



Do You Know the Way [After] *San Jose*

Best Best & Krieger Webinar

June 26, 2018



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Do You Know the Way...

- Introduction
- PRA Overview
- San Jose Overview
- e-Discovery Overview
- Collections
- Best Practices



Introduction



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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” (Gov. Code § 6250)
- members of the public may inspect or obtain a copy of identifiable public records
- public access must sometimes yield to personal privacy interests
 - 76 express exemptions, plus those incorporated by reference



PRA Overview

Definition of a Public Record

- “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency” (Gov. Code § 6252(e))
- every conceivable kind of record involved in the governmental process, possibly exempt purely personal information (Cal POST (2007) 42 Cal. 4th 278, 288, fn. 3)
- must relate in some substantive way to the conduct of public’s business (San Jose (2017) 2 Cal.5th 608, 618)



San Jose (2017) 2 Cal.5th 608



A local attorney and civic activist, sought communications from the Mayor, council members and staff concerning a local development project, which had been developed with private and public money. His request under the Public Records Act explicitly sought “voicemails, emails and texts messages sent or received on private electronic devices” of these officials and employees.



San Jose (2017) 2 Cal.5th 608

GET
THE
FACTS



The City produced some documents, but took the position that “since the City does not prepare, own, use or retain [the language of the PRA] any record created by the Mayor, members of the City Council or their staff using any type of personal digital assistant, those records are not public records.”



San Jose (2017) 2 Cal.5th 608, 614

California Supreme Court decision

“Here, we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act (CPRA or Act).”



San Jose (2017) 2 Cal.5th 608, 617

Public Record Defined → 4-part test

- (1) a writing
- (2) with content relating to the conduct of the public's business
- (3) prepared *or*
- (4) owned, used, or retained by any state or local agency



San Jose (2017) 2 Cal.5th 608

Reasoning

- a “writing” includes electronic communications (e-mails, texts, and voicemail messages) (at 617)
- the holding extends to employees and elected officials because only the people who serve in agencies can prepare, own, use, or retain any record (at 621)
- public records are *retained by the agency* even if the writing is in a personal account or device (at 623)
- whether a record substantively relates to the conduct of public’s business won’t always be clear (at 618)



San Jose (2017) 2 Cal.5th 608, 618

Factors to Identify Public Records

- the **author** of the communication
- the **recipient** of the communication
- the **subject matter** of the communication
- the **content** of the communication
- the communication was prepared by an employee within the **scope of employment**
 - definitely includes elected officials



San Jose (2017) 2 Cal.5th 608, 628

Court-Cited Policies & Procedures

- prohibit use of personal electronic accounts for official business unless messages are copied or forwarded to an official account ([citing 44 USC. § 2911(a)])
- require that agencies ensure official email messages in employees' personal accounts are preserved in the agency's recordkeeping system ([citing 36 CFR § 1236.22(b)])
- encourage a policy that official emails be preserved in employees' personal accounts as well ([citing *Landmark Legal Foundation v. EPA* (2015) 82 F.Supp.3d 211, 225-226])



San Jose (2017) 2 Cal.5th 608, 628

Performing Collection from Personal Devices

- agencies can rely on employees to search their own devices for responsive records
- agencies should train employees on how to distinguish a public vs. a private record
- employees need to be prepared to sign affidavits that they have conducted adequate searches and produced the responsive records



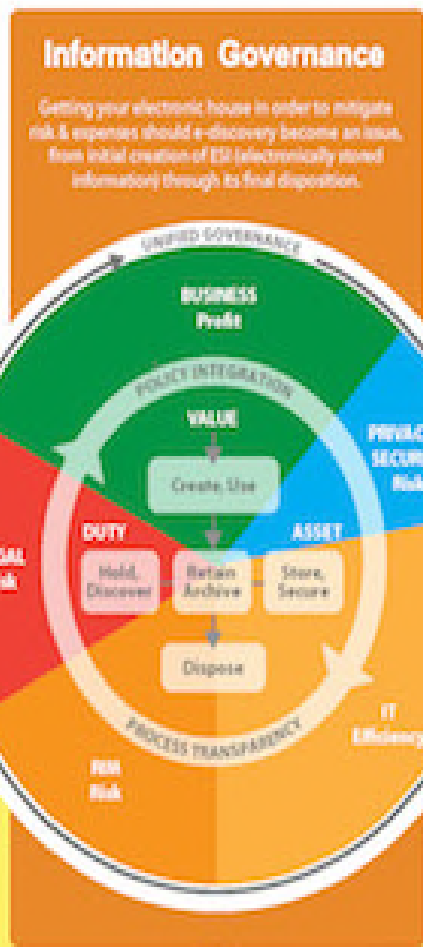
E-Discovery Can Help

E-Discovery Defined

- any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case
 - typically use in support of litigation
 - very effective tool for PRA responses
- part of an attorney's duty of competence (*Formal Opinion No. 2015-193*)



E-Discovery Reference Model



Identification
Locating potential sources of ESI & determining its scope, breadth & depth.

Preservation
Ensuring that ESI is protected against inappropriate alteration or destruction.

Collection
Gathering ESI for further use in the e-discovery process (processing, review, etc.).

Processing
Reducing the volume of ESI and converting it, if necessary, to forms more suitable for review & analysis.

Review
Evaluating ESI for relevance & privilege.

Analysis
Evaluating ESI for content & context, including key patterns, topics, people & discussion.

Production
Delivering ESI to others in appropriate forms & using appropriate delivery mechanisms.

Presentation
Displaying ESI before audiences (at depositions, hearings, trials, etc.), especially in native & near-native forms, to elicit further information, validate existing facts or positions, or persuade an audience.

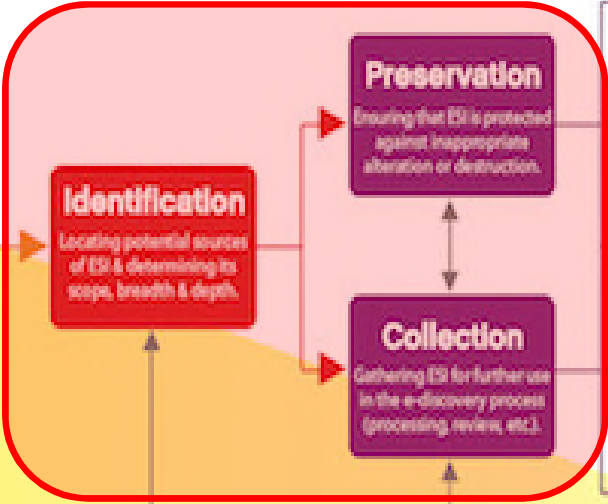
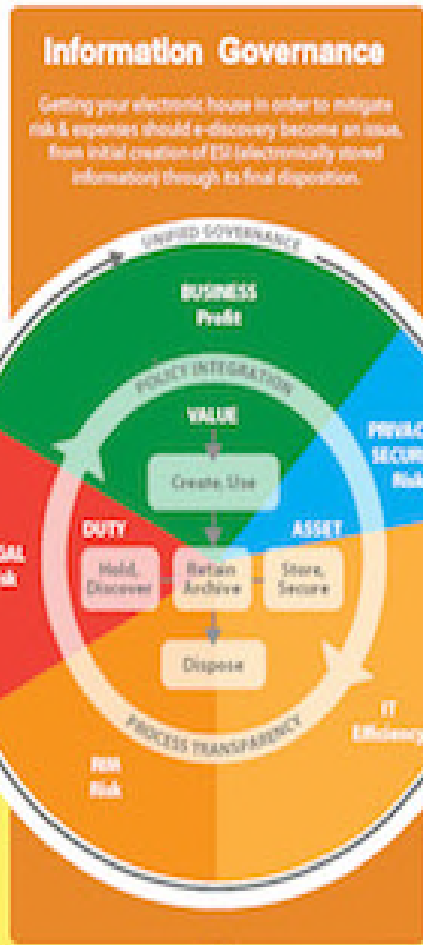
VOLUME

RELEVANCE

Source: www.EDRM.net



E-Discovery Reference



VOLUME

RELEVANCE

Source: www,EDRM.net



One HUGE Caveat...



E-Discovery - Identification

Assess the Request

- What items are being requested? And what date range?
 - key search terms, incl. jargon & acronyms
 - get agreement & consider records retention policy
- What custodians **will** could have these records?
 - business units/people/IT systems/paper files
- What other data sources might exist?
 - email accounts & data servers
 - agency-issued devices (get list from IT)
 - personal email accounts & devices



E-Discovery - Preservation

Considerations

- Records retention policy
 - communicated/enforced/monitored
- Personal devices policy
 - how? when? exceptions?
- Social media policy
 - who? when? how much?
- Storage
 - best practices? economical?



E-Discovery - Collection

Collection is not easy,

- Insufficient tools.
- Undefined/inaccurate search terms.
- Unclear about process

...but it's doable!

- Get assistance.
- Be strategic and plan ahead.
- Conduct a defensible collection process.

DIFFICULT

but Doable



E-Discovery - Collection

Data Sources

- Active Data
- Mobile Data
- Cloud Data
- Offline Data
- Archived Data - Backups
- Hidden Data



E-Discovery - Collection

Types of Collections

- **forensic collection**
 - preserving the document's metadata
 - typically involves special software that copies the targeted data without altering the metadata

- **non-forensic collection**
 - not preserving the document's metadata



E-Discovery - Collection



E-Discovery - Collection

Collection Methods

- In-house Collection
- Self-Collection
- Third Party Collection
- Remote Collection



E-Discovery - Collection

Self-Collection

Pros

- NO or little cost
- Quickest approach
- Best knowledge
 - Location of records
 - Relevance
 - Hot Docs

Cons

- Employees may under collect – un/intentional?
- Limited tech knowledge
- May not be defensible if PRA request is litigated



E-Discovery - Collection

In-house Collection

Pros

- More control
- Cost-efficient when compared to outsourcing
- Better knowledge or organizational systems
 - Data map
 - Agency devices

Cons

- Time consuming
- Limited resources
- Requires supervision by legal staff
 - may collect too broadly resulting in excessive processing & review



E-Discovery - Collection

Third-Party Collection

Pros

- Most defensible processes and tools
- Quickest and most scalable approach

Cons

- Can be expensive
- Least knowledge of organizational systems



E-Discovery - Collection

Remote Collection

Pros

- Fast and targeted approach
- Could be incredibly cost efficient
- Maintains privacy/confidentiality for content owner

Cons

- Relatively new technology
- May requires significant up-start costs
- No option for non-forensic collection



E-Discovery - Collection

Key Documents in Collection Phase

- Custodian Lists
- Custodian Interviews/Questionnaires
- Collection Checklists
- Chain of Custody Forms
- Database Collection Forms
- Password or Encryption key Requests
- Audit Trails



Resources

- Best Best & Krieger
- EDRM, Duke Law Center for Judicial Studies
www.edrm.net
- “The Comprehensive Guide to e-Discovery Data Collection,” Exterro
 - a vendor with great reports & publications
- Association of e-Discovery Specialists
www.aceds.org



Questions?

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