

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23–382

ACORN INTERNATIONAL,

Plaintiff and Appellant,

v.

STATE OF MONTANA, by and through its SECRETARY OF STATE CHRISTI
JACOBSEN,

Defendant and Appellee.

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. ADV 2022–229, the Honorable Mike Menahan, Presiding

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly granted summary judgment to the Secretary of State (“Secretary”) by determining that the fee it charges for the statewide voter database complies with Mont. Code Ann. § 13-2-122(1) (2021).

2. Whether the Secretary violated the right to know in responding to ACORN International’s (“ACORN”) request for information based on the actual cost of the yearly subscription to the statewide voter database.

STATEMENT OF THE CASE

Since 2005, the Secretary of State’s Office has utilized the Montana VOTES enterprise class Voter Registration and Election Management software to store voter information. (Doc. 31 at Ex. A.) This software was specifically designed to comply with the 2002 Help America Vote Act, which requires a centralized, statewide, and interactive system to promote fair and accurate elections. (*Id.*) The software requires ongoing development and support from third-party providers because the data it contains is not fixed—it changes from moment to moment. (*Id.*) The software also requires collaboration with state and county election officials with its data being continually updated by election staff in each of Montana’s 56 counties. (*Id.*)

The system’s framework relies on servers for both the application as well as an Oracle database. (*Id.*) The system is hosted via a private and secure state portal in a Citrix environment. (*Id.*) The annual cost to maintain the system is

approximately \$565,000.00, which includes the following approximated costs: \$382,000.00 for vendor maintenance fees; \$72,000.00 for servers; \$21,000.00 for Oracle licensing; \$8,500.00 for Citrix licensing and application hosting; \$7,750.00 for Active Directory authentication and licensing; \$610.00 for the file server; \$560.00 for Microsoft SQL database licensing and storage; \$55.00 for miscellaneous servers; \$29,500.00 for SharePoint licensing; \$23,000.00 for office expenses (ServiceNow, phone, email, Zoom, Office 365, VPN, etc.); and \$20,000.00 for other miscellaneous costs (application services, development, and hosting; backup services; virtual servers; database hosting; storage hosting; professional services; etc.). (Doc. 31 at Ex. B.)

Admin. R. Mont. 44.3.1101 establishes the fee schedule for access to the statewide voter database lists and extracts. (Doc. 31 at Ex. A.) This Rule was last amended in 2006, shortly after the software was implemented. (*Id.*) The Secretary currently charges a fee of \$5,000.00 for a one-year subscription with ongoing access to the statewide voter database lists and extracts, and other fees for other services. Admin. R. Mont. 44.3.1101. ACORN International (“ACORN”) disputes the validity of this fee and filed suit seeking related declaratory and injunctive relief. (*See* Doc. 1, *generally*).

The District Court held oral argument on the parties’ Cross-Motions for Summary Judgment (Docs. 27–31) on May 11, 2023. On June 13, 2023, the District

Court issued its Order granting the State’s Motion for Summary Judgment. ACORN timely filed its Notice of Appeal. (Doc. 49.)

STATEMENT OF FACTS

ACORN is a foreign non-profit corporation headquartered in New Orleans, Louisiana. (Doc. 1 at ¶ 1; Doc. 31 at Ex. C.) In October 2021, ACORN sent the Secretary a letter requesting access to Montana’s statewide voter database as part of its “voter protection program”. (Doc. 31 at Ex. C.) ACORN characterized this effort in Montana as “critical for [its] work.” (*Id.*) However, ACORN was unwilling to pay the \$5,000.00 fee for the access it sought and instead chose to dispute the validity of that fee. (*Id.*) The Secretary’s Office responded by advising that it is required to charge for the sought records and by referring Plaintiff to the fees set forth in 44.3.1101 as well as the link to purchase the records online. (Doc. 31 at Ex. D.)

Unsatisfied with the Secretary’s response, ACORN filed suit. (Doc. 1.) In issuing summary judgment for the Secretary, the District Court held that ACORN relied on the wrong statute—Mont. Code Ann. § 2-6-1006(3) (2021)—for its argument that the only “actual cost” it is required to pay is the cost of providing access to the voter database. (Doc. 46 at 6.) Rather, it held that § 13-2-122(1) applies to the facts of this case because it was a more specific statute that governed over the general statute. (Doc. 46 at 6–7.) The District Court’s ruling was correct and

ACORN's claims fail as a matter of law because the fees set forth in 44.3.1101 do not exceed the actual cost of the statewide voter database lists and extracts.

STANDARD OF REVIEW

A District Court's grant of summary judgment is reviewed de novo, applying the same criteria as the District Court. *Citizens for a Better Flathead v. Bd. of Cnty. Commn.*, 2016 MT 325, ¶ 14, 385 Mont. 505, 386 P.3d 567 (citing *Sibken v. Voderberg*, 2012 MT 291, ¶ 16, 367 Mont. 344, 291 P.3d 572; *N. 93 Neighbors, Inc. v. Bd. of Cnty. Commn.*, 2006 MT 132, ¶ 17, 332 Mont. 327, 137 P.3d 667). A de novo review is one that is "anew" from beginning to end. *Id.* (citing *White Sulphur Springs v. Voise*, 136 Mont. 1, 5, 343 P.2d 855, 857 (1959)). The Montana Supreme Court reviews a District Court's summary judgment to determine whether it was correctly decided pursuant to Mont. R. Civ. P. 56. *Mt. W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 7, 308 Mont. 29, 38 P.3d 825. Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Steinback v. Bankers Life & Cas. Co.*, 2000 MT 316, ¶ 11, 302 Mont. 483, 15 P.3d 872 (citing Mont. R. Civ. P. 56(c)).

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment to the Secretary under a plain reading of the applicable statute. ACORN's arguments for reversal fail for five reasons. First, ACORN continues to promote a reading of § 13-2-122(1) that

ignores the statute's plain language. ACORN asserts that the Secretary is legally bound only to charge it for access to the voter database, or for the actual costs "associated with a request for the voter file." (*See generally* ACORN Br.) But this is simply not what the statute says. The District Court correctly applied the plain language of § 13-2-122(1) in finding that the State's fees satisfy the relevant "actual costs" limiting language. (Doc. 46 at 7.)

Second, the undisputed evidence demonstrates that the fee the Secretary charges for annual, ongoing access to the statewide voter database is far less than the cost of the database. The database is different from other public records, such as documents or communications, because the information contained in the database is not fixed. It is constantly changing. This is why the costs attendant with obtaining these records are high. Nevertheless, the fee for obtaining the statewide voter database is nominal compared to the actual cost of the database.

Third, ACORN attempts to improperly shift the burden of proof on appeal, asserting that the Secretary has the burden to establish the fees it charges are consistent with § 13-2-122(1). (ACORN Br. at 10–14.) But as the Plaintiff challenging the validity of the fee, seeking declaratory and injunctive relief, ACORN bears the burden of proof in this case.

Fourth, ACORN asserts § 13-2-122(1) is ambiguous and must be interpreted to promote the Right to Know and ensure compliance with the National Voter

Registration Act (“NVRA”). (ACORN Br. at 14–17.) But this, too, is improper and inapplicable to the issues on appeal. ACORN did not plead any claim under the NVRA. And the NVRA is unrelated to the straightforward statutory construction question in this case. The Court should reject this argument.

Finally, ACORN claims that the Secretary did not produce the information it wanted in response to a letter and that this is a violation of the right to know. (ACORN Br. at 18–22.) This is not so. The Secretary responded to ACORN’s letter informing ACORN how it could immediately obtain the information by purchasing the voter file and providing it with the fee schedule. (Doc. 31 at Ex. D.) ACORN never paid the fee. This is not a violation of ACORN’s constitutional right to know. The Secretary remains willing to provide the voter database to ACORN upon payment of the appropriate fee set in accordance with the law.

There is no genuine dispute of material fact. The Secretary properly maintained the records at issue as required and made them available to the public for a fee as set by administrative rule. The Secretary performed all legal duties required of her and followed her statutory obligations under § 13-2-122(1), which is unambiguous and does not violate the NVRA. The District Court properly granted summary judgment to the Secretary. This Court should affirm.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE SECRETARY REGARDING THE FEE IT CHARGES FOR THE STATEWIDE VOTER DATABASE.

A. THE DISTRICT COURT CORRECTLY APPLIED MONT. CODE ANN. § 13-2-122(1) (2021).

The Secretary maintains the information contained in the statewide voter database pursuant to Mont. Code Ann. § 13-2-112. In fulfilling requests for voter file information, the Secretary is authorized to “collect a charge not to exceed the actual cost of the register, list, mailing labels, or available extracts and reports.” § 13-2-122(1); *see also* Mont. Code Ann. § 2-6-1006(6)(a) (2021) (authorizing the Secretary to charge such fees). Those fees must be “set by administrative rule...authorized by law.” Mont. Code Ann. § 2-15-405(1). Also, those fees “must be collected in advance.” Mont. Code Ann. § 2-6-1006(6)(a) (2021).

ACORN asserts the public’s “right to know” is the starting point for any dispute involving access to the workings of government and “there exists a strong presumption against withholding documents.” (ACORN Br. at 8–9.) But the public is not entitled to public records for free. Mont. Code Ann. § 2-6-1006(3) (2021) provides:

A public agency may charge a fee for fulfilling a public information request. Except where a fee is otherwise provided for by law, the fee may not exceed the actual costs directly incident to fulfilling the request in the most cost-efficient and timely manner possible. The fee must be documented. The fee may include the time required to gather public

information. The public agency may require the requesting person to pay the estimated fee prior to identifying and gathering the requested public information.

The fee for the statewide voter database is “otherwise provided for by law” in § 13-2-122(1), which states in relevant part:

[. . .] upon request, the secretary of state shall furnish to any individual, for noncommercial use, available extracts and reports from the statewide voter registration system. [. . .] Upon delivery, the secretary of state [. . .] may collect a charge not to exceed the actual cost of the register, list, mailing labels, or available extracts and reports.

The District Court correctly held that this specific statute governed over the more general § 2-6-1006(3). *See State v. Plouffe*, 2014 MT 183, ¶ 27, 375 Mont. 429, 329 P.3d 1255 (“It is a well-settled rule of statutory construction that specific provisions prevail over general provisions.”) (citing *Oster v. Valley Co.*, 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079 (“[M]ore specific statutes prevail over general provisions of law.”)); *Taylor v. Dept. of Fish, Wildlife & Parks*, 205 Mont. 85, 91, 666 P.2d 1228, 1231 (1983) (“We recognize the rule of statutory construction which provides that special statutes will prevail over general statutes.”); Mont. Code Ann. § 1-2-102 (“[A] particular intent will control a general one that is inconsistent with it.”).

ACORN argues throughout its brief that the Secretary may only charge for the actual cost of “access” to the voter database, or for the actual costs “associated with a request for the voter file.” (*See generally* ACORN Br.) But throughout this

case ACORN has ignored the plain language of § 13-2-122(1). The Secretary “may collect a charge *not to exceed the actual cost of the register, list, mailing labels, or available extracts and reports.*” § 13-2-122(1) (emphasis added). The statute does not say the Secretary:

- may charge only the actual costs associated with a request for the voter file (ACORN Br. at 9); or
- may charge only the actual costs of providing the information to the public (*Id.* at 11).

As the District Court correctly noted, a judge’s office is simply to ascertain and declare what a statute is in terms or in substance, not to insert what has been omitted or to omit what has been inserted. (Doc. 46 at 7.); *see also* Mont. Code Ann. § 1-2-101. The District Court further observed: “... it’s not just the cost of accessing the registry, the statute says it’s the actual cost of the registry itself.” (Hrg. Tr. 25:19–21.) The District Court appropriately read the plain language of the applicable statute, which allows the Secretary of State to set a fee for the statewide voter database not to exceed its actual cost. The District Court correctly applied § 13-2-122(1) as written.

B. THE FEE THE SECRETARY CHARGES IS FAR LESS THAN THE ACTUAL COST OF THE STATEWIDE VOTER DATABASE.

ACORN next argues that because the Secretary is required to maintain the statewide voter database, the costs of creating and maintaining the database are “indirect” and not “actual” costs. (ACORN Br. at 11.) This argument defies logic

and ignores the undisputed evidence. Government entities are required to maintain certain public records. Mont. Code Ann. § 2-6-1012(1)(a) (2021) (“Each public officer is responsible for properly managing the public records within the public officer’s possession or control through an established records management plan that satisfies the requirements of this chapter.”) That public officers are required to maintain public records does not exempt them from charging fees to obtain those records. *See* § 2-6-1006(3) (“A public agency may charge a fee for fulfilling a public information request.”) ACORN’s argument that because the Secretary has an independent obligation to maintain the statewide voter database, the Secretary may not charge a fee for the public to obtain records from it (ACORN Br. at 14) is simply contrary to Montana law. Government agencies are clearly permitted to charge fees to obtain the public records they are required to maintain. §§ 2-6-1006(3); 2-6-1012(1)(a); 13-2-122(1).

ACORN’s argument that ongoing maintenance costs are “indirect” rather than “actual costs” likewise contradicts the plain language of § 13-2-122(1), as well as the undisputed evidence the Secretary provided about the cost of the statewide voter database. The database was originally created in 2005 to comply with the 2002 Help America Vote Act. (Doc. 31 at Ex. A.) Importantly, unlike other public records, the data in the statewide voter database is not fixed—it changes from moment to moment. (*Id.*) The changing nature of the database requires ongoing development

and support from third-party providers, as well as collaboration with state and county election officials in all 56 counties who continually update the information. (*Id.*) The annual cost to maintain the system is approximately \$565,000.00, which includes the following approximated costs:

- \$382,000.00 for vendor maintenance fees;
- \$72,000.00 for servers;
- \$21,000.00 for Oracle licensing;
- \$8,500.00 for Citrix licensing and application hosting;
- \$7,750.00 for Active Directory authentication and licensing;
- \$610.00 for the file server;
- \$560.00 for Microsoft SQL database licensing and storage;
- \$55.00 for miscellaneous servers;
- \$29,500.00 for SharePoint licensing; \$23,000.00 for office expenses (ServiceNow, phone, email, Zoom, Office 365, VPN, etc.); and
- \$20,000.00 for other miscellaneous costs (application services, development, and hosting; backup services; virtual servers; database hosting; storage hosting; professional services; etc.).

(Doc. 31 at Ex. B.)

ACORN presented no evidence to contradict these figures, yet inexplicably asserts that the Secretary “is ignorant of the ‘actual cost’ of the list.” (ACORN Br. at 12.) These figures are “real” and “existing in fact.” (*See* ACORN Br. at 11, citing

Black's Law Dictionary, 3d pocket edition 2006.) The actual cost of the statewide voter database is approximately \$565,000.00 annually. (Doc. 31 at Ex. B.) The Secretary charges a fee that is less than 1% of that amount for annual, ongoing access to the list. 44.3.1101. This fee complies with the requirements of § 13-2-122(1).

ACORN's reliance on *Lee*¹ and *Victory Insurance*² is misplaced, as neither case involved the application of § 13-2-122(1). *Lee* addressed the issue of whether a state agency may lawfully charge a fee for legal review of documents in response to a public records request or a fee for placing a related "hold notice" on electronically stored information. This is not the situation presented by this case. *Victory Insurance* addressed the issue of whether the State Auditor could charge fees that included its employees' health insurance costs. (See Doc. 27 at 11–12.) Likewise, this case does not apply to the facts at issue here.

Similarly, none of the other caselaw from other jurisdictions that ACORN relies on has any bearing on § 13-2-122(1) or 44.3.1101. Those cases involve courts in other jurisdictions interpreting other states' public records law. The same is true with respect to Appellant's argument about prior versions of 44.3.1101. There is no

¹ *Lee Enterprises v. Montana Public Service Commission*, Order on Cross-Motions for Partial Summary Judgment, Cause No. ADV 2021-1189, Montana First Jud. Dist. Ct. (June 6, 2022).

² *Victory Ins. Co. v. Office of the Mont. State Auditor*, Order, Cause No. BDV 2017-1011 (Oct. 11, 2018).

dispute that the Rule was updated in 2006 to include the current fee schedule following the implementation of the Secretary's new voter information system—new system, new costs, new fees. Further supporting the reasonableness of the fee is the fact that it has not been increased in nearly 20 years.

The District Court correctly applied § 13-2-122(1) for requests of the statewide voter database. ACORN simply does not want to pay the fee established by 44.3.1101 in accordance with § 13-2-122(1). ACORN's convoluted reasoning notwithstanding, the District Court reached the correct conclusion, and this Court should affirm.

C. ACORN BEARS THE BURDEN OF PROVING ITS CLAIMS.

ACORN asserts that the Secretary “bears the burden of establishing that any fees it charges are consistent with § 13-2-122. . .” because “there is a presumption that the public has access to public documents.” (ACORN Br. at 10.) This is improper burden-shifting. ACORN, as the Plaintiff, bears the burden of proving it is entitled to declaratory and injunctive relief. Mont. Code Ann. § 26-1-402 (a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief the party is asserting). Appellant must prove these claims by a preponderance of the evidence. Mont. Code Ann. § 26-1-403(1). The District Court correctly held that ACORN was not entitled to the relief sought in its pleadings.

Even if the Secretary was required to show compliance with § 13-2-122(1), she has met that burden. The Secretary has followed the applicable statutes and regulations, and has established, through uncontroverted evidence, both the actual cost of the statewide voter database and that the fee she charges to obtain it is far less than the actual cost. *See* § 13-2-122(1); Mont. R. Civ. P. 56(c). This Court should therefore affirm summary judgment for the Secretary.

D. MONT. CODE ANN. § 13-2-122(1) IS NOT AMBIGUOUS AND DOES NOT CONFLICT WITH THE NATIONAL VOTER REGISTRATION ACT.

From its argument that the fee the Secretary charges doesn't represent the actual cost of the voter database, ACORN pivots to an argument that the fee is not a reasonable cost, and therefore violates the National Voter Registration Act. (ACORN Br. at 15–16.) It asserts the District Court's interpretation and application of § 13-2-122(1) "create a significant conflict" with the NVRA and that "[a]ny potential ambiguities in the [sic] § 13-2-122" must be construed to "ensure compliance with the NVRA." (*Id.* at 14.) But ACORN never explains what is ambiguous about § 13-2-122(1).

As demonstrated in Section I.A *supra*, § 13-2-122 is plain and unambiguous on its face and the District Court correctly interpreted and applied it. When interpreting statutes, their "plain language controls our interpretation if we can discern the legislative intent from the plain meaning of the statute's words." *State v. Martinez*, 2008 MT 233, ¶ 18, 344 Mont. 394, 188 P.3d 1034 (citing *Sturchio v.*

Wausau Underwriters Ins. Co., 2007 MT 311, ¶ 10, 340 Mont. 141, 172 P.3d 1260. Language that is clear and unambiguous, using words’ plain and ordinary meanings, requires no further interpretation. *Mont. Indep. Living Project v. City of Helena*, 2021 MT 14, ¶ 11, 403 Mont. 81, 479 P.3d 961 (citing *Gannett Satellite Info. Network, Inc. v. State*, 2009 MT 5, ¶ 20, 348 Mont. 333, 201 P.3d 132; *Bates v. Neva*, 204 MT 336, ¶ 15, 377 Mont. 350, 339 P.3d 1265).

Moreover, ACORN did not establish that § 13-2-122(1), as written and as applied by the District Court here, violates the NVRA. At the outset, ACORN did not assert this claim in its pleading. (*See* Doc. 1.) This Court should therefore disregard it. Even if it had, the Secretary has established that the fee it charges to obtain the voter database is less than 1% of the actual cost of the database. The fee is therefore objectively reasonable. Under the guise of “potential liability” for an unpled claim, ACORN asks this Court to completely rewrite § 13-2-122(1) to say something it doesn’t say. (*See* ACORN Br. at 14–15.) Montana law forbids this. § 1-2-101.

II. THE SECRETARY DID NOT VIOLATE THE RIGHT TO KNOW IN RESPONDING TO ACORN’S REQUEST FOR THE ACTUAL COST OF THE YEARLY SUBSCRIPTION.

Lastly, ACORN asserts the Secretary violated the right to know by failing to provide ACORN with “documentation of what the ‘actual costs’ are for a yearly subscription.” (ACORN Br. at 18.) But the Secretary did promptly provide ACORN

this requested information. (Doc. 31 at Ex. D.) The Secretary promptly informed ACORN that it “is required to charge for elector lists under 13-2-122, MCA[.]” and that the fees “are set in Montana Administrative Rule at 44.3.1101.” (*Id.*) The Rule clearly sets forth the cost of the yearly subscription (\$5,000.00), as requested.

The Secretary timely provided the information ACORN requested by advising that the fees for a yearly subscription to the voter database were contained in Admin. R. Mont. 44.3.1101. The Secretary responded to ACORN’s letter, citing the authority for the yearly subscription fee. ACORN can still immediately obtain the information by paying the statutory fee and receive the one-year subscription. There is no violation of the right to know.

CONCLUSION

The Secretary properly complied with and faithfully executed all her duties and obligations in accordance with the law. The Secretary responded to ACORN’s request for the statewide voter database pursuant to her statutory obligations under Mont. Code Ann. § 13-2-122(1). The fee charged by the Secretary is set by rule, as authorized by statute. The fee does not exceed the actual cost of the database—indeed, it is far less than the actual cost. The District Court properly granted the Secretary of State’s motion for summary judgment, and this Court should affirm.

DATED this 22nd day of January, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,825 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, and any appendices.

/s/ Alwyn Lansing

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CERTIFICATE OF SERVICE

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