ESI Primer for Public Records (FOIA) Requests

International Municipal Lawyers Association (IMLA)

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Presenter



Christine N. Wood, Partner

Director of PRA Services and e-Discovery Counsel

christine.wood@bbklaw.com
213-542-3861

Christine leads Best Best & Krieger's Advanced Records Center, which provides clients across the nation with comprehensive and cost-effective support for records-related matters, including public records requests of every size and complexity. Christine is also an experienced and sought-after trainer and presenter, with an easy and conversational style that clients appreciate.

CEDS
Certified eDiscovery Specialist

Agenda

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

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What words come to mind when you think of public records requests?

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Overview of ESI



1 2 3
4 5 6
7 8 9
* 0 #
CARRIER
TRANSDATA
DATA
LIMITED
307

What is the device shown in this image?

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Overview of ESI

ESI = writings, drawings, graphs, charts, photographs, sound recordings, images, and other data stored in any medium from which information can be obtained (FRCP Rule 34)

ESI = Electronically stored information: information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities (Cal. 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 e-Records



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.

(*Source*: *San Jose* (2017) 2 Cal.5th 608)

Overview of e-Records



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."

(*Source*: *San Jose* (2017) 2 Cal.5th 608)

Overview of e-Records

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)."

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

Overview of e-Records

National Trend

- WA: *Nissen v. Pierce County* (2015) 357 P. 3d 45 – held that text messages sent or received by a public employee in his or her official capacity are public records
- VT: U.S. Right to Know v. University of Vermont (2021) 214 Vt. 543 – held that an essential factor in identifying a public record is whether its content reflects government business
- MI: Bisio v. City of Village of Clarkston (2020) 506 Mich. 37 – held that whether records are public records depends on whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function

When poll is active, respond at **pollev.com/christinewoo416**

Text **CHRISTINEWOO416** to **22333** once to join

Has your state court (or Legislature) issued a ruling (or law) making electronic records on personal devices disclosable?

- Yes
- No
- Not Sure

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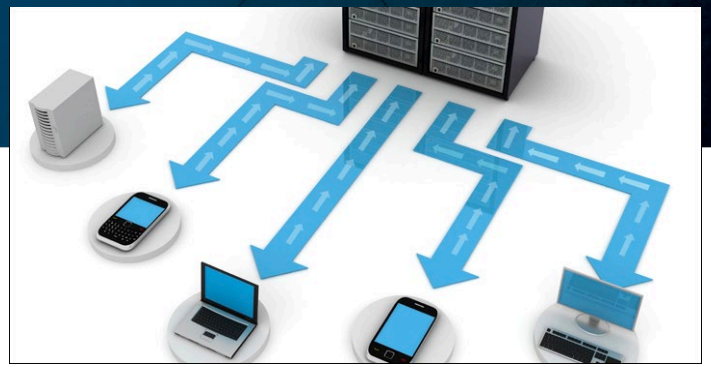
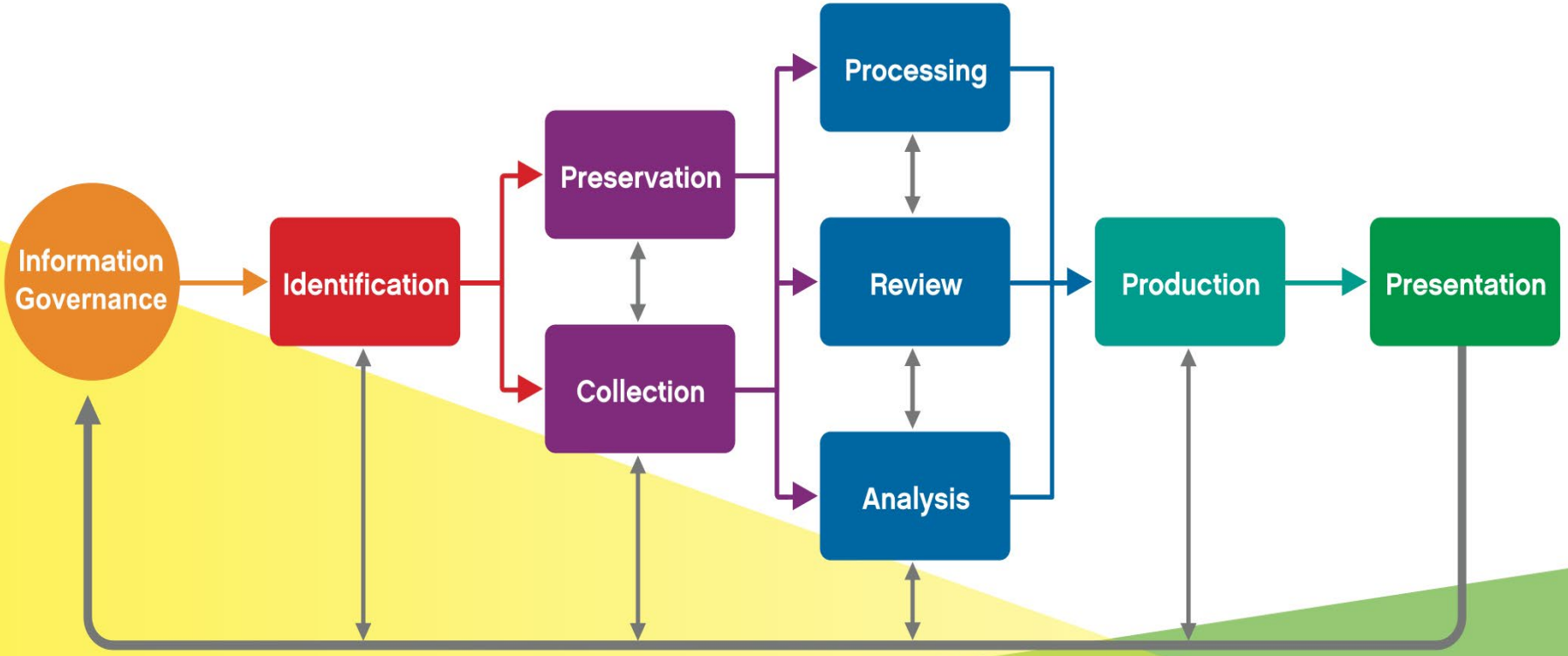
e-Discovery Reference Model



Electronic Discovery Reference Model



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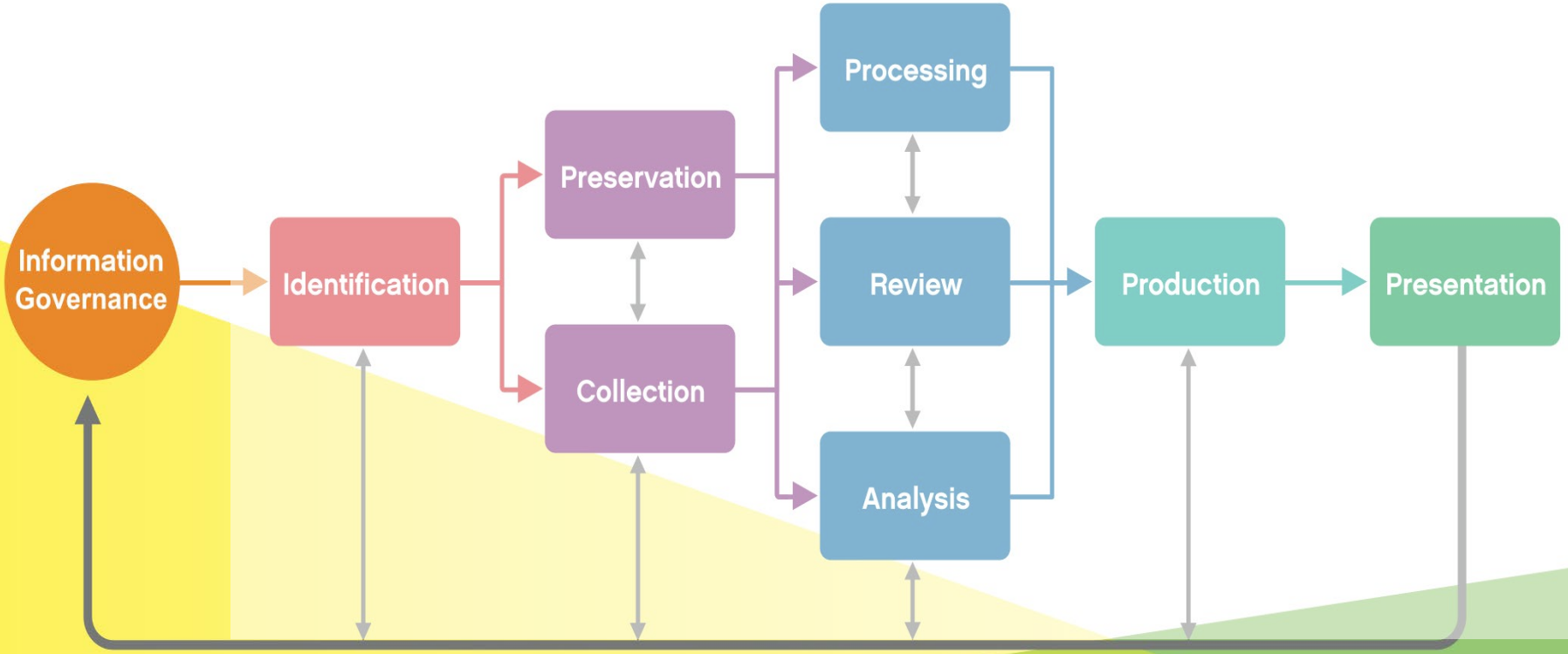
Electronic Discovery Reference Model



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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 public records context

- In most states, the public records law is…

  a constitutional guarantee

  that the public can

  access an agency's records,

  with some specific exceptions



Information Governance…
in the public records context

- The PRA is **NOT**…

a retention policy

a destruction policy

a privacy policy

a usage policy



Information Governance…
in the public records 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 [emphasis added].)

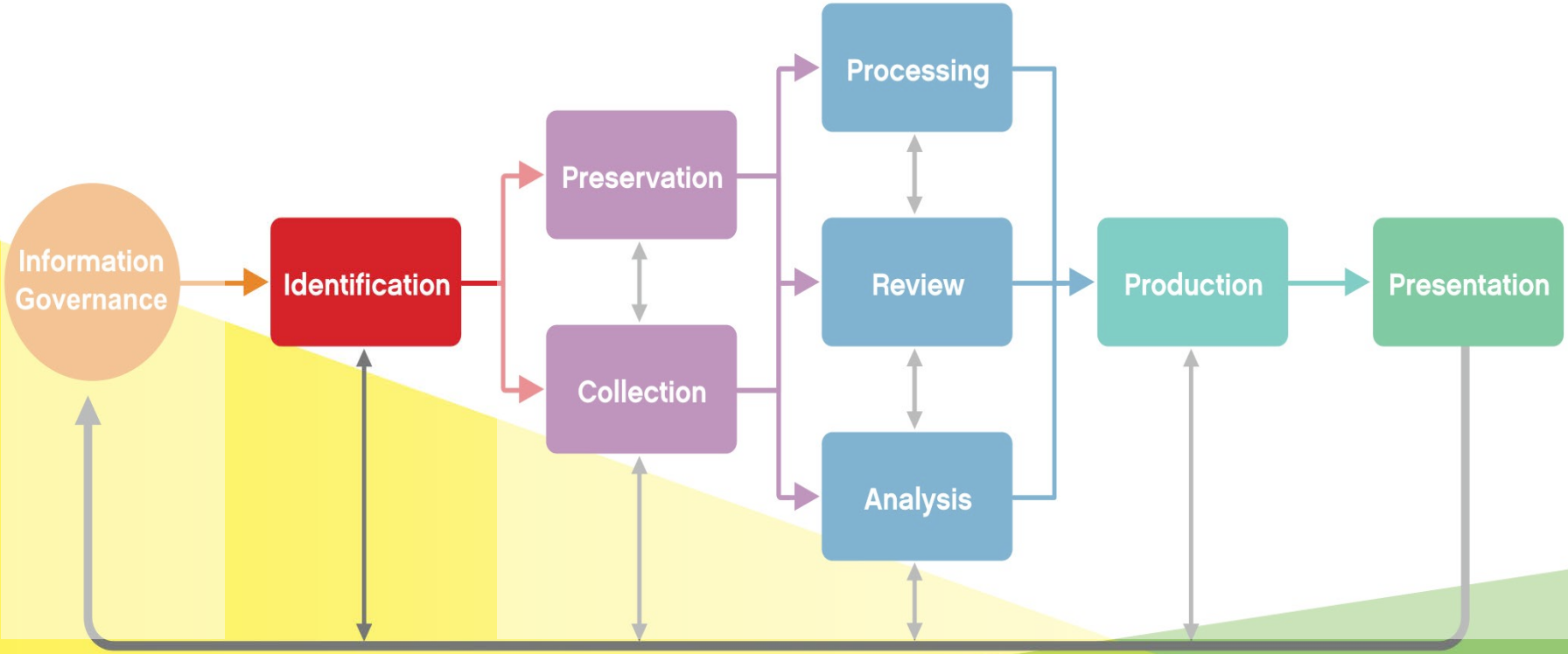
Information Governance…
in the public records context

- 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)





Electronic Discovery Reference Model



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Identification

- Identification refers to the process of determining…
  - **sources** of relevant ESI
  - re**sources** for executing plan
  - Think **DATA MAP**!

two sides of the same coin…



Have you mapped your organization's data?

Yes	**A**
No	**B**

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Identification…

in the public records 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?



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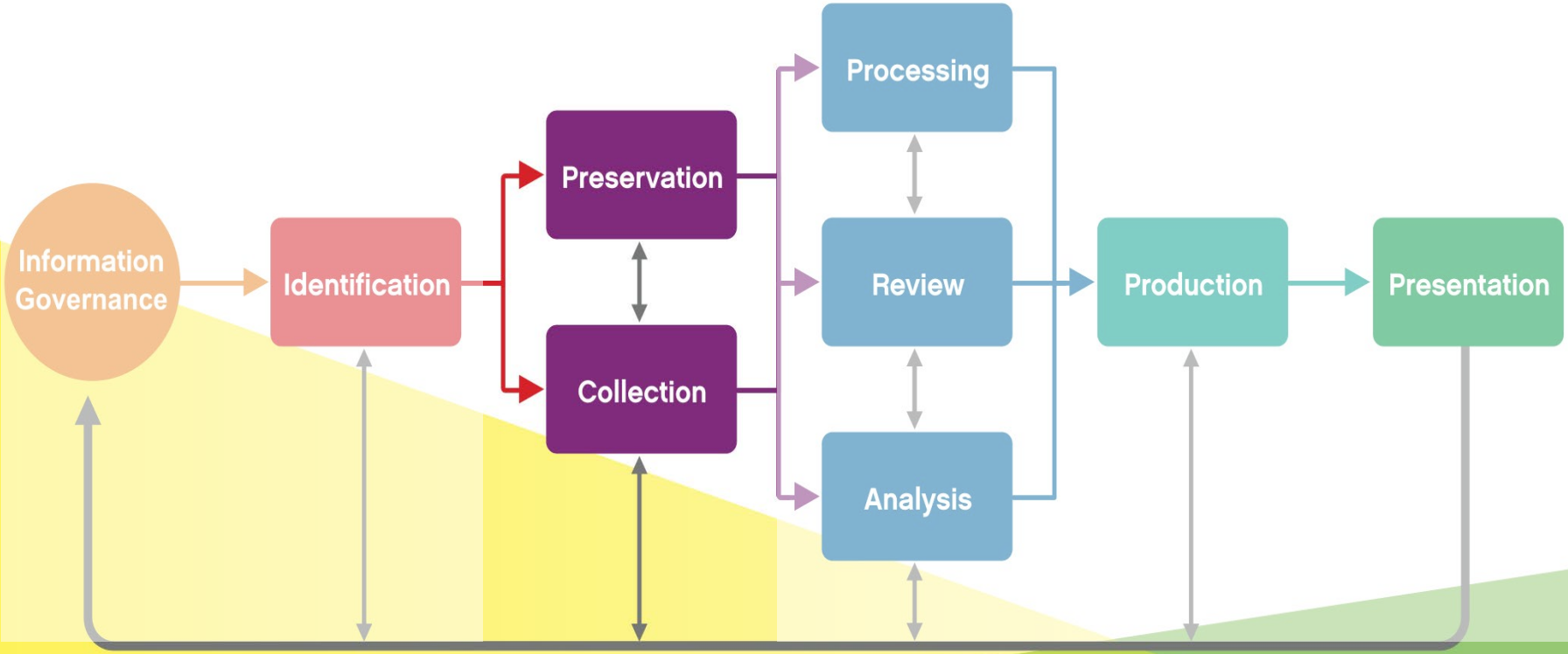
Identification…

in the public records 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



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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 public records 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…

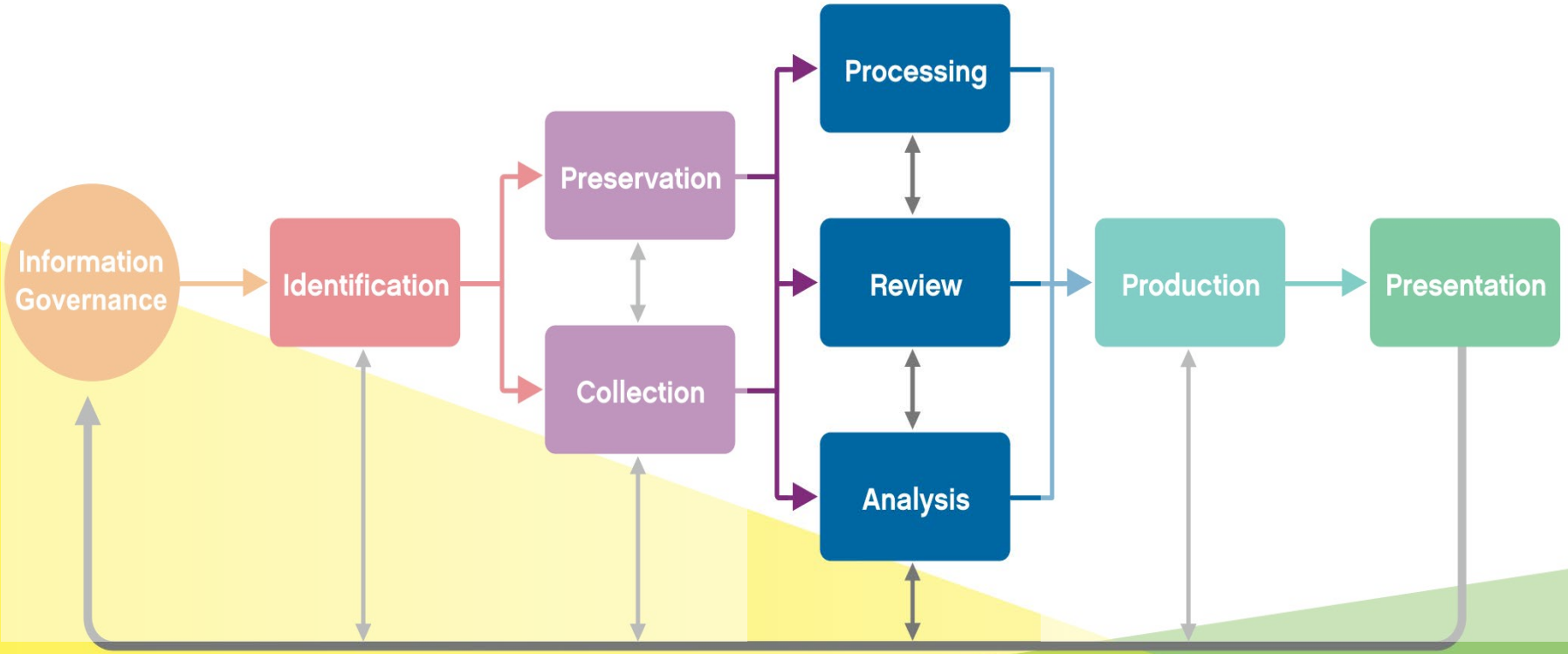
in the public records context

- 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



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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 public records 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 public records context

Records are reviewed for information that is exempt. In California….

- 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

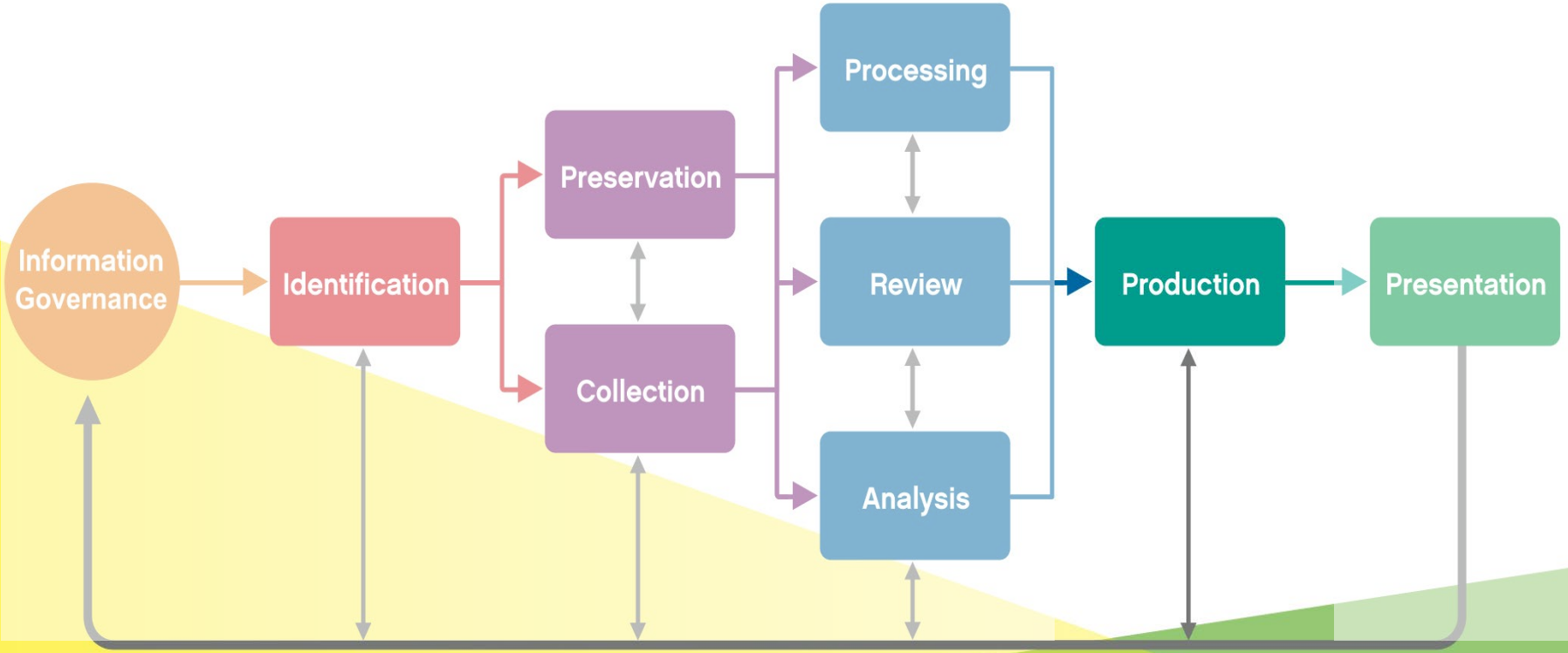


Analysis…

in the public records context

The PRA does not "permit an agency to delay or obstruct" the production of public records. (Cal. Gov. Code § 6253(d).)

Electronic Discovery Reference Model



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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.

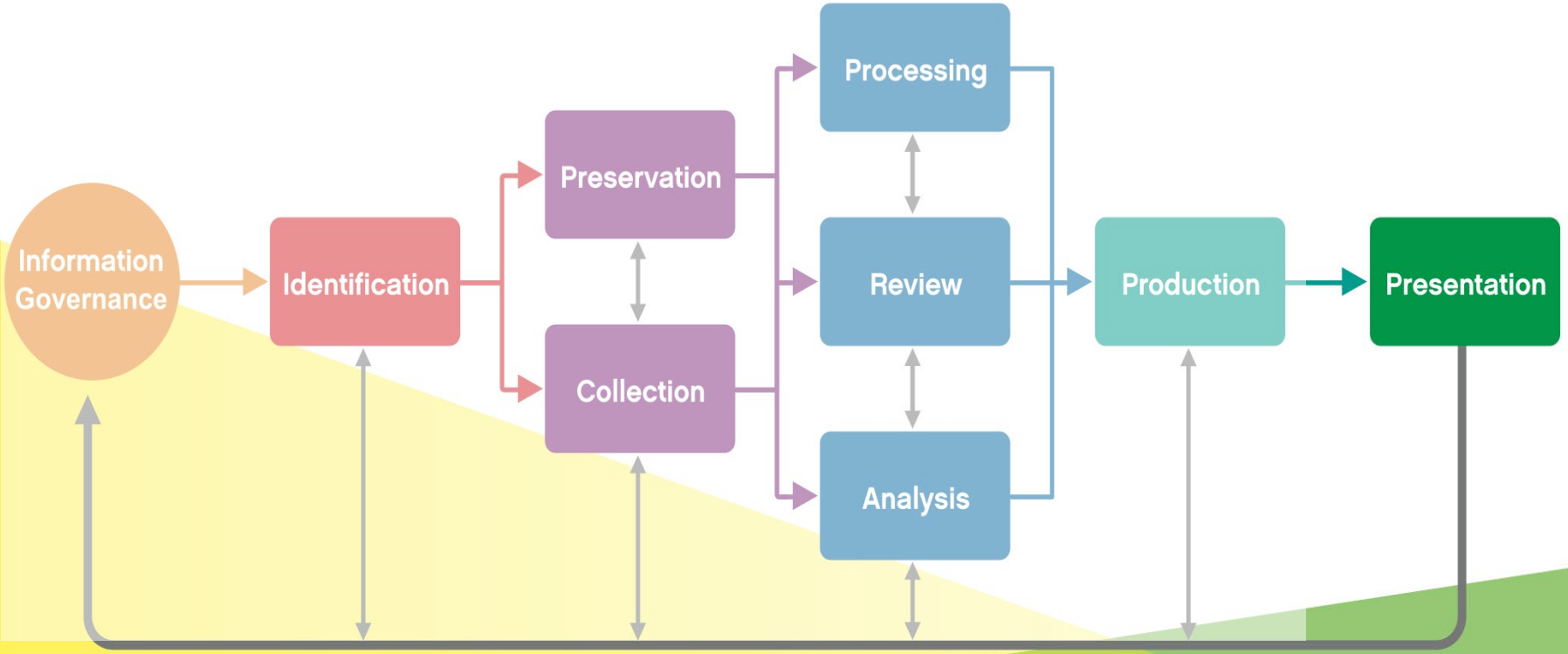
Production…

in the public records 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



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Presentation

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

Presentation…

in the public records context



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ARC: ADVANCED RECORDS CENTER



ARC Team

Amanda Carnero • Nancy Stubbs • Christina Boltinghouse •
Renee Bryant • Melizza Gonzalez • Leo Navarro •
Jennifer Ransom • Kim Mendoza • Towmika Young
Kari Van Sinden • Stephanie Smith
Maria Razo • Bree Wellington (not pictured)

ARC Services & Benefits

- More advanced technology for doc review
- Consistent systems and procedures
- Scalability to handle large-scale reviews
- Focus on e-discovery support and techniques
- Work with a PRA Working Group to standardize the firm's treatment of substantive issues of law
- Blended rates for PRA processing and advice

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Questions?

Christine Wood

christine.wood@bbklaw.com | 213-542-3861

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