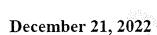
#### **CONFIDENTIAL**

#### INVESTIGATION REPORT

Thompson Rivers University (TRU)



#### Investigation conducted by:

Sharon Cartmill-Lane, B.A. (Hons.), M.A., LL.B. Principal, Pearlman Lindholm, LLP and Kelly Serbu, Q.C. Serbu Law Firm, Limited, now Judge Serbu and David Juteau, B.A., J.D. in the place of Judge Serbu Principal, Pearlman Lindholm, LLP

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# THOMPSON RIVERS UNIVERSITY INVESTIGATION REPORT

#### BACKGROUND

1.	On or about February 8, 2021, Thompson Rivers University ("TRU" or the "University") received
a doc	nument described as "Notice of Allegations of Serious Misconduct". This correspondence was sent to
TRU	's Board of Governors and to various TRU executives and deans. Set out therein were specific
alleg	ations of misconduct \$.22
. * **	("Respondents"). The communication was sent by a group who self-
ident	ified as "Concerned Members of the TRU Community in Solidarity with the Complainants"
(resp	ectively, the "Concerned Members" and the "Anonymous Complainants").1

2. In this letter, the Concerned Members requested investigation into the Anonymous Complainants' reports of wrongdoing as well as certain accommodations regarding the investigation, some of which were provided. To ensure a fair process for all parties, certain requests, such as anonymity for the complainants, could not be provided. In their letter, the Concerned Members wrote:

The TRU Whistleblower Policy is not the appropriate mechanism for addressing these issues for at least three reasons:

- 1) The policy only applies to "members of the TRU community". Many of the complainants and in many cases s.22 was due to their refusal to be complicit in the alleged misconduct in question.
- 2) The policy contains a general commitment to protecting whistleblowers, but it lacks specific provisions for enacting that protection. Rather, it adopts a punitive approach that is perpetrator-centered and not victim-centered. It does not protect the identity of whistleblowers, it contains no procedures for providing support, consulting with them, or affording whistleblowers a remedy if they experience retaliation or further harm in the process.
- 3) The Audit Committee that oversees the policy lacks expertise in the misconduct alleged.

The complainants require a trauma-informed process that is led by an individual with specialized human rights expertise in issues of institutionalized racism and sexism in the

<sup>&</sup>lt;sup>1</sup> The exact identity and number of the individuals represented by this group has never been communicated to us.

workplace and in the university. Moreover, it is possible that some members of the Audit Committee and the Board are not sufficiently independent due to friendship with the alleged perpetrators.

With this letter, we are calling on the Board to act swiftly to establish a safe, trauma-informed, independent and expert-led process where individuals seeking to report misconduct on the part of the alleged perpetrators can come forward. This process must be designed with the agreement of the complainants and must protect their anonymity vis-àvis the Board, the wider community and the alleged perpetrators. It must also be accountable to the complainants and the wider community.

It is the Board's legal duty to act in response to this letter. The provincial government's 2020-2021 mandate letter to this Board encourages it to incorporate the Declaration on the Rights of Indigenous Peoples Act and to apply Gender-Based Analysis Plus (GBA+) lens in TRU operations and programs (pp. 1-2). We also note that according to the Board manual, among its primary responsibilities are to ensure ethical integrity and excellent governance practices.

Further, the Board has the responsibility to "direct Administration to ensure that TRU operates at all times in a manner consistent with the Code of Conduct and within applicable laws, and to the highest ethical and moral standards" (2.7b, p. 9).

Based on the reports we have received from the complainants; we believe that President [BF] and General Counsel [JS] are in a conflict of interest with respect to any assessment of the concerns expressed in this letter. Upon request, and with certain further assurances from the Board, we are willing to provide more details about the nature of this conflict of interest. As a result, we respectfully request that the Board ensure that the President and General Counsel are recused from Board discussion about this matter.

We are approaching the Board in this way because of our commitment to the complainants and our own conscience. We authentically believe in TRU's Vision and Mission and we believe that the university will be unable to achieve its goals and flourish while these allegations remain unaddressed. However, we are also keenly aware that we face personal and professional risks in taking this bold action to support the complainants. Nonetheless, we are willing to meet with a small select subgroup of Board members to discuss the terms of this process and to establish it. Once that process is established, the complainants will come forward to the investigator.

There are a number of TRU employees, Indigenous leaders and members of the broader community who are aware of some of these allegations and are deeply concerned. If the Board fails to establish a proper and timely investigation, the ongoing damage to the workplace and TRU's local, provincial and national reputation is certain to escalate. If the Board does not reply to this email address with a meaningful response within two weeks of the date of this letter, we will consider that we have exhausted all possible internal institutional processes and we will have no choice but to take the only available next step and contact the media.

- 3. In response to this letter, a sub-committee of the Board of Governors of TRU ("Sub-Committee") was established to address the matter. It responded in writing to the Concerned Members eight (8) days after receiving the initial correspondence. The Sub-Committee tried to work with the Concerned Members to determine a mutually agreeable process. Numerous communications went back and forth over the course of several months to discuss process. Ultimately, there was no agreement.
- 4. Throughout those several months, the Sub-Committee and Concerned Members corresponded regarding the requests set out above. The Sub-Committee advised them on May 18, 2021 that it had retained outside counsel, JW, "to provide the sub-committee of the Board with independent legal advice in connection with this matter." This counsel then retained the first investigator, Sharon Cartmill-Lane. Shortly thereafter, Kelly Serbu, QC (now Judge Kelly Serbu) was retained to be co-investigator. The Sub-Committee's counsel reported significant challenges finding an available Indigenous lawyer to act as co-investigator, ultimately having to retain counsel as far away as Halifax. Judge Serbu remained co-investigator for most of the investigation process until called to the bench in June 2022<sup>2</sup>, then replaced by David Juteau.
- 5. The Concerned Members expressed the importance to the Anonymous Complainants and the process that the investigators were "independent," meaning that none of them had any previous existing relationship with TRU or lived in or near Kamloops where TRU's main campus is physically located and where the parties reside. This was the case. They also requested that at least one of the investigators have an Indigenous identity, which increased the time to start the process, as it was necessary to find a candidate that had the required experience to avoid the implication that TRU was not engaging in tokenism that could otherwise be implied. Judge Serbu's experience and qualifications speak for themselves.
- 6. The process and Terms of Reference were determined by the investigators in their independent discretion and approved by counsel for TRU as to scope on or about August 12, 2021.
- 7. The Terms of Reference were drafted solely based on the above referenced "Notice of Allegations of Serious Misconduct" without the benefit of the interviews and particulars of various complaints. The Terms of Reference indicate harassment and discrimination alone. Therefore, this investigation does not

<sup>&</sup>lt;sup>2</sup> In other words, he was appointed as a judge and as such was required to cease practising all legal work, including this investigation.

concern issues of privacy or make findings on whether there are breaches of privacy or inappropriate behaviour that might be captured by a general code of conduct.

- 8. It is important to note that this process was confined to the Terms of Reference. This report answers the specific allegations made against the Respondents only. Although some complainants have been quoted in media articles speaking about the culture at TRU and the desired outcomes reported by the complainants include wishes for systemic changes, this process and report are not a cultural audit or review. We will make no findings of that culture. In any event, the evidence gathered in this process, although extensive, would be insufficient to make such a determination.
- 9. Based on the foregoing, we undertook this investigation to determine whether the Respondents engaged in either some form of harassment or discrimination. In the interests of thoroughness and fairness, we reviewed all the allegations provided to us and then made determinations only in respect of the legal principles set out in the Terms of Reference. As a result, we make no findings for certain allegations that, among other things, fall outside of the scope of the Terms of Reference or because of procedural fairness reasons there was a lack of evidence.
- 10. The Terms of Reference for this process were provided to the Concerned Members on August 13, 2021, who agreed to share them with the individuals they had identified as having complaints. The Terms of Reference included an initial deadline of thirty (30) days from August 16, 2021, for complainants to come forward and identify themselves to the investigators. At the request of the investigators, TRU extended the initial deadline for complaints to September 30, 2021 after the Anonymous Complainants indicated they required more time for various reasons, including that the timing (end of summer) and the regional wildfires had presented challenges in communicating with the potential complainants.
- 11. It is important to note that the Anonymous Complainants, through the Concerned Members. requested several changes to the Terms of Reference, some which could not be made because it would create a procedurally unfair process. On September 16, 2020, they wrote to us requesting the following:

Dear Sharon Cartmill-Lane and Kelly J. Serbu,

We have received your correspondence dated September 1, in which you offered to extend the deadline for complainants to contact you until the end of September. We had requested an extension due to the poor timing of your original 30-day deadline and we outlined several pressing issues complainants were collectively dealing with. Because of these concerns and the end of summer holidays, we have only recently been able to connect with all of the complainants regarding the Terms of Reference (TOR) you provided on August 13.

The complainants' concerns with the proposed TOR and suggestions for modified terms and process follow:

First, the process in the proposed TOR does not guarantee anonymity and appears to make weak commitments to confidentiality (i.e. confidentiality will be protected "to the extent reasonably possible" page 2). It would be helpful if you could clarify what you mean by anonymity and confidentiality in the context of the investigation.

It is important for you to understand that some complainants are willing to participate in the investigation on the basis proposed, but some cannot. For some complainants, any disclosure of their identity to the respondents is untenable.

We propose the following terms which are essential to enable all complainants to participate safely: "The investigators will make every possible effort to achieve the requirements of procedural fairness (respondents' right to respond) while also strictly protecting the identity of each complainant. In the circumstances where this is not possible, no complainant's identity will be disclosed without their prior consent."

Second, the complainants have reasonable grounds to distrust TRU's commitment to acting on the investigation.

The first reason for this is that, in the course of the last two years, at least five complainants have notified TRU's President and/or TRU General Counsel of their concerns with one or 222 of the respondents. Unfortunately, no meaningful investigation occurred following these notifications. The complainants have repeatedly expressed their belief that these two individuals are in a conflict of interest with the investigation, however, the Board has refused to exclude them from oversight of the present investigation.

Added to this, likely at the advice of TRU General Counsel, the Board has hired lawyer [JW] to oversee the investigation, and in the proposed TOR, the investigators provide the final report exclusively to [JW] (the "independent representative of the subcommittee"). Unfortunately, the complainants do not trust [JW]. Despite her own and the Board sub-committee's written denial of any previous relationship between herself and TRU, the complainants have written evidence that [JW] has indeed represented TRU on a related matter in the last year, where she received instructions from the respondents and/or from General Counsel. For this reason, [JW]'s assertions of her independence are misleading, and they have undermined trust in the legitimacy and credibility of the investigation, especially in light of [JW]'s apparent control over the final report with no independent oversight.

For these reasons, appropriate oversight and transparency regarding the outcome of the investigation is essential, both to ensure that the findings are properly addressed and to restore the community's trust in the university.

We propose the following terms, to restore complainants' trust in the credibility and legitimacy of the investigation: "The investigators' final report will be provided directly to the entire TRU Board of Governors and to a designated team within the office of the

Minister of Advanced Education, tasked with ensuring the credibility and legitimacy of the process and the outcome."

Third, the proposed TOR indicates that complainants would only be advised (by [JW]) of "the outcome" of the investigation. The term "outcome" in this context is unclear and the proposed level of disclosure to the complainants is inadequate. In investigations of discrimination and harassment complaints under TRU's collective agreements, the final report is routinely provided to the complainants. This minimum standard of procedural fairness is also owed to the complainants in these circumstances. The near nil disclosure proposed by [JW], in combination with weak protection of the complainants' identities and confidentiality, once again undermines the credibility and legitimacy of the investigation.

We propose the following terms to ensure the complainant's procedural fairness rights are respected: "Complainants will have access to those portions of the report that pertain to their complaint, the respective findings and the outcome."

Fourth, as a condition of receiving a severance payment, several complainants had no choice but to sign a non-disparagement agreement (NDA) that prevents them from speaking about the misconduct they observed and experienced. It is deeply unethical that senior TRU leaders have used TRU's public funds to secure the silence of those who have made allegations about misconduct on the part of the respondents. In order for you, as investigators, to hear and consider all relevant allegations against the respondents, the investigation must include terms that allow all complainants to come forward.

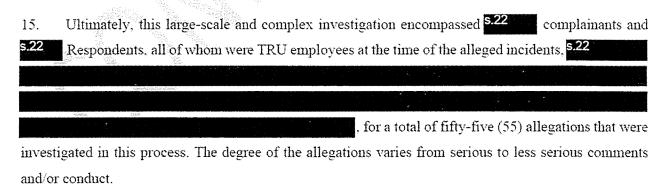
At present, these complainants are seeking legal advice to identify the language required to modify their NDAs and enable them to participate in the investigation. We anticipate that the proposed language may be as follows: "For the purposes of enabling the participation of X complainant in the investigation of misconduct allegedly perpetrated by the respondents, TRU agrees not to enforce the relevant terms of any non-disclosure agreement signed between TRU and the complainant."

Since the TRU Board of Governors first received notice on February 8 of the allegations against the respondents, the complainants have advocated for a safe, trauma informed approach that would ensure all are all able to access an independent investigation. The Board sub-committee delayed more than six months before it provided terms of reference for the investigation on August 13. The present communication to you represents the first time that the complainants are able to reach out to an independent trusted party and disclose the full scope of their concerns and their needs when it comes to the terms of the investigation. We hope that you as investigators are able to design a process that complainants can access safely. We intend to follow this letter up with a phone call so that we can discuss these suggestions in greater detail.

Thank you,

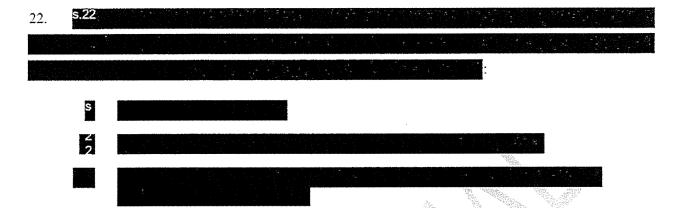
Concerned members of the community

- 12. In response to this communication, we met virtually with the spokesperson for the Anonymous Complainants to discuss their concerns. One key issue was the fact that several possible complainants had signed non-disclosure agreements ("NDAs") and/or no disparagement clauses. As a result of hearing this concern, we requested that the University consider a waiver of those contractual restrictions for the purpose of this process and/or extend the deadline further so that the possible complainants had a meaningful opportunity to obtain advice about any restrictions set out in their NDAs. TRU addressed these concerns and agreed to a further deadline extension to October 30, 2021 to allow individuals to obtain advice as to whether they would be in breach of those obligations if they came forward in this process. In addition, TRU subsequently released parties that were part of this process from their confidentiality obligations to allow them to speak freely in this investigation. We note that this was considered a "major victory" for the complainants, as stated by the media.<sup>3</sup>
- 13. The first complainant made contact with us on August 28, 2021 and interviews with other complainants occurred thereafter until December 2021. The Respondents received the Terms of Reference on November 19, 2021.
- 14. Given the relatively unique way the allegations were raised initially, (that is, in the form of a letter to the Board of Governors and deans as opposed to a complaint under one of the applicable TRU policies), the investigators were given discretion to determine the investigation process, including the format of receiving the various complaints. We discuss this process in detail below.



## **Summary of Allegations**

16.	This investigation centered on reports of alleged sexist, racist and retaliatory acts alleged to have
been o	one by the <b>5.22</b>
17.	s.22 individuals came forward ("Complainants"), s.22 of which brought complain
agains	t s.22 Respondents. These individuals are: <sup>s.22</sup>
18.	We considered each allegation on its own merits as set out in the findings section.
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20.	s.22
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s.22	
21.	s.22



#### Scope of the Investigation

- 23. The "Complainants" are either individuals with complaints or individuals that are complaining on behalf of others, all of whom are alleged to have experienced or witnessed this conduct while working at TRU. Accordingly, as noted above, the investigation did not consider issues relating to any alleged systemic discrimination or sexism by the University (for which we make no findings and would have insufficient evidence to do so). We only considered the specific allegations raised.
- 24. Considering the foregoing, our mandate was to consider, based on the evidence gathered in the investigation, whether on the balance of probabilities, the specific events reported by the Complainants occurred and whether any of the actions or events that did occur constitute a breach of applicable policy and/or the below referenced legislation.<sup>4</sup>

#### **Complainants Reporting Conduct Directed Towards Others**

25. Some of the allegations raised in this investigation were brought forward by Complainants who did not personally experience the impugned conduct. Despite not having been directed towards the respective Complainant, these allegations were properly considered within the scope of this investigation. In this regard, we note paragraph 2.8 of TRU's Respectful Workplace and Harassment Prevention Policy, which provides, in part:

"[a] Il members of the University Community are expected to report experienced or observed discrimination or harassment that are incidents of within the scope of this policy"

<sup>&</sup>lt;sup>4</sup> It should be also noted that the scope of our investigation is limited to the witnesses and evidence that we reviewed and does not provide a complete review of TRU, its policies, or its employees.

and section 21 of the BC Human Rights Code, which allows representative complaints. (emphasis added)

#### **Indigenous Considerations**

- Respondents are alleged to have engaged in anti-Indigenous commentary. In our analysis of those allegations, we have considered the application of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) ["UNDRIP"]. We also note that TRU's campuses are located on the traditional lands of the Tk'emlúps te Secwépemc (Kamloops campus) and the T'exelc (Williams Lake campus) within Secwépemc'ulucw, the traditional and unceded territory of the Secwépemc. The region also extends into the territories of the St'át'imc, Nlaka'pamux, Nuxalk, Tŝilhqot'in, Dakelh, and Syilx peoples. About 10% of TRU's student population identifies as Indigenous. 6
- 27. Between March 27 and June 30, 2019, TRU began the first of five stages for Envision TRU, a vision statement for the University, which was adopted after extensive consultation with various stakeholders in the region.<sup>7</sup>
- 28. TRU also advertises itself with four core themes: student success, research, intercultural understanding and sustainability. It has an Intercultural Understanding Subcommittee, which is:

Responsible for reporting annually on mission fulfilment in relation to the core theme Intercultural Understanding and advises Senate on matters related to intercultural, international, and Indigenous initiatives that promote or impede intercultural understanding, as well as methods for culturally responsive performance measurement. The committee is a subcommittee of both the International Affairs Committee and Qelmúcw Affairs Committee and has representation from Indigenous Education, TRU World, Faculty of Student Development, Cplul'kw'ten, faculty, staff, and students—stakeholders who have the authority, theoretical expertise, and experiential expertise to effectuate change. 9

29. TRU also engages 5.22 to the President of TRU. He was 5.22

<sup>5</sup> https://www.tru.ca/indigenous.html

<sup>&</sup>lt;sup>6</sup> https://www.tru.ca/indigenous/coyote html. accessed on September 21, 2022

https://www.tru.ca/about/tru-mission-statement/envision.html, accessed on July 26, 2022

<sup>8</sup> https://www.tru.ca/about/tru-mission-statement/themes.html, accessed July 26, 2022

https://www.tru.ca/about/tru-mission-statement/themes/intercultural-understanding.html, accessed on July 26, 2022

#### **Coyote Project**

- 30. TRU adopted the Coyote Project, a five-year project funded by \$1,000,000 per year as a panimstitutional program to accelerate Indigenization, with its impacts and legacies meant to be long-lasting. The Indigenous story, *Coyote Brings Food from the Upper World*, forms the basis of the Coyote Project at TRU.
- 31. The Coyote Project includes providing sufficient funding to close identified educational achievement gaps within one generation; improving education attainment levels and success rates; developing culturally appropriate curricula; and protecting the right to Indigenous languages, including the teaching of those languages and credit courses.<sup>10</sup>
- 32. Each faculty at TRU has specific goals under the Coyote Project, with each faculty's Indigenization goals integrated under the banner of the Coyote Project. These goals include creating new courses and programs, altering course content or curriculum, expanding research, Indigenizing support services, hiring expertise and enhancing environments.<sup>11</sup>
- 33. Simply put, TRU has an express goal of integrating Indigenous life and culture into TRU's cultural, social, monetary and educational identity. The allegations are reviewed with this context in mind.

#### Legal and Policy Framework for Alleged Anti-Indigenous Comments

- We have reviewed the reports by the Complainants against a legal framework guided by the BC Human Rights Tribunal ("BCHRT" or the "Tribunal") as well as other provincial human rights tribunals, courts (including the Supreme Court of Canada), UNDRIP, and relevant statutes, including the *Human Rights Code*, RSBC 1996, c 210 ("Code") and the *Workers Compensation Act*, RSBC 2019, c 1 ("WCA").
- 35. We have also reviewed and considered the applicable TRU policies, including TRU's Values and Vision Plan, the Memorandum of Understanding between TRU and Tk'emlúps te Secwépemc ("TteS"), and the Partnership Agreement dated April 5, 2021 between those two parties. In addition, we have considered TRU's Equity, Diversity and Inclusion Action Plan, TRU's current Respectful Workplace and

<sup>16</sup> https://www.tru.ca/indigenous/coyote html, accessed September 21, 2022

<sup>11</sup> https://www.tru.ca/indigenous/coyote/goals.html. accessed September 21, 2022

Harassment Prevention Policy (BRD 17-0), TRU's Sexualized Violence Policy (BRD 25-0), TRU's Whistle Blower Policy (BRD 18-0) and where relevant, the historical versions of those documents.

- 36. In addition to the foregoing, we have reviewed and considered the Coyote Project, TRU's acknowledgment and implementation of the Truth and Reconciliation Commission's ("TRC") of Canada recommendations <sup>12</sup> for educational institutions to act <sup>13</sup> and the TRC's call to fully adopt and implement UNDRIP as the framework for reconciliation.
- 37. The Partnership Agreement specifically acknowledges Articles 21(1), 13(1), 14(1) & 23 of UNDRIP and acknowledges that TRU's main campus:

is situated on ancestral Tkemhipsemcúlecw and acknowledges that the Tkemhipsemc have an inherent right to education, including post-secondary education and will actively collaborate with TteS in developing and implementing mutually beneficial and innovative programs for the Tkemhipsemc. <sup>14</sup>

38. It has been clearly established through the TRC that Canada's relationship with and treatment of Indigenous peoples has caused harm that is ongoing and impacts successive generations. A further important component of the backdrop to this investigation is the University's commitment to incorporating UNDRIP and the TRC's Calls to Action which are incorporated in TRU's Values and Vision Plan. In addition, TRU has implemented the Coyote project, with clear goals of inclusiveness and Indigenization. In this context, there is a heightened and significant cultural sensitivity in which the Complainants' reports of discrimination must be considered.

#### United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

39. UNDRIP has arguably applied to the laws of British Columbia since Canada first endorsed it on November 12, 2010, and the above-referenced policies makes explicit TRU's intention to apply its principles. Accordingly, UNDRIP has been considered as part of the lens applied to the facts of this

<sup>&</sup>lt;sup>12</sup> https://www2.gov.bc.ca/assets/gov/british-columbians-our-goverments/indigenous-people/aboriginal-peoples-documents/calls to action english2.pdf. accessed August 2, 2022

<sup>15</sup> https://www.tru.ca/indigenous/coyote/about html, accessed August 2, 2022

<sup>&</sup>lt;sup>14</sup> See https://inside.tru.ca/wp-content/uploads/2021/04/TteS-TRU-Partnership-Agreement-Mar-02-2021-with-President-Sign.pdf, accessed October 19, 2022

investigation in respect of allegations of racism and any anti-Indigenous sentiment. TRU has adopted UNDRIP and the recommendations as part of its community.

- 40. The relevance of UNDRIP in Canada was discussed by the Canadian Human Rights Tribunal in First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 and the Tribunal confirmed "when Canada endorsed [UNDRIP], it reaffirmed its commitment to 'improve the well-being of Aboriginal Canadians'."<sup>15</sup>
- 41. Several articles of UNDRIP are relevant to issues raised by the Complainants, as well as to the interpretation of the Code and the WCA through a lens of reconciliation and anti-racism.

#### The BC Human Rights Code & Indigeneity

42. The Code prohibits discrimination in employment because of Indigenous identity, race, colour and sex (among other grounds). It states:

Discrimination in employment

13(1) A person must not

- a) refuse to employ or refuse to continue to employ a person, or
- b) discriminate against a person regarding employment or any term or condition of employment

because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

<sup>15</sup> Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples. November 12, 2010, online; Indigenous and Northern Affairs Canada http://www.aadnc-aandc.gc.ca>

- 43. As noted by the B.C. Court of Appeal, a bare assertion of discriminatory conduct is not sufficient. 

  There must be more than speculation that discrimination has occurred. 

  17
- 44. To establish discrimination under the Code, the following factors must be established:
  - a. The complainant has a personal characteristic (or is perceived to have a characteristic) protected under the Code;
  - b. The complainant experienced an adverse or negative effect [with respect to an area protected by the Code]; and
  - c. The personal or protected characteristic was a factor in the adverse effect. 18
- 45. Regarding the first element of this test, the protected personal characteristic (for example, race) need only have been  $\underline{a}$  factor in the respondent's conduct or the impact of that conduct on the complainant. Further, a complainant may complain on behalf of another person.
- 46. There is no requirement to establish that a respondent <u>intended</u> to contravene the Code as a prerequisite to finding that their conduct was discriminatory. <sup>19</sup> Accordingly, courts have eliminated the distinction between so-called "direct" and "indirect" discrimination, because that distinction is rooted in the respondent's intent; at this first stage of the analysis, the evidence is to be evaluated through the lens of the complainant's experiences and the adverse impact they are alleging. The Supreme Court of Canada has noted that maintaining a distinction between direct and indirect discrimination may act to legitimize systemic discrimination, because so-called neutral policies and practices can have an unjustifiable adverse impact on a protected class of people. <sup>20</sup>
- 47. The second component of the test set out above is dependent on the context; in this case, the complainants must establish that they experienced a negative effect in the employment context. The Tribunal has identified "a negative effect in the employment context" as including: refusing to hire; denying a promotion; discipline; denying benefits; refusing to return someone to work; harassment based

<sup>16</sup> Chen v. Surrey (City), 2015 BCCA 57 at para. 31

<sup>&</sup>lt;sup>17</sup> Middlemiss v. Norske Canada Ltd., 2002 BCHRT 5: Giesbrecht v. Pacific Marine Contracting and another, 2018 BCHRT 145; Helm v. RBC Life Insurance Co., 2013 BCHRT 282

<sup>18</sup> Moore v. British Columbia (Education), 2012 SCC 61 ["Moore"] at para. 33.

<sup>&</sup>lt;sup>19</sup> Code at section 2.

<sup>&</sup>lt;sup>20</sup> Moore at paras. 58-63.

on a personal characteristic that negatively affects the work environment or leads to negative job-related consequences; and ending employment.<sup>21</sup>

48. The third component of the test – the connection between the adverse effect and the protected characteristic – is typically the most difficult to establish. Whether a protected characteristic is a factor in an adverse treatment is largely a question of fact. In *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, leave to appeal refused, [2018] S.C.C.A. No. 226 at para. 62, the Court described the required connection as follows:

...Courts have recognized the equivalency of such words as "connection", "factor", "nexus", and "link" in describing the association that must exist between adverse treatment and prohibited grounds of discrimination. On occasion, they have also used the language of "causation"... discussion of "causation" is generally best avoided, lest it be confused with the concept of "causation" in other areas of the law, which may involve "but for" tests and may import issues of the exclusivity, proximity, or dominance of a cause. The link required to found a claim under the Code need not satisfy the usual criteria that we associate with causation in other areas of the law. According to the caselaw, the adverse treatment must be "based in part" on the protected characteristics, or, the protected ground "need only have contributed to" the discriminatory acts. While this is not the strict causation applied in cases of civil liability, this language does describe an attenuated form of causation. This is what the Code means when it uses the words "because of".

#### Reasonable Inference of Racism

- 49. The BCHRT remarked on the difficulty of proving racism in *Mezghrani v. Canada Youth Orange Network (CYONI) (No. 2)*, 2006 BCHRT 60, and noted that racial discrimination "is frequently subtle" and "direct evidence of racial discrimination is rarely available", such that the discrimination "must often be inferred from the conduct in issue." According to the BCHRT's recently published report, Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights, "the burden of proof may be well beyond the capabilities of individual Indigenous complainants."
- While inferences are permitted, "the subtlety of prejudice does not transform it into a presumption of prejudice under the Code": *Student A v. Institutional Respondent and others*, 2017 BCHRT 13 at para.

<sup>21</sup> A separate policy breach may arise distinct from discrimination under the Code.

<sup>22</sup> Ardith Walpetko We'dalx Walkem, QC, Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights (2019) ["Expanding Our Vision"] at 30.

94.<sup>23</sup> Any inference of discrimination must be rooted in the objective evidence of a particular case.<sup>24</sup> In *Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136 at para. 283, the Tribunal stated:

However, that is not the end of the analysis. I accept the Respondent's argument that there must be objective evidence from which any such reasonable inferences can be drawn. It is not enough that Francis subjectively believed or perceived that he had been treated adversely because of his race. Rather, his belief must be that of a reasonably objective observer. In short, a finding that engages s. 13 of the Code must be based on objective evidence and established on a balance of probabilities. (emphasis added)

- 51. Regarding what is a "reasonably objective observer", the Tribunal further stated "[e]stablishing what constitutes a reasonably objective observer in the context of race discrimination cases is challenging. There are 'no bright lines' in cases where discrimination must be proven by circumstantial evidence, and these cases are often 'difficult' and 'nuanced': *Shaw v. Phipps*, 2010 ONSC 3884 [71 C.H.R.R D/168]; aff'd 2012 ONCA 155 [75 C.H.R.R. D/246]; cited with approval in *Brar*<sup>25</sup>, infra, para. 716."
- 52. In terms of the standard required to prove an allegation of discrimination including harassment, courts, tribunals and adjudicators have held that the allegations must be established on a balance of probabilities. This was confirmed by the Supreme Court of Canada which explained "the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred."<sup>27</sup>
- 53. Establishing the evidence on a balance of probabilities means that the standard of proof requires that the inference be more probable than not; however, it need not be the only other rational explanation: Vestad v. Seashell Ventures Inc, 2001 BCHRT 38 at para. 44; Campbell v. Vancouver Police Board (No. 4), 2019 BCHRT 275 at para. 103. A respondent may rebut an inference of discrimination by providing a reasonable non-discriminatory explanation for their conduct: Probyn v. Vernon Dodge Jeep, 2012 BCHRT 87 at para. 28.
- 54. The Tribunal has stated that discrimination may, in some cases, "only reveal itself gradually over a series of events." See, for example, Gichuru v. Pallai (No. 2), 2010 BCHRT 125 at para. 95 and Ibrahim

<sup>&</sup>lt;sup>23</sup> Richardson v. Great Canadian Casinos and another, 2019 BCHRT 265 at para, 144

<sup>&</sup>lt;sup>24</sup> Bombardier at para. 88; Batson-Dottin v. Forensic Psychiatric Hospital (No. 2), 2018 BCHRT 246 at para. 82.

<sup>&</sup>lt;sup>25</sup> Brar v. British Columbia Veterinary Medical Assn. (No. 22). 2015 BCHRT 151 [ 82 C.H.R.R. D/104]

<sup>&</sup>lt;sup>26</sup> Francis v. BC Ministry of Justice (No. 3), 2019 BCHRT 136 at para. 284

<sup>&</sup>lt;sup>27</sup> F.H. v. McDougall. 2008 SCC 53

- v. Intercon Security Ltd., 2007 BCHRT 201 at paras. 71-80. It has also indicated that context is important to the analysis.
- 55. In Francis, supra (at para. 284) the Tribunal noted that a contextual examination of all relevant circumstances is often required to identify the 'subtle scent of discrimination': Kennedy v. British Columbia (Energy and Mines) (No. 4), 2000 BCHRT 60 [39 C.H.R.R. D/42], para. 168. For example, one such contextual circumstance is any historical disadvantage experienced by the group: Mezghrani v. Canada Youth Orange Network Inc. (CYONI) (No. 2), 2006 BCHRT 60 [CHRR Doc. 06-066], para. 28.
- 56. Social context is not in and of itself enough to make a finding. In *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275 at paras. 104-105, the Tribunal noted:

...indeed it is undisputed, that the social context of this interaction is not enough, on its own, to prove that Ms. Campbell was discriminated against. In other words, the fact that she is Indigenous and had an adverse encounter with the police does not mean that she was discriminated against.

That said, the facts of this complaint – like many race-based complaints – can only be properly understood within their broader social context: Campbell, supra at paras. 16-19. In large part, this is because:

Individual acts themselves may be ambiguous or explained away, but when viewed as part of the larger picture and with an appropriate understanding of how racial discrimination takes place, may lead to an inference that racial discrimination was a factor in the treatment an individual received.

[Ontario Human Rights Commission, Policy and Guidelines on Racism and Racial Discrimination (2005)] at p 21

To this I add that a proper understanding of the social context may support a finding that an individual has experienced a race-based adverse impact.

#### Legal and Policy Framework for Alleged Sexual Harassment Complaints

- 57. Sexual harassment, as a form of sex discrimination, is prohibited in the workplace under section 8 of the Code. Much of the foundational law for discrimination remains the same, no matter the type of discrimination that occurs. However, we set out some relevant principles below regarding sexual discrimination as there are important additions.
- 58. The Supreme Court of Canada set out the test for sexual harassment in the seminal case of *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252. The Court provided a non-exhaustive definition of sexual

harassment as "unwelcome conduct of a sexual nature that is detrimental to the work environment". It stated:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.

- 59. In the case of *Mahmoodi v Dutton* 1999 BCHRT 56, affirmed, 2001 CarswellBC 2016 (B.C.S.C.), a decision by the BCHRT and upheld upon judicial review by the BC Supreme Court, the Tribunal discussed how to determine whether conduct of a sexual nature was "unwelcome". It held that such a determination requires an objective assessment of whether "it is reasonable to conclude that a reasonable person would have recognized the conduct as unwelcome in the circumstances."
- 60. Sexual harassment and sexualized violence vary in severity and form. The BCHRT, in *Mahmoodi*, confirmed that conduct falling within the definition of sexual harassment may be physical or psychological, overt or subtle, and may include verbal immendoes, affectionate gestures, repeated social invitations, and unwelcome flirting, in addition to more blatant conduct such as leering, grabbing, or sexual assault.
- 61. It is not necessary for a complainant to expressly object to the conduct. The law recognizes that a person's behaviour "may be tolerated and yet unwelcome at the same time": Walker v. Sashmasters and another, 2018 BCHRT 95; Mahmoodi, paragraph 141. In Canada (Human Rights Commission) v. Canada (Armed Forces), 167 F.T.R. 216, 34 C.H.R.R. D/140 the Court stated, "in order to determine if the conduct is welcome or unwelcome... the proper inquiry will not require a verbal 'no' in all cases."

#### 62. Further, the BCHRT noted:

... The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage. <sup>28</sup>

63. Gender-based insults or sexist remarks, as well as comments about a person's looks, dress, appearance or sexual habits may, depending on the circumstances, constitute sexual harassment (see Arjun P. Aggarwal's book, Sexual Harassment in the Workplace, (1992), 2nd edition, Butterworths

<sup>&</sup>lt;sup>28</sup> Dupuis v. British Columbia (Ministry of Forests), 1993 CanLII 16472 (BC HRT) at para 141

Canada Ltd. at page 11; Lobzun v. Dover Arms Neighbourhood Public House Ltd. (unreported) March 13, 1996, B.C.C.H.R.; Egolf v. Donald Watson and 4140 Sales Ltd. doing business as Japan Camera Centre One Hour Photo (1995), 23 C.H.R.R. D/4 at D/15 (B.C.C.H.R.) and Shaw v. Levac Supply Ltd. and Roger Levac and Herb Robertson (1991), 14 C.H.R.R. D/36 (Ont. Bd. Inq.)).

- As indicated above, there need not be a pattern of behaviour to establish sexual harassment. The law is clear: a single event may be sufficient in certain circumstances to establish harassment. When considering a claim of harassment under the Code, the BCHRT applies an objective test to determine whether the conduct constitutes sexual harassment.
- 65. Similarly, a complaint does not need to be made immediately after an event. Aggarwal states that courts have accepted that there may be valid reasons why there was delay before a victim or survivor was comfortable enough to report incidents of harassment. He describes the concerns of those who have been harassed:

Chapter 4

Taking Legal Action - A Predicament for the Victim

Victim's Reluctance to Complain

A woman faced with unwanted and unsolicited sexual advances may feel confused, as well as frustrated and angry. She may not know how to react to the situation. She may think: Should I confront the harasser? Should I tell my [partner]? Should I discuss it with fellow employees? Should I complain to the employer (the boss of the harasser, if any)? If I tell them, how will they react? Would they believe me? Would they say I invited it myself? Would I be labelled a troublemaker? Would they make my life hell on the job? What if I am fired? Where would I get another job? I have to have a job to make ends meet.

These fears may hound her into keeping her mouth shut. Typically, in such cases, she will suffer the humiliation and harassment silently as long as she can, and then she will quietly quit. These fears are not imaginary; they are real. When harassment occurs, often the woman is unsure whether a real injustice has been committed, for the aggressor may make light of it or pretend that she initiated the encounter.

- 66. In *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12 the BCHRT summarized these principles outlining the following three "myths and stereotypes" which must not be considered when analyzing whether alleged sexual harassment is welcome:
  - [177] I identify three myths and stereotypes that do not factor in my analysis.

- [178] First, the lack of protest does not factor in my analysis. I reject the argument that evidence of protest is required to establish the unwelcomeness of conduct. That the Employee and the Faculty Member continued to work together productively for another three months after the incident, or that the Employee did not tell the Faculty Member that she did not want to continue working with him, is not determinative. It is not necessary for a complainant to expressly object to the conduct and the law recognizes that a person's behaviour "may be tolerated and yet unwelcome at the same time": Mahmoodi, para. 141.
- [179] Second, the delay in reporting does not factor in my analysis. I reject the argument that evidence of early reporting is required to establish unwelcomeness. I acknowledge that non-reporting is a stereotype that privileges complainants who resist and report immediately. That the Employee waited more than three months before reporting the comment to Ms. A is not a fact that goes against my finding that the conduct was unwelcome. A person may choose not to report for a variety of reasons including fear of negative jobrelated consequences, not being believed, attacks on their reputation, or the difficult nature of the investigations: Hastie. In this case, the Employee testified that she was advised by her union not to report the incident until she successfully completed probation because of fears of being fired. That she acted on this advice should not be held against her. After she completed probation, the further delay was due to Ms. A being on vacation.
- [180] Third, participation in prior behaviour does not factor in my analysis. I reject the argument that the Employee engaged in a pattern of behaviour with the Faculty Member that invited his comment. The Employee and the Faculty Member willingly engaged in conversations about their values and interests, which they both agreed strengthened their working relationship. In my view, that they were friendly and had these conversations does not suggest a pattern of consent to engage in a romantic relationship. It also does not support a finding that the Employee welcomed the conduct, that she is less worthy of belief, or that it is unreasonable to know that the conduct would be unwelcome.<sup>29</sup>
- 67. Since sexual harassment is a form of discrimination, conduct of a sexual nature is not required to be "<u>because of [a person's] sex</u>", as that is a strict standard not to be applied to human rights cases. It need only be <u>a factor</u>. <sup>30</sup>
- 68. A single event, depending on the facts, may be sufficient to constitute discrimination conduct, however not every negative incident that is connected to sex will be discriminatory harassment contrary to the Code.<sup>31</sup> The framework of *Pardo v. School District No. 43*, 2003 BCHRT 71 is the appropriate model for consideration of adverse consequences where there is a single event. The *Pardo* factors were considered recently by the Tribunal in 2020<sup>32</sup>:

<sup>29</sup>Paras 177-180.

<sup>&</sup>lt;sup>30</sup> Hodgson v. Coast Storage and Containers, 2020 BCHRT 55, at para 51.

<sup>31</sup> Hadzic v. Pizza Hut Canada [1999] BCHRTD No. 44 at para 33

<sup>32</sup> The Employee v. The University and another (No.2), 2020 BCHRT 12 at para 12

- a. the egregiousness or virulence of the comment;
- b. the nature of the relationship between the involved parties;
- c. the context in which the comment was made;
- d. whether an apology was offered; and
- e. whether or not the recipient of the comment was a member of a group historically discriminated against.

## Poisoned or Toxic Work Environment in respect of Indigeneity and Sexual Harassment

- 69. We have also considered the concept of a poisoned work environment on both aspects of alleged discrimination.
- 70. In some cases, sexual harassment is sexually related conduct that is hostile, intimidating, or offensive to the employee, but nonetheless has no direct link to any tangible benefit or harm, i.e., it is not a *quid pro quo* situation. Rather, this annoying conduct creates a bothersome or poisoned environment. As such, the notion that there must be an overt sexual "proposition" relies on historically narrow understandings of sexual harassment as sexual advances rather than the broader definition set out in *Mahmoodi* and potentially expanded upon further in *MacDonald*.<sup>33</sup>
- 71. In *Brar*, supra, the Tribunal identified several factors that might constitute a poisoned work environment, including:
  - a. Even a single statement or incident, if sufficiently serious or substantial, can have an impact on a racialized person by creating a poisoned environment.
  - b. A poisoned environment is based on the nature of the comments or conduct and the impact of these on an individual rather than on the number of times the behaviour occurs. As mentioned earlier, even a single egregious incident can be sufficient to create a poisoned environment.
  - c. A poisoned environment can be created by the comments or actions of any person, regardless of his or her position of authority or status in a given environment.

<sup>&</sup>lt;sup>33</sup> Bethany Hastie, "Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions in 2010–16" (2019) 31:2 CJWL 293).

- d. Behaviour need not be directed at any one individual in order to create a poisoned environment. Moreover, a person can experience a poisoned environment even if he or she is not a member of the racialized group that is the target. (at para, 741)
- 72. The Tribunal also added the following about a toxic work environment:

...A toxic or poisoned work environment is one where discrimination or harassment on a prohibited ground becomes a part of a person's workplace: Vanderputten v. Seydaco Packaging Corp, 2012 HRTO 1977 at para. 63...

- 73. Subjective feelings or even genuinely held beliefs are insufficient to discharge this onus. There must be evidence that the objective reasonable bystander would support the conclusion that a poisoned workplace environment had been created: *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 at para. 66.<sup>34</sup>
- 74. The court has also addressed the issue of a toxic work environment as it relates to alleged sexual misconduct, outlining the following obligations of an employer:

[an] employer has a broader responsibility to ensure that the work environment does not otherwise become so hostile, embarrassing or forbidding as to have the same effect." An employer has a duty "to see that the work atmosphere is conducive to the well-being of its employees. 35

75. Management personnel who know, or ought to know, of the existence of a poisoned atmosphere but permit it to continue thereby discriminate against affected employees, even if they themselves are not involved in the production of that atmosphere: *Kinexus Bioinformatics Corp. v. Asad*, 2010 BCSC 33: *Ghosh v. Domglas Inc. (No.2)* (1992), 17 C.H.R.R. D/216 at para. 76 (Ont. Bd. In.).

#### Microaggressions

76. "Microaggression" is a relatively new term used to describe "the subtle, mostly nondeliberate biases and marginalizations that ultimately [add] up to serious assaults"<sup>36</sup>: these covert instances of discrimination are targeted at individuals from marginalized groups, are chronic and can occur daily.<sup>37</sup> In some contexts, these experiences of marginalized people are understood as racial profiling, such as when

<sup>34</sup> Jones v. BC Clinical and Support Services Society and Rivit Danois, 2020 BCHRT 99

<sup>35</sup> Baraty v. Wellons 2019 BCSC 33

<sup>&</sup>lt;sup>36</sup> Expanding Our Vision, supra at 20-21.

<sup>37</sup> Ibid.

an Indigenous person is followed or stopped by staff or security in a store – sometimes referred to as "shopping while Indigenous"<sup>38</sup> – or a Black person is pulled over by police for no clear reason, an experience described in the U.S. as "driving while Black".<sup>39</sup>

77. The subtle and everyday nature of microaggressions can make them difficult to identify, especially for a person who has not had firsthand experience of systemic discrimination to draw upon. The *Expanding Our Vision* report offers three types of microaggressions and examples at page 21 to assist us:

In the American Indian context, "micro-discriminations" are more commonly referred to "microaggressions" which are chronic and covert: "They are defined as 'events involving discrimination, racism, and daily hassles that are targeted at individuals from diverse racial and ethnic groups.' Microaggressions are chronic and can occur on a daily basis." Wing Sue and his colleagues identify three types of microaggressions, with Indigenous examples added:

Microinsults: "communications that convey rudeness and insensitivity and demean a person's racial heritage" (i.e. eye rolling);

Microinvalidations: "communications that exclude, negate or nullify the psychological thoughts, feelings, or experiential reality of a person of color" (i.e. "I don't see colour" which denies the experiences of racialized people, or asking if someone is "really Indigenous"); and

Microassaults: "explicit racial derogation[s] characterized primarily by a verbal or nonverbal attack meant to hurt the intended victim" (i.e. avoiding people of a particular race, associating Indigenous Peoples with aggressive imagery, alcohol use or theft).

#### Retaliation Under the Code

78. We take guidance from the test for determining retaliation under the Code as set out in the case of *Bissonnette v. Sooke School District No. 62*, 2006 BCHRT 447 (B.C. Human Rights Trib.), para. 19, and clarified by the B.C. Court of Appeal in *Gichuru v. Pallai*, 2018 BCCA 78 at para. 58. Therein, the B.C. Court of Appeal set out the following criteria for assessing a complaint of retaliation:

To establish a complaint [of retaliation], a complainant must show the following on a balance of probabilities:

<sup>38</sup> Ibid.

<sup>&</sup>lt;sup>39</sup> See for example. Commission des droits de la personne et des droits de la jeunesse (DeBellefeuille) c. Ville de Longueuil, 2020 QCTDP 21 at para 210. It is worth noting that this term has gained wider exposure since the Black Lives Matter movement.

A previous complaint has been made under the Code and that the respondent was aware of the complaint.

The respondent engaged in or threatened to engage in the conduct described in s. 43 (e.g., evicted, discharged, intimidated, etc.).

There is a sufficient connection between the impugned conduct and the previous complaint. This connection may be established by proving that the respondent intended to retaliate, or may be inferred where the respondent can reasonably have been perceived to have engaged in that conduct in retaliation, with the element of reasonable perception being assessed from the point of view of a reasonable complainant, apprised of the facts, at the time of the impugned conduct. (emphasis added)

79. The timing of an alleged retaliatory action may create a reasonable inference of retaliation if an explanation is not provided:

[103] At its highest, I could find that Mr. Gichuru's human rights complaint, civil suits, and complaints about and against Mr. Pallai, other tenants and neighbours indicated to Mr. Pallai that Mr. Gichuru was not happy in his residence at the Highlander. These circumstances existed but did not bear a causal connection with the Eviction Notice. I find that, but for the marital discord, Mr. Pallai would not have had Mr. Gichuru served with an Eviction Notice. Although the timing of the Eviction Notice points to possible retaliation, a reasonable complainant, apprised of the facts, including Mr. Pallai's explanation for the eviction, would not perceive the eviction as retaliation.

80. Under the Code, as noted above, an employer is obligated to respond reasonably and appropriately to complaints of discrimination, which includes a duty to investigate (Jamal v. TransLink Security Management and another (No. 2), 2020 BCHRT 146 at para 106). A failure to appropriately or reasonably investigate can, on its own, amount to discrimination "regardless of whether the underlying conduct subject to the investigation is found to be discriminatory" (Employee v. The University and another (No. 2), 2020 BCHRT 12). Factors that may be considered by the Tribunal in determining whether an employer has properly discharged this duty include:

(1) Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;

<sup>40</sup> Gichuru v. Pallai, 2012 BCHRT 327, affirmed Gichuru v. Pallai, 2018 BCCA 78

- (2) Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
- (3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the Circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?
- 81. Case law also outlines that following reasonable legal advice is a factor in determining whether appropriate action was taken:

Laskowska v. Marineland of Canada Inc., 2005 HRTO 30 (Ont. Human Rights Trib.), para. 53<sup>41</sup> states:

...There is little from the BCHRT that deals specifically with how/if legal advice interacts with this responsibility. In The Sales Associate v. Aurora Biomed Inc. and others (No. 3), 2021 BCHRT 5, the Tribunal explains that ignorance of the law with respect to an employer receiving a complaint is not a defence, but in the context of an employer who did not seek out legal advice. Here, the failure to seek advice weighs against the reasonableness of the employer's actions (at paras 128-129):

- 128 I accept Ms. Liang's evidence that this was the first time she or Ms. Jang had encountered a situation like this. ...it was incumbent on them as employers to educate themselves properly about their legal obligations under the Code. Dr. Liang repeatedly emphasised that the company always follows "labour laws", while at the same time the Respondents testified that they were completely unaware of the Human Rights Code or this Tribunal until this complaint. In fact, the Code is a very important part of this province's laws governing employment and ignorance of those laws is no defence to a complaint of discrimination.
- Given their unfamiliarity with these issues, the Respondents should have sought advice or done some research about how to respond appropriately to the type of concerns the Sales Associate was raising. They did neither of those things. Instead, Ms. Liang and Ms. Jang crafted a plan that, while maybe well-meaning, was insensitive and inappropriate
- 82. The Tribunal has dealt specifically with faulty legal advice, but only with respect to where erroneous legal advice has led to procedural faults, like the late filing of applications:
  - 49 ... the case law requires that the complainant obtain legal advice in a timely way, provide some evidence about the nature of the advice and their detrimental reliance thereon, and demonstrate diligence in filing despite that advice. While identification of the lawyer is not essential, it would usually be prudent for a complainant seeking an extension of time to

<sup>&</sup>lt;sup>41</sup> Cited in Beharrell v. EVL Nursery Ltd., 2018 BCHRT 62 at para, 24

provide as much information as possible about the advice received including the identity of the lawyer and how the advice factored into the timing of the complaint.<sup>42</sup>

- 83. These principles are clearly not directly applicable to legal advice regarding an investigation, but the requirements to provide as much information as possible about the advice, demonstrate diligence despite the advice, and establish how the advice factored into the alleged deficiency could be applied more broadly.
- 84. Outside the context of the BCHRT, the topic of reliance on erroneous legal advice has been discussed at various levels and in various contexts. In *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, the Supreme Court of Canada found that, though a chairman of a corporation had acted in a legally incorrect way, he did so in good faith and in reasonable reliance of legal advice and was entitled to indemnification (paras 58, 65, 70):
  - "How does reliance on legal advice support a claim for indemnification under s. 136(1)? At the outset, I note my agreement with the position of the Court of Appeal that mere de facto reliance on legal advice will not guarantee indemnification. However, reliance that is reasonable and in good faith will establish that a director or officer acted "honestly and in good faith with a view to the best interests of the corporation". In the instant appeal, Blair's reliance on Osler's advice was both reasonable and in good faith.
  - I note that the case law cited by the appellant establishes that reliance on counsel's advice (even if it leads to a deleterious result) will strongly militate against a finding of mala fides or fiduciary breach, such a finding being necessary to disentitle one from indemnification.
  - ...it should be remembered that Blair, a layperson, could not have been expected to be suspicious about advice that, prima facie, appeared legitimate and came from Enfield's own corporate counsel. I would affirm the Court of Appeal's finding that the advice given by Osler [the law firm] and followed by Blair would, to a layperson in Blair's circumstances (and with his business experience), have been "ostensibly credible" (p. 801). He thereby acted in accordance with the duties he owed.
- 85. Or in *Dockside Brewing Co. v. Strata Plan LMS 3837*, 2007 BCCA 183, where the BCCA cites *Blair* in the context of Strata Council Members violating conflict of interest provisions, despite receiving legal advice:

<sup>42</sup> The Parent obo the Child v. The School District, 2020 BCCA 333

- 72 The Supreme Court found (at para. 58) that in the circumstances, Mr. Blair had acted reasonably and in good faith in relying on the advice of corporate counsel...
- The appellants cannot make the same claim to good faith reliance on the advice of their lawyers. It may be accepted that, as laypersons, they would not necessarily have been suspicious about the substance of the advice... But as members of a strata council, which is charged with the responsibility to manage and supervise the affairs of the strata corporation in the best interests of the strata corporation, they cannot be excused from ignoring all of the contrary arguments, advice, and court orders that demonstrated that they and their lawyers were acting in a conflict of interest ... the members of the strata council cannot reasonably claim that they acted "honestly and in good faith" in relying on the advice of those same lawyers to defend the claim against them that they acted in a conflict of interest.
- 86. Or in the context of reliance on legal advice as a defence to a regulatory proceeding in *Crown Hill Capital Corp.*, Re, 2013 ONSEC 32:
  - 152 Accordingly, reliance on legal advice must be in good faith and must be reasonable in the circumstances. Reliance on legal advice is not reasonable where the reliance is not fully informed or the advice is not credible. Further, reliance on legal advice may not be reasonable where the legal counsel giving the advice has a material conflict of interest.
  - As noted above, if CHCC relied in good faith on Stikeman legal advice in entering into the transactions Staff challenges, that reliance is not a legal defence to Staff's allegations. However, if that reliance was reasonable, it is evidence that (i) supports the submission that CHCC acted in good faith and with due care in connection with the conduct sheltered by the legal advice; (ii) is a relevant consideration in imposing any sanctions in respect of the Respondents' conduct; and (iii) is a relevant consideration in determining whether the Respondents' conduct was contrary to the public interest.

#### Retaliation under the WCA

87. Retaliation under the WCA has similar considerations as under the Code:

Under the Act, retaliation is a discriminatory action and is prohibited. Sections 150-152 of the Act state: Division 6 — Prohibition Against Discriminatory Action

Actions that are considered discriminatory

150 (1) For the purposes of this Division, "discriminatory action" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.

(2) Without restricting subsection (1), discriminatory action includes

(a)suspension, lay-off or dismissal,

(b) demotion or loss of opportunity for promotion,

(c)transfer of duties, change of location of workplace, reduction in wages or change in working hours,

(d)coercion or intimidation,

(e)imposition of any discipline, reprimand or other penalty, and

(f) the discontinuation or elimination of the job of the worker.

Discrimination against workers prohibited

151 An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker

(a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,

(b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the Coroners Act on an issue related to occupational health and safety or occupational environment, or

(c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to

(i) an employer or person acting on behalf of an employer,

(ii) another worker or a union representing a worker, or

(iii) an officer or any other person concerned with the administration of this Part.

- 88. In the Workers' Compensation Appeal Tribunal's ("WCAT") Decision A1604017<sup>43</sup>, Vice-Chair Pendray stated:
  - [34] ... The test to determine whether an employer has engaged in unlawful discriminatory action against a worker contrary to section 151 of the Act has four (4) elements.
  - [35] First, the worker must suffer the kind of negative employment consequences described in section 150 of the Act. Second, the worker must have engaged in the type of safety activities protected under section 151 of the Act. Third, there must be a causal connection between the negative employment consequence and the safety activity in question. If the worker succeeds in establishing these three elements, he or she is said to have demonstrated a prima facie or basic case of prohibited discriminatory action. This is not an onerous task.

<sup>43</sup> A1604017 (Re), 2016 CanLII 154701 (BC WCAT)

- [36] Where a worker is able to demonstrate a prima facie or basic case of discriminatory action, it falls on the employer to disprove this case, as required by subsection 152(3) of the Act. This is the fourth element of the enquiry.
- [37] In assessing the employer's motivation, the "taint" principle is applied. This principle essentially recognizes that there may be multiple reasons behind an employer's decision to discipline or terminate a worker. However, if any part of the employer's reasoning is related to any of the impermissible anti-safety attitudes described in section 151 of the Act, the employer's actions will generally be considered to amount to discrimination within the meaning of that section.
- [38] The reasons for adopting a "taint" principle and the effect of this principle were discussed at length by the former Appeal Division in AD-2002-0458, dated February 21, 2002. I agree with the Appeal Division's analysis and adopt it as my own. In particular, I note the following statements from paragraphs 71 and 83, respectively of that decision:

There is no doubt that the taint theory makes it more difficult for the employer to discharge its burden under Section 152(3). The employer must demonstrate that its reasons for taking action against the worker were not related to any of the prohibited grounds in Section 151. This means that the employer cannot shield itself by pointing to proper cause, or what may be a valid business reason for the impugned conduct, where there is also evidence of a prohibited action... The taint theory stands for the proposition that safety considerations need not be the only or dominant

89. Workplace safety is mandated by the WCA, requiring employers to take all reasonable steps in the circumstances to ensure the health and safety of its workers and that includes preventing where possible and addressing claims of retaliation.<sup>44</sup>

# Retaliation under the Respectful Workplace and Harassment Prevention Policy

90. Under the Respectful Workplace and Harassment Prevention Policy, the Responsible officer is responsible. This Policy defines this position as:

Responsible officer – The University official who may carry out one or more of the following roles within the terms of this policy:

- a) decide whether the policy has been violated;
- b) make recommendations or decisions regarding remedies or discipline;
- c) assume the role of complainant to initiate an investigation;

<sup>44</sup> See Section 21 Workers Compensation Act [RSBC 2019] Chapter 1

- d) initiate interim measures.
- 91. The Respectful Workplace and Harassment Prevention Policy states:
  - 10.3 If the responsible officer for the respondent finds that the complaint was frivolous, vexatious or malicious he/she will take steps to appropriately address this conduct, which may include disciplinary action for the complainant. Except for complaints that are frivilous [sic], vexatious or malicious, there will be no retaliation by any member of the University Community against a complainant for bringing a complaint.

## Personal Harassment and Bullying under the WCA

- 92. Supervisors must ensure the health and safety of all workers under their direct supervision, be knowledgeable about Occupational Health and Safety ("OHS") provisions and regulations applicable to the work being supervised and comply with OHS provisions, regulations and applicable policies<sup>45</sup>including those set out in the 2013 Board of Directors Resolution regarding Workplace Bullying and Harassment *Policies*. <sup>46</sup> It defines bullying and harassment as follows:
  - a. includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or infimidated, but
  - b. excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.
- 93. The Resolution requires the employer take reasonable steps to address the possibility of harassment, including minimizing harassment, developing and implementing procedures, training, and not engaging in bulling or harassing conduct. The Resolution defines the reasonable steps as follows:

Black's Law Dictionary, Ninth Edition defines a reasonable person as follows:

"...a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions..."

<sup>&</sup>lt;sup>45</sup> See Section 23 Workers Compensation Act [RSBC 2019] Chapter 1

<sup>&</sup>lt;sup>46</sup> British Columbia, WorkSafeBC, Occupational Health and Safety Regulation Policies, D3-115-2, D3-116-1, and D 117-2

- 94. WorkSafeBC's definition does not require an abuse of power, misuse of authority or a pattern of mistreatment. Indeed, courts and arbitrators have long agreed that depending on the circumstances of a matter, a single event if egregious enough may constitute harassment. Furthermore, harassment may occur where there is no power imbalance between the parties.
- 95. WorkSafeBC Practice Directive #C3-3 (Interim) sets out clarification on the interpretation of bullying and harassment:

Interpersonal conflicts between a worker and co-workers, supervisors or customers are not generally considered significant unless the conflict results in behavior that is considered threatening or abusive.

. . .

Not all interpersonal conflict or conduct that is rude or thoughtless will be considered abusive behaviour. Each case will need to be investigated to determine the details and nature of the interpersonal conflict. However, conduct that is determined to be threatening or abusive is considered a significant work-related stressor.

96. In the decision, A1901824 (Re), 2020 CanLII 47344 (BC WCAT), Vice Chair Thomson discussed the legitimate exercise of managerial action as compared to harassment. This is known as the "labour relations exclusion":

<u>Section 135(1)</u>(c) provides that there is no entitlement for compensation if the mental disorder is caused by a decision of the worker's employer relating to the worker's employment. The Act provides a list of examples of such decisions including changing work to be performed, working conditions, discipline and termination of employment. The policy explains that this list is not exhaustive.

The practice directive provides further guidance. It explains that there may be situations that fall outside these "routine" employment issues that give rise to a compensable mental disorder, such as targeted harassment or another traumatic workplace event. An employer has the prerogative to make decisions regarding the management of the employment relationship. This does not mean that decisions can be communicated in any fashion. However, the fact that the decisions were communicated in a manner that was upsetting to the worker is not demonstrative. The practice directive says that heated exchanges or emotional conflicts are not uncommon when addressing discipline, performance or assignment of duties. In order to constitute a workplace stressor, it must be threatening or abusive.

As pointed out by the worker's representative, in noteworthy WCAT Decision 2014-02791, for the labour relations exclusion not to apply there would need to be extremely egregious behavior, such that a reasonable person considering it would clearly see it as abusive or

personally threatening. In WCAT Decision A1601845, the panel found that even severe criticism by a supervisor genuinely attempting to deal with a perceived performance problem will fall within the exclusion, except if it occurs in a seriously hostile, intimidating, threatening or abusive manner.

- 97. Just as it is with complaints under the Code, complaints under the WCA must meet the threshold of being more than speculation or conjecture; see *Workers' Compensation Appeal Tribunal v. Hill*. 2011 BCCA 49 ("*Hill*") at para 27.
- 98. As many of the allegations occurred off TRU's campus, Policy Item C3-14.00, located in WorkSafeBC's *Rehabilitation Services & Claims Manual, Volume II*, is relevant as it sets out the principles for determining if a worker's injury has arisen out of and during the worker's employment. Policy Item C3-14.00 provides that:

In applying the test of employment connection, it is important to note that employment is a broader concept than work and includes more than just productive work activity. An injury or death that occurs outside a worker's productive work activities may still arise out of and in the course of the worker's employment.

- 99. To determine if an injury has arisen out of and in the course of a worker's employment, Policy Item C3-14.00 lists various indicators of employment. No single criterion can be regarded as conclusive. Those criteria are:
  - a. whether the injury occurred on the premises of the employer;
  - b. whether it occurred in the process of doing something for the benefit of the employer;
  - c. whether it occurred in the course of action taken in response to instructions from the employer;
  - d. whether it occurred in the course of using equipment or materials supplied by the employer;
  - e. whether it occurred in the course of receiving payment or other consideration from the employer;
  - f. whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;
  - g. whether the injury occurred during a time period for which the employee was being paid;

- h. whether the injury was caused by some activity of the employer or of a fellow employee;
- i. whether the injury occurred while the worker was performing activities that were part of the regular job duties; and
- j. whether the injury occurred while the worker was being supervised by the employer.
- 100. WCAT, which is the final level of appeal in the workers' compensation system, has held that injuries that arose at events such as a Christmas party, a golf tournament, and a breakfast were all sufficiently connected to the worker's employment to attract compensation: see WCAT Decision Number: A1602081; WCAT Decision Number: 2005-03922-ad; and WCAT Decision Number: 2011-02063.
- 101. Similarly, case law has regularly found that conduct that occurs off an employer's premises, at work-related events, is still considered "conduct in the workplace" and is "very much connected to the employer": see van Woerkens v. Marriott Hotels of Canada Ltd., 2009 BCSC 73, at para 171; Lorion v. 1163957799 Ouebec Inc., 2015 ONSC 2417, at para 52.

# Case Law Regarding Personal Harassment

102. As noted in Cara Operations Ltd. v. Teamsters, Chemical, Energy & Allied Workers, Local 647 ((2005) Carswell Ont 7614 (Ont. Arb. Bd (Luborsky) at 8):

...one must be careful not to construct too narrow a definition of "departure from reasonable conduct" lest every perceived slight or subjective inference of abuse might result in paralysing consequences to the workplace. There is a wide range of personalities that we experience in our interaction with others; not all of which may be pleasing to our individual sensitivities, but which we must live with nevertheless, within legal bounds, developing a certain "thickness of skin" to the challenges another's disagreeable mannerisms might present. Whether dealing with a family member, backyard neighbor, co-worker or supervisor, the question of whether the other person's behavior amounts to a "departure from reasonable conduct" is an objective inquiry that given the expected variability in human capabilities and personalities, must be afforded a relatively wide margin of interpretation.

103. Arbitrators have cautioned against the liberal use of the word 'harassment' in workplace disputes (*Re Government of BC and BCGEU* (1995), 49 LAC (4th) 193 (B.C. Arb. Bd.) at 227-232 and 248) and turning the term into a "weapon." (*Joss v. Canada (Treasury Board)* (2001) Carswell at 4151 at para. 63). More specifically, Arbitrator Laing's comments in the former case are particularly instructive:

- 227. In these times there are few words more emotive than harasser. It jars our sensibilities, colours our minds, rings alarms and floods of adrenaline through the psyche. It can be used casually, in righteous accusation, or in a vindictive fashion.
- 228. Whatever the motivation or reason for such a charge, it must be treated gravely, with careful, indeed scrupulous, fairness given both to the person raising the allegations of harassment and those against whom it is made.
- 229. The reason for this is surely self-evident. Harassment, like beauty, is a subjective notion. However, harassment must also be viewed objectively. Saying this does not diminish its significance. It does, however, accentuate the difficulty of capturing its essence in any particular circumstance with precision and certainty.
- 230. For example, every act by which a person causes some form of anxiety to another could be labelled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless and insensitive. The question then is, when are we guilty of harassment?
- 231. I do not think every act of workplace foolishness was intended to be captured by the word "harassment". This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts or foolish words, where the harm, by any objective standards, is fleeting. Nor should it be used where there is no intent to be harmful in any way, unless there has been a heedless disregard for the rights of another person and it can be fairly said "you should have known better".
- 232. To this point, I have addressed the generic use of the word "harassment" as a concept of general application ...

\* \* \*

248. As I said earlier in this award, harassment is a serious subject and allegations of such an offence must be dealt with in a serious way, as was the case here. The reverse is also true. Not every employment bruise should be treated under this process. It would be unfortunate if the harassment process was used to vent feelings of minor discontent or general unhappiness with life in the workplace, so as to trivialize those cases where substantial workplace abuses have occurred...

#### Standard of Proof

104. In terms of the standard required to prove an allegation of personal harassment, a complainant carries the burden of proving, on a balance of probabilities, that the respondent(s) engaged in the comments and conduct that constitutes harassment or bullying.

# **Applicable TRU Policies**

- 105. We have outlined several university policies that apply in this circumstance and that were included in the Terms of Reference. A breach of a policy may or may not also indicate a breach of another right or legal principle, just as a breach of the Code or the WCA will not necessarily result in a breach of a policy. We have canvassed these issues in the findings section of the report.
- 106. TRU also represents itself as having a values-based culture and as of April 2022 it published updated versions of its policies in respect of workplace harassment.<sup>47</sup>

## TRU Respectful Workplace and Harassment Prevention Policy

- 107. The Respectful Workplace and Harassment Prevention Policy has had at least two iterations that are relevant to this investigation.
- 108. On May 28, 2009, TRU approved a Respectful Workplace and Harassment Prevention Policy. Eleven years later, on March 26, 2021, TRU updated that policy to its current version.
- 109. A complainant under the original policy could make a complaint for experiencing discrimination, which was expanded to explicitly include harassment in 2021. The definition of harassment was expanded in 2021 to include the definition arising out of the WCA.
- 110. Harassment under this policy has four (4) different categories?, including harassment under a prohibited ground under the Code, personal harassment, sexual harassment and workplace bullying and harassment. Two of the types are not materially different from the corresponding requirements under the Code or WCA. The remaining two are set out as follows:

#### Sexual harassment. Behavior of a sexual nature by a person:

- i. who knows or ought reasonably to know that the behaviour is unwanted or unwelcome; and
- ii. which interferes with another person's participation in a University-related activity; or

<sup>&</sup>lt;sup>47</sup> https://www.tru.ca/about/developing-values-based-culture-at-tru html, accessed July 26, 2022

iii. leads to or implies job- or academically-related consequences for the person harassed.

Personal harassment. Behavior directed towards a specific person or persons that:

- i. serves no legitimate purpose; and
- ii. would be considered by a reasonable person to create an intimidating, humiliating, or hostile work or learning environment.

## TRU Sexualized Violence Policy

- 111. On March 31, 2017, TRU approved a Sexual Violence Policy. This policy was replaced on March 27, 2020, by the Sexualized Violence Policy. The 2020 policy is substantially like its predecessor, with the salient differences set out where necessary. Some of the events are alleged to have occurred when the 2017 policy was in place. Where relevant, we have outlined whether that has a material effect on a decision in the findings section.
- 112. Both iterations of the policies are designed to protect the University Community from sexualized violence. The policies each include a trauma-informed approach to sexualized violence:

The University is committed to taking a trauma informed approach to Sexualized Violence, recognizing that victims and survivors may be traumatized by their experiences and that the University's approach needs to be grounded in an understanding that peoples' experiences will be affected by many factors such as their sex, ancestry, race, ethnicity, language, ability, faith, age, socioeconomic status, sexual orientation, and gender identity. The University is committed to ensuring a safe environment for all and will take appropriate measures to prohibit visitors and others from campus that pose a threat to a safe environment.<sup>49</sup>

113. We have applied this approach throughout all stages of this investigation. In general, TRU's policy towards sexualized violence is consistent with its obligations under statute and consistent with basic discriminatory principles:

"[1] he University is committed to ensuring a safe environment for all and will take appropriate measures to prohibit visitors and others from campus that pose a threat to a safe environment."

<sup>&</sup>lt;sup>48</sup> The policy can be accessed at https://www.tru.ca/\_\_shared/assets/BRD\_25-0\_Sexualized\_Violence40359.pdf as of October 19, 2022.

<sup>49</sup> https://www.tru.ca/\_\_shared/assets/BRD\_25-0\_Sexualized\_Violence40359.pdf. as accessed Feb 2. 2022

114. "Sexualized Violence" includes the following definition:

Sexual Violence: ... It varies in severity and takes many forms, including but not limited to:

...

sexual harassment, which is conduct of a sexual nature by one who knows or ought reasonably to know that the behaviour is unwanted or unwelcome, and which interferes with another person's participation in a University-related activity, or leads to or implies job or academically-related consequences for the person harassed;

- 115. The updated Sexualized Violence Policy expands the circumstances in which the policy applies for the purposes of investigation and discipline (granting online jurisdiction), but otherwise outlines substantially the same real and substantial connection to the University for there to be a breach. The policy states:
  - (3) For the purposes of University investigations and discipline, this policy applies only to Sexualized Violence by a member of the University Community against another member of the University Community that is Reported to the Sexualized Violence Prevention and Response Manager and that is alleged to have occurred:
    - a. on any property that is controlled by the University and used for University purposes including student residences owned by the University but excluding activities that are in the exclusive control of organizations other than the University;
    - b. at an event or during an activity sponsored or under the auspices of the University; or
    - c. online, using the University's Information and Communications Technology; or
    - d. when the Respondent was in a position of power or influence over the survivor's academic or employment status; or
    - e. the alleged conduct has a real and substantial connection to the University.
- 116. The 2020 policy also explicitly sets out a requirement about no retaliation, which was absent, but implied in the previous version: "[t]he University will not tolerate any retaliation, direct or indirect, against anyone making, or involved in a Disclosure, a Report, or an Investigation. A finding of retaliation may result in separate disciplinary action".

### TRU Whistle Blower Policy

117. TRU approved its Whistle Blower Policy on May 30, 2014. The purpose of this policy is to protect individuals from making a "protected disclosure," which is defined in the policy as:

...a communication to a responsible University employee about actual or suspected Improper Activity based on a good faith and reasonable belief that the activity has both occurred and amounts to Improper Activity.

118. The definition of an improper activity is broad:

"Improper Activity" means any activity that is undertaken by the University, an employee of the University, a student, a volunteer or a contractor, that:

- i. is in violation of federal, provincial or municipal laws or regulations including corruption, malfeasance, bribery, theft of University property, fraud, coercion, misuse of University property, or willful omission to perform duty;
- ii. is a serious violation of University policy; or
- iii. involves gross misconduct, gross incompetence or gross inefficiency.
- 119. This policy has become relevant as it forms the background to one of the allegations in this investigation and any application of the policy in this report is set out below in the findings section.

# Commentary on Bias and Similar Fact Evidence

- 120. Evidence must be considered and weighed in a neutral, unbiased manner. The natural inference and potential bias, when faced with a multitude of complaints against a single individual, is to assume that if one or more specific complaints is found unsubstantiated, that nonetheless, there must be *something* wrong because so many people have commented or complained about that person. Some would say "where there is smoke, there is fire". We are cognizant of the bias that such an approach could cause and although similar fact evidence may be relevant on issues of credibility, it is not a construct that is useful in establishing wrongdoing beyond that allowed at law. As such, we are mindful to guard against the bias that a long list of complaints can have, and we have reviewed each allegation on its merits and on the evidence presented to us that either supports it or detracts from it.
- 121. We must weigh each of the complaints with the above in mind, to sift through the evidence and assess each matter in an unbiased way. Upon doing so, and when drilling down into the actual events that

occurred and the evidence that exists for each of those complained events, we find that at law, the onus to prove some of the allegations has not been met.

- 122. In a highly oppositional and widely reported investigation, it is not uncommon that parties on both sides will suggest bias. In fact, parties will sometimes conflate fairness and/or bias with an unfavourable finding.
- 123. Avoiding both the appearance of and actual bias has been paramount in this process and is enshrined in our legal requirements. The court has said in respect of an administrative tribunal:

Dr. Kaburda's contention with respect to bias, or the apprehension of bias, is broadly based. He says, and I accept, that a reasonable apprehension of bias will be found if a reasonably informed bystander, viewing the matter realistically and practically and having thought the matter through, could reasonably perceive bias on the part of the adjudicator. 50

- 124. Therefore, we set out the correspondence and various positions on fairness in this report, so that the results of our investigation can be received with the proper context and so that all parties can be assured that we have acted in a neutral role and within our mandate as guided by the Terms of Reference and nothing further.
- 125. In the civil court context, evidence of good character is generally inadmissible. However, evidence of bad character may be admissible as circumstantial proof of a fact, if it is determined that the probative value of the evidence outweighs the prejudicial effect.<sup>51</sup>
- 126. Resolving the admissibility of similar fact evidence is a difficult exercise. The problem lies in the fact that this evidence is simultaneously probative and prejudicial. A person's capacity and propensity to commit certain kinds of harm—including criminal acts—is likely relevant when brought up in the context of other harm they caused, since people tend to act consistently with their known character. However, too much focus on this idea may capture the attention of the trier of fact to an unwarranted degree. The potential for prejudice, distraction and time consumption that similar fact evidence can cause is considerable.<sup>52</sup>

<sup>&</sup>lt;sup>50</sup> Kaburda v. College of Dental Surgeons (British Columbia) 2000 BCSC 481 at 43; see also McKenelley v. Minto (Village), 2016 NBQB 229.

<sup>51</sup> Saskatchewan v. Racette. 2020 SKCA 2. at paras 23-31: Willis v. Blencoe 2001 BCHRT 12.

<sup>52</sup>https://www.westlawnextcanada.com/blog/insider/ced-an-overview-of-the-law-similar-fact-evidence-160/

- 127. To avoid this pitfall, the courts say a trier of fact should consider several factors when deciding how much weight to give to similar fact evidence. Its probative value comes primarily from the improbability of coincidence between the defendant's/respondent's alleged similar acts and the acts they stand accused of. As such, the value of the evidence will tend to be enhanced where:
  - a. the similar acts are proximate in time to the offences before the trier of fact;
  - b. the acts are similar in detail;
  - c. there are multiple occurrences as opposed to just a single event;
  - d. the surrounding circumstances provide similarities;
  - e. there are distinctive features unifying the incidents; and
  - f. there are no intervening events that undermine the value of the evidence.
- 128. The probative value of similar fact evidence will be severely diminished where there is a potential for collusion between witnesses. These factors are not exhaustive and are merely a guide to the types of matters that may assist in determining the probative value of the evidence.<sup>53</sup>
- 129. Section 27.2(1) of the Code provides the Tribunal with discretion to admit evidence it considers necessary and appropriate, whether or not the evidence would be admissible in a court of law. However, the Tribunal has consistently applied the principles underlying the modern similar fact evidence rule (Brown v. PML Professional Mechanical Ltd., 2010 BCHRT 93 at para 921-922).
- 130. As summarized in Willis v. Blencoe, 2001 BCHRT 12, the Tribunal stated (at paras 9-10):

As a general rule, it is not appropriate to admit similar fact evidence to bolster an argument that a respondent has a propensity which makes it more likely than not that he or she engaged in the alleged conduct...

... similar fact evidence that demonstrates a pattern of conduct that is unique or distinctive and coincides with some unique or distinctive pattern alleged in the case before the adjudicator should be, and is, admitted. The question the adjudicator must ask is whether the probative value of the evidence outweighs its prejudicial effect.

<sup>53</sup> R v Handy 2002 SCC 56

- 131. In Neumann v. Lafarge Canada Inc., 2008 BCHRT 303 [Neumann], similar fact evidence which was relatively general in nature, and went towards establishing that the workplace was a male-dominated environment, was admitted (at para 27):
  - I find Ms. Van Rhyn's proposed evidence about Lafarge being a male-dominated environment relevant to facts in issue in Ms. Neumann's complaint. Ms. Neumann alleges that she has been harassed and shummed at work, because she is a woman, disabled, or both. Evidence that Lafarge is a male-dominated environment which is difficult for women to work in, if accepted, may tend to prove Ms. Neumann's allegation that any harassment or shumning to which she was subjected was due, in whole or in part, to being a woman.
- 132. The Tribunal in *Neumann* puts forward three factors which led to the conclusion that probative value outweighed prejudicial effect in that case: the complainant provided ample notice of the evidence in question, the admission of the evidence would not substantially lengthen the hearing of the complaint. and the proposed evidence was general, contextual evidence (at paras 34-36).
- examination where discrimination is alleged, that it seems may prompt similar fact evidence in some cases. The Tribunal has held that "direct evidence of racial discrimination is rarely available, and such discrimination must often be infeired from the conduct in issue" (Mezghrani v. Canada Youth Orange Network Inc., 2006 BCHRT 60 at para 28). To this end, the Tribunal has held that the context within which harassment occurs is important and usually repeated conduct or a pattern of behaviour is required to establish harassment, though there may be circumstances where a single, extreme offensive comment is sufficient (Hadzic v. Pizza Hut Canada, 1999 BCHRT 44 at para 33). The BCHRT has held that incidents of alleged harassment should not be considered in isolation, and factors should be considered, such as: the nature of the behaviour, the workplace environment, the previous personal interaction between the parties, the context in which the comment was made, and the impact the behaviour had on the complainant (Walker v. Sashmasters and another, 2018 BCHRT 95 at para 50).
- 134. In *Buck-Hutchins v. MCL Motor Cars and another*, 2020 BCHRT 121, a complainant attempted to introduce evidence about how other women were treated poorly by the employer. This evidence was accepted, following *Neumann*, however the Tribunal limited the use of the evidence as it connected to the adverse impacts identified in the complaint.

#### **PROCESS**

### Media and its relationship to Process

- 135. This investigation was given a high profile by the media and within TRU. Starting on November 23, 2021, and continuing throughout the life of the investigation, multiple media outlets, including the CBC, published articles and podcasts about the complaints (some media statements are outlined in Appendix A). The University published a timeline summary on its website of the investigation and several videos outlining the process. <sup>54</sup> Neither the media, nor TRU, had any consultation with us prior to publications being made. If they had tried to consult with us, we would have declined participation.
- 136. As a result of the media coverage, we were required to address several issues: the fact that new individuals came forward because of it, its effect on confidentiality and the impact on witnesses' evidence. These issues are discussed below.

### Additional complainants

- 137. Within several days, numerous individuals reached out to us requesting to participate in this investigation as complainants and in some cases, as witnesses. Between the dates of November 22, 2021 and December 9, 2021, we were approached by approximately individuals, who asked to be a part of this process. Some of the initial comments by these new individuals appeared to be outside of the Terms of Reference and unrelated to the Respondents. Some of the individuals gave no initial comments. 22 individuals mentioned individuals mentioned they might have or whether it was relevant to the Terms of Reference, either in support of or against those individuals. We note that witnesses on both 'sides' came forward because of the media and therefore we cannot draw any inferences from choice to come forward.
- 138. We did speak with some individuals who came forward due to the media as witnesses in this process who had relevant information about the existing complaints.
- 139. The Terms of Reference provided that the scope could potentially be expanded and as such, on November 26, 2021, three (3) days after the media articles were first published, we received confirmation

<sup>54</sup> https://www.tru.ca/board/board-of-governors-investigation html. accessed July 26, 2022

from TRU that it agreed with our assessment that under the Terms of Reference, we could consider additional complainants. Given the expected increase in administration and organization of these additional complaints, TRU also authorized the appointment of a case manager which had been previously declined. Accordingly, we communicated with several of these individuals and begun to set up their interviews.

- 140. On December 2, 2021, TRU reversed its decision on the expansion of the scope. We met with the Sub-Committee's lawyer on December 3, 2021 to seek clarification.
- 141. On December 7, 2021, we wrote to TRU, indicating that we had already reached out to individuals and asked that we be allowed to interview those additional people. TRU's response was that the Terms of Reference was intended to apply to the complaints arising from the Anonymous Complainants. <sup>55</sup> It was TRU's understanding that some complainants were being cherry-picked to add "their voice" to the complaints and that certain Indigenous individuals were being telephoned and solicited to participate, even though they may have nothing to add to the process. We were not privy to the veracity of those statements. In any event, while we initially objected to this reversal, our mandate was set up pursuant to the Terms of Reference and it was within TRU's discretion to direct complainants who were not originally part of the Anonymous Complainants for which our mandate was generated, to an alternate process.
- 142. While we had already set up some interviews based on our original November 26, 2021 instructions, in the interests of time and fairness, we were directed to tell those people that complaints could be made through normal TRU avenues for complaints as well as a new process that had been initiated called the Neutral Zone. More particularly, on December 15, 2021, the TRU Sub-Committee directed us to respond to any person that may have come forward after October 22, 2021 as follows:

We apologize for the delay in responding to your request to speak to us. We have been in discussions with the sub-committee of the Board of Governors about the investigation we have been retained to conduct. Out of a concern that a protracted and open-ended process is necessarily unfair to the respondents and risks becoming a culture assessment (which is not our mandate), the sub-committee of the Board of Governors has limited this process to the specific group of people who raised the allegations and came forward by the ultimate deadline of October 30, 2021.

<sup>55</sup> See para. 1.

It may be that you are identified as witnesses by the complainants. If that is the case, we look forward to speaking with you in that context.

Furthermore, we are informed that TRU has set up processes that are outside of People and Culture to receive complaints under TRU's policies as follows:

Complaints about sexualized violence (including sexual harassment) can be sent to the Sexualized Violence Prevention & Response e-mail, at SVPR@tru.ca. Please see the Sexualized Violence Policy for more information.

Complaints related to bullying, harassment, and discrimination (whether made under a collective agreement or under the Respectful Workplace and Harassment Prevention Policy) can be reported through the university's Human Rights Officer, at humanrightsofficer@tru.ca. The Neutral Zone will provide fresh capacity to manage and support this process. For matters under the Respectful Workplace and Harassment Prevention Policy, people may also report or discuss the matter with the Dean or Director of the faculty/school/division in which the concern has arisen.

Ideas for how to improve TRU's workplace culture – what priorities need to be addressed, what roadblocks need to be removed, or what supports added, should be taken to our engagement process which will be established with The Neutral Zone. Again, more details to come.

We apologize for the confusion and thank you for your patience as we sought clarification.

143. During one of our interviews with \$.22

144. We draw no conclusions or inferences from evidence we did not hear.

# Confidentiality and Impact on Evidence

145. The Terms of Reference for this investigation outlined the following about the confidential nature of this process:

In the Notice of Allegations, the writers also state: "...we are in contact with at least eleven (11) individuals who are seeking a safe and independent process where they can confidentially and anonymously report their direct observations of actions and statements in the TRU workplace and at TRU events...".

...A dedicated and confidential email address through which the Complainants can contact Mr. Serbu and Ms. Cartmill-Lane and share information with them will be established specifically for this process.

...

The investigation will conform to the principles of natural justice and procedural fairness and as such be:

- a. Undertaken promptly and diligently
- b. Fair and impartial; and
- c. Sensitive to the interests of all parties involved and maintain confidentiality to the extent reasonably possible. Anonymity cannot be guaranteed.

..

At the conclusion of the investigation, the Investigators will provide a non-privileged confidential report to the independent representative of the Sub-Committee. (emphasis added)

146. All participants were also informed of the confidential nature of this process during our interviews, for brevity, we provide two examples:

MS. CARTMILL-LANE:... This is a confidential conversation, so, we ask that you not disclose it to -- disclose that you met with us, disclose what we discussed with anyone other than an uninvolved support person. Okay? And you're nodding, I'll take that as a yes.

s.22 : Yes.

MS. CARTMILL-LANE: Okay. So, we just wanted to make sure that — and we're not naïve, we know that people will — and I'm not suggesting you'll do this, but people will say they'll abide by confidentiality and then don't and for various reasons, good or bad, but it is really important to the process that people not share their evidence obviously 'cause as you know, you're a see that could impact the weight we give evidence.

**5.22** : Mmhmm.

MS. CARTMILL-LANE: And we say the same thing to the respondents, of course.

147. Despite those statements, and the clear outline in the Terms of Reference, some individuals made reports to the media. We understand that \$.22

(February 2021), prior to the Terms of Reference being created. The Anonymous Complainant noted the intention to do so if no response was made within "two weeks."

- 148. Although no individual gave evidence to us that the investigation process was discussed or that our questions were repeated with the media, several individuals reported the contents of their allegations to the media and their opinions on the same. In some, but not all, media reports, an element of bias towards a particular finding is evident, though the media is careful to state in their articles that the investigation has made no findings.
- 149. In certain cases, statements made to the media appear to fall outside, or differ from, the evidence reported to us. Some statements to the media also appeared to be based on information and belief and not as firsthand knowledge. While we do not list every example of those statements in this report, we have considered all we have received and found as to how it might affect the evidence we obtained.

150. We do not dispute or debate the importance of an informed public and the necessity of media for an accountable democracy. We are also not tasked with determining how the media may play a social role in the governance of large institutions like TRU. As outlined, the Terms of Reference do not include an analysis of any systemic issues at TRU.

- 151. However, the need for confidentiality in an investigation is not only to allow a trauma-informed process, but, among other things, is also to protect the integrity of the evidence and the credibility of witnesses. In addition, confidentiality is to ensure fairness to the Respondents so that they are not considered culpable or guilty of wrongdoing before any findings are made by the investigators, something we have observed in some of the witnesses and the media articles in general. It is a fundamental part of our society that wrongdoing is not found before evidence is weighed and a determination made.
- 152. We have evaluated the credibility of each witness separately and how and if media involvement affected a particular individual's credibility below. In some cases, details outlined in the media were heard

by witnesses and repeated by them. We have set out whether a particular person spoke with the media in the relevant complaint section.

## Procedurally Fair and Trauma-Informed Process

- 153. Throughout this process, we have viewed our roles as neutral and independent third parties focused on fact-finding as opposed to (dis)proving the complaints. We outlined this view at the beginning of every interview with the Complainants and Respondents (collectively, the "Parties") and witnesses and maintained this approach in the collection of information and selection of witnesses we interviewed. At all times, we have strived to maintain a balance of conducting a procedurally fair and thorough process that is also trauma-informed while moving it forward at a reasonable pace.
- 154. Procedural fairness is a basic tenet of any proper investigation, and a fundamental principle of procedural fairness is that a respondent has a fair opportunity to know the case against them. As such, despite the Concerned Members strongly advocating that the Complainants remain anonymous, our process provided the Respondents with the identities of the Complainants who came forward.
- To implement a trauma-informed process, we worked to minimize the number of times Complainants were required to tell their stories. Since there was no pro forma complaint form and no case manager to assist them with preparing their information, we met with the Complainants, audio recorded the interviews (with their consent) and transcribed the discussions. We then provided their reports in a written format which were vetted by the Complainants before providing them to the Respondents weeks in advance of being interviewed. Where requested by a Respondent, additional particulars were requested by us from the Complainants and provided to them prior to being interviewed. Additional details were reviewed in the interviews. As such, the Respondents were given the necessary information to know the allegations against them and a fair opportunity to respond.
- 156. An investigator must maintain control over the process and documentation and as such we did not produce documents in advance or provide copies to witnesses. In addition, we were under obligations imposed by TRU to maintain control over certain documents and so could not produce them in advance of interviews with Parties or provide copies thereof.
- 157. In addition, we took steps to obtain access to privileged documentation to ensure fairness in the process. Specifically, we raised concerns about the inability to share certain documents with the

Respondents because TRU claimed privilege over them. We requested that to ensure a fair process for the Respondents, we were able to obtain privileged information and provide it to them. We took this position for \$222 Respondents.

158. To be clear, some of the documents did constitute legal advice and were privileged. As such, TRU had no obligation to provide them and gave up a fundamental right at law<sup>56</sup> to allow the investigation process to consider that privileged material. That privilege was not generally waived but was allowed in a limited context to increase fairness. We draw no inference from the choice to limit the use of privileged material.

159. In the case of <sup>s.22</sup>

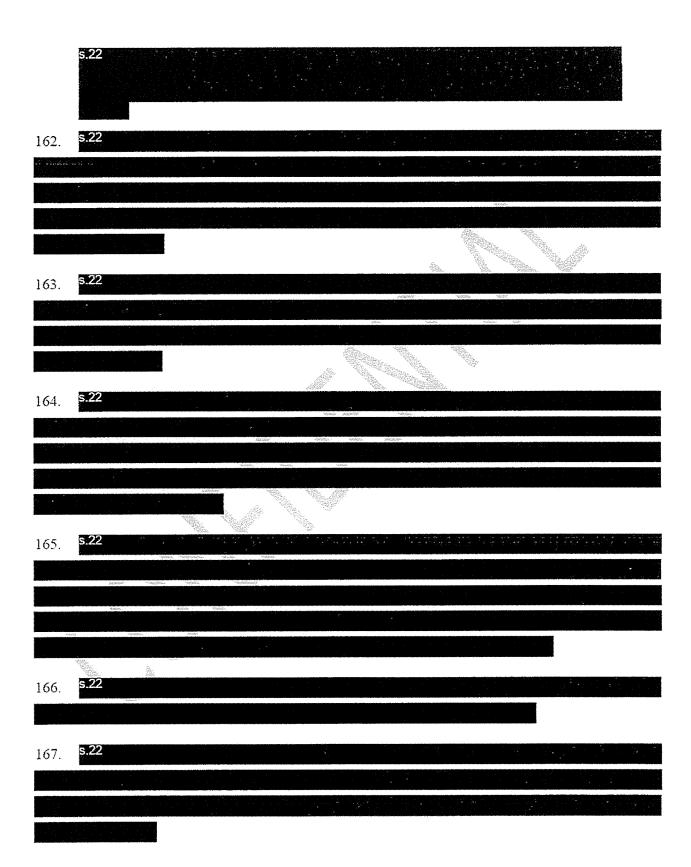
160. We also preserved the integrity of the investigation by accepting lists of witnesses but refraining from discussing who we interviewed or what we asked them unless we were seeking a specific comment on a relevant statement.



161. In response to this request, we wrote:



<sup>56</sup> The Supreme Court of Canada has commented that solicitor-client privilege is not merely a rule of evidence, but a rule of substantive law, and that Court has "consistently emphasized the breadth and primacy of the solicitor-client privilege... 'solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance'... it is a necessary and essential condition of the effective administration of justice" see Blank v. Canada 2006 SCC 39. at paragraphs 24 & 26



- 169. To move this investigation forward in a timely manner, TRU permitted us to utilize resources at our disposal to assist in gathering, organizing and analysing evidence. This included many of hours of transcription of witness testimony, assistance from junior counsel in collating evidence, and research from articled students.
- 170. To provide a trauma-informed approach to this process, we provided Complainants with an opportunity to chat with us in advance of their interviews if they had any questions about process and to help create a sense of comfort, which some elected to do. They were advised that an uninvolved support person or union representative (where appropriate) could accompany them in our meeting although none chose to have anyone accompany them. They were advised if they changed their mind about having a support person present during the interview, we could pause and reconvene with that support person present.
- 171. While we interviewed the Complainants by video given the state of the pandemic at that time, we interviewed the Respondents later on in person. We traveled to Kamloops to reinterview several of the Complainants but not all, as some Complainants requested to be reinterviewed virtually and others were unable to meet with us in person in a timely way as a result of conflicting schedules.
- 172. We offered everyone we interviewed opportunities to take breaks where needed and in the case of one Complainant who reported the greatest number of allegations, we divided her interview into two (2) sessions over the course of two (2) days in order to minimize the stress she was experiencing in recounting the information.
- 173. Where there were material or credibility issues, those matters were put to the Parties with warnings that the information could be difficult to hear, that they could take breaks if needed, that they could have a support person if there was not one present, and/or that we could reconvene later if necessary. All participants completed their interviews without asking for any of these accommodations.
- 174. Despite the difficulties inherent in this process, several Complainants and one of the Respondents described the approach taken in the investigation in positive terms. Comments included but were not

limited to the following "thank you both too for taking this on, and doing it so caringly"; "...thank you for listening and for being supportive"; "thank you both for listening, and for being so lovely and professional. I really appreciate your entire approach to this. And how you've conducted yourself in this meeting today... You guys do make it very pleasant"; and "...this has been an ordeal, since February of 2021, so we're closing in on 2 years. And I know it's not an ordeal of your making, and I -- you know, as much as I hate and don't want to be here, I appreciate the time and how all of you have handled this. So, I'm -- in that perspective, I guess I'm thankful."

- 175. In summary, we have conducted all our interviews in the same manner, which has included:
  - conducting the process in accordance with the rules of evidence and procedural fairness, as set out in more detail below:
  - offering all participants an opportunity to attend the interview with an uninvolved support person or counsel;
  - recording all interviews with consent after the interviewee was informed of the process and rationale for recording;
  - providing an opportunity to ask questions in advance of answering our own questions;
  - providing a mix of open-ended and direct questions:
  - maintaining consistency in questions, for instance, collecting evidence from all Complainants about what outcome they wish to see:
  - requesting from the Parties the names of witnesses for us to take under advisement;
  - not identifying to the Parties which witnesses would be interviewed:
  - requesting the Parties and witnesses maintain confidentiality and specifically to not disclose that they have been interviewed and what was discussed; and

refraining from focusing on media reports of the allegations while considering what impact
media coverage has had on the Parties, witnesses, the evidence and how that may influence the
weight given to the information we have received.

#### Interviews

- 176. In addition to meeting the \$22 Parties, we interviewed \$22 witnesses, some on multiple occasions. We approached other individuals to be interviewed in addition to the above, but some either did not respond to us, declined to be interviewed or were unable to be found. As noted, all witnesses and the Parties were advised of their right to bring an uninvolved support person or legal counsel, as applicable, to the interviews. We draw no inferences from the choice to have a support person or not.
- 177. Most of the interviews were conducted virtually in part because of the pandemic and also to minimize the cost and time involved in traveling to Kamloops. Courts and tribunals have accepted evidence by video and telephone.<sup>57</sup> In assessing the credibility of the witnesses who spoke to us by video, we considered the criteria courts review in accepting such evidence:
  - whether they are alone in the room from which they are testifying, which they were in every case:
  - whether there are any sounds indicating that someone else is present or is coaching the witness:
  - the need to give attention to the tone of voice, and pauses in speaking, as other clues as to demeanour are not available; and
  - whether it is necessary or merely preferable to be able to see the witness. If credibility is not
    in issue, the decision-maker may not need to see the witness (e.g. in the case of an expert
    witness), in which case teleconferencing may be the best option. If it is merely a matter of
    preference, the use of videoconferencing should be subjected to a cost/ benefit analysis.
- 178. In some instances, some witnesses (both those who supported Complainants and those who gave evidence favourable to the Respondents) indicated that they had pre-knowledge of the specific complaints

<sup>&</sup>lt;sup>57</sup> Courts have held that there is no denial of natural justice or fundamental justice in the use of video testimony and accepted telephone testimony out of necessity, where it would be difficult or impossible for them to testify otherwise.

- made. At times, the same witnesses or others gave some answers that appeared rehearsed or practised. Where relevant, we have set out the necessary details below and their impact on credibility.
- 179. The Parties were interviewed at the beginning of the investigation and, where required, again after we met with the witnesses, to allow them to provide their responses to contradictory or new information disclosed during the investigation.
- 180. During all interviews we conducted, we took handwritten notes and made audio recordings of those interviews, with the consent of the individual being interviewed. Nearly all audio recordings were transcribed.
- 181. The Parties and witnesses were given our contact information to communicate with us if any they had further information to share. They were encouraged to do so. Some participants sent material to us after their interviews, including follow up documents and correspondence.
- 182. As stated above, all individuals interviewed were cautioned by us about the need to maintain strict confidentiality throughout this investigation and to not disclose any information pertaining to the complaints, our interviews or this investigation process. The issue of retaliation was also addressed, and the Parties and witnesses were advised to notify us if they experienced any form of reprisal due to the investigation.
- 183. In addition to speaking with individuals, we reviewed hundreds of documents, including but not limited to: emails between the Parties and others, privileged material. Human Resource documents, TRU policies, media reports and articles, social media posts, TRU audit reports, minutes of various meetings, calendar entries, notes taken by Parties or witnesses, video and audio recordings, and text messages.

# **EVIDENCE AND FINDINGS**

Respondent. We have done our best to do so here. However, it became clear during the investigation that when more than one Complainant named the same Respondent or had separate allegations against Respondents, their complaints were often about the same or similar conduct and the evidence relevant to those complaints overlapped. To avoid duplication of evidence and minimize the length of the report, we have organized the allegations as set out below. Unless otherwise stated, where we have found an

allegation to be substantiated, we have concluded that the conduct amounts to a breach of the policies and legislation set out above.

185. We have considered all the evidence that was gathered in this process, although not all the evidence is contained in the body of this report.

# Credibility and Reliability of the Parties

- 186. In a trauma-informed process, some questions that can challenge a person's credibility can be difficult to hear and difficult to ask. We did our best to forewarn individuals that a difficult question was being posed. We did not perform this investigation in the style of a cross-examination, but one or two of the Parties/witnesses did express how some questions made them feel. We draw no inferences from such statements. Unfortunately, a difficult part of this process is testing evidence and credibility and potentially making findings that one person's evidence is more convincing than another person's evidence. That is the legal framework that we are governed by in this process. We are not making general findings about a person's demeanor or character in this assessment. It is the evidence we are weighing, not the person that gave it. There are multiple reasons for a person's credibility to be high or low.
- 187. In making our assessments of credibility and assessing what weight to give their evidence, we have relied on the principles established in the leading BC decision of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BC CA), particularly the following comments:
  - ... Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (...) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken. (para. 356-357)

188. We have also considered the decision of Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, 2012 BCCA 296, leave to appeal refused, [2012] S.C.C.A. No. 392 at paras. 186-187:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560(S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Farnya v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 12 Alta. L.R. (3d) 298 at para: 13 (Alta. Q.B.))...

- 189. In addition, in *Hadzic v. Pizza Hut Canada* (1999), 1999 BCHRT 44 (CanLII), 37 CHRR D/252 (BCHRT), the Tribunal set out the following non-exhaustive list of factors that should be weighed in assessing credibility: the witnesses' motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence.
- 190. Based on the foregoing, an investigator must ultimately determine whether the story "adds up." "hangs together," "makes sense" and "is it plausible?".
- 191. We must guard against considering evidence of good character or "oath helping" and review the evidence of the specific allegations, not statements that say a party would not do a particular thing:

It is possible for people of good character to hold, perhaps quite unconsciously, biases and prejudices which only manifest themselves in particular circumstances. Furthermore, the

Tribunal makes its decisions after considering and assessing all of the relevant evidence, not on the basis of the general character, reputation or past conduct of a party. 58

192. Both credibility and reliability are different parts of the assessment. A witness can be credible, but give unreliable evidence:

[106] I also have relied on the observations on credibility assessment made in R. v. Taylor, 2010 ONCJ 396, cited by the Tribunal in Soheil-Fakhaei v. Canadian Business College, 2012 HRTO 172 as follows:

"Credibility" is omnibus shorthand for a broad range of factors bearing on an assessment of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: honesty (sometimes, if confusingly, itself called "credibility") and reliability. The first, honesty, speaks to a witness' sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture of cognitive, psychological, developmental, cultural, temporal and environmental factors that impact on the accuracy of a witness' perception, memory and, ultimately, testimonial recitation. The evidence of even an honest witness may still be of dubious reliability.

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable. (R v. Morrissey para 205)<sup>39</sup>

193. We note that at times, credibility and reliability assessments can be difficult to articulate and it does not require complete verbalization, recognizing that being delicate and sparing a witness can be part of the assessment. As the Supreme Court of Canada held in *R v. R.E.M.*, at para, 49<sup>60</sup>:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise

<sup>58</sup> Ownsu v. Keech and Cordick, 2005 BCHRT 278 at para 22

<sup>59</sup> A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107

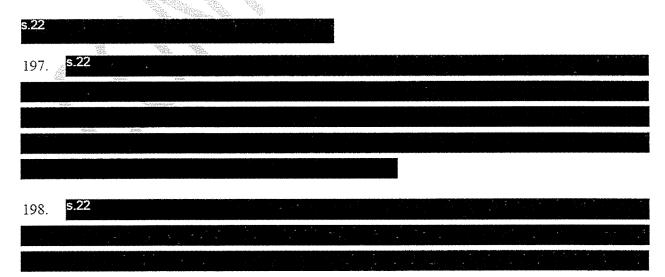
<sup>60</sup> R. v. R.E.M., 2008 SCC 51

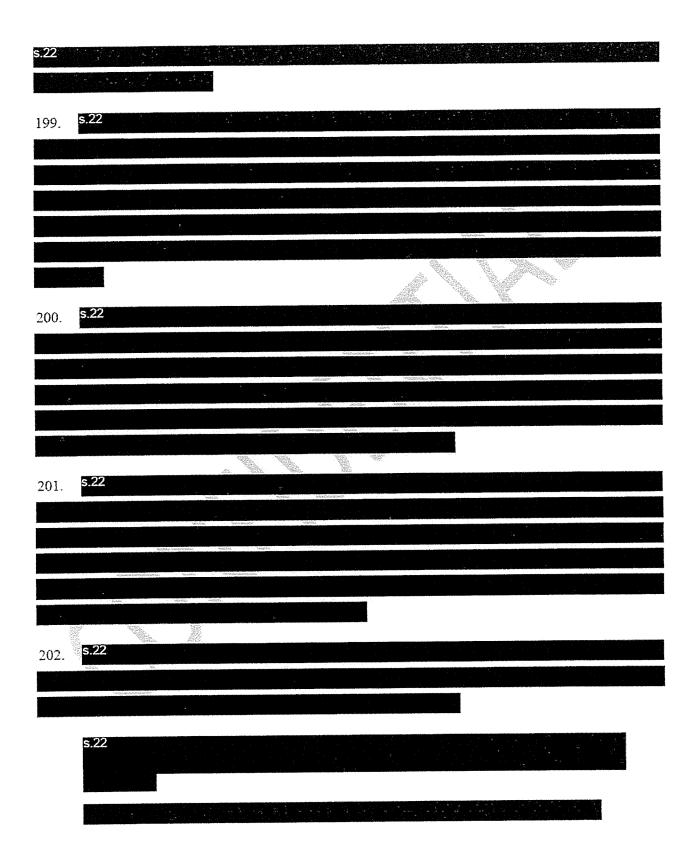
may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

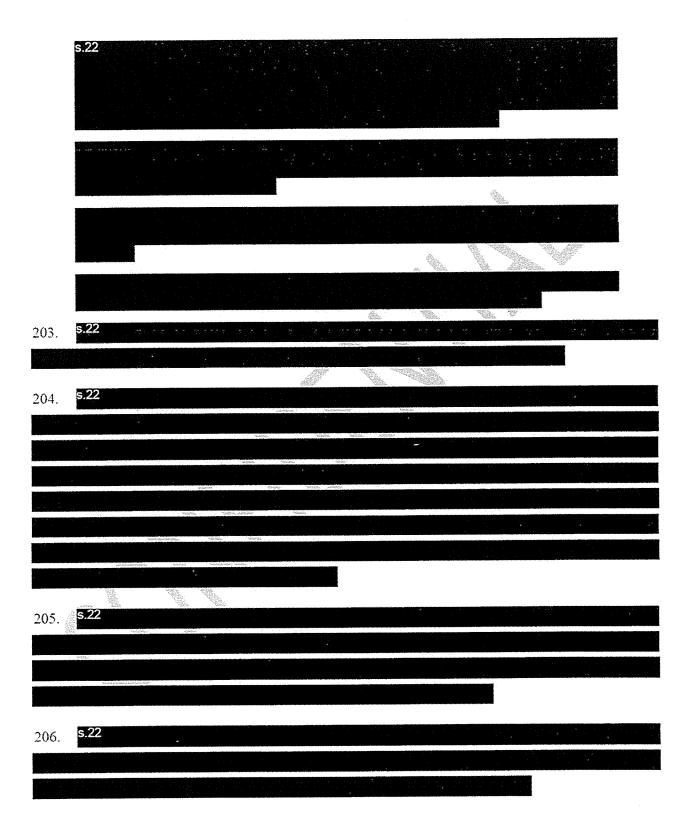
- 194. For each witness, we have summarized our view on credibility in an overall approach. We have attempted to avoid duplication and only included the portion of the evidence necessary to give a summary. A more fulsome analysis, where appropriate, and the impact it has on our findings, is in the relevant section.
- 195. We have also considered similar fact evidence where appropriate and where its use is relevant at law. Where some witnesses claim they experienced similar conduct to a complaint being made, this information, if substantiated, may serve to enhance our view of credibility of one or more witnesses.

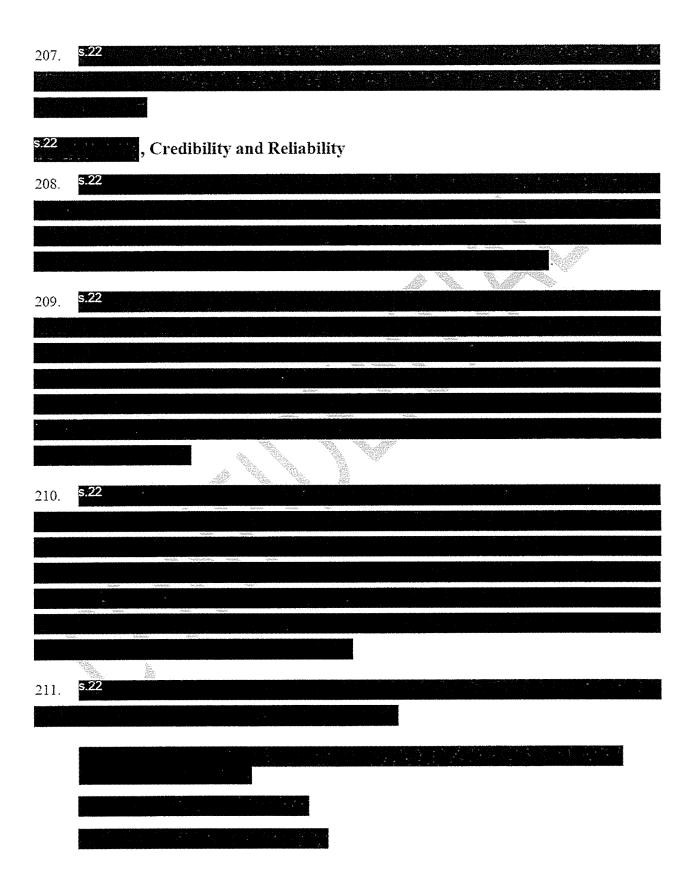
# Credibility and Reliability of the Respondents

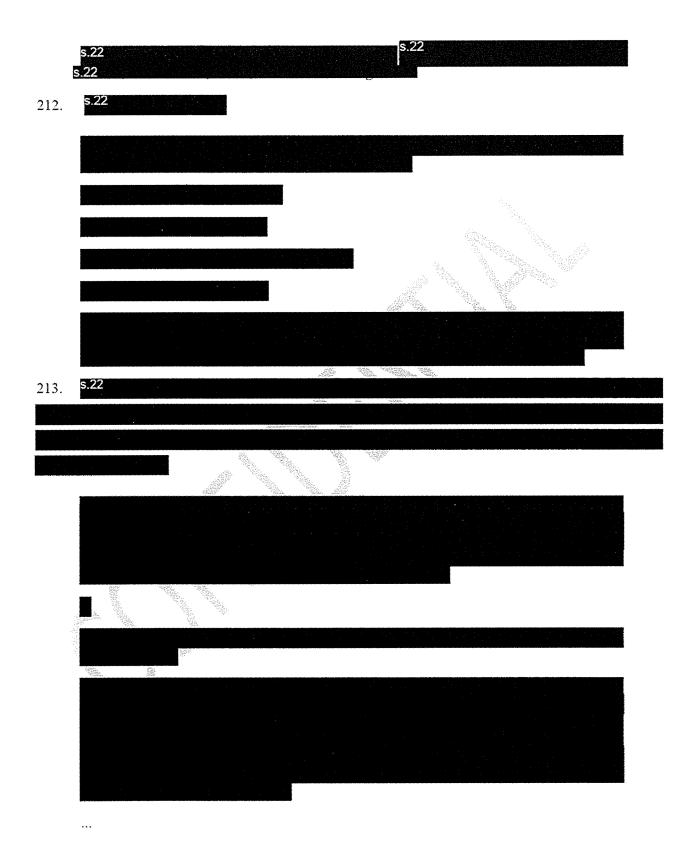
196. We are not tasked with determining whether the Respondents are/were good leaders. It is clear from the evidence that some people like their management styles and others do not. We are also not tasked with a review of TRU as an institution or to decide on matters outside of the Terms of Reference. To ensure a fair process, our task is guided by what both the Complainants and the Respondents have been told we are doing within the Terms of Reference.

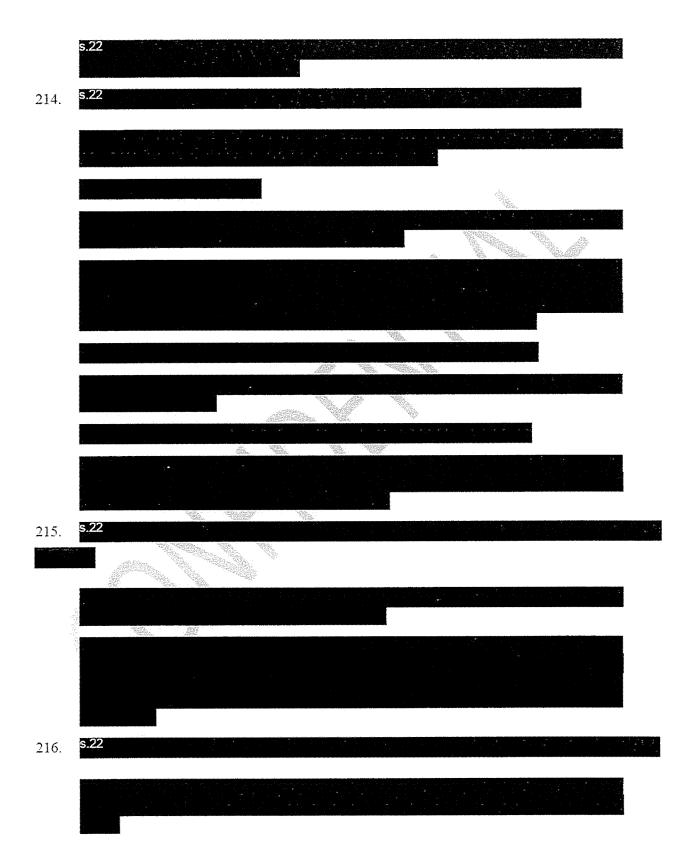


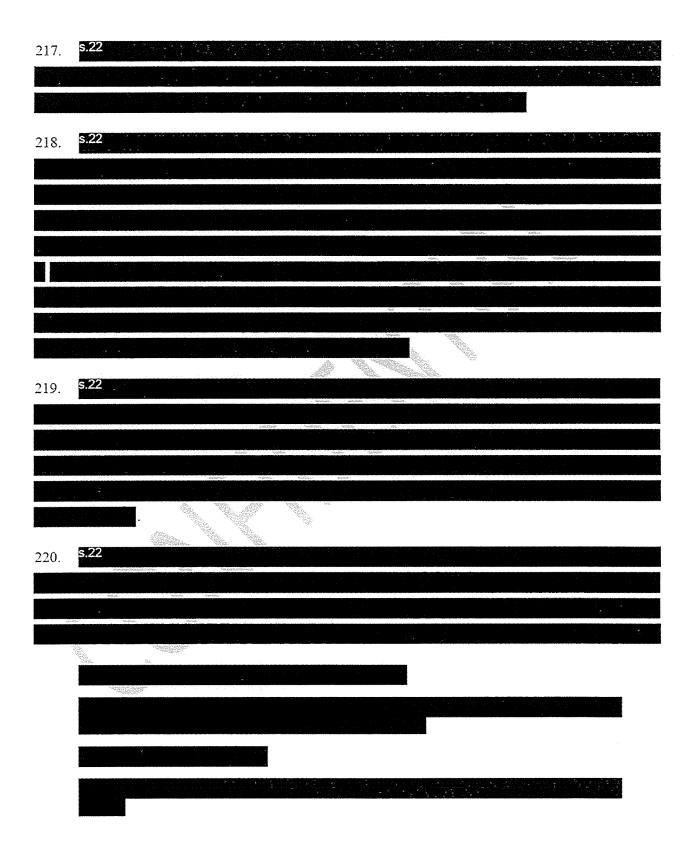


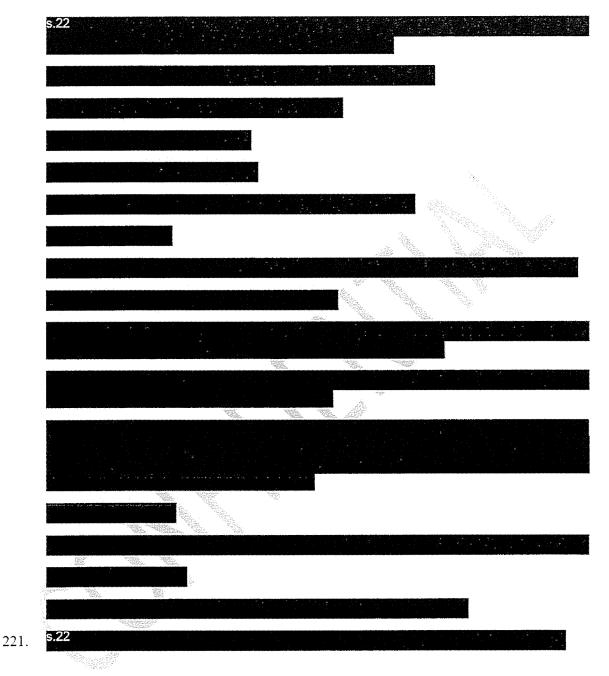








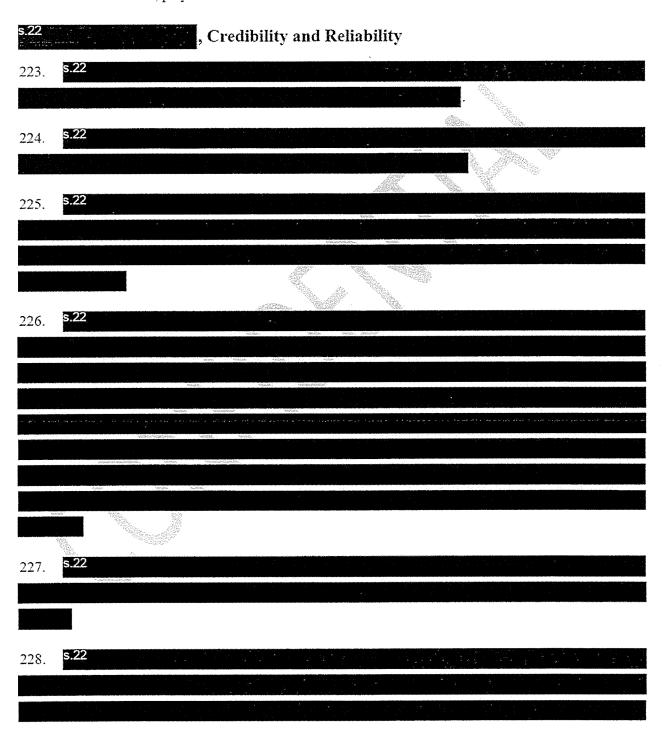


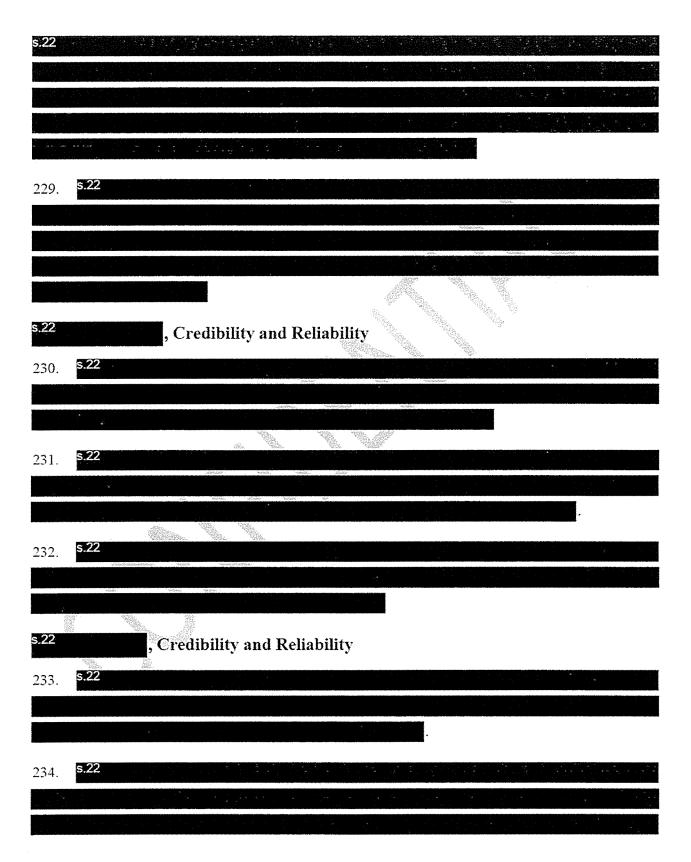


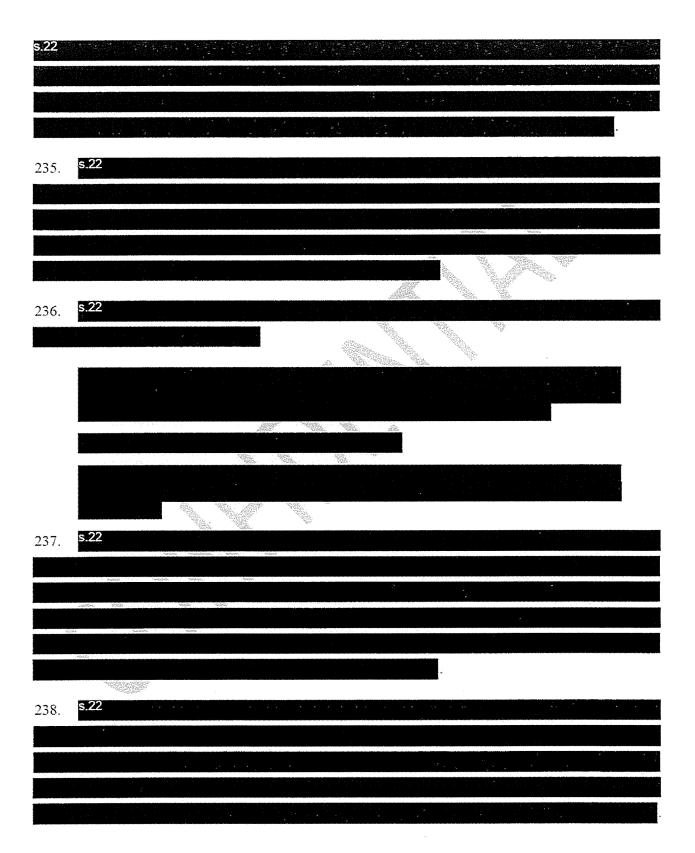
## Credibility and Reliability of the Complainants

222. All the Complainants were at one time employed by TRU. The Respondents have implied that some were disgruntled employees and that their evidence was coloured for that reason. We consider that possibility a neutral factor to their credibility, since it is equally likely that a former (versus current) employee would feel less restricted in what he/she/they might say in an investigation. An unattached

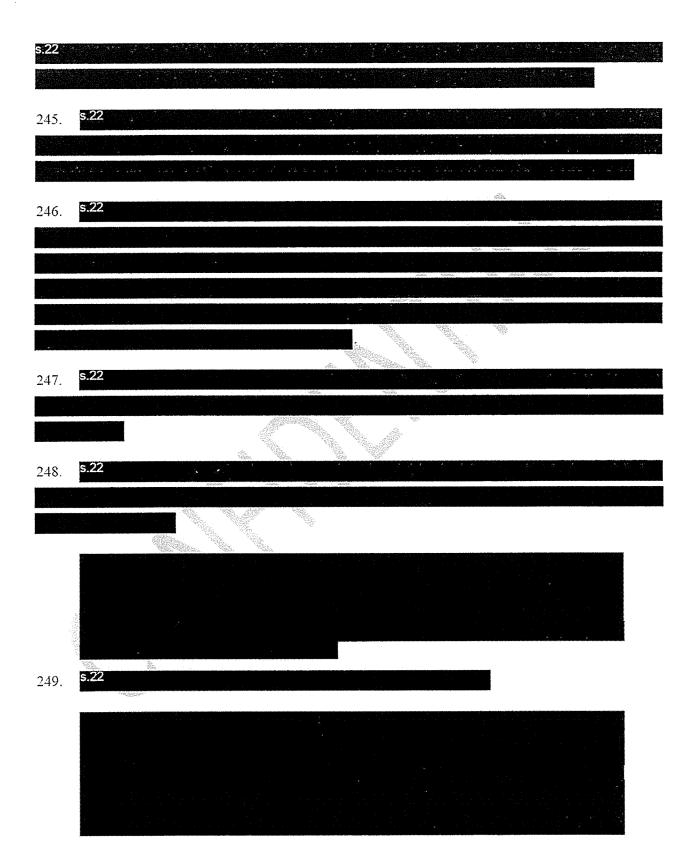
witness has 'nothing to lose'. Therefore, unless there is separate evidence that calls into question a Complainant's credibility arising out of the fact that they have left TRU, the mere fact that they did, even if terminated for cause, plays no role in our assessment.

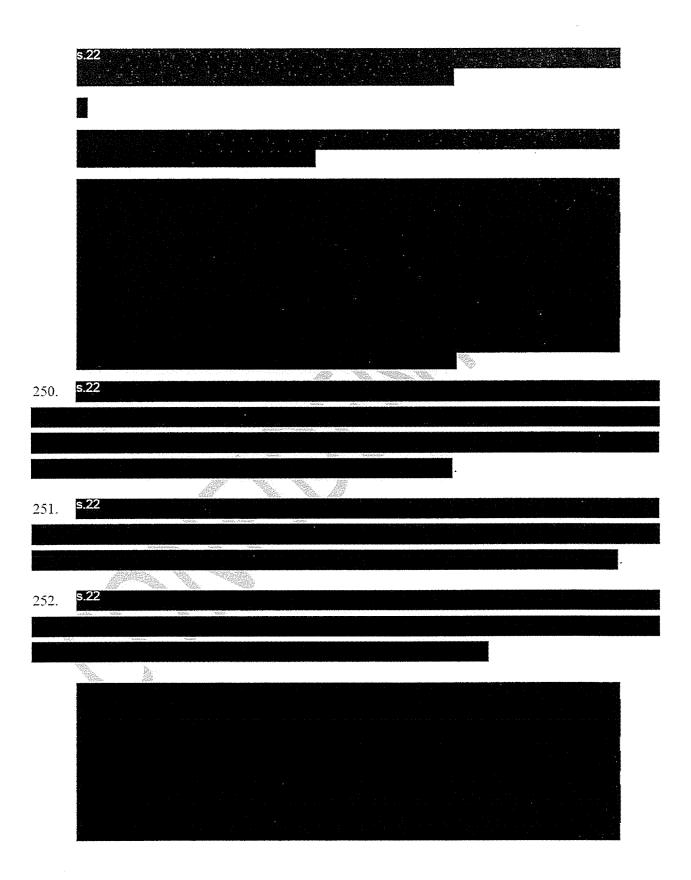


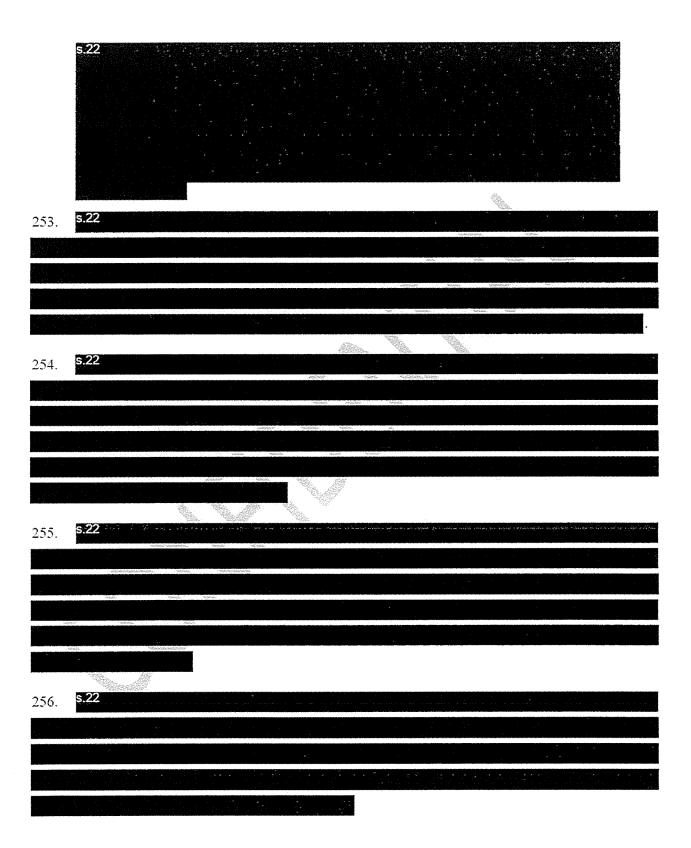


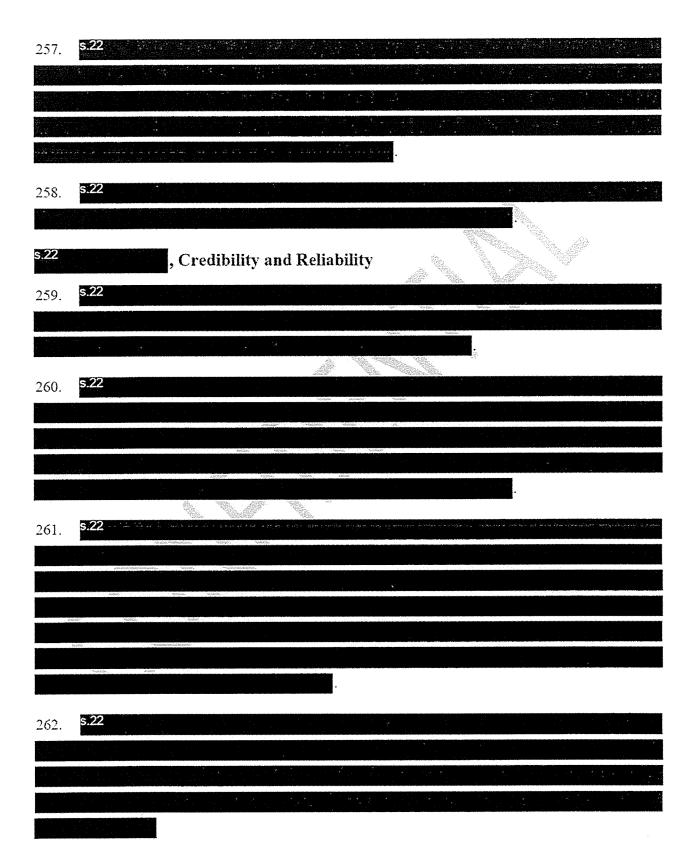


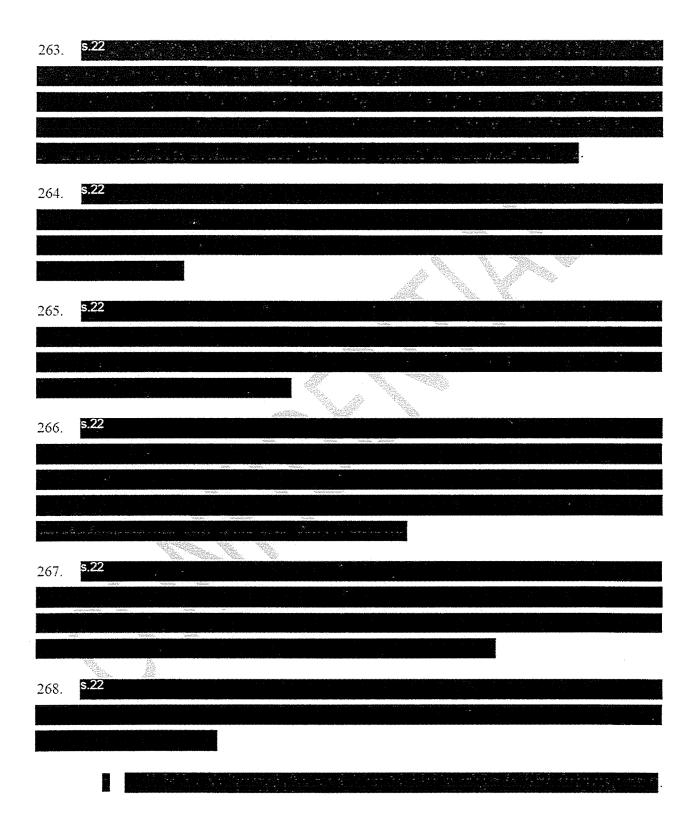
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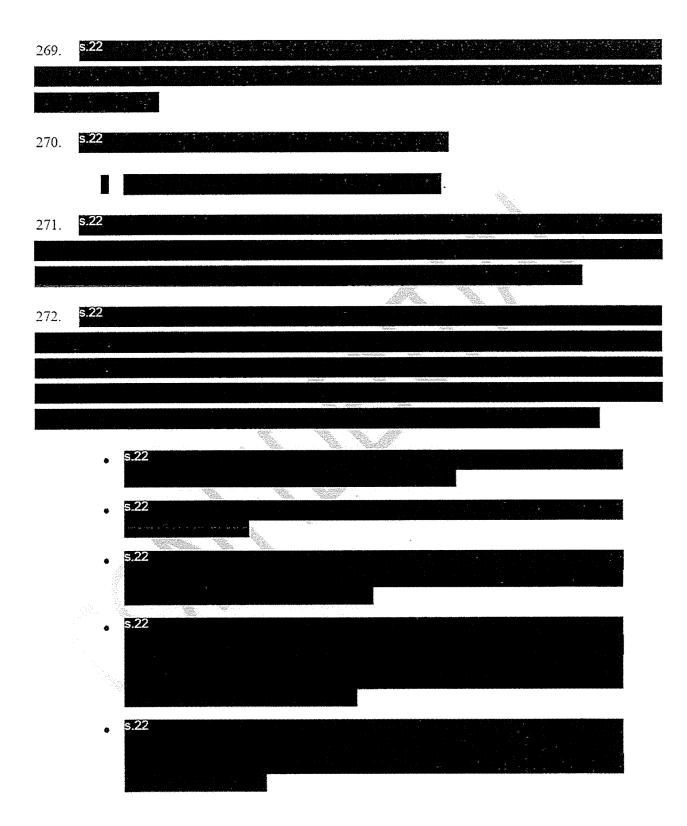


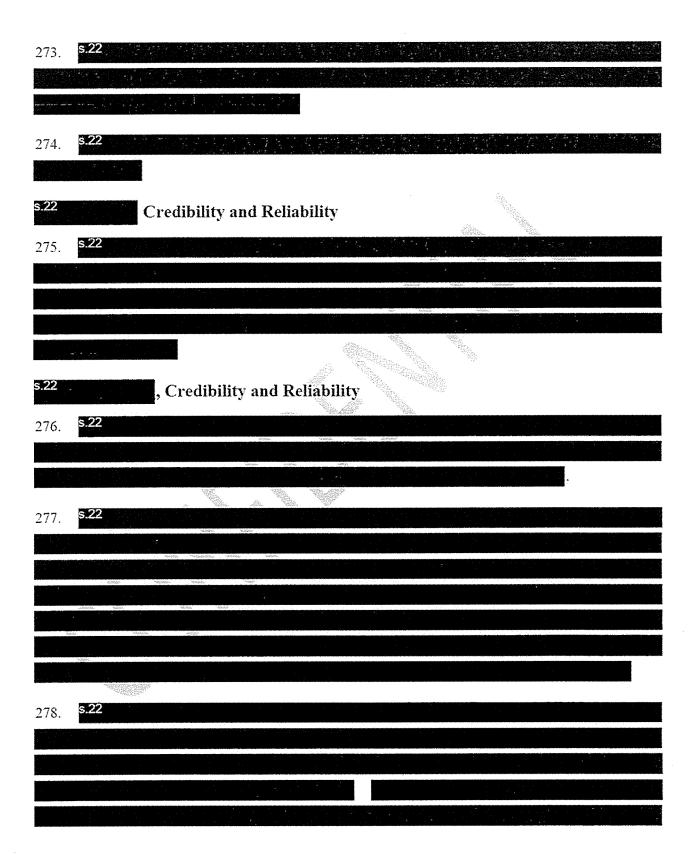






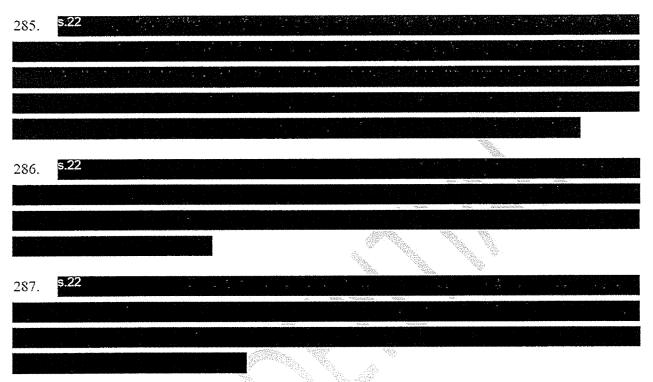






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## Witnesses, Credibility and Reliability



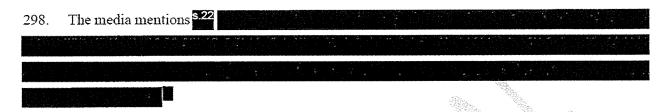
## Media Statements Impact on Credibility and Reliability

- 288. The investigation, including some of the positions of various individuals, including the Complainants, have been framed by the media in various reports from November 2021 until the date of this report.
- 289. It is difficult to determine how much of an impact the media articles and broadcasts have had on the evidence of various individuals. However, some of the witnesses we interviewed came forward because of the media articles. As previously noted, many witnesses came with pre-knowledge of the general nature of the allegations against the Respondents, but without specifics. Some witnesses made assumptions about the kind of information we were seeking. Some witnesses had heard specific retellings of information contained in the complaint documents.
- 290. In some cases, that pre-knowledge effected that witness's credibility and reliability and where it did, we include the relevant portions of that analysis in this section of the report.

- 291. To provide context for the evidence, it is important to set out some of the language that appears in the media, which we set out in Appendix A.
- 292. Some of the allegations made in the media are unrelated to the allegations that form part of this investigation. Some of the witnesses reported by the media make claims about TRU that are unrelated to this investigation. Some of the reporting is related to entirely different grievances held by individuals against people other than the Respondents.
- 293. In certain cases, statements made to the media appeared to fall outside or differ from the evidence reported to us. Some statements to the media also appeared to be based on information and belief and not as firsthand knowledge. While we may not list every example of those statements in this report, we have considered all we have received and found.
- 294. We are not investigating systemic problems at TRU and none of our findings will comment on any alleged systemic problems. Some of the media reports imply general allegations of misogyny, racism and bullying against 222 Respondents, without providing details of those allegations. Many of the media articles lump the 222 Respondents into the same categories, without differentiating between the allegations made.
- 295. We have outlined some portions of the media articles in this report. We have not included every media article, nor every media outlet. We note that there were articles published in writing, by video and by audio. We have seen articles by at least the following media outlets: Kamloops This Week. The Vancouver Sun, CBC, CFJC, the Victoria News, the Tofino News, Tittle Press, Canadian Occupational Safety Magazine, InfoTel, RadioNL, Castanet, The Province, The Aldergrove Star, The Maple Ridge News, University Affairs, People in Vancouver, Sasha Kandroshov's BLOG, Maple Ridge News, The New Zealand Times, and Academica.
- 296. The articles we saw were predominantly from Kamloops This Week and CBC.
- 297. At least one author said, "The messages came as far as from Australia with questions...." It is reasonable to conclude that the media reported widely on the allegations to an international audience.

<sup>61</sup> https://krasun.ca/2021/11/28/tru-investigation-what-do-we-know-and-what-actions-are-needed/, accessed October 26, 2022

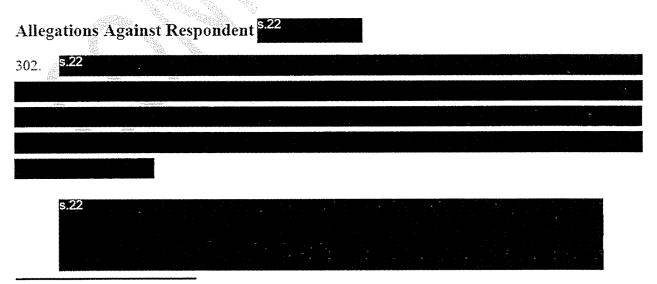
Some witnesses admitted to hearing about or learning about the investigation or details of the investigation from the media.



299. However, although it was alleged that s.22 complainants wrote anonymously to the Board of Governors in February 2021, we are only investigating the specific complaints of s.22 individuals that came forward in accordance with the Terms of Reference.

## The University's Response

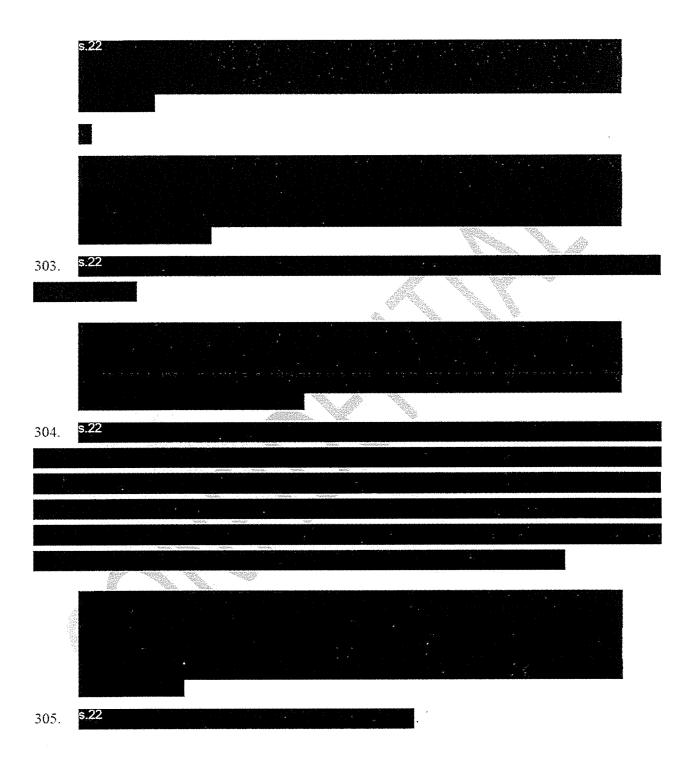
- 300. TRU created its own webpage about the investigation on its website<sup>63</sup> which included a timeline of various steps and videos about the investigation process published November 24, 2021, December 1, 2021 and February 10, 2022. It also published letters from various stakeholders and the responses of the president or the board.<sup>64</sup> We were not involved in the publication of that information.
- 301. The timing of the first video by TRU corresponds with the timing of the first media article by Kamloops This Week. TRU provides no details about the allegations.

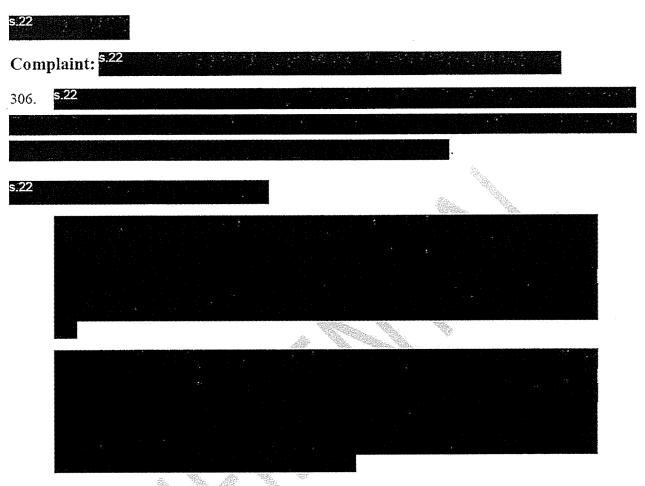


<sup>62</sup>https://issun.com/kannthisweek/docs/ktwn211229\_a. accessed October 25, 2022

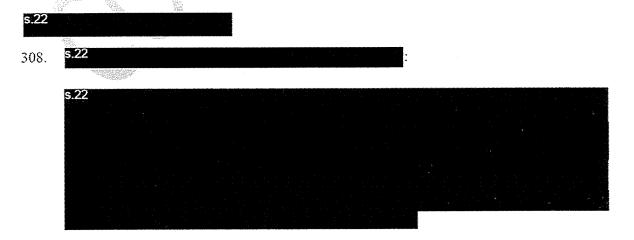
<sup>63</sup>https://www.tru.ca/board/board-of-governors-investigation.html. October 27, 2022

<sup>64</sup> https://www.tru.ca/board/board-of-governors-investigation/correspondence.html





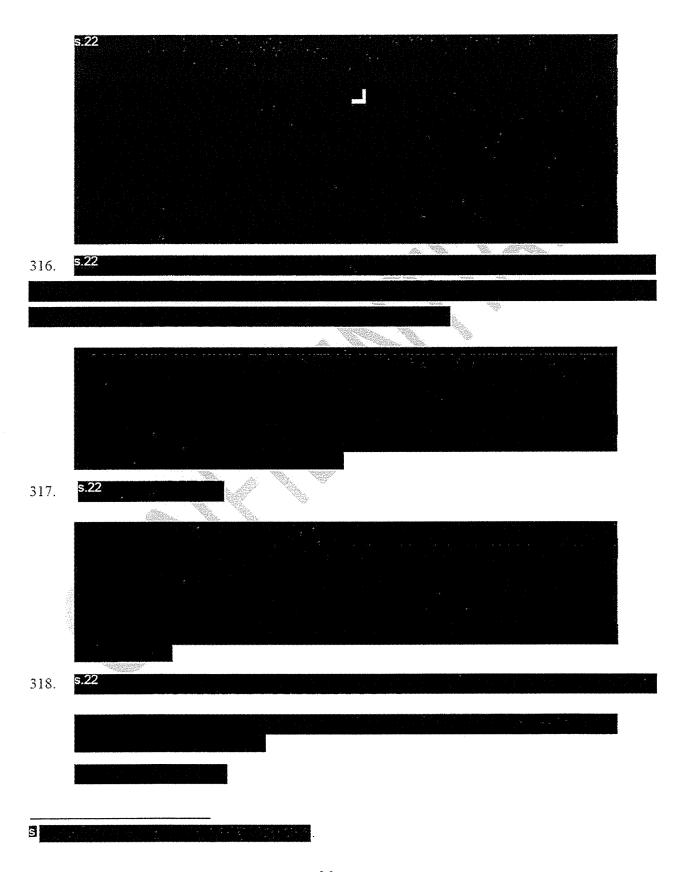
307. This complaint is too general, and we are unable to investigate it. We are not tasked with investigating general conduct, but specific allegations of alleged wrongdoing. It would be procedurally unfair to 222 to go on a fishing expedition. S22 had an opportunity to provide details but did not. Therefore, we find this allegation is unsubstantiated.

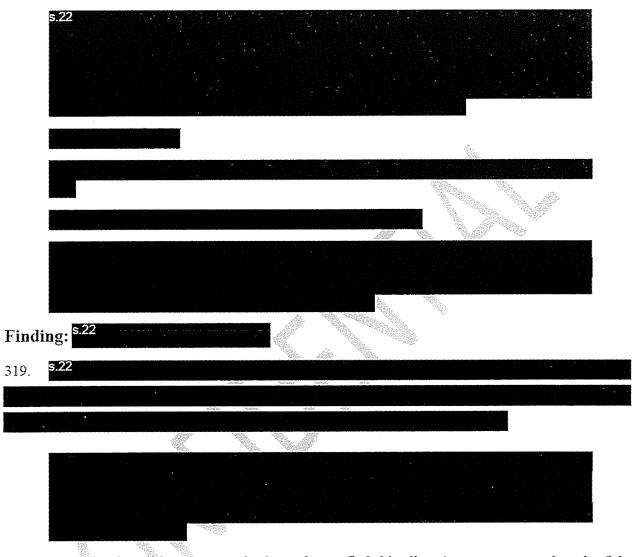


This allegation was previously reviewed by SV, who made the following findings: 309. 310. s.22 311. . It would be unfair to 5.22 to redo the work that was already done on this issue. As a result, for this allegation we make no finding. Summary of Evidence: 5.22 312.

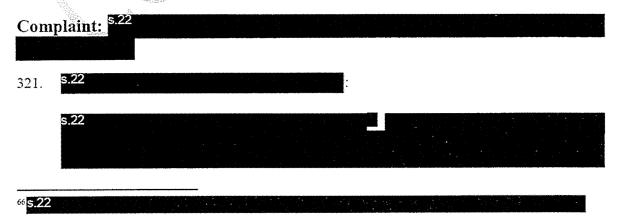
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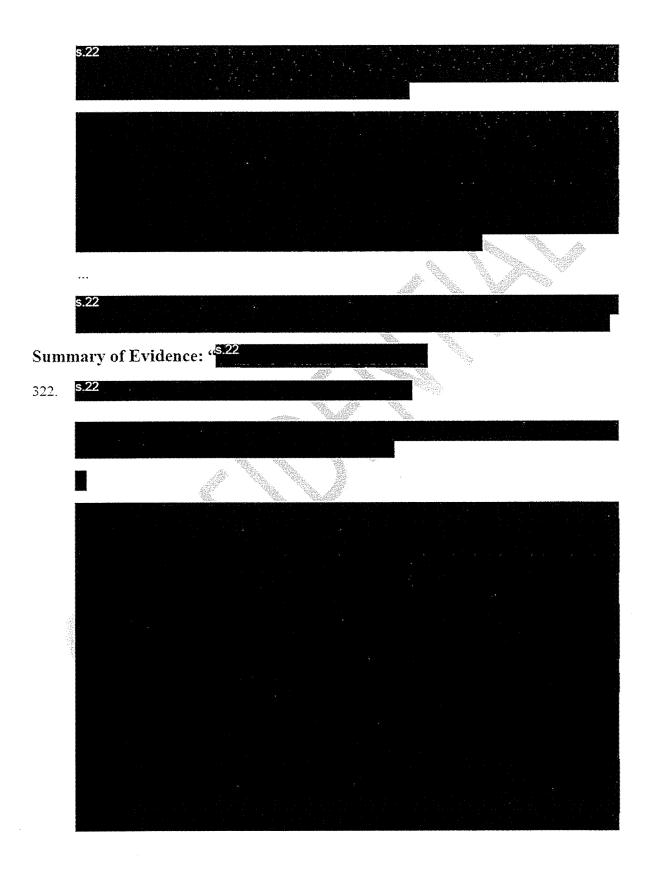
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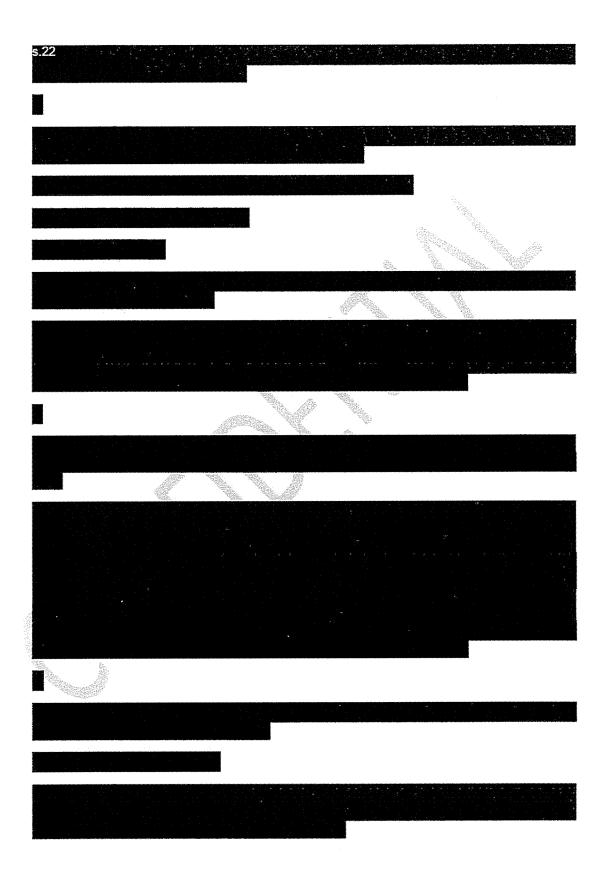


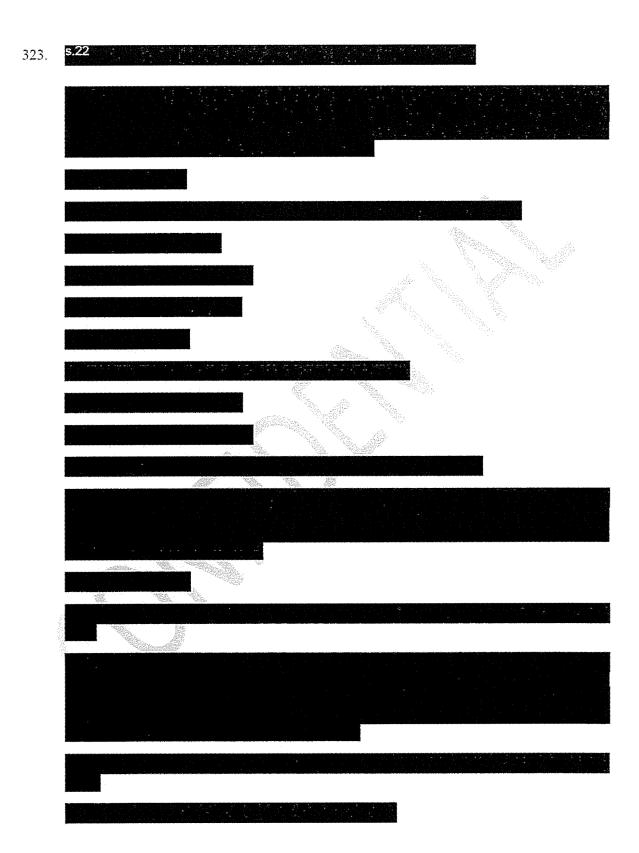


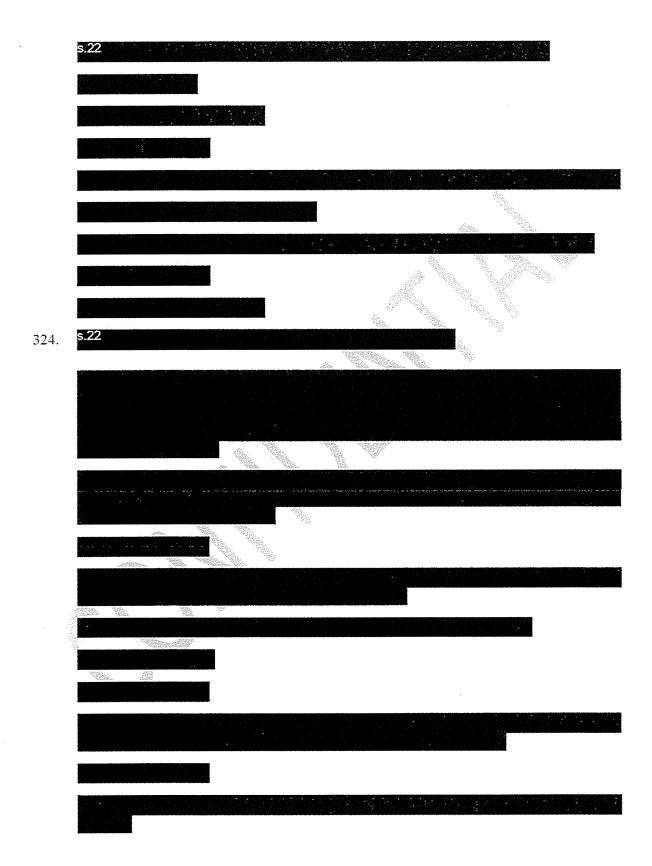
320. Based on the evidence we received, we do not find this allegation amounts to a breach of the Respectful Workplace and Harassment Prevention Policy and as such, is unsubstantiated.

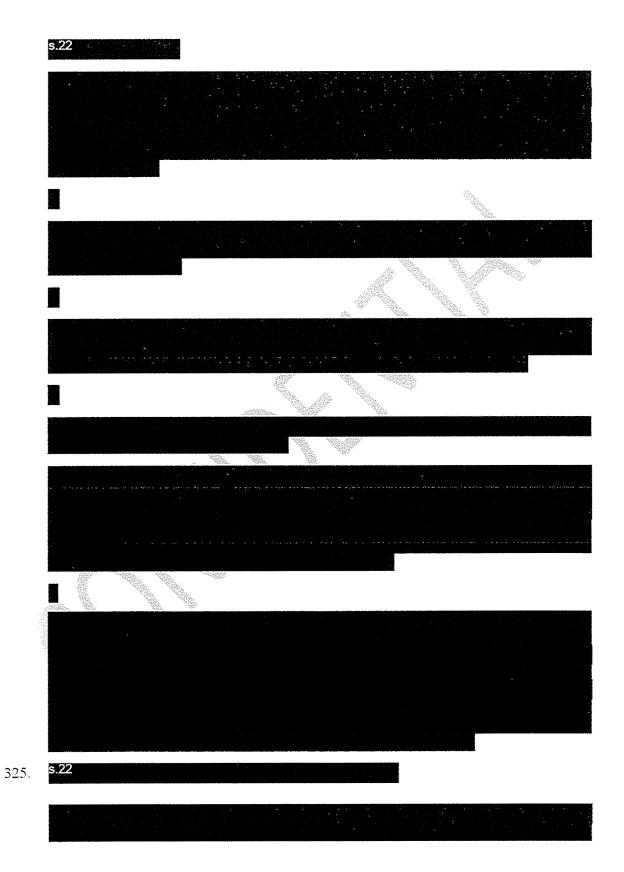


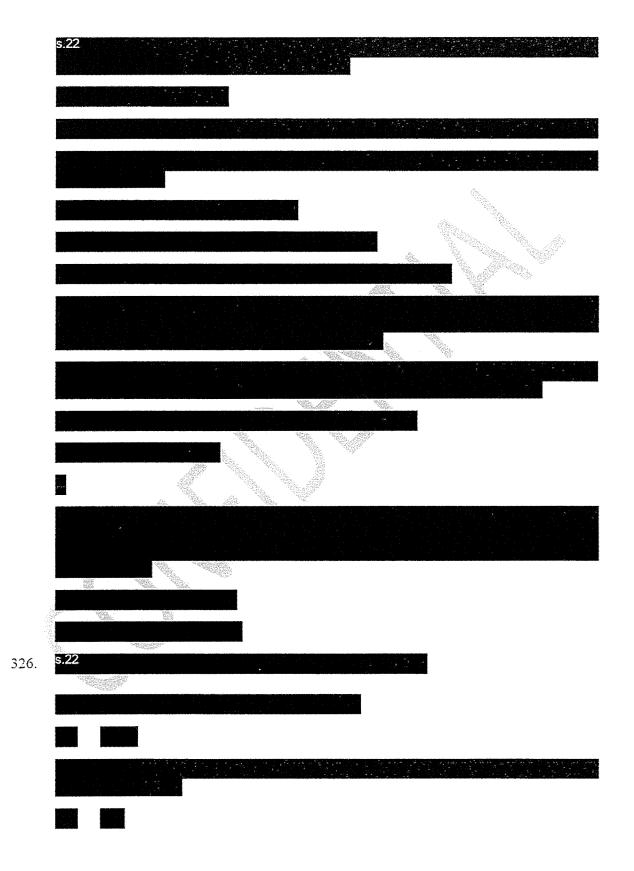


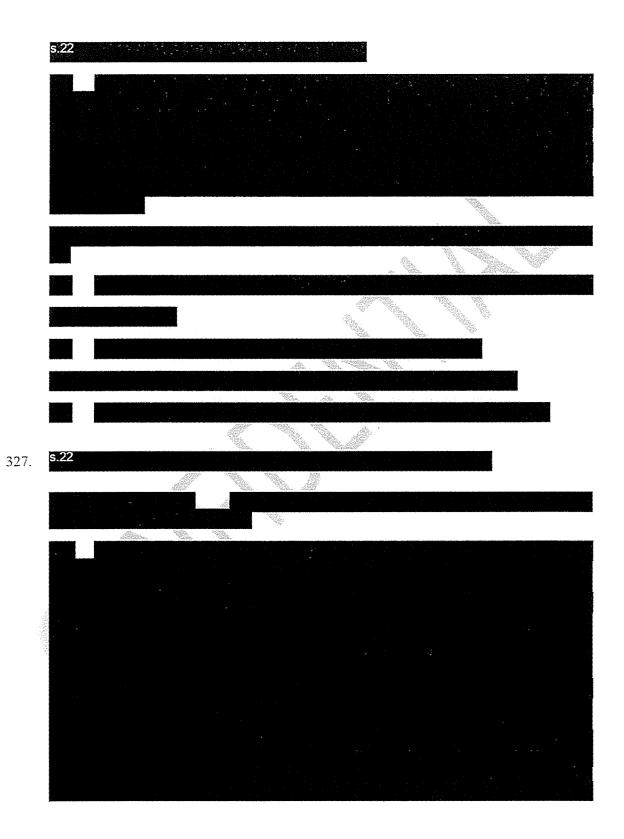


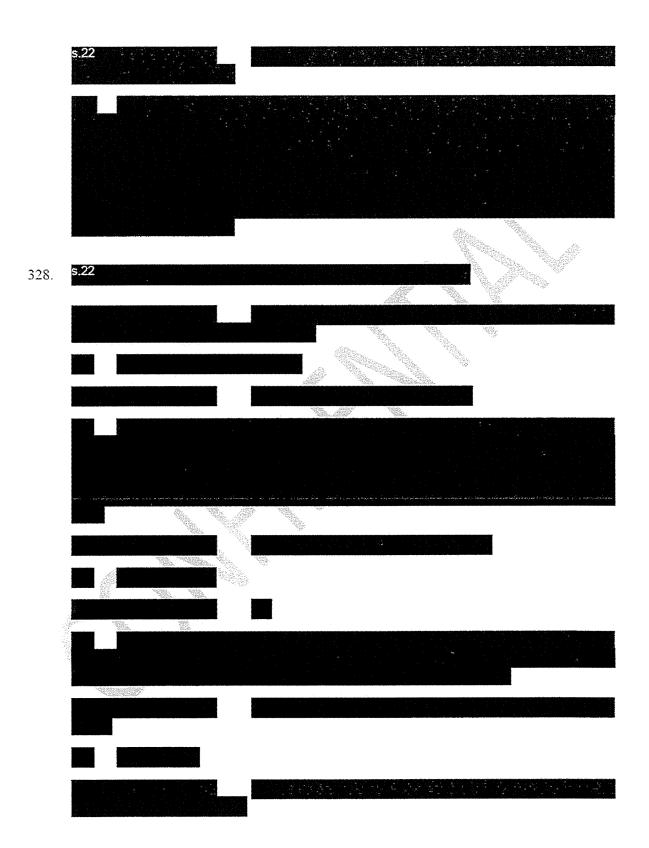


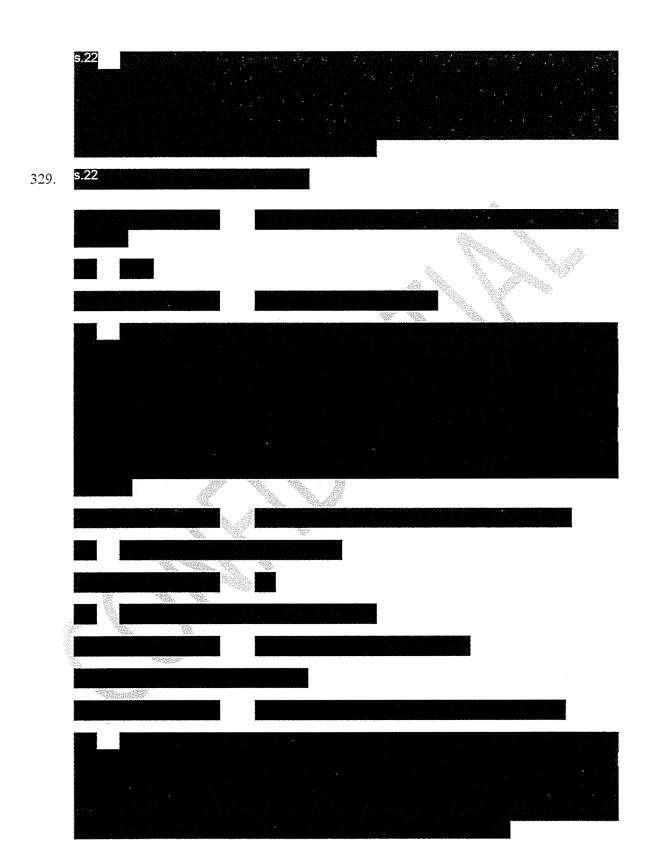


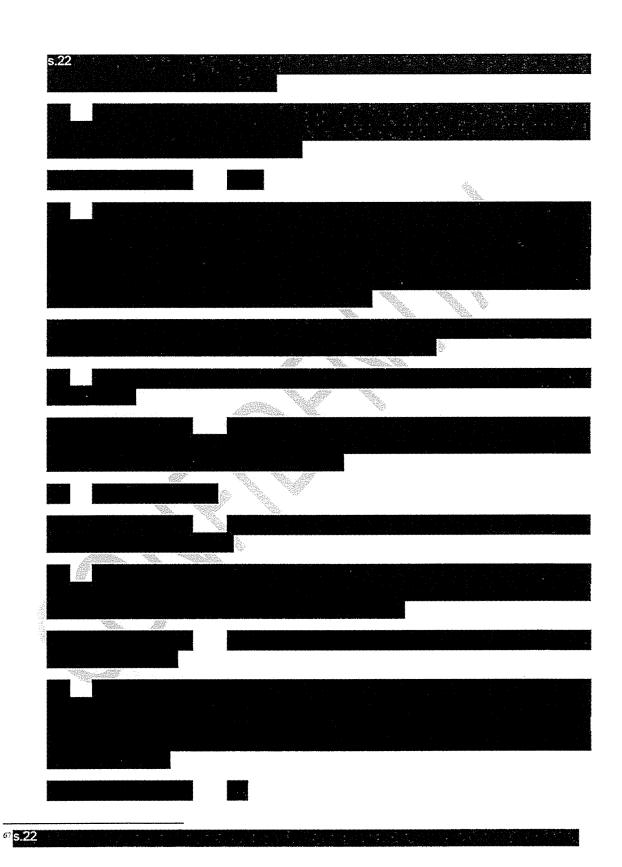


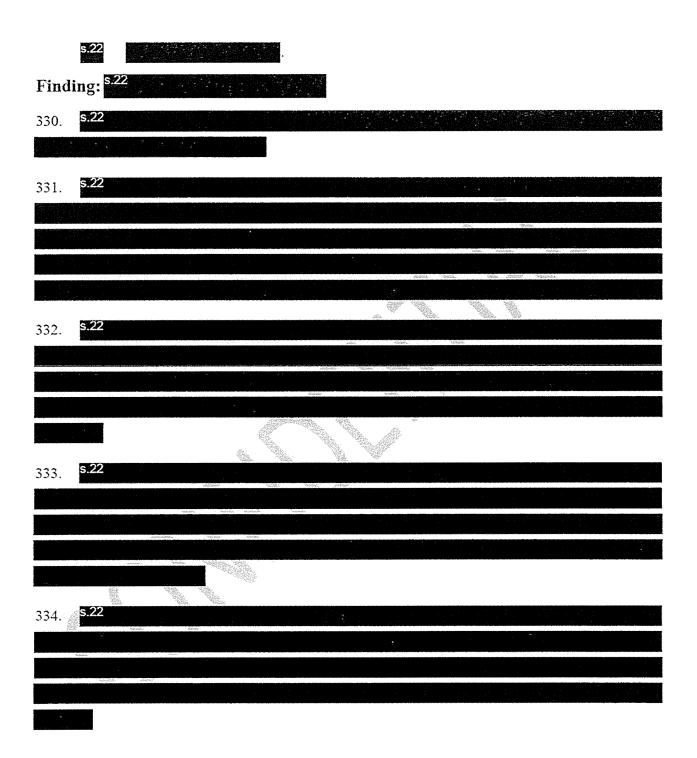


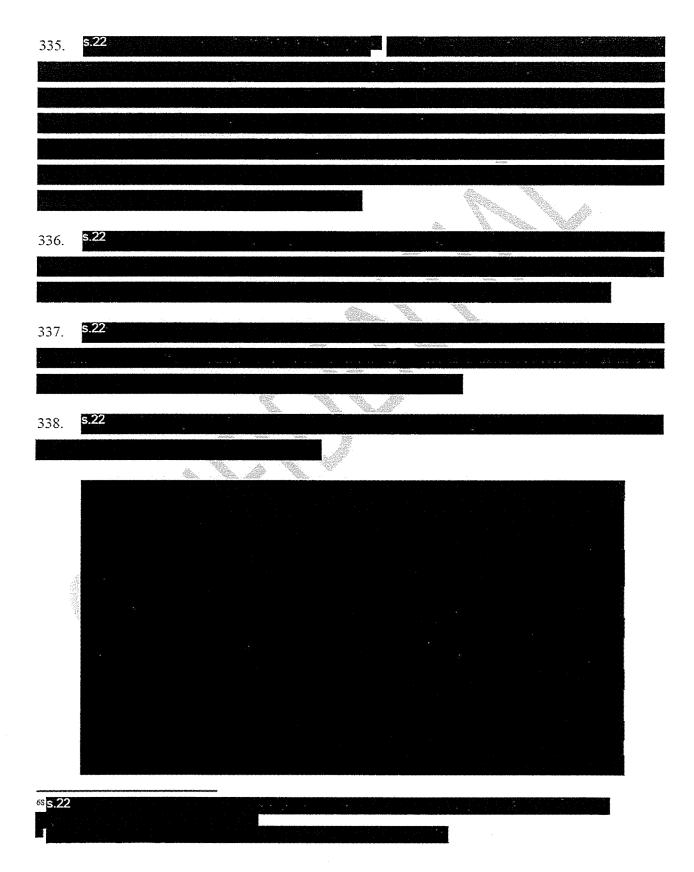


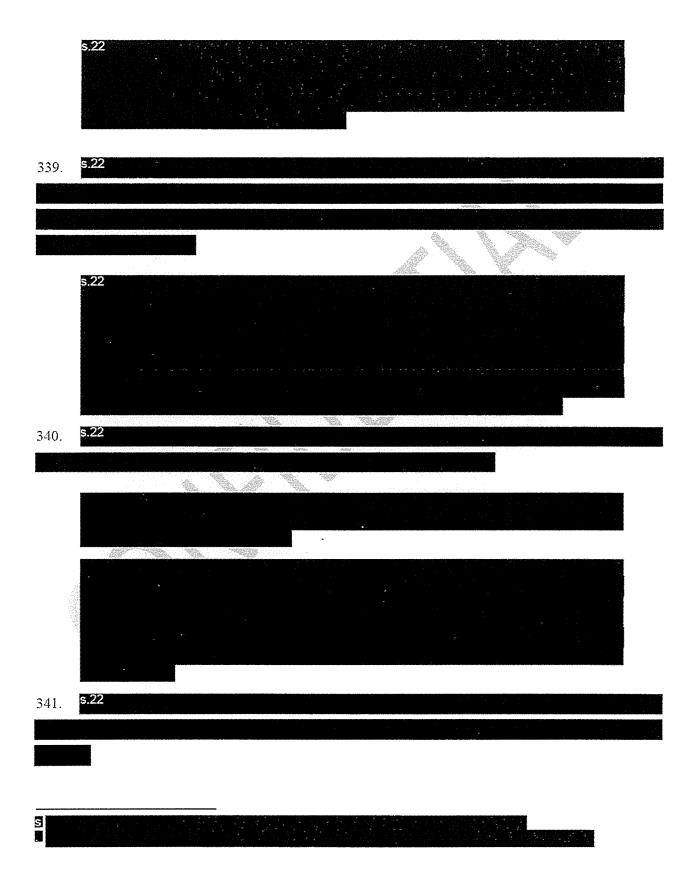


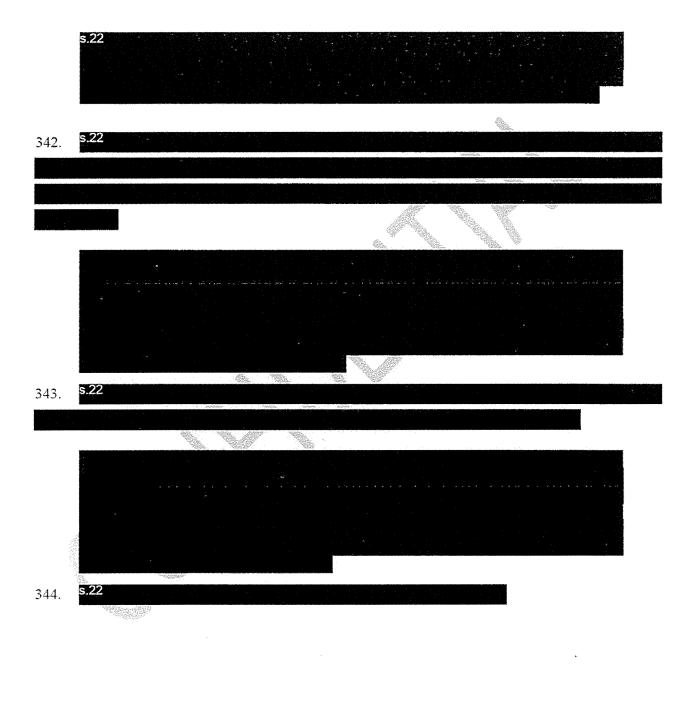




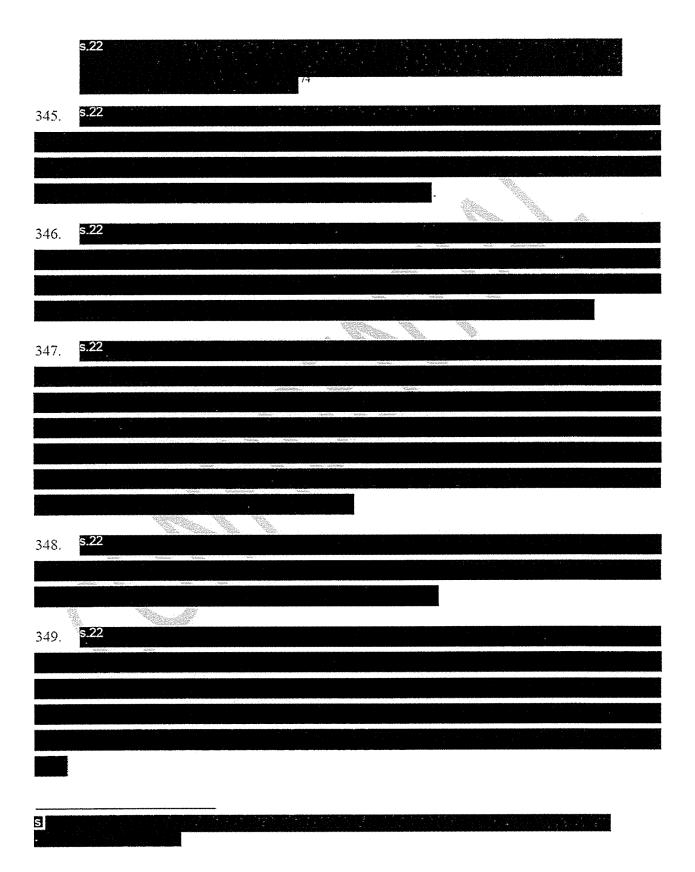


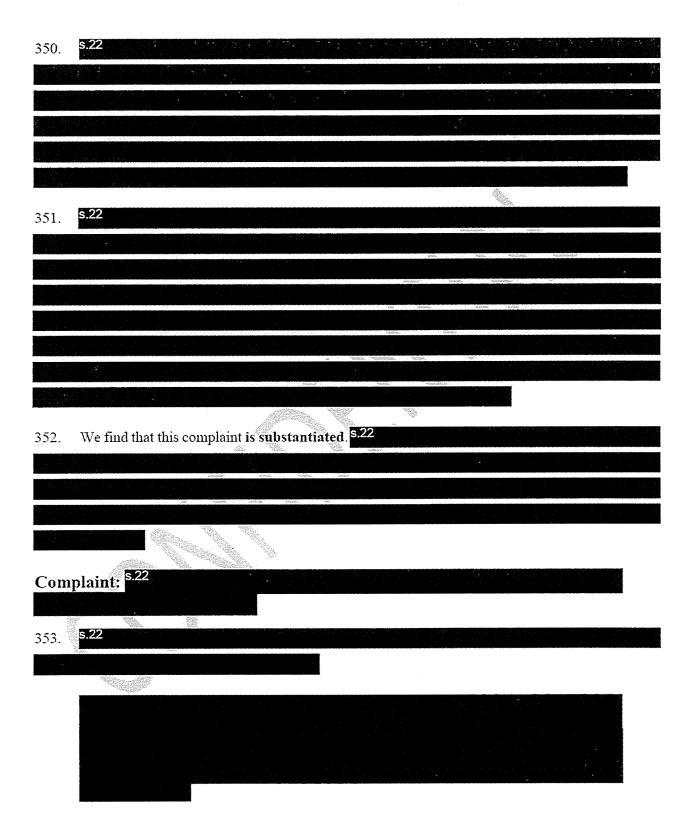


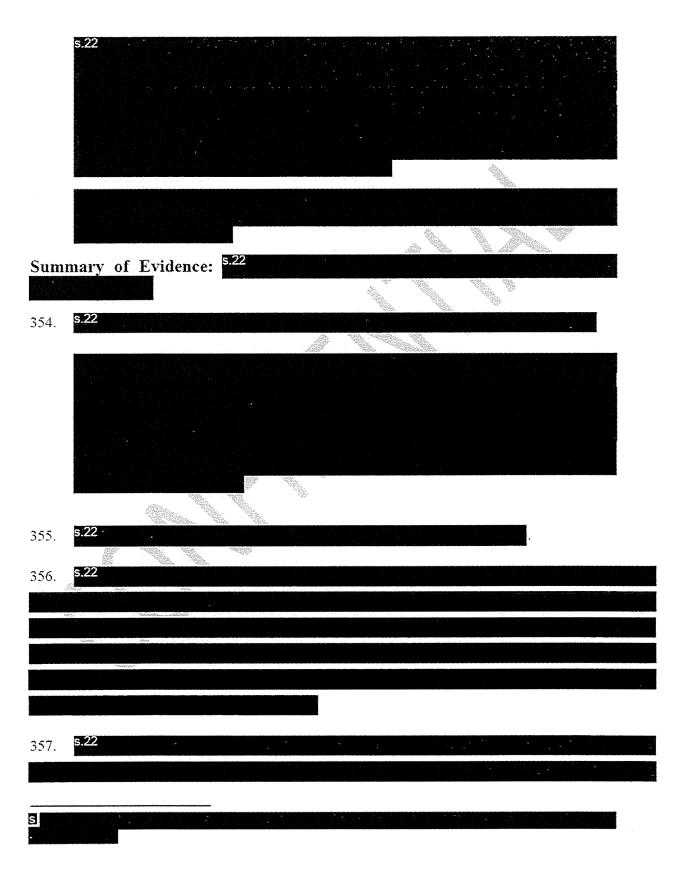


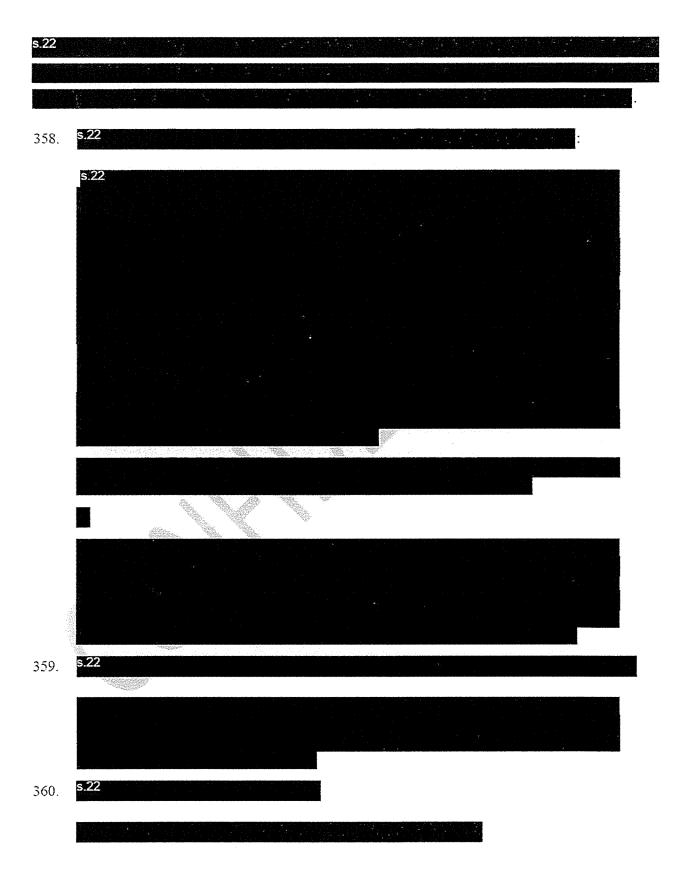


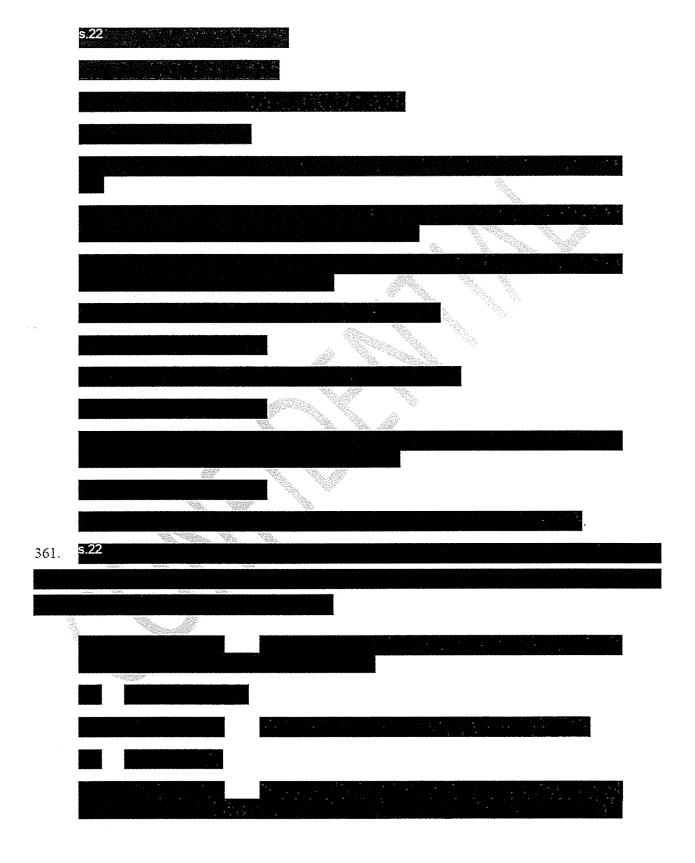


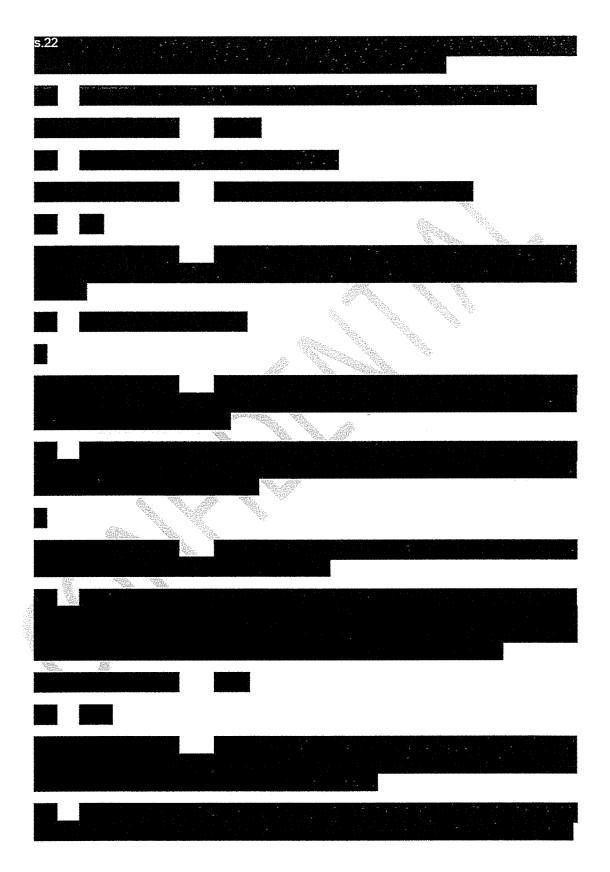


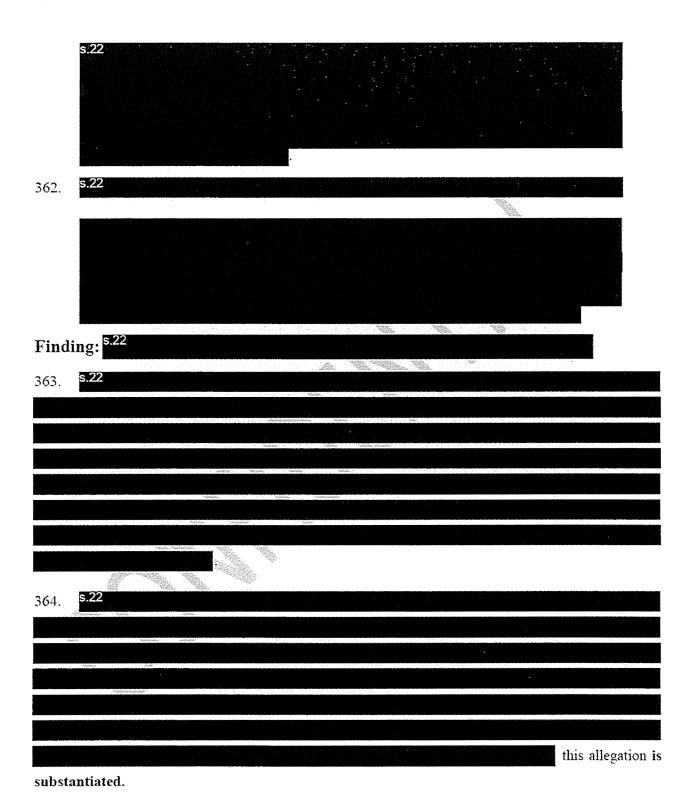


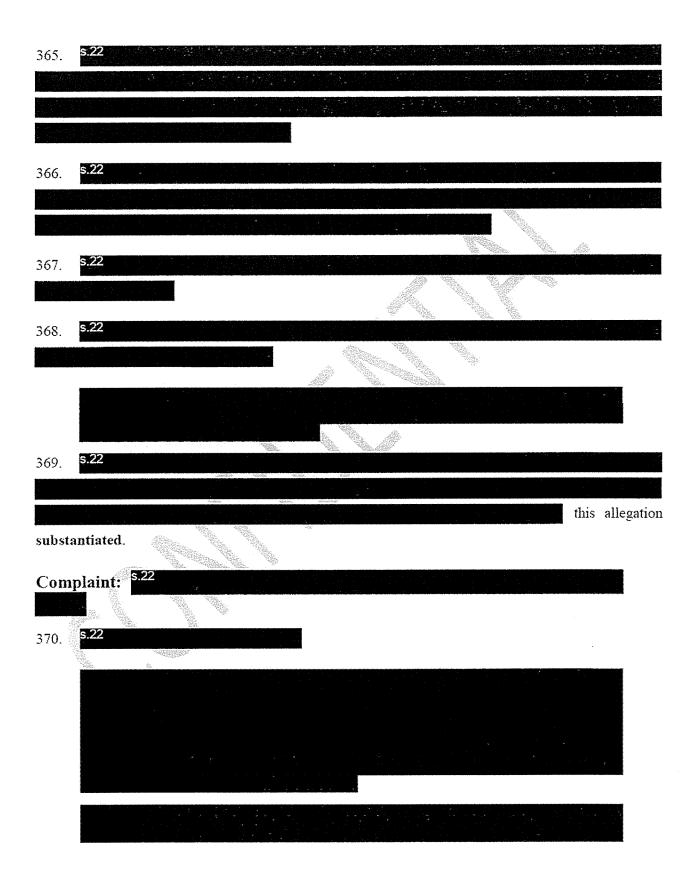


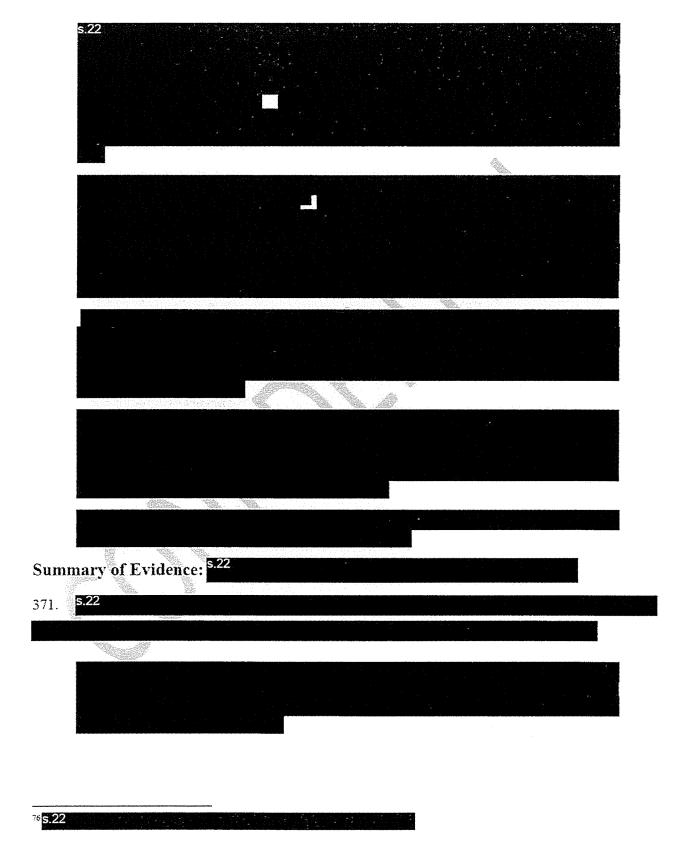






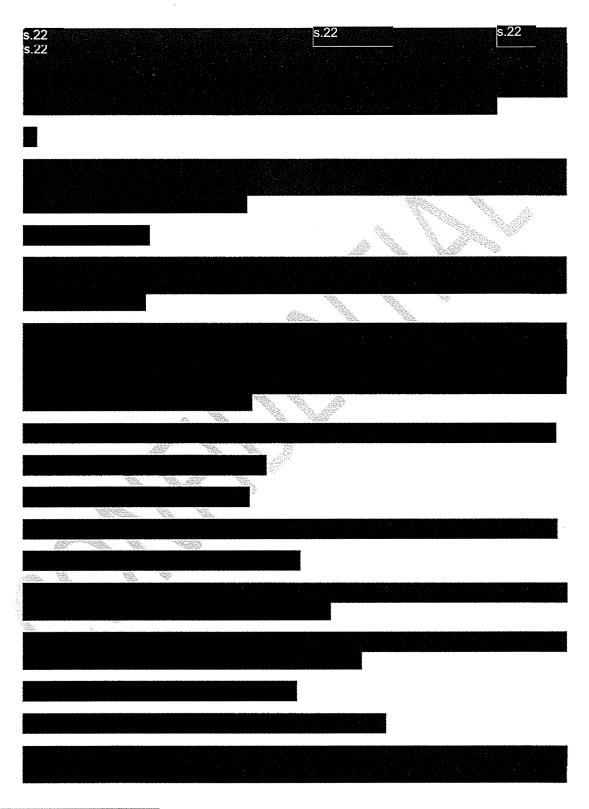




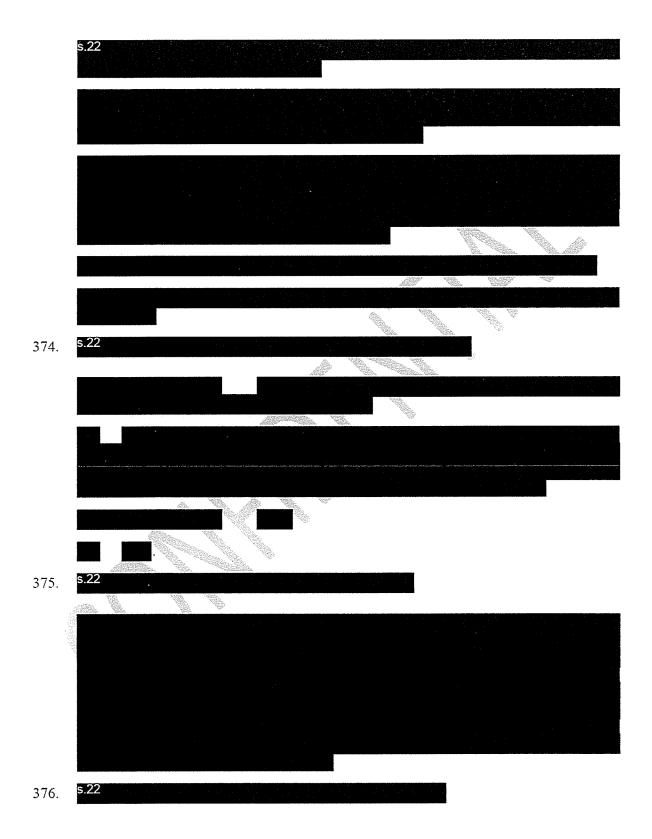


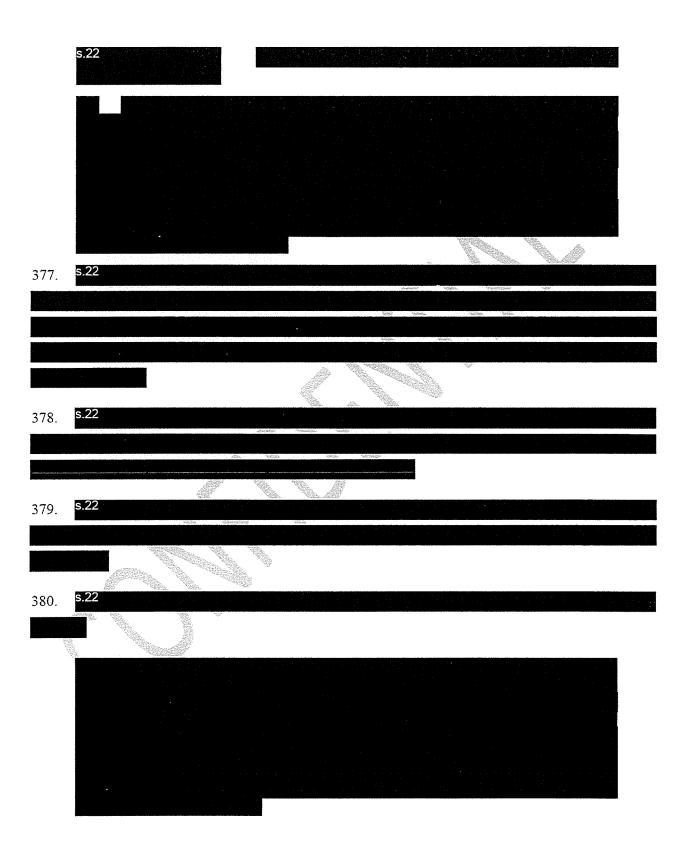
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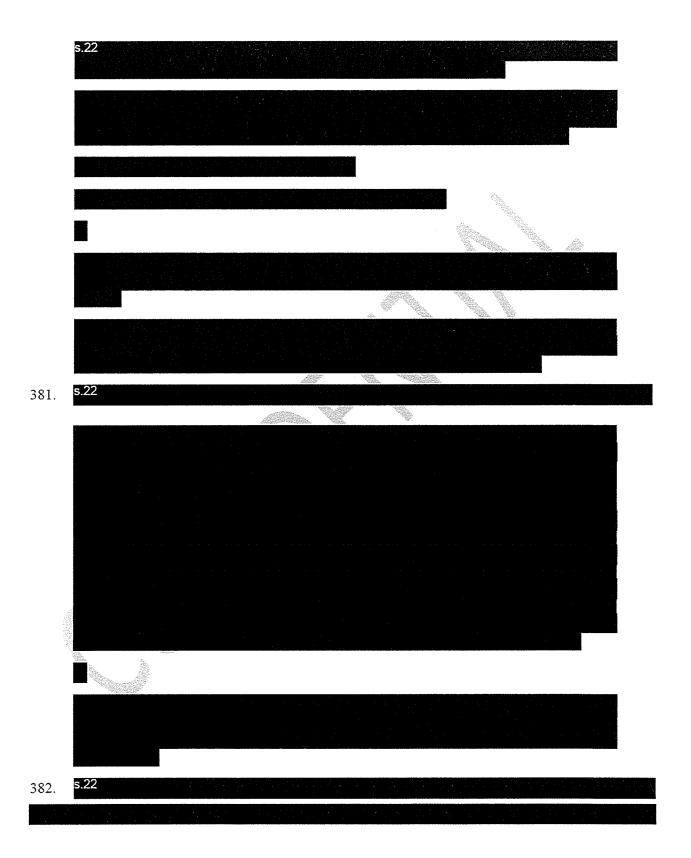
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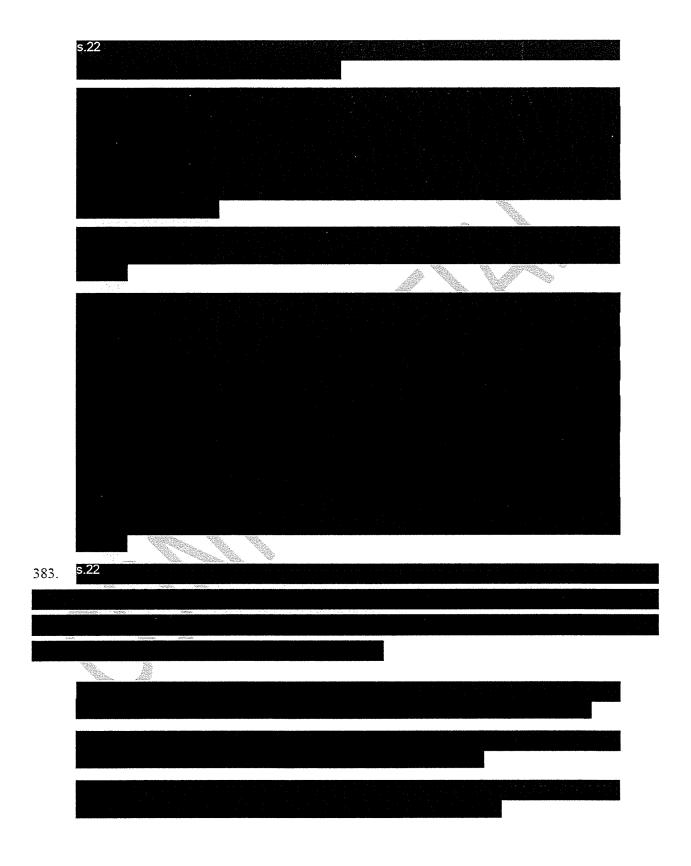


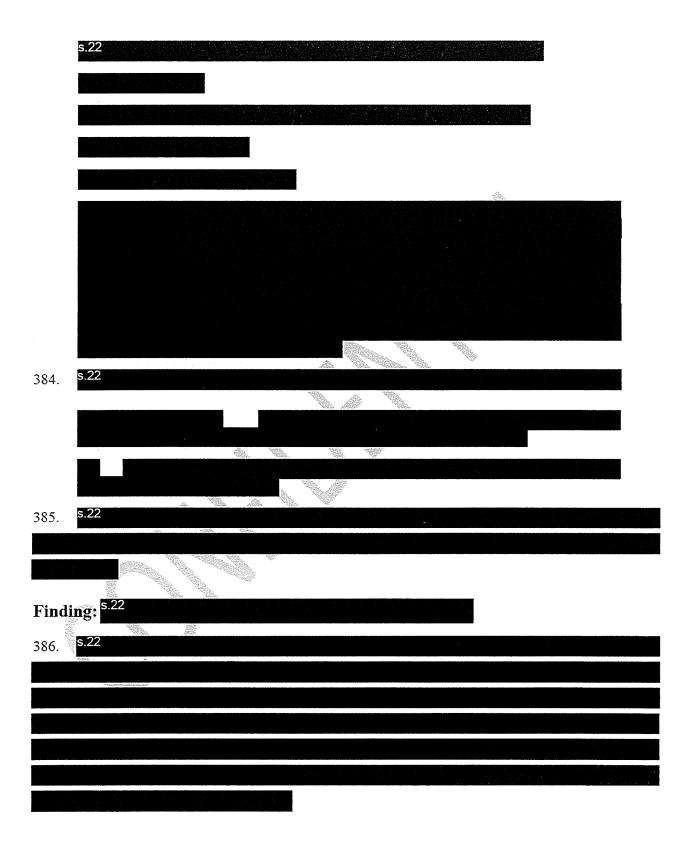
<sup>77</sup> Referring to S. discussed above.

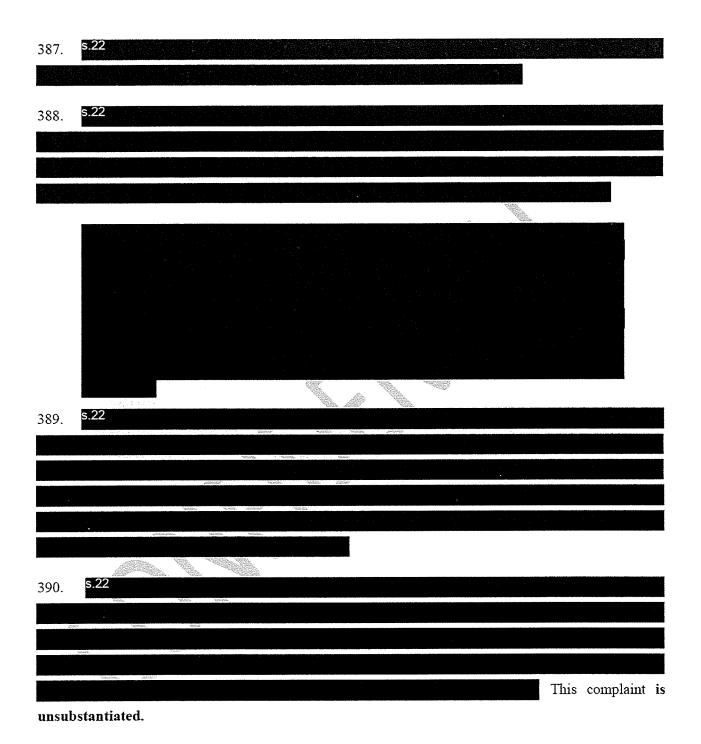


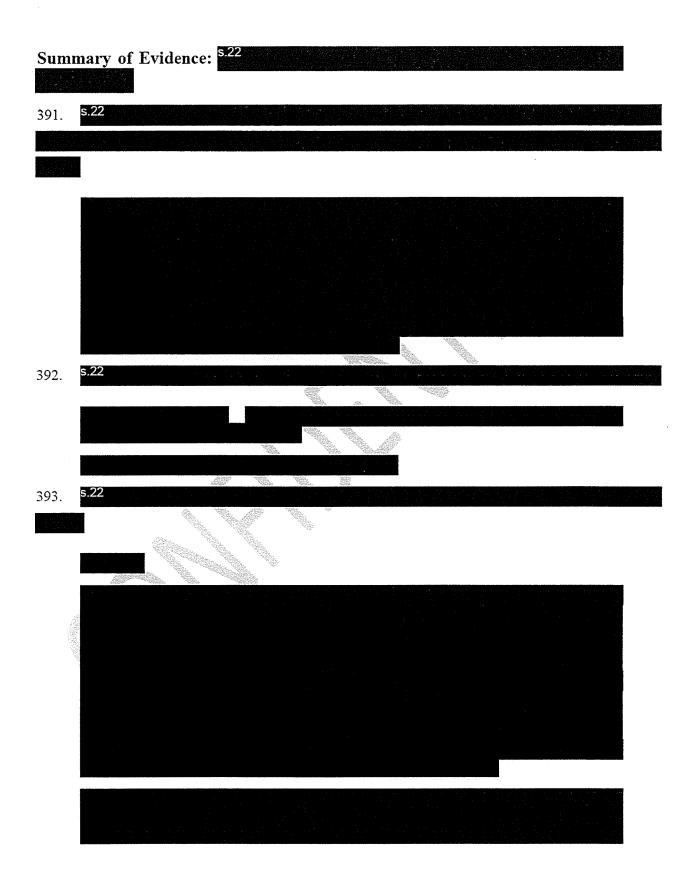


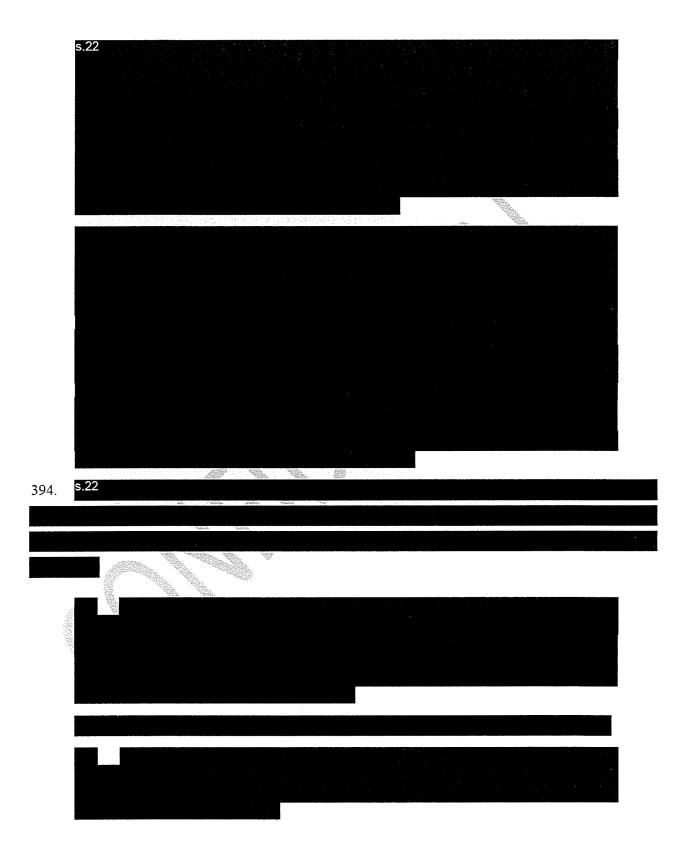


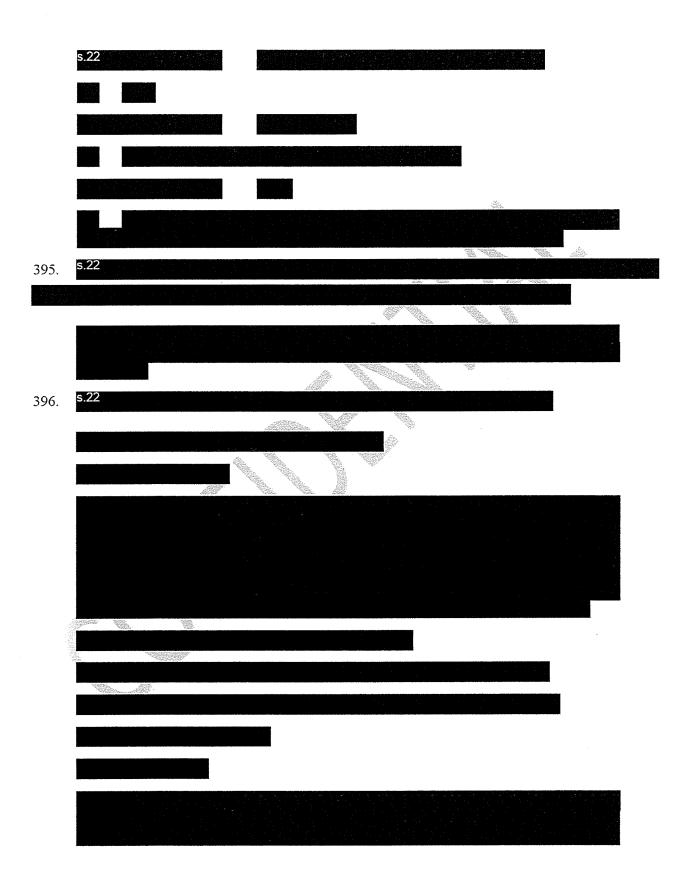


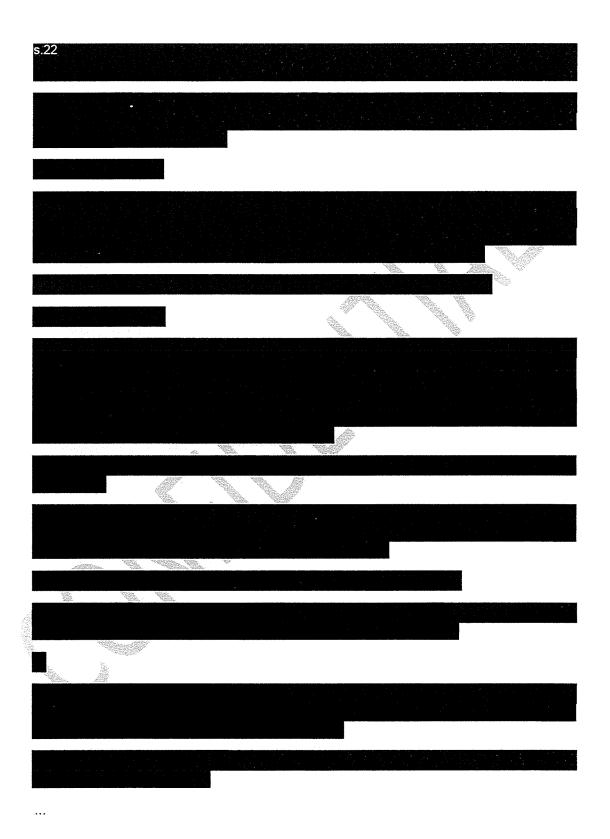


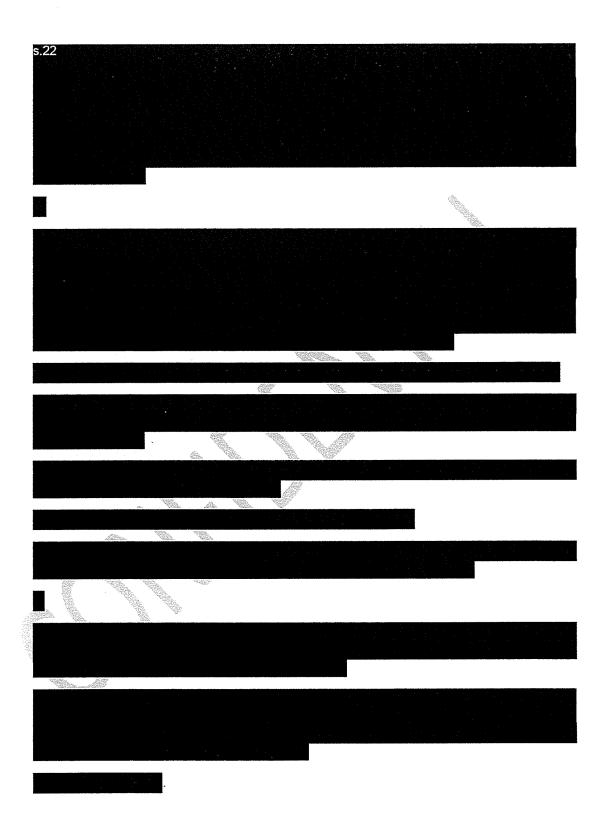


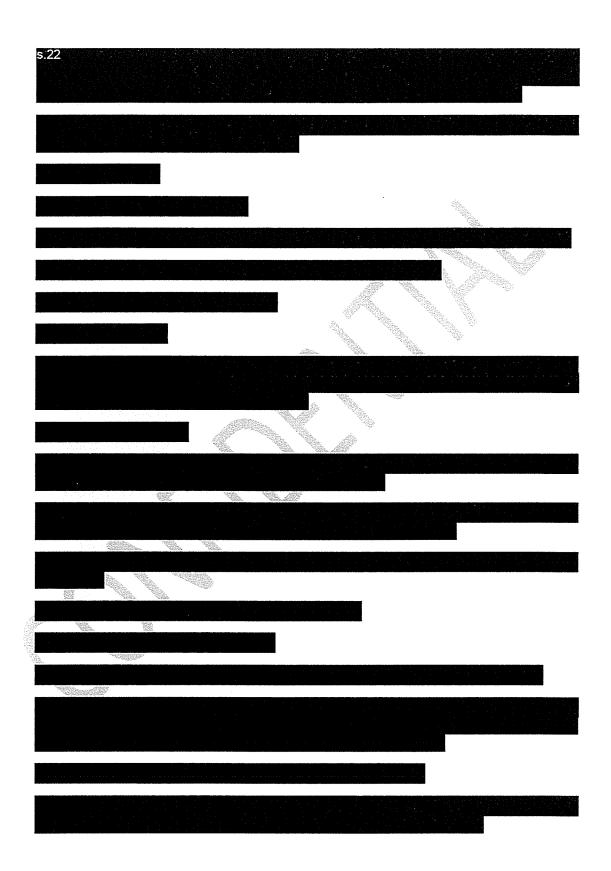


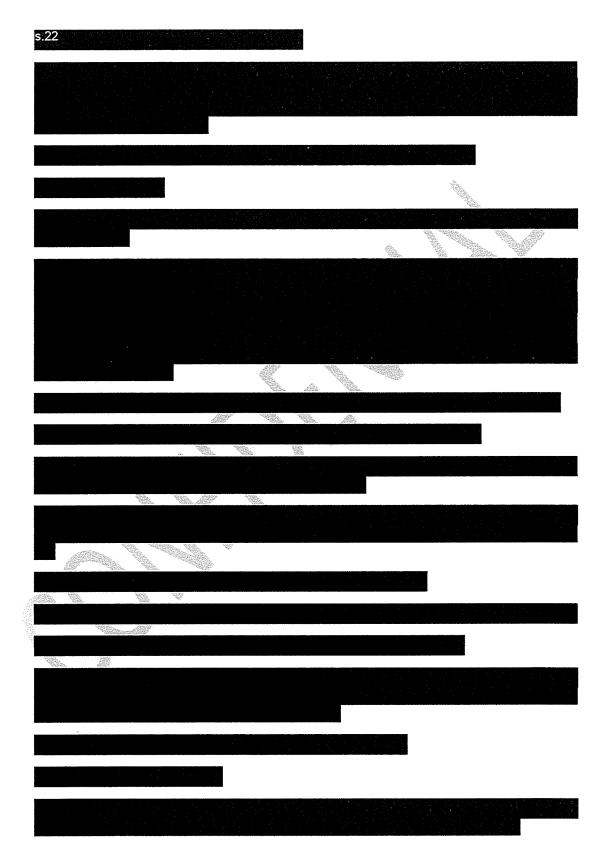


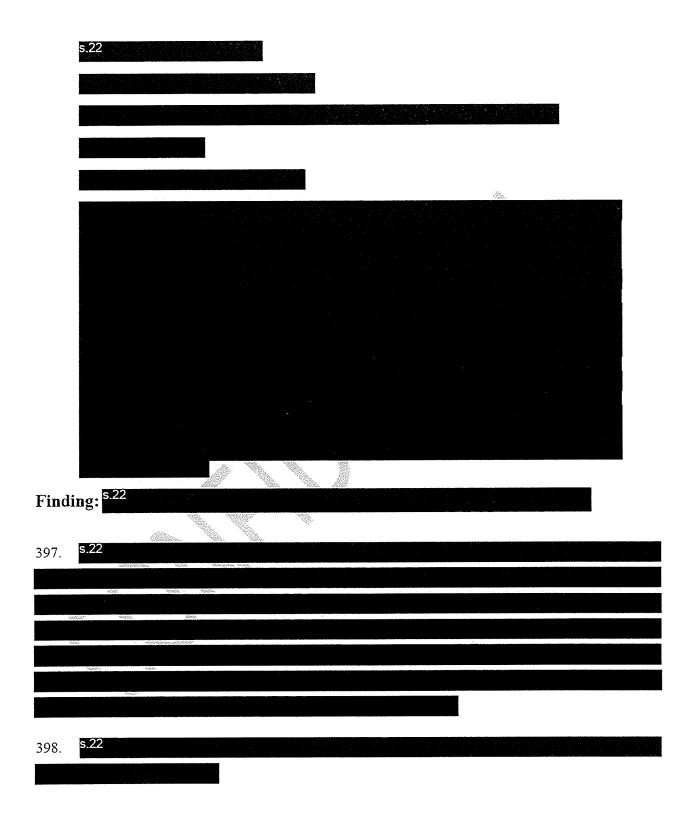


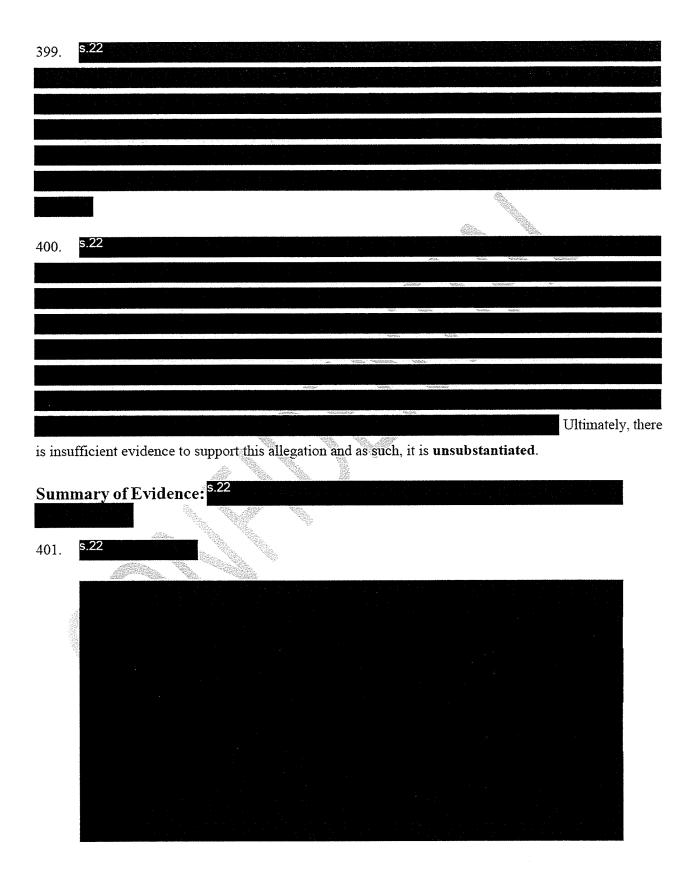


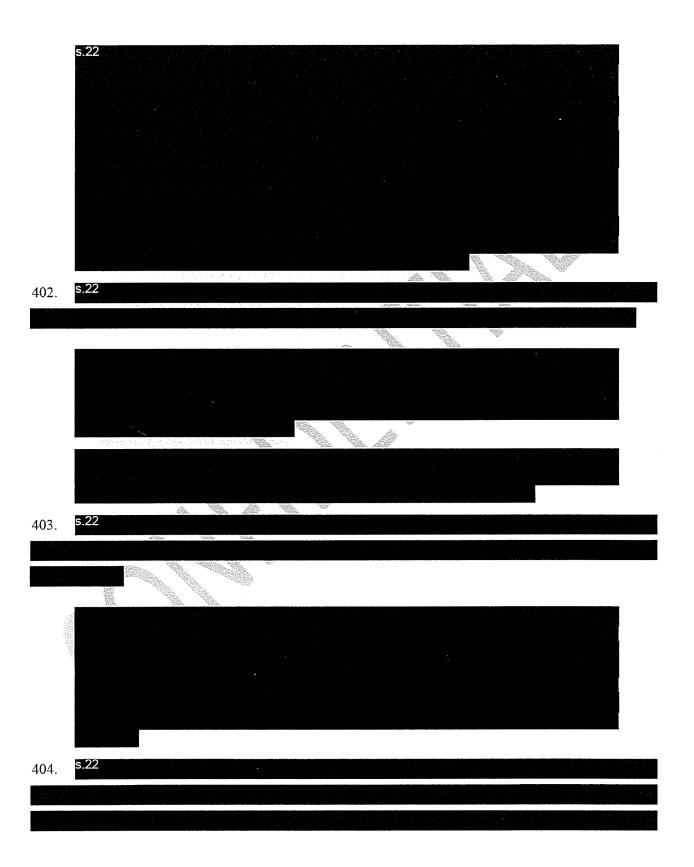


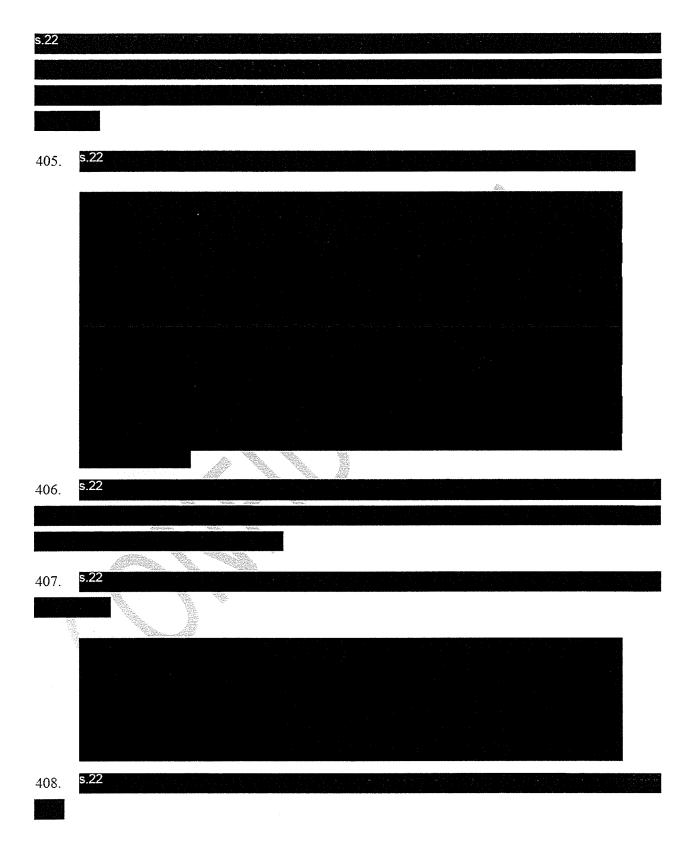




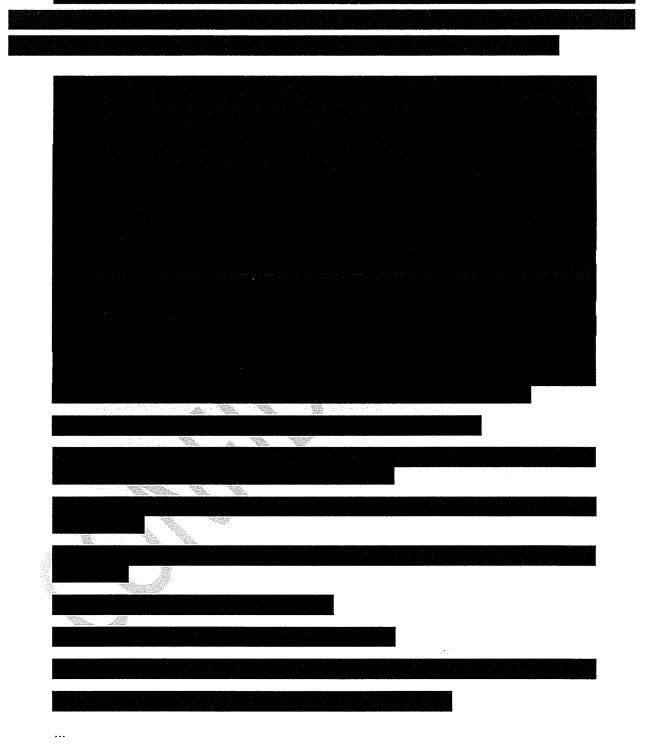


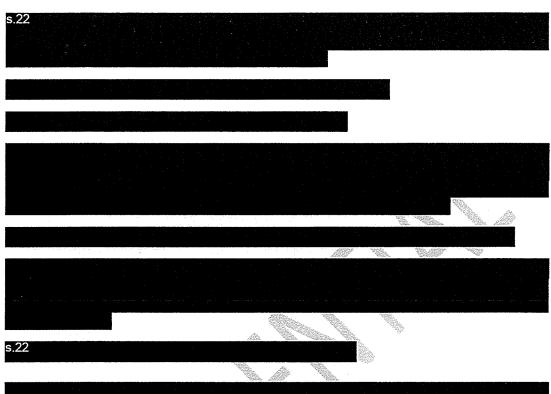




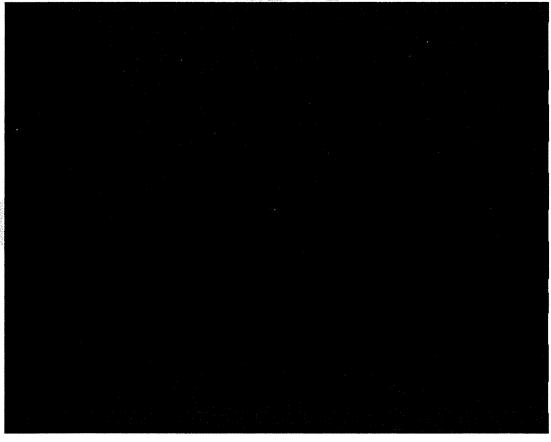


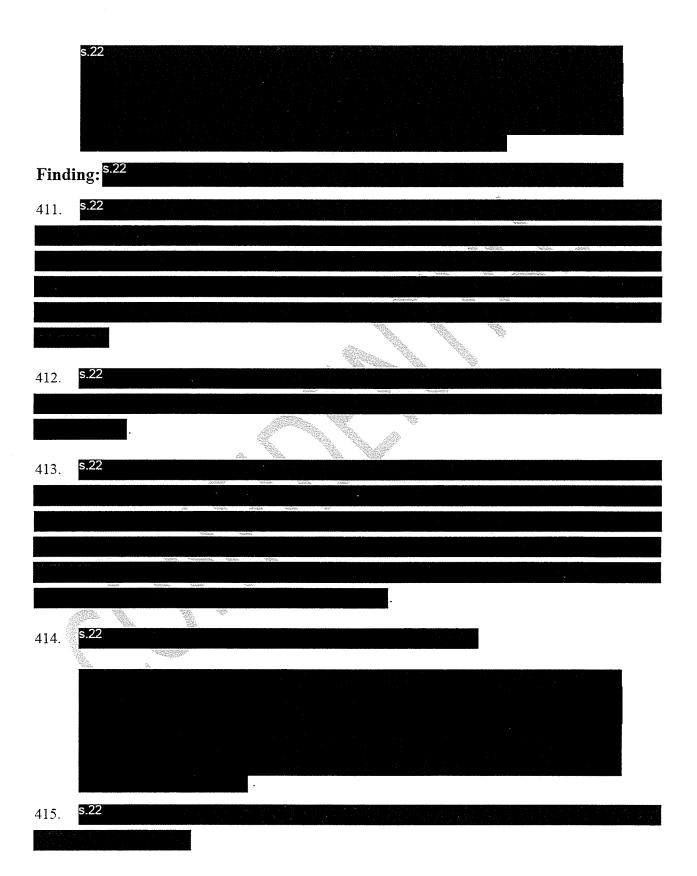
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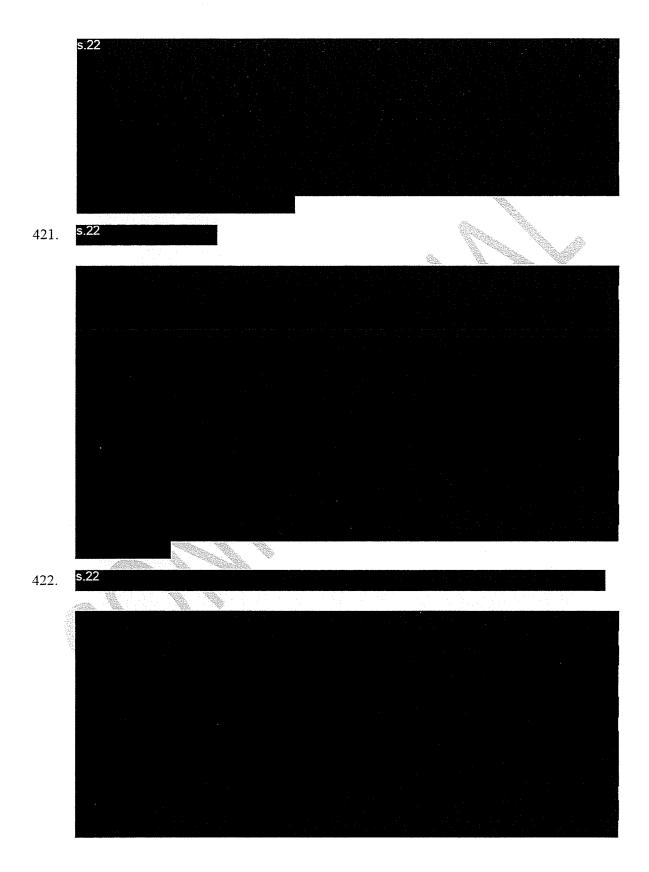


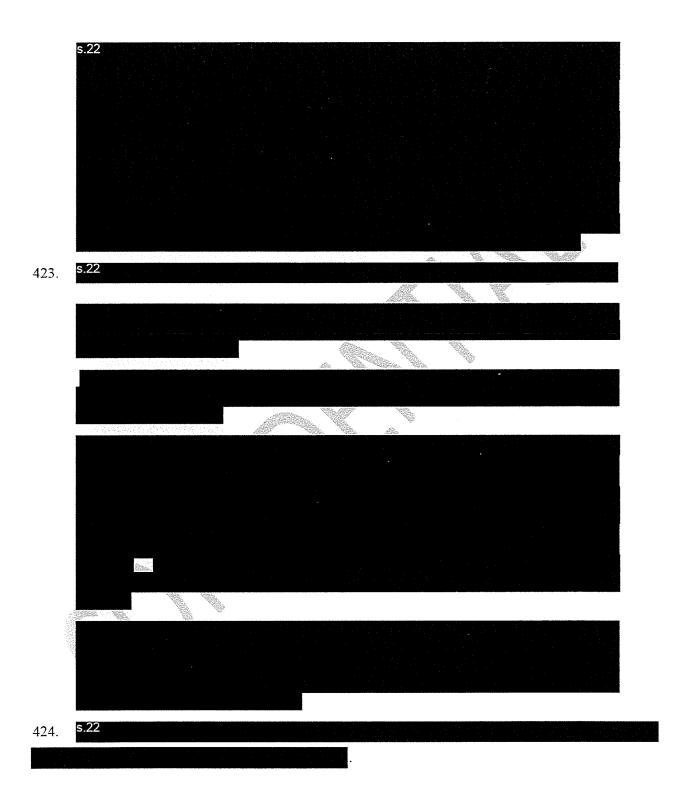
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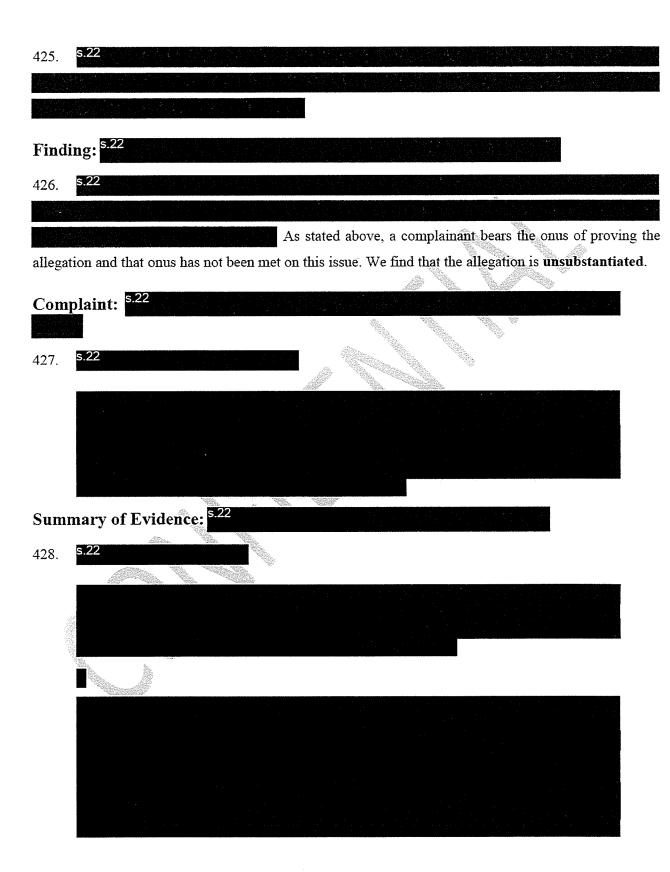


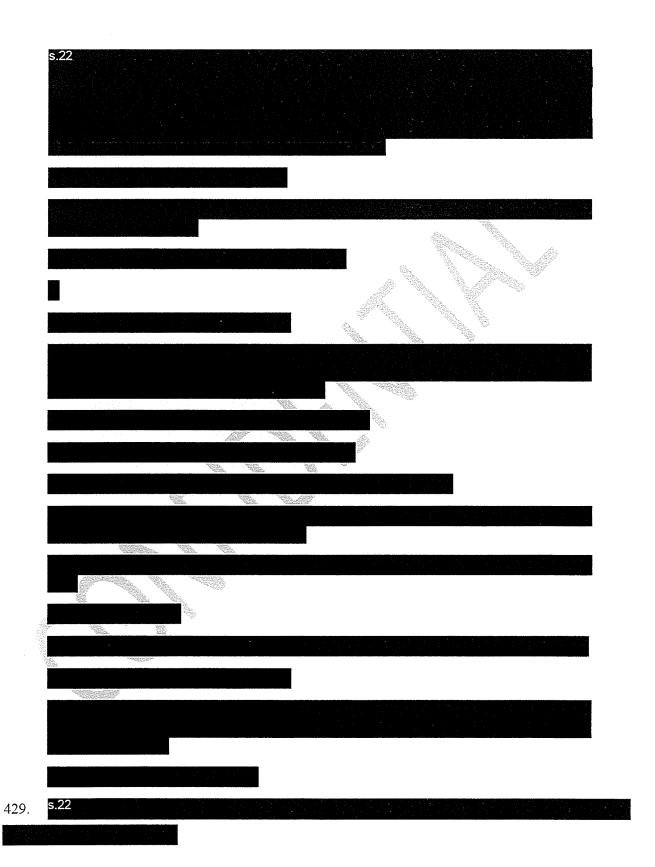


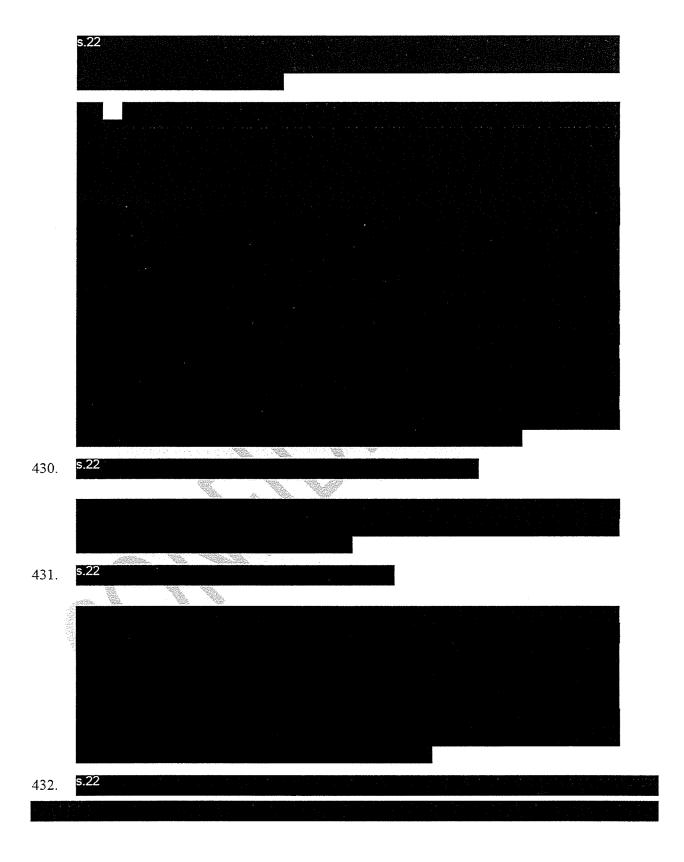
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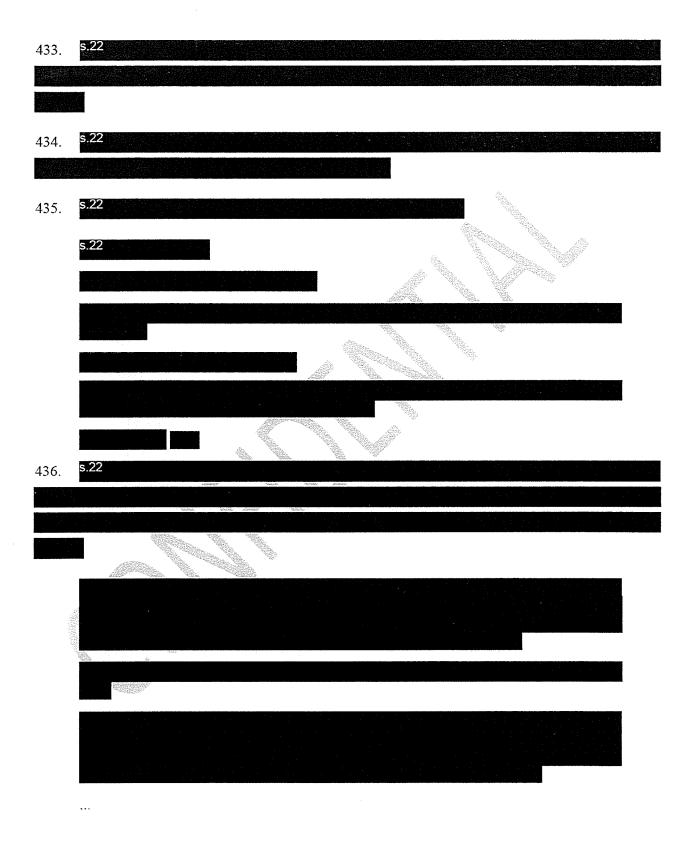


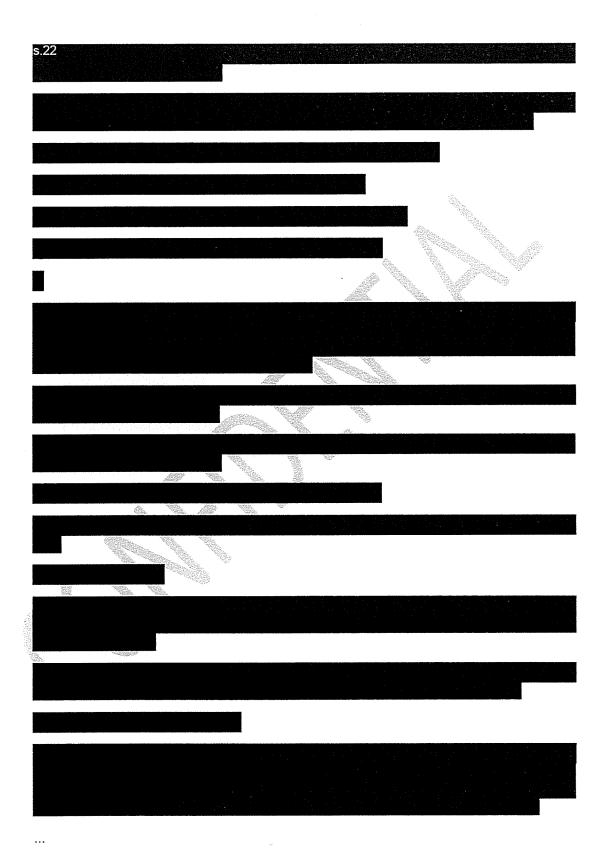


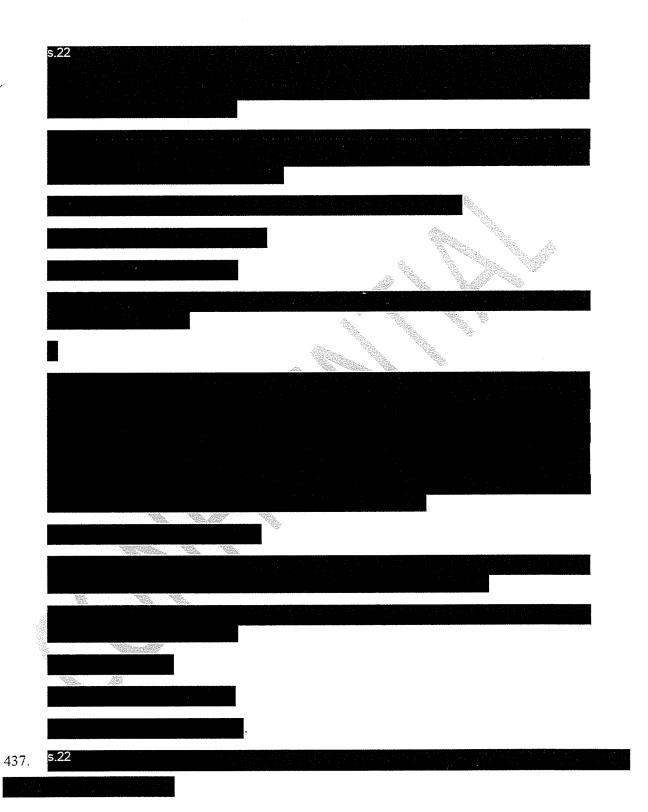


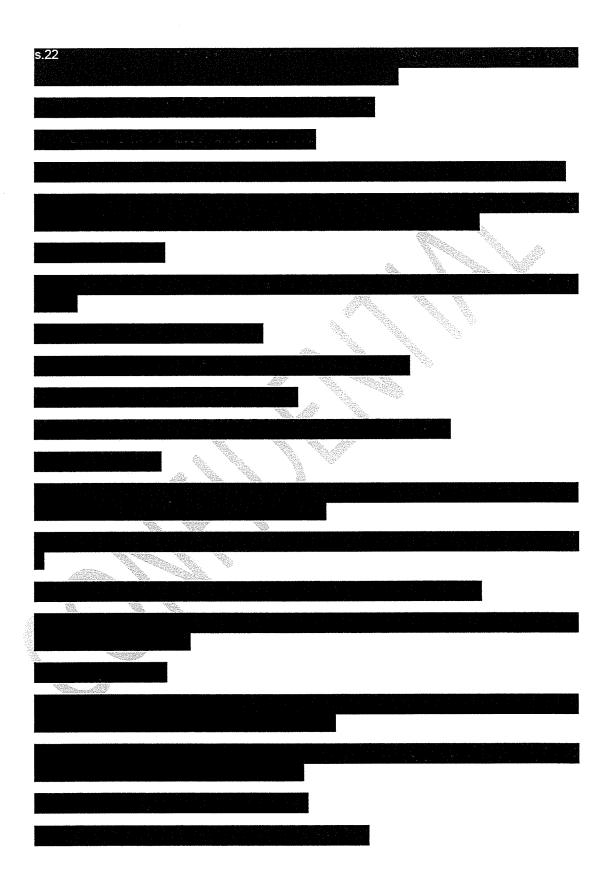


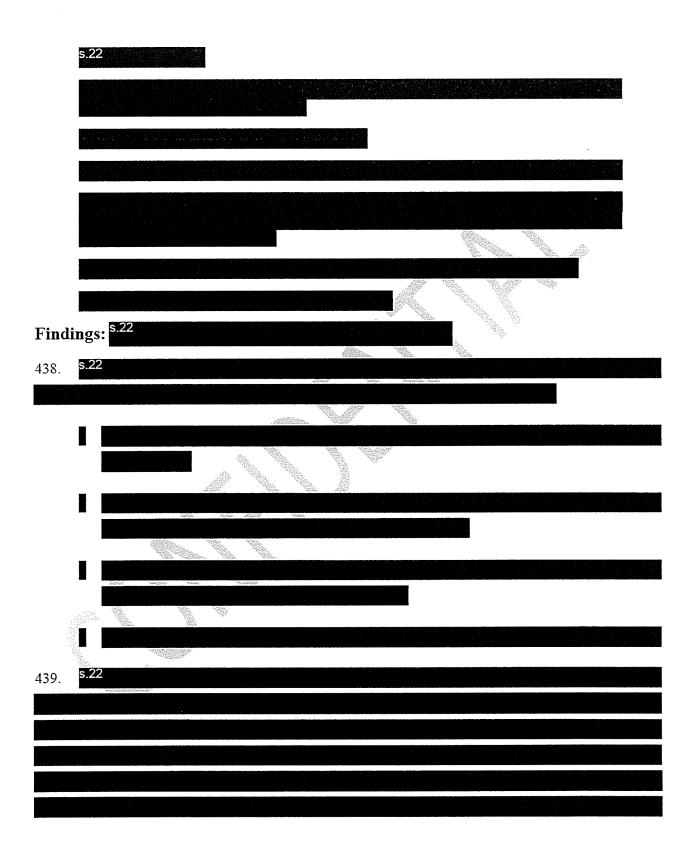


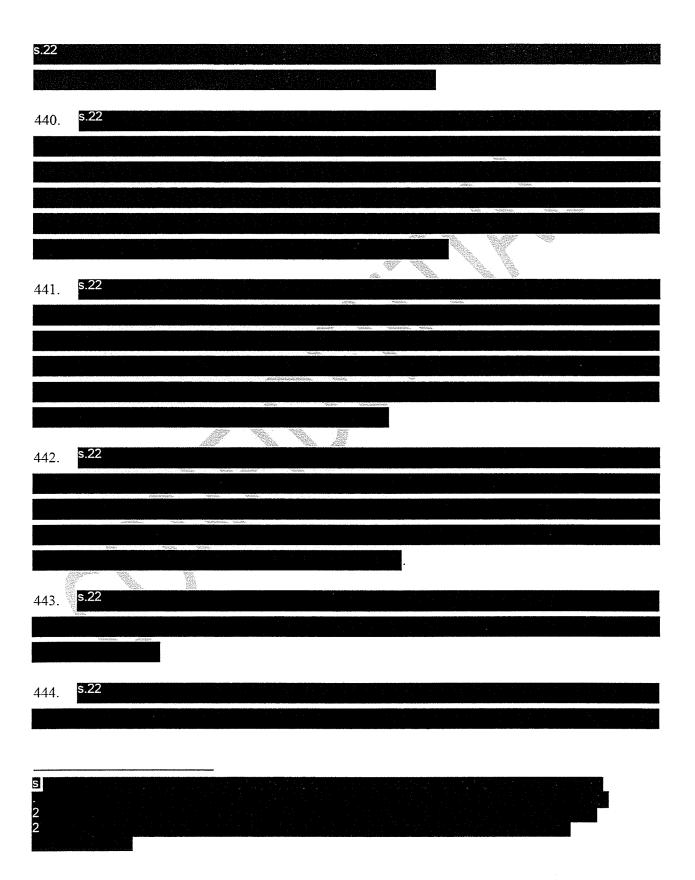


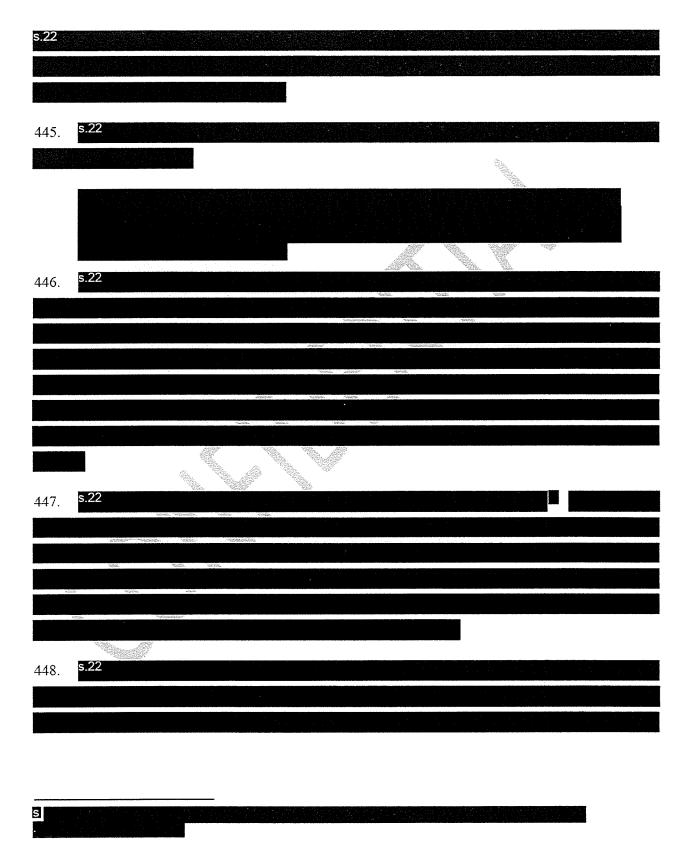


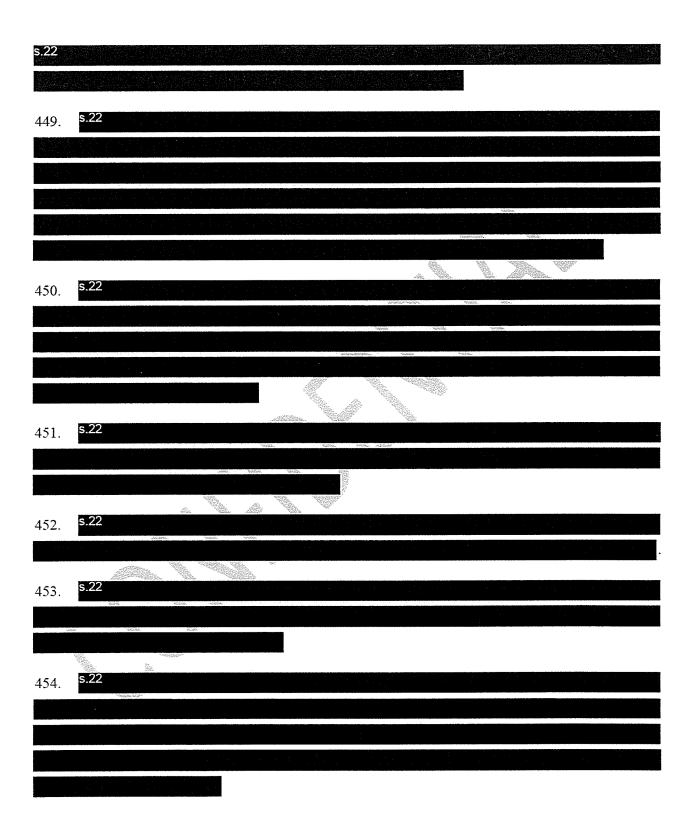


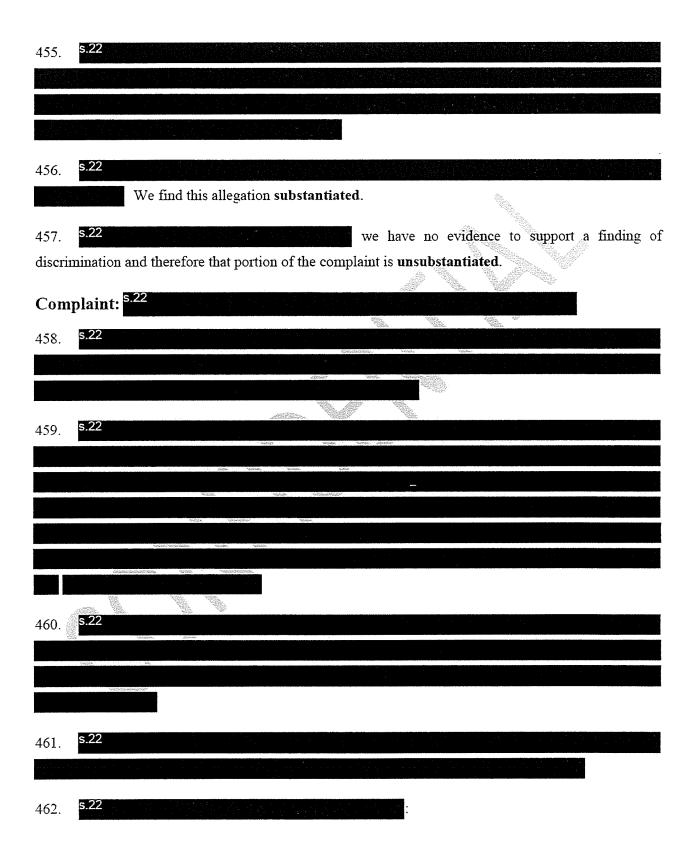


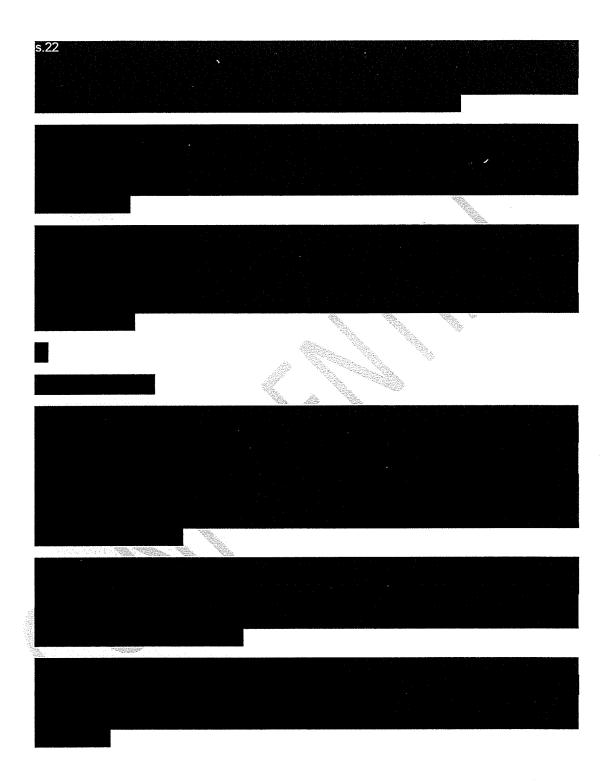


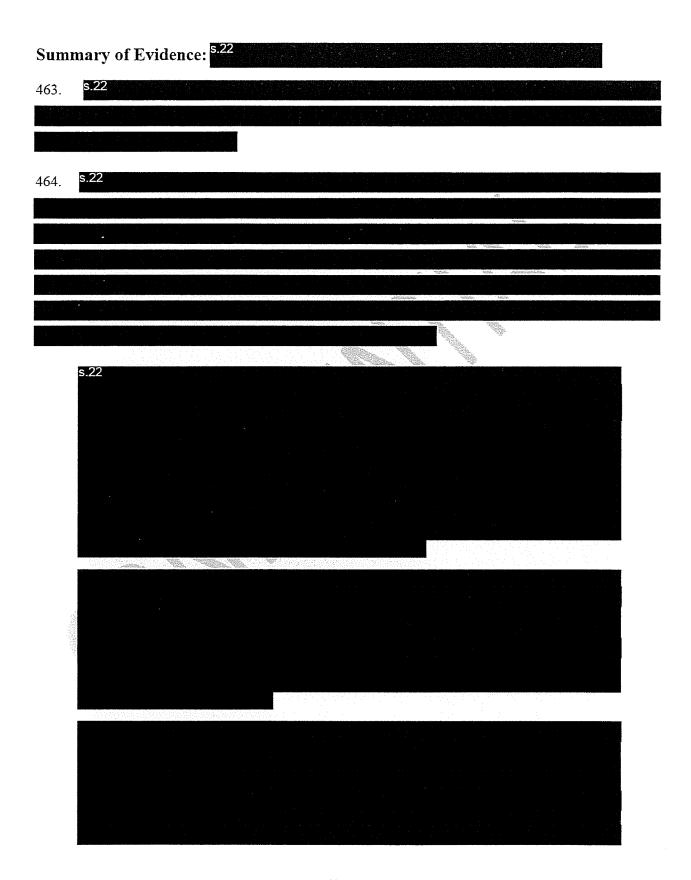


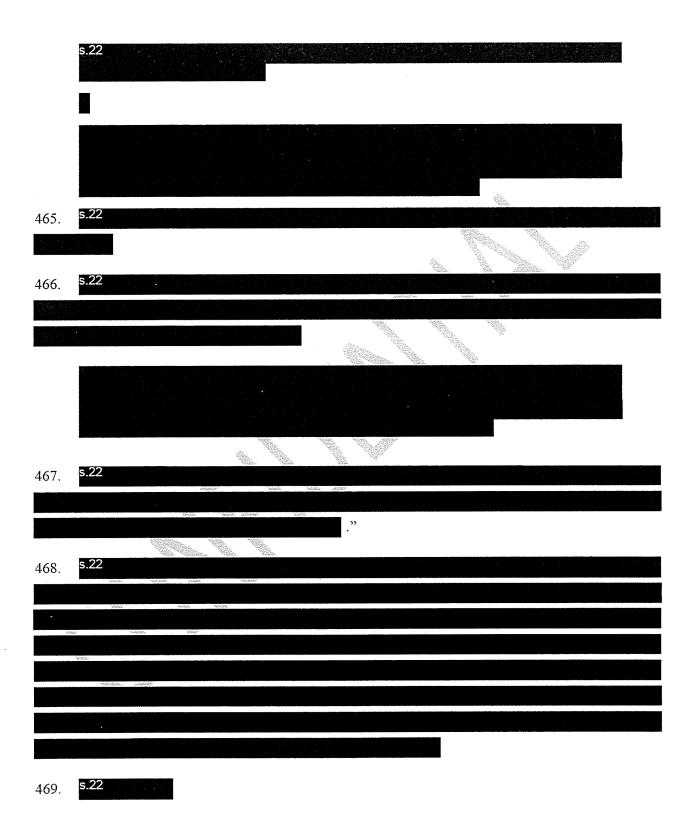


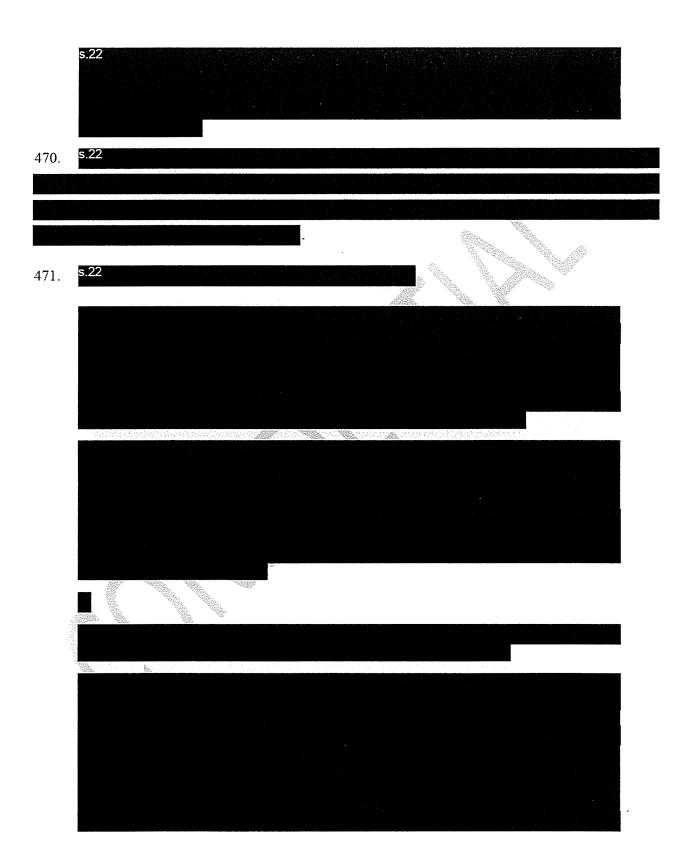


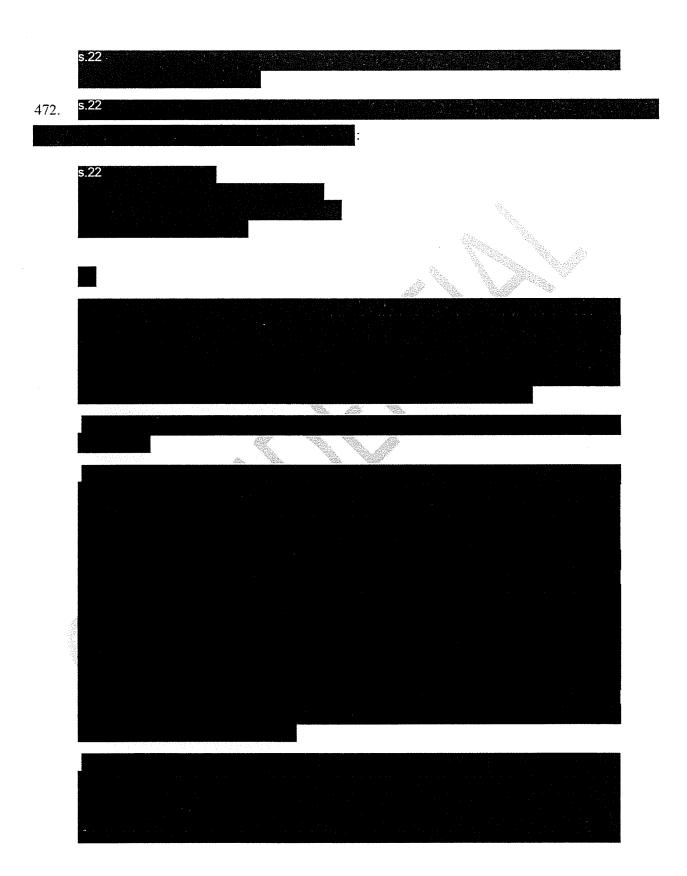


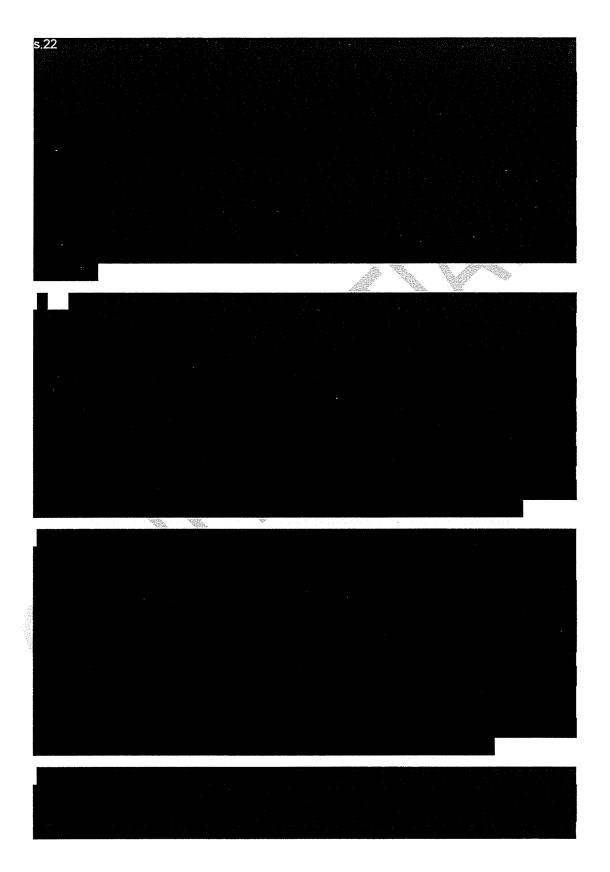


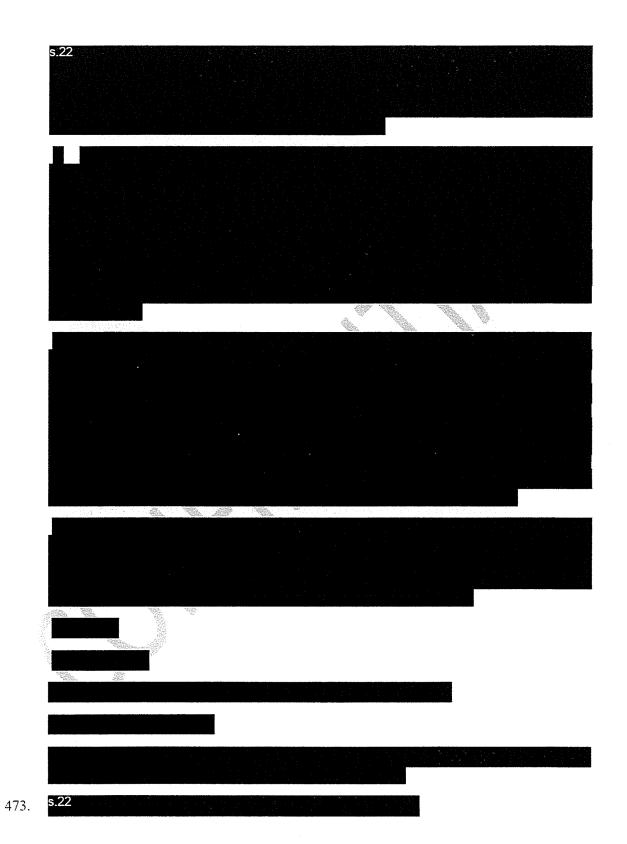


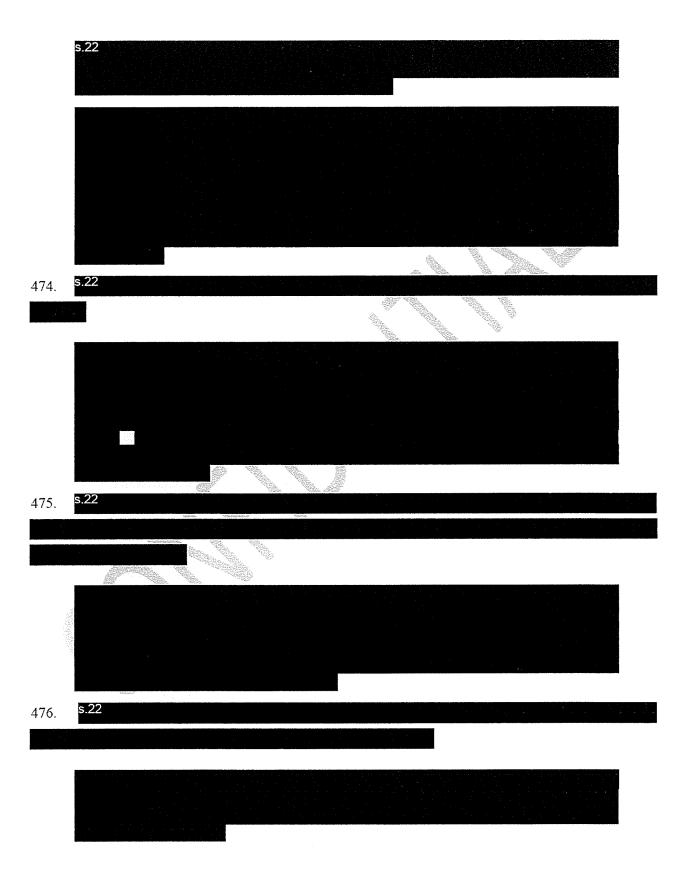






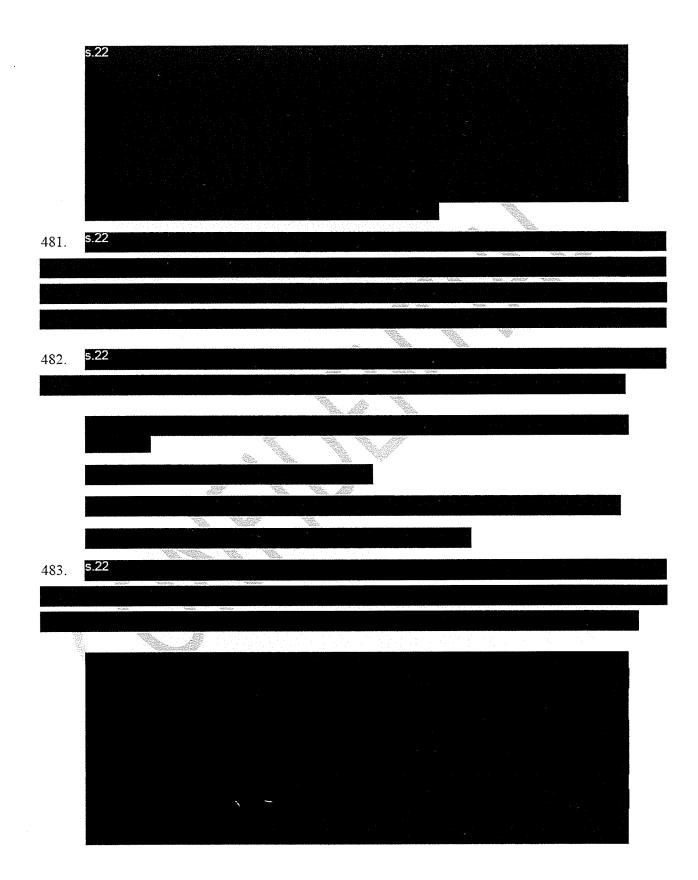


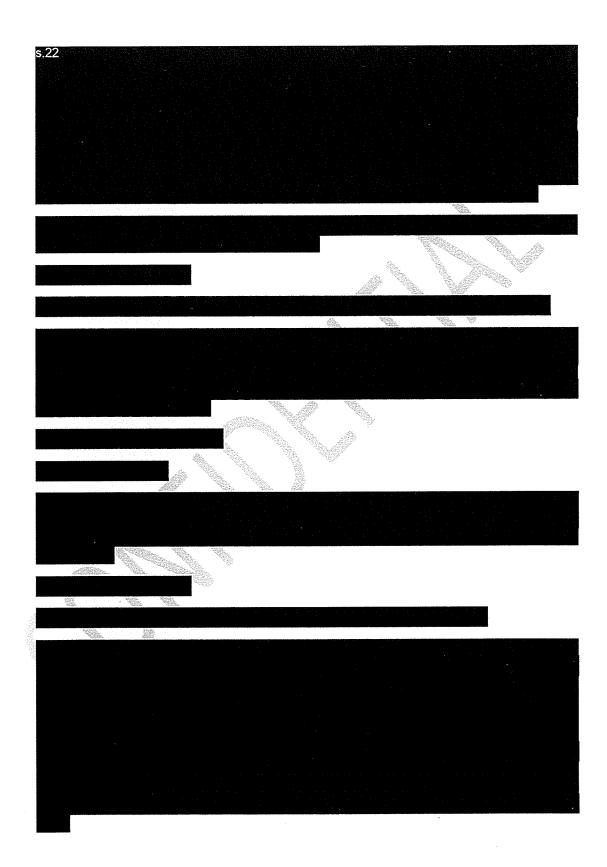




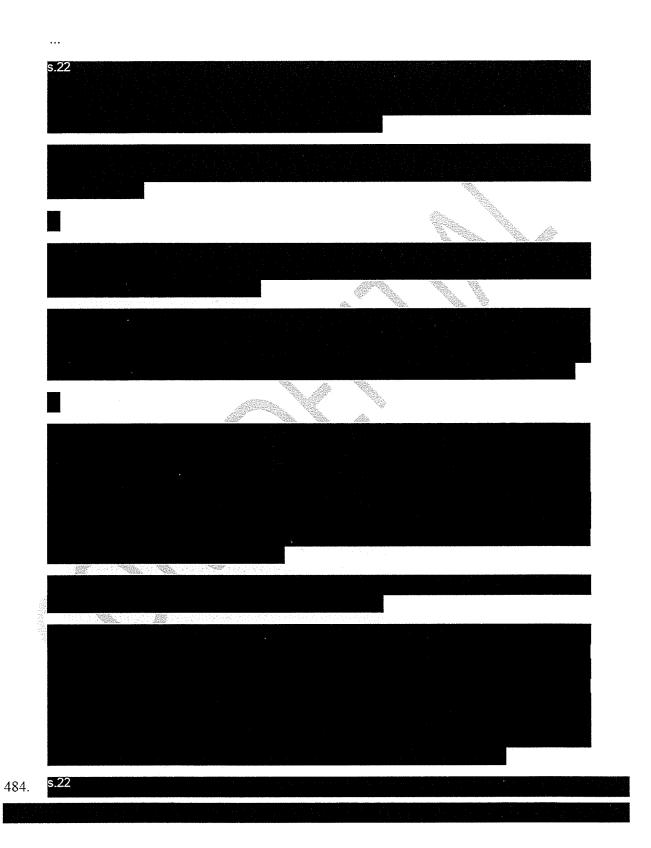
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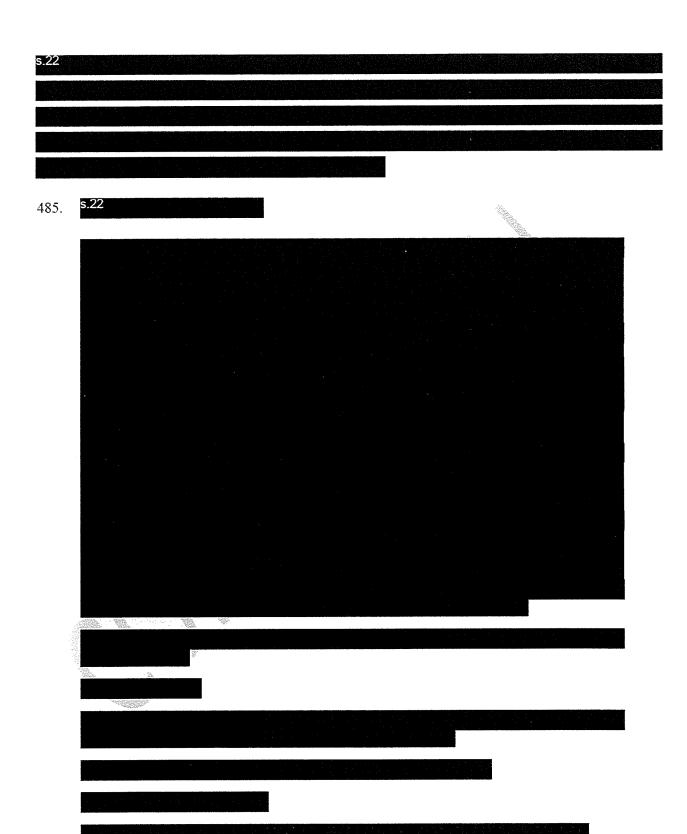
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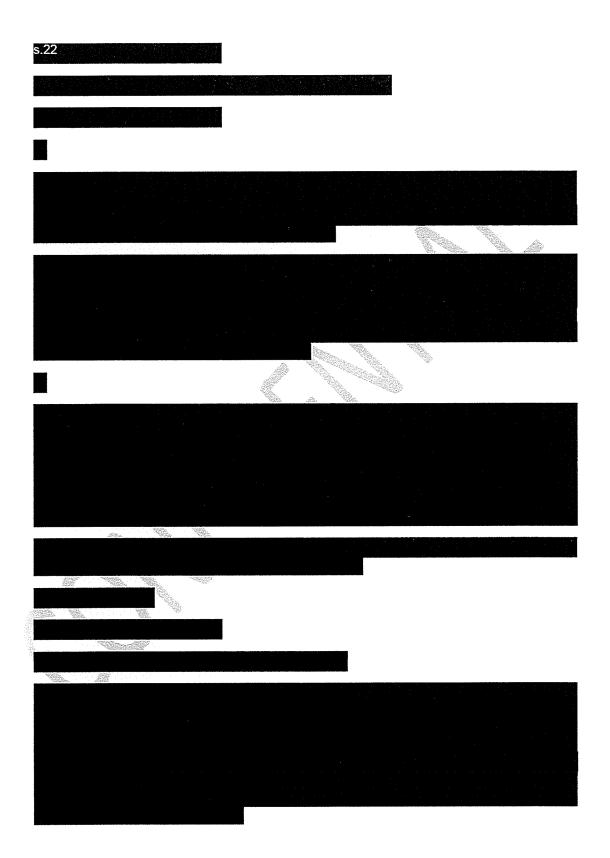


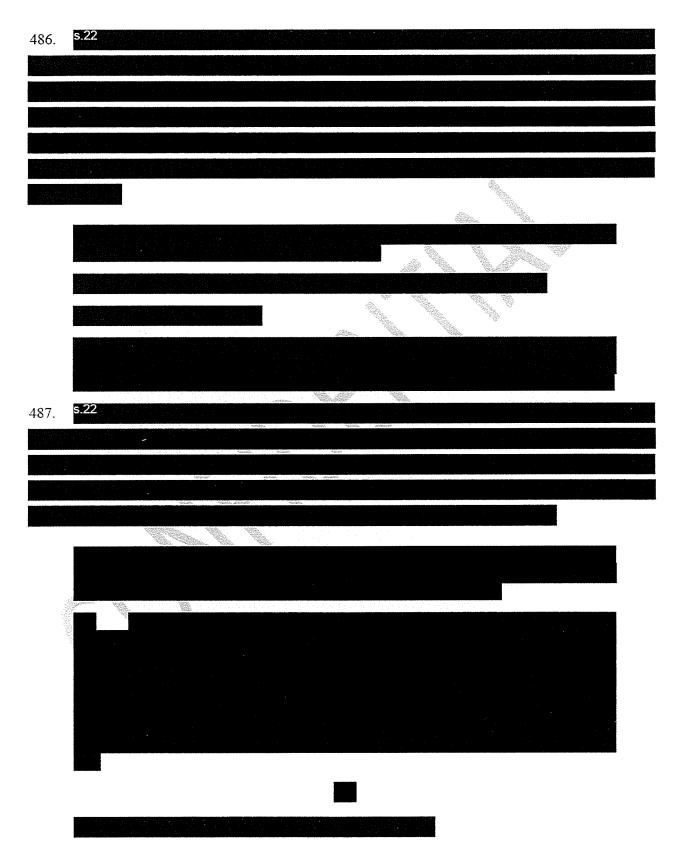


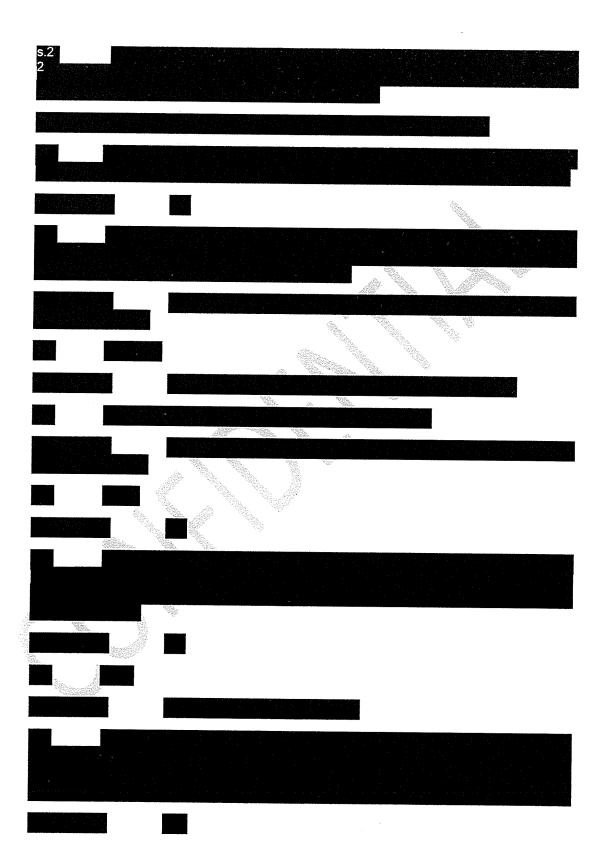


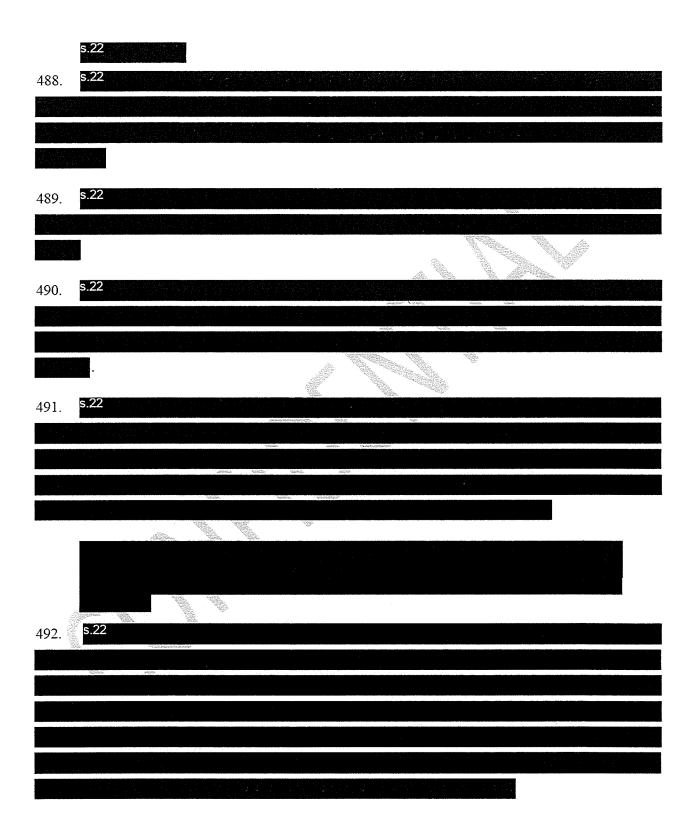


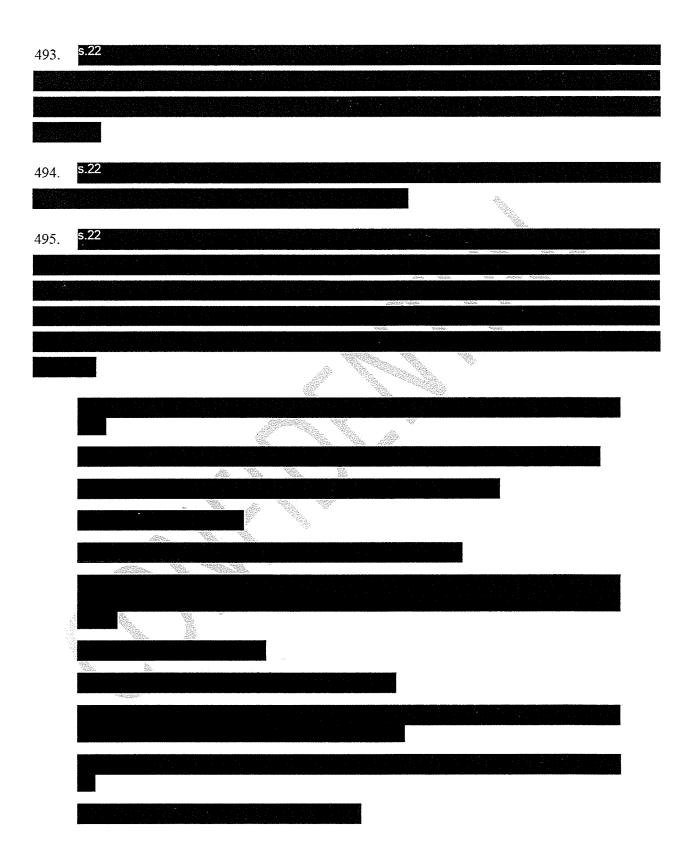




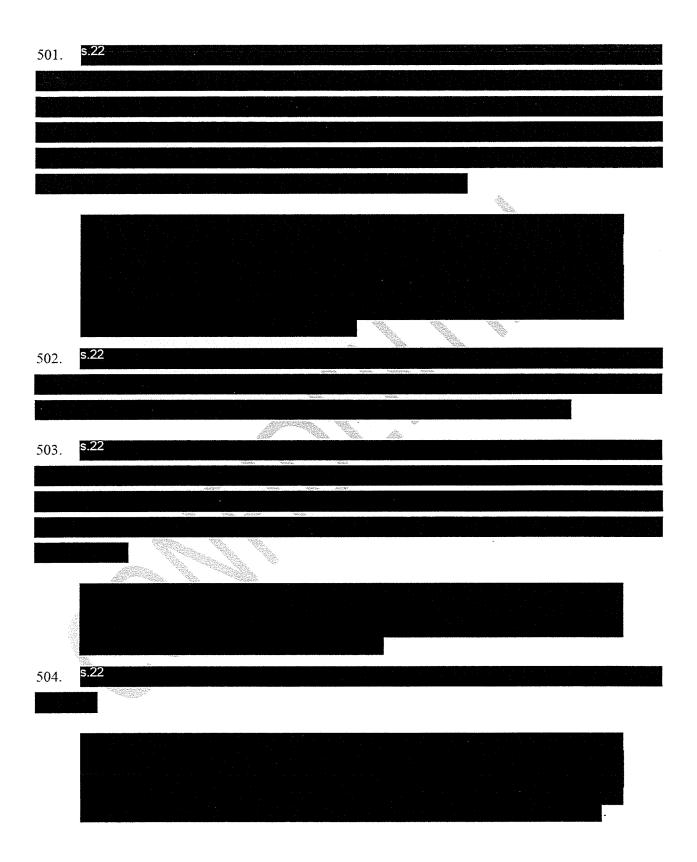


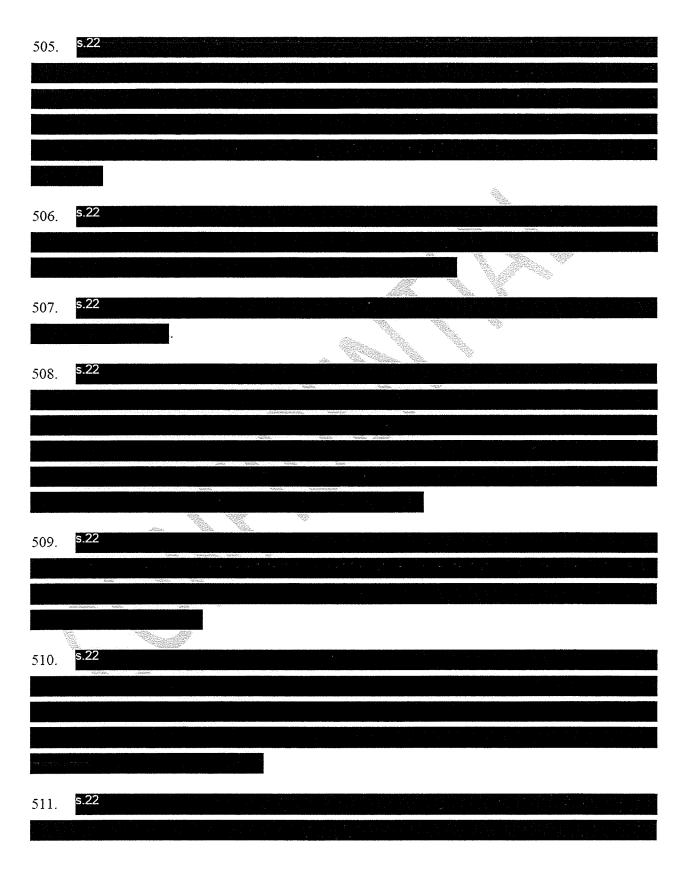


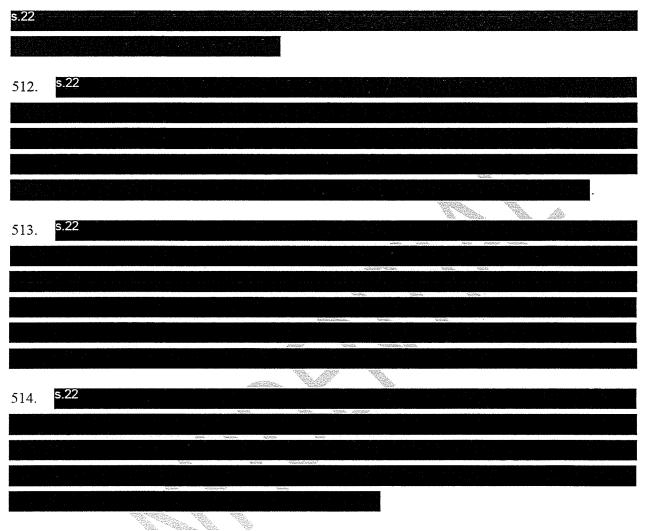




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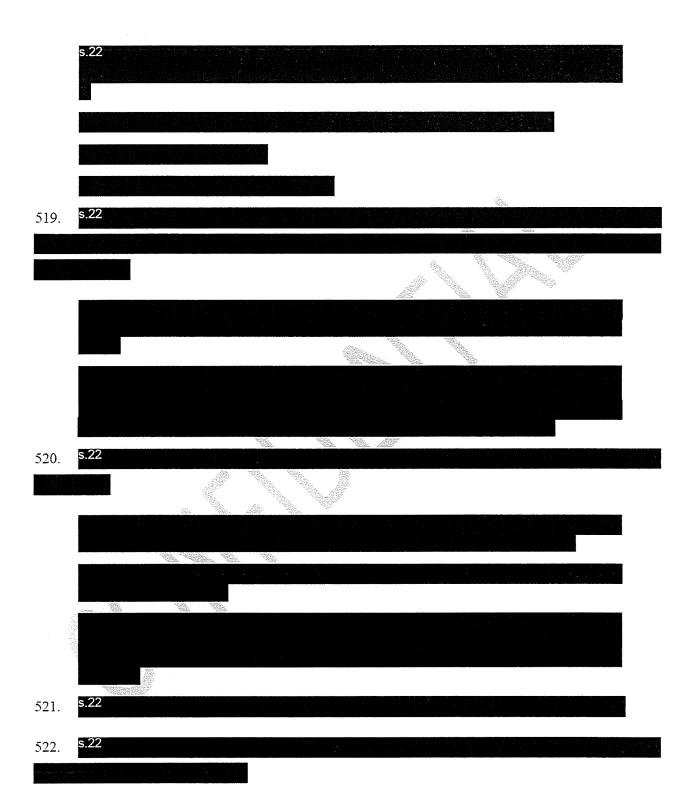


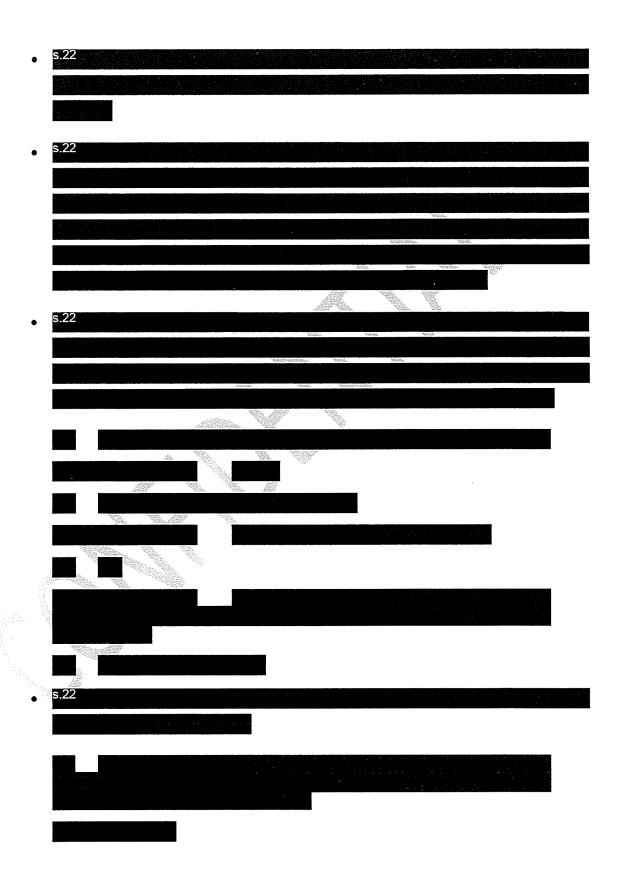


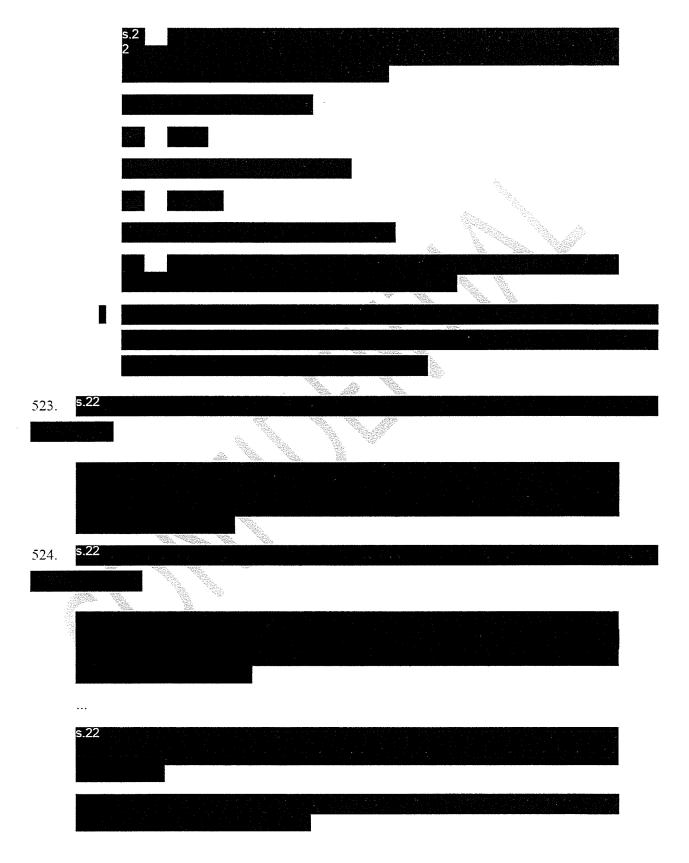


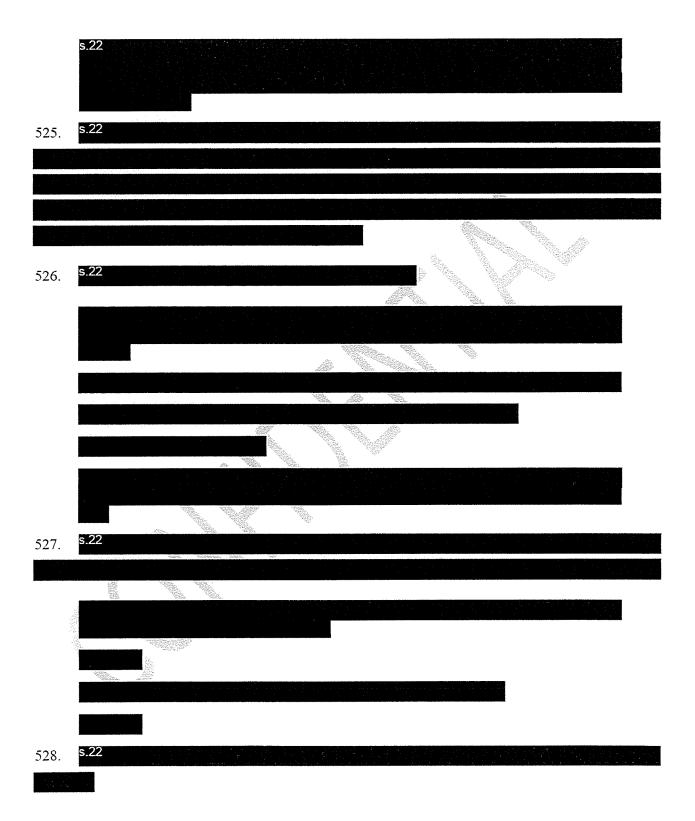
- there is missing evidence that this process could not remedy. That is not the fault of the University or the Parties, but, in this case, simply arises out of the limitations of the investigation process, where third parties are seeking evidence that require a more hands-on approach.
- 516. It would therefore be unfair to both Parties to attempt to do so without the benefit of more information about the projects and work in question. As such, we are **unable to make a finding** on this allegation.

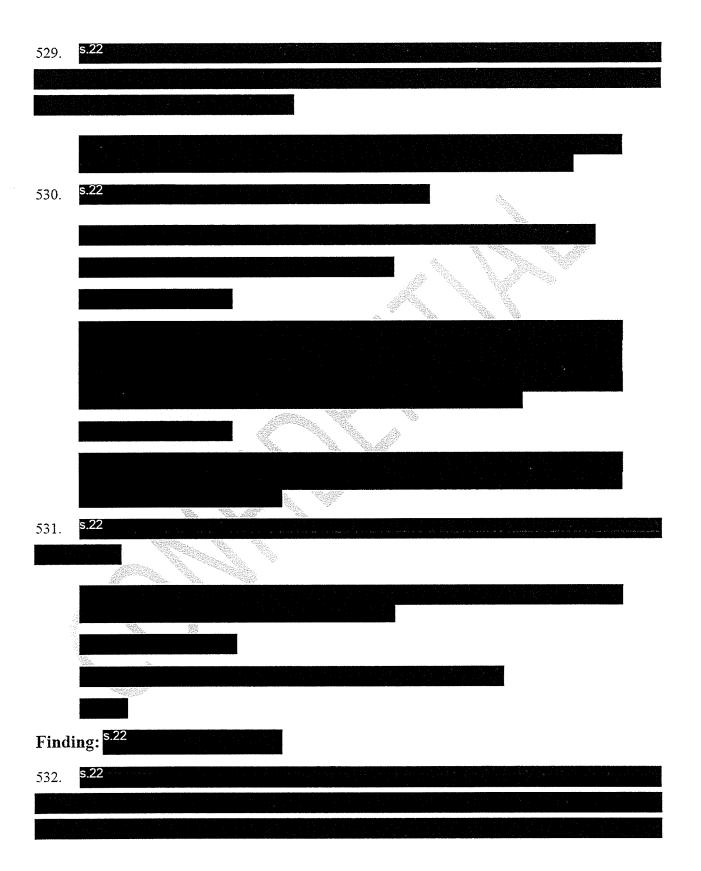
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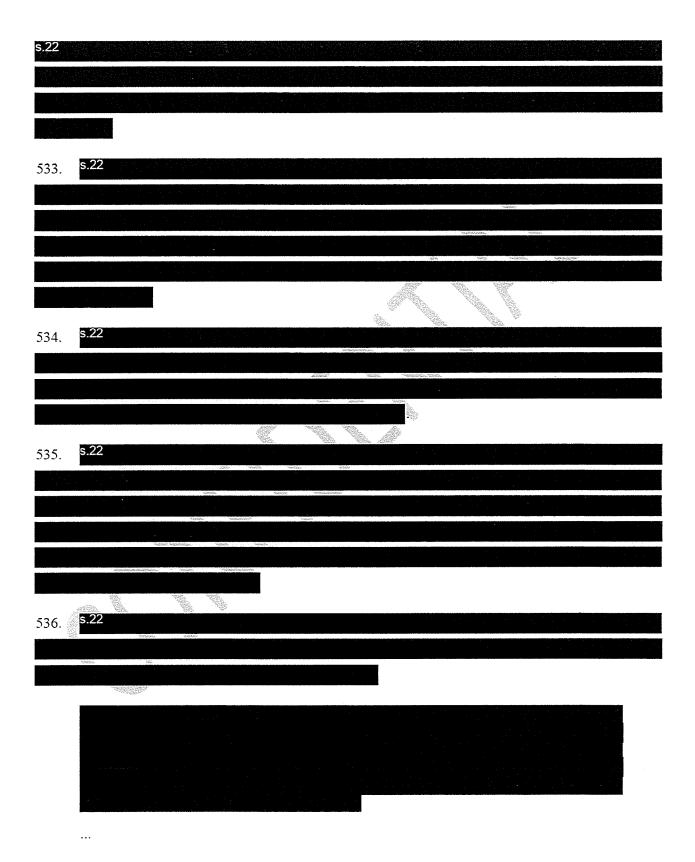


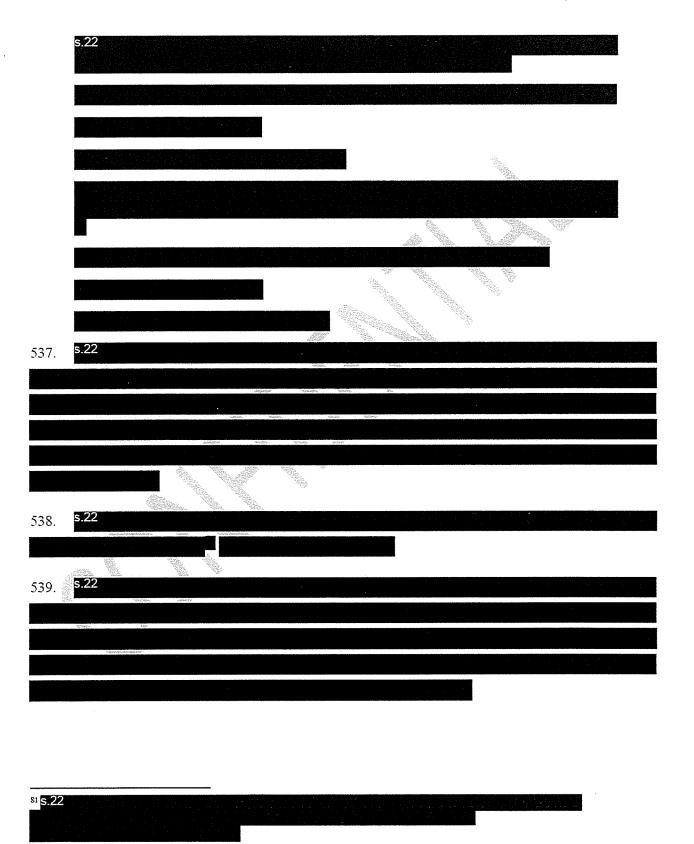


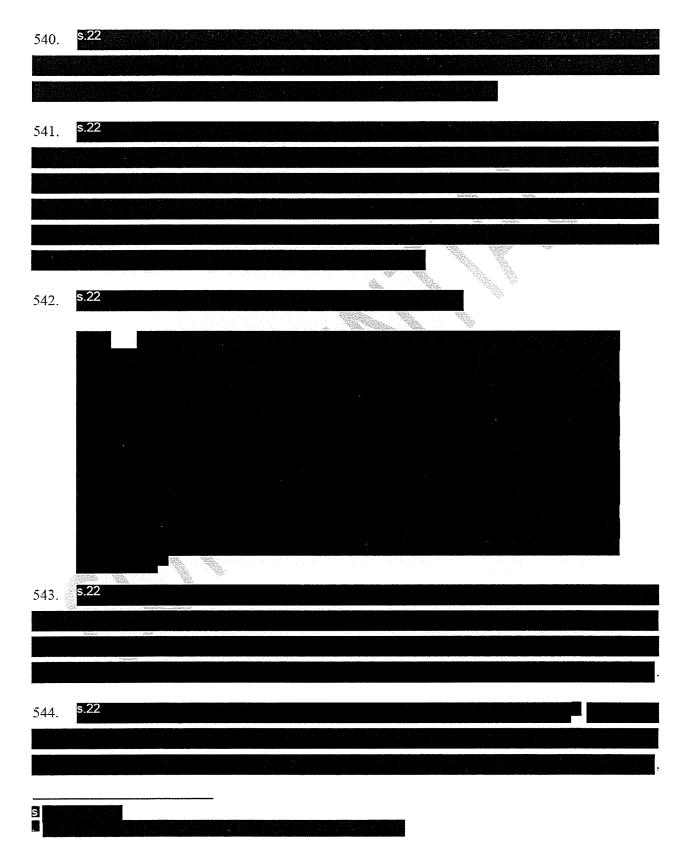




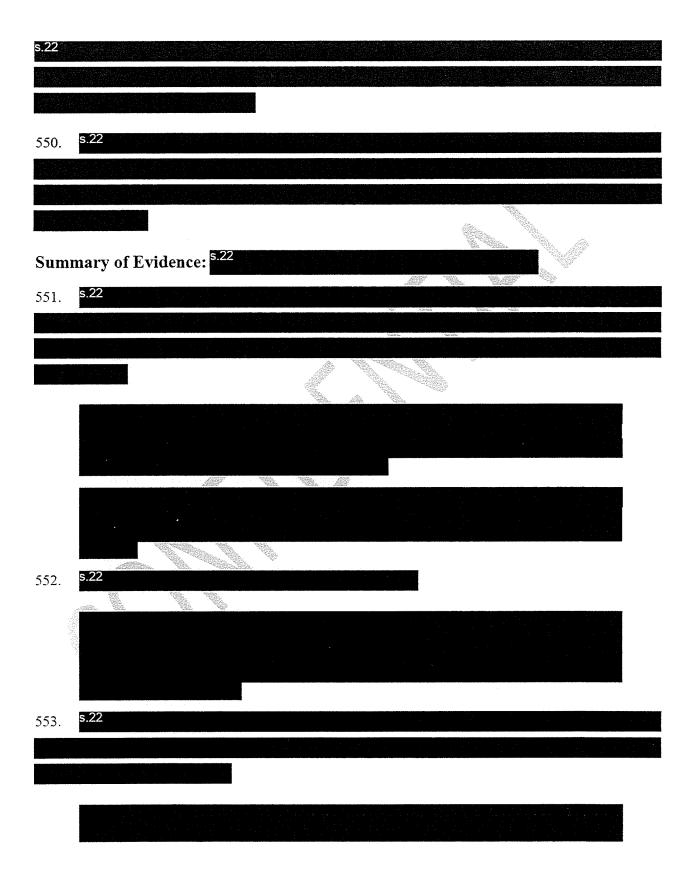


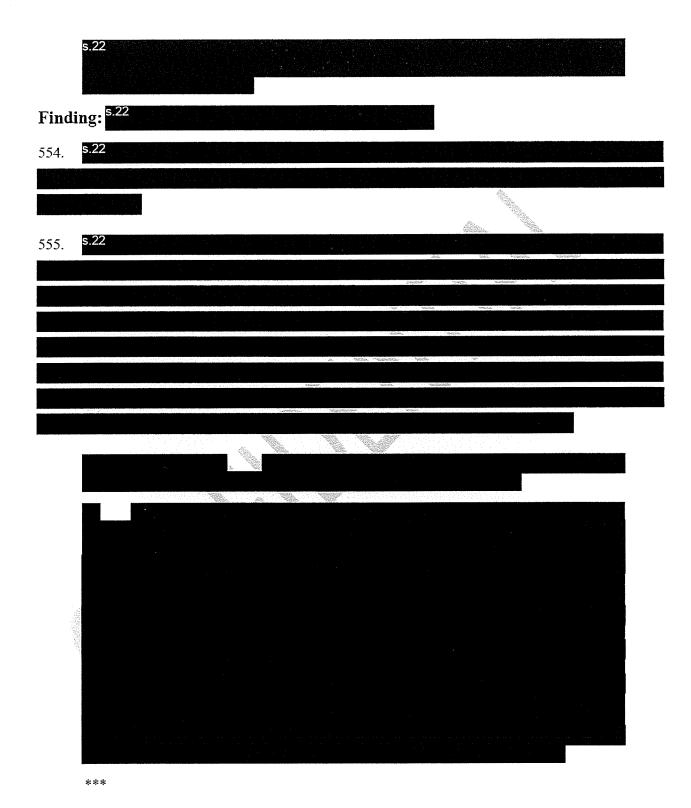


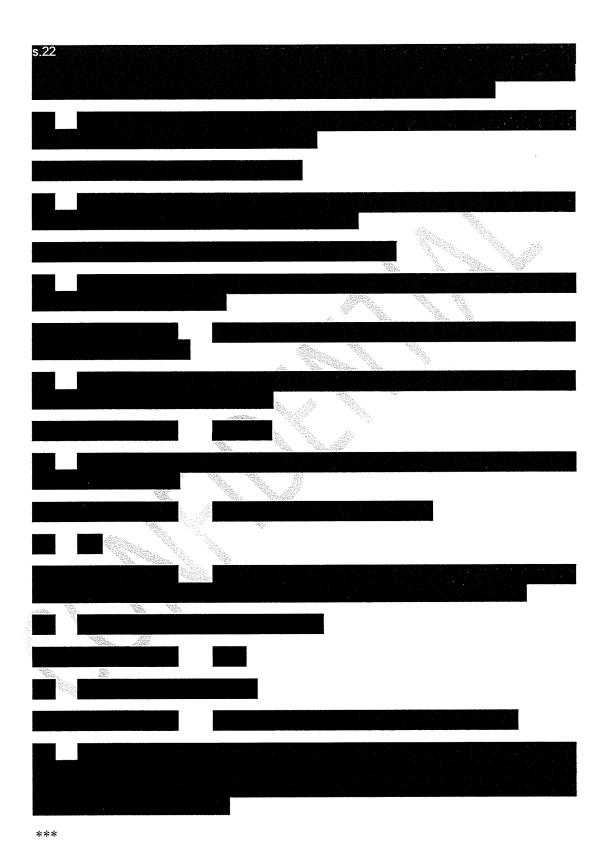


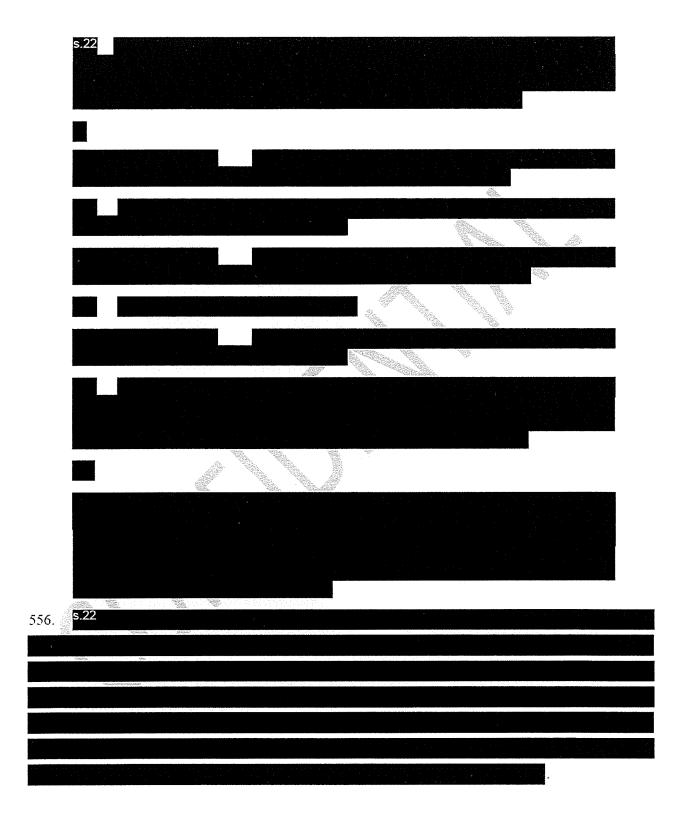


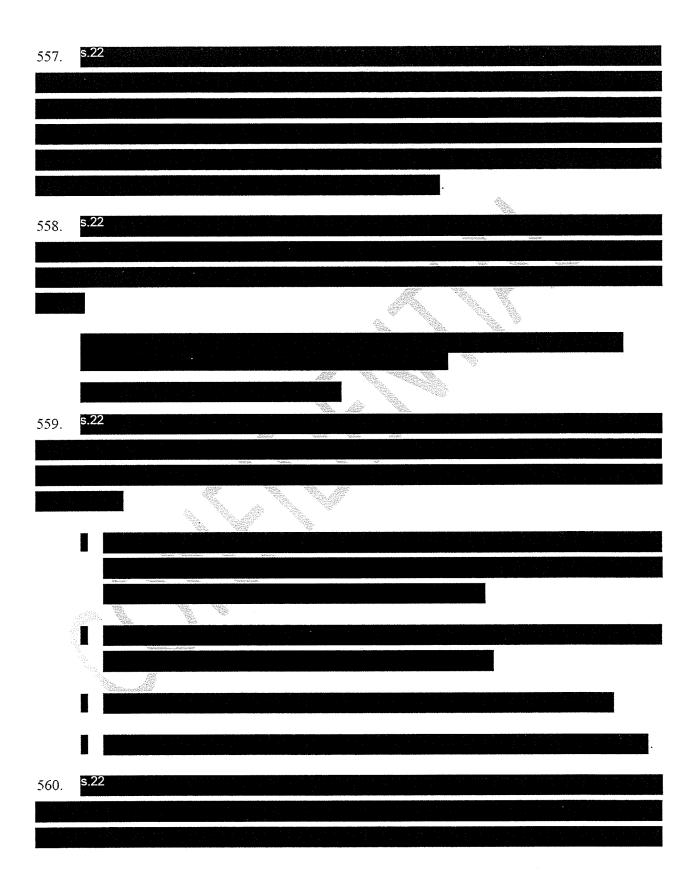
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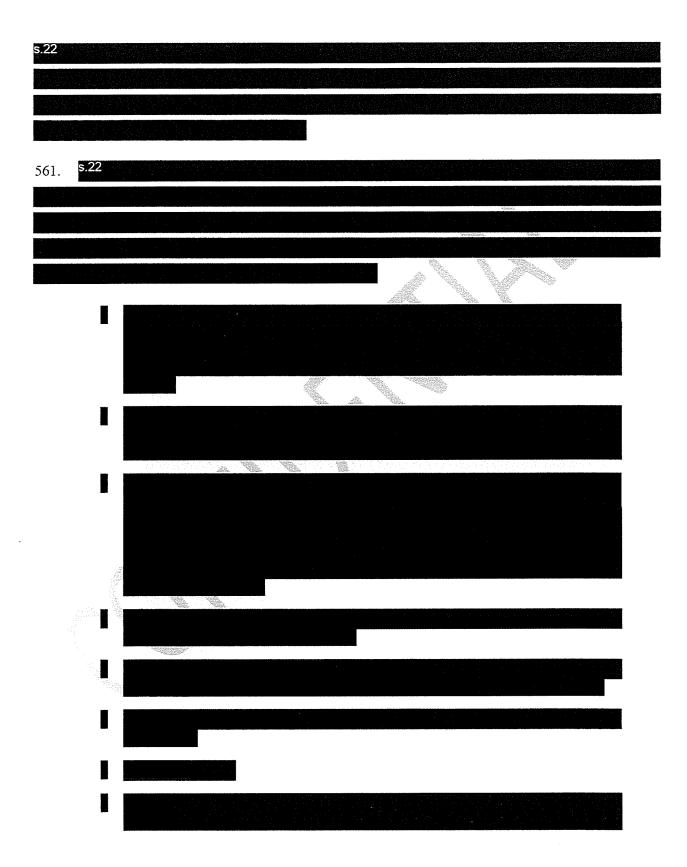


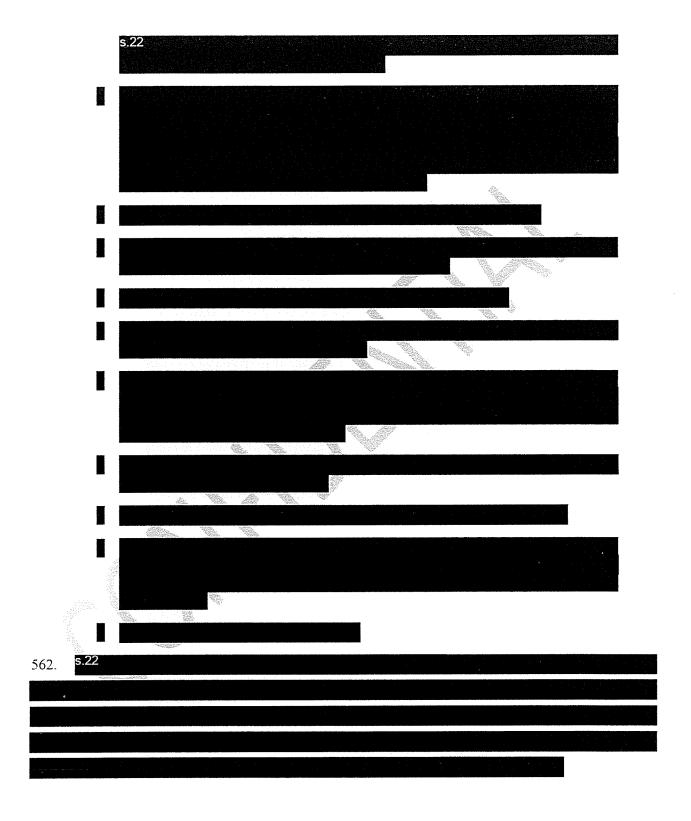


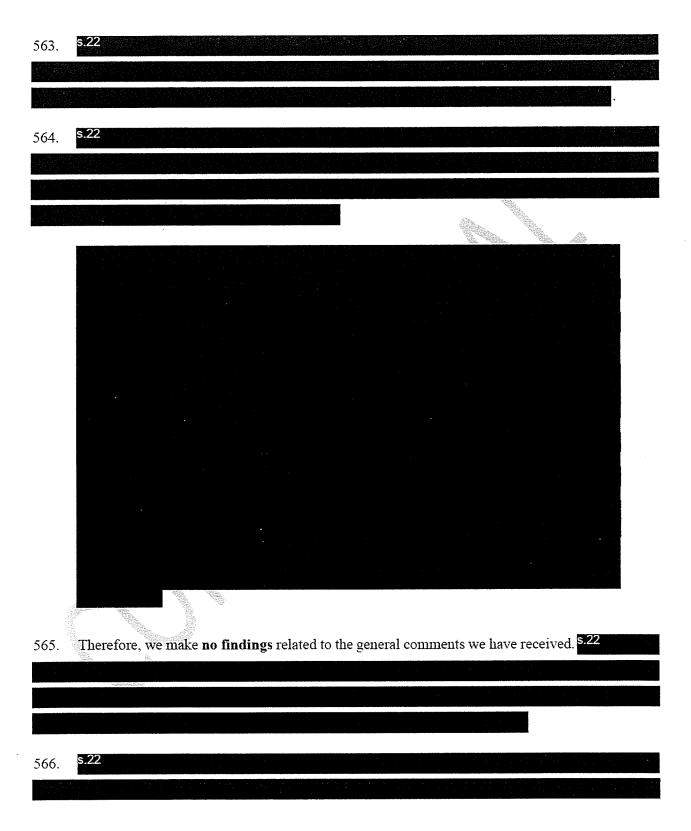


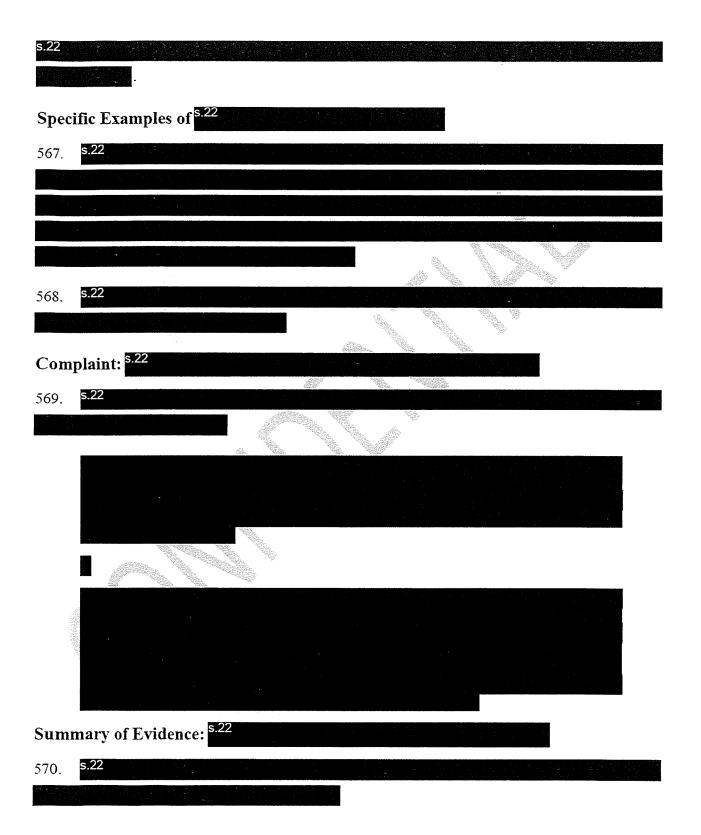


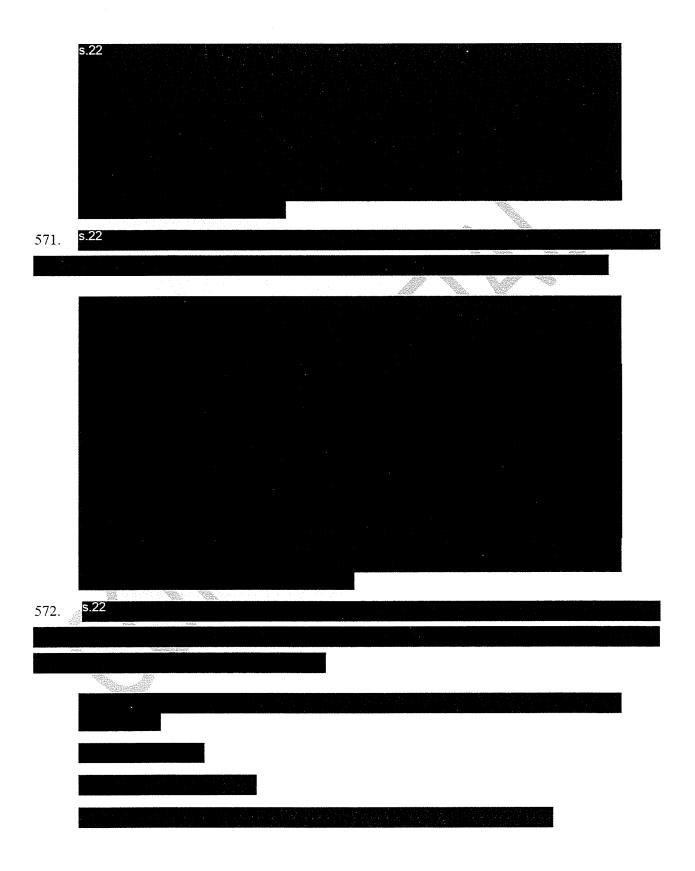


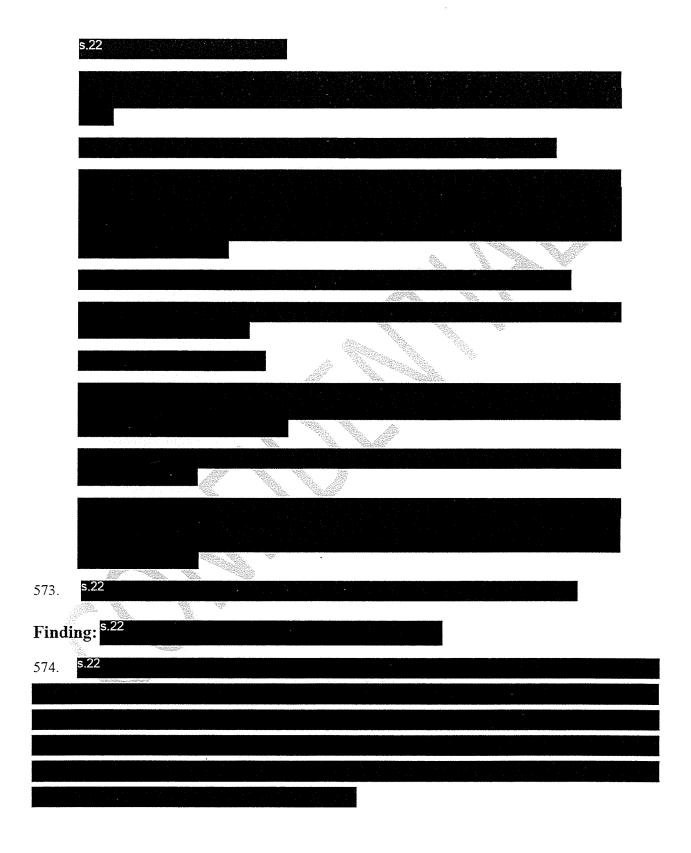


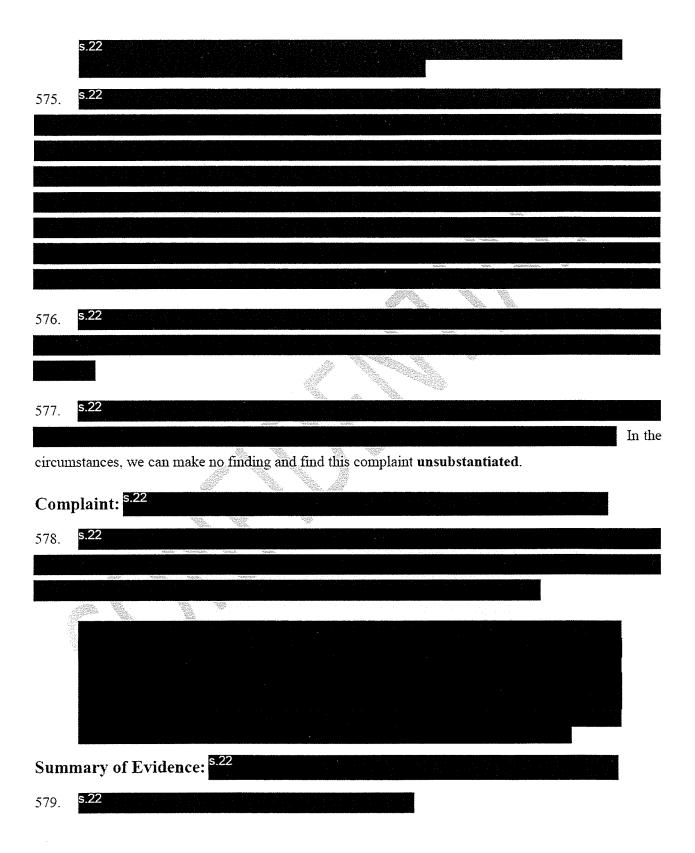


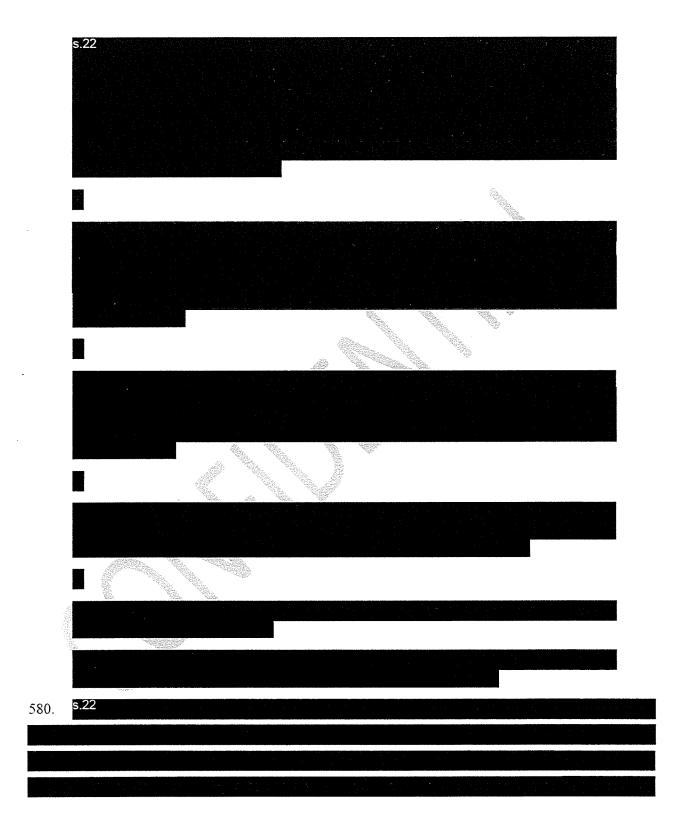


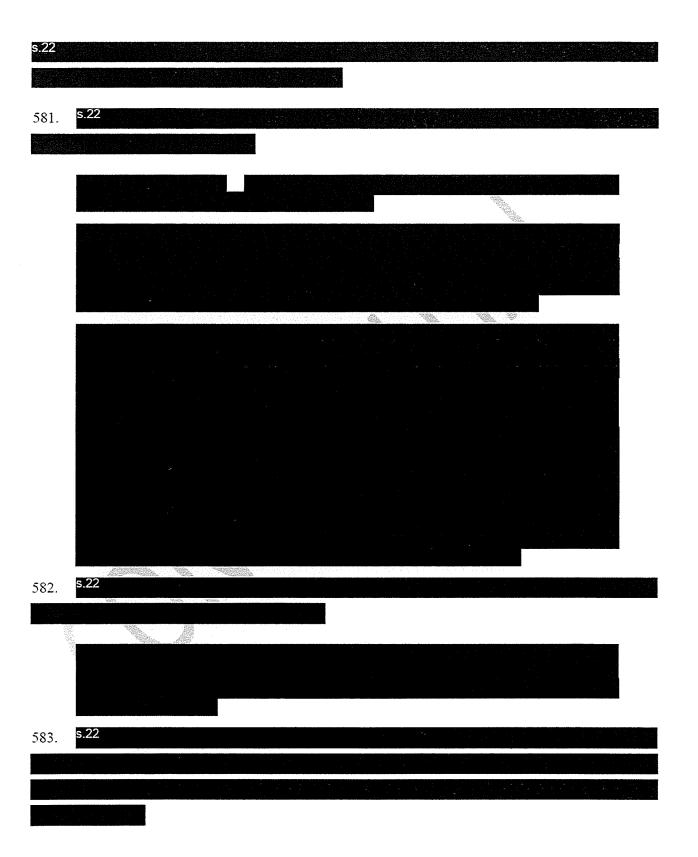


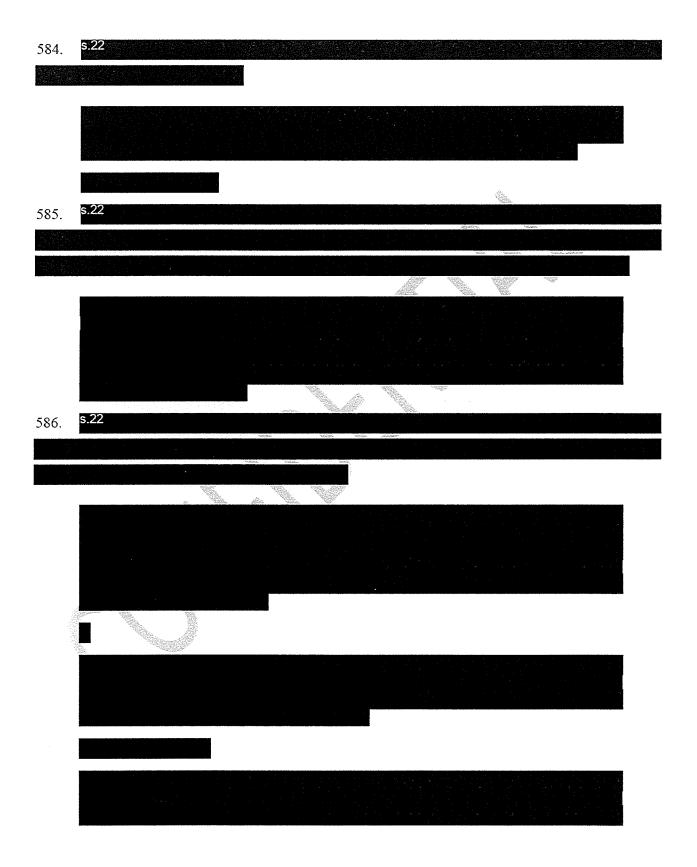




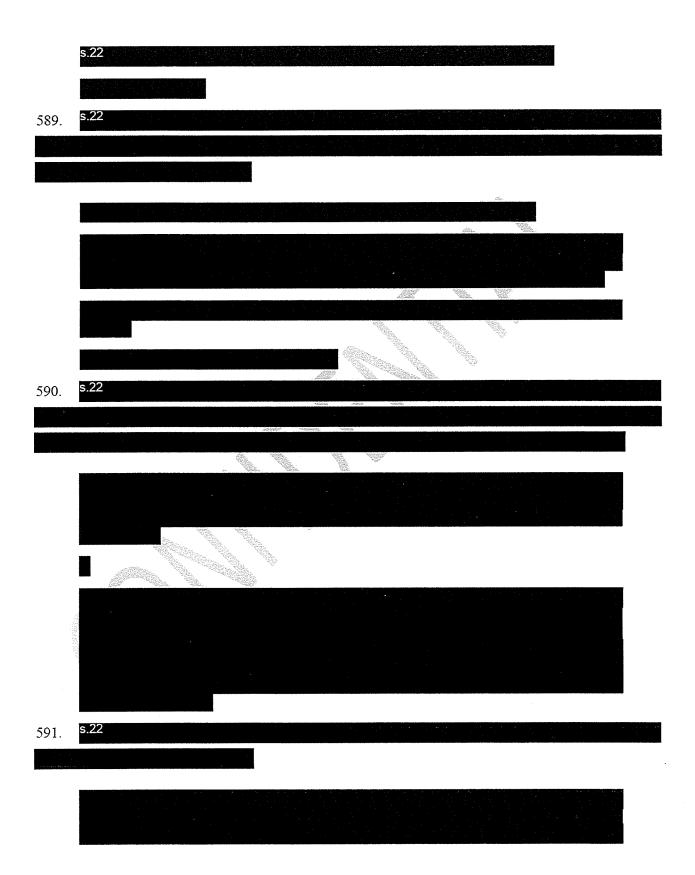


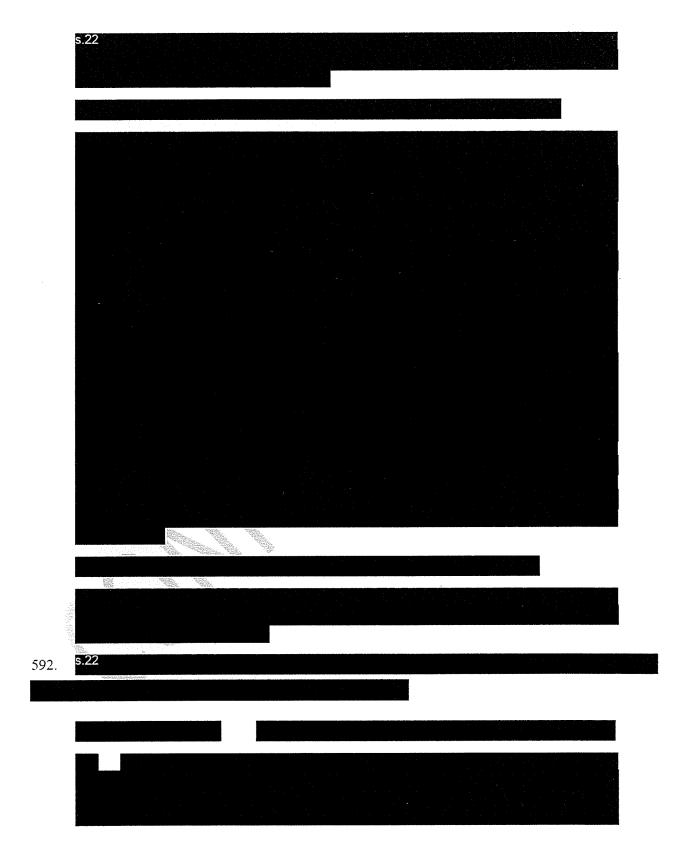


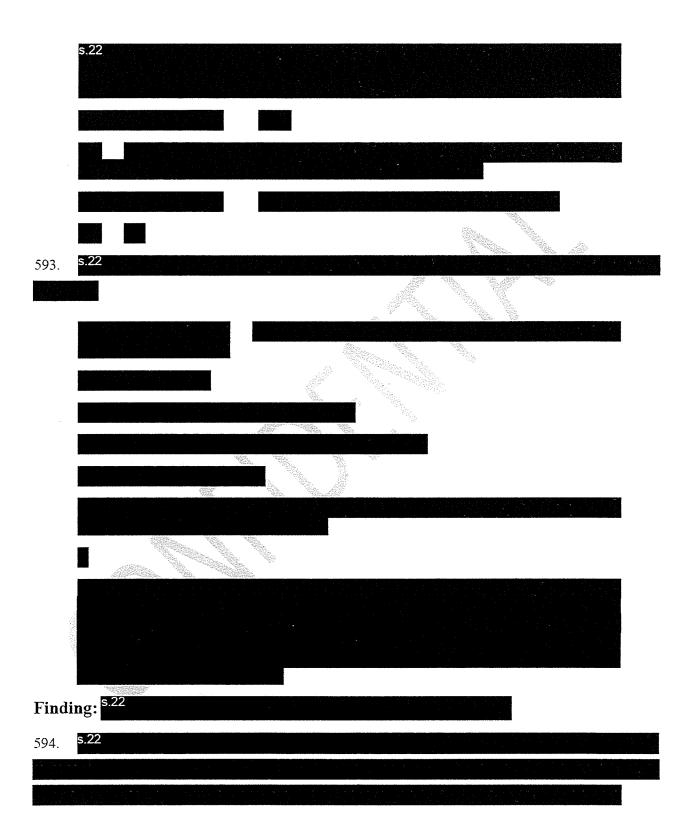


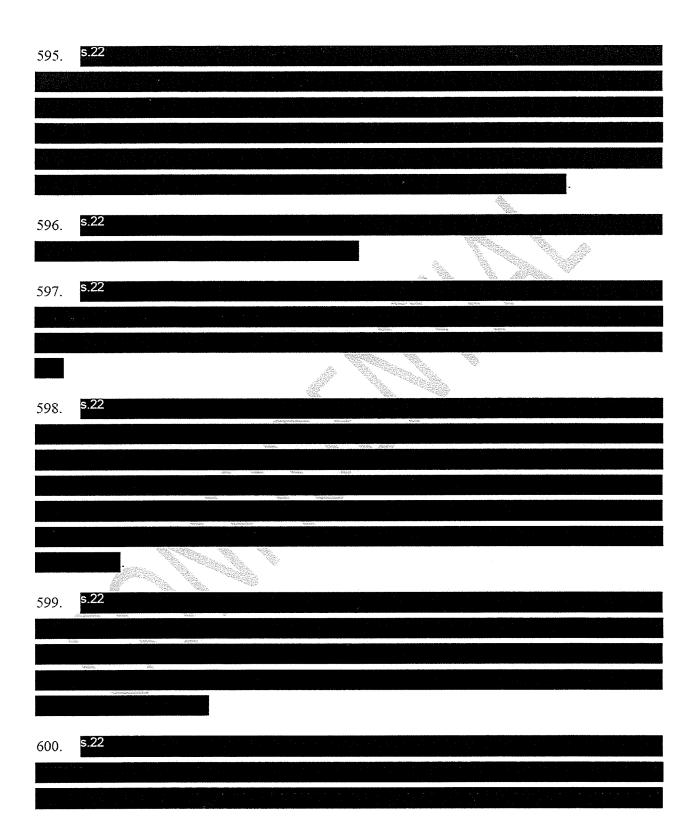


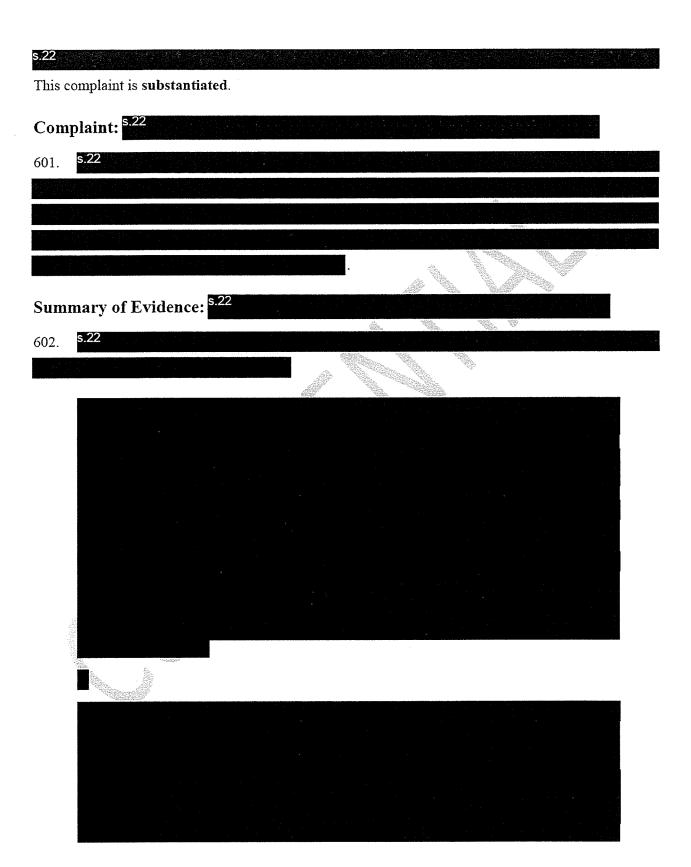
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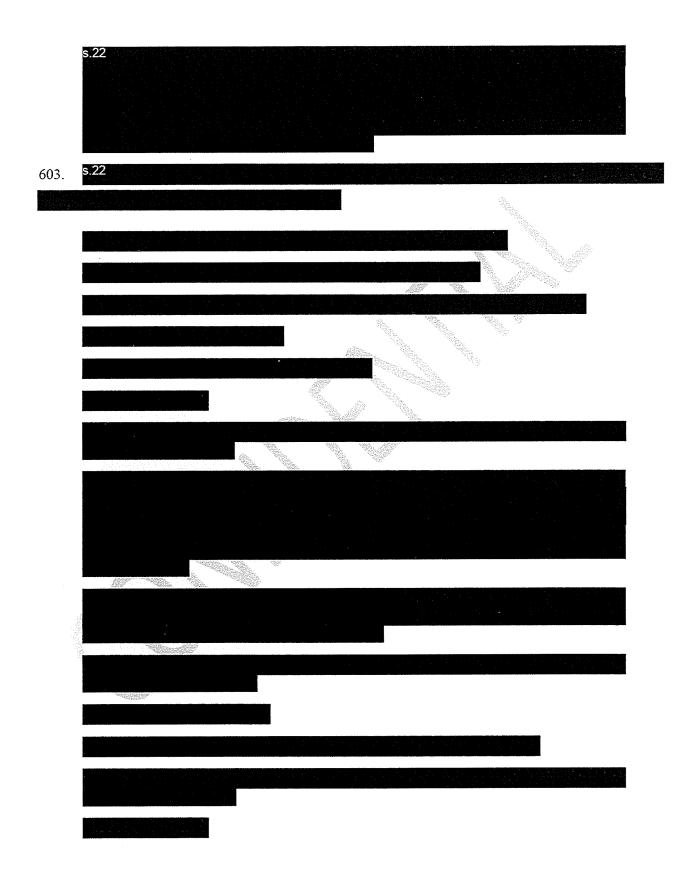


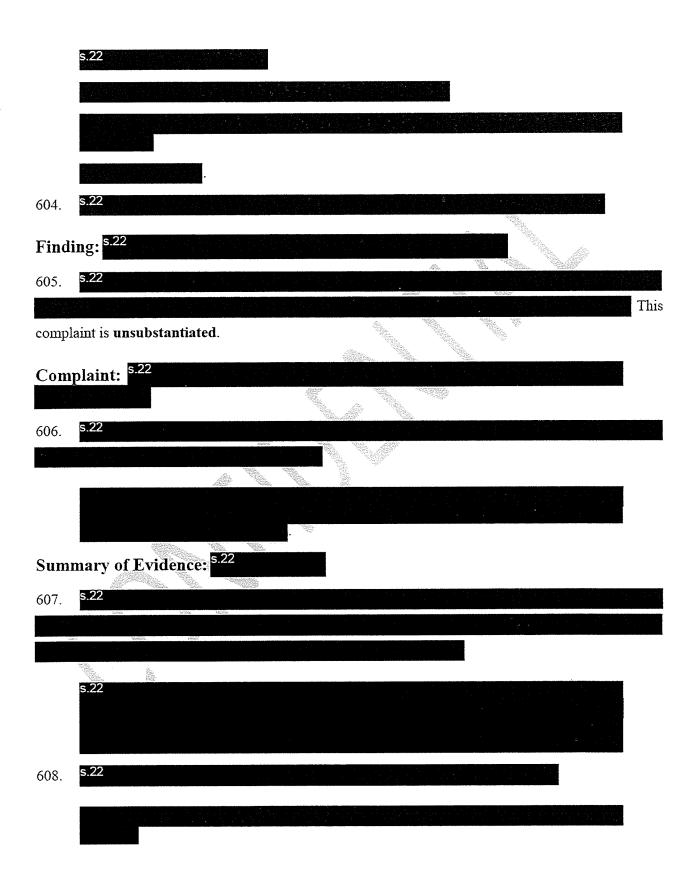


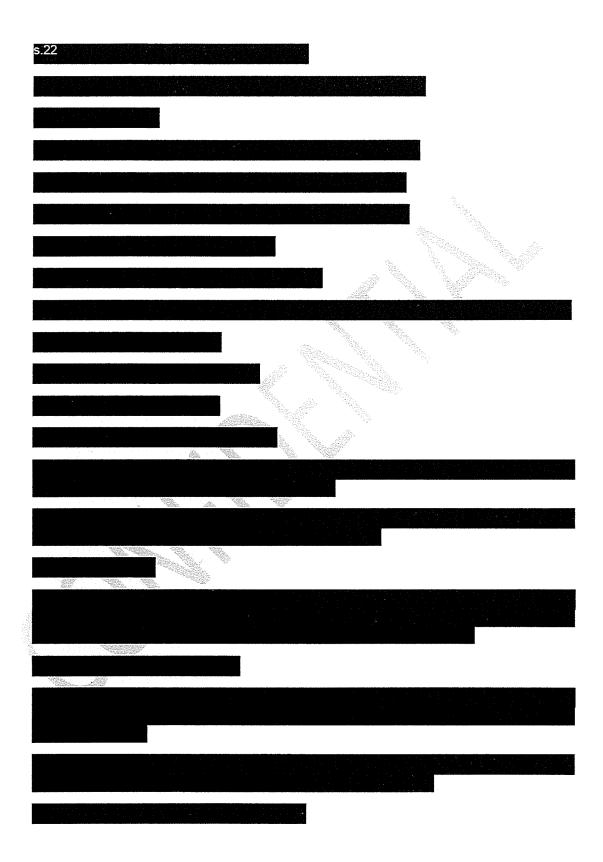


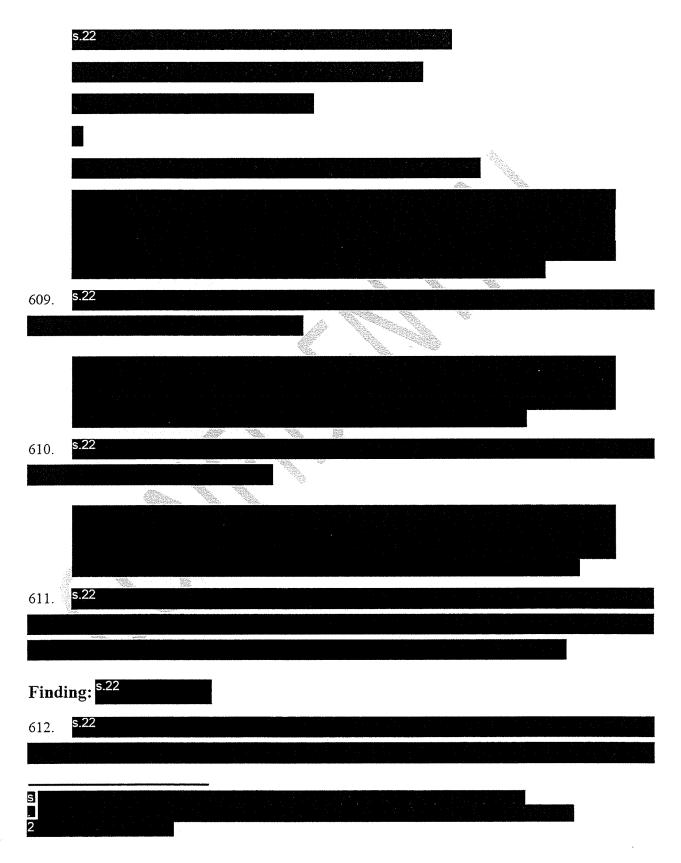




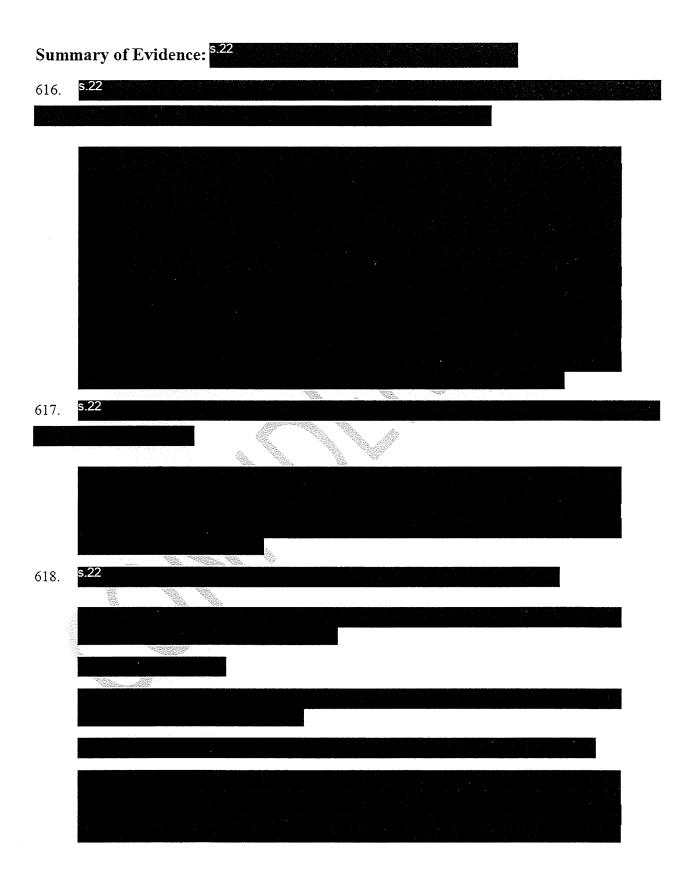


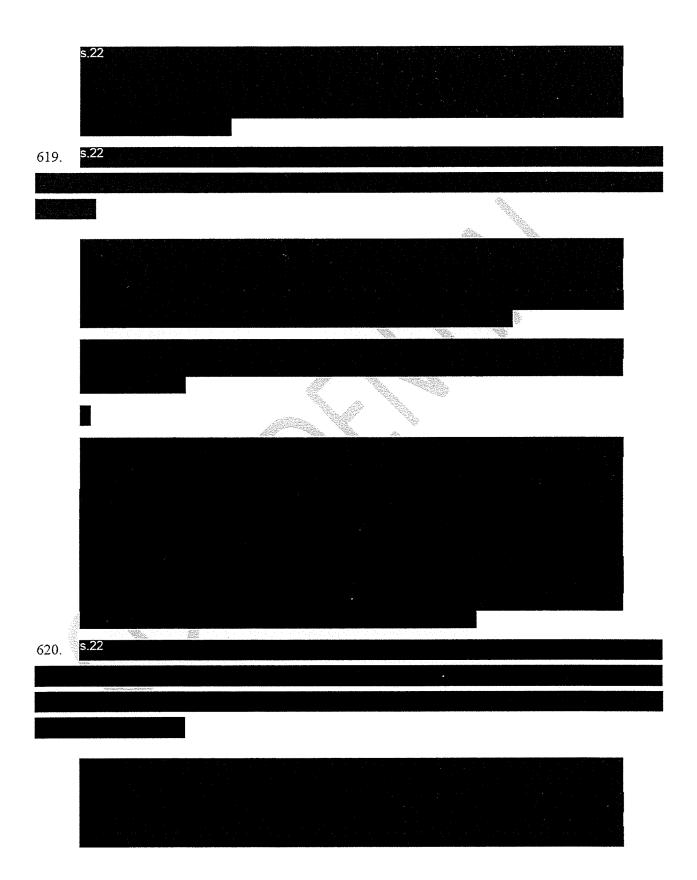


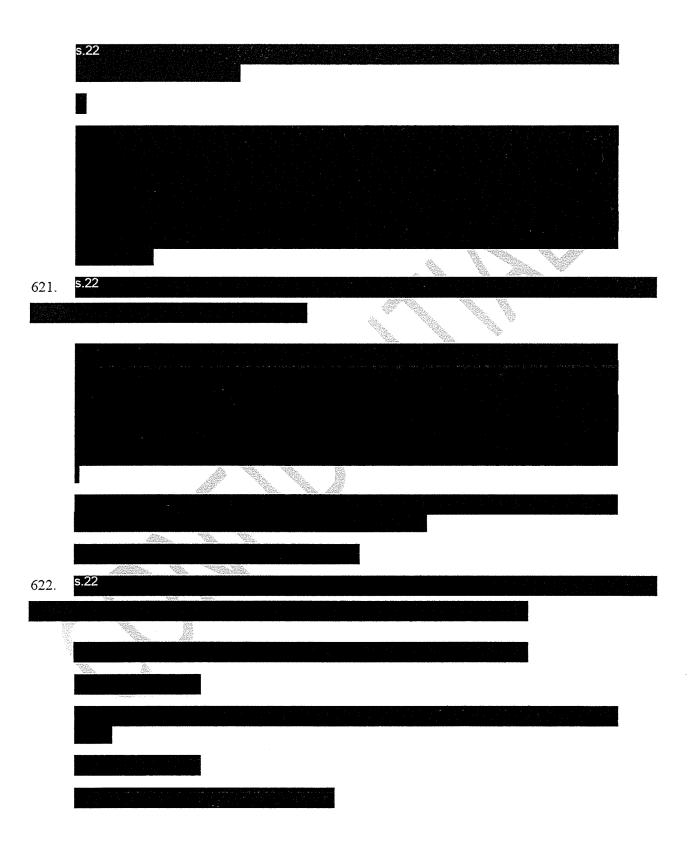


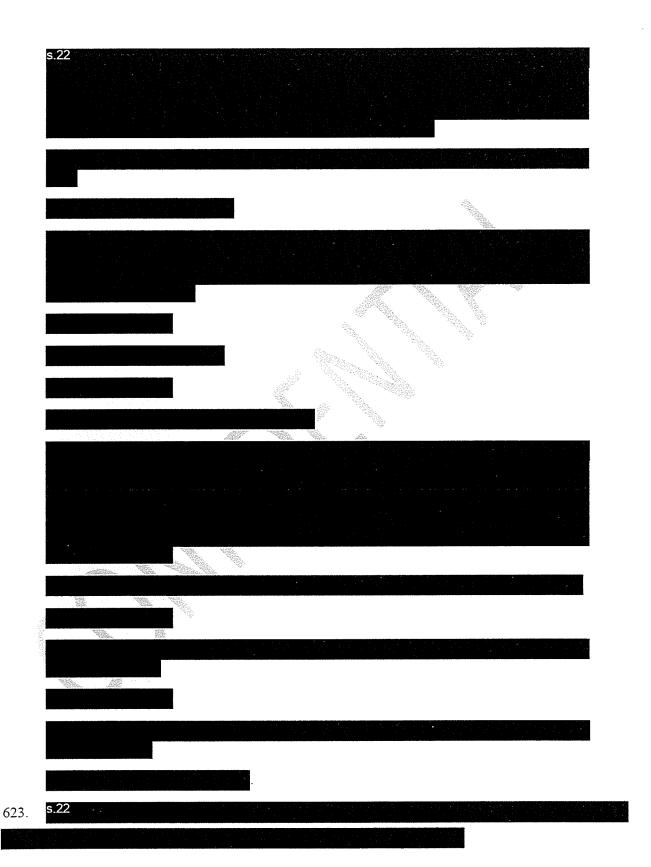


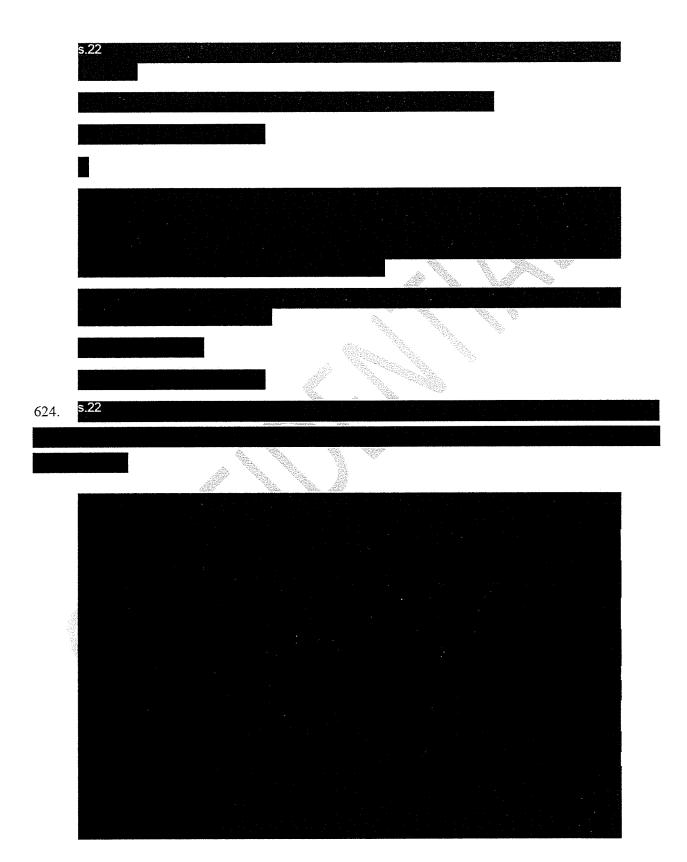
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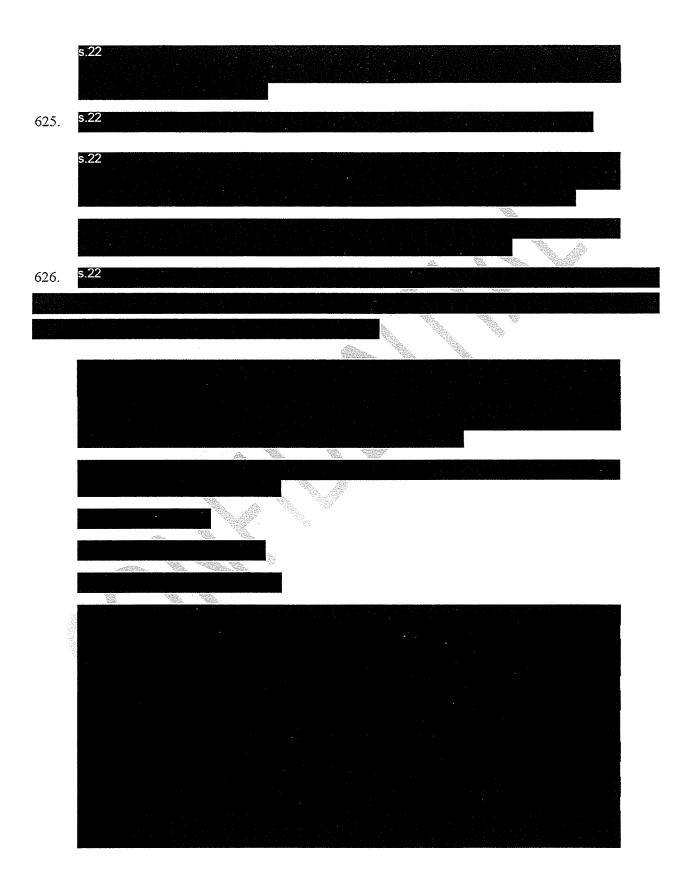


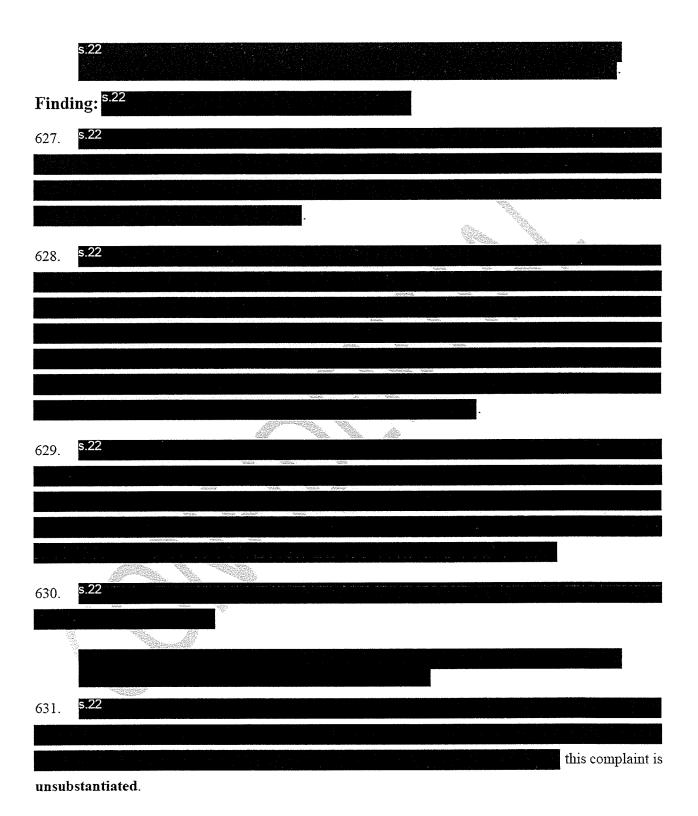


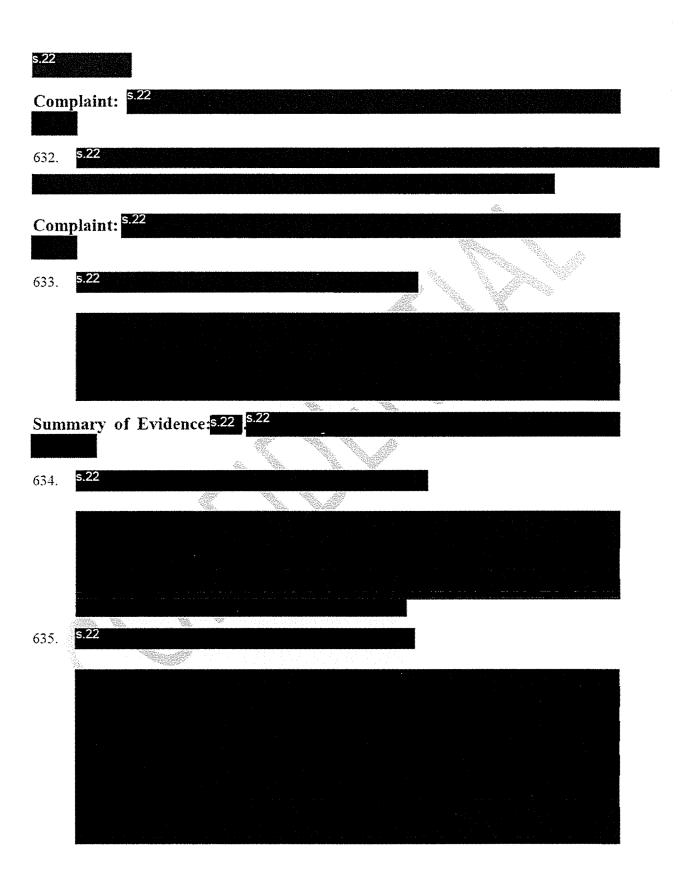


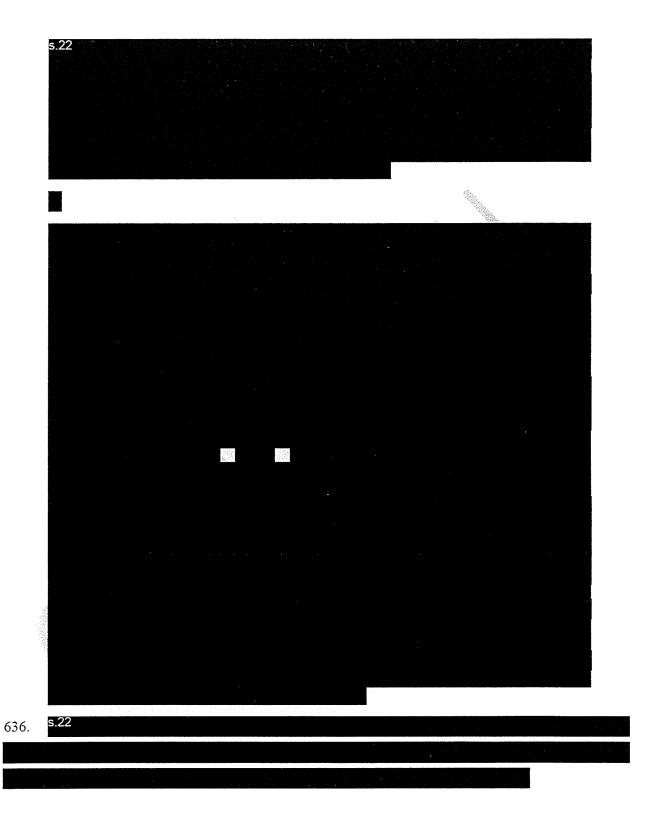


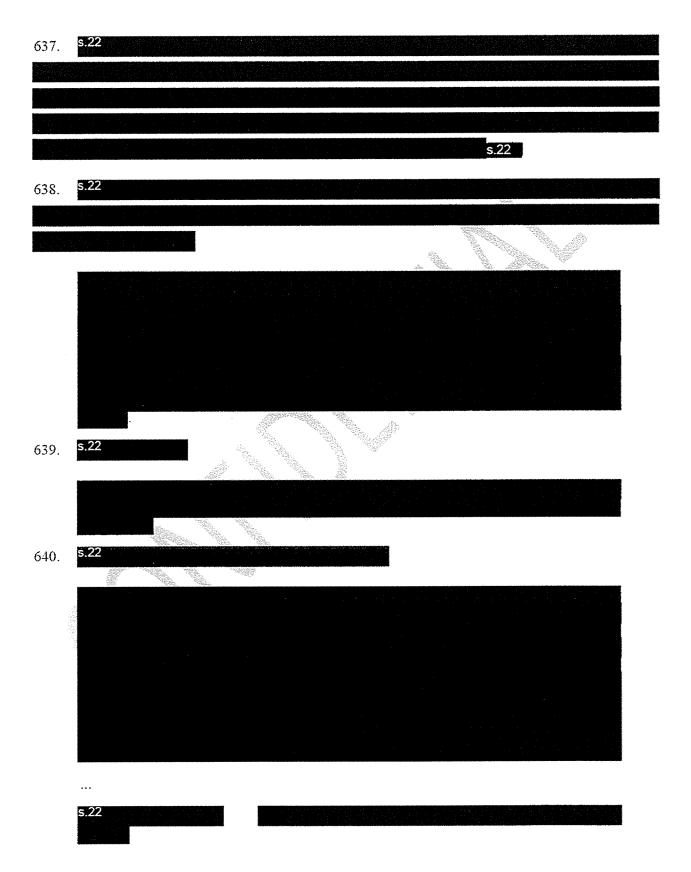


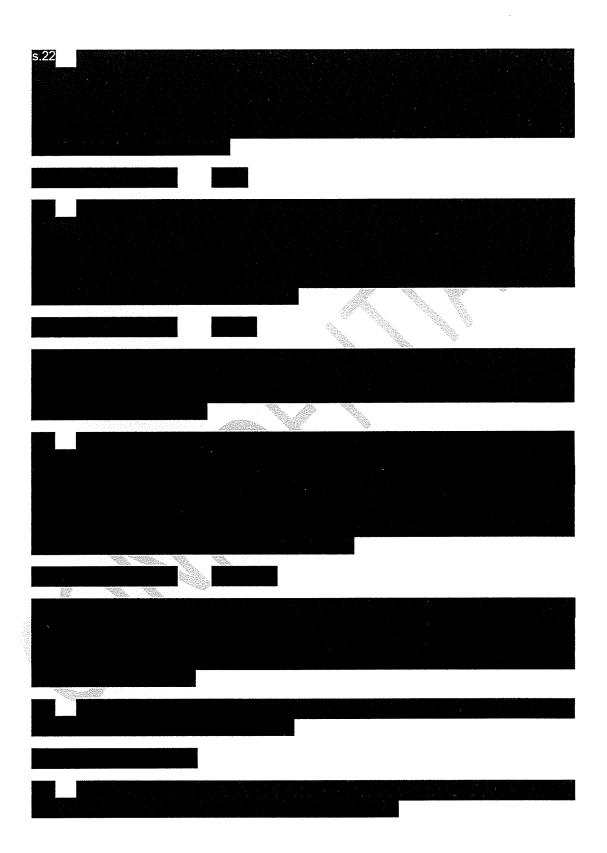


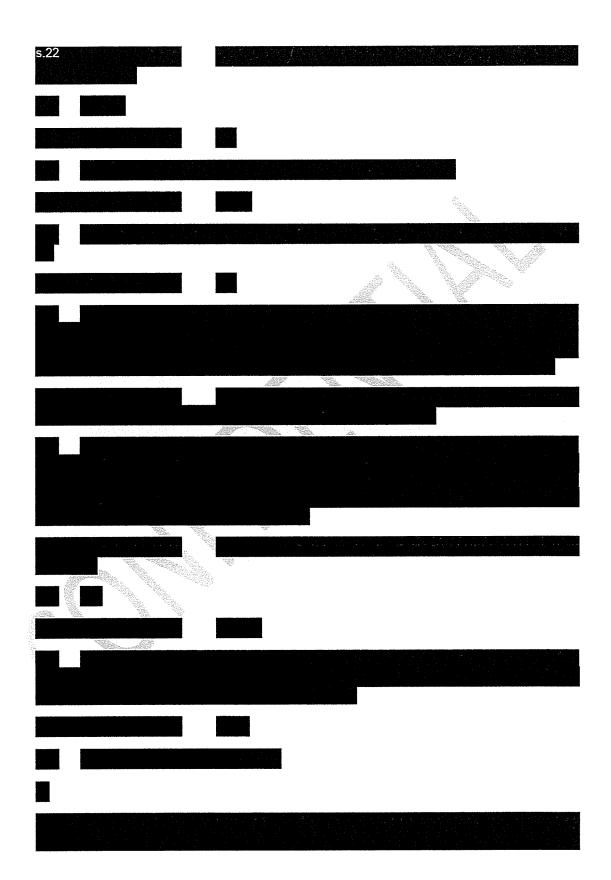


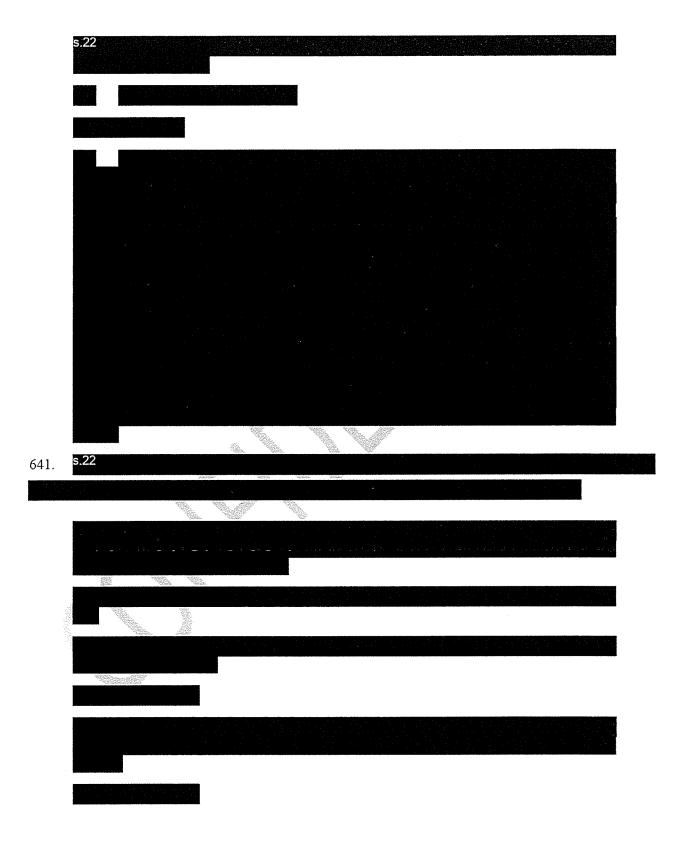


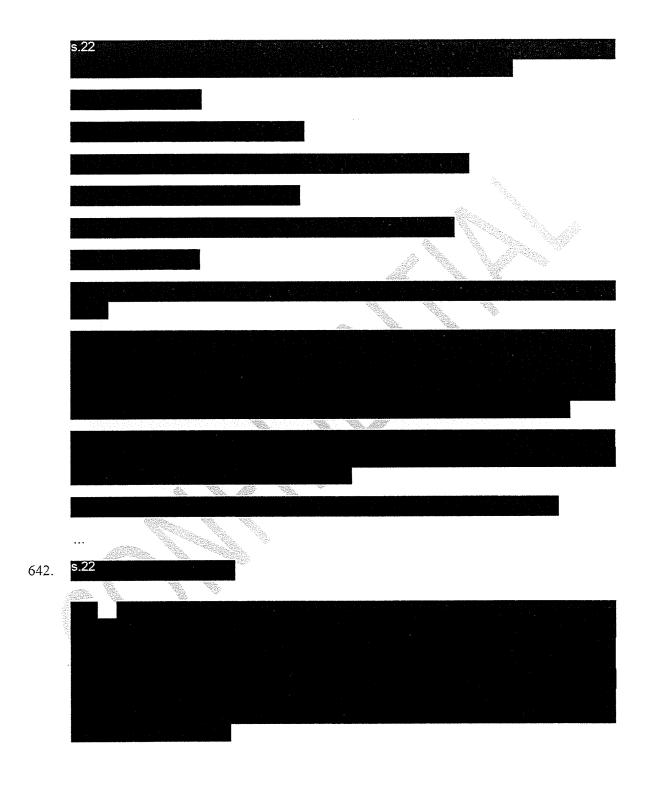




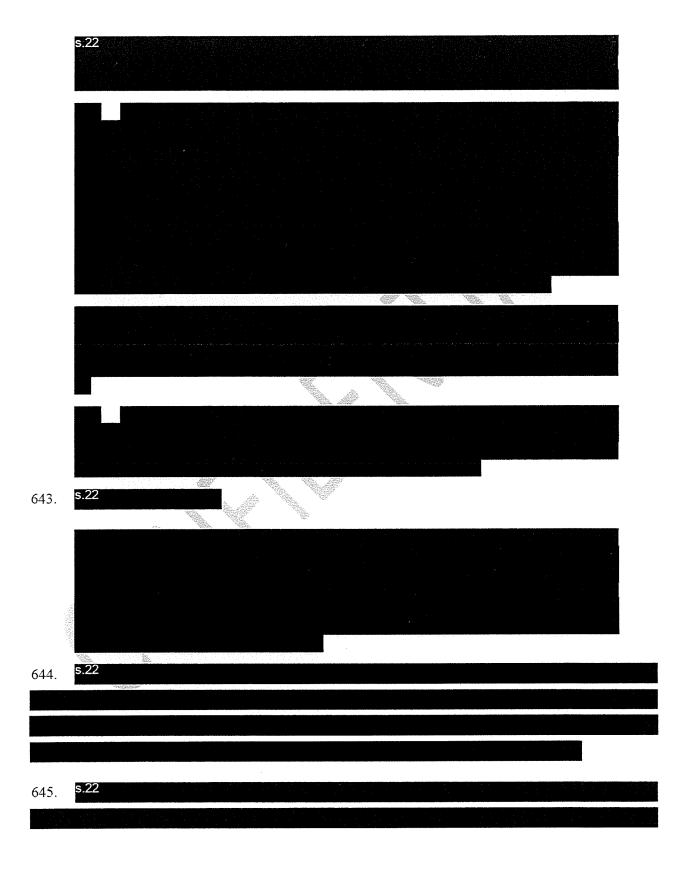


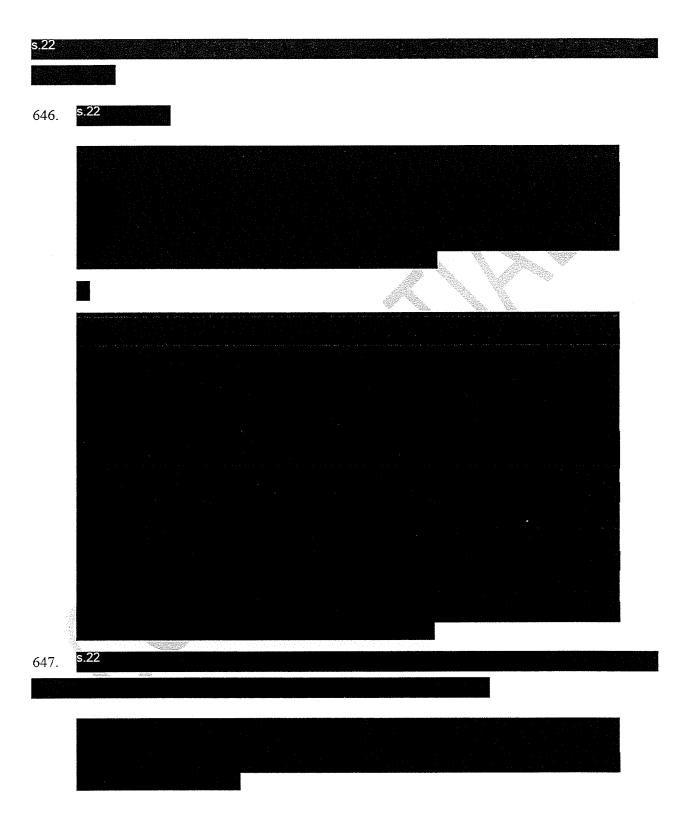


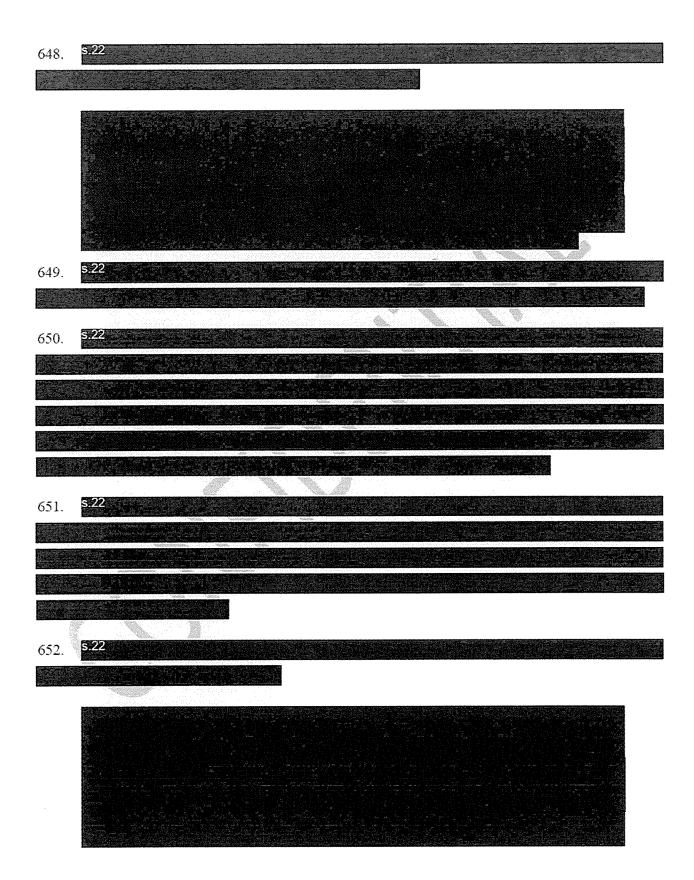


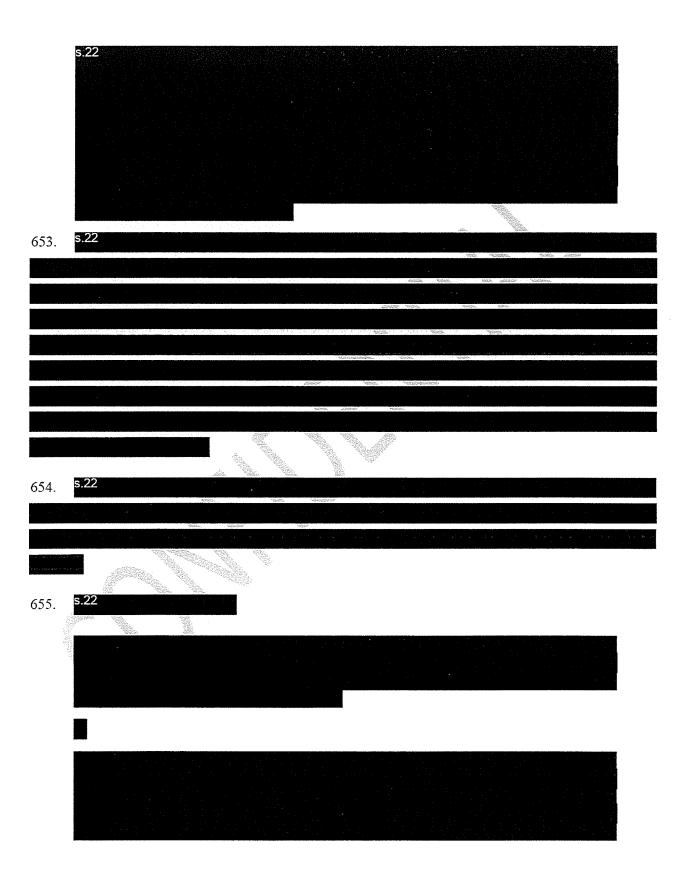


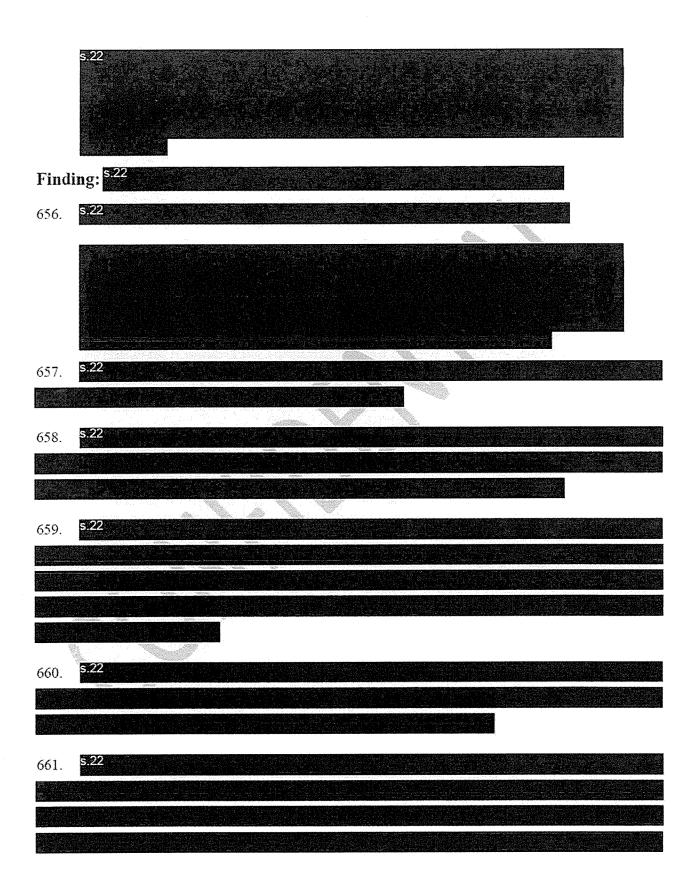
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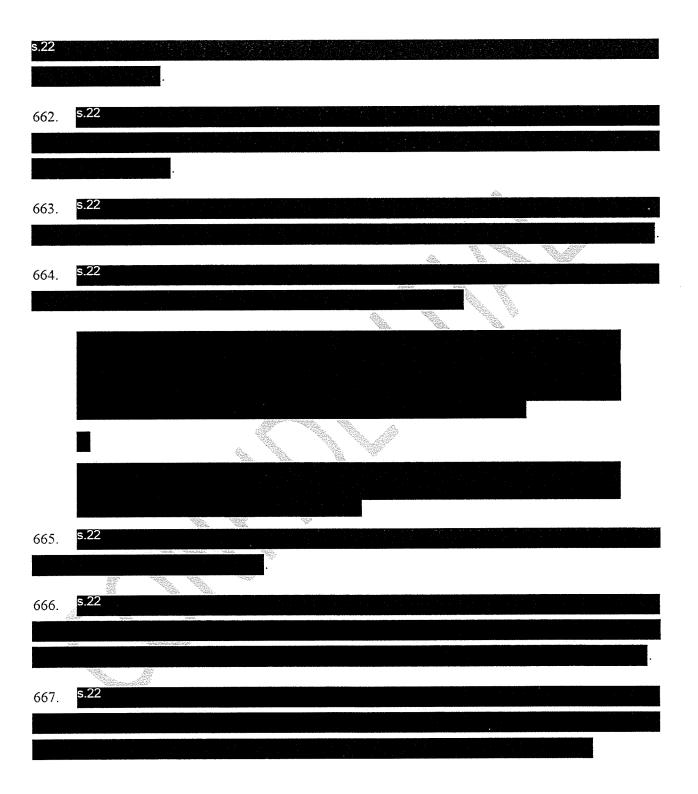


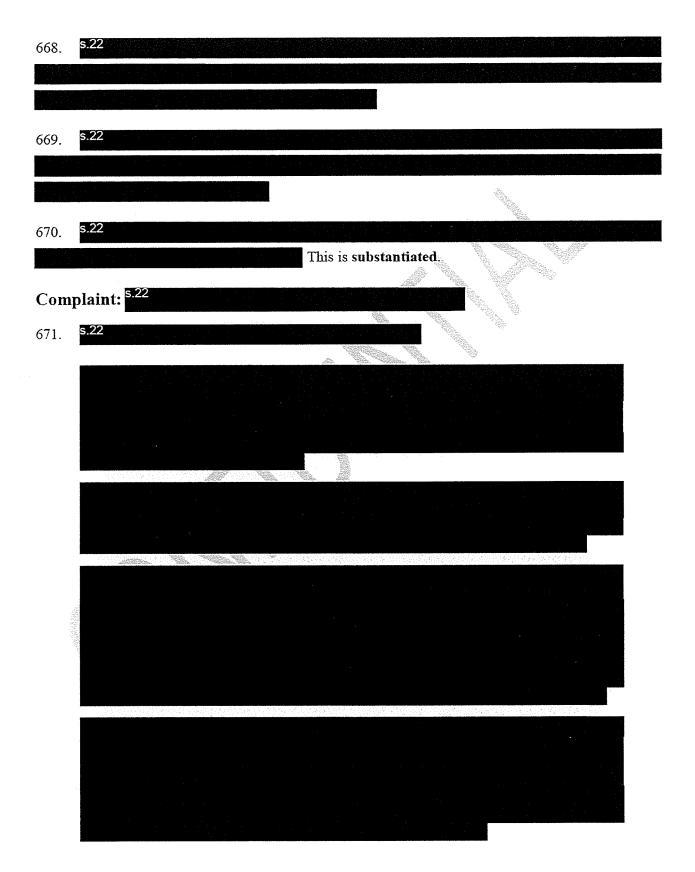


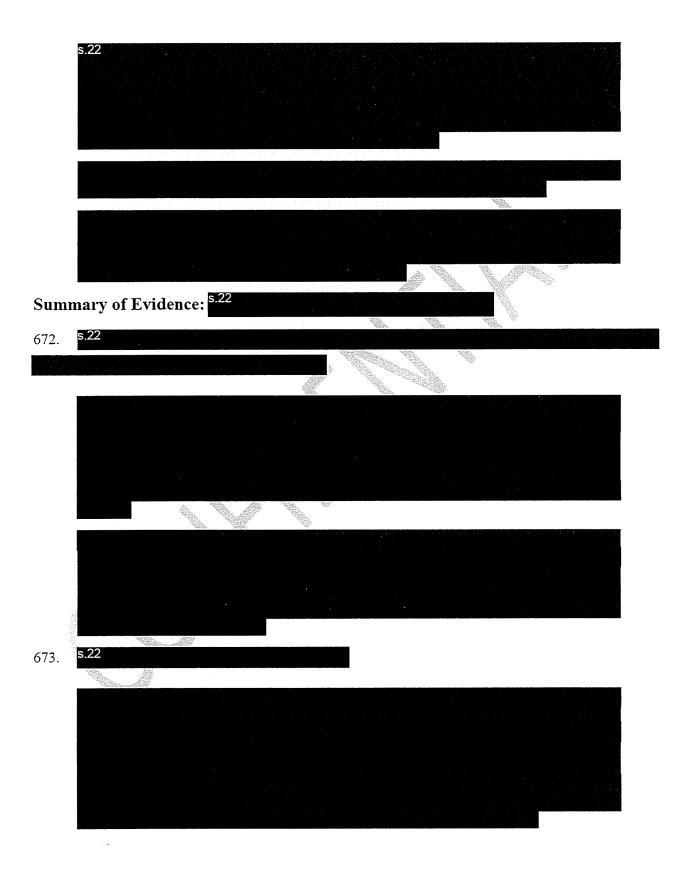




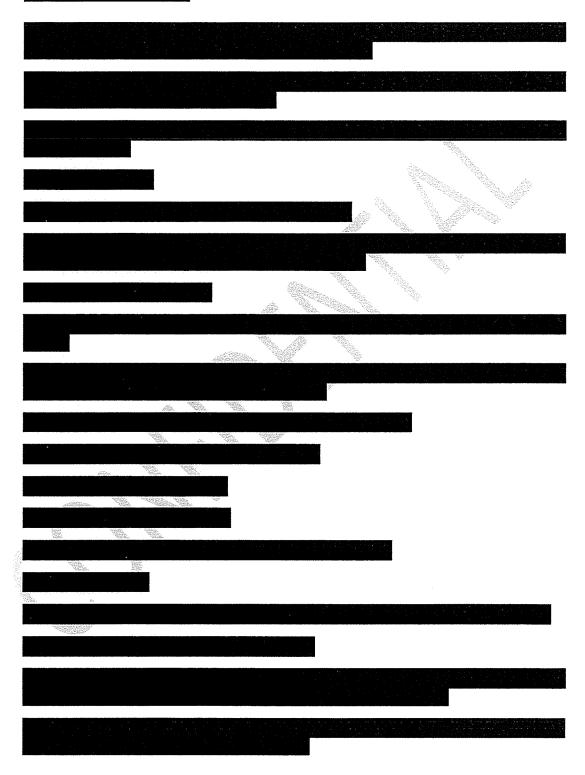


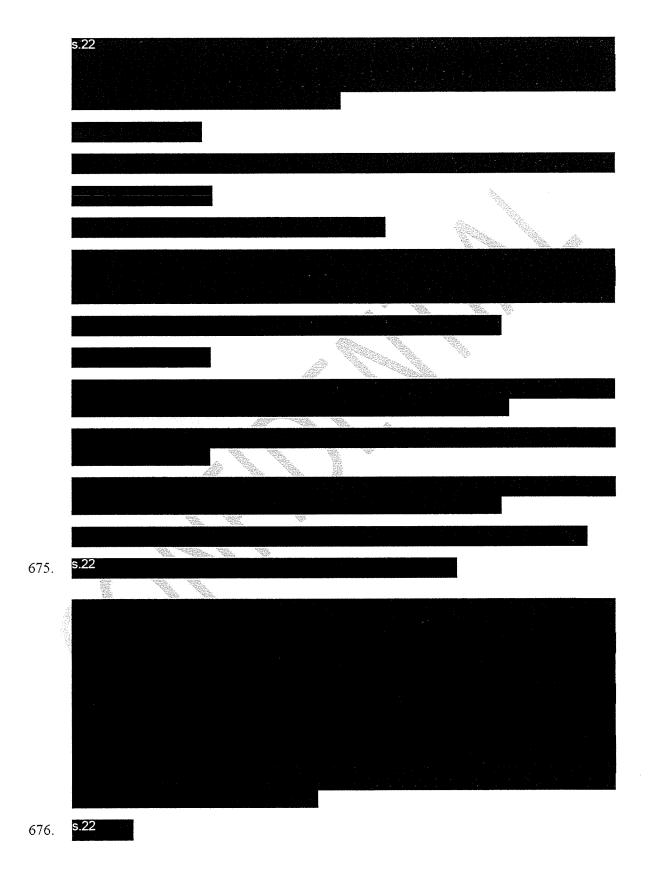


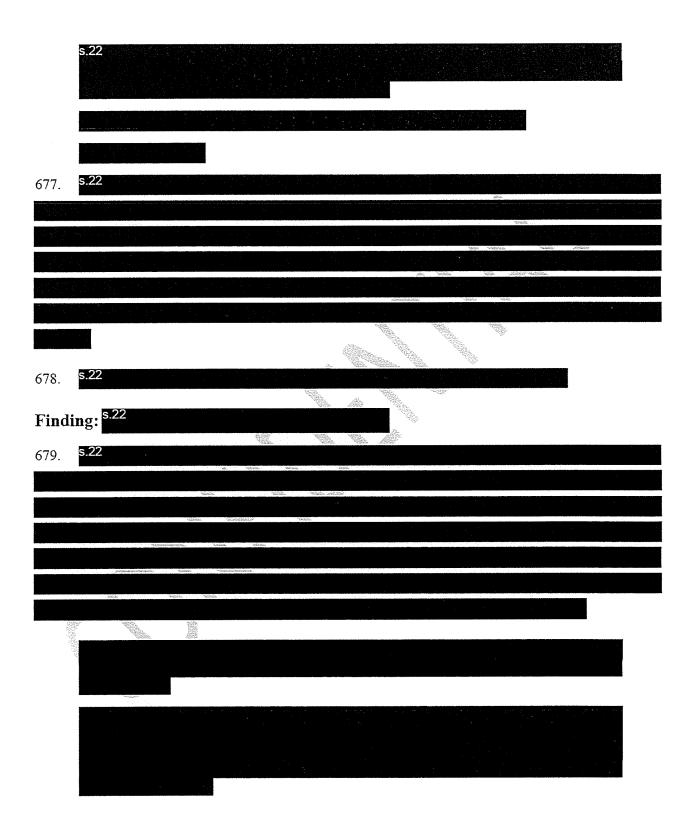




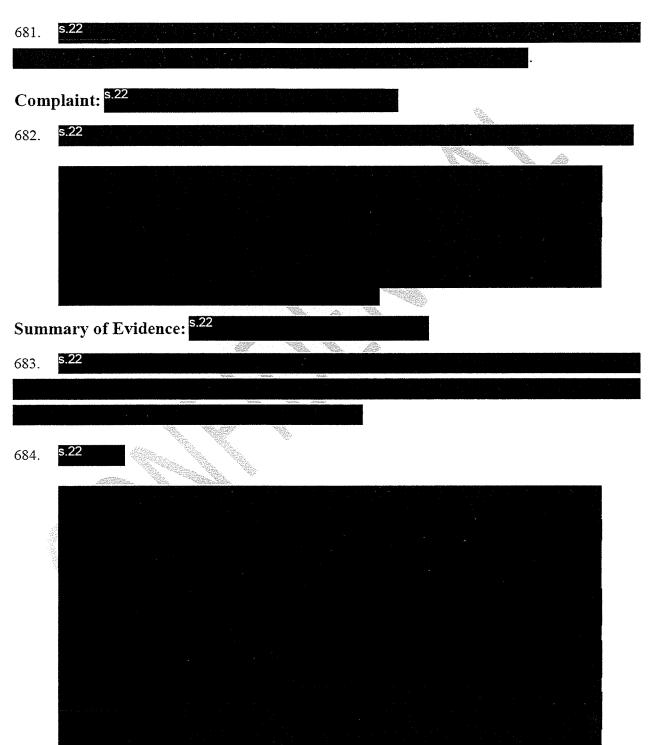
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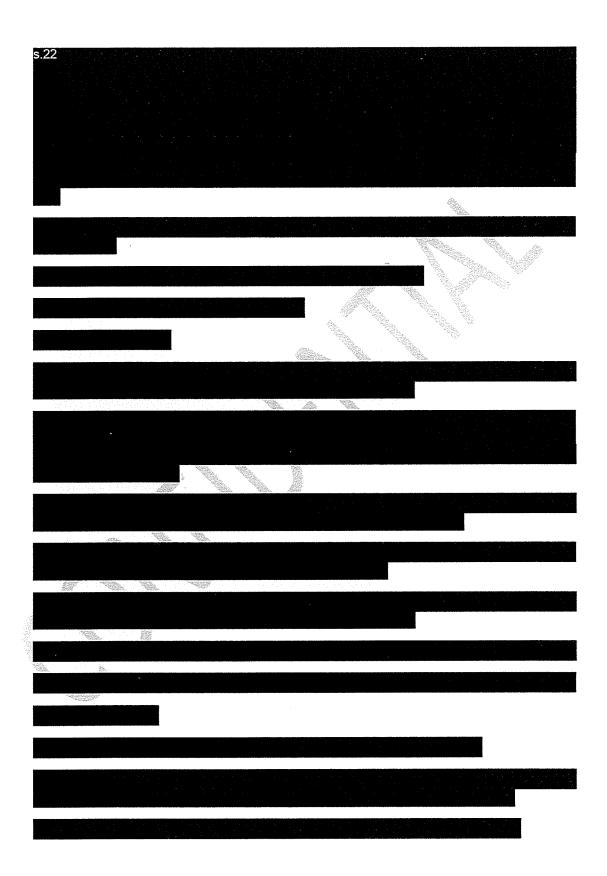




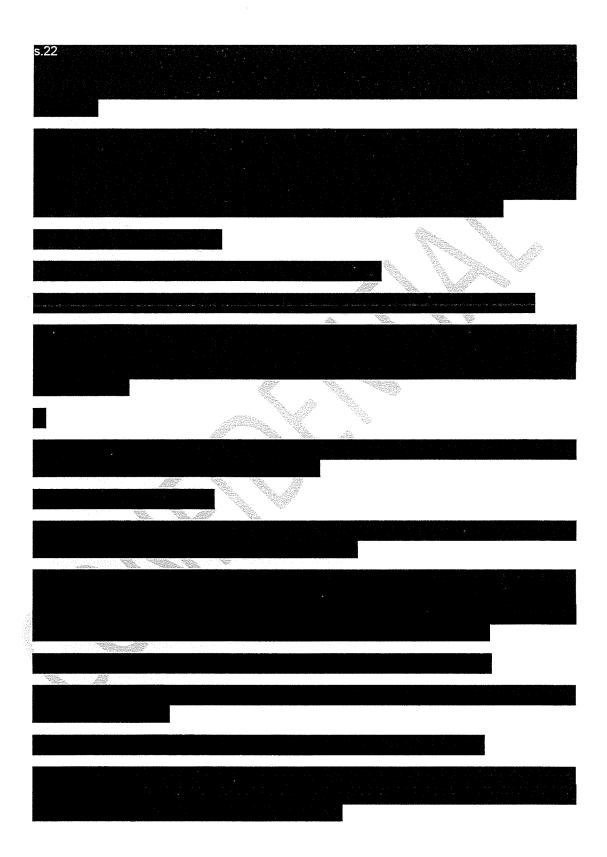


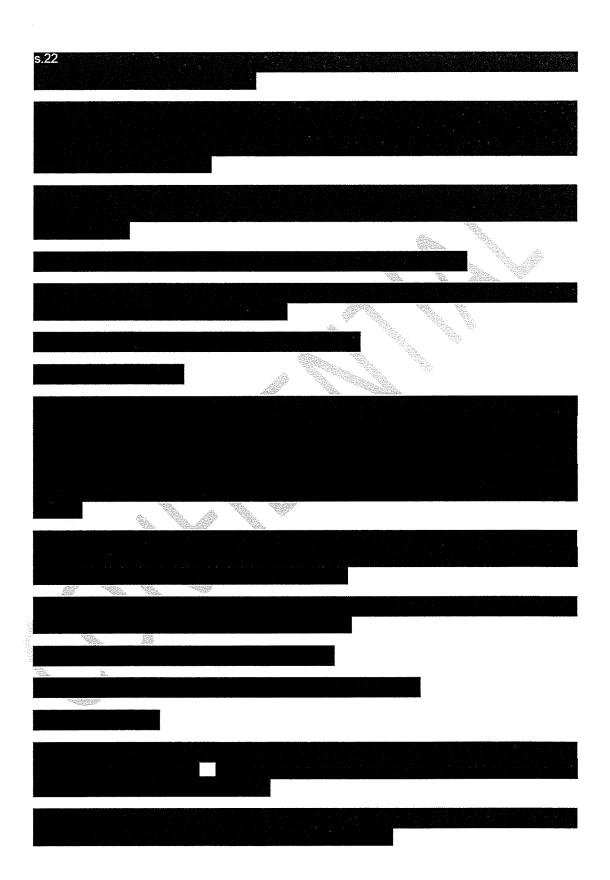
680. As there was insufficient evidence provided by 5.22 to investigate this and so find this complaint to be unsubstantiated as we also do regarding the other examples she provided.

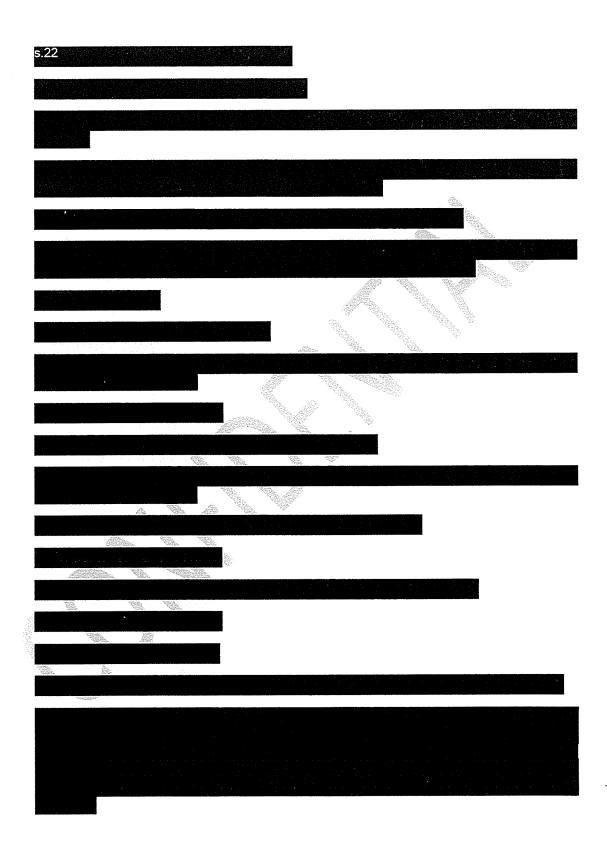


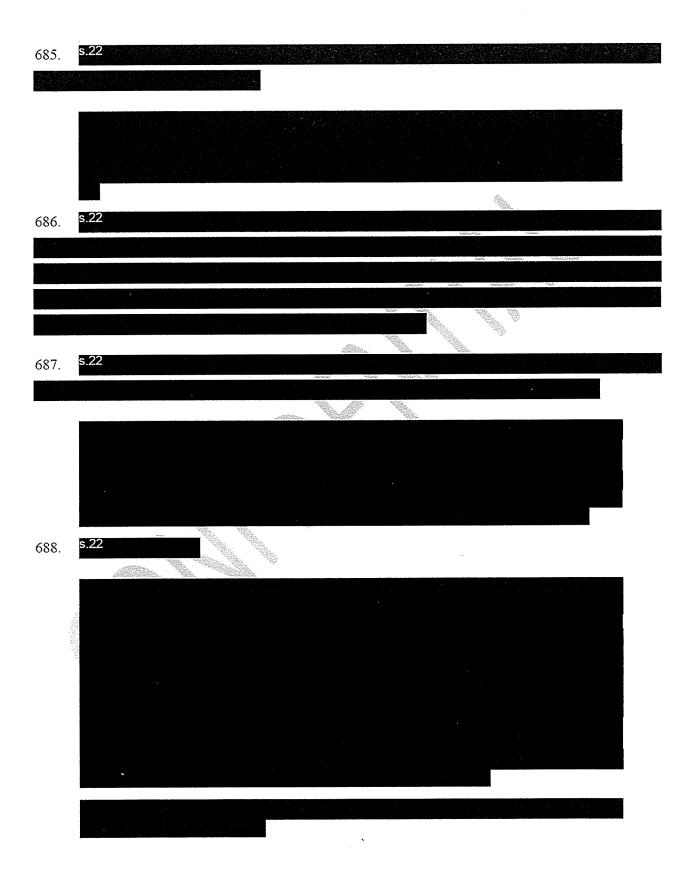


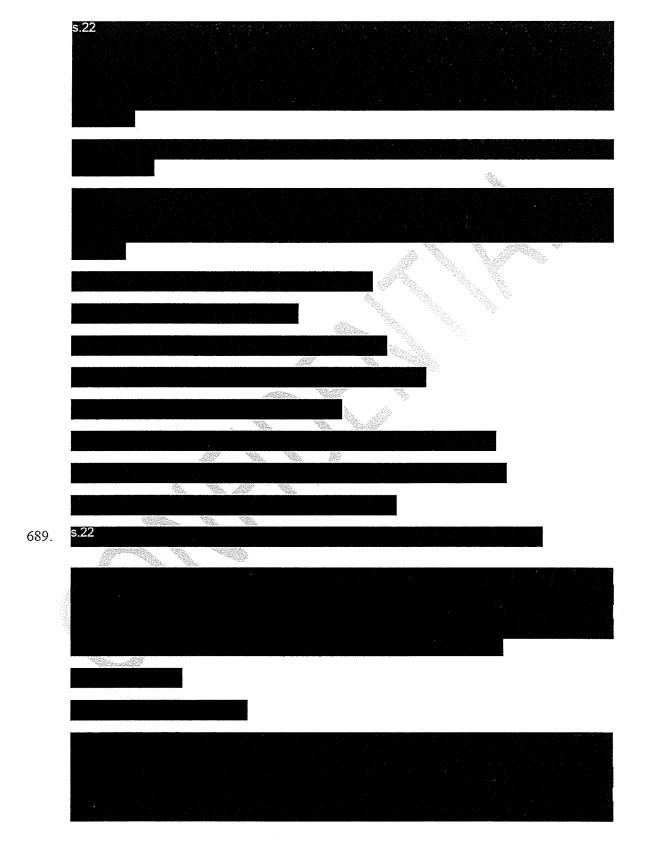


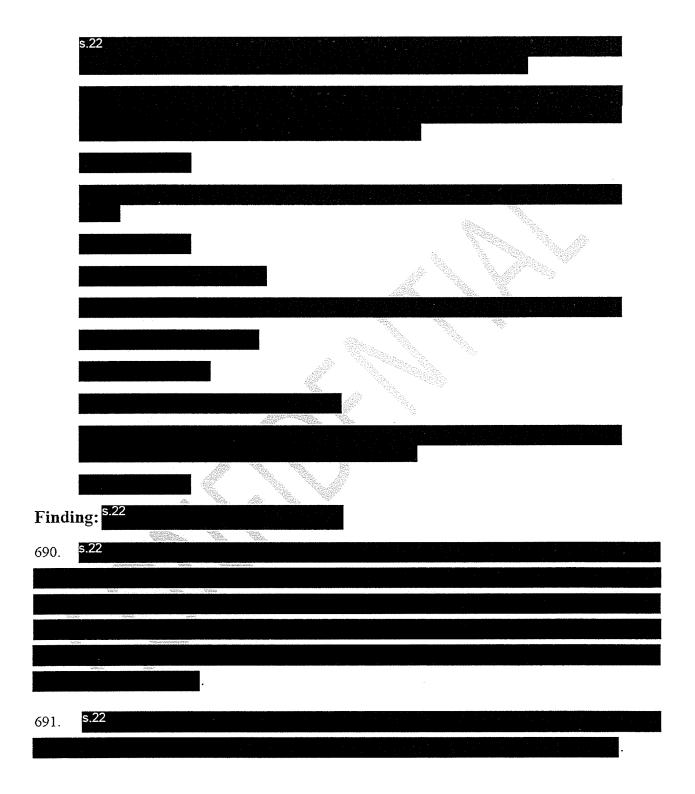


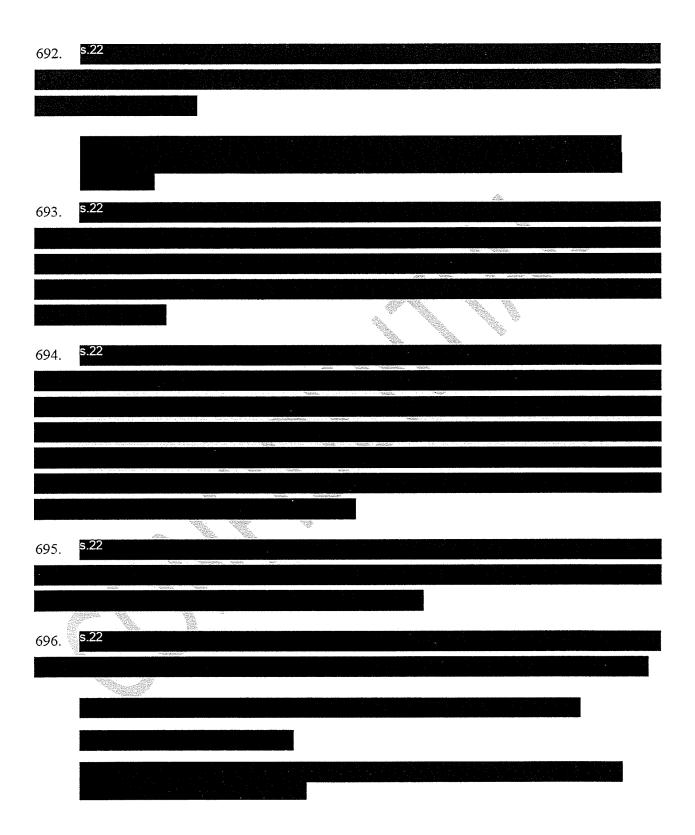


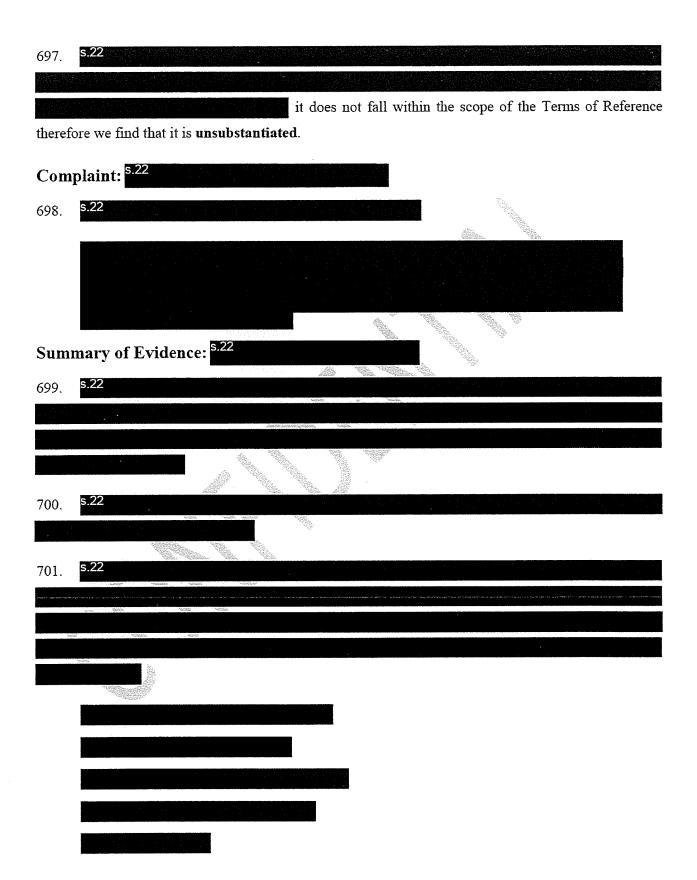


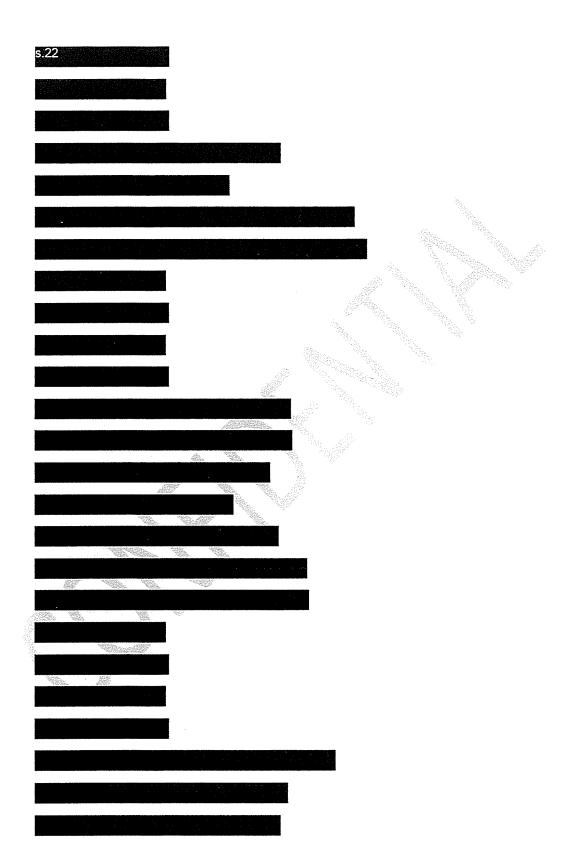


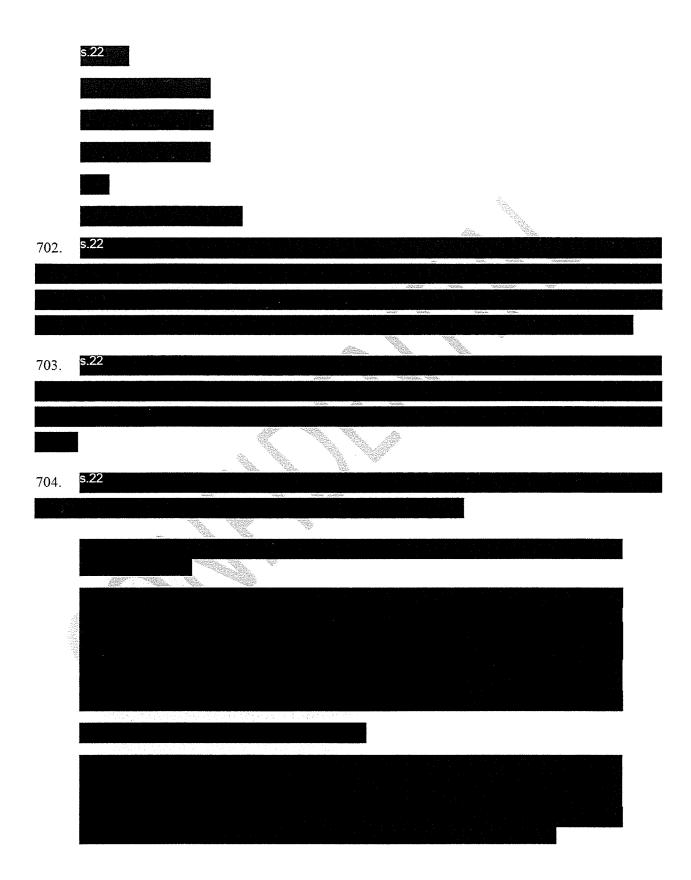


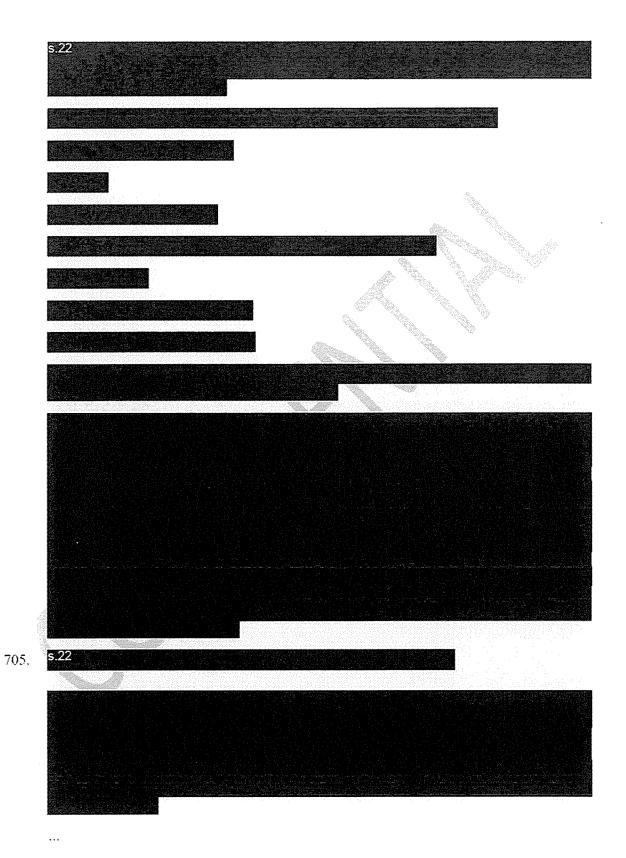


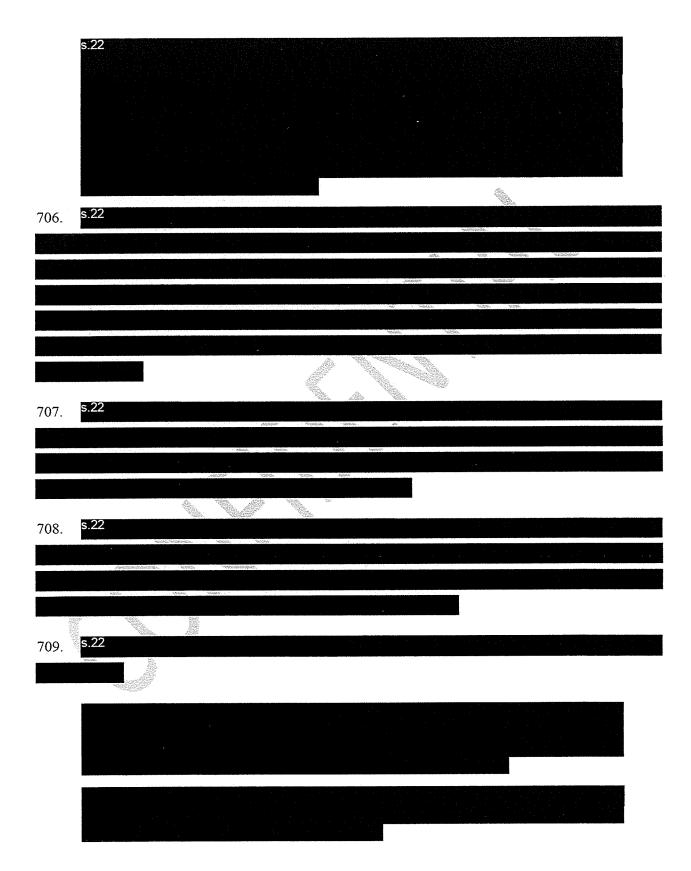


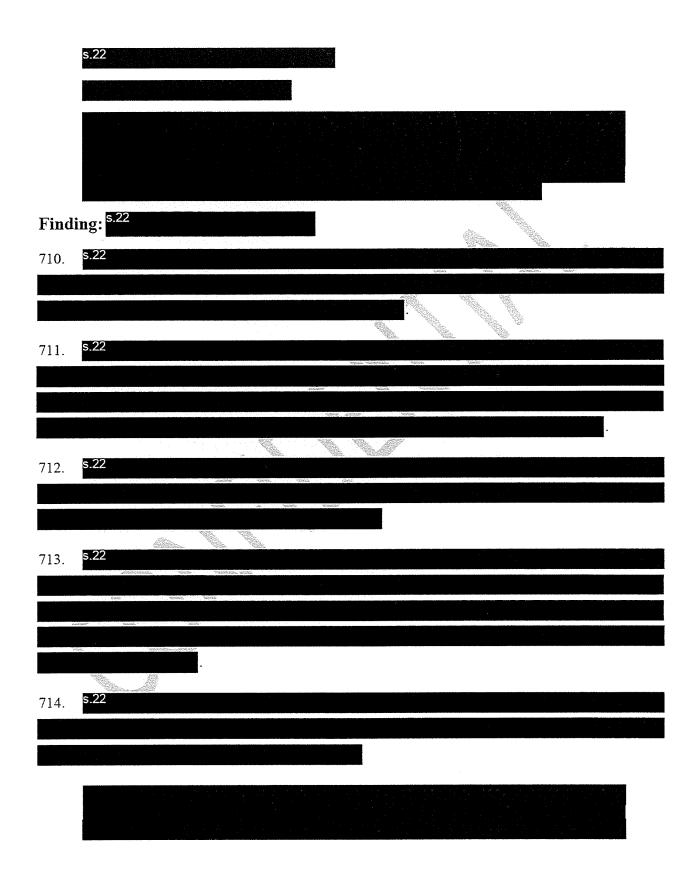


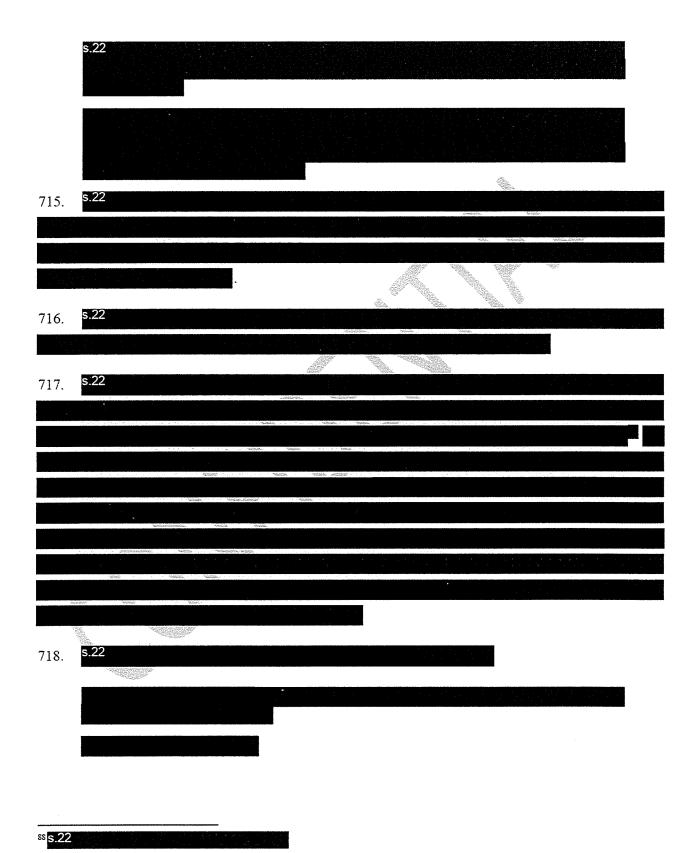


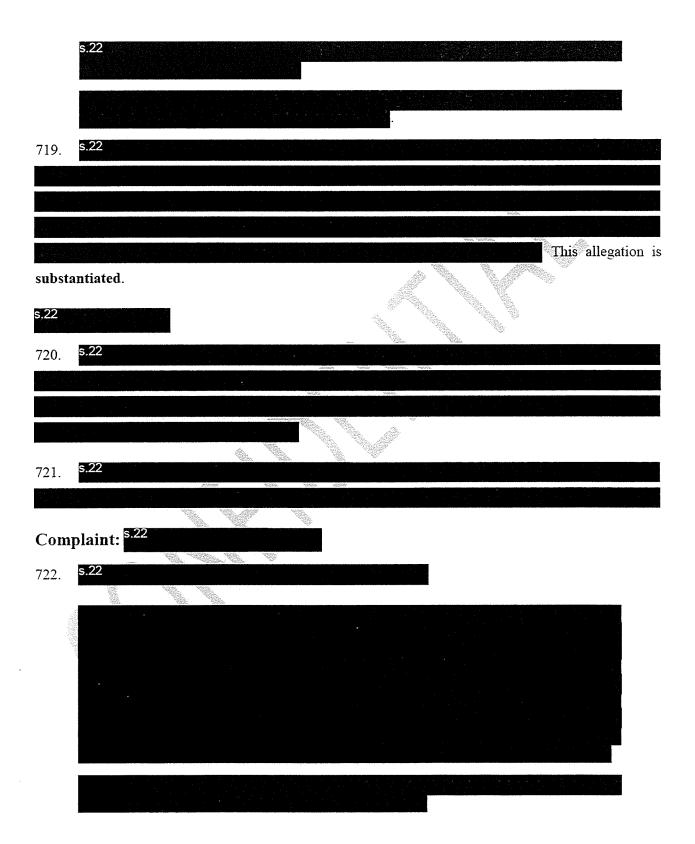


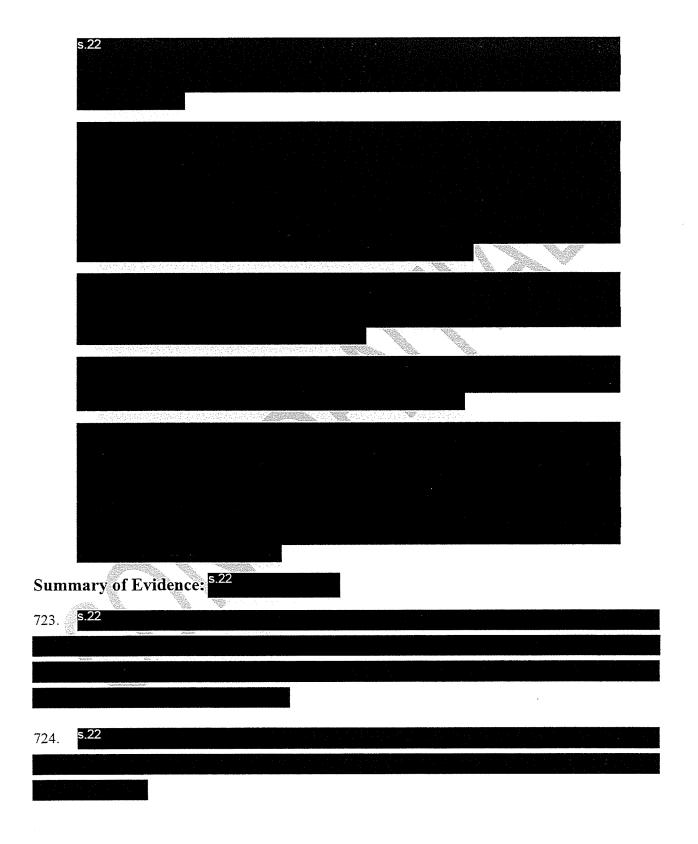


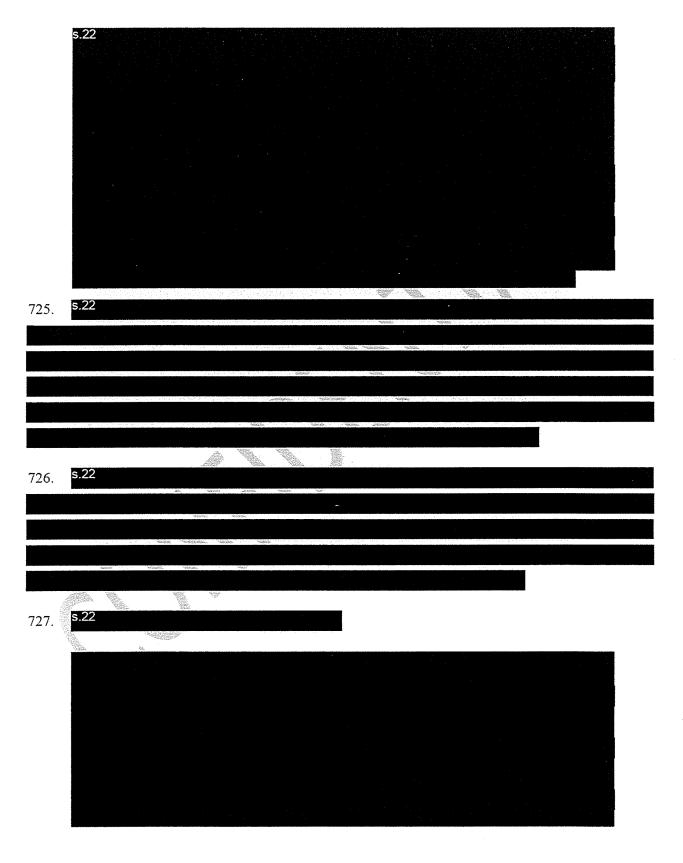


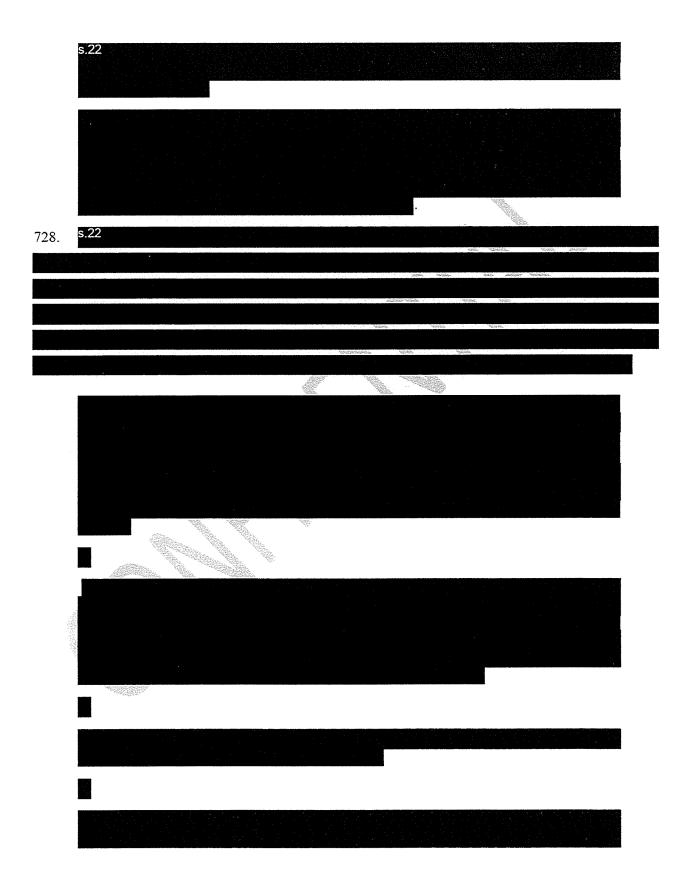


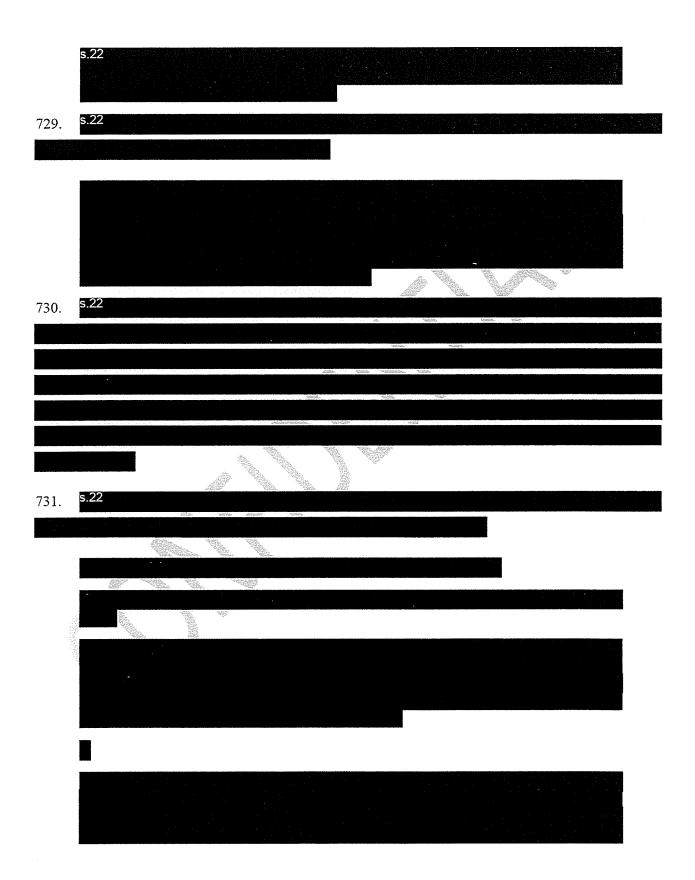


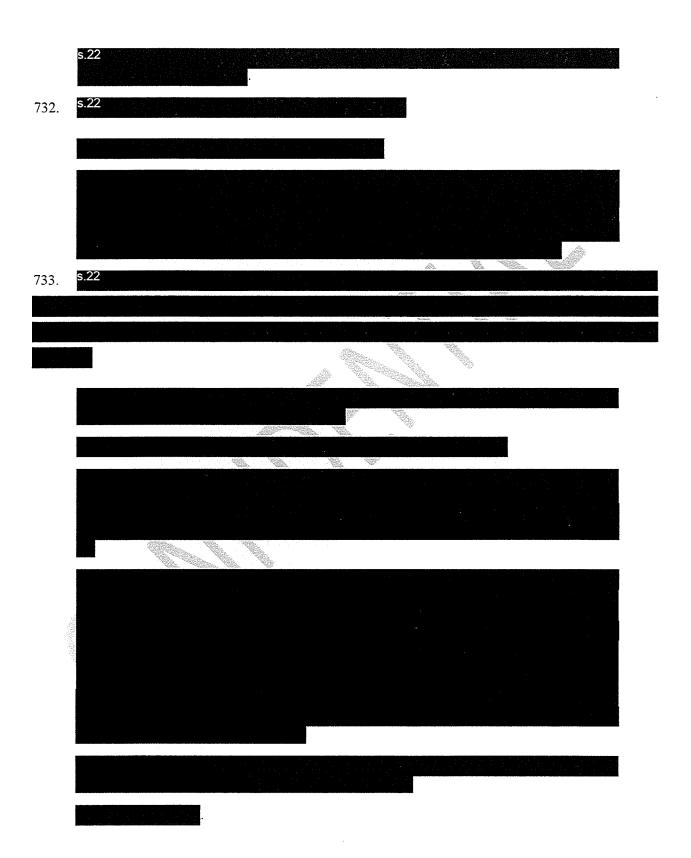


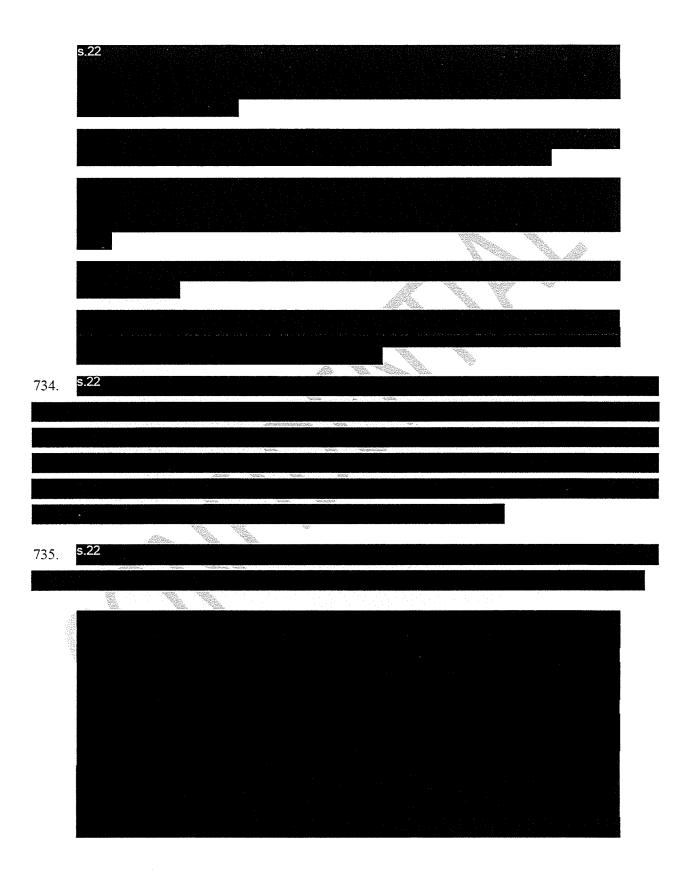


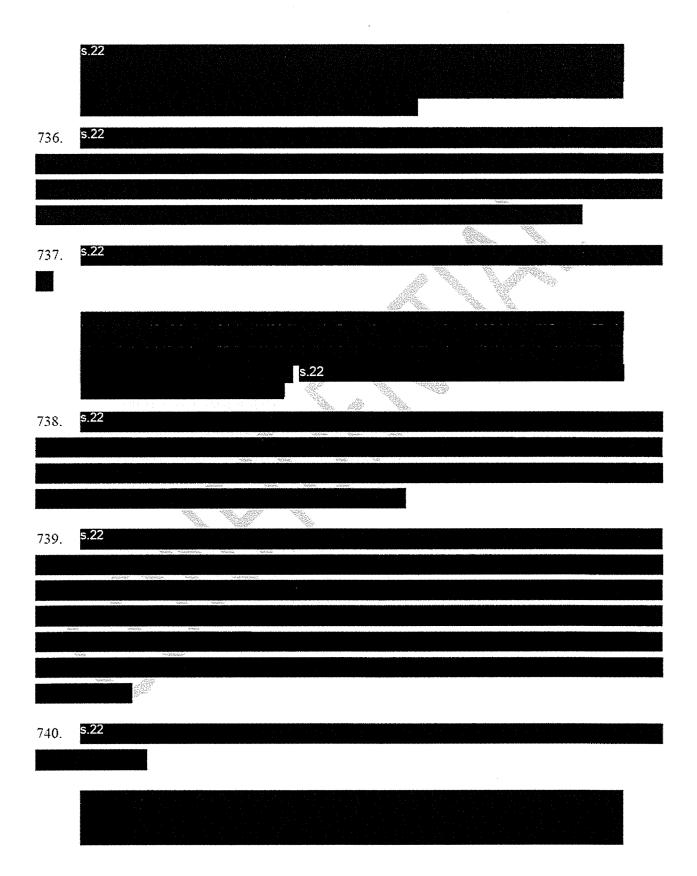


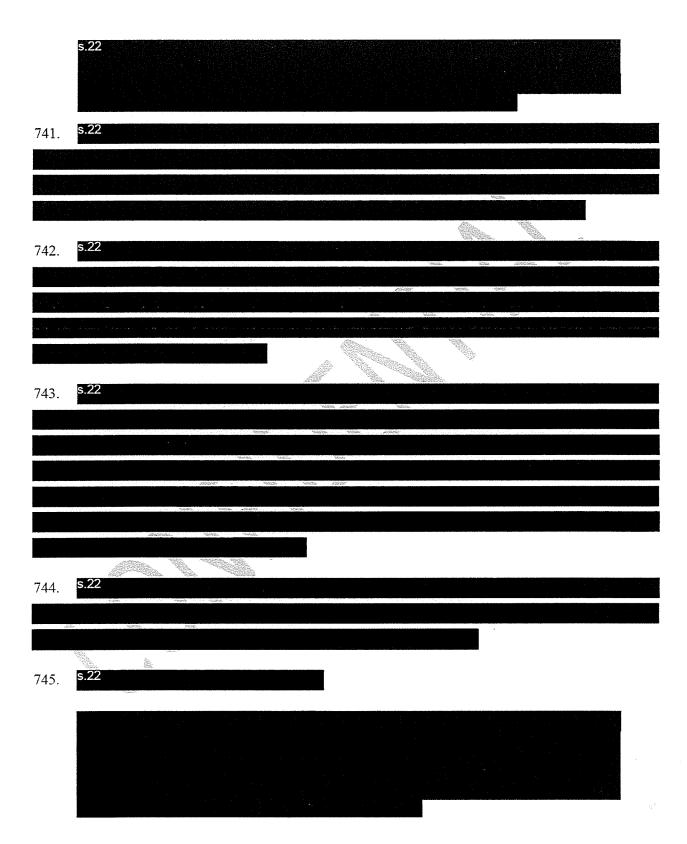




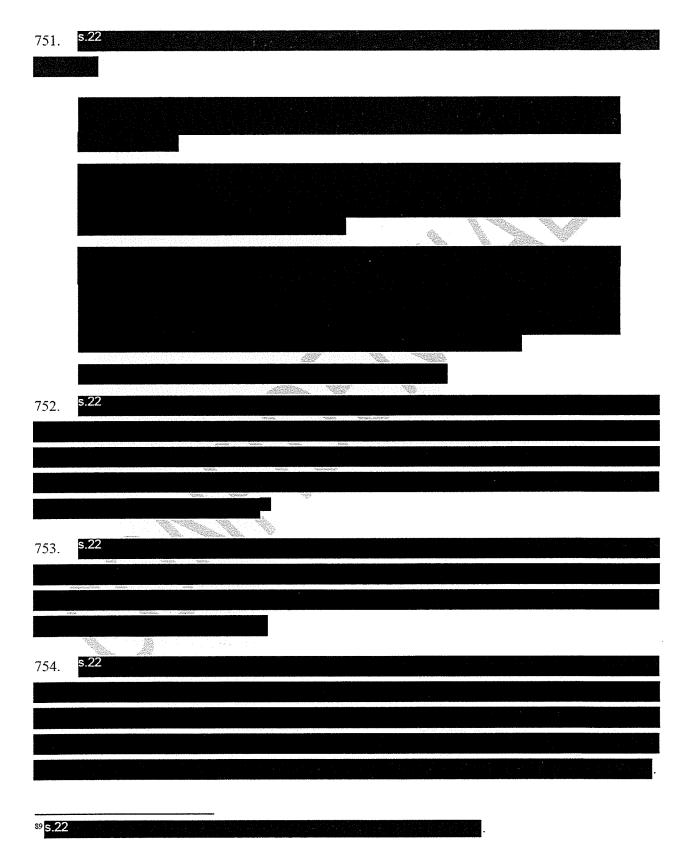


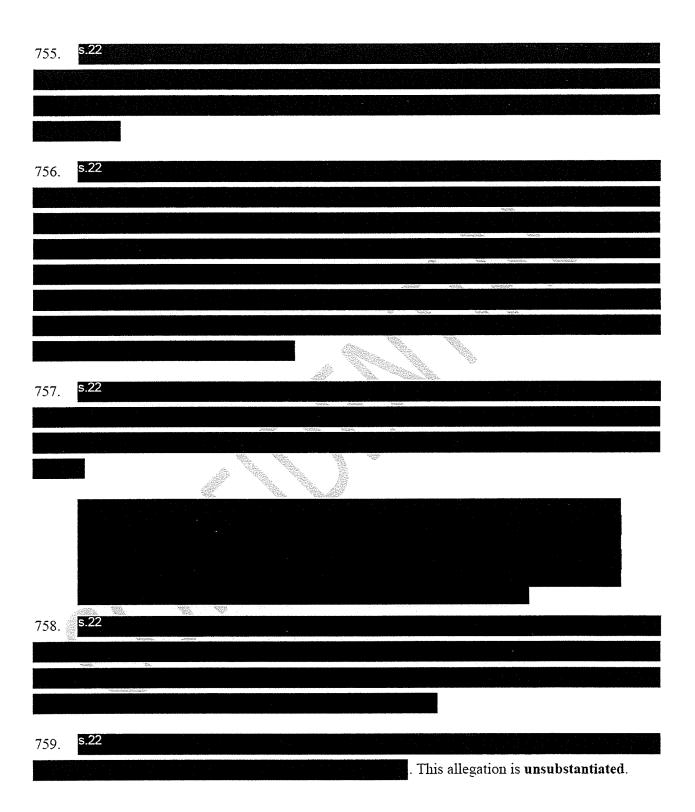




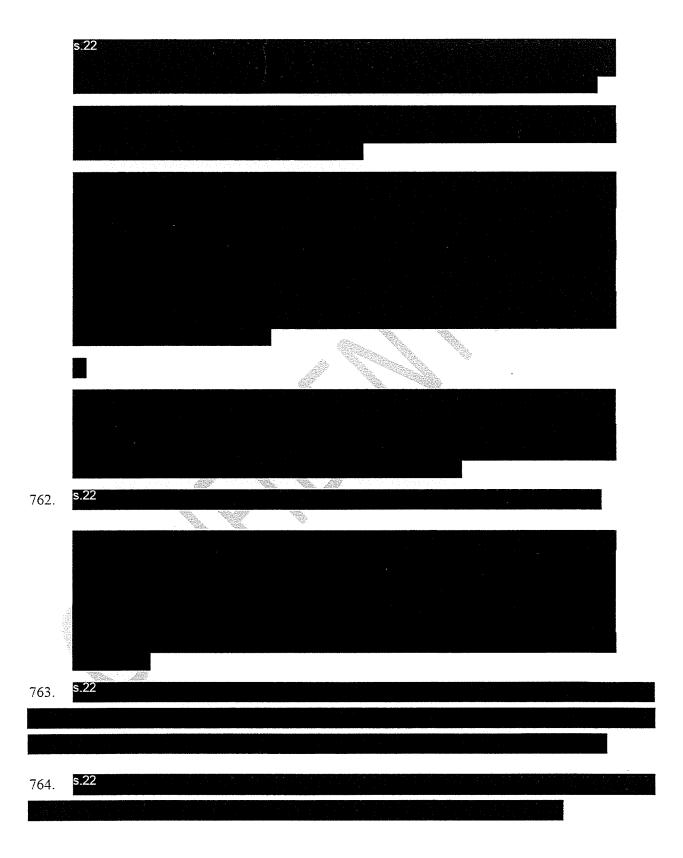


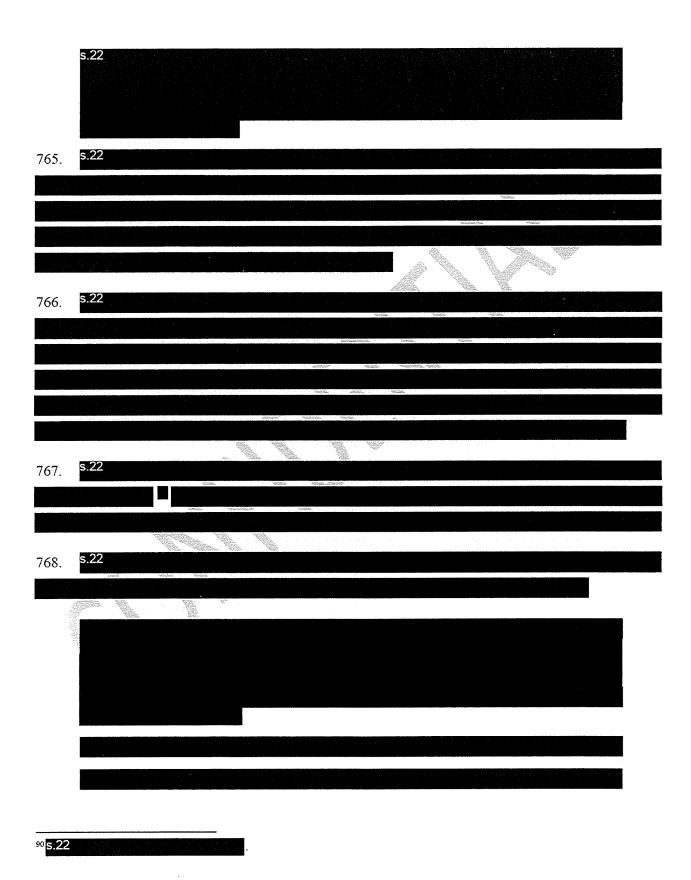
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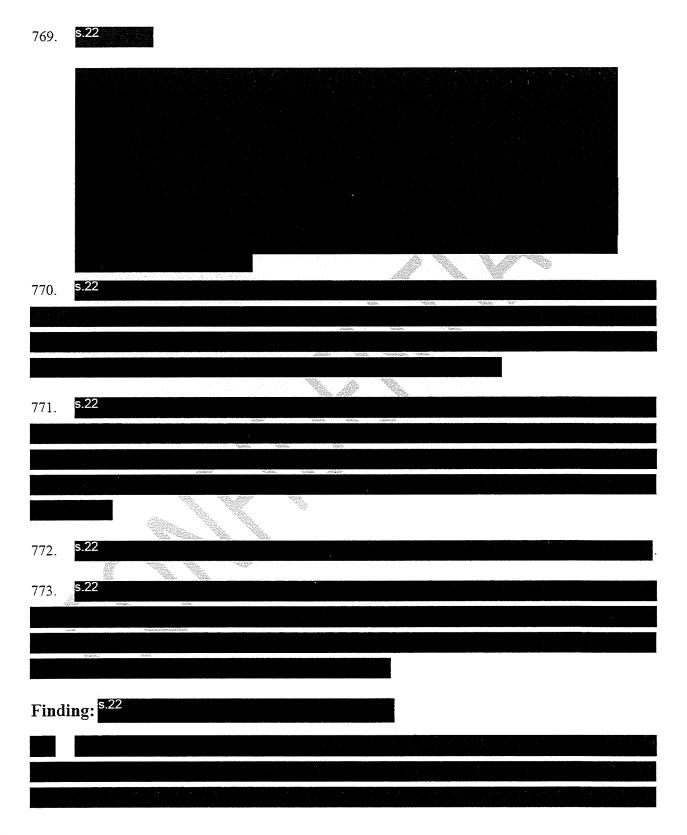




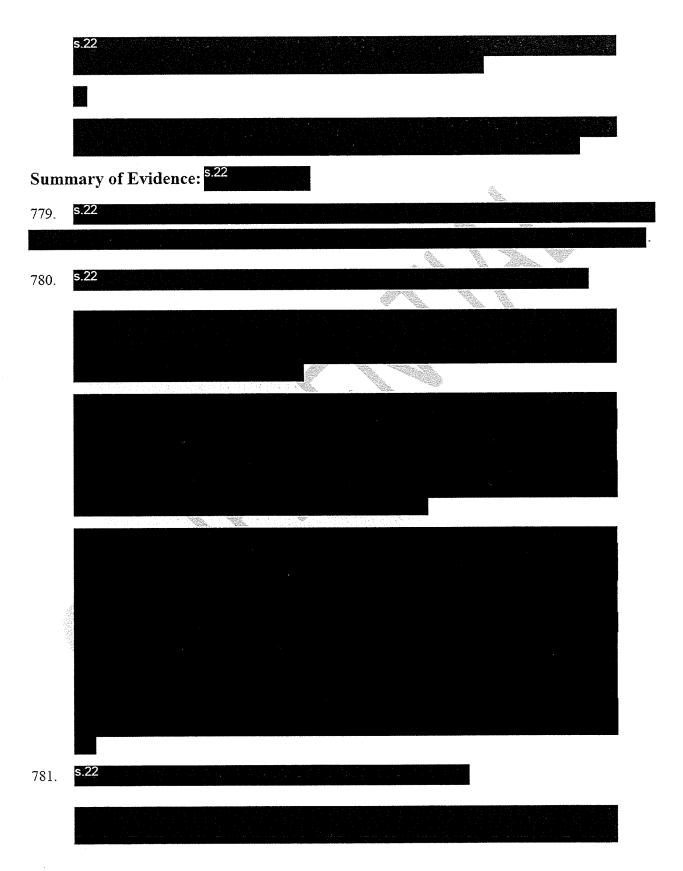
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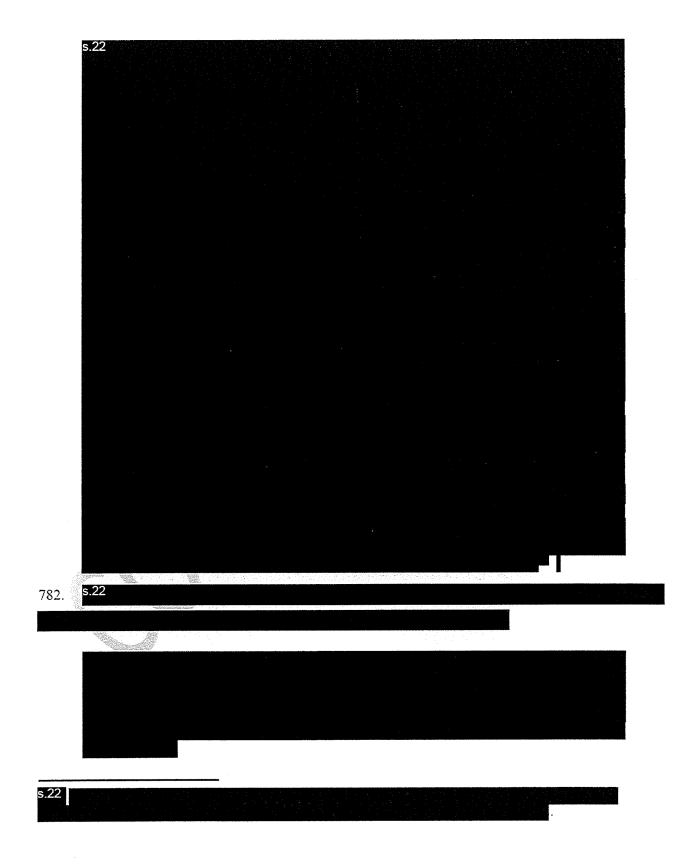


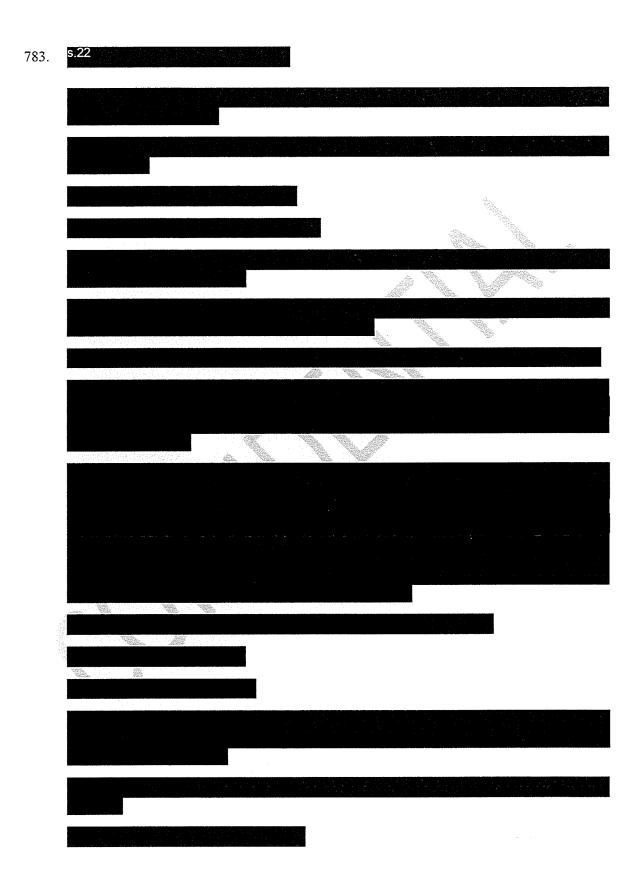


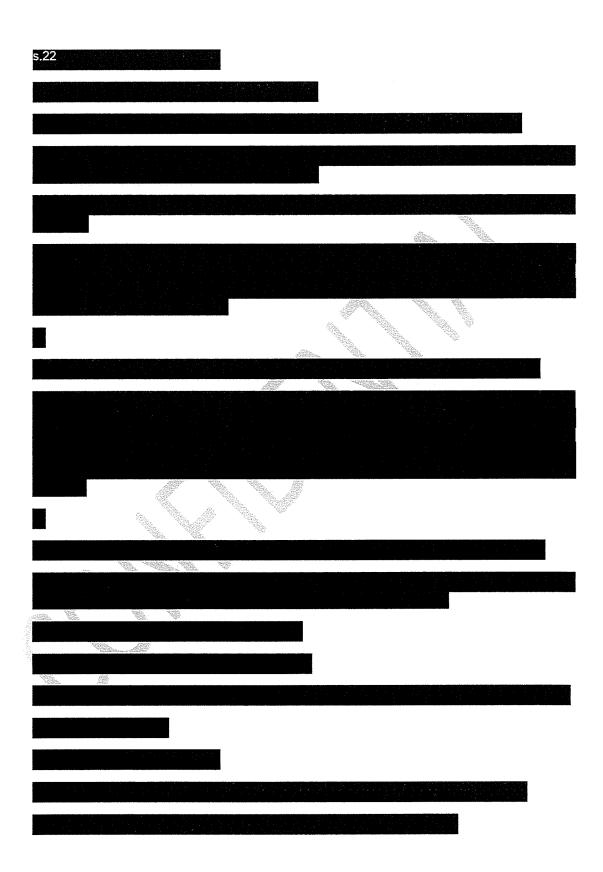


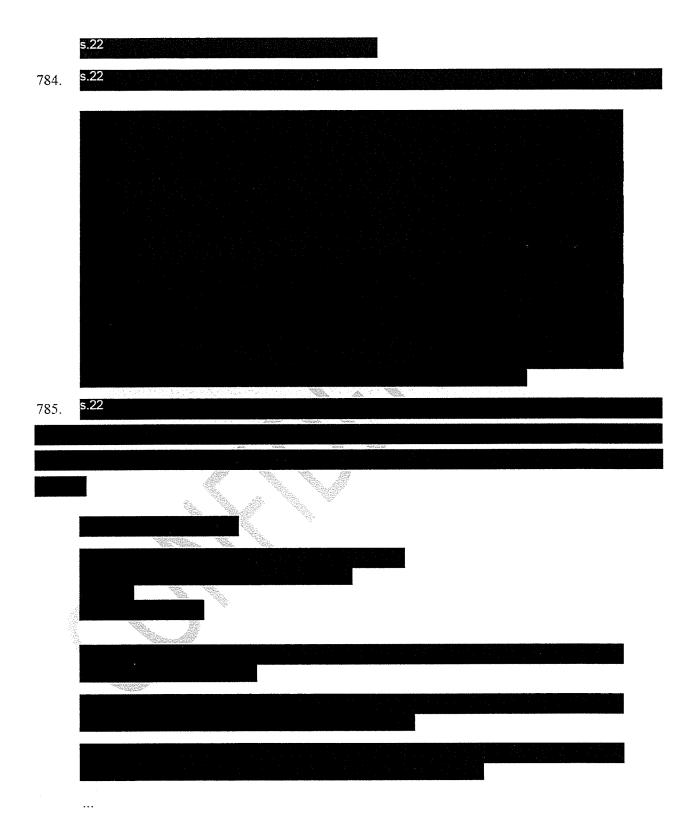
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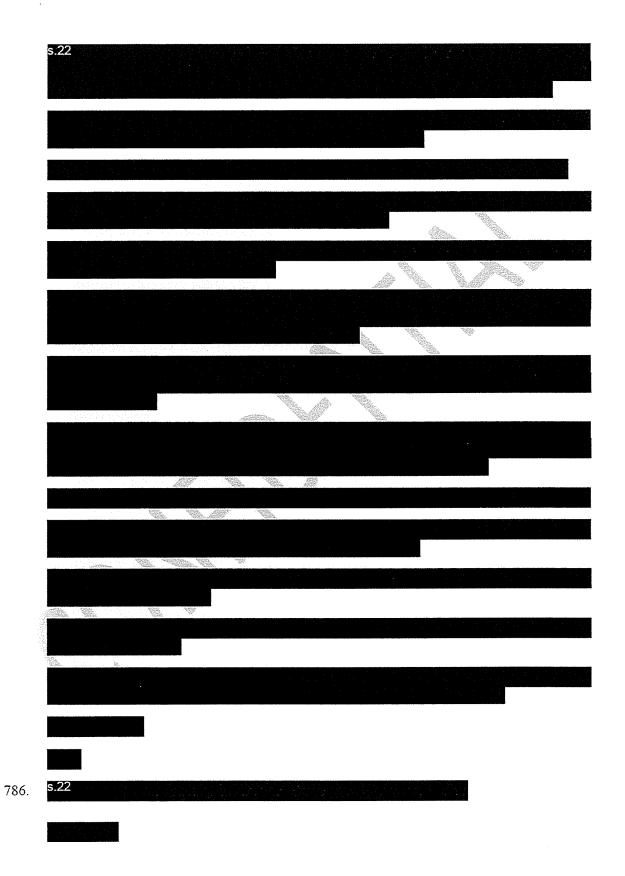


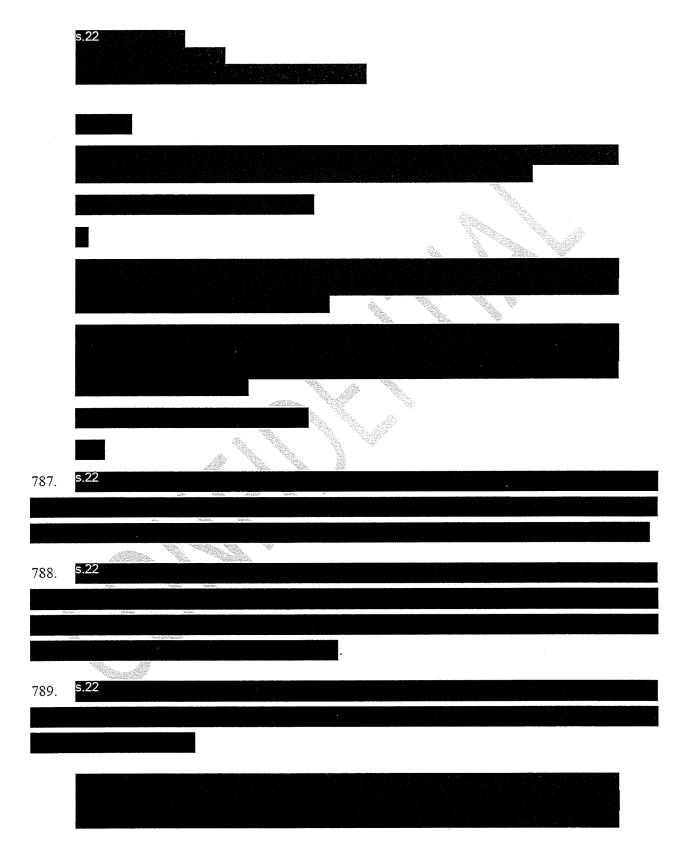


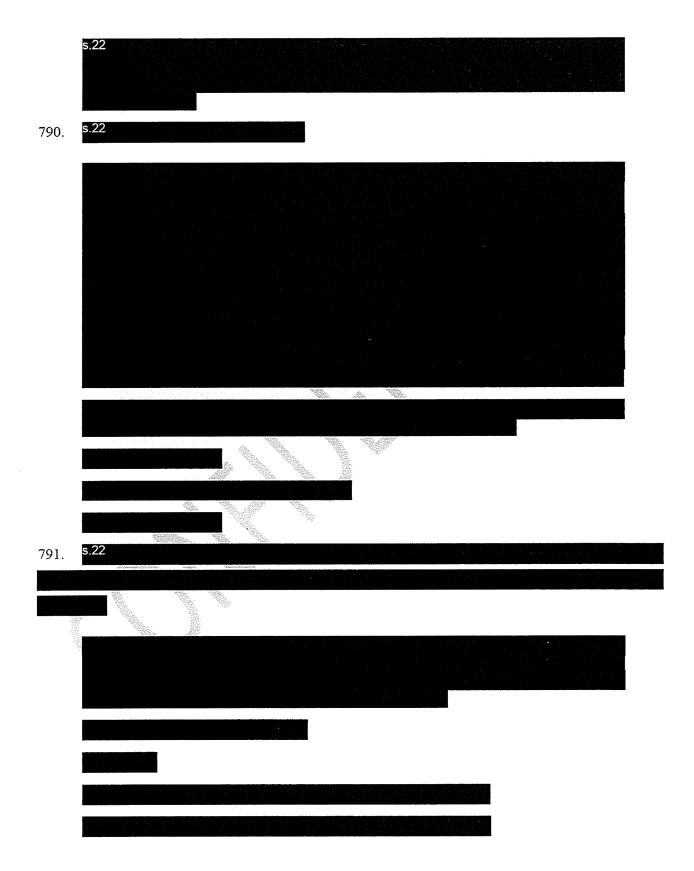


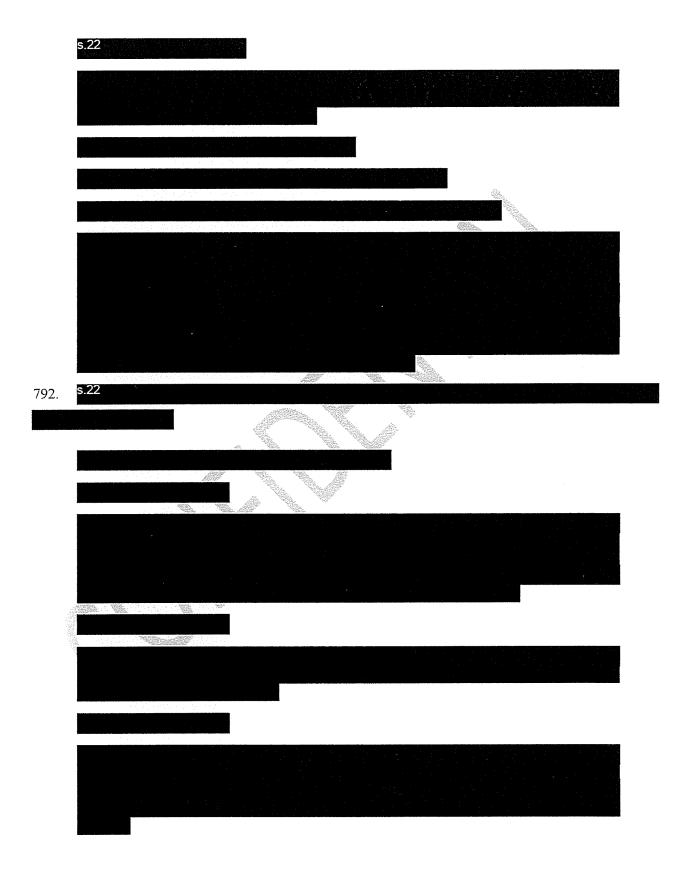


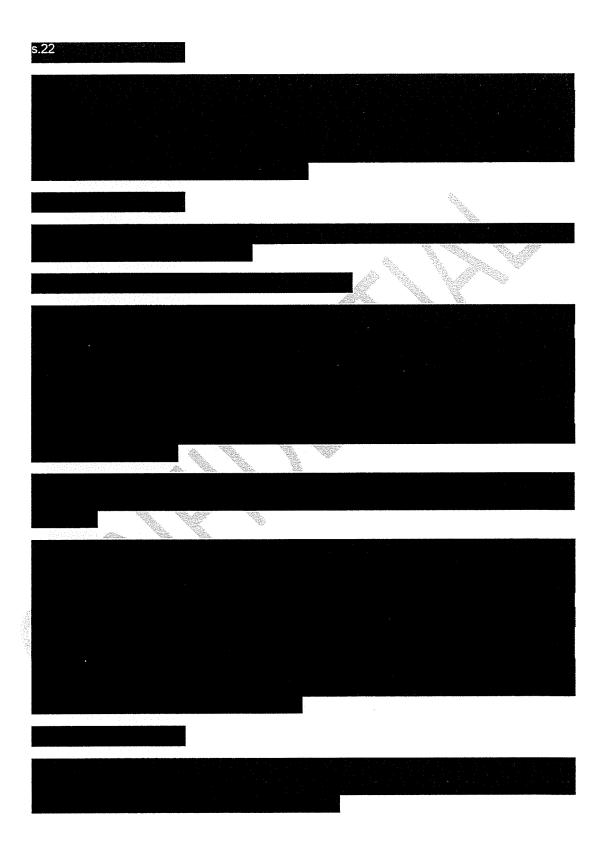


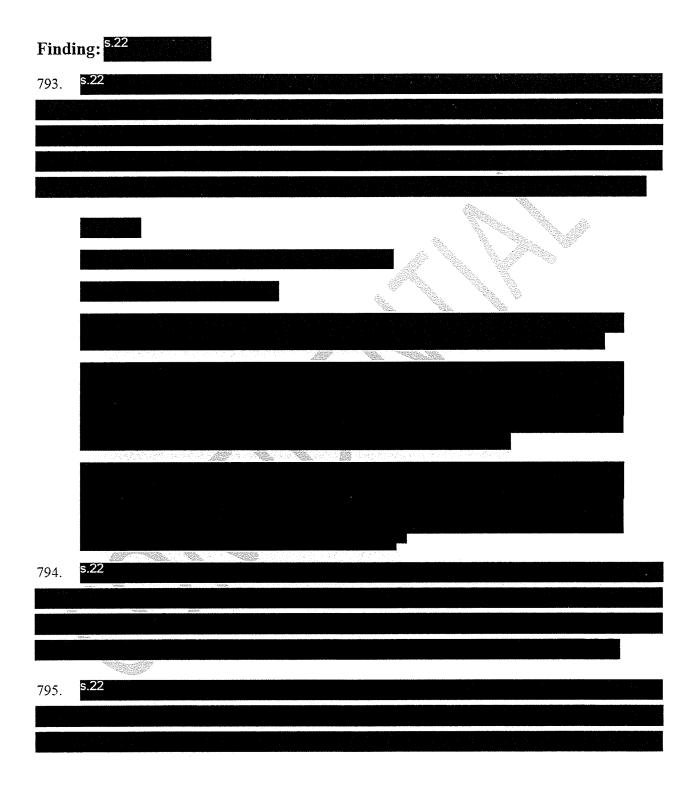


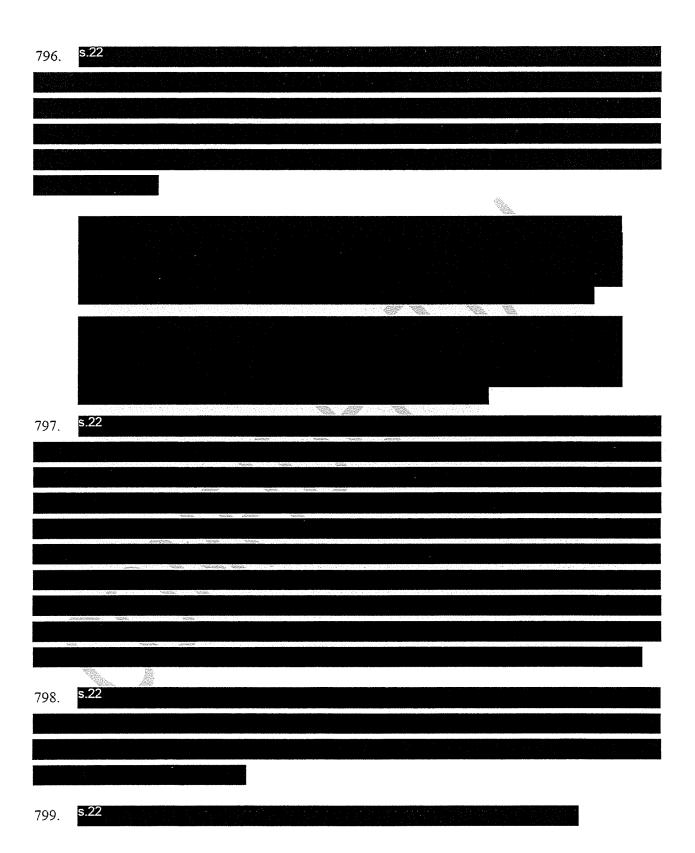


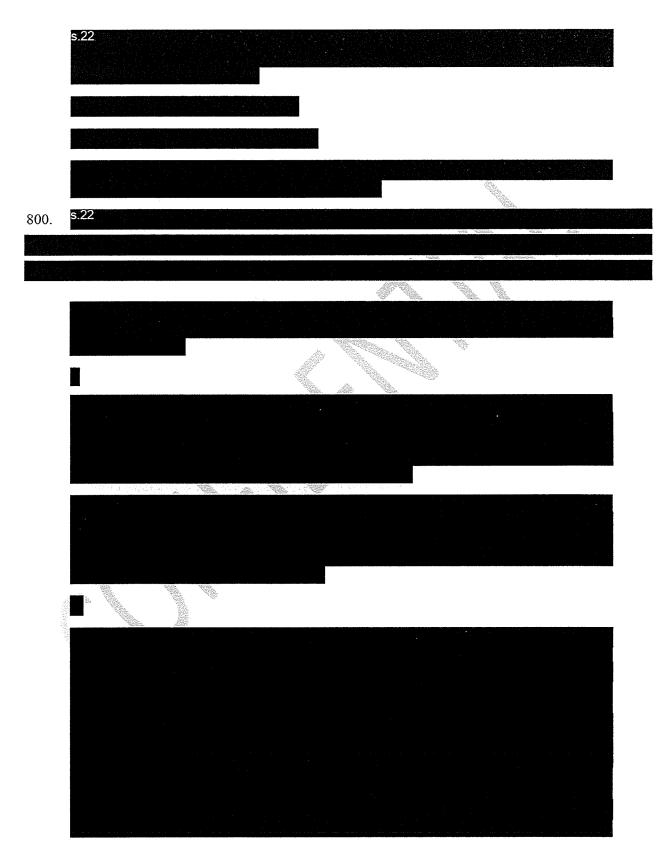


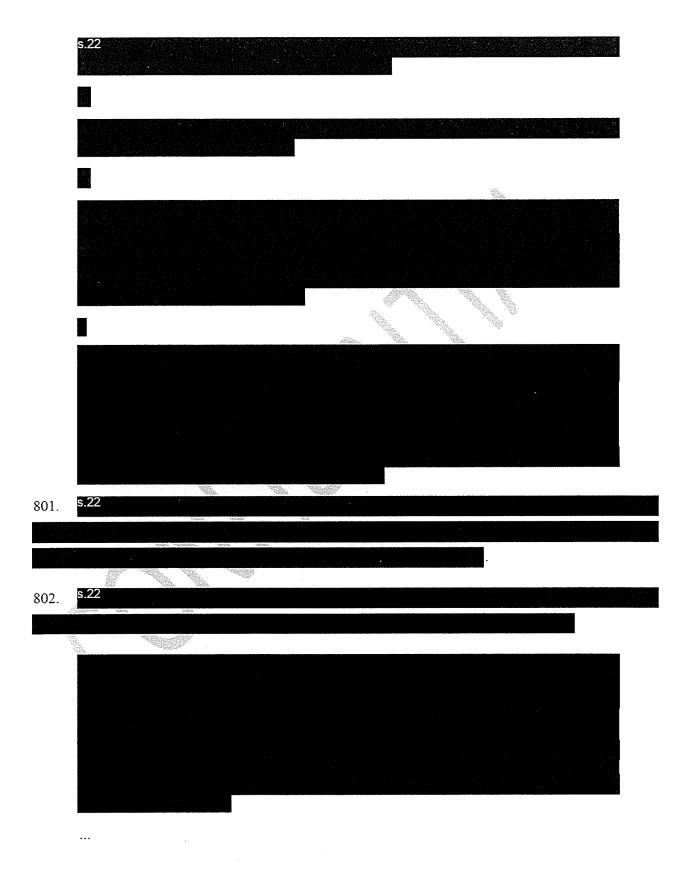


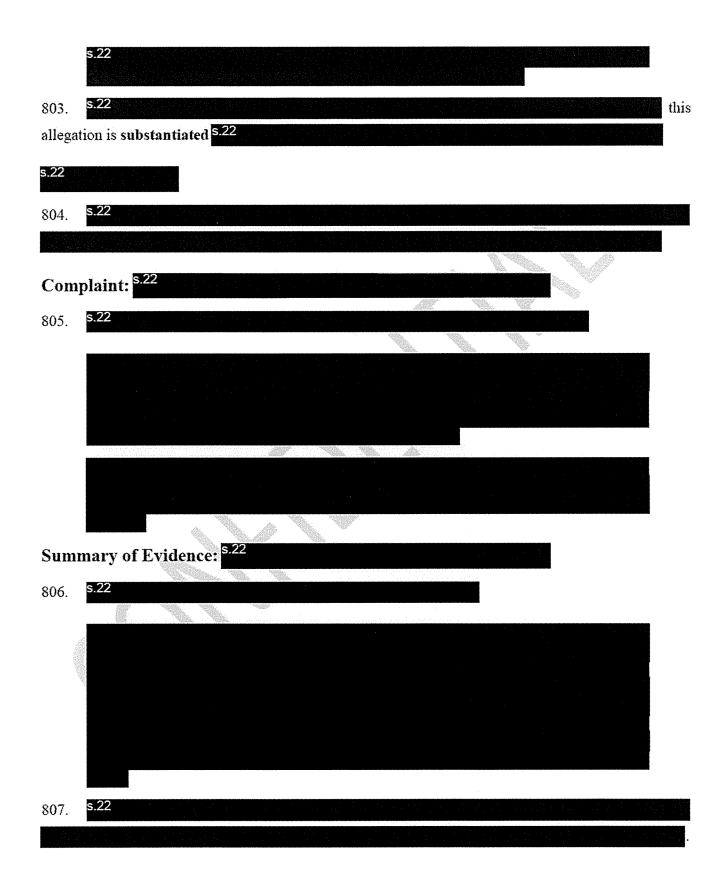


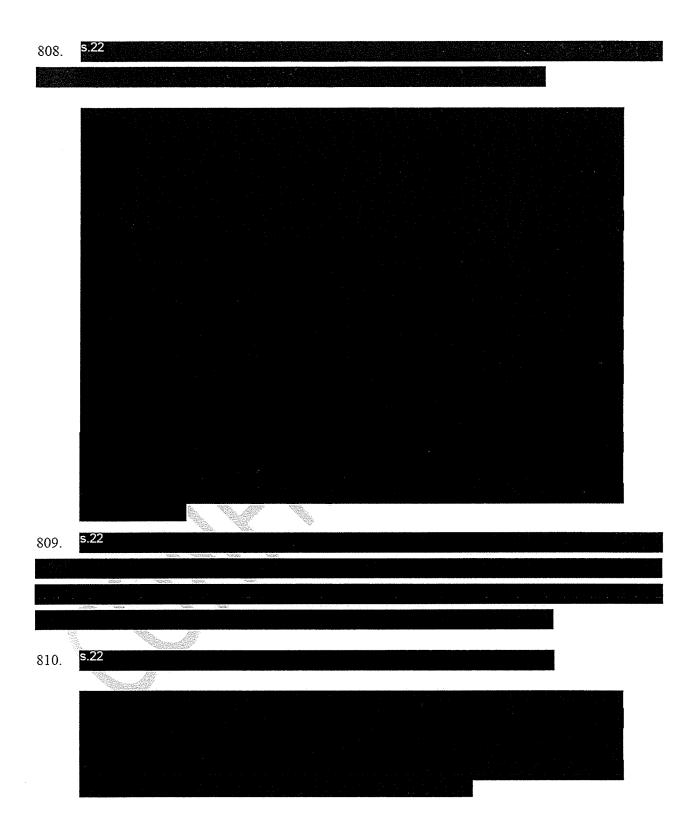


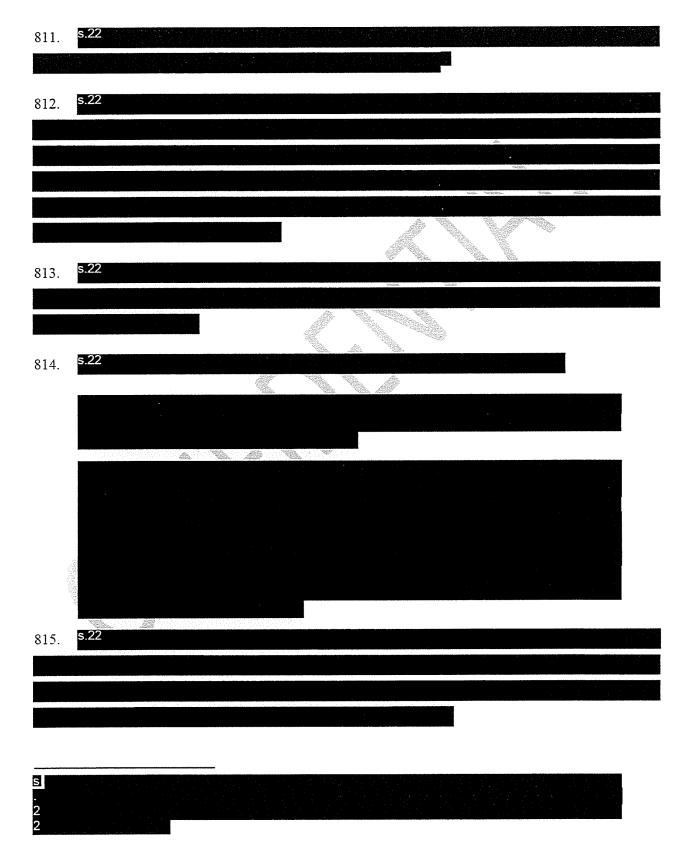




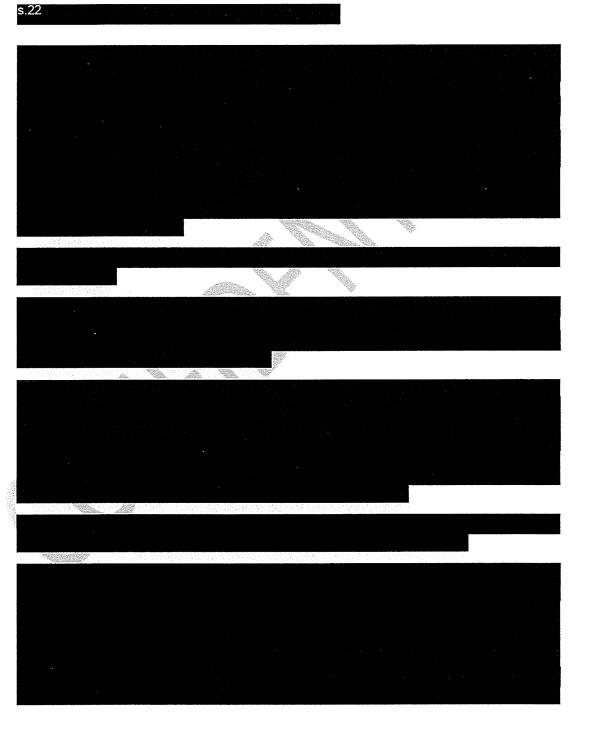


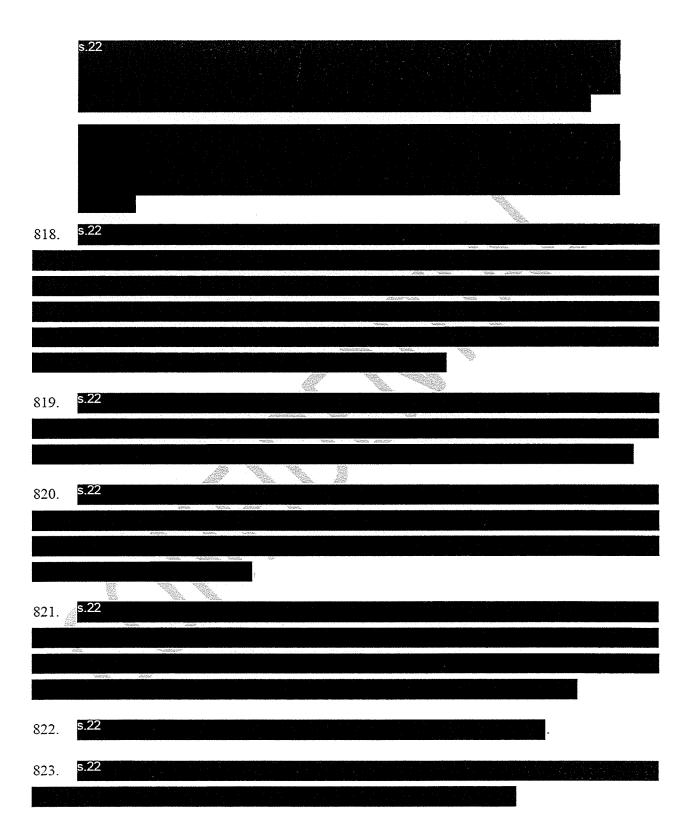


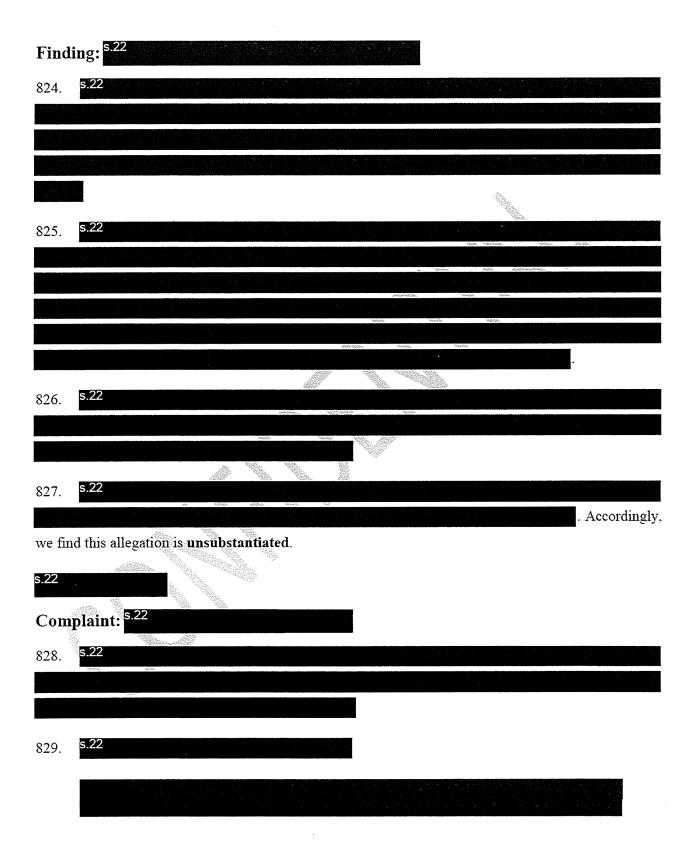


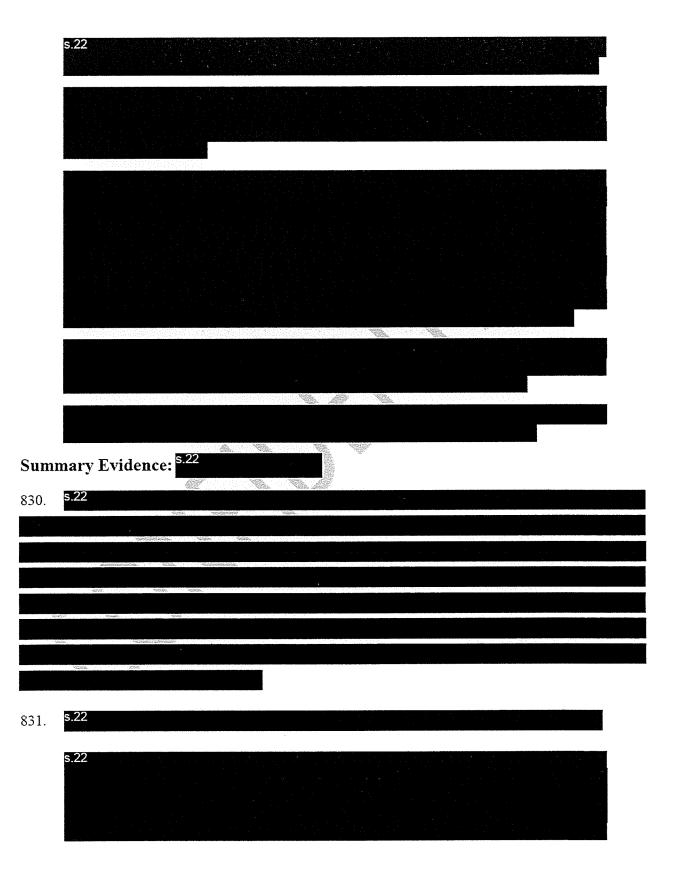


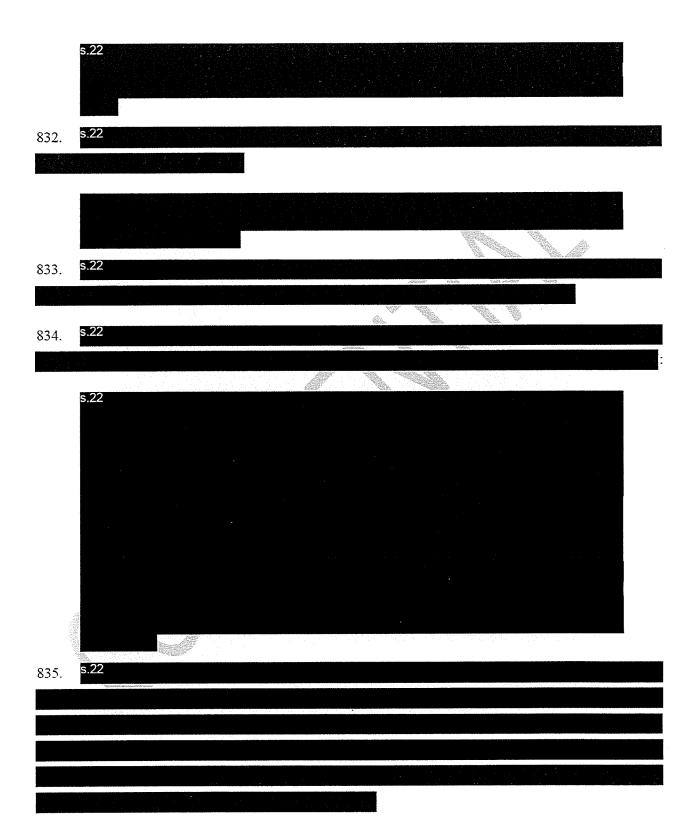
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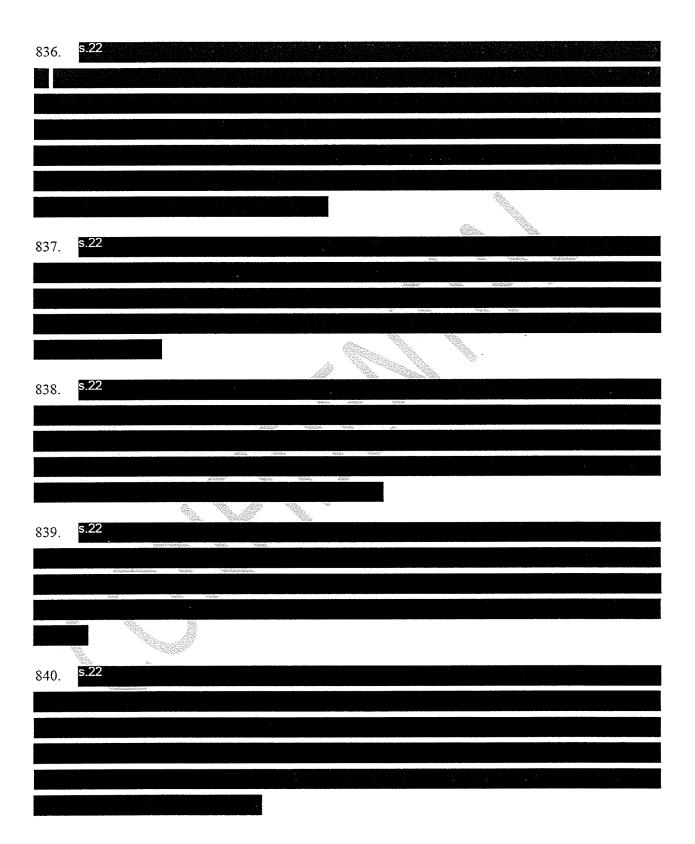


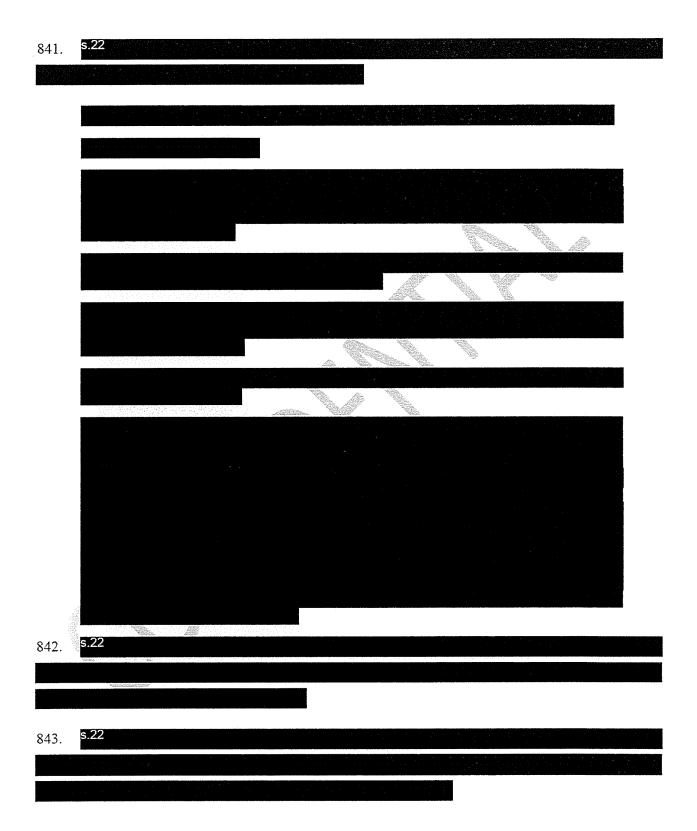


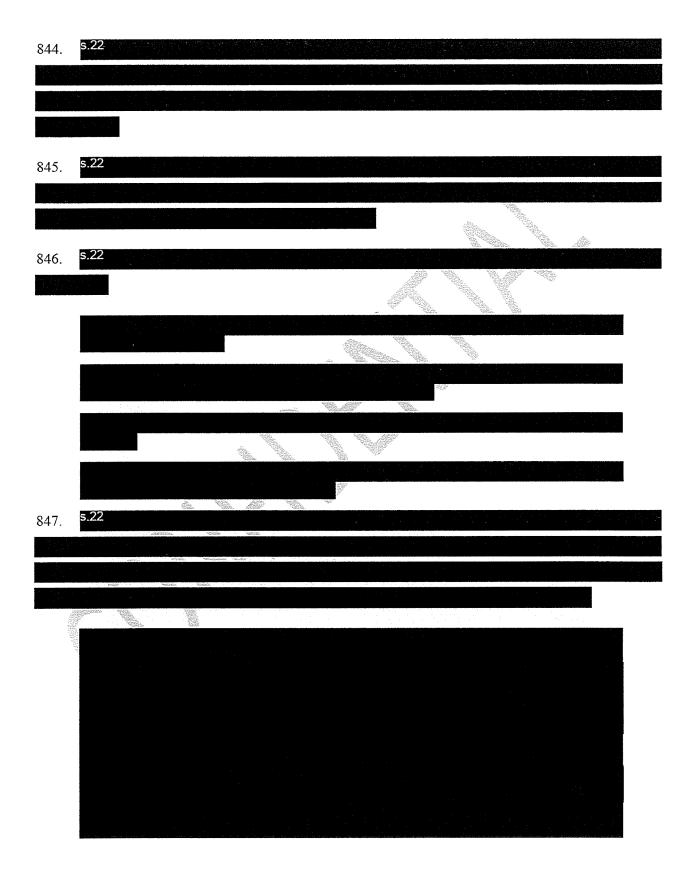


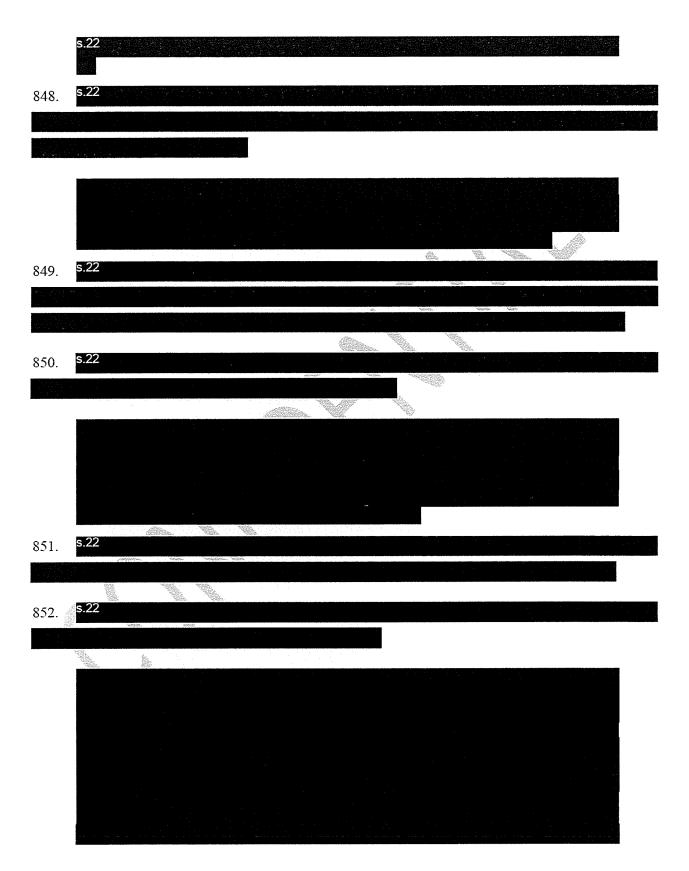


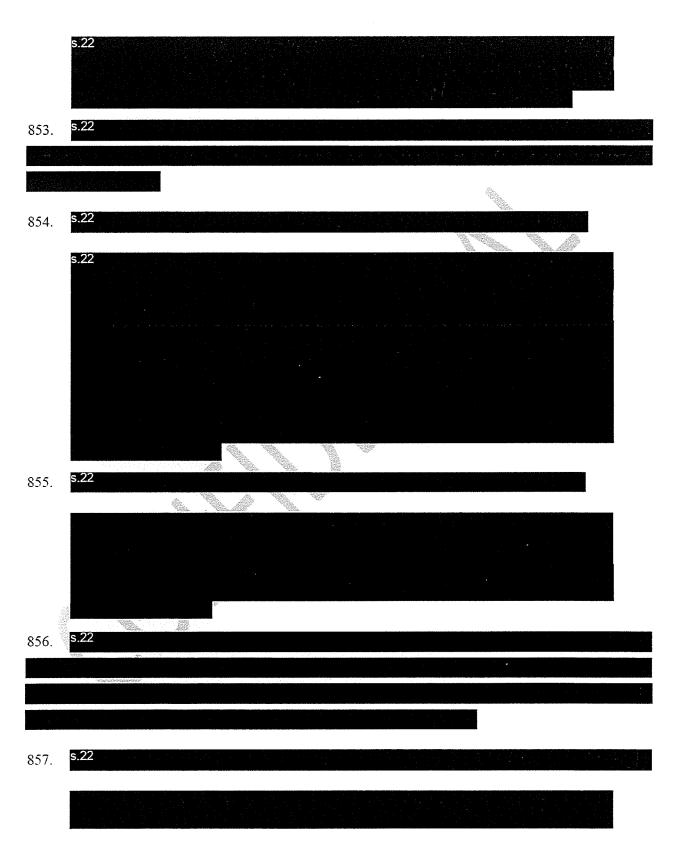


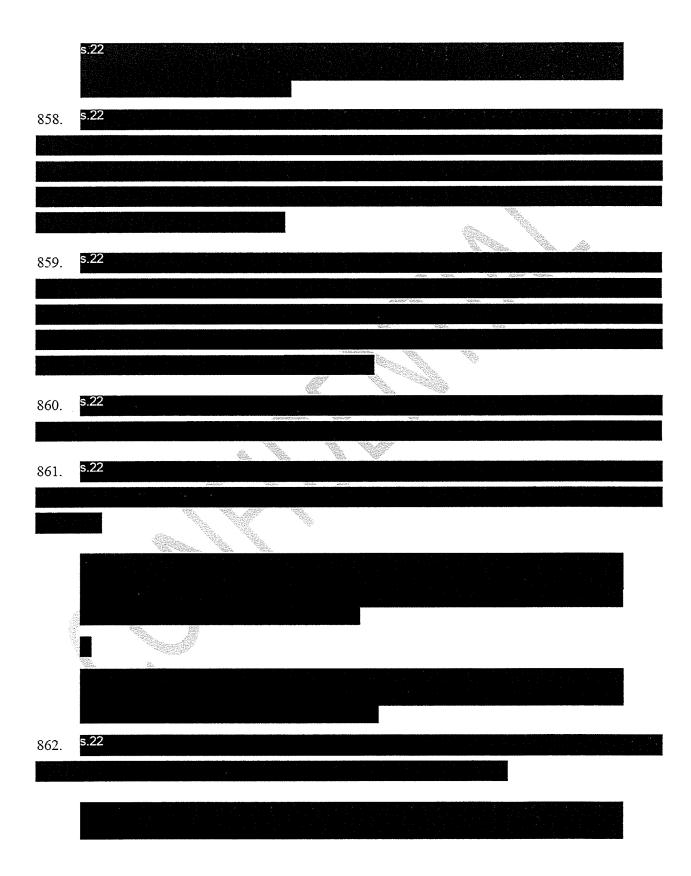


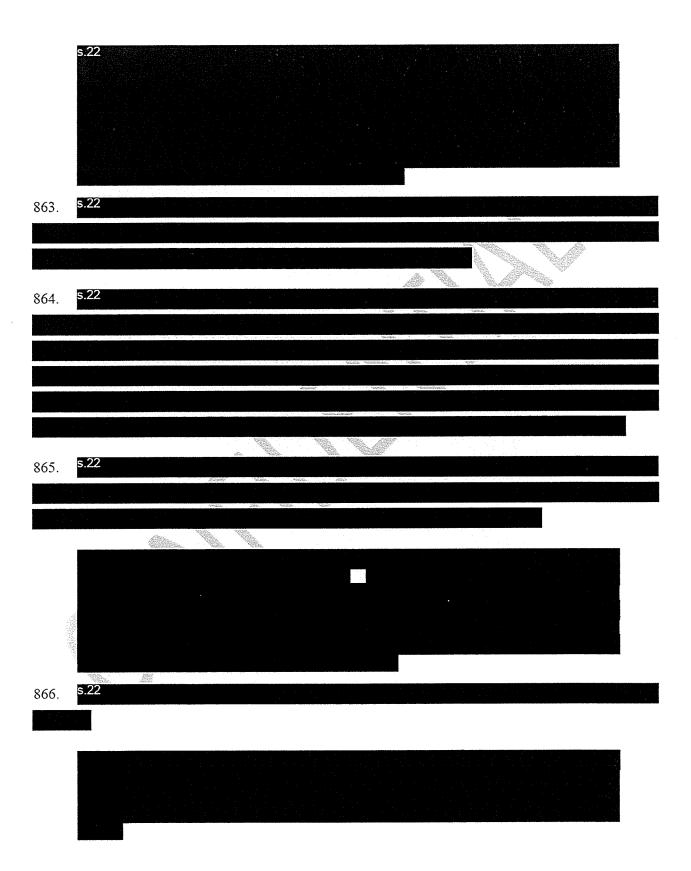


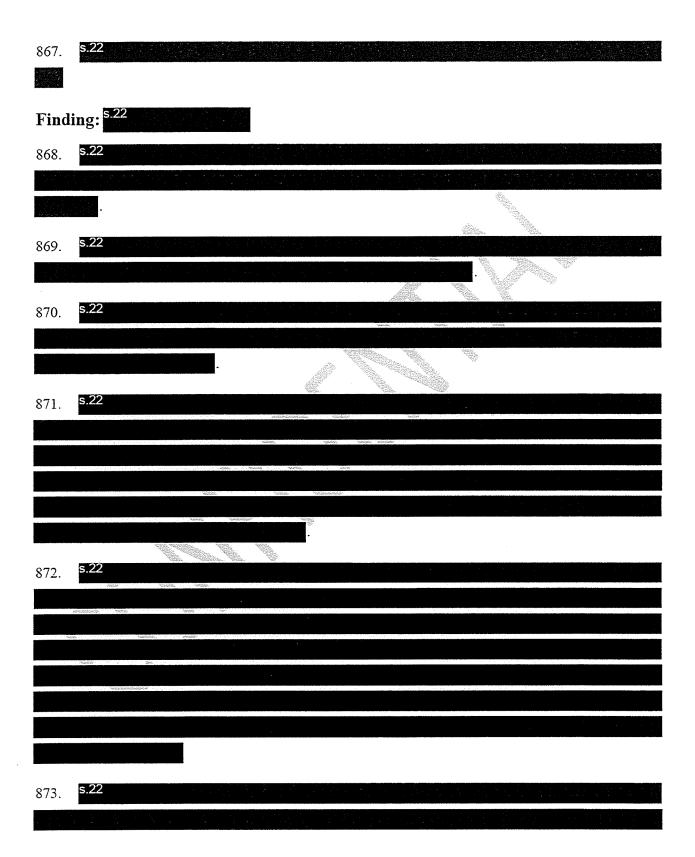


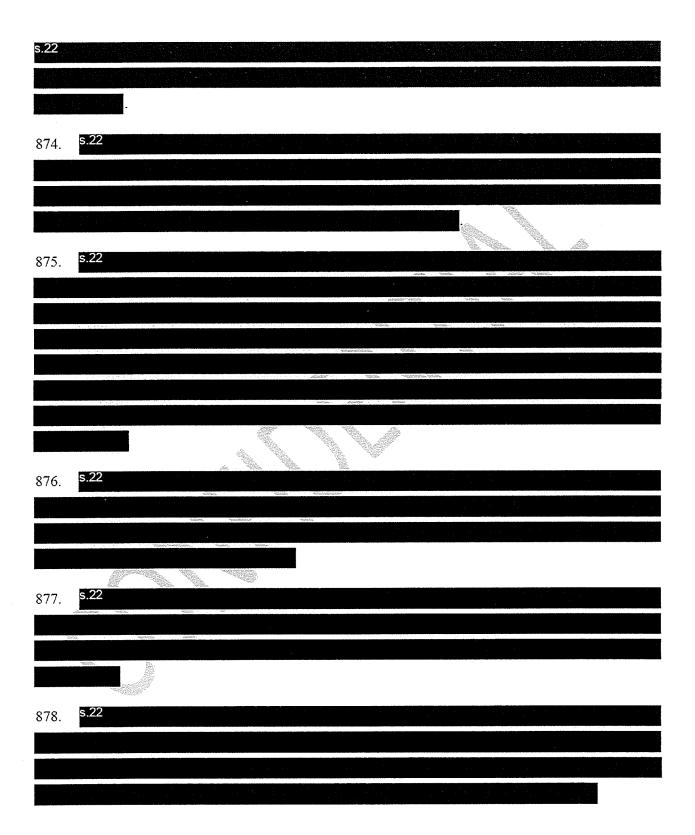


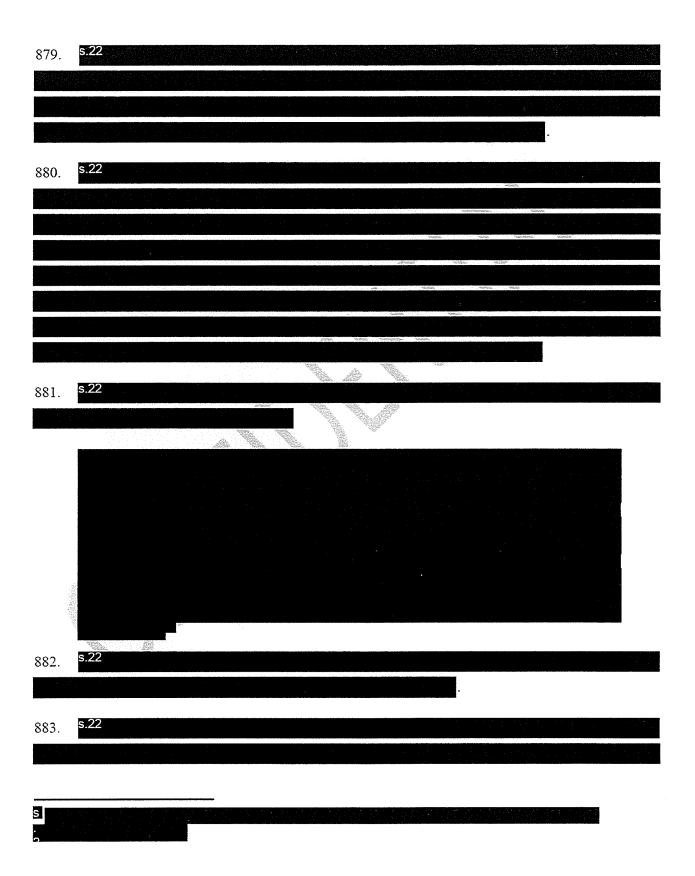




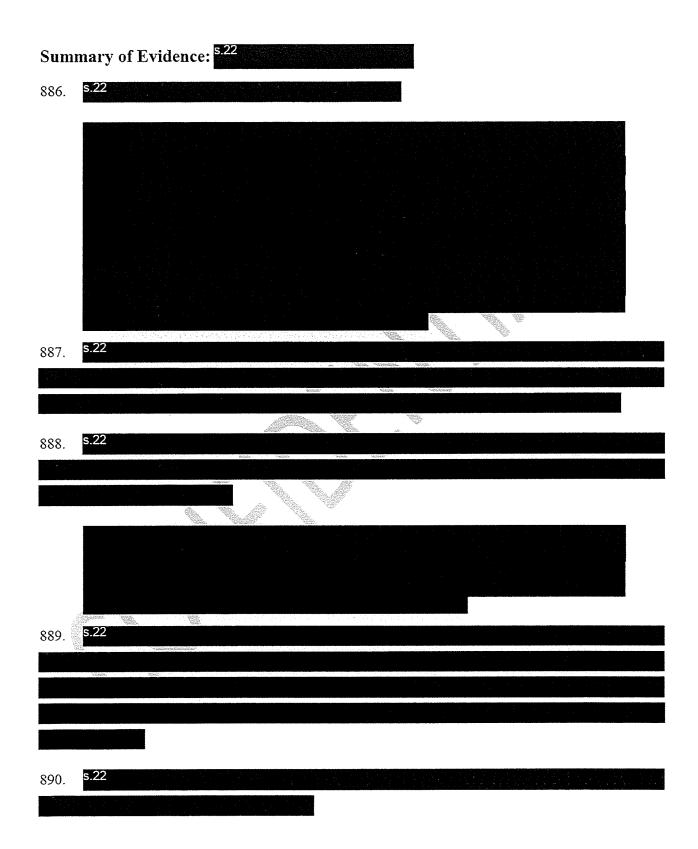


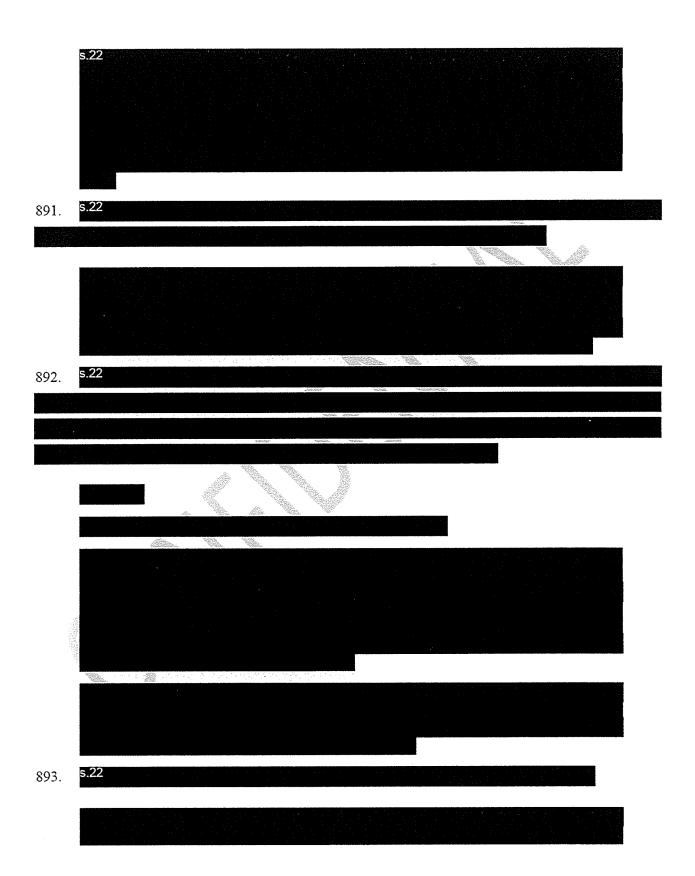


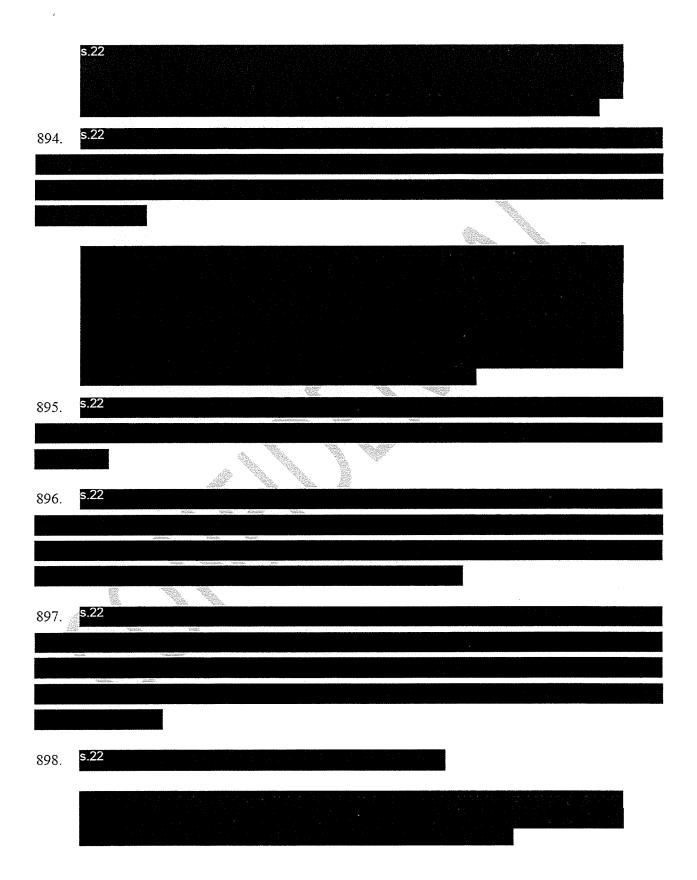


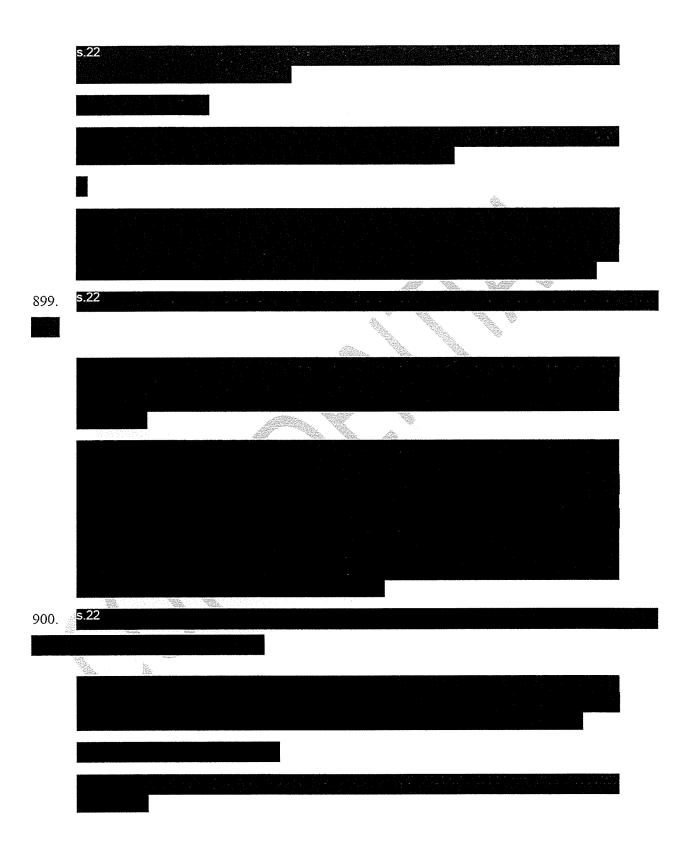


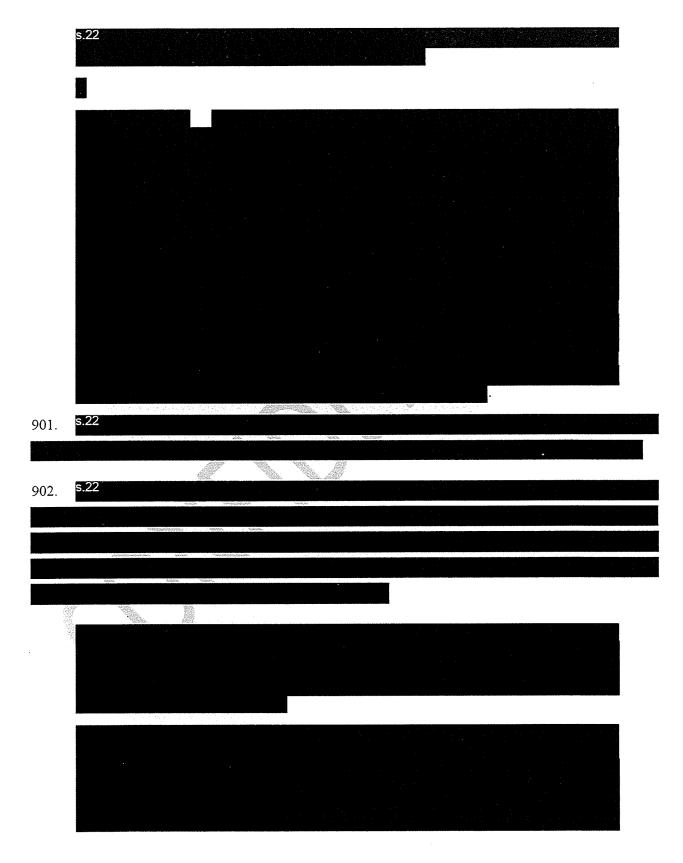
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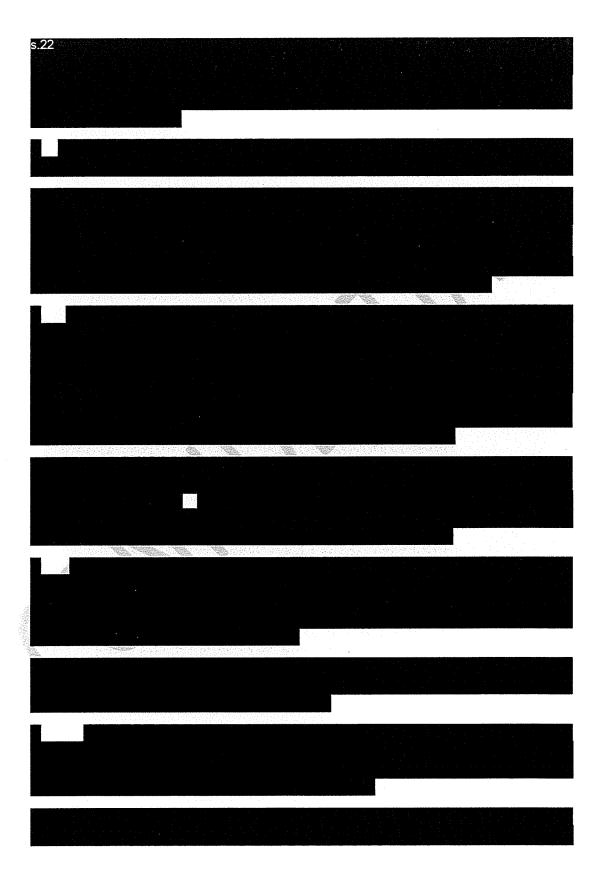


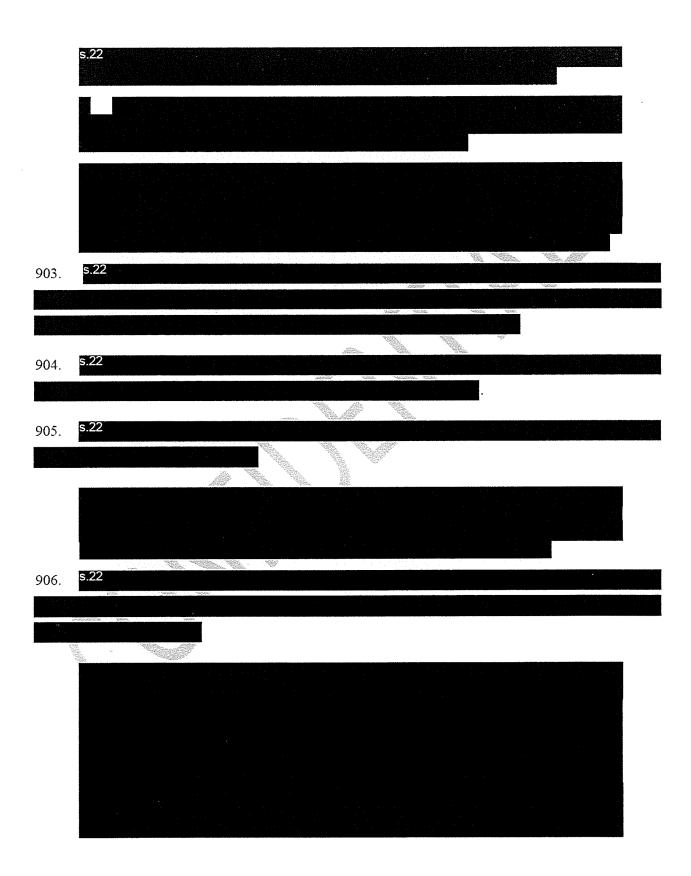


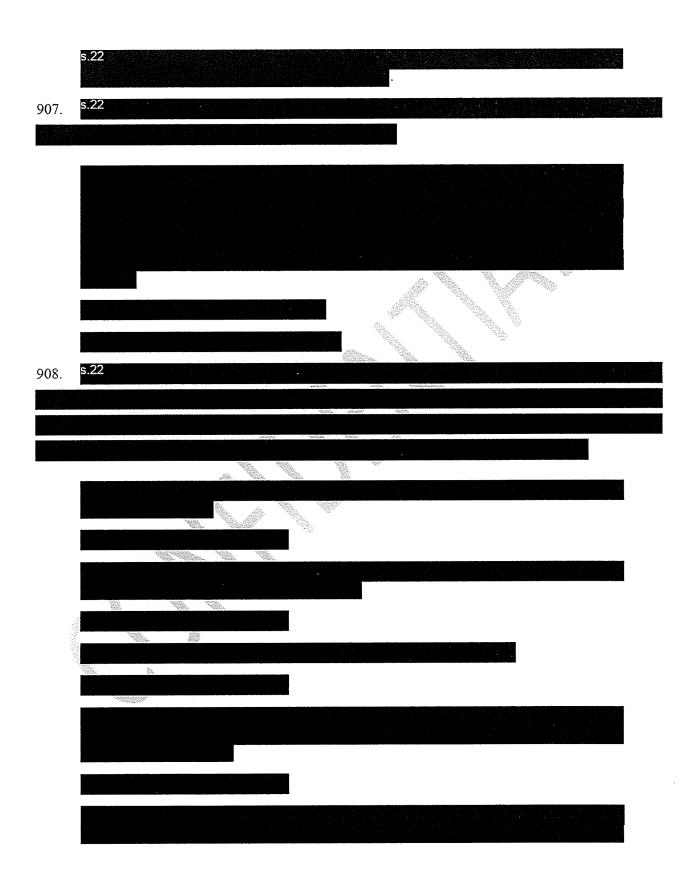


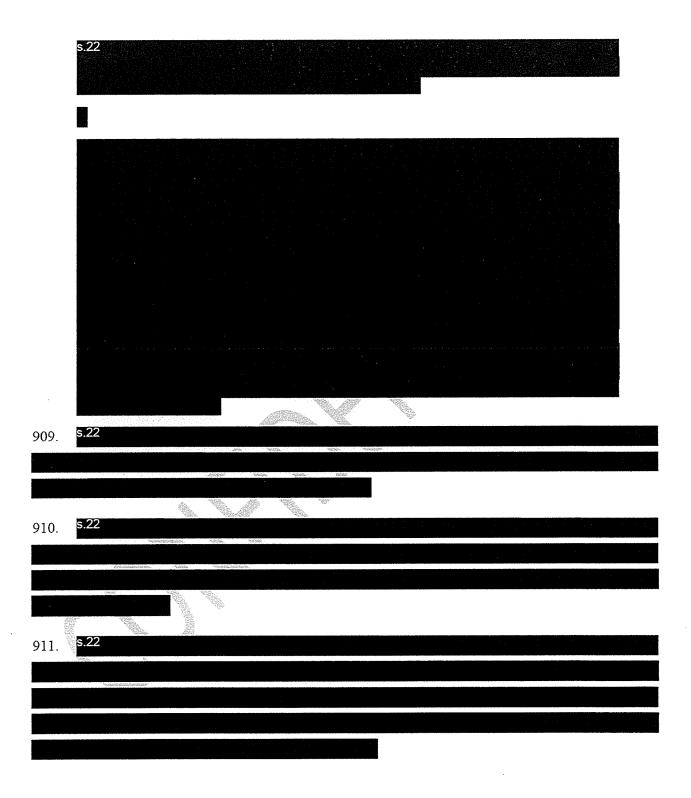


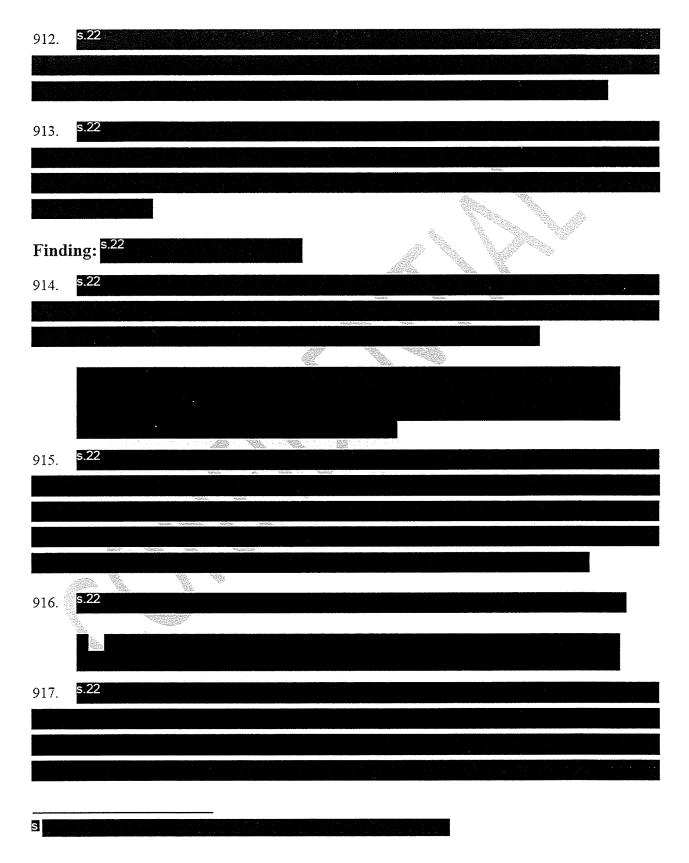


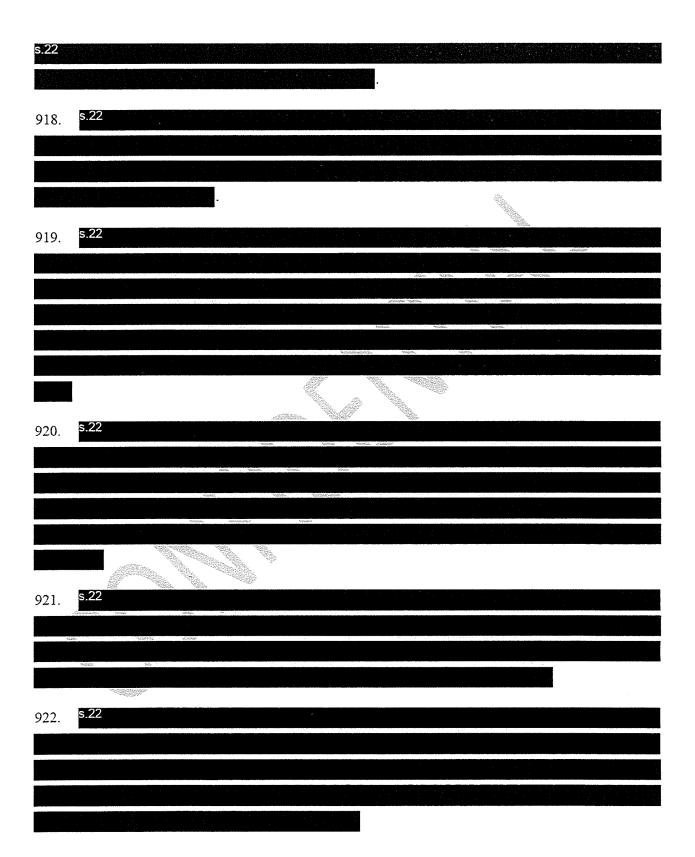


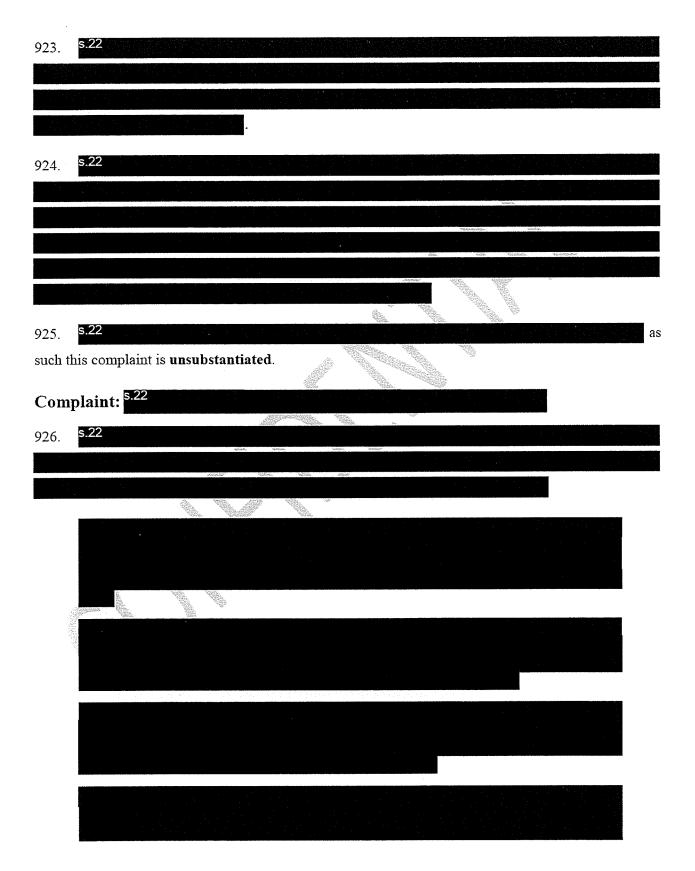


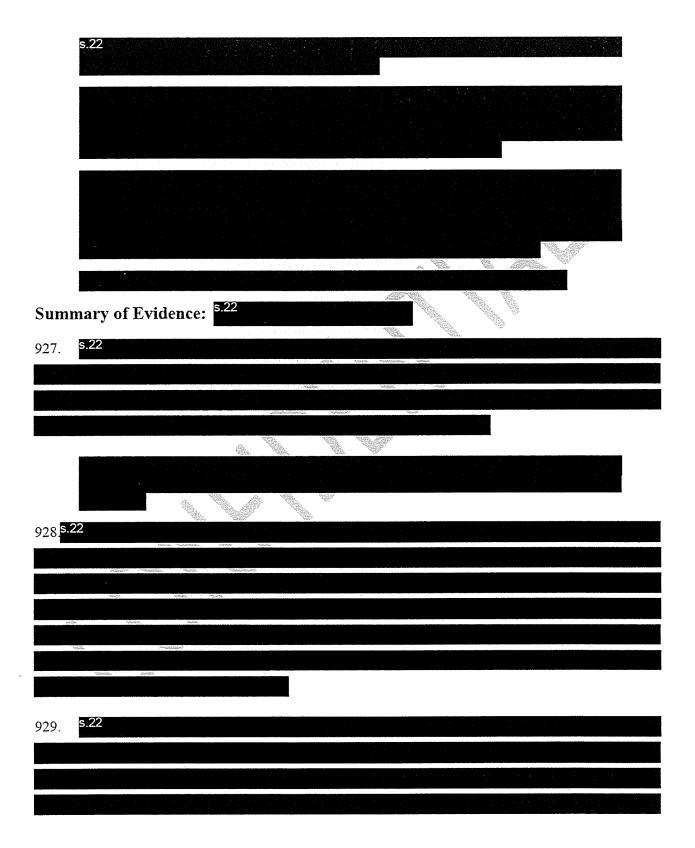


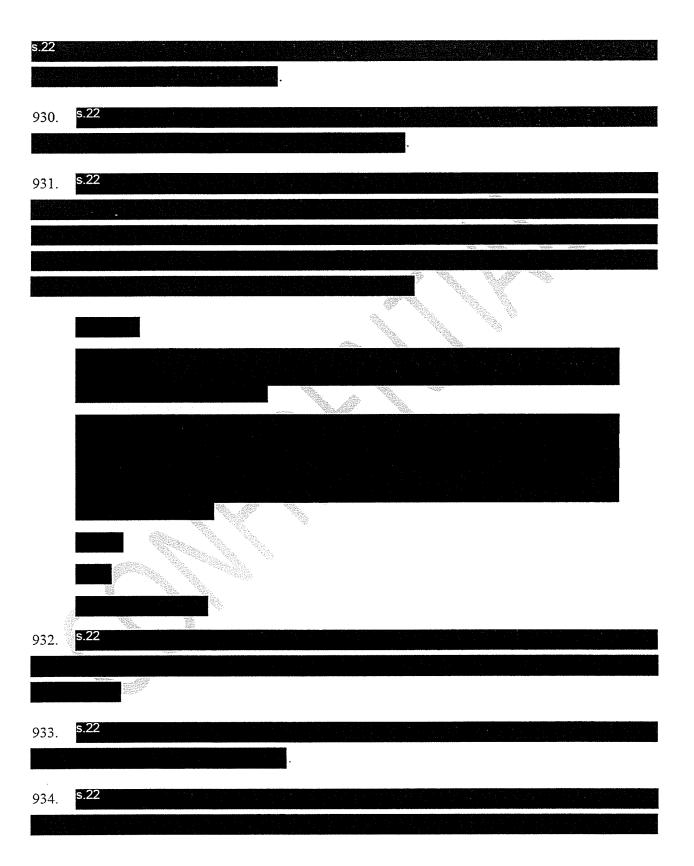


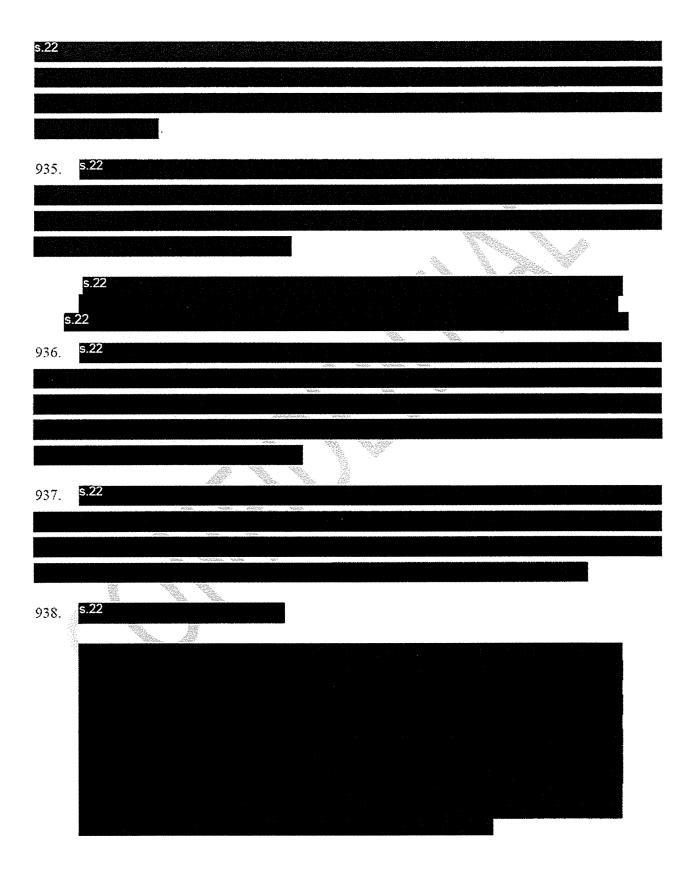


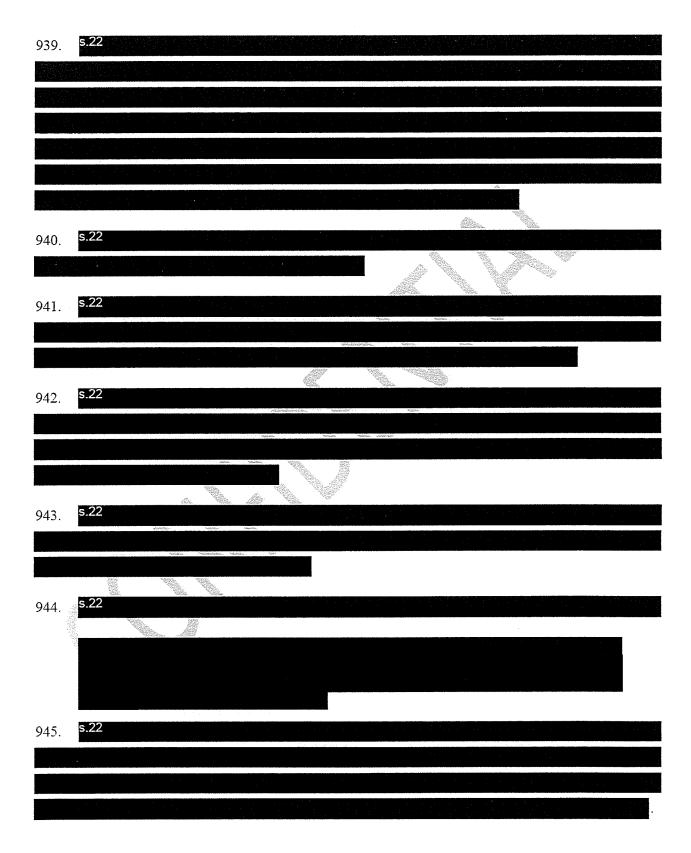


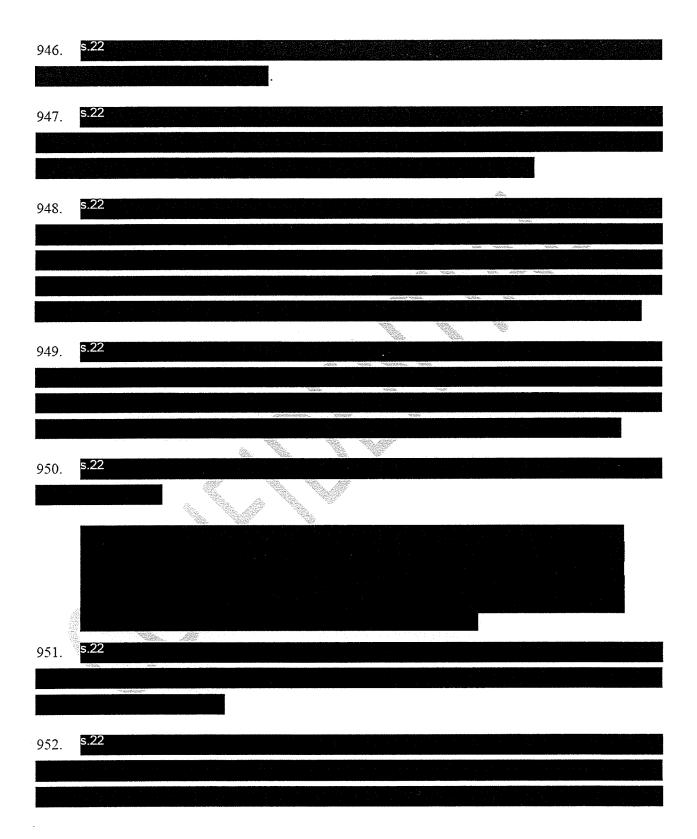


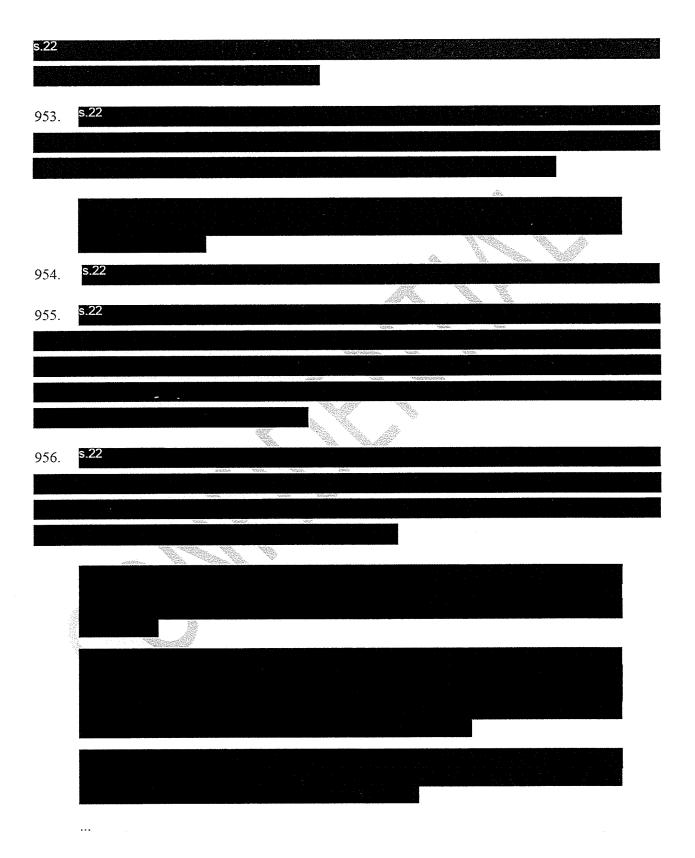


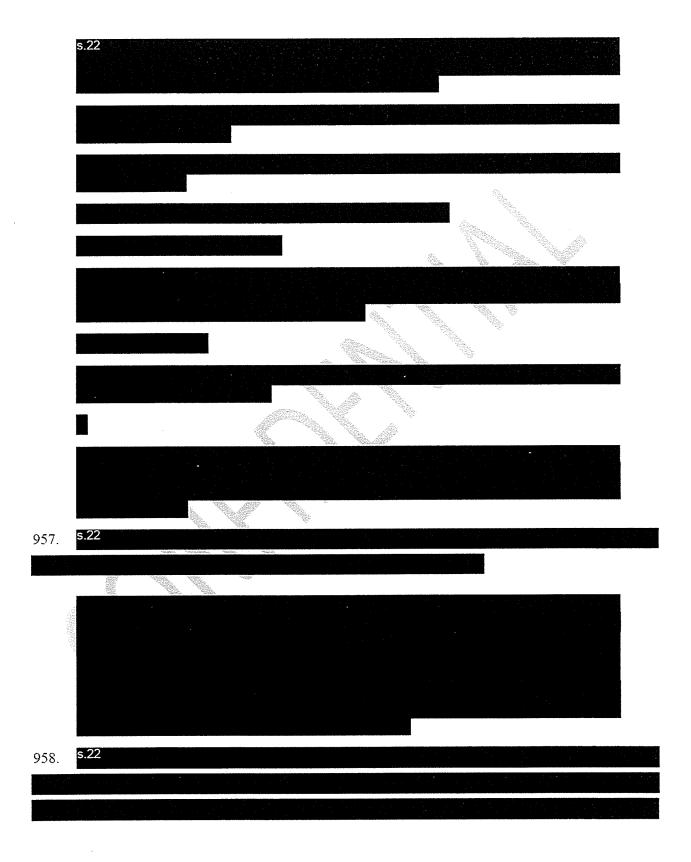


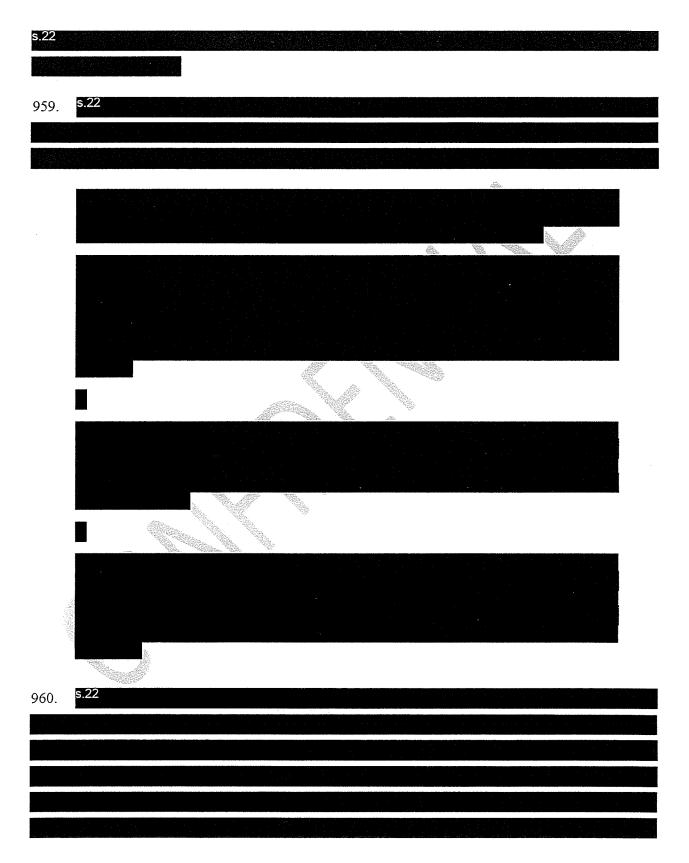


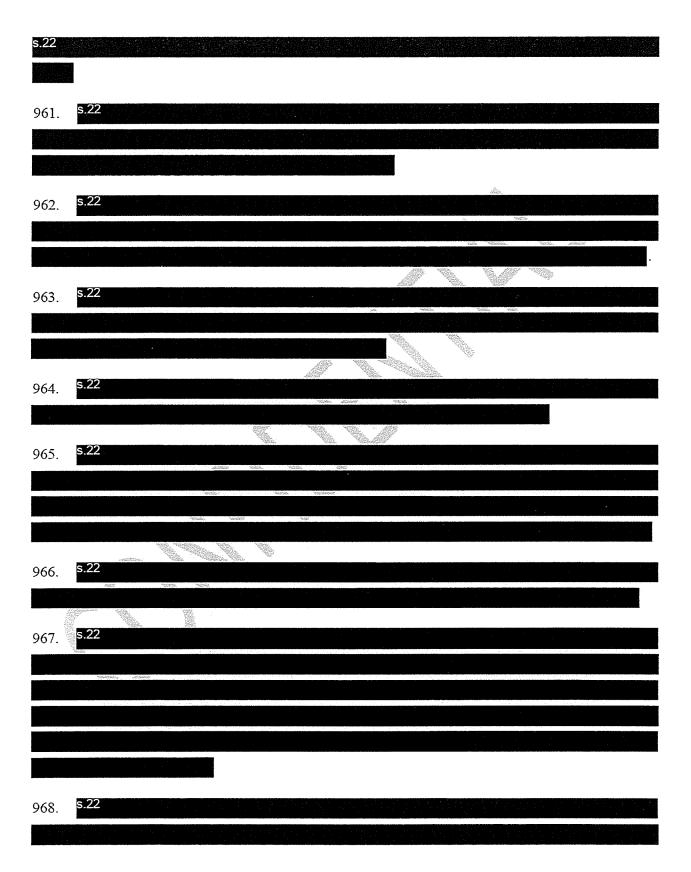


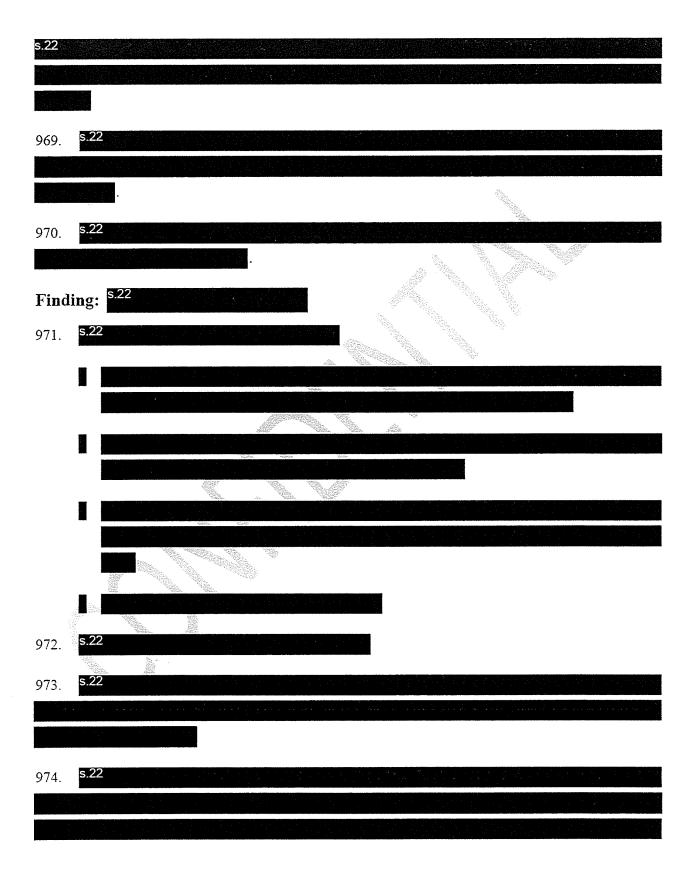


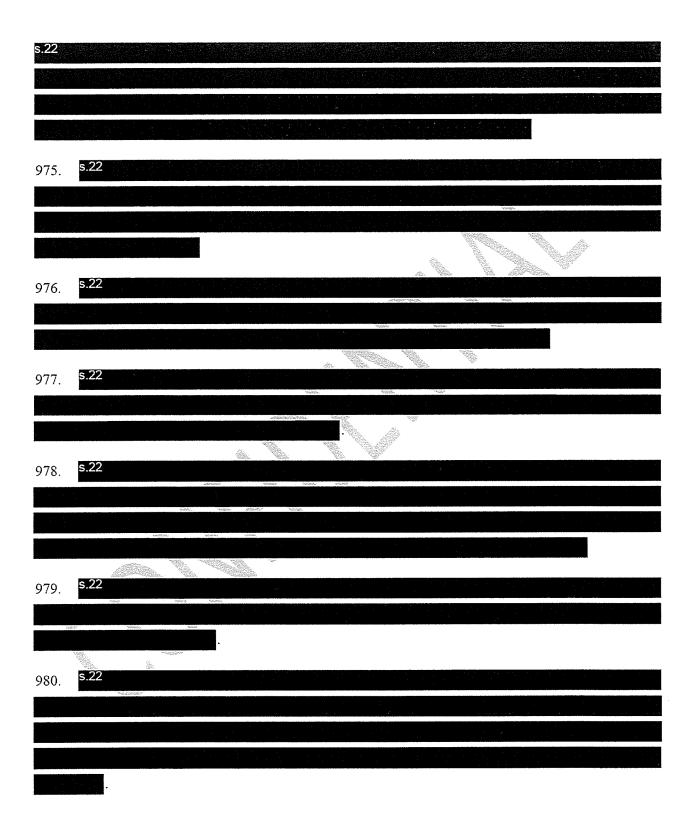


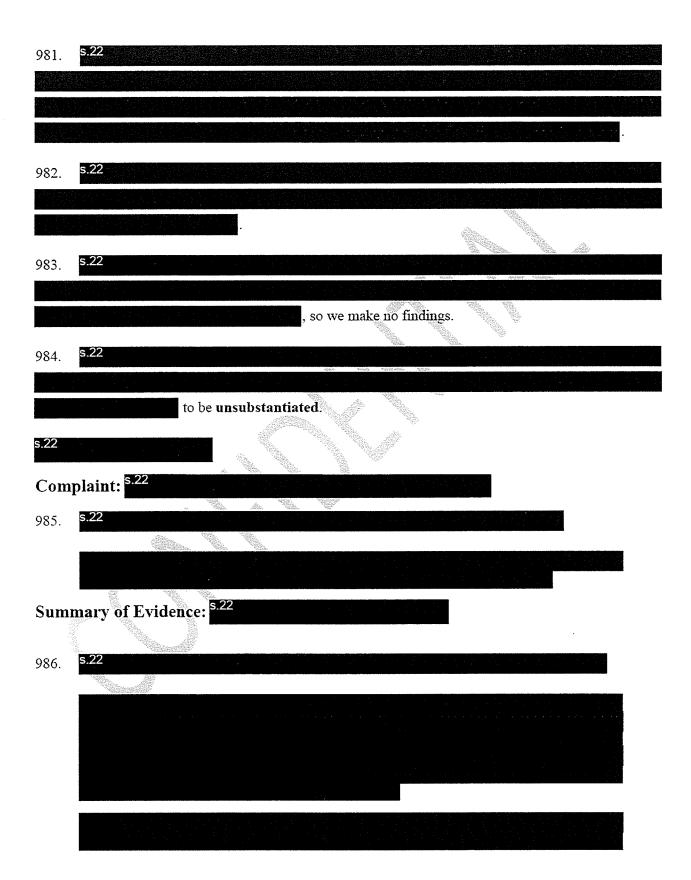


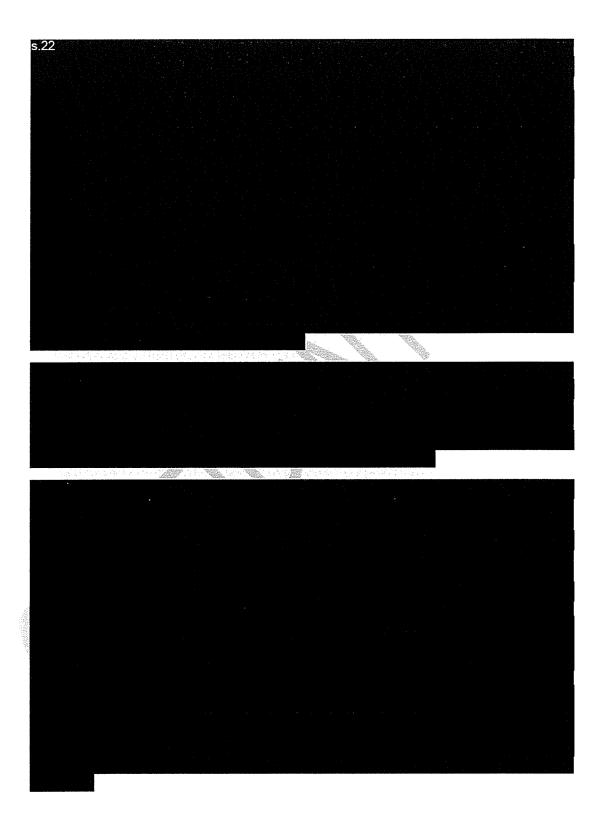


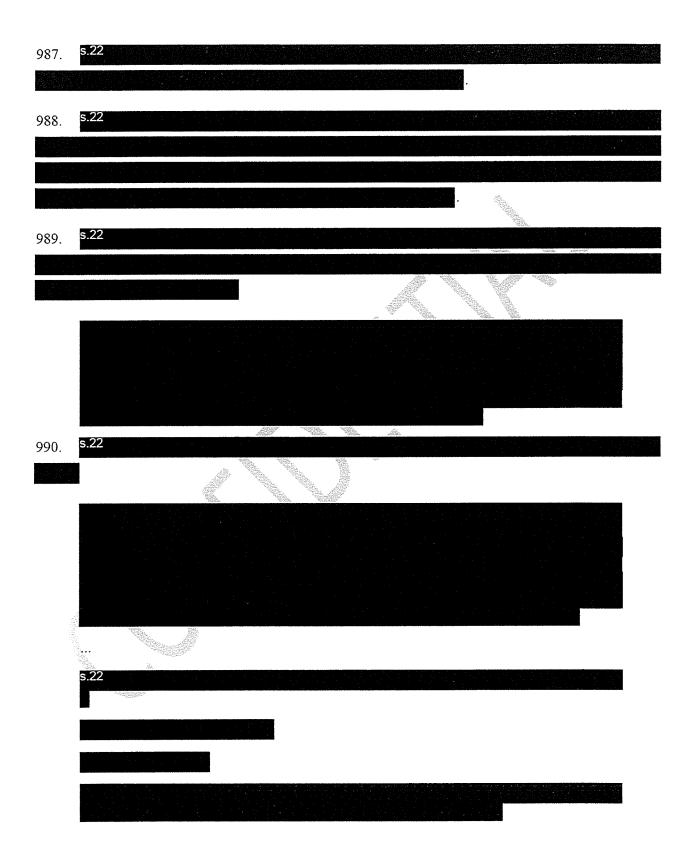


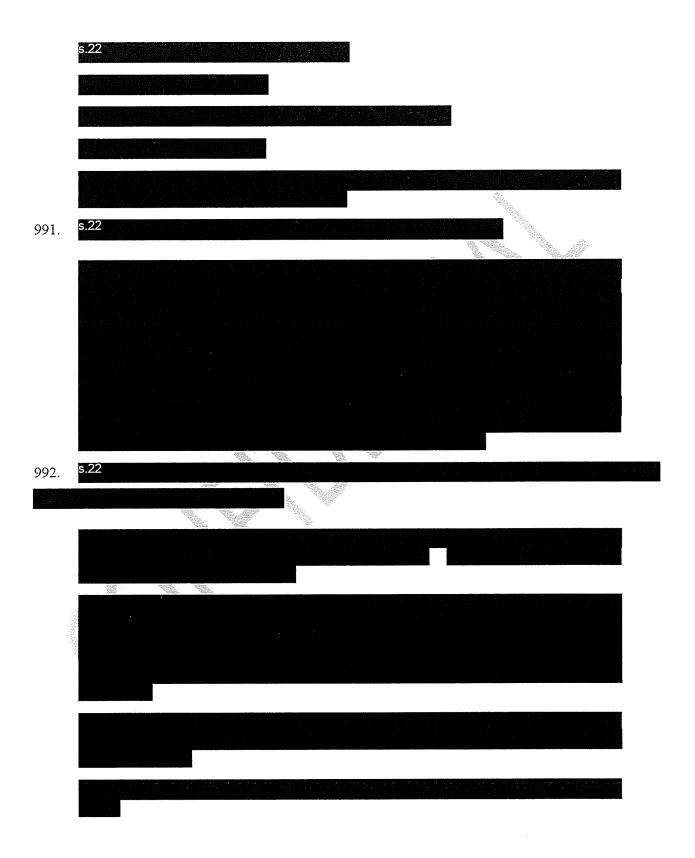


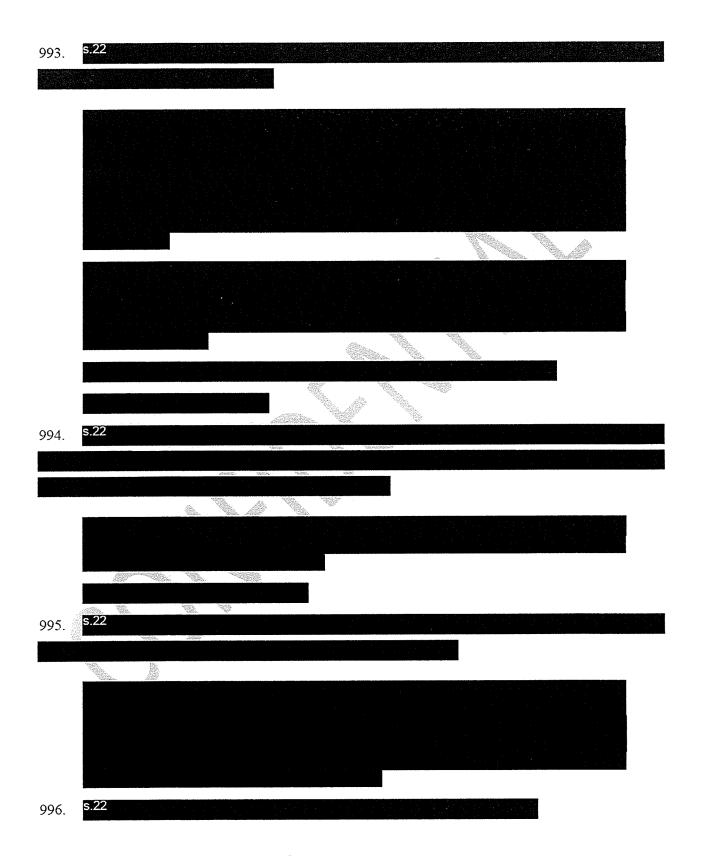


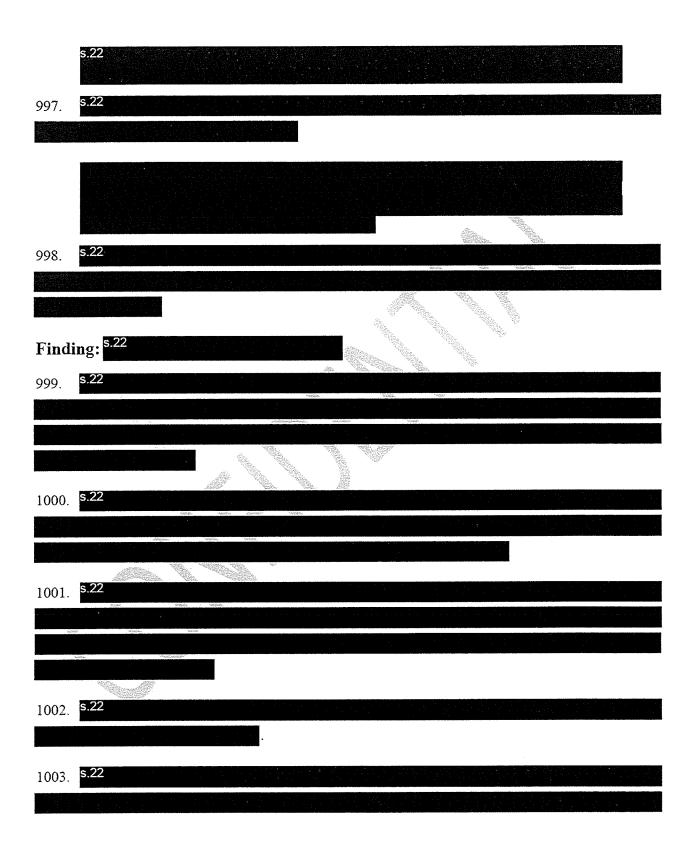


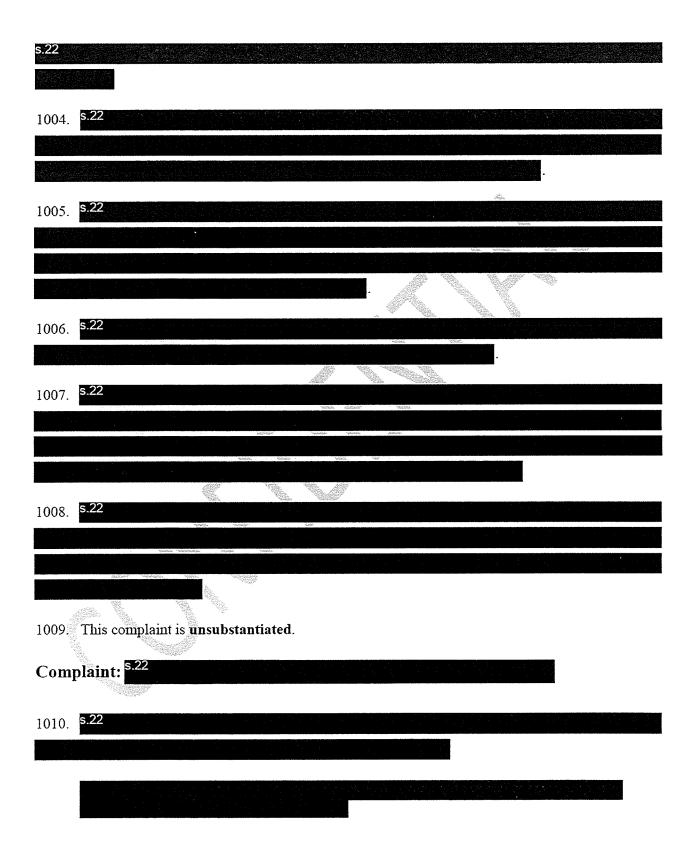


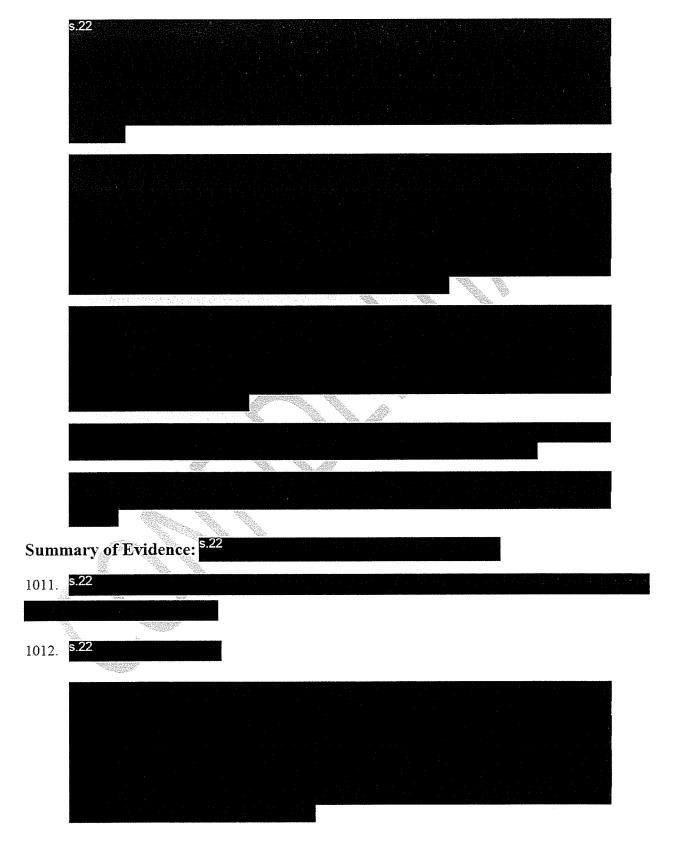


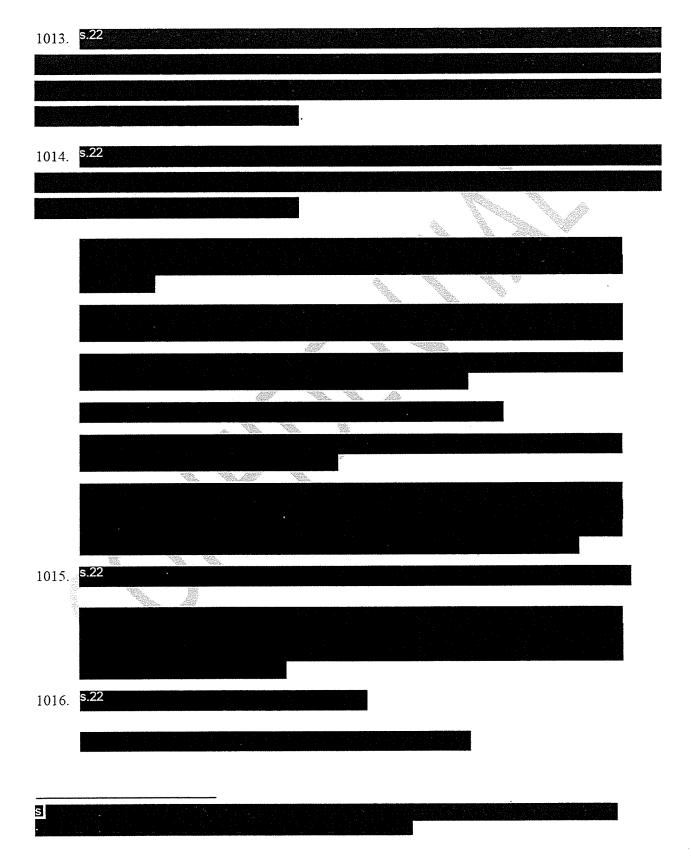


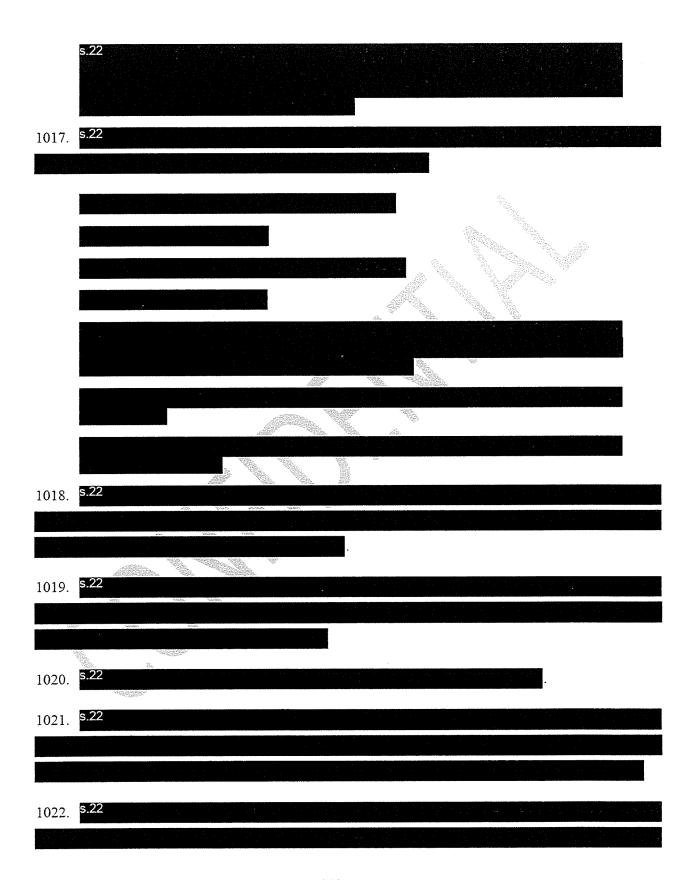


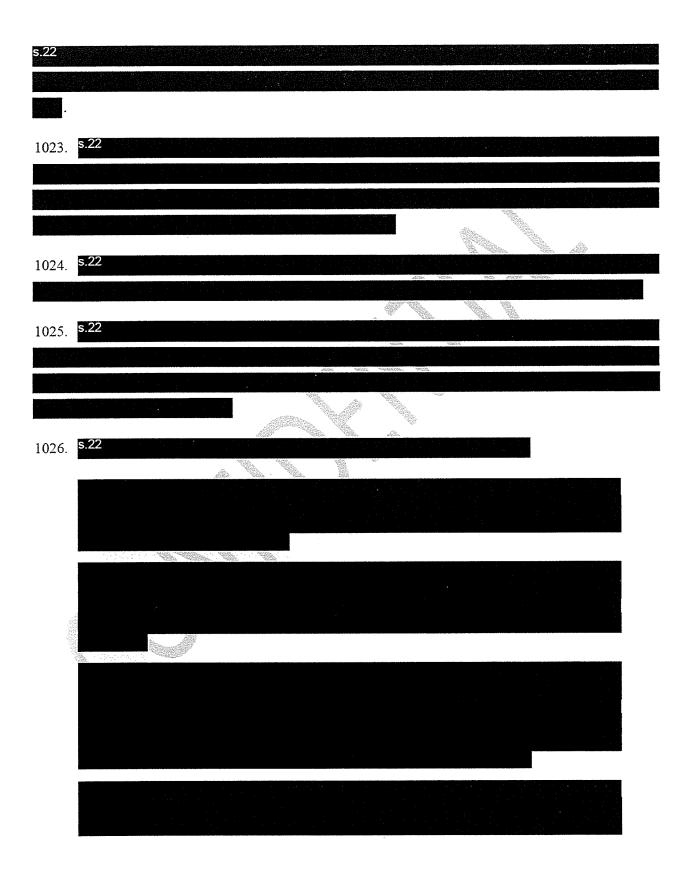


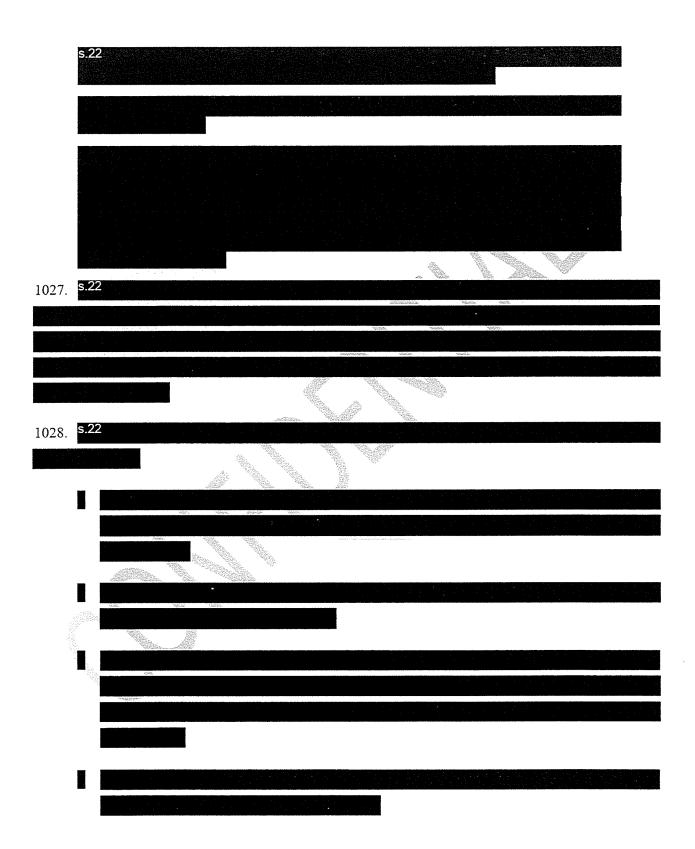


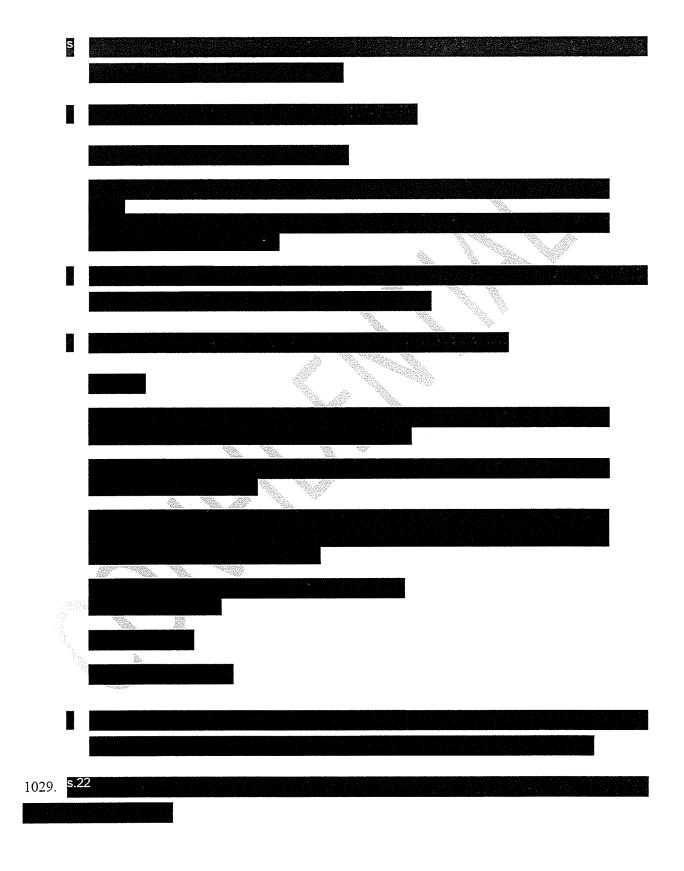


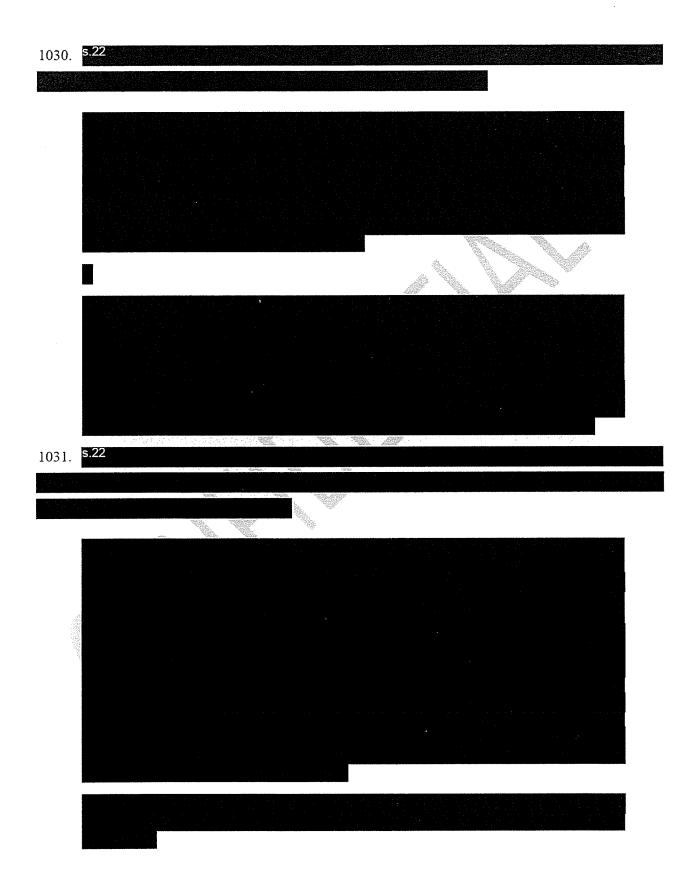


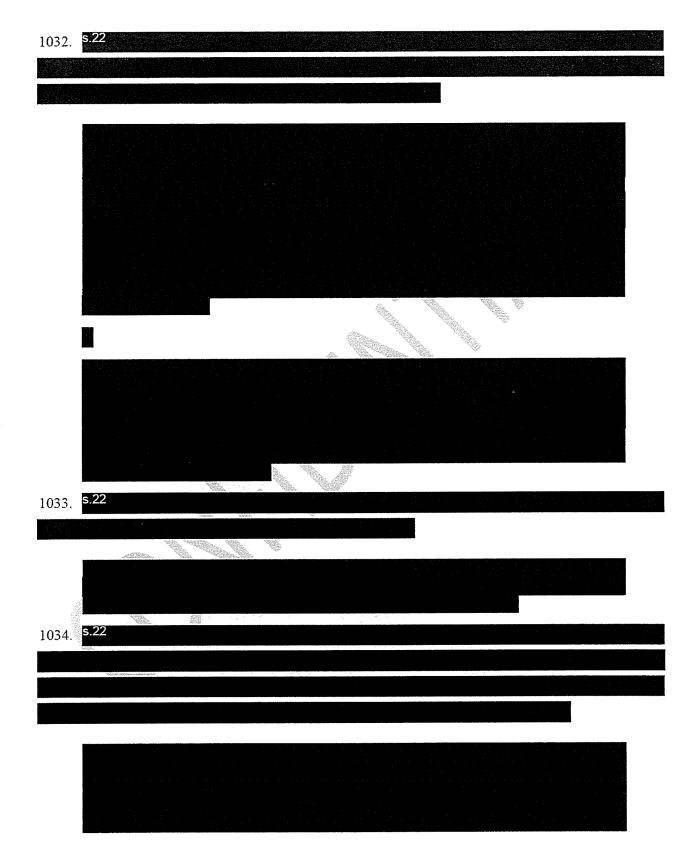


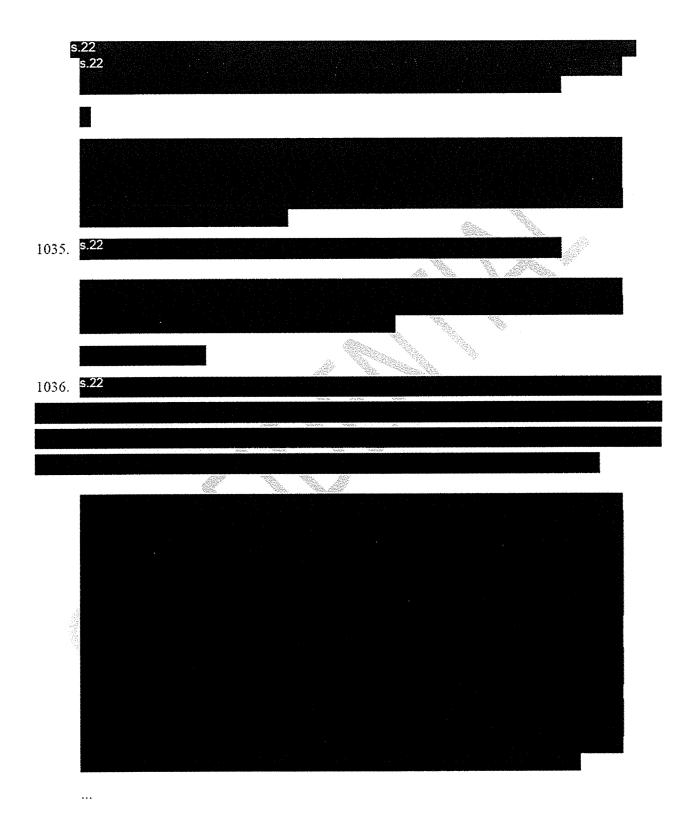


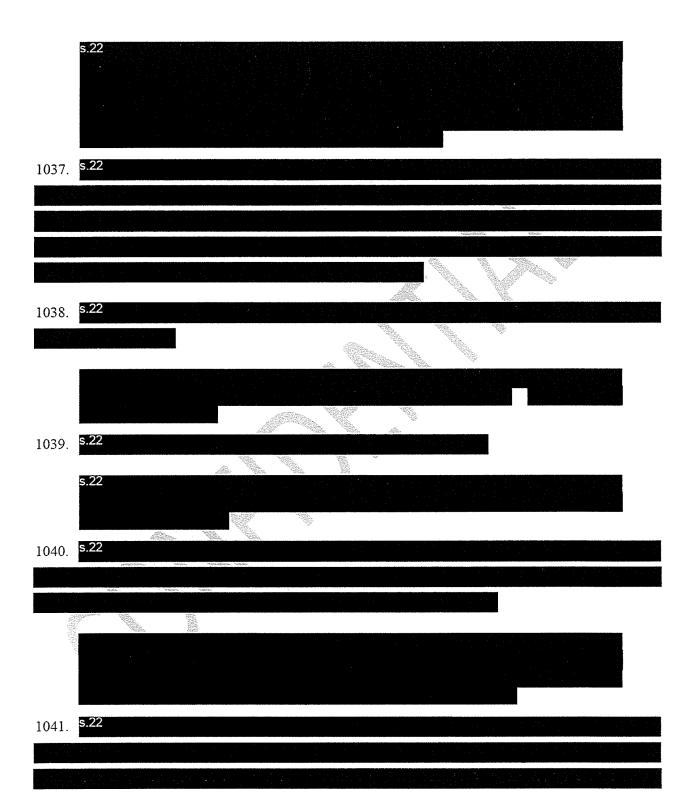


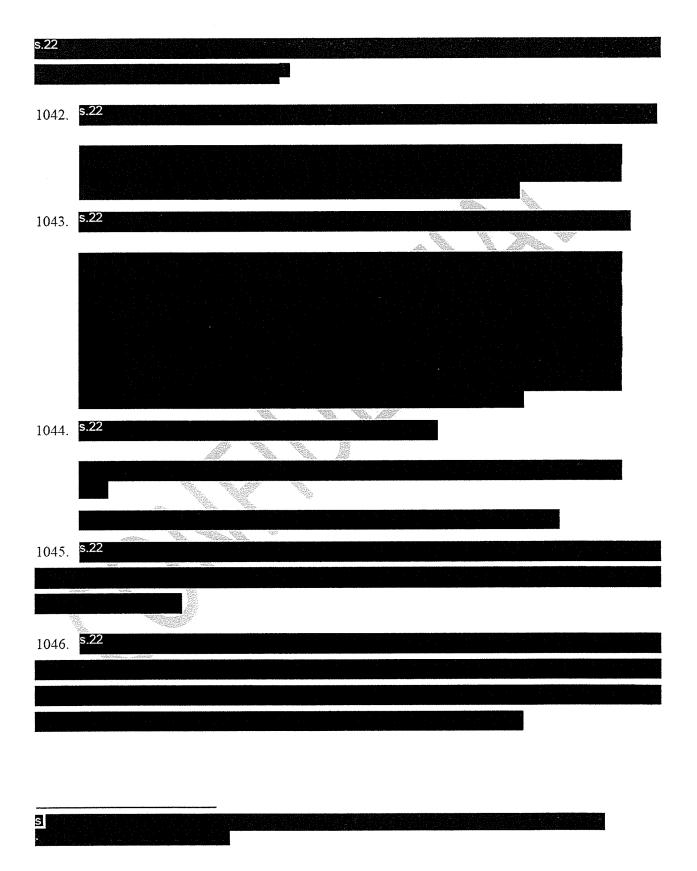


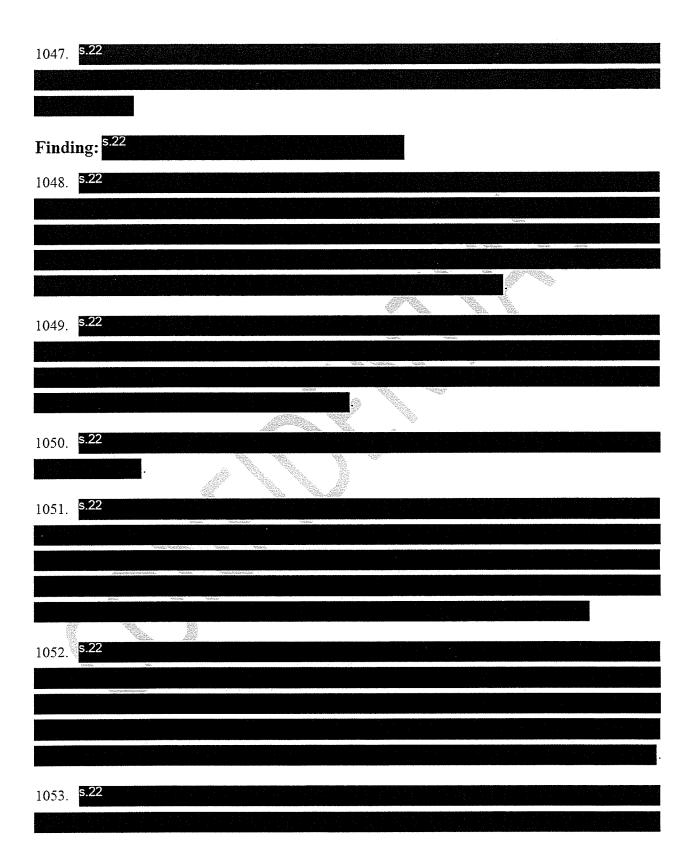


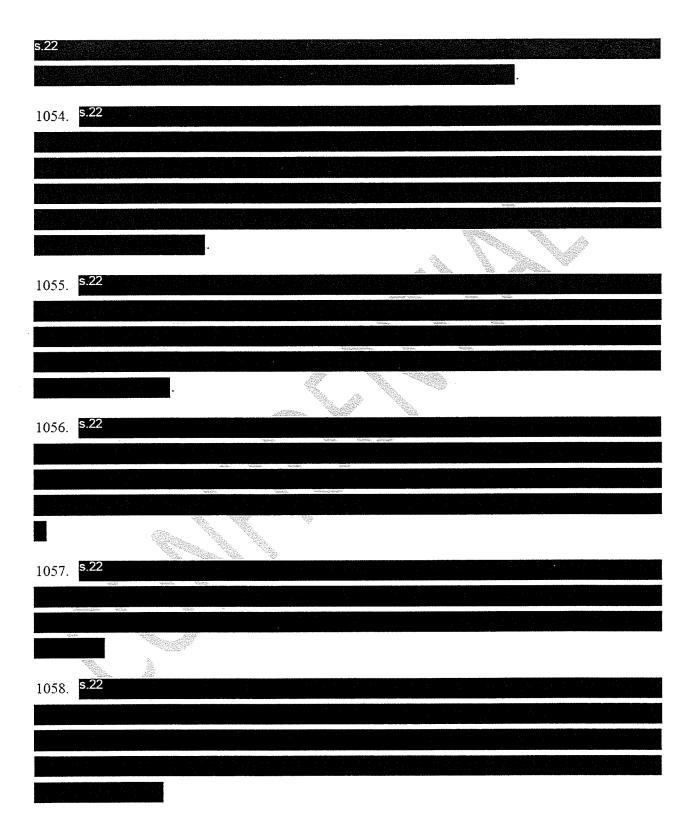


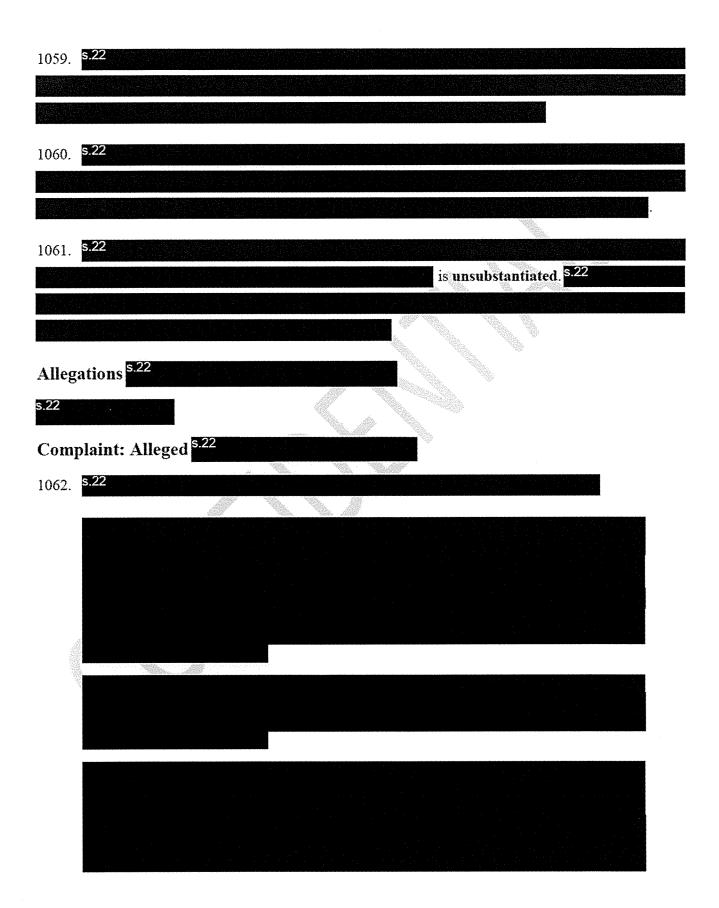


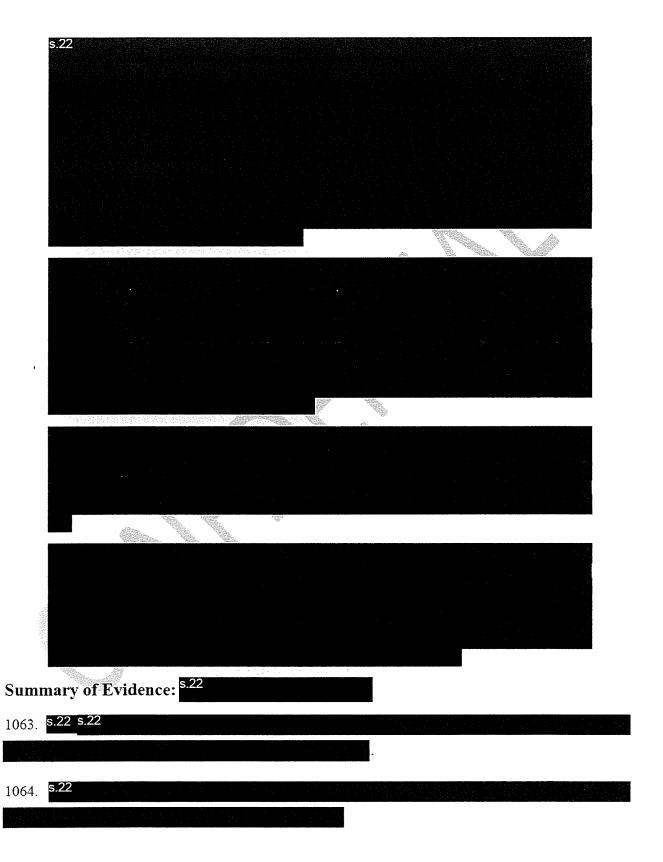


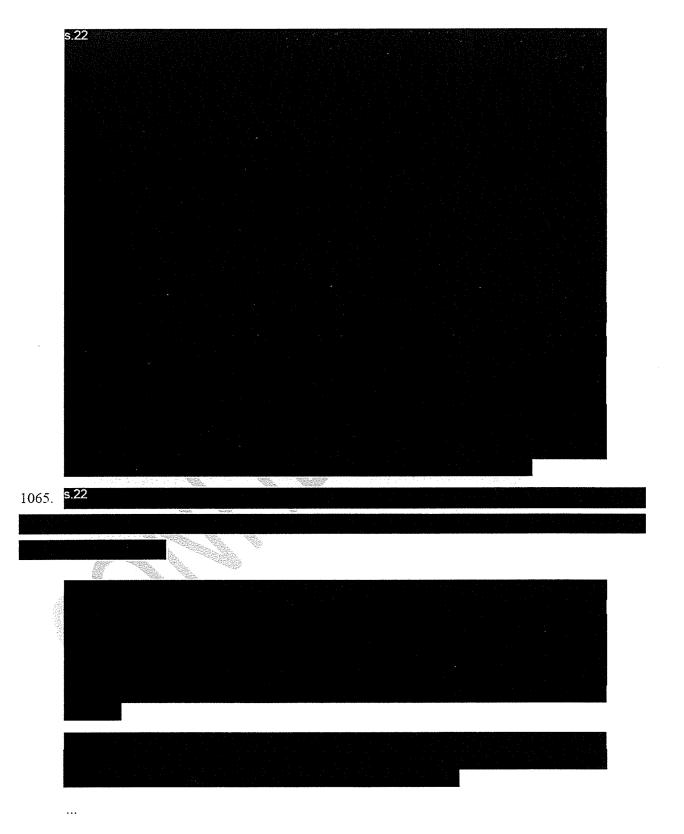


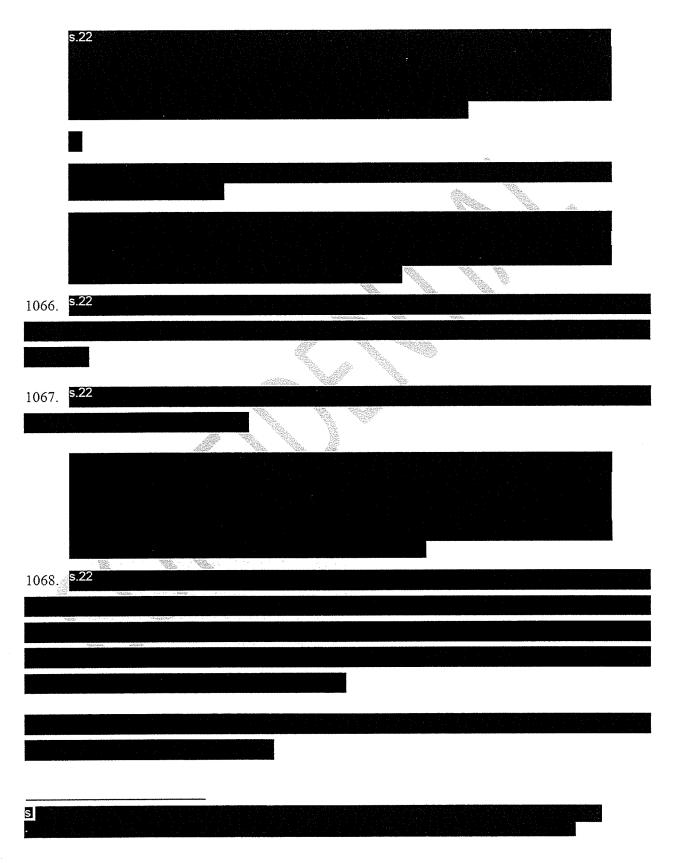


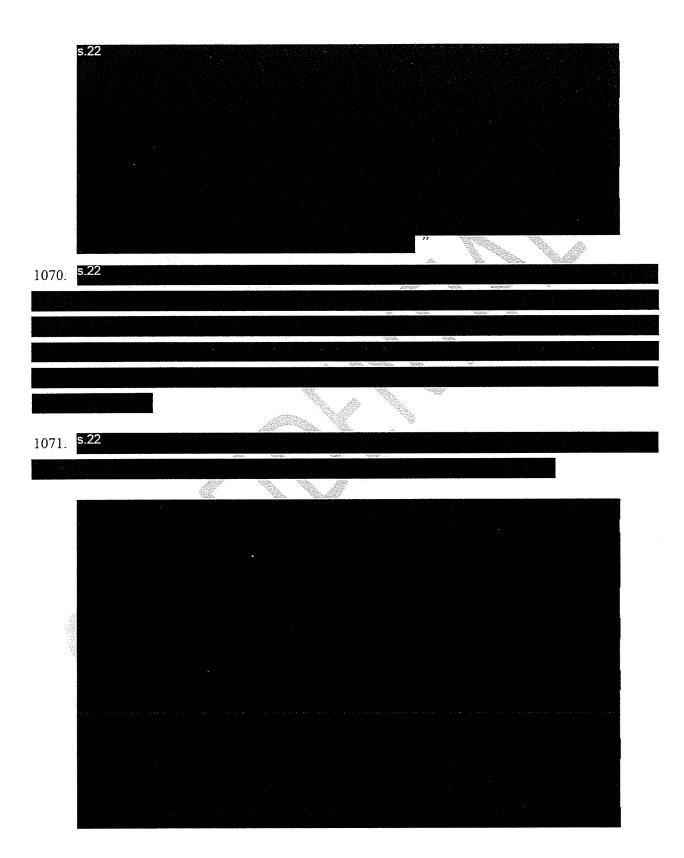


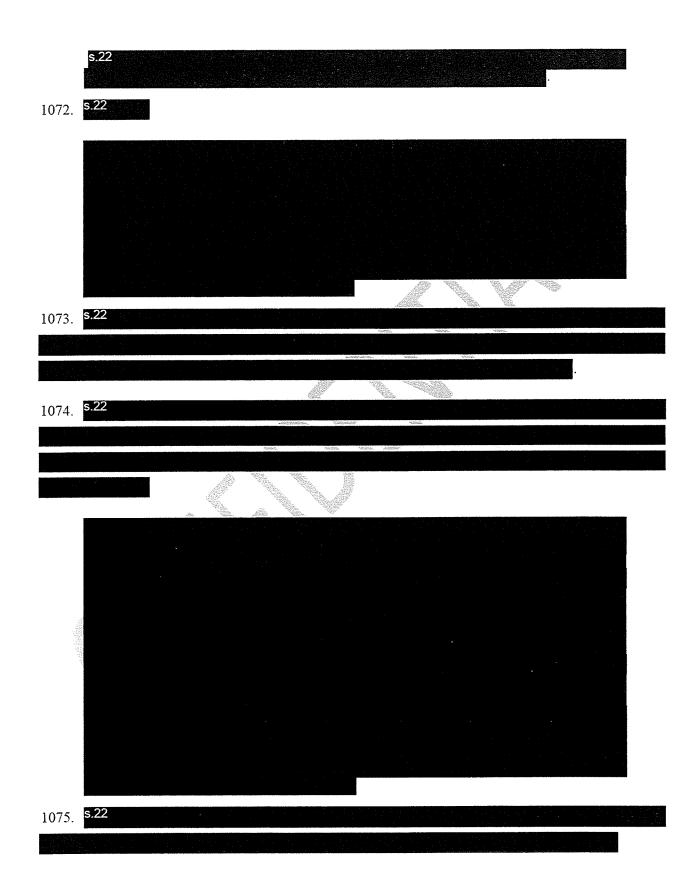


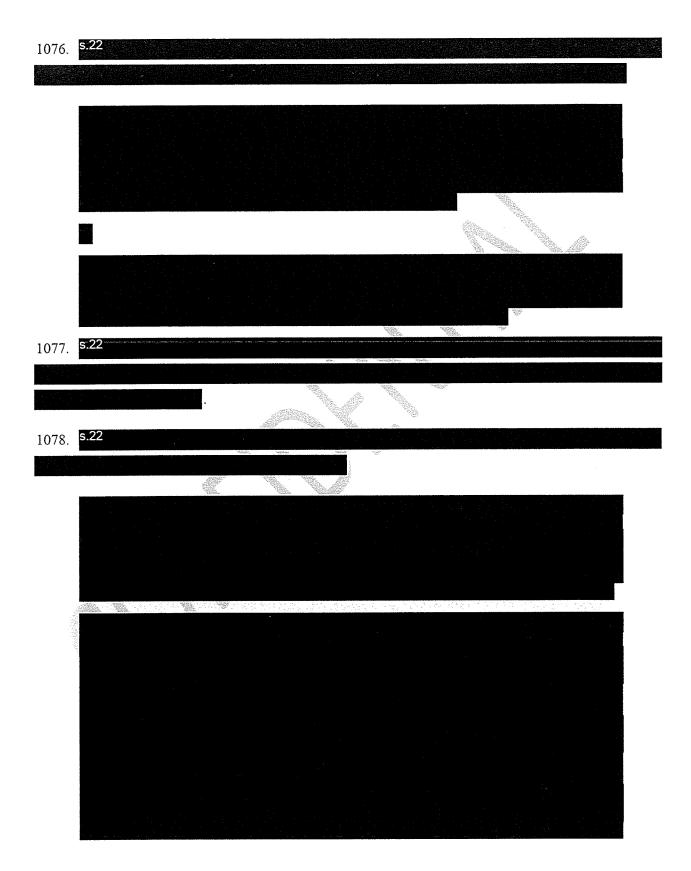


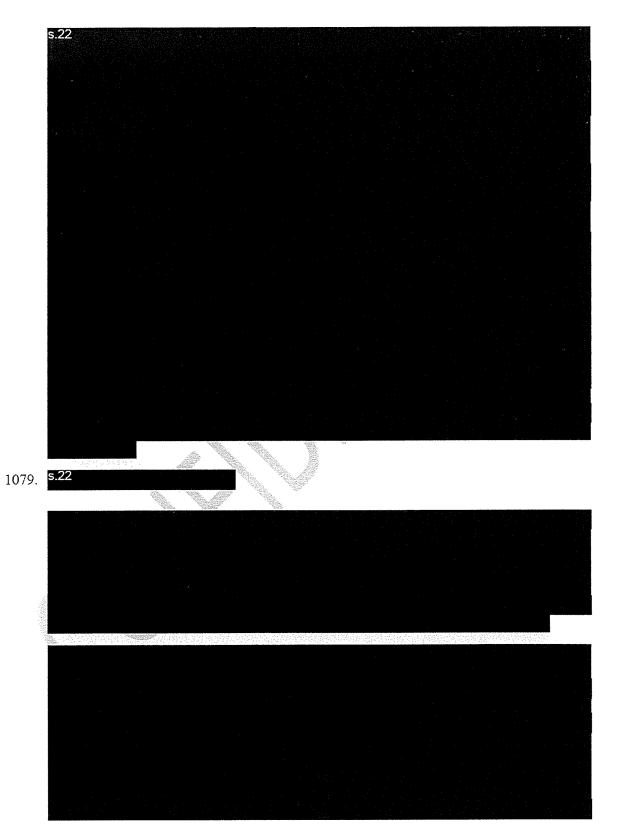


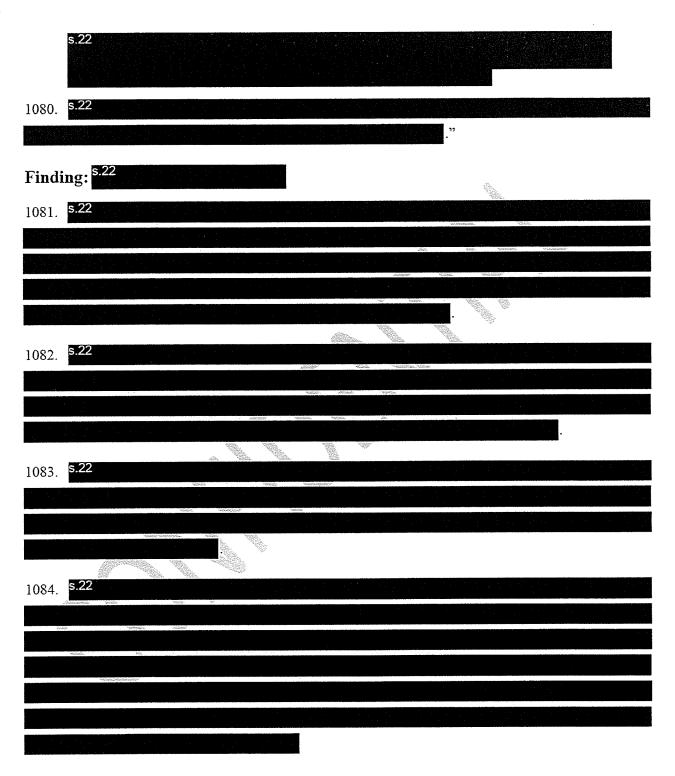




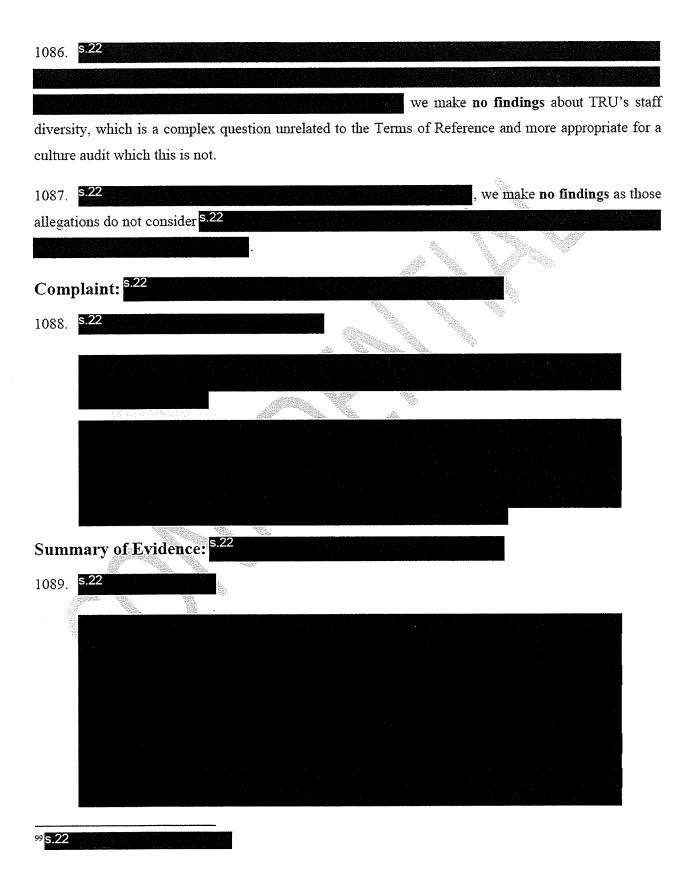


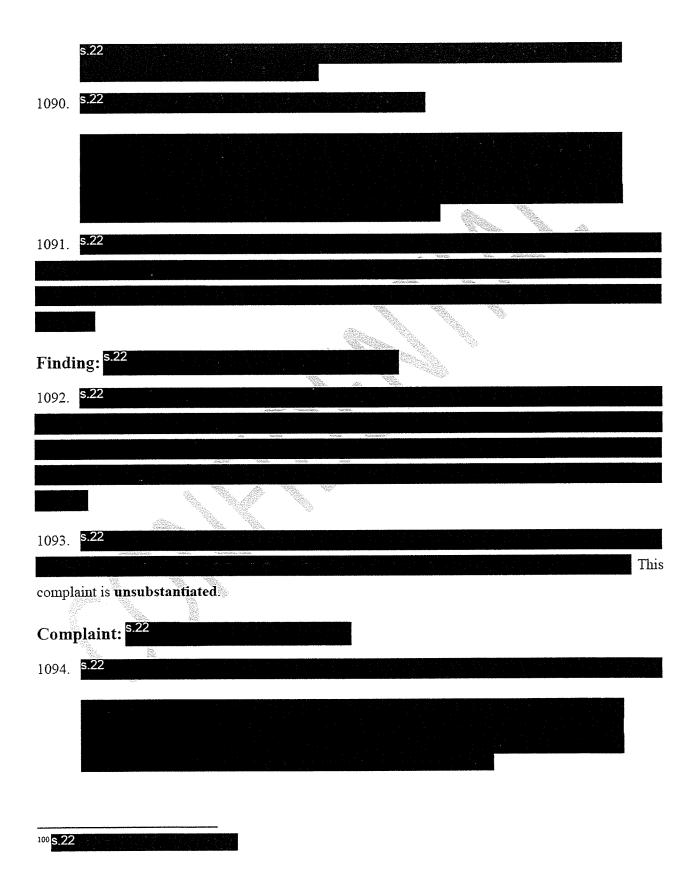


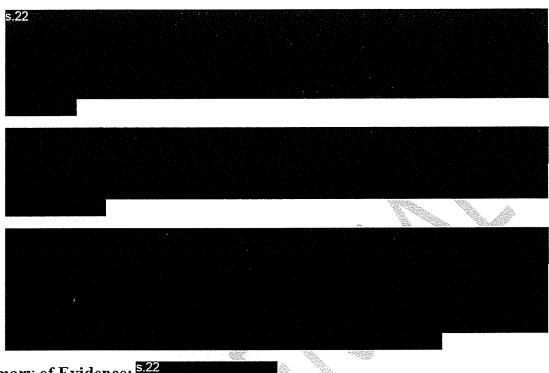




1085. Based on the foregoing, we find this allegation unsubstantiated.



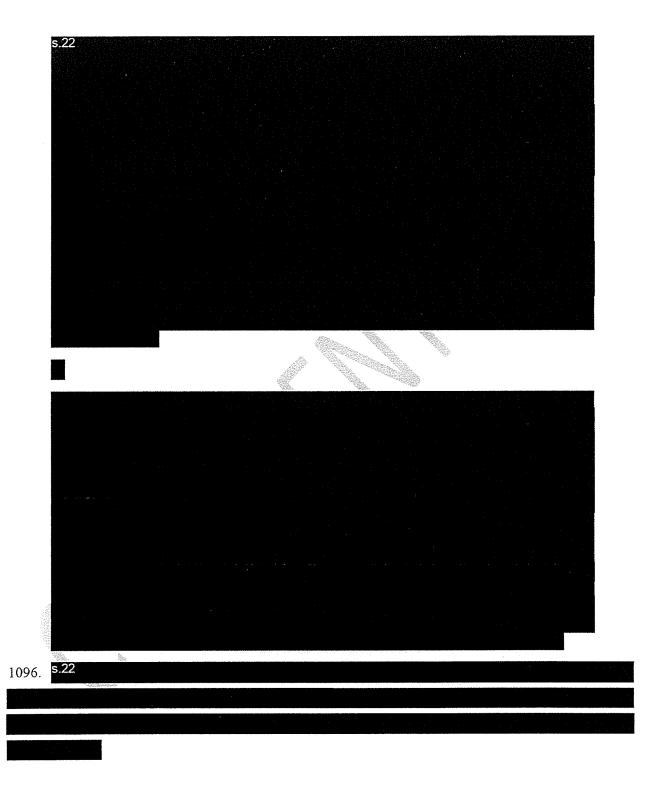


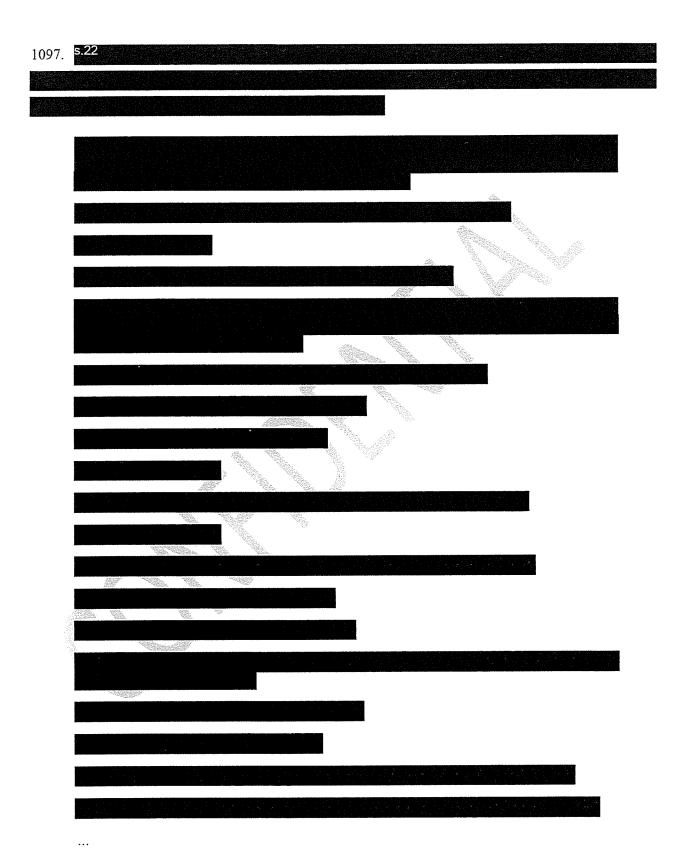


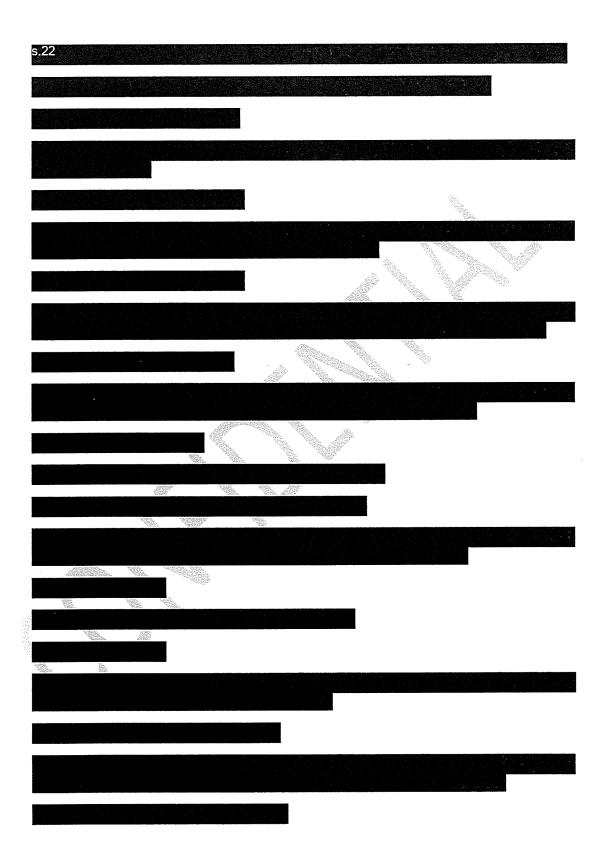
Summary of Evidence: 5.22

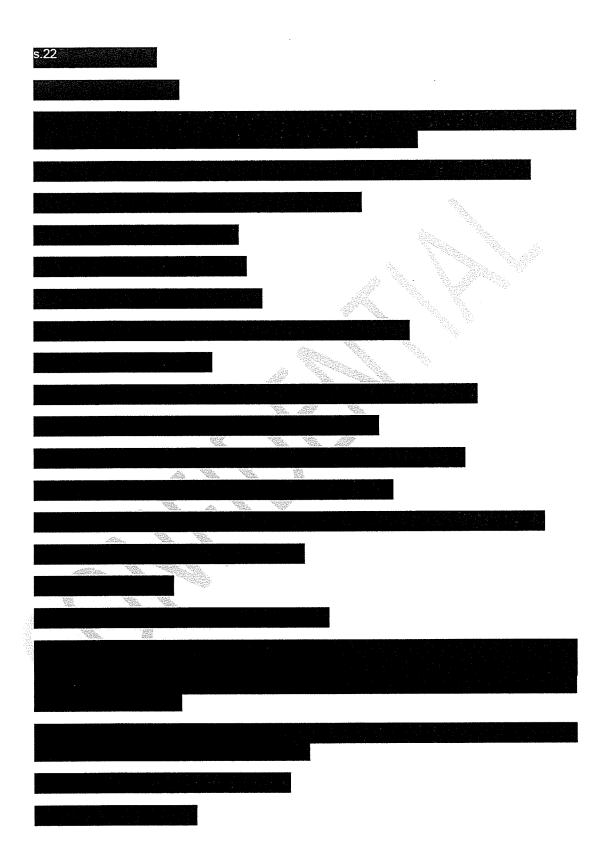
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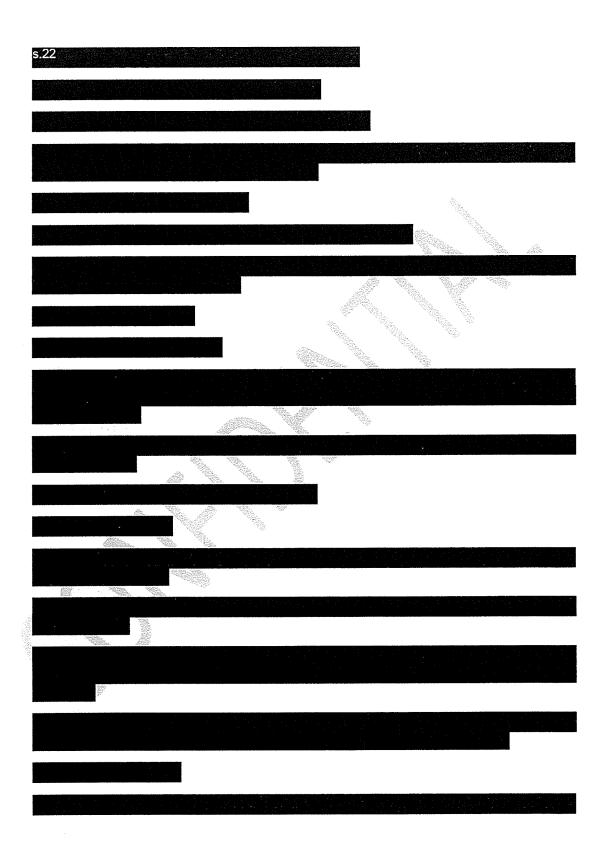


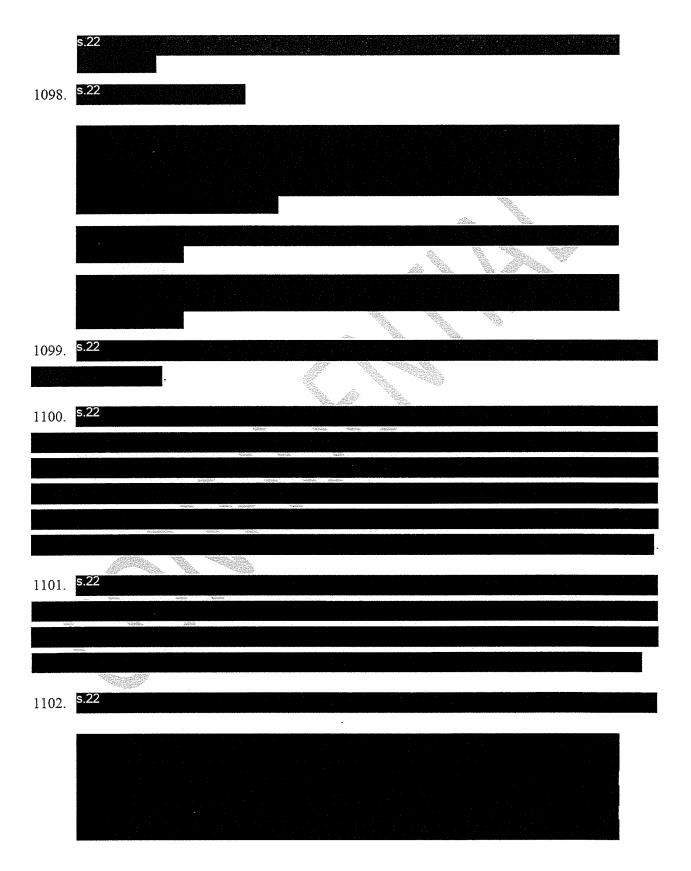


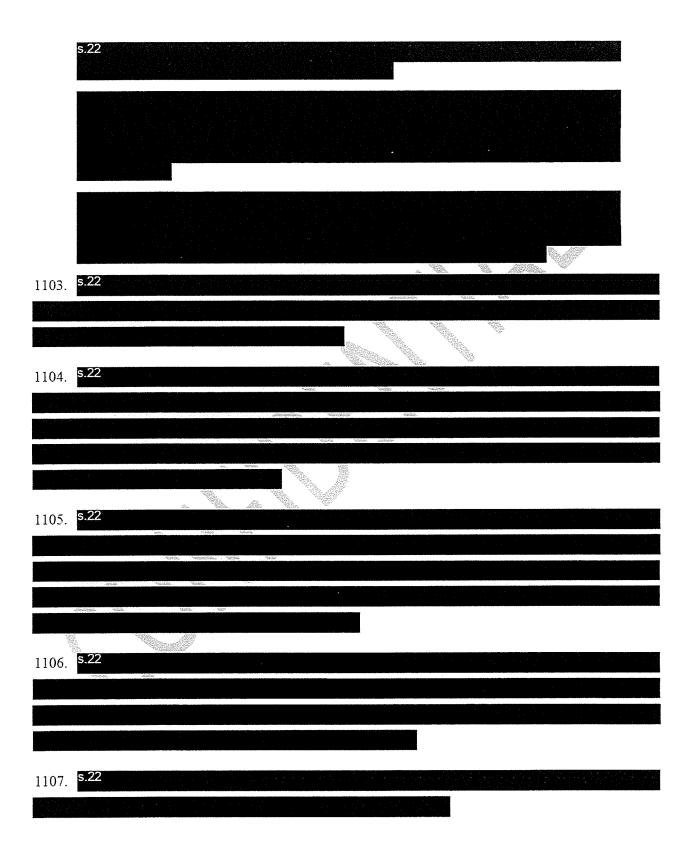


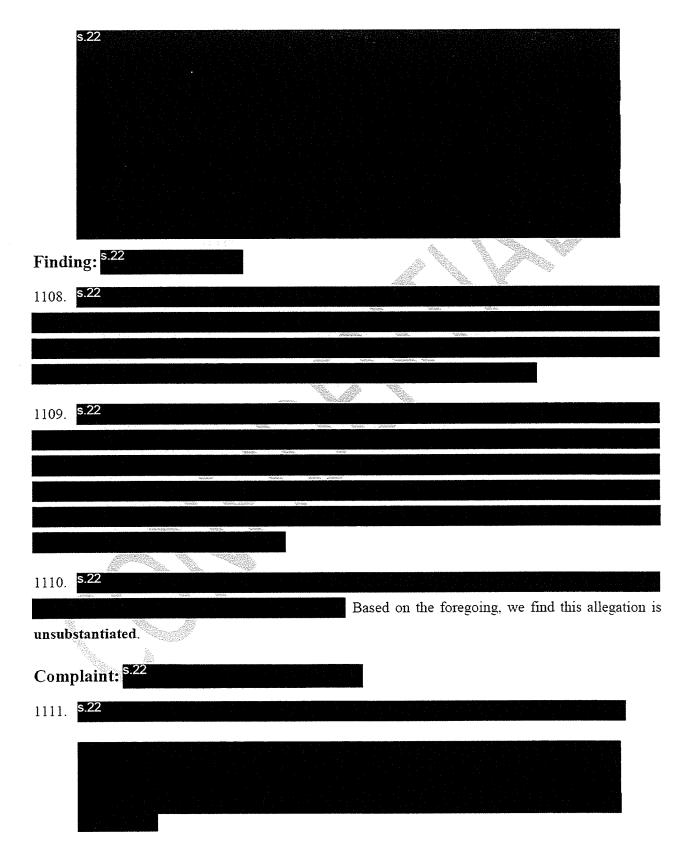


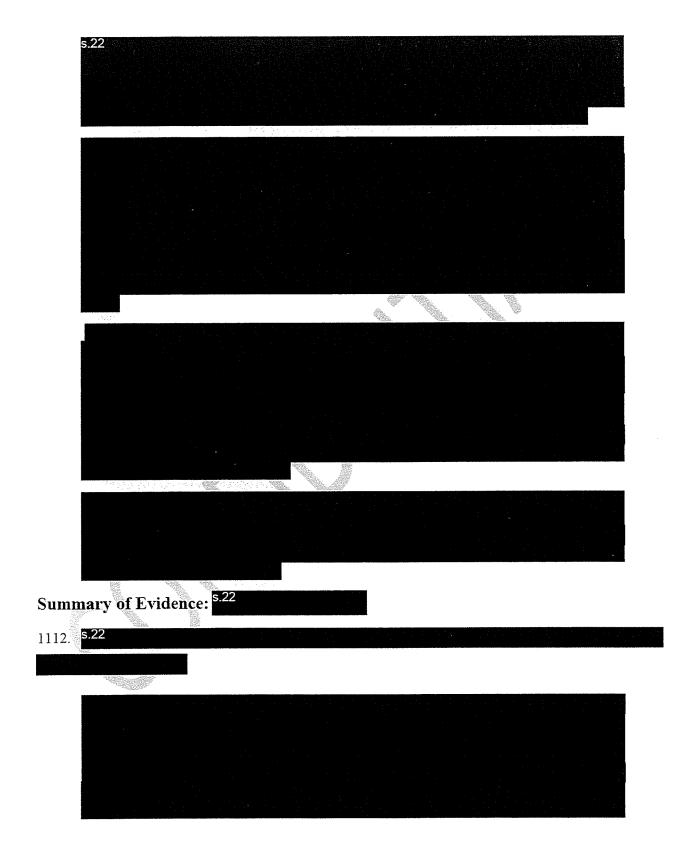


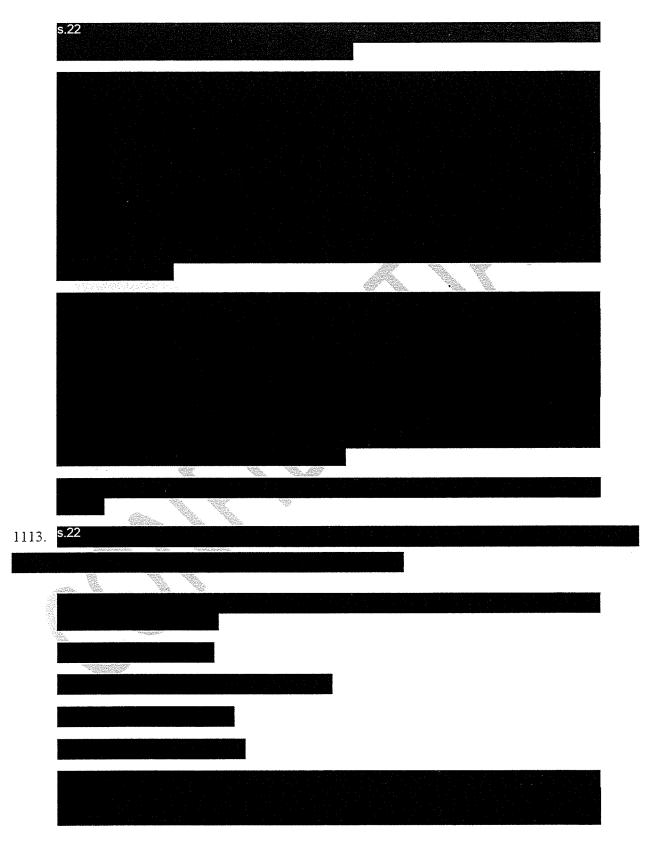


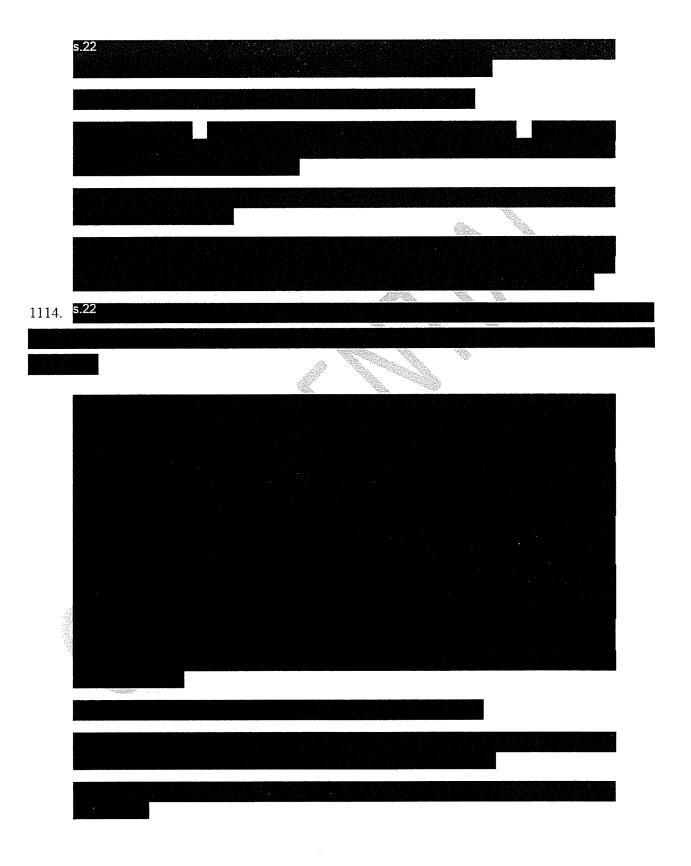


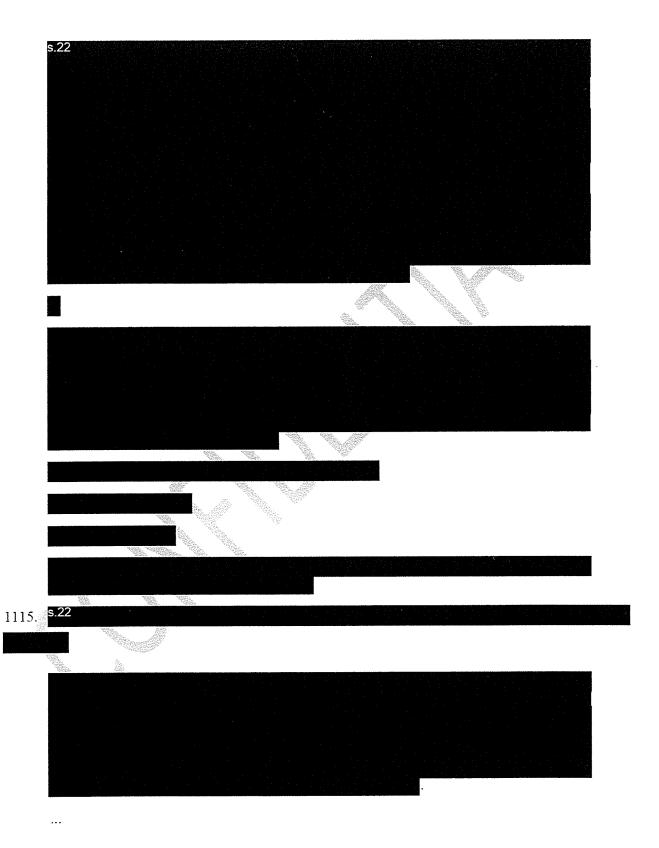


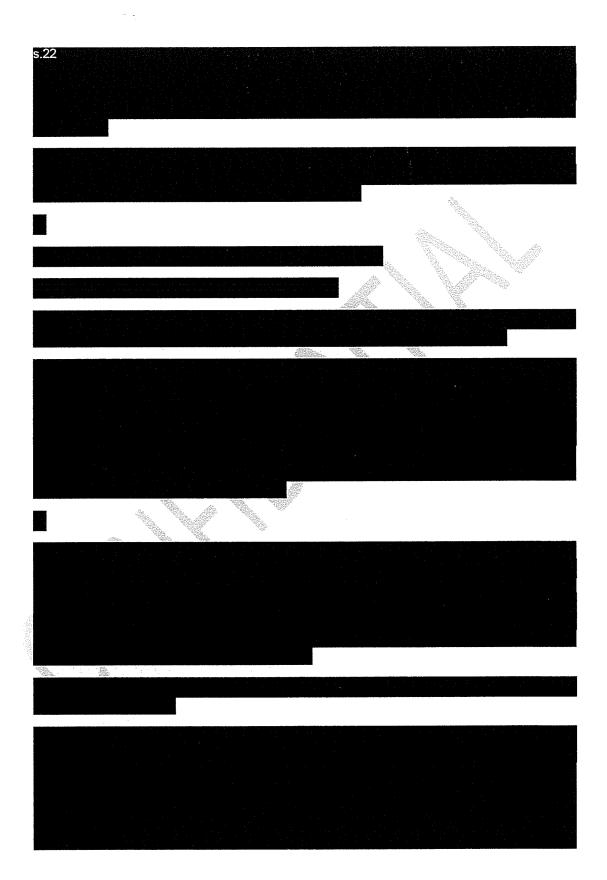


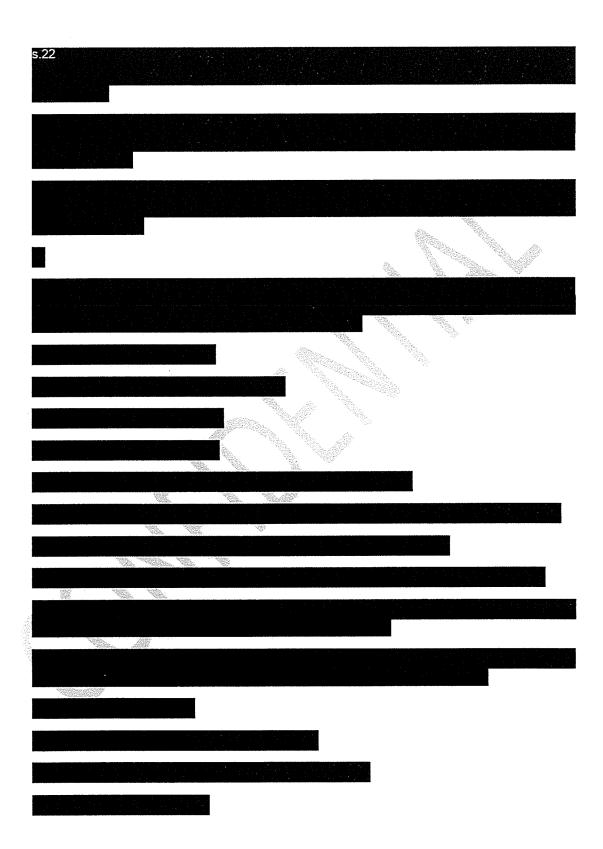


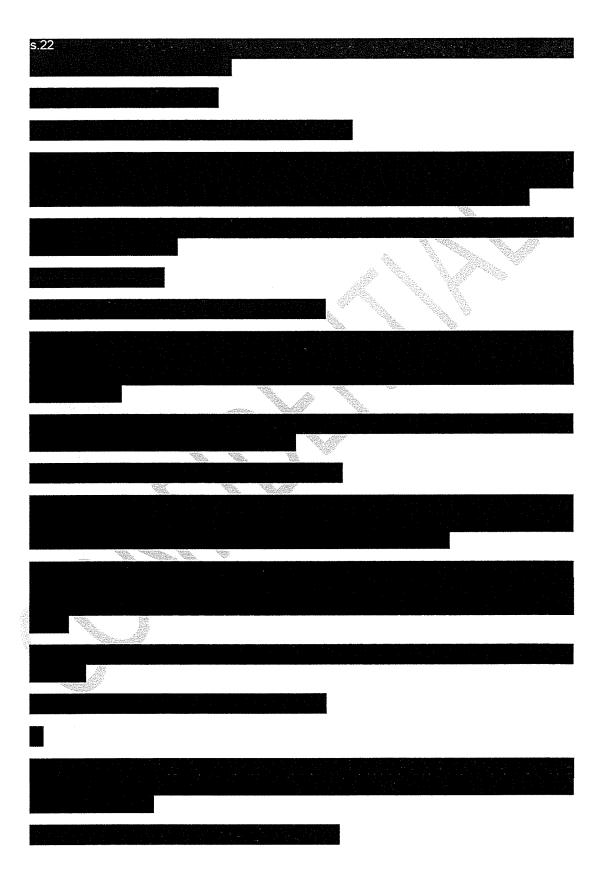


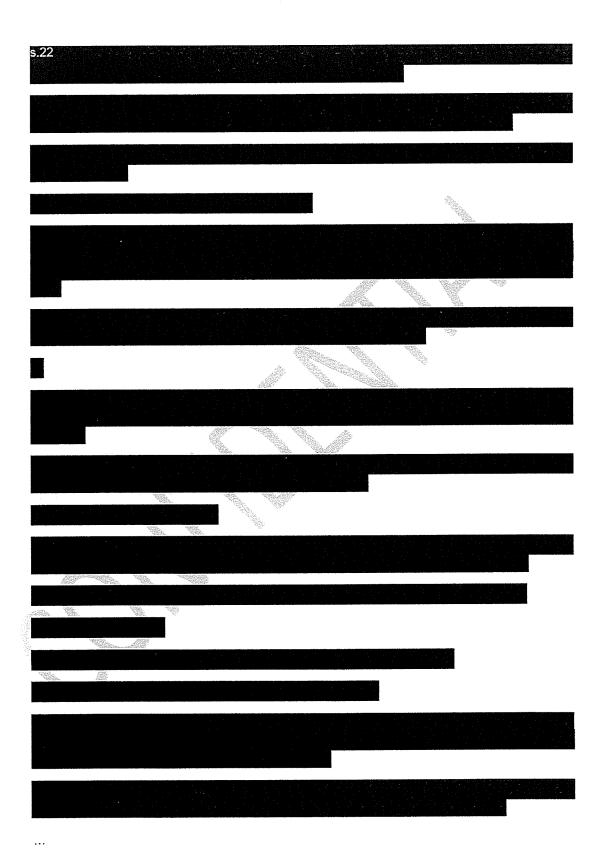


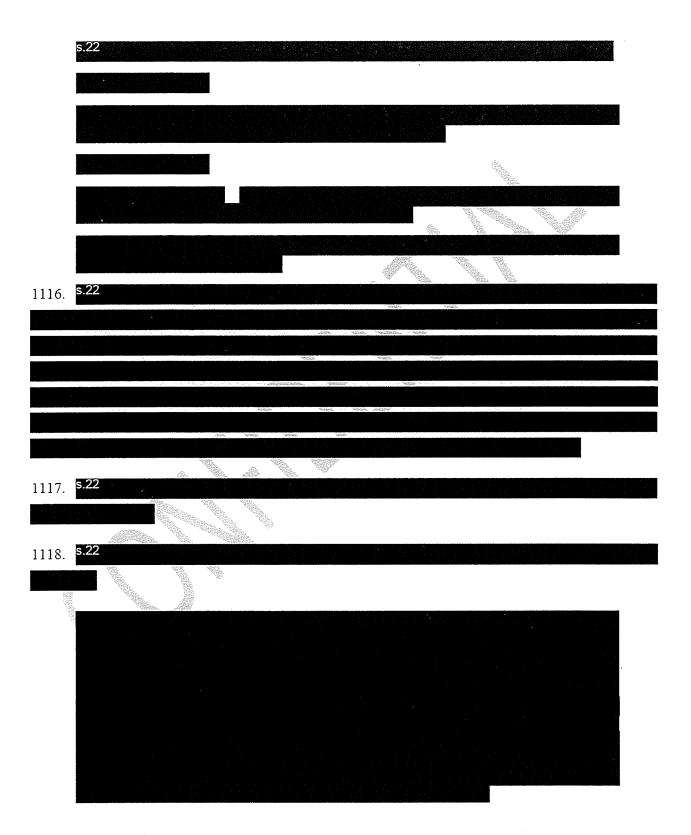


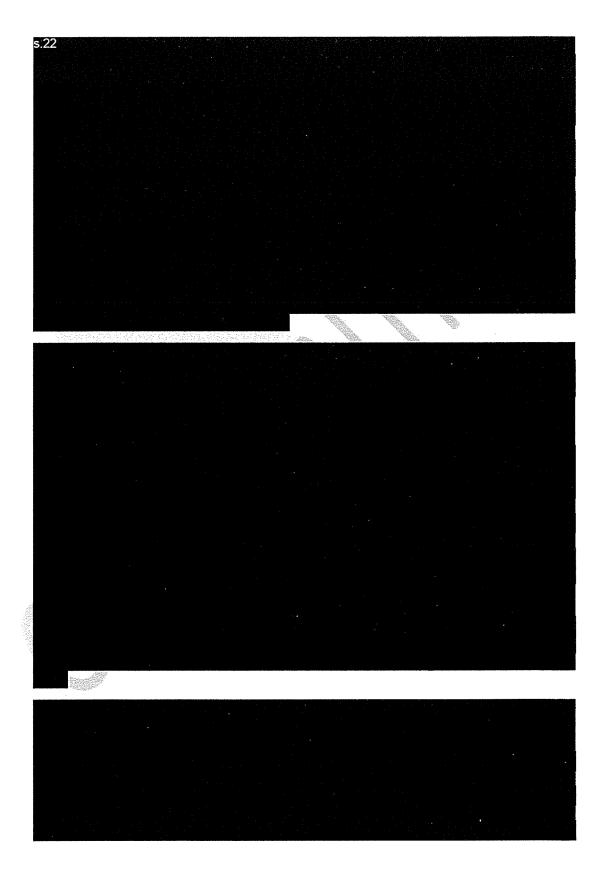


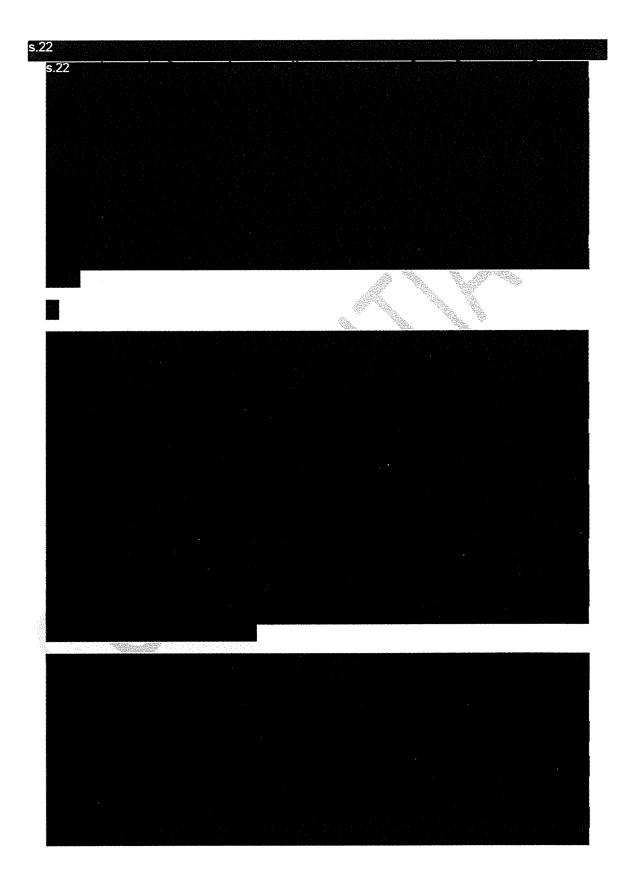


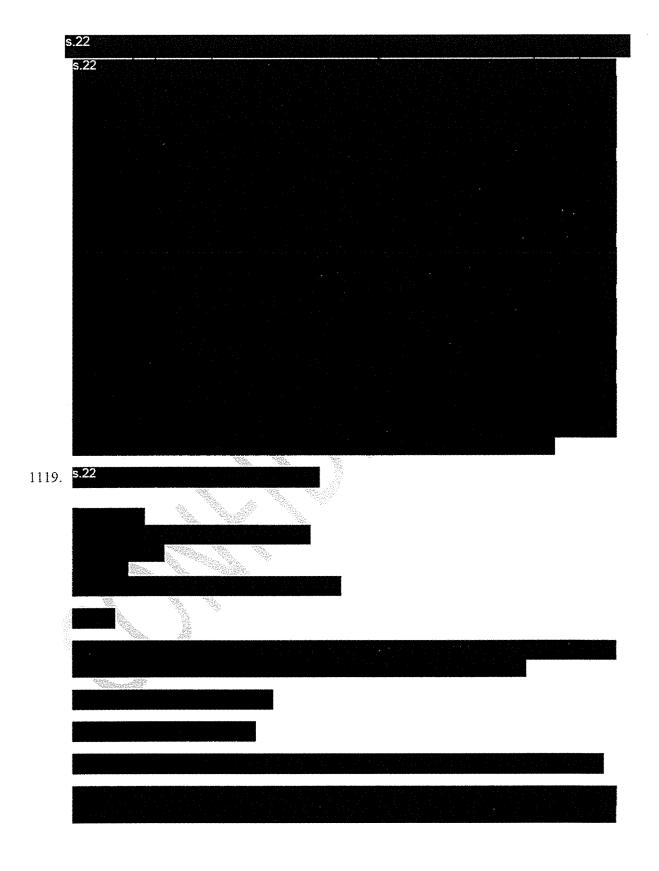


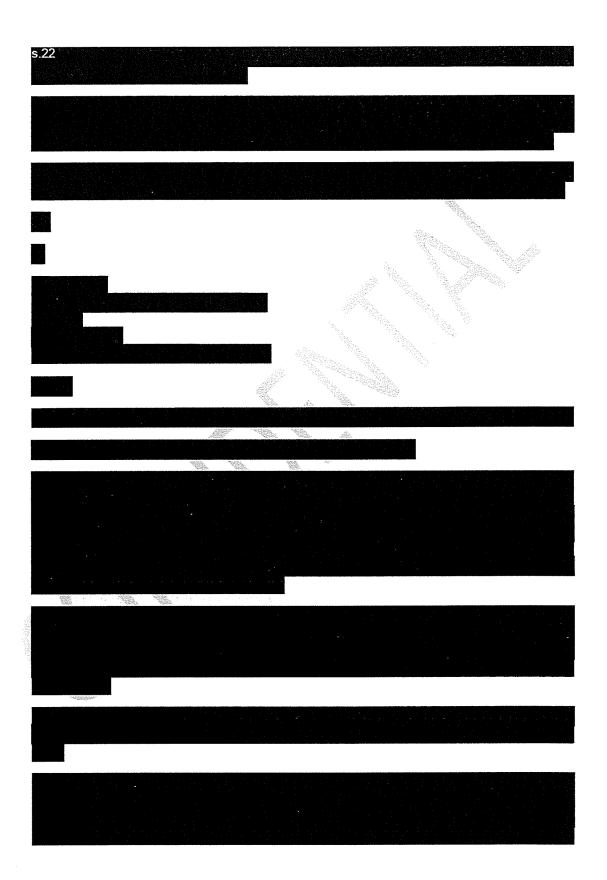


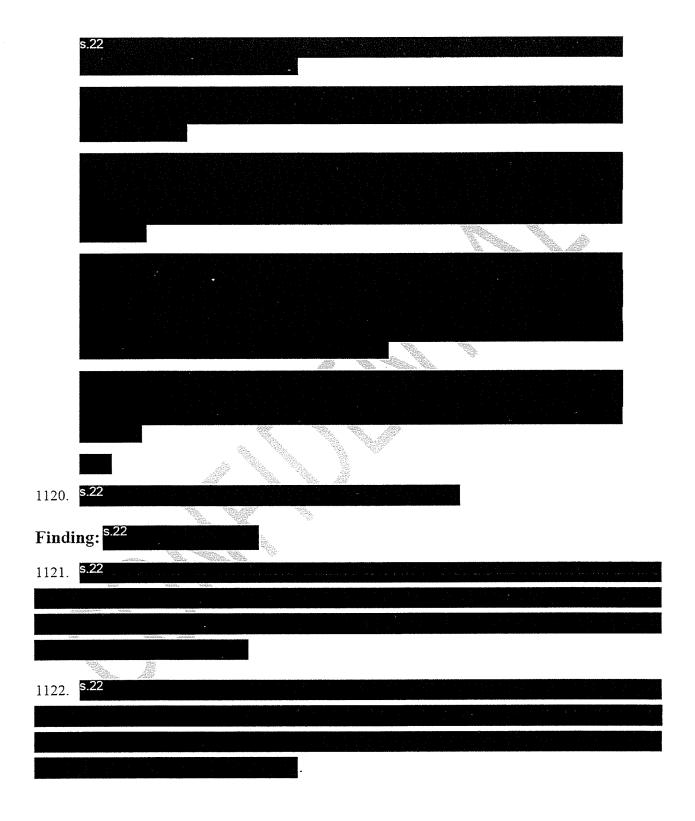




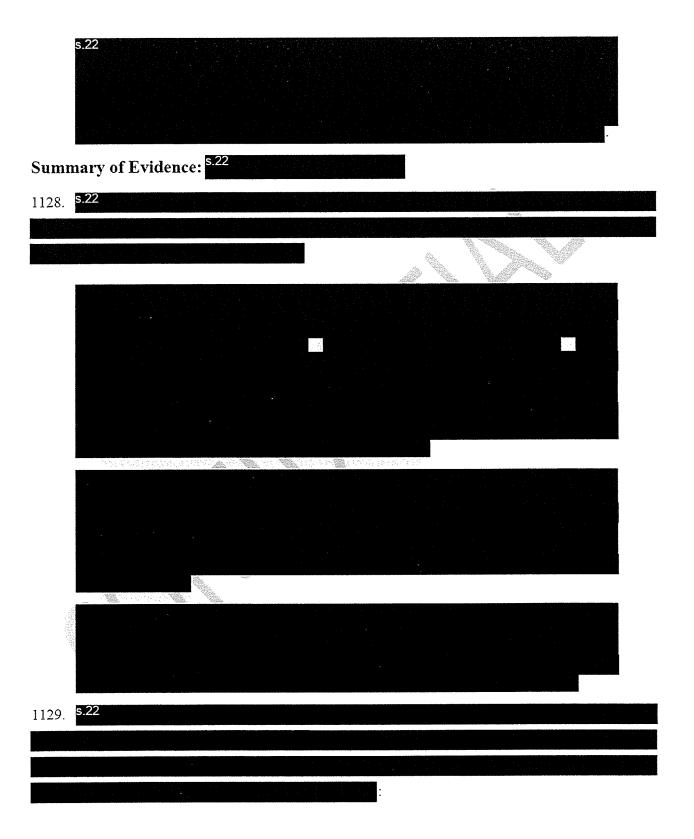


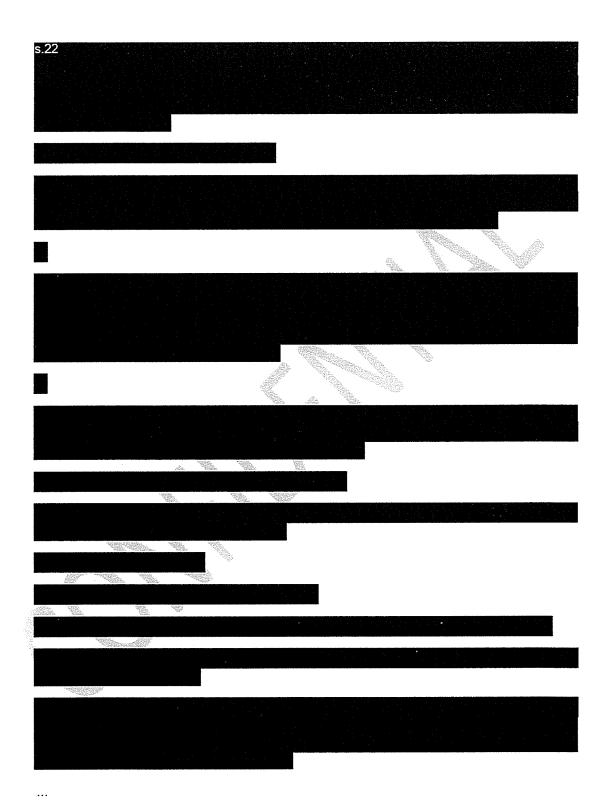


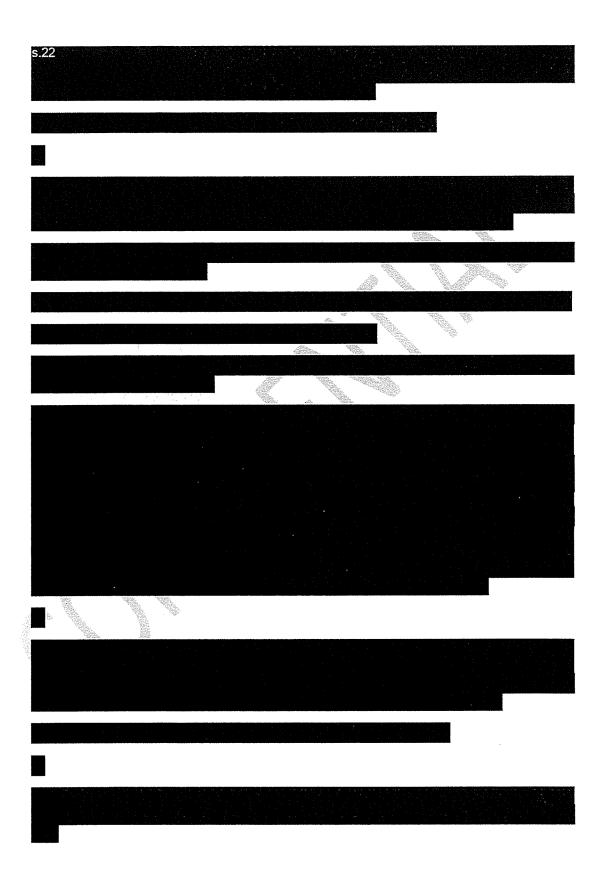


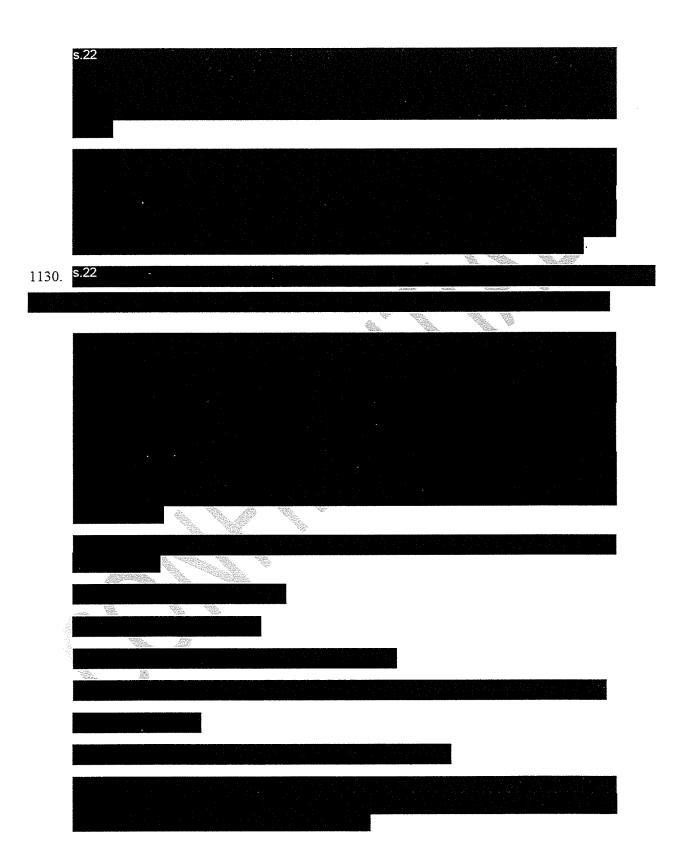


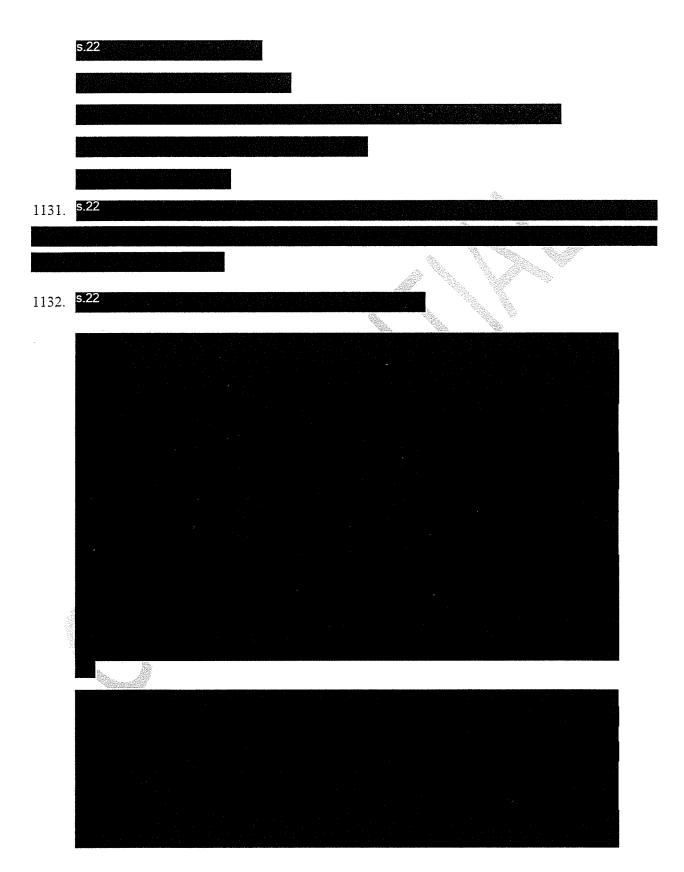
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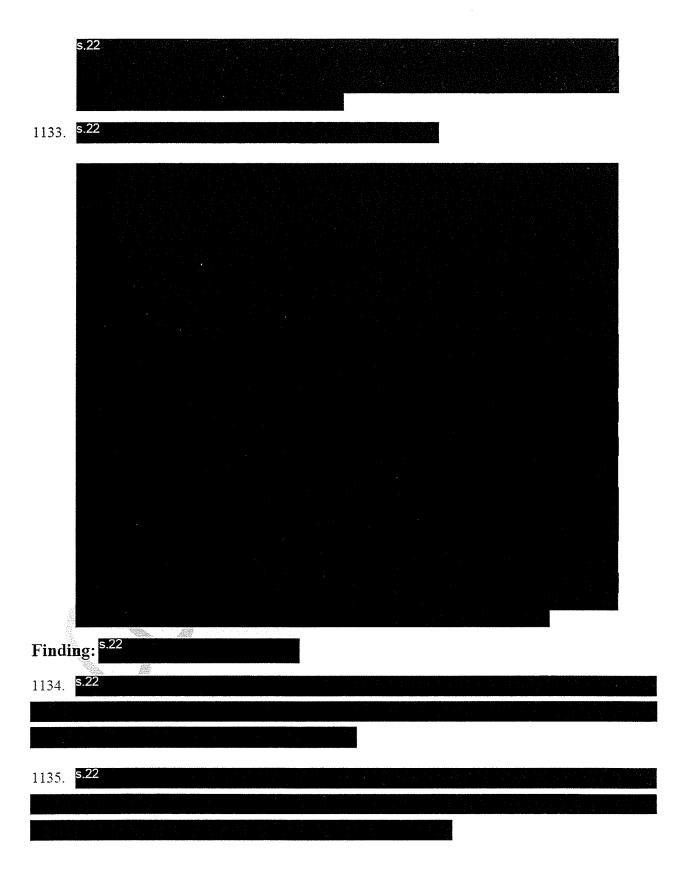




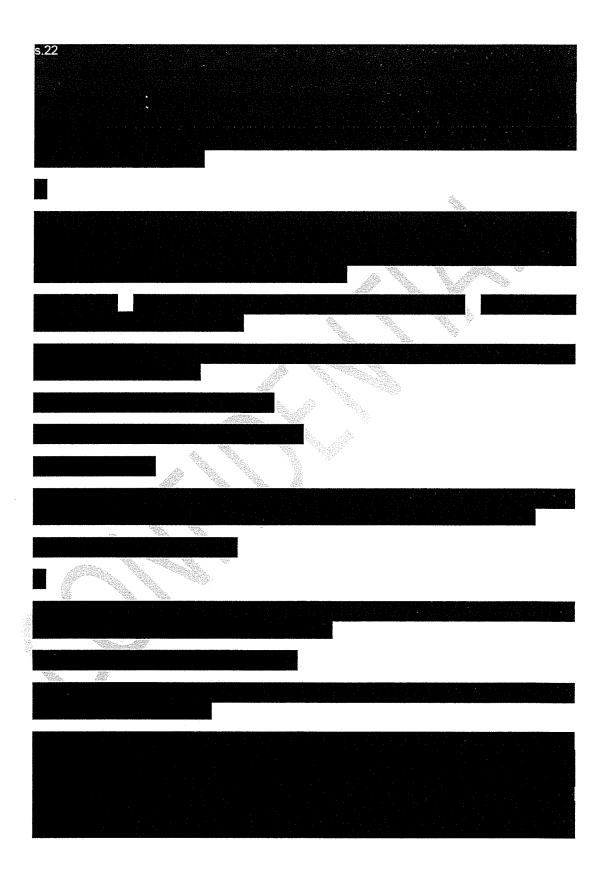


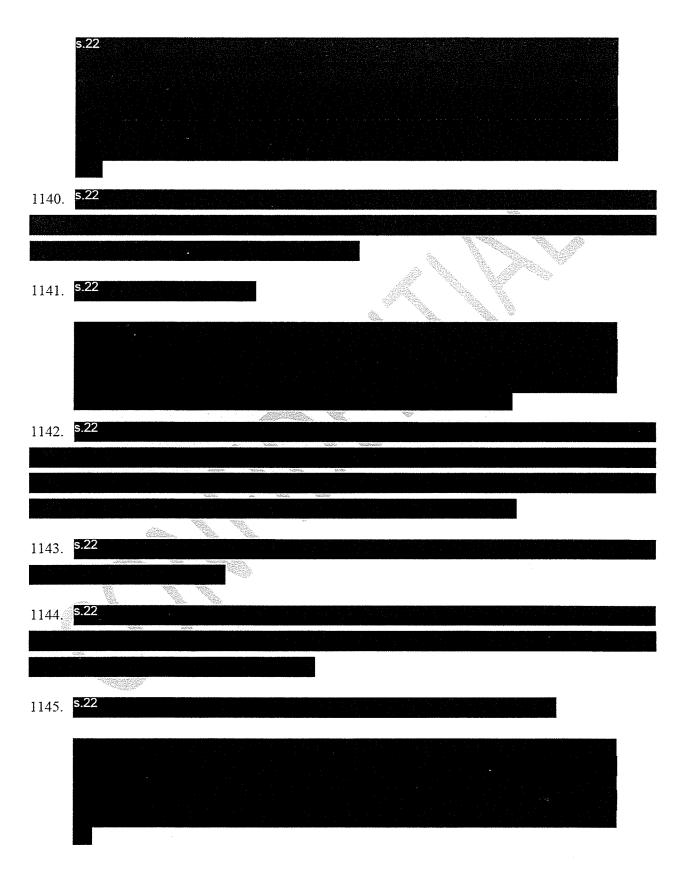


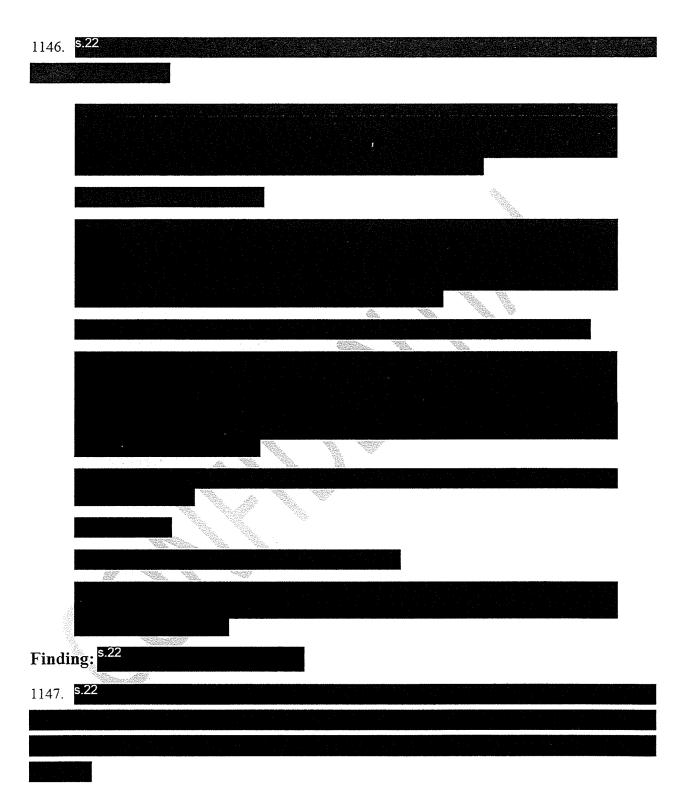


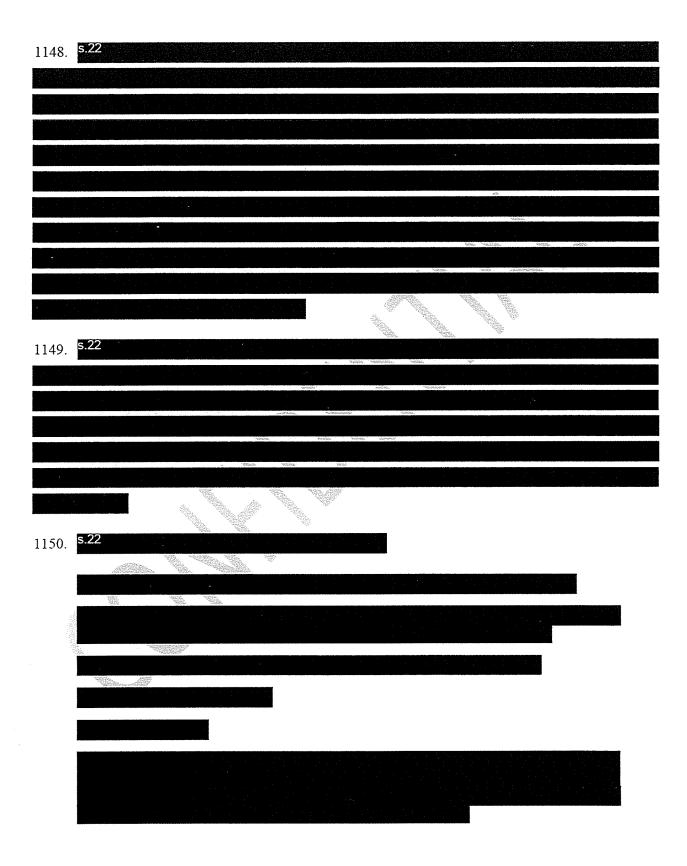


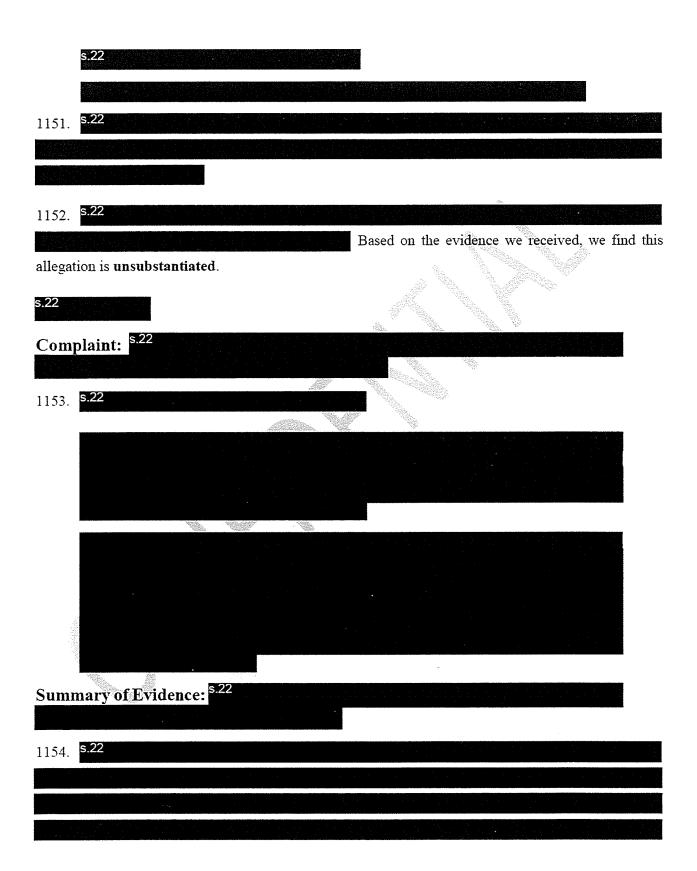
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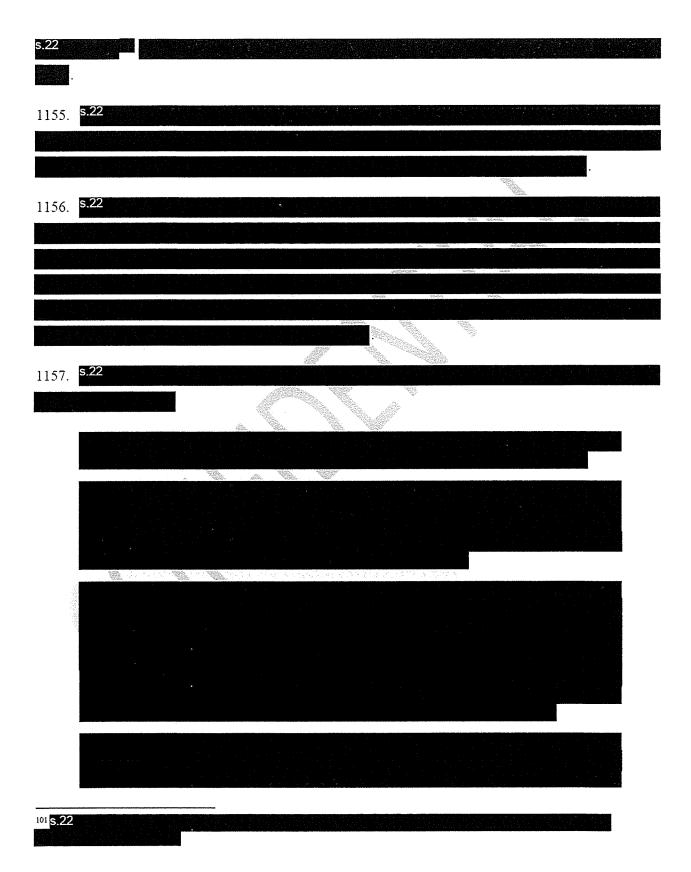


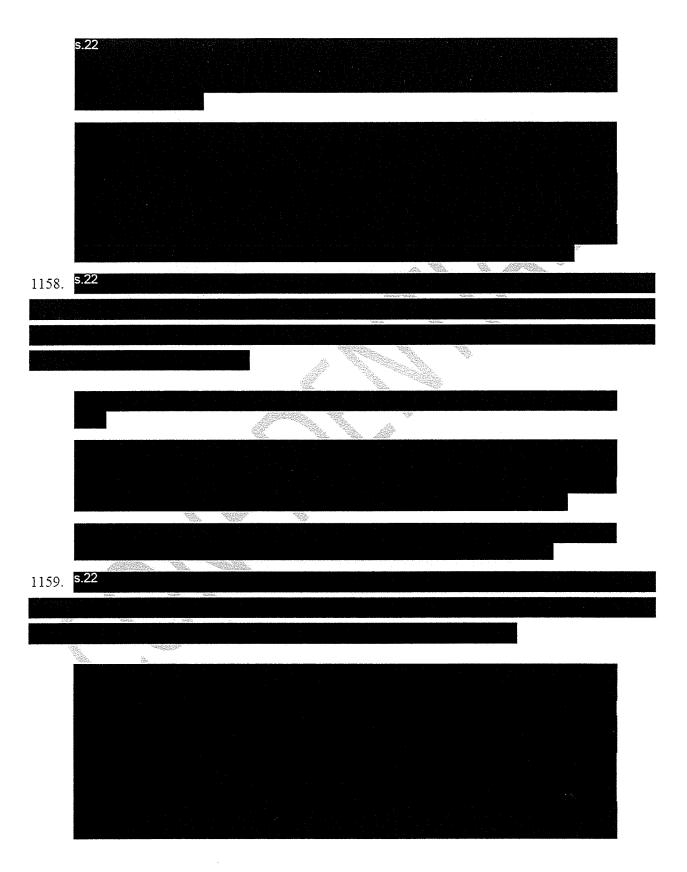


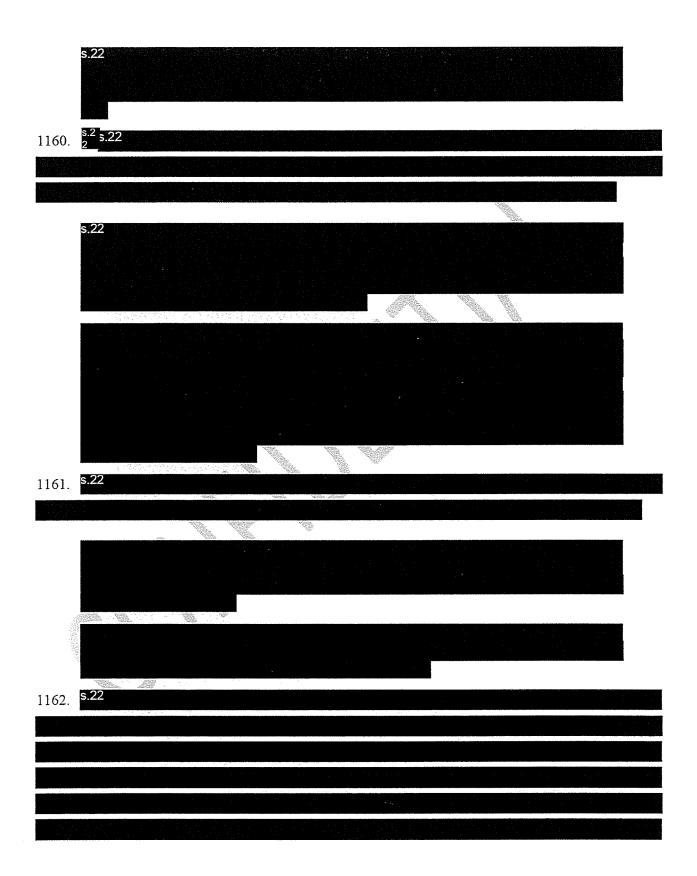


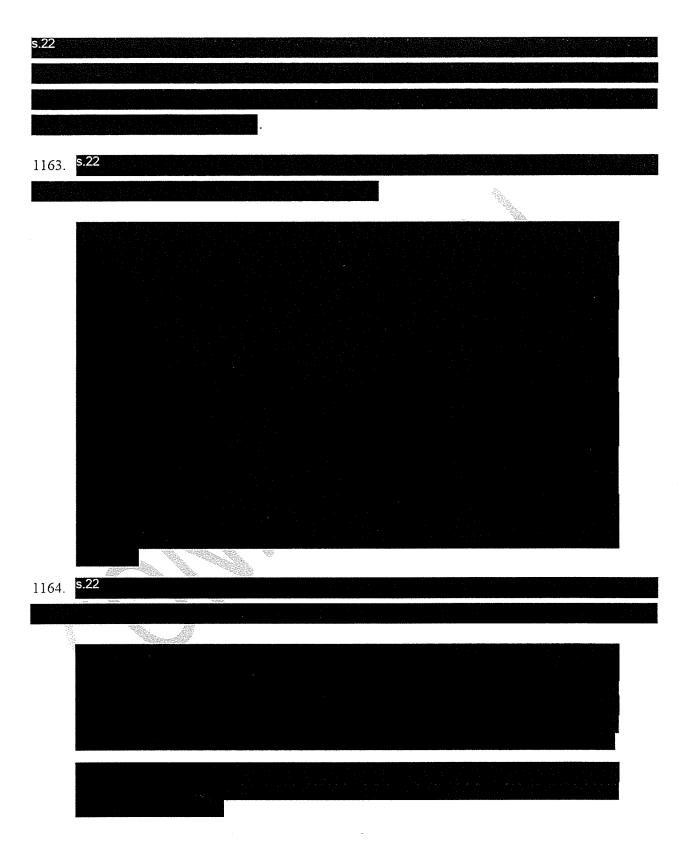


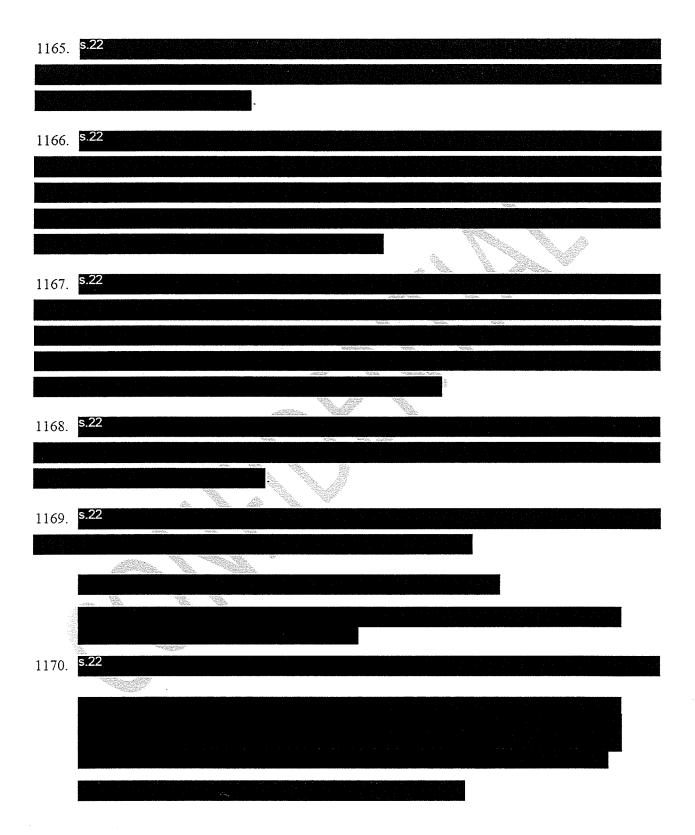


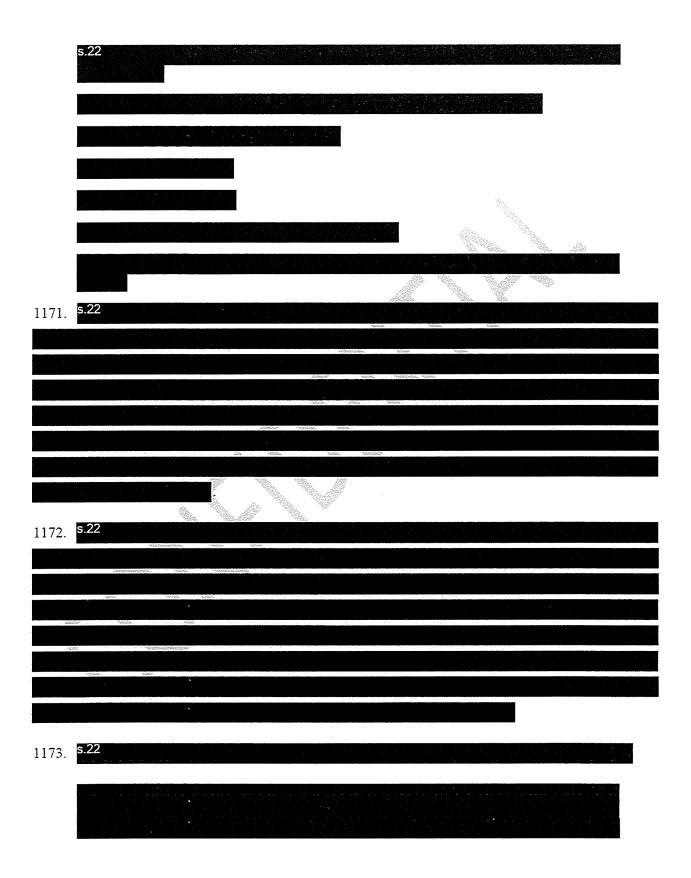




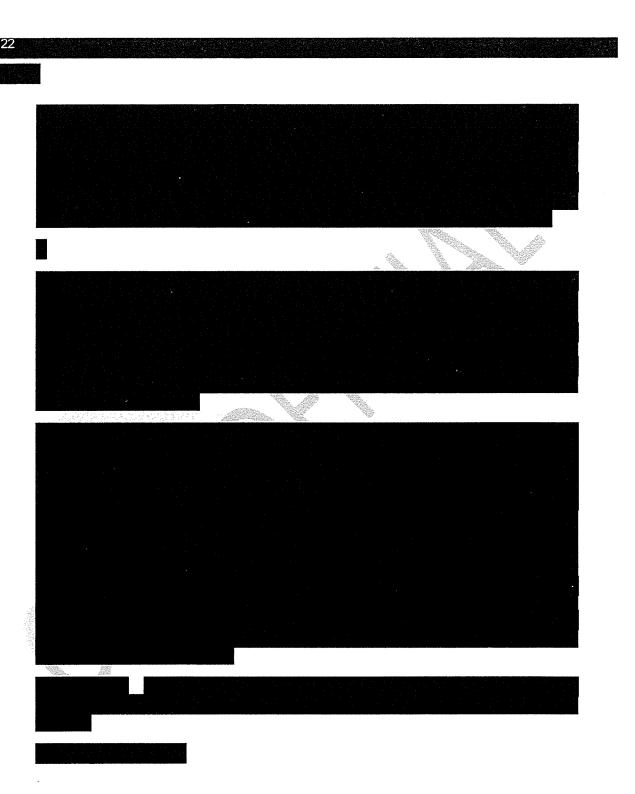


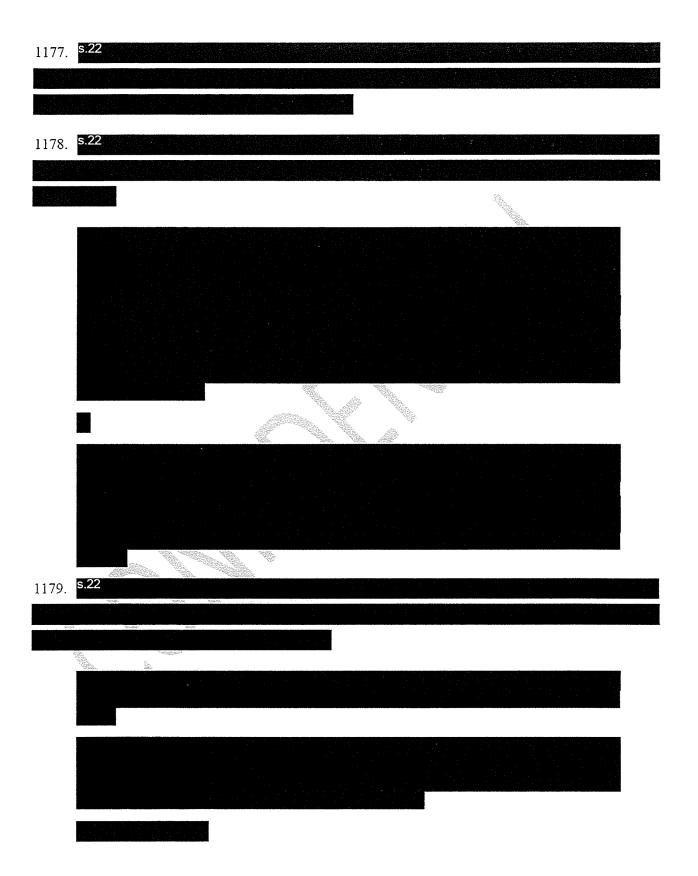


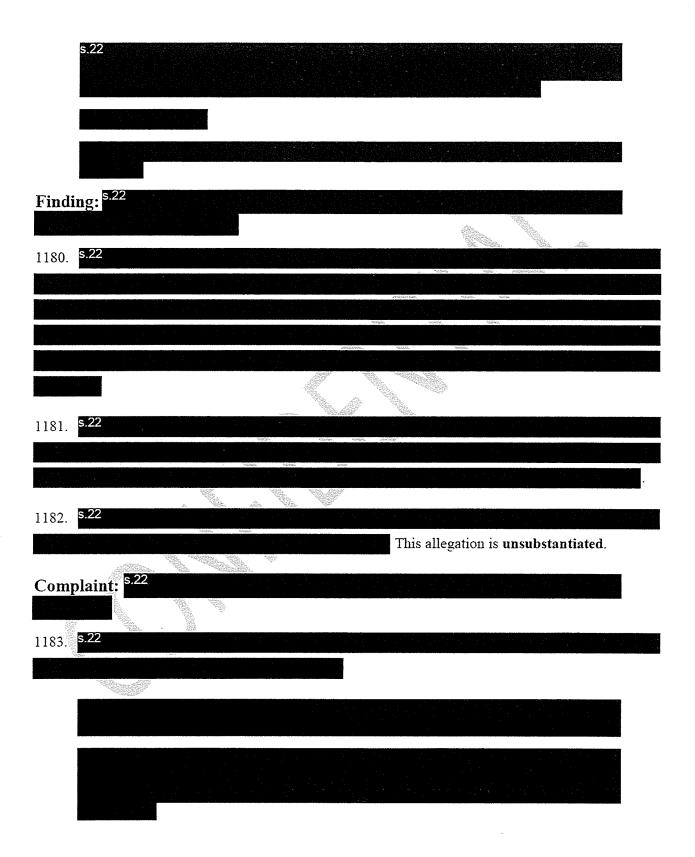


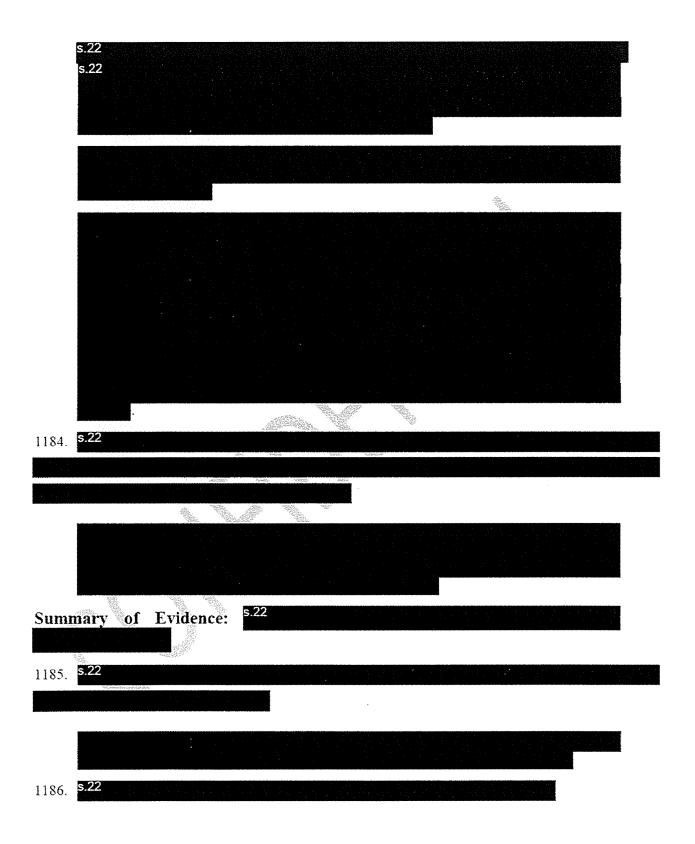


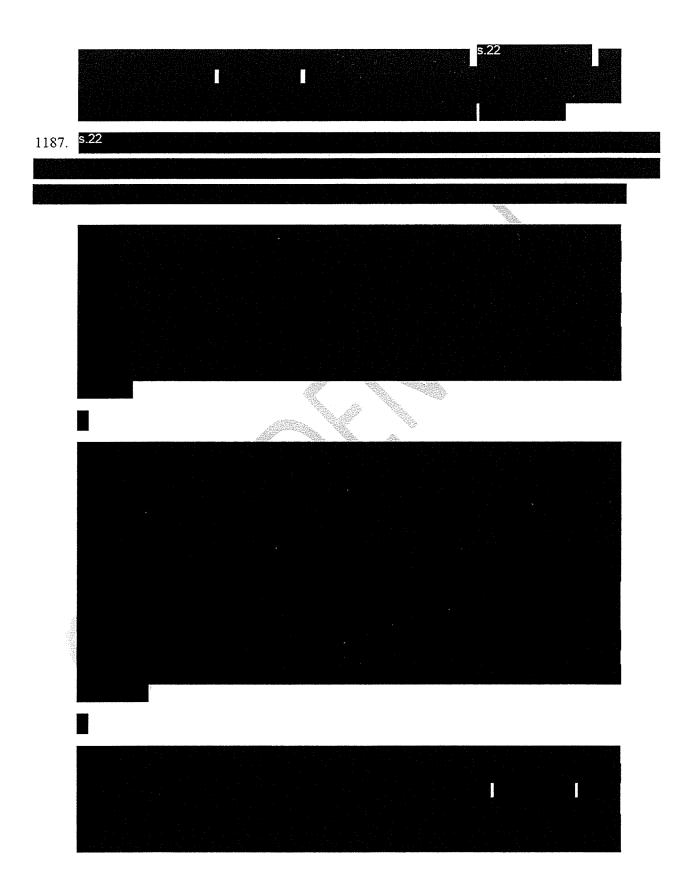


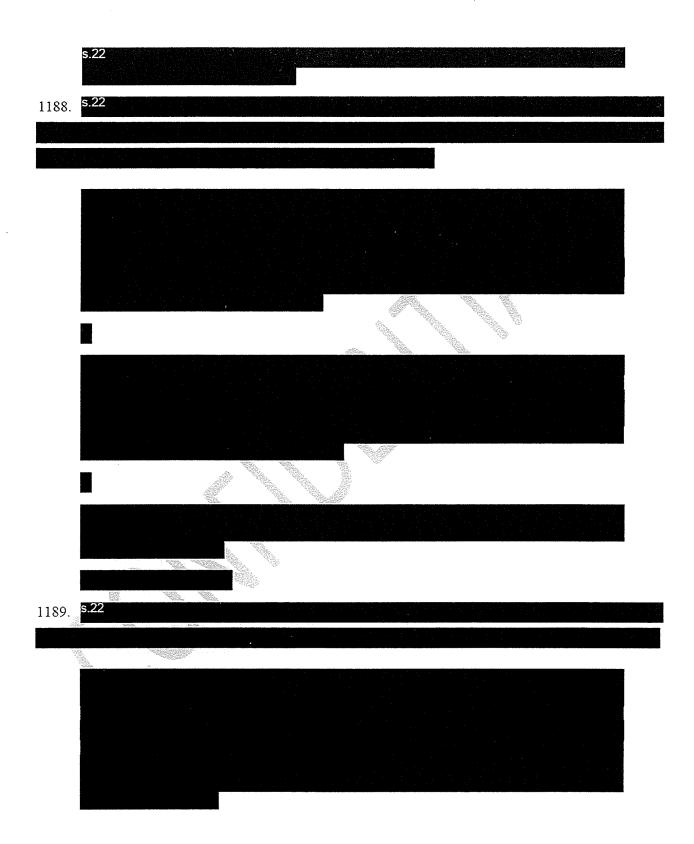


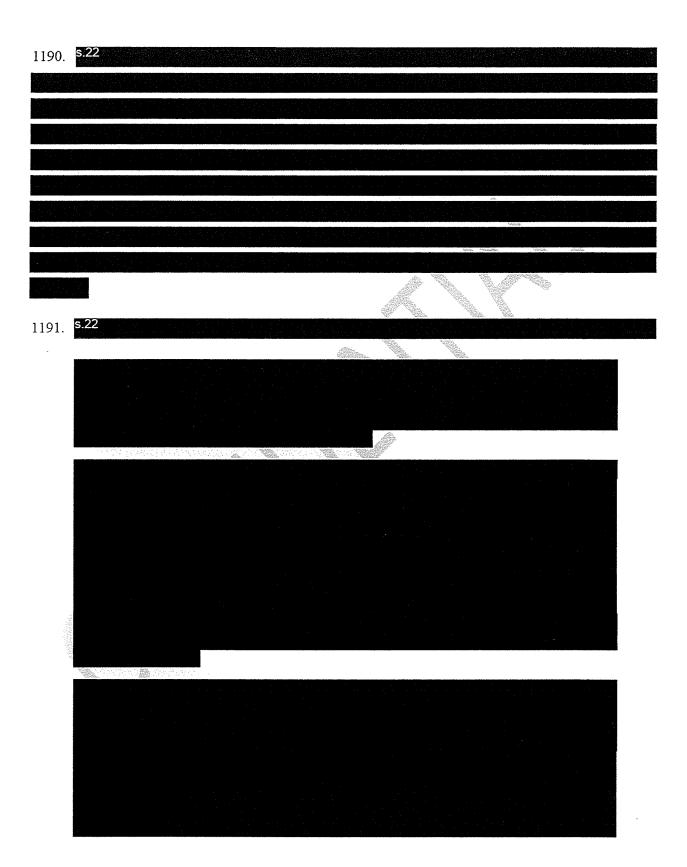


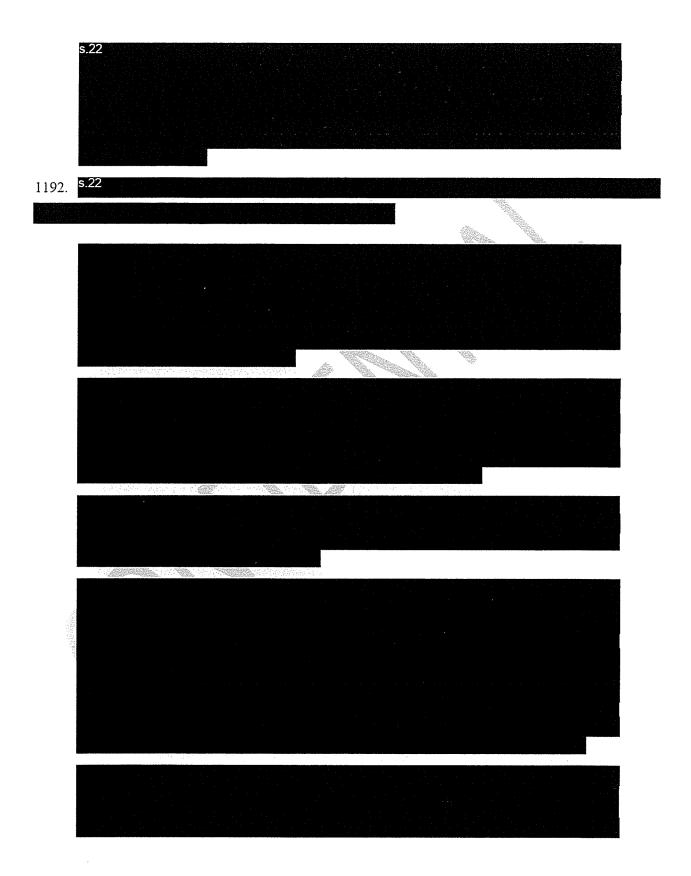


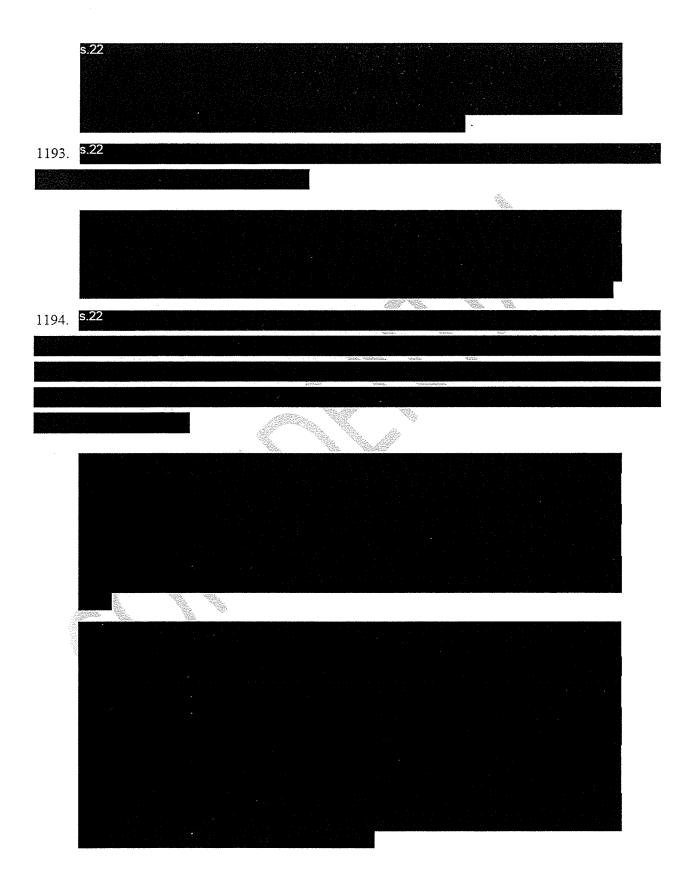


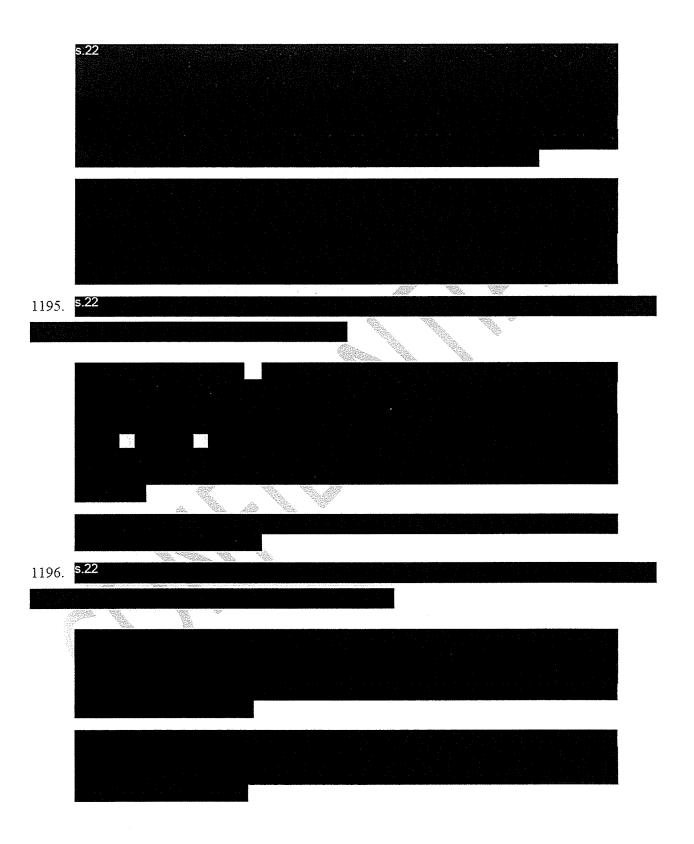


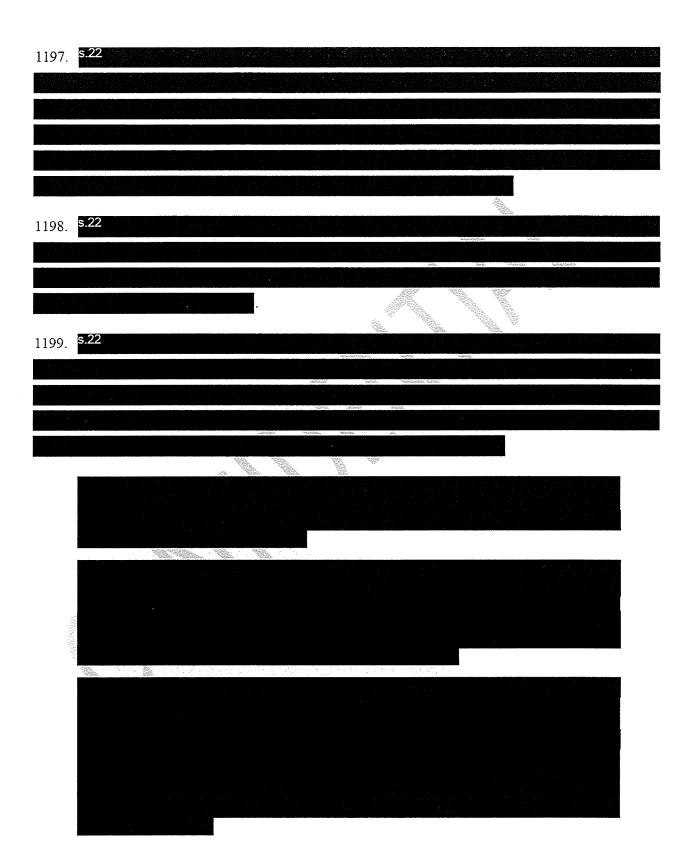


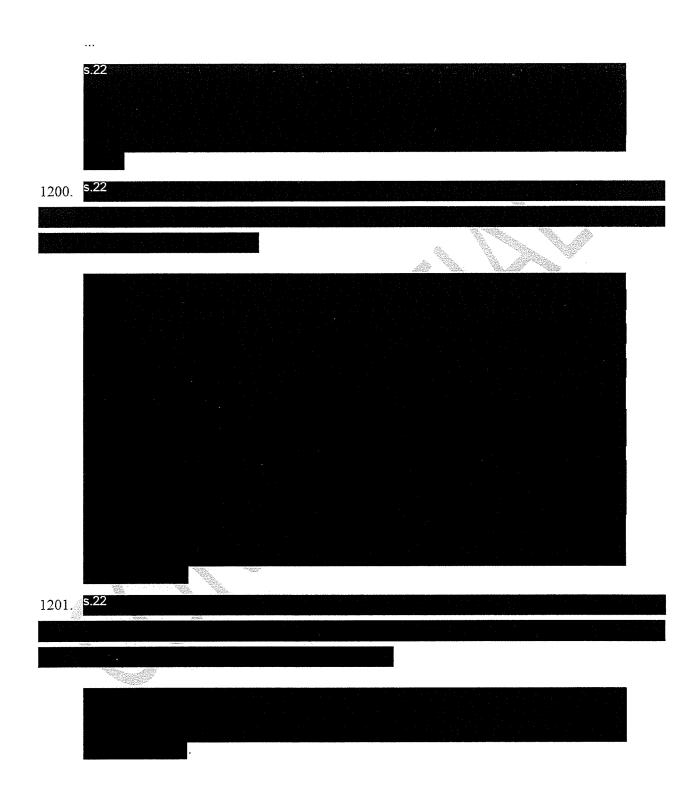


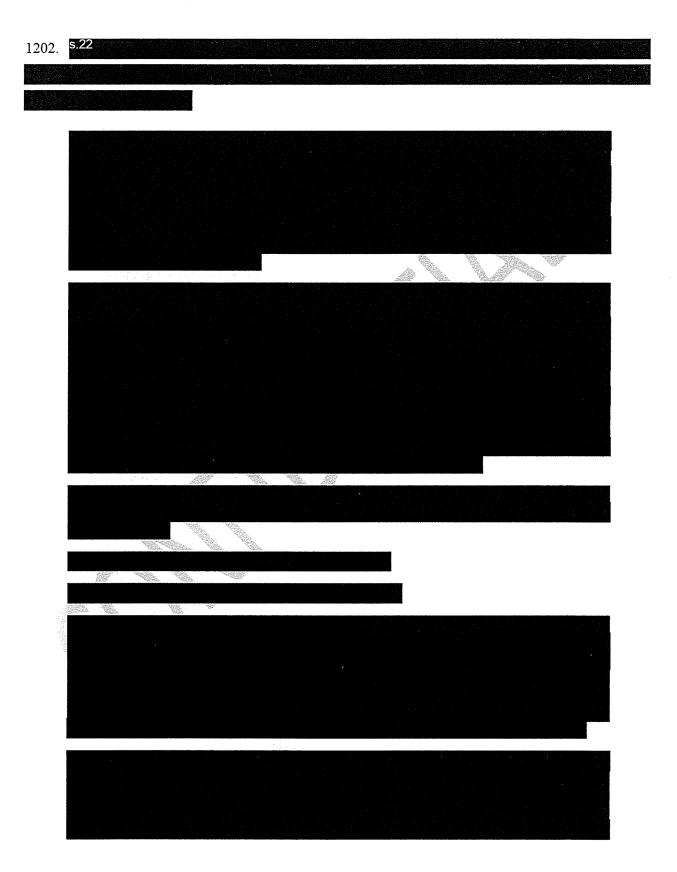


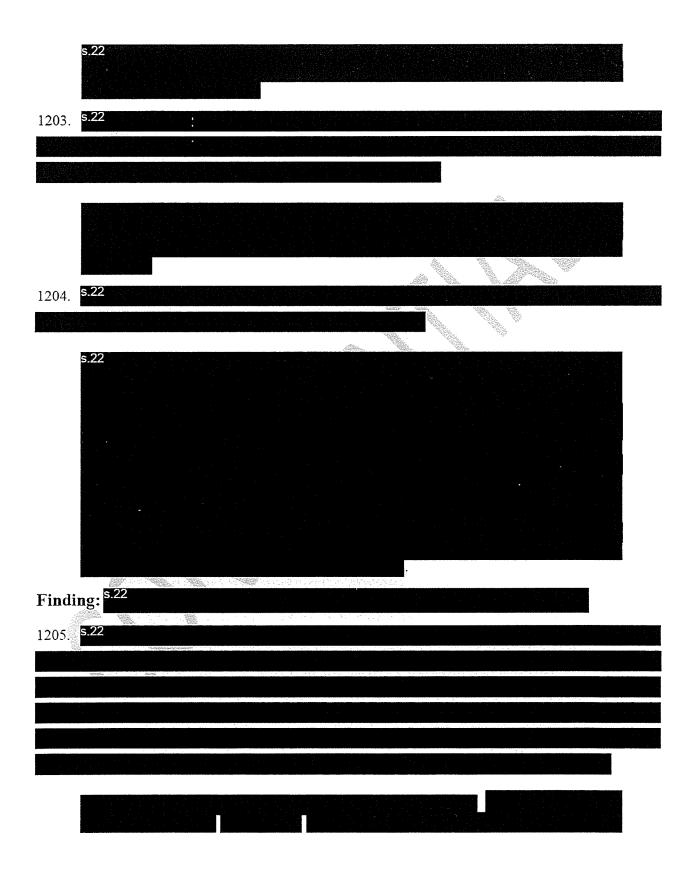


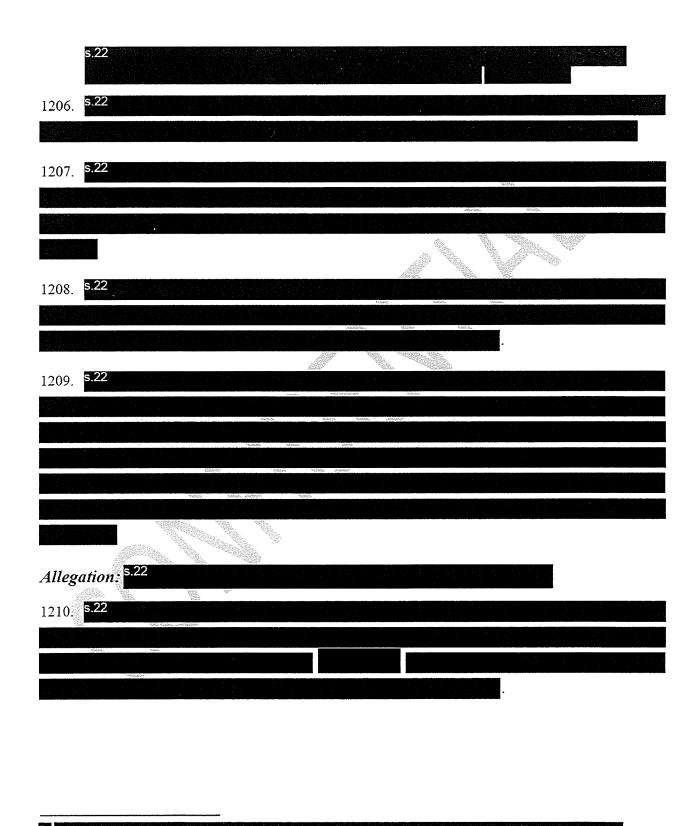




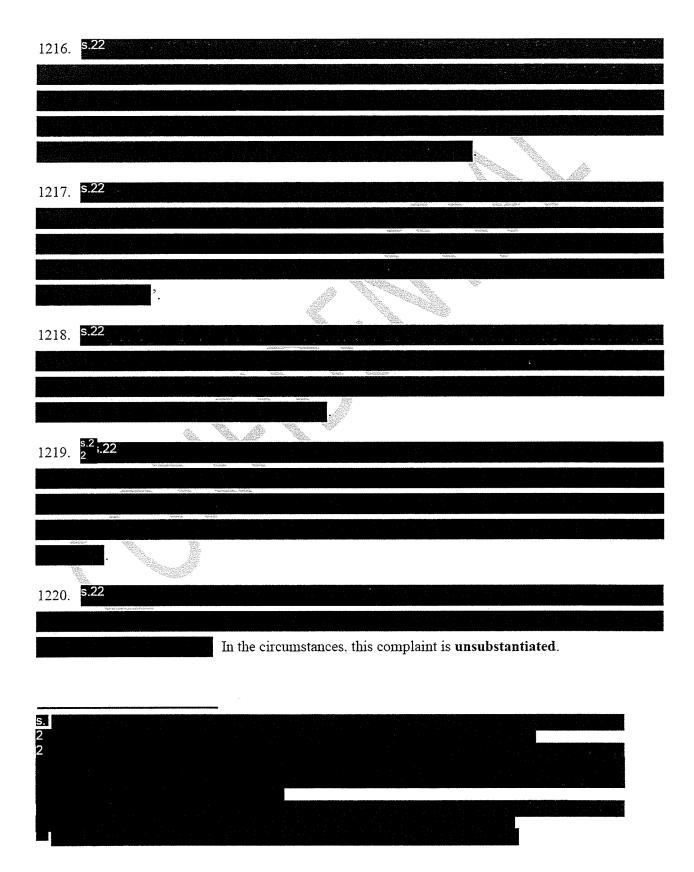


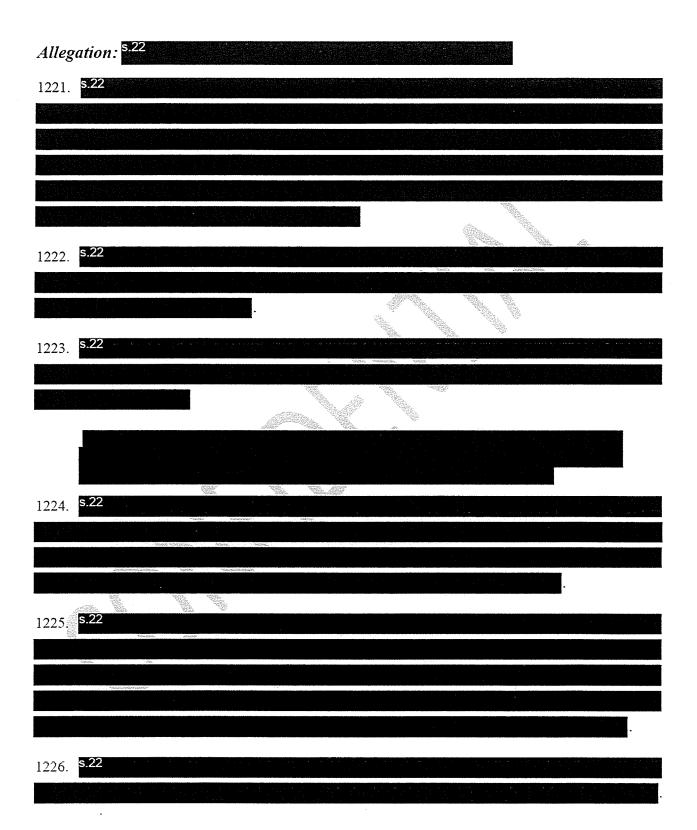


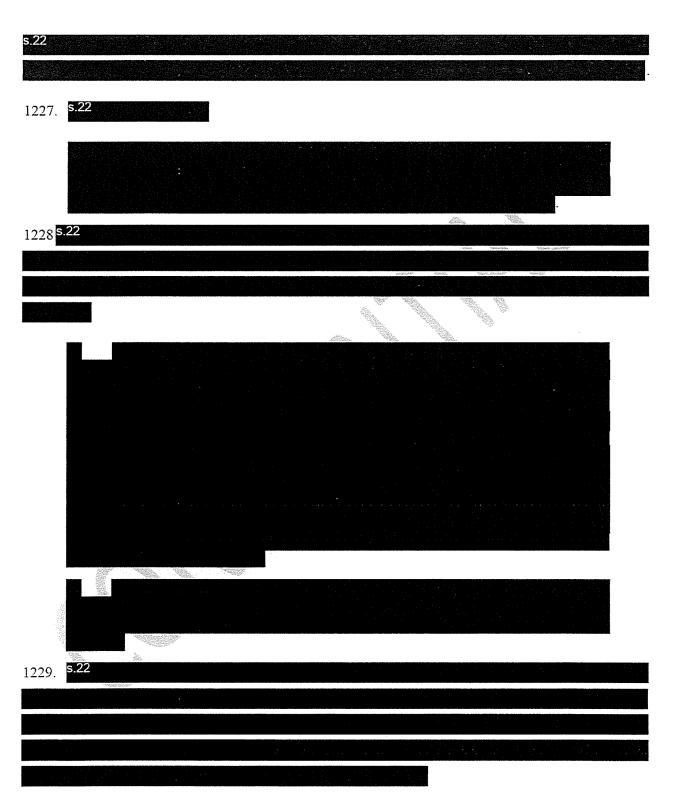




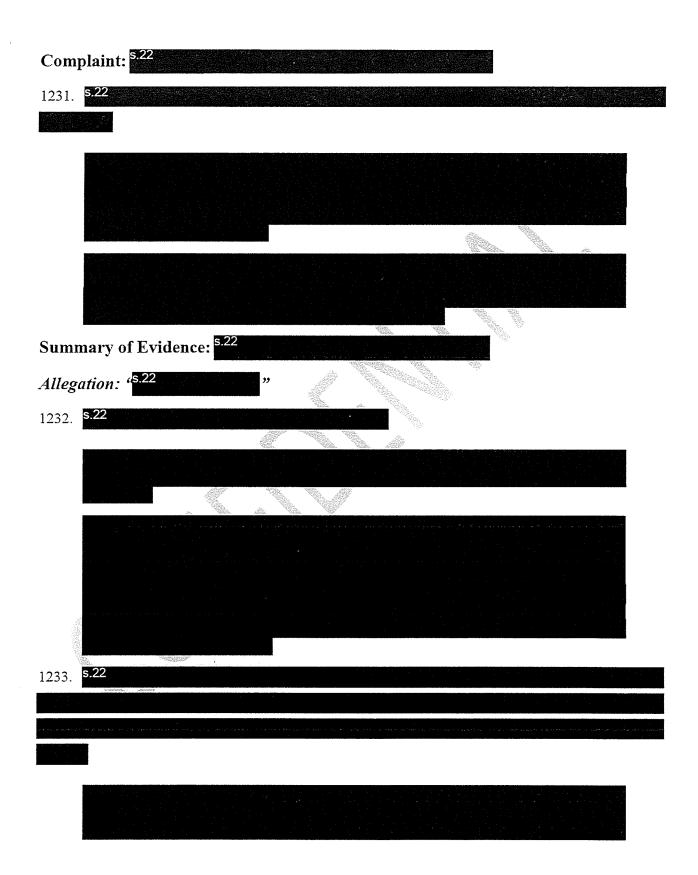
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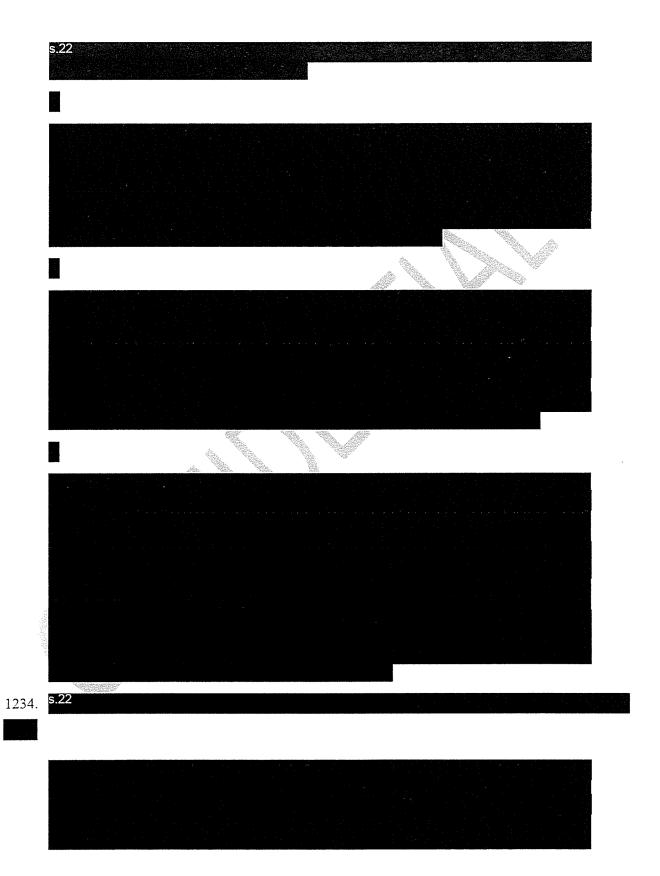


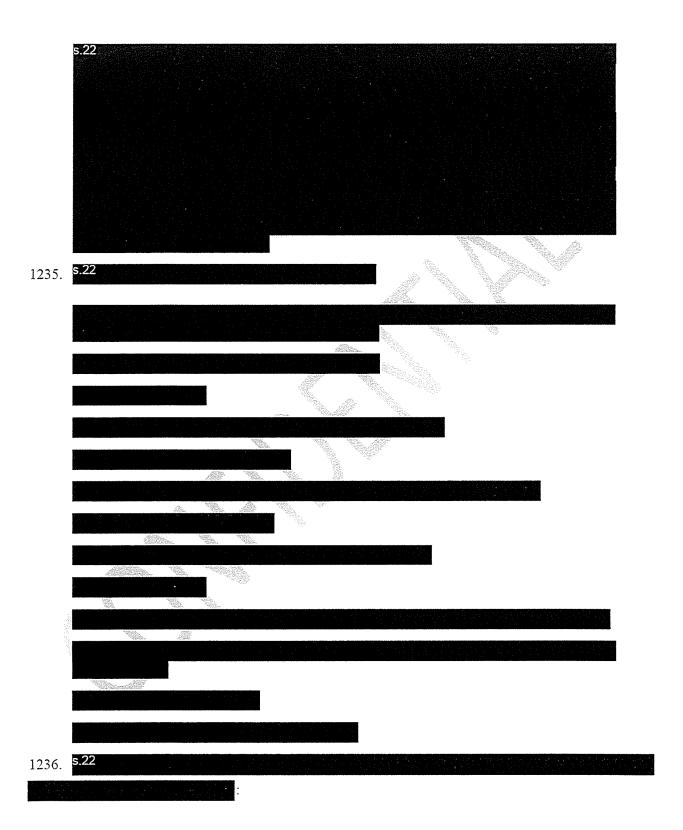


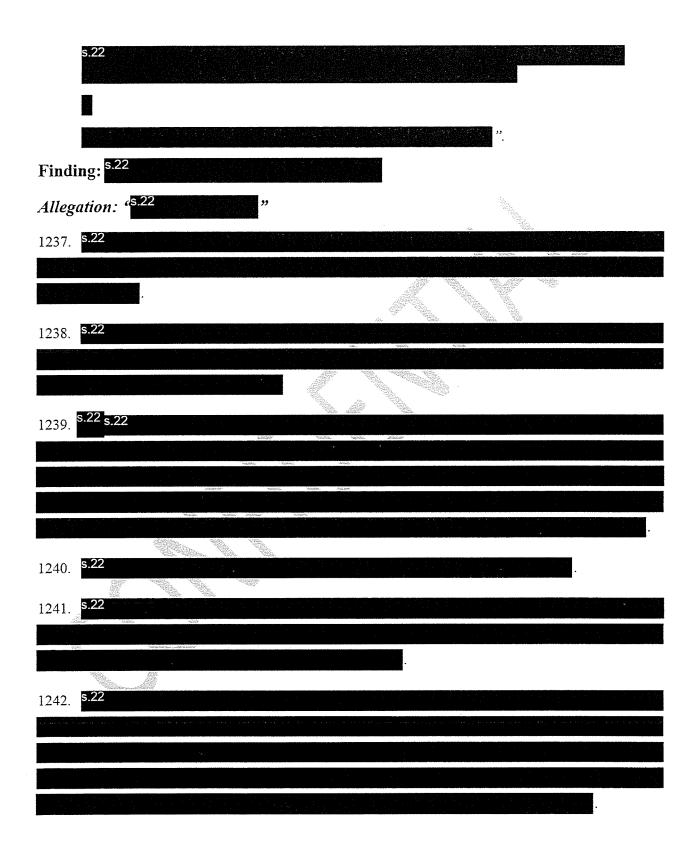


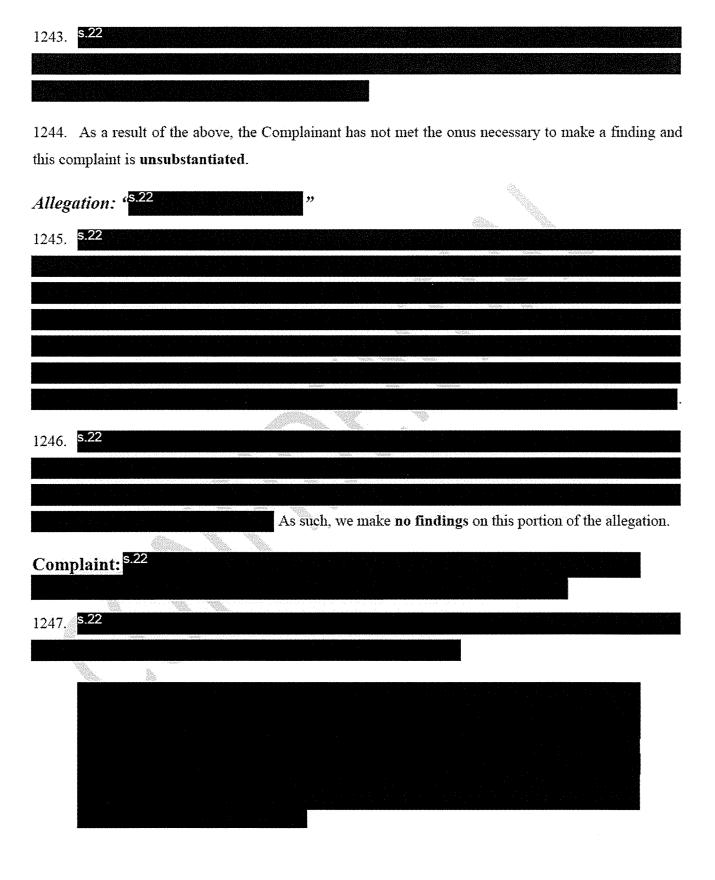
1230. This complaint is unsubstantiated.

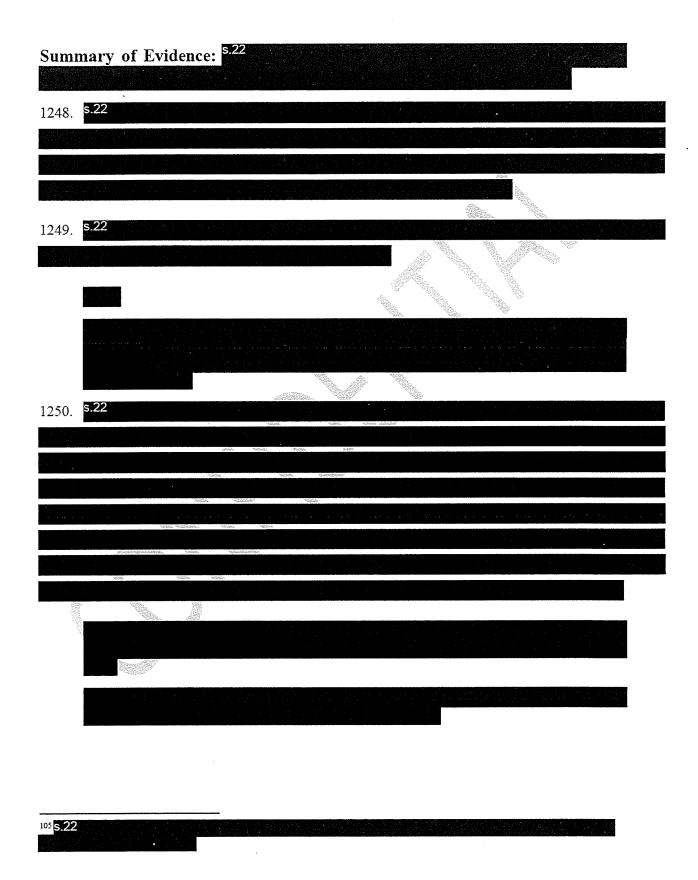


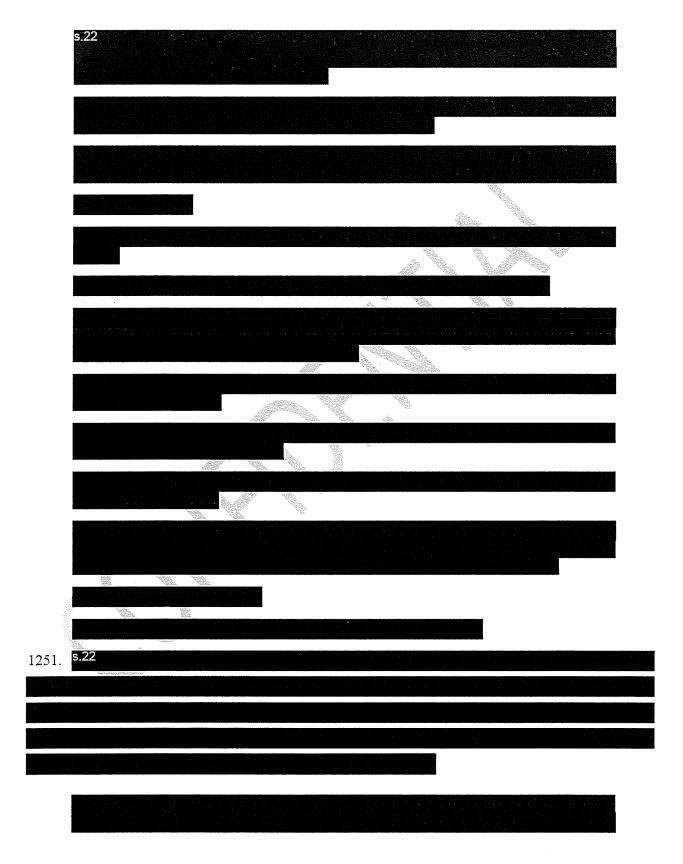


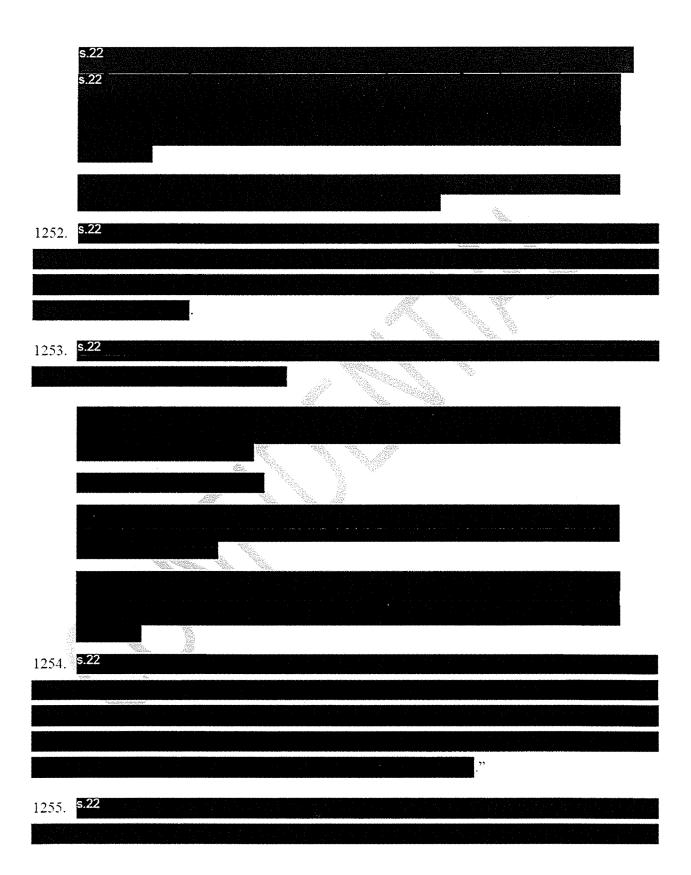


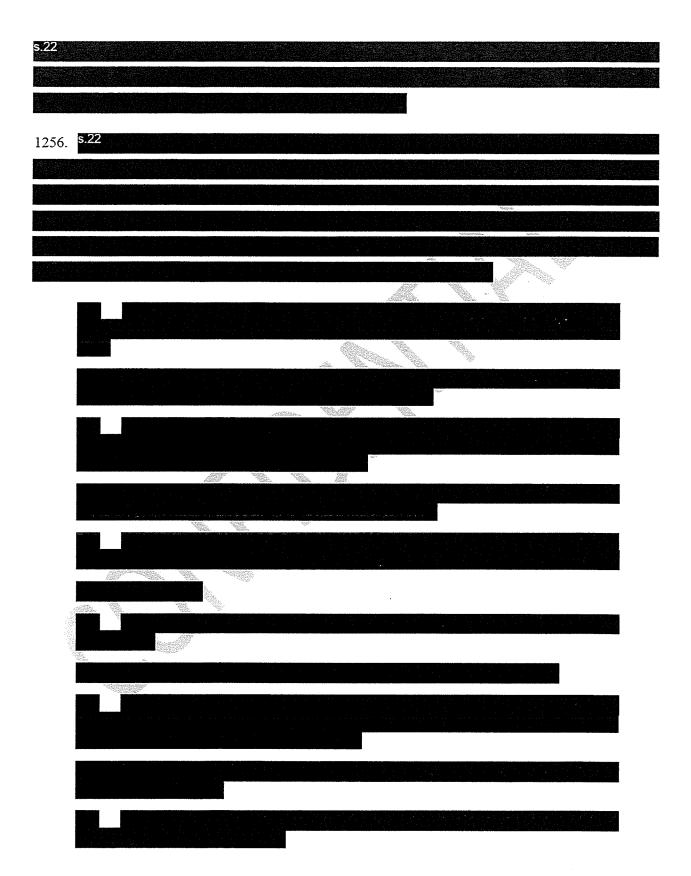


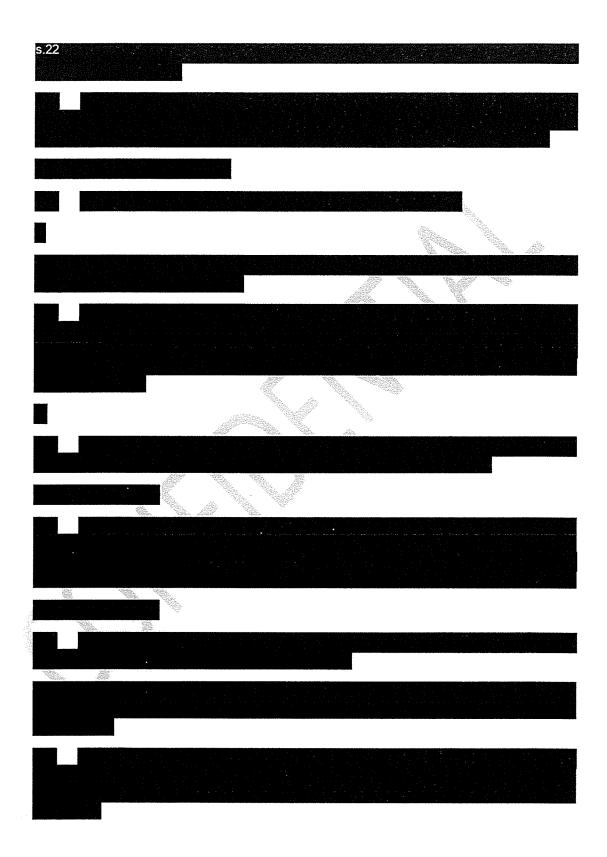


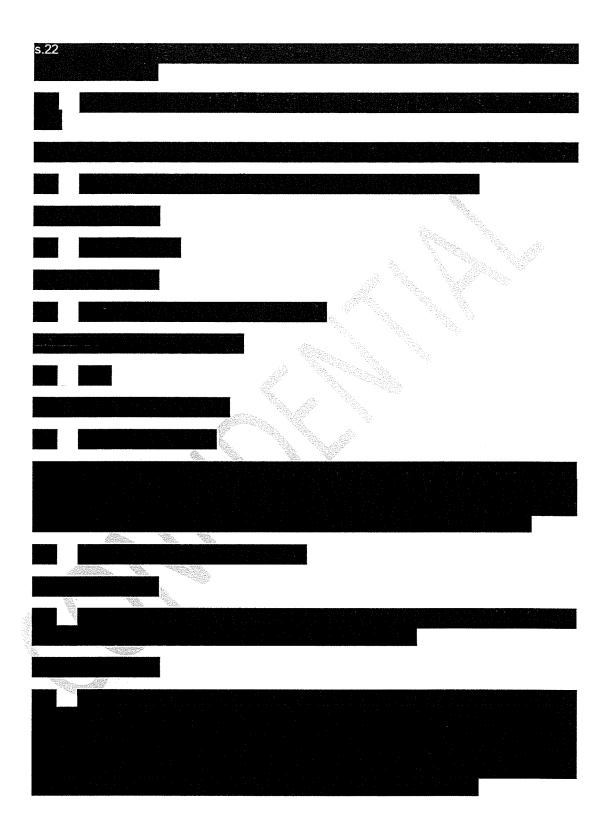


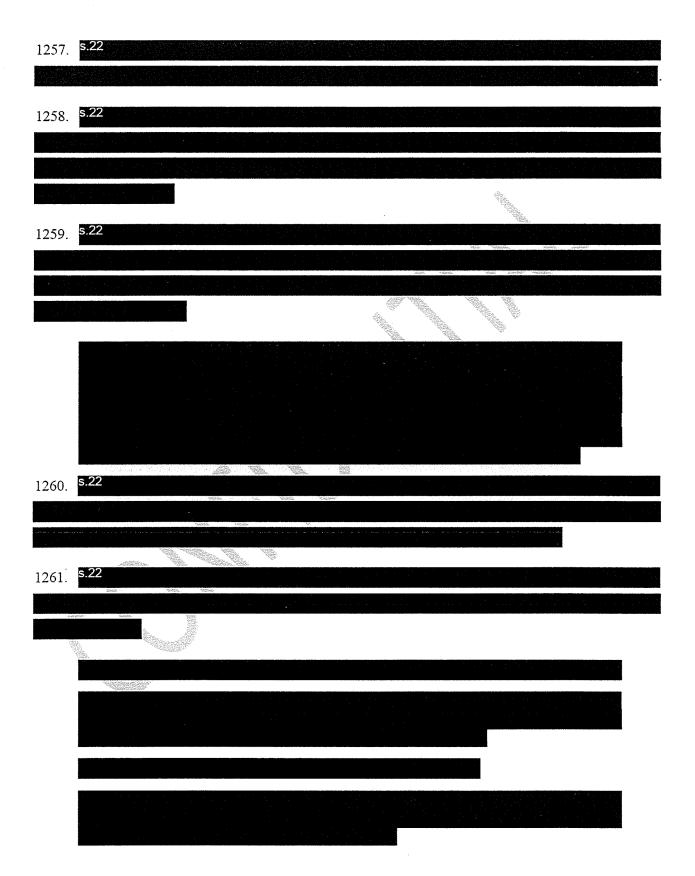


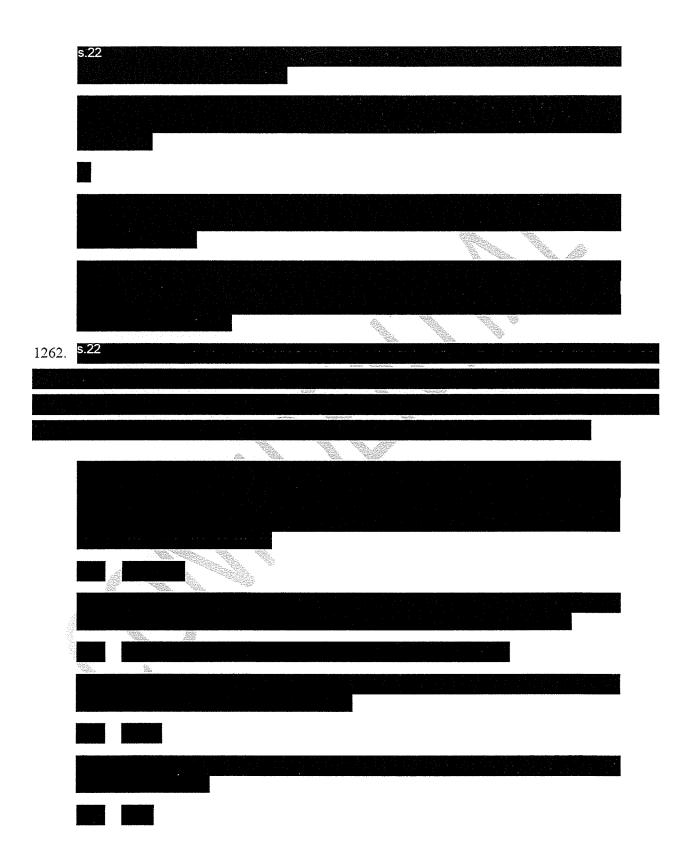


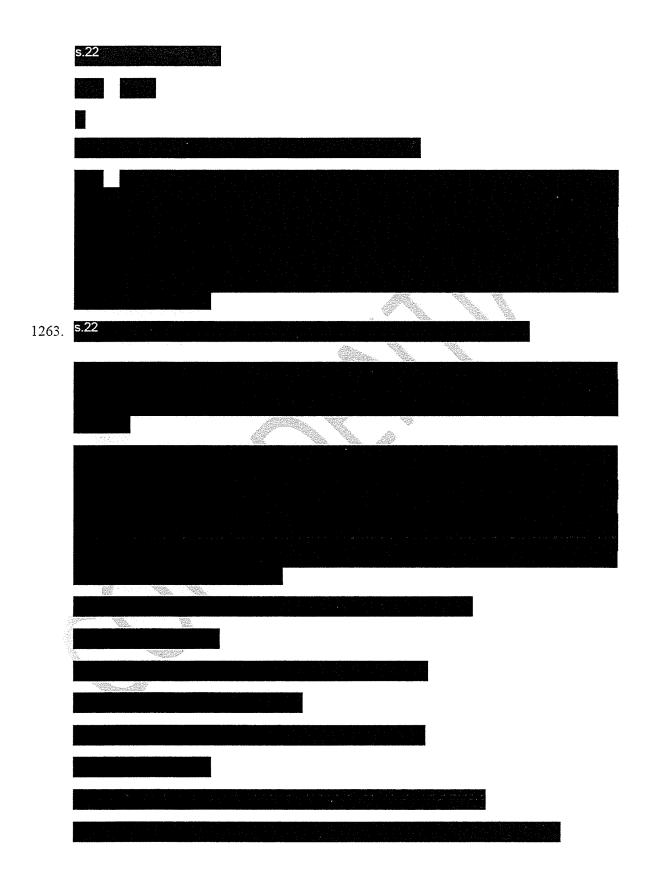


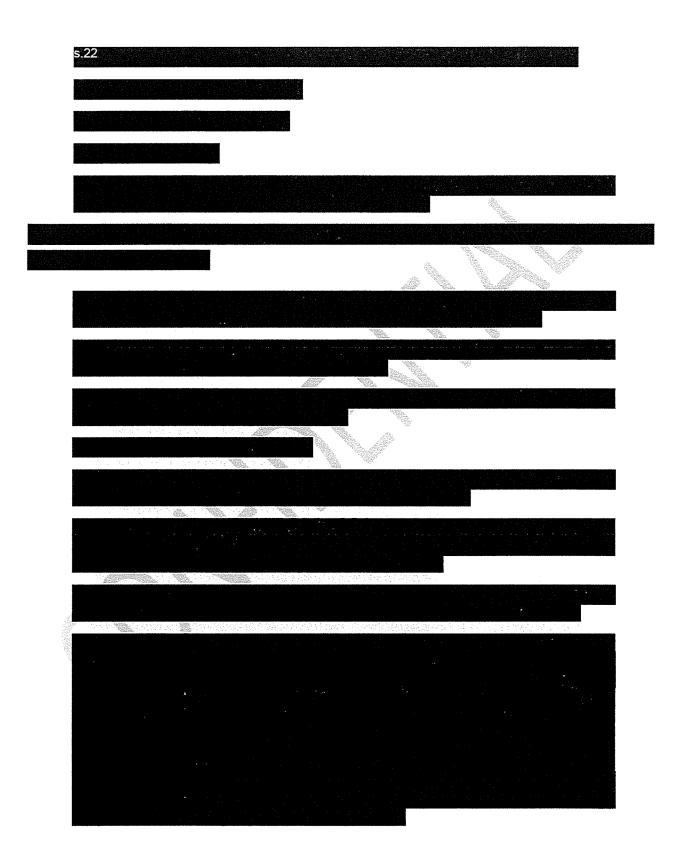


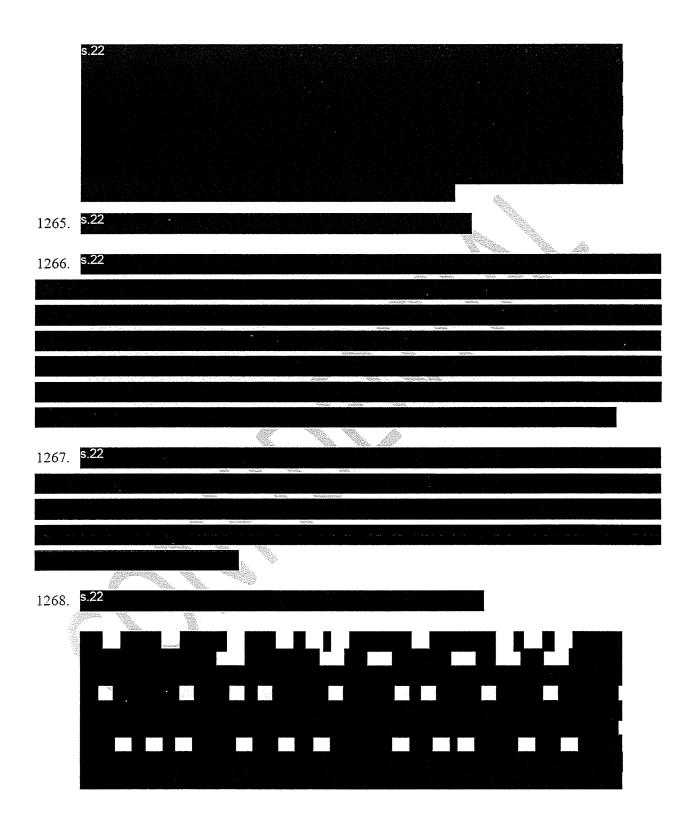


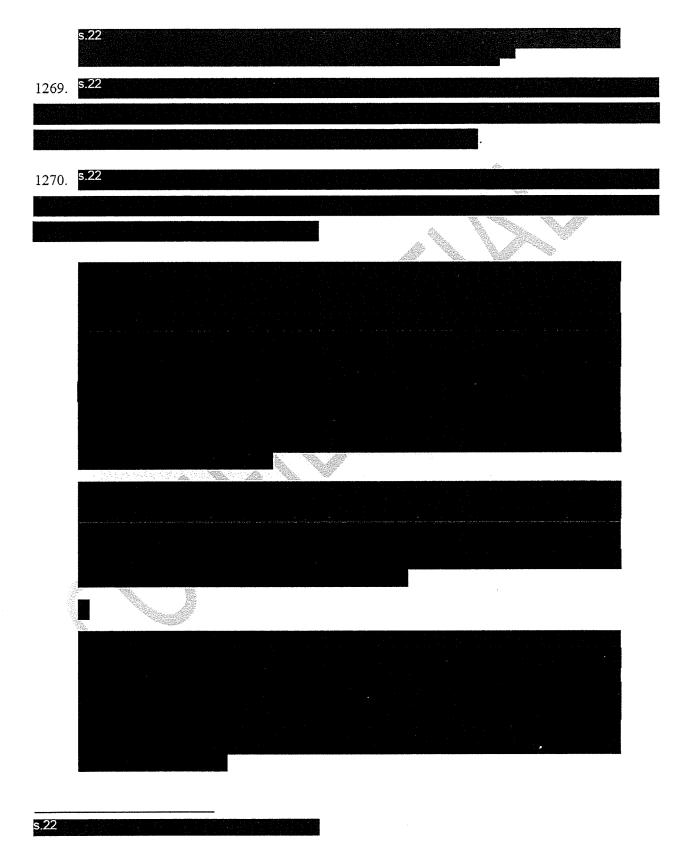


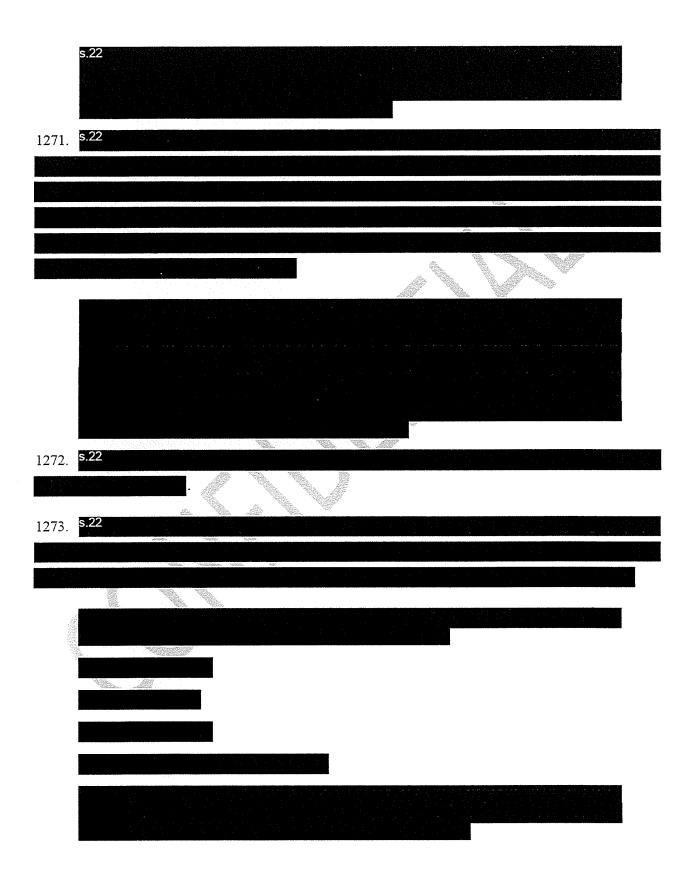


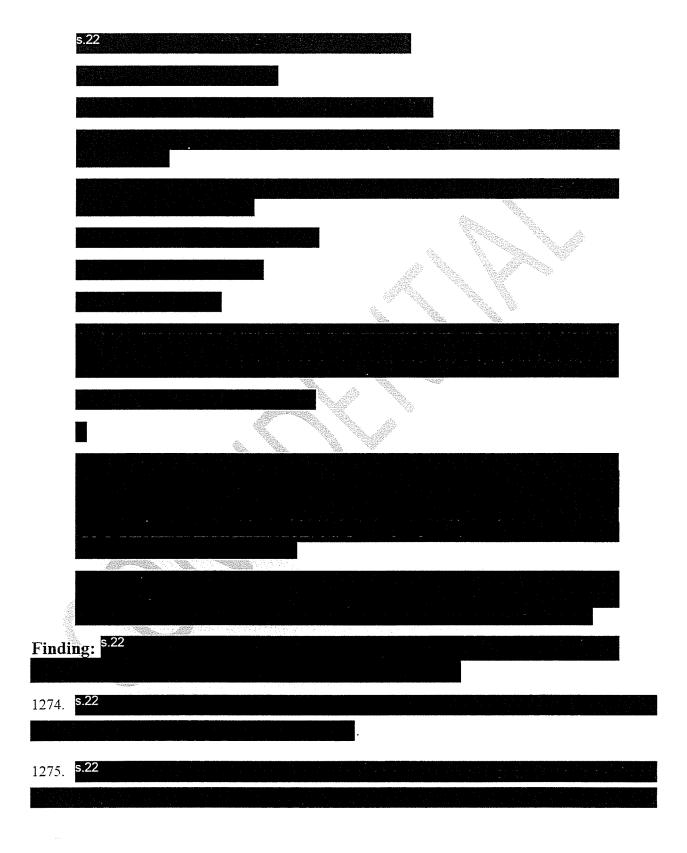




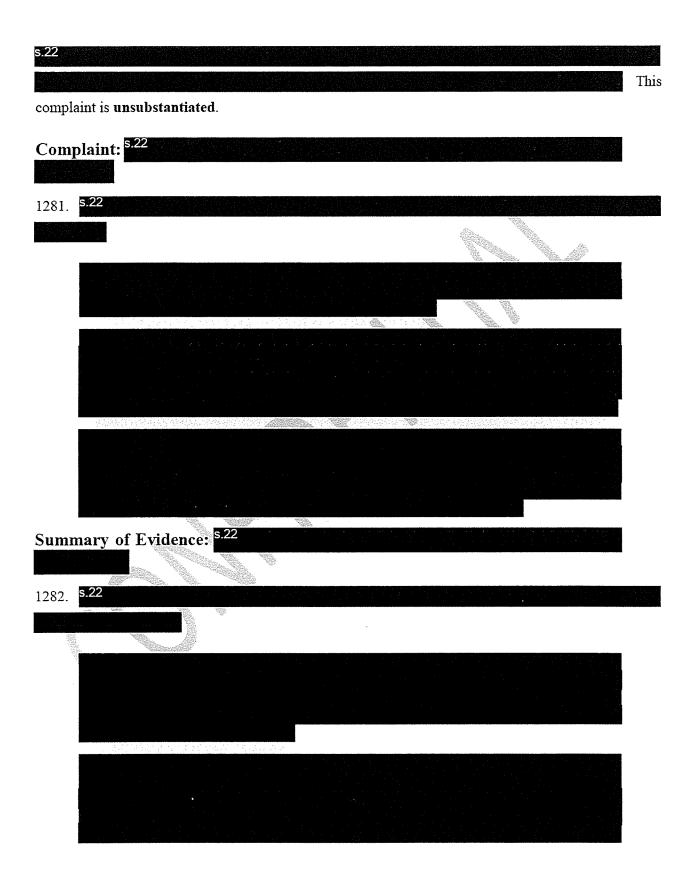


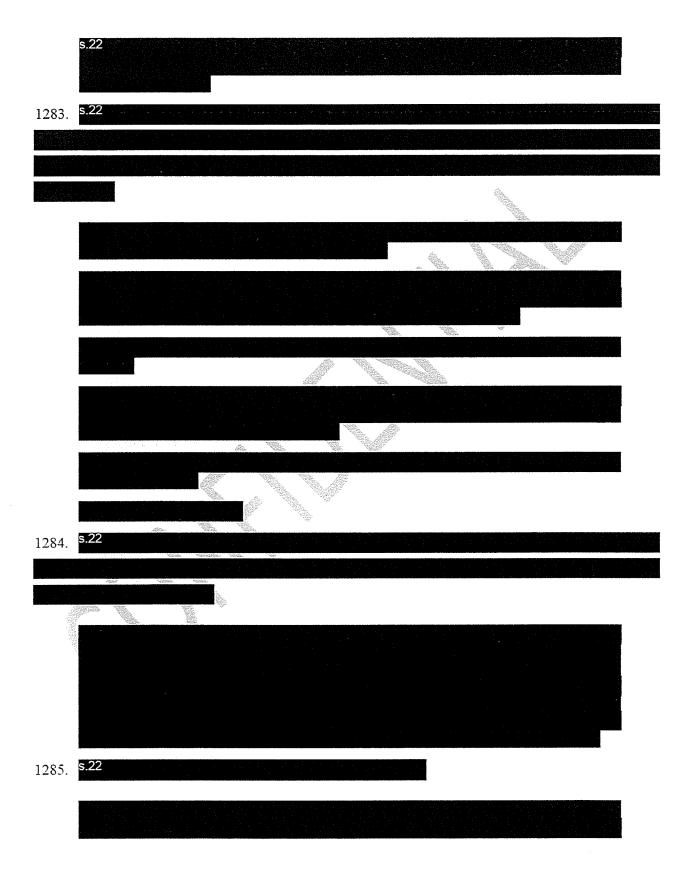


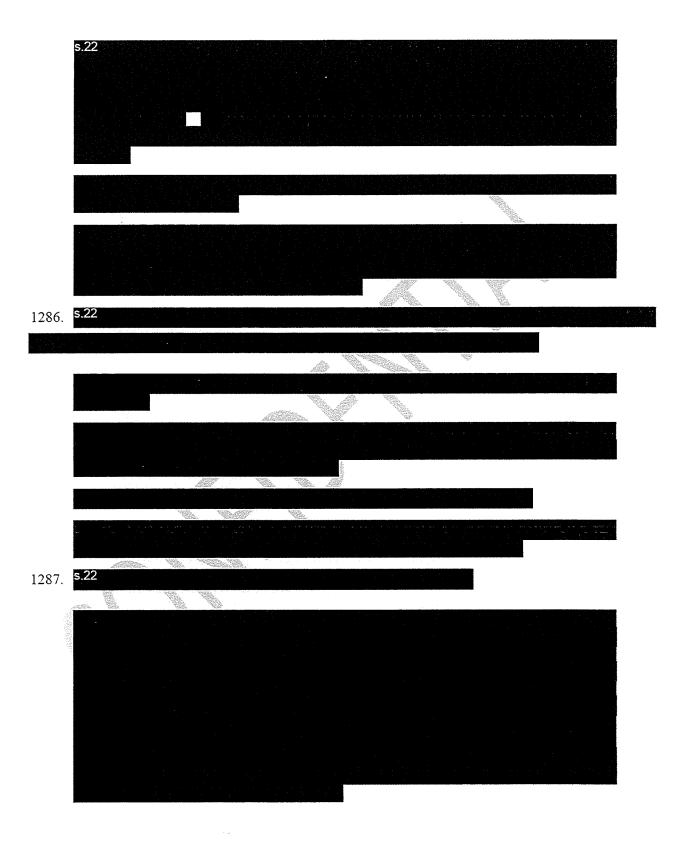


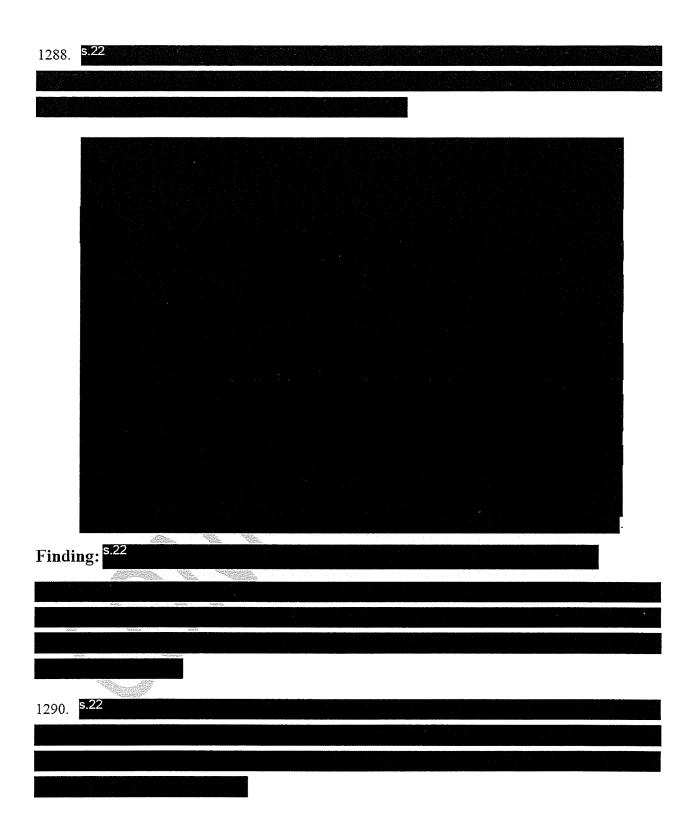


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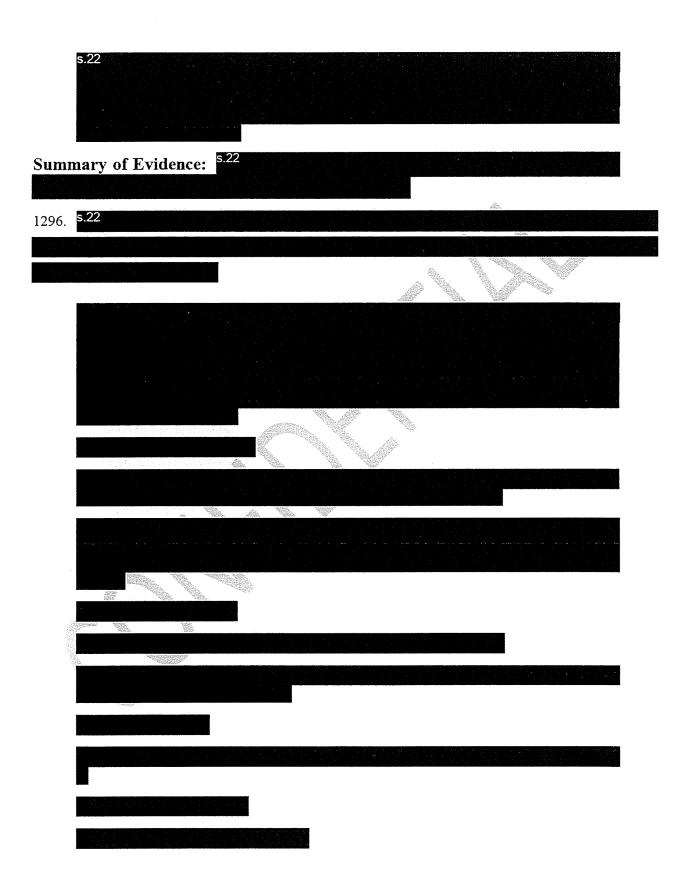


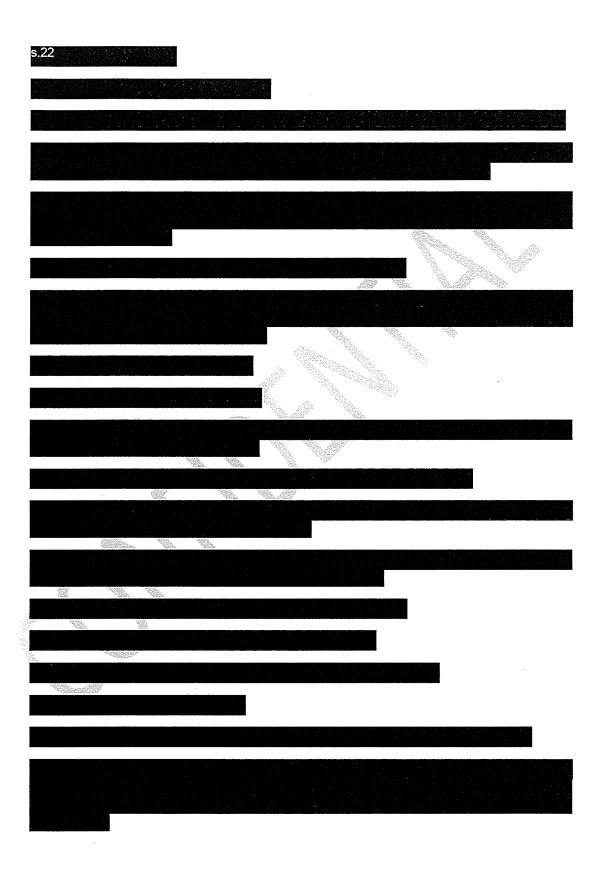


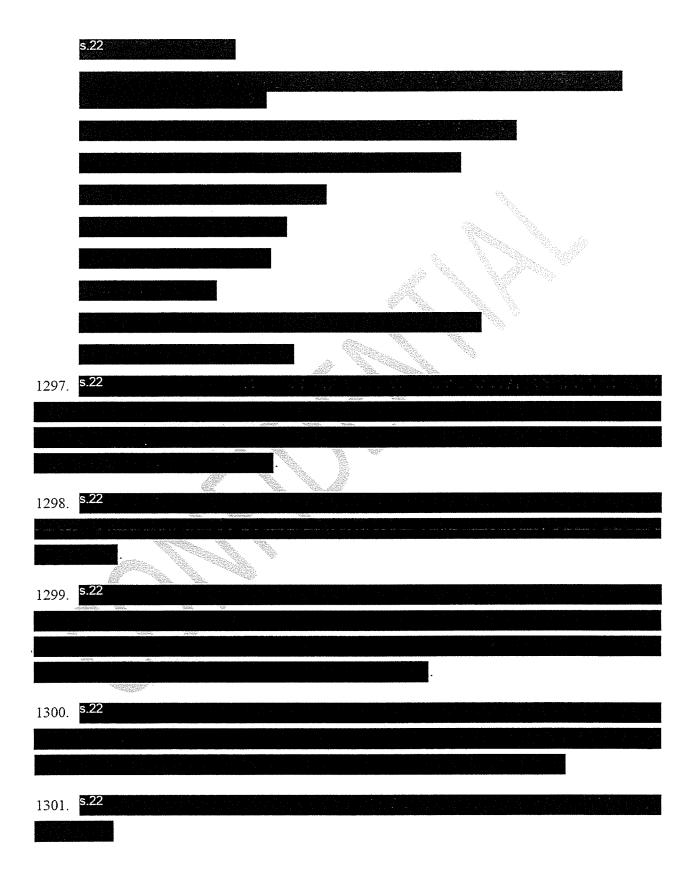


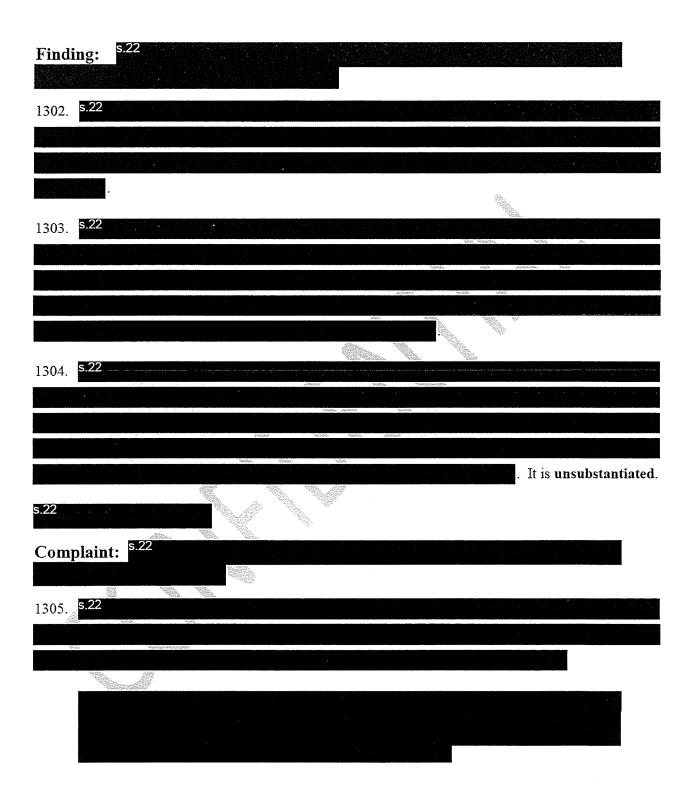


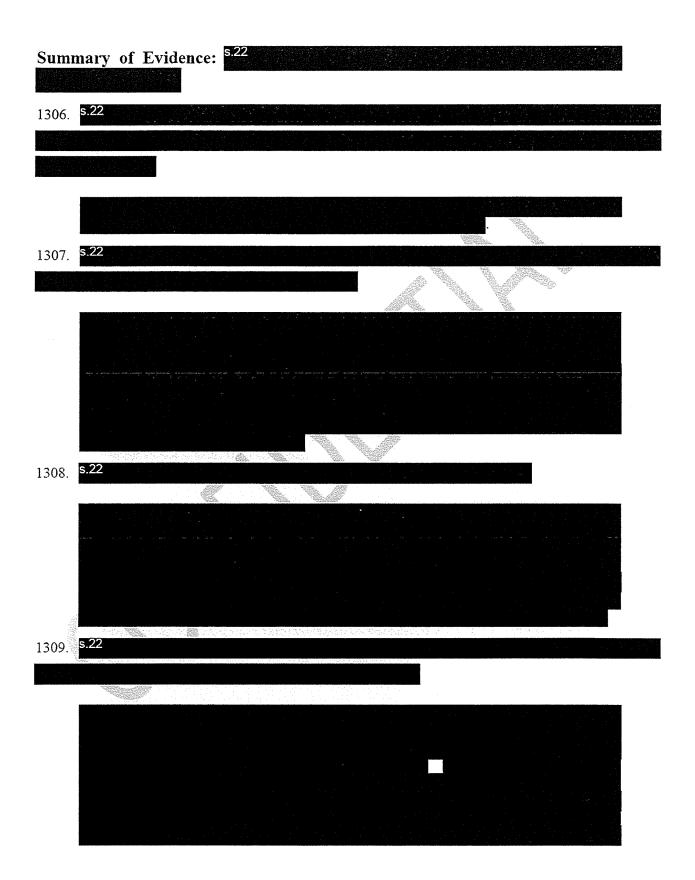
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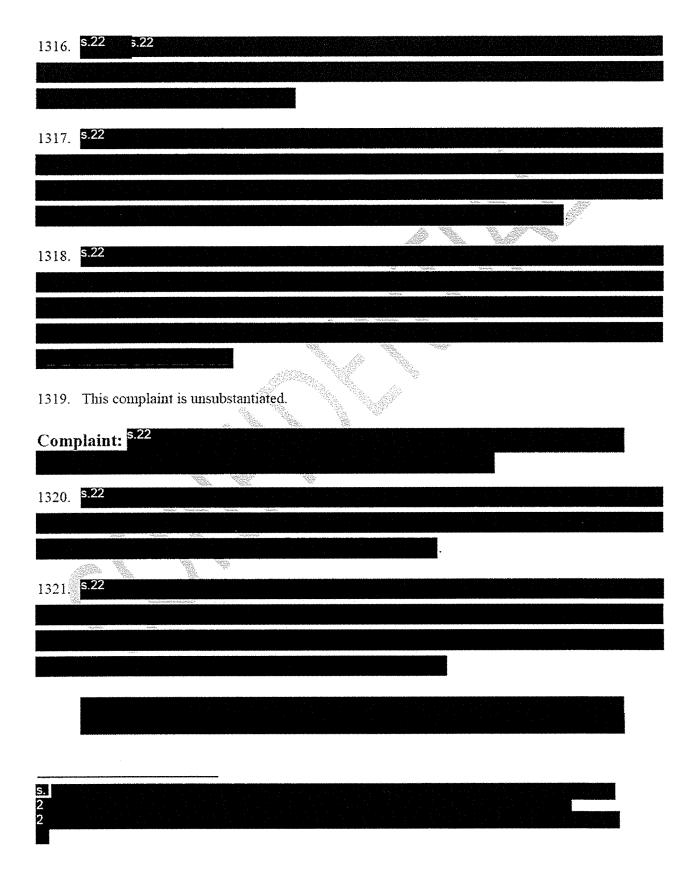


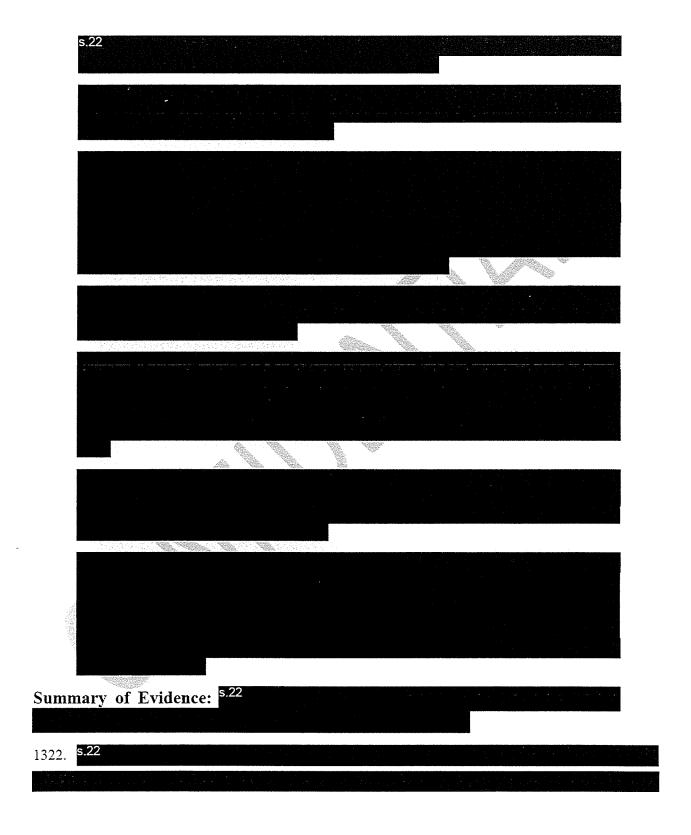


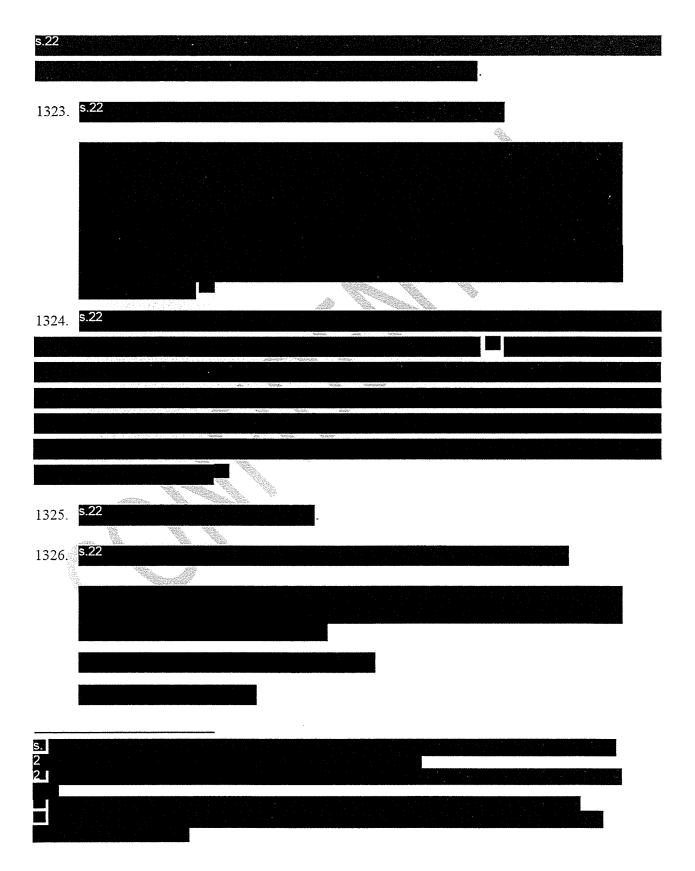


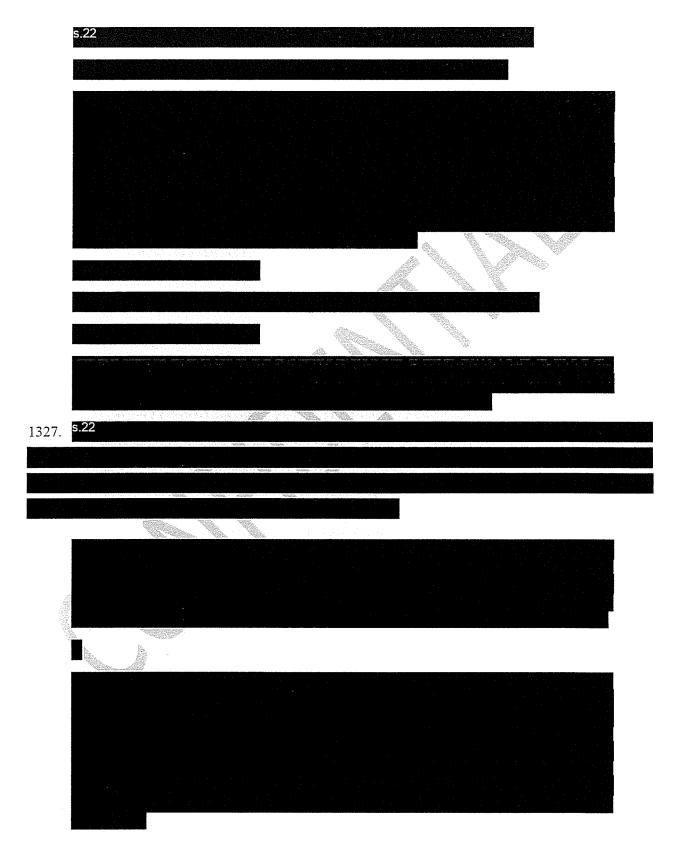


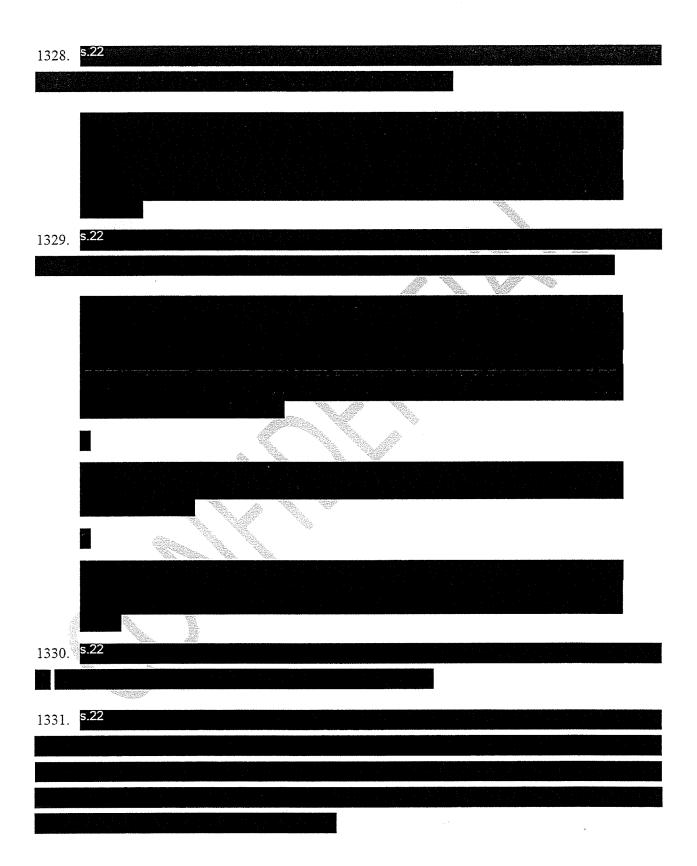
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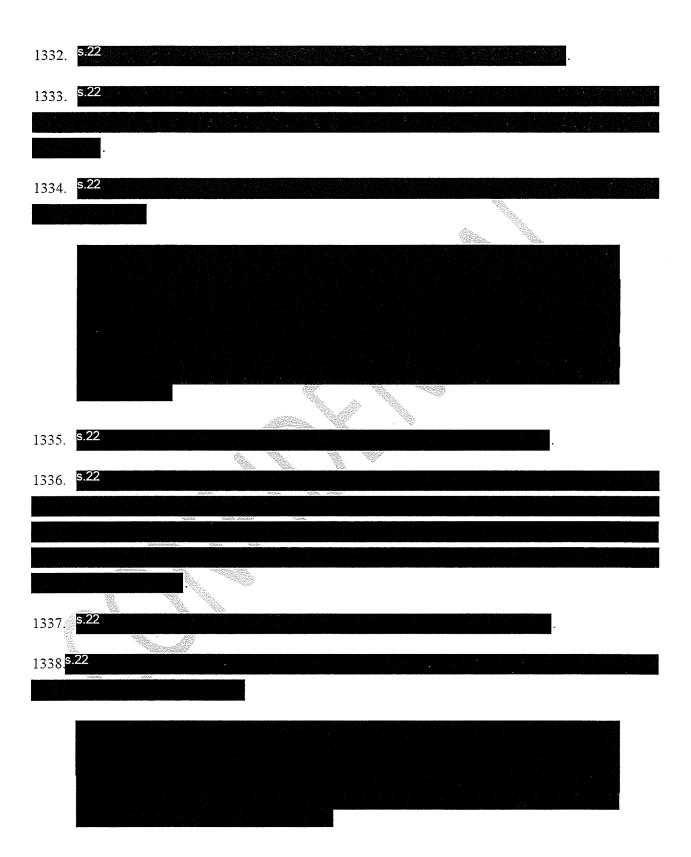


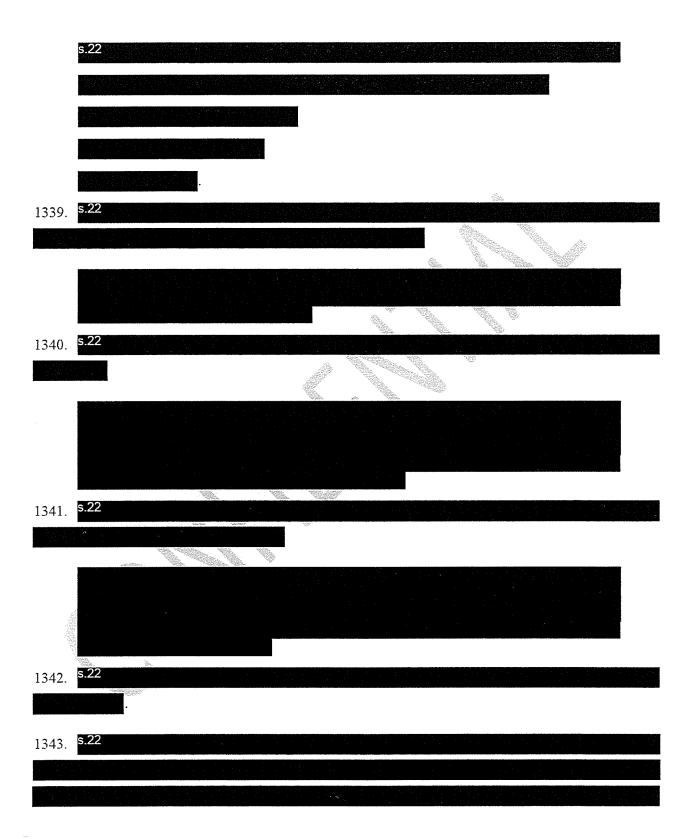


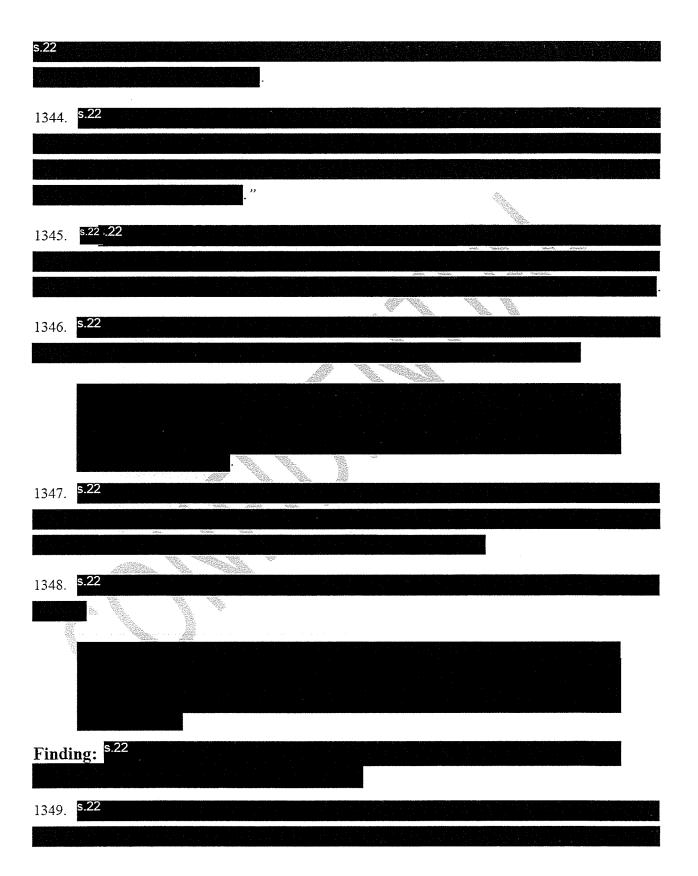


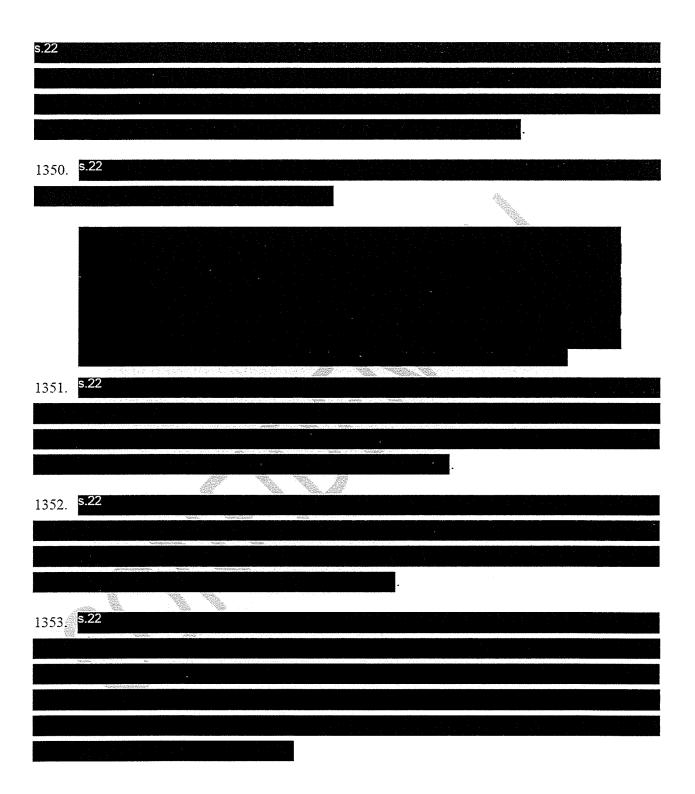


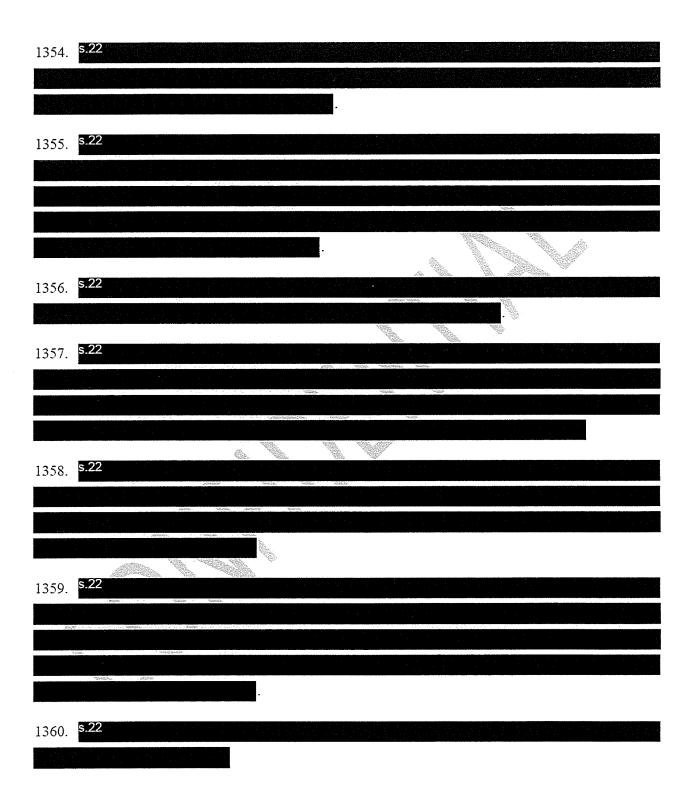


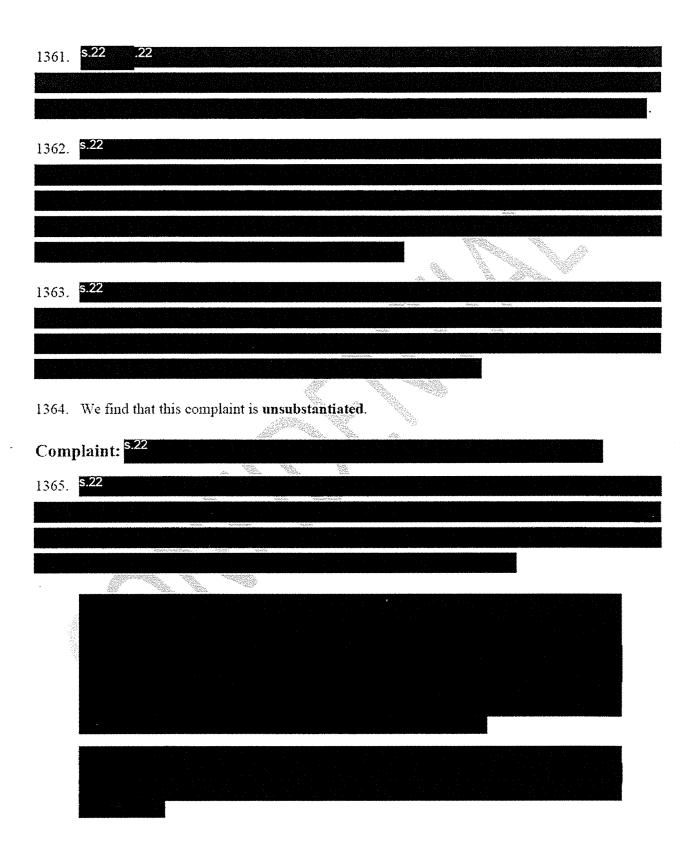


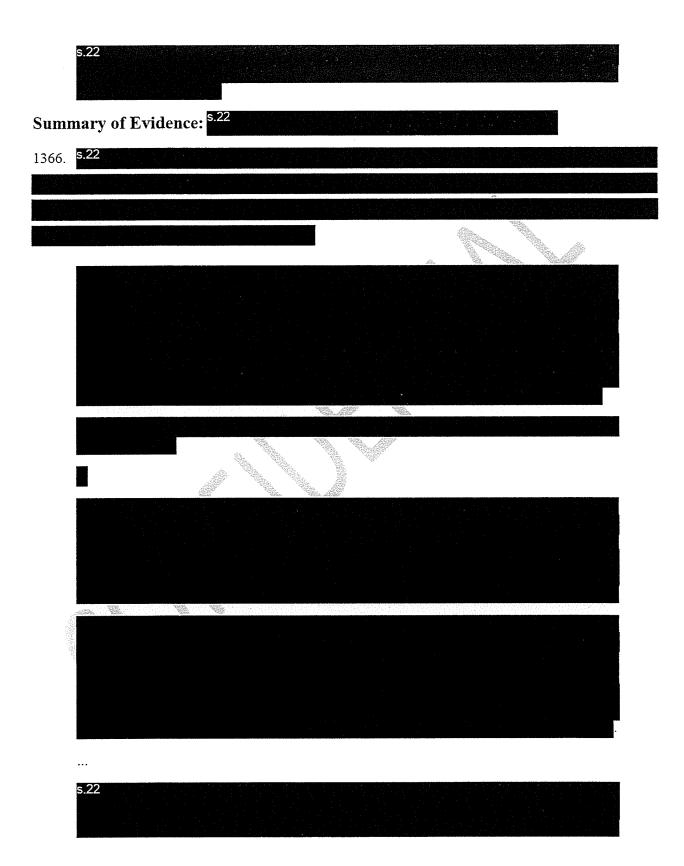


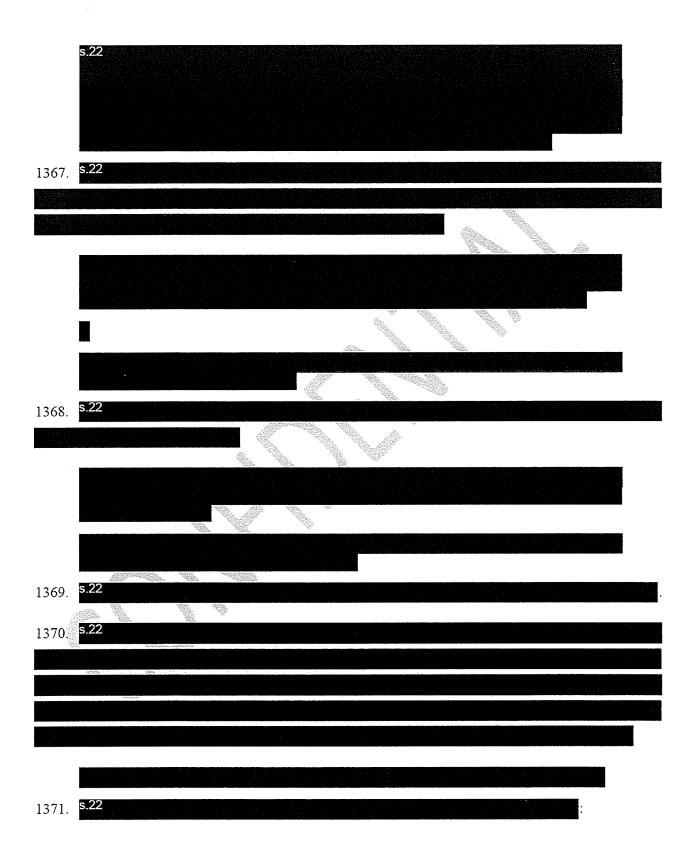


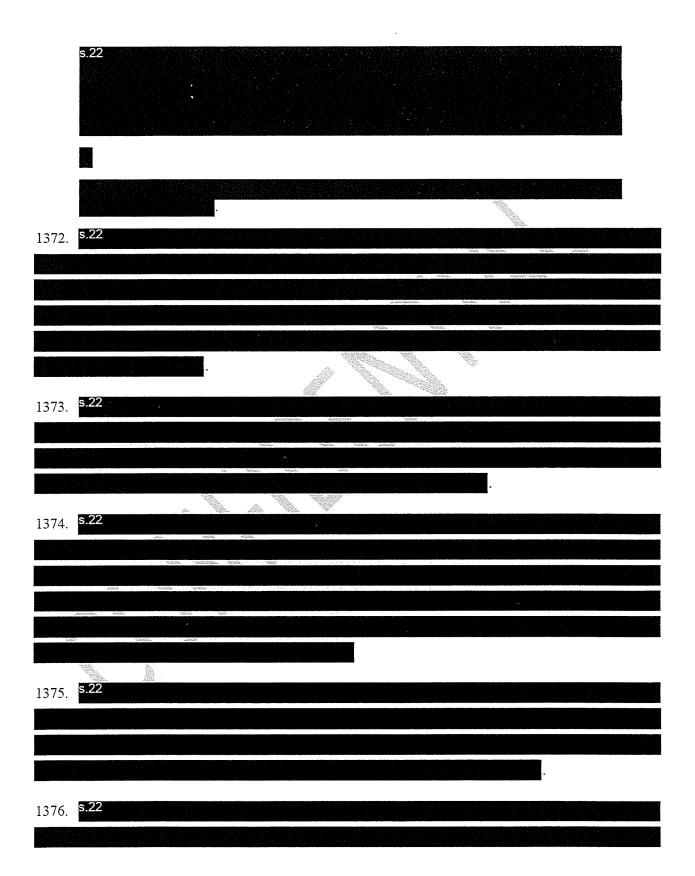


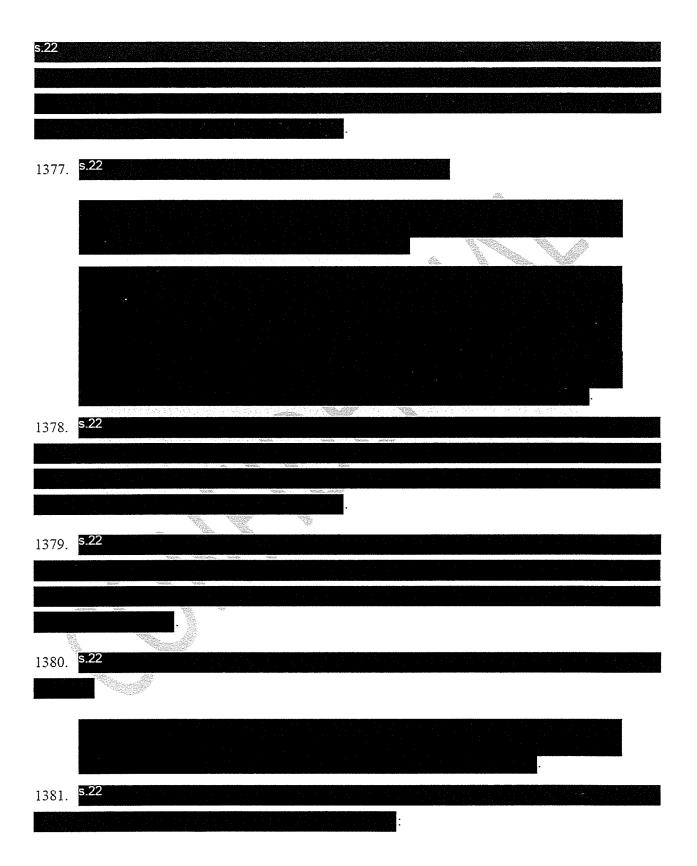


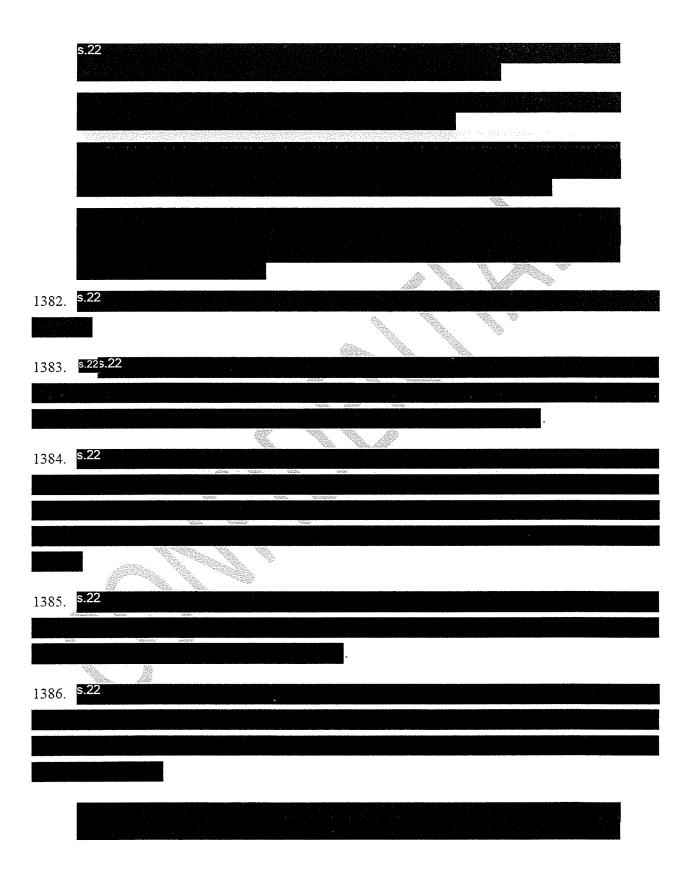


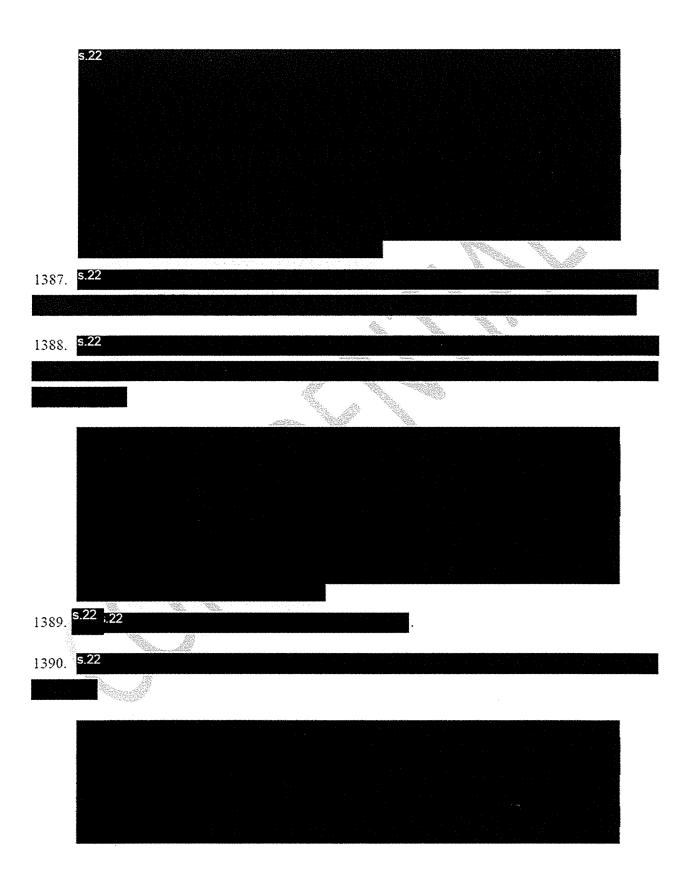


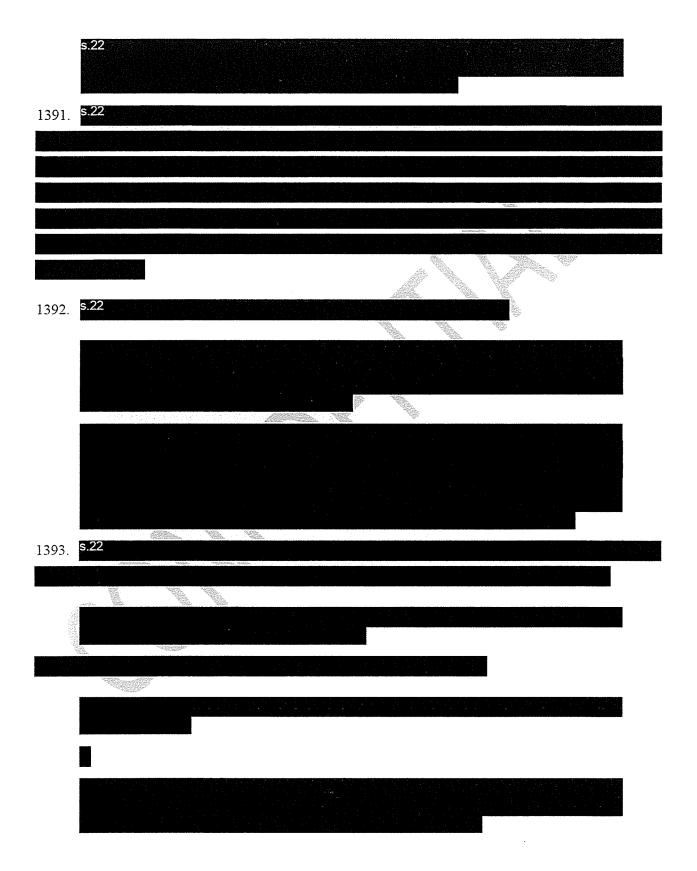


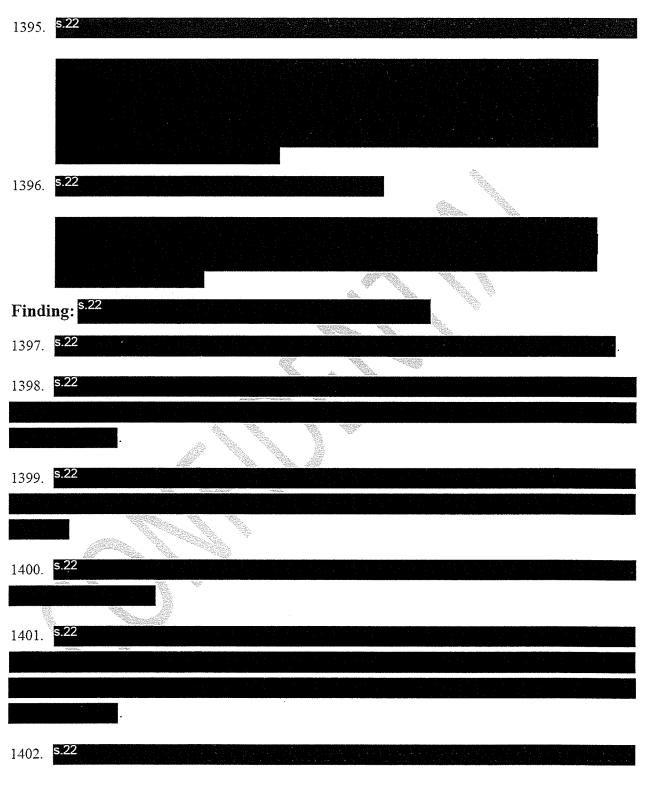




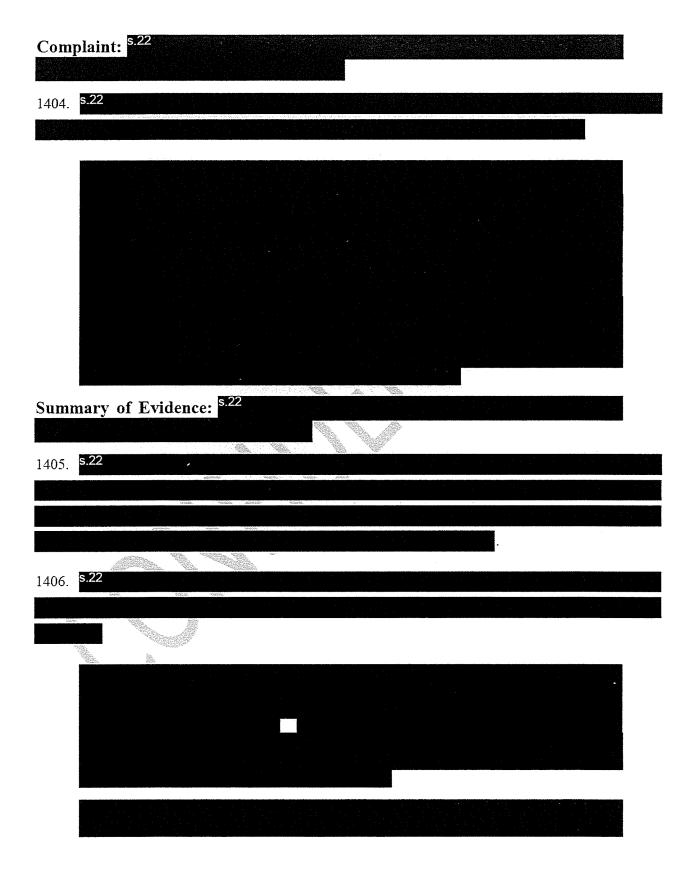


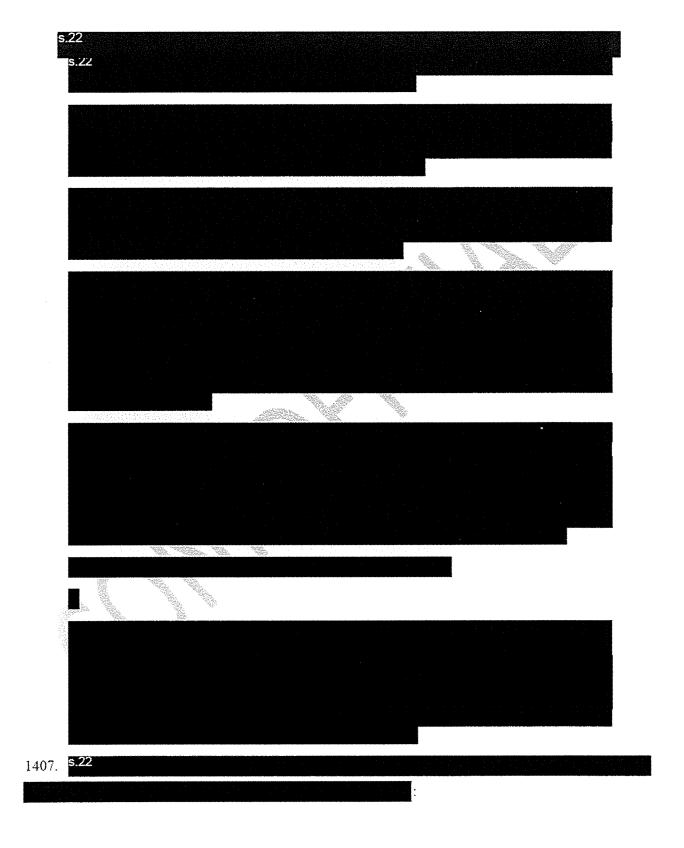


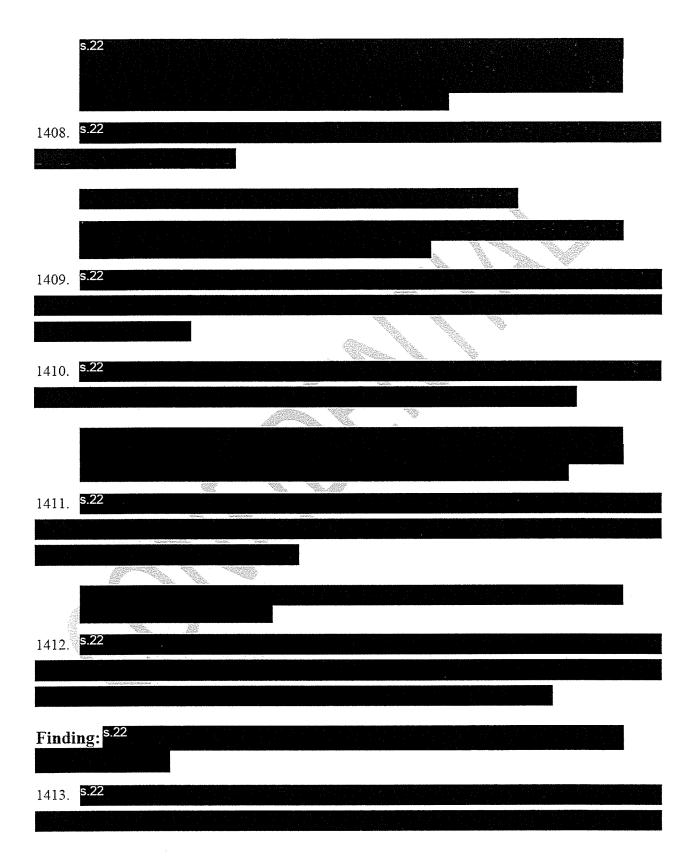


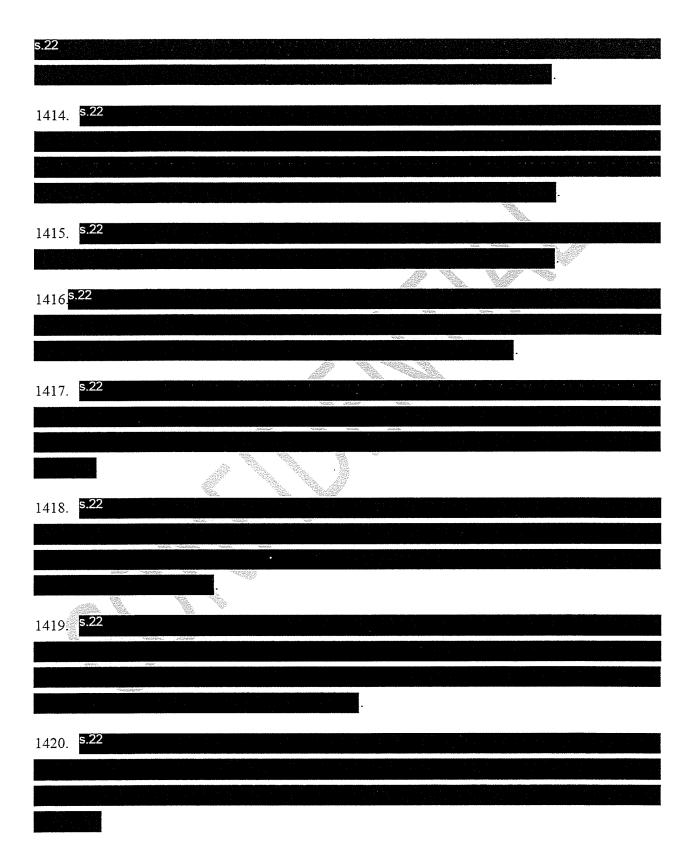


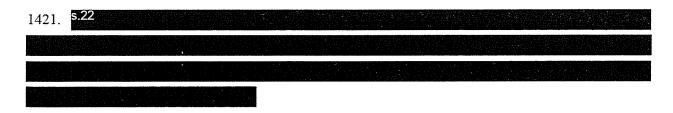
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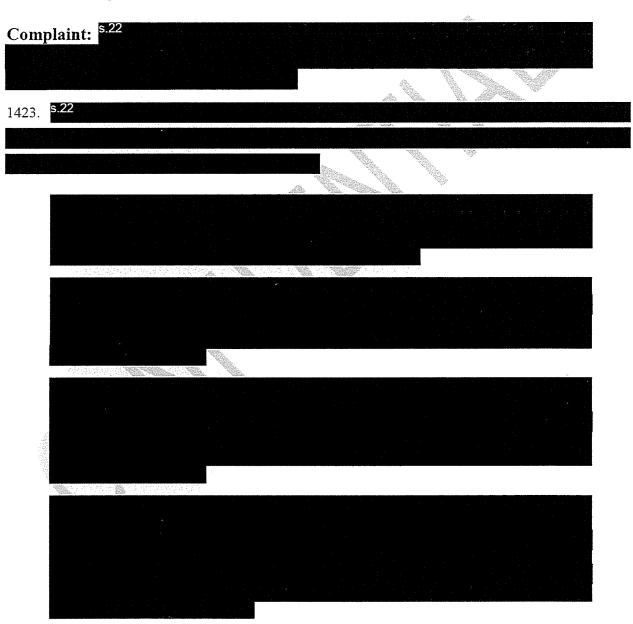


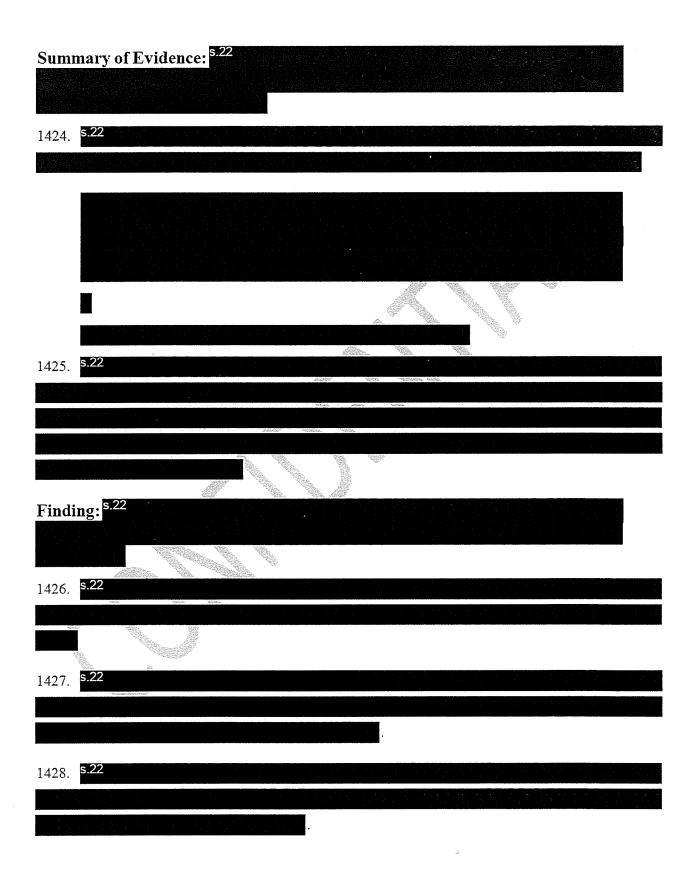






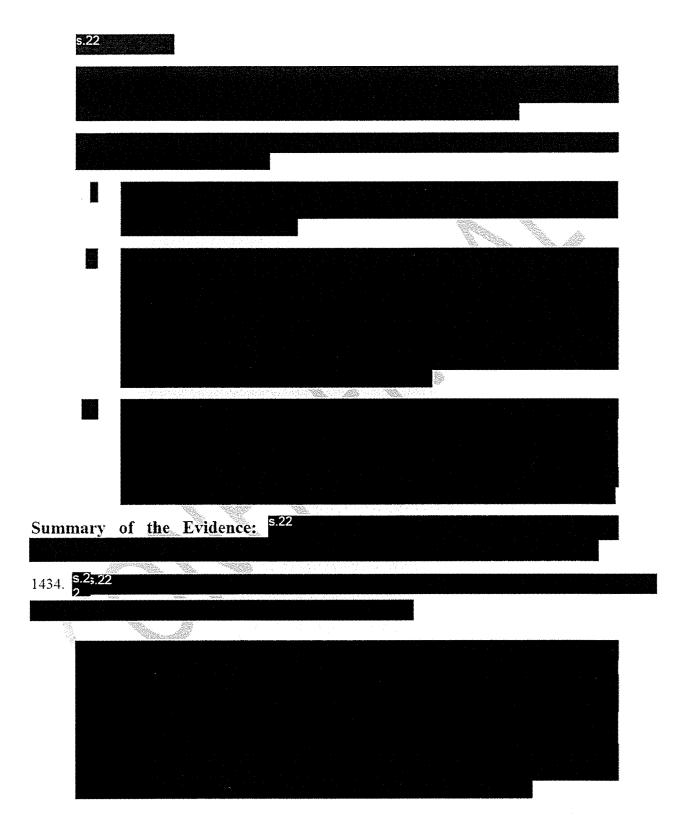
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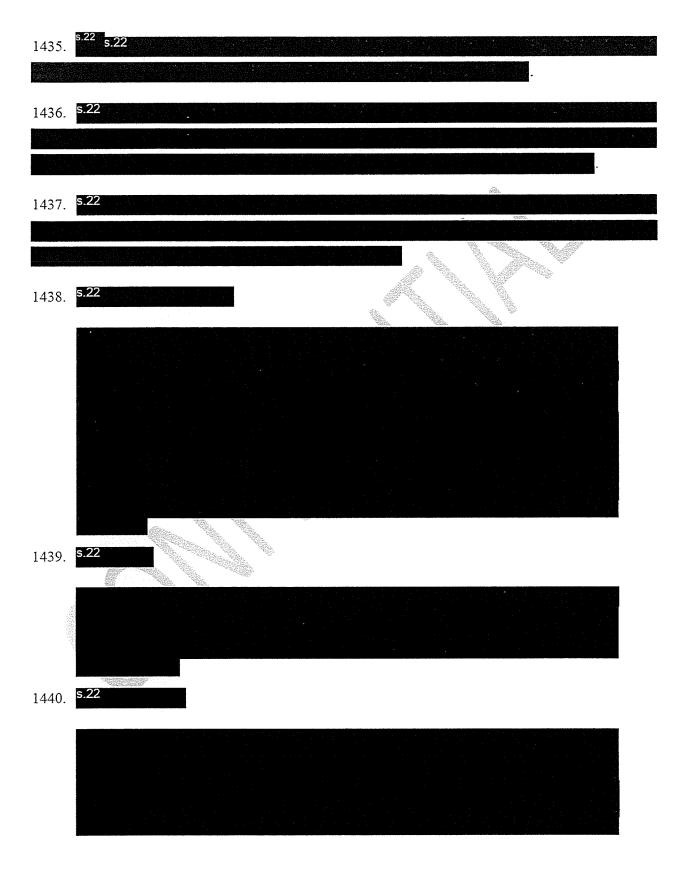




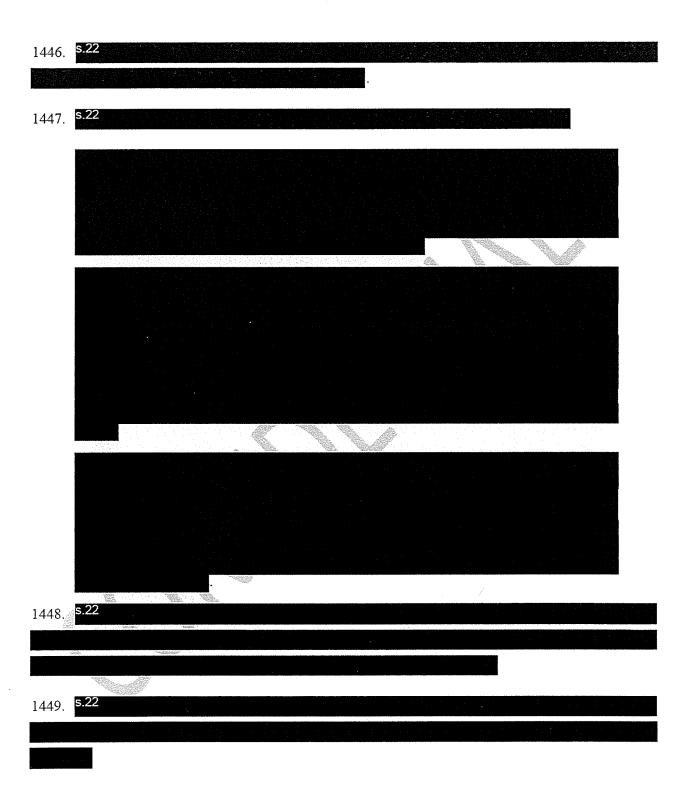
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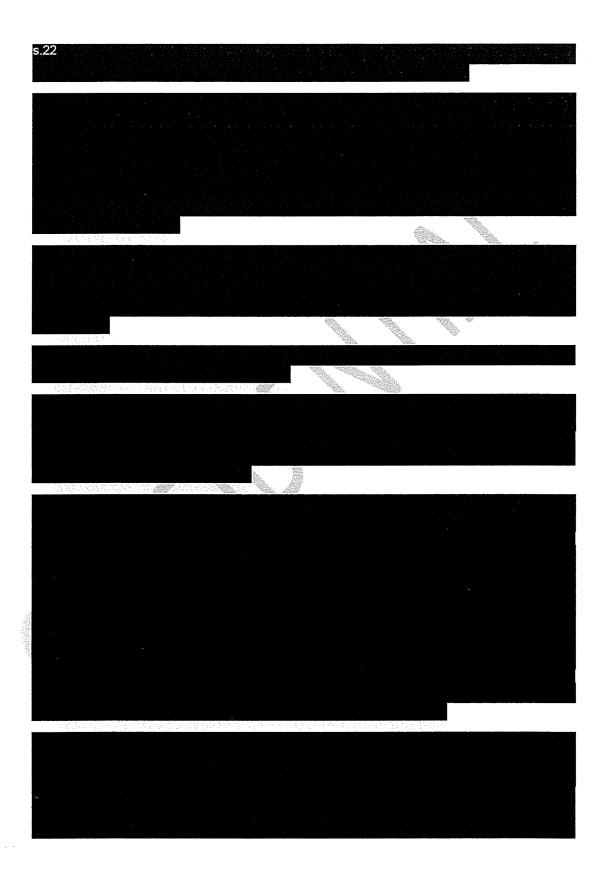


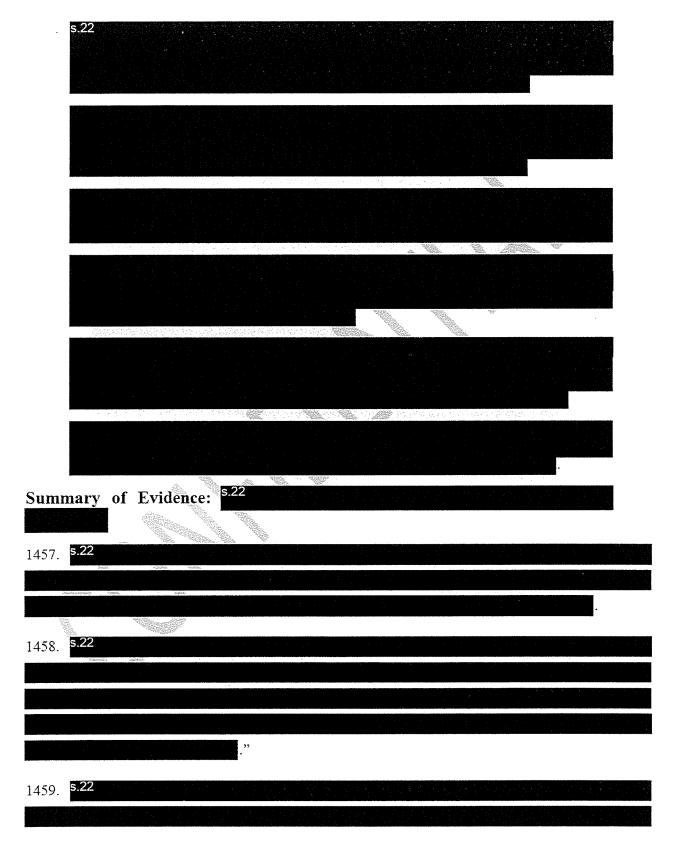


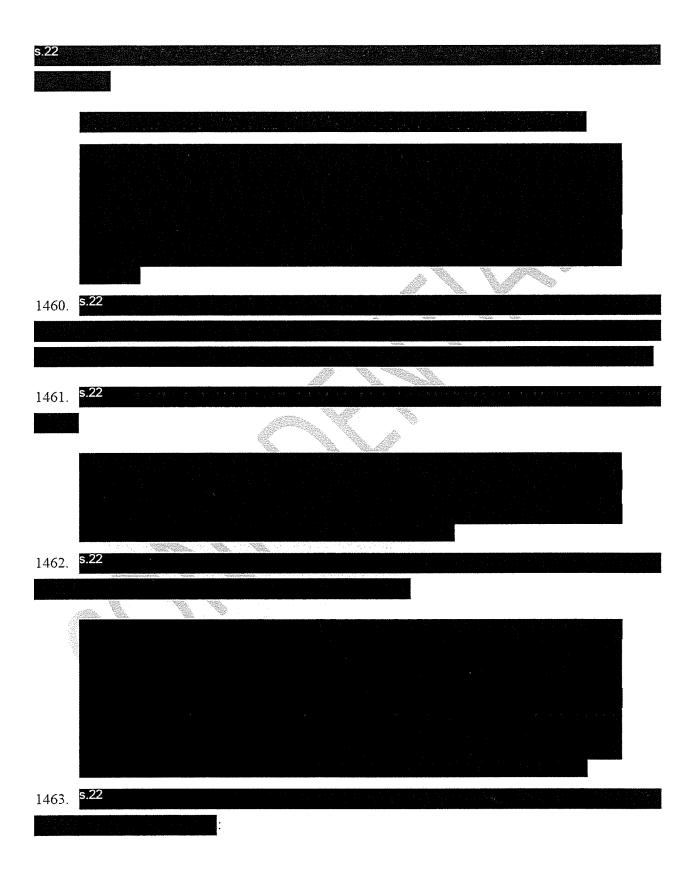
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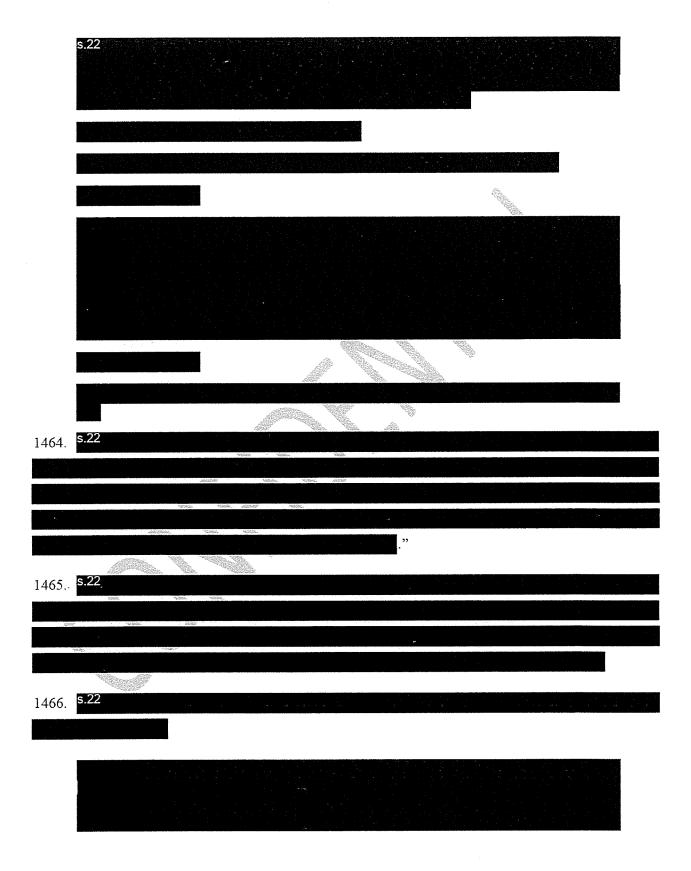


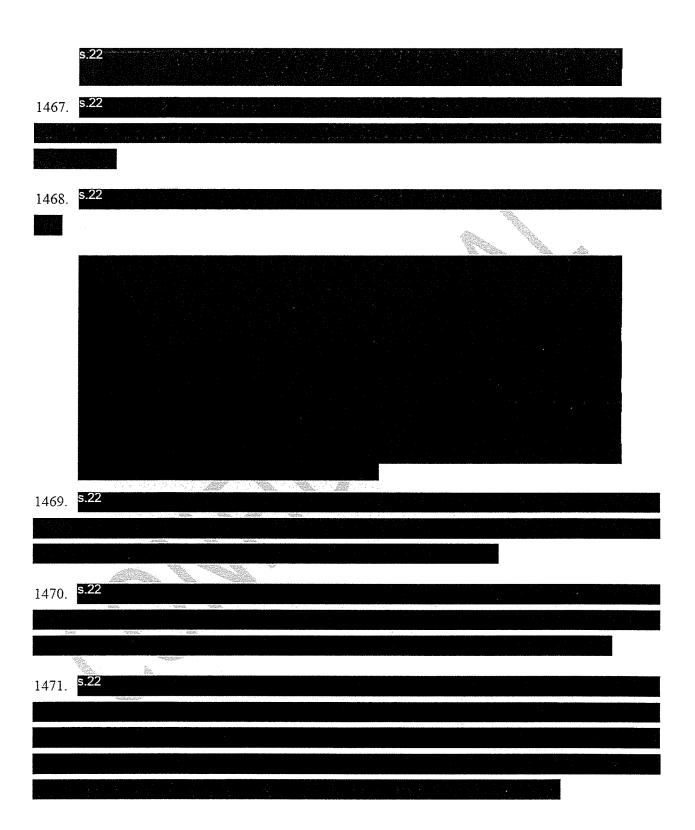
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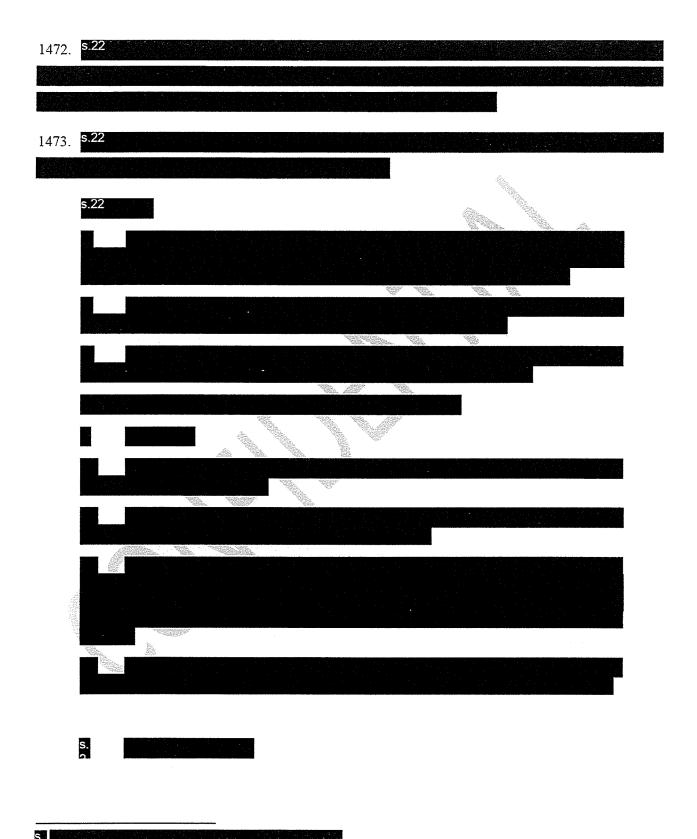


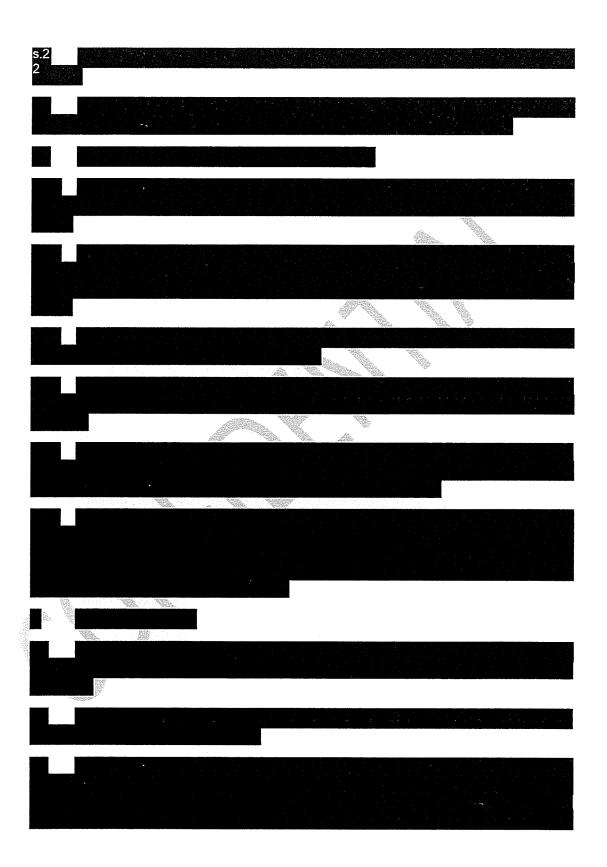


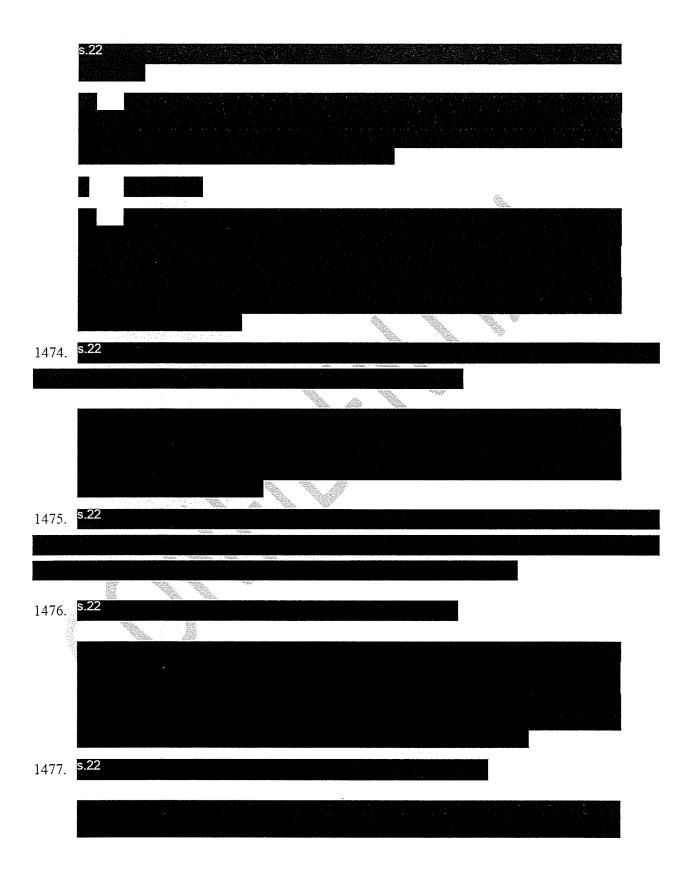


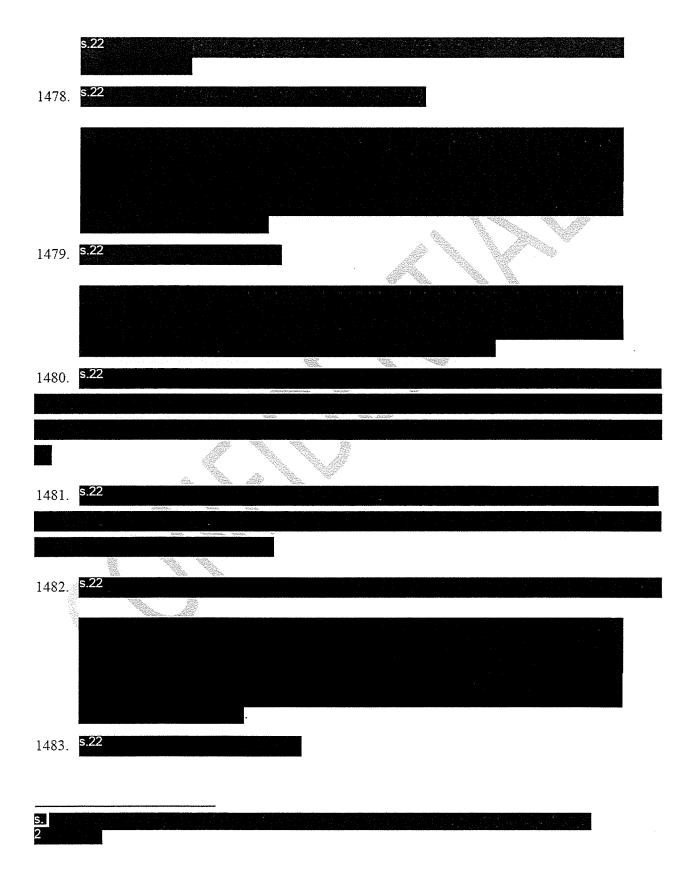


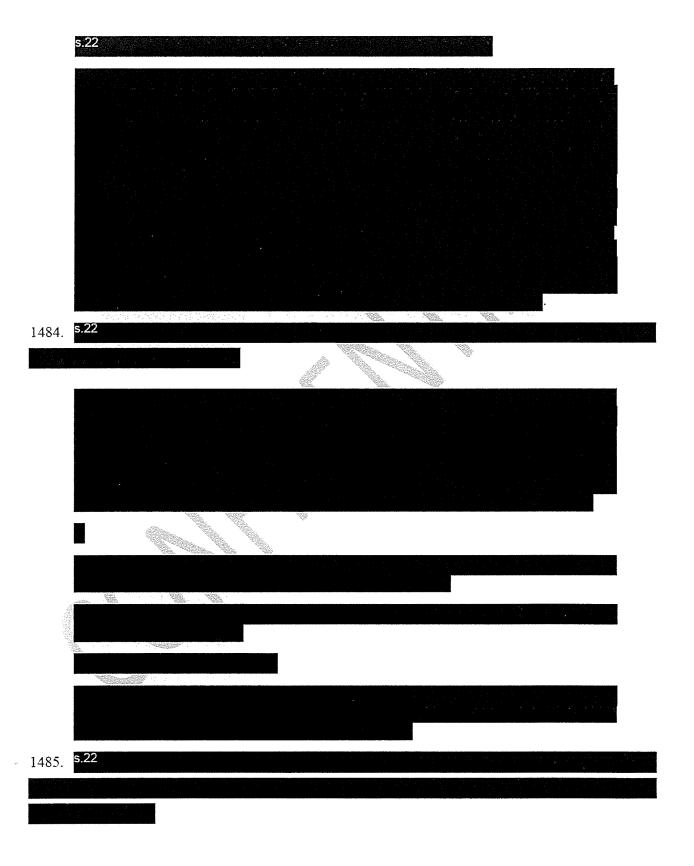


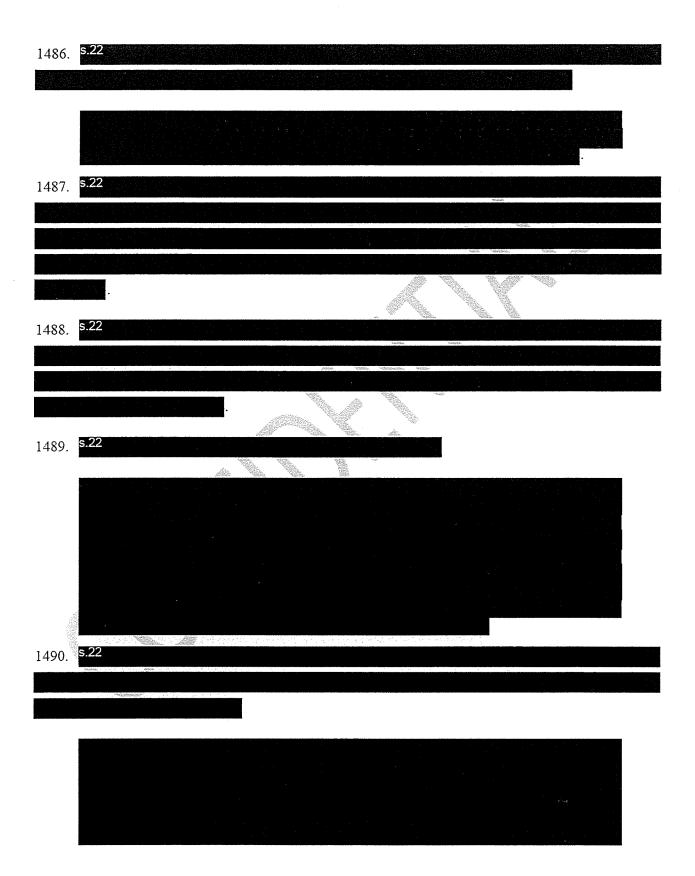


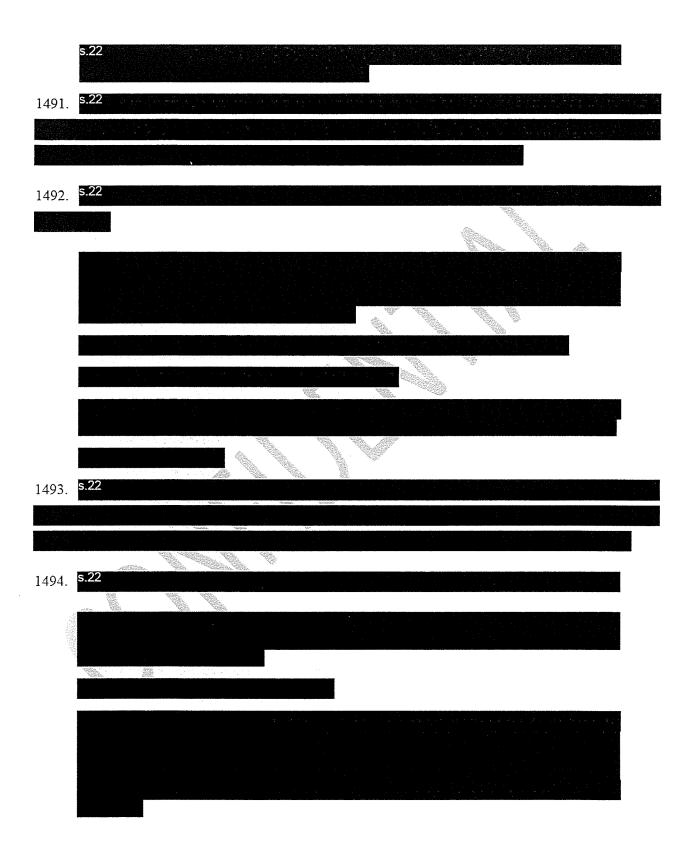


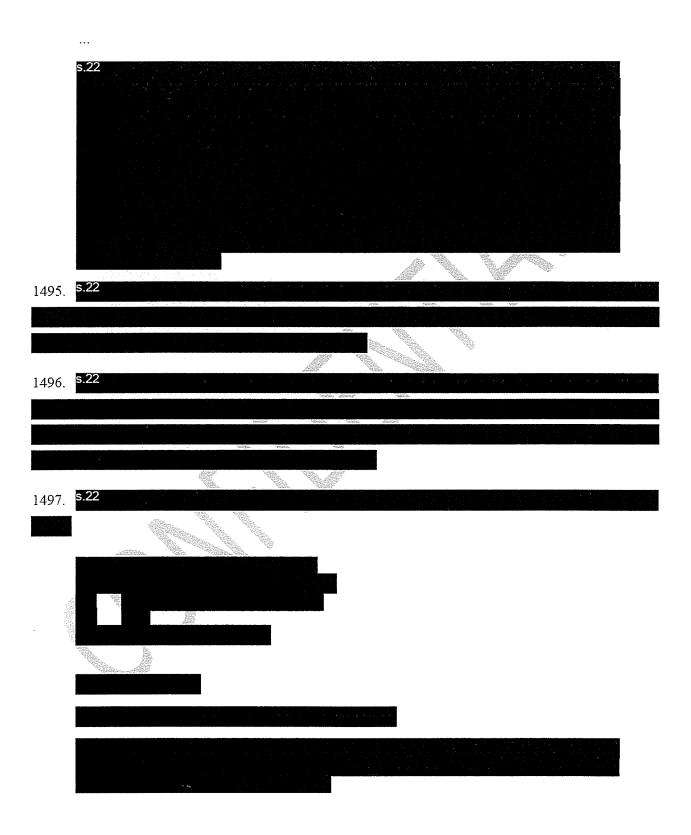


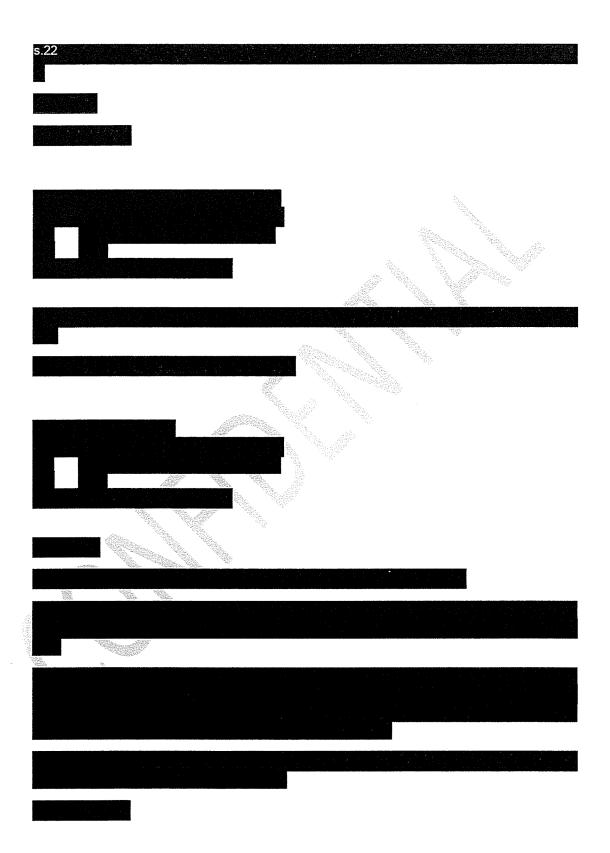


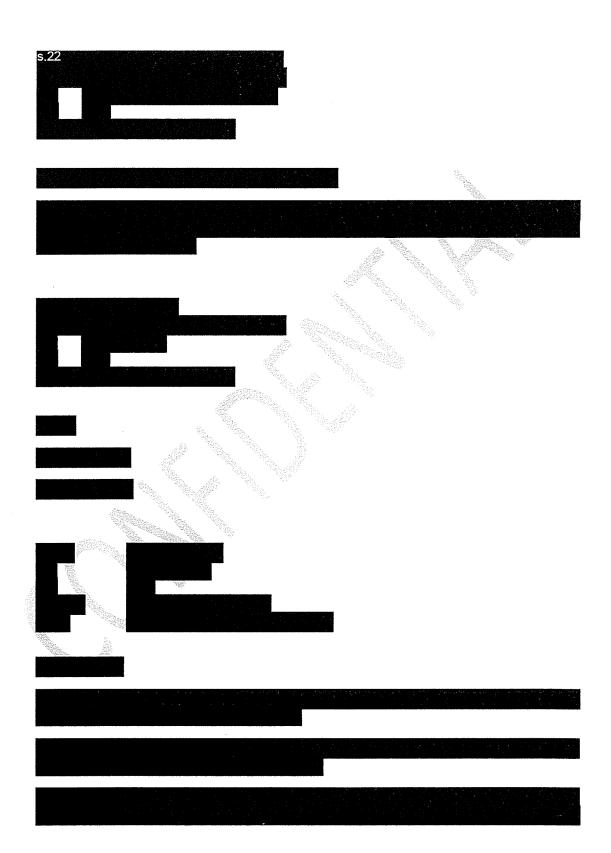


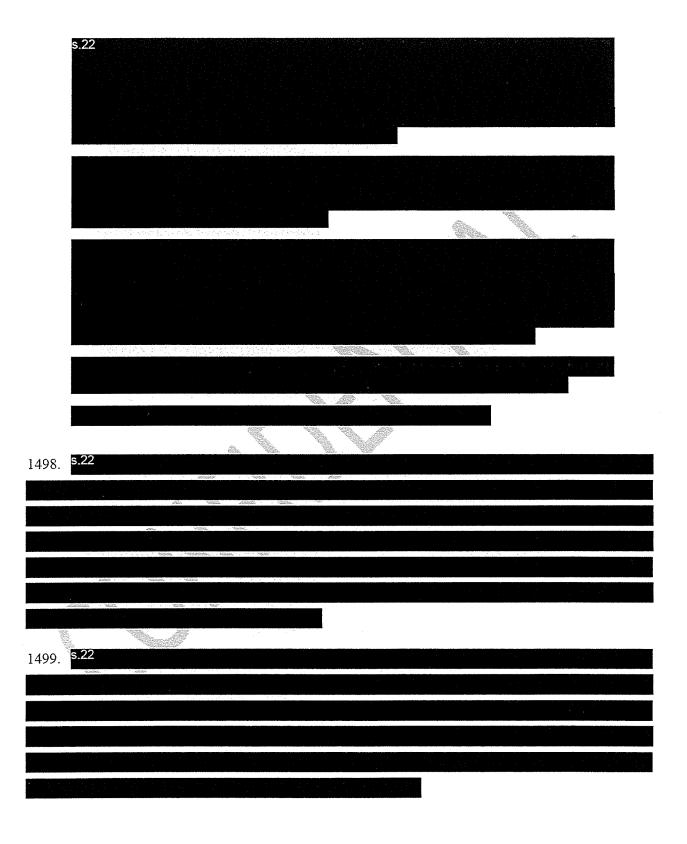


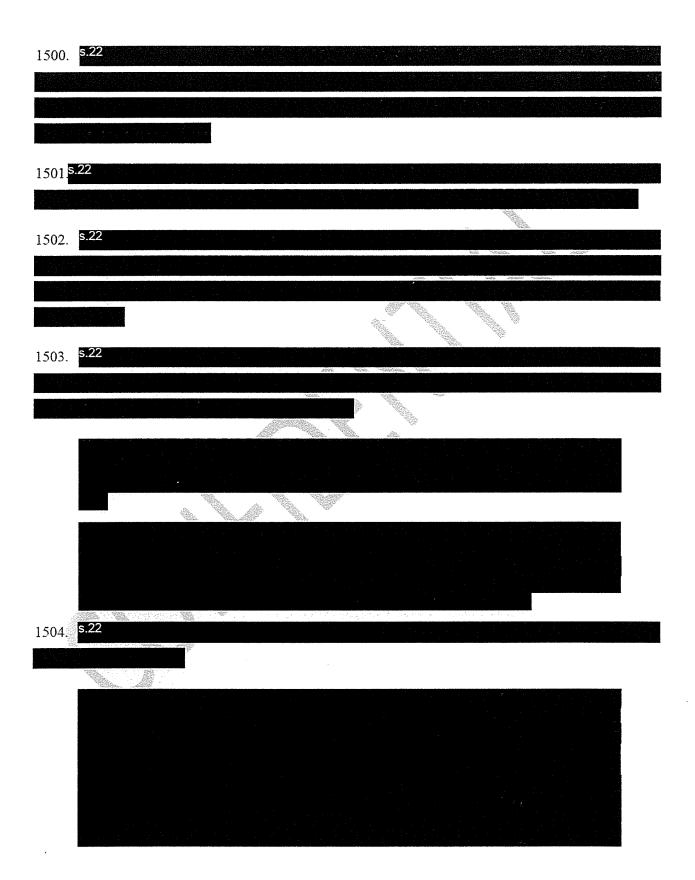


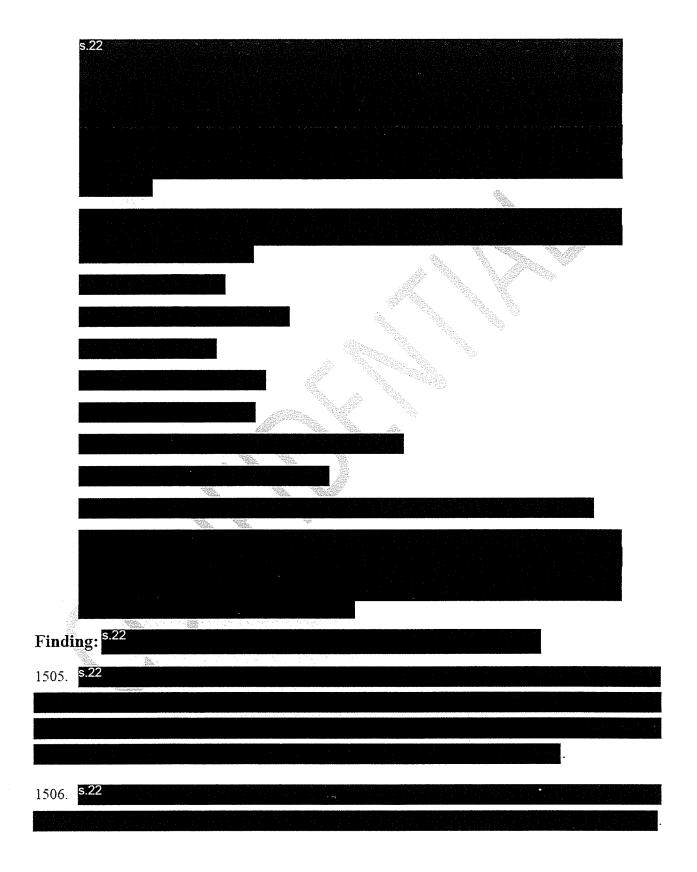


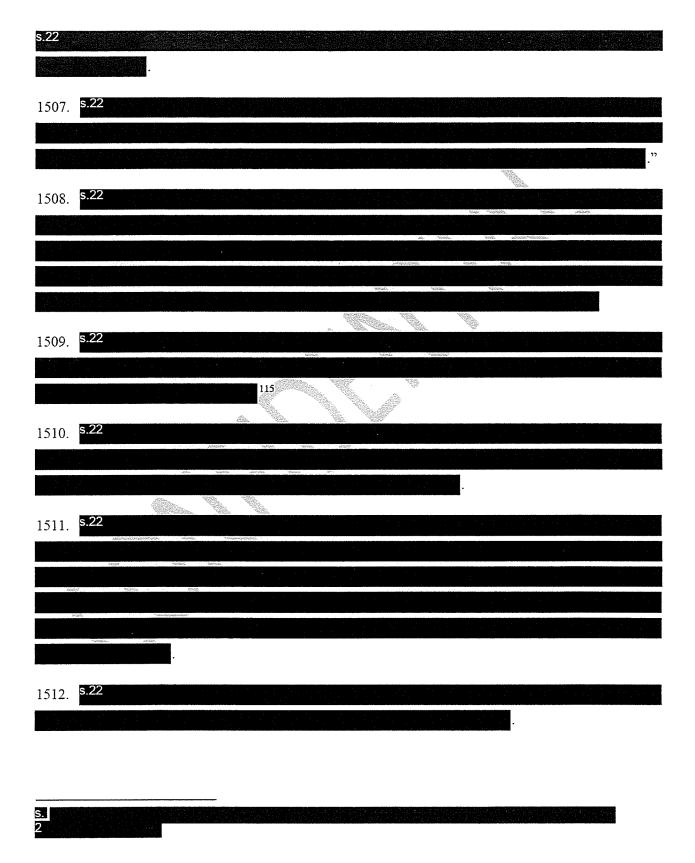


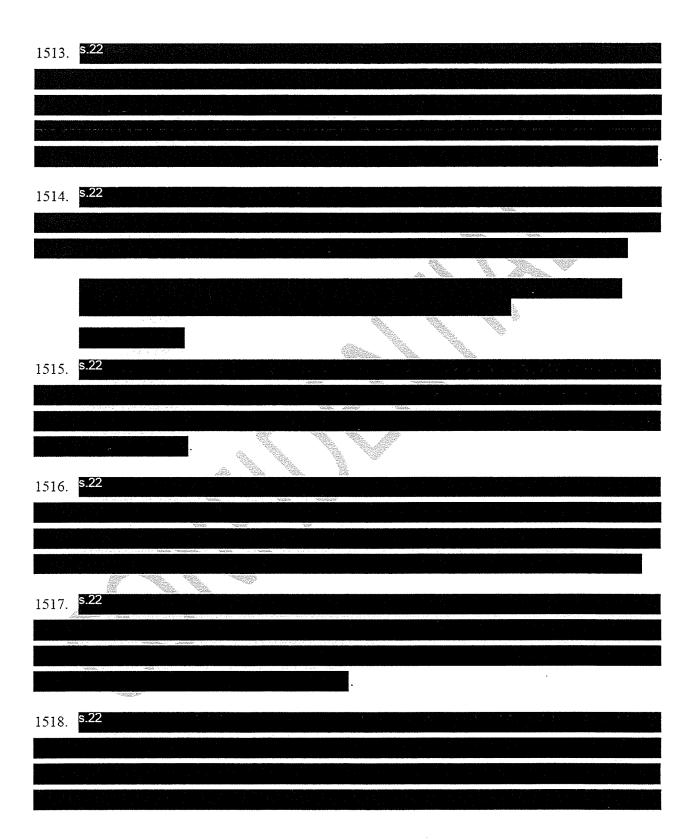


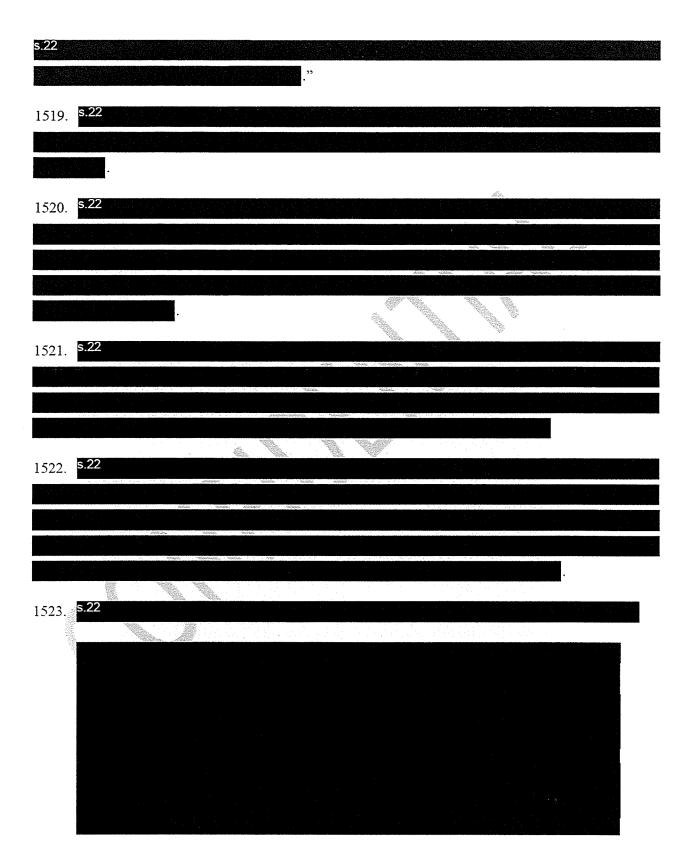


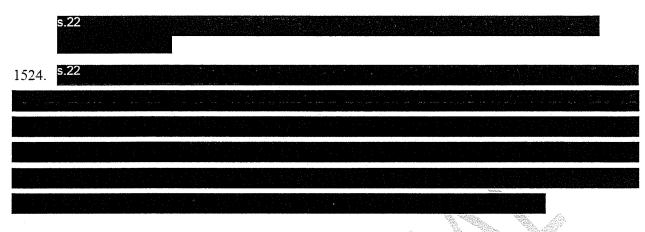












1525. As such, this complaint against 5.22 is unsubstantiated.

## COMPLAINANTS' COMMENTS ABOUT OUTCOME

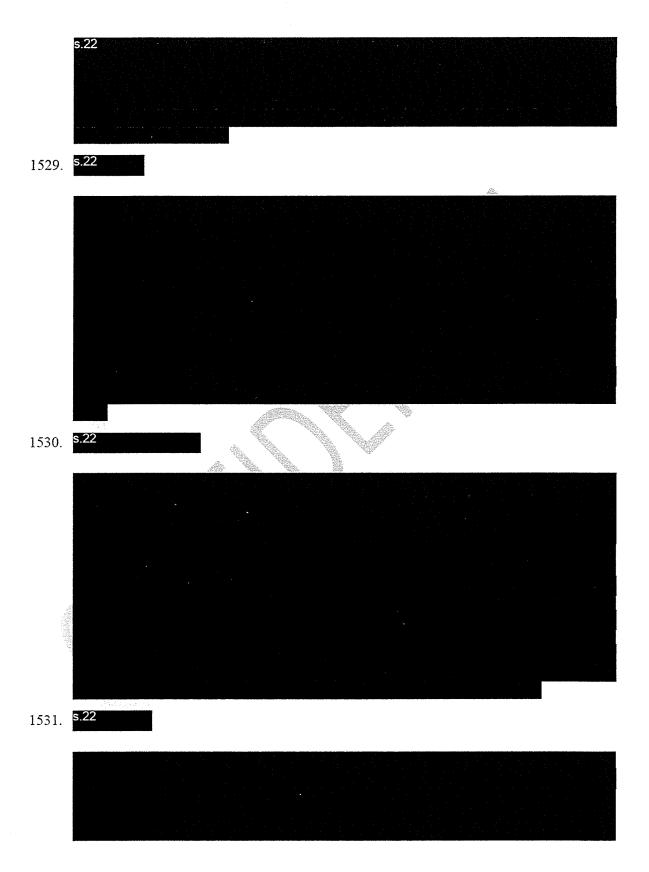
1526. It is not part of our mandate as investigators to make recommendations on the outcome of this investigation. Therefore, this report does not contain any recommendations. However, each of the Complainants provided evidence on the outcome they would like to see from this investigation. That evidence is reproduced below, as it may be of assistance to those who are tasked with determining the outcome of this process.

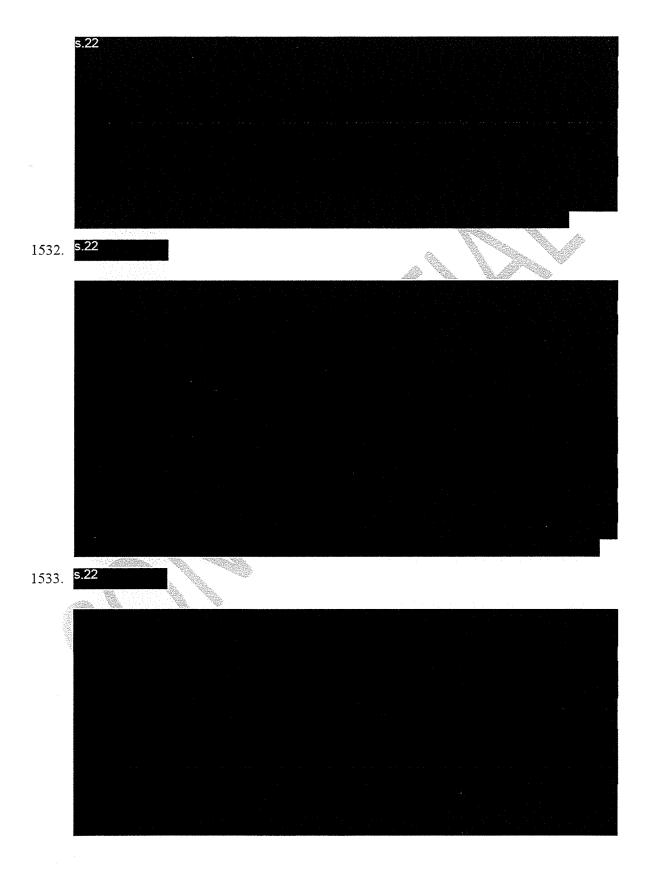


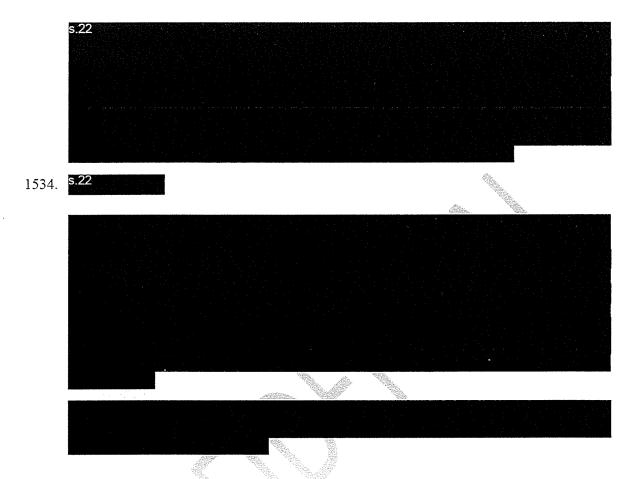


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## **CONCLUSION**

- 1535. This was a highly charged and complex investigation. It played out in the media to a large degree. There was strong support for the Complainants, as evidenced by the marches on campus, and strongly held suspicion of this process.
- 1536. On numerous occasions, it was suggested that the University was influencing the process. This is true to the extent that it determined the scope of the investigation which it is entitled to do and which is typical in cases such as this. That said, we did not make TRU aware of the names of Complainants, the number of allegations or the nature of the complaints. It is accurate to say that TRU left us alone to conduct this investigation.
- 1537. Throughout our work, we sought to balance the sometimes competing interests of a traumainformed approach and a procedurally fair process. Our findings are based on the evidence we received

through a properly conducted administrative investigation. It should be noted that through an alternate process, where the scope is different, evidence may be presented differently (through representation by lawyers or discovery/cross-examination), new evidence may be produced, or witnesses may present themselves differently, which might lead a tribunal or judge to make a different assessment of the facts or credibility.

1538. Investigations by their very nature are polarizing and create significant stress on all the parties involved. We are thankful for the willingness of all the Parties herein to participate fully in this process. While there were no doubt concerns about the length of time of this process, every party was willing to speak with us more than once and answer all the relevant questions put to them. We wish to recognize the patience and fortitude that all the Parties demonstrated throughout this highly sensitive and difficult investigation and extend our thanks for their cooperation.

Respectfully Submitted:

Sharon Cartmill-Lane, B.A. (Hons.), M.A., LL.B.

Director, Pearlman Lindholm Law Corporation

David Juteau, B.A., J.D.

Director, Pearlman Lindholm Law Corporation

December 21, 2022

Special mention of Catriona Chevalier, who was instrumental in collating and organizing evidence and assisting with editing of the Investigation Report

