

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I and amendment of ARM 44.5.121 pertaining to fees charged by the Business Services Division) NOTICE OF ADOPTION AND AMENDMENT)

TO: All Concerned Persons

1. On September 4, 2014, the Secretary of State published MAR Notice No. 44-2-200 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1993 of the 2014 Montana Administrative Register, Issue Number 17.

2. The Secretary of State has adopted the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

New Rule I (44.5.122) MANUAL AND ONLINE SEARCH FEES (1) and (2) remain as proposed.

AUTH: 2-15-403, 2-15-404, 2-15-405, MCA
IMP: 2-15-403, 2-15-404, 2-15-405, MCA

3. No member of the public commented on the proposed new rule. The Secretary of State received comments from K. Virginia Aldrich, attorney for the State Administration and Veterans' Affairs Interim Committee (SAVA). The Secretary of State responds to Ms. Aldrich's comments as follows:

COMMENT 1: Ms. Aldrich stated that the Secretary of State may not charge fees concerning electronic information other than the fees authorized in 2-6-110, MCA, and suggested adding 2-6-103 and 2-6-110, MCA, to the list of implemented statutes. She also stated that under 2-6-103, MCA, the Secretary of State is not authorized to charge a member of the legislature, a state officer, or a county officer for any search relative to matters pertaining to the duties of the office.

RESPONSE 1: The Secretary of State strongly disagrees that the Secretary of State may not charge fees concerning electronic information other than the fees authorized in 2-6-110, MCA. Title 2, chapter 6, MCA, pertains to "public records" and the Secretary of State's responsibilities for managing the public records for all state agencies in the executive branch of government. This responsibility was transferred from the Department of Administration to the Secretary of State in 1991. It is currently administered through the Records and Information Management Division within the Secretary of State's office.

Section 2-6-110, MCA, is not applicable to a rule notice promulgated under the Secretary's duties under 2-15-403, MCA. The more specific authority to charge a fee for the business records contained on the "corporate information computer system maintained by the secretary of state" is 2-15-403, MCA, which not only gives the Secretary of State the authority to charge a fee to both "private or public entities," but rulemaking authority. This is confirmed by a review of the legislative history.

The Statement of Intent for Ch. 289, L. 1991, states as follows: "A statement of intent is required for this bill because [section 1][2-15-403] authorizes the secretary of state to adopt rules setting fees to be charged for the sale of the corporate information list. It is the intent of the legislature that the fees should be commensurate with the costs of producing the list. Existing fees may be modified to the extent necessary to conform to this statement of intent and [section 1][2-15-403]."

The "corporate information computer system maintained by the secretary of state" is the Secretary of State's Information Management System (SIMS) located on and accessed through the Secretary of State's web site. It is hard to argue that the information contained in SIMS is not "electronic." The statutory authority for the SIMS system is 2-15-404, MCA, which has been added as an authority and implementation statute for this rule.

Also, 2-15-405, MCA, is the general authority for the Secretary of State to charge a fee for all its services. The Secretary of State is structured to run as a business and deposit its fees into an enterprise fund. The office is fully funded through the fees it charges. House Bill 639, as passed by the 2001 Montana Legislature, enacted 2-15-405, MCA. It was the Montana Legislature's intent that 2-15-405, MCA, provides broad rulemaking authority for all fees the Secretary of State charges.

Corporate information is also excluded from the public records statutes by 2-6-109(7), MCA.

4. The Secretary of State has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

44.5.121 MISCELLANEOUS FEES (1) through (9) remain as proposed.

AUTH: 2-15-403, 2-15-405, 30-9A-526, 35-1-1307, 35-2-1107, 35-7-103, MCA
IMP: 2-6-103, 2-15-403, 2-15-405, 30-9A-525, 30-13-320, 35-1-1206, 35-2-119, 35-2-1003, 35-2-1107, 35-7-103, 80-8-210, MCA

5. No member of the public commented on this proposed rule amendment. The Secretary of State received comments from K. Virginia Aldrich, attorney for the State Administration and Veterans' Affairs Interim Committee (SAVA). The Secretary of State responds to Ms. Aldrich's comments as follows:

COMMENT 2: Ms. Aldrich suggested adding 2-15-403, MCA, to the list of authorizing statutes and questioned whether 35-2-1107 and 35-7-103, MCA, should still appear as implementing statutes.

RESPONSE 2: The Secretary of State agrees and has added 2-15-403, MCA, to the authorizing and implementing statutes, but disagrees with the suggestion to remove 35-2-1107 and 35-7-103, MCA, because fees charged under this rule apply to both nonprofit corporations and registered agents.

/s/ JORGE QUINTANA
Jorge Quintana
Rule Reviewer

/s/ LINDA MCCULLOCH
Linda McCulloch
Secretary of State

Dated this 14th day of October, 2014.