

**Opinion No. 85**

**Fees—Clerks and Recorders**

HELD: The County Clerk and Recorder may not, for official services enjoined by law, charge the State Highway Commission with fees for the recording of, nor for furnishing copies of instruments.

November 2, 1956

Mr. Scott P. Hart  
State Highway Engineer  
Montana State Highway Commission  
Helena, Montana

Dear Mr. Hart:

You have asked my opinion upon the following question:

Must the State Highway Commission, when it requests the recording of, or furnishing copies of instruments, pay the legal fees when the County Clerk and Recorder believes that some individual and not the Highway Commission receives the benefit or some benefits therefrom?

Section 25-209, R.C.M., 1947, reads:

"No Fees To Be Charged State, County or Public Officer. No fees must be charged the state, or any county, or any subdivision thereof, or any public officer acting therefor, or in habeas corpus proceedings for official services rendered, and all such services must be performed without the payment of fees."

The foregoing statute is a general one and controls in the absence of governing special legislation. Generally speaking the power of a public officer is limited by the statute conferring the power. In *re. Farrell*, 36 Mont. 254, 92 Pac. 785.

It is apparent that the County Clerk and Recorder may only do that which is permitted by statute and may not do that which is prohibited by statute. And necessarily he may charge for official services rendered only where permitted and not where prohibited.

Further, the familiar rule is that no officer may demand a fee for any official service unless clearly authorized to do so. (*State ex rel. Baker v. Second Judicial Court*, 24 Mont. 425, 92 Pac. 688).

The statute does not lodge with the County Clerk and Recorder discretionary determination. It is plain, clear, and does not demand construction. Discretion, if any, belongs with the Highway Commission to determine whether recording or securing

copies is absolutely necessary or only desirable in order to fulfill its governmental functions. If it is necessary to the State Highway Commission in any proper transaction to secure the recording of an instrument or any copy, then the County Clerk and Recorder must record and/or furnish copies free of charge. Section 25-209, R.C.M., 1947, requires the discharge by the County Clerk and Recorder of a ministerial function only and with him discretion does not lie.

It is therefore my opinion that the County Clerk and Recorder may not, for official services enjoined by law, charge the State Highway Commission with fees for the recording of, nor for furnishing copies of instruments.

Very truly yours,  
ARNOLD H. OLSEN,  
Attorney General.