

October 10, 2002

Mr. Scott Darkenwald, Director
Department of Administration
P.O. Box 200101
Helena, MT 59620-0101

Dear Mr. Darkenwald:

You have requested an opinion of the Attorney General on the following question:

Does Mont. Code Ann. § 32-3-104(3) allow the owner of an electronic terminal to impose a surcharge for the use of the terminal on non-U.S. residents using an automated teller machine?

Since your question may be answered by reference to the clear language of the statute and established rules of statutory interpretation, it has been determined that a letter of advice rather than a formal opinion is appropriate for response to your question.

The statute in question provides, in pertinent part:

(3) The owner of an electronic terminal may impose a surcharge for the use of its electronic terminal. The owner of an electronic terminal that elects to impose a surcharge for the use of its electronic terminal shall clearly advise the user of the electronic terminal, by a conspicuous disclosure on the terminal or through a message displayed on the electronic terminal screen, of the exact amount of the surcharge. The user must then be provided the option either to cancel the transaction, without incurring the surcharge, or to complete the transaction subject to the surcharge.

Nothing in the statutory language could give rise to an interpretation that would distinguish between residents and non-residents with respect to the authority granted by the statute to impose the surcharge. In interpreting statutes, the clear language of the statute controls. Lovell v. State Compensation Mut. Ins. Fund, 260 Mont. 279, 285, 860 P.2d 95, 99 (1993). It is not appropriate to insert in the statute what has been omitted or to omit what has been included. Mont. Code Ann. § 1-2-101. In this case, in the absence of any statutory language indicating an intent on the part of the legislature to exempt non-residents from paying a surcharge, the only conclusion that can be drawn is that the legislature intended to authorize imposition of the surcharge without regard to residency.

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While the statute authorizes imposition of the surcharge, it does not require it. I express no view on the question of whether any federal law may prohibit the practice of charging the surcharge against non-residents, nor do I express any view as to whether the provisions of any contracts between terminal owners and third parties may limit the terminal owners ability to impose such a surcharge.

This letter of advice may not be considered a formal opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym