

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

-----x
 In the Matter of Arbitration :
 Between: :
 :
 GABRIEL RESOURCES LTD. and GABRIEL :
 RESOURCES (JERSEY) LTD., :
 : Case No.
 Claimants, : ARB/15/31
 :
 and :
 :
 ROMANIA, :
 :
 Respondent. :
 -----x

HEARING ON THE MERITS

Friday, September 23, 2016

The World Bank Group
1818 H Street, N.W.
MC Building
Conference Room 2-800
Washington, D.C.

The hearing in the above-entitled matter came on
pursuant to notice, at 9:00 a.m. before:

MS. TERESA CHENG, SC, President of the Tribunal
DR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator
PROF. ZACHARY DOUGLAS, Co-Arbitrator

B&B REPORTERS
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

Also Present:

MS. SARA MARZAL YETANO
Secretary to the Tribunal

Court Reporter:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

B&B REPORTERS
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

APPEARANCES:

Attending on behalf of the Claimants:

MS. ABBY COHEN SMUTNY
MR. DARRYL LEW
MR. BRODY GREENWALD
MR. MICHAEL ROCHE
MR. ANDREI POPOVICI
MS. SAMANTA FERNÁNDEZ MICONE
White & Case, LLP
701 13th Street, N.W.
Washington, D.C. 20005
United States of America

MS. ANCA PUȘCAȘU
MS. RUXANDRA NIȚĂ
Țuca Zbârcea & Asociații
Sos. Nicolae Titulescu nr. 4-8
America House, Aripa de Vest, et. 8
Sector 1, 011141, Bucuresti
Romania

Company Representatives:

MR. JONATHAN HENRY
MR. DAVID KAY

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

MR. VEIJO HEISKANEN
MS. LORRAINE de GERMINY
MR. CHRISTOPHE GUIBERT de BRUET
Lalive
35, rue de la Mairi
CH - 1207 Geneva
Switzerland

MS. CRENGUTA LEAUA
MS. ANDREEA SIMULESCU
MS. LILIANA DEACONESCU
Leaua & Asociatii
10 Zborului Street, sector 3
030595, Bucharest
Romania

C O N T E N T S

	PAGE
PRELIMINARY MATTERS	7
OPENING STATEMENTS	
ON BEHALF OF THE CLAIMANTS:	
By Ms. Cohen Smutny	24
By Mr. Lew	81
ON BEHALF OF THE RESPONDENT:	
By Mr. Heiskanen	133
By Ms. de Germiny	172
By Mr. Guibert de Bruet	197
CLOSING ARGUMENTS	
ON BEHALF OF THE CLAIMANTS:	
By Ms. Cohen Smutny	245
By Mr. Lew	257
ON BEHALF OF THE RESPONDENT:	
By Ms. Leaua	274
By Mr. Guibert de Bruet	282
By Mr. Heiskanen	284

C O N T E N T S (Continued)

	PAGE
CONFIDENTIAL SESSIONS:	
1.	81-132
2.	197-242
3.	245-298

1 Mr. David Kay.

2 From our co-counsel, the law firm of Țuca
3 Zbârcea & Asociații, Anca Pușcașu and Ruxandra Nița.

4 Also a colleague, Andrei Popovici, from White &
5 Case is with us as well.

6 MR. HEISKANEN: Good morning, Madam President
7 and Members of the Tribunal. My name is Veijo
8 Heiskanen. I'm of Lalive, representing the Respondent.
9 On my left is Lorraine de Germiny of Lalive; and next
10 to her, Dr. Crenguta Leaua of Leaua & Asociații; and
11 then Christophe Guibert de Bruet of Lalive; and next to
12 him, Andreea Simulescu of Leaua & Asociații; and in the
13 back we have Liliana Deaconescu, also of Leaua &
14 Asociații.

15 PRESIDENT CHENG: Thank you.

16 I believe there are some housekeeping matters
17 we need to cover. From our own reading, there is the
18 new authorities that is being put in by the Respondent.
19 There is some issue about the recording from those in
20 the broadcasting room, and obviously also a way we are
21 going to handle the questions of confidentiality as the
22 proceedings arise.

1 Those are the three that the Tribunal noticed
2 that we have to cover.

3 Would that be right?

4 Claimant?

5 MS. COHEN SMUTNY: Yes.

6 PRESIDENT CHENG: All right. And Respondent?

7 MR. HEISKANEN: And nothing to add on the part
8 of the Respondent. Thank you.

9 PRESIDENT CHENG: Thank you.

10 Then, in that case, perhaps can I just deal
11 with these procedural matters very quickly first so
12 that we will know how we're going to proceed before we
13 go into the two Provisional Measures Application.

14 First, in relation to the new documents--or the
15 new authorities, I should say. And, of course, this is
16 only a provisional view of the Tribunal, and we will be
17 persuaded otherwise if--and give, of course, the
18 Parties a chance to look at that.

19 What the Tribunal is thinking of in terms of
20 the new authorities is this: We are thinking that
21 perhaps we can hear them on a de bene esse basis to see
22 how the Respondent relies on them, and then thereafter

1 the Claimant will be able to say whether they can deal
2 with it now or whether they want to deal with it at a
3 later stage, and that, I think, will save some time in
4 arguing whether we can now, as it were, without hearing
5 how it is to be put, whether that can be relied upon.
6 That's our provisional view.

7 So may I first hear the Claimant on that,
8 please.

9 MS. COHEN SMUTNY: Yes, that would be
10 acceptable to the Claimant in the circumstances.

11 PRESIDENT CHENG: Thank you.

12 Respondent?

13 MR. HEISKANEN: The Respondent will be happy to
14 proceed on basis that as well.

15 PRESIDENT CHENG: Thank you very much.

16 Now, then we look at the question of the
17 recording, which I think is Claimants' application for
18 primarily the attendees in the broadcasting room to
19 leave all their recording devices, mainly phones and
20 computers, outside. I do not recall the Respondent's
21 observations on that.

22 May I first ask the Respondent's views on that.

1 MR. HEISKANEN: It's the question of whether
2 the attendees in the hearing room will be able to
3 record the Hearing.

4 PRESIDENT CHENG: In the broadcasting--we call
5 it the broadcasting room?

6 SECRETARY MARZAL YETANO: The broadcasting
7 room.

8 MR. HEISKANEN: Our preliminary view would
9 be--we haven't consulted our client specifically on
10 that, but in terms of PO 1 and the Tribunal's decision
11 on the scope of publicity of this Hearing, we would
12 object to any recording of this Hearing. The Tribunal,
13 first of all, would have to first decide whether, for
14 instance, the recording--or the video recording of the
15 Hearing can be posted on ICSID's Web site, for
16 instance, after the Hearing. I think that's something
17 that should be discussed first between the Parties and
18 with the Tribunal.

19 So, for the time being, we would object to any
20 recording.

21 PRESIDENT CHENG: I don't think we are
22 discussing about whether or not the proceedings can be

1 posted on the Web site. I think it's just whether
2 those who are sitting in the broadcasting room should
3 be precluded from having their phones.

4 Now, again, we will be persuaded otherwise, but
5 provisional view of the Tribunal is this: Given that
6 there is a delay in the broadcasting, because I think
7 we have agreed--is it one-hour delay in the
8 broadcasting?--anything that is confidential is going
9 to be precluded. It will be--it will not be
10 broadcasted; and, therefore, that will, as it were, be
11 protected from being recorded, if it is to be recorded.

12 The other matters really are matters of
13 principle and arguments on principle, and that is not
14 subject to the question of confidentiality.

15 So, at the moment--and we will be happy to hear
16 Parties to the contrary--we take the view that there is
17 probably not a specific need to direct that the phones
18 and the computers of the attendees in the broadcasting
19 room be left outside the broadcasting room because the
20 concerns of confidentiality would already be dealt with
21 by the way we handle the Hearing itself. And I think
22 that's our provisional view, but again, let's hear the

1 Parties on that.

2 MS. COHEN SMUTNY: The Claimants' concern is as
3 follows: In the Procedural Order Number 1, the Parties
4 agreed that the manner in which we would make the
5 Hearings open and transparent would be by the
6 closed-circuit television arrangement that we've made,
7 so those who want to attend the Hearing and observe it
8 would be in the room.

9 Our understanding is that no recording
10 equipment is permitted by those attending, and that, I
11 believe, was also a communication from the Secretariat
12 that the Parties received, and we understood that
13 that's also in the spirit of the nature of the
14 transparency, the nature of the open hearings that was
15 agreed by the Parties and reflected in the Procedural
16 Order Number 1.

17 The reality of today's technology, however, is
18 that every phone, every computer is a recording device.
19 And so, if the Rule is "no recording device," then that
20 needs to mean phones and computers because it is
21 impossible to police. Even if there is, you know, a
22 well-meaning person in the room observing that there is

1 no camera or something obvious, it's perfectly possible
2 and easy. And, in Claimants' experience on this matter
3 and in related matters or matters of a similar nature,
4 there are those who are very eager to record and post
5 online, which is contrary to the spirit of the nature
6 of what we agreed in terms of transparency.

7 And so, in the spirit of having the rule that
8 we understood we had agreed to, this is the precaution
9 that we ask because, unfortunately, just today's
10 technology is such that to say "no recording devices"
11 but then to allow effectively recording devices which
12 are difficult to police, that was the concern. And so,
13 it was that which motivated Claimants' request, and
14 probably the Tribunal understands the nature of the
15 issue.

16 MR. HEISKANEN: Yes, Madam President.

17 The Parties have agreed on the scope of
18 publicity of this Hearing, as it has been recorded in
19 Procedural Order Number 1. It's been defined how
20 transparency is going to be handled in this
21 arbitration.

22 We share the concern that if recording devices

1 are allowed to be in the hearing room, the publicity or
2 the degree of transparency would go beyond what the
3 Parties have agreed and what the Tribunal has
4 specifically decided in Procedural Order Number 1.

5 PRESIDENT CHENG: One of the matters that the
6 Tribunal was thinking of is it's extremely difficult to
7 police. If someone is going to record, it would not
8 just be the phone, and there could be other recording
9 devices. So, leaving the phones and computers outside
10 may not necessarily be "safe," if I can use that word,
11 to preclude that.

12 So, I don't know whether a pronouncement that
13 "this proceeding is not to be recorded" would be
14 adequate for the purposes of this particular Hearing,
15 given the difficulty of policing and of ensuring that
16 everybody do not have any--any--recording device, not
17 just the mobile phone or the computer.

18 I don't know whether that--I mean, I have to,
19 of course, consult, also, with my colleagues in due
20 course on that, but I'd just like to hear your views on
21 it first.

22 MR. LEW: I don't think that we want to, you

1 know, let the perfect be the enemy of the good, and I
2 think we should take all reasonable measures to ensure
3 that what is a closed-circuit broadcast doesn't become
4 a global broadcast through a recording.

5 So, I think we would maintain our view that we
6 should do all we reasonably can to ensure that the
7 scope and nature of the publicity agreed to in
8 Procedural Order Number 1 is adhered to, and we think
9 that this measure that we're asking for does that.

10 MR. HEISKANEN: We would be happy with this
11 arrangement, Madam President. No need to have the
12 "obligation of result," as French lawyers would say.

13 (Tribunal conferring.)

14 PRESIDENT CHENG: Thank you very much for both
15 sides on providing your views.

16 On the basis of the agreement of the Parties,
17 the Tribunal felt that we have to grant the order, that
18 is or grant a direction that is sought and ask the
19 attendees in the broadcasting room to leave the
20 recording devices, including phones and laptops outside
21 of the broadcasting room, and that's by the Agreement
22 of the Parties; and the Tribunal, therefore, grants

1 that particular request.

2 The third housekeeping matter is that of
3 confidentiality, how we're going to deal with it.
4 Again, I hope the Parties don't mind that I pronounce
5 what is the provisional view of the Tribunal. Again,
6 we'll be happy to listen and be persuaded otherwise.

7 We have provided a timetable by which there are
8 opening and closing remarks; but, in the light of the
9 changes and the circumstances that have arisen, we are
10 thinking of the way in which the Hearing can be
11 structured could be this: That we spend time, first,
12 as we've indicated in our letter, to deal with
13 Provisional Measure 1, and that can be dealt with
14 first, and that at the moment we don't think there is
15 anything that would give rise to questions of
16 confidentiality because that's more a matter of
17 principle at the moment, as we see them.

18 Then we move on to Provisional Measure 2, and
19 there I think there are, matters of principle and there
20 are matters of fact. And I'd, therefore, like to hear
21 the Parties on which aspect of it would the Parties
22 consider as being confidential and that the broadcast

1 would be stopped: That, of course, is quite apart from
2 the fact that we have a delayed broadcasting and ways
3 in which we can cut the broadcast, but I think it would
4 be useful to just roughly have an idea in advance, and
5 that will help us to structure the arguments that would
6 be made in Provisional Measure 2.

7 MS. COHEN SMUTNY: Thank you.

8 For the Claimants, we've worked to structure
9 our argument in such a way that we think it would work
10 to--we will be able to indicate, you know, on again and
11 off again in terms of the broadcast.

12 Given how developments have been progressing, I
13 think we can discuss--I think Claimants agree, we can
14 discuss the issues relating to access to documents, the
15 subject of Provisional Measures Number 1, in a manner
16 that is not confidential. I think we had some concerns
17 about whether we would have to be describing in some
18 detail some of these documents but we think not, and
19 given how we're proceeding.

20 So, we agree that what you propose is fine in
21 terms of the Second Provisional Measures.

22 And we're also fine to--we're agreed to discuss

1 that matter first, and then, if that's acceptable to
2 Respondent, to discuss that entirely first and then
3 turn afterwards to the Provisional Measures Request
4 Number 2 where the discussion of the facts we've tried
5 to separate that in our presentation so that we can
6 discuss legal principles separately from facts, and so
7 we hope we've achieved what will be a workable
8 separation.

9 PRESIDENT CHENG: Can I just understand, your
10 position is that all the facts--you would argue that
11 they are all confidential and should not be
12 broadcasted; am I right?

13 MS. COHEN SMUTNY: Yes, you know, because all
14 of the facts--there may be certain facts that are in
15 the public domain, but it's so intertwined when one
16 starts talking about it with details that are not in
17 the public domain, our concern is that it's really
18 difficult to talk about the facts, separating the
19 public facts from the nonpublic facts.

20 So, again, we've tried to organize our argument
21 so that we can discuss legal principles that are
22 debated between the Parties separately from factual

1 issues, and we hope we've achieved a good separation.

2 PRESIDENT CHENG: Okay, thank you.

3 MR. HEISKANEN: We share the Tribunal's initial
4 thinking. It's also our view that the first request
5 can be addressed. There seems to be no confidential
6 information or privileged information or classified
7 information--that's the very subject matter of the
8 request--that would require interrupting the
9 broadcasting. And, for instance, in our presentation,
10 we have also organized the presentation in such a way
11 that the discussion on Provisional Request Number 1 is
12 discussed separately, and there should be no need to
13 interrupt the broadcasting for that purpose.

14 Then the issues surrounding the second request
15 are a bit more complicated. The existence of the two
16 investigations to which the request relates are
17 actually in the public domain. The Claimants have
18 reported on those investigations in their corporate
19 recordings, and those documents are on record of this
20 arbitration.

21 It gets a bit more complicated when we are
22 moving to the facts. Much of the information--perhaps

1 almost all of the information relating to the second
2 request is covered by fiscal secret under Article 11 of
3 the Romanian Tax Procedure Code. It would be
4 obviously--which effectively requires Romanian public
5 officials and the Romanian State in this case not to
6 disclose any of that information in the public domain.

7 The provision protects the interests of the
8 taxpayer, in this case RMGC. It would be for the
9 Claimants and for RMGC to waive their right to fiscal
10 secret or fiscal secrecy if they so wish. We
11 understand that they are not prepared to waive fiscal
12 secret, so it seems that it will be difficult to
13 discuss the second request, any of the facts, publicly.

14 As to the other aspects of the--as to the
15 second leg or the second investigation that forms the
16 subject matter of the second request, the existence of
17 that investigation is also in the public domain, but
18 the facts are not, and they cannot be, in the public
19 domain until the investigations are completed. So, we
20 have also reviewed the evidence on file, and our view
21 is that the documents that relate to the second
22 investigation are also confidential and nonpublic under

1 Romanian law.

2 As to how we plan to organize our presentation,
3 we would probably have to suspend the broadcasting when
4 we discuss the facts of the second request, but when we
5 then come to the legal argument, that should be
6 something that can be broadcast.

7 PRESIDENT CHENG: Thank you very much.

8 It seems there's a broad agreement on how we
9 are to approach the matter, and I think if it can
10 be--and, of course, it will be a matter of counsel, how
11 they wish to organize their submissions--but if it can
12 be done in a way that the cessation of the broadcasting
13 can be in one slot rather than bit-by-bit, that will,
14 of course, be easier, but I leave it to counsel to see
15 how best to deal with it. And I believe that Parties
16 have had a chance to discuss with the Secretariat about
17 how they are going to indicate, roughly, when that
18 confidentiality arguments are going to--or factual
19 submissions are going to be made so that there would be
20 signs given for the broadcasting to be stopped.

21 So, I think those are the three housekeeping
22 matters that we have thought of that we thought need to

1 be dealt with.

2 Is there anything else from the Claimants' side
3 on housekeeping?

4 MS. COHEN SMUTNY: No, we're ready to proceed.

5 PRESIDENT CHENG: All right. And I think the
6 Respondent confirmed those are the only matters,
7 anyway?

8 MR. HEISKANEN: Yes, indeed.

9 PRESIDENT CHENG: Thank you.

10 So, we now would like to hear the Parties on
11 the Provisional Measure Number 1, and we've had some
12 updates yesterday, and so thank you very much.

13 MS. COHEN SMUTNY: I wonder if we could get the
14 screen live. Yes, thank you.

15 PRESIDENT CHENG: Just again for managing the
16 time for today, we indicated in our letter that we
17 would like very much that the Provisional Measure
18 Number 1 be dealt with in total by arguments from both
19 sides to be 1.5 hours. If it can be shorter, it would
20 be better.

21 So, can I just roughly estimate the time or ask
22 the Parties to indicate the time that they need for the

1 opening and the reply, and the same for the Respondent,
2 just so that we roughly can plan ahead. You're not
3 going to be held to it as if cast in stone, but I think
4 an indication for everybody's benefit would be useful.

5 MS. COHEN SMUTNY: For the Claimant, I'm
6 reasonably confident that one--60 to 90 minutes all in
7 for both Parties should be sufficient to cover the
8 ground.

9 MR. HEISKANEN: We agree with this.

10 PRESIDENT CHENG: Good.

11 So, I'll roughly gauge the time, approximately
12 half-half, again as I said not cast in stone so that
13 Sara can keep track.

14 Thank you.

15 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

16 MS. COHEN SMUTNY: Well, then, if we're ready
17 to proceed, let's begin.

18 Just as a way of introduction just to orient
19 the discussion, the subject of this arbitration is the
20 Claimants' investment in the Rosia Montana Gold
21 Corporation, which the Parties refer to as RMGC. RMGC
22 is a sort of joint venture enterprise. It is a

1 Romanian company that is owned approximately 80 percent
2 by the Claimants and 20 percent by the Romanian State
3 through a State Enterprise that is called Minvest.

4 RMGC is a titleholder of two Mining Licenses
5 that relate to the subject of the claims presented in
6 this case. They are referred to as the Bucium License
7 and the Rosia Montana License, and this is relevant
8 because one can see this discussed in the documents
9 relating to Confidential and Classified Documents.

10 RMGC has been principally developing the Rosia
11 Montana Mine Project, but also the adjacent Bucium
12 property.

13 Romanian law provides that Mineral Resources
14 located within Romania are the property of the State,
15 and also that all data and information acquired or
16 developed relating to the State's Mineral Resources is
17 also the property of the State. So, mineral
18 Concession, or License concessionholders such as RMGC
19 are permitted to use the data that they require for
20 mining activities during the term of their License.
21 So, RMGC, as it worked to develop the mining properties
22 at issue, did acquire such data and information.

1 Documents containing such information are held by RMGC
2 pursuant to a Custody Agreement that it concluded with
3 the Romanian Mining Authority. This is referred to in
4 English as the National Agency for Mineral Resources,
5 or NAMR.

6 Romanian law provides that that data and
7 information is also confidential. That's a requirement
8 that's set forth in the Mining Law, Article 5. The
9 documents that RMGC maintains in its possession,
10 subject to the Custody Agreement within NAMR, are thus
11 subject to two restrictions arising from the law and
12 also the terms of that Custody Agreement and that are
13 relevant here.

14 First, RMGC is obligated to keep those
15 documents confidential. And although RMGC is permitted
16 to use the documents for--and the information contained
17 in the documents--for purposes of its mining
18 activities, it is required--it requires--RMGC
19 requires--NAMR's consent to provide any third-party
20 access to those documents, including to its
21 Shareholders, including to Gabriel for purposes of this
22 arbitration.

1 Romanian law also contemplates that certain
2 categories of information that are managed by public
3 institutions are to be classified and, as such, treated
4 in accordance with the highly restrictive
5 confidentiality regime. The law establishes at least
6 two categories of classification. One is referred to
7 as "State secret," in English, and that category
8 implicates national-security issues; and there is
9 another category referred to as, in the English, as
10 "work secret" classification, and this is for
11 information the disclosure of which could be
12 detrimental to the public institution, and also for the
13 protection of commercially sensitive information.

14 NAMR, accordingly, in accordance with that
15 legal regime, issued a number of orders over the years
16 applicable to the mining sector as a whole designating
17 certain categories of documentation relating to the
18 State's Mineral Resources as requiring work secret
19 classification, and examples of those orders--I'm
20 sorry, you just saw on the screen there, there are two,
21 C-13 and Exhibit C-18, are these orders which set out
22 the categories of documents that were to be work secret

1 classified.

2 So, in connection with its mining activities in
3 which it conducted within the perimeter of the two
4 Licenses, Rosia Montana License and Bucium, RMGC
5 obviously obtained and acquired information in the
6 categories designated as work secret classified by
7 those NAMR orders, and RMGC, therefore, was obligated
8 to, and did, classify that information, those
9 documents, accordingly, and maintained documents in
10 accordance with the classification regime requirements.

11 So, those classified documents constitute a
12 subset, albeit the majority when we started here, of
13 the documents that RMGC maintains in accordance with
14 its Custody Agreement with NAMR.

15 So, just to make that clear, there's all of the
16 documents subject to the Custody Agreement are
17 confidential by law, a subset of those were classified.
18 And when we started this process, that subset was the
19 majority of those documents, but nevertheless it was a
20 subset. So, I wanted that point to be understood.

21 So, the classified documents were to be treated
22 not only confidentially but also additionally subject

1 to restrictive regime of an extra-confidential, if you
2 will, the classified document regime.

3 ARBITRATOR GRIGERA NAÓN: May I ask a question.

4 So, under the Custody Agreement--

5 (Sound interference.)

6 ARBITRATOR GRIGERA NAÓN: So the Custody
7 Agreement covers both documents; that is to say what
8 you have referred to as the work secret and this inner
9 confidential and classified documents. They are all
10 covered by the Custody Agreement?

11 MS. COHEN SMUTNY: Correct.

12 Let me just state it again. All of the
13 documents that are subject to the Custody Agreement
14 are, by definition, including information
15 belonging--relating to the Mineral Resources of the
16 State, so that is why they are subject to the Custody
17 Agreement with NAMR. All of those documents by law are
18 confidential. That's an attribute of these, this type
19 of information under Romanian law.

20 A subset of those documents have been
21 designated as classified by NAMR orders, and so a
22 subset, albeit a large subset when we started, were not

1 only confidential and subject to this Custody
2 Agreement, but also classified. So, subject to special
3 restrictive confidentiality regime.

4 And so, just to jump ahead, as documents are
5 declassified, they remain confidential and subject to
6 the Custody Agreement.

7 ARBITRATOR DOUGLAS: Let's complete the
8 intervention for interruption.

9 If they're still subject to the Custody
10 Agreement, and I know there are amendments being made
11 to that Agreement in the context of the arbitration,
12 but what needs to happen then in order for you to have
13 access to them and be able to use them for the purposes
14 of the arbitration?

15 MS. COHEN SMUTNY: Yes, jumping ahead, the
16 Parties have proposed that maybe there are any number
17 of ways that could have been achieved, and as I'll walk
18 through, I'll just jump ahead to where the Parties are
19 now on that.

20 One approach which we thought was
21 straightforward and perhaps is agreed with the other
22 side--I'm hopeful that we are, in fact, close to

1 agreement--is a simple amendment to that Custody
2 Agreement whereby the Parties to the Custody Agreement
3 would agree to provide access to the Parties to this
4 arbitration, copies of these documents for purposes of
5 the arbitration.

6 In particular, only NAMR could give access for
7 purposes of this arbitration because RMGC cannot grant
8 more than it has. RMGC only enjoys access for purposes
9 of its mining activities. And so, for purposes of
10 using--so, for example, during the course of Project
11 development, Gabriel as a Majority Shareholder had,
12 certainly, access to those documents as necessary for
13 mining activities with NAMR's consent.

14 But for purposes here--so, it's not here to
15 question--not just of additional third parties having
16 access, but for a different purpose. And so this is
17 why we've proposed, and perhaps we are close to
18 agreement--at least I'm hopeful that we are--that an
19 amendment to the Custody Agreement that is agreed by
20 both NAMR and RMGC could achieve what's needed in terms
21 of access subject to obligations of confidentiality,
22 which remain in the law as we understand. So, that's

1 where we hope we were going with this, and I believe
2 that's where we are going.

3 So, let me proceed.

4 For the reasons--obviously--maybe let me jump
5 ahead on a couple of these slides and try to get to the
6 main points of where we are now. Give me a moment, and
7 I will catch up here.

8 (Pause.)

9 MS. COHEN SMUTNY: So, go to Slide 6.

10 To clarify for the Tribunal, I just wanted to
11 walk through, so the Tribunal would understand, the
12 documents we had put in before.

13 This Exhibit C-20, which had also been updated,
14 the Tribunal may recall.

15 So, when this process started, the documents
16 that were in this annex were those classified documents
17 that were subject to the Custody Agreement. This
18 Exhibit C-20 was an annex, is an annex, to the Custody
19 Agreement which set forth those documents that were
20 classified. At some point, NAMR asked RMGC to please
21 update that annex, which RMGC then did, because, from
22 the last time that annex had been updated at NAMR's

1 request, certain categories of documents had been
2 declassified, and so that list became smaller. And I
3 just wanted to clarify what that document was.

4 So, following the Provisional Measures Request,
5 as the Tribunal knows, in fact, NAMR did begin to
6 progressively declassify documents; and, as of the
7 Parties' last submissions, approximately 130 documents
8 that were classified in RMGC's--and are in RMGC's
9 possession, about 130 remained to be declassified.
10 Respondent had requested copies to assist it in the
11 declassification process. RMGC agreed to do that and
12 has been arranging to send such copies.

13 Just so the Tribunal understands, while the
14 document is classified, there is actually a whole
15 process even to copy it, and there are requirements to
16 maintain Registries, and only certain individuals can
17 copy and have access. So, it's a bit of a process, as
18 I understand, and so the process of just providing even
19 copies takes some time, and then it needs to be
20 transported specially, arrangements made by the State.
21 So, even that process is taking a while.

22 The fact is the Parties had agreed--because

1 this set of documents was getting smaller, it became
2 more practical for RMGC to agree to go through the
3 process of making these copies. And, also, the
4 Tribunal may recall there was a dispute between the
5 Parties as to whether RMGC should need to turn over the
6 originals of it, but when Respondent said, "Well, we
7 could work with copies," and the list of documents had
8 become smaller, it became feasible. And so RMGC is in
9 the process of arranging to provide copies to
10 facilitate remaining declassification, but, in the
11 meantime, additional documents have been declassified,
12 and this reflects even the most recent update. So, as
13 we're sitting here today, it's not 130 anymore. I'm
14 not sure I can give a precise number--

15 PRESIDENT CHENG: You let us at 75, I think.

16 MS. COHEN SMUTNY: Yes, it's about half of
17 that. About 75, exactly.

18 So, that's what remains. And so where we are--

19 PRESIDENT CHENG: Can I just interrupt you a
20 little bit?

21 MS. COHEN SMUTNY: Yes, I'm sorry.

22 PRESIDENT CHENG: Just so we can, again, look

1 ahead, what sort of time frame do you think that would
2 be for the provision of copies to be completed for the
3 outstanding 75 or maybe 75 minus 13? I think 13 were
4 maps which are not urgent, I think you said.

5 MS. COHEN SMUTNY: Yes. I think the 13 was
6 taken out before we got to 130, so it is still about
7 75. So on this slide, we tried to summarize where we
8 are, as Claimants understand.

9 So, the process of declassification needs to be
10 completed. And in Claimants' understanding, this
11 really requires NAMR to make the decisions to issue
12 orders or directions, as it has been, up until now,
13 doing that. It needs to indicate to the Parties that
14 may hold these documents "please declassify." So,
15 there are a group of documents for which NAMR has not
16 yet, as far as we know, issued that direction. That
17 process needs to be completed.

18 Whether NAMR needs to wait for RMGC to give it
19 copies is a question they've asked. We've disputed
20 that. RMGC understands that the documents that remain
21 are NAMR's own documents, documents that it issued,
22 but, whatever the reason, the Parties now have agreed

1 to work--to try to get to a solution here. So, I'm not
2 sure how long that's going to take, but let me go
3 through the other points.

4 You will see our submission at the bottom
5 there. We think all that remains to be done can be
6 achieved in 30 days. We will see here what Respondent
7 has to say about that, but it seems, when one reviews
8 the progress, once focus was turned to this issue,
9 progress happened pretty quickly. So, we were hopeful
10 that everything could be achieved now within 30 days.

11 So, in addition to completing declassification
12 of this remaining group of documents, the Parties need
13 to agree on those terms of access. Basically, I
14 believe we may reach an agreement on an amendment to
15 the Custody Agreement, which would provide access to
16 the Parties, and then in terms of a confidentiality
17 order--pardon me, because all of these documents--and
18 there may be other documents in the arbitration outside
19 of this category that may be subject to confidentiality
20 restrictions. So, we need to agree on terms of a draft
21 Confidentiality Order. And there, too, the Parties
22 have exchanged drafts, and I'm hopeful that we are very

1 close.

2 So, in Claimants' view, this whole process
3 should be able to be completed within 30 days. It
4 seems to us that the record shows, once there was an
5 attention focused on this, that the matters proceeded
6 rather promptly.

7 PRESIDENT CHENG: Can I just clarify, first of
8 all, the copies from RMGC have already been delivered
9 for the outstanding 75 documents, have they?

10 MS. COHEN SMUTNY: No, they have not. That is
11 something that is, in my understanding, in the works.
12 Again, it's hard to maybe appreciate the documents.
13 Some of them are large, some of them are oversized,
14 making the copies by the one individual with the
15 Registry. It's a tedious process, from my
16 understanding.

17 PRESIDENT CHENG: It's a process.

18 MS. COHEN SMUTNY: And then it can only be
19 delivered during certain transport times.

20 So, it would take a while but not that long.

21 PRESIDENT CHENG: Roughly, can you give me an
22 indication?

1 MS. COHEN SMUTNY: Yeah, my understanding is
2 maybe within a week it could be sent to NAMR, assuming
3 NAMR really required it, which is still, in Claimants'
4 understanding, a serious question whether it really is
5 necessary for NAMR to have these copies.

6 PRESIDENT CHENG: Can I then ask a second
7 question. From the documents that have been
8 declassified, roughly, are you able--as it were, one
9 learns from the experience. How long does NAMR take,
10 from your point of view, for them to declassify a
11 document or sets of documents?

12 MS. COHEN SMUTNY: It seems that decisions as
13 to whether to declassify or not seem to be taken
14 promptly. In fact, I will come to that.

15 What Claimants have not heard from Respondent
16 is that Respondent commits to declassifying these
17 documents, so what Claimants understand Respondent to
18 be saying is that a declassification decision will be
19 taken, not indicating what that decision will be. Up
20 until now, it seems that there's not ultimately been an
21 issue; documents have been declassified, but Claimants
22 observed this point, were not given assurance that, in

1 fact, these documents will be declassified, so that's a
2 point we note. But assuming that it progresses in the
3 same direction, it seems to happen fairly quickly--

4 PRESIDENT CHENG: Yeah, it is really just a
5 time for the decision.

6 MS. COHEN SMUTNY: --and once something is
7 declassified, then the Parties have a little procedure,
8 too. There's literally a process of taking it off a
9 Registry and removing certain markings, and then they
10 are declassified, and then ordinary confidentiality
11 attaches to them, which I don't think poses any
12 particular problem for either Party.

13 So, my understanding is that this whole process
14 should not take more than a week or two, at most, to
15 just complete. It seems as if the progress, once this
16 started, took about that long. It was a matter of a
17 couple of weeks, and we got declassification of a lot
18 of documents.

19 PRESIDENT CHENG: So, the decision to be taken
20 by NAMR from the past experience would be two, three
21 weeks? One or two weeks? Or what?

22 MS. COHEN SMUTNY: Well, I have to say, in

1 fairness, we don't know when they started contemplating
2 the question.

3 PRESIDENT CHENG: Right.

4 MS. COHEN SMUTNY: But it does seem that, from
5 what we could tell--and, no doubt, Respondent could
6 speak to this better--it does seem to us, from what we
7 have observed, that from the time that they focused on
8 this--it was a very fast, a matter of days--a decision
9 was taken, and letters and orders, directions were
10 circulated to the Parties, including RMGC.

11 PRESIDENT CHENG: Thank you.

12 ARBITRATOR GRIGERA NAÓN: If I may, for me to
13 really understand who has to decide what--because one
14 thing is the declassification, which, according to your
15 presentation, is NAMR, the one who really has to take
16 the major decision--and then it's the modification of
17 the Custody Agreement for the documents to be released
18 to the Parties, which has to be decided by RMGC and
19 NAMR, which, according to what I understand, has to be
20 combined with the Confidentiality Agreement between the
21 Parties.

22 Is that the path to be followed? And all that

1 has to happen in 30 days? That's my question.

2 MS. COHEN SMUTNY: Yes.

3 The Parties have--even while this
4 declassification process is unfolding, the Parties have
5 exchanged drafts of an amendment to the Custody
6 Agreement and exchanged drafts of a Confidentiality
7 Order. My sense is that we, the Parties, are very
8 close to agreeing on the terms of those two documents,
9 and so this process--those agreements can be put in
10 place, I suspect, very quickly. So, these things are
11 not necessarily sequential, but a certain number of
12 these things are happening at the same time so that
13 everything can converge and be done.

14 So, it's our sense that there is enough time
15 within 30 days to achieve those steps. As I say, I
16 think basically Step 2 and Step 3, so to speak, on this
17 slide are, I think, very close to being done, and I
18 would expect are, for example, possible to be achieved
19 within a week, and at the same time, NAMR can complete
20 its decision-making in respect of declassification.

21 And we can certainly--all these steps can be
22 completed, in Claimants' sense of where we've gone and

1 where we are now, within 30 days.

2 ARBITRATOR DOUGLAS: A little follow-up. You
3 may well be getting to this, but at what point can time
4 start running in terms of the formal steps in the
5 pleading process? How long would you need for your
6 Memorial? Do you need all the documents before you can
7 realistically--the time can start running or are the 75
8 remaining not critical to the preparation of the first
9 round?

10 MS. COHEN SMUTNY: A core set of these
11 classified documents, these Custody Agreement
12 documents, Claimants do not now have a copy of. These
13 documents include some of the most central documents in
14 the case. The most obvious central documents, the
15 Licenses themselves, we do not have a copy of and
16 cannot work with. So, we really need to have--perhaps
17 not all of those documents to begin meaningfully
18 working on the Memorial, but a large group of them are
19 absolutely critical for us to be able to meaningfully
20 advance the Memorial in a sensible way.

21 I cannot say that all of the documents that are
22 subject to that Custody Agreement are equally relevant

1 and important, but such an important segment of them
2 are, that it's critical that we get a copy of those
3 things--which, again, I think we're very close to being
4 able to have a copy of them--and then we could
5 start--the time clock should start to run at that
6 point.

7 Please bear in mind that, as counsel, we have
8 not laid eyes on these documents, so I hope that
9 answers the question.

10 So, assuming we had completed this process
11 within 30 days from today and that the Parties were at
12 liberty to receive copies of these things, the time
13 clock could start to run 30 days from today. That
14 would be, in Claimants' position, about how the timing
15 might work.

16 ARBITRATOR DOUGLAS: I guess it's just the
17 scenario whereby Steps 2 and 3 on your slide are done
18 relatively quickly because it just depends on counsel
19 in this room, to a large extent; whereas, the
20 declassification, for whatever reason, takes a bit
21 longer, and so you're still without the 75 documents
22 that remain. Whether that changes anything, or I seem

1 to--my understanding of what you're saying is that some
2 of the documents remaining are so critical that,
3 really, time couldn't start running until you had all
4 75 or most of them; is that correct?

5 MS. COHEN SMUTNY: We certainly want, at least,
6 a certain core of those documents which are really
7 extremely critical. But, again, our sense is that that
8 should happen quickly. I mean, in principle, I can
9 imagine a scenario is, if the Parties agree to, let's
10 say, Step 2 and Step 3 and get that in place and those
11 documents that are already declassified--if they can
12 start being distributed in tranches to the Parties, I
13 suspect a good number of the documents we do require
14 have been declassified now. I mean, again, that's
15 another reason why we thought certainly within 30 days
16 we should be far enough along in this process that we
17 could get going.

18 And so, even if there were some--I don't
19 know--a dozen or 20 documents that we don't yet have,
20 they would be coming soon enough thereafter, especially
21 if there was a time period, a commitment--we can get
22 this process this far by 30 days and no later than 60

1 days for the remainder as long as documents already
2 declassified were in the possession of the Parties.

3 Something like that, I think, would work, but
4 we do want to actually have possession of, at least,
5 all of the documents that have been declassified to
6 date within 30 days. And as long as that's the case,
7 if there were for any reason a few--I don't know--15 or
8 20 that for some reason was taking a little bit longer,
9 I think we would feel especially more comfortable if we
10 actually had a commitment that these documents are
11 intended to be declassified, and we're not in this
12 position where we are waiting for a "declassification
13 decision," and we're not quite sure what that is, that
14 would be especially comforting.

15 Obviously, if the decision is taken not to
16 declassify any of these documents, it won't surprise
17 the Tribunal to know that we would reserve the right to
18 apply to the Tribunal and ask for some action in
19 relation to that.

20 I hope that answers.

21 (Tribunal conferring.)

22 PRESIDENT CHENG: I believe there is some

1 person who has walked into the room. Is that someone
2 from the Claimants' side? Or Respondent's side?

3 (Off microphone.)

4 (Pause.)

5 PRESIDENT CHENG: I think we could continue.

6 ARBITRATOR GRIGERA NAÓN: I think so.

7 MS. COHEN SMUTNY: Okay. Thank you.

8 If there are not further questions on where we
9 are in the process, there are a few more points--and
10 I'm mindful of the time, but there are a few more
11 points that we wish to make.

12 I do wish, on the Claimants' side, to just walk
13 through very briefly why we are where we are here, in
14 particular, because the Tribunal is, no doubt,
15 conscious of the fact that both Parties have sought
16 costs in relation to this exercise. And I do want to
17 just walk briefly, very briefly--mindful of the
18 time--through a number of points I just want to make
19 sure that are well-understood.

20 As we've been saying--and I think the Tribunal
21 does appreciate--these documents are absolutely
22 centrally relevant to the Claimants, and the Claimants

1 cannot reasonably put on its case without these
2 documents. The Tribunal knows very well from the
3 pleadings that Claimants were, frankly, both surprised
4 and frustrated by the time and were really very hopeful
5 that there was going to be earlier engagement on this
6 issue than there was. These dates were reflected in
7 our pleadings--and I think the Tribunal knows very well
8 how this unfolded--but the Claimants did not hear
9 anything from the Respondent until it responded on the
10 Provisional Measures Request itself, and that was a
11 frustrating process for the Claimant, and the
12 Claimants' view is that this could have been dealt with
13 earlier.

14 Again, bearing in mind, the Claimants, not
15 having heard anything, did not even know whether or not
16 Respondents were even agreed that they were going to
17 work towards some sort of process of access. So,
18 really, Claimants were in the complete dark about what
19 was happening here.

20 The Respondent has taken the position that the
21 absolute only way that these documents could be used is
22 with declassification. There's some nuance of Romanian

1 law here, but, in Respondent's understanding, although
2 this is a practical approach--and certainly, perhaps,
3 even the most direct approach--it is not the only
4 means. And so Claimants were absolutely unclear at the
5 start of this process, whether the Respondent wished to
6 declassify or was going to look for another way. The
7 classification of these documents was done via NAMR
8 order and government decision, so it was not an act of
9 Parliament, for example, that caused these documents to
10 be classified. So, the Government could have, for
11 example--the State being a Party--they could have
12 issued a government decision to provide some sort of
13 special means of access. There were other ways of
14 doing this.

15 And so, truly, Claimants did not know anything
16 about whether they had any degree of cooperation here
17 and reject the argument that this is absolutely the
18 only way to achieve the access necessary for this
19 international arbitration.

20 Claimants sought Provisional Measures because
21 access to these documents was absolutely necessary to
22 preserve procedural integrity of this arbitration. And

1 the fact that, once we got started, Respondent was
2 taking a position that would have added practically
3 another year before we even knew whether we were going
4 to get access to the documents was really a very
5 frustrating exercise for the Claimants.

6 It is amply pleaded in the documents, I
7 believe, the dispute between the Parties about what the
8 Canada BIT--the Romania-Canada BIT restrictions have to
9 say about this. In the Claimants' submission, the
10 restriction that relates to so-called "Cabinet
11 confidences" or classified information that is
12 contained in the Canada BIT is absolutely not a
13 restriction to the access required by the Claimants.

14 I just want to point the Tribunal to a few of
15 the provisions of the Canada BIT that make the point.

16 These various Articles of the Canada-Romania
17 Bilateral Investment Treaty are the ones that refer to
18 the fact that the Contracting Parties to that
19 investment treaty are not to be required to furnish
20 information, the disclosure of which is contrary to
21 essential security interests. And, in Claimants'
22 submission, looking at the Treaty as a whole in

1 context--and let me just point out to the next slide as
2 well--bearing in mind there is more than one official
3 language to this Bilateral Investment Treaty.

4 When the Tribunal considers all of these
5 Articles together, the different languages, in
6 Claimants' submission, it's very clear that what this
7 Treaty provides is that, when there are documents that
8 disclosure of which would compromise what the State
9 considers to be its essential security interest, those
10 documents the Respondent cannot be obligated to
11 disclose.

12 This, again, is what I was just saying here.
13 There are different languages in the Romanian, in the
14 English. The Tribunal can appreciate looking at these
15 various Articles, Claimants' point about how to
16 interpret all of these Articles together and in the
17 different languages what is really meant by this.

18 The classification as "work secret" is not a
19 classification that relates to essential-security
20 interests. Claimants invite the Tribunal to look at
21 the definitions that both Parties were citing to about
22 what "work-secret information" means, what "classified

1 information" means, and so on.

2 The BIT--the bilateral investment treaty's
3 reference to classified information--the disclosure of
4 which should not be required--is not a reference to a
5 specific statute of either of the Contracting Parties.
6 So, it is a reference to this notion of documents that
7 are essential to the security interests of the State.

8 So, in Claimants' submission, not only was it
9 not necessary to declassify and that there was another
10 approach to doing this, but this type of document, this
11 category of documents, in Claimants' submission, is
12 absolutely not covered by what the Canadian BIT has in
13 mind when it says that a State should not be obligated
14 to disclose, whether it's called "classified
15 information" in the Romanian, but interpreted in a way
16 that is understood consistent with the English and the
17 French, which refers to "Cabinet confidences,"
18 understood all in context.

19 So, Claimants dispute this interpretation of
20 the Canadian BIT.

21 There is no dispute that the United
22 Kingdom-Romania BIT does not contain any such

1 restrictions, and I just want to say briefly the
2 point--and we will talk about this more, no doubt, when
3 we talk about second measures, but the fact is that the
4 UK BIT is a separate source of authority for the
5 Tribunal, and this Tribunal acts pursuant to authority
6 that it exercises under both Treaties.

7 The Respondent is relying on procedural
8 decisions in EuroGas versus Slovakia, and no doubt the
9 Tribunal will look at these two Procedural Orders that
10 the Respondent has referred to. The first is
11 Procedural Order Number 2. It's a very short Order,
12 and then there is a Redfern Schedule that they put in.

13 ARBITRATOR DOUGLAS: Do we actually really need
14 to decide these issues now? I thought it was water
15 under the bridge, to some extent. I'm not protesting,
16 but--

17 MS. COHEN SMUTNY: Yeah, you know, I hesitate
18 to walk too much through this point now. I suspect we
19 may come to it later.

20 For purposes of addressing access to documents,
21 I think the main point that Claimants wish the Tribunal
22 to appreciate, just given the nature of the

1 applications made by the Parties to the Tribunal, is
2 that the Claimants proceeded in the way that was
3 absolutely required, and there was not some sort of
4 fatal flaw in the Treaties to the request made by the
5 Claimants, and so we dispute that point.

6 I'm very confident we're going to come back to
7 these EuroGas procedural orders and discuss their
8 relevance at a later junction. So, let's maybe stop at
9 that point and say I think that is what we need to say
10 about the access to documents, and we will end there.

11 PRESIDENT CHENG: Just to clarify one further
12 point with you.

13 The documents that have been declassified, I
14 think a number of them, you have not been able--you,
15 meaning counsel--have not been able to have access to
16 it because of the lack of agreement on the
17 confidentiality arrangements; is that right?

18 MS. COHEN SMUTNY: Yes, both because there is
19 not yet an amendment to the Custody Agreement, so the
20 Parties don't have access to the documents. And access
21 will be on condition of confidentiality, and so also
22 the terms of the Confidentiality Agreement needs to be

1 put in place as well.

2 PRESIDENT CHENG: Thank you.

3 I hand over to the Respondent.

4 MR. HEISKANEN: Madam President, our
5 understanding of how the Hearing would be organized is
6 that the Claimants would make an Opening Statement
7 covering the first request and the second request, and
8 then we would respond. That is how we read the
9 timetable, which provides the Claimants with two hours
10 for the Opening Statement and then two hours for the
11 Respondent covering both requests, and we have
12 organized our submission in such a way that in the
13 beginning we cover issues that are common to both
14 requests. So, it would not be, in our view, convenient
15 for us to address now only the first request because
16 there are common issues. So, our preference would be
17 to follow what the Tribunal has instructed the Parties
18 to do, which is to cover both requests, and then go for
19 the rebuttals in the afternoon.

20 PRESIDENT CHENG: I think I believe I mentioned
21 this morning--and I thought--we might have
22 misunderstood it--that there is broad agreement that we

1 deal with and dispose of PM 1, Provisional Measure 1
2 first, and then look at Provisional Measure 2 in that
3 way. I think that's also the intent of the letter that
4 we wrote, I believe, a few days ago.

5 MR. HEISKANEN: Then there's, perhaps, a
6 misunderstanding.

7 PRESIDENT CHENG: Yes.

8 MR. HEISKANEN: There is a timetable that was
9 attached to that letter which still followed the same
10 timetable that was initially proposed by the Tribunal.

11 PRESIDENT CHENG: Yes, right.

12 MR. HEISKANEN: So, in our view, it's
13 inconvenient for the Respondent now to make a statement
14 that will effectively cover both requests initially.
15 At some point we will cover, address separately both
16 requests, but it would be inconvenient.

17 PRESIDENT CHENG: So, what are you proposing?
18 Maybe you just tell us.

19 MR. HEISKANEN: We are proposing that the
20 Claimants continue with their argument on the second
21 request--if necessary, then the broadcast has to be
22 interrupted--and complete their Opening Statement.

1 Then we will come back with our Opening Statement,
2 which will be organized in such a way that it needs to
3 be interrupted only once at some point in our
4 presentation, and then we will revert to a public
5 hearing towards the end of our argument.

6 PRESIDENT CHENG: You're not in a position to
7 deal with just PM 1 for the moment?

8 MR. HEISKANEN: We are not because we have not
9 organized our presentation in such a way that it
10 addresses exclusively one or the other. There is an
11 Initial Statement that covers both because there are
12 issues raised by the requests that are common to both
13 requests, in particular, the question of the
14 consolidation and the impact of consolidation on these
15 proceedings.

16 ARBITRATOR DOUGLAS: Could I just ask on that,
17 is this really a live issue now? We're dealing with
18 whether 75--the timetable mechanics for declassifying
19 75 remaining documents and the Confidentiality Order or
20 agreement that you're currently discussing?

21 MR. HEISKANEN: Yes. It is not a live issue
22 for the first request, but it is a live issue for the

1 second request, certainly.

2 ARBITRATOR DOUGLAS: But can we then just
3 discuss the mechanics of how we declassify the rest of
4 the documents and agree to a confidentiality regime in
5 relation to the first and leave all the more
6 interesting topics about consolidation and so on for
7 the second request?

8 MR. HEISKANEN: We would have to reengineer our
9 presentation and argument and our slides, which,
10 unfortunately, have been printed at 7:30 this morning.
11 So, it would be inconvenient. And our understanding,
12 certainly, from the timetable, was that this is how the
13 presentation would be organized. So, that would be our
14 strong preference, in particular, because the two
15 requests cannot be entirely separated on certain
16 issues.

17 (Tribunal conferring.)

18 PRESIDENT CHENG: We will move on--could the
19 Claimants move on to Provisional Measure 2.

20 MS. COHEN SMUTNY: Yes. Claimants can do that.
21 I apologize; may I ask just for a five-minute
22 break.

1 PRESIDENT CHENG: Yes. Let's do that.

2 MS. COHEN SMUTNY: Thank you.

3 (Brief recess.)

4 PRESIDENT CHENG: Ms. Cohen Smutny.

5 MS. COHEN SMUTNY: Thank you.

6 Turning to Claimants' Second Request for
7 Provisional Measures, we are going to talk about just
8 legal standards and legal issues first so that we can
9 keep the live feed--the feed on.

10 The Tribunal's authority to issue Provisional
11 Measures is as set forth in Article 47 of the ICSID
12 Convention, and that provision provides that if the
13 Tribunal considers circumstances so require, it may
14 recommend any Provisional Measure to preserve the
15 respective rights of the Parties. This is a broad
16 authority for the Tribunal to proceed as it considers
17 is warranted in the circumstances. The jurisprudence
18 of international tribunals show that a tribunal has
19 authority to issue Provisional Measures in the
20 following circumstances:

21 First, the Tribunal must be properly seized of
22 the dispute submitted. This is so when the Tribunal's

1 jurisdiction is established prima facie.

2 Second, there must be a right that is the
3 subject of the request. When the existence of the
4 right is disputed, the Tribunal need only establish
5 that the existence of the right is plausible.

6 Third, there must be a material risk of harm to
7 the right.

8 And, finally, the requested measure must be
9 proportional to the risk of harm.

10 This Tribunal's jurisdiction over the dispute
11 submitted is established prima facie. It is
12 established and not disputed that the Tribunal has the
13 authority to issue Provisional Measures to protect both
14 procedural and substantive rights in relation to a
15 dispute over which its jurisdiction has been
16 established prima facie.

17 This Tribunal's jurisdiction over the dispute
18 presented in the Request for Arbitration is established
19 prima facie. Respondent has not raised any
20 jurisdictional objections in relation to the claims
21 presented in the request. When jurisdiction is so
22 established prima facie, the Tribunal has authority to

1 issue Provisional Measures even in the face of a
2 jurisdictional objection, and that's seen in a number
3 of cases; Helnan is one. There are many such cases, a
4 few were cited. Millicom versus Senegal is another
5 example.

6 The rights that are the subject of Claimants'
7 requests are procedural rights relating to the
8 integrity of the arbitration, and rights to the status
9 quo and non-aggravation or extension of the dispute.
10 In Claimants' understanding, there is no dispute that
11 the Tribunal has authority to issue Provisional
12 Measures to ensure procedural integrity of the dispute,
13 and a number of cases, of which there are many, are
14 cited as an example.

15 The Tribunal also has the power to issue
16 Provisional Measures to preserve the status quo and to
17 prevent aggregation or extension of the dispute.
18 Respondent, in Claimants' understanding, does not
19 dispute those observations as such but rather argues
20 that Provisional Measures may be ordered to protect
21 only the rights in dispute--that is to say, in relation
22 to claims already submitted.

1 Numerous tribunals, however, have rejected that
2 narrow view of the Tribunal's authority. For example,
3 the cases before the International Court of Justice
4 cited by Respondent only refer to a link between the
5 requested measures and the claims presented. Numerous
6 ICSID tribunals and other investment treaty tribunals
7 have specifically recognized that the Tribunal may
8 issue provisional measures not only to protect rights
9 already in dispute, but also to prevent the enlargement
10 of the dispute or to make its eventual resolution more
11 difficult, and there are a number of cases. These are
12 taken out of the pleadings. You can go through
13 several--this is--however many we have. There are a
14 number that are cited.

15 Respondent argues that Claimants' complaints
16 regarding the ANAF measures--ANAF refers to the--I
17 confess I forget the words that refer to the acronym
18 ANAF, but I think the Tribunal recalls this is the body
19 that falls onto the authority of the Ministry of
20 Finance that has jurisdiction over a number of matters,
21 including as to tax measures, and the Parties are
22 referring to the acronym ANAF. No doubt someone will

1 remind me what ANAF stands for.

2 The Respondent argues that Claimants'
3 complaints regarding the ANAF measures cannot justify
4 an order of Provisional Measures, that they cannot form
5 the basis of a protected right because, in Respondent's
6 submission, they cannot form the basis of treaty claims
7 in this case.

8 As the International Court of Justice as well
9 as numerous investment treaty tribunals have held, the
10 requesting Party need not prove the existence of rights
11 for which it seeks protection. It only needs to show
12 that such rights are plausible, and here a number of
13 authorities from the pleadings are cited for that
14 point.

15 ARBITRATOR DOUGLAS: What do you say is the
16 disputed right in this particular instance?

17 MS. COHEN SMUTNY: The two rights or, let's
18 say, two-and-a-half rights--if you want to call it
19 that--procedural integrity of the dispute and the
20 non-aggregation or extension of the dispute.

21 ARBITRATOR DOUGLAS: But how do the--I can see
22 how that--

1 MS. COHEN SMUTNY: It's going to be difficult
2 to discuss how those rights are interfered with without
3 talking about the facts. But those are--

4 ARBITRATOR DOUGLAS: Oh, I see.

5 MS. COHEN SMUTNY: Those are the rights, and
6 I'm sorry, it's a little frustrating in this respect to
7 separate-- the natural response to your question.

8 ARBITRATOR DOUGLAS: I won't anymore--
9 ask any more case-specific questions--

10 MS. COHEN SMUTNY: I appreciate it.

11 I'm eager to answer, but it will come.

12 Respondent's argument is that, in Claimants'
13 understanding, that the ANAF actions cannot be the
14 subject of Provisional Measures Requests because any
15 claim regarding such measures would fall outside the
16 scope of the Romania-Canadian Bilateral Investment
17 Treaty's protections; that is to say, in Respondent's
18 submission, any such complaint would fall afoul of the
19 so-called "tax carve-out" that is contained in the
20 Canadian BIT.

21 In Claimants' submission, this argument fails
22 for several reasons. The first is that whether or not

1 the Claimants could ever raise a treaty claim about the
2 ANAF measures, those measures are jeopardizing the
3 procedural integrity of the arbitration and are
4 aggravating the dispute, making its resolution
5 potentially more difficult. And, in Claimants'
6 submission, this is a sufficient basis to order
7 Provisional Measures, even if a claim of treaty
8 violation is never ultimately presented.

9 Respondent's position that the ANAF measures
10 could not form the subject of treaty claims, in any
11 event, is incorrect in Claimants' submission; but, at a
12 minimum, it is plausible that Claimants are correct
13 that the ANAF measures are not actually so-called
14 "taxation measures" within the meaning of the Canadian
15 BIT's exclusion. And in any event--and we'll turn to
16 this as well--there is no basis to conclude that
17 Gabriel Jersey could not present such claims under the
18 UK-Romania Bilateral Investment Treaty, the UK BIT.

19 Turning to whether the ANAF measures are
20 taxation measures within the meaning of the Canadian
21 BIT. I just want to make sure the slides are caught up
22 with me. Yes?

1 ARBITRATOR DOUGLAS: I will try rephrasing my
2 question not to delve into the facts, which is going to
3 be slightly difficult, but I will try. In relation to
4 the rights that need to be protected and you say the
5 threshold is--that you plausibly have those rights, one
6 can see how that makes sense in relation to the
7 substantive rights in issue because you're asserting a
8 breach of a treaty. For example, you're making a claim
9 on that basis, and so the test is whether or not
10 plausibly you would succeed in that claim.

11 The problem when we get to procedural rights,
12 and I certainly don't question the fact that they
13 exist, but it's undisputed, I think, that there is a
14 right to procedural fairness, for example.

15 So, is it enough simply to say that you
16 plausibly have that right, which is, if you ask that
17 question, you're answering it straightaway, of course
18 you have that right, but is that enough then to simply
19 justify the imposition of Provisional Measures?

20 In other words, there must be--it seems for me,
21 for procedural rights, there must be something else
22 which is required because if the test was simply do you

1 plausibly have the right to procedural fairness, the
2 answer in every case is going to be of course you do.
3 So, what connection, then, is needed between that
4 alleged right and the particular scenario that requires
5 the Provisional Measure?

6 MS. COHEN SMUTNY: Yes, and maybe one can go
7 back to Slide Number 3 for a moment, and I'm not sure
8 if this is answering your question, but of course not
9 only must there be a right, but there must be a
10 material risk that that right is harmed or is
11 interfered with in some way. And I don't know if that
12 was basically your question, but that certainly is an
13 element. So one has to have a right, and there needs
14 to be some threat to that right. I'm not sure if
15 that's what you were asking, but certainly, yes, there
16 must be one way to refer to it is a material risk of
17 harm to that right.

18 So, certainly when we talk about the facts,
19 we're going to be talking about what is that material
20 risk of harm to these rights.

21 Does that answer the question?

22 ARBITRATOR DOUGLAS: I think it's probably best

1 if we park it until we get into the facts, because it's
2 true in the abstract, it's quite difficult, but let's
3 wait until we get to the facts.

4 MS. COHEN SMUTNY: Okay.

5 I'm sorry, the separation is a little--perhaps
6 a little artificial between facts and law.

7 ARBITRATOR DOUGLAS: For the benefit of the
8 crowd of the people out there watching.

9 MS. COHEN SMUTNY: Yes.

10 So, going back to where we were, I want to
11 speak to the question which is presented whether ANAF
12 measures are taxation measures within the meaning of
13 the BIT, whether that should be assumed to be the case.
14 Respondent refers to Article 12(1) of the BIT, which
15 refers to the so-called "tax carve-out."

16 Numerous Tribunals, however, have recognized
17 that analogous so-called "carve-out provisions" do not
18 bar claims of abuse of authority, and a number of
19 examples here are shown. And so again, bearing in mind
20 the question, does Claimant have a plausible right
21 potentially to complain about tax measures--assuming
22 that was even relevant--Claimants' submission is yes,

1 it certainly does.

2 When we speak about the ANAF investigations,
3 Claimants' submission is that they cannot, in any
4 event, be fairly considered as a tax measure. That
5 will be seen more when we discuss the facts. It is an
6 exercise of investigative authority relating to matters
7 more broadly, which we will discuss shortly.

8 Respondent's argument that the ANAF measures
9 fall within the so-called "carve-out provision," in
10 Claimants' submission, is unlikely to be accepted but,
11 in any event, it's certainly plausible that Claimant is
12 correct on this issue. Whether or not the ANAF
13 measures are taxation measures within the meaning of
14 the Canadian BIT also has no bearing on Gabriel
15 Jersey's protections under the UK BIT. In other words,
16 even if it were relevant, which it is not, Gabriel
17 Jersey could assert claims in relation to the ANAF
18 measures.

19 Claimants note that Respondent indicated in its
20 submissions that, even Gabriel Jersey would not be able
21 to raise a claim regarding ANAF measures as the
22 arbitration progresses because any such claim would

1 fall afoul of notice provisions under the UK BIT, but,
2 in Claimants' submission, that, too, is not necessarily
3 the case. There are many examples of tribunals which
4 find that an ancillary claim may be made under the
5 ICSID Arbitration Rules without having to start a new
6 arbitration, even when the Treaty refers to notice.

7 And so, again, the issue of the plausibility of
8 Claimants' position is, in Claimants' submission,
9 clear.

10 The next point is--I'm sorry.

11 PRESIDENT CHENG: You might want to speak
12 closer to the mike.

13 MS. COHEN SMUTNY: Oh, sorry. Respondent also
14 argues with respect to the Provisional Measures that
15 Article XIII(8) of the Canada BIT, bars the Tribunal
16 from issuing requested measures, and this is the
17 Article in the Canadian BIT which refers to limitations
18 on the Tribunal's powers in relation to Provisional
19 Measures, and there is a first sentence and a second
20 sentence, and the first sentence clearly confirms that
21 the Tribunal's power to order Provisional Measures to
22 preserve the integrity of the proceeding is

1 established, and it is the second sentence that may
2 have relevance for the argument. It refers to
3 substantive rights in dispute, and it basically limits
4 what the Tribunal can do under the Canadian BIT. It
5 cannot order an attachment or enjoin the application of
6 a measure alleged to be in breach.

7 Now, Claimants' Request for Information and
8 Documents--well, I'm going to delve into the facts just
9 a little bit in a way that I think is safe. Claimants'
10 request that information and documents obtained through
11 ANAF's investigation not be used for purposes of this
12 arbitration, which relates to preserving the procedural
13 integrity of this arbitration, is the type of measure,
14 in Claimants' submission, plainly permitted by
15 Article XIII(8). So, there is no basis to conclude
16 that anything in the Canadian BIT prevents the Tribunal
17 for recommending that type of measure to safeguard the
18 integrity of these proceedings.

19 With respect to the other requests, it's
20 probably better to save that when we're talking about
21 the facts, and so I'll come back to that.

22 In any event, there is no restriction--to the

1 extent--let me just say this: To the extent that
2 Claimants' request is that Respondent--actually, let me
3 just say this: Originally Claimants requested that
4 Respondent join in seeking a stay of enforcement of a
5 certain assessment. In Claimants' submission, that
6 would have been consistent even under the Canadian BIT.
7 We'll come back to that because there are some
8 important developments that we need to discuss with the
9 Tribunal.

10 But, just going back to the legal rules.

11 In any event, whatever the restrictions are
12 under the Canadian BIT under Article XIII(8), there is
13 no restriction on the Tribunal's authority to issue
14 Provisional Measures in response to Gabriel Jersey's
15 requests under the UK BIT. The Tribunal cannot
16 disregard that this arbitration also proceeds under the
17 UK BIT, and Gabriel Jersey has standing to present
18 requests and has done so. There is no dispute that the
19 Tribunal has authority under the UK BIT to recommend
20 the requested measures that Gabriel seeks, Gabriel
21 Jersey seeks, assuming that the conditions were met.
22 There is no issue of the Tribunal's authority, at least

1 under the UK BIT.

2 Let me turn to the interplay of the two BITs
3 that is at issue here.

4 Respondent argues that, having agreed to an
5 arbitration in which claims under both the Canadian BIT
6 and UK BIT would be heard, that there has been what the
7 Claimant calls the so-called "consolidation" of claims
8 with the effect, in its submission, that the most
9 restrictive provisions set forth in the Canadian BIT
10 must be applied also in relation to Gabriel Jersey and
11 its claims. There is nothing in the text of either BIT
12 that suggests this result, however.

13 The notion of consolidation of claims, for
14 example, which one sees in the NAFTA, where there are
15 references to concepts of consolidation, there are no
16 analogous provisions in the Treaties that are at issue
17 here.

18 To the extent that the Respondent seeks to
19 attach consequential meaning to its proposed label that
20 the claims have been "consolidated" in a single
21 proceeding, there really is just no basis for that. In
22 the pleadings, there was an example of another tribunal

1 referring to this notion of consolidation that is cited
2 here.

3 I think there is no dispute that there have
4 been many cases in which different Claimants present
5 claims under different instruments in the same
6 arbitration. Tribunals in such cases confirm that the
7 claims under each must be considered under the
8 respective treaty, and a number of examples and
9 paragraph numbers are cited.

10 In Claimants' understanding, Respondent does
11 not dispute that the two Claimants must--that the two
12 Claimants' claims must be addressed on the merits under
13 each applicable BIT. Our understanding is that that
14 point is not disputed. Claimants understand that it's
15 Respondent's position, however, that there are
16 consequences to the procedures that are to be followed
17 in this arbitration, and it relies on the Procedural
18 Order issued in--and now we'll come back to it--the
19 EuroGas versus Slovakia Case, which it claims
20 demonstrates that for so-called "procedural matters,"
21 the restrictions contained in the Canada BIT must be
22 applied also vis-à-vis the arbitration of Gabriel

1 Jersey's UK BIT claims.

2 I should point out, of course, the point that
3 even if Respondent were correct, which Claimants insist
4 they are not, as to the nature of the EuroGas'
5 Tribunal's decision, of course, this Tribunal is not
6 bound to follow that decision. But, in fact, the
7 EuroGas Tribunal's decision is not precedent for the
8 position that Respondent takes here.

9 The EuroGas decision is a Procedural Order in
10 which one issue was disputed and addressed, and that
11 issue was only whether there would be "open" hearings
12 as was set forth in the annex to the Canadian BIT that
13 happened to be at issue there. There were two
14 Claimants in that case, a Canadian Claimant and a U.S.
15 Claimant, and that Canadian BIT had a transparency
16 annex, which required open hearings.

17 The Claimants in that case had presented an
18 argument to that Tribunal that, although the Canadian
19 BIT referred to open hearings, the Canadian Claimant
20 had an argument that it was entitled, pursuant to
21 another provision of that BIT, it was entitled to a
22 so-called "more favorable regime," which it argued

1 existed under the ICSID Arbitration Rules, which gave
2 an option as to whether or not there would be an open
3 hearing. So, in that case, the Canadian Claimant came
4 to the Tribunal and said open hearings are an option
5 under the ICSID Rules. That's a more favorable regime,
6 that Claimant should be excluded from the obligation to
7 have an open hearing. And, of course, the U.S.
8 Claimant had no obligation to have open hearings, and
9 that was the question presented to the Tribunal.

10 The Tribunal rejected this interpretation of
11 the so-called "more favorable regime" provision of the
12 Canadian BIT and concluded that the Canadian Claimant
13 was obligated by the Canadian Treaty to have open
14 hearings, and the U.S. Claimant participating in the
15 same arbitration--obviously, it's a binary choice, the
16 Parties are pleading their cases together. One could
17 not plead--and I don't believe it was even
18 suggested--that the U.S. Claimant would proceed
19 separately in a closed hearing while the Canadian
20 Claimant proceeded in an open hearing. The argument
21 was simply presented in that case that there was either
22 to be open hearings or not, and the Tribunal concluded

1 that there was to be open hearings.

2 The remainder of Procedural Order Number 2 does
3 include a repetition in the order of other provisions
4 of the Canadian BIT annex, but there is no indication
5 that any of those other issues were disputed between
6 the Parties, and that was just repeated.

7 So, this result, deciding that there must be
8 open hearings in the circumstance like that, and that
9 the U.S. Claimant--it wasn't even clear the U.S.
10 Claimant was proposing somehow to get a separate
11 treatment from the Canadian Claimant, this is not
12 precedent for what the Respondent is arguing here.
13 And, in any event, that result is not analogous to the
14 requests being made here.

15 Just as each of the two Claimants in this case
16 may be entitled to present somewhat different claims on
17 the merits, they may also be entitled to different
18 relief, depending upon the different provisions of the
19 two treaties. They may be entitled to different forms
20 of provisional relief. Respondent's argument that
21 Gabriel Canada cannot be a free-rider on any
22 Provisional Measure that Gabriel Jersey may be entitled

1 to is misguided because the restrictions in the
2 Canadian BIT do not reflect prohibited benefits to the
3 Canadian Claimant. It is not that the Canadian
4 Claimant is prohibited to have some sort of relief. It
5 is simply a function of a restriction on the Tribunal's
6 authority as it emanates from the Canadian BIT to do
7 certain actions.

8 But the Tribunal's authority flows from not one
9 but two BITs. So, the Tribunal's authority is limited
10 with respect to one of the Treaties, but it is not
11 restricted with respect to the other. So, this is not
12 a prohibition on the benefit that a claimant, the
13 Canadian Claimant, can get. Rather, it is a limitation
14 on the Tribunal's authority as it emanates from one of
15 the two instruments.

16 The Tribunal's authority derives equally in
17 this arbitration from the UK BIT. Nothing in the
18 Canadian BIT detracts from that authority. Romania is
19 a Party to the United Kingdom-Romania BIT. And,
20 moreover, it consented for this Tribunal to conduct an
21 arbitration in which the Tribunal exercises power under
22 both treaties. While certain procedural matters

1 obviously have to, from a practical point of view, have
2 to be coordinated so as to satisfy affirmative
3 requirements of the BIT with respect to procedures,
4 such as an open hearing, nothing limits the Tribunal's
5 authority to exercise its full power under each of the
6 two BITs. Nor is there anything about the Canadian BIT
7 that requires the Tribunal to refrain from exercising
8 authority that it has under the UK BIT. The Canadian
9 BIT does not have effects on the UK BIT. It does not
10 operate to limit it.

11 I just want to point, before I end on this
12 segment, to this Redfern Schedule, which is another
13 example that the Respondent refers to as reflecting
14 what the EuroGas-Slovakia Tribunal was dealing with,
15 and the Respondents have asserted that this Redfern
16 Schedule shows that there was an acceptance also of
17 limitations on confidentiality and so on. I invite
18 this Tribunal to look at this particular back and forth
19 reflected on the Redfern Schedule. It has nothing to
20 do with any restriction relating to
21 confidential/classified information restrictions in the
22 Canadian BIT, so this other example of authority is

1 not.

2 Let me break here because we are about to turn
3 to facts, so I would mark this place.

4 Sorry, we're going to just reshuffle a little
5 bit here.

6 (End of open session. Confidential business
7 information redacted.)

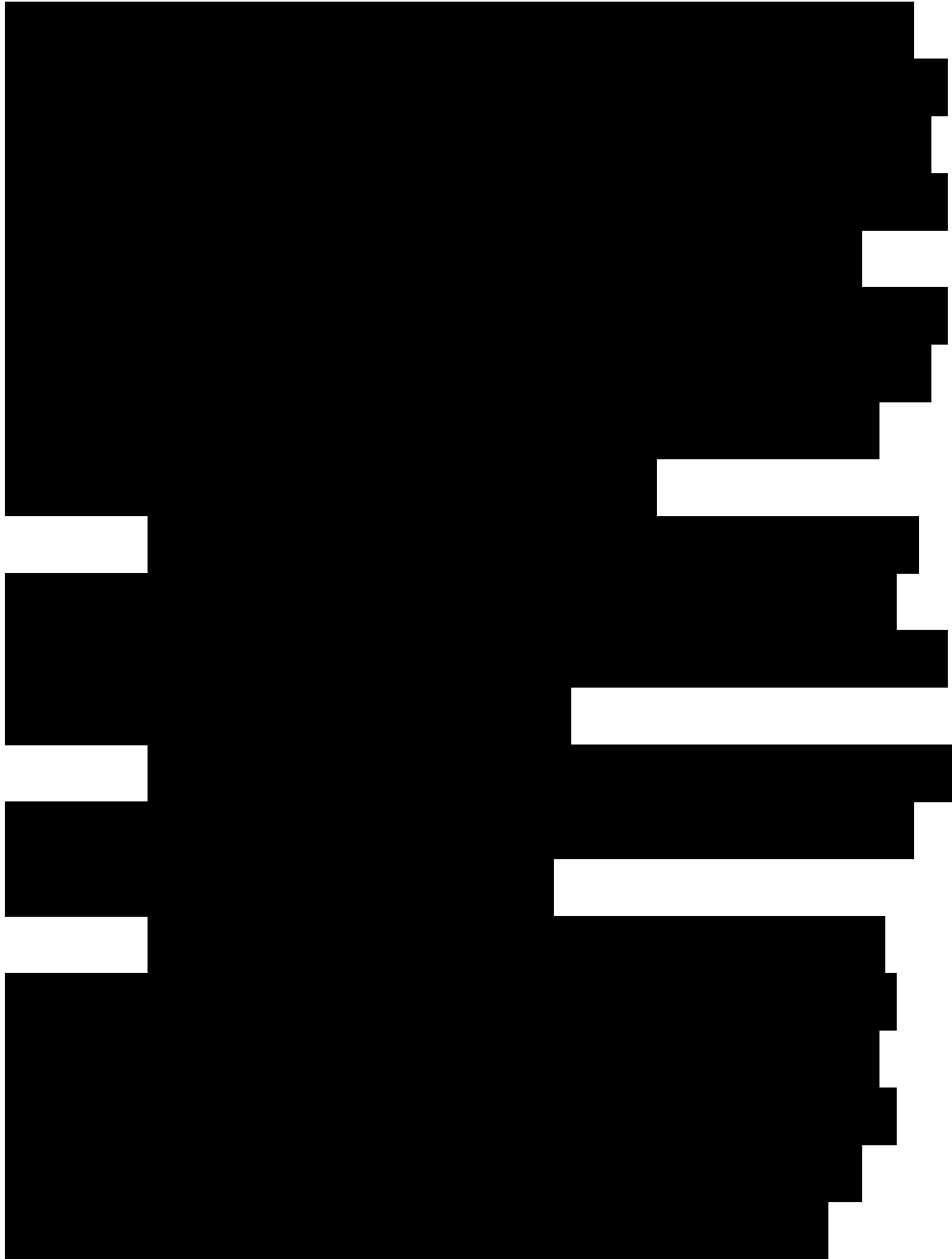
B&B REPORTERS
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

CONFIDENTIAL SESSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

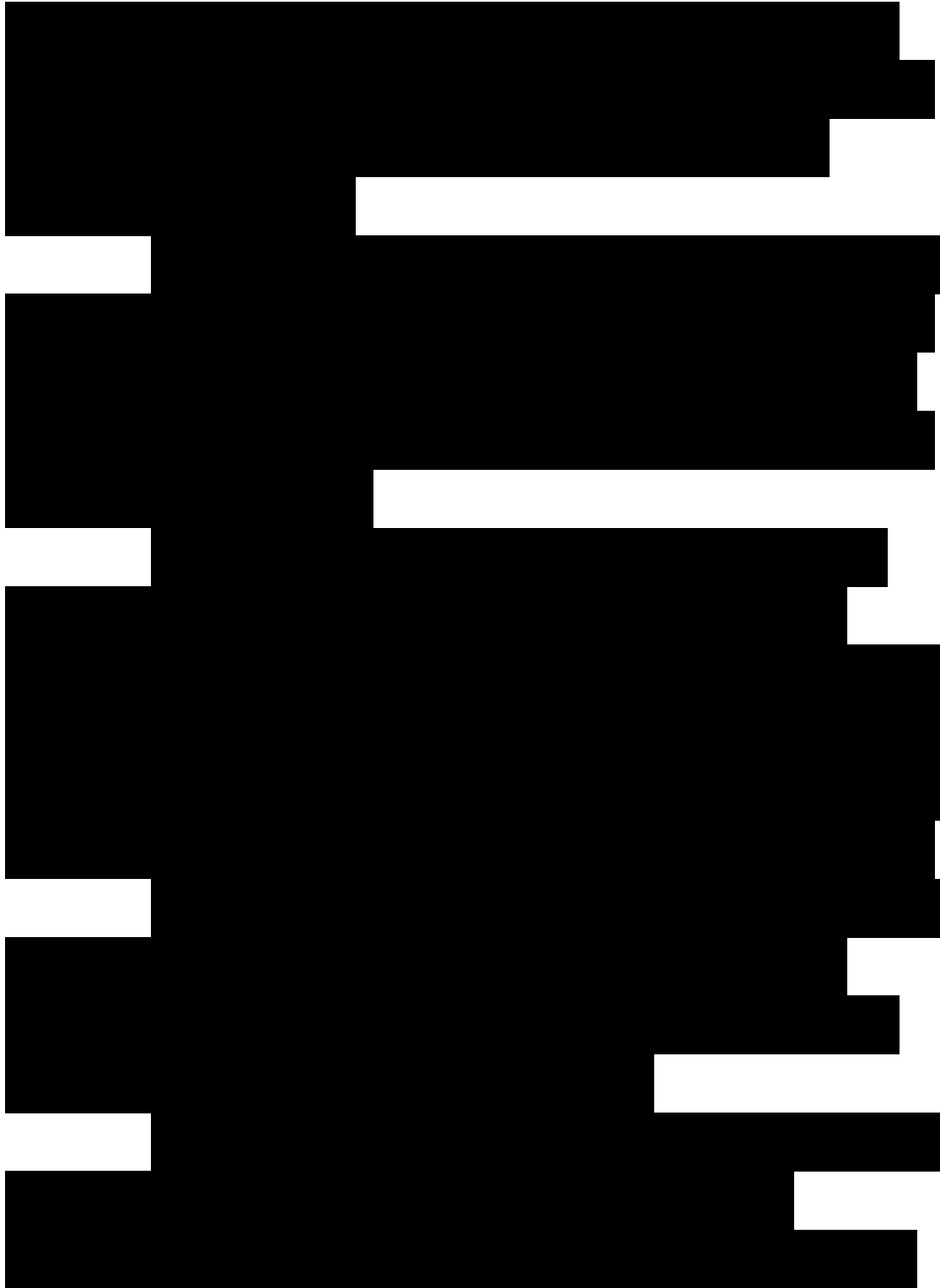
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



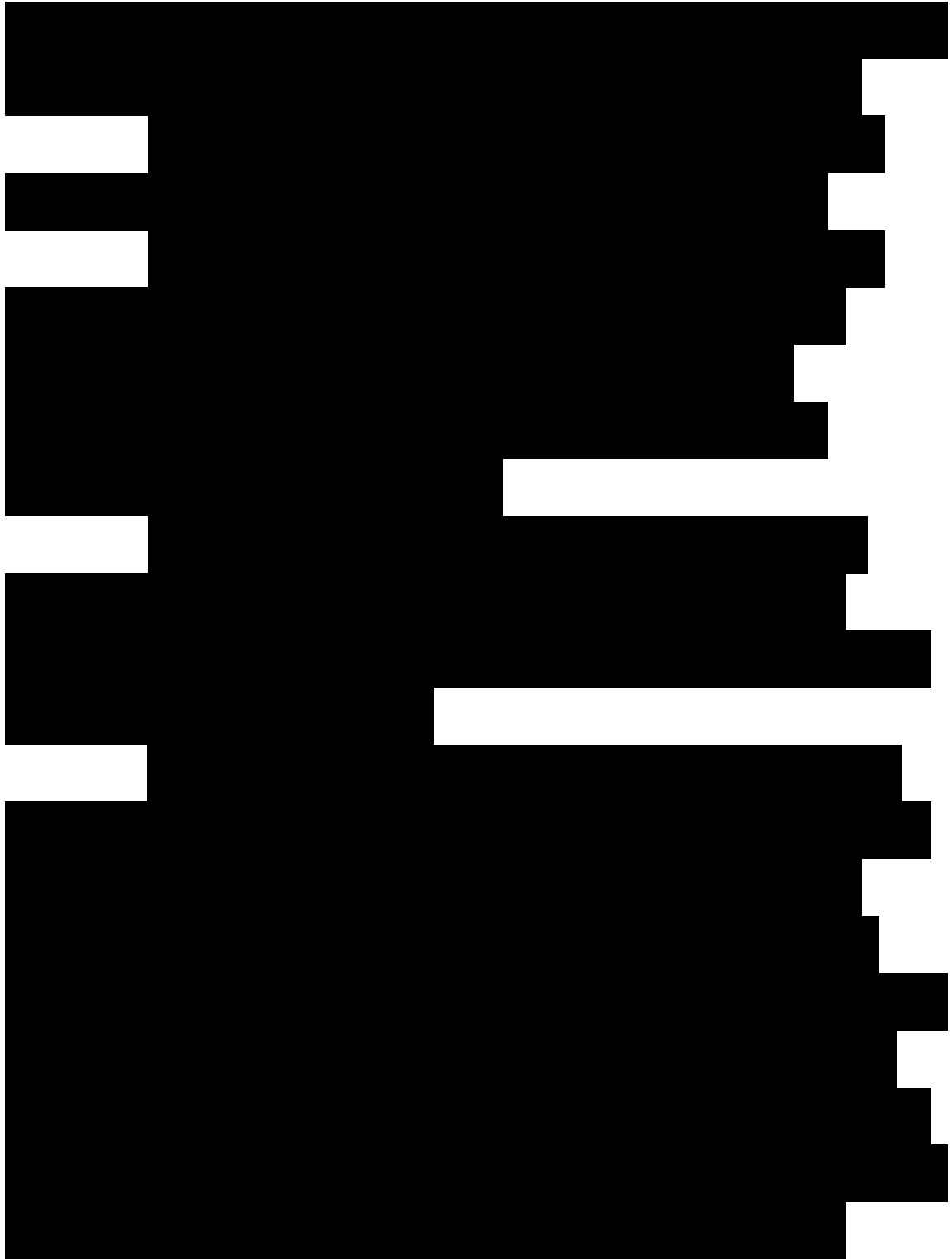
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



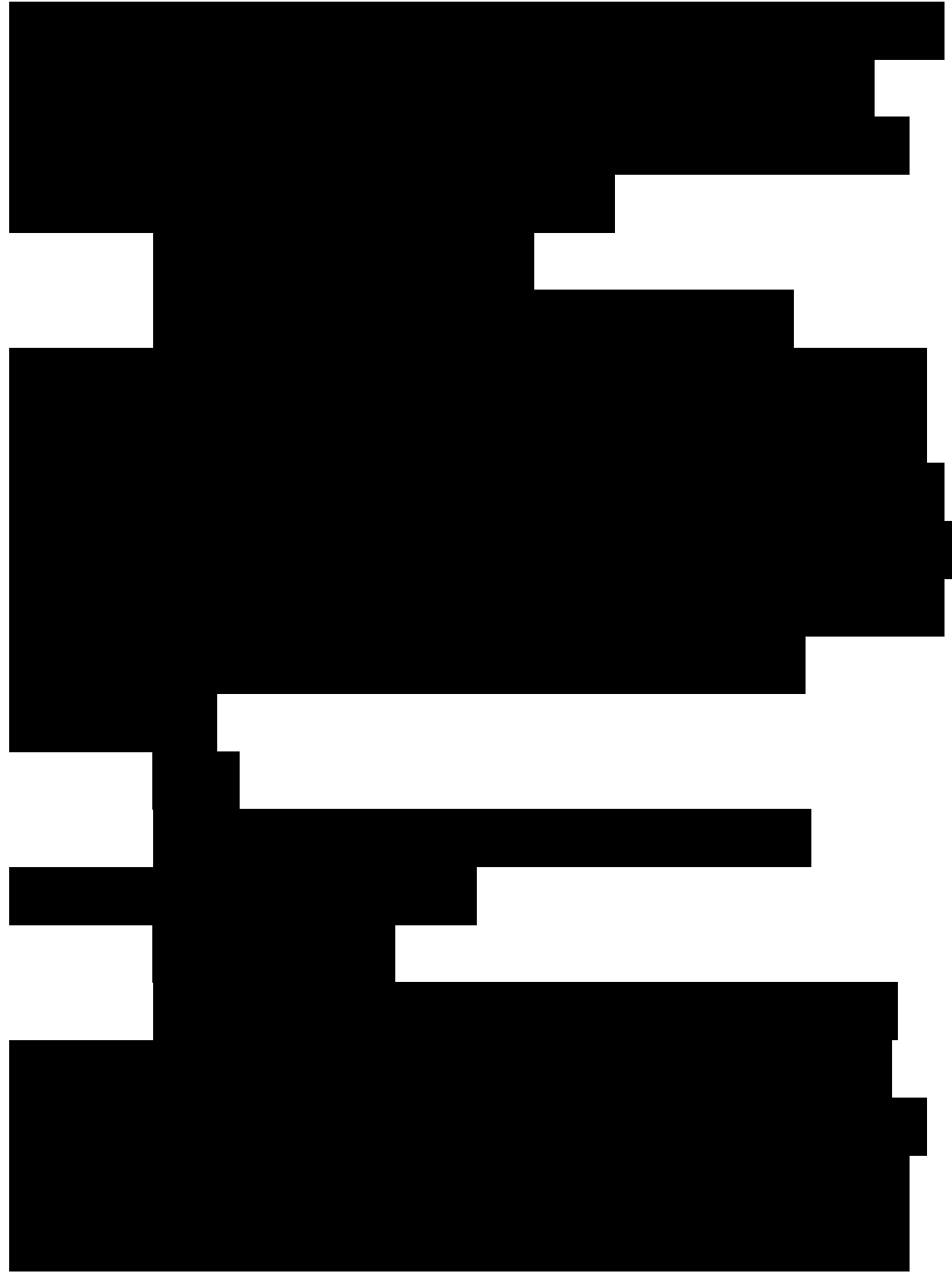
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



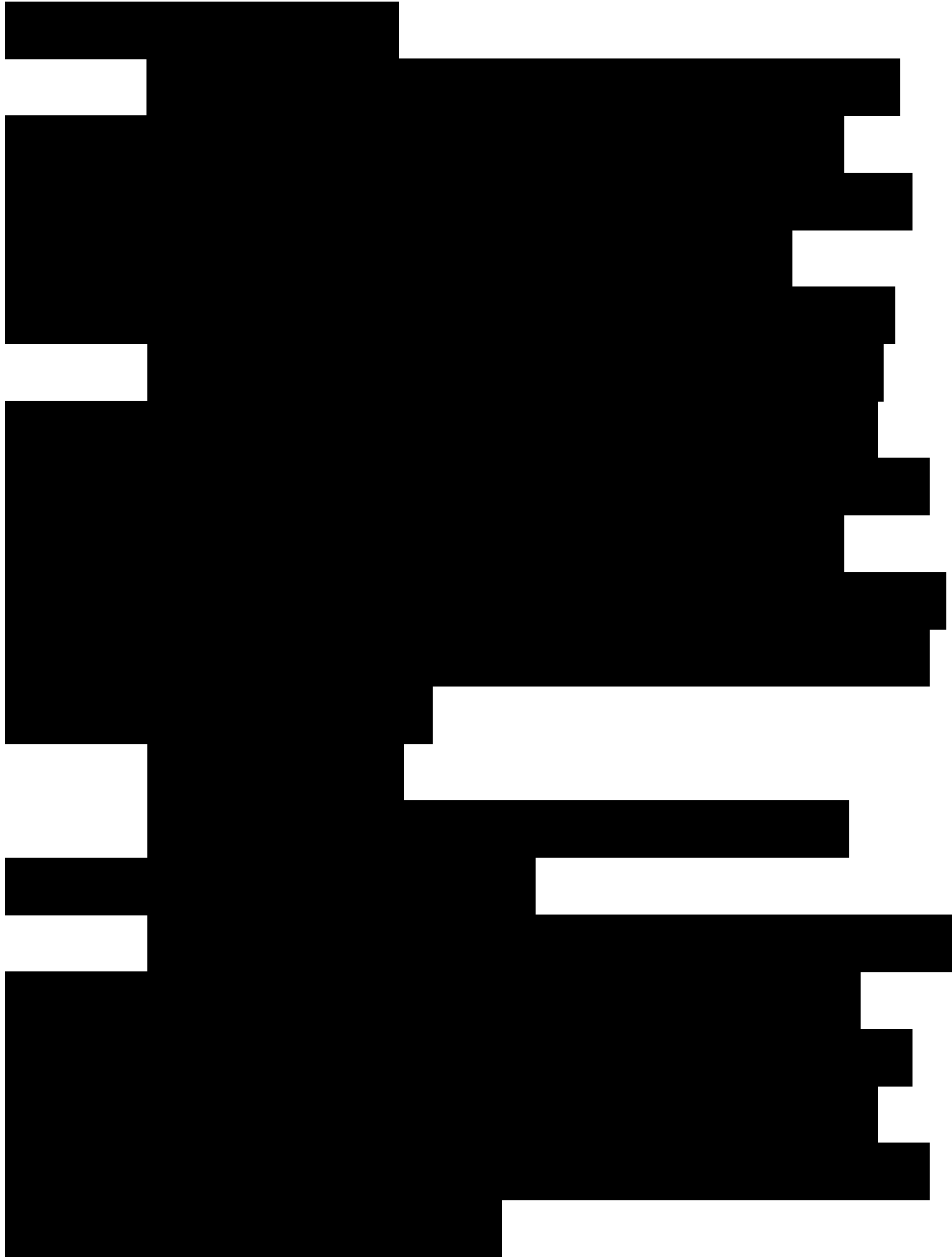
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



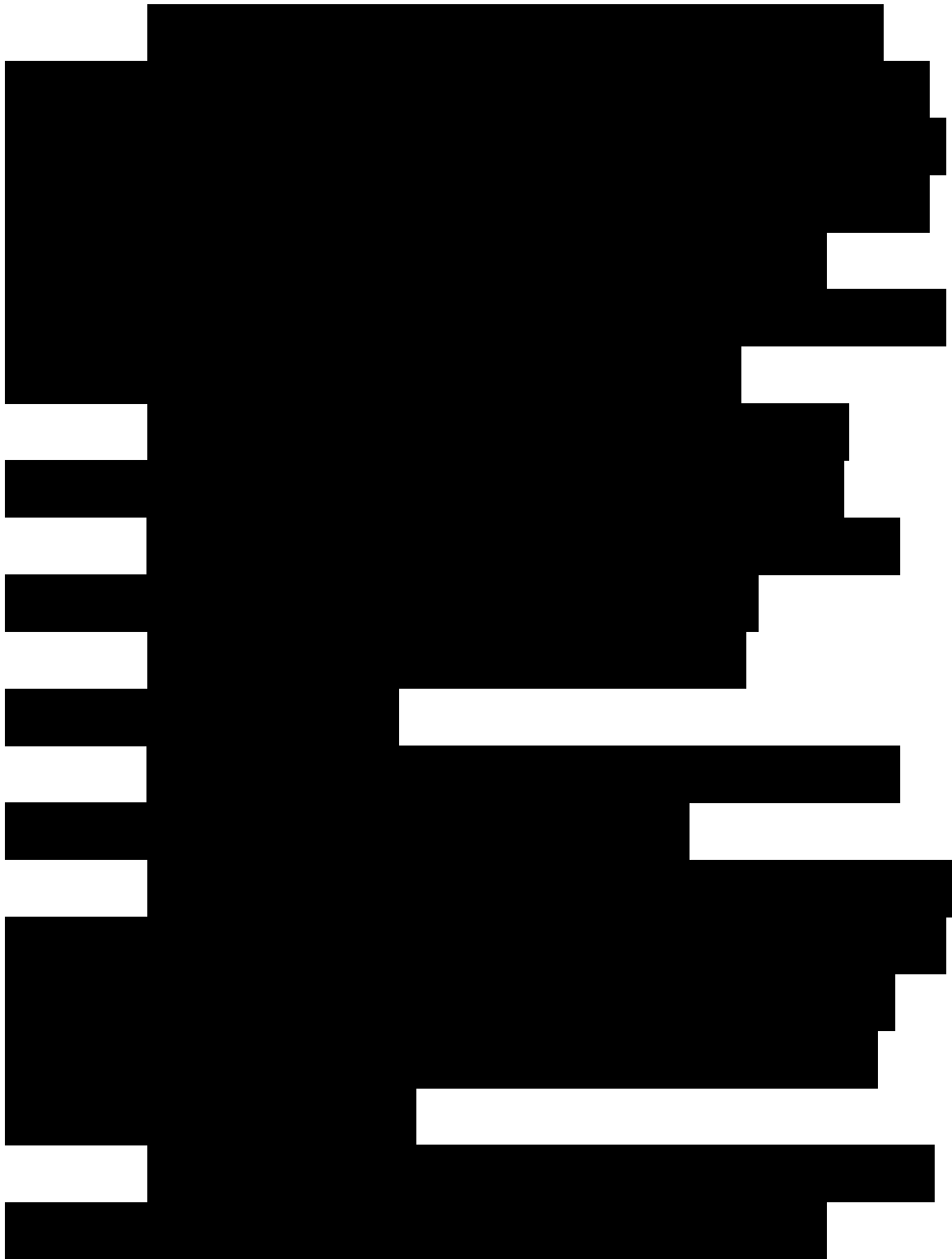
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



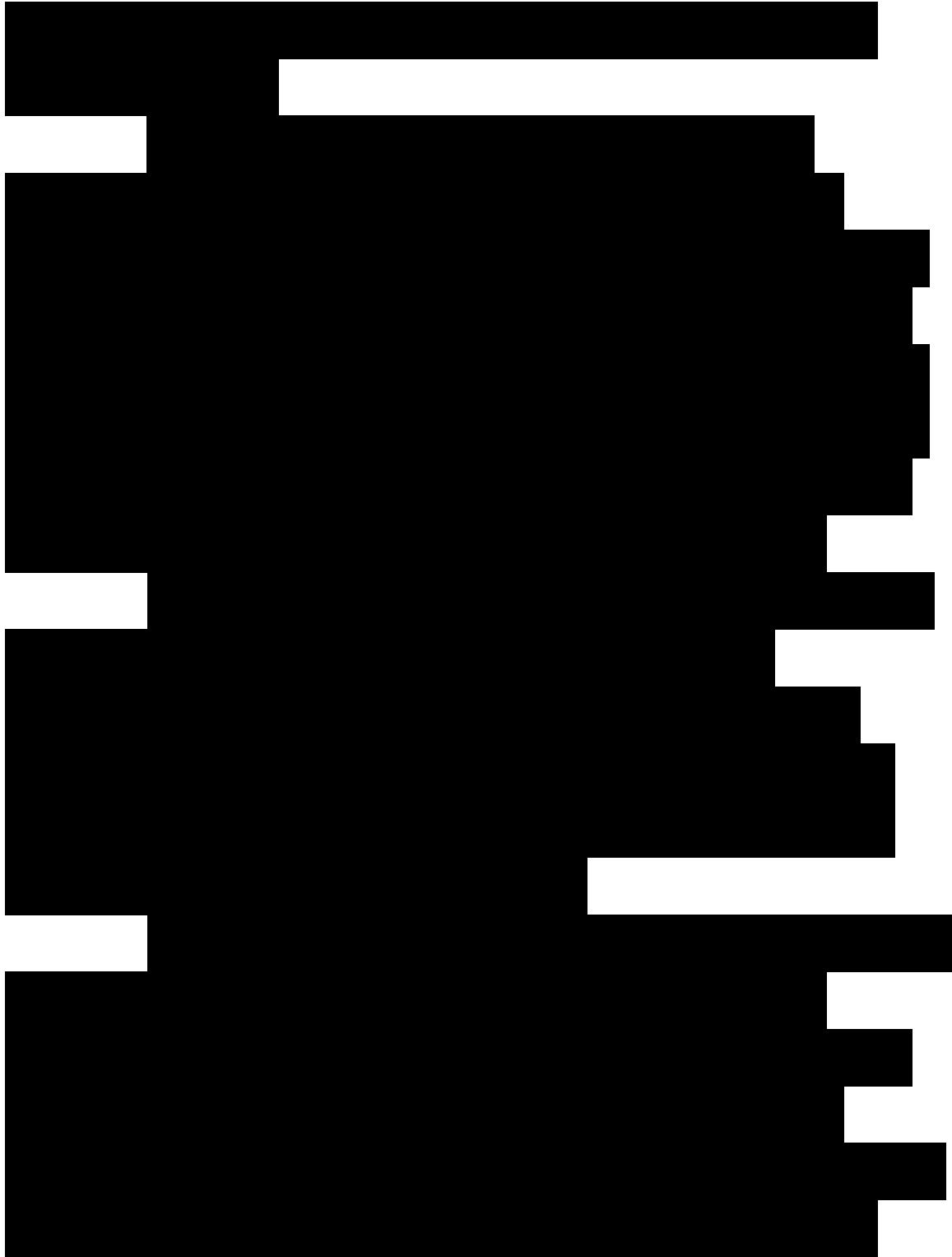
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



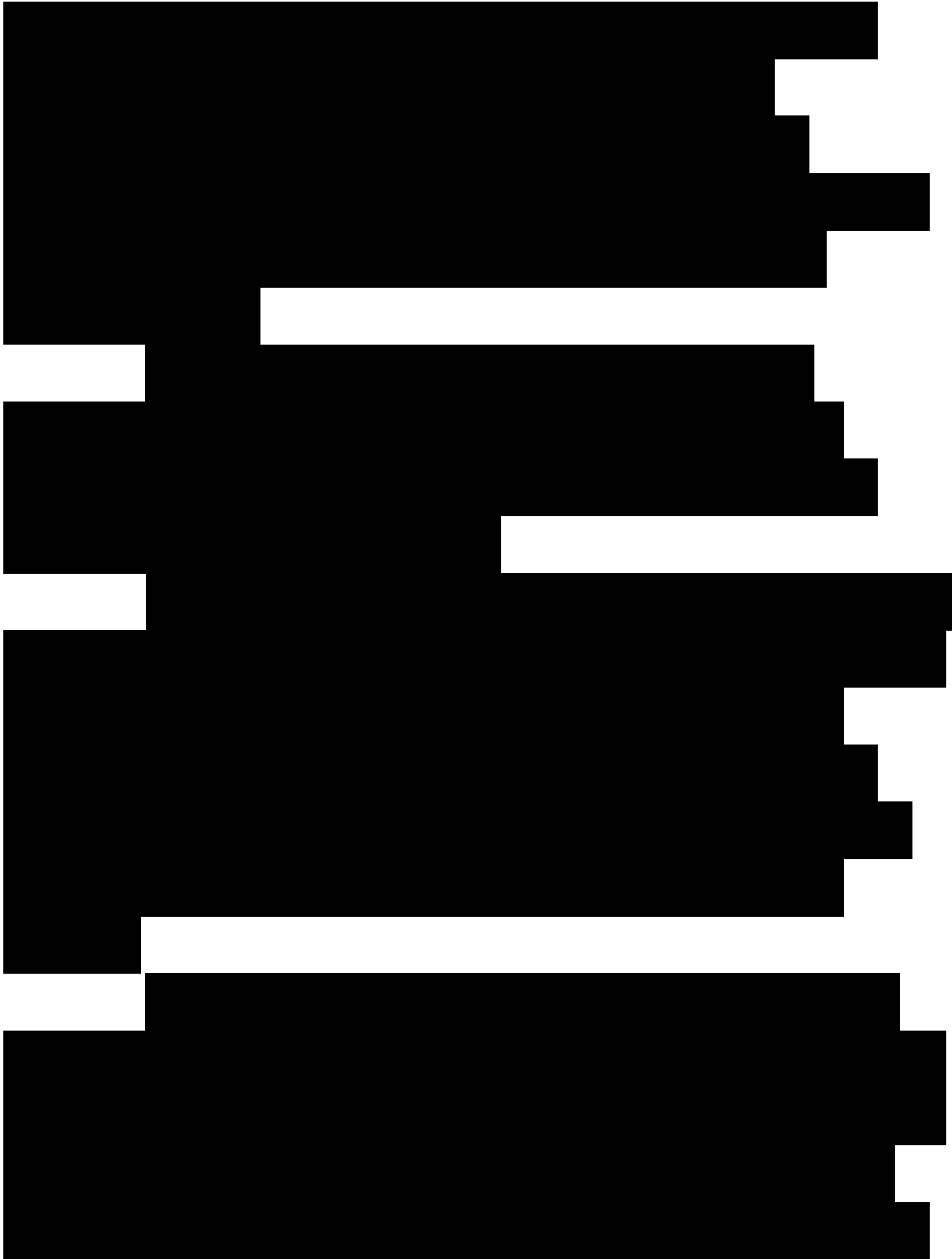
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



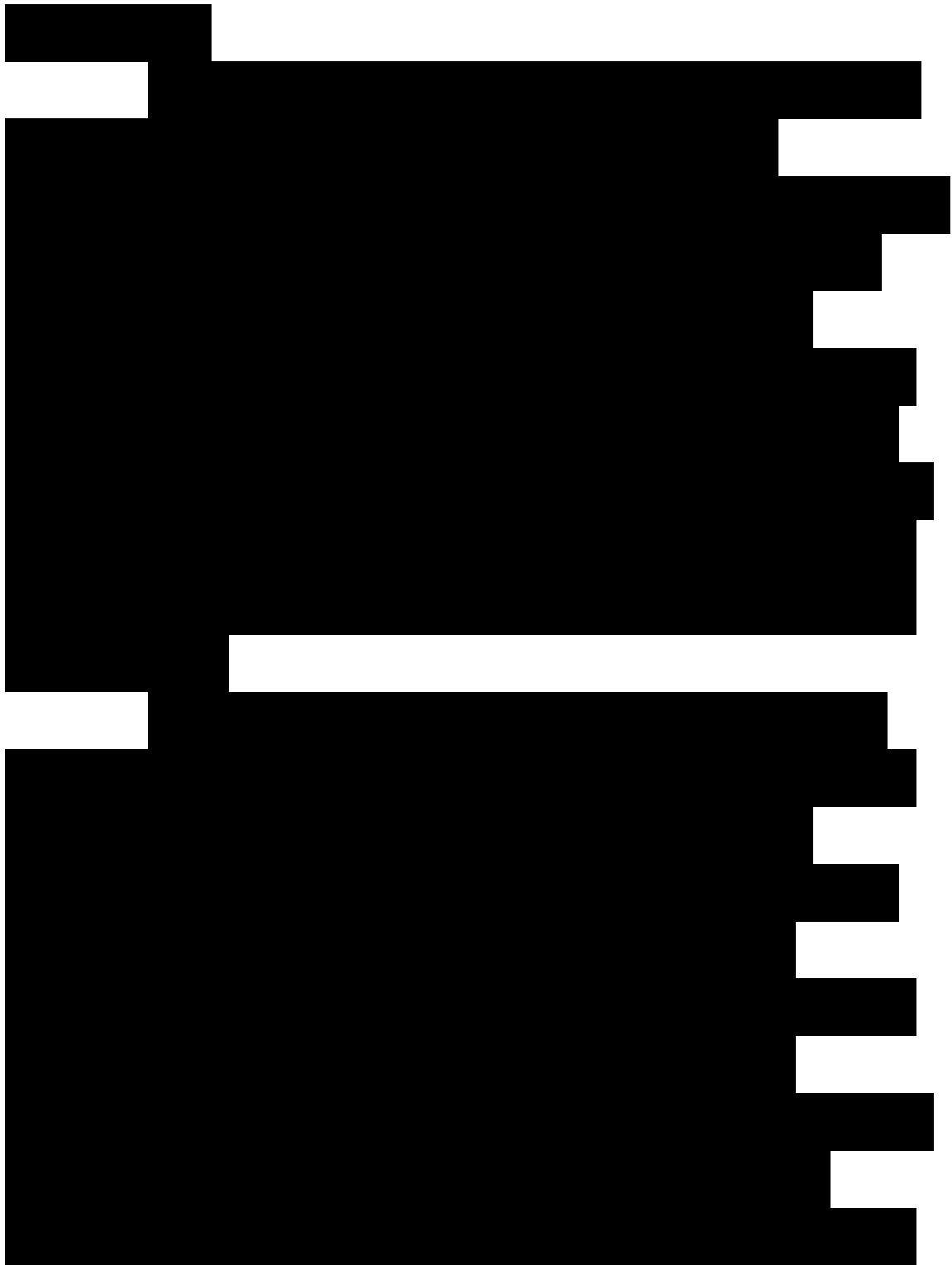
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



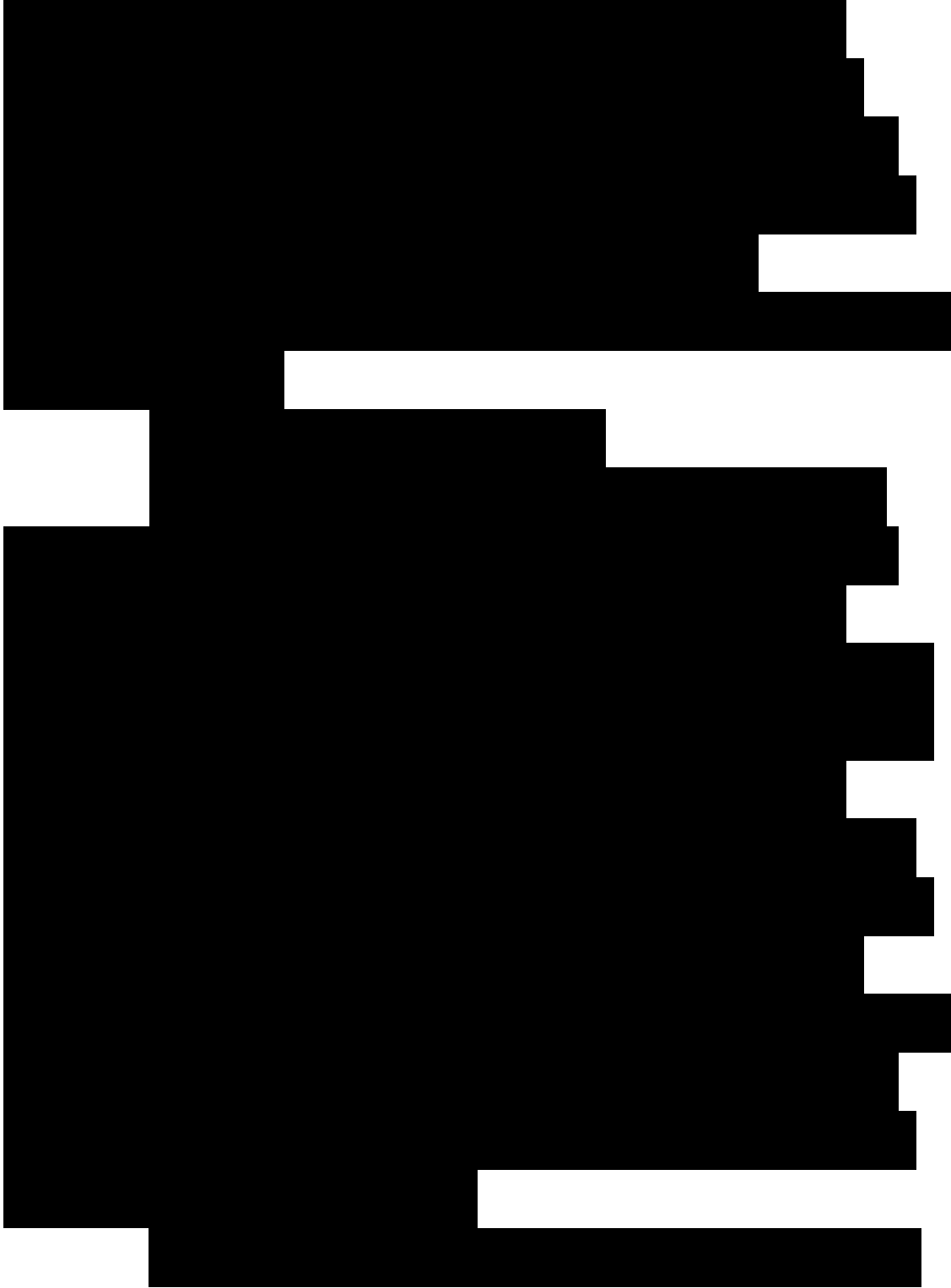
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



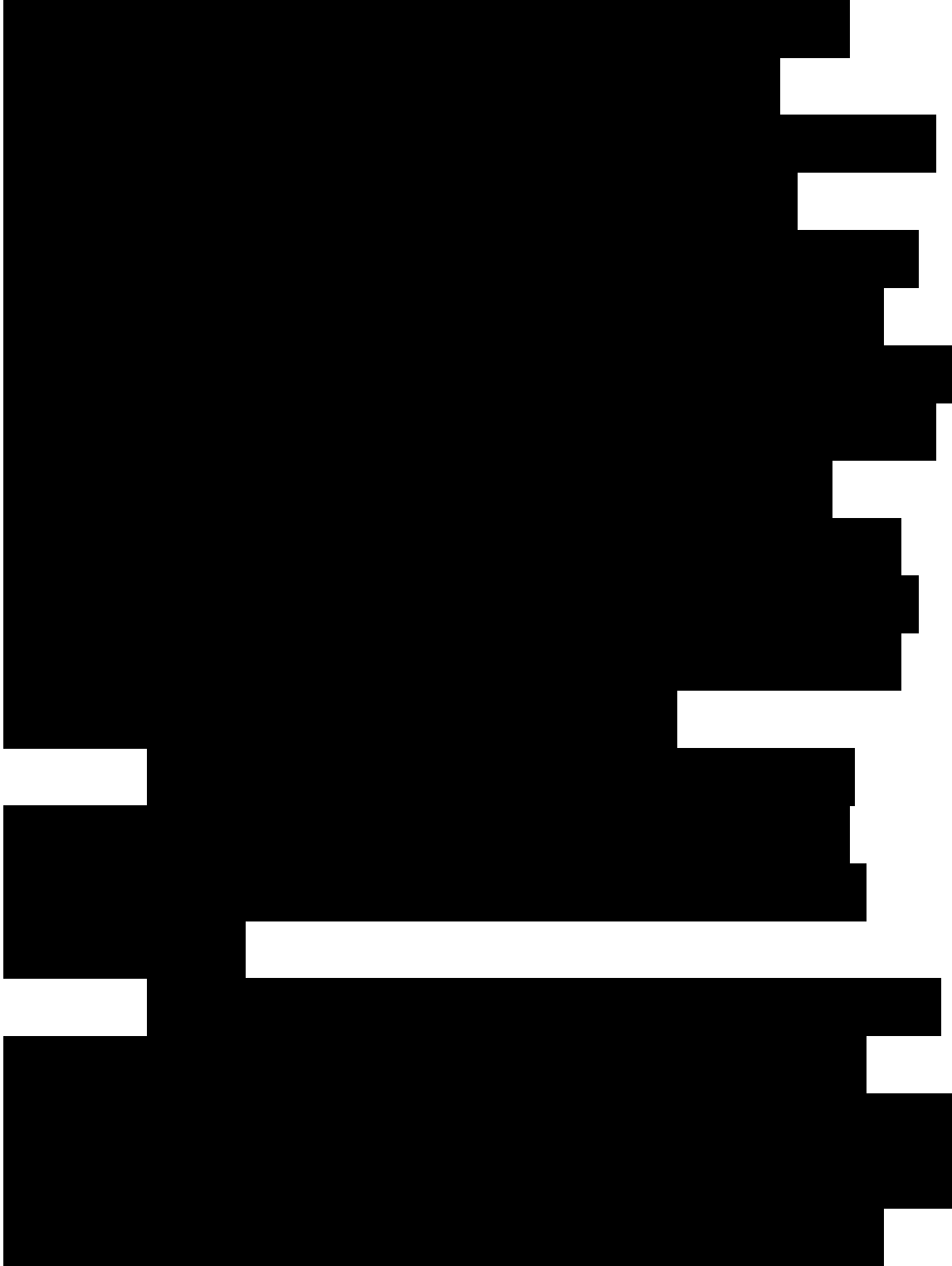
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



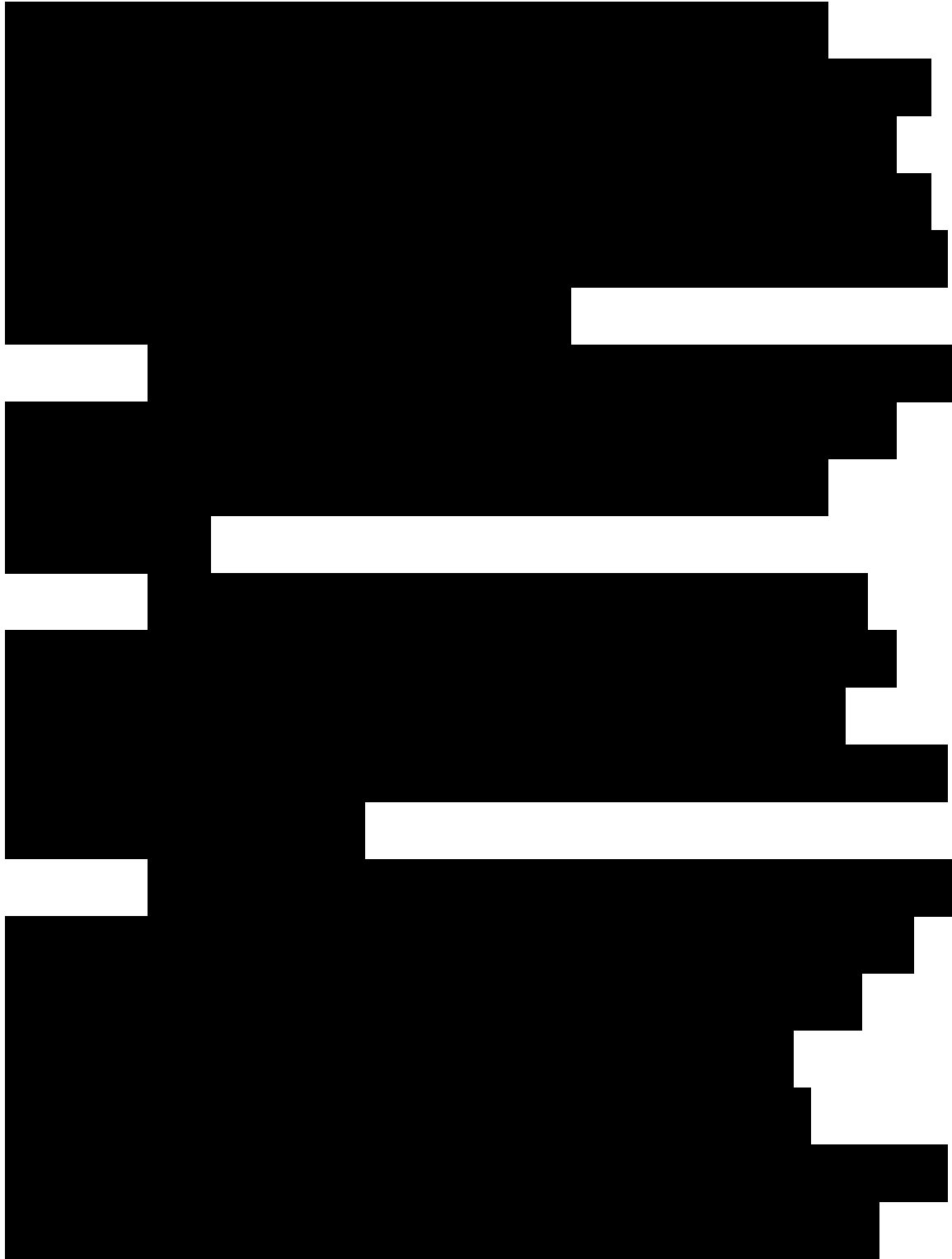
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



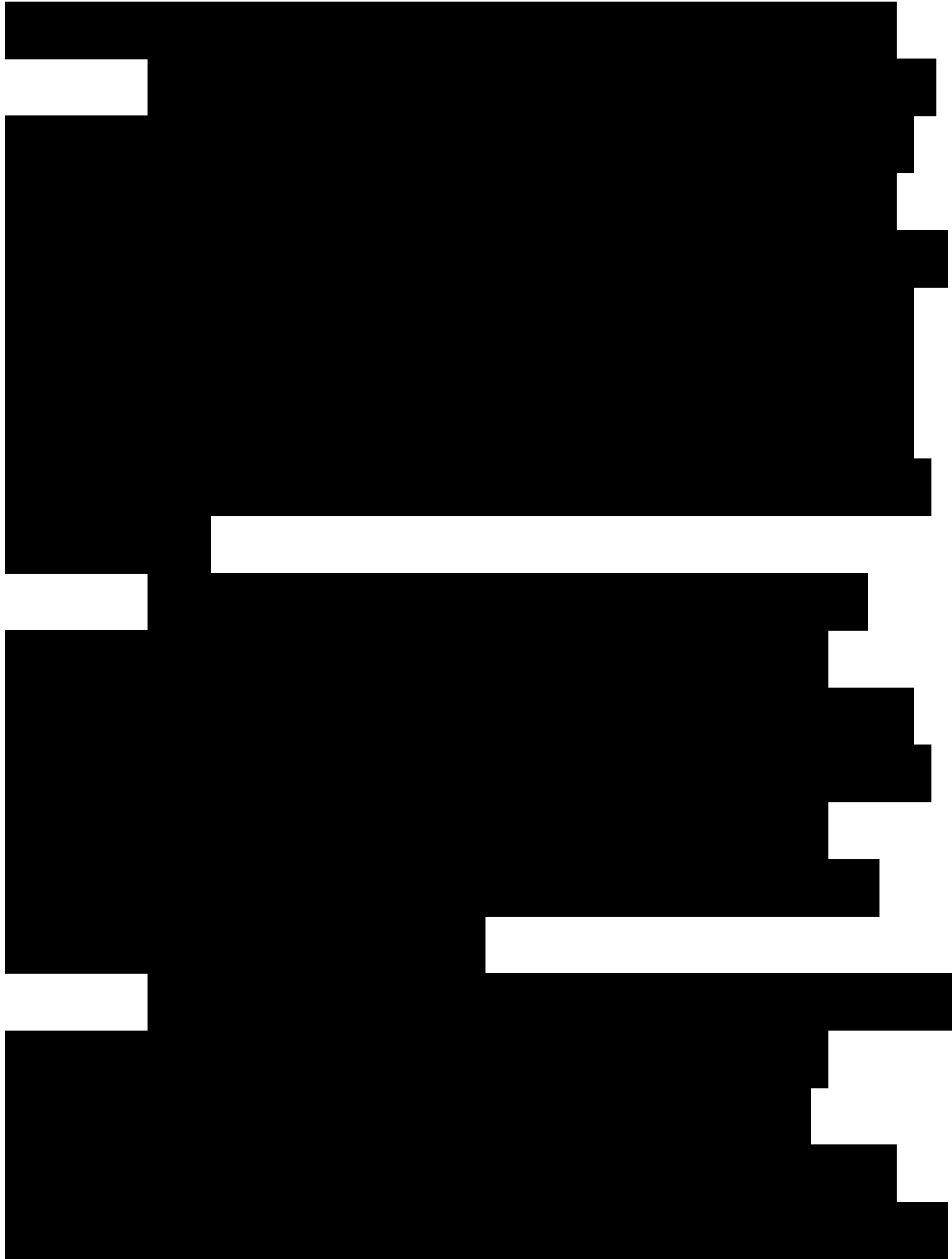
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



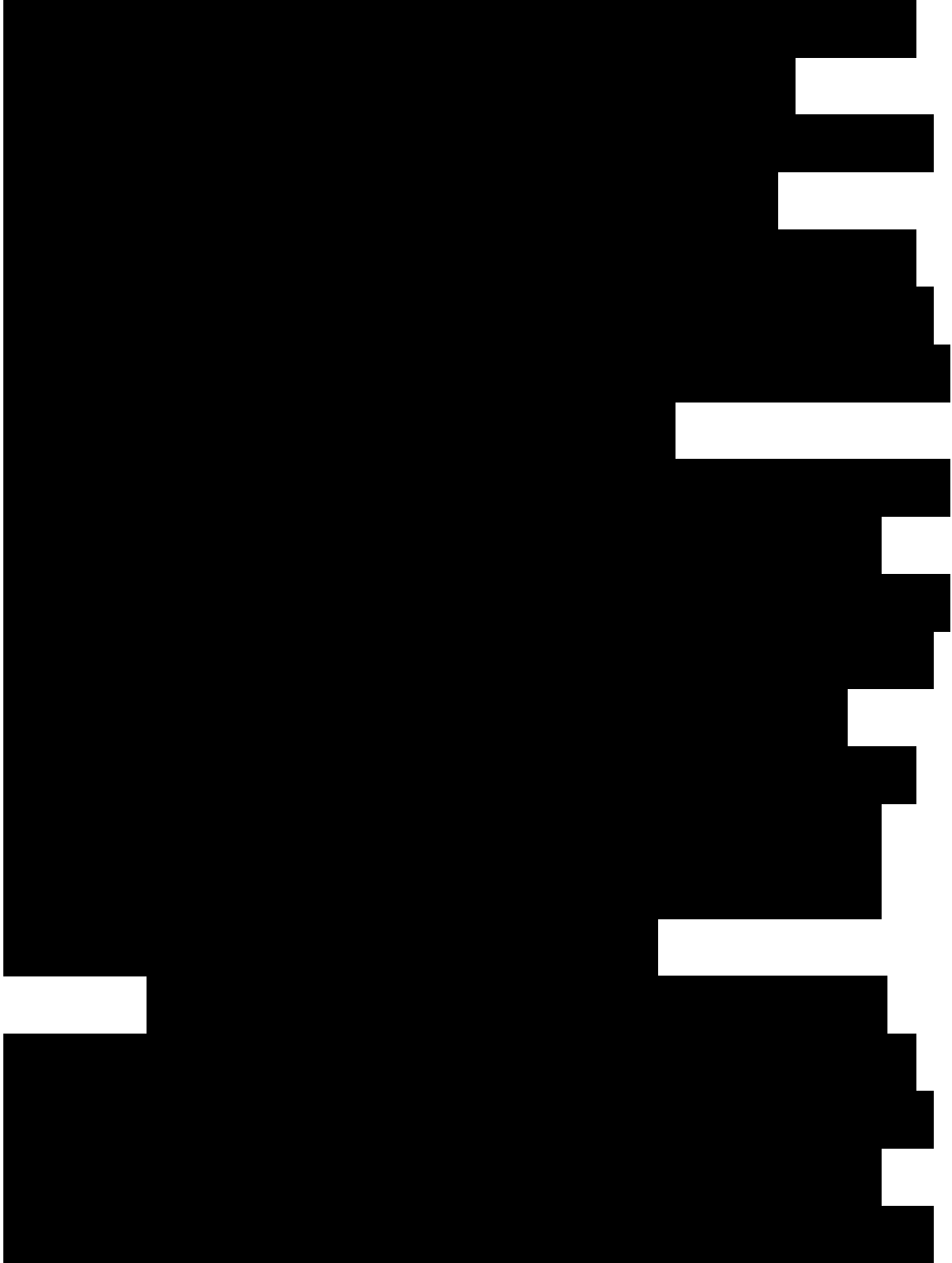
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



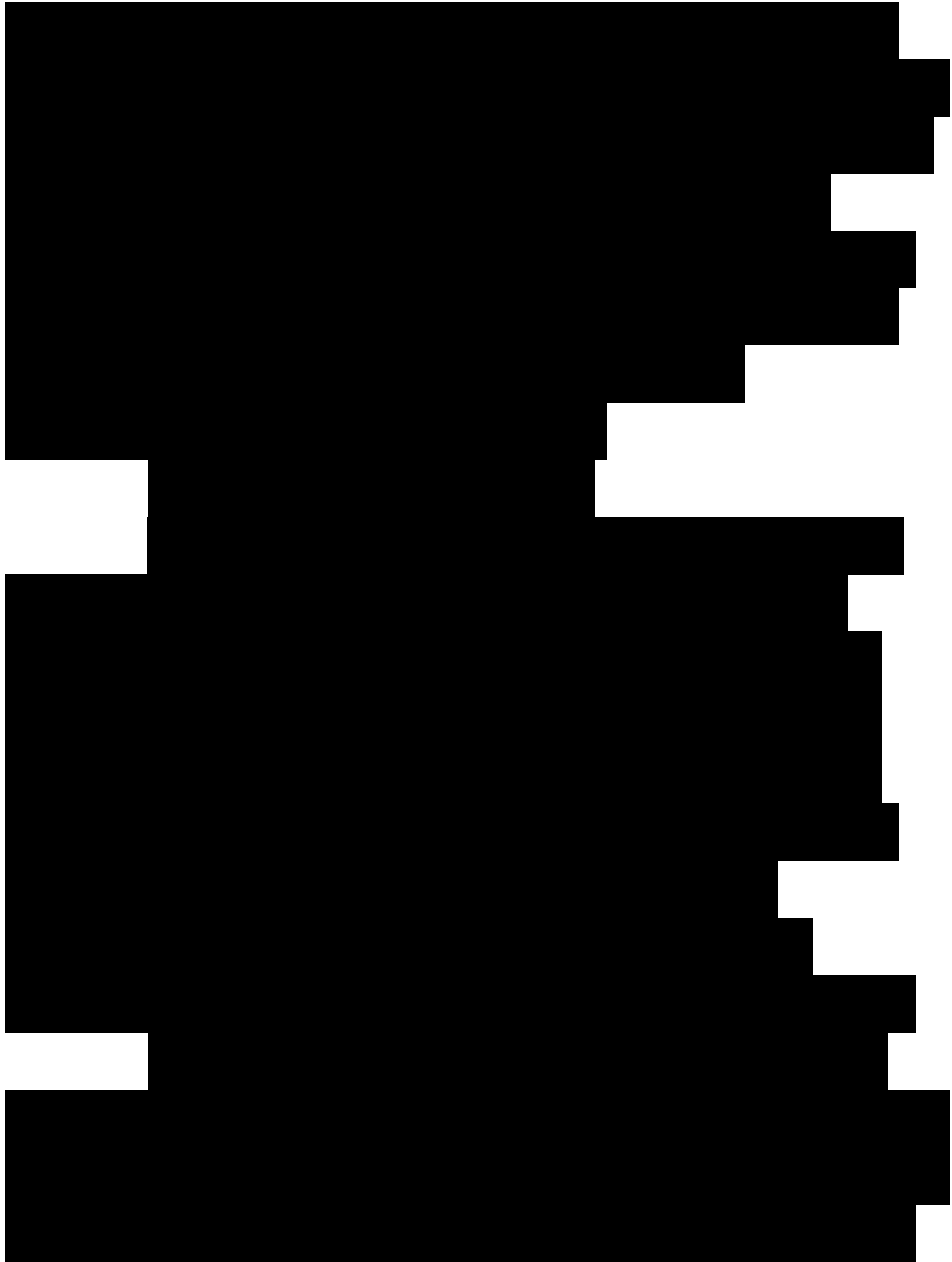
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

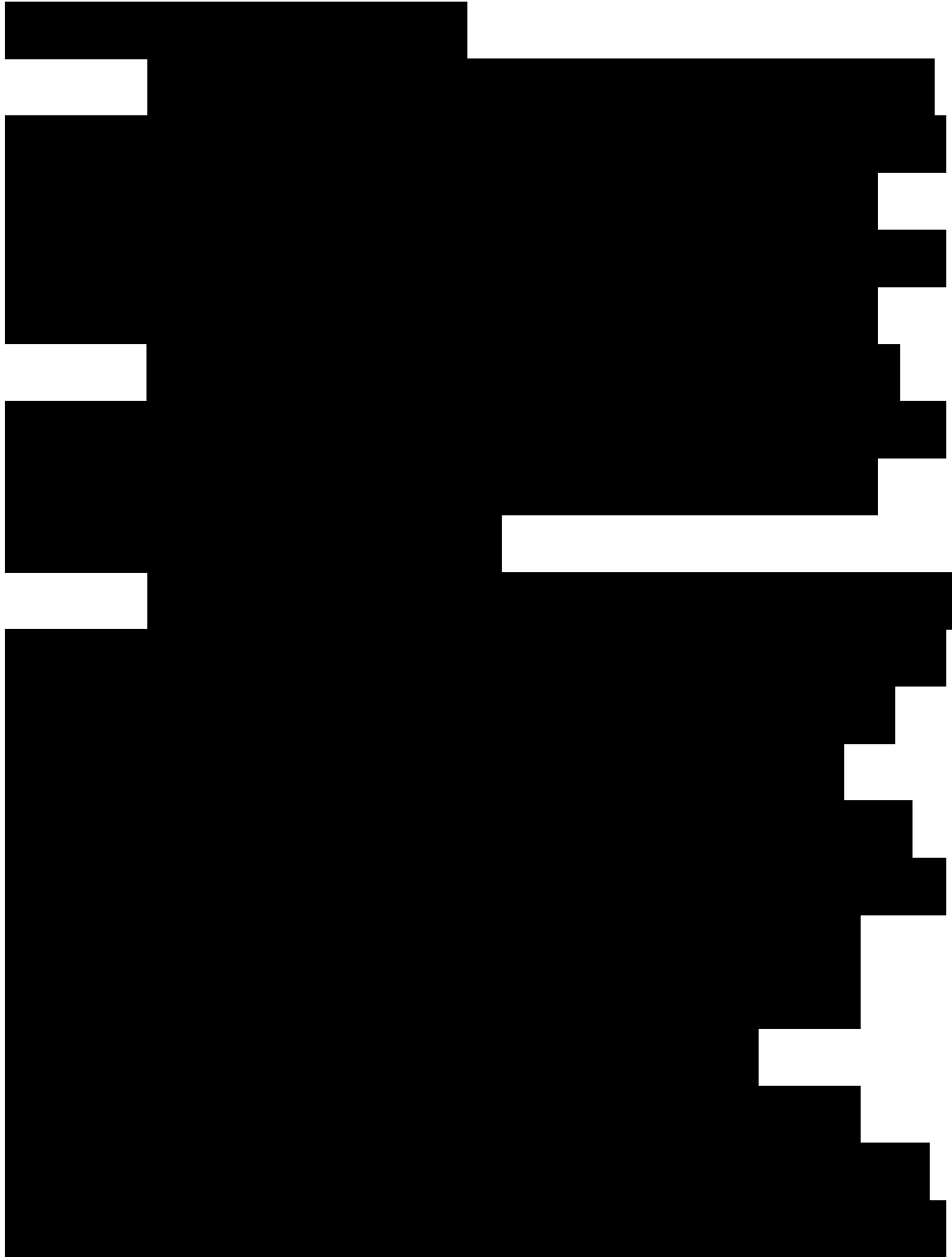
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



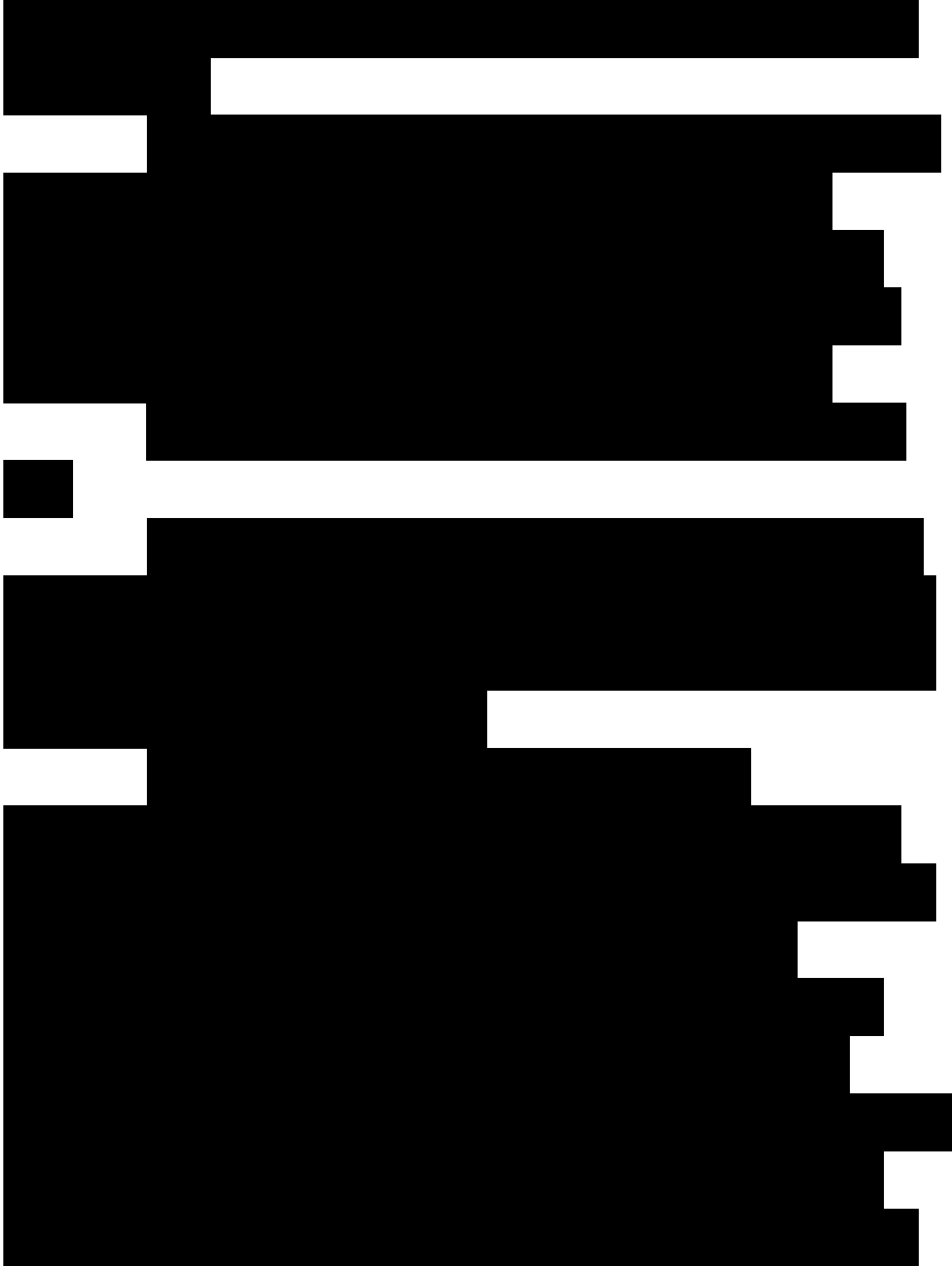
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



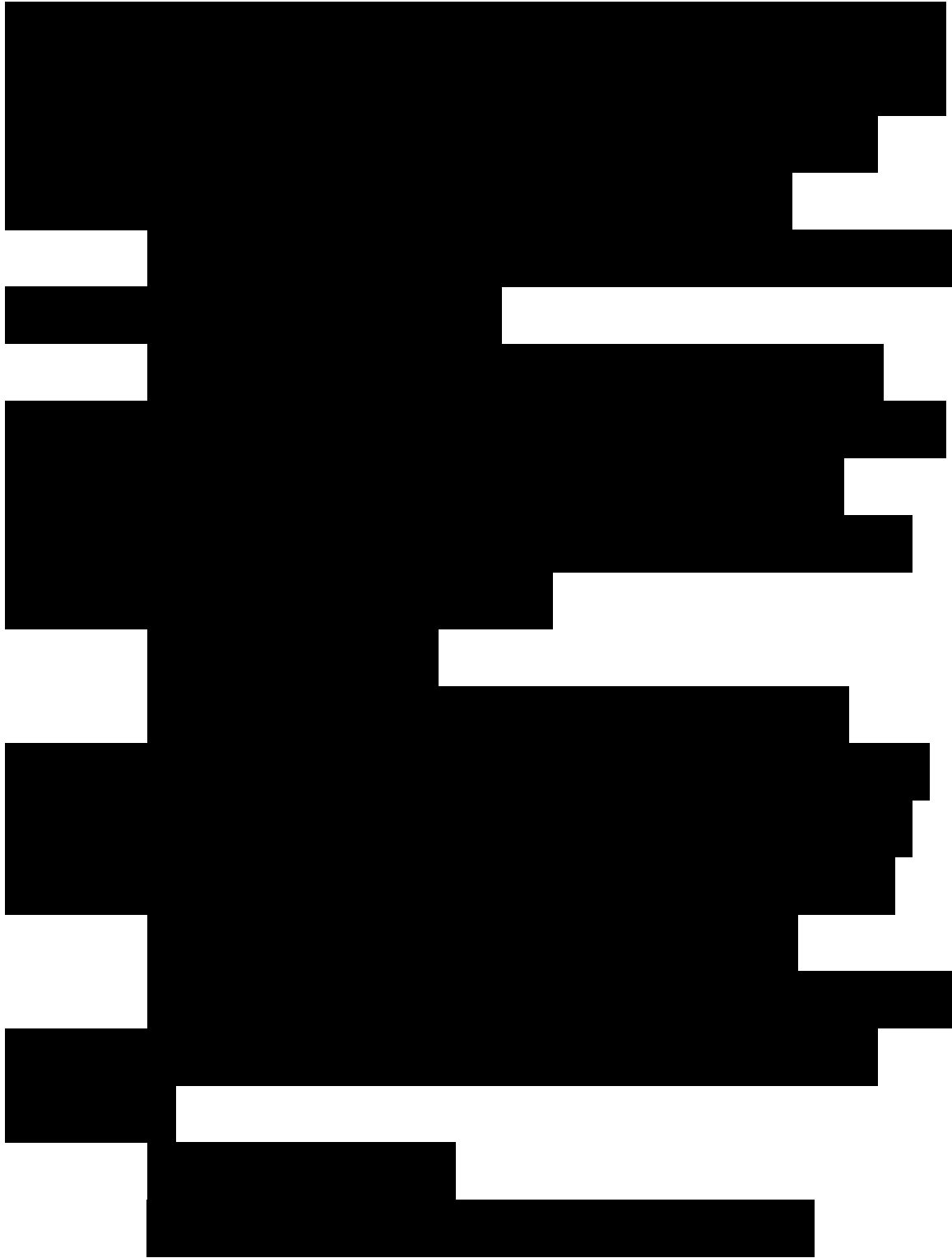
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



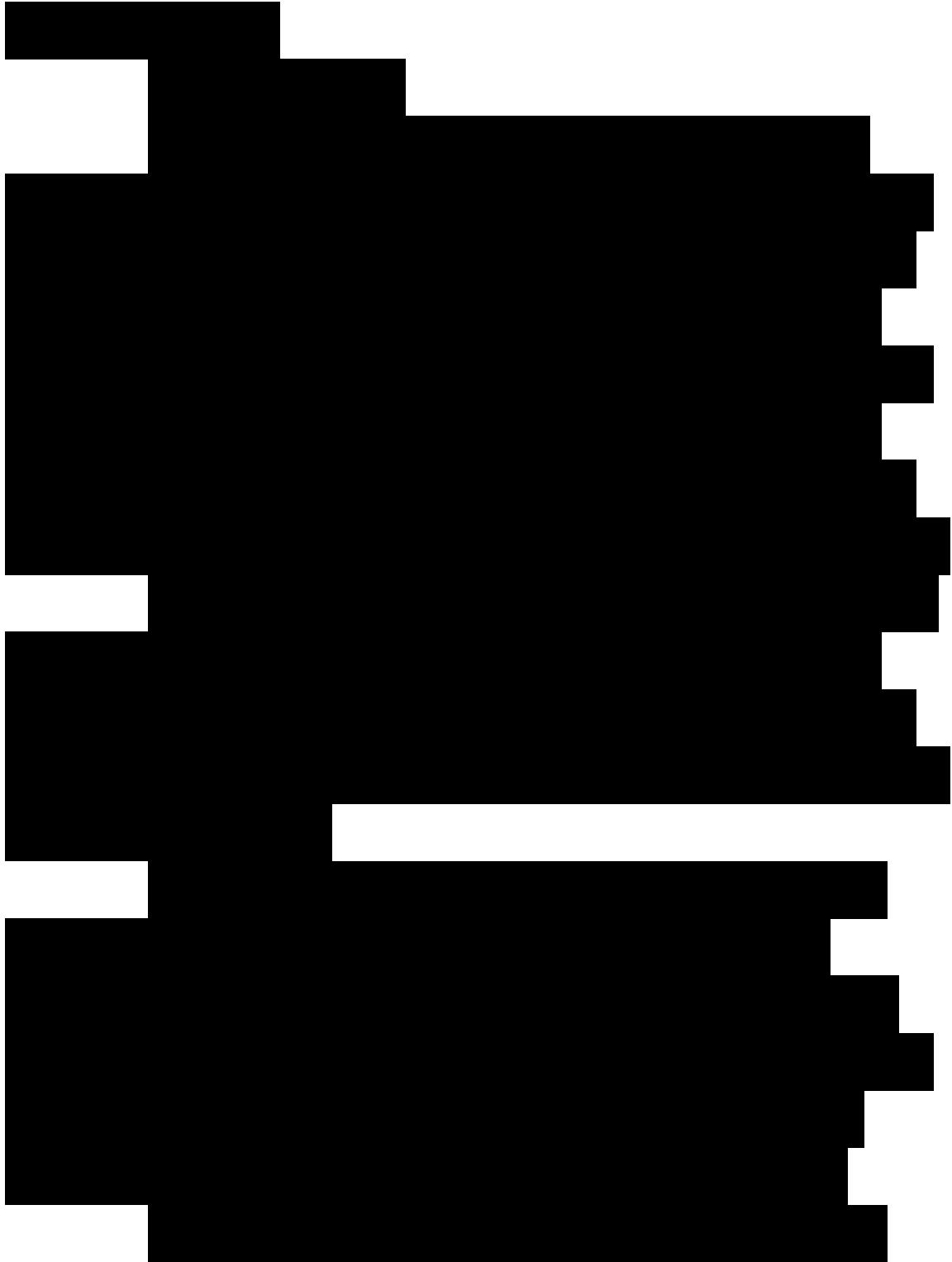
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



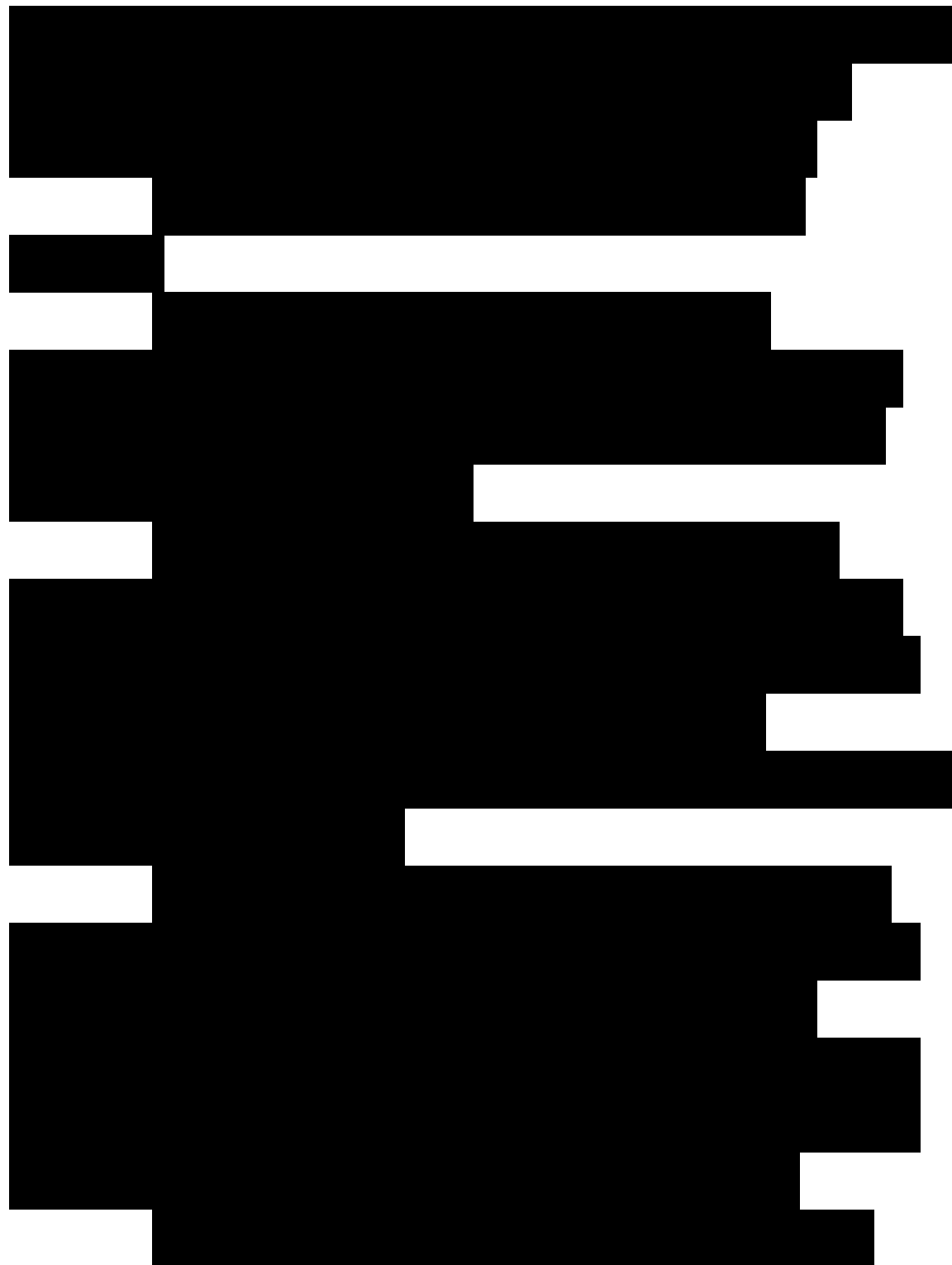
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

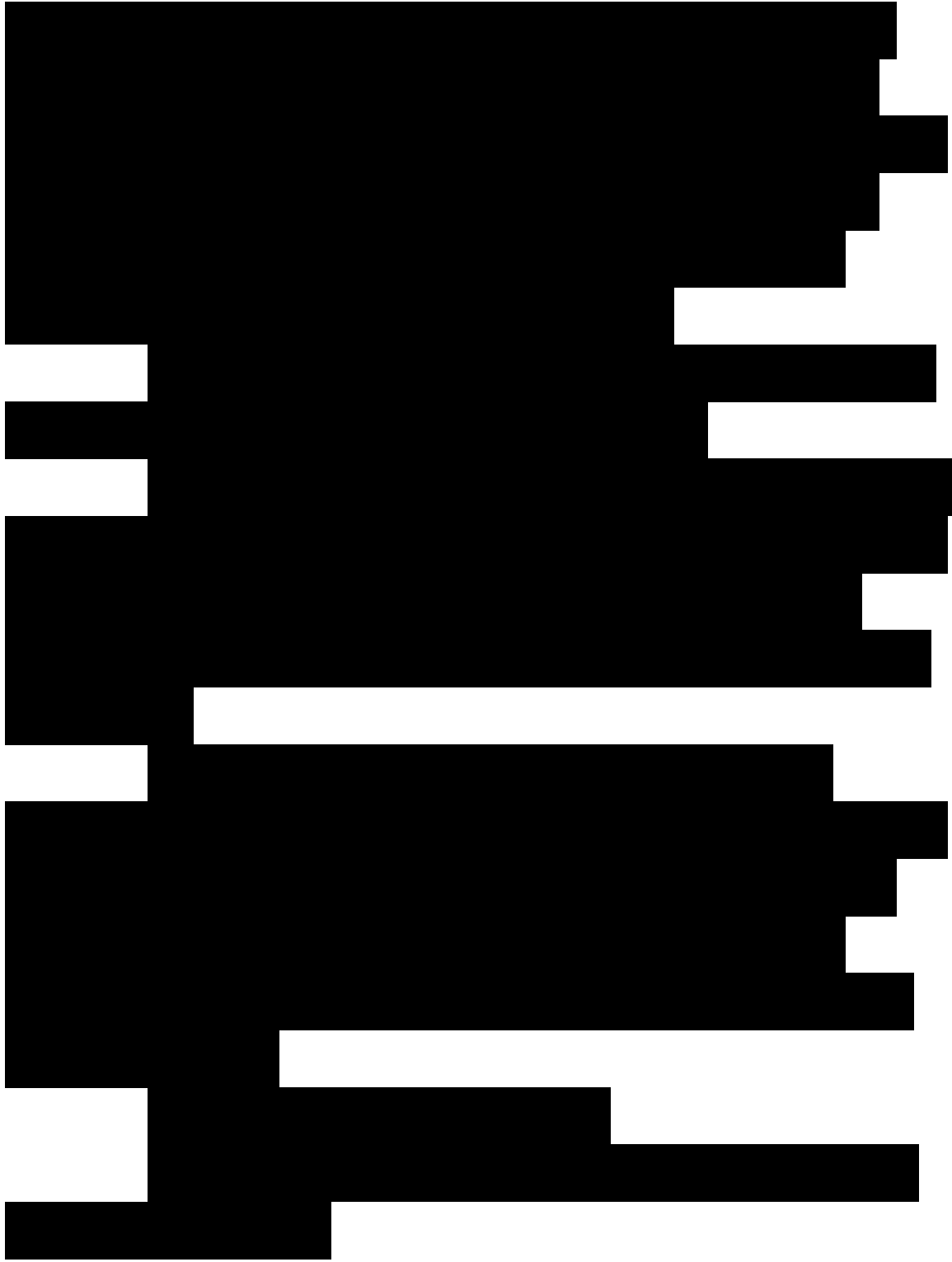
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



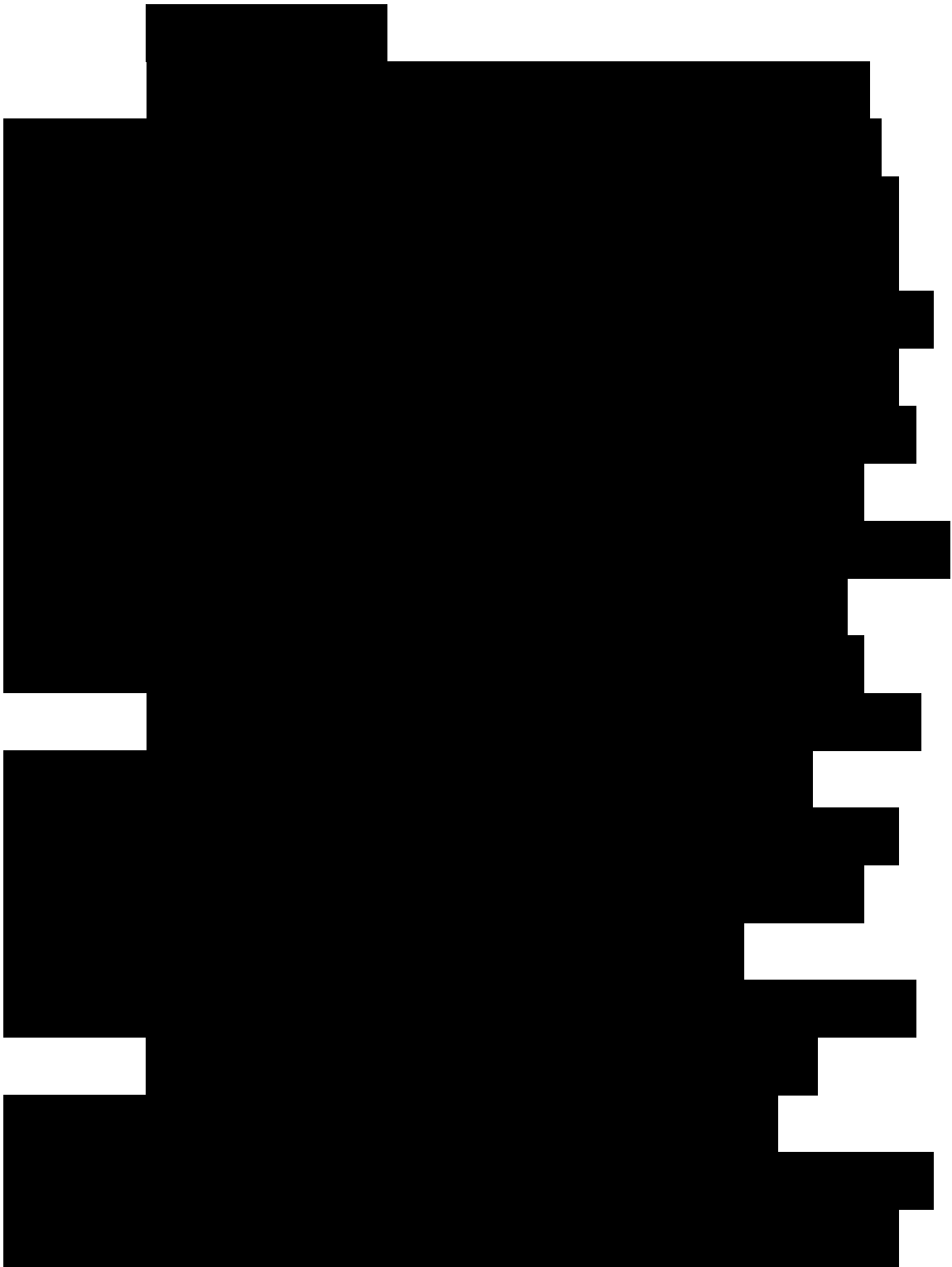
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



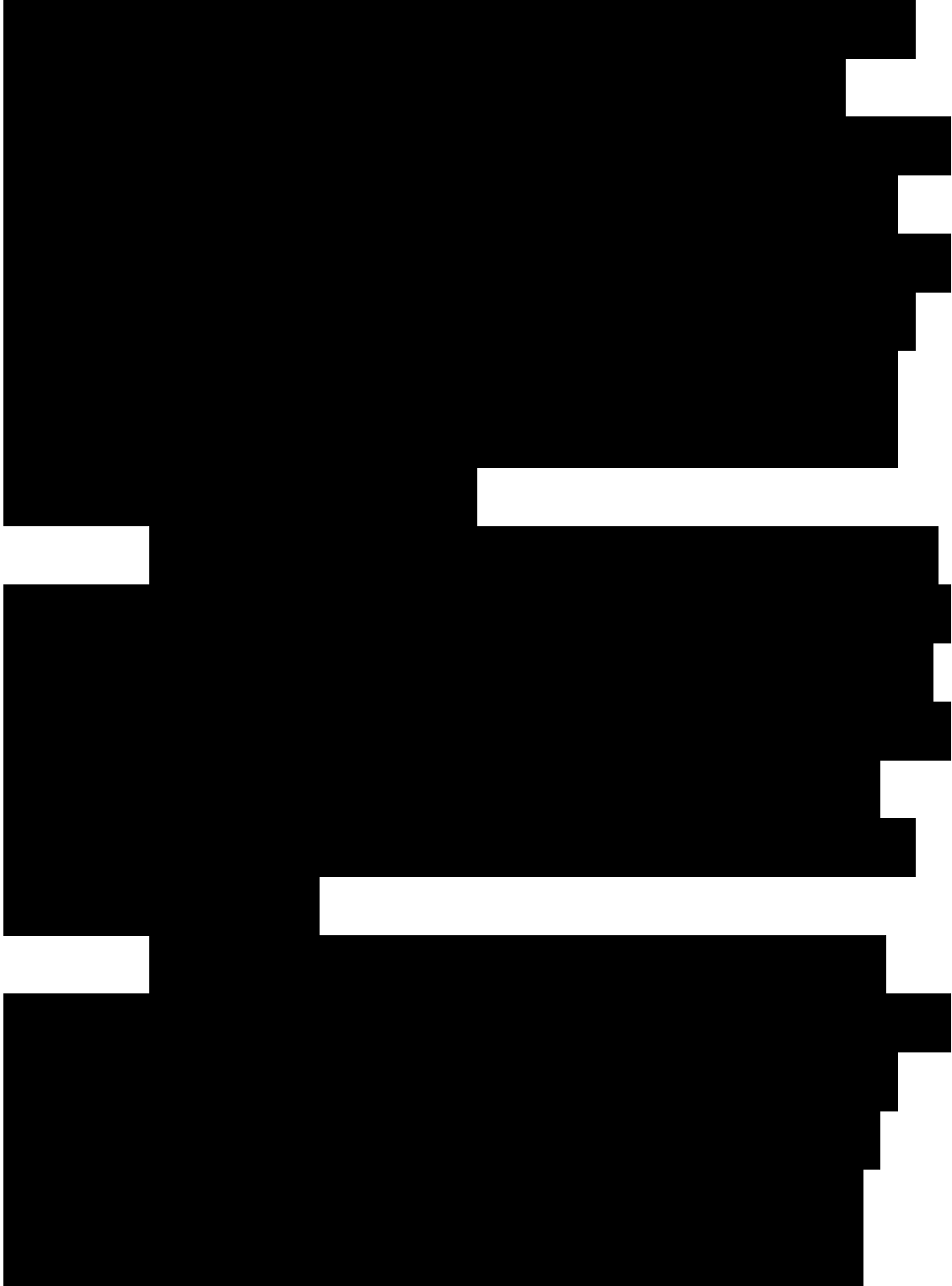
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



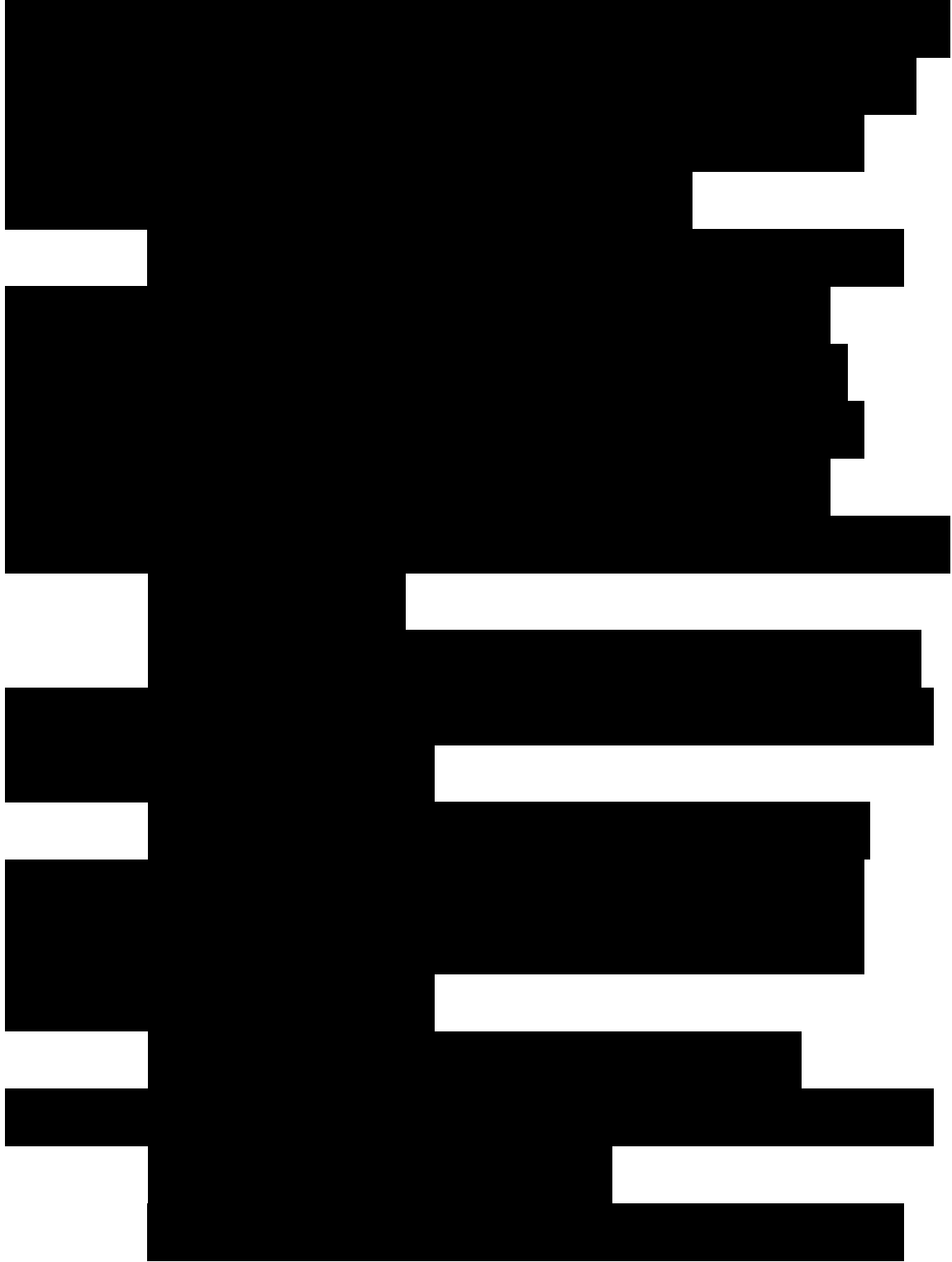
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



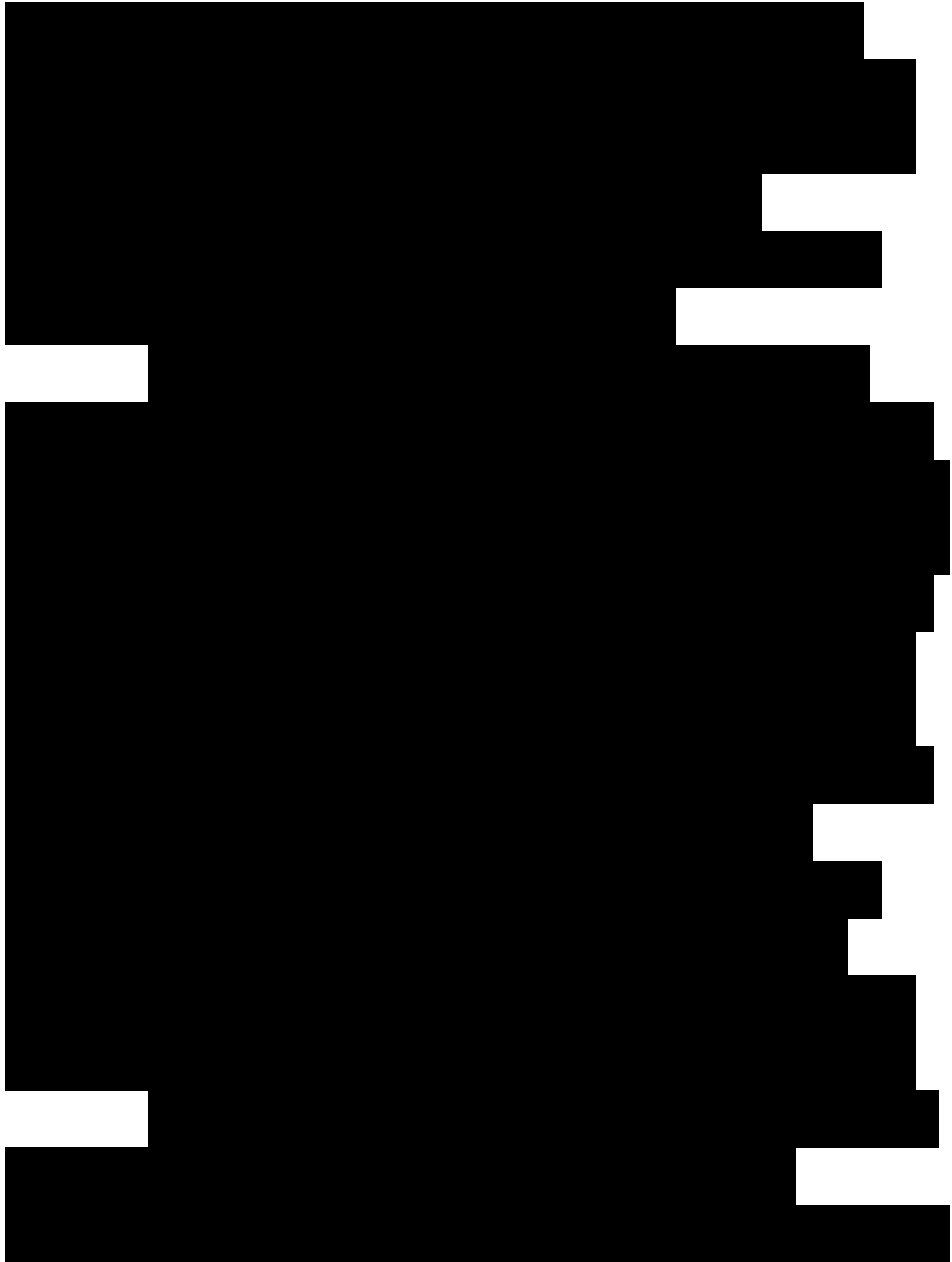
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

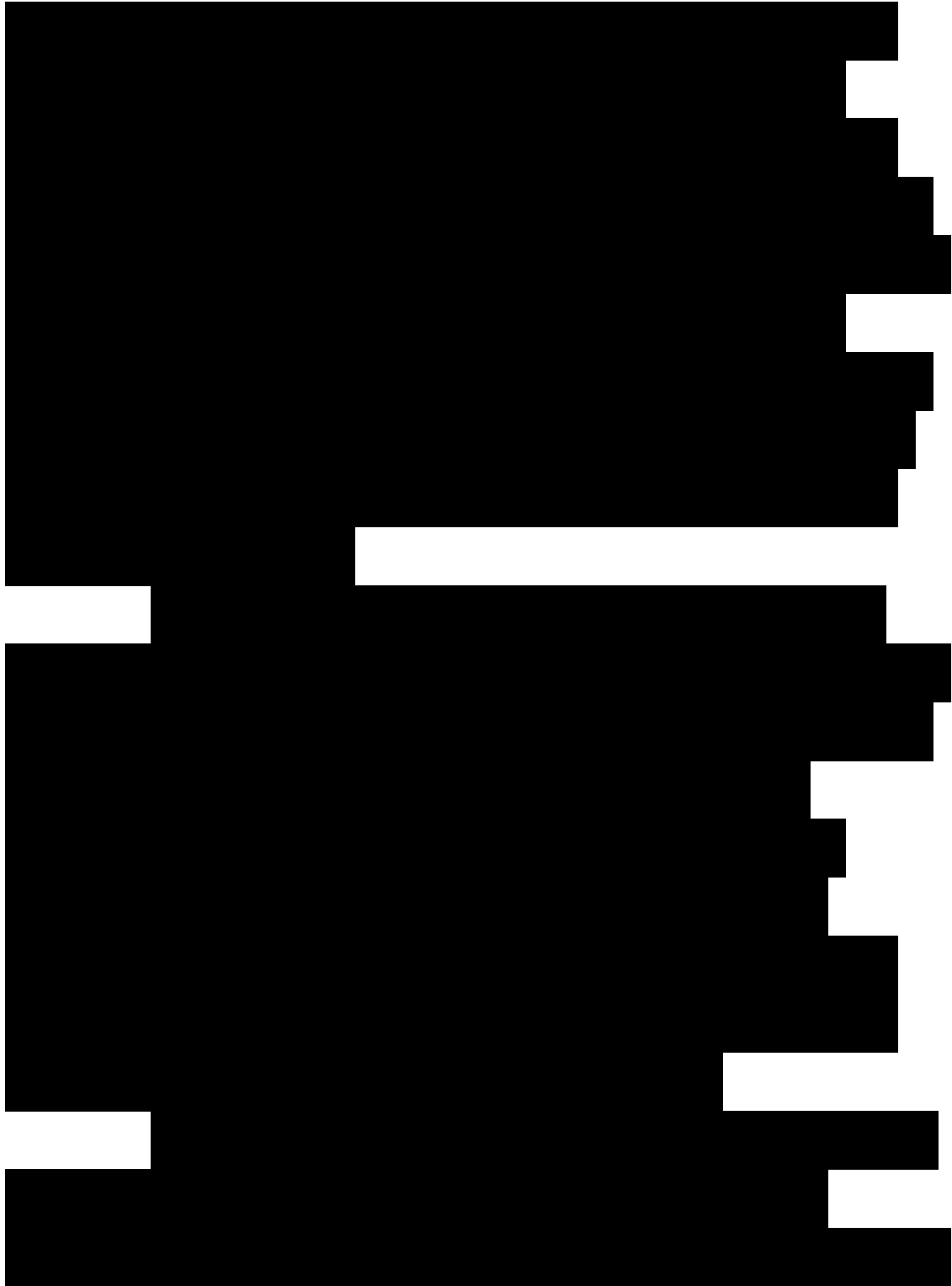
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



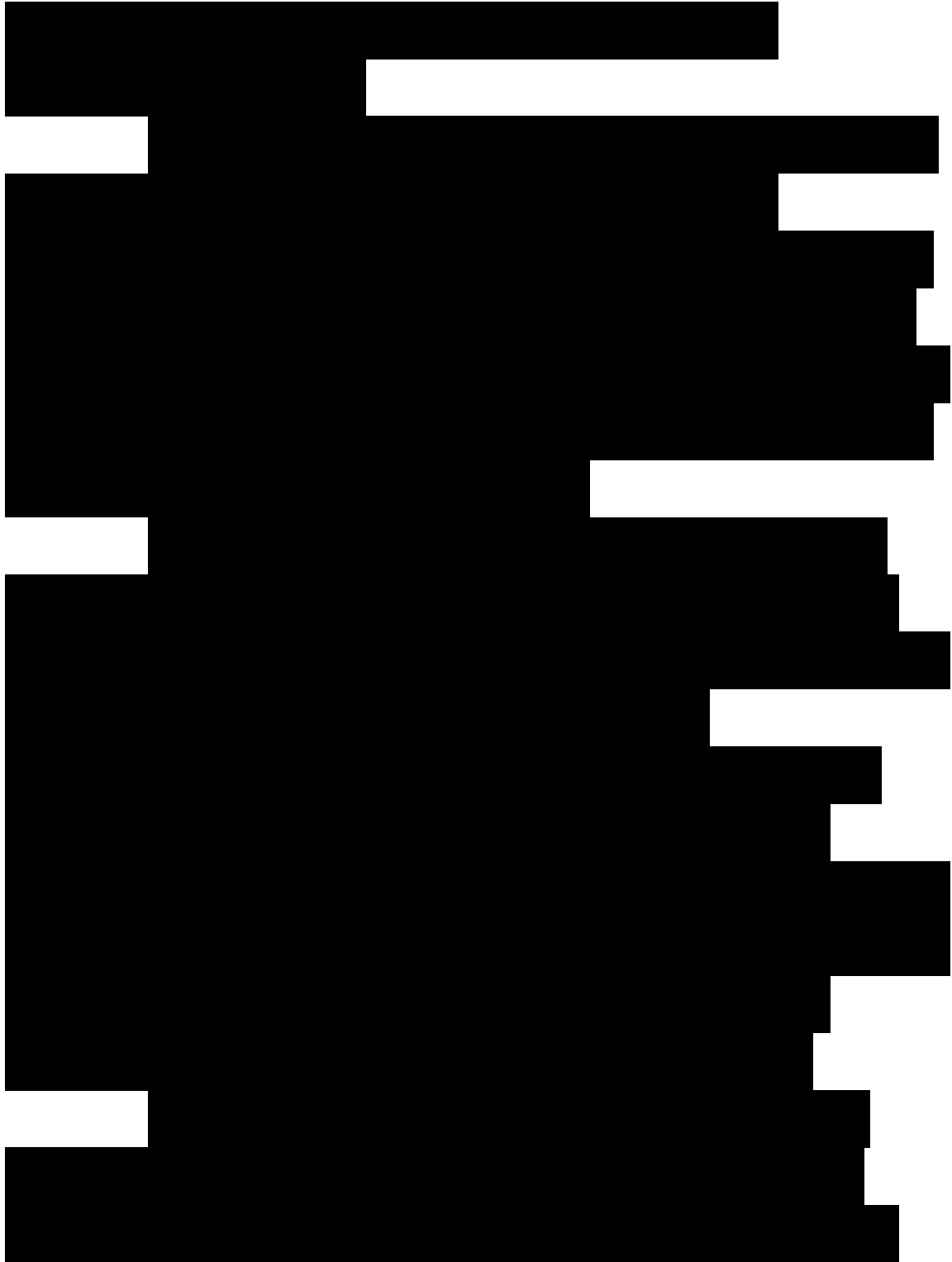
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



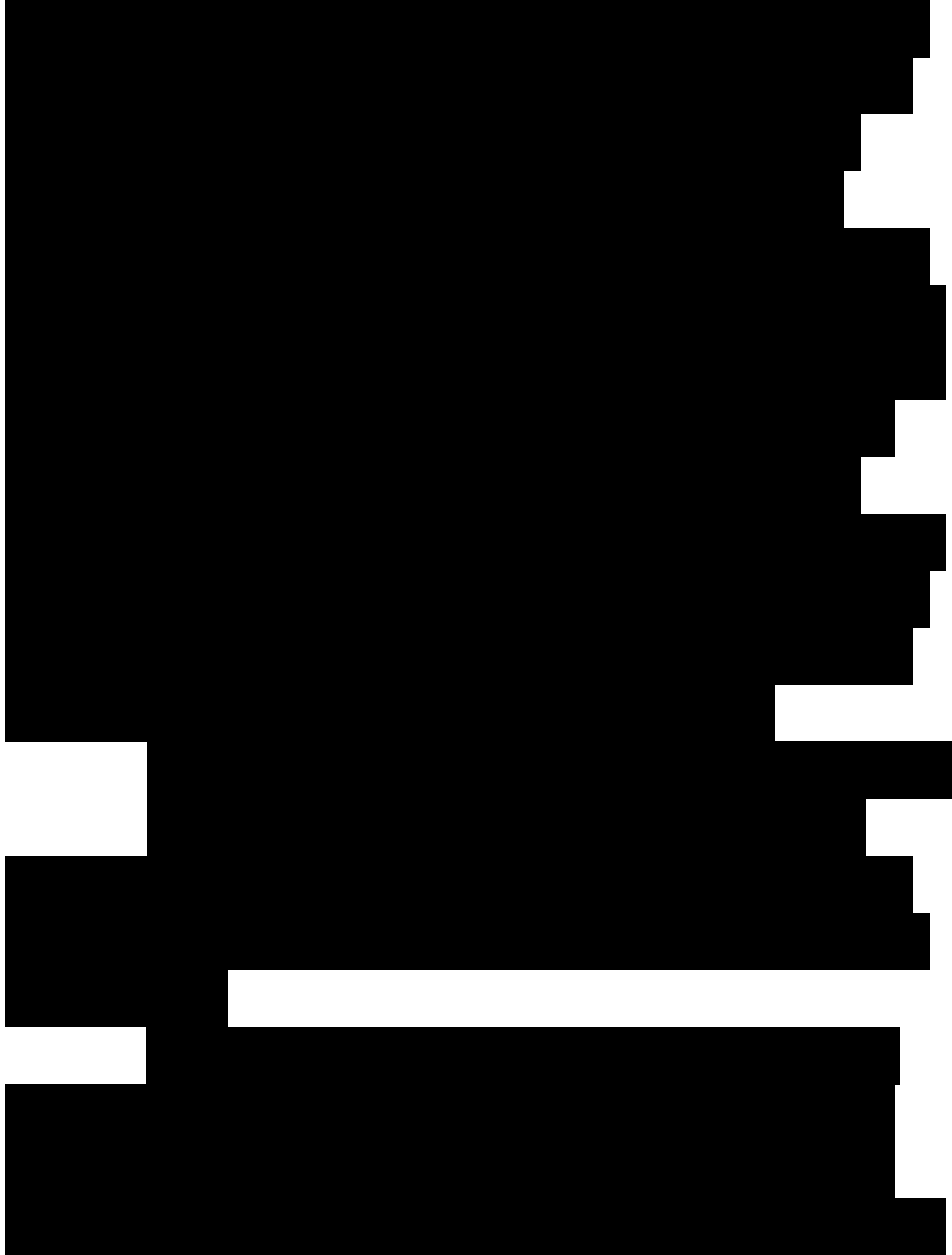
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



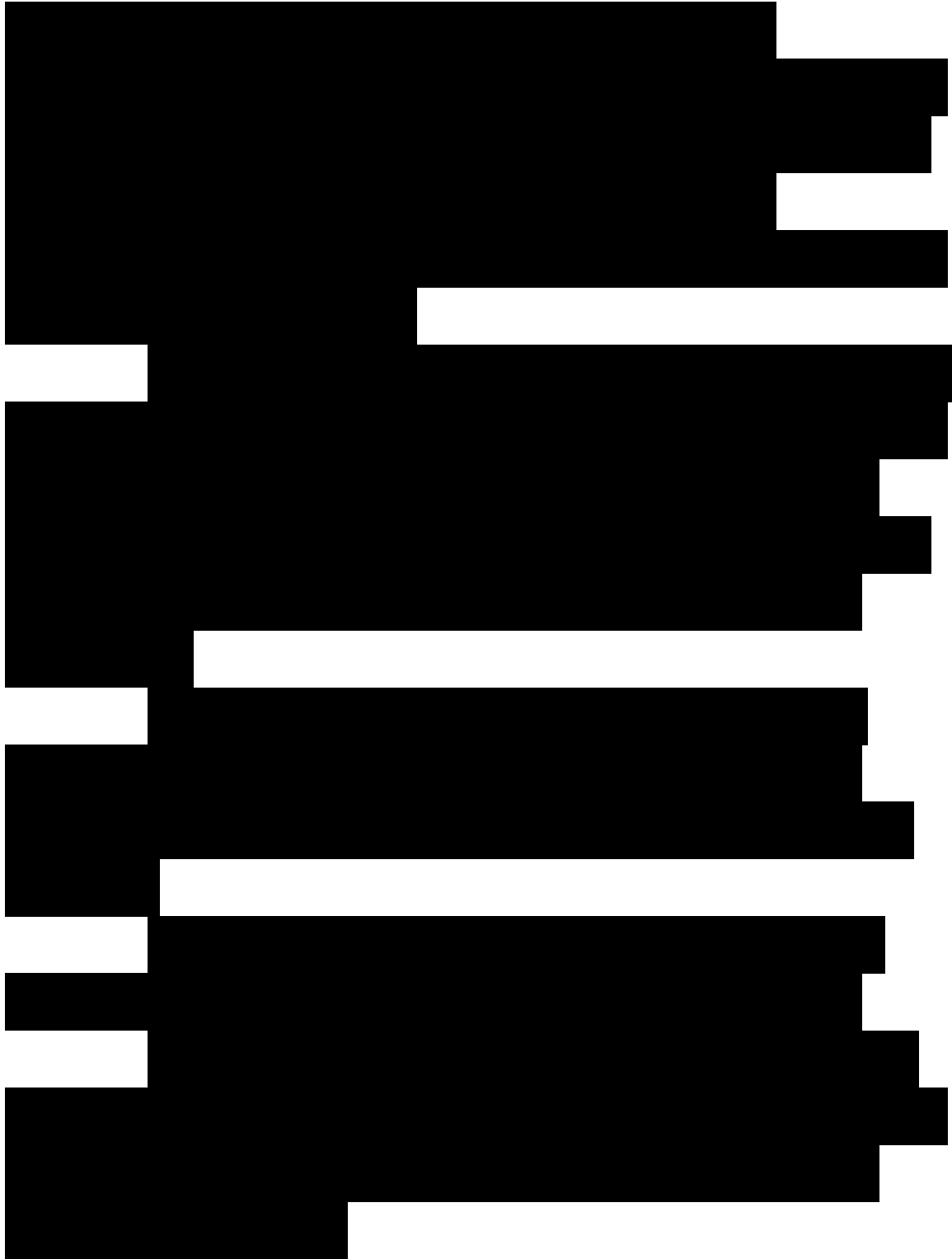
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



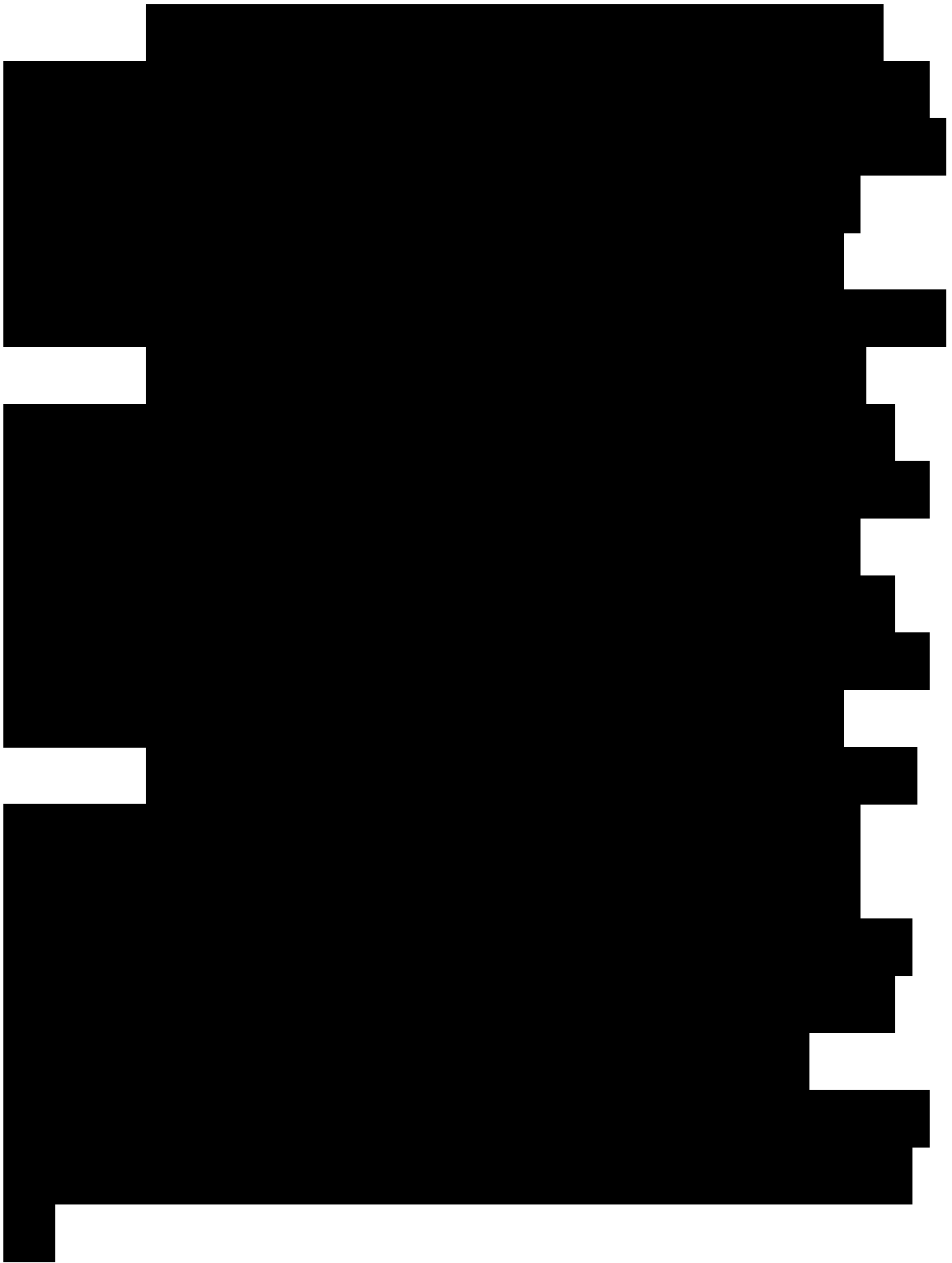
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



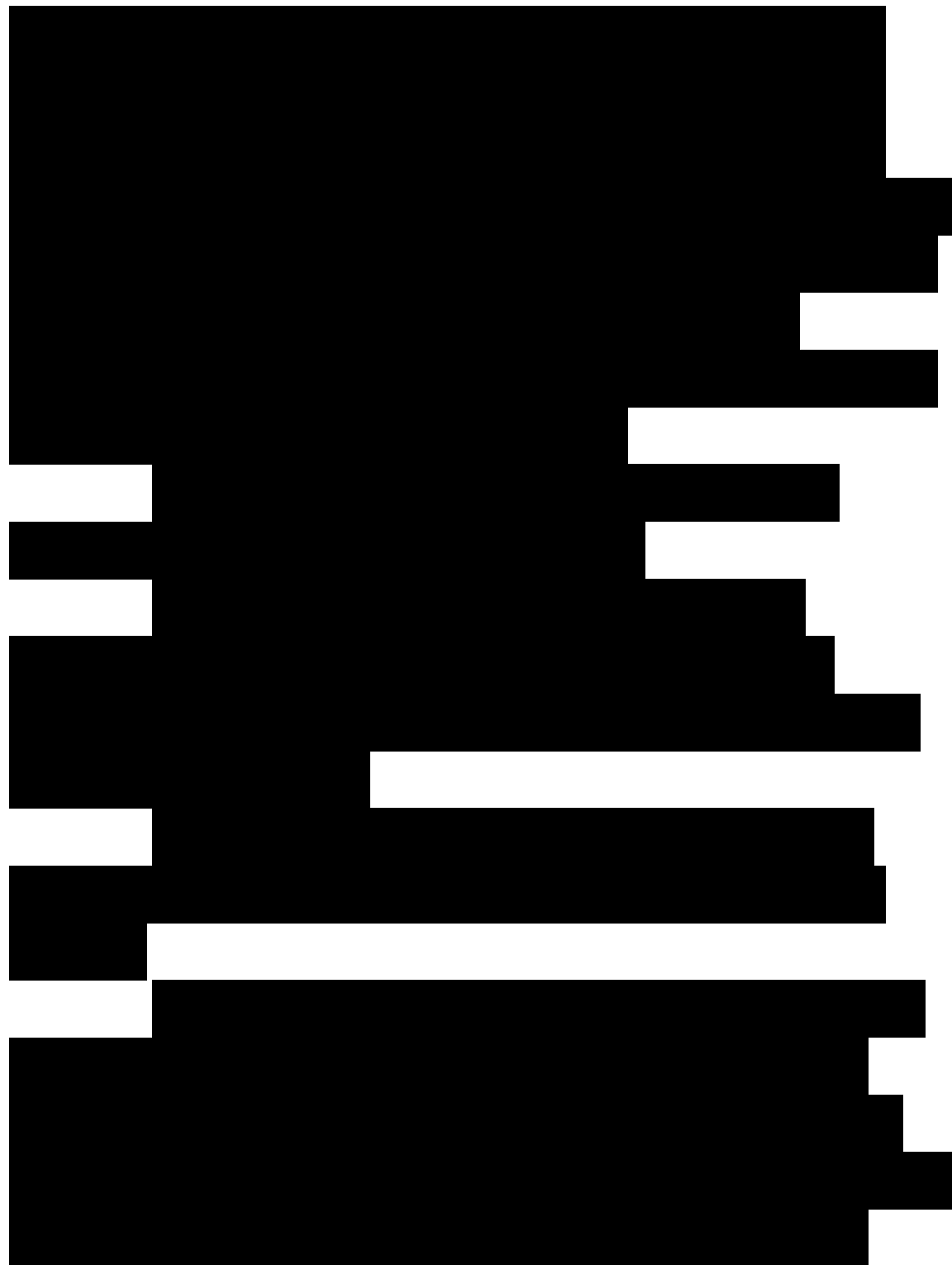
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



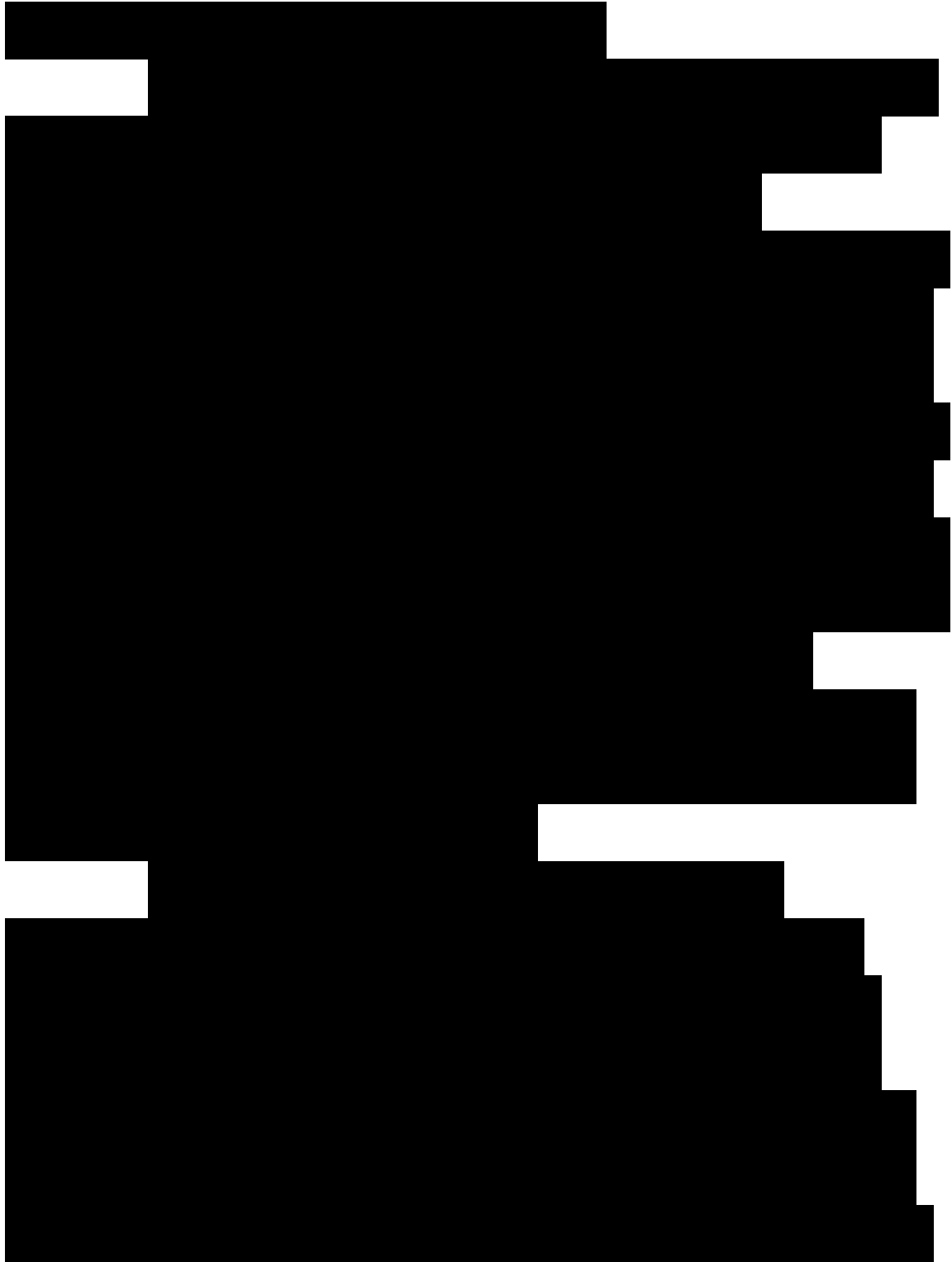
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

[REDACTED]

(End of confidential session.)

1 OPEN SESSION

2 MR. HEISKANEN: Thank you, Madam President,
3 Members of the Tribunal.

4 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

5 MR. HEISKANEN: You have two requests for
6 interim relief before you today. Let me just start by
7 making clear what the Respondent's position is on these
8 requests.

9 PRESIDENT CHENG: Do we have a copy of your
10 PowerPoint?

11 MR. HEISKANEN: Excuse me?

12 PRESIDENT CHENG: Do we have a copy of the
13 PowerPoint, please?

14 MR. HEISKANEN: Yes, it's coming.

15 PRESIDENT CHENG: Thank you.

16 (Pause.)

17 MR. HEISKANEN: So, just to summarize, the
18 exhibits that were sent by e-mail yesterday are in the
19 process of being distributed.

20 Everything is all right with the Tribunal? You
21 are comfortable? Okay.

22 So, the Respondent's position, very briefly, on

1 these two requests is that the first request is not a
2 matter of interim relief at all, and the second is
3 outside the jurisdiction of this Tribunal, so they both
4 fail on a preliminary basis. And, in any event, they
5 don't meet the substantive requirements for interim
6 relief under the ICSID Convention and the applicable
7 law.

8 Let me start by first looking at the Claimants'
9 first request. The Claimants' first request for
10 Provisional Measures is effectively an opening bid in
11 the discussions between the Parties as to how to
12 organize the process, access to and the use of
13 classified documents in this arbitration, a process and
14 discussions that are now taking place before this
15 Tribunal and through submissions to this Tribunal. The
16 Claimants did not have the patience to wait for the
17 process to be agreed. They rushed to file the
18 Application for Interim Relief as soon as the Tribunal
19 was in place, so there were never proper discussions.

20 Just to clarify the record, the allegation that
21 the Respondent did not engage in these discussions is
22 not correct. We informed the Claimants' counsel that

1 we were looking into this matter. You will hear more
2 in detail when we go through the facts what was going
3 on in the first six months of this year. After our
4 engagement, there was a detailed assessment as to
5 whether there was any other way to deal with this issue
6 except by way of a process of declassification, and the
7 conclusion was that there wasn't any.

8 In effect, the Parties' submissions that are
9 now before you and the developments over the last few
10 weeks showed that progress, substantial progress, has
11 been made in the declassification process, and there
12 are only a very limited number of issues to be decided
13 by the Tribunal in a Procedural Order.

14 There are effectively two outstanding issues.
15 One of them is to ensure that the Respondent has
16 sufficient time to go through the process of
17 declassification, and the other is to ensure that both
18 Parties will have access to these documents and not
19 only the Claimants.

20 In addition, as the Claimants' counsel
21 explained earlier this morning, before the classified
22 and confidential documents can, in fact, be made

1 available to the Parties, and the Tribunal and others
2 involved in this arbitration, the Tribunal must issue a
3 confidentiality order to regulate the use of these and
4 any other confidential documents that may become part
5 of the record in these proceedings.

6 As you also heard, the Parties are currently in
7 the process of discussing a draft Confidentiality
8 Order, and we hope to reach an agreement on it in the
9 coming days; or, if there is no agreement on all
10 points, the Parties will identify the disputed points
11 for the Tribunal to decide. There will also be an
12 amendment to the Custody Agreement or the Storage
13 Agreement at the same time, which the Parties and their
14 counsel are negotiating on behalf of RMGC and NAMR.

15 These are obviously not issues for interim
16 relief. They are procedural issues that should, in the
17 first place, be discussed and agreed between the
18 Parties; or, if the Parties are not able to agree, then
19 they must be referred to the Tribunal for decision.
20 And we understand from the communications from the
21 Tribunal earlier this week that this is what the
22 Tribunal, in fact, intends to do.

1 So, this entire process of approaching this
2 issue as a matter of Provisional Measures is not only
3 an improper way to deal with it. It has also been a
4 waste of the Tribunal's and the Parties' time and
5 money, and the Tribunal and the Respondent must be
6 entitled to an award on costs, which we are claiming.

7 It is worth recalling here that the Respondent
8 would be entitled to decline access to classified
9 documents altogether under the Canada-Romania BIT. The
10 Claimants, therefore, have no legal right, procedural
11 or otherwise--procedural or substantive--to obtain
12 these documents.

13 The fact that Romania has agreed to review the
14 classified documents for purposes of their
15 declassification and use in this arbitration does not
16 change this. Romania has not waived any of its rights
17 under the BIT. It is simply that Romania's position is
18 that these documents can be declassified for purposes
19 of arbitration. In fact, a few years ago,
20 NAMR--National Agency for Mineral Resources--sought
21 RMGC's consent for the declassification of these
22 documents but RMGC declined. This is a very strange

1 background for an application for Provisional Measures.

2 Just to clarify the legal position, let's look
3 at Article 17(7) of the Canada BIT, which you already
4 saw earlier today: "Nothing in this Agreement should
5 be construed to allow or require a Contracting Party to
6 allow access to information the disclosure of which
7 would be contrary to a Contracting Party's law
8 protecting Cabinet confidences. The Romanian version
9 uses the term "informatiilor clasificate" instead of
10 "Cabinet confidences." That is classified information.

11 Section 1 of Annex C of the BIT is even more
12 specific. It says clearly that: "The Tribunal shall
13 not require a Contracting Party to allow access to
14 information the disclosure of which would be contrary
15 to the Contracting Party's law protecting Cabinet
16 confidences."

17 Again, the Romanian version is the same,
18 "classified information." The Claimants' position
19 appears to be that the Tribunal should focus only on
20 the English version of the BIT and disregard
21 effectively the Romanian version, even if the BIT makes
22 it clear that English, Romanian and also the French

1 version are equally authentic.

2 ARBITRATOR DOUGLAS: Out of fairness to the
3 Claimant, because I cut short Claimants' counsel on
4 this point, but are we still required to make a ruling
5 on this now, given the position that we've got just in
6 terms of your formal application whether or not you're
7 expecting us to decide it?

8 MR. HEISKANEN: It is relevant to the question
9 of costs. There was no legal basis for this request in
10 the first place, so we invite the Tribunal to consider
11 whether a request that is certainly not a matter for
12 interim relief in the first place should have been made
13 in this form to this Tribunal, and whether the Tribunal
14 should consider the lack of legal basis when making a
15 decision on costs.

16 PRESIDENT CHENG: There would, however, be a
17 need for some sort of Procedural Order in any event?

18 MR. HEISKANEN: Yes, indeed. And the
19 Respondent, in its Request for Relief, is proposing how
20 that Procedural Order should look like, and we will
21 come back to that in a moment.

22 PRESIDENT CHENG: Okay.

1 MR. HEISKANEN: But the issue here is whether
2 it's prima facie clear under the BIT that this kind of
3 request could not have been made, and should not have
4 been made as a Request for Provisional Measures, but I
5 take the point, and I will keep this short.

6 What is important in the language of the BIT is
7 that in determining what is classified information,
8 reference is to be made to the Contracting Parties'
9 law, "mesahagua," (phonetic) and under Article 15(b) of
10 the Law of Classified Information of Romania,
11 classified information is defined as any information of
12 interest to national or for the national security. The
13 entire term "Cabinet confidences" is unknown in
14 Romanian law, and it was obviously introduced for the
15 purpose of Canadian law, where it is a known concept,
16 including in the French version of the BIT.

17 So, Romania, therefore, has no obligation under
18 the BIT to allow access to classified documents until
19 after they have been declassified. Romania has a fair
20 request that it be given sufficient time to declassify
21 the documents, to go through the process that is
22 required under Romanian law. There is no other way.

1 There can be no government decision because a
2 government decision cannot bypass a law, can't set
3 aside a Law on Confidential Information.

4 There is a more serious issue of the
5 consequences of not complying with the Romanian law.
6 We submit that the Tribunal cannot expose Romanian
7 Government officials or indeed the employees of RMGC or
8 any other entities who have classified these documents
9 to the strict civil and criminal sanctions that
10 Romanian law imposes for noncompliance with Law on
11 Classified Information.

12 And finally, on this first request, it is
13 important to keep in mind that the Parties are here in
14 the same situation. Neither Party can use the
15 classified documents in this arbitration in that they
16 have been classified. This is not a matter for the
17 Claimants only. Both Parties need access, and there is
18 no dispute between the Parties that these documents are
19 likely to be relevant to this arbitration. Hence the
20 Request for Relief that the Respondent is making and to
21 which, in part, the Claimants have already agreed.

22 They have agreed to hand over copies of the

1 classified documents held by RMGC to NAMR for purposes
2 of declassification. What is less clear is whether
3 they have also agreed--and this is on the next
4 slide--whether they have also agreed that Romania will
5 also get access at the same time to these documents.
6 On this issue, we therefore request an order from the
7 Tribunal that once the documents are declassified, RMGC
8 or the Claimants cause RMGC to share these documents
9 with the Respondent.

10 Now, going to the Second Request.

11 ARBITRATOR DOUGLAS: Sorry, just to interrupt,
12 you haven't had any confirmation, one way or another,
13 from Claimants' counsel on that? I mean, couldn't that
14 be something that--

15 MR. HEISKANEN: That is perhaps something to be
16 clarified by the Claimants' counsel. We understand
17 there is no firm position whether or not they agreed
18 with this. This is one of the issues that is, in fact,
19 we proposed should be covered by the amendment to the
20 Custody Agreement or the Storage Agreement. We have
21 made proposals to this effect, but we have no feedback
22 yet whether the Claimants are agreeable to this

1 amendment.

2 ARBITRATOR DOUGLAS: We would need to await
3 that process before drafting an order, presumably?

4 MR. HEISKANEN: Well, the amendment actually
5 says that RMGC will make these documents available at
6 the Tribunal's request or at the request--and/or the
7 request of counsel, so the Tribunal's order need not
8 wait until that process has been completed. If the
9 Tribunal now decides to issue the Procedural Order,
10 setting a deadline--I will come back to what the
11 appropriate deadline should be, setting a deadline for
12 RMGC to complete--NAMR to complete the process of
13 declassification during the period of two months, which
14 they have assessed is a reasonable period, count it as
15 of the date when they have received the copies of these
16 documents from RMGC.

17 After that order has been issued and the
18 Parties have agreed on the Confidentiality Order and
19 the amendment to the Storage Agreement, the legal
20 framework is ready for the Parties to move ahead with
21 the process.

22 ARBITRATOR DOUGLAS: Is it possible that the

1 amendment to the Custody Agreement and the Agreement
2 regulating the confidentiality could be in place
3 quicker than that so that the Claimant has access to
4 the documents which have been declassified as soon as
5 possible and then the process takes the course with the
6 declassification of the other 75-odd documents? Do we
7 have to wait for the latter before the former can be in
8 place?

9 MR. HEISKANEN: Either one can be completed
10 first. Either the Tribunal issues its Decision on the
11 First Request for Provisional Measures--logically, that
12 should come first because that would facilitate the
13 finalization of the Confidentiality Order and the
14 Storage Agreement or may facilitate--we don't know what
15 the Claimants' position is on the amendments that we
16 have proposed to their draft, but certainly the
17 Tribunal's decision on the first request would open up
18 the process for finalizing the remaining steps.

19 PRESIDENT CHENG: I believe you're coming to
20 that after you deal with this jurisdictional ground
21 more specifically; is that right? Is it possible to
22 jump to that now so we finish the first application?

1 MR. HEISKANEN: Going now to the Request for
2 Relief?

3 PRESIDENT CHENG: Yes, if that's all right.

4 MR. HEISKANEN: That is fine.

5 PRESIDENT CHENG: That, I believe, is on your
6 Slide 20. That's where you begin.

7 And I think there are a few questions that we
8 have asked the Claimant, and perhaps we can ask the
9 Respondent in terms of the timing just so that we focus
10 on the matter that perhaps we have to think about.

11 One of the questions I think my colleague has
12 asked and that is whether the progress or finalizing
13 the Confidentiality Agreement and the amendment to the
14 Custodian Agreement can be done at the same time whilst
15 declassifying the remaining 75 documents, and I think
16 the answer, I understand it to be yes, in principle.

17 MR. HEISKANEN: That is certainly yes.

18 PRESIDENT CHENG: And if that is doable, and if
19 that is what the Tribunal ultimately ordered--now I'm
20 trying to explore the various avenues--would it mean
21 that as soon as the Confidentiality Agreement and the
22 amendments to the Custody Agreement is made, what has

1 been declassified can then be provided to both Parties?
2 I understand, of course, you want to make sure that
3 RMGC is directed to provide the Respondent copies, so
4 therefore I say "both Parties." Would that
5 understanding be correct?

6 MR. HEISKANEN: The confidentiality order would
7 cover documents that are classified independently of
8 the declassification or that have been declassified?

9 PRESIDENT CHENG: Those that have been
10 declassified.

11 MR. HEISKANEN: Yes, it would mean that those
12 documents could then be shared, and perhaps it could be
13 done on a rolling basis by the Parties.

14 PRESIDENT CHENG: "On a rolling basis" is a
15 great term. I was short of words, but that's exactly
16 what I was thinking of in terms of ensuring a good
17 progress of this matter.

18 Then I think the only issue, really, is the
19 time which I believe in the submissions Claimants said
20 30 days and the Respondent said 60 days for the
21 declassification exercise, and I think the Claimant has
22 given their reasons for why they say 30 days is

1 adequate. I think, very specifically, I'd like to
2 hear, and I believe we'd like to hear how and why do
3 you say 60 days is required. I think those are the
4 first main questions, and then you take us to other
5 points you want to make as well.

6 MR. HEISKANEN: Thank you. Yes, first of all,
7 it's important to clarify when the 60 days starts
8 running. We heard this morning that the Claimants have
9 agreed, and we knew earlier that they have agreed, to
10 provide copies of these classified documents to NAMR
11 for declassification. This was one of the two
12 alternative Requests for Relief that we made.

13 Now, we also heard this morning that it has now
14 taken--it's now a week since this Agreement was
15 reached. We also heard that it's going to be another
16 week before these documents will actually be
17 transmitted to NAMR, which would effectively--then, if
18 the 30 days is counted from today, it would leave NAMR
19 with three weeks to declassify.

20 We don't know where the 30 days come from. It
21 seems to be something that the Claimants' counsel
22 thinks is reasonable. The Claimants think it's

1 reasonable. Sixty days or the two months comes from
2 NAMR, which is the entity that is performing the
3 declassification process. It is their estimate of how
4 long it takes, reasonably, to go through this process
5 of declassification.

6 There is an issue of how many documents
7 actually need to be declassified. We don't quite agree
8 with the numbers that the Claimants provided earlier
9 today. We're not sure where the differences come from,
10 but we will come back to that in the factual part of
11 our argument.

12 But, certainly, the Respondent's position is
13 that the 60 days should be counted from the day NAMR
14 receives copies of the classified documents from RMGC.

15 Now, the reason--and again, the question was
16 raised, why doesn't NAMR simply declassify the
17 documents that it already has? The answer is simple:
18 There are plenty of documents that relate to other
19 Projects other than the Rosia Montana Project. And
20 going through and trying to identify the archives,
21 trying to identify the documents that relate to this
22 particular Project is a much more time-consuming

1 process than if RMGC simply sends the documents that it
2 wants to have declassified to NAMR for
3 declassification.

4 Sixty days is the professional estimate of what
5 is required.

6 PRESIDENT CHENG: Then one other question I
7 asked the Claimant--I'd like also to hear your
8 response--is the documents that have been declassified,
9 that has actually taken place, how long did the process
10 take?

11 MR. HEISKANEN: This process has been going on,
12 I believe, since--

13 PRESIDENT CHENG: I think one would have to
14 talk about each document. I know it would be a rolling
15 exercise.

16 MR. HEISKANEN: This has been done in batches.
17 The declassification will take different time for
18 different types of documents, depending on who is
19 holding them.

20 ARBITRATOR DOUGLAS: The impression from afar
21 is that it's been relatively quick in the last month or
22 so, at least.

1 MR. HEISKANEN: It's been done in batches, the
2 documents that have been available. Obviously what you
3 do is declassify the documents that can be most easily
4 declassified, so it's an expedited process, but let's
5 keep in mind that the entity that is most competent and
6 in the best position to assess how long it takes to go
7 through this process is NAMR. This is the entity that
8 has been doing this before. And let's keep in mind
9 that they initially suggested six months because of the
10 number of documents. Now, because of the reduced
11 number of these documents, we have come down to two
12 months, but this is an assessment coming from a
13 professional organization.

14 PRESIDENT CHENG: Do we know the previous
15 documents that have been declassified in batches, how
16 long, roughly? What ranges are the timeframe so that,
17 from the Tribunal's angle, you will have to appreciate
18 that we, of course, take on board NAMR's estimates, but
19 we also have heard the Claimants' suggestions that it
20 could be done quickly.

21 So, one of the very good measures, I would have
22 thought, would be to see how long has it been for this

1 particular Project, for the past declassification, just
2 as a ruler, just to see what it is. Do you have some
3 information about that?

4 MR. HEISKANEN: I'm afraid we don't have that
5 kind of information. It's probably more an art than a
6 science, because it depends on what kind of documents
7 you're reviewing, how long they are, how complicated
8 they are, and the nature of the documents themselves.

9 PRESIDENT CHENG: We have taken you out of your
10 stride. You can now either go to Slide 20 or you
11 continue from where you are on the jurisdiction. Up to
12 you.

13 MR. HEISKANEN: We are happy to address your
14 questions, Madam President.

15 PRESIDENT CHENG: Thank you.

16 MR. HEISKANEN: This would be actually in the
17 part of our presentation that would be covered by my
18 colleague, so it might be actually more convenient if
19 she's answering this question.

20 So, what we have tried to do is to divide up
21 the works so that more factual presentation is handled
22 in a different part in case there are any

1 confidentiality issues, which we don't believe there
2 will be in relation to these documents.

3 If there are no questions on these issues of
4 principle, we're happy to move ahead and go back to the
5 Second Request.

6 SECRETARY MARZAL YETANO: So, just to confirm,
7 we will stop the feed now?

8 MR. HEISKANEN: No, not yet. We are still
9 covering the legal aspects. So once we get to the
10 facts, we will, I'm afraid, we have to suspend the
11 feed.

12 Now, the Second Request, the Claimants' Second
13 Request is based on the allegation that the VAT
14 Assessment issued by ANAF--and that stands for National
15 Authority for Fiscal Administration--Romania's Tax
16 Authority which is separate from the Ministry of
17 Finance, and the antifraud investigation conducted by
18 DGAF, the Antifraud Directorate of ANAF, which is a
19 separate entity within ANAF, that these investigations
20 and the assessment of retaliatory measures undertaken
21 because the Claimants filed this arbitration against
22 Romania.

1 And being retaliatory measures, they create an
2 imminent harm or the risk of an imminent harm or
3 irreparable harm to the Claimants' procedural rights in
4 this arbitration.

5 Now, the Claimants' Second Request fails on the
6 preliminary threshold issue of applicable law. The
7 request relates to tax measures which, under the Canada
8 BIT Article XII, are specifically carved out of the
9 scope of the BIT.

10 Quite bluntly, nothing in this Agreement shall
11 apply to taxation measures. The Claimants appear to
12 argue that the BIT only excludes substantive claims
13 based on taxation measures, but that it does not
14 exclude interim relief in relation to taxation
15 measures. This position is based on a misreading of
16 the Canada BIT.

17 The Canada BIT also deals specifically with
18 Provisional Measures. Article XIII(8) confirms that
19 the Tribunal may order interim relief to preserve the
20 rights of a disputing party and ensure that the
21 Tribunal's jurisdiction is made effective. It's,
22 therefore, clear that the phrase "nothing in this

1 Agreement in Article 12" also applies to interim
2 relief. That's the natural reading of these two
3 provisions. Nothing in this agreement includes the
4 provisions of the Treaty dealing with taxation, with
5 interim relief in relation to taxation measures.

6 There were some references to case law under
7 the ECT. Let's keep in mind that the ECT tax carve-out
8 provides a specific exception to mala fide, tax
9 measures, hence the claims and cases involving Yukos
10 deal with this issue. And the other point that the ECT
11 exception also applies only to substantive claims,
12 claims for expropriation. Under the ECT, one cannot
13 claim that the exception would allow interim relief
14 relating to tax measures.

15 The Claimants' position appears to be that
16 there is an exception to the tax carve-out if they can
17 show that the tax measures are clearly abusive. If
18 it's manifest from the evidence that the measures in
19 question are not really tax measures in substance but
20 measures taken for the sole purpose of disrupting or
21 interfering with this arbitration, the tax carve-out
22 does not apply. The Claimants have not come even close

1 to showing this. In fact, there is no evidence
2 whatsoever on the record to support the case that
3 either the VAT Assessment or the antifraud
4 investigation are not tax measures undertaken by the
5 Romanian State in the ordinary course of its business.

6 ARBITRATOR DOUGLAS: Could I just ask you a
7 hypothetical question. Suppose a Tax Authority seized
8 all the documents relevant to a particular arbitration
9 and the Claimant came before the Tribunal and said,
10 "Well, we can't possibly proceed in this arbitration
11 without the core documents that we need to rely upon."
12 Is that still a measure that would be covered by the
13 tax exemption?

14 I mean, one can certainly see if it's a right
15 in dispute, and it can't be a right in dispute if
16 there's a tax carve-out. But if we're talking about
17 procedural integrity or procedural-fairness-type
18 considerations, isn't there any scope for Provisional
19 Measures in relation to that type of scenario where
20 it's simply the case that Claimant couldn't proceed or
21 couldn't have access to the evidence unless the Tax
22 Authority agreed to relinquish documents that exist?

1 It does seem strange, if the Tax Authority did
2 that, there would be no possible relief, whereas if the
3 Sanitary Authority did that, then there might be.

4 MR. HEISKANEN: The question arises under the
5 Canadian BIT, I assume.

6 Our position is that this question is academic
7 in the sense that in this case there isn't even
8 evidence that would justify or establish that there is
9 any risk to the procedural integrity of the
10 arbitration. So we have not taken a view on that issue
11 because it's an issue that the Tribunal does need to
12 decide.

13 ARBITRATOR DOUGLAS: It's your case in terms of
14 things we have to decide that narrowed significantly
15 over the past 24 hours. But is it your position that
16 the antifraud investigation is also covered by the tax
17 carve-out?

18 MR. HEISKANEN: Yes, it is certainly.

19 There was an assertion made that the antifraud
20 investigation is not a tax measure. It certainly is.
21 First of all, it's an investigation conducted by the
22 Antifraud Directorate of ANAF, the Tax Authority, the

1 national Tax Authority. And, to the extent that there
2 is any evidence on record--and we will come back to
3 this why there cannot be any evidence on record of the
4 purpose of those investigations or why they are being
5 conducted.

6 We know from the Witness Statement of Mr.
7 Voinescu and the correspondence that the Claimants have
8 put on record that the investigations relate, inter
9 alia, to [REDACTED]. If antifraud
10 investigations conducted by National Tax Authority
11 Antifraud Directorate related to [REDACTED] are not
12 tax measures, what are?

13 PRESIDENT CHENG: Sorry, can I just further
14 test the proposition so that we can understand the
15 case.

16 The antifraud measures relate to [REDACTED]
17 [REDACTED] and, therefore, it would be
18 within the taxation measures, as I understand your
19 position.

20 What if the ANAF or its offices--and, of
21 course, I know it is hypothetical, but in order to
22 fully understand what you mean by "taxation measures,"

1 we'd like to know your position--went into RMGC and
2 just seized documents that are unrelated to tax, the
3 employment records, for example, and it's nothing to do
4 with tax, and it is assumed it is pure outright
5 abusive? Now, the mere fact that it was conducted by a
6 taxation authority, do you say it still falls within
7 the carve-outs?

8 MR. HEISKANEN: Yes, it does.

9 First of all, let's clarify the facts in this
10 case--

11 PRESIDENT CHENG: Sorry, let me just say I'm
12 not saying the facts in this case establish that or
13 anything of that sort for the moment. I'm just trying
14 to understand how far do you say the words "taxation
15 measures" cover.

16 MR. HEISKANEN: First of all, just to clarify
17 the assumption, [REDACTED]

18 [REDACTED]

19 [REDACTED].

20 Tax measures are not defined in the BIT. Tax
21 measures are of a different kind. They are
22 assessments, tax assessments. They are investigations

1 into [REDACTED], they are tax audits. These are all
2 tax measures to the extent that they are being
3 conducted by a Tax Authority and to the extent they
4 relate to tax avoidance or tax liabilities.

5 It would be extremely difficult to draw a line
6 between documents that are relevant and that are not
7 relevant for an investigation relating to [REDACTED].
8 Employment documents might well be relevant, [REDACTED]
9 [REDACTED].

10 PRESIDENT CHENG: Thank you.

11 MR. HEISKANEN: Now, before we move to the
12 factual issues, let me start by looking for a few
13 minutes at the procedural rules that apply to this
14 arbitration. This is a relevant issue for two reasons:
15 First of all, because interim relief/Provisional
16 Measures are a matter of procedure, a procedural device
17 designed to protect the rights of a Party during the
18 pendency of the proceedings; and, second, because the
19 Claimants in this case, are seeking to take improper
20 advantage of the differences between the two BITs under
21 which the claims have been brought.

22 The question of the effect of consolidation on

1 the procedural rules, we heard the Claimants' position
2 on this this morning. It's an overarching question in
3 the sense that it relates to both requests, the First
4 Request and the Second Request, and it is also an issue
5 of principle, in the Respondent's view, because it will
6 have an impact on how the remaining proceedings in this
7 arbitration will be organized.

8 The issue here is whether the more specific
9 provisions in the Canada BIT apply to both Claimants or
10 whether Gabriel Jersey is entitled to rely on the UK
11 BIT which is silent on certain issues, these same
12 issues that are now relevant for the Second Request in
13 particular.

14 Now, this arbitration involves consolidation of
15 proceedings relating to two claims of two different
16 Claimants under two different BITs. This is,
17 therefore, in substance, a consolidated proceeding even
18 if this Tribunal has not taken any specific decisions
19 on consolidation. The Claimants chose to submit the
20 claims in a consolidated fashion, in one Request for
21 Arbitration, and the Respondent has not objected to
22 this and has not requested de-consolidation, at least

1 for the time being. We'll come back to this.

2 Now, consolidation, like interim relief, is a
3 matter of procedure. It is a procedural mechanism.
4 This is not on record, but I suspect Black's Law
5 Dictionary doesn't count as a legal authority.
6 Consolidation is a procedural mechanism that allows two
7 or more claims to be united into one single procedure
8 concerning all Parties and all disputes. Since
9 consolidation is a procedural device, it has no impact.
10 It cannot have any impact on the jurisdiction of the
11 Tribunal and it cannot have any impact on the merits of
12 the law applicable to the merits of the Claimants'
13 claims. Whether this Tribunal has jurisdiction over
14 Gabriel Canada's claims, depends solely on the Canadian
15 BIT. Whether these claims have any merit depends
16 solely on the Canada BIT, and the same applies to
17 Gabriel Jersey's claims. Jurisdiction over these
18 claims and their merits are assessed exclusively under
19 the UK BIT. This much we all seem to agree.

20 But consolidation, therefore, only applies to
21 procedure, not to Jurisdiction Decisions or substantive
22 decisions. Consolidation means that the claims are

1 processed together in the same manner under the same
2 procedural rules. And consolidation, as a procedural
3 mechanism, can be available only if the two BITs allow
4 for arbitration under the same procedural rules. And
5 if there are no additional rules, procedural rules, in
6 the two BITs, that would be in any way conflicting or
7 incompatible as to procedure.

8 We have no issue here about the Rules of
9 Procedure that apply. Both claims have been submitted
10 under the ICSID Convention, under the ICSID Arbitration
11 Rules. The question, therefore, is whether there are
12 Rules in the two BITs' Procedural Rules that are, in
13 any way, incompatible.

14 Neither Party has argued there are incompatible
15 or conflicting Procedural Rules in the two BITs, and,
16 in Respondent's view, they are not; there are no
17 incompatible or conflicting rules, and this is the very
18 reason why the Respondent has, so far, not objected to
19 the consolidated submission of the Claimants' claims.

20 However, as we heard again this morning,
21 Claimants argue that Gabriel Jersey is entitled to
22 interim relief, a procedural relief, in relation to tax

1 measures under the UK BIT because this Treaty is silent
2 on taxation. This is the argument apparently even if
3 the Tribunal were to decide that the tax carve-out in
4 the Canada BIT would preclude any requests for interim
5 relief by Gabriel Canada.

6 Now, this is not possible in a consolidated
7 arbitration. The Tribunal cannot apply different
8 procedural rules and create different procedural rights
9 for the two Parties. The fact that the UK BIT is
10 silent on these issues, such as interim relief and tax
11 measures and what kind of interim relief can be
12 granted, is the very reason why the proceedings can be
13 consolidated because it's silent. The two BITs are not
14 incompatible.

15 Now, this Tribunal is not the first tribunal
16 that has dealt with this issue and that has faced this
17 issue. The Claimants have looked at the EuroGas
18 Decision this morning, and it's worth looking at it
19 again because there was a very misleading presentation
20 of what that case was about.

21 In that case, very quickly, the two Claimants,
22 EuroGas and Belmont, brought their claims under two

1 different BITs: Canada-Slovakia BIT and U.S.-Slovakia
2 BIT. One of the Claimants--regardless, the subject
3 matter of the request doesn't matter. One of the
4 Claimants, EuroGas, argued that Canadian-Slovakia BIT
5 did not apply to it because its claims were based on
6 the other Treaty.

7 The Tribunal was not impressed by this
8 argument, and they said, and I quote: "We are not
9 convinced by Respondent's argument that if EuroGas did
10 not wish to be impacted by the Canada BIT, then it
11 should not have filed this arbitration with Belmont as
12 jointly as Claimants."

13 The Tribunal then decided in a lengthy
14 Procedural Order--and it covered a number of items very
15 similar to the items that are covered by the specific
16 provisions of the Canada BIT in this arbitration, but
17 which are not included in the UK BIT. The Tribunal
18 decided that the provisions, these more restrictive
19 provisions, in the Canada BIT regarding access to
20 hearings and documents, classified documents and so on,
21 applied in the arbitration, even if they were only
22 provided for in the Canada-Slovakia BIT but not in the

1 U.S.-Slovakia BIT.

2 This is exactly the same situation as we have
3 here. One could simply substitute the names of the
4 Claimants in the EuroGas Tribunal's conclusion. This
5 Tribunal should also conclude and not be convinced--or
6 be convinced by Romania's argument that, if Gabriel
7 Jersey did not wish to be impacted by the Canada BIT,
8 then it should not have filed this arbitration with
9 Gabriel Canada as Claimants. That is the relevant
10 holding of the EuroGas Tribunal.

11 The Claimants simply cannot pick and choose;
12 Gabriel Canada cannot get a free ride on the back of
13 the UK BIT, an interim relief that it would get for
14 free effectively if it's granted for Gabriel Jersey.

15 Now, if the Tribunal decides, contrary to the
16 Respondent's position, that Gabriel Jersey is entitled
17 to rely on the silence of the UK BIT on tax measures,
18 then the Respondent must reserve its right to request a
19 de-consolidation of these proceedings.

20 I have spent some time on this because this is
21 a major issue of principle for the Respondent. It will
22 have an impact, not only on this issue; it will have an

1 impact on how the remaining proceedings in this
2 arbitration will be organized and conducted.

3 Now, Ms. de Germiny will now continue here and
4 will look at in more detail the factual side of the
5 Claimants' First Request for Provisional Measures. Mr.
6 Guibert will then address the Second Request on the
7 facts, and I'm afraid at that point we have to suspend
8 the feed, and I'll come back at the end to address in
9 more detail the legal argument on the Claimants' Second
10 Request because that is effectively--particularly the
11 issue relating to the antifraud investigation--it's the
12 only live issue now before this Tribunal in terms of
13 interim relief. Thank you.

14 PRESIDENT CHENG: So far as the First Request
15 is concerned, you do not need it to be--to stop the
16 broadcasting?

17 MR. HEISKANEN: No, we don't.

18 PRESIDENT CHENG: Okay. Thank you.

19 MS. de GERMINY: Madam President and Members of
20 the Tribunal, since I know this presentation is all
21 that separates us from lunch, I think I can say that I
22 should take just about 20 minutes to go through the

1 points, come back to some points we've already
2 discussed, and maybe clarify a few additional items.

3 As you will have understood, the Parties do
4 essentially agree on what remains to be done in terms
5 of declassification. I would like, though, to start by
6 first coming back to what has happened to date in terms
7 of declassification, including the steps taken by
8 Romania since our last written submissions, and come to
9 where we really stand precisely in terms of the
10 documents that are still outstanding.

11 Second, I will go through very briefly why the
12 Claimants' Request for Provisional Measures is
13 improper, in our submission. This part will be brief,
14 given the Tribunal's recent indications that it is
15 inclined to deny that request and to, indeed, issue a
16 Procedural Order.

17 Third, and, finally, I will go through our
18 Request for Relief and, thus, what we respectfully
19 submit should be contained in this Procedural Order.

20 So, the Claimants seek access to what they call
21 the "confidential and classified documents," and I do
22 want to come back to, really, what are the documents

1 that are at issue because I think this is important.

2 On the screen is the definition that they
3 provide of the documents that they seek to access and
4 use.

5 One might also say, though, that they're
6 seeking access to the confidential and/or classified
7 documents. Since they seek access to documents in
8 RMGC's custody, which benefit from one or more levels
9 of protection--and I will explain what I mean.

10 First, they seek access to the documents listed
11 in this Registry, the RMGC Registry, which they have
12 submitted twice, as was explained again this morning as
13 Exhibit C-20. They provided an updated version
14 following their First Request for Provisional Measures,
15 and they also submitted a color-coded version as
16 Exhibit C-80 with their last submission. So, that is
17 the list of classified documents.

18 Those documents were classified in accordance
19 with Romanian laws: The 2002 Romanian Classified
20 Information Law and the National Standards for the
21 Protection of Classified Information. Those laws are
22 based on the NATO criteria and categories for

1 classified documents.

2 As Ms. Cohen Smutny explained this morning, and
3 as we have explained in our submissions, the original
4 version of Exhibit C-80 comprised 785 documents. In
5 July, one of the things that the NAMR did was to write
6 to RMGC and to meet with RMGC to check whether that
7 really was the most up-to-date version of that list,
8 and RMGC came back with this much-reduced list of 491
9 documents.

10 The current status right now is that the vast
11 majority of those documents have been declassified or
12 are in the process of being declassified, but I will
13 come back to the exact figures in a moment.

14 Now, all of the documents in the Registry are
15 classified. Some of them are also confidential,
16 confidential by virtue of the terms of the Licenses.
17 Although the Licenses are not on the record, we
18 understand that the Licenses should contain
19 confidentiality provisions that come from the Romanian
20 Mining Law, and these documents are also confidential
21 by virtue of the Custody Contract itself.

22 Finally, as the Claimants confirmed in their

1 last submission, they also seek access to other
2 unidentified what we would call "purely confidential
3 documents" held by RMGC, so documents that are in
4 confidential--that are not classified and, therefore,
5 are not in this list that you have as Exhibit C-20.
6 The Claimants have only referred to these documents,
7 sort of in passing, in their submissions. We don't
8 know exactly what the documents are. We do not have an
9 objection to the Claimants' accessing and using these
10 purely confidential documents held by RMGC, as long as
11 the Respondent also obtains those documents
12 simultaneously and as long as those documents are used
13 in accordance with this Confidentiality Order that
14 we're currently discussing.

15 ARBITRATOR DOUGLAS: Could I just ask a
16 question, then. If that's possible in relation to
17 confidential documents that weren't previously
18 classified, then why do we need changes to the Custody
19 Agreement if declassified documents--which are now just
20 simply confidential--need to be used by the Parties?
21 In other words, if they've got a right now to use
22 confidential documents, the declassified documents

1 become simply confidential documents.

2 So, why do certain additional procedures need
3 to be put in place for the use of those?

4 MS. de GERMINY: The confidential documents,
5 indeed, all that needs to be done for purely
6 confidential documents is to agree to the terms of this
7 Confidentiality Order. Once that is done, these purely
8 confidential documents, they could, indeed, access
9 them, and we would want access at the same time.

10 ARBITRATOR DOUGLAS: We don't need to worry
11 about the Custody Agreement then?

12 I mean, to be frank, this is something--there
13 seems to be a bit of a difference between the Parties,
14 at least in their written cases, as to whether or not
15 these amendments to the Custody Agreement are actually
16 necessary for each Party to have access to purely
17 confidential documents.

18 MS. de GERMINY: I think the two items have to
19 come together; the RMGC and NAMR will only allow the
20 release of these documents to third parties in
21 accordance with the Confidentiality Order.

22 So, there are two things again: There is the

1 amendments to the Storage Contract, but then there will
2 be the need to assure RMGC and NAMR with the
3 Confidentiality Order as to how these documents will be
4 used. I don't know if that--

5 (Off microphone.)

6 Right. The two go hand in hand. The
7 amendments to the Storage Contract will allow NAMR and
8 RMGC to release these documents for this arbitration
9 since there will be the Confidentiality Order in place.

10 ARBITRATOR DOUGLAS: When you say "release
11 these documents," you're talking about the full
12 spectrum of confidential documents, not just the
13 declassified documents?

14 MS. de GERMINY: Everything that's
15 confidential, yeah, yeah.

16 So, I would like to come back, then, at this
17 stage to simply what happened since the Request for
18 Arbitration and what Romania has done and how we've
19 gotten to where we are today. The Claimants have
20 argued that the Respondent has been dragging its feet
21 with respect to this issue of access to documents.
22 And, with all due respect, we simply do not accept that

1 position.

2 The Claimants filed their Request for
3 Arbitration in July 2015. At the time they did flag
4 the issue of what they called the "confidentiality
5 secrecy regime" covering documents at issue in the
6 case. At the time, although they did not give specific
7 information as to what documents were at issue,
8 Romania, nevertheless, started to actively study how to
9 address this issue.

10 We have put up on the next two slides the
11 meetings that Romania has held to discuss this issue.
12 And as we've heard--and Dr. Heiskanen came back to this
13 a moment ago--the Claimants again said this morning
14 that there were many options and that Romania could
15 have issued a government decision. That is something
16 that was considered, along with many options. All
17 options were considered and thought through, and that
18 was not one of the options since, as we've explained,
19 it is not possible to issue a government decision sort
20 of overriding these classified information laws.

21 Now, as I said, with the Claimants' First
22 Request for Provisional Measures of 16 June, that's

1 actually when we got the Registry, the Registry--and we
2 understood that there were 785 documents and that that
3 was the aim of their request. It's shortly thereafter,
4 then, that NAMR met with RMGC that it actually got the
5 clarification regarding the number of documents in the
6 Registry, which was, in fact, 491 documents.

7 Now, as we've explained in our pleadings, in
8 order to declassify a document, a person from the
9 entity that classified that document has to physically
10 review it. So that means that NAMR can declassify
11 documents that someone from NAMR classified.
12 Conversely, NAMR cannot declassify documents that a
13 third party classified. So, there are several
14 entities, as the Tribunal will have understood, that
15 are working on these issues.

16 If you look at the Registry, you will see that
17 the main entities that classify documents are NAMR
18 itself, of course, RMGC, as well as Minvest, but also
19 some private companies such as Cepromin and Ipromin.

20 ARBITRATOR GRIGERA NAÓN: Sorry, I have another
21 question.

22 Some of these documents, according to what I

1 understood from reading your papers--sorry.

2 Some of these documents, as I understood from
3 reviewing your papers, have been classified by private
4 entities.

5 Now, how can a private entity classify a
6 document that's State-secret? How can--quite frankly,
7 I don't understand that.

8 MS. de GERMANY: Well, first of all, just a
9 slight clarification. So, these do appear to be
10 work-secret documents versus State-secret, but it does
11 appear that, because of the nature of the documents,
12 these are documents that are part of what the Romanian
13 Mining Law calls the National Geological Fund and the
14 National Fund for Mineral Resources, based on the
15 nature of the documents and the orders issued in the
16 past by NAMR. Actually, these third parties do need to
17 classify documents via the orders previously issued by
18 NAMR.

19 So, technically, we are in a situation where we
20 have third parties that have prepared and issued
21 documents that directly relate to Mineral Resources and
22 mining activities and that are de facto classified

1 according to the laws in place.

2 ARBITRATOR GRIGERA NAÓN: But, if I understand
3 what you have just said, NAMR couldn't override that
4 classification. However, I read some other part of
5 your or the other Party's papers--and it seems that, in
6 fact, NAMR can override those classifications. So, I
7 must confess, I'm very confused. Maybe it's something
8 I don't understand or the law is strange.

9 MS. de GERMINY: NAMR can issue, and has
10 issued, directions--some of which even this week--to
11 third parties instructing them to declassify these
12 documents based on its own declassification now of the
13 two main documents at issue, which are the Rosia
14 Montana License and the Bucium License. In principle,
15 these third parties should, therefore, declassify the
16 documents. We see no reason why they would not. In
17 theory, if they were to indicate that they would not
18 declassify documents, then there could be applications
19 made to challenge that resistance.

20 PRESIDENT CHENG: So, the power of
21 classification by these third parties really emanate
22 from NAMR, and, therefore, NAMR can direct them to

1 declassify?

2 MS. de GERMANY: Exactly. It comes from NAMR
3 and by the very nature of the documents at issue, as I
4 say, which pertain--you will see references in these
5 orders to documents that are part of the National
6 Geological Fund and the National Fund for Mineral
7 Resources and Reserves. That's actually a reference to
8 the type of documents that are at issue and that are
9 essentially Mineral Reserves documents and mining
10 documents and that, therefore, are classified.

11 Okay, just to come back to where we were as at
12 our last written submissions in August, August 31,
13 essentially, already by that point, NAMR had
14 declassified the Rosia Montana License. It had issued
15 directions to other entities to declassify documents,
16 including RMGC, which had declassified a number of
17 documents. Minvest and Cepromin had also declassified
18 documents.

19 There has been further progress made, indeed,
20 since our last written submission. As of the Parties'
21 last submissions, of the 490 documents--and, actually,
22 here just one clarification. It seems that one of the

1 491 documents has actually been struck through because
2 it pertains to a different License, so actually that's
3 why this slide refers to 490 documents.

4 So, of the 490 documents in the RMGC Registry,
5 274 had been declassified as of August 31. We've
6 provided the breakdown there with the references to the
7 exhibits. This shows, indeed, the documents
8 declassified by NAMR, which was essentially the Rosia
9 Montana License and certain addenda, and 216 documents
10 were then outstanding.

11 Now, since our last submission, NAMR has taken
12 further steps. This week, it issued two orders. These
13 orders are in the papers you received yesterday. This
14 is Order 223 and 224. By Order 223, NAMR declassified
15 the Bucium License and its addenda. This is
16 significant because that permits the declassification
17 of all the documents relating to the Bucium License
18 which could not, then, be declassified until that
19 License was first declassified.

20 Separately, by Order 224, NAMR declassified 29
21 documents, 29 further documents, relating to both
22 Licenses. NAMR then communicated these orders to the

1 various third parties, saying "Please, again, take note
2 of these orders and declassify the documents that you
3 have in the Registry that relate to these Licenses,"
4 and it did ask them to revert quickly and actually
5 within 30 days.

6 Those are the other exhibits that we present
7 that we filed yesterday, so you have the two orders and
8 the correspondence by which NAMR sent these
9 instructions to third parties.

10 Where does this bring us? Of the 216 documents
11 that were outstanding at the time of the Parties' last
12 submissions, 37 have now been declassified. Those are
13 the 29 documents from Order 224 and the 8 documents
14 from Order 223, so 37 documents. That means 179 are
15 outstanding, and this is where clearly there is some
16 differences in the numbers and how we come to our
17 numbers, but I think when the Claimants have provided
18 this lower number, that's, I think, because they're
19 considering documents where an instruction has been
20 given but that has not actually been declassified, but
21 our position is there are 179 documents that have not
22 been declassified yet. Instructions have been given,

1 but they have not yet been declassified.

2 And more specifically, 13 of those 179
3 documents are maps where the Claimants have said,
4 "Actually we don't need these right now." 121, then,
5 are these documents issued by third parties, and then
6 45 are actually NAMR documents.

7 PRESIDENT CHENG: When you say 45 documents
8 were issued by NAMR, you mean that it would be NAMR who
9 could declassify?

10 MS. de GERMANY: Exactly.

11 PRESIDENT CHENG: Instead of issuing
12 instructions?

13 MS. de GERMANY: Exactly.

14 PRESIDENT CHENG: So, on your analysis, on your
15 figures, there are only 45, plus 13 maps, because the
16 others you have already directed that they be
17 declassified?

18 MS. de GERMANY: Correct.

19 PRESIDENT CHENG: And these third parties ought
20 to comply?

21 MS. de GERMANY: They ought to comply. We've
22 asked them to comply within 30 days, but those

1 documents are outstanding. We don't know--

2 PRESIDENT CHENG: I see.

3 MS. de GERMINY: --yet when they will be
4 declassified, but that is correct. 45 documents are
5 NAMR documents.

6 PRESIDENT CHENG: I understand. Thank you.

7 MS. de GERMINY: Okay.

8 ARBITRATOR DOUGLAS: Just to clarify as well,
9 these are the photocopies that need to be provided?

10 MS. de GERMINY: Exactly.

11 ARBITRATOR DOUGLAS: So we're talking about 45
12 documents?

13 MS. de GERMINY: Yes, we're talking about 45
14 documents. That has been one of the issues, as the
15 Tribunal will have understood, is how NAMR could see
16 these documents. NAMR does have original counterparts
17 and copies of some of these documents.

18 PRESIDENT CHENG: But the Claimants said that
19 they would be able to provide copies within a week. I
20 asked specifically.

21 MS. de GERMINY: Yes.

22 PRESIDENT CHENG: So, whatever those 45

1 documents, we are not going to get into here.

2 MS. de GERMINY: That's fine. We agree.

3 Just for the record, one of the other letters
4 we submitted yesterday--and that's why I was planning
5 to come back to this--is simply that RMGC agreed to
6 provide the copies a week ago. NAMR accepted that
7 agreement. And, actually, two days ago, RMGC sent a
8 letter to NAMR saying, "Actually we would rather wait
9 to see what Tribunal says before we give you the
10 copies."

11 So, I will very briefly, then, just for
12 Provisional Measures, this was the second part of our
13 presentation. We do understand that the Tribunal is
14 inclined to denying.

15 PRESIDENT CHENG: I think probably you can
16 leave us to read whatever there is because I believe it
17 totally goes to a question of costs. Am I right?

18 MS. de GERMINY: Yes. Right.

19 PRESIDENT CHENG: So, you could leave that to
20 us to read, unless there is anything specific.

21 MS. de GERMINY: Then I will go straight to our
22 Request for Relief and simply make a few conclusions

1 about the Claimants' Requests for Relief.

2 As previously explained, Claimants and RMGC
3 have tentatively--

4 PRESIDENT CHENG: Is that Slide 37?

5 MS. de GERMINY: Slide 31.

6 PRESIDENT CHENG: 31. Thank you.

7 MS. de GERMINY: Actually, I think I can even
8 take you further if you give me a moment. I think we
9 can skip through this. Actually, I will take you to
10 36.

11 As we have said, although the Claimants
12 acknowledge that both Parties are entitled to these
13 documents, their Prayer for Relief does not reflect
14 that, so that's what we sought to show on this slide.
15 And it's for that reason--that's one of the reasons why
16 we've indicated that their Request for Provisional
17 Relief should be denied.

18 As previously explained, Claimants and RMGC
19 have tentatively agreed to the second part of our
20 request, which was for the copies, and we have heard,
21 now, today that we'll get it within a week.

22 I did want to come back to the question of

1 timing, which we discussed just a moment ago. The
2 Claimants did indicate that they would like--that they
3 would like that the remaining documents be declassified
4 within 30 days from the date of the order. We do
5 submit that that is too short a time frame based on
6 NAMR's professional assessment. There again, what
7 needs to take place is for NAMR to review the
8 documents, these 45 documents, but we do also still
9 need to see what happens with respect to these third
10 parties.

11 So, there are over 100 documents--121 documents
12 outstanding, so there are actually two items that need
13 to take place for this declassification process to be
14 completed: It's both NAMR to review the documents that
15 RMGC will provide and, also, for the third parties to
16 hopefully quickly declassify their documents, but that
17 is why we have requested up to two months.

18 ARBITRATOR GRIGERA NAÓN: Excuse me.

19 MS. de GERMINY: Yes.

20 ARBITRATOR GRIGERA NAÓN: All of these third
21 parties are private, or they are also public?

22 MS. de GERMINY: There is one public entity,

1 which is only, I think, responsible for--well, there is
2 also Minvest. Yes, there is Minvest, and there is the
3 Geological Department. There is a Geological
4 Department which is also responsible for very few
5 documents. The vast majority of the outstanding
6 documents are in the hands of private parties.

7 Finally, we have discussed this, but we have
8 requested that the Tribunal order the Claimants to
9 cause RMGC to provide, once the declassification
10 process is completed and within 30 days of the issuance
11 of the confidential order, the Parties with
12 simultaneous access to the documents. We talked about
13 that a moment ago and the notion of, perhaps, getting
14 documents on a rolling basis. In any event, just to
15 confirm, this request is designed to avoid the
16 situation where RMGC might provide certain documents
17 only to the Claimants and not to the Respondent. So,
18 we have asked that RMGC provide simultaneously to both
19 Parties all classified documents in the Registry, once
20 they're declassified, and all confidential documents
21 relating to the Project once we have the
22 Confidentiality Order in place.

1 I think this would conclude our presentation on
2 the First Request for Provisional Measures.

3 MR. HEISKANEN: Perhaps, if I could, I could
4 just come back to Professor Grigera Naón's question
5 about why private companies are classifying these
6 documents. The answer is simple: It's the question of
7 the nature of the information. The information relates
8 to the Mineral Resources of Romania. National
9 Authority on Mineral Resources, NAMR, has classified
10 certain documents that relate to those resources, but
11 NAMR is not involved in the exploitation of these
12 resources. It's private companies, like RMGC, that are
13 involved in that process. RMGC itself has classified a
14 number of documents because, in the course of its
15 exploration process, in the course of the project, it
16 has discovered additional information about the nature
17 of those resources. So, under the law, it has to
18 classify documents that relate to Natural Resources and
19 information that has been previously classified. That
20 is why, also, other private companies that are
21 involved, like consultancies, geological consultancies
22 and others who are involved in that process, they have

1 to classify those documents to the extent that they
2 relate to Natural Resources and Mineral Resources of
3 Romania.

4 ARBITRATOR GRIGERA NAÓN: This is a blunt
5 question to you: What are they protecting? Are they
6 protecting the geological knowledge that they gain
7 after their own efforts, or are they really protecting
8 a public interest? I am a former oil-and-gas lawyer.

9 MR. HEISKANEN: Yes. Mineral Resources are
10 considered a strategic resource of the country.

11 ARBITRATOR DOUGLAS: Could I just ask the
12 Parties whether it would be possible over the lunch
13 break to provide--it's more for the Claimants'
14 position--as to whether or not the fourth point here on
15 Slide 41 is agreed; in other words, whether or not we
16 need to order the Claimants or whether or not it is, in
17 fact, agreed they will provide--or cause RMGC to
18 provide the documents once the process is finished.

19 PRESIDENT CHENG: That was what I was going to
20 suggest, too, so thank you.

21 Before we break for lunch, I think it would be
22 convenient because I believe the next session you would

1 want it to be not broadcasted, as I understand it. So,
2 it might be convenient we break for now, but as a
3 matter of planning, may I turn to Sara? And just
4 indicate to the Parties the time that the Claimants
5 have used, including the questioning that we have had,
6 and the time that the Respondent has used so far so
7 that we try and have a balance.

8 SECRETARY MARZAL YETANO: So, Claimants, in
9 total, was 2 hours and 12 minutes; and Respondent so
10 far has used 1 hour and 16 minutes.

11 MS. COHEN SMUTNY: I'm sorry; one question.

12 If Claimants are invited to consider the point
13 on Slide 41 over the break, relatedly, we have pointed
14 out that it's not yet been indicated whether Respondent
15 is undertaking actually to declassify the remaining
16 documents. There is the talk about the time it takes
17 to make a declassification decision, suggesting that
18 the possibility exists that the declassification
19 decision would be "No, we are not declassifying."

20 So, we are still theoretically in uncertainty.
21 It's not been made clear, at least in our
22 understanding, that we are just talking about how much

1 time does it takes to actually declassify. We're
2 understanding that we're waiting for a declassification
3 decision.

4 And this is a material point for Claimants and,
5 perhaps, related to the point that--and we can also
6 wait for a reply here, but I think both Parties,
7 ironically have--or at least I understood--have
8 expressed the concern that maybe this all--at least
9 from our point of view--that this all could have and
10 should have been something agreed between the Parties.
11 And this is an example of something that, as we sit
12 here today, we still don't know.

13 Are we going to actually have--do we have
14 Respondent's undertaking that these documents will be
15 declassified--and it's just a function of how long it's
16 going to take us to do it--or are we talking about a
17 time period to make a decision about whether or not
18 there will be declassification of these documents?

19 This is a fundamental uncertainty that we still
20 have.

21 MR. HEISKANEN: The declassification decisions
22 will be taken by the entities--public and private--who

1 classified the documents initially. The Respondent has
2 no control over private parties who will be taking
3 these decisions and how long it will take. The review
4 process is underway. Most of these documents, the
5 documents that have been reviewed, have been
6 declassified. The Respondent is not in a position to
7 take--make an undertaking; otherwise, the whole entire
8 review process would serve no purpose.

9 It's not excluded, although it seems now
10 unlikely that there are among these documents,
11 State-secret documents, which would require a different
12 review and possibly different decisions.

13 We have been informed by the Claimants, or by
14 RMGC through the Claimants, that there are no
15 State-secret documents among these documents to be
16 declassified. It may be a theoretical possibility, but
17 we are not in a position to provide undertaking, but I
18 think what has happened so far speaks for itself.

19 ARBITRATOR DOUGLAS: Just one more thing to
20 reflect on over lunch was the possibility of an
21 undertaking in relation to documents procured by the
22 antifraud investigation, just to give you forewarning

1 that I'm probably going to ask you a question about
2 whether or not Respondent's counsel would be prepared
3 to give such an undertaking.

4 MR. HEISKANEN: We will come back to this
5 entire issue of the Second Request for Relief and
6 whether there is, indeed, any need for this order in
7 the second part of our argument today.

8 PRESIDENT CHENG: But also to consider the
9 points raised by Professor Douglas about whether or not
10 an undertaking may be given, can be given. All right?
11 I think I'm sure the question will be asked.

12 MR. HEISKANEN: We will consider that.

13 PRESIDENT CHENG: Thank you.

14 So, we will come back from lunch, one-hour
15 lunch.

16 Now, I think in the light of the questions that
17 we have asked, we hope the reply might be a little bit
18 shorter, but you might have to--I don't know how our
19 timing would be. How would the timing be from here?
20 If we have to finish at 5:00, that is.

21 I think most of our questions have been asked
22 as the submissions are made.

1 SECRETARY MARZAL YETANO: We have 15 minutes
2 for questions from the Tribunal at the end of the day.

3 PRESIDENT CHENG: Yes. So, we're allowing one
4 hour each for the reply or rejoinder. You might have
5 to think how to deal with that time with the view to
6 finishing as close to 5:00. Of course, we can sit a
7 little bit longer. All right? All right.

8 We will come back in one hour's time. Thank
9 you.

10 (Whereupon, at 1:28 p.m., the Hearing was
11 adjourned until 2:30 p.m., the same day.)

1 for different reasons, but we will, of course, hear
2 you, but we just felt--we wished to indicate
3 that--indicate our provisional views.

4 The second point is that looking at the
5 timeframe and bearing in mind we have had a lot of
6 questions that we raised with the Parties already, and
7 given the time of the Hearing, we wonder whether the
8 Parties could agree to a shorter closing and then a
9 very short break, then we will finish very much soon
10 after 5:00 p.m., if not at 5:00 p.m. Is that something
11 that would be doable and acceptable in the light of
12 what has transpired over the day?

13 Ms. Smutny.

14 MS. COHEN SMUTNY: Claimants do anticipate that
15 any reply points would be quite limited and certainly
16 not a full hour. So, yes.

17 PRESIDENT CHENG: Good, thank you.

18 I hope the Respondent can--

19 MR. HEISKANEN: Yes, we don't expect to spend
20 more than, perhaps, 20-30 minutes max on the closing.

21 PRESIDENT CHENG: Thank you.

22 I think that probably would be about right.

1 And our questions have been asked, and we will continue
2 to be asking questions as the Parties are making their
3 submissions so that the points are clarified.

4 So, I believe that the Respondent would still
5 have about one hour for their openings. So I believe
6 now we also go into a stop of the broadcasting. Am I
7 right?

8 MR. HEISKANEN: Yes, that's correct. So, it
9 will be Mr. Guibert de Bruet, and he will be discussing
10 the facts underlying the Claimants' Second Request, so
11 it will be a bit more sensitive information.

12 PRESIDENT CHENG: Thank you.

13 (End of open session. Confidential business
14 information redacted.)

1

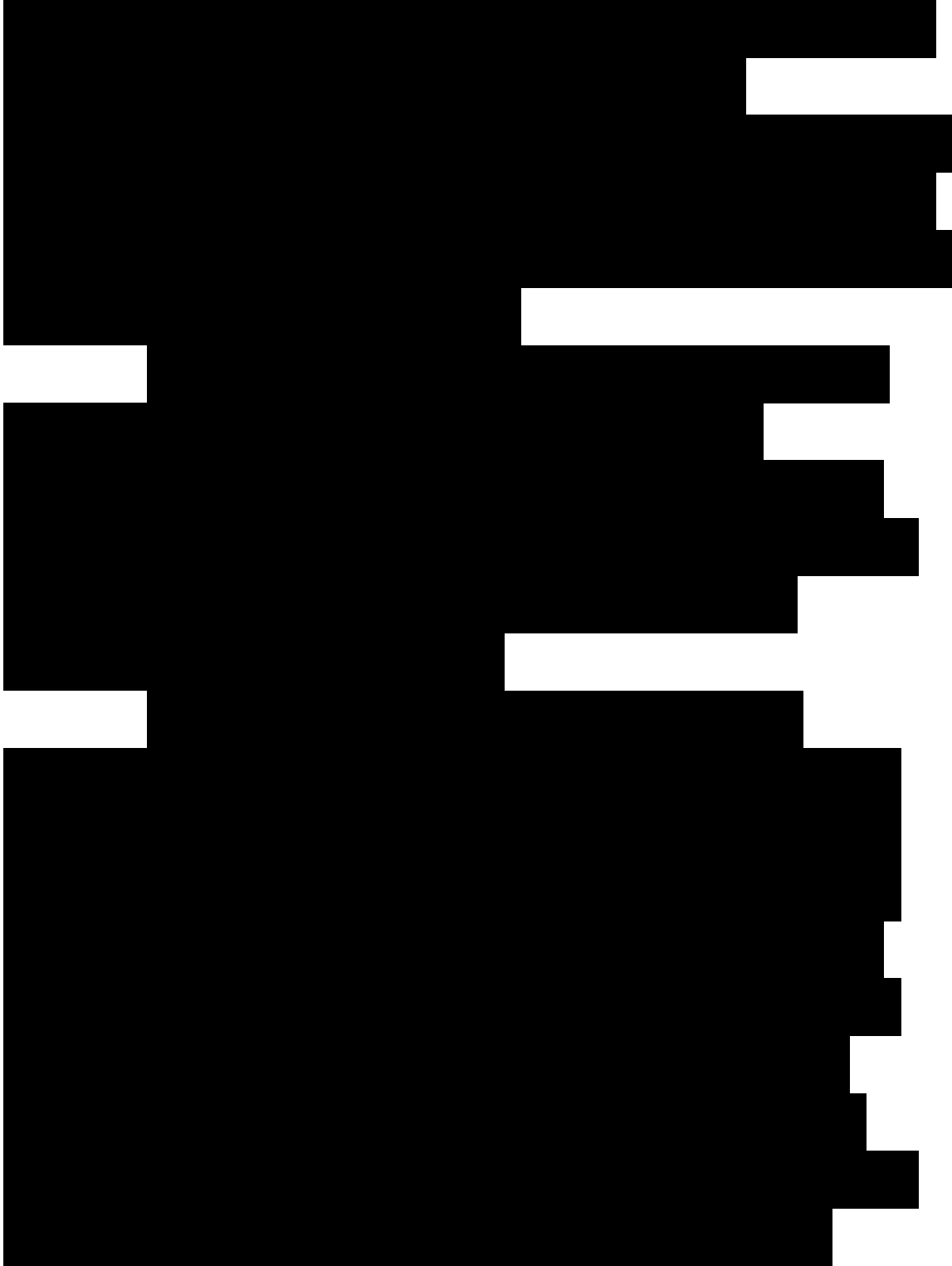
B&B REPORTERS
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

CONFIDENTIAL SESSION

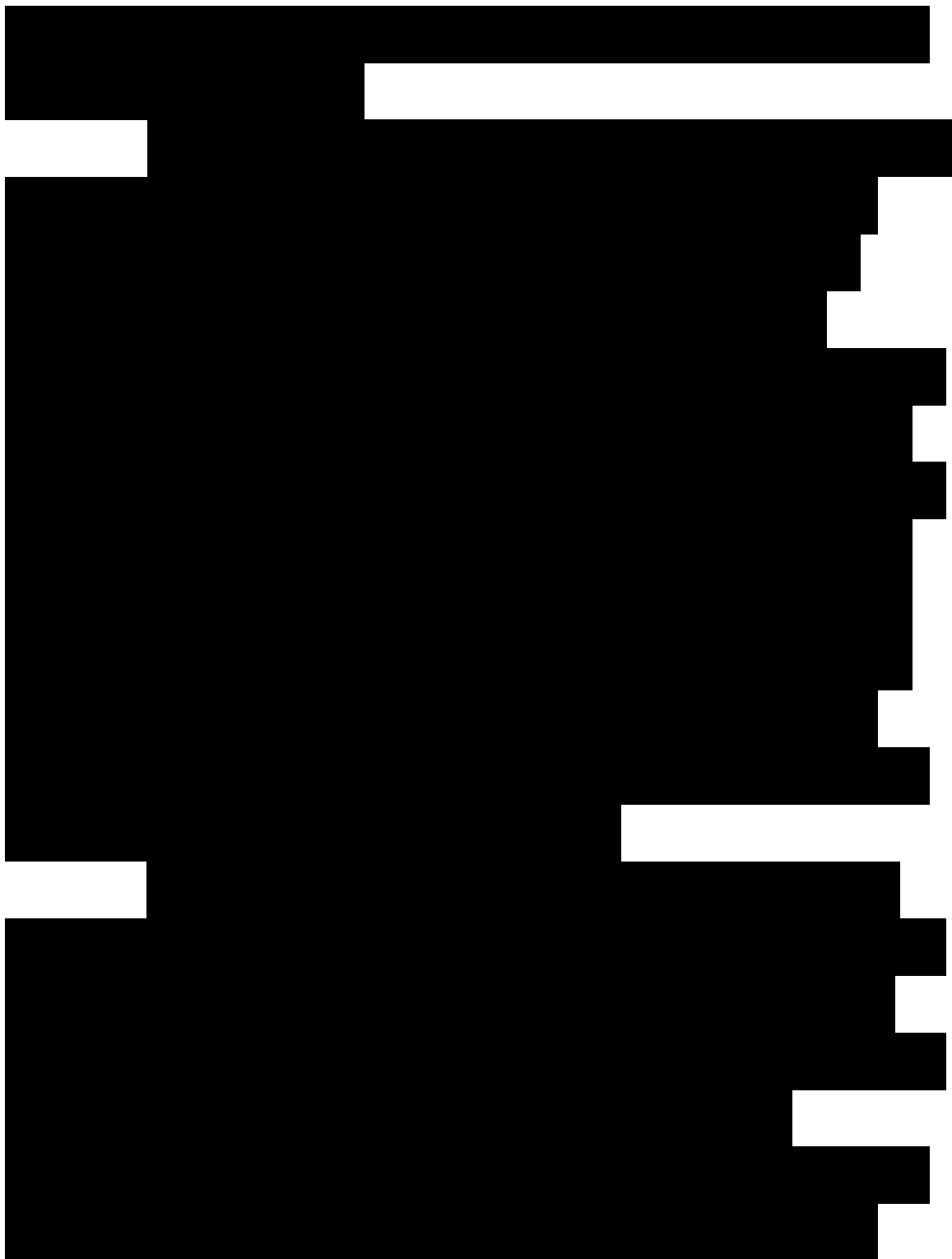
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

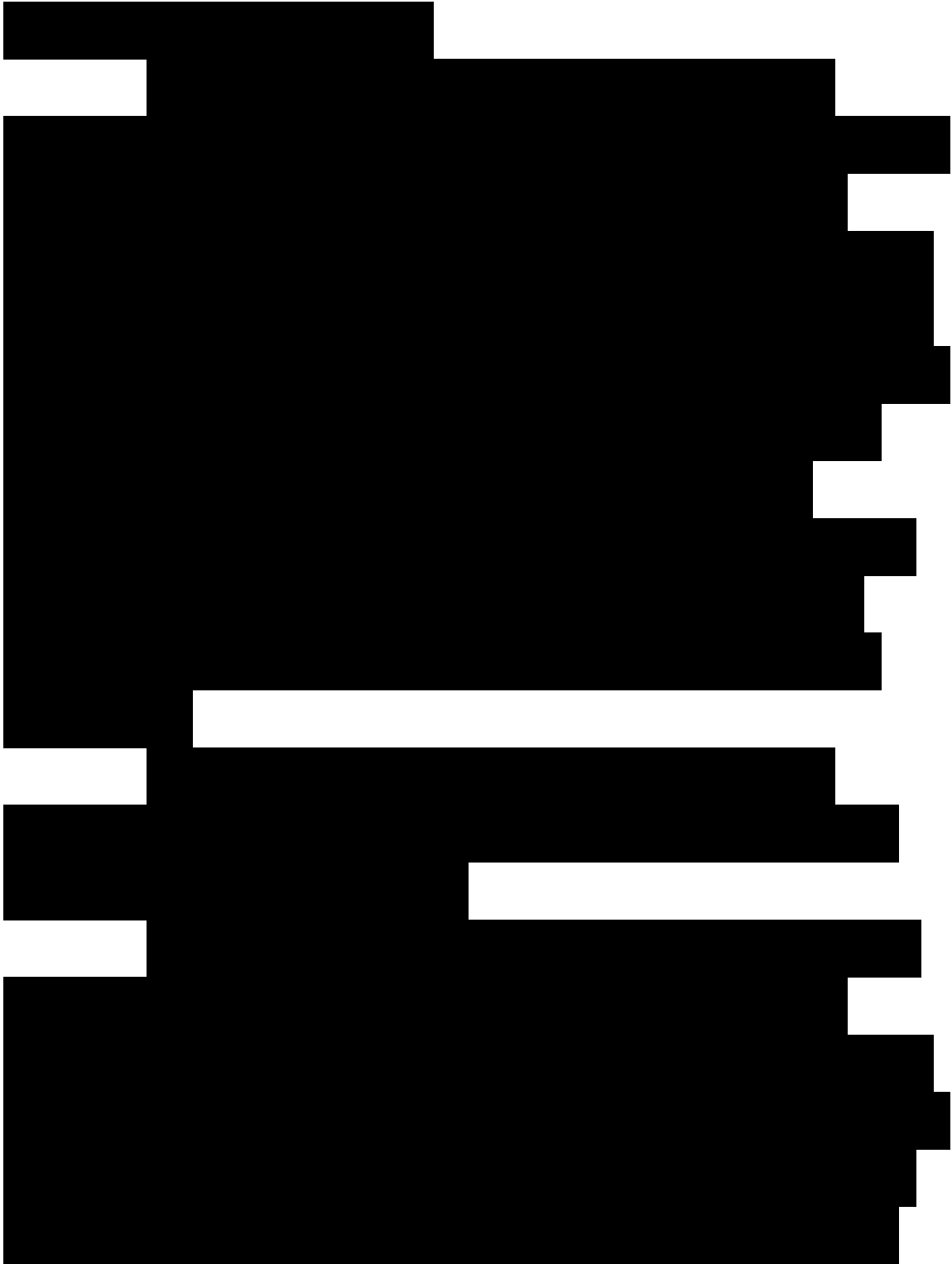
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



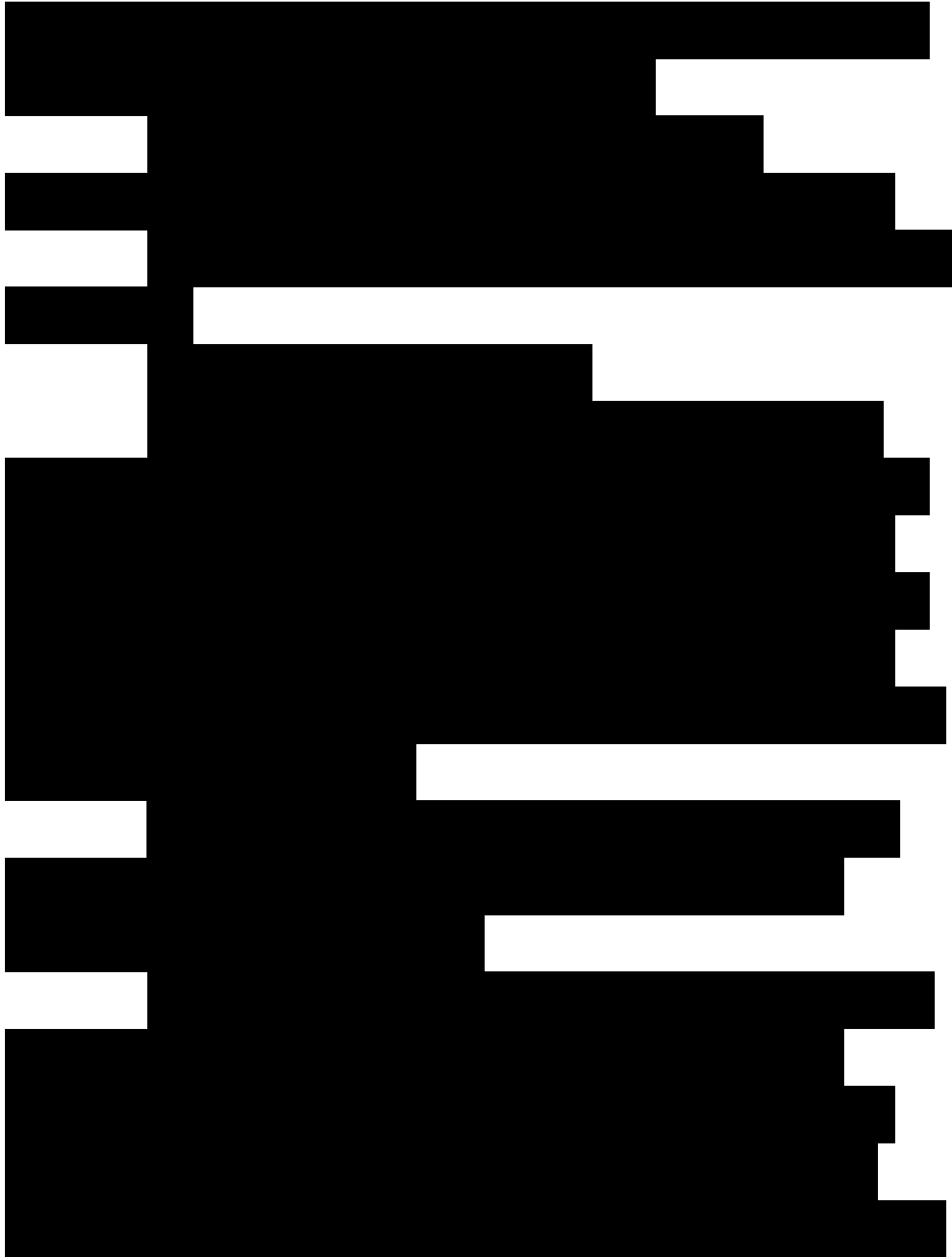
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



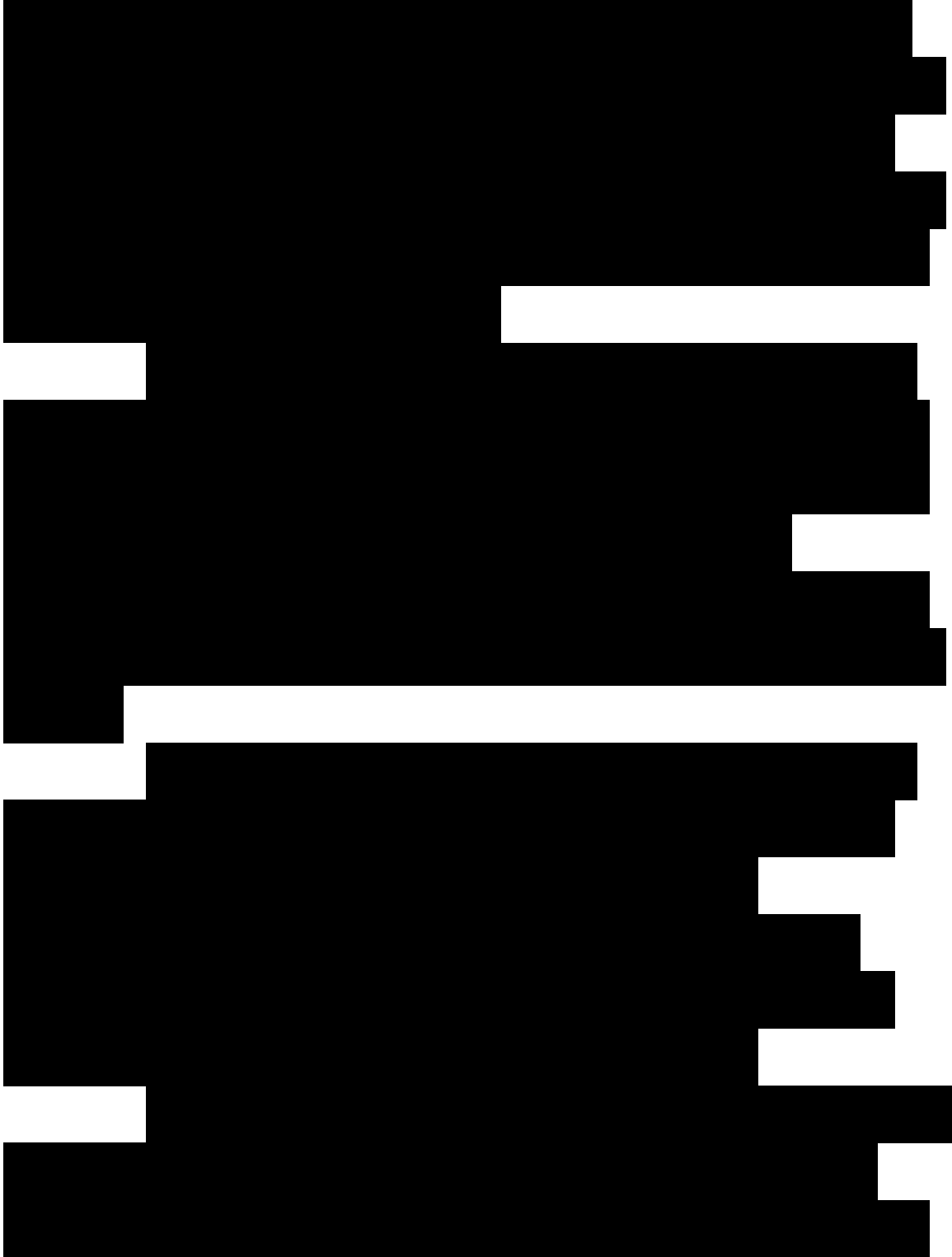
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



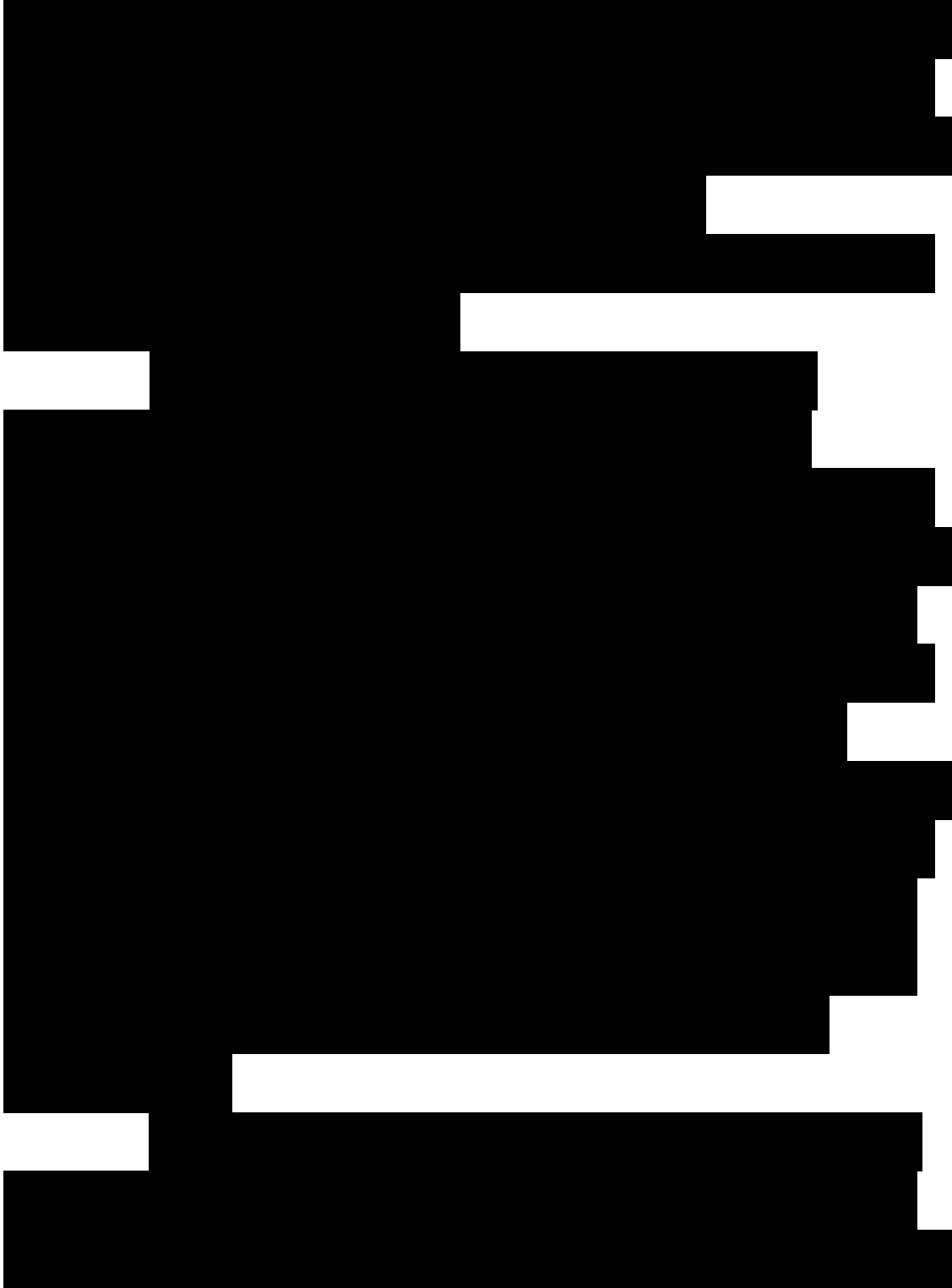
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



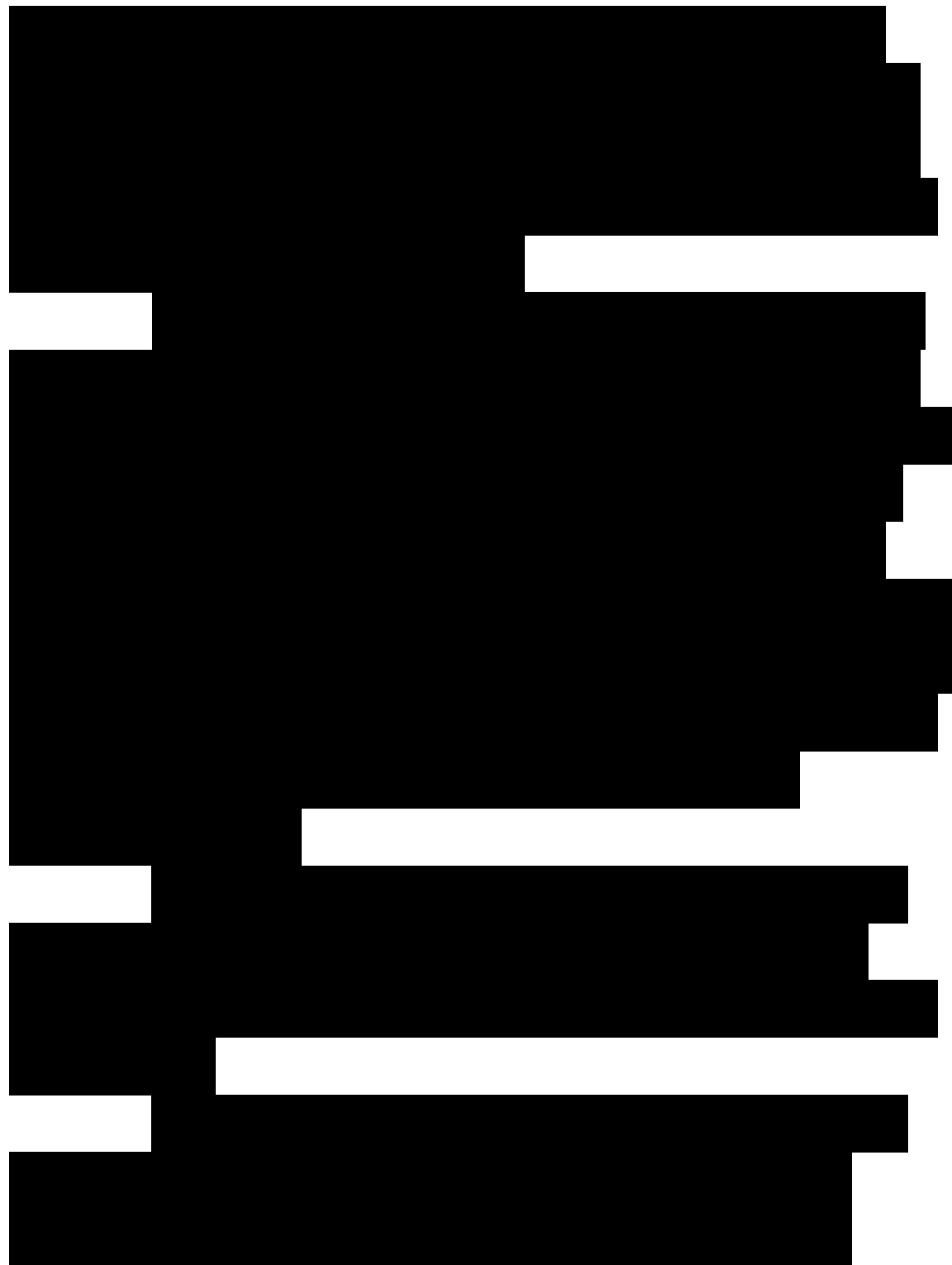
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



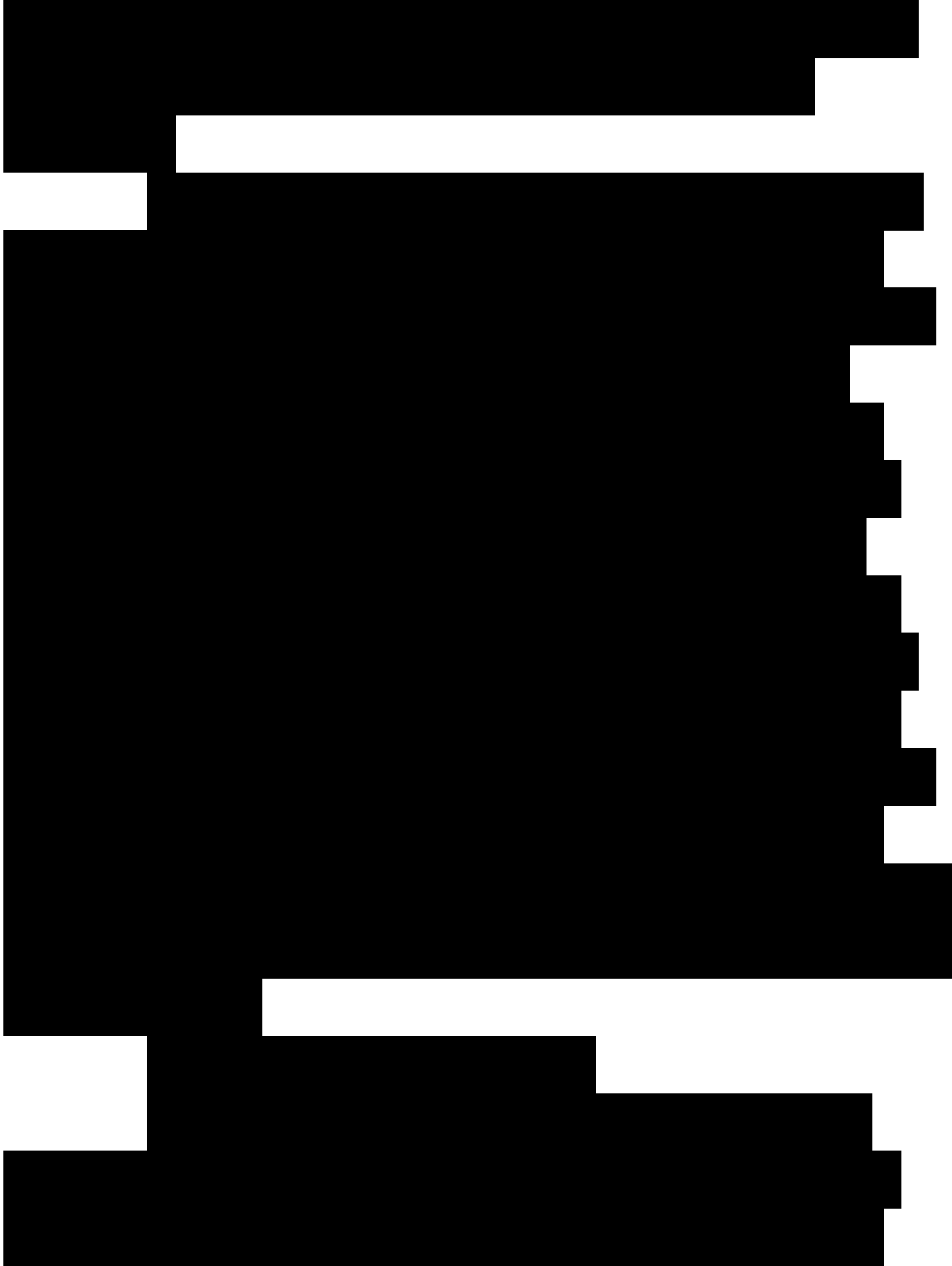
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



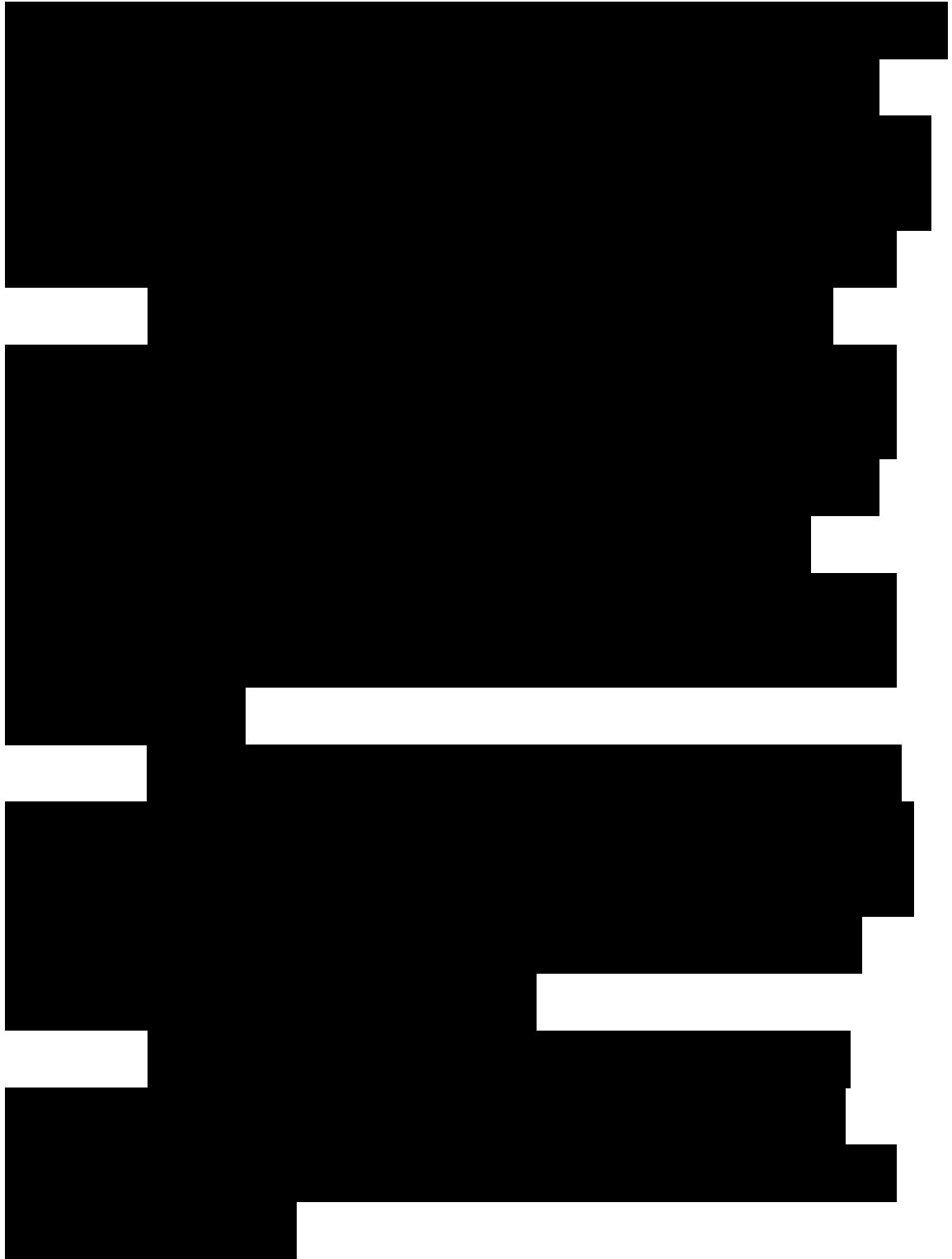
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



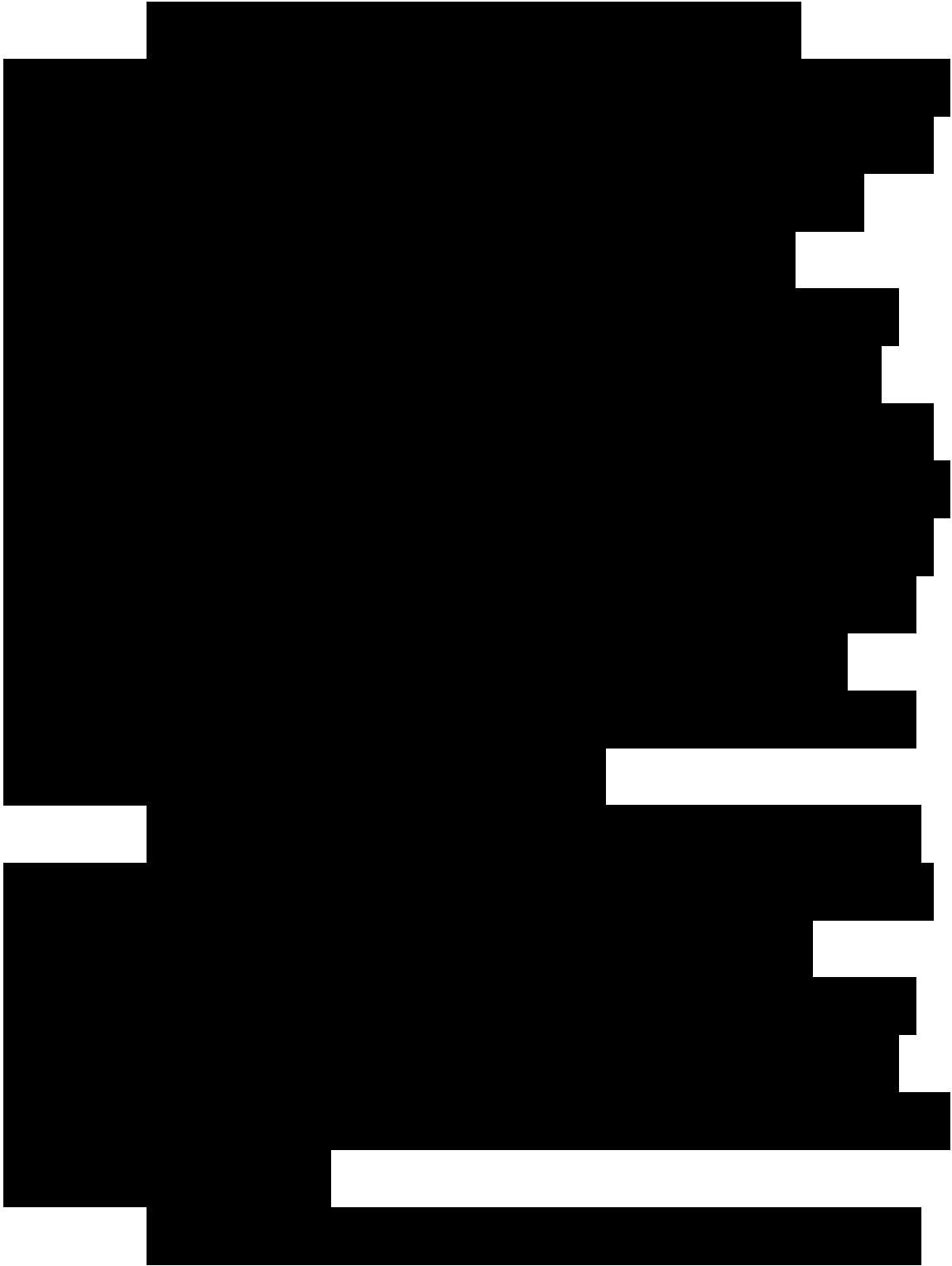
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



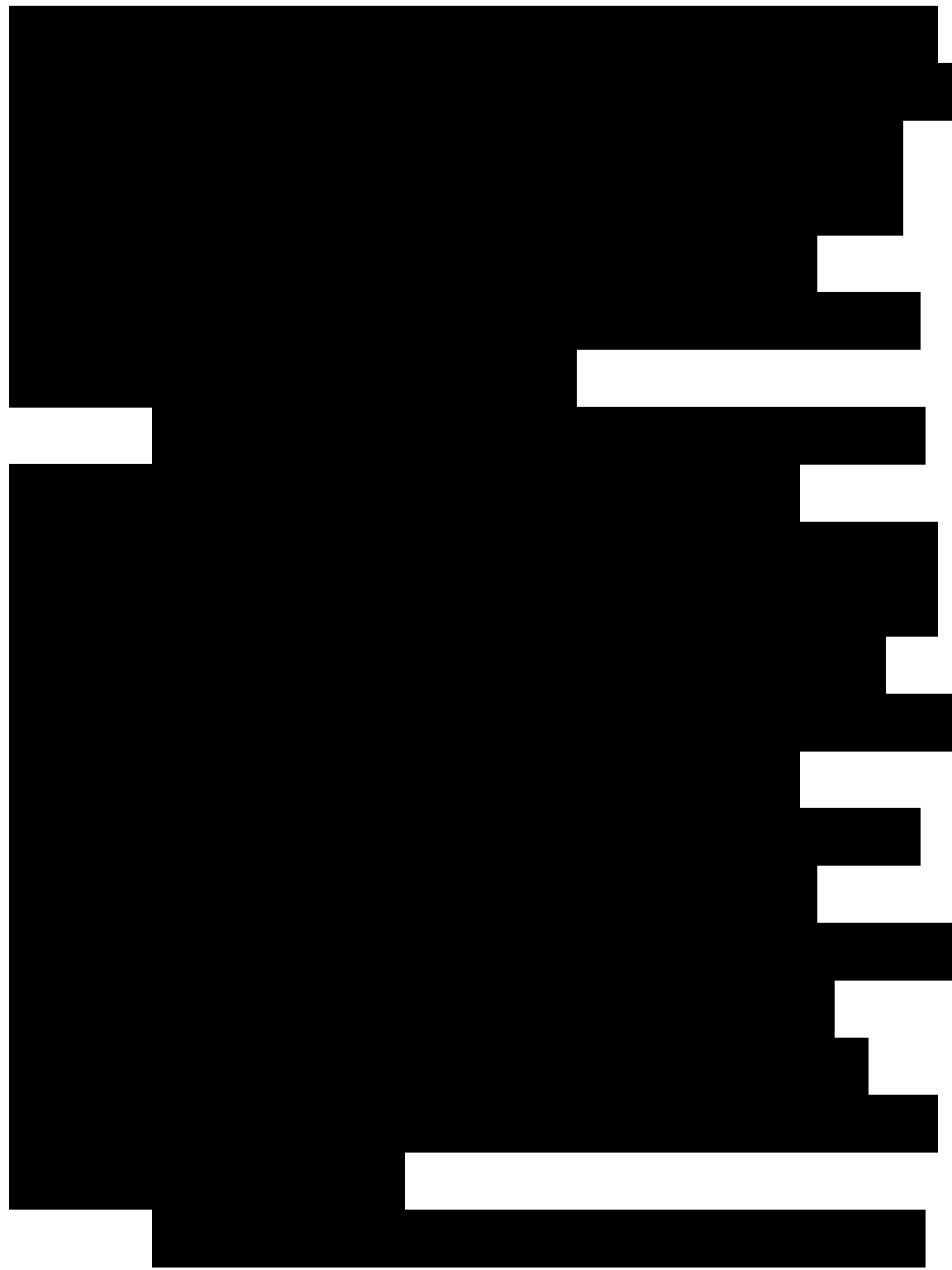
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



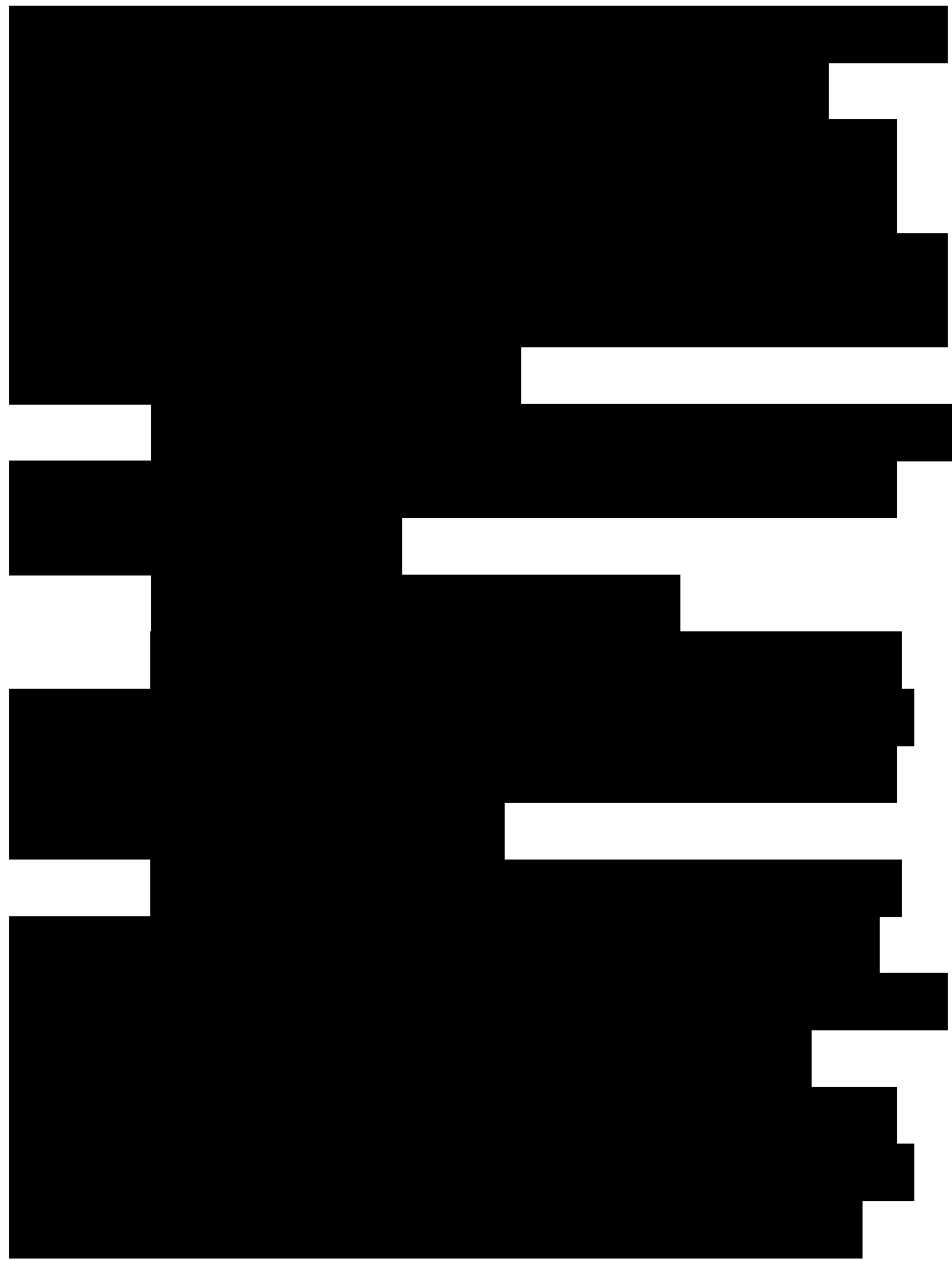
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



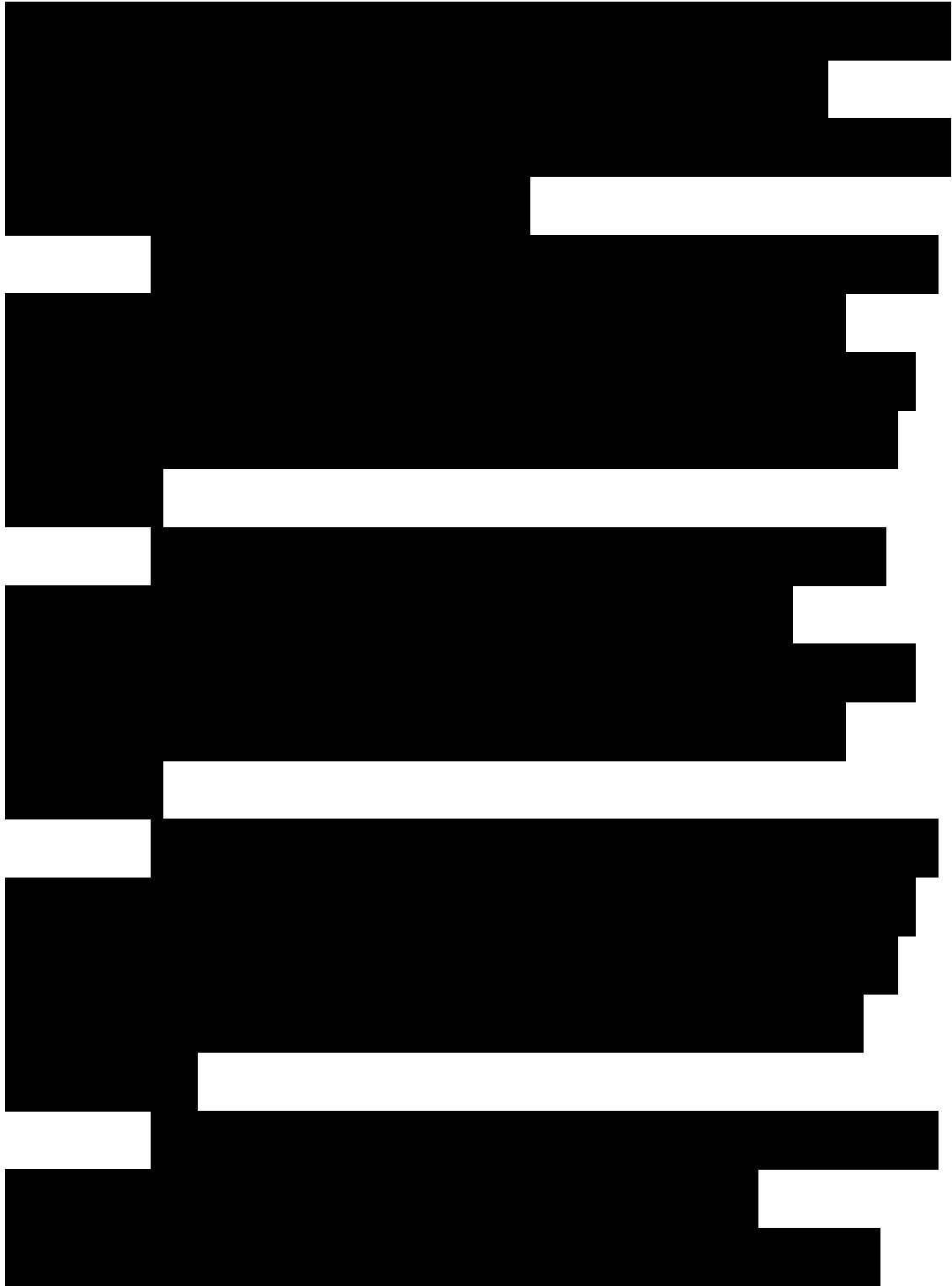
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



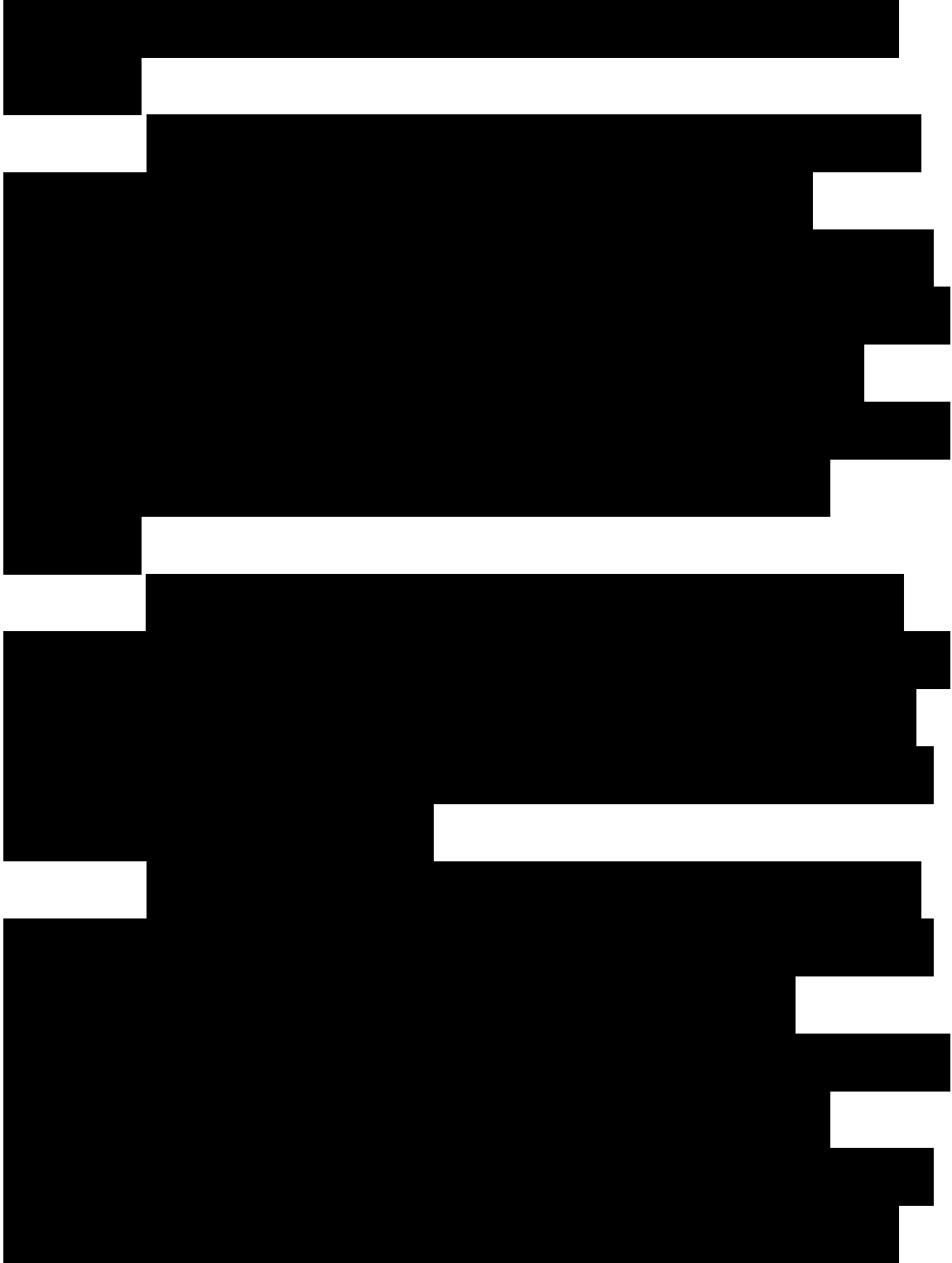
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



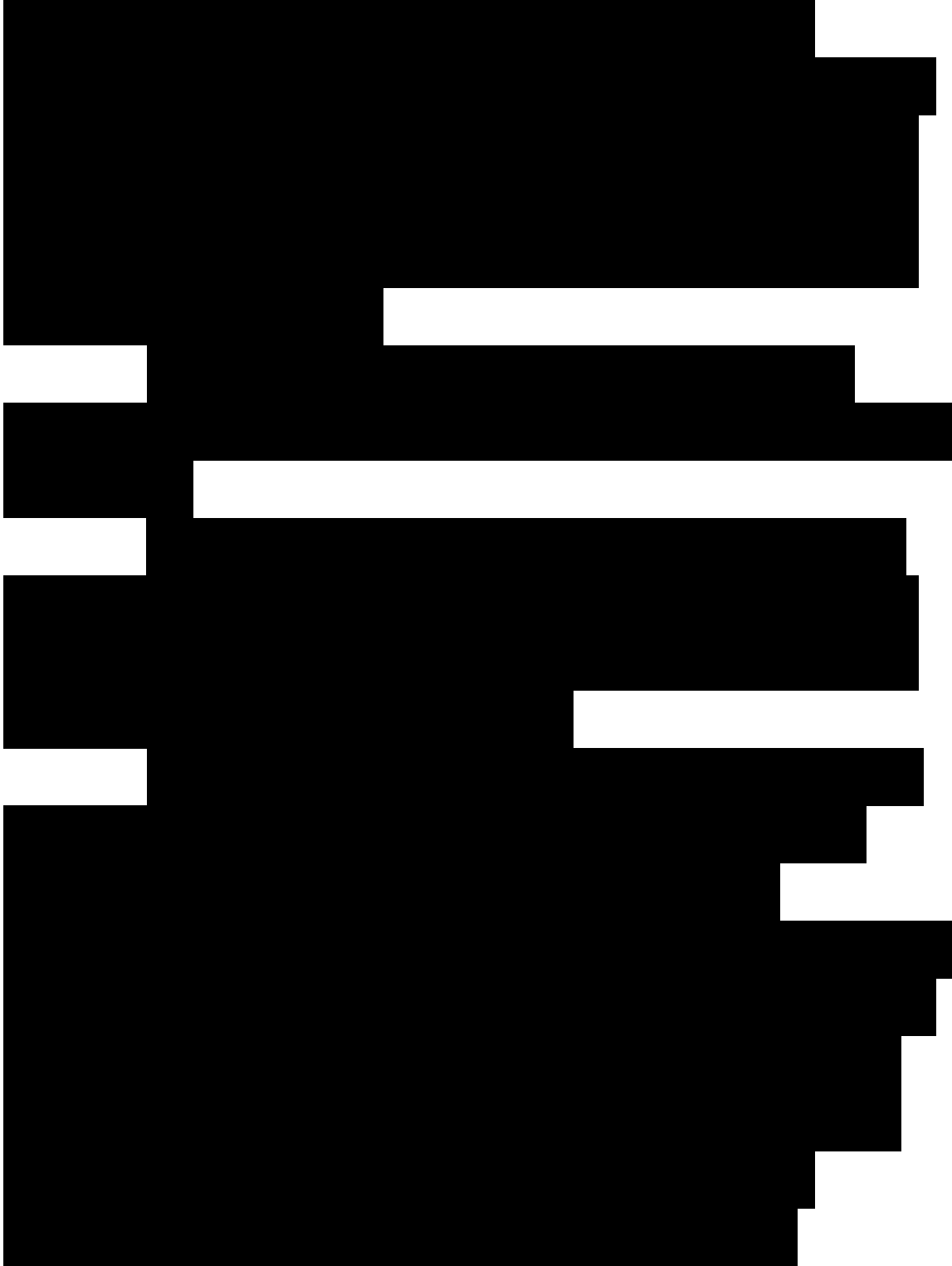
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



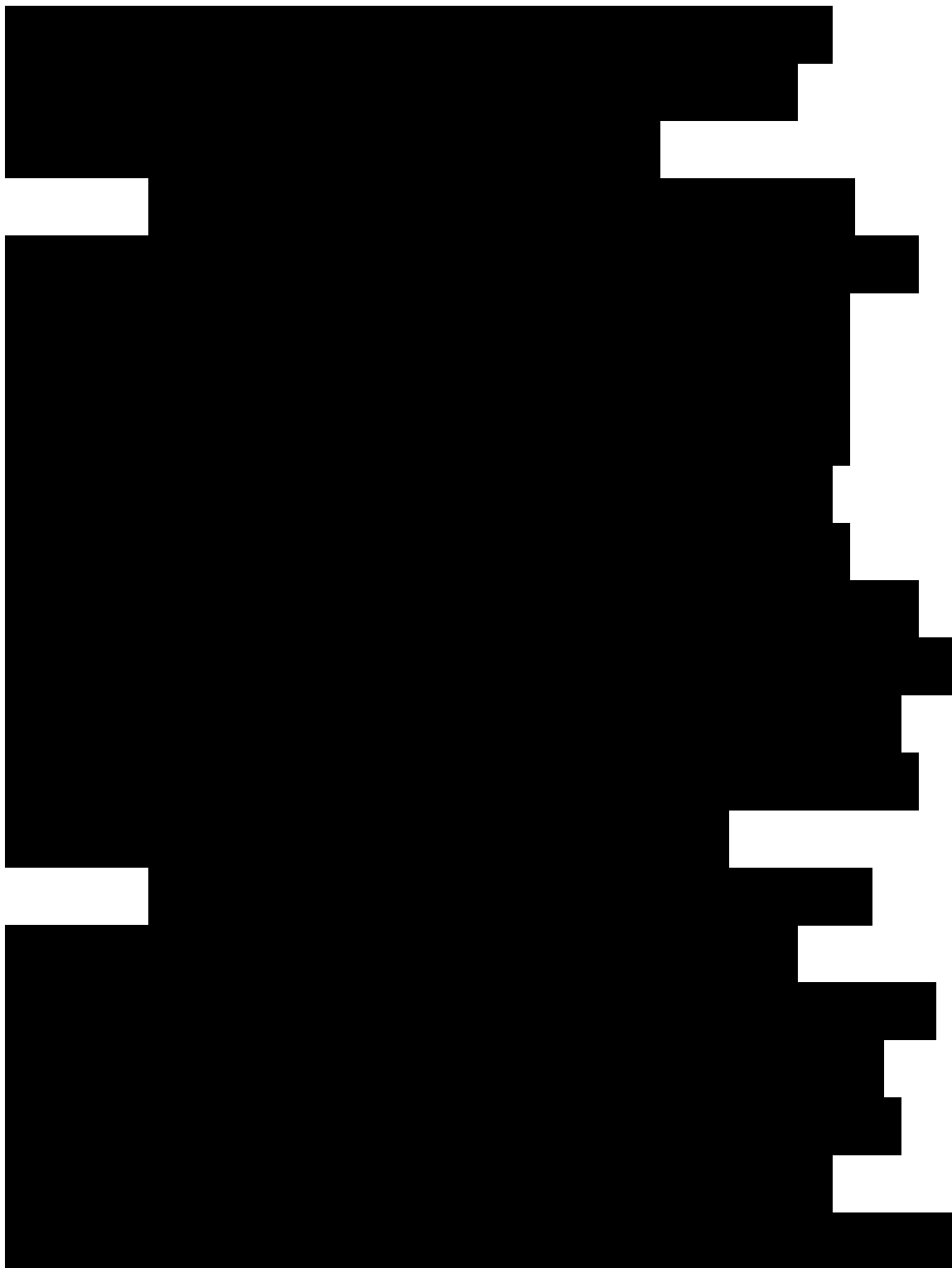
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22

[REDACTED]

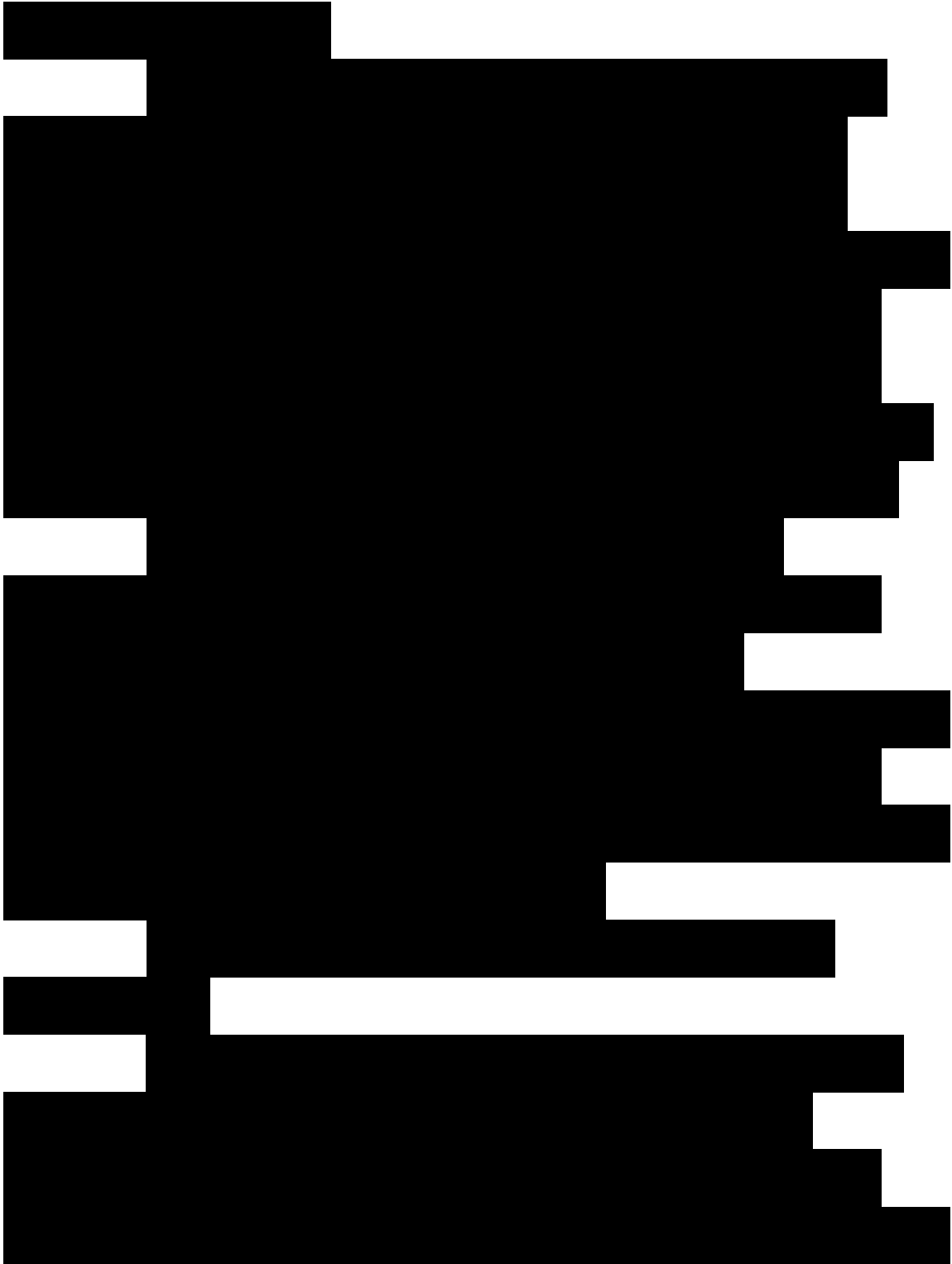
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



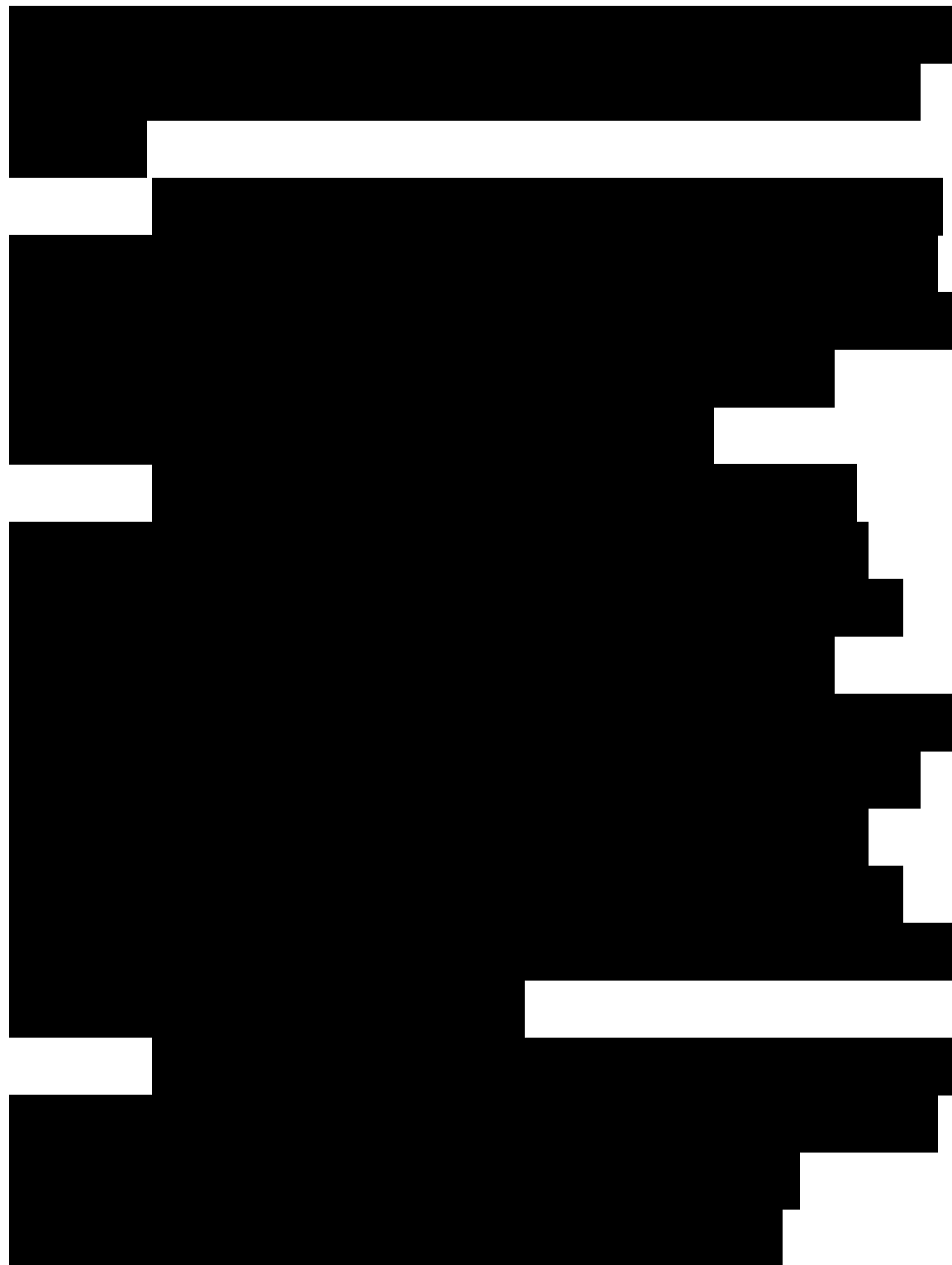
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



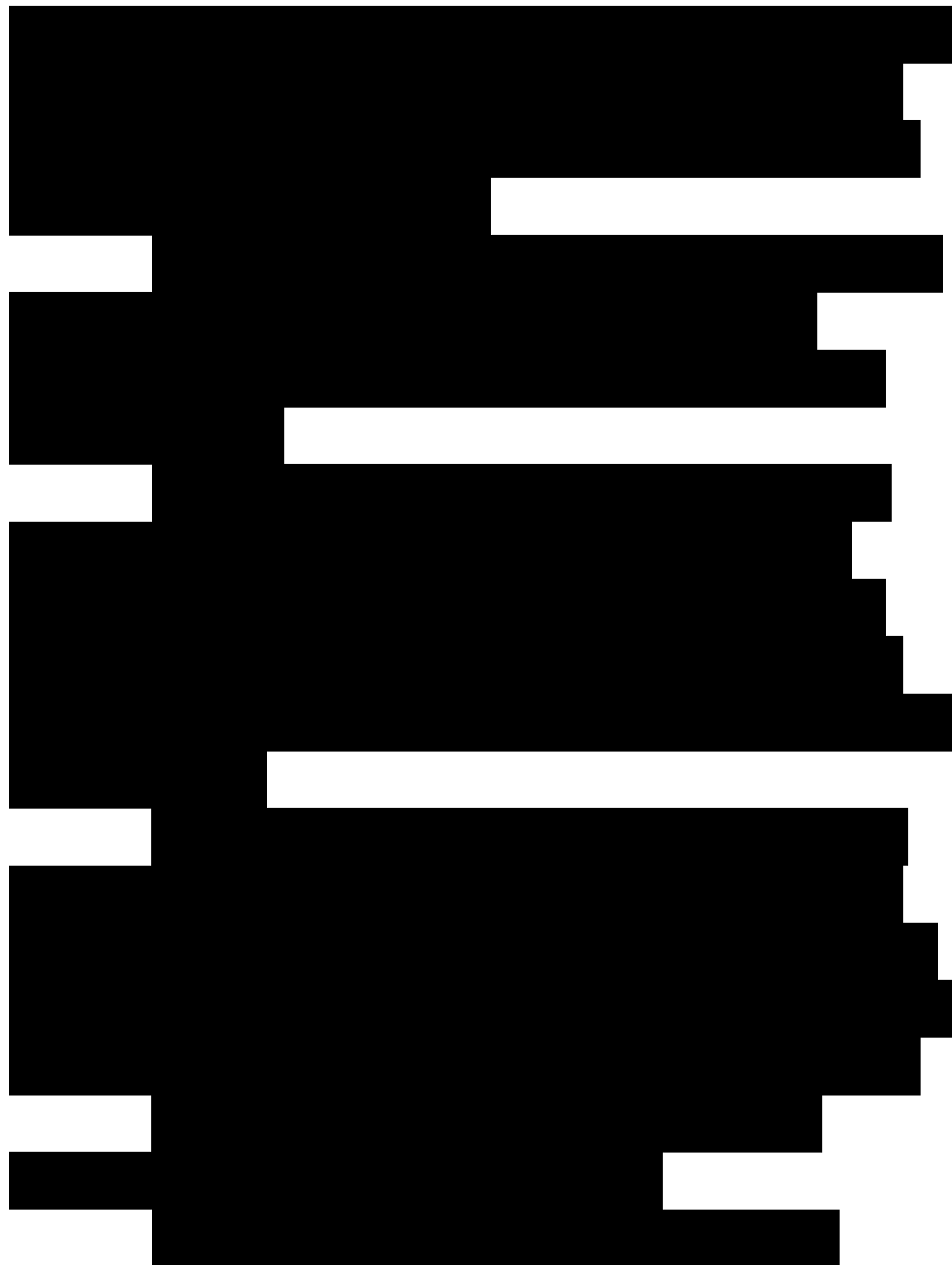
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



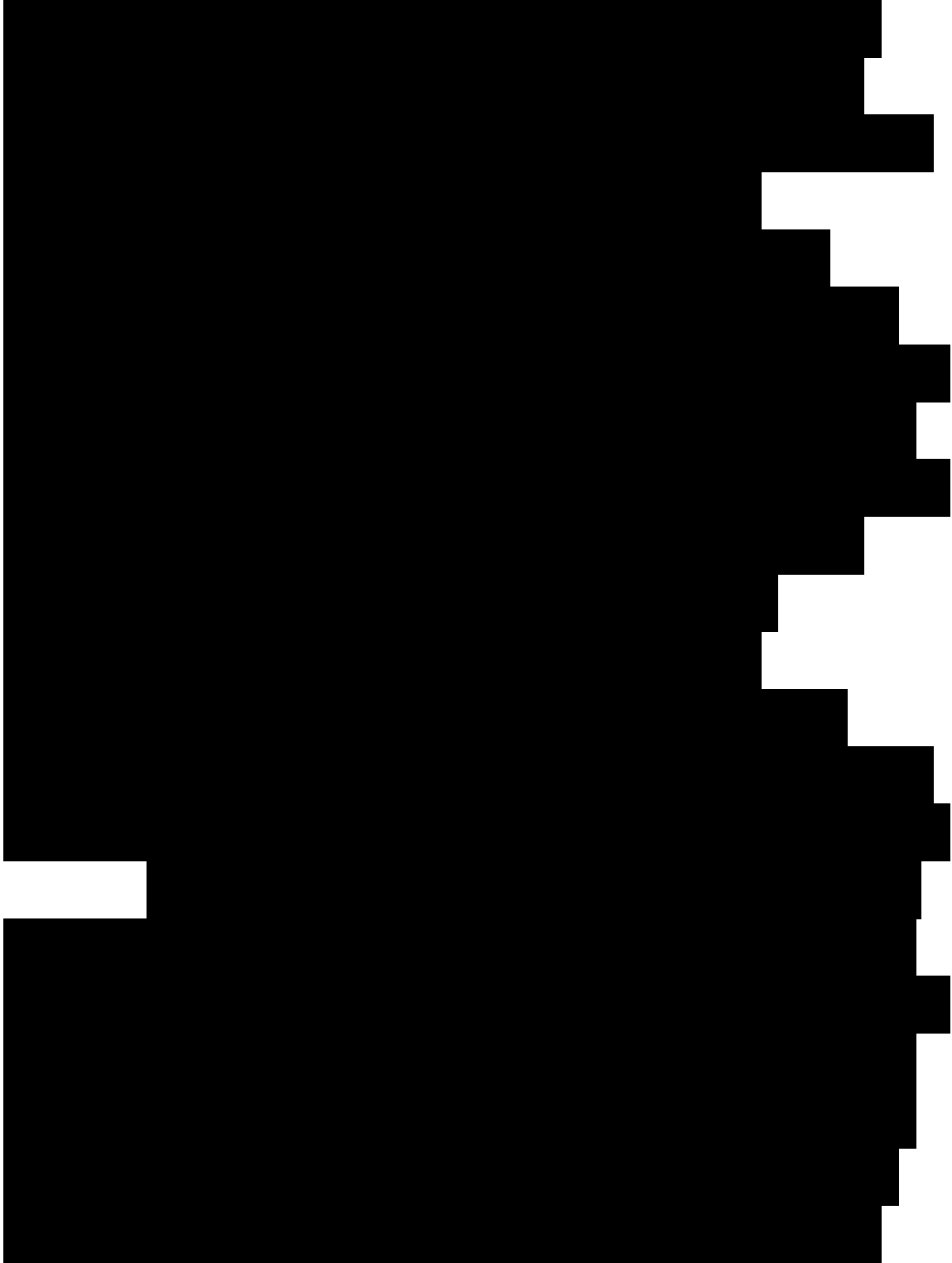
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



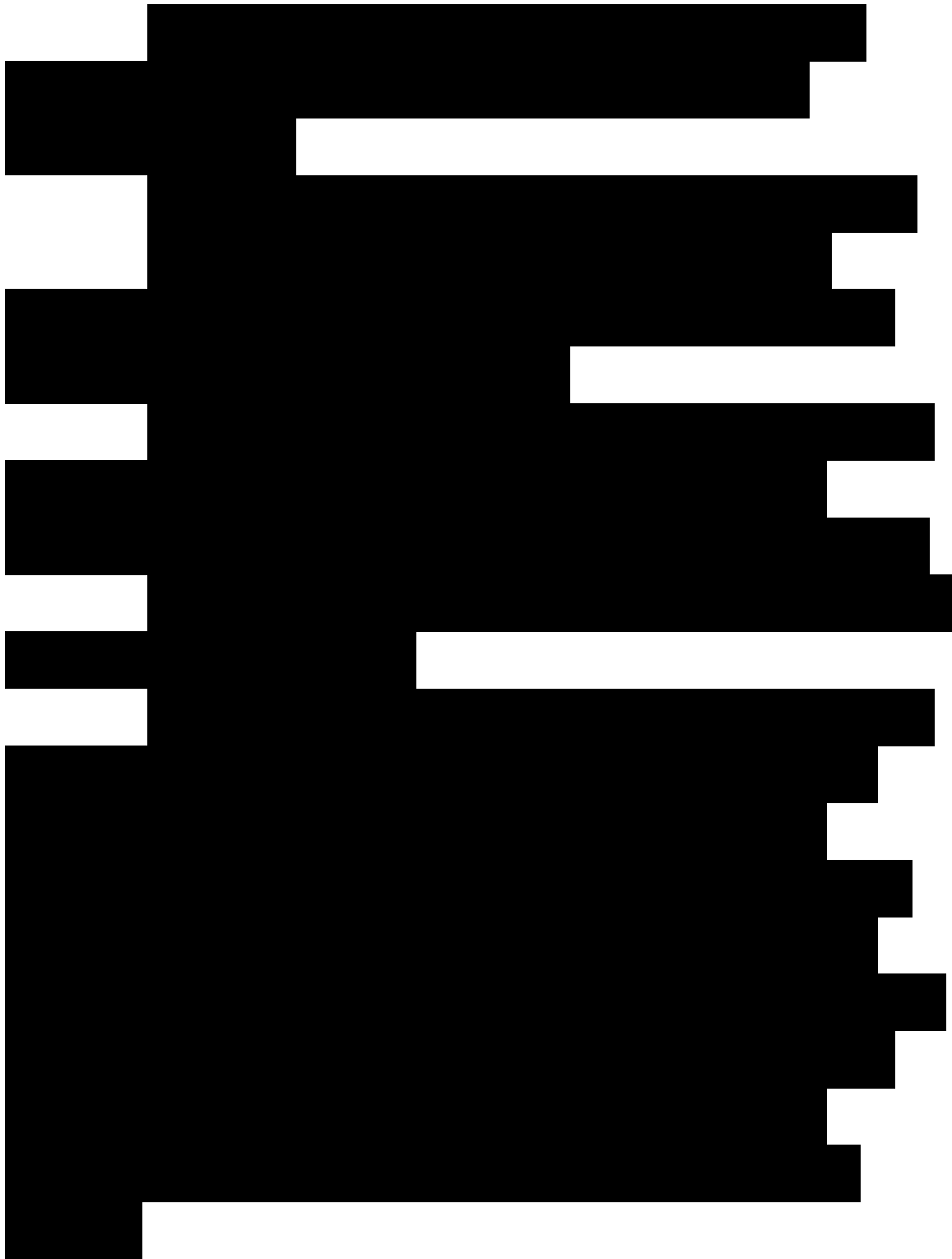
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



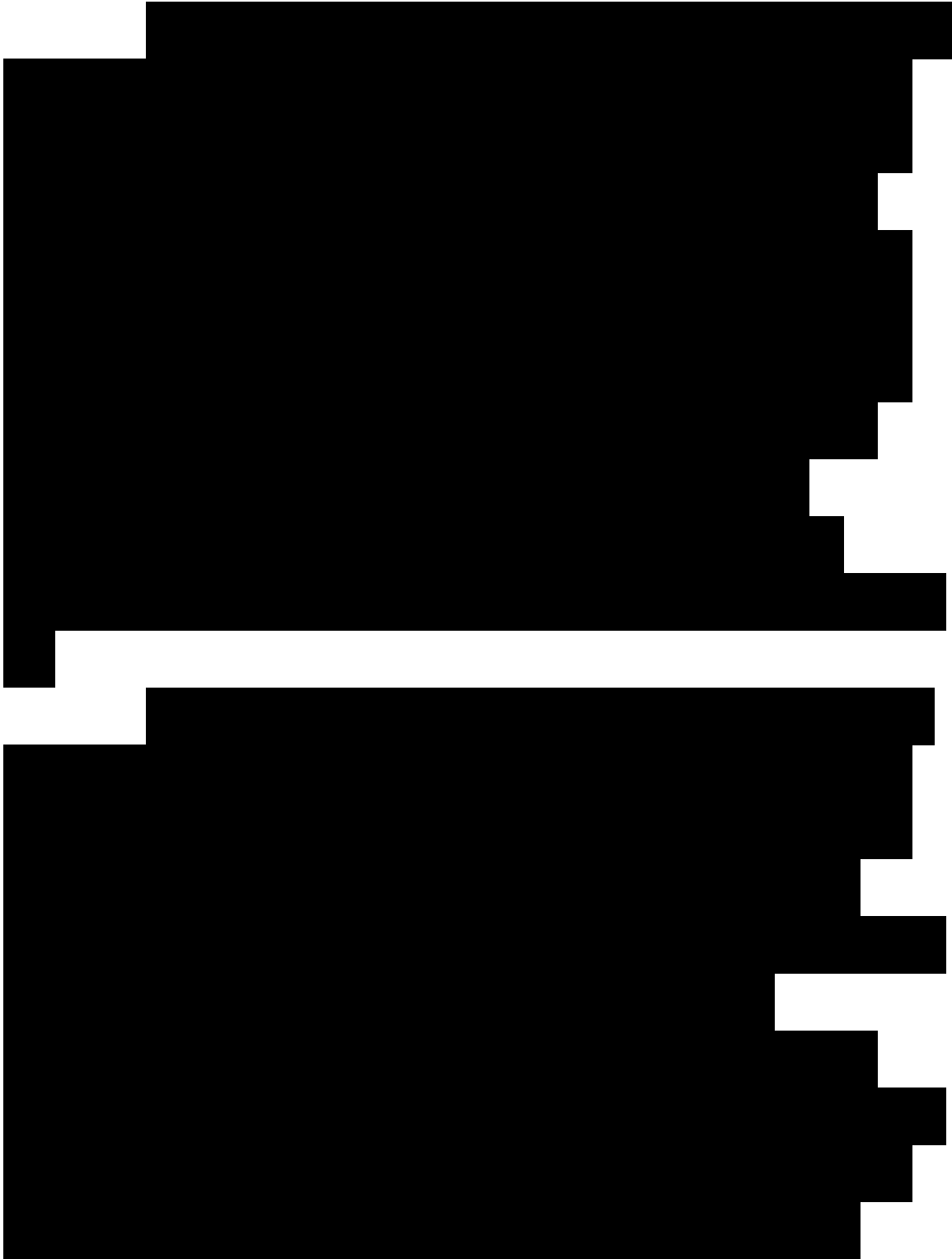
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

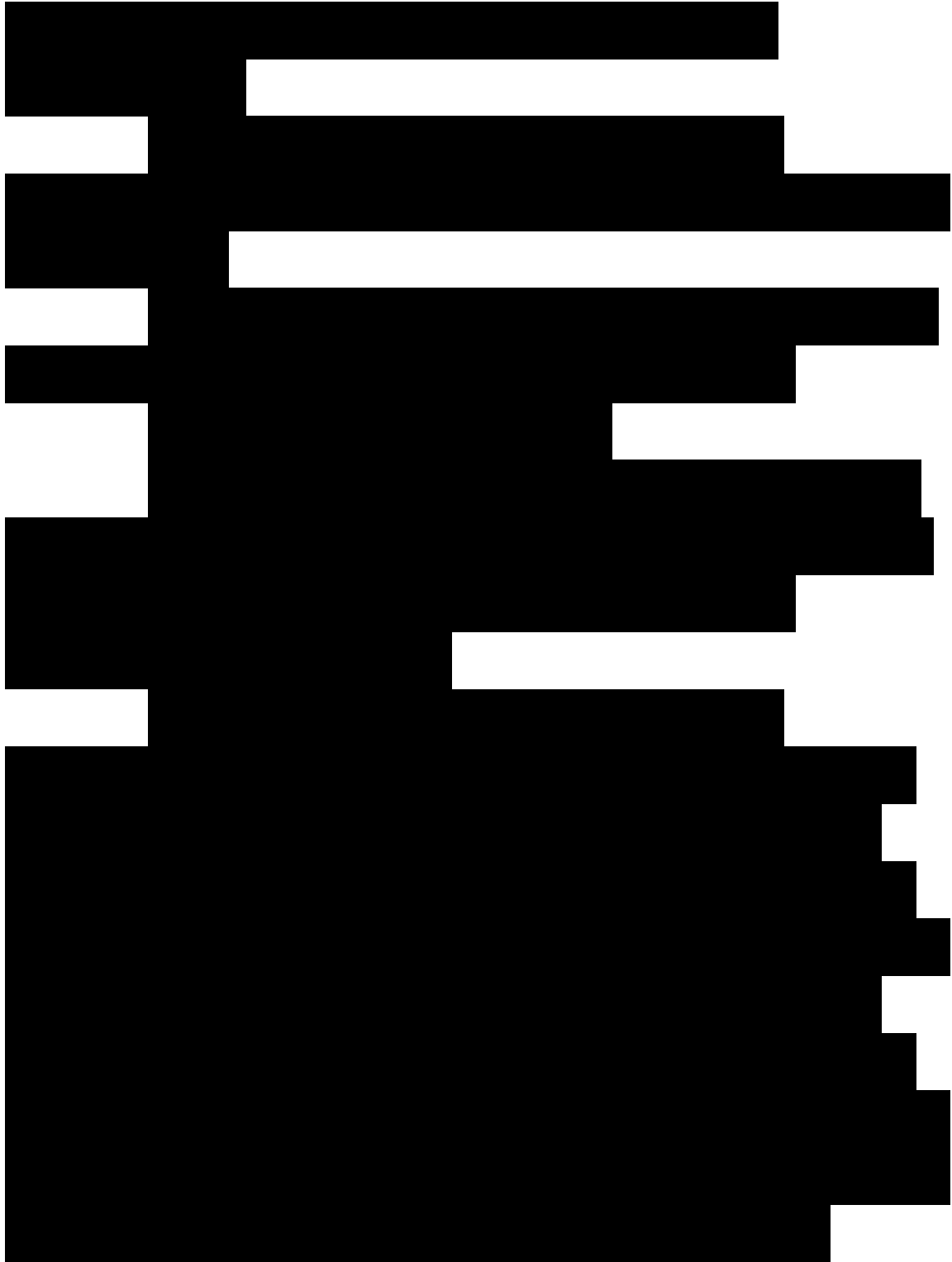
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



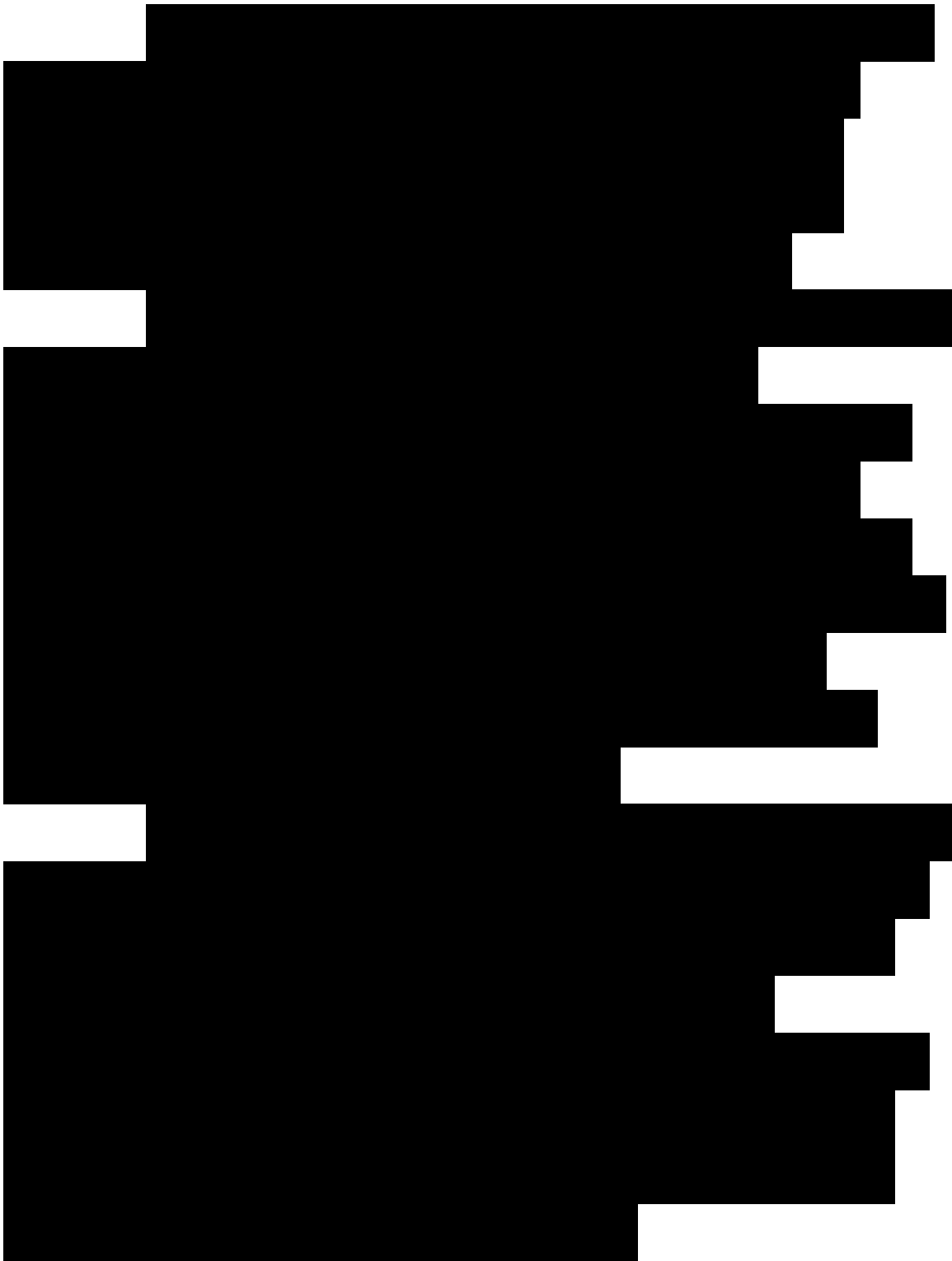
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



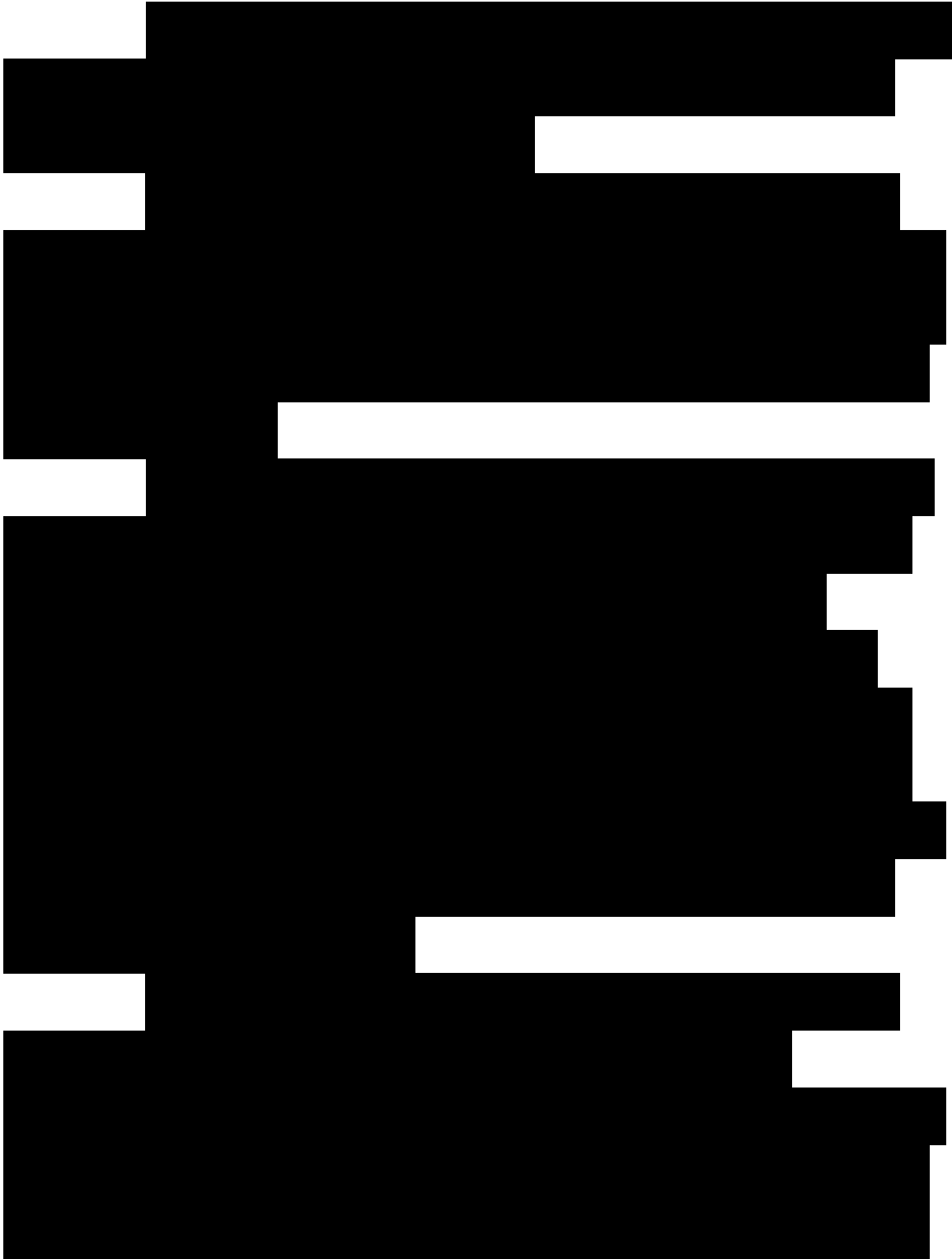
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



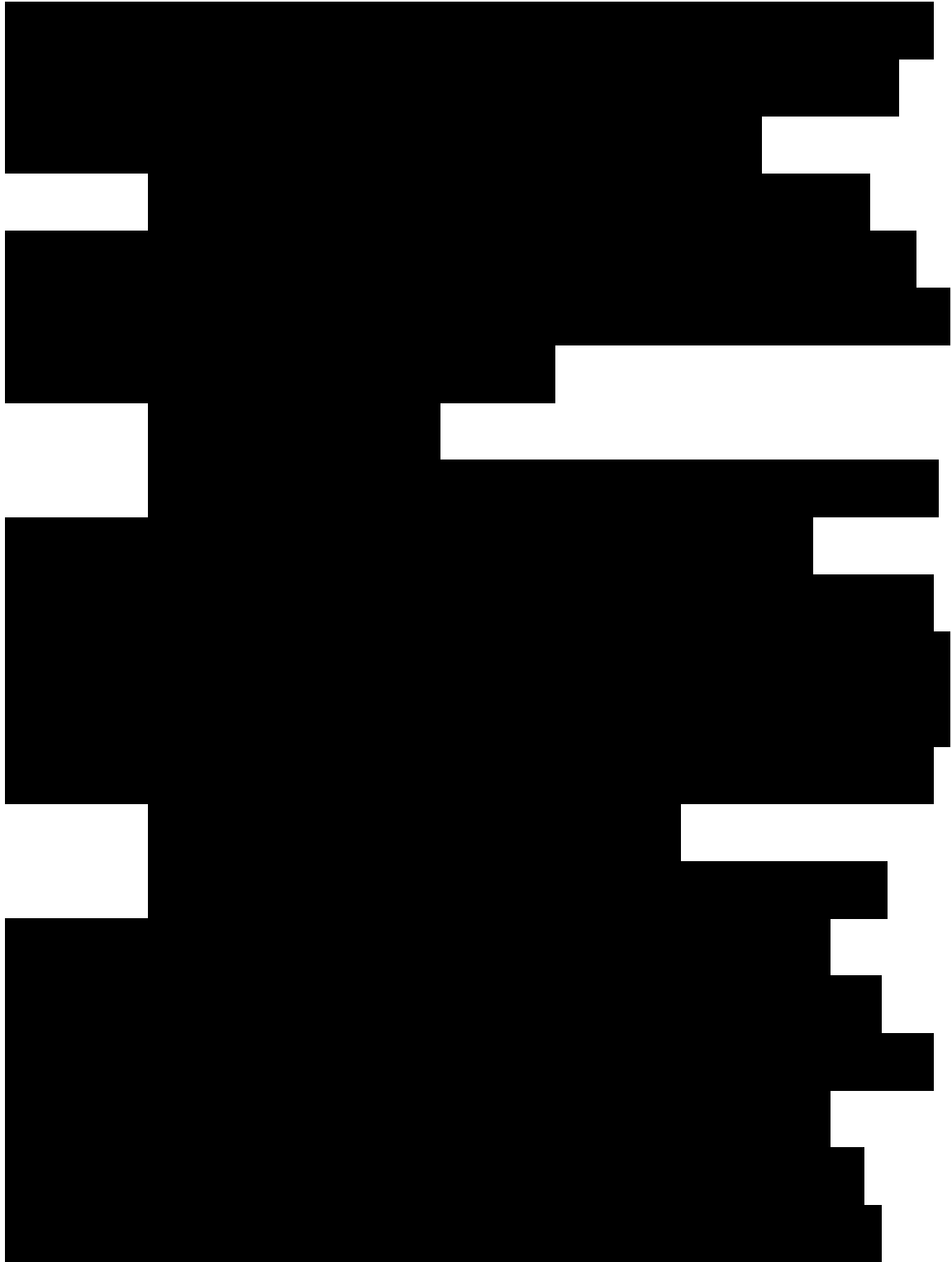
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



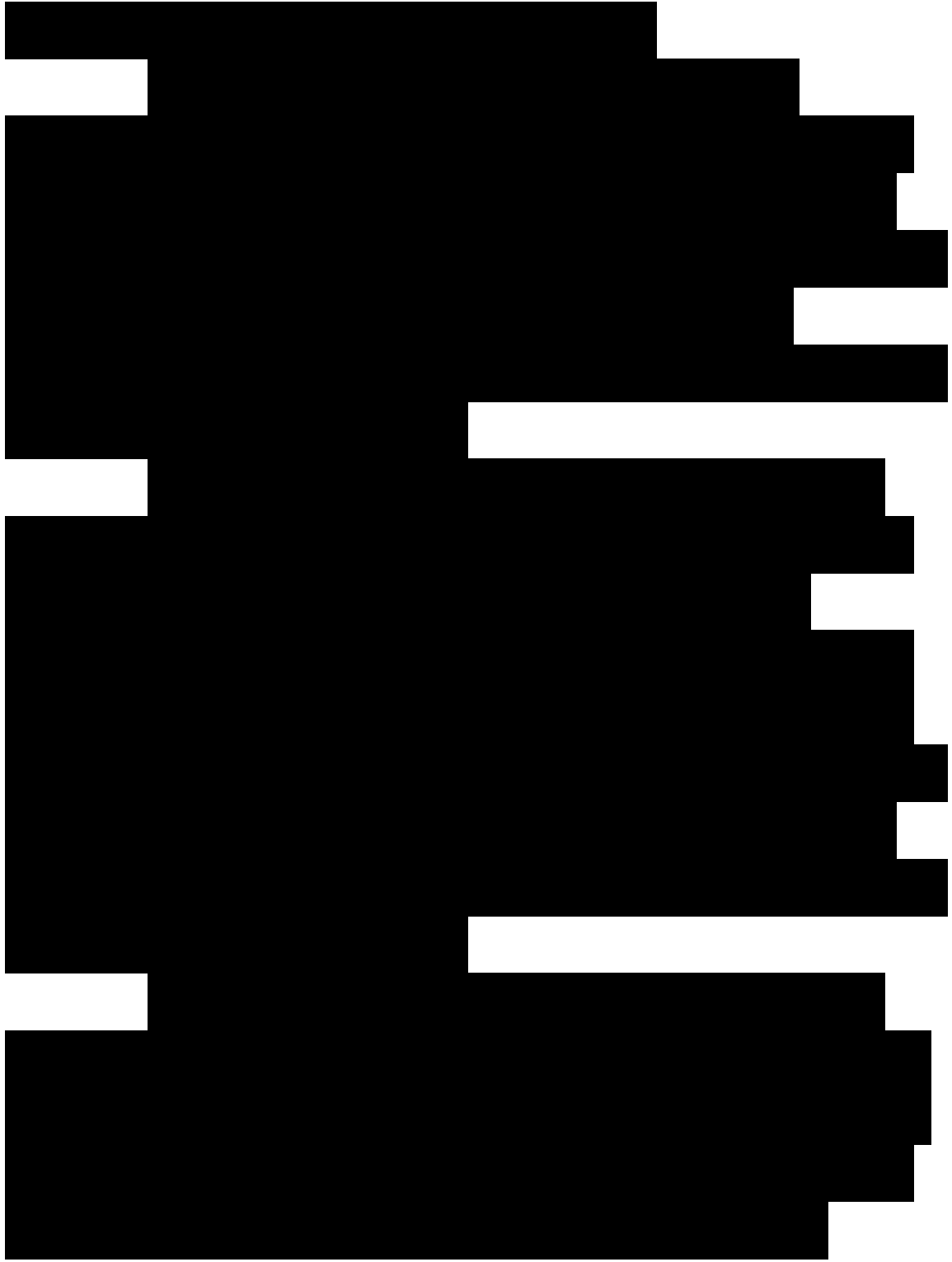
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



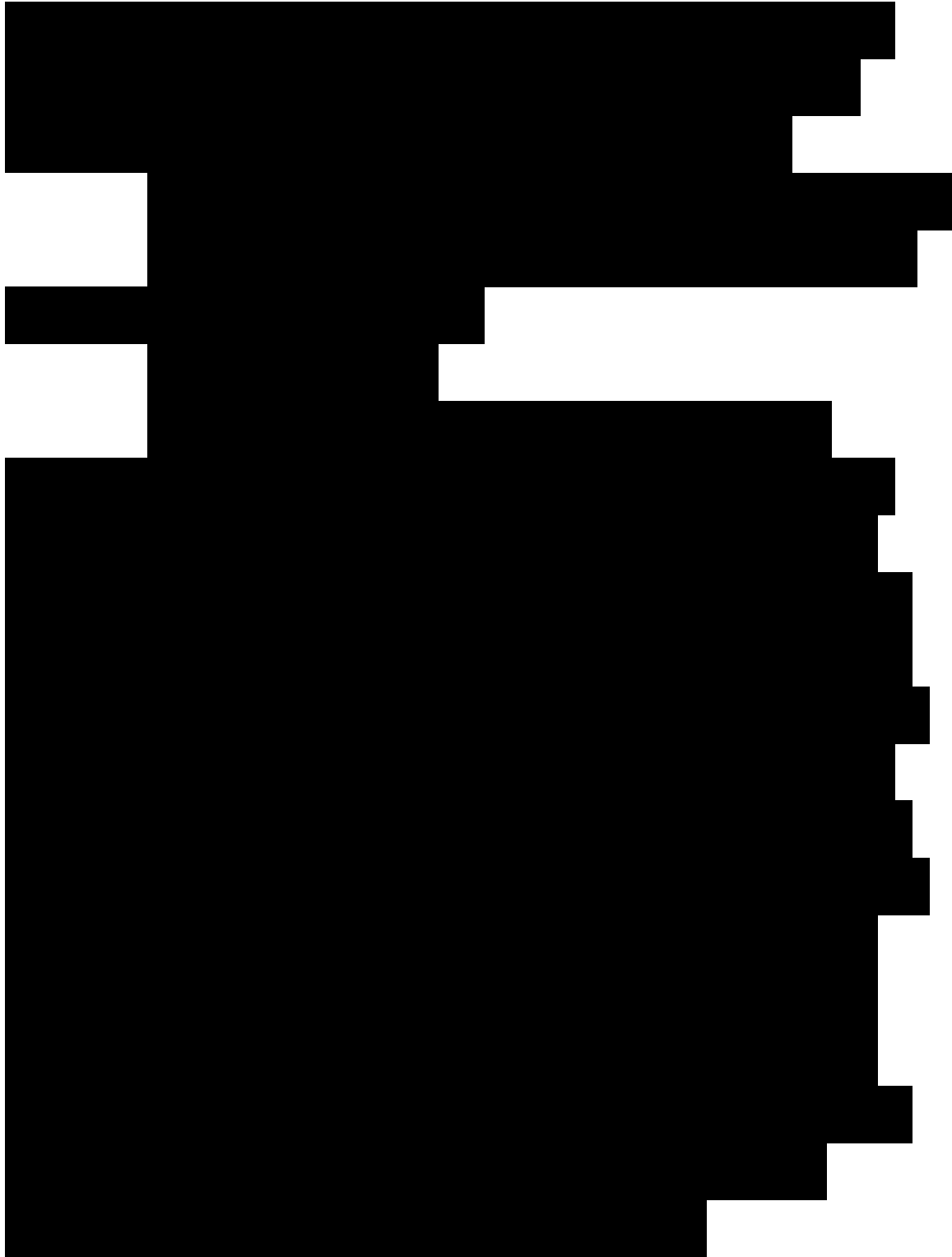
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



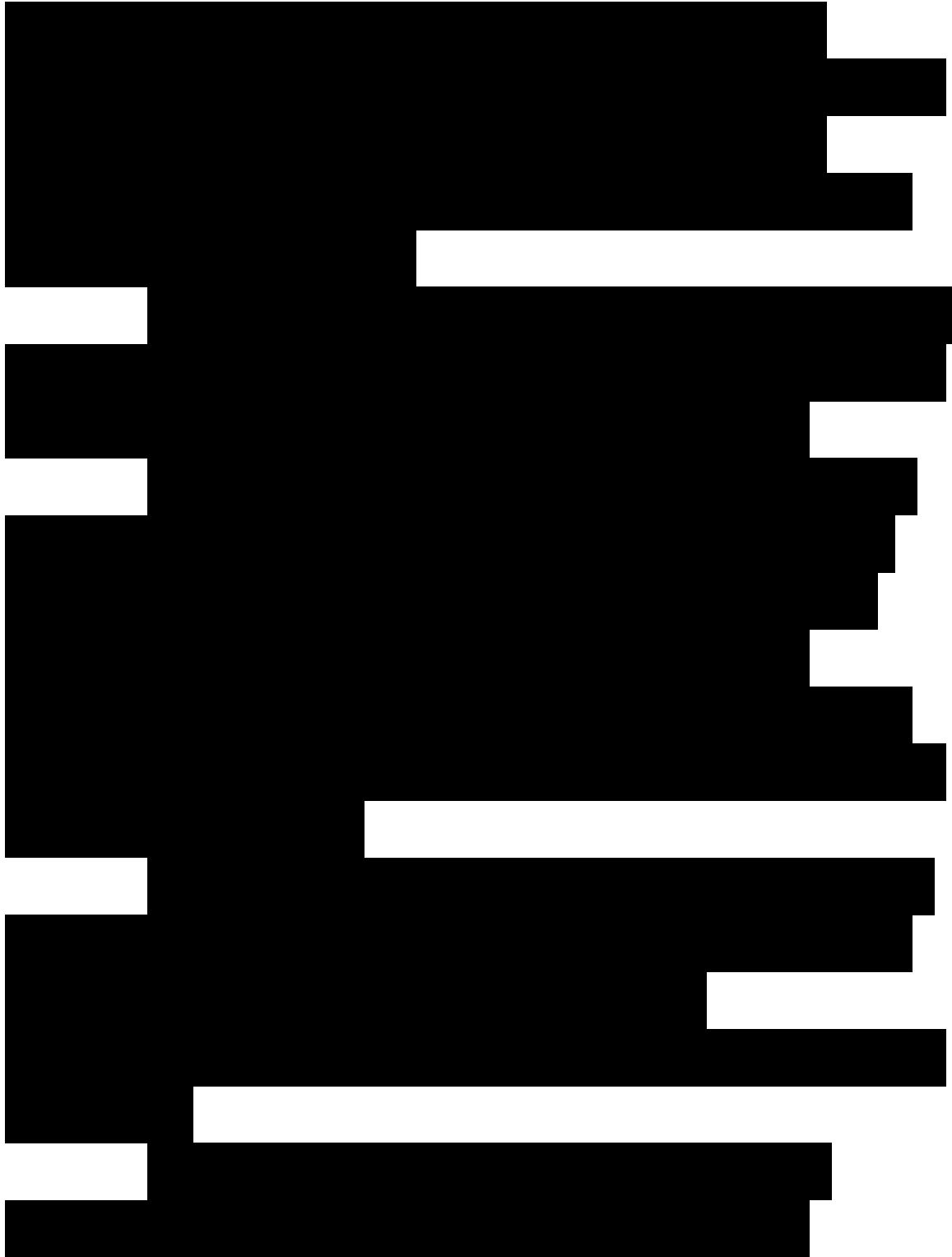
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



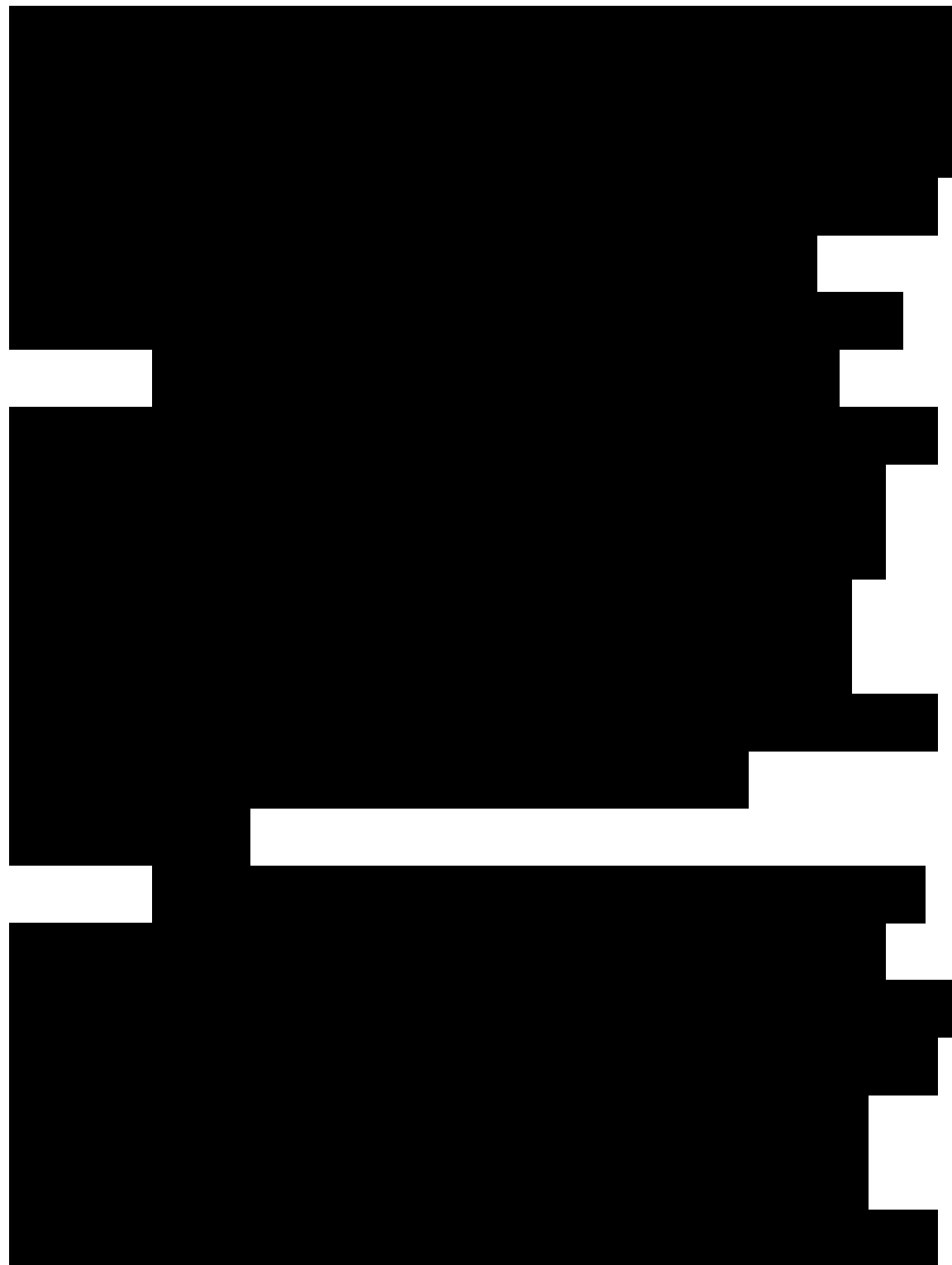
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



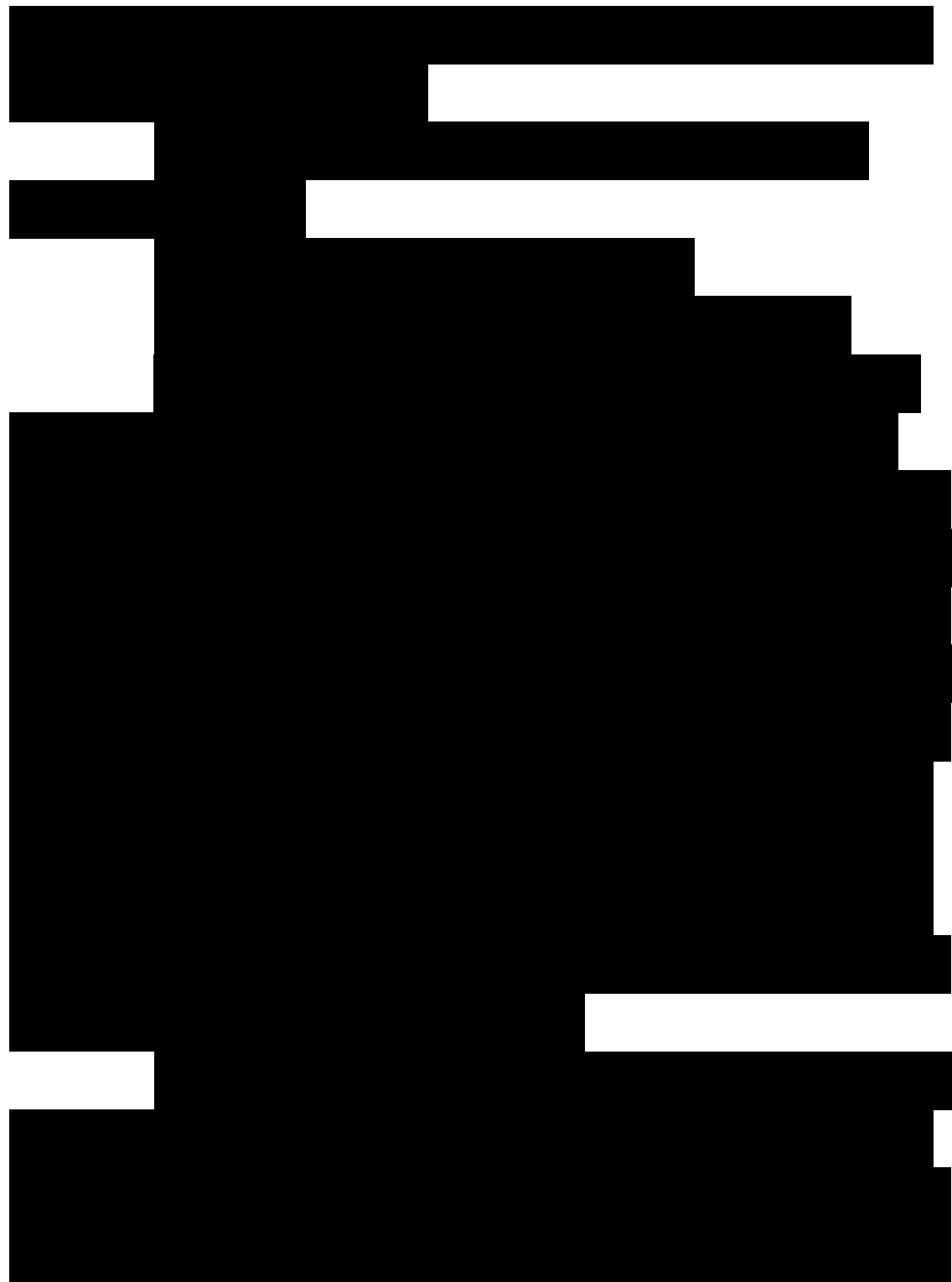
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



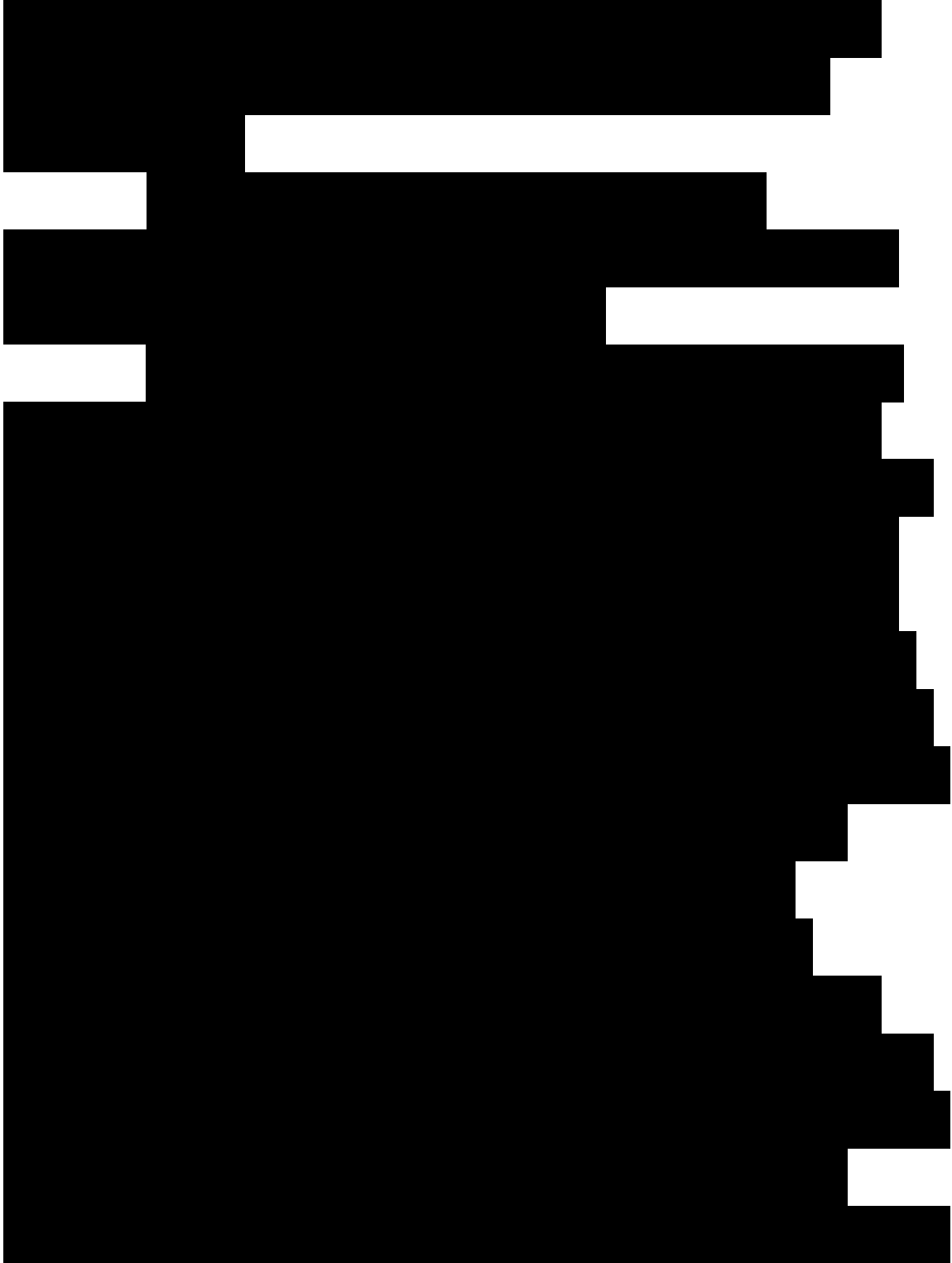
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



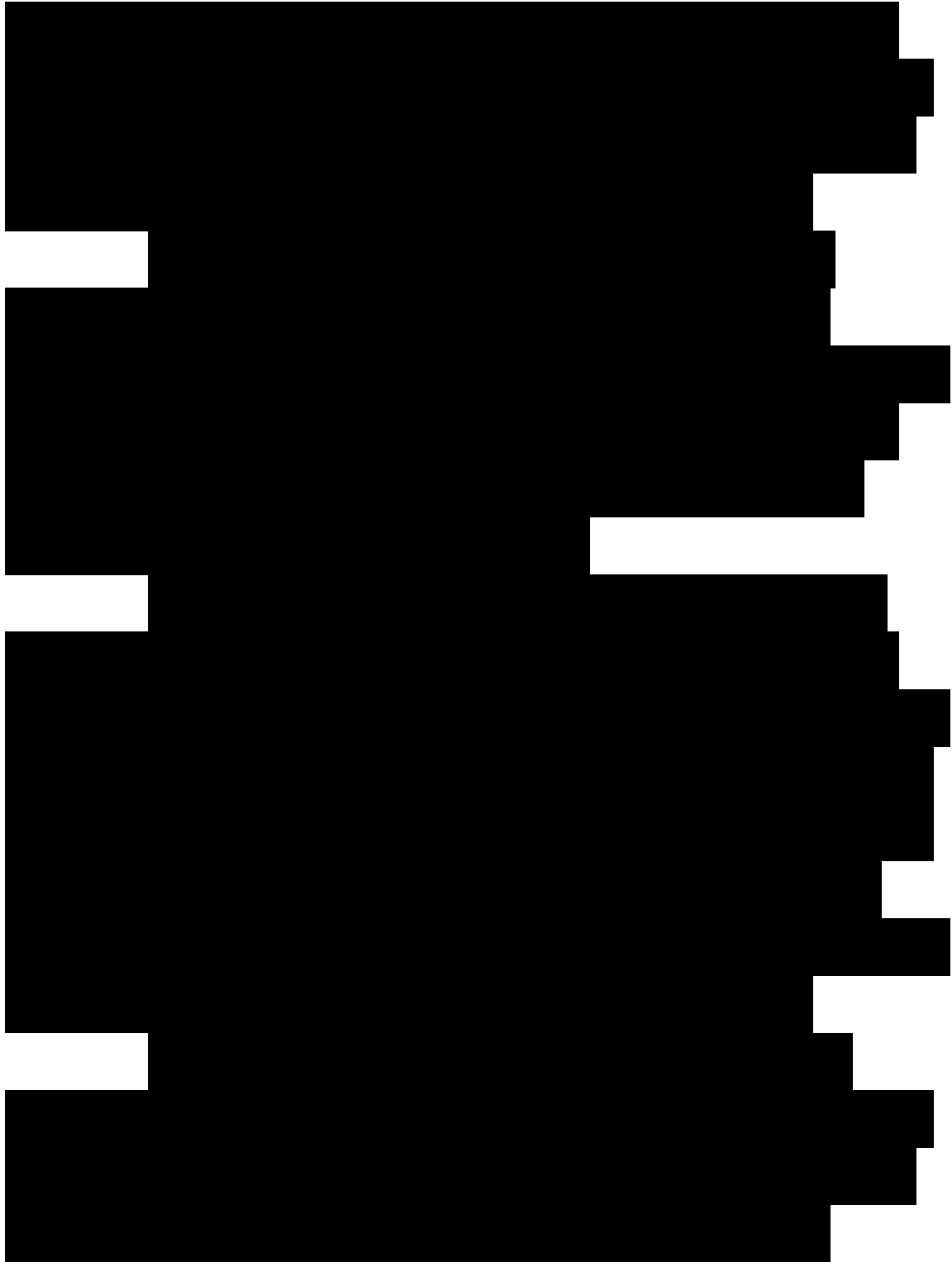
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



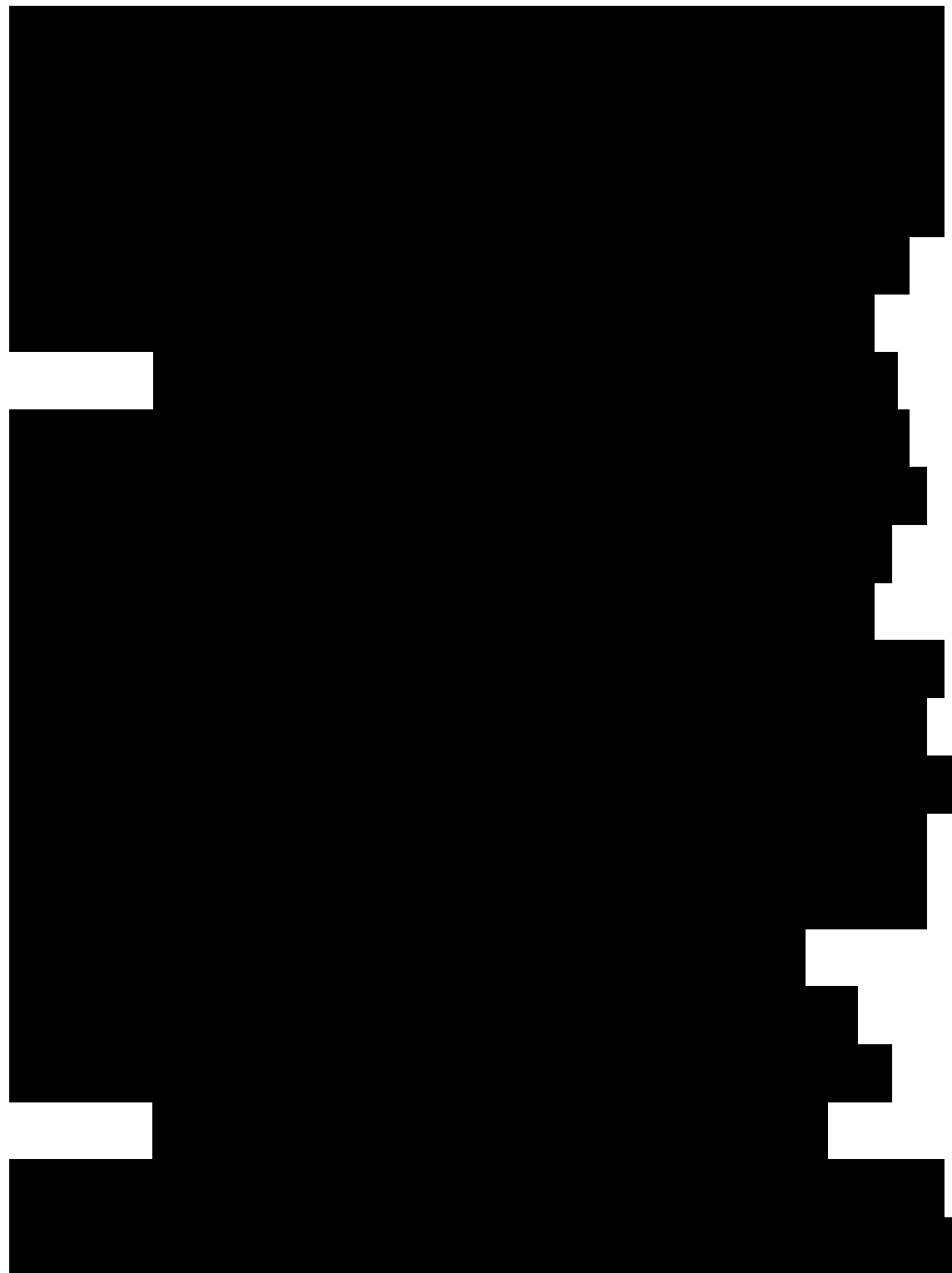
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



B&B REPORTERS
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

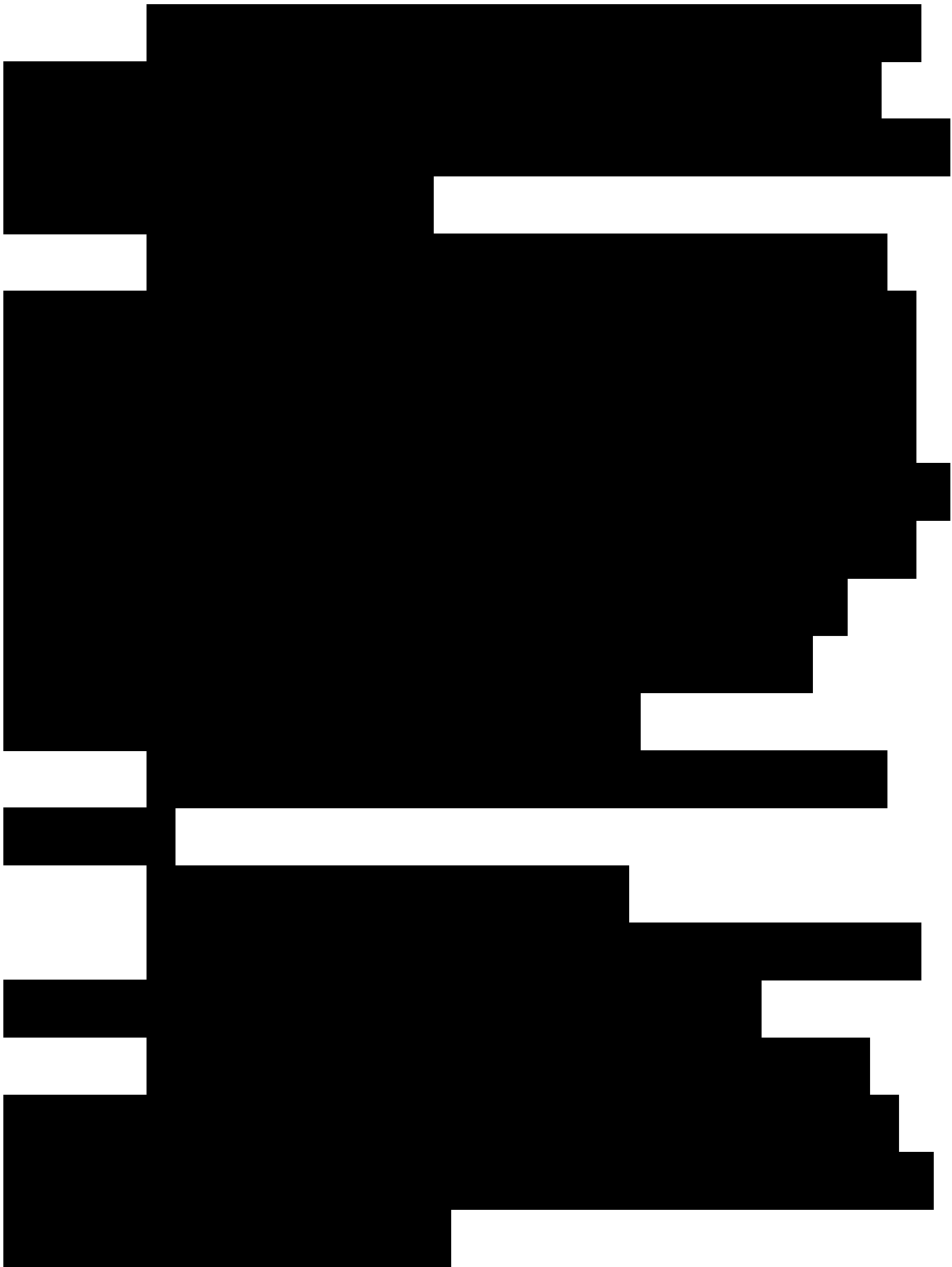
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7

[REDACTED]

(End of confidential session.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

OPEN SESSION

PRESIDENT CHENG: Before the reply, we noticed that we have just over an hour to 5:00. You will no doubt bear that in mind in utilizing the time. We'll try and give equal time to the two Parties as much as we can.

However, I'd like to ask both Parties how they wish to deal with the questions of confidentiality in the Reply. Will you be providing it--or will you be having it mixed so that you would like it kept confidential, or are you still pricking it into parts?

I'll start with the Claimants first.

MR. LEW: I think it's going to be too hard to unscramble the egg at this point given the interrelated nature of this issue, so I think Claimants believe that this session should be confidential.

PRESIDENT CHENG: Respondent?

MR. HEISKANEN: That is probably the best approach. We expect to focus on some of the factual allegations, and it will be difficult to discuss those without suspending the broadcast.

PRESIDENT CHENG: All right. Well, in that

1 case, I think we will from here on stop the
2 broadcasting again for the Reply.

3 All right.

4 (End of open session. Confidential business
5 information redacted.)

CONFIDENTIAL SESSION

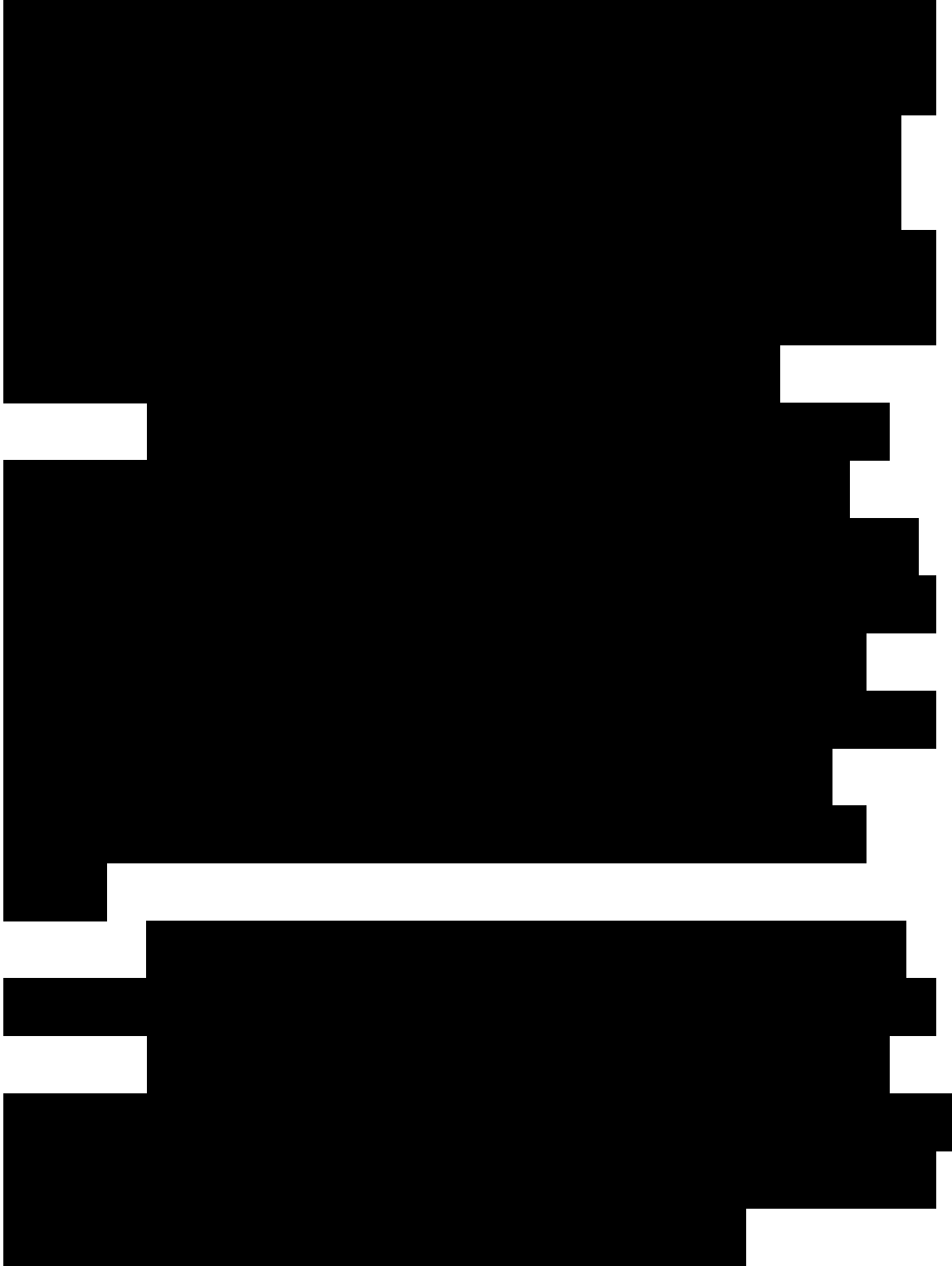
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



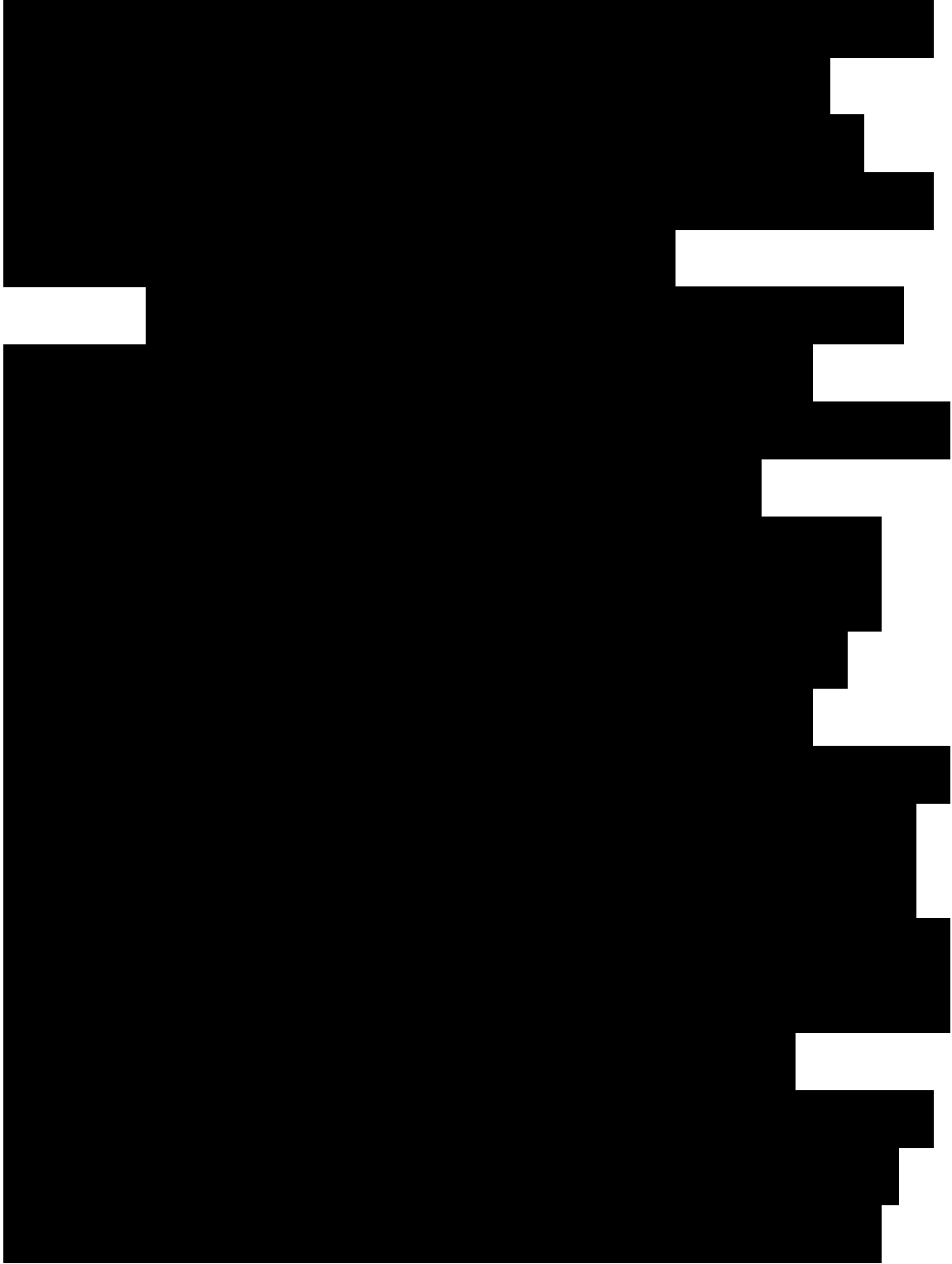
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



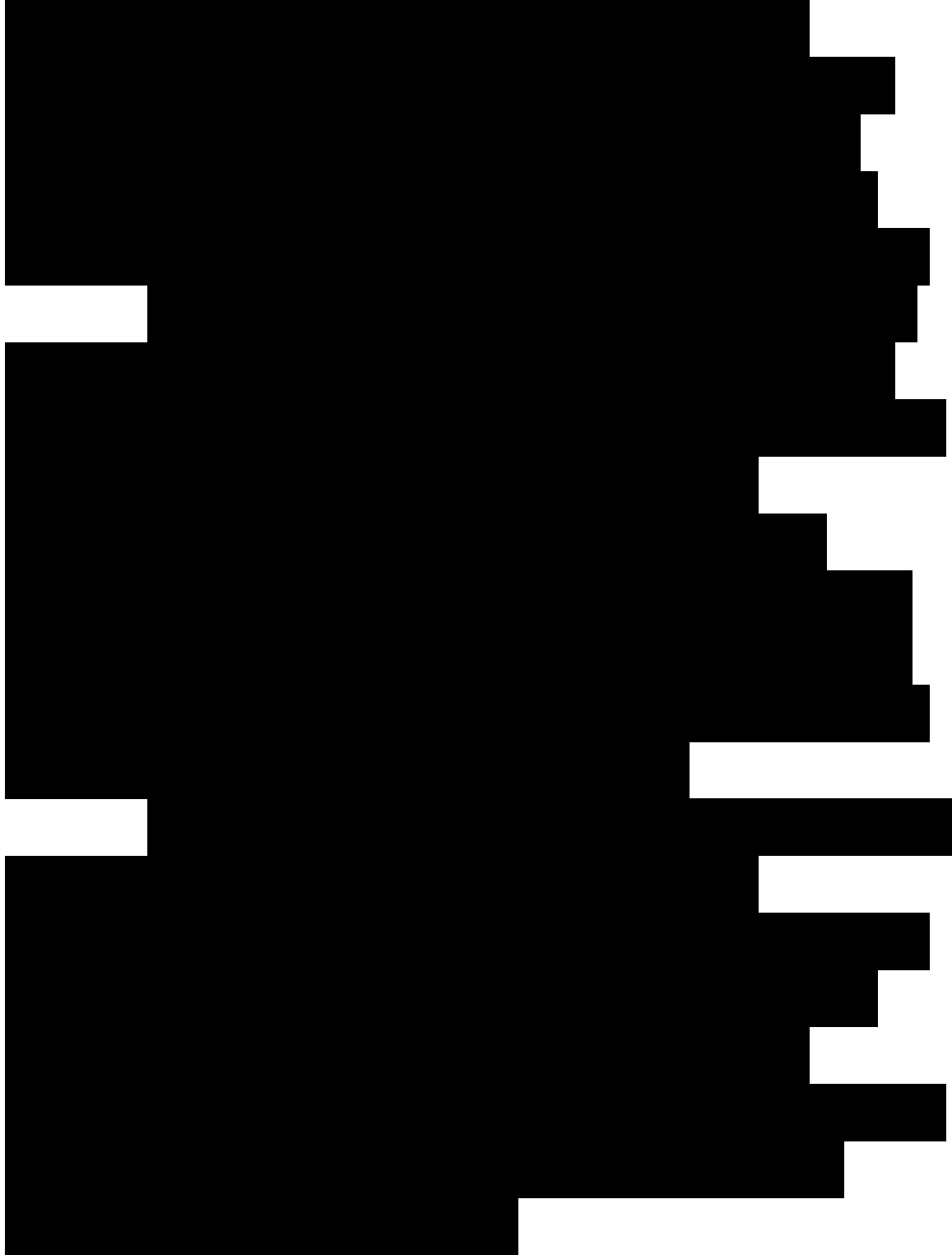
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



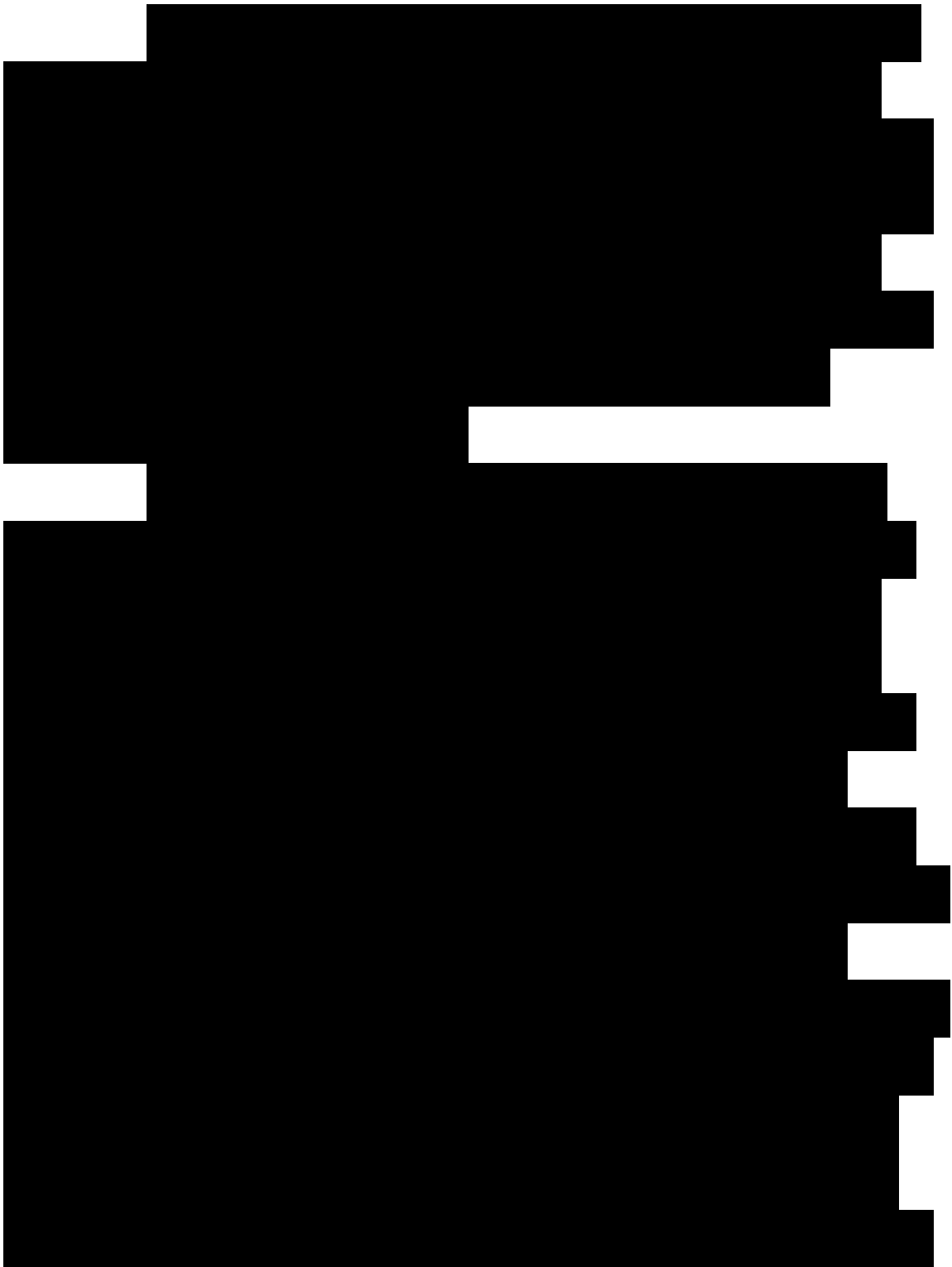
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

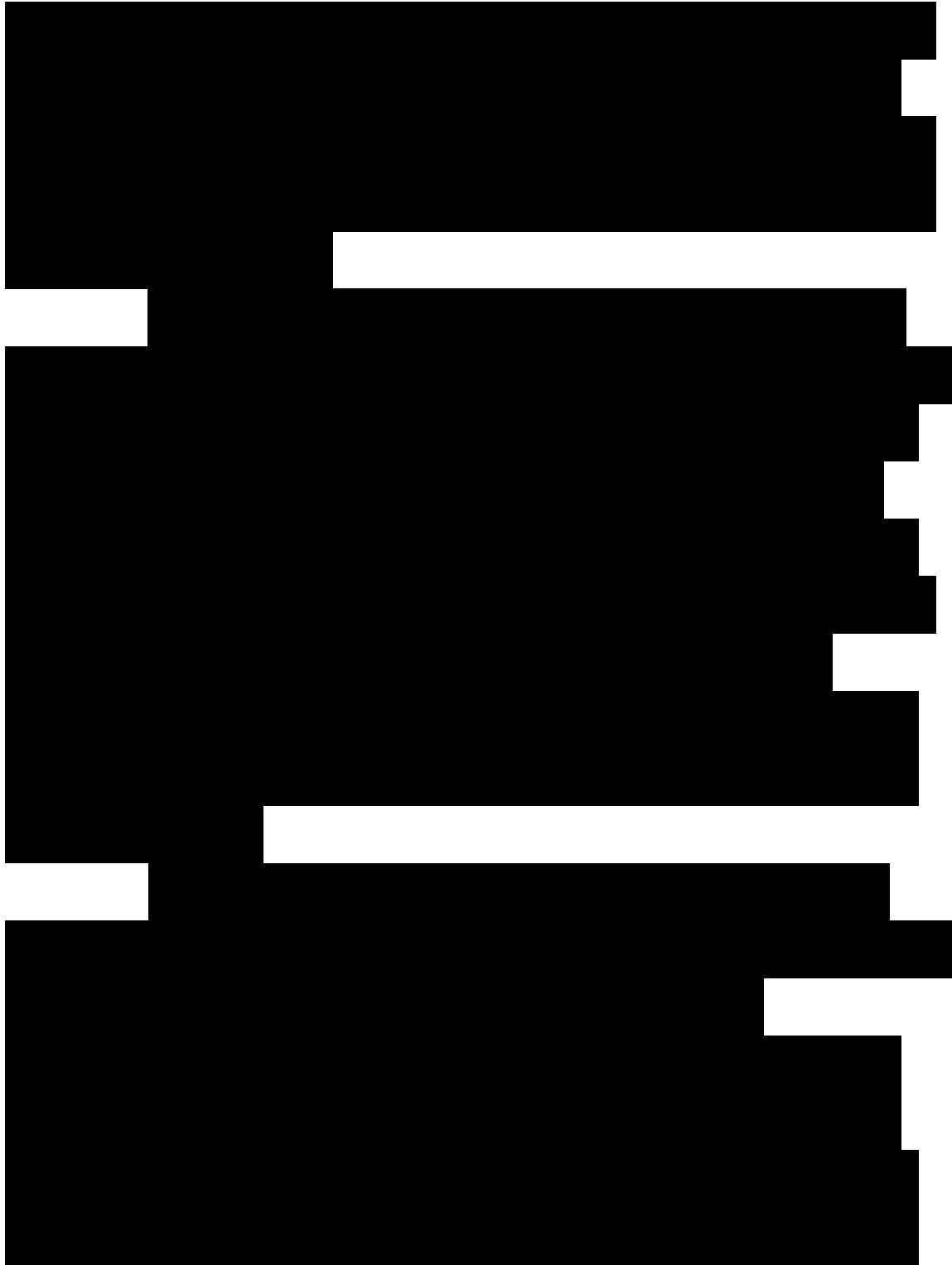
[Redacted text block]

[Redacted text block]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



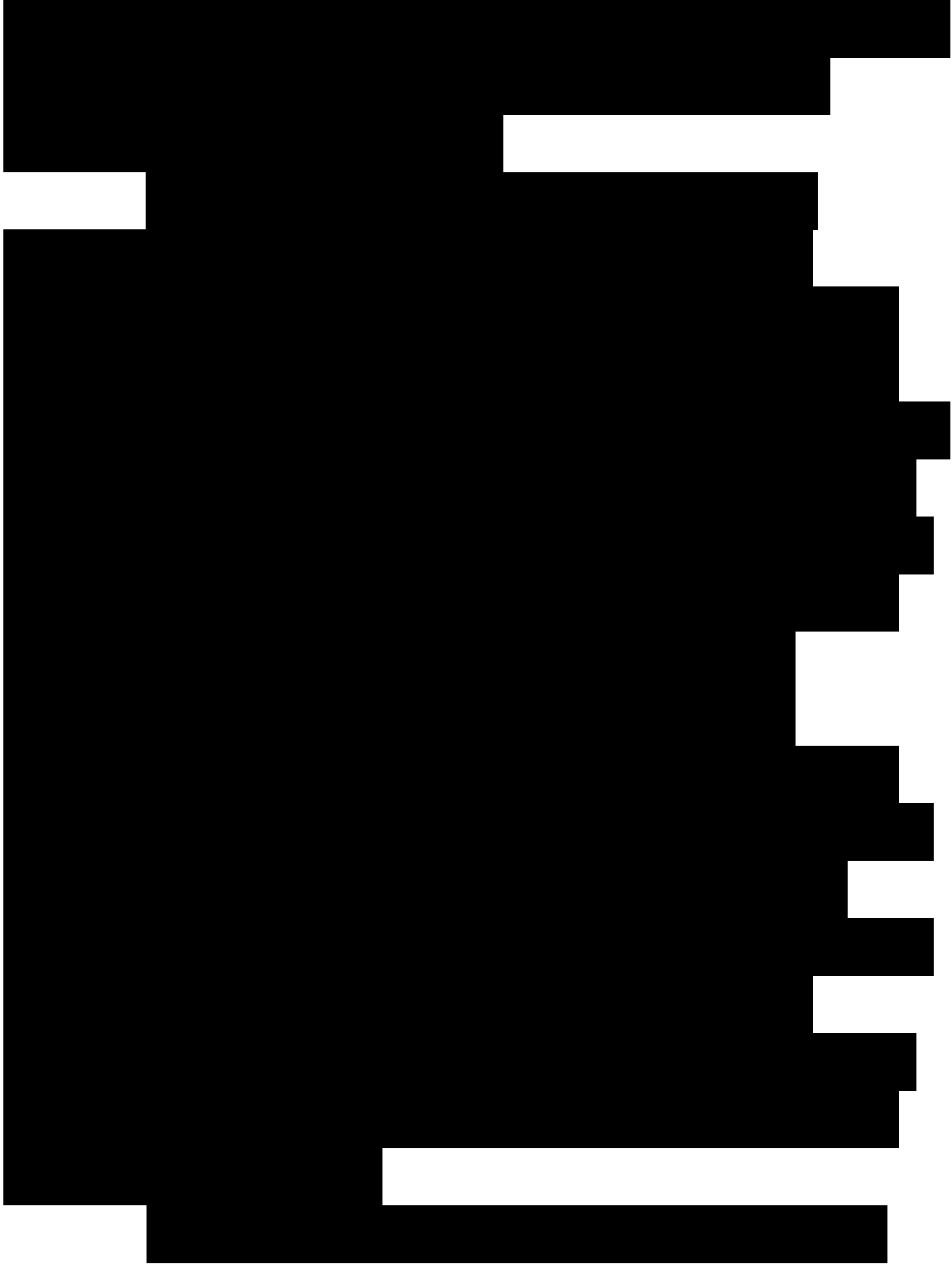
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



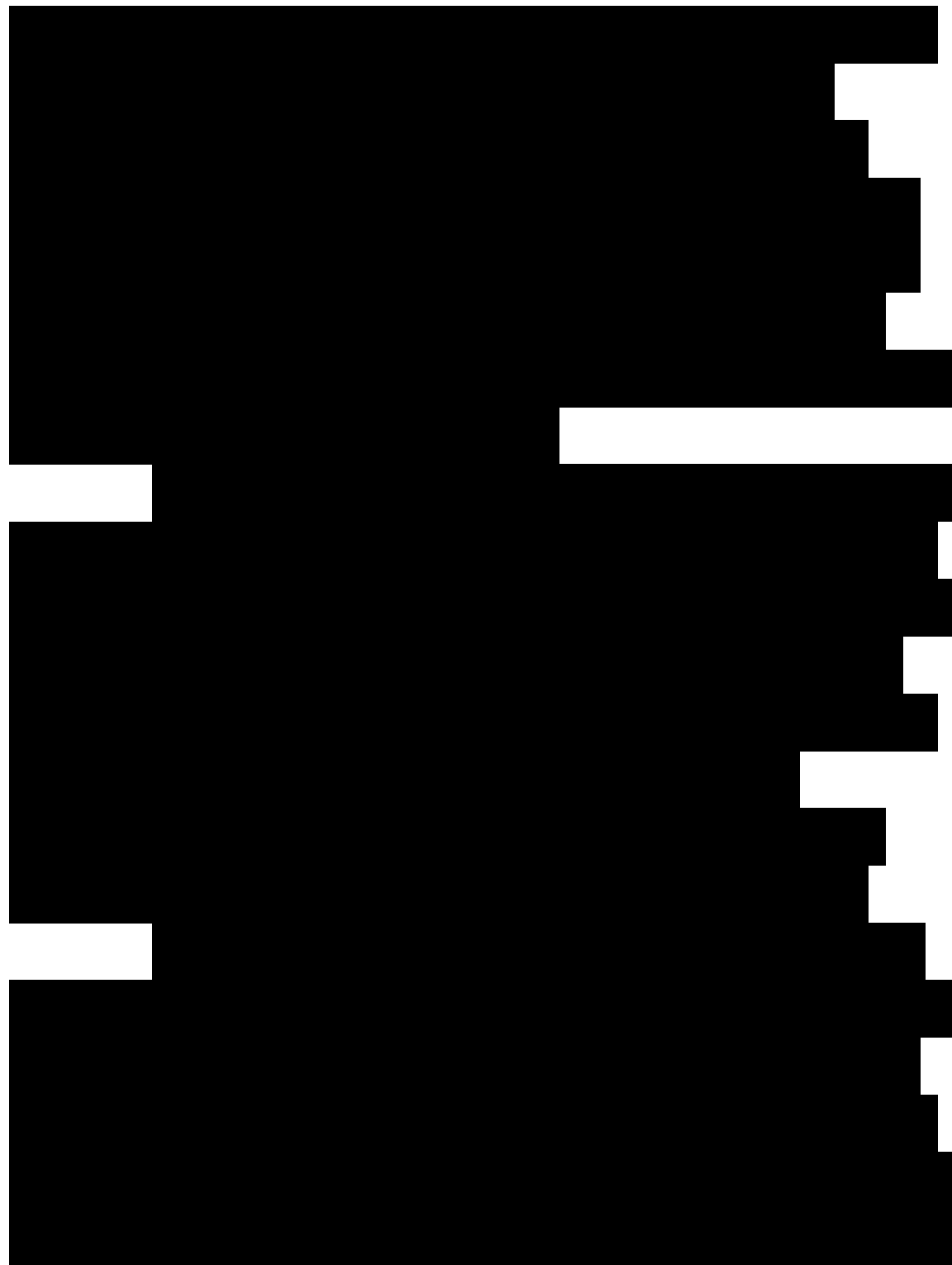
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

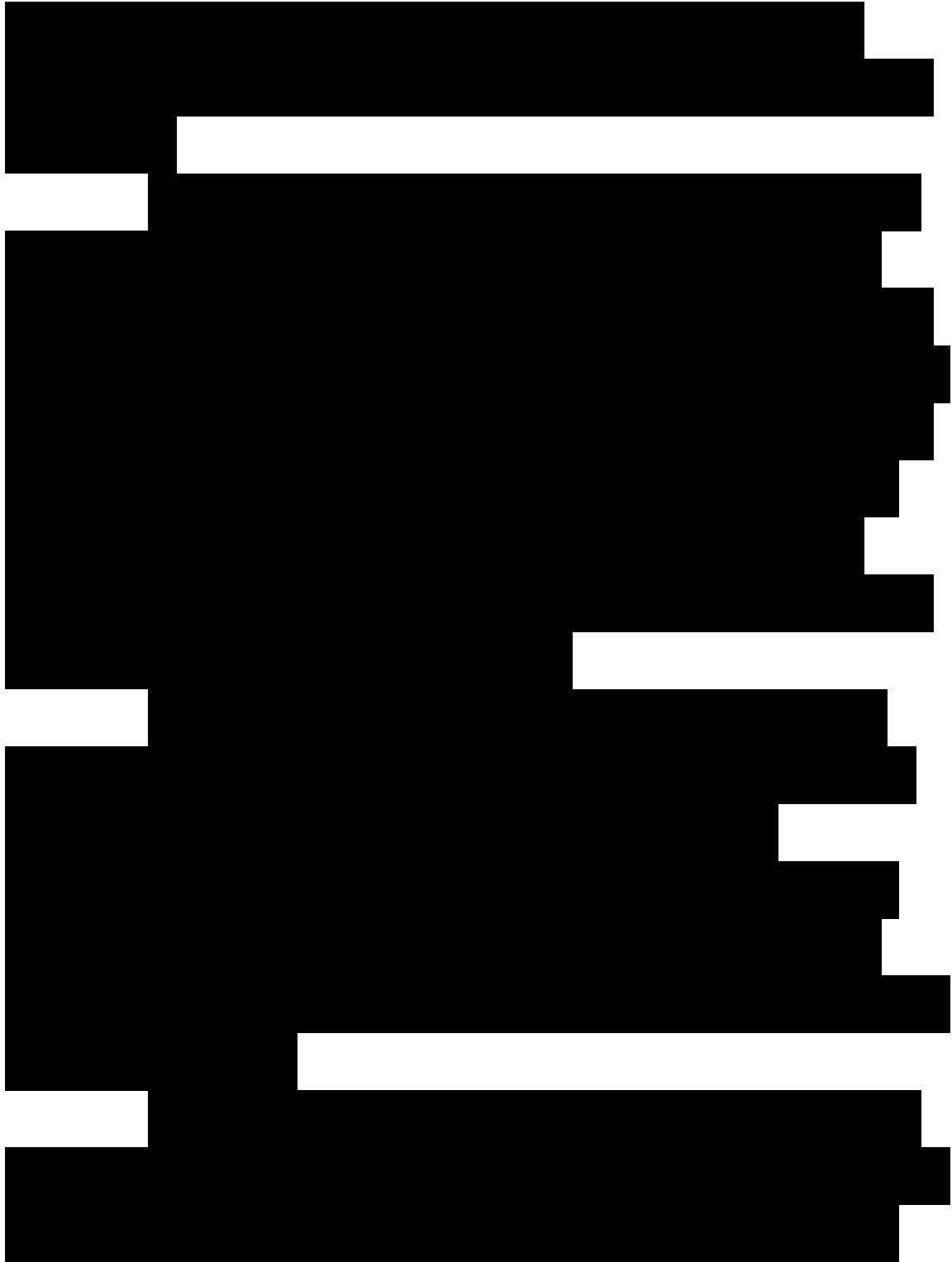
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



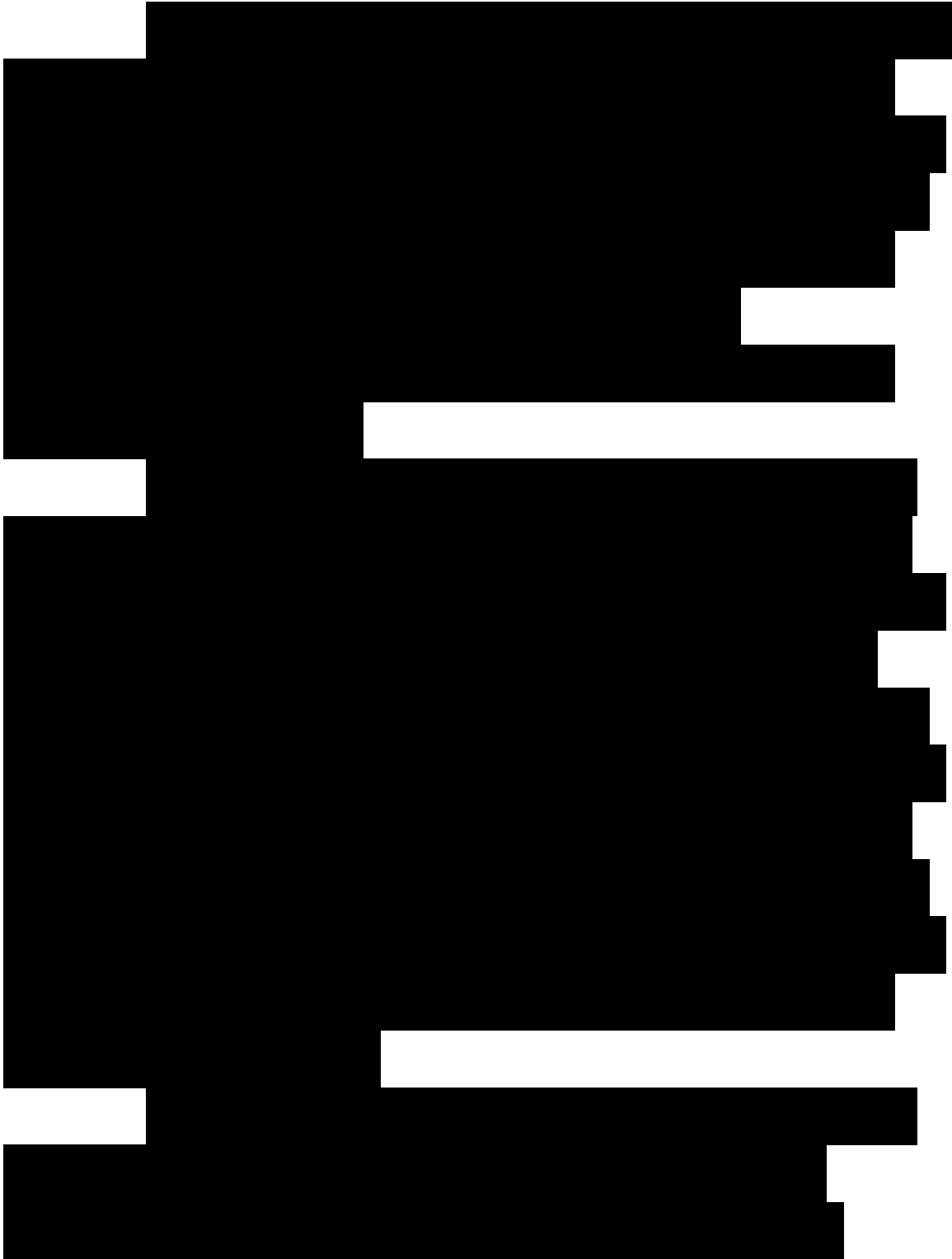
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



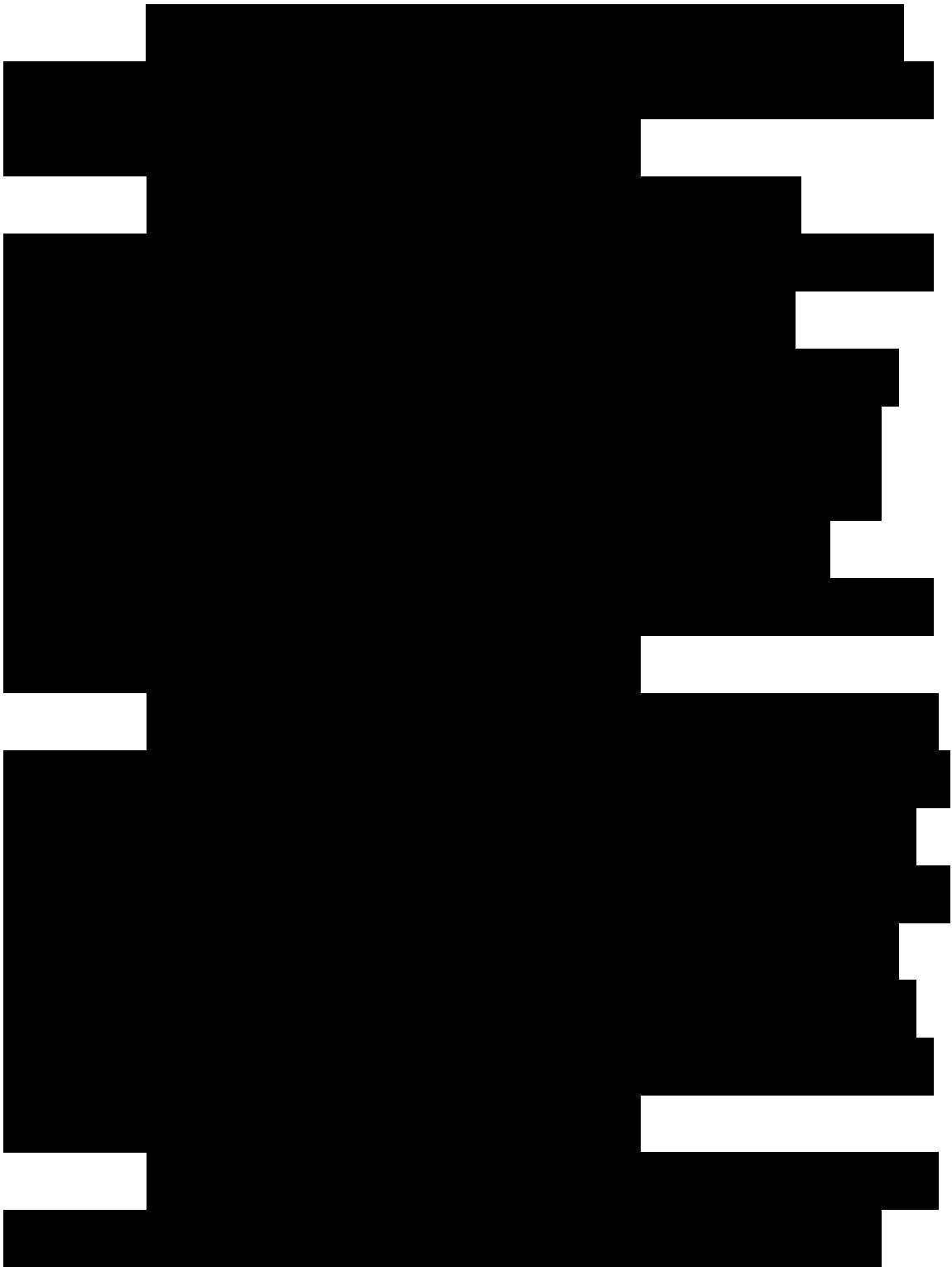
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



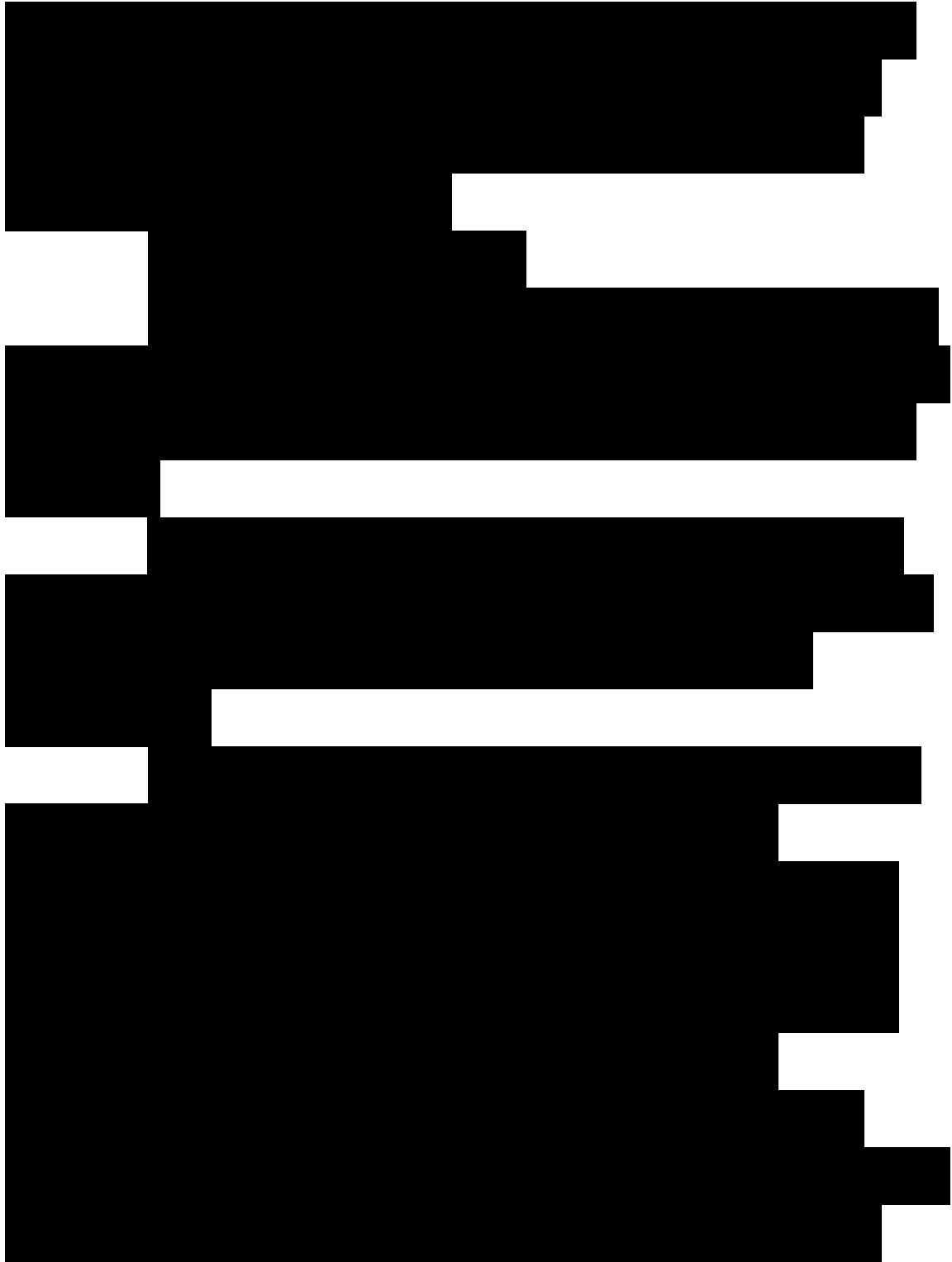
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



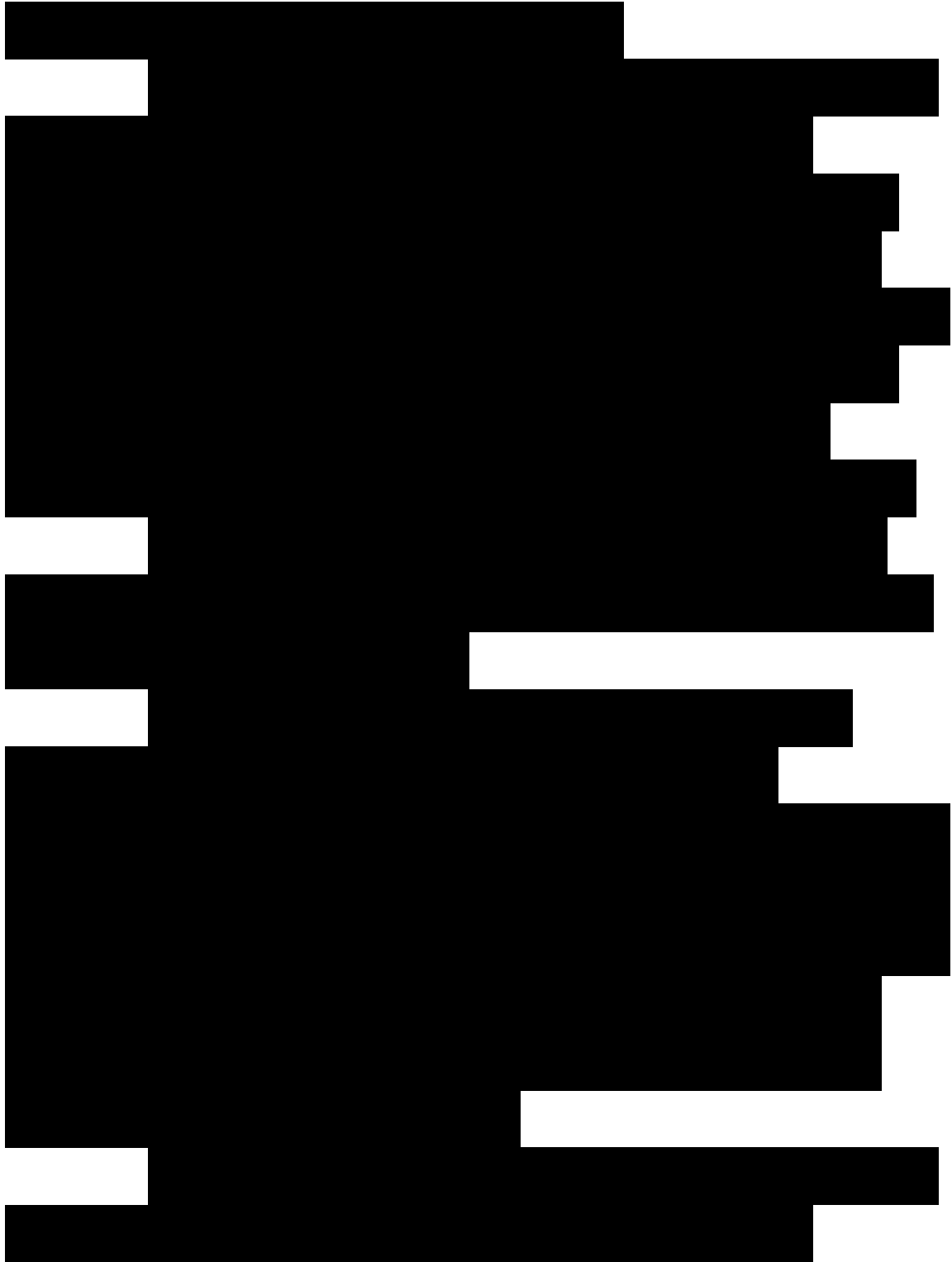
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



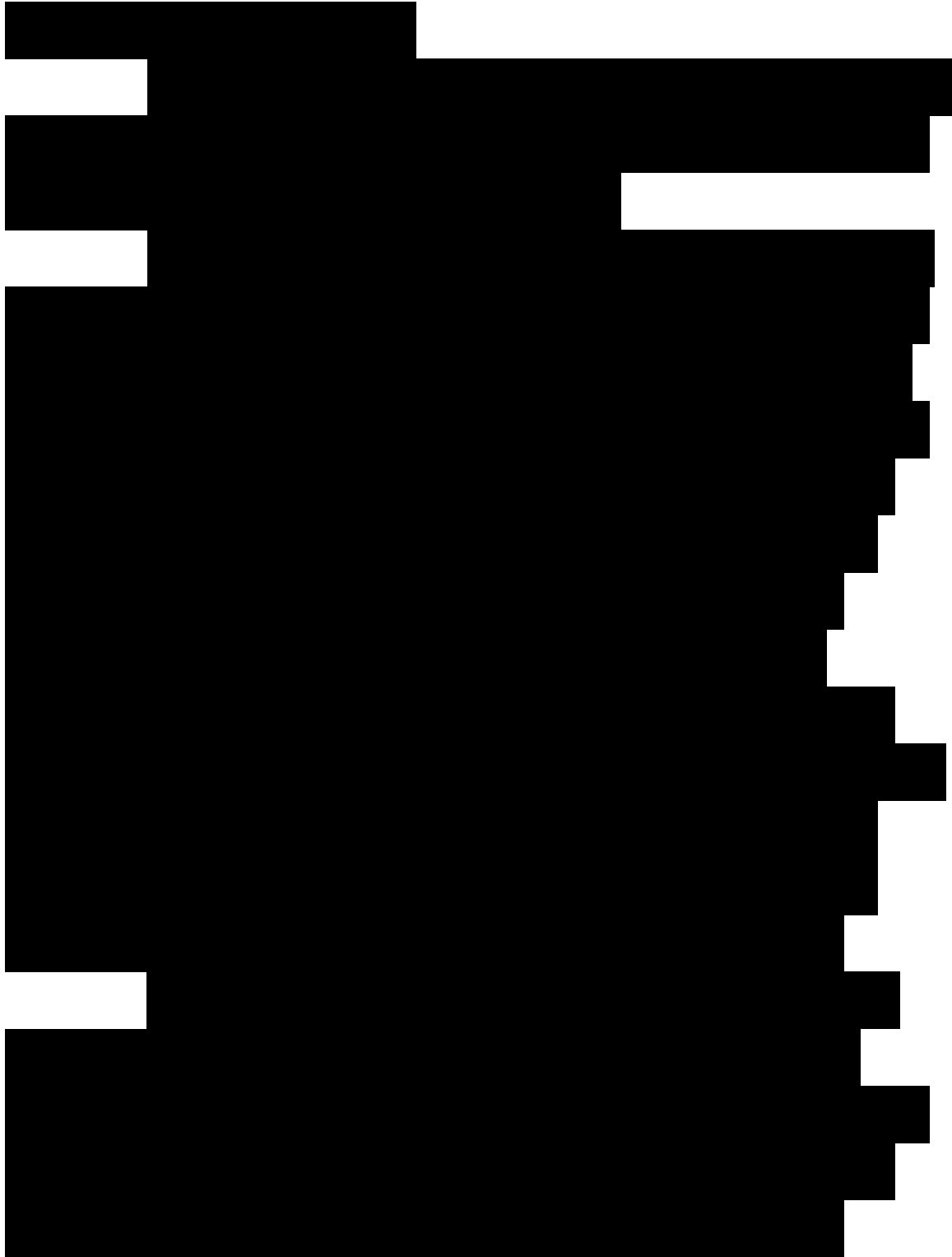
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



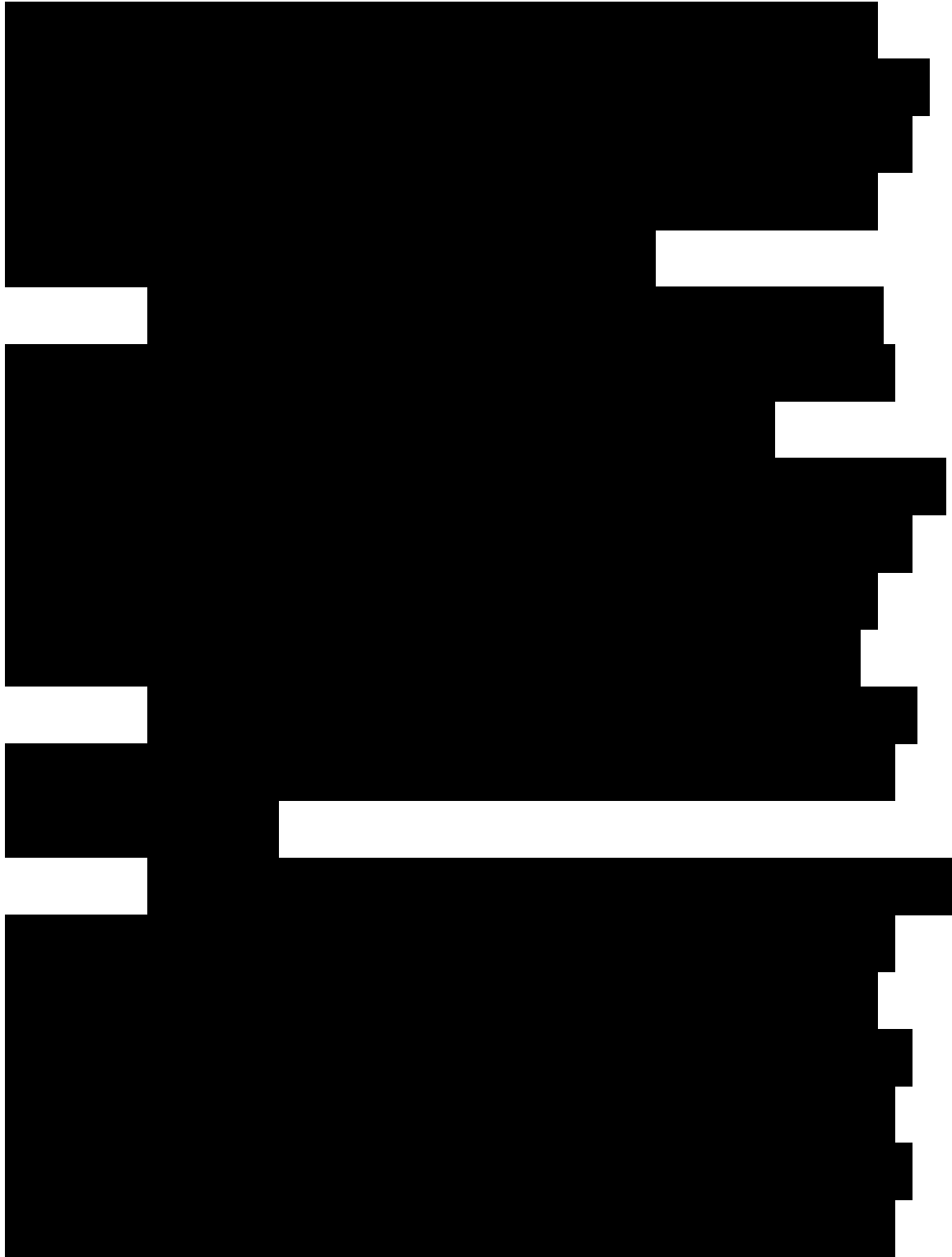
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



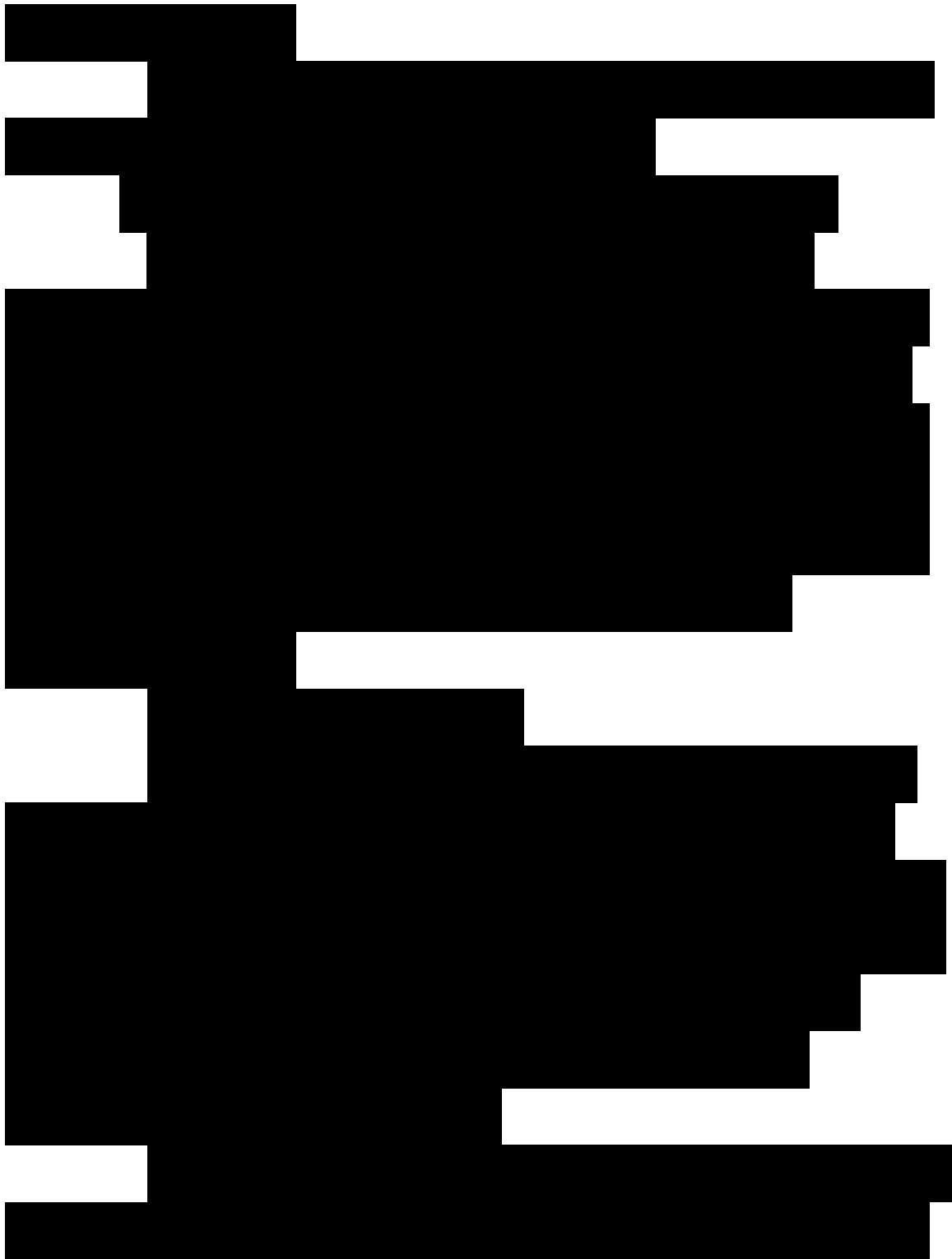
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

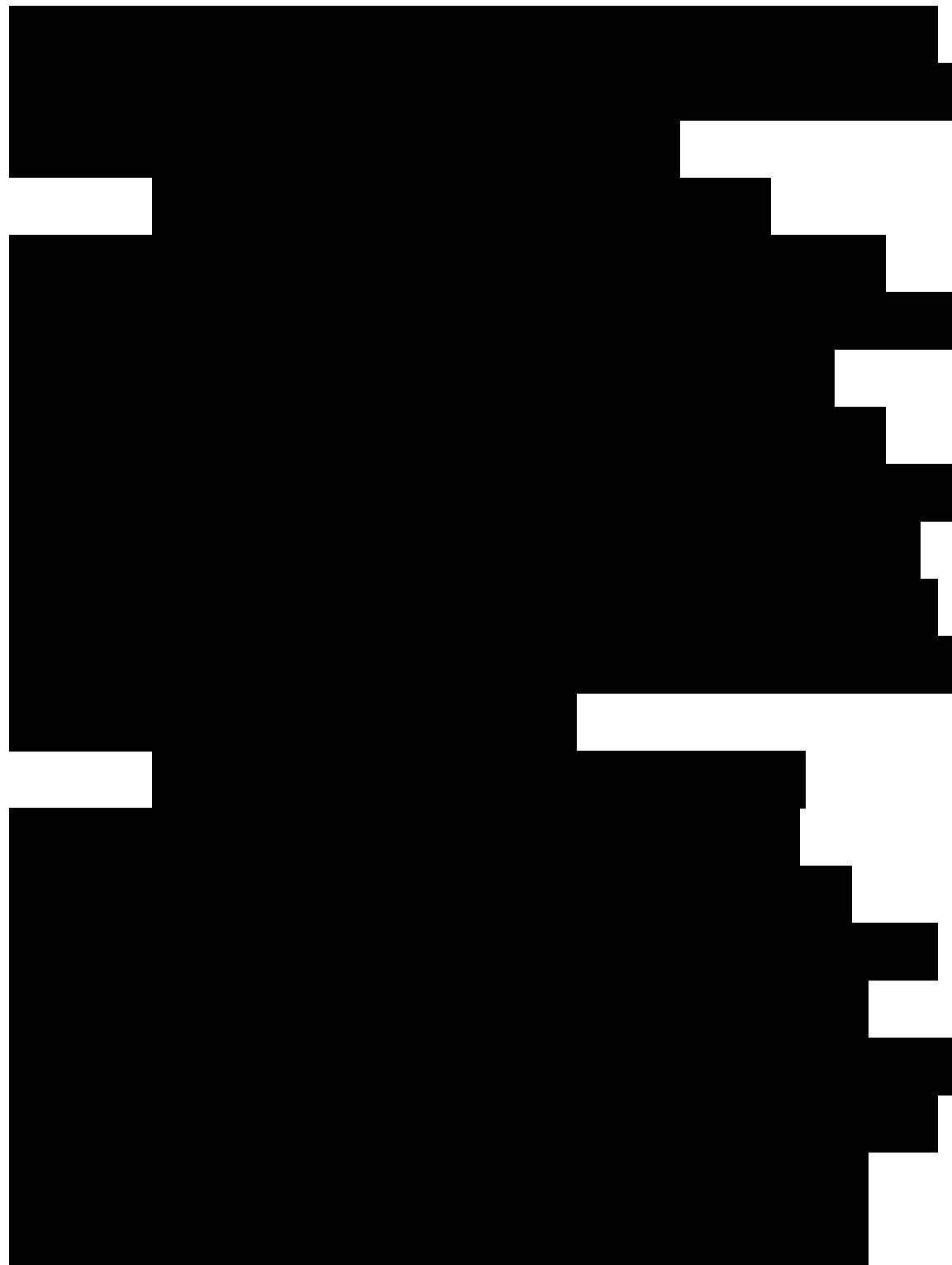
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



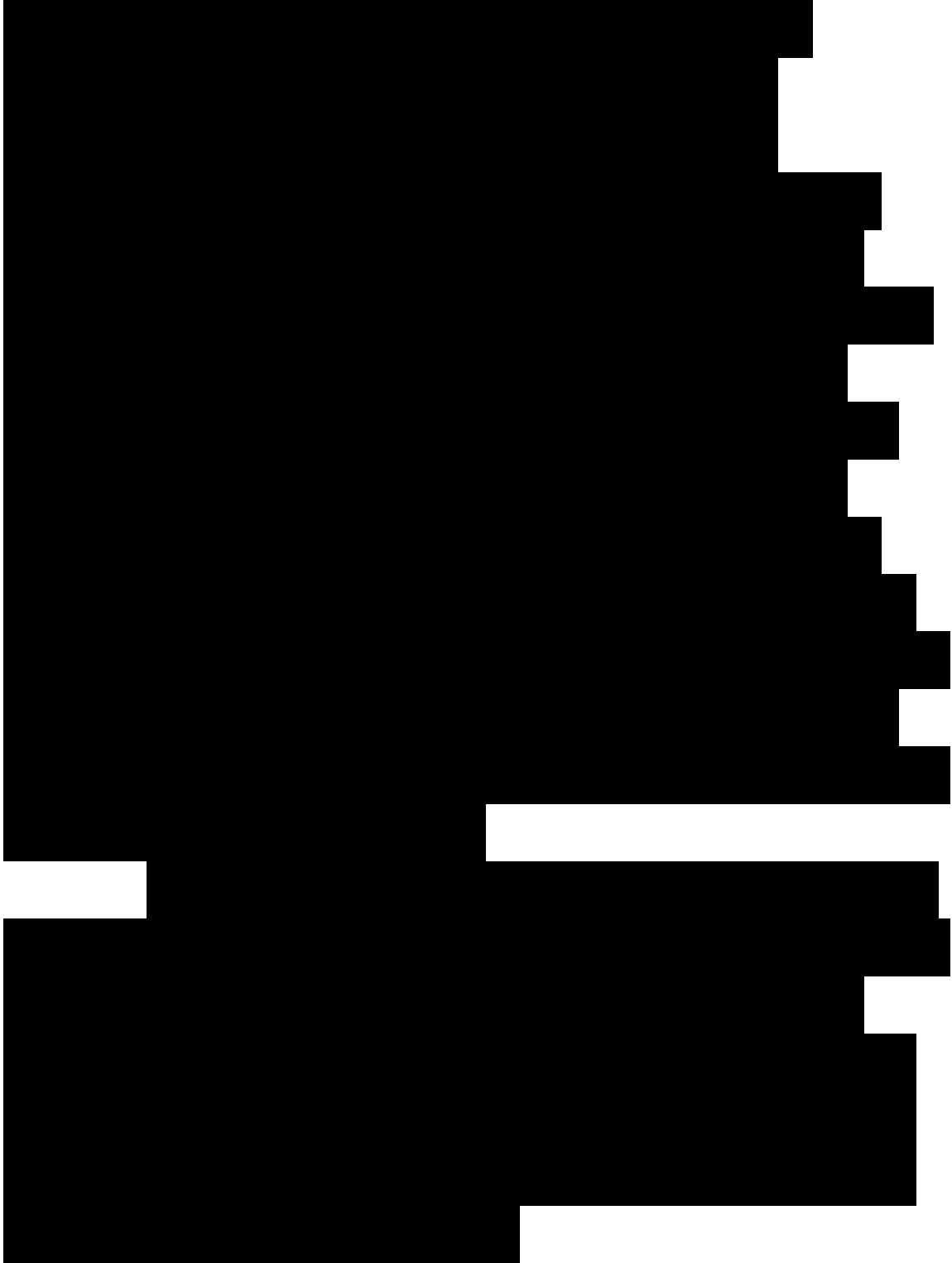
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



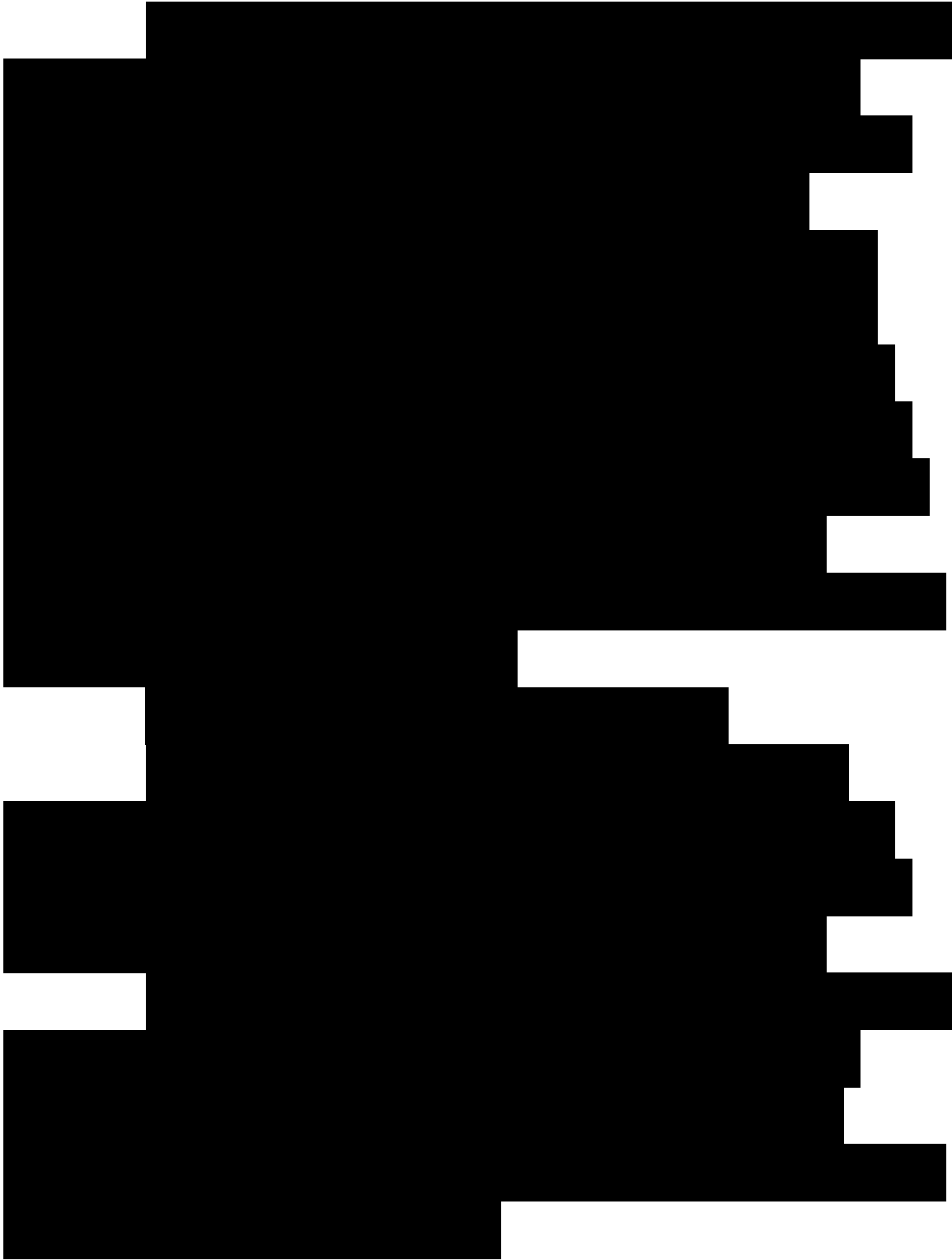
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



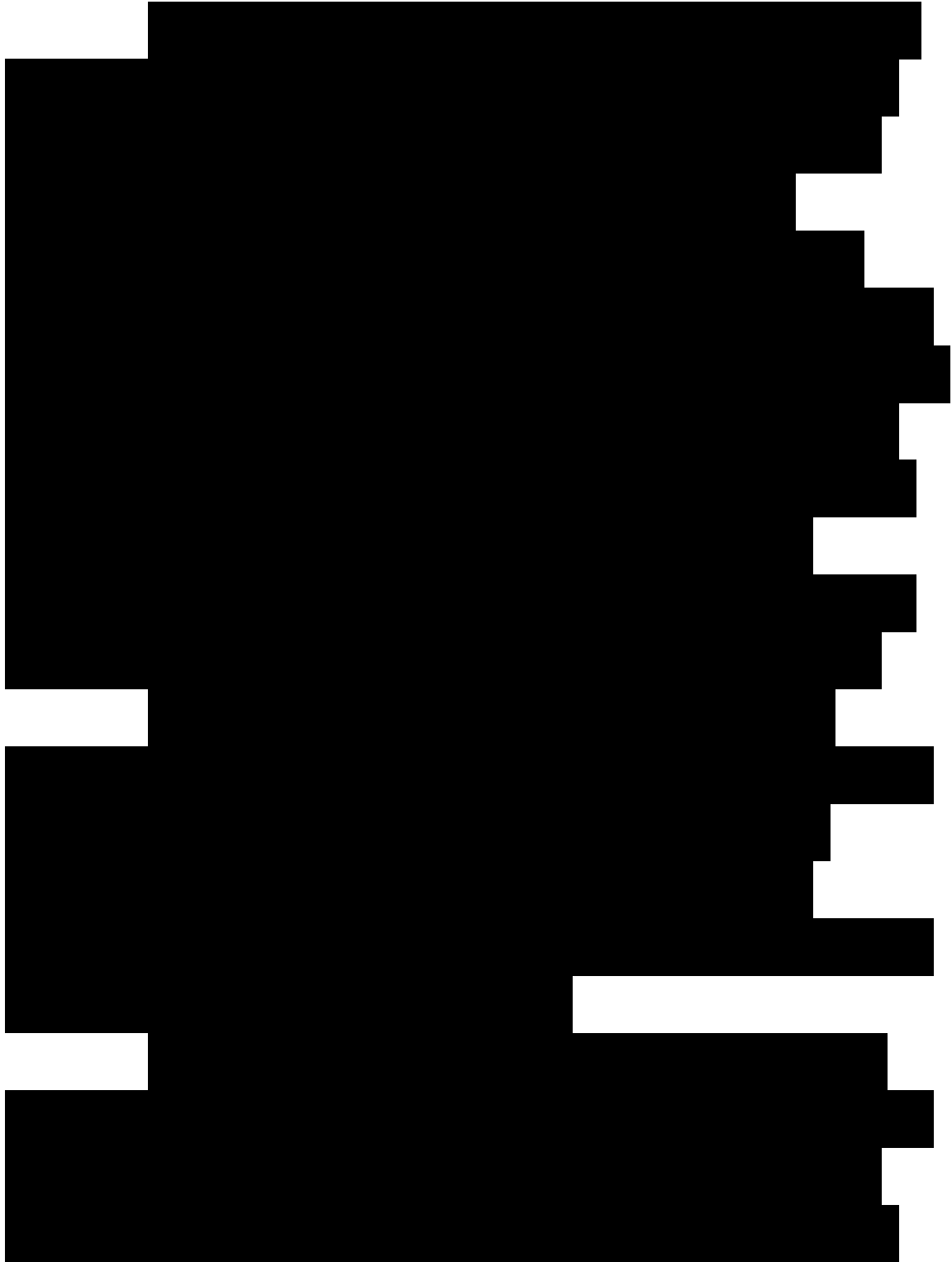
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



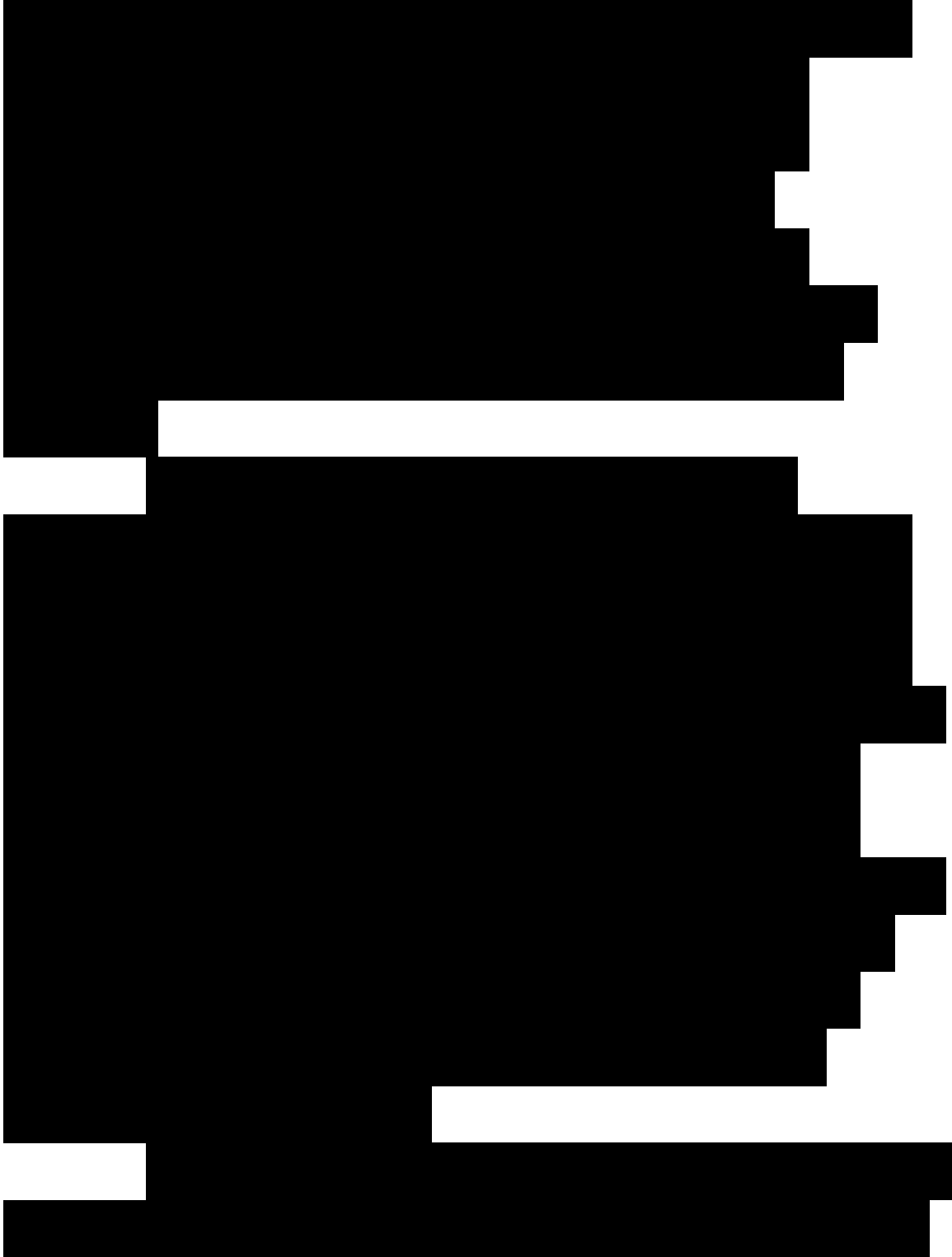
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



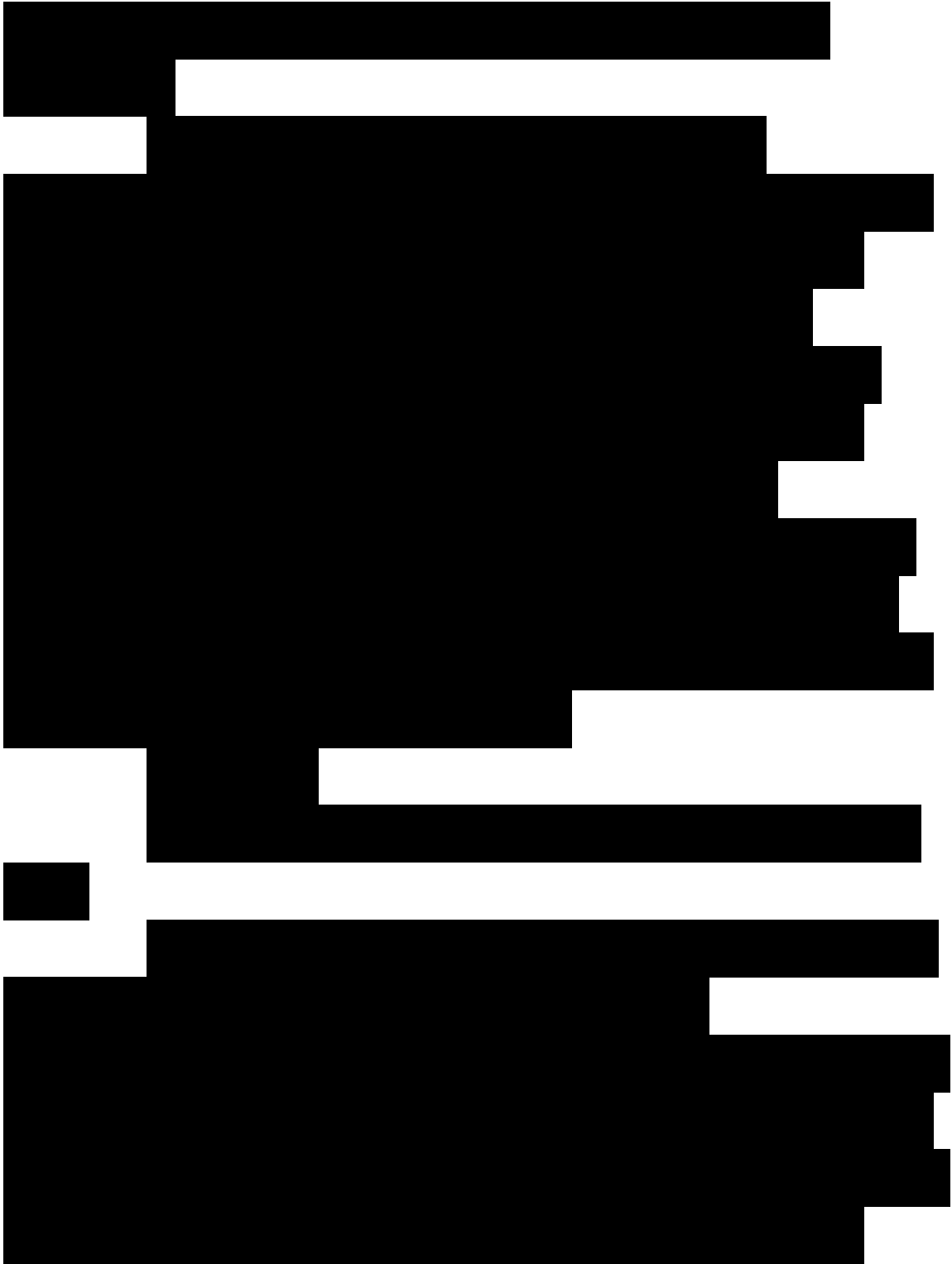
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



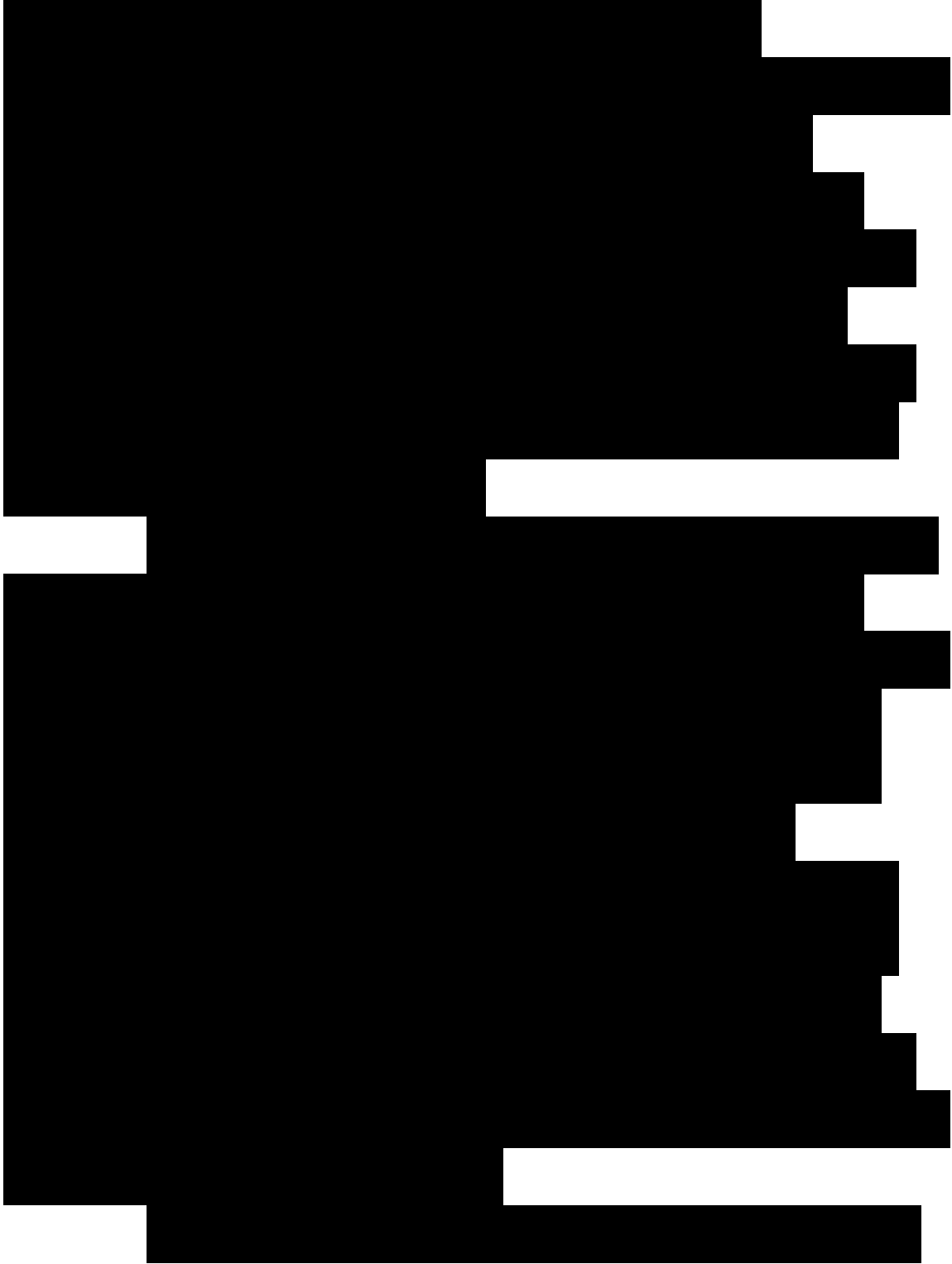
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



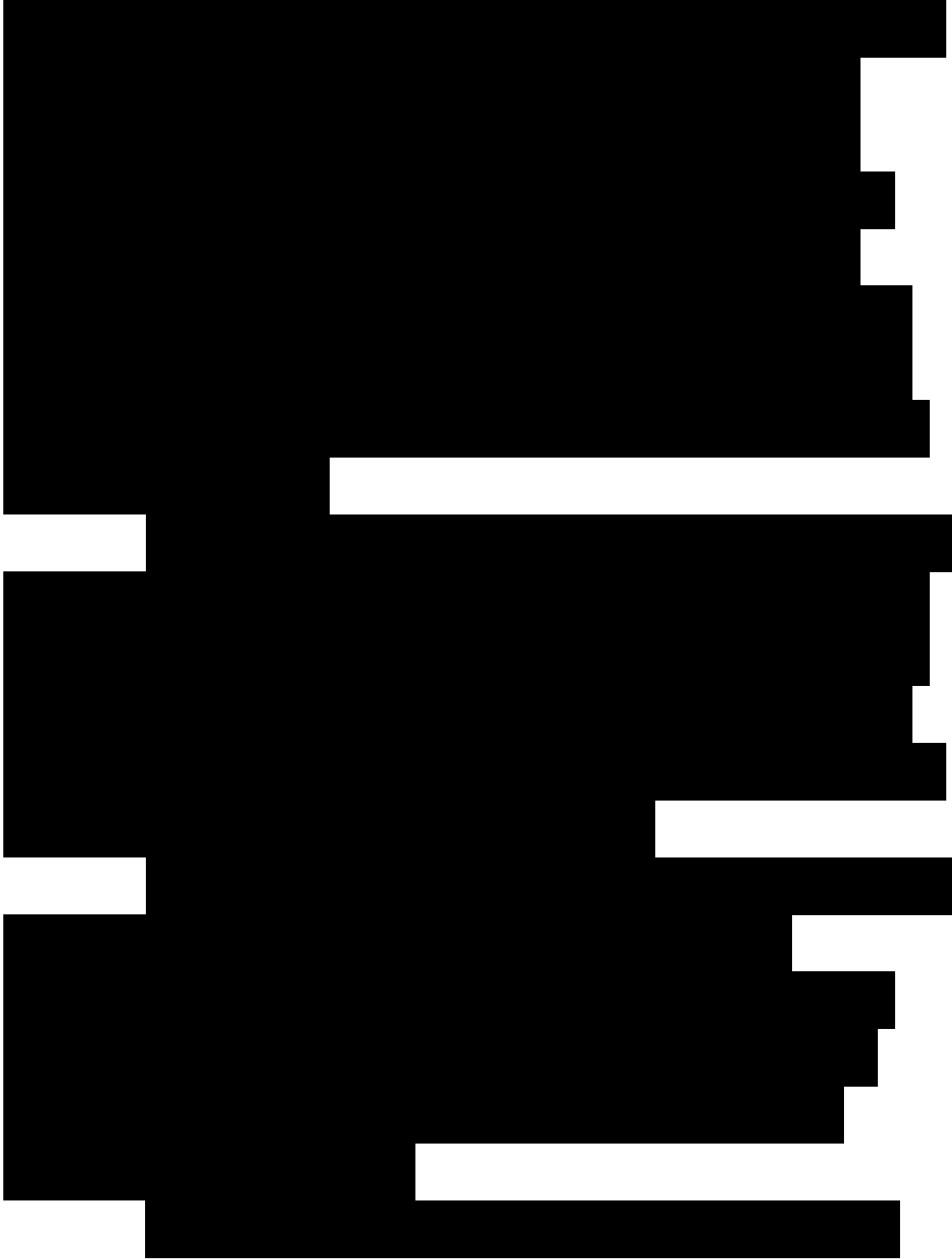
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



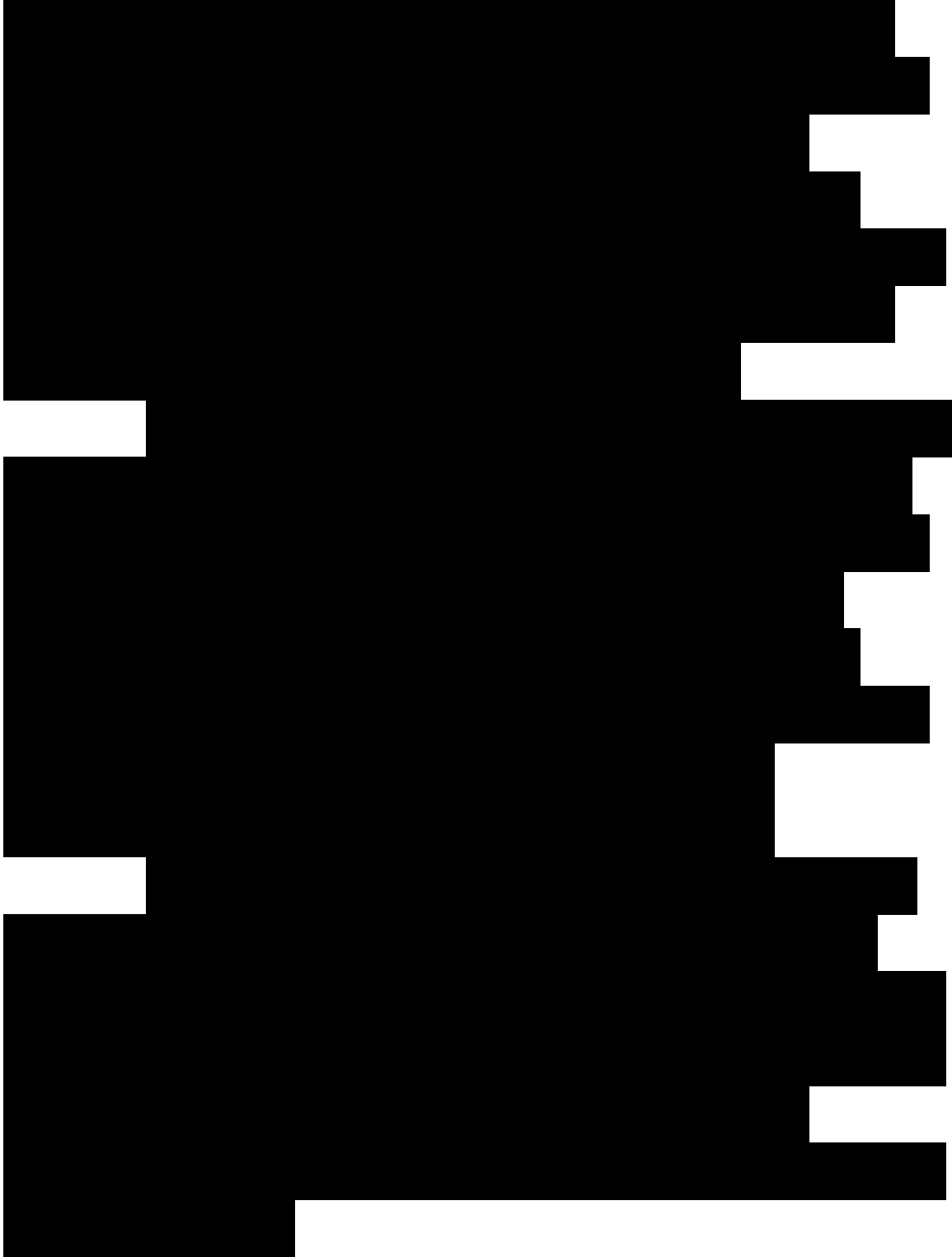
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



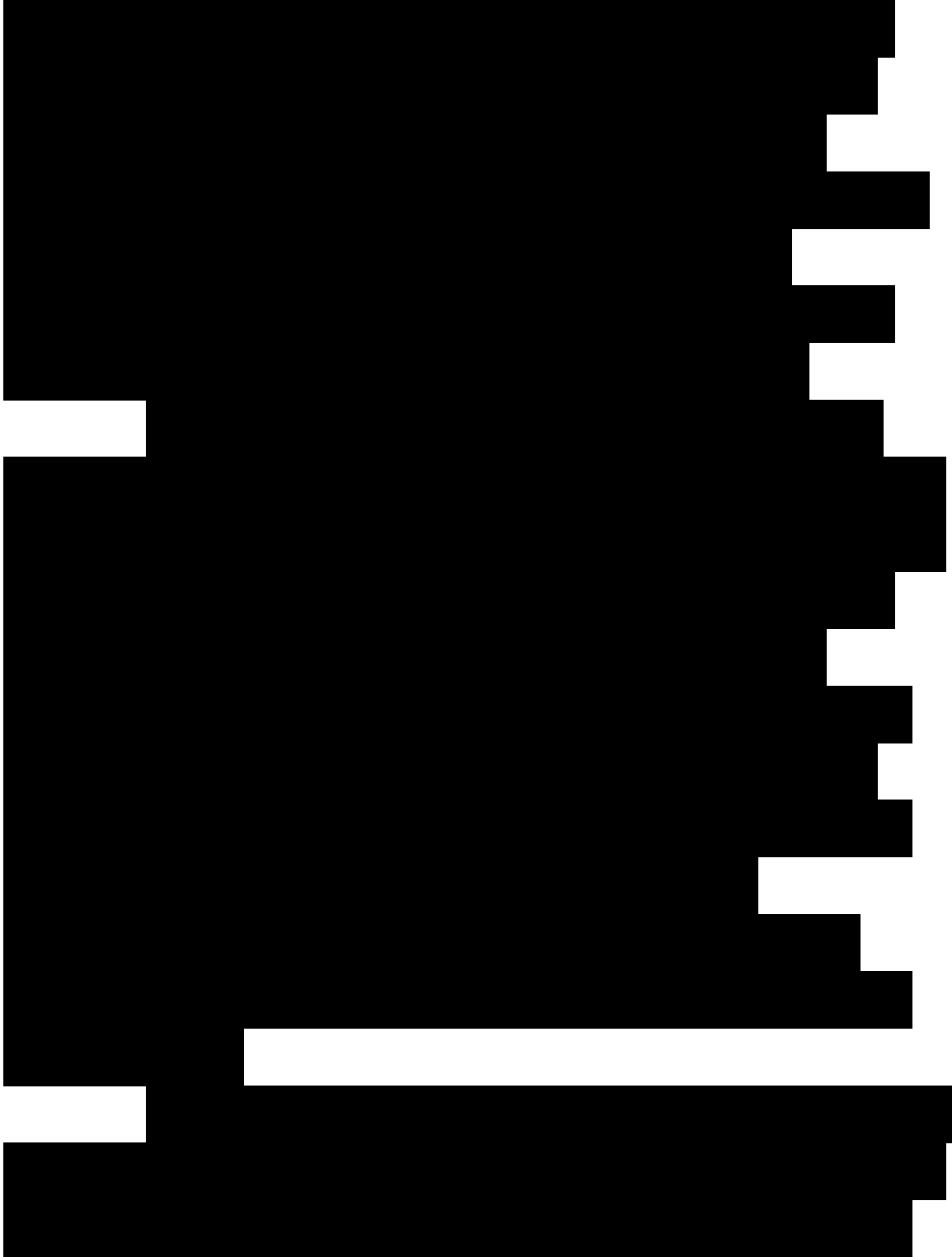
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



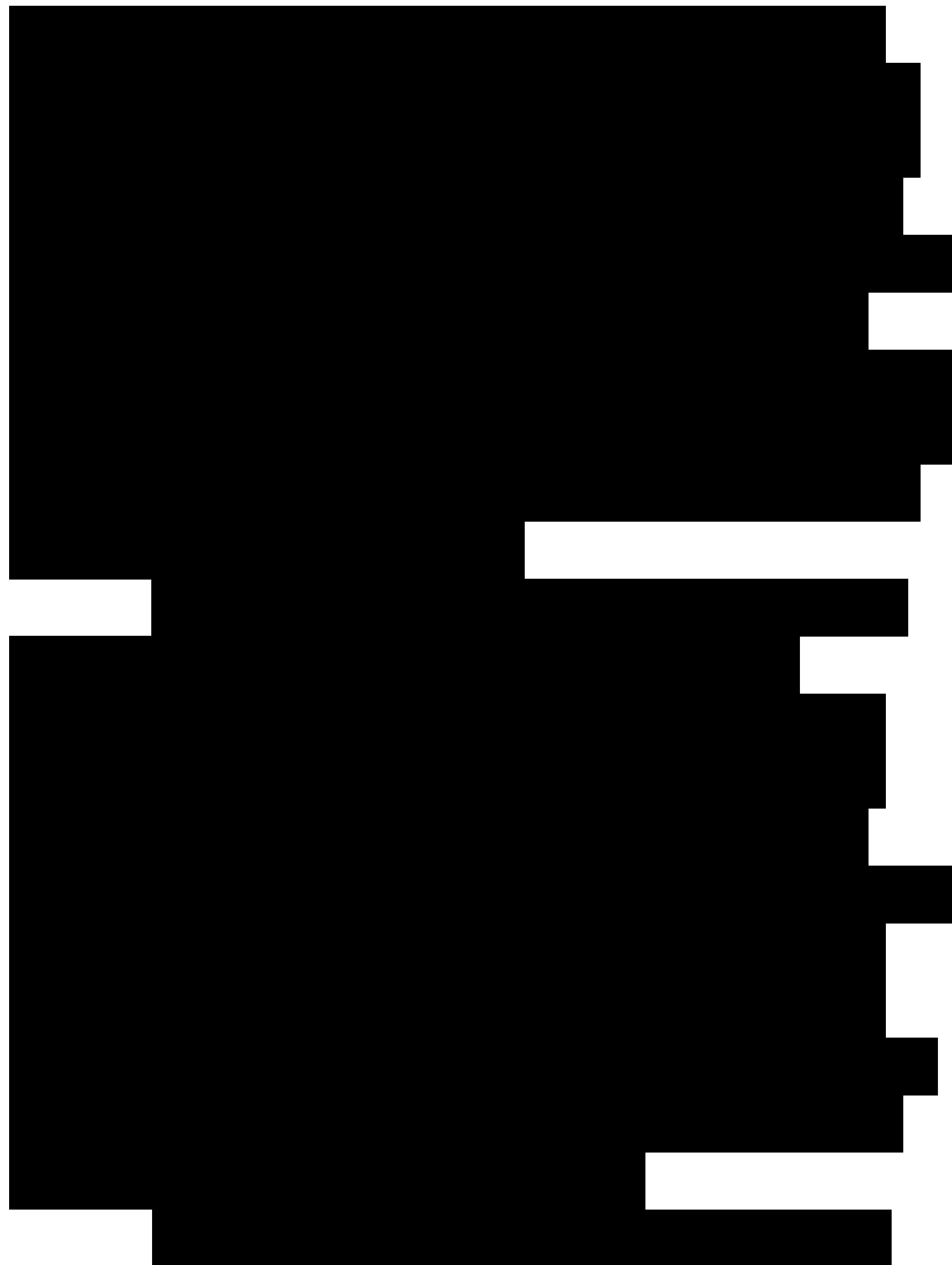
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



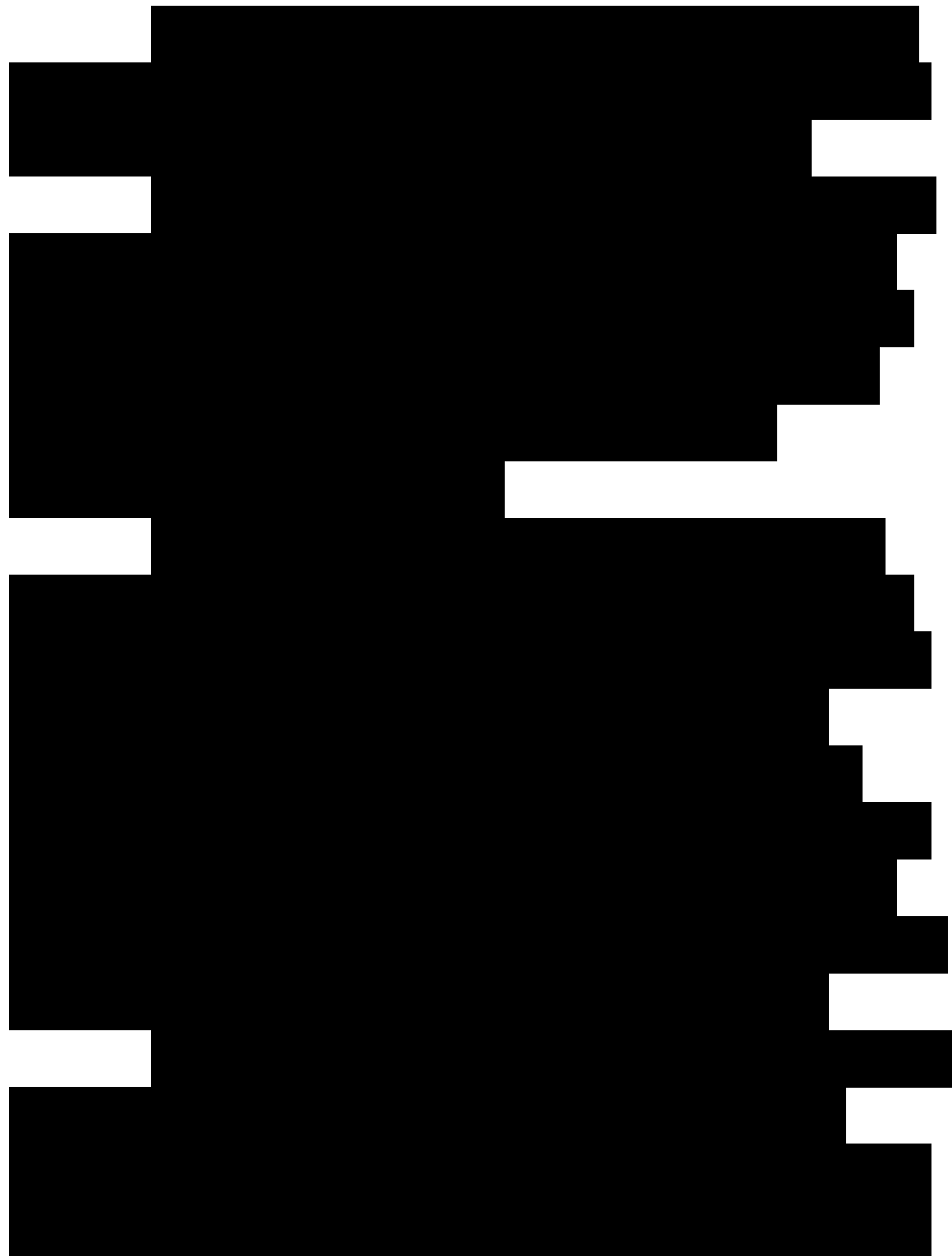
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



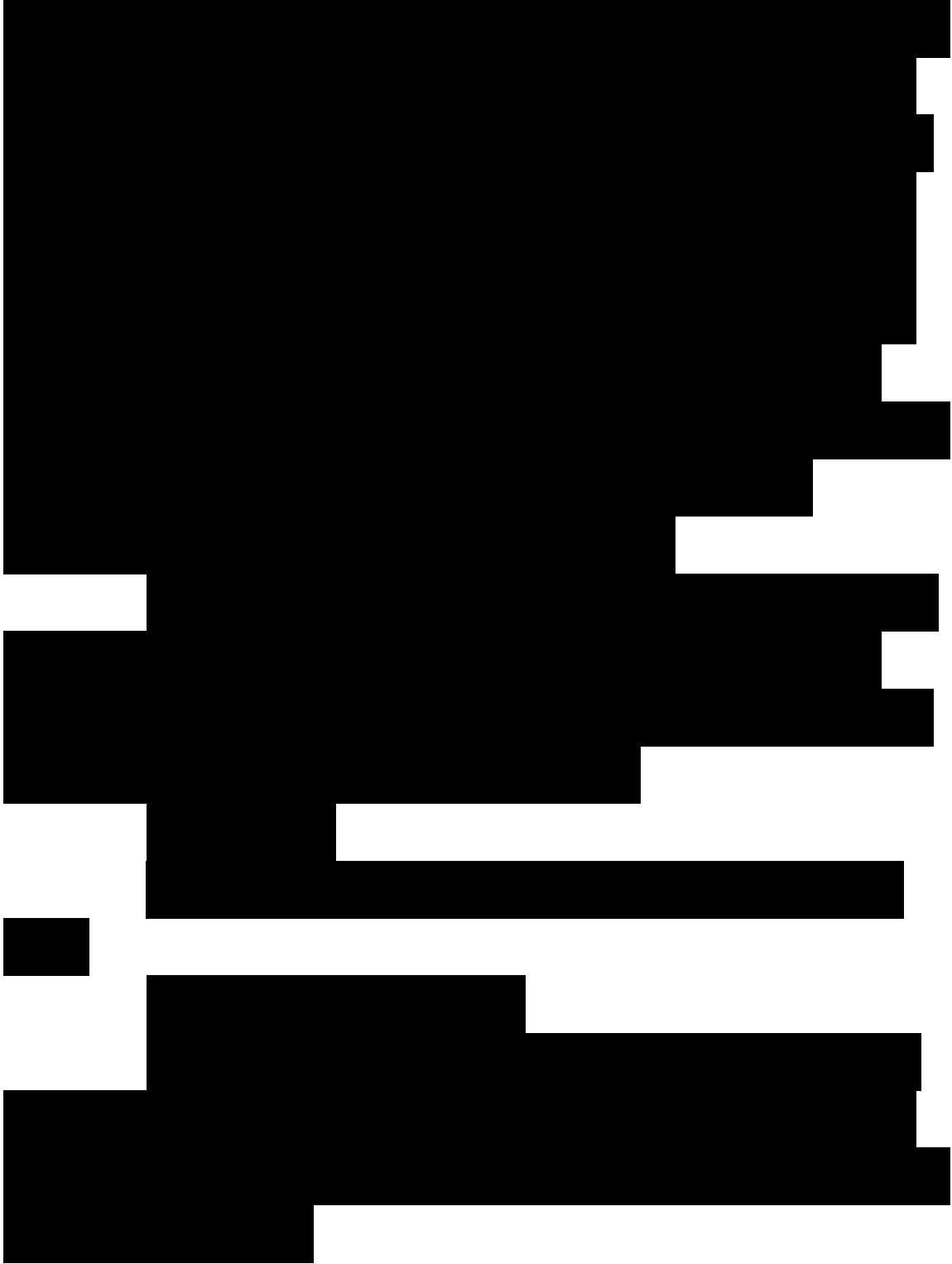
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



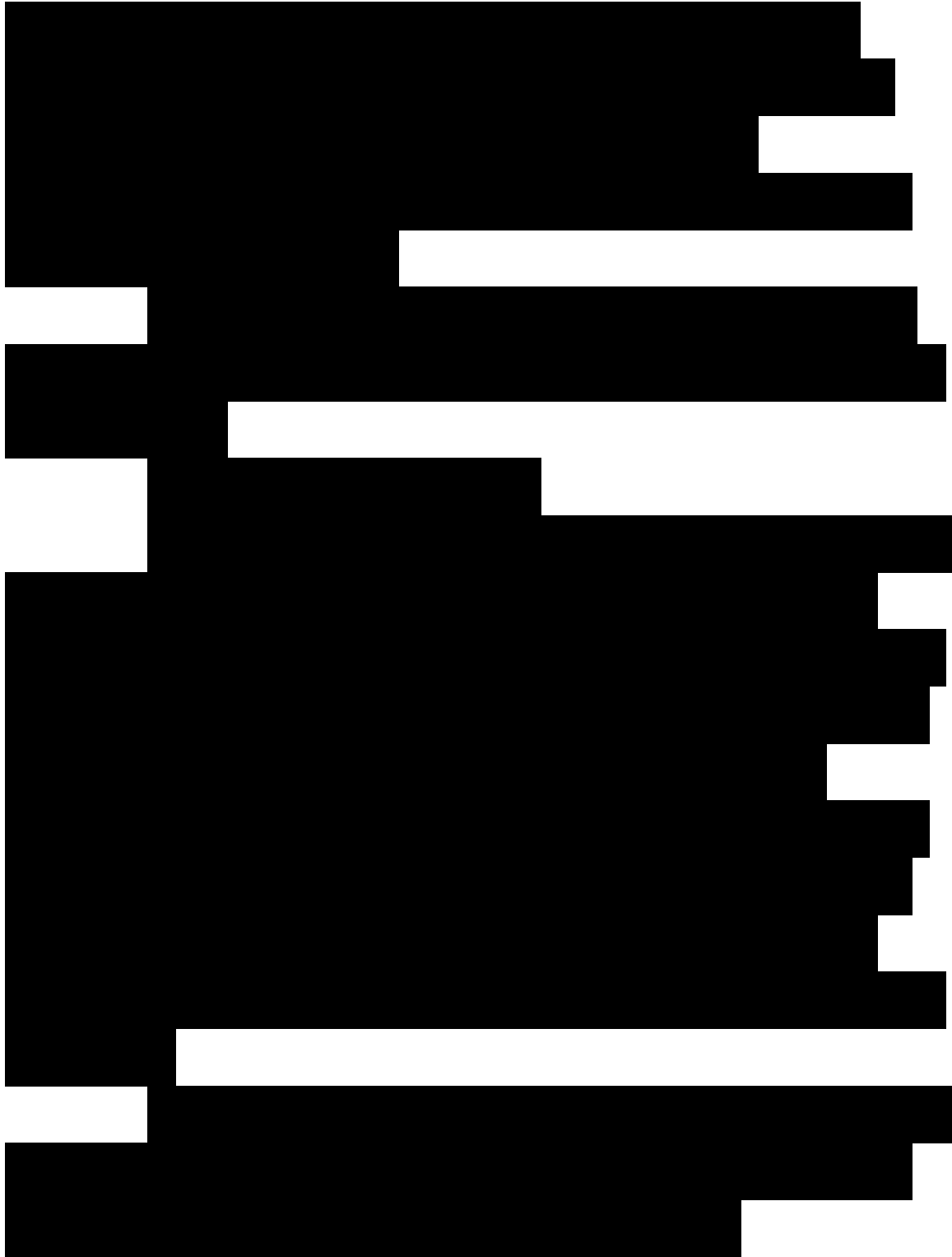
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

[REDACTED]

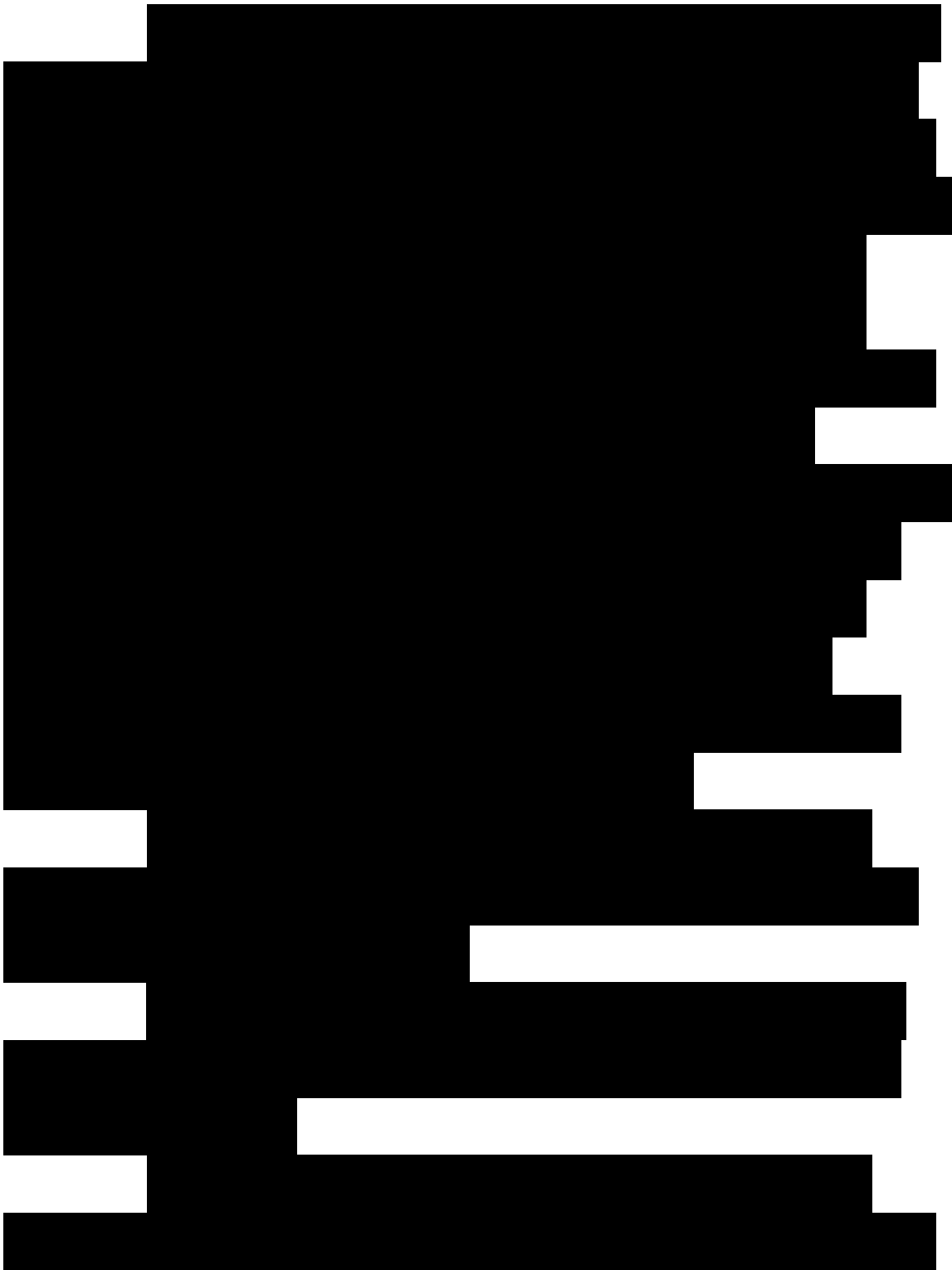
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

[REDACTED]

(Whereupon, at 5:12 p.m., the Hearing was concluded.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR, CRR, CRC, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

David A. Kasdan

DAVID A. KASDAN

B&B REPORTERS
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903