

GUIDE TO INVESTIGATIONS FOR CONSUMERS

Established in 1996, the Real Estate Council of Alberta (RECA) is an independent, non-government agency, responsible for regulating industry professionals in the real estate, mortgage broker and real estate appraisal industries under Alberta's *Real Estate Act*.

This guide provides consumers with information on RECA's investigation process. The process begins when RECA receives information or a complaint that meets certain criteria and it is determined that the matter should be further investigated.

For information on the complaint process, refer to the *Consumer Guide to Complaints* available on www.reca.ca.

PURPOSE OF AN INVESTIGATION

One of the basic responsibilities of a self-regulatory body is to carry out investigations into the conduct of industry members and take disciplinary action when necessary. RECA's industry members are licenced real estate brokers, associate brokers and associates, mortgage brokers, associate brokers and associates, and real estate appraisers and candidates.

RECA's investigation process has three main objectives:

1. to gather all relevant information to enable the executive director and hearing panels (if applicable) to make an informed decision on the facts of the matter being investigated
2. to treat all parties courteously, fairly, impartially and according to the rules of administrative law
3. to gather the information efficiently

WHAT RECA INVESTIGATES

RECA investigates conduct that appears to:

- be in breach of the *Real Estate Act* or Rules
- be contrary to the standards of practice expected of an industry member
- demonstrate incompetence, recklessness or willfulness
- put consumers or other industry members at risk

This is referred to as 'conduct deserving of sanction.'

How does RECA determine whether the conduct is ‘conduct deserving of sanction’?

RECA carries out investigations to gather evidence that helps in deciding whether an industry member’s conduct is deserving of sanction. Assessment of conduct is based on all the facts and circumstances at the time of the conduct and may take into account:

- the industry member’s intentions
- the information available to the industry member
- the significance of the consequences for any particular breach of legislation
- harm to the integrity of the industry or a member of the public

What is NOT considered ‘conduct deserving of sanction’?

Isolated, trivial or technical breaches of the standards of business practice devoid of significant consequences are not considered conduct deserving of sanction.

For example, if a real estate associate explained dual agency to you but the formality of signing the dual agency form was not completed until after a dual agency relationship was entered into, the matter will be considered relatively minor.

Note: provided no previous warnings have been issued, efforts will be made to resolve the minor issue informally and constructively through advisory correspondence rather than through the investigation and disciplinary process.

Competent industry members acting in good faith may make errors or omissions that affect their clients. Their conduct in such situations may also not be sanctioned. Matters such as negligence are usually resolved through arbitration or the civil courts. Licensed industry members are required to carry errors and omissions insurance to ensure satisfaction of civil judgments arising from negligence.

For example, if an industry member did not correctly calculate the square footage of the house you purchased and you can prove that the error caused you damage in a civil action, the industry member’s errors and omissions insurance may provide coverage, ensuring that you collect the judgment.

Licensed industry members also contribute to the real estate assurance fund, which was established to compensate consumers who suffer losses as a result of fraud or breach of trust. More information is available on www.reca.ca > Consumers > Complaints & Discipline > Consumer Protection Fund.

If you believe you are a victim of fraud, in addition to contacting RECA, you should contact your local police agency.

WHO RECA INVESTIGATES

RECA investigates the conduct of licenced industry members. This includes real estate brokers and associates, mortgage brokers and associates, and real estate appraisers and candidates.

Does RECA investigate unlicensed individuals?

RECA will only investigate unlicensed individuals if the individual was required to hold a licence for the activities in which he or she engaged. For example, RECA would investigate an individual who appraised your house but was not licenced as a real estate appraiser.

In investigating unlicensed activity, RECA's jurisdiction is limited to determining whether the activity constitutes real estate, mortgage brokering, or real estate appraisal services and if a licence was required to carry out the activities under investigation. Any sanctions imposed as a result of such an investigation are related specifically to this issue. RECA does not examine the manner in which unlicensed activity was carried out (e.g., whether service provided meets industry standards, a loss or misappropriation of a client's funds, misrepresentations).

Clients and customers of real estate and mortgage associates or real estate appraisers should ensure they are dealing with licensed individuals. To determine if the person you are working with is licensed, visit www.reca.ca and click 'Licence Search'.

UNDERSTANDING THE INVESTIGATION PROCESS

RECA investigations are conducted according to a formal process based on the requirements of the *Real Estate Act* and the principles of natural justice (which promote fairness throughout the process).

What is the investigation process?

RECA's standard investigation procedure is designed to maximize transparency, be fair to all parties and minimize any intrusive or disruptive effects of the investigation. Steps in this process include:

1. The complainant agrees to cooperate with the investigation process. Agreement to cooperate is provided when the complainant signs the 'Agreement to Proceed' form.

Without your cooperation, it is unlikely that RECA will have sufficient evidence to warrant investigating the complaint further. Cooperating with the investigation means that you agree to answer RECA's questions, provide necessary information and appear as a witness if the matter goes to a hearing or prosecution.

Note: where matters are serious such as fraud or breach of trust, the executive director may elect to continue an investigation in the absence of a complainant's cooperation.

2. The industry member is provided written notification when an investigation has been opened. As part of this opening process, the member will receive a copy of the letter of complaint and supporting documents, and is advised of the issues of concern to RECA. The industry member is asked to respond to those issues in writing and to submit documents as directed.
3. The complainant is provided with the industry member's response and asked to comment in writing.
4. The industry member is provided with the complainant's response and given an opportunity to comment in writing.

Steps 2-4 are referred to as the exchange of statements. It provides all parties an opportunity to review information they may not have been able to examine when the event occurred. The exchange of statements may also clarify an industry member's actions and satisfy the complainant's concerns.

RECA reserves the right to 1) end the exchange of statements at any point (e.g., if responses are unproductive or unduly delayed) and 2) omit or obscure information in the exchange that may be of harm to other parties and is not integral to the matters under investigation. It is the investigator's responsibility to test all evidence. The truth of witness statements and the credibility of other evidence are established using recognized investigative techniques and additional testing when necessary.

5. The investigator may gather statements and documents from other sources in addition to the information provided by the complainant and industry member(s). Other sources may include the industry member's brokerage or broker.

What happens if I don't want my contact information provided to the industry member?

If you do not want your phone number, address and other contact information provided to the industry member, RECA will keep it confidential at your request.

Is the same process followed in every case?

Every effort is made to follow the standard investigation process described above. However, there are some circumstances where the standard investigation process will not be followed.

Examples include situations where:

- the exchange of statements may jeopardize the integrity of the investigation

The exchange of statements can jeopardize the integrity of the investigation if 1) the matters under investigation appear to involve criminal activity, 2) several parties are involved and confidentiality must be maintained or 3) one or more parties alters or conceals information.

- the issues are very serious (e.g., fraud or trust deficiencies) and must be dealt with quickly to minimize public harm
- time is an overriding factor
- an unlicensed practitioner is the subject of an investigation

How long does an investigation take?

Each investigation is different and the time required depends on the circumstances of the case. Timeliness of an investigation is a common concern, as industry members and complainants usually want to deal with the issue as quickly as possible – but the due process required under the *Real Estate Act* and the principles of natural justice take time.

Complainants and industry members must be given adequate opportunity to explain what happened and answer questions. Documents must be gathered and verified, information is sometimes sought from outside sources and a full report needs to be prepared.

This process is time-consuming, but failure to follow it could have a negative impact on the public and/or industry members.

RECA investigators are unable to provide you with updates; to do so could jeopardize the investigation as this may suggest that the investigator is acting on your behalf or has agreed with your position. However, RECA investigators can confirm that the file is still under investigation.

Is an investigation conducted on behalf of me (the complainant)?

While investigations are often initiated by complaints, investigations are not done on behalf of complainants. The *Real Estate Act* names the executive director as the person responsible for conducting the investigation to determine whether there is sufficient evidence of conduct deserving of sanction at the conclusion of the investigation.

Complainants should be aware that while RECA like other regulatory organizations considers the interests of victims, in the protection of privacy and the issues under investigation, its focus must be on public interest. Meeting the requirements of the Act does not always coincide with the interests of victims.

REMEMBER, the purpose of a RECA investigation and any resulting conduct proceedings is to address the conduct of the industry member. RECA cannot help you recover money or damages. Actions to recover deposits or other funds must be pursued through the courts. Consumers should obtain legal advice without delay and should not wait until a related RECA complaint evaluation and/or investigation is complete. RECA protects consumers by requiring

industry members to carry errors and omissions insurance and also maintains the assurance fund for victims of fraud or breach of trust.

Will RECA contact me during the investigation?

Yes. Investigations are intrusive. RECA may contact you several times during the investigation to interview you and gather information and documents related to the investigation. This information may include your personal records.

For example, your personal phone records may be required if there is a dispute about whether or not a particular phone call took place. Your personal phone records may be evidence that helps prove or disprove that the phone call occurred. Your bank records may also be required as evidence to show that you paid a deposit to the industry member.

Only information that is related to the investigation will be requested.

Can my lawyer attend an interview?

If a RECA investigator has scheduled an interview with you, your lawyer may attend. However, as per your agreement to cooperate with the investigation, you must answer the investigator's questions. Your lawyer may be present to advise you during an interview but cannot interfere with the interview process. The investigator will not address questions to your lawyer or accept your lawyer's testimony on your behalf.

Please inform the investigator if your lawyer will be attending the interview.

COLLECTING INFORMATION & PROTECTING CONFIDENTIALITY

Is information gathered during an investigation confidential?

Information that is gathered by RECA during an investigation is shared only as far as the investigation process requires it to be or when required by a law of Canada.

- In most cases, information is disclosed to the parties during the exchange of statements. Industry members receive a copy of the complaint that led to the investigation and the complainant receives a copy of the industry member's written response. In addition, certain information or documents may be shared with witnesses in order to confirm their accuracy or to obtain their statements and evidence in relation to that information.
- If a matter that has been investigated proceeds to a hearing or a prosecution, all information gathered during the investigation must be disclosed to the industry member affected. Since hearings held in relation to an industry member's conduct are public proceedings, information gathered during an investigation and disclosed to the industry member may become public at a hearing.

This exchange of information is required by RECA to meet the requirements of natural justice. It also enables the industry member who is the subject of investigation to know all relevant facts gathered in relation to the matter and enable that industry member to defend him or herself.

- In unlicensed practice investigations, RECA may refer the matter to Alberta Justice for prosecution, in which case RECA must disclose ALL information.

You must advise the investigator immediately if certain personal information must be kept confidential. RECA will make every reasonable attempt to comply with such requests provided the information is not integral to the matter under investigation (e.g., new address, phone number).

Will my conversations with the investigator be recorded?

RECA electronically records interviews with complainants and other witnesses. This ensures the integrity of the investigation by providing an actual record of what was said rather than relying on an investigator's interpretation.

The recording of interviews is also a means of ensuring that an investigation is conducted in accordance with RECA's policies and procedures.

What is a solicitor-client privilege waiver?

RECA often requires information pertaining to your complaint that is maintained by your lawyer. For example, your lawyer has copies of documents related to the sale of your house. In situations where your lawyer has documents or information related to your complaint that you do not possess, the investigator may request a solicitor-client privilege waiver. The waiver allows the investigator to speak directly to your lawyer only about information specifically related to your complaint. This often improves the efficiency of an investigation.

OUTCOMES

What happens when the investigation is concluded?

Once the investigation is complete, RECA will review the file and determine how to proceed. Evidence indicating a breach of the legislation, including any mitigating or aggravating factors, will be considered when determining how to proceed.

- The file may be closed as unfounded, outside RECA's jurisdiction or there may be insufficient evidence.
- An advisory note or administrative penalty may be issued to the industry member.
- The matter might be referred to a hearing panel for a decision or it may be referred for prosecution in the courts if it relates to a person carrying on business without a required authorization or a repeated breach of the *Real Estate Act*.

Will I be informed about the outcome of an investigation?

Complainants will be informed in writing of the outcome if the file is closed or if the industry member was issued an advisory note or administrative penalty.

If the matter is referred to a hearing panel or for prosecution in the courts, the file is transferred to RECA's legal services department. Legal services will contact the complainant advising that the file has been received. The complainant will receive a closing letter and a copy of the decision after a disciplinary decision or outcome has been served on the industry member.

Is there anything I can do if I disagree with the outcome of an investigation?

If the file is closed and no further action is taken by RECA following an investigation, complainants who disagree with that decision have the right to appeal to a hearing panel by providing written notice to the executive director. Notice must be provided within 30 days of receiving notice of the decision and it must state the reasons for filing the appeal. A hearing panel will make a final decision on whether there is sufficient evidence of conduct deserving of sanction to warrant a hearing.

Note: if the hearing panel determines the complaint is frivolous or vexatious, it may order the complainant to pay costs to the Real Estate Council of Alberta.

Are disciplinary decisions confidential?

All enforcement actions (e.g., a hearing) are published in RECA's newsletter, the Regulator, in accordance with RECA's policy. The Regulator is distributed to industry members and available to the public on www.reca.ca. Hearing panel decisions resulting in sanction are also posted on www.reca.ca.

RECA publishes a notice of industry members who withdraw from the industry under section 54 of the *Real Estate Act* while the subject of conduct proceedings. Such notice is limited to cases where RECA has commenced an investigation into an allegation of serious misconduct.

FOR MORE INFORMATION ON INVESTIGATIONS,
PLEASE CONTACT THE REAL ESTATE COUNCIL OF ALBERTA:
Suite 350, 4954 Richard Rd SW, Calgary AB T3E 6L1
Toll free in Alberta 1-888-425-2754
Phone (403) 228-2954 Fax (403) 228-3065
www.reca.ca