ESI Primer for PRA Requests

Best Best & Krieger LLP
October 24, 2018
Overview

• Overview of ESI
• E-Discovery Reference Model
  • Information Governance
  • Identification
  • Preservation & Collection
  • Processing, Review, Analysis
  • Production
  • Presentation
An Attorney’s Ethical Duty

Attorneys handling a client’s ESI should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

1. Initially assess e-discovery needs and issues
2. Implement/cause to implement appropriate ESI preservation procedures
3. Analyze and understand a client’s ESI systems and storage
4. Advise the client on available options for collection and preservation of ESI
5. Identify custodians of potentially relevant ESI
6. Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan
7. Perform data searches
8. Collect responsive ESI in a manner that preserves the integrity of that ESI
9. Produce responsive non-privileged ESI in a recognized and appropriate manner

(California Formal Opinion on Ethics No. 2015-193, pp. 3-4)
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)
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
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
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 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).)
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?
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))
- 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
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).)
Processing, Review, & 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

VOLUME

Production

RELEVANCE

Electronic Discovery Reference Model / © 2014 / v3.0 / edrm.net
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 – Native Files

Pros
1. Eliminate image conversion costs and time
2. Easily produce certain files such as spreadsheets and databases
3. Files are easily searchable by requester

Cons
1. Cannot endorse, number, or redact records
2. Requester may need proprietary software to open and view files
3. Records can be altered... intentionally or accidentally
Production – Image Files

Pros
1. Can endorse, number, or redact records
2. Eliminate any risk of accidental alteration of records

Cons
1. Not favorable for the review of certain files (SSs and DBs)
2. Increased time and cost for processing and image conversion
3. Risk of altering data during the image conversion process
Production – Paper Files

Pros

1. Can endorse, number, or redact records
2. Eliminate any risk of accidental alteration of records

Cons

1. Not favorable for the review of certain files (SSs and DBs)
2. Increased time and cost for printing
3. No connection to native file
4. No indexing or search capabilities
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*
BB&K Resources

- BB&K Education: www.bbklaw.com
- ARC Information: bbkarc.smartsyt.com
- PRA Assessment: ARC@bbklaw.com
- Advice & Guidance: Christine Wood

Christine Wood
Director of PRA Services & E-Discovery Counsel

E: christine.wood@bbklaw.com
P: (213) 542-3861