

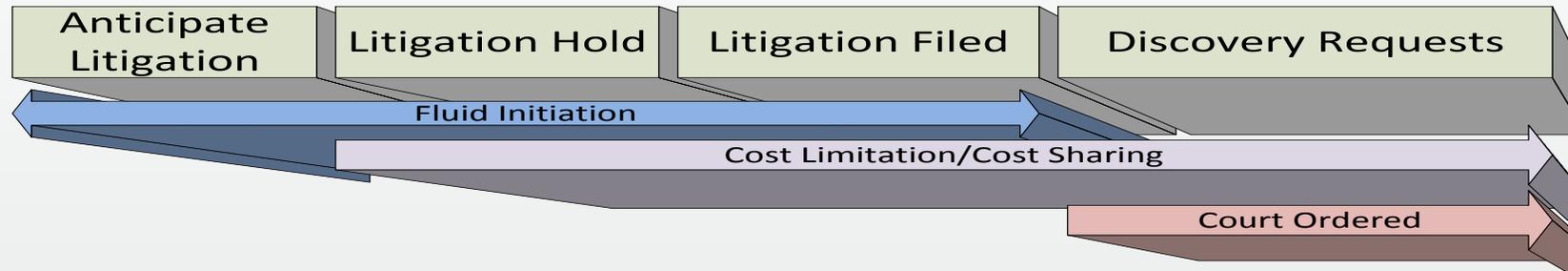


# Costing E-Discovery

Projecting and Controlling the Costs of Discovery

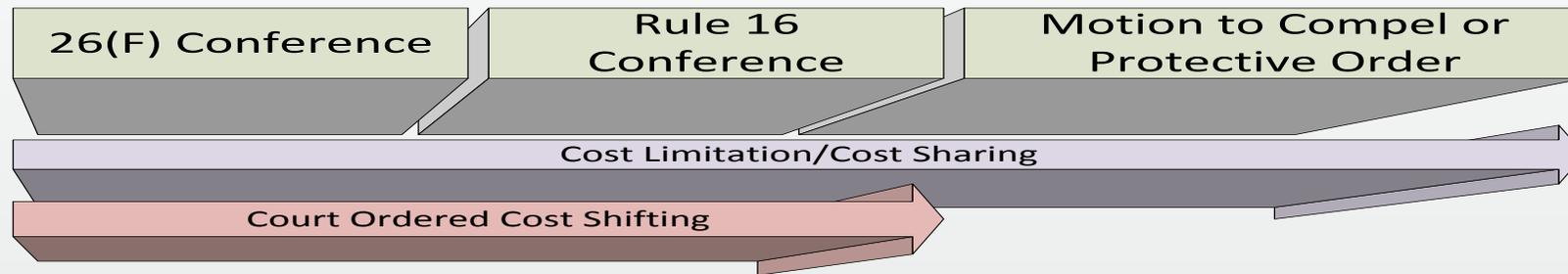
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# Costs: Limiting, Sharing, Shifting



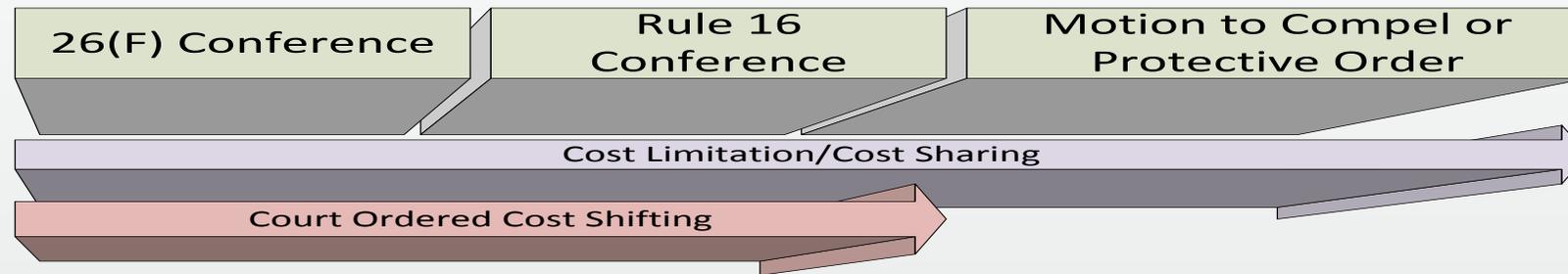
- Limiting Scope of Discovery
  - Custodians, date range, file type, accessibility, etc.
  - Cost sharing/shifting (e.g. cost of vendor, hosting platform, etc)
- Practical and Legal Limits on cost sharing/shifting
  - ADA – prohibition on “gifts”
  - Ability to monetize the costs
  - Ability to sell your proposal to the opposing party

# Cost Shifting/Court Ordered



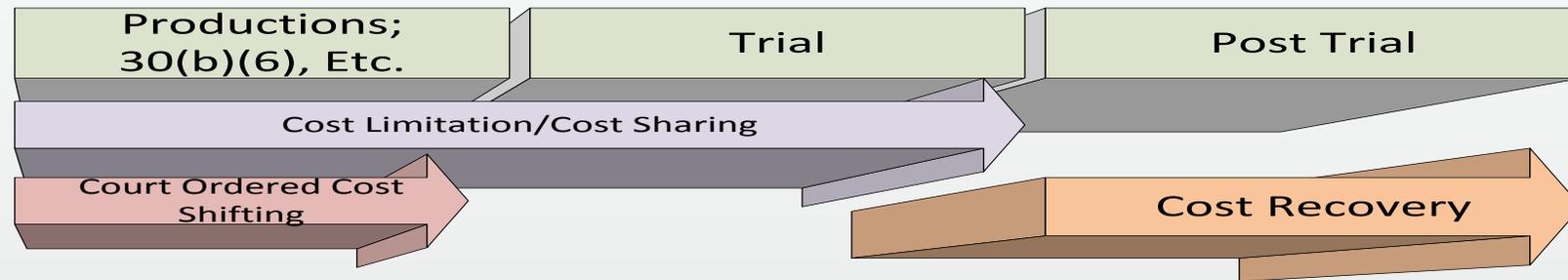
- Court Ordered Limits or Cost Shifting
  - Common Law “Tests” Applied
    - FRCP 26(c), 26(b)(2)(B), 26(b)(2)(C)
  - But consider:
    - Cost of motion practice
    - Timing – court will work from *status quo*

# Court Ordered



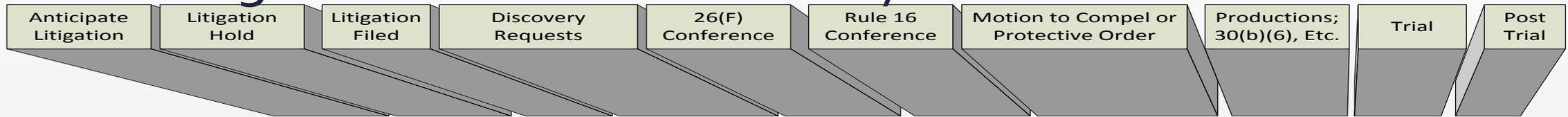
- Costs that courts will often agree to shift to requesting party
  - Restoration of inaccessible data
  - Search (type and scope)
- Costs that many courts will not shift to requesting party:
  - Preservation
  - Processing/production
  - Review for privilege/confidentiality
  - Forensic examination of computers.

# Cost Recovery



- Post-trial Recovery Limited
  - FRCP 54(d) – only “prevailing party” can recover enumerated costs
  - 28 USC 1920(4) – often limited to costs of “exemplification”
  - 28 USC 1920(3) – printing and witnesses

# Legal Cost Control Summary



Potential Cost Control/Recovery

- Your greatest ability to control costs is at the beginning of the case.
- There are real costs to seeking court intervention.
- The willingness and ability of the court to limit/shift costs decreases the further along the parties are in the discovery process.
- “What is good for the goose is usually good for the gander.”
- Post-trial ability to recover discovery costs is very limited

# Finding the Costs of E-Discovery



Changing the direction of e-discovery costs



Increased clarity through  
defined processes and  
understood costs

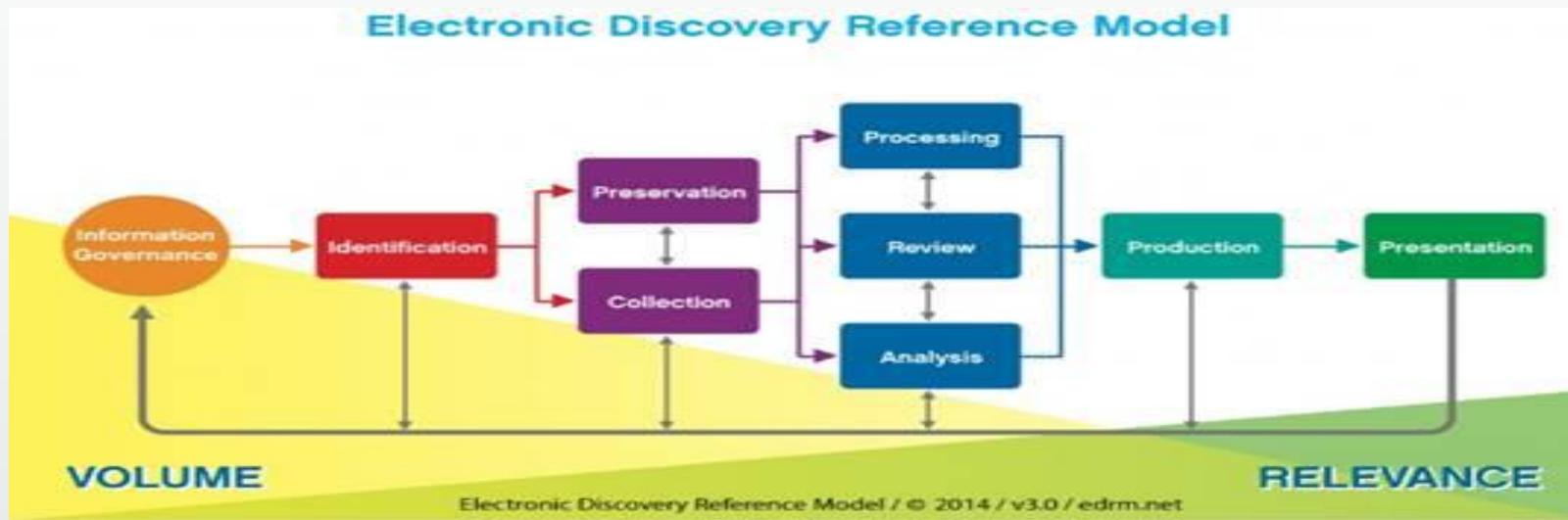


Reduced project costs  
through technology, case  
strategy, and cooperation

# Finding the Costs of E-Discovery

- Three strategies, one goal: Develop the tools to define costs, reduce costs, and facilitate cost-shifting to reduce an Agency's financial e-discovery burden
- Define costs:
  - Define the workflow
    - Define the process
  - Define the intended result
    - *Assign value to each step*

# Design the Workflow



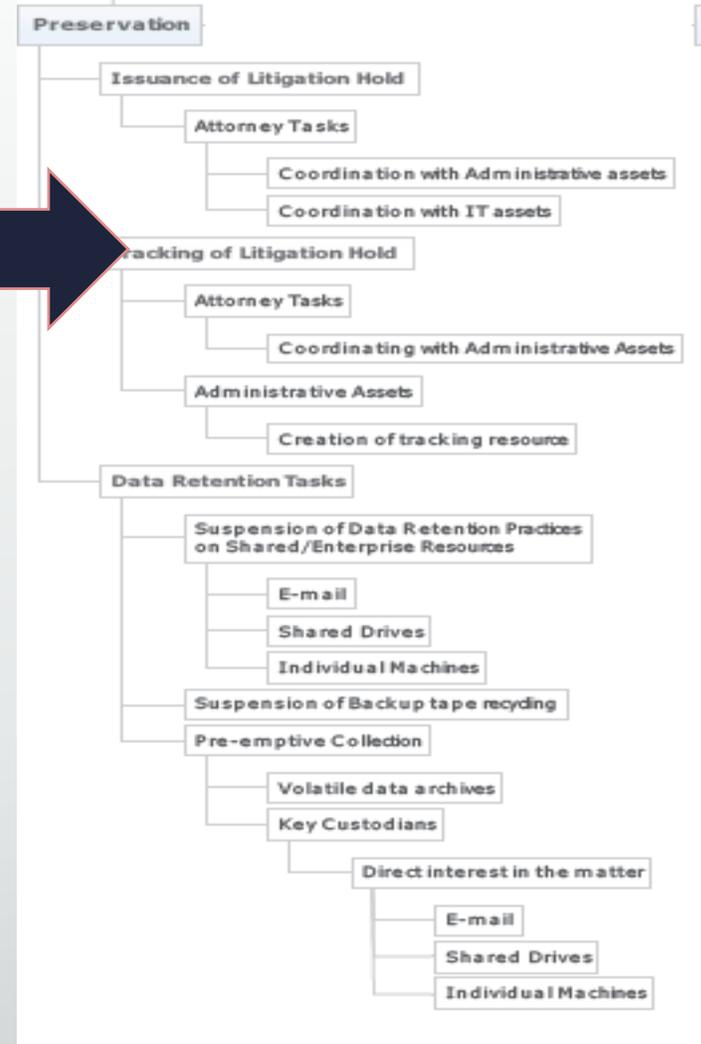
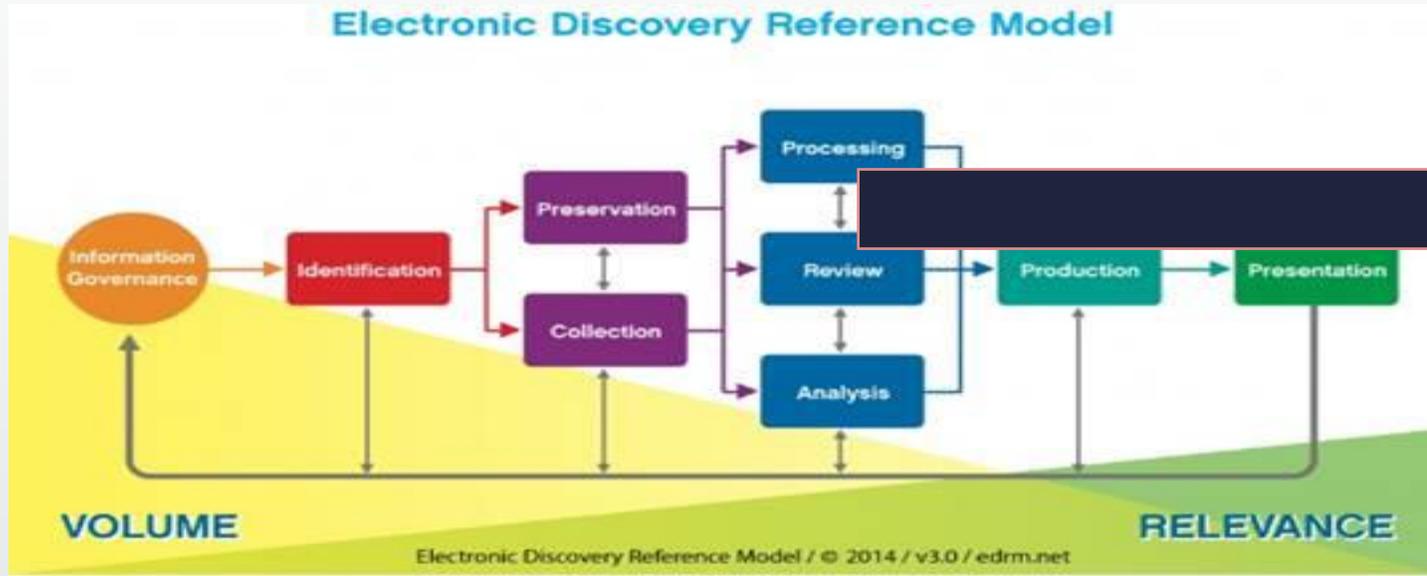
~~Define the workflow~~

Define the process

Define the intended result

*Assign value to each step*

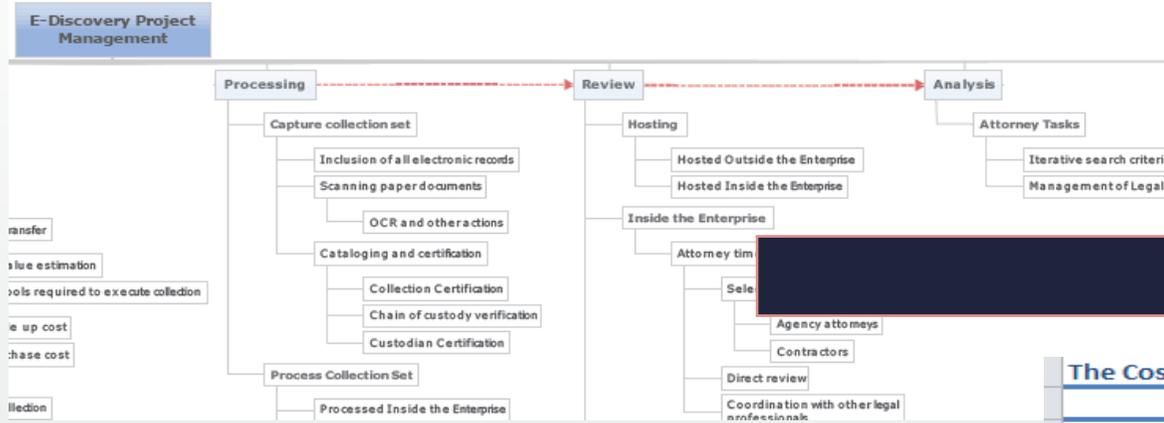
# Design the Process: Theory into Practice



# Define the Intended Result

- Individualized to the project and the mission
  - E-Discovery
  - FOIA
  - Investigations
  - May develop or change over time
  - Posture may be offensive or defensive
- **Objective:** Shared vision with legal, IT, and other stakeholders

# Assign Value to Each Step



## Mega 4 Automated Litigation Support

Solicitation Number: DJJI-12-RFP-0783  
 Agency: Department of Justice  
 Office: Offices/Boards/Divisions  
 Location: Procurement Services Staff (PSS)

Buyers: 1

Notice Details

Packages

Interested Vendors List

The Costs of E-Discovery Working Template – Collection

ITEM DESCRIPTION			PROJECT TASKS	GSA STAFF POSITION	LABOR HOURS	LABOR COST/HR (\$)
Lead Project Manager	Hour	INDIVIDUAL MACHINE	Individual Machine Collection	PC Technician	40.0	\$46.88
Project Manager	Hour		Individual Machine Collection		1.0	\$1.00
Project Supervisor	Hour		Individual Machine Collection		3.0	\$1.00
Task Supervisor	Hour		Individual Machine Collection		1.0	\$1.00
Document Management Analyst	Hour		Individual Machine Collection		1.0	\$1.00
Document Management Technician	Hour		Subtotal			46.0
Supervisory Paralegal	Hour	ENTERPRISE E-MAIL	Enterprise E-Mail Collection		1.0	\$3.00
Law Clerk	Hour		Enterprise E-Mail Collection		0.0	\$0.00
Senior Paralegal	Hour		Enterprise E-Mail Collection		0.0	\$0.00
Paralegal	Hour		Enterprise E-Mail Collection		0.0	\$0.00
Supervisory Clerical	Hour		Enterprise E-Mail Collection		0.0	\$0.00
Clerical	Hour		Subtotal			1.0
Office Applications Specialist	Hour	BACKUP M COLLECTION	Backup Data Collection		0.0	\$0.00
Senior Word Processor	Hour		Backup Data Collection		0.0	\$0.00
Word Processor	Hour		Backup Data Collection		0.0	\$0.00
Receptionist	Hour		Backup Data Collection		0.0	\$0.00
Field Discovery Manager	Hour		Backup Data Collection		0.0	\$0.00
Document Coder	Hour		Subtotal			0.0
Data Entry Technician	Hour					

Disclaimer: The rates and numbers are hypothetical and used purely for illustrative purposes.



# Process in Action

- USDA developing in-house resources to execute e-discovery projects
  - **Objective:** Create cost savings with efficiency and predictability
  - **Challenge:** Balancing single investment vs. on-going costs
  - **Solution:** Mix methods of the market and the Department
    - Mega 4 contract vs. Enterprise-level investments and vendor relationships
    - Labor costs in house
    - Managing the costs for long-term vs. short-term matters

# The One TB, One Million Record Case

- Assumes Agency Used Internal Resources For Identification, Preservation & Collection
- Processing
- Imaging
- Hosting
- Near Duplicates & E-Mail Threading
- Analytics Indexing
- Review
- 10% For Project Mgmt, Productions, Security Clearances, Supplies, Rework, & Unknowns

# One TB, One Million Record Case

Product/Service	Unit	Rate	Volume	Cost
Processing	GB	96.97	1024	\$99,297.28
Create Images	Page	0.032	3,500,000	\$112,000.00
Near-Duplicate & E-mail Threading	Document	0.06	1,000,000	\$60,000.00
Analytics	GB	191.43	1024	\$196,024.32
Hosting	GB Month	20.45	12288	\$251,289.60
Review (Contract Law Clerk)	Hour	59.46	20000	\$1,189,200.00
<b>Subtotal</b>				<b>\$1,907,811.20</b>
Project Management and Other Direct Costs (10%)				\$190,781.12
<b>Total</b>				<b>\$2,098,592.32</b>

Disclaimer: The rates and numbers are hypothetical and used purely for illustrative purposes.

# Where to Begin?

My Agency Doesn't Have The:

- Funding To Respond To Discovery
- Human Capital To Respond To Discovery
- Expertise To Respond To Discovery
- Technology To Respond To Discovery
- People Who Are Responsible For Responding To Discovery
- Lines Of Authority Between Counsel and IT For Responding To Discovery
- Commitment To And Recognition That Responding To Discovery Is Mission Critical

# So How Do We Manage?

What Can Counsel And IT Do To Control Costs

- Advocating For Information Management Policies
- Strategies For Limiting Scope
- Advocating For In-House Resources
- Effective Oversight Of Contract Vendors
- Effective Application Of Available Technologies

# Information Management

- **Have Established Information Management Policies For Employees**
  - Project Folders For Both E-Mail and Loose Files
  - Project Based vs. User Based
- **Manage Unique User Generated Information**
  - Should Not Reside On The Desktop (PC), Home Systems Or Mobile Devices
- **Discovery by Design**
  - Employ E-Mail Archiving and Document Management Systems
- **Life Cycle Management Solutions**
  - Auto-Tagging Of Records
  - Single Instance Storage
- **Analytics** On Data In Place?

# Information Management (continued)

Sound Information Management Enables Collection of Source Data That Is:

- Clear In Composition And Right Sized
- Thoughtfully Organized
- Differentiated
- Centrally Administered

Enabling Narrow, Appropriately Focused Data Collection Will Provide More Savings Than Any Downstream Legal or Technical Strategies **Combined**.

# Data Custodians

## Establish Effective and Timely Process

- Key Custodians
  - **Every Custodian Represents A Cost**
  - Basis for Inclusion/Exclusion From COR List
  - Every Person That Can Reasonably Be Removed From List Represents Immediate Savings
  - Consider Use of Custodian Tiers To Allow Appropriate Scope and Process On Per Tier Level

# Processing & Hosting

## The Arguments for Bringing Processing and Hosting “In House”

- Hardware and Software Investment Usually Pays For Itself From The First Large Project
- ENRD Provided Over \$10 Million In E-Discovery Products And Services For Less Than \$1 Million In Labor
- Ensures All Projects Receive The Same Repeatable And Defensible Treatment
- Multi-use Investment
  - Discovery, FOIA And Other Information Requests

# Utilizing Contract Vendors

If Your Agency Does Not Regularly Face Large Discovery Consider Using a Vendor (Don't Try To Do It Yourself)

- Hold Competitions
- Negotiate Hard
- Time & Material Vs. Product
- Image Only What's To Be Privilege or Produced
- Be Aware of Average Pricing
  - GSA, MEGA Contract good sources.

# Review Strategies

Have A Solid Methodology For Training Review Staff And Stay Involved Daily

- Helps When Need To Ramp Up Review Staff
- Avoids Constant Back And Forth Questions
- Ensures Consistency
- Measure Review Progress
- The more documents reviewed in an hour will have an enormous impact on cost

# Takeaways

- Get Control Of And Understand Your Agency's Information
- Use All Available Strategies To Limit The Scope/Volume Of Data In Every Case
- Use In-House Processes or Effectively Manage Contract Vendors Through Competitions, Negotiation, Knowledge and Oversight
- Take Advantage Of Text Analytics Technologies To Make Your Reviewers As Efficient As Possible