



The Day of Law Enforcement Agencies Recouping Redaction Costs of Recorded Audio and Video Content has Come!

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On April 1, 2024, Wisconsin Act 253 went into effect. This law allows law enforcement agencies to recoup costs under the Public Records Law for time spent redacting records containing recorded audio or video content.¹ Specifically, this new law permits law enforcement agencies to

1. Following is the Text of Act 253:

AN ACT to create 19.35 (3) (h) of the statutes; relating to: fees for redacting certain records of law enforcement agencies and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 19.35 (3) (h) of the statutes is created to read:

19.35 (3) (h) 1. In this paragraph, "law enforcement agency" has the meaning given in s. 19.36 (8) (a) 2.

2. Subject to subds. 3. to 7., an authority that is a law enforcement agency may impose a fee upon a requester for the actual, necessary, and direct cost of redacting, whether by pixelization or other means, recorded audio or video content to the extent redaction is necessary to comply with applicable constitutional, statutory, or common law.

3. An authority may not impose the fee under subd. 2. with respect to a request for records containing audio or video content for which all of the following apply:

a. If the requester is an individual, the requester provides written certification to the authority that the requester will not use the audio or video content for financial gain, not including an award of damages in a civil action. Any individual providing a false certification under this subd. 3. a. shall be subject to a forfeiture of \$10,000 for each violation.

b. During the calendar year in which the authority receives the request, the same requester has not made more than 10 requests to the authority for records containing audio or video content, including the current request but excluding any request subject to subd. 4. or 5.

4. An authority may not impose the fee under subd. 2. with respect to a request for records containing audio or video content if the requester is an individual directly involved in the event to which the requested records relate, that individual's attorney or other authorized representative, or that individual's parent or guardian if the individual is under the age of 18.

5. An authority may not impose the fee under subd. 2. with respect to a request for records containing audio or video content if the event to which the requested records relate is a shooting involving an officer of a law enforcement agency.

6. In calculating the fee imposed under subd. 2., the rate for an actual, necessary, and direct charge for staff time spent redacting shall be based on the pay rate of the authority's lowest paid employee capable of performing the task.

impose a fee upon certain records requesters for the actual, necessary, and direct costs of redacting recorded audio or video content to the extent redaction is required to comply with applicable constitutional, statutory, or common law. These charges are in addition to location, reproduction, and shipping charges already permitted by the Public Records Law.

Although the intent of Act 253 is in line with a need law enforcement has faced over the past decade or so, the final language within Act 253 contains a number of exceptions that may limit the law's actual impact. Specifically, Act 253 contains the following exceptions:

- A redaction fee may not be imposed for a request for records containing audio or video content if the requester meets all three of the following criteria:
 - (1) an individual;
 - (2) who provides written certification to the authority that they will not use the audio or video content for financial gain (not including civil damages); and
 - (3) who has not made more than 10 requests in the same calendar year to the authority for records containing audio or video content, including the current request.
- A redaction fee may not be imposed for a request for records containing audio or video content if the requester was directly involved in the event to which the requested records relate
- A redaction fee may not be imposed for a request for records containing audio or video content if the request involves audio or video records related to officer-involved shootings.

If an authority wishes to recoup qualifying redaction costs for records containing audio or video content, then prior to fulfilling the request, the authority must provide the requester with a written estimate of the redaction fee to be charged. Consistent with legal interpretations involving other labor fees under the Public Records Laws, authorities must use the pay rate of the lowest-paid employee capable of performing the redaction task. When complying with this requirement, consideration should be given to the scope of employees who have access to certain restricted records, technological skillsets or training, and other factors that may impact the necessary qualifications associated with who could conduct the redaction.

To best navigate Act 253, law enforcement agencies should adopt a uniform internal checklist of considerations that each request for a record containing video or audio content is subject. This list

7. An authority may not impose the fee under subd. 2. with respect to a request for records containing audio or video content unless prior to fulfilling the request the authority provides to the requester in writing an estimate of the amount of the fee to be charged.

will allow agencies to approach requests for such records with consistency and thoroughness. A list of considerations might contain some of the following items:

- Is there a recorded audio or video record that is responsive to the request for records?
 - Has the requester provided sufficient information for the authority to determine whether requested recordings contain audio or video content? If not, consider seeking clarification from the requester before proceeding.
 - If no recorded audio or video content is responsive to the request, then no redaction costs cannot be recouped.
 - If there is recorded audio or video content responsive to the request, then the requester should be provided the form for competition so that the authority may determine whether an exception applies to the imposition of redaction fees.
- Do the records contain recorded audio or video content related to a shooting involving an officer of a law enforcement agency?
 - If yes, then no fees may be charged.
 - If no, then consider the identity and motivations of the requester.
- Has the requester completed the form and provided certification as to the requirements of Wis. Stat. § 19.35(3)(h)3a asserting that the requester will not use the recorded audio or video content for financial gain, not including an award of damages in a civil action ?
- Has the requester provided sufficient information for the authority to determine whether the requester has made more than 10 requests in a calendar year wherein there may be recorded audio or video records responsive to the request as identified in Wis. Stat. § 19.35(3)(h)3b?
- The estimate of costs should be prepared for purposes of determining estimated costs to be recouped for redaction if constitutional, statutory, or common law considerations require redaction. To best prepare an estimate, a brief review of the responsive records should occur upon receiving a proper request to estimate time of redaction required.
- Has the requester paid the estimate of redaction costs? No further work should be undertaken to review or redact the recorded audio or video content until the estimate is paid in full.

Exception Designation and Certification Form

As to the certification form for the requester, the following is an example of possible text for an authority to consider for their form. We note that each authority should consult their local legal counsel rather than relying on this text:

Wisconsin Statute § 19.35(3)(h) **Exception Designation and Certification Form**

To Be Completed by the Custodian.

Custodian name: _____.

Name of the Requester: _____.

Date of the Request for Records: _____.

Records Requested: _____.

Describe the record containing recorded audio or video content identified as responsive to the request: _____

Do the responsive records containing recorded audio or video content involve an event that relates to a shooting involving an officer of a law enforcement agency? _____ Yes _____ No _____ Some. If the answer is "some" or "no," then have the requester complete the rest of this form. The requester cannot be charged redaction fees for redaction time involving recorded audio or video content of the event to which the requested records relate is the shooting involving an officer of a law enforcement agency.

The City of _____ Police Department charges redaction fees to records requesters when permitted by law. The redaction fees shall be reasonable and shall not exceed the actual, necessary, and direct cost of the redaction time. The redaction fee shall be based on the pay rate of the City's lowest-paid employee capable of performing the task. The lowest-paid employee capable of performing the task will vary based on the source of the record, the content of the record, the capability and skills of operating equipment to perform the redactions, and other legitimate factors. The Department will not fulfill the request for records involving recorded audio and video content until the estimate of costs identified in the written fee estimate is paid by the requester.

The requester is responsible for providing sufficient information for the records custodian to determine whether an exception under Wis. Stat. § 19.35(3)(h) prohibits the Department from charging redaction fees.

Requester name: _____

I was an individual directly involved in the event to which the requested records relate: _____ Yes _____ No. If yes, then please explain how you were directly involved in the event to which the requested records relate: _____

I am the attorney or authorized representative of an individual directly involved in the event to which the requested records relate: ____ Yes ____ No. If yes, then please explain who this individual is and how this individual was directly involved in the event to which the requested records relate: _____

I am the parent or guardian of an individual under the age of 18 who was directly involved in the event to which the requested records relate: ____ Yes ____ No. If yes, then please explain who this individual is and how this individual was directly involved in the event to which the requested records relate: _____

If the answer to the preceding questions is "No," then complete the rest of this form.

In this calendar year 202__, I have made fewer than ten requests for records containing recorded audio or video content with this authority, in this case, the City of ____ Police Department under authority of the Chief of Police as defined in Wis. Stat. § 19.32(1). ____ Yes ____ No.

Certification and Understanding of Consequences for False Certification: I hereby certify as follows, with full knowledge of the legal consequences identified in Wis. Stat. § 19.35(3)(h)3a for false certification, including prosecution of me and a forfeiture of up to \$10,000.00 for each violation by me. Wisconsin Statute § 19.35(3)(h)3a specifically provides:

3. An authority may not impose the fee under subd. 2. with respect to a request for records containing audio or video content for which all of the following apply:

a. If the requester is an individual, the requester provides written certification to the authority that the requester will not use the audio or video content for financial gain, not including an award of damages in a civil action. Any individual providing a false certification under this subd. 3. a. shall be subject to a forfeiture of \$10,000 for each violation.

I am requesting the records containing recorded audio or video content solely for pursuit of an award of damages in a civil action and for no other financial gain. ____ Yes ____ No.

I will not use the recorded audio or video content disclosed to me for financial gain. ____ Yes ____ No.

Certification Signature of the requester: _____

Date: _____

Full name: _____

Contact information: _____

Issues to be aware under Act 253.

Act 253 contains several ambiguities.

First, what may an authority do if the requester refuses to identify themselves? Arguably, the authority may charge redaction fees to the requester as the requester has refused to provide sufficient information for the authority to assess whether exceptions could apply. As such, the law appears to default to allow the authority to charge redaction fees after an estimate is given.

Second, what constitutes redaction time for purposes of recouping costs? Is redaction time all the time spent reviewing records containing audio and video content to identify whether redaction is required considered “redaction time”? Or does “redaction time” only begin once the physical redactions are being implemented? A reasonable interpretation of the law suggests redaction time would include time spent identifying required redactions given that part of the process is directly connected to the implementation of redactions, but the law does not explicitly address that issue. Regardless, consistency with regard to the approach an agency adopts is important.

Third, when does the recorded audio or video content relate to a shooting involving an officer of a law enforcement agency under Wis. Stat. § 19.35(3)(h)5? Does this standard only apply to the actual incident involving the shooting or to other records referencing the shooting incident such as an interview of the officers involved? Act 253 does not provide clarity on this, so best judgment will have to be utilized and consistency is critical.

Fourth, when does the recorded audio or video content relate to the incident that the requester was directly involved under Wis. Stat. § 19.35(3)(h)4? Does this standard only apply to the actual incident or to other records referencing the incident such as an interview of the officers involved? Again, best judgment will have to be utilized and consistency is critical.

Fifth, what constitutes “financial gain” under Wis. Stat. § 19.35(3)(h)3a? Does the pursuit of financial gain satisfy this requirement or must financial gain actually be accomplished? The spirit of this law appears to apply to the former situation where the record is used by the requester for purposes of trying to make money, whether for themselves or another.

Sixth, who bears the burden of determining whether an individual requester has not exceeded the 10-request threshold per calendar year? To avoid wasting time and resources, agencies should make a practice of issuing written requests for prepayment early within the request process. Forms given to the requester should include verbiage that notifies requesters that it is the requester’s duty to notify the authority of their qualification for an exception to redaction costs associated with

records containing recorded audio and video content. Likewise, the authority should create internal spreadsheets that track requests through each calendar year to determine when a requester has exceeded the 10-request threshold. This information will be necessary for the authority for defense purposes.

Should you have any questions about 2023 Wisconsin Act 253 or the creation of any forms and response letters, please contact your legal counsel.