ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2005

Mr. Leonard B. Smith
City Attorney, City of Cedar Park
Post Office Box 684633
Austin, Texas 78768

OR2005-01126

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), Government Code, chapter 552.[1] Your request was initially received by the Open Records Division of this office and designated Public Information Request ID# 217148, but pursuant to an agreement between the City of Cedar Park and this office,[2] preparation of the ruling has been assigned to the Opinion Committee of this office and your request has been redesignated ML-44073-05. Because of delays incident to formulating the agreement, the Office of the Attorney General has waived the deadlines for submitting documents that usually apply to public information requests, and we will therefore not address them.

I. The Public Information Act Request

The City of Cedar Park (the "city") received a letter from Fred Sides requesting written and electronic documents about investigations affecting city officers and related matters.[3] The request specifically asks for certain information found in named individuals' city and personal e-mail accounts.[4] It seeks information for time periods ending with the date of the request, and beginning

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[1]Letter from Leonard B. Smith, City Attorney, City of Cedar Park, to Honorable Greg Abbott, Texas Attorney General (Nov. 9, 2004) (on file with Opinion Committee) [hereinafter Smith Letter].

[2]Agreement between Nancy Fuller, Chair, Opinion Committee, representing Office of Attorney General, and Leonard Smith, City Attorney, representing City of Cedar Park, at 1 (Dec. 1, 2004) (on file with Opinion Committee) [hereinafter Agreement]. The Agreement arose out of concern that documents submitted in response to ML-44073-05 should not be used to assist this office's investigation of Cedar Park's compliance with the Open Meetings Act. Agreement at 1.

[3]*See* Letter from Fred C. Sides to City of Cedar Park (Oct. 22, 2004) (attached to Smith Letter) (on file with Opinion Committee) [hereinafter Public Information Request].

[4]A City of Cedar Park e-mail account has the following address: [office] @ci.cedar-park.tx.us. The individual city officers' personal e-mail accounts are with various e-mail services and include the addressee's name.

on dates ranging from March 1, 1999 to March 1, 2004, depending on the kind of information. Information in the following categories has been requested:

1. Campaign financial reports filed with the city secretary, and documents prepared for the city council, city officials, or the public regarding campaign finances, contributions, and participation for the mayor and three city council members. *See* Public Information Request, ¶ 1.[5]

2. Information about the investigation conducted by City Attorney Leonard B. Smith and/or Mark Dietz about a possible violation by Leonard Smith of a city charter prohibition against participating in campaigning and fund raising for a municipal candidate for public office. *See id.*, ¶ 2.

3. Documents prepared for the city council, other city officials, or the public about the investigation conducted by Leonard B. Smith and/or Mark Dietz about the parkland transaction involving approximately 48 acres known as the Logue Tract and former Mayor Bob Young. *See id.*, ¶ 3.

4. Documents prepared for the city council, other city officials, or the public about the investigation conducted by Leonard B. Smith and/or Mark Dietz of Texas American Title Company and/or Fred Sides. *See id.*, ¶ 4.

5. Communications to or from the current mayor and identified city council members on the above matters. *See id.*, ¶¶ 5 - 20.

6. Various fee bills representing the city's payment to Leonard B. Smith and Mark Dietz for services provided to the city, its economic development corporations, and subordinate bodies; documents representing unpaid billings by these persons for such services. *See id.*, ¶¶ 21, 22.

7. Documents about the selection of additional legal counsel retained to investigate Bob Young, the parkland matter, Leonard Smith with respect to city charter violations, and/or Fred Sides for breach of fiduciary loyalty and the Texas Attorney General's investigation into possible Open Meetings violation. *See id.*, ¶ 23.

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[5]We have summarized the information requested into eight categories, identifying the paragraphs of the Public Information Request in which that information is requested.

8. Any former or previous engagements of the selected legal counsel with the city and Leonard Smith. Any previous engagements of the selected legal counsel with Leonard Smith's private practice. *See id.*, ¶ 23.

II. The City's Response

You have not provided any information described in category 7 or category 8. You state that the city has no information responsive to the request in category 8 pertaining to previous engagements of the selected legal counsel with Leonard Smith's private practice. *See* Smith Letter at 4. We assume that any of the other category 7 or 8 information in the city's possession has been made available to the requestor.

Nor have you provided any documents in the first category of information sought, campaign financial reports filed with the city secretary and related material. You state that some of this is already in the public realm and that any responsive information found on e-mail accounts maintained by the city is subject to the Act. We assume that you have made such information in city records and city-maintained e-mail accounts available to the requestor.

You also note that the city has been asked to provide "'any and all other documentation whereby Campaign Financial Reports, campaign finances, campaign contributions, participation in political campaigns, participation in political fundraising and influence on voting were discussed or mentioned'[6] from personal e-mail accounts of named elected officials." Smith Letter at 1-2 (quoting from Clarification Letter at 1). You argue that "information concerning campaigning and fundraising activity found in an elected official's personal e-mail account and private files is not public information." *Id.* at 2. Government Code section 552.002 defines "public information" as

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
> (1) by a governmental body; or
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

TEX. GOV'T CODE ANN. § 552.002(a) (Vernon 2004). You have not provided any personal e-mail records relating to campaign and personal political matters.

You maintain that information created in a public officeholder's personal e-mail account for campaign and personal political purposes is not public information within section 552.002(a) and not subject to disclosure under the Act. Information in a public officeholder's personal e-mail account may be subject to the Act where the officeholder uses the personal e-mail account to conduct public business. *See* Open Records Letter Nos. 2003-1890 at 2; 2003-0951 at 2. *See also* Tex. Att'y Gen.

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[6]Letter from Fred C. Sides to Mr. Leonard Smith (Nov. 2, 2004) (attached to Smith Letter)(on file with Opinion Committee) [hereinafter Clarification Letter].

ORD-635 (1995) at 6-7 (appointment calendar owned by a public official or employee is subject to Act when it is maintained by another public employee and used for public business). However, a governmental body's official business ordinarily does not include a public officer's personal campaign and political activities. In Open Records Decision No. 317 (1982) this office concluded that the names of advisory task force members appointed by the mayor-elect before he took office were not subject to the Open Records Act (the Public Information Act's predecessor), because the advisory task force operated completely outside of the city structure. *See* Tex. Att'y Gen. ORD-317 (1982) at 2. *See also* Tex. Att'y Gen. Op. No. GA-0104 (2003) at 4 (school district has no legitimate interest in paying a school board member's expenses in an election contest, because the lawsuit involves only the trustee's personal interest in seeking office). While a governmental entity may have custody of a public officer's campaign information pursuant to regulatory authority, this is not at issue here. *See* TEX. ELEC. CODE ANN. tit. 15 (regulating political funds and campaigns) (Vernon 2003 & Supp.). Based on the information you have provided, we conclude that information created for campaign and personal political purposes in a public officeholder's personal e-mail account that is not in the city's possession is not "public information" subject to the Act.

You have provided representative samples of the remaining information requested. You state that the requestor has sought information relating to internal investigations resulting from the ongoing criminal investigation conducted by the Office of the Attorney General and the Williamson County District Attorney.[7] *See* Smith Letter at 2. This investigation caused the city to hire the law firms of Dietz & Associates and Minton, Burton, Foster & Collins as special counsel for this investigation. *See id.* Internal investigations initiated in response to a grand jury subpoena led to the city providing a report to the Williamson County District Attorney, which resulted in the Cedar Park mayor's resignation. Special counsel prepared other reports relating to the city's business transactions with Texas American Title Company ("TATC") and an investigation of the city attorney, Leonard Smith. The Smith investigation was conducted in response to an anonymous letter of complaint relating to a possible charter by city attorney Leonard Smith.[8]

You state that you will make available the final report of the investigation into an alleged charter violation by the city attorney. *See* Smith Letter at 2 and Exhibit F (copy of final report regarding alleged charter violation). We assume that you have already done so. You wish to withhold the notes and research file created by Special Counsel Mark Dietz while conducting this investigation. *See* categories 2 and 5, *supra at* 2, 3. You claim that Government Code section 552.111 excepts this information from disclosure as attorney work product information.

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[7]By letter of November 30, 2004, the Office of the Attorney General agreed to defer for a period of 180 days presentment of evidence to the Williamson County grand jury seeking indictments Cedar Park city council members in their individual capacities for alleged violations of the Open Meetings Act, to allow those persons to complete conditions set out in the letter. *See* Letter from Brandy Byrd, Assistant District Attorney by Appointment, Williamson County and Assistant Attorney General, to Mr. Samuel E. Bassett, Attorney at Law (Nov. 30, 2004) (on file with Opinion Committee, *also available at* http://www.oag.state.tx.us/newspubs/releases/2004/120204cedarpark.pdf).

[8]Letter from R. Mark Dietz, Special Counsel to City of Cedar Park, to Nancy Fuller, Chair, Opinion Committee, Office of the Attorney General (Jan. 10. 2005) (on file with Opinion Committee) [hereinafter Dietz Letter].

You state that a copy of the final report on the investigation into TATC has been released to the requestor. *See* Smith Letter at 2 and Exhibit G (copy of report on investigation into TATC). *See id.* at 2-3. However, you claim that the notes and research file compiled by special counsel in preparing this report are excepted from disclosure by Government Code section 552.107 as information within the attorney-client privilege.[9] *See* categories 4 and 5, *supra at* 3.

The final report on an investigation about conflicts of interest involving the former mayor and the parkland matter has been released to the public, but you maintain that the request seeks related information that may be withheld pursuant to Government Code section 552.107. *See* Smith Letter at 3 and Exhibit H (report about mayor without attachments). *See also* categories 3 and 5, *supra at* 3. The information you wish to withhold includes e-mails between the city attorney, special counsel and city council members that contain specific legal advice. *See id.* at 3. "It also includes notes and mental processes, research and evaluation." *Id.*

The requestor seeks invoices for statements of services provided to the city by special counsel Mark Dietz or city attorney Leonard Smith from October 1, 2003 to the date of the request. *See id.* You state that Mr. Dietz's billing began in July 2004 and that all invoices are related to the Williamson County Grand Jury investigations. Smith Letter at 3. *But see* Dietz Letter (Smith investigation was conducted in response to an anonymous letter of complaint). Mr. Smith's invoices cover the entire time period and reflect a broad range of representation. You claim that all billings associated with the investigation conducted in response to the grand jury investigation are privileged as attorney work product. *See* Smith Letter at 3. *See also* TEX. GOV'T CODE ANN. § 552.111.

You also claim that the requested information is excepted from disclosure in its entirety by Government Code section 552.103(a) as information related to reasonably anticipated litigation. Smith Letter at 3. You write that the city believes that the requestor intends to file suit against the city for various causes of action. *See* Smith Letter at 3. This belief is based on a written communication received from Mr. Sides' attorney and representations Mr. Sides has made to the mayor of Cedar Park, prior council members and other members of the community. *See id.* & exhibits D (letter from attorney), E (affidavit from mayor of Cedar Park).

III. Exceptions to Disclosure Claimed by the City

A. Section 552.103

A governmental body must demonstrate how and why information is excepted from required public disclosure. *See* Tex. Gov't Code Ann. § 552.301(e)(1)(A) (Vernon 2004) (a governmental body must submit to this office, among other information, written comments giving the reasons why the stated exceptions apply that would allow the information to be withheld); Tex. Att'y Gen. ORD-676 at 6. We first consider your claim that section 552.103 applies to the information it its entirety.

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[9]Government Code section 552.107 protects the same information protected under Texas Rule of Evidence 503. *See* Tex. Att'y Gen. ORD-676 (2002) at 4.

Section 552.103 excepts from disclosure "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party." TEX. GOV'T CODE ANN. § 552.103(a) (Vernon 2004). Section 552.103(c) provides that "[i]nformation relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) *only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.*" *Id* § 552.103(e) (emphasis added).

The requestor applied to the City of Cedar Park for information on October 22, 2004, requesting records for himself, his retained legal counsel, and any other interested party. *See* Public Information Request. Before that date, the City of Cedar Park had received a letter from an attorney representing TATC, which referred to allegations "concerning the activities of TATC and its employee Fred Sides" made public by Leonard Smith in a local newspaper.[10] The letter characterized the allegations, if accurate, to indicate a reckless disregard for the truth as to TATC. The attorney wrote that TATC would not allow its reputation to be damaged by such statements and demanded a retraction and public apology. Given the content of this letter, the City of Cedar Park could reasonably anticipate a lawsuit in which the requestor, Mr. Sides, would be involved. Information related to the issues that the letter raises, such as allegations about TATC and its employee Fred Sides or the process of preparing the report on TATC, may be withheld under section 552.103. We have reviewed the records and marked those that may be withheld under section 552.103.

Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982). Thus, you may not withhold documents already obtained by the requestor.

B. <u>Section 552.111</u>

We next address section 552.111, which you claim for Special Counsel Mark Dietz's notes and research file created for the investigation into an alleged charter violation by the city attorney (the "Smith investigation"). *See* TEX. GOV'T CODE ANN. § 552.111 (Vernon 2004). You also claim this exception for attorney fee bills.

Section 552.111 encompasses the attorney work product privilege found in Rule 192.5, Texas Rules of Civil Procedure. Information is confidential under Texas Rule of Civil Procedure 192.5 only to

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[10]Letter from Travis R. Phillips, Attorney at Law to Mr. Leonard Smith, City Attorney, City of Cedar Park (Sept. 16, 2004) (attached as exhibit D to Smith Letter).

the extent the information implicates the core work product aspect of the work product privilege. *See* Tex. Att'y Gen. ORD-677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5, provided the information does not fall within an exception to the privilege found in Rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.--Houston [14th Dist.] 1993, no writ).

You have not demonstrated that the special counsel's notes and research file created for the Smith investigation were prepared for trial or in anticipation of litigation. Thus, you have not proved the first part of the work product test. Accordingly, section 552.111 does not permit the city to withhold from disclosure the special counsel's notes and research file created for the Smith investigation.[11]

You also state that "[a]ll billings associated with the investigation associated with the ongoing grand jury investigation are privileged as attorney-client work product." Smith Letter at 3. Attorney fee bills may be excepted from disclosure under section 552.111 only if they contain core work product information. Upon review we find that the submitted attorney fee bills state in general terms the subject matter of legal services provided and identify individuals with whom the attorneys communicated. They do not reveal any mental impressions or legal conclusions formed by the attorneys concerning the matters for which the attorneys are providing legal services. Furthermore, we find that the fee bills do not reveal any mental impressions, opinions, or conclusions of the attorneys regarding legal issues, strategy, or objectives. We therefore determine that none of the fee

[11]The requestor has written to us that he has obtained the final report in the Smith investigation, with supporting documents, from sources other than the City of Cedar Park. *See* Letter from Fred C. Sides to Nancy Fuller, Chair, Opinion Committee, Office of the Attorney General (Jan. 17, 2005) (on file with Opinion Committee).

bills consists of core attorney work product, and the city may not withhold them pursuant to the attorney work product privilege under Rule 192.5 as incorporated into section 552.111.

C. **Section 552.107**

You maintain that the notes and research file compiled by special counsel in preparing the reports about the former mayor and the parkland matter and TATC are excepted by Government Code section 552.107, which protects information within Texas Rule of Evidence 503. *See* Tex. Att'y Gen. ORD-676 at 2; *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). You state that the notes and research file reflect thought processes and mental impressions that were part of the investigation begun in response to the grand jury investigation. When asserting the attorney-client privilege, a governmental body must demonstrate the elements of the privilege, which we summarize. *See* Tex. Att'y Gen. ORD-676 at 7. The information must have been communicated for the purpose of facilitating the rendition of professional legal services to the client government body. *See* TEX. R. EVID. 503(a)(5),(b)(1) (Vernon 2003). The privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See id.* 503(b)(1). *See also id.* 503(a)(2) (defining representative). It moreover applies only to a confidential communication, that is, a communication that was not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or those reasonably necessary to transmit the communication. *See id.* 503(b)(1). The communication must have been maintained as confidential. *See* Tex. Att'y Gen. ORD-676 at 10.

We have reviewed the records and have marked those that are within the attorney-client privilege. The records that have not been marked as within one of the exceptions you raise are open to the public.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. Upon releasing records in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Susan Garrison
Assistant Attorney General
Opinion Committee

SLG/kld

Ref: ML-44073-05 (Formerly Public Information Request ID# 217148)

Enc. Documents submitted by Leonard B. Smith

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(with documents submitted by Mark Dietz)

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