Order F25-10

MINISTRY OF ATTORNEY GENERAL

D. Hans Hwang
Adjudicator

February 6, 2025

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records regarding a complaint she made about a criminal matter. The Ministry of Attorney General (Ministry) withheld the records under ss. 15(1)(g) (exercise of prosecutorial discretion), 16(1)(b) (harm to intergovernmental relations) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner to review the Ministry's decision, and the matter was later forwarded to inquiry. The Ministry did not provide the records to the adjudicator in the inquiry. The adjudicator ordered the Ministry, under s. 44(1)(b), to produce the records for his review so he could decide if ss. 15(1)(g), 16(1)(b) and 22(1) apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 15(1)(g), 15(3), 15(4), 16(1)(b), 22(1), 44(1)(b) and Schedule 1 (Definition of "exercise of prosecutorial discretion").

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an individual (applicant) asked the Ministry of Attorney General (Ministry) for access to records regarding a complaint she made about a criminal matter.

[2] The Ministry withheld information in the responsive records under ss. 15(1)(g) (exercise of prosecutorial discretion), 16(1)(b) (harm to intergovernmental relations) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.[1]

[1] From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA unless otherwise specified.

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The OIPC's review and mediation process did not resolve the matter and it proceeded to inquiry. Both parties provided written submissions.

Preliminary Issue, s. 14

[4] The OIPC investigator's fact report and the notice of inquiry identify s. 14 (solicitor-client privilege) as an issue in the inquiry. Section 14 says the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. The Ministry did not initially cite s. 14 in response to the applicant's access request, but it later added s. 14 during the OIPC's review and mediation process.

[5] In its inquiry submission, the Ministry says it has decided to withdraw its reliance on s. 14 for the purpose of this inquiry. However, in other parts of its inquiry submission, the Ministry continues to assert solicitor-client privilege over the information at issue in the responsive records.[2]

[6] I found the Ministry's submissions contradictory, and it was unclear whether and how the Ministry can continue to assert solicitor-client privilege without claiming s. 14 applies to the disputed information. A public body must cite s. 14 where it is asserting solicitor-client privilege applies to the information at issue.

[7] Therefore, I requested the Ministry clarify its position on s. 14 and solicitor-client privilege.[3] The Ministry responded as follows:

> The Ministry has stated at paragraph 54(b) of its Initial Submissions that it is withdrawing its reliance on s. 14 for the purposes of this inquiry. The Ministry has removed s. 14 from the records package at issue in this inquiry and will not be making any submissions regarding s. 14. As a consequence, s. 14 is not at issue in this inquiry.[4]

[8] Given this response, I conclude the Ministry is not refusing the applicant access to the records because solicitor-client privilege applies, so s. 14 is no longer at issue in the inquiry. Therefore, I will not consider or make any decision about whether the Ministry is authorized to refuse access to the applicant under s. 14 and solicitor-client privilege.

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[2] Ministry's initial submission at para 54(b).
[3] OIPC's November 27, 2024 letter.
[4] Ministry's December 2, 2024 letter.

ISSUES AND BURDEN OF PROOF

[9] The issues I must decide in this inquiry are the following:

1. Is the Ministry authorized to refuse to disclose the information at issue under ss. 15(1)(g) and 16(1)(b)?

2. Is the Ministry required to refuse to disclose the information at issue under s. 22(1)?

[10] Under s. 57(1), the Ministry, which is the public body in this case,[5] has the burden of proving the applicant does not have the right to access the information withheld under ss. 15(1)(g) and 16(1)(b).

[11] Section 57(2) places the burden on the applicant to establish that disclosure of the information at issue under s. 22(1) would not unreasonably invade a third-party's personal privacy. However, the Ministry has the initial burden of proving the information at issue qualifies as personal information.

BACKGROUND

[12] The British Columbia Prosecution Service (Prosecution Service) of the Ministry conducts prosecutions of offences pursuant to the *Crown Counsel Act*.[6]

[13] Crown Counsel are lawyers with the Prosecution Service who are authorized under s. 4(3) of the *Crown Counsel Act* to decide whether to prosecute offences and to also conduct the prosecutions.

[14] Police agencies investigate alleged crimes and submit a report to Crown Counsel if they believe an allegation merits a charge. The report provides a description of evidence in support of the recommended charges. Crown Counsel review the report and decide whether to approve the charges and procced with a prosecution based on the Prosecution Service's Charge Assessment Guidelines.[7]

[15] The applicant and her children made a complaint (Complaint) to the Royal Canadian Mounted Police in Surrey (Surrey RCMP) about a criminal matter. After investigating the Complaint, Surrey RCMP submitted a report to the Prosecution Service recommending charges. Crown Counsel who reviewed the report declined to approve the recommended charges.

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[5] Schedule 1 "Definition".
[6] R.S.B.C. 1996, c. 87.
[7] Available online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1.pdf

RECORDS AND INFORMATION AT ISSUE

[16] The Ministry describes the records at issue as: (1) a one-page communication between Crown Counsel and the Surrey RCMP (RCMP Communication) and (2) a one-page communication Crown Counsel prepared to advise an administrative crown counsel[8] and the Surrey RCMP, which attaches a duplicate of the RCMP Communication. The disputed records total three pages and the Ministry withheld all the information on those pages.

EXERCISE OF PROSECUTORIAL DISCRETION, s. 15(1)(g)

[17] The Ministry is withholding the records at issue under s. 15(1)(g), which reads as follows:

> The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> …
>
> (g) reveal any information relating to or used in the exercise of prosecutorial discretion,
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> ...

[18] Schedule 1 of FIPPA defines the term "exercise of prosecutorial discretion" as follows:

> "exercise of prosecutorial discretion" means the exercise by
> (a) Crown counsel, or a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
> (i) to approve or not to approve a prosecution,
> (ii) to stay a proceeding,
> (iii) to prepare for a hearing or trial,
> (iv) to conduct a hearing or trial,
> (v) to take a position on sentence, and
> (vi) to initiate an appeal, or
> ...

[19] The courts have provided the following examples of the types of decisions that fall within the scope of prosecutorial discretion:

- whether to bring the prosecution of a charge laid by police;
- whether to enter a stay of proceedings in either a private or public prosecution;
- whether to accept a guilty plea to a lesser charge;

[8] Ministry' initial submission at para 23. An administrative crown counsel provides direction, advice, and assistance to Crown Counsel and their staff on matters of law and assigns Crown Counsel to files for charge assessment.

- whether to withdraw from criminal proceedings altogether; and
- whether to take control of a private prosecution.[9]

[20] The Supreme Court of Canada has said prosecutorial discretion is a necessary part of a properly functioning criminal justice system and it ensures the independence of Crown Counsel in conducting criminal prosecutions.[10] The Supreme Court of Canada has also said prosecutorial discretion is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it".[11]

[21] The Ministry says the records at issue directly relate to Crown Counsel's exercise of prosecutorial discretion in determining not to prosecute an individual named in the Surrey RCMP's report, which qualifies as an exercise of prosecutorial discretion within the meaning of Schedule 1.[12] The Ministry provided an affidavit from its Prosecution Service's Information and Privacy Crown Counsel (Information Counsel). The Information Counsel explains that Crown Counsel exercise their power to approve or not approve a prosecution and that the records at issue relate to Crown Counsel's charge assessment and decision to not prosecute the matter the applicant brought to the Surrey RCMP.[13]

Should I order the Ministry to produce the s. 15(1)(g) records for my review?

[22] The Ministry did not provide the records at issue in this inquiry for my review. The Ministry provides two reasons for declining to do so.[14] First, it says that protecting prosecutorial independence is constitutionally important, so the Ministry is not required to produce the records. Second, it says that although the Ministry has withdrawn its reliance on s. 14 for the purposes of this inquiry, it continues to assert solicitor-client privilege over the records.

[23] The Ministry says that prosecutorial discretion is like solicitor-client privilege in that it is also "a principle of fundamental justice" within the meaning of s. 7 of the *Canadian Charter of Rights and Freedoms* (Charter).[15] The Ministry submits the records at issue are not reviewable by the OIPC because they are so closely and directly related to the exercise of prosecutorial discretion that they

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[9] *R v. Anderson* 2014 SCC 41 at paras 40 and 44 citing *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 and *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566.
[10] *R v. Anderson*, 2014 SCC 41 at paras 37 and 44.
[11] *Krieger v. Law Society of Alberta*, 2002 SCC 65 at para 47.
[12] Ministry's initial submission at para 54.
[13] Affidavit#1 of Information Counsel at paras 40-43.
[14] Ministry's initial submission at para 54.
[15] *The Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. Section 7 of the Charter says, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

are protected by what the Ministry calls "prosecutorial discretion privilege"[16]. The Ministry submits that prosecutorial discretion privilege and solicitor-client privilege belong in the same category and should be treated similarly under FIPPA, and public bodies are not required to infringe their own privilege by disclosing records to an administrative decision-maker.[17] For that reason, the Ministry says it "respectfully declines to infringe the privilege by voluntarily providing the Records to the OIPC for review".[18]

[24] Further, the Ministry submits that it is not "absolutely necessary" in this case for the OIPC to review the records because the Ministry's submissions and affidavit evidence are sufficient to decide that s. 15(1)(g) applies to the information in the records.

[25] The applicant's submission does not address the Ministry's arguments that it is not required to provide the records for my review.

Analysis

[26] Section 44(1)(b) gives me, as the Commissioner's delegate, the power to order production of records to review them during an inquiry. Given that the Ministry is unwilling to provide the records for my review, I must decide whether to exercise my authority under s. 44(1)(b) and order their production.

[27] First, I will address the Ministry's argument that it will not produce the records for my review because they are protected by solicitor-client privilege. The Ministry did not provide any affidavit evidence to establish its claim that the records are protected by solicitor-client privilege.[19] For that reason, I am not persuaded that it is inappropriate to order the Ministry to produce the records for my review because they are protected by solicitor-client privilege.

[28] I will now turn to the Ministry's argument that the OIPC should treat records that relate to the exercise of prosecutorial discretion in the same way it treats records subject to solicitor-client privilege. For the reasons that follow, what the Ministry says does not persuade me that the principles and concerns the courts have expressed about solicitor-client privilege apply equally to the exercise of prosecutorial discretion.

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[16] Ministry's initial submission at paras 56-57. "Prosecutorial discretion" is a term sometimes used for "Crown immunity": *R v Cluett* 2021 BCSC 885 at para 4.
[17] In support, the Ministry cites *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para 35 where the Court said that disclosing records to the Commissioner for the purpose of verifying solicitor-client is an infringement of solicitor-client privilege.
[18] Ministry's initial submission at para 57.
[19] That may be because the Ministry is not relying on s. 14 to refuse the applicant access to the records, as noted in the preliminary issues section above.

[29] Solicitor-client privilege and the exercise of prosecutorial discretion have different purposes and protect different values.

[30] The exercise of prosecutorial discretion protects the independence of Crown Counsel in conducting criminal prosecutions. The Courts have said that prosecutorial discretion is a necessary part of a properly functioning criminal justice system and it advances the public interest by allowing prosecutors to fulfil their professional obligations without fear of judicial or political interference.[20] Prosecutorial discretion privilege, also known as Crown immunity, is a means by which two constitutional principles are protected: (1) the separation between the judicial and executive branches and (2) prosecutorial independence. Crown immunity is not absolute and extends only so far as necessary to protect these values.[21] Also, prosecutorial discretion privilege is not in and of itself a constitutional principle.[22]

[31] On the other hand, solicitor-client privilege protects a broad range of communications between a lawyer and their client, and the Courts have said that the concept at the heart of solicitor-client privilege is that people must be able to speak candidly with their lawyers to enable their interests to be fully represented; therefore, clients have a right to keep these communications confidential.[23]

[32] Because solicitor-client privilege is protected as an important right and a principle of fundamental justice, the courts have repeatedly explained that this privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary including by a privacy commissioner. Therefore, unlike prosecutorial discretion privilege, the protection of solicitor-client privilege has a constitutional dimension.[24] The courts have said the following about the disclosure of information protected under solicitor-client privilege:

- compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege;[25]

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[20] *Krieger v. Law Society of Alberta*, 2002 SCC 65; *R v. Anderson* 2014 SCC 41.
[21] *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337 [*Davies*] at paras 34 and 55. leave to appeal ref'd [2009] S.C.C.A. No. 421. In addition, the courts protect prosecutorial discretion by providing prosecutors with immunity from civil suit in respect of charging decisions unless prosecutorial discretion has been exercised maliciously (*Davies* at para 33 citing *Nelles v. Ontario*, 1989 CanLII 77 (SCC)). The courts will only review the exercise of prosecutorial discretion for an abuse of process (*R. v. Anderson*, 2014 SCC 41 at para 51).
[22] *Davies* at para 34.
[23] *R. v. McClure*, 2001 SCC 14 (CanLII) at para 2.
[24] *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 at para 85.
[25] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 at para 35.

- solicitor-client privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction;[26] and
- solicitor-client privilege will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis.[27]

[33] Given what the courts said above, when records are claimed to be protected by solicitor-client privilege, the OIPC uses its s. 44(1) production power only when absolutely necessary to decide the issues. This approach is warranted by the importance of solicitor-client privilege to the proper functioning of the legal system.[28]

[34] The Ministry cited no case law where the courts have said the same about information that relates to the exercise of prosecutorial discretion and a privacy commissioner's ability to review such information. I was also unable to find any past OIPC order where an adjudicator decided that it is appropriate to decide whether s. 15(1)(g) applies in the absence of the records.[29]

[35] Having considered these circumstances, it is clear that prosecutorial discretion and solicitor-client privilege have different purposes and protect different values, and they have not been treated the same by the courts. Given this, I am not persuaded that information withheld under prosecutorial discretion warrants the same treatment in this inquiry as information withheld under solicitor-client privilege.

[36] FIPPA does not treat prosecutorial discretion or Crown immunity as absolute. Sections 15(3) and (4) set out certain types of information and records that a public body cannot withhold under s. 15(1), even if that information could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion. Those sections read:

> 15(3) The head of a public body must not refuse to disclose under this section
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> > (a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act,

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[26] *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 SCR 809, at para 17.
[27] *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 SCR 445 at para 35.
[28] Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para 17.
[29] I note that the Ministry took a different approach in the past. It provided the OIPC with the records withheld under s. 15(1)(g) in the inquiry that resulted in Order F19-15, 2019 BCIPC 17 (CanLII).

> (b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program or activity unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (2), or
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> (c) statistical information on decisions under the *Crown Counsel Act* to approve or not to approve prosecutions.
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> (4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute
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> (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
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> (b) to any other member of the public, if the fact of the investigation was made public.

[37] Therefore, deciding if a public body can withhold information under s. 15(1)(g) requires the OIPC to review the records at issue to determine whether they are the type of record or contain the type of the information that falls under ss. 15(3) and (4). This determination requires a detailed line-by-line review of the information and records at issue. This kind of analysis is not required in s. 14 because it treats information that is protected by solicitor-client privilege as absolute and does not contain provisions similar to ss. 15(3) and (4).

[38] It is unclear, and the Ministry does not sufficiently explain, how the OIPC's review of the records in dispute, in order to carry out the analysis under s. 15(1)(g), would interfere with Crown Counsel's prosecutorial discretion and independence. I am not persuaded that it would.

[39] It is only if the records become public that there would be any risk of undue pressure on the Crown. The sole reason the OIPC wants the records is to determine if s. 15(1)(g) or exceptions apply, so it is hard to see how the disclosure of the records to the OIPC and the OIPC alone for the limited purpose of deciding the inquiry would have any impact on prosecutorial discretion. Even if the records are provided by the Ministry pursuant to s. 44(1)(b), s. 47 says the commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties or exercising their powers and functions under FIPPA, except in limited circumstances. This means the information will only become public if I determine, after considering all the evidence and reviewing the records, that the disclosure exceptions claimed do not apply and order disclosure pursuant to s. 58. If the Ministry disagrees with my decision, it can seek judicial review. In that case there would be an automatic stay of the challenged parts of the order pursuant to s. 59 pending the outcome of the judicial review.

[40] To be clear, the OIPC's review of the records and evidence about the exercise of prosecutorial discretion is only incidental to its duty to decide this inquiry under FIPPA. The OIPC does not have any interest in second-guessing the merits of Crown Counsel's decisions, nor does it have the authority under FIPPA to do so. Nothing in the OIPC's statutory task requires me to question or provide an opinion about Crown Counsel's decisions to prosecute offences and conduct prosecutions. Instead, my duty in this inquiry is to determine whether the disputed information could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion and whether any of that information falls under ss. 15(3) and 15(4).

[41] Moreover, my authority to review the Ministry's decision to refuse access under s. 15(1)(g) clearly falls under the OIPC's statutory jurisdiction. As noted, ss. 15(3) and 15(4) sets out certain types of information and records that a public body cannot withhold under s. 15(1). The Legislature created those exceptions to s. 15(1) and gave the OIPC the authority to review a public body's decision to withhold information under s. 15(1) and to determine whether a public body properly considered ss. 15(3) and 15(4). The BC Court of Appeal has found that so long as an administrative tribunal's inquiries are strictly within its statutory jurisdiction, and do not interfere with constitutionally protected prosecutorial independence, administrative tribunals may make inquiries that touch even on the core of prosecutorial discretion.[30]

Conclusion on whether to order the Ministry to produce the records

[42] Considering all the above, I am not persuaded by the Ministry's arguments that prosecutorial discretion privilege and solicitor-client privilege belong in the same category and should be treated similarly under FIPPA and in this inquiry.

[43] Contrary to the Ministry's submissions, prosecutorial discretion privilege does not enjoy the same status as solicitor-client privilege. I also do not think it would be appropriate to decide s. 15(1)(g) without reviewing the records at issue. Deciding whether s. 15(1)(g) applies requires me to conduct an independent, line-by-line review of the disputed information and consider ss. 15(3) and (4). Moreover, reviewing the records to decide whether a public body may withhold information under s. 15(1)(g) is within the OIPC's statutory jurisdiction and does not interfere with Crown Counsel's prosecutorial discretion. As a result, I consider it necessary and appropriate to order the Ministry to produce to me the records containing the information it asserts is excepted from disclosure under s. 15(1)(g).

[30] *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337 at para 59.

[44] Besides that, for the sake of completeness, I also considered whether the Ministry's affidavit evidence was sufficient for me to decide the various provisions outlined above (i.e., ss. 15(1)(g), 15(3) and 15(4)), and I find it does not. The affidavit provides the affiant's opinion that s. 15(1)(g) applies and describes what the records relate to and who prepared them. It also explains the factors the Ministry considered in exercising its discretion to apply s. 15(1)(g) to the records, including the meaning of prosecutorial discretion as well as the significance of the exercise of prosecutorial discretion and independence to the criminal justice system.[31] However, this evidence does not help me to conduct a detailed line-by-line review of the information in dispute, which is necessary to decide whether s. 15(1)(g) applies to the information in dispute and if so, whether ss. 15(3) and 15(4) applies to nullify the protection of s. 15(1)(g).

SECTIONS 16(1)(b) AND 22(1)

[45] The Ministry has also applied ss. 16(1)(b) and 22(1) to some of the same information that it withheld under s. 15(1)(g). Since the Ministry did not provide these records for my review, I cannot decide whether ss. 16(1)(b) and 22(1) apply to this information. Deciding whether a FIPPA exception to disclosure applies requires me to conduct an independent, line-by-line review of the information in dispute. As mentioned above, the only time this does not occur is in the context of s. 14. Without being able to review the disputed information, I cannot conduct the necessary analysis under ss. 16(1)(b) and 22(1). Therefore, I conclude it is necessary and appropriate to also order the Ministry to produce the disputed information for my review so I can decide whether ss. 16(1)(b) and 22(1) apply to that information.

CONCLUSION

[46] For the reasons given above, under s. 44(1)(b), the Ministry is required to produce to the OIPC the records at issue so I can decide if ss. 15(1)(g), 16(1) and 22(1) apply. Under s. 44(3), the Ministry must produce these records by **March 21, 2025**.

February 6, 2025

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F22-91303

[31] Affidavit #1 of Information Counsel at para 40.