HENRY MCMASTER
ATTORNEY GENERAL

January 14, 2010

Randy S. Thompson, Fire Marshal
Department of Fire Safety
York County
2151 Ogden Road
Rock Hill, South Carolina 29730-7583

Dear Mr. Thompson:

In a letter to this office you raised several questions relating to fire investigations. You posed the following questions:

1. Can a fire inspector complete and sign, as the affiant, a criminal search warrant?

2. Is there an administrative search warrant and who issues the type warrant?

3. If there is an administrative search warrant, can a fire inspector complete and sign this type of search warrant as the affiant?

4. May a fire inspector serve an administrative search warrant?

As referenced in a prior opinion of this office dated April 21, 1998, two cases decided by the United States Supreme Court, Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) and Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) are controlling. In Michigan v. Tyler, supra, the local fire department responded to a call to the defendants' furniture store. As the fire was extinguished, containers of flammable liquid were discovered at the scene and reported to the chief. The fire chief summoned a police detective for investigation of possible arson but he had to cease the investigation because of smoke and steam. Subsequently, the fire chief and detective removed the containers and left. An hour later the assistant and the detective in the course of an another examination removed pieces of evidence. At later dates, a member of the State police arson section took photographs and made an inspection, which was then followed by several other visits where additional evidence and information were obtained. The defendants were subsequently charged and evidence seized was used to convict them notwithstanding their objections that no warrants were obtained.

The United States Supreme Court agreed that the defendants' objections were valid. In response to the State's argument that in light of the context of arson the defendants' privacy interests were negligible, the Court responded that

> [t]his argument is not persuasive. ... People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises. ... Once it is recognized that innocent fire victims retain the protection of the Fourth Amendment, the rest of the...(State's)...argument unravels. For it is, of course, impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used ex post facto to validate the introduction of evidence used to secure that same conviction.

98 S.Ct. at 1947-48. Thus, in the Court's view,

> ... there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately." Id.

In short, "[a]s a general matter, then, official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment." 98 S.Ct. at 1948.

The Court, however, rejected any argument that the fighting of a fire does not create exigent circumstances for purposes of the Fourth Amendment. As to this point, the Court stated that:

> [f]ire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. ... And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.

98 S.Ct. at 1950. In applying these rules, the Court found that "the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting

seizure of evidence." Id. at 1951. However, the "entries occurring after January 22 ... were clearly detached from the initial exigency and warrantless entry ..." and were thus invalid because made without warrant or consent. The Court concluded stating:

> ... we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches... [citations omitted]...Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime.

98 S.Ct. at 1951.

In Michigan v. Clifford, supra, the defendants' private residence caught fire and was damaged while they were out of town. Upon extinguishing the fire, all the firefighters and police left the premises. However, hours later a team of arson investigators arrived to investigate. A work crew was at the scene boarding up the house and pumping water out of the basement. The investigators learned that the defendants had been notified and instructed their insurance agent to send the work crew to secure the house. Knowing this, the investigators entered the residence and searched the premises without either consent or a warrant. The investigators found evidence that the fire had been deliberately set. At the defendants' trial for arson, the defendants moved to suppress on this basis.

The Supreme Court first addressed the issue of what type of warrant is necessary once the Tyler parameters of fighting the fire and remaining for a reasonable time to investigate the cause of the blaze had been fulfilled. Reasoning that where a warrant is necessary, "the object of the search determines the type of warrant required ...", the Court stated:

> [i]f the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. ... To obtain such a warrant, fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time. If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. If evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the "plain view" doctrine. Coolidge v. New Hampshire, 403 U.S. 443, 465-466, 91 S.Ct. 2022, 2037-2038, 29 L.Ed.2d 564 (1971). This evidence then may be used to establish probable cause to obtain a

> criminal search warrant. Fire officials may not, however, rely on this evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer. The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause....

104 S.Ct. at 647. The Court then applied the foregoing rule in responding to the State's argument that Tyler should be modified to justify the warrantless search in that instance. Distinguishing the facts from Tyler, the Court noted that

> [a]s the State conceded at oral argument, this case is distinguishable for several reasons. First, the challenged search was not a continuation of an earlier search. Between the time the firefighters had extinguished the blaze and left the scene and the arson investigators first arrived about 1:00 p.m. to begin their investigation, the Cliffords had taken steps to secure the privacy interests that remained in their residence against further intrusion. These efforts separate the entry made to extinguish the blaze from that made later by different officers to investigate its origin. Second, the privacy interests in the residence-- particularly after the Cliffords had acted--were significantly greater than those in the fire- damaged furniture store, making the delay between the fire and the mid-day search unreasonable absent a warrant, consent, or exigent circumstances. We frequently have noted that privacy interests are especially strong in a private residence. ... These facts--the interim efforts to secure the burned-out premises and the heightened privacy interests in the home-- distinguish this case from Tyler. At least where a homeowner has made a reasonable effort to secure his fire-damaged home after the blaze has been extinguished and the fire and police units have left the scene, we hold that a subsequent post-fire search must be conducted pursuant to a warrant, consent, or the identification of some new exigency. ... So long as the primary purpose is to ascertain the cause of the fire, an administrative warrant will suffice.

104 S.Ct. at 648. Therefore, the Court determined that since no exigent circumstances justified the upstairs search, such search was unreasonable under the Fourth Amendment. A criminal search warrant was required to search the upstairs and, because one was not obtained, the search was invalid.

These two decisions control as to the need for a warrant in the circumstances of a fire investigation. The Supreme Court clearly distinguished for purposes of the Fourth Amendment

between fighting the fire, ascertaining the origins and cause of the fire and a criminal investigation for arson. As set forth in the referenced 1998 opinion of this office, the following principles appear to be applicable from these cases:

1. No warrant is necessary for officials who enter a building or premises to put out a fire.

2. Officials need no warrant to remain for "a reasonable time to investigate the cause of the blaze after it has been extinguished." Evidence found in "plain view" or uncovered during the removal process may be seized.

3. Where reasonable expectations of privacy remain in the fire-damaged property, additional investigations begun after the fire has been extinguished and fire and police officials have left the scene must generally be made pursuant to a warrant or the identification of some new exigency.

4. Where a warrant is necessary, the object of the search determines the type of warrant necessary.

a. an administrative warrant is sufficient if the primary object is to determine the cause and origin of a recent fire. The showing required is that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.

b. If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

Several state statutes authorize courts to issue administrative search warrants in particular circumstances. For instance, S.C. Code Ann. § 41-15-260 establishes procedures by which the Commissioner of Labor and employees of the South Carolina Department of Labor are authorized to inspect work sites for compliance with the occupational safety and health provisions contained in Title 41 of the South Carolina Code. This provision also allows the Commissioner to seek a warrant from any circuit judge if he or she is denied entry. Several other provisions of the State Code also allow for the issuance of an administrative search warrant in certain circumstances. See, e.g. S.C. Code Ann. § 39-9-90 (allowing the Agriculture Commissioner to seek a search warrant if denied entry to commercial premises when enforcing provisions under Chapter 9 of Title 39 of the South Carolina Code and regulations thereunder); § 44-53-1390 (allowing the Department of Health and Environmental Control to obtain an administrative warrant from a court of competent

jurisdiction to enter a dwelling unit or childcare facility in order to investigate a report of lead poisoning); § 44-53-480 (controlled substance violations); § 56-29-40 (chop shop operations); 44-53-520(b) (drug forfeitures).

While the above provisions authorize administrative warrants in the situations provided, I am unaware of any State statutory provision authorizing the issuance of an administrative warrant in association with a fire investigation. Also, I was informed in a telephone conversation with an individual at the State Fire Marshall's office that they were unaware of any statutorily-authorized administrative warrants for fire investigations. The authority of the State Fire Marshall is set forth in S.C. Code Ann. § 23-9-50 which states that

> (a) The State Fire Marshal shall have authority at all times of the day or night, in the performance of duties imposed by this chapter, to enter upon and examine any building or premises where any fire has occurred and other buildings or premises adjoining. Provided, that the Fire Marshal may enter a private dwelling or premise only with the permission of the owner or occupant, unless there is probable cause to believe that a violation of the provisions respecting fire laws exists, that there exists imminent danger to the occupants thereof or arson.
>
> (b) The State Fire Marshal shall have authority at any reasonable hour to enter into any public building or premises or any building or premises used for public purposes to inspect for fire hazards.
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> (c) Nothing in this section shall restrict the authority of the State Fire Marshal from investigating any premises which has been damaged by a fire of suspicious cause within a reasonable period of time after the occurrence of such fire....

As stated in an opinion of this office dated December 15, 2006,

> South Carolina courts, as well as courts of other jurisdictions, require specific statutory authority for judges and magistrates to issue search warrants. In State v. Baker, 251 S.C. 108, 109, 160 S.E.2d 556, 556-57 (1968), the South Carolina Supreme Court noted: "There is no common law right to issue search warrants. The issuing authority is subject to the constitutional prohibition against unreasonable searches and seizures as set forth in the fourth amendment to the Constitution of the United States, and subject to statutory control."...Other jurisdictions' courts follow the same reasoning. For instance, the Supreme Court of Washington has consistently held "municipal courts have no inherent authority to issue administrative search warrants, they must rely on an authorizing statute or court rule." City of Seattle v. McCready, 877 P.2d 686, 691 (Wash. 1994). See also,

> City of Seattle v. McCready, 868 P.2d 134, 141 (Wash. 1994) ("There is... no general common law right to issue search warrants."). The courts of Delaware, Iowa, and Kentucky also reached this conclusion. Matter of Brookview Assoc. Petition for A Writ of Prohibition, 506 A.2d 569, 570 (Del. Super. Ct. 1986) ("Justice of the Peace Court only has such jurisdiction as is expressly conferred upon it by statute."); Fisher v. Sedgwick In and For Story County, 364 N.W.2d 183 (Iowa 1985) (finding in the absence of statutory authority a court does not have warrant authority); Stovall v. A.O. Smith Corp., 676 S.W.2d 475, 476 (Ky. Ct..App. 1984) (finding the Commissioner of Labor did not have the right of entry under common law and "the courts had no parallel authority to issue administrative search warrants."); State v. Peterson, 194 P. 342, 351 (Wyo. 1920) ("[T]he powers of a justice of the peace are strictly limited to what is conferred upon him by statute.").

The opinion concluded that this office was unable to locate a provision of the South Carolina Code affording authority to magistrates or city judges or the like to issue administrative search warrants for the enforcement of zoning ordinances. In finding no such authority, this office concluded that we presumed that the General Assembly did not intend for such authority to exist. Similarly, in the absence of any State statutory authority for an administrative warrant for fire investigations, this office cannot conclude that the issuance of such would be authorized.

There is statutory authority pursuant to S.C. Code Ann. §§ 6-11-1410 et seq. for certain fire investigations for a recognized "fire authority". The term "fire authority" is defined by Section 6-11-1410 as "...any lawfully and regularly organized fire department, fire protection district, or fire company regularly charged with the responsibility of providing fire protection and other emergency services incident thereto." Section 6-11-1420 states that

> [n]otwithstanding any other provisions of law, authorized representatives of the Fire Authority having jurisdiction, as may be in charge at the scene of a fire or other emergency involving the protection of life or property or any part thereof, have the power and authority to direct such operation as may be necessary to extinguish or control the fire, perform any rescue operation, evacuate hazardous areas, investigate the existence of suspected or reported fires, gas leaks, or other hazardous conditions or situations, and of taking any other action necessary in the reasonable performance of their duty. In the exercise of such power, the Fire Authority having jurisdiction may prohibit any person, vehicle, vessel, or object from approaching the scene and may remove or cause to be removed or kept away from the scene any person, vehicle, vessel, or object which may impede or interfere with the operations of the Fire Authority having jurisdiction. (emphasis added).

However, no reference is made to the utilization of or authorization for an administrative warrant. Therefore, in summary, as to your questions regarding an administrative warrant, I cannot direct you to statutory authorization for such warrants in association with fire investigations in this State. I assume that there are no local ordinances authorizing such or a situation where York County has adopted a separate fire code which would provide for an administrative warrant. You may wish to contact your county attorney as to whether there has been such an adoption. In the absence of such, I can only suggest that you continue to use the search warrant process in situations where such is appropriate.

As to your separate question of whether a fire inspector can complete and sign as the affiant a criminal search warrant, again, I am unaware of any State statute authorizing such. The general statute for search warrants, S.C. Code Ann. § 17–13-140 states that a search warrant "...shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant." Case law in this State typically refers to a law enforcement officer serving as the affiant on a search warrant. See, e.g., State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). Therefore, until a court so rules in this State, or there is specific authority for a fire inspector who is not a commissioned law enforcement officer or who does not possess any law enforcement authority generally, in the opinion of this office, a fire inspector would not be authorized sign, as an affiant, a criminal search warrant.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General