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Via Email

Hon. Mayor Chris Watts and
Hon. Members of Denton City Council
215 E. McKinney St.
Denton, TX 76201

Re: City of Denton Code of Ordinance § 2-30, Improper Disclosure of Confidential Information
("Denton Ordinance")

Dear Mayor Watts and Honorable City Council Members:

I write you on behalf of the Freedom of Information Foundation of Texas with regard to the referenced Denton Ordinance. As written, the Denton Ordinance impermissibly restricts your own First Amendment rights and also those of the public and the press—specifically including Denton’s residents. The Denton Ordinance criminalizes speech and, most egregiously, prohibits a person from disclosing “any information from a meeting closed to the public pursuant to the Texas Open Meetings Act.” Further, the Denton Ordinance contradicts and creates confusion with the Public Information Act (“PIA”) by criminalizing the release of “all information held by the city deemed confidential by law and clearly marked as confidential.” For the reasons set out below, we believe the Denton Ordinance is bad public policy and that it was improper for the City to pass the Denton Ordinance in an attempt to control the speech of its elected officials.

- (1) First Amendment Rights of Denton’s Elected Officials. It is well-settled that the Texas Open Meetings Act does not prohibit elected officials from publicly discussing matters deliberated in closed session. Tex. Att’y Gen. Op. No. JM-1071 (1989). Further, while a governmental body may place restrictions on the speech of its employees, it may not do so with regard to its elected officials. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Accordingly, subjecting elected officials to criminal penalties for disclosure of information solely on the basis that it was discussed in closed session improperly restricts the speech of Denton’s elected officials and violates their First Amendment rights.
- (2) First Amendment Rights of the Public and Press. Preventing Denton’s city officials from disclosing information on the sole basis that it was discussed in closed session also violates the First Amendment rights of Denton’s citizens and the press. The public, including the media, has a First Amendment right to receive information from public officials who are willing to speak. *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 928-29 (5th Cir. 1996); *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982) (“The First

Amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say."); *Dow Jones & Co., Inc. v. Simon*, 842 F.2d 603, 607 (2d Cir. 1988) (recognizing First Amendment right to receive information and ideas). The Denton Ordinance's broad prohibition against disclosing nearly all information discussed in closed session, without any clearly articulated compelling government interest in preventing Denton officials from doing so, violates the First Amendment rights of the public and the press to receive the information.

- (3) Contradiction and Usurpation of the Public Information Act. The City is without authority to define terms of a state statute, particularly where such definitions are inconsistent with case law, Attorney General opinions and the mandate of the PIA. The PIA and the Texas courts provide the mechanism for determining whether information is confidential. TEX. GOV'T CODE § 552.001, *et seq.* Denton is without authority to, *sua sponte*, "deem" or "mark" information as "confidential" unless it *is* actually confidential under the PIA. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *Envoy Med. Sys. v. State*, 108 S.W.3d 333, 337 (Tex. App.—Austin 2003, no pet.); Open Records Decision No. 594 at 3 (1991). Moreover, the PIA already prescribes the criminal penalties for improper disclosure of information deemed confidential under the PIA. TEX. GOV'T CODE § 552.353. As a result, the Denton Ordinance creates confusion in that it appears to either be superfluous to the existing provisions of the PIA or, worse, attempts to grant Denton the inherent power to deem information as "confidential as a matter of law" without regard to the PIA and subject Denton officials and employees to criminal penalties based on that determination. Because the Denton Ordinance either contradicts or usurps the PIA, it cannot stand.

Based on the reasons discussed above, as well as others, we believe the Denton Ordinance is unenforceable on constitutional and statutory grounds. Additionally, as long as the Denton Ordinance remains on the books, it is impermissibly chilling the speech of governmental officials and the citizens of Denton. We therefore request that you repeal it promptly. I would be happy to speak with you further on this matter, or to answer any questions.

Thank you for your consideration of and attention to this matter.

Best regards,

Joseph R. Larsen

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Sedgwick LLP

On behalf of the Freedom of Information Foundation of Texas

cc: FOIFT Board Members