

APPEALING THE EXECUTIVE DIRECTOR'S DECISION TO REFUSE TO INVESTIGATE A COMPLAINT

The purpose of this publication is to provide complainants whose complaint has been refused investigation with a description of the complaint review process and the complainant appeal process.

THE COMPLAINT REVIEW

What is the purpose of the complaint review?

The *Real Estate Act* requires the executive director of the Real Estate Council of Alberta (RECA) to review complaints and determine whether an investigation is required to determine whether the industry member's conduct may be conduct deserving of sanction.

The complaint review process enables the executive director to decide whether the complaint meets the criteria for investigation.

What is required for a complaint to be investigated?

There are many criteria that must be met for an investigation to occur but the main criteria are:

1 The subject matter of the complaint must relate to the actions of an industry member.

RECA receives many complaints from complainants who are dissatisfied with the process or the outcome of a trade in real estate, a deal in mortgages or a real estate appraisal. Many of these complaints do not relate to the actions of an industry member, but rather to the actions of sellers, buyers, borrowers, lenders or other parties in real estate trade, deals in mortgages or real estate appraisal services.

While an industry member may have represented you or another party to the trade in real estate or deal in mortgages, and may have communicated on your behalf as the client, it does not mean the industry member's actions are a contravention of the *Real Estate Act* or Rules or that the industry member is the party responsible for the issues outlined in your complaint.

Here are some examples:

- A buyer may complain about a mortgage associate as a result of a lender withdrawing a financing commitment. Unless the financing commitment was withdrawn because of misconduct on the part of the mortgage associate, the buyer's concerns are with the lender.

- A seller may complain about their associate or the buyer's associate if their transaction does not close on time. Normally, closing delays are related to the actions of one of the parties to the trade, delays in financing, delays associated with the legal paperwork and delays at Land Titles. In these types of cases, concerns should be discussed with the lawyers or lending institutions. There are cases where a delay in closing may be because of misconduct on the part of a real estate or mortgage associate and RECA will investigate those issues.
- A tenant may accuse a property manager of misconduct when the property manager is following the landlord's lawful instructions. For example, the landlord refuses to rent the property, even though a rental agreement was signed. In these types of cases, the tenant must discuss the issue with Service Alberta (the government agency responsible for landlord and tenant issues).
- A buyer purchases a property and discovers the property has a material latent defect such as a crack in the basement wall that is not visible because it is behind drywall. The seller in this case knew of the defect but did not tell their real estate associate. Since the real estate associates involved did not have knowledge of the defect and were not able to find out about it, they are not responsible for alerting the buyer. The seller had knowledge about the defect and is responsible for disclosing the information.

2 The industry member must be conducting activities regulated by the *Real Estate Act*.

As with members of other professions, RECA industry members may be involved in private ventures or other business ventures and activities. RECA will not investigate matters that relate to activities that fall outside of the scope of the *Real Estate Act*.

Here are some examples:

- A real estate brokerage fails to pay their lease.
- A mortgage associate does not pay spousal support.
- A real estate appraiser sells someone a vehicle with an odometer rolled back.

If you have been affected by the conduct of an industry member acting outside of the scope of the *Real Estate Act*, you will have various types of legal recourse. You may wish to consult a lawyer for advice.

While RECA's executive director will not investigate complaints that do not relate to the *Real Estate Act*, the executive director may take into consideration judgments, convictions, criminal proceedings or other disciplinary decisions that would undermine public confidence in the industry, harm the integrity of the industry or bring the integrity of the industry into disrepute.

Some examples of situations that may result in the executive director commencing an investigation:

- A real estate industry member is convicted of fraud relating to the sale of securities.
- A mortgage broker is found guilty of creating false and misleading documents, and of tax evasion.
- A real estate appraiser is found guilty of odometer roll back under the *Fair Trading Act*.

3 The complaint must clearly identify the industry member.

In order for the executive director to refer a matter to investigation, RECA must know the identity or be reasonably able to determine the identity of the industry member involved.

4 The subject matter of the complaint must not have been dealt with in a prior investigation.

Sometimes, a complaint references activities or conduct that has already been examined in a complaint evaluation, an investigation or an audit. Often in these cases, RECA was unaware of the complainant's concerns. However, the matter has already been examined in relation to the activities or conduct referenced. For example, while performing an audit, it is found that moneys were not deposited in trust in accordance with the terms of trust. In these cases, the result may have been an investigation or alternative outcome, and RECA has already dealt with the conduct or activity in question.

As a result, the executive director may choose not to investigate a subsequent complaint from a consumer that arises out of the same set of facts.

5 The conduct complained of must be a potential breach of the *Real Estate Act* or Rules.

The executive director receives many complaints that do not relate to potential breaches of the *Real Estate Act* or Rules. Many of the complaints in this category relate to lack of prompt communication or the quality of service provided. Unless the delays in communication are deliberate or reckless or the quality of service is of a degree that demonstrates incompetence, these types of issues are not normally considered potential conduct deserving of sanction.

The term "conduct deserving of sanction" generally means conduct that falls outside of general and industry standards outlined in the *Real Estate Act*, Regulations, Rules and Bylaws.

6 There must be sufficient evidence of the potential breach of the *Real Estate Act* or Rules.

Complaint analysts review every complaint to determine if there is sufficient evidence to determine whether there was a breach of the *Real Estate Act* or Rules, and to determine whether there is a likelihood of conduct deserving of sanction. Sometimes the issues complained about relate to disputes about oral representations. In these situations, complaint analysts will undertake reasonable efforts to speak to other witnesses or find other corroborating evidence such as documents, e-mails, phone records, etc. If the results of these efforts are inconclusive or do not support the complaint, there may not be sufficient evidence to warrant an investigation.

What happens if a complaint meets the necessary criteria?

If the complaint meets the required criteria, the executive director exercises one of two options:

- If the breach complained of is minor in nature, the executive director may issue an advisory note; or,
- The executive director will commence an investigation.

What were the reasons for my complaint not being referred for investigation?

In most cases, in addition to a written letter outlining the reasons for refusing to investigate a complaint, the complaint analyst assigned to your file will telephone you to advise you of the complaint review outcome, discuss the reasons for the decision and answer any questions you may have.

The written letter outlining the reasons for the refusal to investigate the complaint will be sent by registered mail. If you have any questions, please call the complaint analyst that handled your complaint.

After a refusal to investigate, can I provide additional information to support my complaint?

If you are able to provide information that was not provided during the review, you may submit this information to the complaint analyst. Please be aware that after you receive notification of the refusal to investigate the complaint, your file will only remain open for the 30-day appeal period.

If additional information is received within the 30-day appeal period, the complaint analyst will conduct a further review of the complaint and advise you of the new information's effect on the complaint review. If, after this second review, the decision stands and the complaint is refused, you have 30 days after you receive written notification of the decision from the second review to file a notice of appeal.

THE APPEAL

If I am dissatisfied with the decision to refuse to investigate my complaint, what can I do?

Please ensure you have reviewed the criteria listed above and that you have spoken with a complaint analyst regarding the reasons your complaint was refused for investigation.

If you have questions regarding the particulars of your file, the complaint analyst may be able to explain the matters fully or refer you to other information sources.

You also have the right to appeal the executive's director decision to refuse to investigate your complaint to a hearing panel after 30 days.

What is required to appeal?

Appealing the decision of your complaint is a formal process under administrative law, and it can be time-consuming. You may be required to provide documentary evidence and testify before the Hearing Panel. You may need to call witnesses to support that your complaint ought to have been investigated.

Are there any costs to the appeal?

In order to commence an appeal, you will be required to pay security for costs of \$500. If your appeal is successful, the \$500 will be returned to you.

If your complaint is found to be frivolous or vexatious, the hearing panel may order your payment of other costs, including appeal costs.

How do I appeal?

An appeal must be made within 30 days after you receive the letter of refusal to investigate. The appeal must be in writing and must include your reasons for appeal. You must supply your appeal letter to the executive director in care of RECA's hearings administrator. Fax or designated email are preferred methods of communication of a written notice of appeal.

RECA's address is as follows:

350, 4954 Richard Road S.W.
Calgary, Alberta T3E 6L1

RECA's fax is: 403.228.3065

RECA's appeal e-mail is: appeals@reca.ca

What happens next?

Once RECA receives your appeal, a case presenter will contact you about specific appeal processes and procedures.

Is the industry member I complained about notified of the appeal?

The industry member will be notified of your appeal.

Will I be able to get a copy of all information received and considered by the complaint analyst?

No. Neither you nor the industry member complained about will receive that information in this appeal. That information will only be supplied to the hearing panel for their consideration as part of your appeal.

Will I be able to call witnesses?

Yes. You will be provided every opportunity to adequately present your appeal, which includes calling witnesses.

Is the hearing panel decision final?

A hearing panel decision is the final process at RECA, though judicial review through the Courts may be available to you.

Can I withdraw my appeal?

Yes. However, there could be costs associated with doing so.

What are the relevant sections of the *Real Estate Act* the Real Estate (Ministerial) Regulations or the Bylaws?

Real Estate Act

Sections 37, 38, 38.1, 39, 40 40.1

Real Estate (Ministerial) Regulations

Section 21

Bylaws

Section 28(1) and (2)

The *Real Estate Act*, the Real Estate (Ministerial) Regulations and the Bylaws are available at RECA's website www.reca.ca