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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

November 10, 1999

Andy Blackwell, Chief of Police
Irmo Police Department
P. O. Box 406
Irmo, South Carolina 29063-0406

Re: Informal Opinion

Dear Chief Blackwell:

Thank you for your letter, dated August 5, 1999, to Attorney General Condon which has been referred to me for a response. You ask about the validity of a business's policy to charge a fee for the production of records compelled by a lawful search warrant.

The law in South Carolina is unclear in this area. We are unaware of any South Carolina statutes, decisions or court rules which authorize or comment upon such a charge. No South Carolina case has required such payment, in other words.

I would note that, generally speaking, "a witness or the recipient of a subpoena duces tecum is required to bear the costs of compliance." *In re Grand Jury No. 76-3 v. U.S.*, 555 F.2d 1305 (5th Cir. 1997). In that case it was held that a bank whose records were subpoenaed by the government as part of a criminal investigation was required to pay the costs of compliance unless such compliance would be considered "unreasonable" or "oppressive."

Moreover, in *Hurtado v. U.S.*, 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d (1973), the United States Supreme Court held that the detention of a material witness to assure his presence at a criminal trial does not constitute a "taking" for which just compensation is required under the Fifth Amendment. The Court said that the "Fifth Amendment does not require that the Government pay for the performance of a duty it is already owed." In other words, in the eyes of the Supreme Court, the duty to give evidence is "a part of the necessary contribution of the individual to the welfare of the public."

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Again, however, there does not appear to be any authority in South Carolina which addresses your question. As such, we are unable to advise whether our courts would follow the general rule of law expressed above in the *Grand Jury* and *Hurtado* cases which found that the duty to provide evidence pursuant to lawful order required no compensation. Whether a magistrate as the officer issuing a search warrant could require compensation would also be an open question.

In short, it would appear that legislative or judicial clarification would be necessary to determine with certainty the answer to your question. In the interim, you may wish to contact the Division of Court Administration for any policy guidance as to how to proceed with such requests for payment.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an

cc: Sgt. Brian Buck
Irmo Police Department