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NOTICE IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 (PAIA)

RE: THE SUPREMACY OF THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 OVER OTHER LEGISLATION RELATED TO INFORMATION DISCLOSURE

This Notice serves to state that the South African Human Rights Commission (the Commission) hereby confirms that the Promotion of Access to Information Act 2 of 2000 (PAIA) supersedes all other legislation related to information disclosure.

The Commission is an independent public body currently designated under PAIA to monitor the implementation of the Act. In line with its mandated responsibilities under PAIA, the Commission states that contrary to any legal opinion about the status of PAIA, PAIA supersedes all other legislation relating to information disclosure on the grounds that it is a law established to give effect to a constitutional right. The supremacy of PAIA over other legislation is echoed in section 5 of PAIA and has been confirmed by the courts in the case of *Andrew Christopher Davis v Clutcho (PTY) Ltd* (2003) ZAWCHC 23. The effect of the supremacy of PAIA is to promote the constitutionally aligned objective to 'foster a culture of transparency and accountability', as stated in the Preamble.

1. The Constitution

Section 2 of the Constitution of the Republic of South Africa, (the Constitution) provides that the 'supreme law of the Republic; law or conduct inconsistent with it is invalid'. The Constitution enshrines in section 32 the right of access to information, and provides for legislation to 'be enacted to give effect to this right'. PAIA was enacted in 2000 to fulfil this Constitutional requirement. As a law enacted to give effect to a Constitutional provision, PAIA holds supremacy over other laws which relate to information disclosure.

2. The Law

In Section 5 of PAIA relating to the '**Application of other legislation prohibiting or restricting disclosure**' of information, it states that the Act 'applies to the exclusion of any provision of legislation that':

- (a) Prohibits or restricts the disclosure of a record or a public or private body; and
- (b) Is materially inconsistent with an object, or a specific provision, of this Act.

Other legislation which relates to the disclosure of information includes the Protected Disclosures Act 26 of 2000, the Companies Act 71 of 2008, Public Audit Act 25 of 2004, South African Reserve Bank Act 90 of 1989, and the National Environmental Act 107 of 1998.

3. The Interpretation of the Courts

In the matter between *Andrew Christopher Davis v Clutcho (PTY) Ltd*, the courts determined that the respondent could not use the provisions of the Companies Act to refuse information disclosure, as access to information was a constitutional imperative and therefore trumped the provisions of the Act:

"The Companies Act cannot, contrary to section 36(2) of the Constitution, limit the right of access to information at section 32 of the Constitution, and mirrored in the Act [refers here to PAIA], nor can it be interpreted to exclude such right, which would thus be contrary to the spirit of the Bill of Rights. To the extent that the Companies Act does not provide for access to information, section 32 of the Constitution, and the Act [PAIA], must be read into the Companies Act."

This court judgement establishes precedent for the supremacy of PAIA over all other laws and provisions related to information disclosure, due to its constitutional alignment.

4. Concluding Statement

Given that PAIA is established under the Constitution, giving effect to the right of access to information, and that the Act itself states in Section 5 that no other legislation can prevent information disclosure or be inconsistent with the objectives of the Act, it follows that the PAIA supersedes all other law related to information disclosure.

Sincerely,

Advocate L M Mushwana

Chair of the South African Human Rights Commission

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Chairperson: ML Mushwana; **Deputy Chairperson:** P Govender; **Commissioners:** L Mokate, B Malatji, J Love, D Titus, S Ameerma
Chief Executive Officer: K Ahmed