

From: AGO,Rocelle
Sent: Wednesday, 5 February 2025 19:10
To: s 22(1)(a)(ii)
Cc:
Subject: New Full Court decision [SEC=OFFICIAL]

Follow Up Flag: Follow up
Flag Status: Flagged

Good evening

For the Guidelines register- new decision by the Full Federal Court

Bachelard v Australian Federal Police[\[2025\] FCAFC 5](#)

s 22(1)(a)(ii) grateful if you could please review and advise on any procedural issues to consider, noting procedural fairness issues appear to be discussed.

Kind regards
Rocelle

From: s 22(1)(a)(ii)
Sent: Thursday, 6 February 2025 8:54
To: AGO,Rocelle; s 22(1)(a)(ii)
Cc: s 22(1)(a)(ii)
Subject: RE: New Full Court decision [SEC=OFFICIAL]

Follow Up Flag: Follow up
Flag Status: Completed

Good morning,

Thank you – will do!

Kind regards,



s 22(1)(a)(ii)
A/g Assistant Director
Office of the Australian Information Commissioner
Brisbane | GPO Box 5288 Sydney NSW 2001
s 22(1)(a)(ii) @oaic.gov.au

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From: AGO,Rocelle
Sent: Wednesday, 5 February 2025 6:10 PM
To: s 22(1)(a)(ii)
Cc: LODGE,Justin
Subject: New Full Court decision [SEC=OFFICIAL]

Good evening

For the Guidelines register- new decision by the Full Federal Court

Bachelard v Australian Federal Police[\[2025\] FCAFC 5](#)

s 22(1)(a)(ii) grateful if you could please review and advise on any procedural issues to consider, noting procedural fairness issues appear to be discussed.

Kind regards
Rocelle

From: s 22(1)(a)(ii)
To: AGO,Rocelle
Cc: s 22(1)(a)(ii)
Subject: Implications of Bachelard and AFP [2025] FCAFC 5 [SEC=OFFICIAL]
Date: Thursday, 6 February 2025 13:13:21
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Good afternoon Rocelle,

Please see below my recommendations about potential procedural issues arising from the recent decision in: *Bachelard v Australian Federal Police* [2025] FCAFC 5. McDonald J gave the majority judgment (by reason of Wigney and Thawley JJ agreeing). However, the separate judgments of Wigney and Thawley JJ expanded on McDonald J's reasons in respect of s 37(1)(b) of the FOI Act and those judgments had some reasoning in common.

Ensuring procedural fairness to applicants during an IC review:

The decision has implications for how we ensure procedural fairness is afforded to applicants where we are considering applying exemptions that have been raised in an IC review matter but have not been specifically raised in relation to a particular document. In this matter, the AAT was found to have denied the applicant procedural fairness by considering ss 47E(c) and (d) in relation to the *Witness Statements* when the AFP's submissions and document schedule had *only* maintained those exemptions in relation to the *Report* (Ground 4: [182] - [207]). While the reasoning in relation to the obligations of procedural fairness relied on the AAT's legislation (s 35(4)) and s 63 of the FOI Act (as it then was), the findings are nonetheless applicable:

Applied to a review of an agency's decision to refuse access to documents under the FOI Act, this aspect of the procedural fairness hearing rule would ordinarily require that an applicant for review be put on notice of the exemptions or conditional exemptions on which the agency relies in the Tribunal in relation to each document. [198] (emphasis added)

The denial of procedural fairness in relation to the *Witness Statements* also impacted the AAT's ss 47E(c) and (d) findings in relation to the *Report*, even though the AFP had maintained those exemptions over the *Report*: [210] – [211].

This error was material because these exemption claims were a significant issue and, had the applicant been put on notice the AAT was considering ss 47E(c) and (d) over the *Witness Statements* too, he might have addressed that issue via further submissions or evidence: [205].

In obiter about the benefits of providing access to edited documents under the FOI Act, McDonald J said:

Finally, because an FOI applicant will always be at a disadvantage when arguing for the release of documents the content of which is wholly or partly unknown to them, the Tribunal should be astute to try to consider what issues an FOI applicant might have identified, and what submissions they might have wished to make, if they had been aware of the content of documents over which exemptions are claimed. In order to afford a fair hearing to the agency, it may be necessary for the Tribunal to raise such issues and hear argument on them in the absence of the FOI applicant or

their representatives. [293]

Procedural fairness Qs to put to agencies in light of this decision:

This decision impacts ongoing AFP matters in relation to ss 37(1)(b) and 47F of the FOI Act where the AFP has solely/ largely relied on the effect of s 60A of the AFP Act as their evidence that the material/ the sources of that material are confidential given the ‘significant practical effect of the exemptions to the prohibition’: [133]. In relation to s 37(1)(b), it was found that ‘the application of s 60A in relation to the information in the Statements does not, by itself, establish that the persons who provided them were “confidential sources”’: Ground 1 [107] – [134]. McDonald J also found that the misinterpretation of s 60A of the FOI Act also affected its consideration of s 47F: Ground 6 [238]. **s 47C**

s 47C

1. ‘The protection that is afforded [by s 37(1)(b)] is in respect of information that would reveal the identity of the confidential source of information, not in respect of the information provided to the authorities by the source’ (Wigney J at [13]; Thawley J at [37]; McDonald J at [162])
2. ‘[T]he focus of the assessment [in s 37(1)(b)] is on the position of the informer, and the circumstances and basis upon which they provided information to the authorities. Did the source provide the information under an express or implied assurance or undertaking that their identity would remain confidential, or on the understanding gleaned from the circumstances in which the information was provided that the law enforcement agency would not disclose their identity?’ (Wigney J at [14]; Thawley J at [35])
3. ‘The exemption [37(1)(b)] is concerned with the protection of informers, not with mere reluctant witnesses who would prefer to remain anonymous until they were required to give evidence.’ (Wigney J at [15]; Thawley J at [34]).

The matter also has general implications in relation to how we deal with matters where agencies are maintaining single or multiple exemptions over a document in full. The decision reinforces that if we find an exemption applies and it has been claimed to apply to a document in full, we *must* consider whether we can provide partial disclosure to an edited copy as per s 22 of the FOI Act. In this matter, the AAT failed to consider this question in relation to ss 37(1)(b), 47E(c), and 47E(d) over the Witness Statements and the Report: (Ground 2 [139] – [178]; Ground 5 [212] – [219]; obiter [285] – [293]). In its observations, the decision makes it clear that even a heavily redacted document may be of benefit to an applicant bearing in mind that:

1. we should not assume that applicants would reject a heavily edited copy of a

document

2. the objects of the FOI Act are promoted by the provision of documents to the greatest extent possible, even if this is via a heavily redacted document
3. even redacted documents may enable applicants to glean context allowing them to make more targeted and relevant submissions about why said redactions should not apply to the redacted parts
4. the provision of even a heavily redacted document provides transparency about the operation of the FOI Act itself
5. FOI applicants are always at a disadvantage given they are making arguments about material partly or wholly unknown to them.

[178], [285] – [293].

Lastly, this matter also has implications in relation to ensuring that agencies (and us) correctly interpret the scope of an applicant's request (s 22) in deciding whether the request is asking for a whole document or for certain parts of a document. The decision found that the AAT had erred by failing to correctly interpret the scope of the applicant's FOI request as being a request for the whole Report rather than for certain parts of the report and also failed to provide legally sufficient reasons for its interpretation (Ground 8 [242] – [281]). The decision found that certain terms used by the applicant were merely descriptors, they were not intended to restrict his request to only parts of the document: [263]. We already tend to put scoping issues to agencies but this decision has helpful commentary that we could use in distinguishing descriptors used to identify a document and statements intended to restrict the scope of a request.

I haven't summarised the other s 47F material at [228] – [237] as the discussion of the 'public purpose' in the release of the material as that discussion specifically relates to the content of the documents at issue.

Kind regards,



s 22(1)(a)(ii)

A/g Assistant Director
Office of the Australian Information Commissioner
Brisbane | GPO Box 5288 Sydney NSW 2001

s 22(1)(a)(ii)

[@oaic.gov.au](mailto:s 22(1)(a)(ii)@oaic.gov.au)

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From: AGO,Rocelle

Sent: Wednesday, 5 February 2025 6:10 PM

To: s 22(1)(a)(ii)

Cc: s 22(1)(a)(ii)

Subject: New Full Court decision [SEC=OFFICIAL]

Good evening

For the Guidelines register- new decision by the Full Federal Court

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s 22(1)(a)(ii) grateful if you could please review and advise on any procedural

issues to consider, noting procedural fairness issues appear to be discussed.

Kind regards

Rocelle

From: s 22(1)(a)(ii)
To: TYDD,Liz; PIRANI,Toni; AGO,Rocelle; s 22(1)(a)(ii)
Subject: RE: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]
Date: Friday, 7 February 2025 17:23:46
Attachments: Bachelard v Australian Federal Police [2025] FCAFC 5.pdf

Dear Liz

I think this is the relevant judgment.

Kind regards

s 22(1)(a)(ii)

From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Sent: Friday, 7 February 2025 5:08 PM
To: s 22(1)(a)(ii) @oaic.gov.au; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; s 22(1)(a)(ii) @oaic.gov.au
Subject: RE: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]

This is an extremely important decision – so notice appreciated. I think we should circulate the case

Many thanks

Liz

From: OAIC - Media <media@oaic.gov.au>
Sent: Friday, 7 February 2025 4:50 PM
To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; s 22(1)(a)(ii) @oaic.gov.au
Cc: OAIC - Media <media@oaic.gov.au>
Subject: FOI article about Ben Roberts-Smith

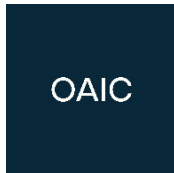
Good afternoon

Please find attached an article about the Federal Court supporting the release of AFP documents relating to the Ben Roberts-Smith case. An extract is below.

Nine Newspapers: The Federal Court has demolished the Australian Federal Police's attempts to keep secret the details of an anti-corruption investigation that reached the top levels of the peak policing body, having rejected arguments that releasing the information would be against the public interest. The FOI battle launched by this masthead in 2021 was aimed at uncovering and airing the full story of how ex-AFP Commissioner Keelty came to know about the AFP's war crimes investigations, how the federal police's internal investigators responded to the leaks and why the scandal has never resulted in any formal public accountability. AFP lawyers first rejected an FOI request from this masthead in 2021. Police refused it a second time late that year. **The Office of the Australian**

Information Commissioner, which is designed to review FOI disputes, assessed the matter for 15 months before deciding in April 2023 not to act, and instead to refer it to the Administrative Appeals Tribunal.

Have a good weekend.



s 22(1)(a)(ii) (he/him)
Director, Communications and Engagement
Office of the Australian Information Commissioner
Sydney
s 22(1)(a)(ii) E media@oaic.gov.au

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From: s 22(1)(a)(iii)
To: OAIC FOI Significant Decisions
Subject: Bachelard - FCAFC decision [SEC=OFFICIAL]
Date: Monday, 10 February 2025 12:09:04
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Hi Team,

[Please see below a copy of my email to Rocelle flagging PF issues. I note I didn't go into s 47F (which is where that name thing came in) as I was giving a summary purely from the PF perspective.]

Please see below my recommendations about potential procedural issues arising from the recent decision in: *Bachelard v Australian Federal Police* [2025] FCAFC 5. McDonald J gave the majority judgment (by reason of Wigney and Thawley JJ agreeing). However, the separate judgments of Wigney and Thawley JJ expanded on McDonald J's reasons in respect of s 37(1)(b) of the FOI Act and those judgments had some reasoning in common.

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Kind regards,



s 22(1)(a)(ii)

A/g Assistant Director
Office of the Australian Information Commissioner
Brisbane | GPO Box 5288 Sydney NSW 2001
s 22(1)(a)(ii) @oaic.gov.au

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From: s 22(1)(a)(ii)
Sent: Monday, 10 February 2025 11:10
To: s 22(1)(a)(ii)
Cc: AGO,Rocelle
Subject: RE: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]
Attachments: Implications of Bachelard and AFP [2025] FCAFC 5 [SEC=OFFICIAL]

Hi s 22(1)(a)(ii) and Rocelle,

Sorry about that. The summary is attached. Thanks

Regards

 s 22(1)(a)(ii) (he/him)
Director, FOI Case Management
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
s 22(1)(a)(ii) @oaic.gov.au


From: s 22(1)(a)(ii)
Sent: Monday, 10 February 2025 10:58 AM
To: AGO,Rocelle
Cc: s 22(1)(a)(ii)
Subject: FW: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]

Hi Rocelle

Could you please send me through the case summary from the BRS decision?

Thanks

s 22(1)(a)(ii)

 s 22(1)(a)(ii) (she/her)
Executive General Manager | Information Rights Division
Office of the Australian Information Commissioner
s 22(1)(a)(ii) E s 22(1)(a)(ii) @oaic.gov.au
W www.oaic.gov.au

From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Sent: Monday, 10 February 2025 10:37 AM
To: s 22(1)(a)(ii) @oaic.gov.au
Subject: FW: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]

FYI I should have included you - apologies

From: TYDD,Liz

Sent: Monday, 10 February 2025 9:34 AM

To: s 22(1)(a)(ii) @oaic.gov.au; s 22(1)(a)(ii) @oaic.gov.au;

PIRANI,Toni <Toni.Pirani@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>

Subject: RE: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]

Dear s 22(1)(a)(ii)

Excellent summary from s 22(1)(a)(ii) thank you and can you please pass on my appreciation. I can see a significant impact on our processes in relation to consideration of exemptions and the final stages of our consideration ie pre drafting – fortunately your case planning phase will assist this process. The other aspects of the summary appear to me to fortify our position/approach. It is a very strong decision for discussion purposes.

Kind regards

Liz

From: s 22(1)(a)(ii) @oaic.gov.au>

Sent: Friday, 7 February 2025 5:37 PM

To: s 22(1)(a)(ii) @oaic.gov.au; TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>;

PIRANI,Toni <Toni.Pirani@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>

Subject: RE: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]

Hi all,

Rocelle recently asked s 22(1)(a)(ii) to consider the implications of this judgment (in particular regarding procedural fairness). s 22(1)(a)(ii) case note is attached for information.

Regards

s 22(1)(a)(ii)

From: s 22(1)(a)(ii) @oaic.gov.au>

Sent: Friday, 7 February 2025 5:23 PM

To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au> s 22(1)(a)(ii) @oaic.gov.au>

Subject: RE: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]

Dear Liz

I think this is the relevant judgment.

Kind regards

s 22(1)(a)(ii)

From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>

Sent: Friday, 7 February 2025 5:08 PM

To: s 22(1)(a)(ii) <[REDACTED]@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>;

AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; s 22(1)(a)(ii) <[REDACTED]@oaic.gov.au>

Subject: RE: FOI article about Ben Roberts-Smith [SEC=OFFICIAL]

This is an extremely important decision – so notice appreciated. I think we should circulate the case

Many thanks

Liz

From: OAIC - Media <media@oaic.gov.au>

Sent: Friday, 7 February 2025 4:50 PM

To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; AGO,Rocelle

<Rocelle.Ago@oaic.gov.au>; s 22(1)(a)(ii) <[REDACTED]@oaic.gov.au>

Cc: OAIC - Media <media@oaic.gov.au>

Subject: FOI article about Ben Roberts-Smith

Good afternoon

Please find attached an article about the Federal Court supporting the release of AFP documents relating to the Ben Roberts-Smith case. An extract is below.

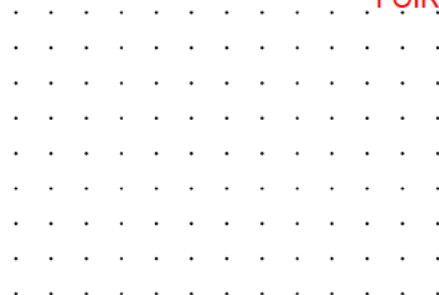
Nine Newspapers: The Federal Court has demolished the Australian Federal Police's attempts to keep secret the details of an anti-corruption investigation that reached the top levels of the peak policing body, having rejected arguments that releasing the information would be against the public interest. The FOI battle launched by this masthead in 2021 was aimed at uncovering and airing the full story of how ex-AFP Commissioner Keelty came to know about the AFP's war crimes investigations, how the federal police's internal investigators responded to the leaks and why the scandal has never resulted in any formal public accountability. AFP lawyers first rejected an FOI request from this masthead in 2021. Police refused it a second time late that year. **The Office of the Australian Information Commissioner**, which is designed to review FOI disputes, assessed the matter for 15 months before deciding in April 2023 not to act, and instead to refer it to the Administrative Appeals Tribunal.

Have a good weekend.

 s 22(1)(a)(ii) (he/him)
 Director, Communications and Engagement
 Office of the Australian Information Commissioner
 Sydney
 s 22(1)(a)(ii) E media@oaic.gov.au

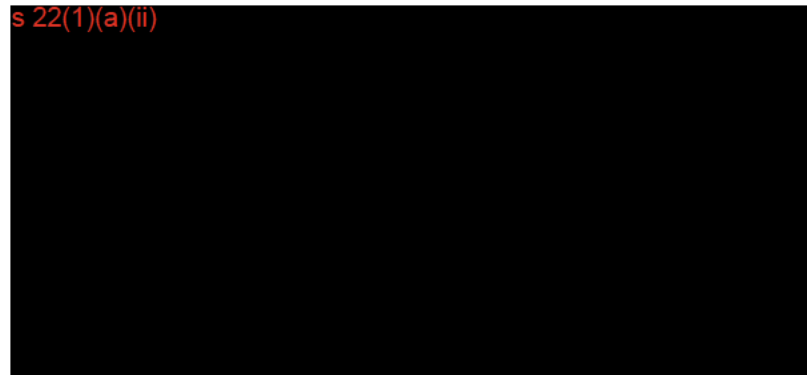
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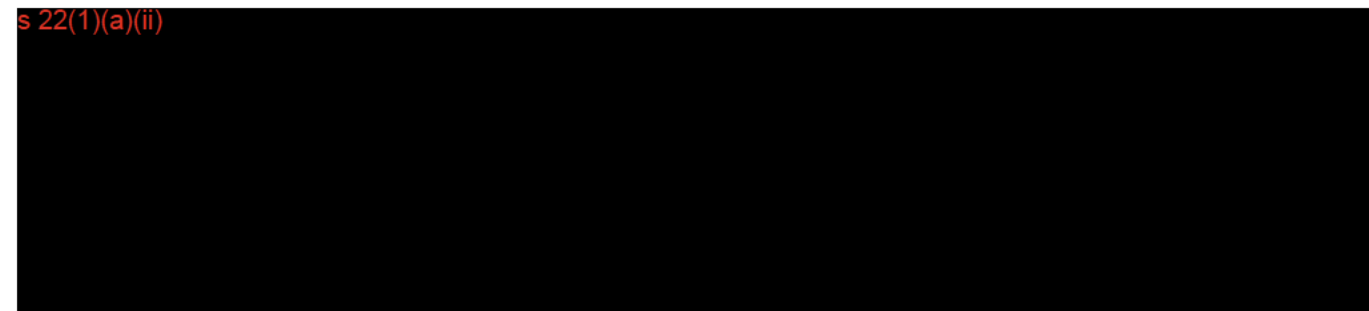
FOI Commissioner Meetings | Casework: 20 February 2025 at 3:00pm

s 22(1)(a)(ii)

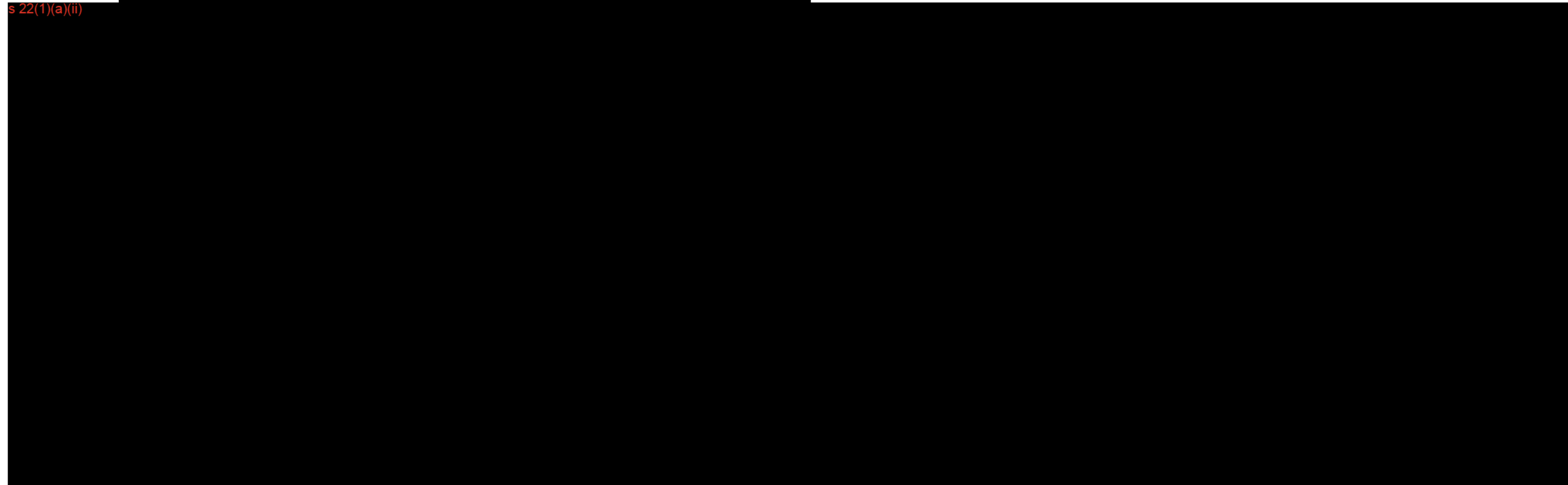


b. New matters of significance – Bachelard and AFP [2025] FCAFC 5 and ART matter (not yet published) – case summaries to be circulated around branch


s 22(1)(a)(ii)



s 22(1)(a)(ii)



s 22(1)(a)(ii)





Australian Government

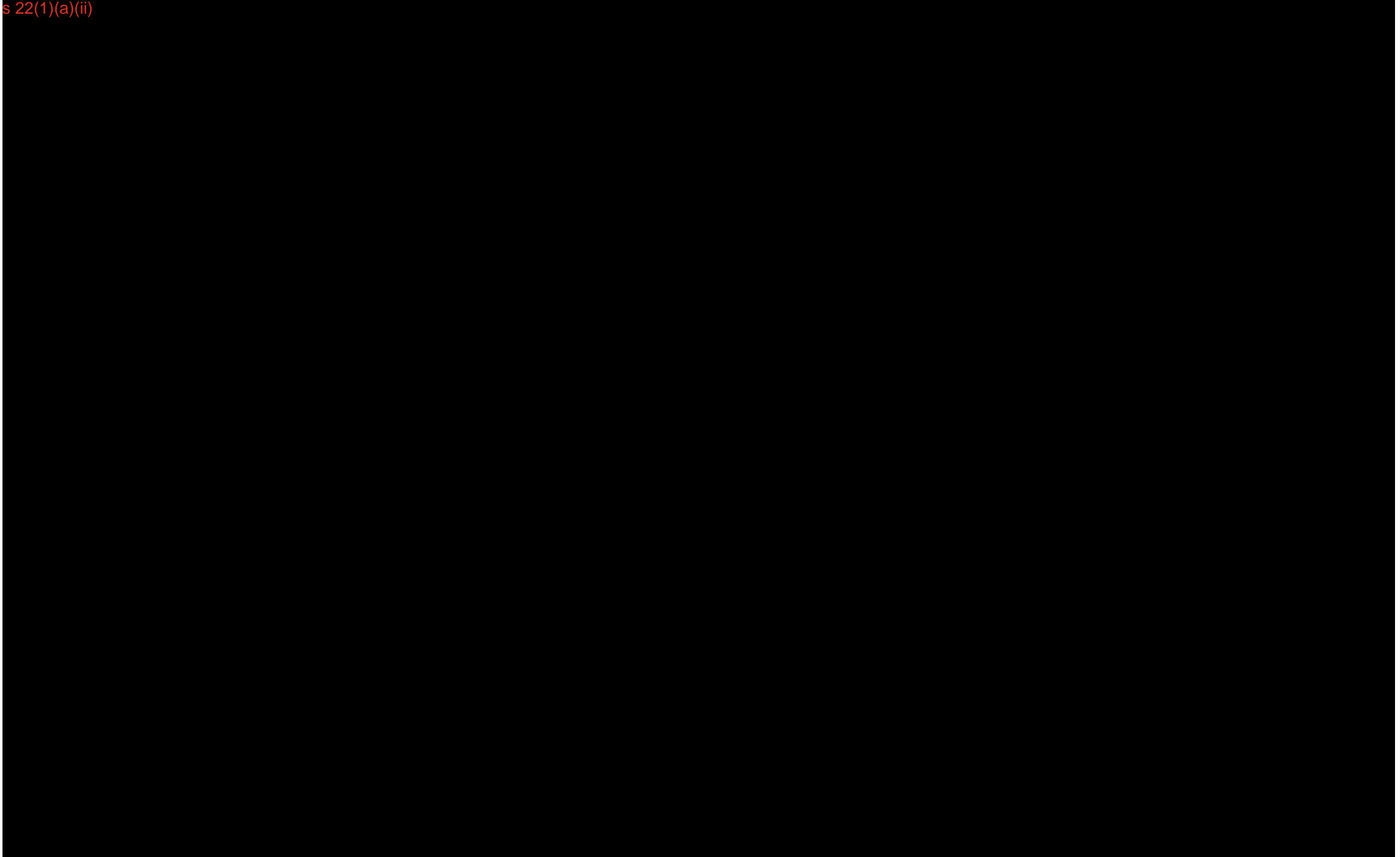
Office of the Australian Information Commissioner

Amendments to the FOI Guidelines

s 22(1)(a)(ii)

Amendments to the EOI Guidelines

s 22(1)(a)(ii)



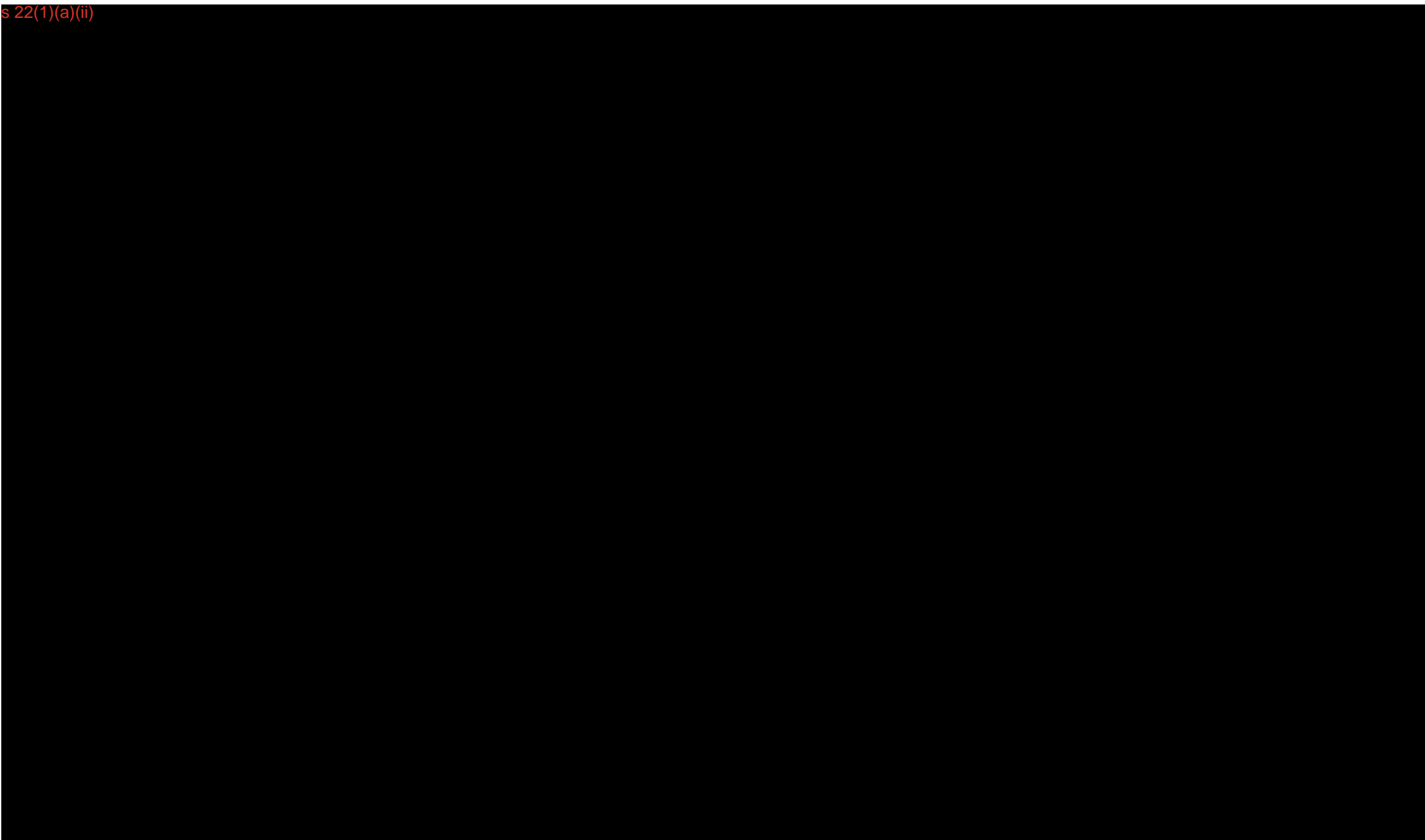
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



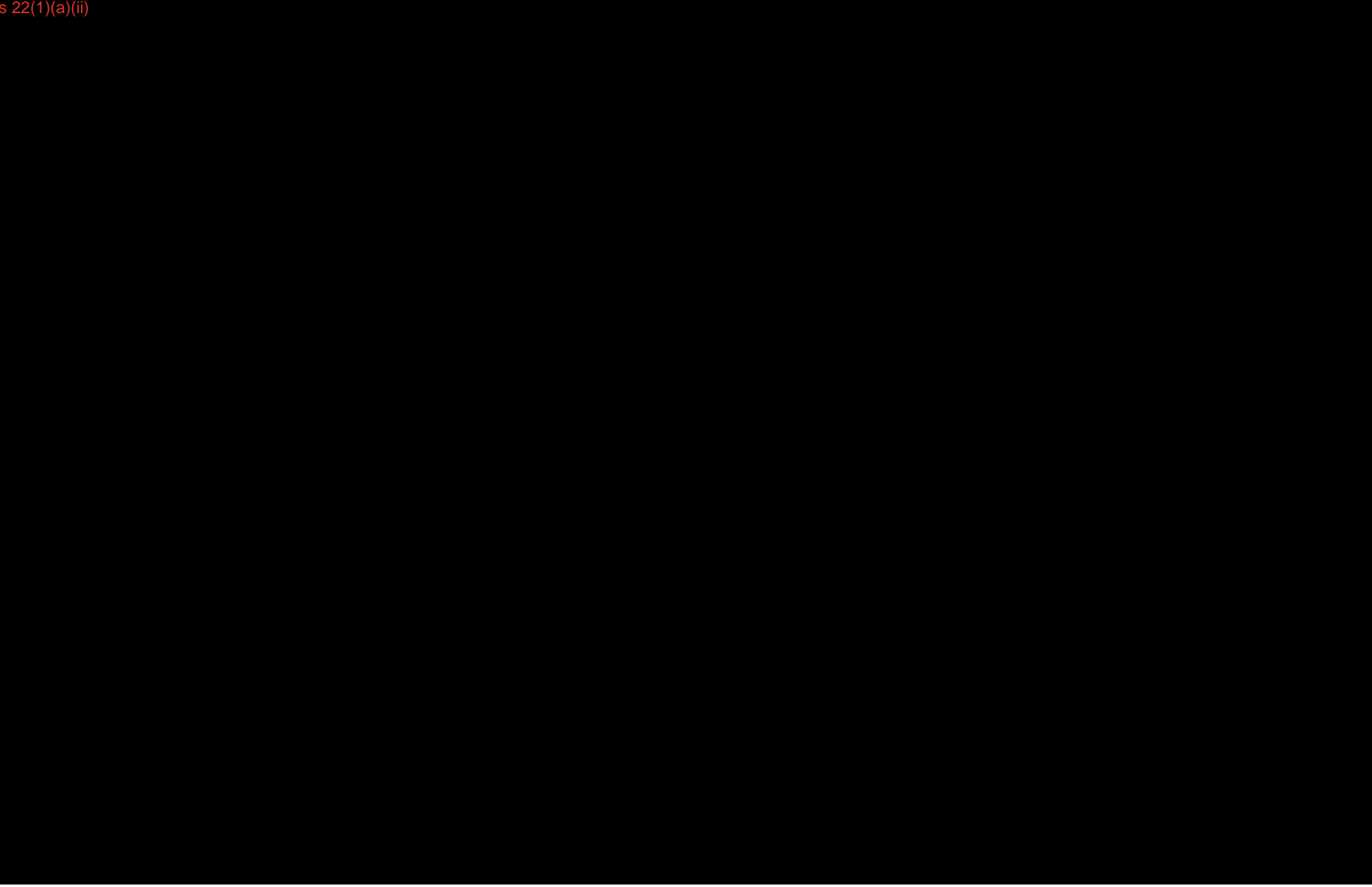
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



Amendments to the FOI Guidelines

s 22(1)(a)(ii)



Amendments to the FOI Guidelines

s 22(1)(a)(ii)



Amendments to the FOI Guidelines

s 22(1)(a)(ii)



Amendments to the FOI Guidelines

s 22(1)(a)(ii)



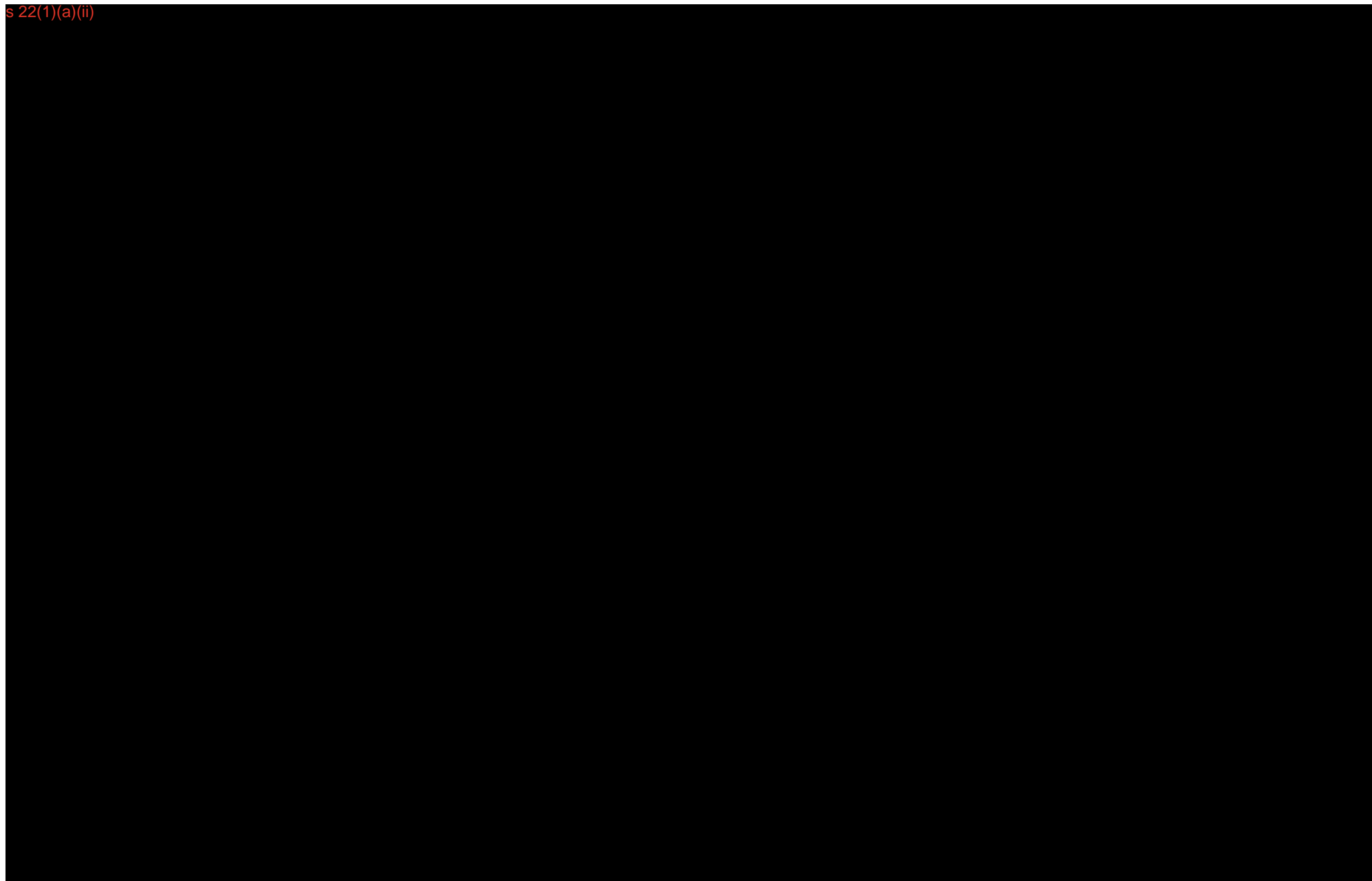
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s 22(1)(a)(ii)



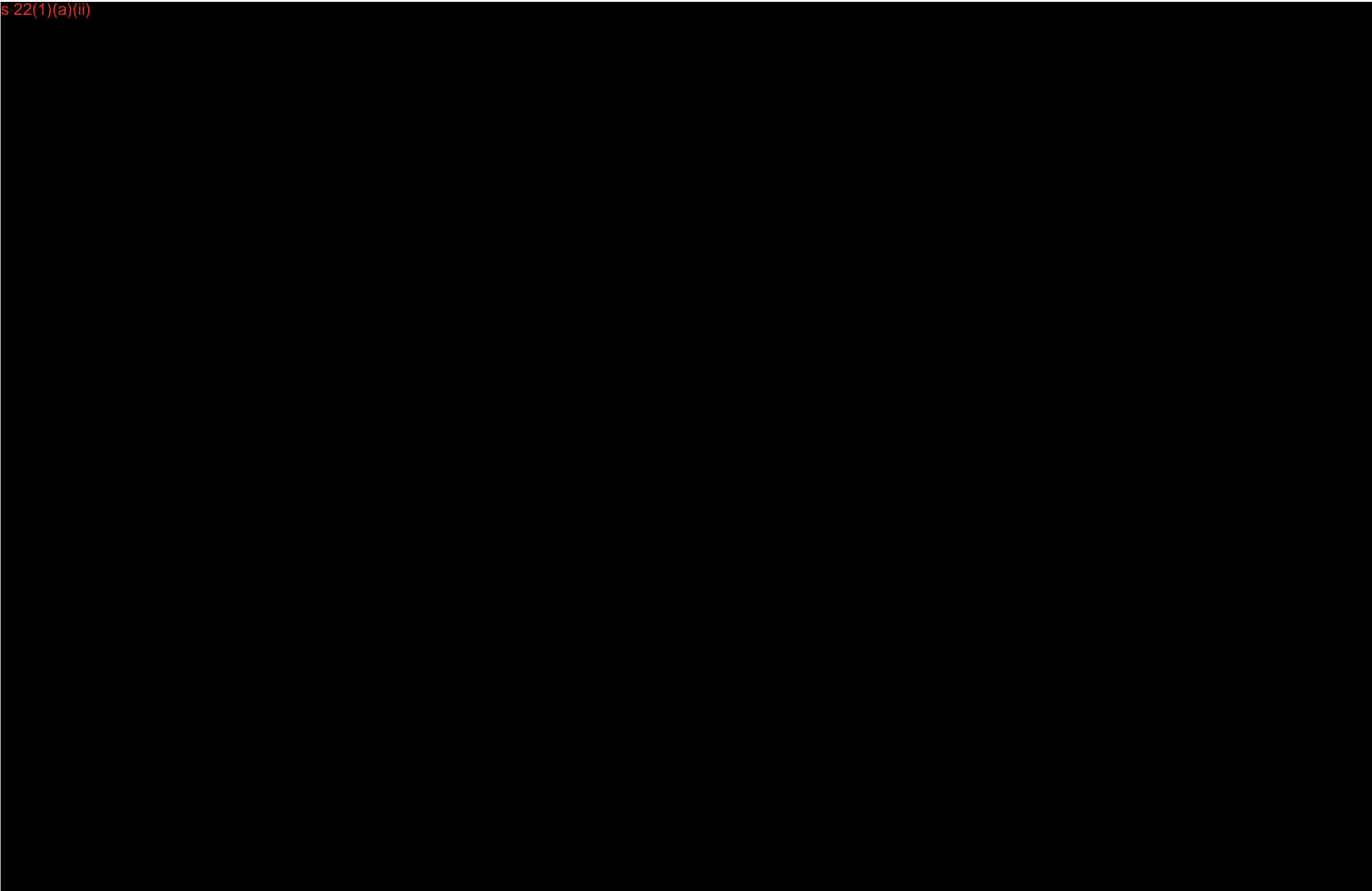
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



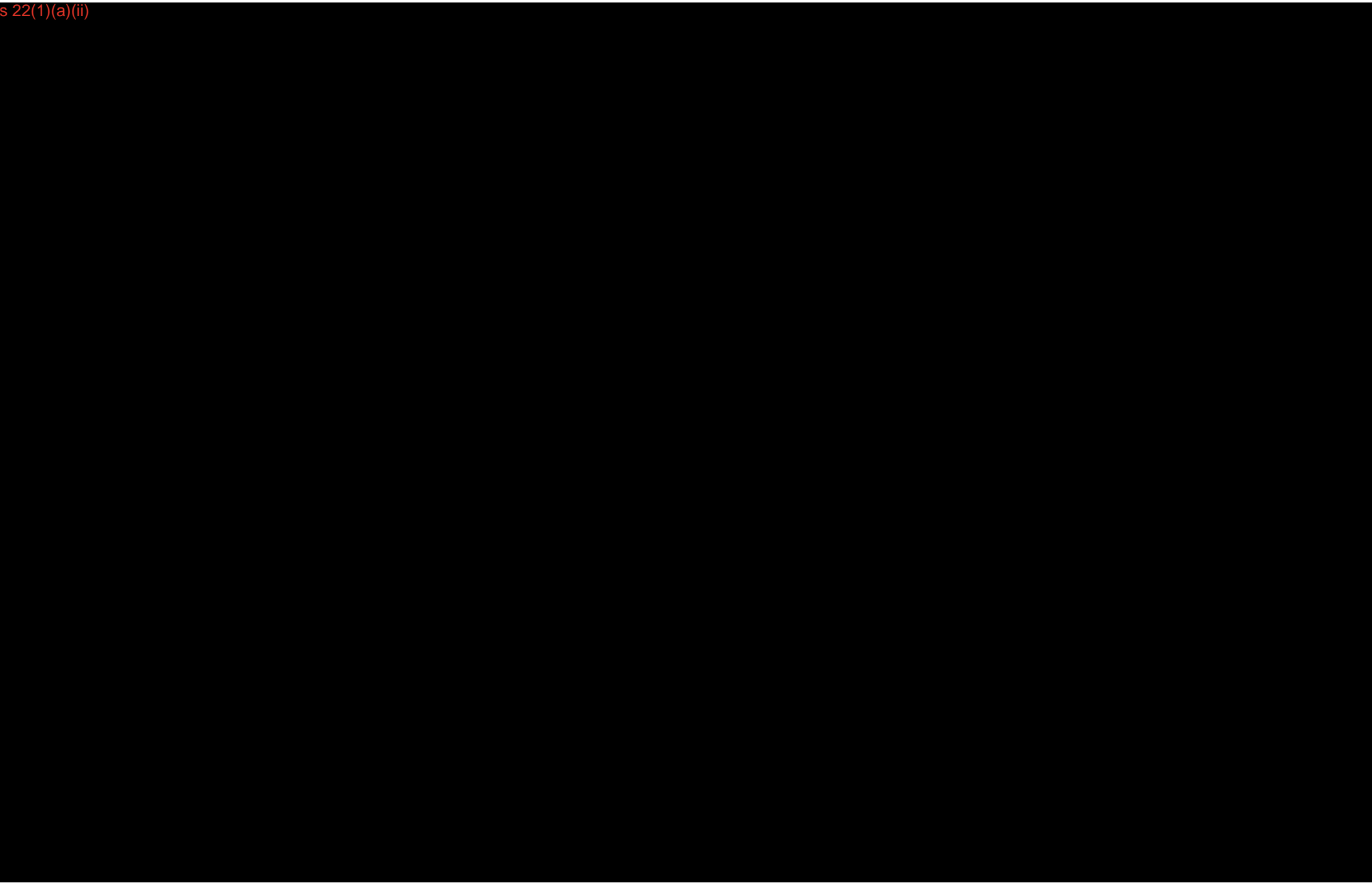
Amendments to the FOI Guidelines

s 22(1)(a)(ii)




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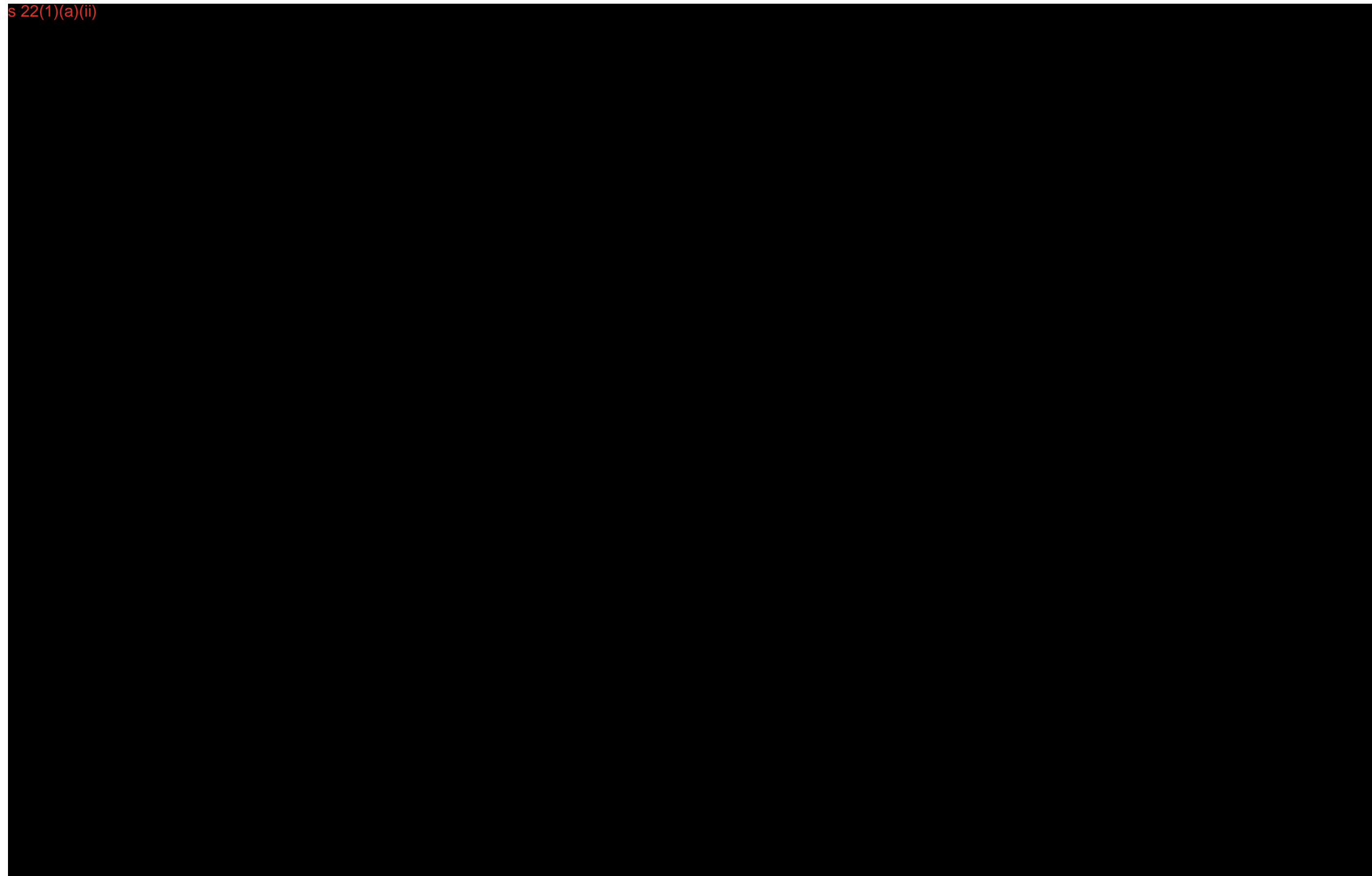
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



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s 22(1)(a)(ii)



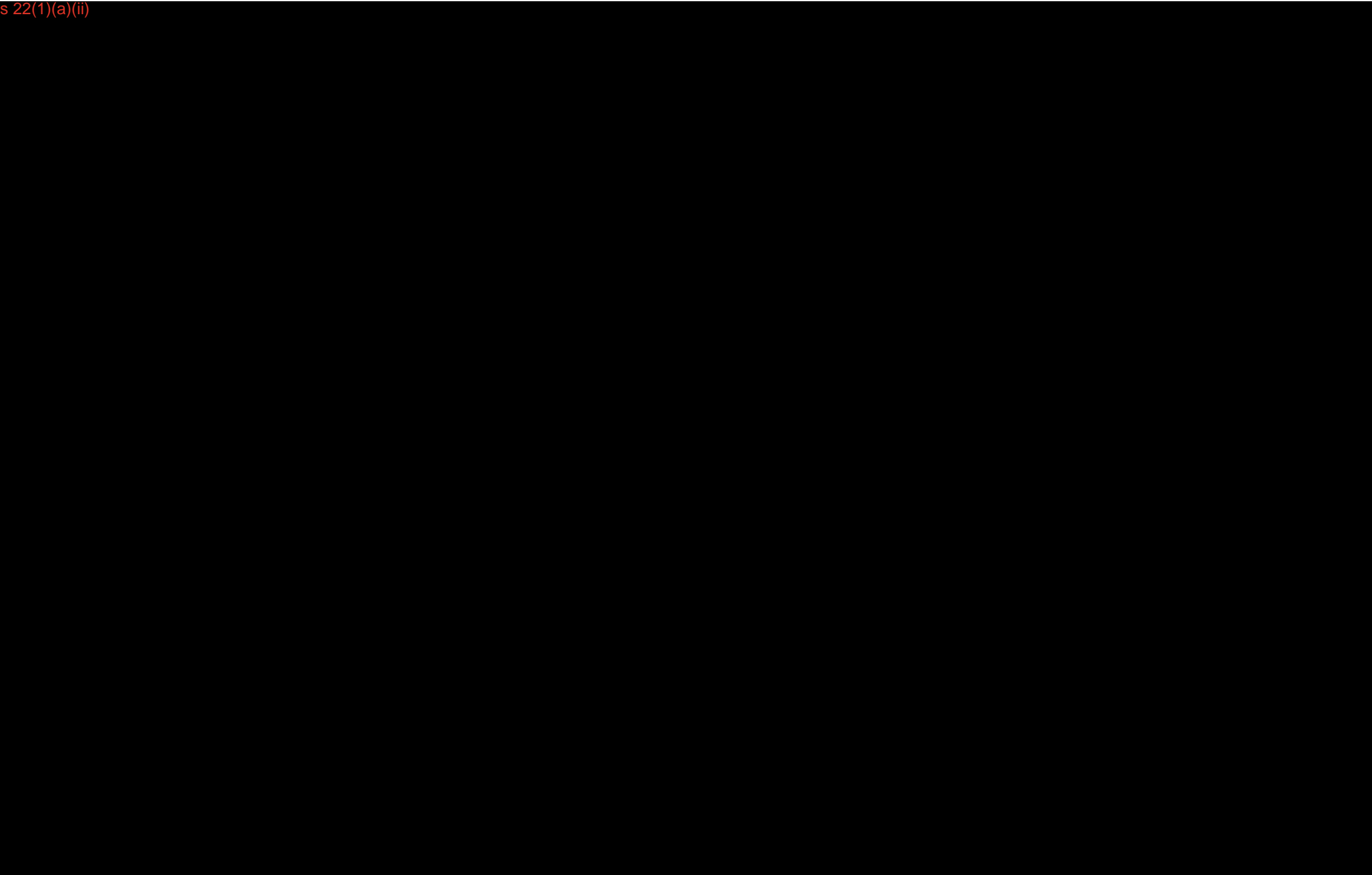
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



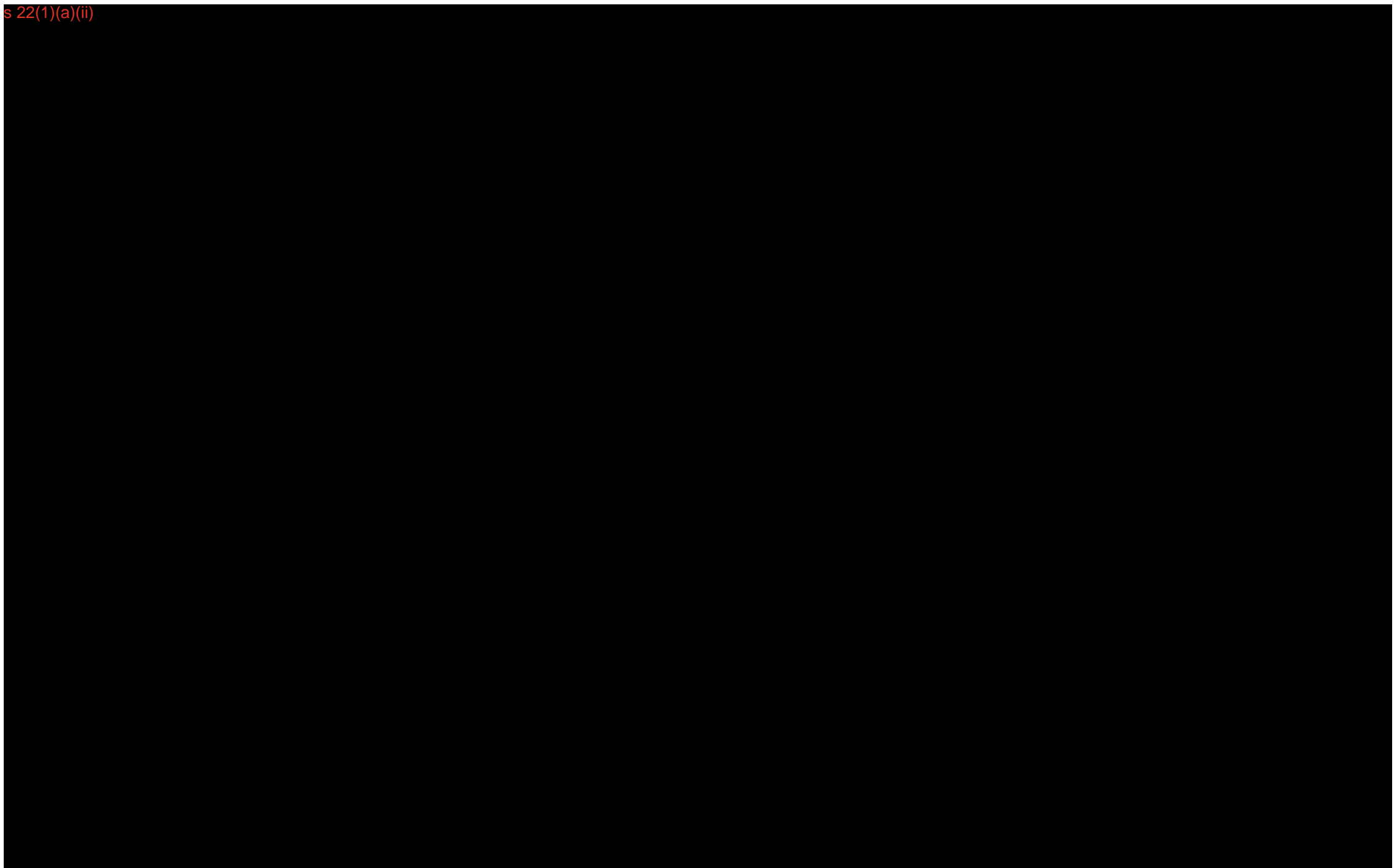
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



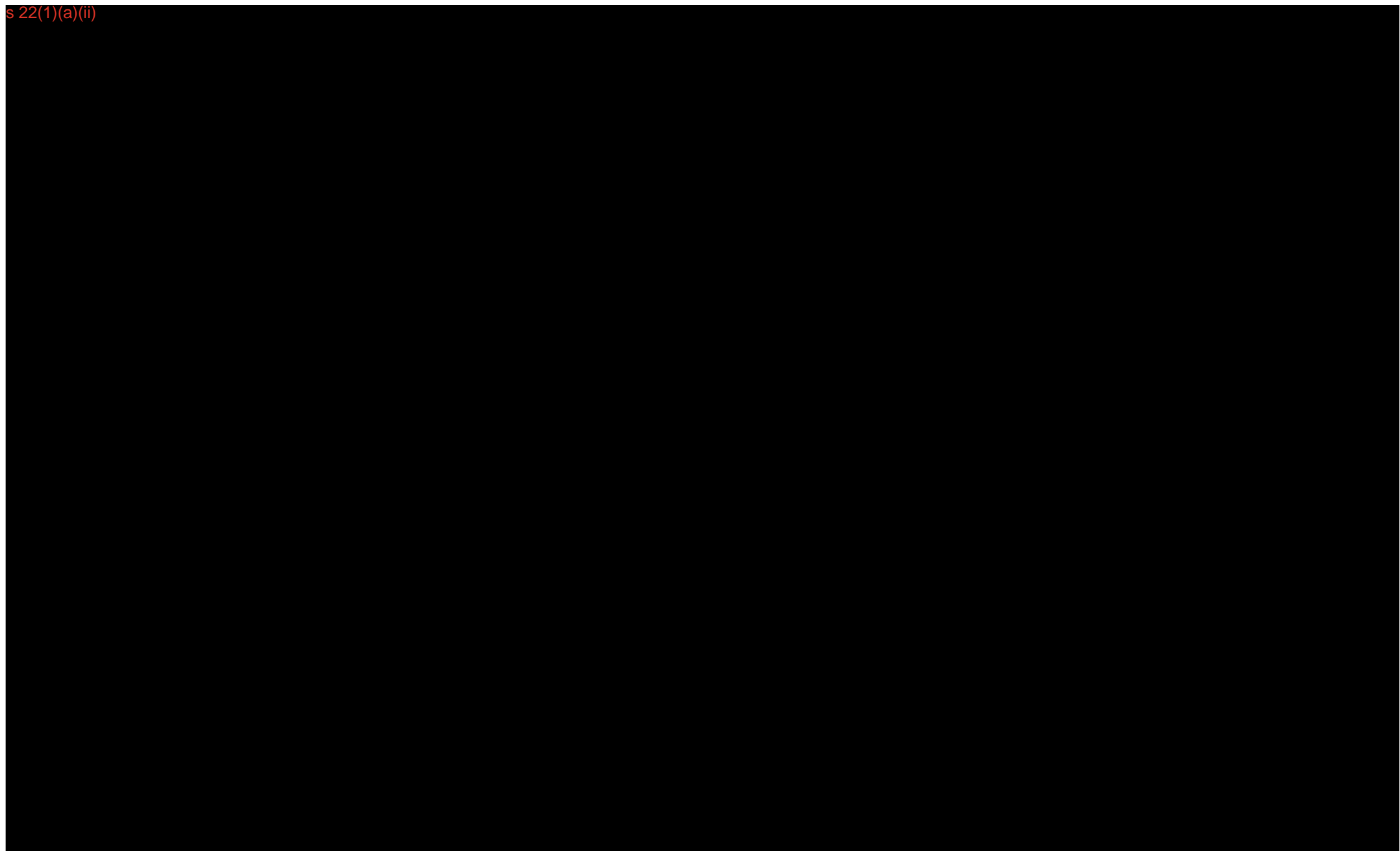
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



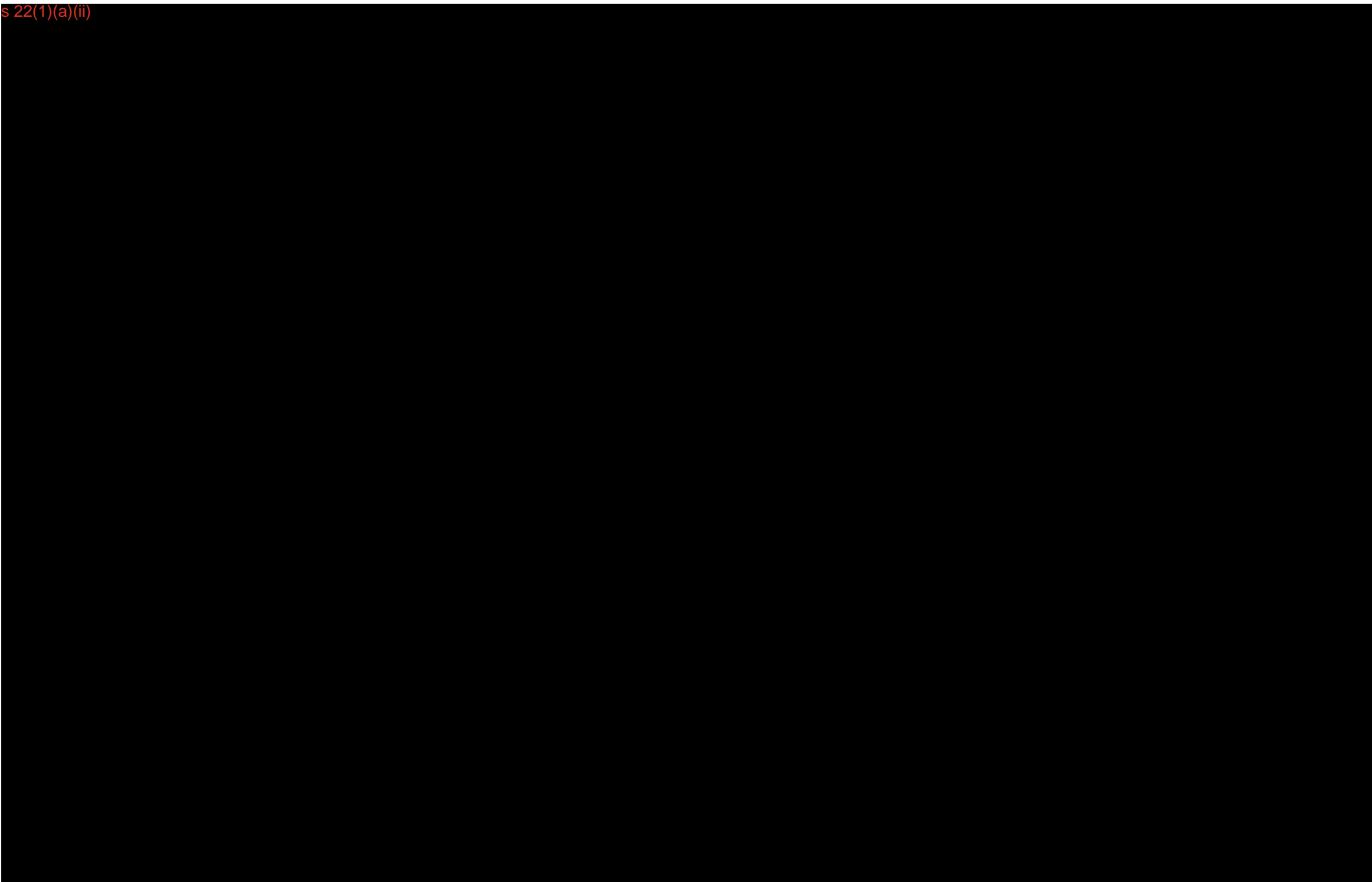
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



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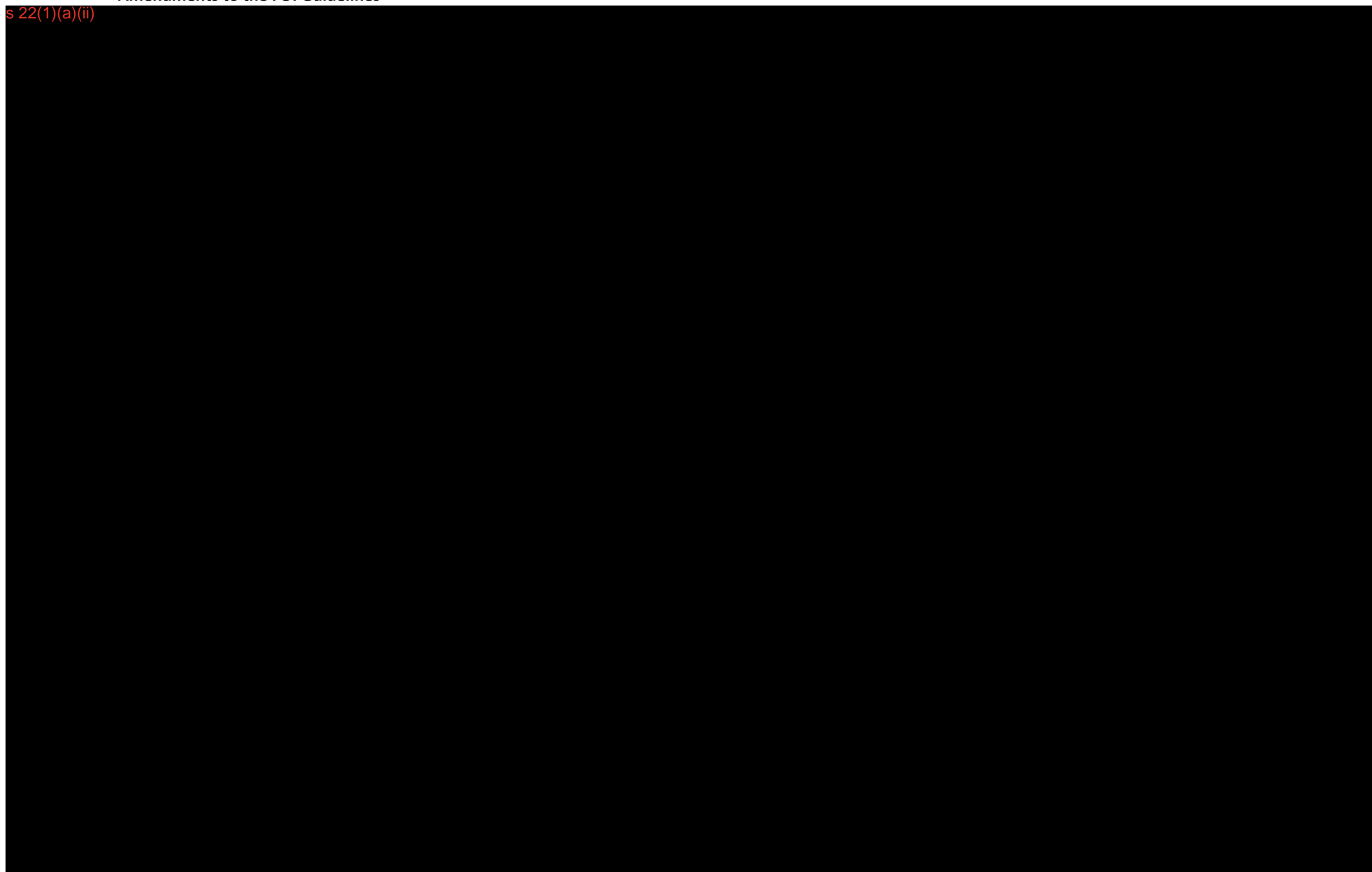
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



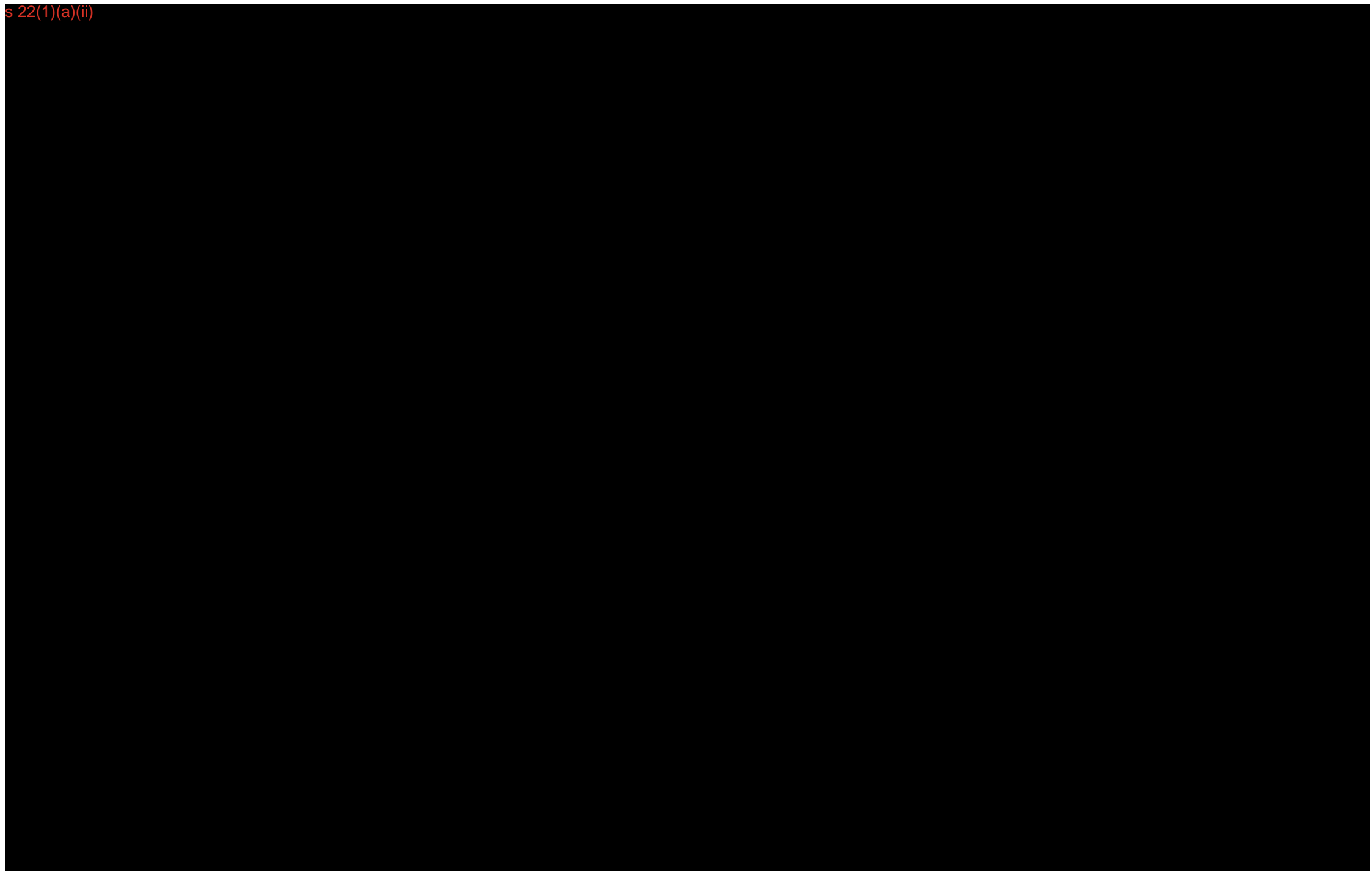
Amendments to the FOI Guidelines

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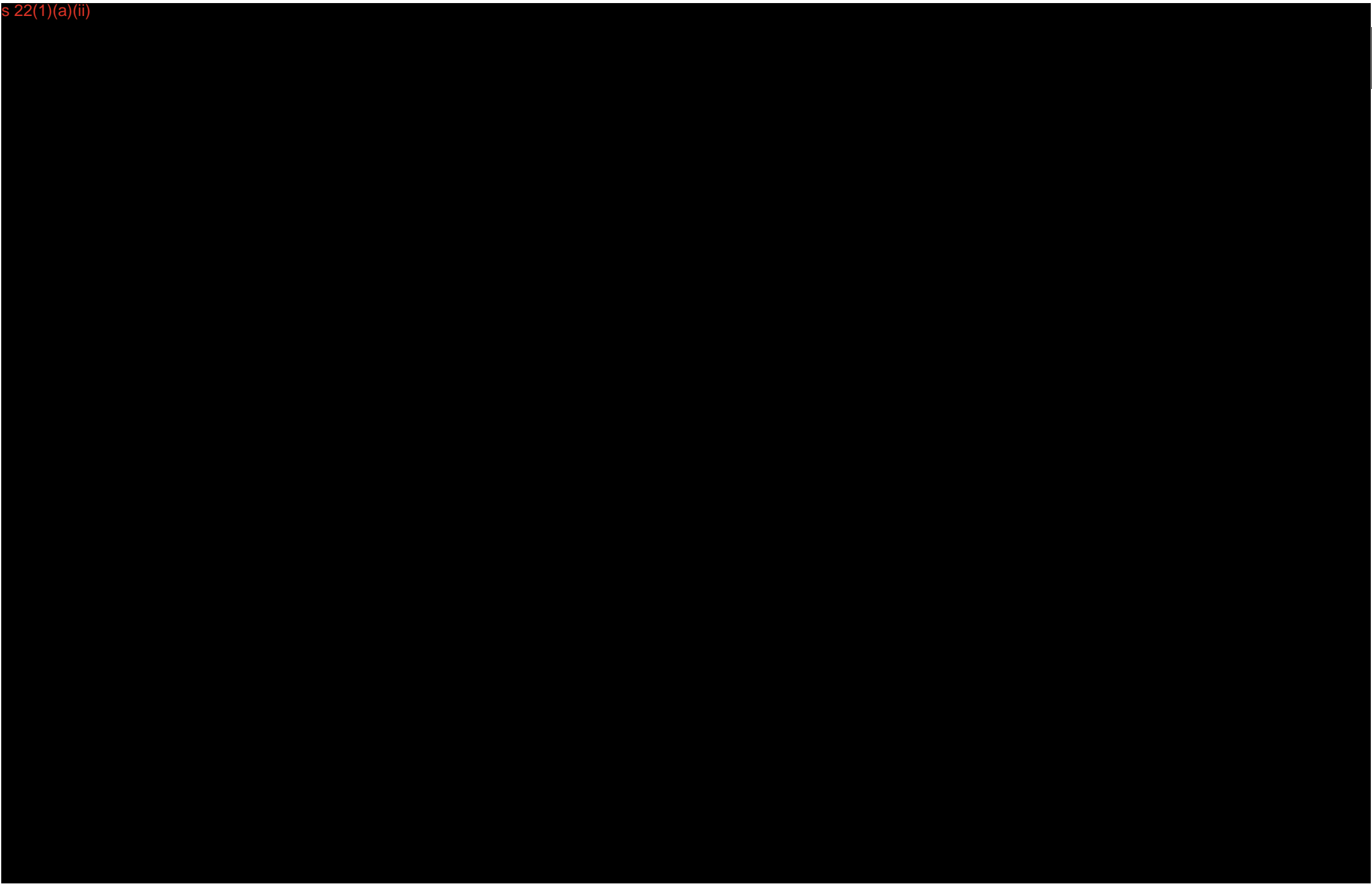
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



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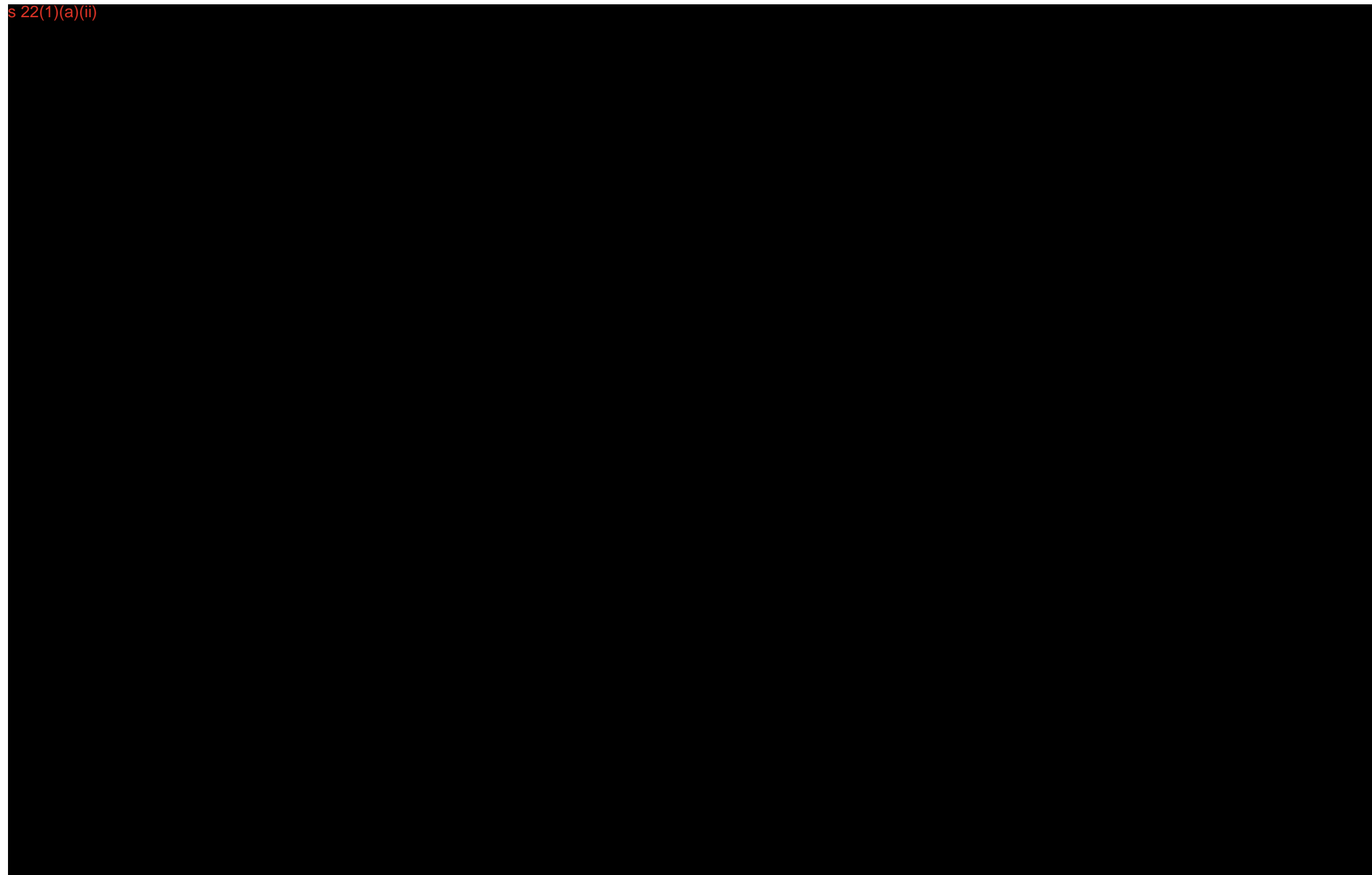
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



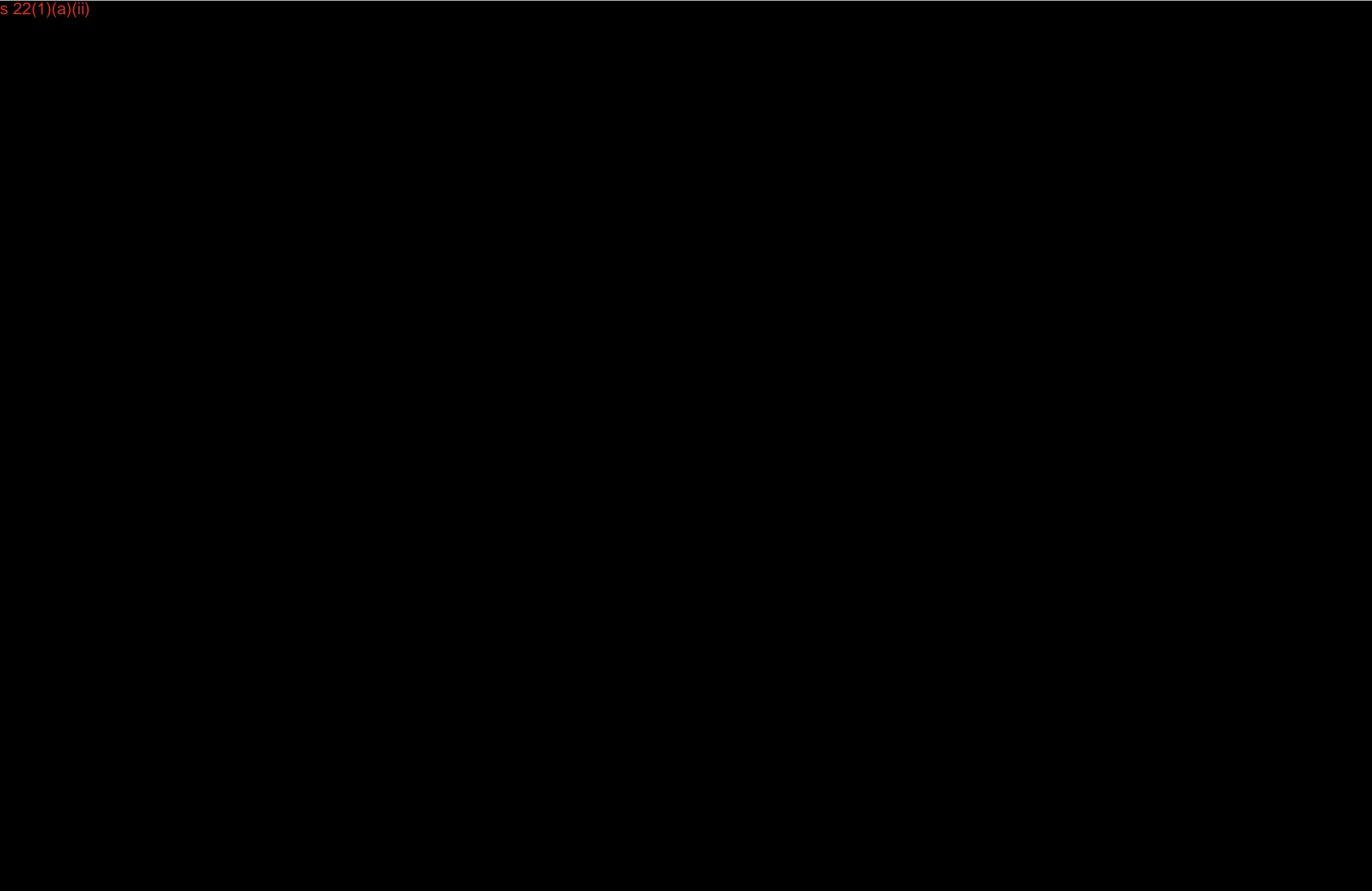
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



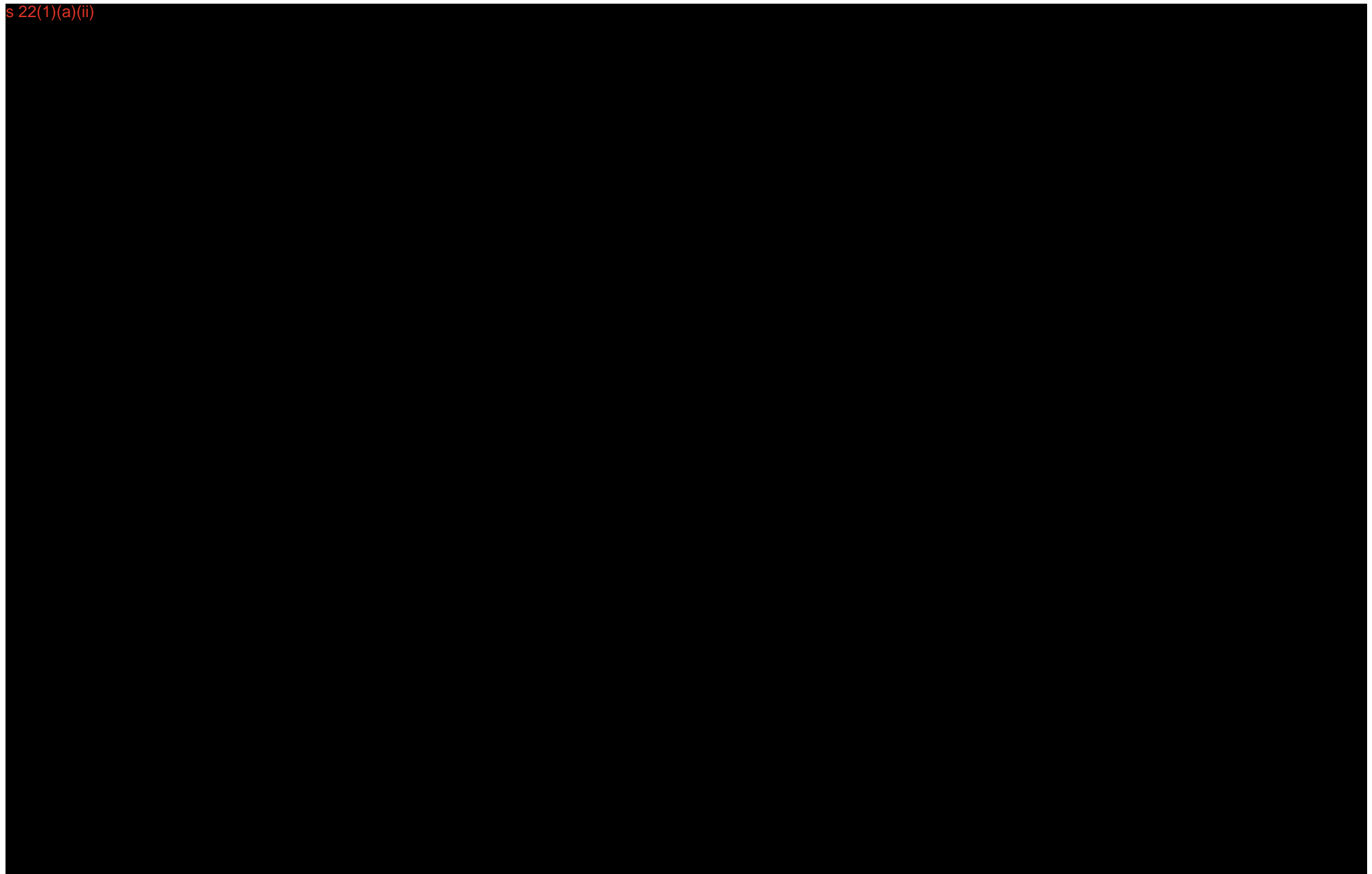
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



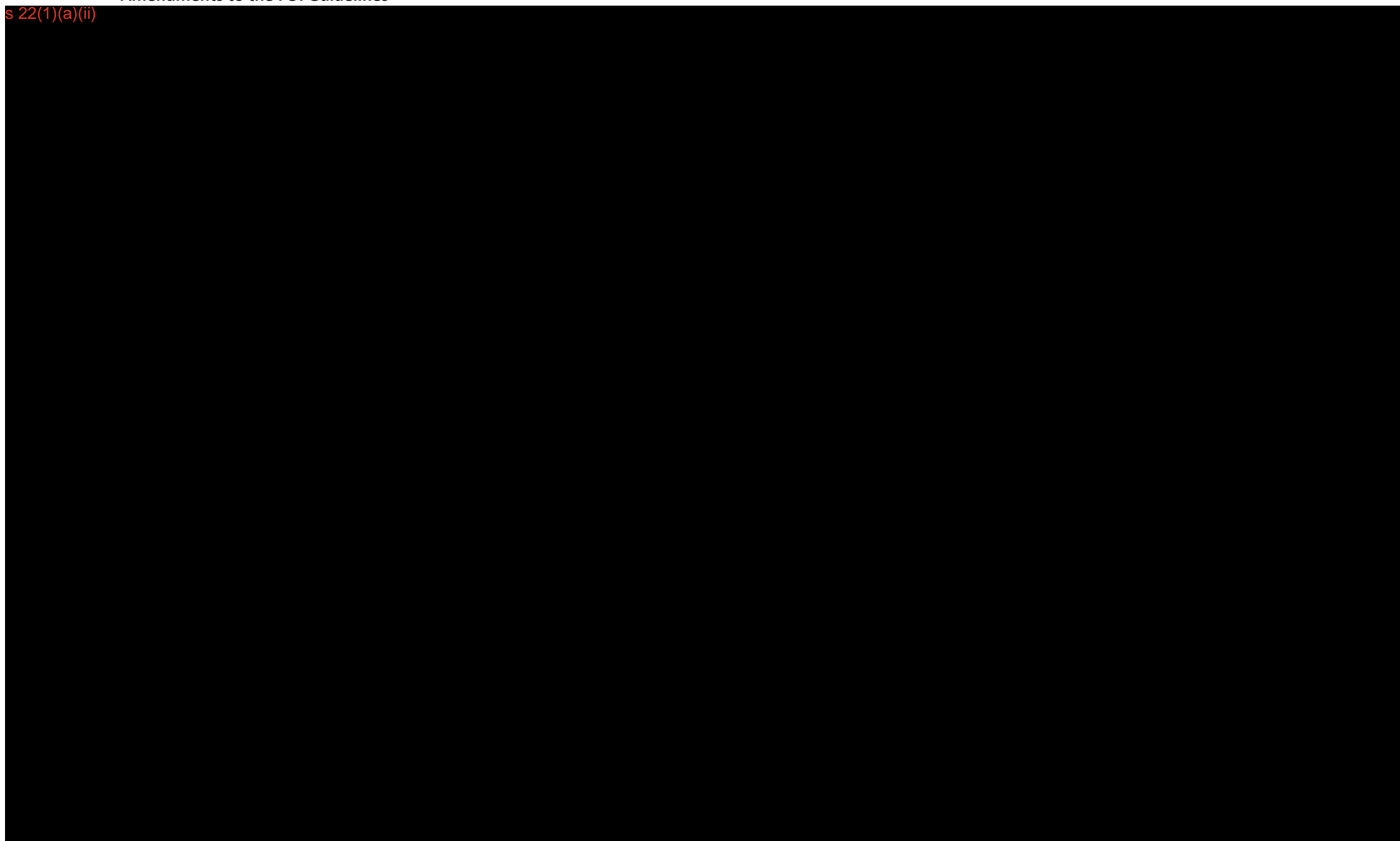
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



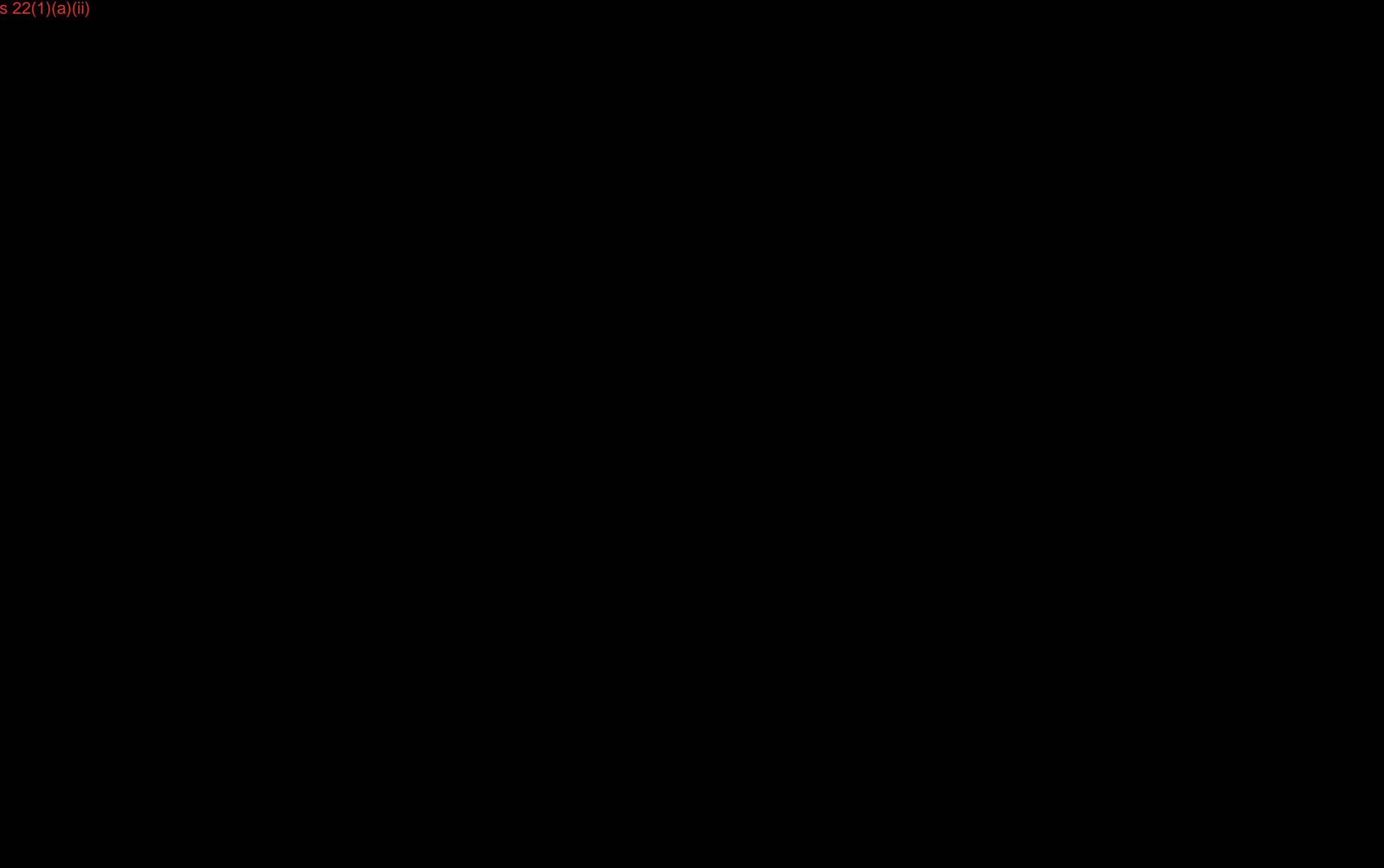
Amendments to the FOI Guidelines

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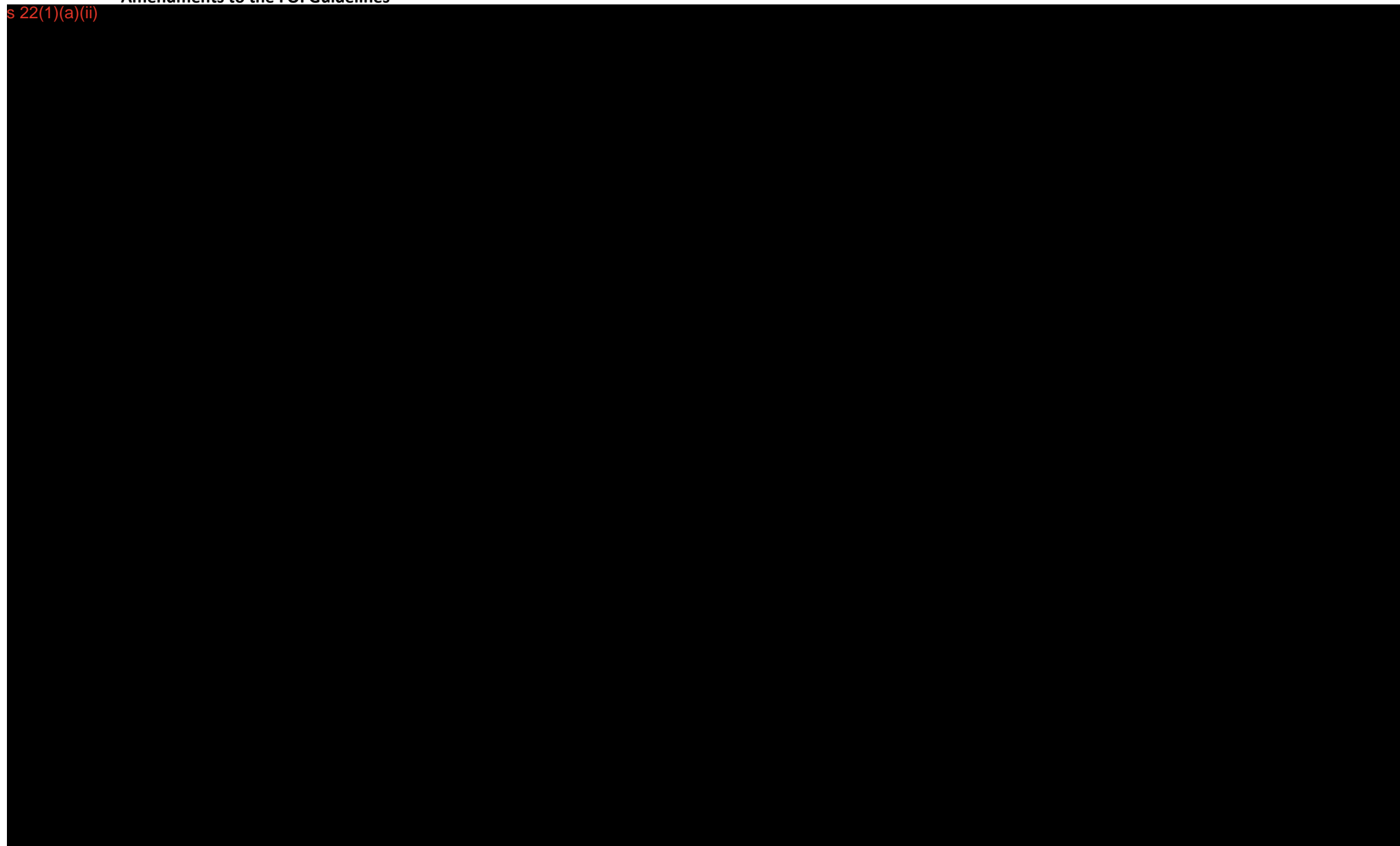
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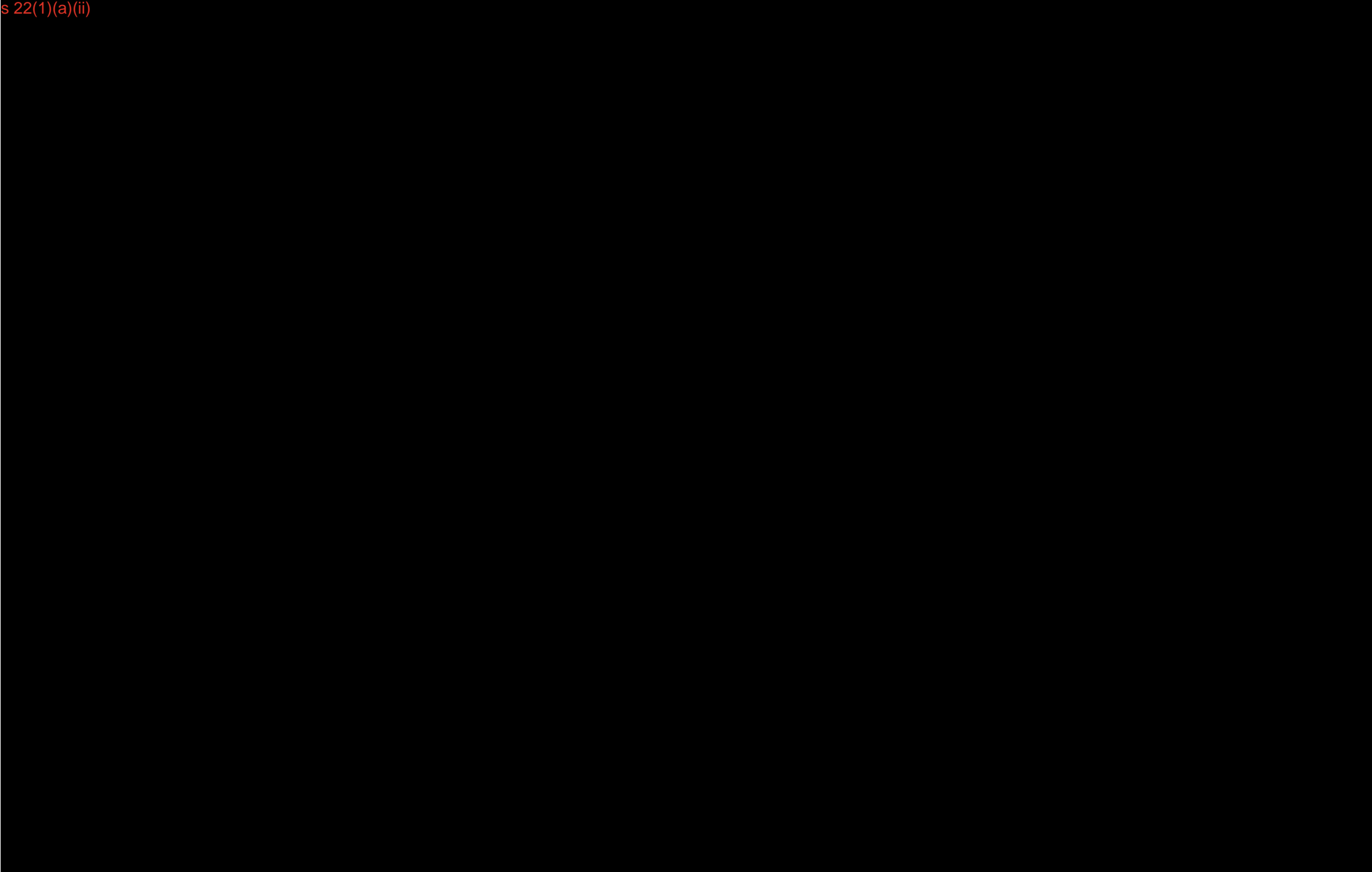
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



Amendments to the FOI Guidelines

s 22(1)(a)(ii)



Amendments to the FOI Guidelines

<i>Part</i>	<i>Para</i>	<i>Issue</i>	<i>Date identified & by whom</i>	<i>Amendment/Action</i>	<i>Approved by Assistant Commissioner</i>	<i>Amended by</i>	<i>Date amended</i>
s 22(1)(a)(ii)							
	3	3.95-3.100 in v 1.8	Section 22 see discussion in <i>Bachelard v Australian Federal Police</i> [2025] FCAFC 5 . [139]-[142] and [150]-[166] deal with the AAT's decision to exempt in full a document under s 37(1)(b) and includes some principles about not assuming applicants would refuse access to a heavily redacted document.	Decision handed down 3.2.2025	Added as footnote 86 to 3.148.		

s 22(1)(a)(ii)

Amendments to the FOI Guidelines

<i>Part</i>	<i>Para</i>	<i>Issue</i>	<i>Date identified & by whom</i>	<i>Amendment/Action</i>	<i>Approved by Assistant Commissioner</i>	<i>Amended by</i>	<i>Date amended</i>
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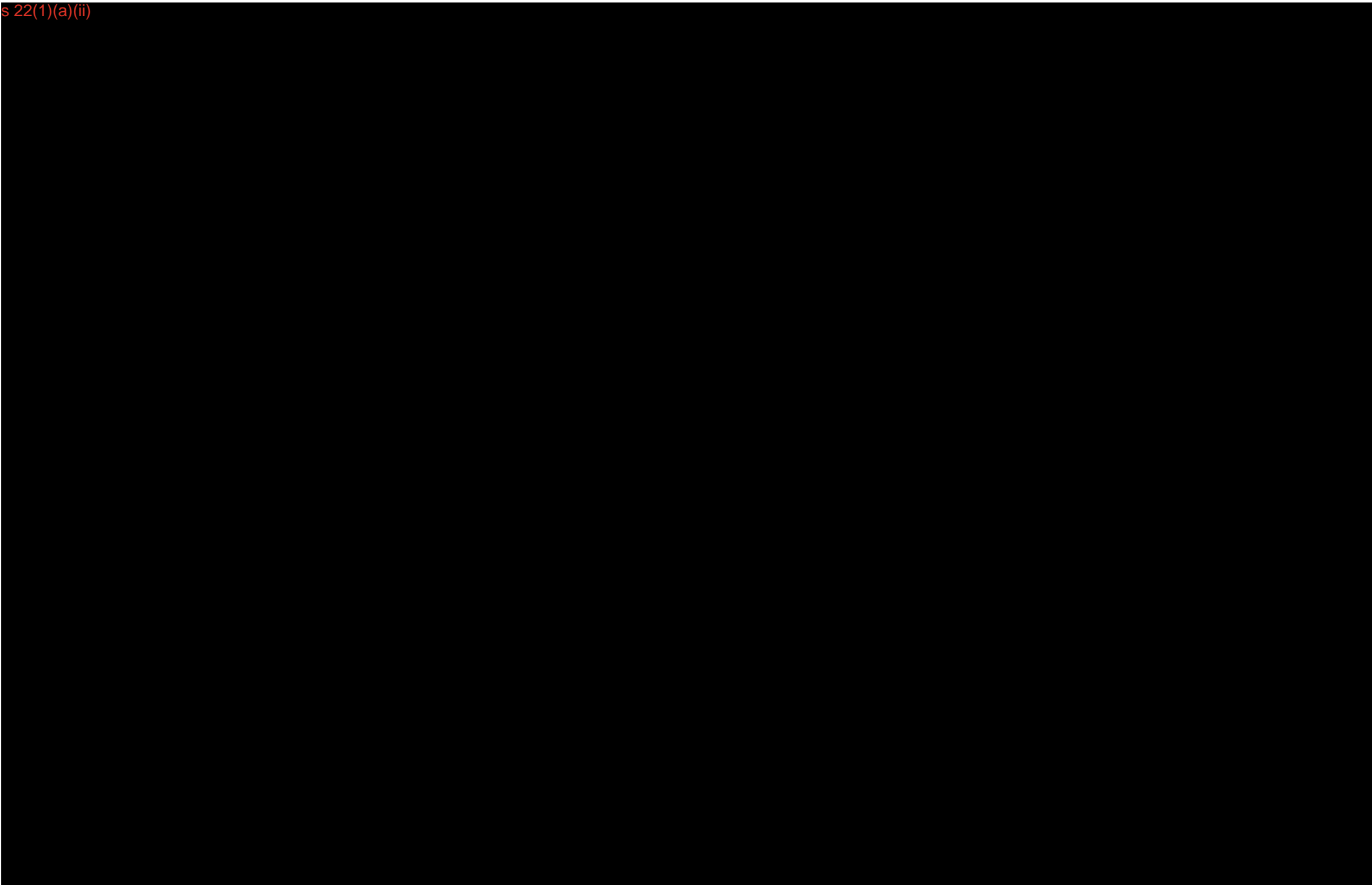
s 22(1)(a)(ii)



5	5.107- 5.116	Disclose confidential information. See discussion in <i>Bachelard v Australian Federal Police</i> [2025] FCAFC 5.	Decision handed down 3.2.2025				
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Amendments to the FOI Guidelines

s 22(1)(a)(ii)



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s 22(1)(a)(ii)



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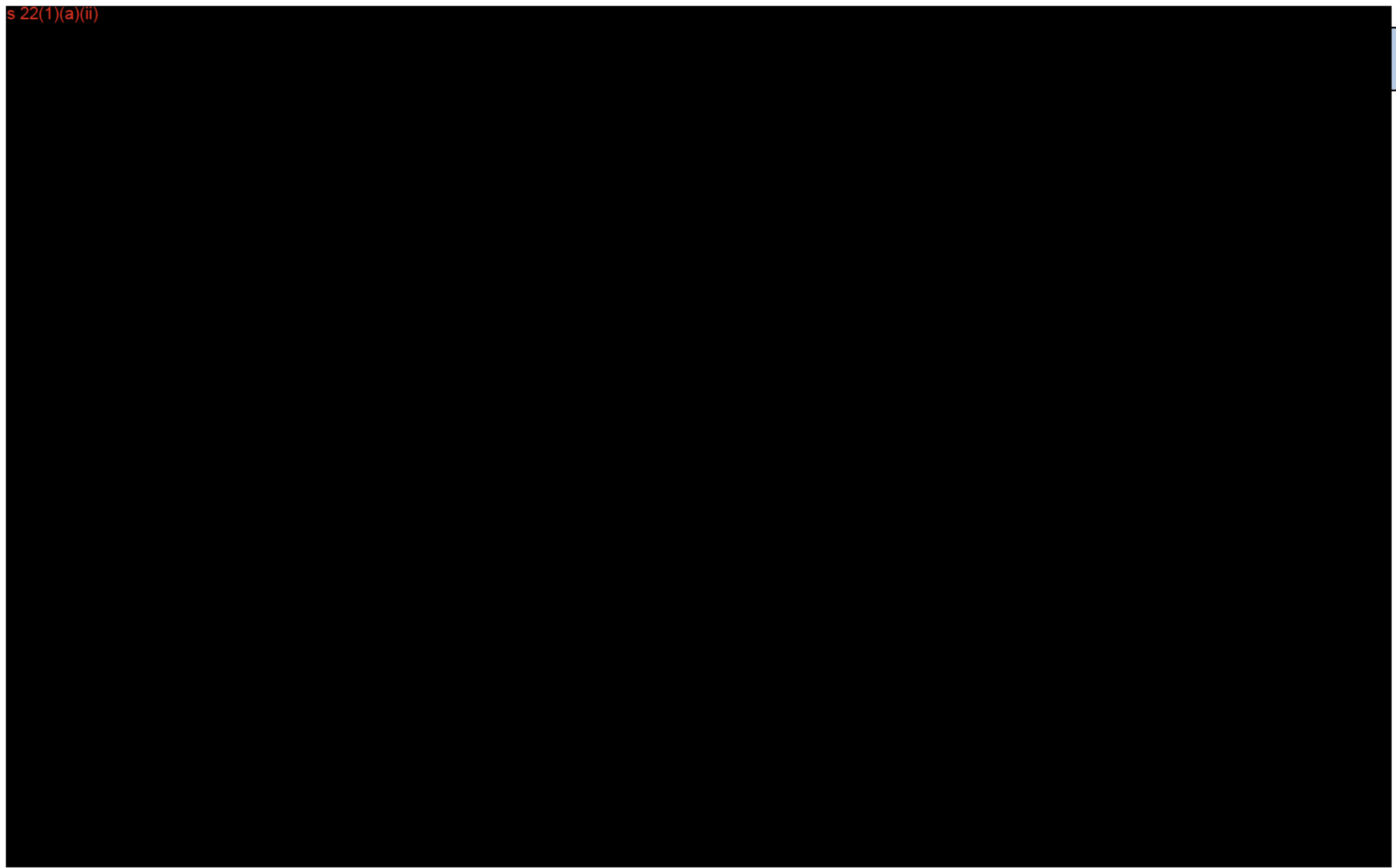
Amendments to the FOI Guidelines

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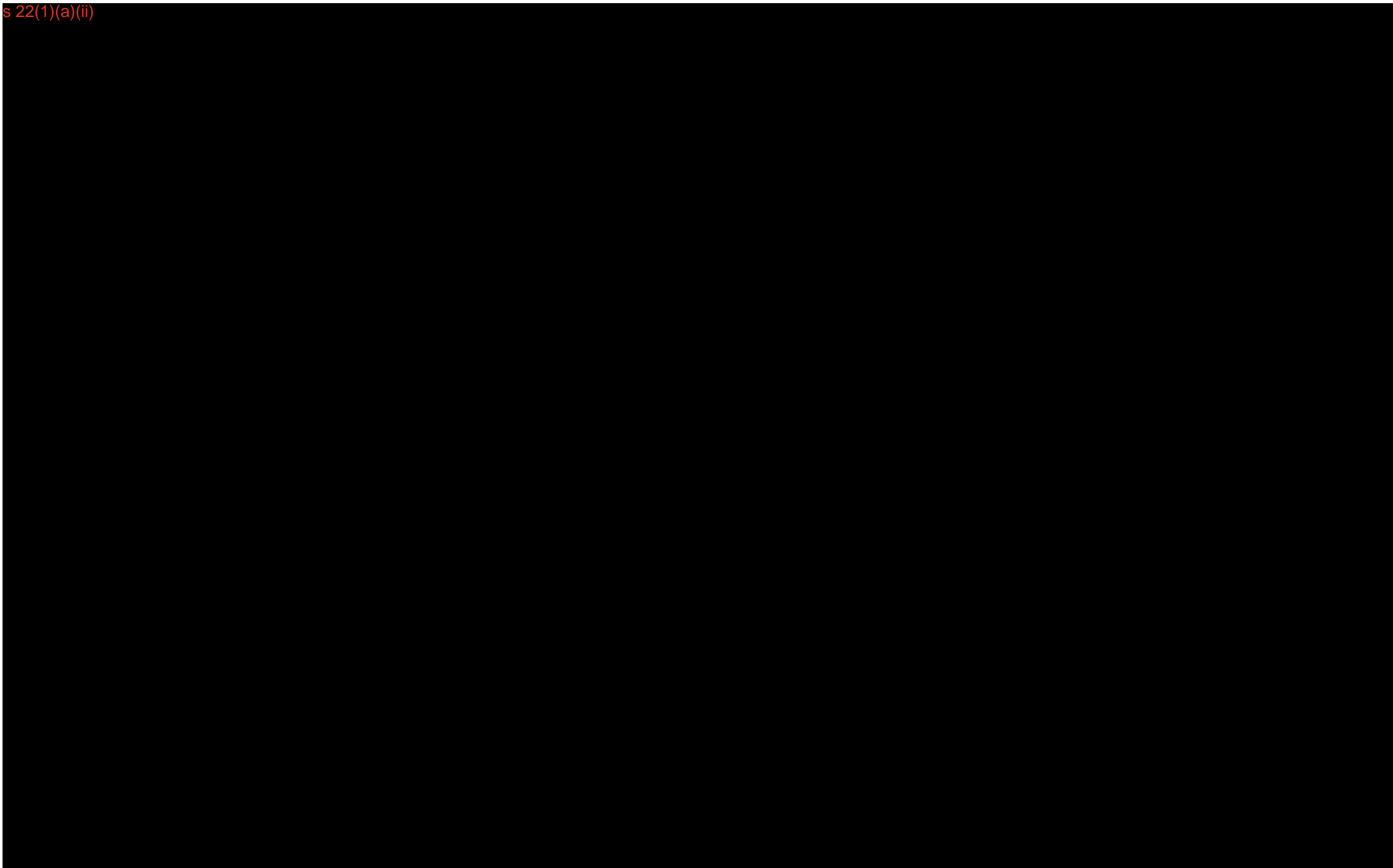
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



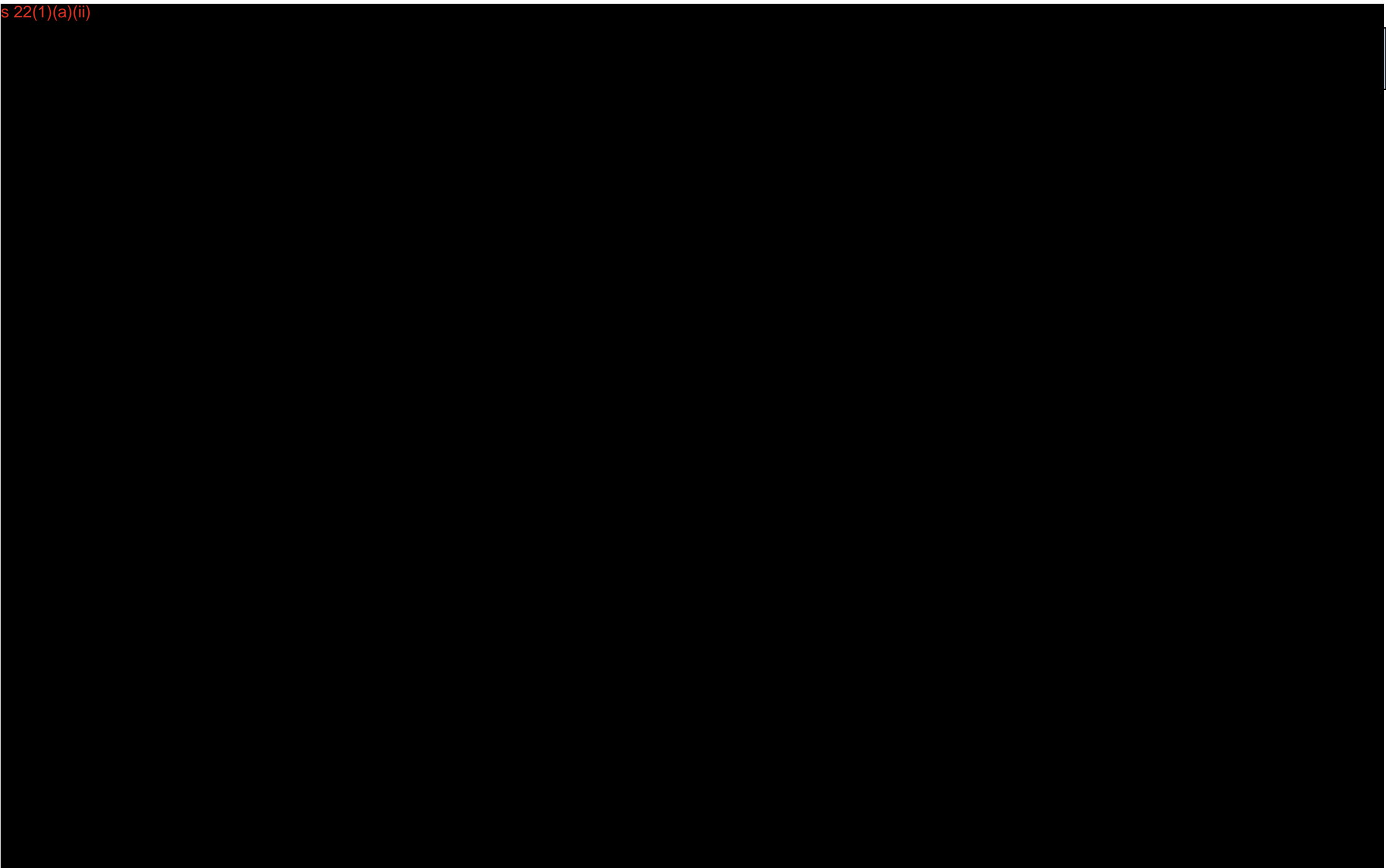
Amendments to the FOI Guidelines

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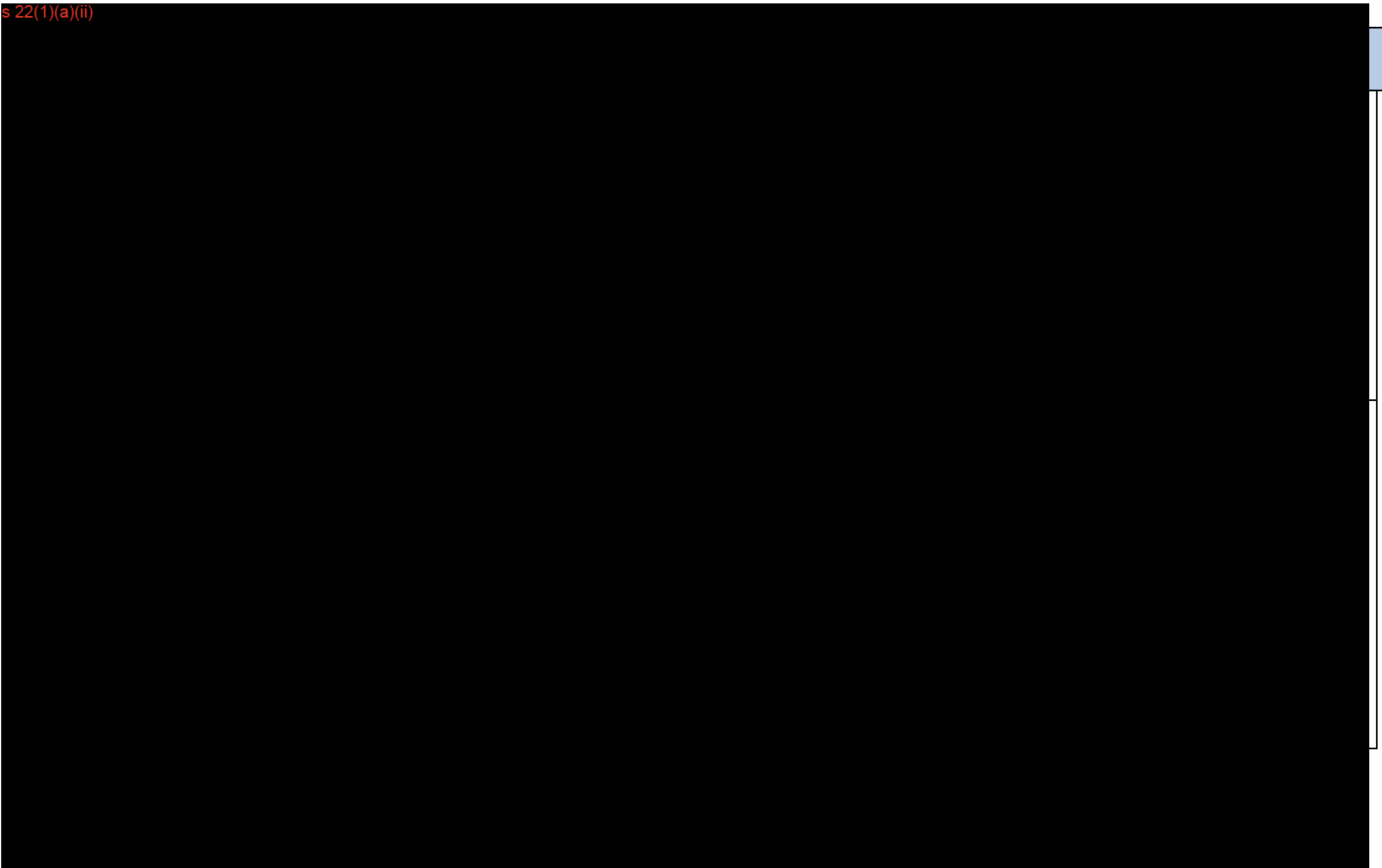
Amendments to the FOI Guidelines

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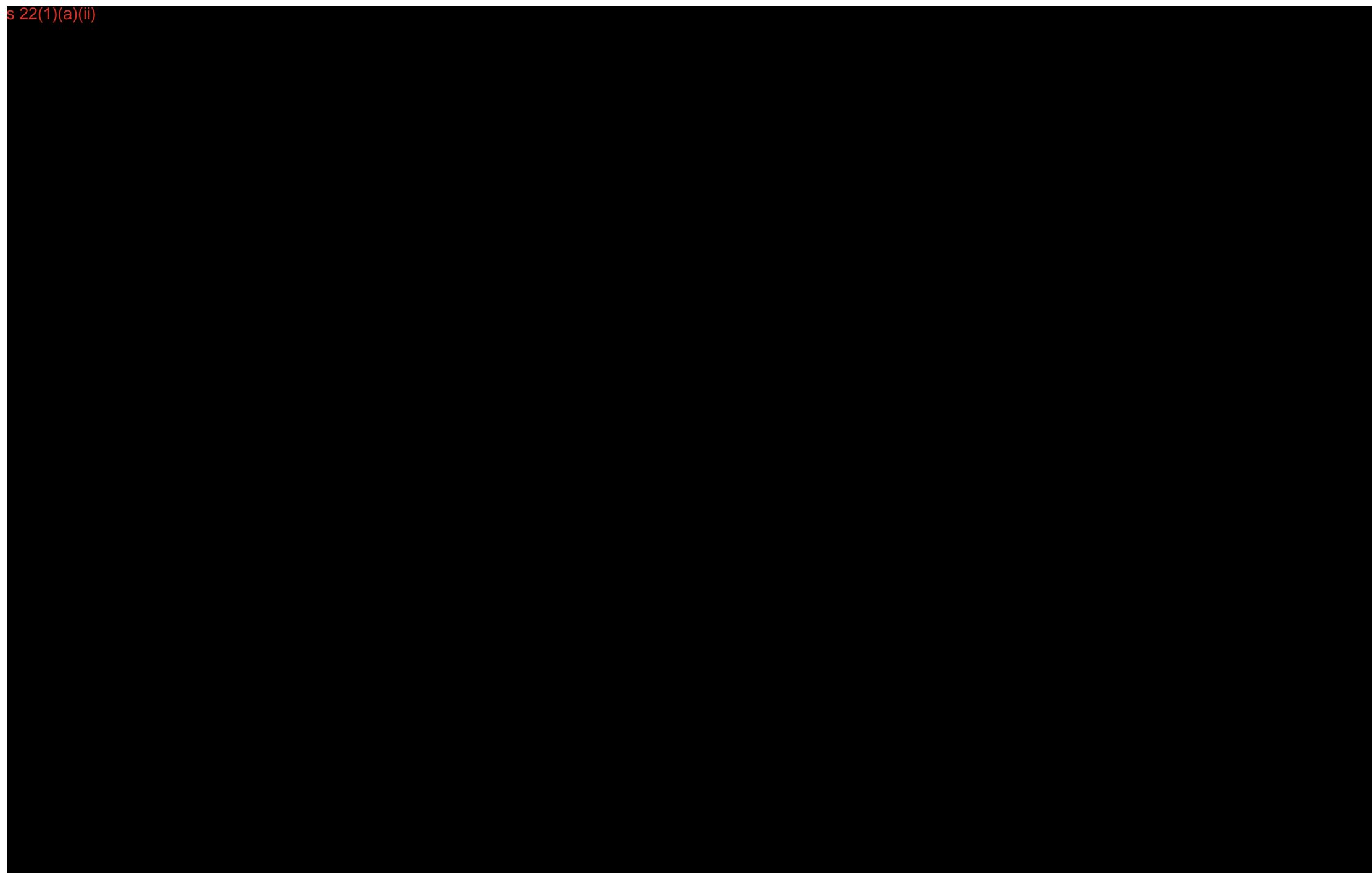


Amendments to the FOI Guidelines

s 22(1)(a)(ii)

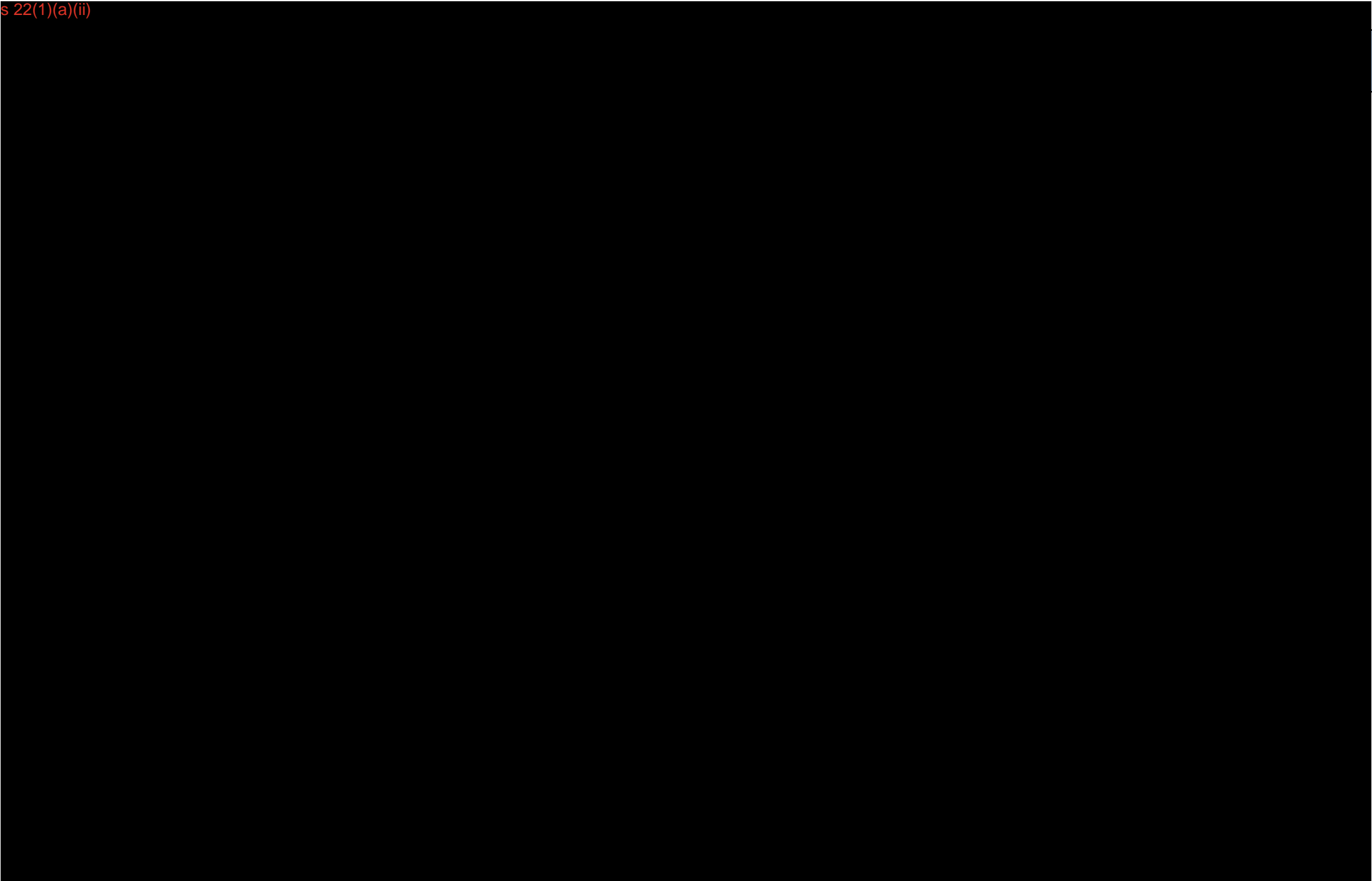


s 22(1)(a)(ii)




Amendments to the FOI Guidelines

s 22(1)(a)(ii)




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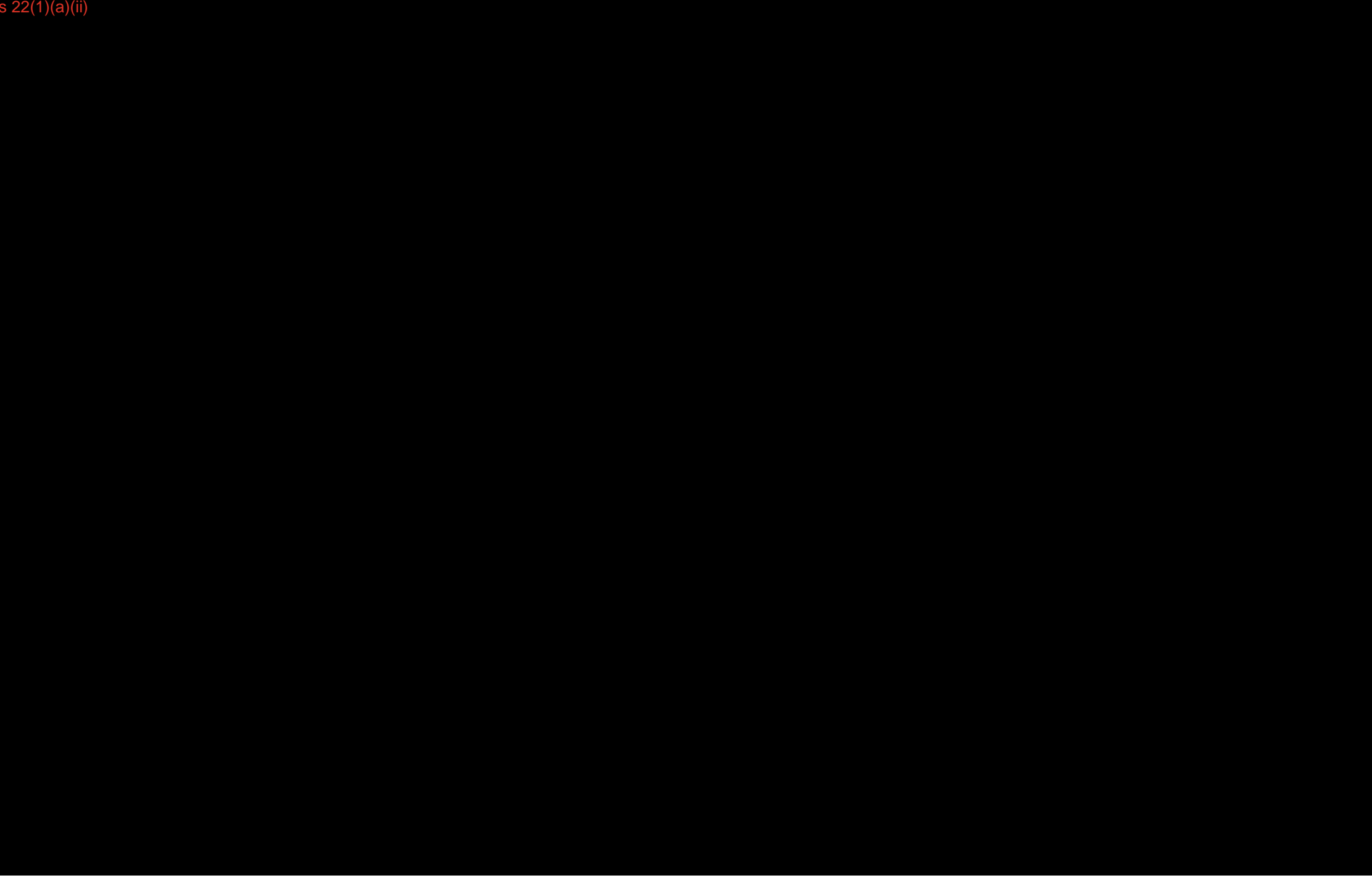
Amendments to the FOI Guidelines

s 22(1)(a)(ii)



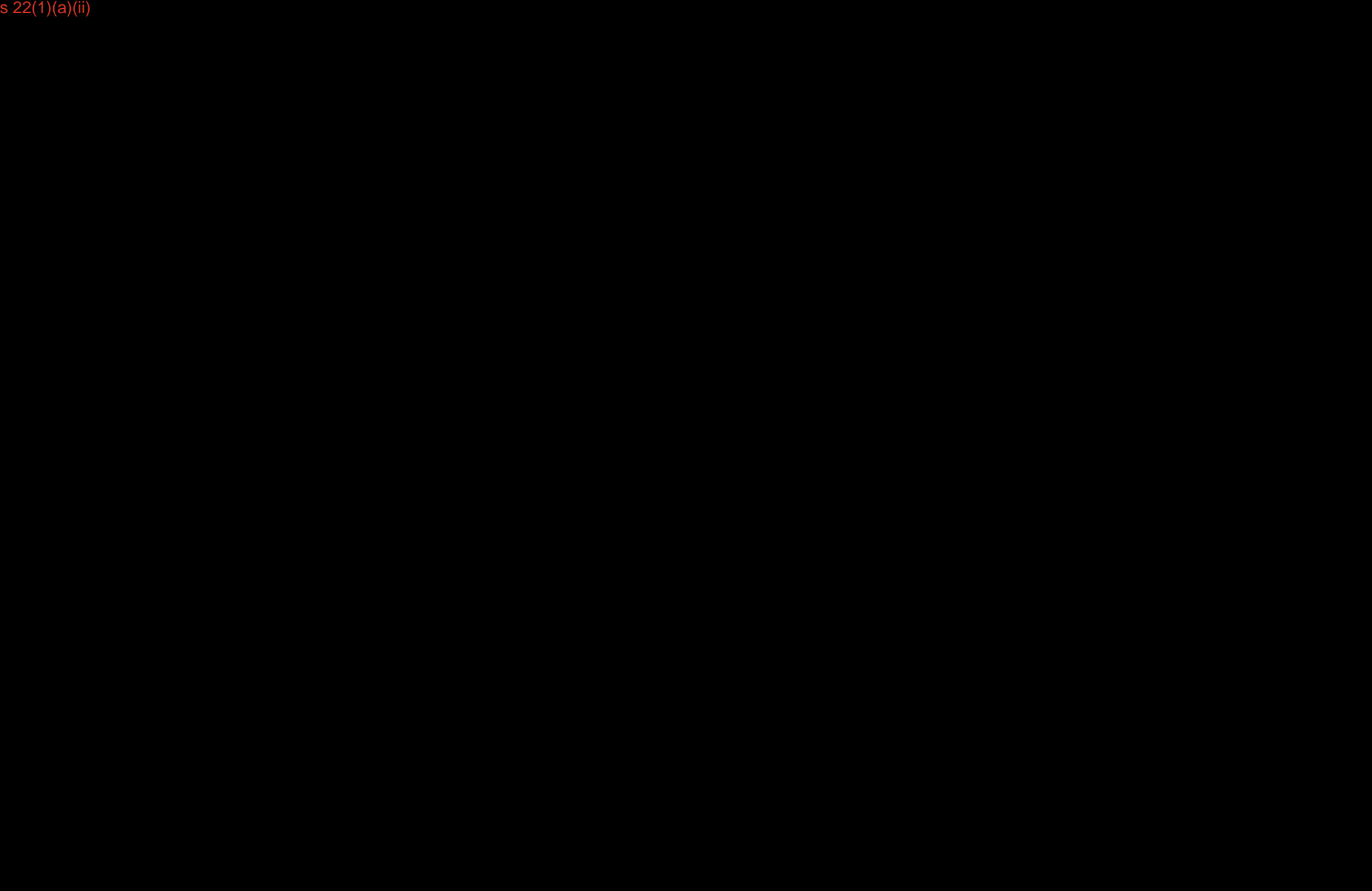
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