester and attempt to clarify (and possibly narrow) the request (@456).

- Help the requester develop a specific and narrowed request.
- Come to an agreement on search terms and key custodians.
- Build a written [evidentiary] record that shows the parties' communications, the timing of the productions, and the nature of the records produced (@454).
- Set a rolling production to allow for a reasonable search for records. Don't rush!

Lesson #2

Do your due diligence when identifying sources of relevant ESI...bad faith is not the test.

Sukumar Case - Lessons

Lesson #2

Do your due diligence when identifying sources of relevant ESI...bad faith is not the test (@466).

In *Sukumar*...

- The City produced three sets of additional documents after the suit was initiated and depositions were noticed.
 - 9/2/2014 email from Councilmember's Office
 - 5 photos from Code Enforcement's S-Drive
 - 146 pages of additional emails

Sukumar Case - Lessons

Lesson #2

Do your due diligence when identifying sources of relevant ESI...bad faith is not the test (@466).

“...bad faith is not the test. The effect of the City’s inability or unwillingness to locate and produce these documents until court-ordered discovery ensued after March 8, 2016, is tantamount to withholding requested information from a PRA request.” (@466 [emphasis in original])

Sukumar Case - Lessons

Lesson #2

Do your due diligence when identifying sources of relevant ESI...bad faith is not the test (@466).

- Find the Records

1. Are there paper documents or objects in employee's offices that may be relevant?
2. Are potentially relevant paper documents or objects stored centrally (libraries, file cabinets, warehouses, etc.)?
3. How is electronic information stored?
4. Who is the person most familiar with the computer systems and ESI?
5. Do you have any pertinent documentation related to the location of data (eg. data maps)?

Sukumar Case - Lessons

Lesson #2

Do your due diligence when identifying sources of relevant ESI...bad faith is not the test (@466).

- Interview the Custodians
 - Get general employee information – provides insight into the individual's role and identifies others that might have potentially relevant information
 - Get general computer information – determines general information about the custodian's computer usage
 - Obtain relevant data – determines what type of files the user has and where they are located

Sukumar Case - Lessons

Lesson #2

Do your due diligence when identifying sources of relevant ESI...bad faith is not the test (@466).

- Engage IT Staff
 - determine what relevant information exists and where it is located
 - determine what type of email system is utilized and specific details
 - determine storage practices and whether employees have the ability to store electronic data on the company
 - determine data accessibility and any potential issues with preservation
 - collect transaction data & know where it is stored

Lesson #3

Once you receive a writ, spend some time double checking the defensibility of your response.

Sukumar Case - Lessons

Lesson #3

Once you receive a writ, spend some time double checking the defensibility of your response (@458).

In *Sukumar*....

- After receiving the City's initial response, Sukumar reached out at least twice re the thoroughness of the search (@457).
- Then, he waited three weeks before filing the writ, which identified specific records being sought (@458).
- After being served w/ the Notices of PMK Depos, the City asked staff to check for more responsive records (@460).

Sukumar Case - Lessons

Lesson #3

Once you receive a writ, spend some time double checking the defensibility of your response (@458).

- Goal: to open negotiations, reduce exposure, and limit court-awarded fees.
- Remember...
 - the stakes are much higher than normal discovery (sanctions v. attorneys' fees award)
 - fee award to the prevailing party is mandatory (@463)
 - burden is on the agency to prove compliance, and all ties go to the Petitioner

Lesson #4

Understand the applicable legal standard under the PRA, and never increase your burden.

Sukumar Case - Lessons

Lesson #4

Understand the applicable legal standard and never increase your burden (@457).

In *Sukumar*...

- 9/25/2015 – City searched as broadly and thoroughly as possible (@ 450).
- 2/1/2016 – City produced all remaining emails of which the City was aware (@459).
- 3/8/2016 – City produced “everything” (@459).
 - Then the Court ordered a PMK depo to confirm that the City produced all responsive documents (@460).

Sukumar Case - Lessons

Lesson #4

Understand the applicable legal standard and never increase your burden (@457).

- PRA standard for identifying the responsive records = conduct a reasonable search

So what IS a reasonable search?



Sukumar Case - Lessons

Lesson #4

Understand the applicable legal standard and never increase your burden (@457).

PRA standard = conduct a reasonable search

- comply with the PRA as long as the record can be located with reasonable effort (*Cnty Youth Athletic Center* (2013) 220 Cal.App.4th 1385, 1425)
- a citizen's right to public documents is not absolute, but subject to an implied rule of reason (*Bruce* (1967) 65 Cal. 2d 666, 676)
- a custodian of records can regulate as necessary to allow the orderly function of the office and employees (*Id.*)

Sukumar Case - Lessons

Lesson #4

Understand the applicable legal standard and never increase your burden (@457).

- agencies may impose reasonable restrictions on general requests for voluminous classes of documents (*Rosenthal* (1973) 34 Cal.App.3d 754, 761)
- a request may be overbroad or unduly burdensome, or that the documents cannot be located with reasonable effort (*Fredericks* (2015) 233 Cal.App.4th 209, 225)
- an agency must assist the public in formulating reasonable requests (*Id.* at 228)

Lesson #5

Understand the legal significance of the request being deemed complete.

Sukumar Case - Lessons

Lesson #5

Understand the legal significance of the request being deemed complete (@457).

In *Sukumar*...

- City declared “final response” on 8/31/2015 (@457)
- Then, the City tried to assert the suit was premature, creating a conflict of facts (@ 458)
- City declared to the Court that the response was “final” again on 3/8/2016 (@459)

Sukumar Case - Lessons

Lesson #5

Understand the legal significance of the request being deemed complete (@457).

- Be precise in your language when closing out a PRA request.
- Even include clever if you want to encourage additional meet & confer opportunities.
- Never close out a PRA request unless you have completed a reasonable search that is auditable and defensible.

Bonus Lesson

In a PRA lawsuit, a losing party can still recover fees because of the prevailing party provision.

Sukumar Case - Lessons

Bonus Lesson

In a PRA lawsuit, a losing party can still recover fees because of the prevailing party provision (@454).

In *Sukumar*...

- The Court found it compelling that the City didn't do a "second look" for records until after the lawsuit was filed.
- "The City didn't even think of searching the S-drive until its contents were revealed during [the] court-ordered deposition." (@465)
- The lawsuit must have "induced" production of additional records, or have been a "material factor."



**ARC: ADVANCED
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